MICHIGAN REPORTS

CASES DECIDED

IN THE

Michigan.

SUPREME COURT

OF

MICHIGAN

FROM

JULY 13, 1959 to NOVEMBER 24, 1959.

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SUPREME COURT.

CHIEF JUSTICE.

	TERM EXPIRES
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JOHN D. VOELKER, ISHPEMING, ...	Dec. 31, 1959
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40. TIMOTHY C. QUINN, Caro.
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Traffic and Ordinance Division: GEORGE T. MURPHY.
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Superior Court of Grand Rapids, CLAUDE Vander PLOEG.

[1] Appointed August 11, 1959; qualified August 27, 1959.
[2] Died July 20, 1959.

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JUNE TERM, 1959.*

JOHNSON *v.* GRAND RAPIDS BUILDING & CONSTRUCTION TRADES COUNCIL.

LABOR RELATIONS—PICKETING—COMMERCE.

Finding of trial court in suit to enjoin peaceful picketing that plaintiff builder was engaged in a business affecting commerce within the meaning of the national labor management relations act is affirmed, hence, the case is controlled by *Town & Country Motors, Inc.*, v. *Local Union No. 328*, 355 Mich 26, and *Davidson* v. *Michigan State Carpenters Council*, 356 Mich 557 (29 USCA, § 160[a]).

Appeal from Ottawa; Smith (Raymond L.), J. Submitted April 15, 1959. (Docket No. 54, Calendar No. 47,990.) Decided July 13, 1959.

Bill by Bert Johnson against Grand Rapids Building and Construction Trades Council, AFL-CIO, its affiliates and various individuals, for injunction against picketing. Decree for plaintiff. Defendants appeal. Reversed and remanded for dismissal of bill.

Walsh, Levandoski & Mitus (*Leo W. Walsh*, of counsel) and *Morse & Kleiner* (*A. Robert Kleiner*, of counsel), for defendants.

PER CURIAM. This is an appeal from an order of the Ottawa county circuit court in chancery grant-

* Continued from Volume 356.

REFERENCES FOR POINTS IN HEADNOTES

31 Am Jur, Labor § 190 *et seq.*

ing plaintiff-appellee a permanent injunction restraining defendants-appellants from picketing plaintiff-appellee's building projects. There was no allegation that the picketing was other than peaceful. The facts were stipulated before the circuit judge and he found, after reviewing the stipulation, that plaintiff-appellee was engaged in a business affecting commerce within the meaning of the national labor management relations act (See 29 USCA, § 160[a]). With this finding, we agree.

This case involves the question of Federal preemption of the field of labor relations. It originates with an employer's charge of unfair labor practice against a union in an industry found to be affecting commerce. In all essential facts, the case is similar to and controlled by *Town & Country Motors, Inc.*, v. *Local Union No. 328*, 355 Mich 26, and *Davidson* v. *Michigan State Carpenters Council*, 356 Mich 557 (decided June 6, 1959), and, for reasons set forth therein, must be reversed and remanded for entry of an order dismissing the bill of complaint.

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

HENSLEY *v.* HENSLEY.

1. APPEAL AND ERROR—CHANCERY CASES—DE NOVO HEARING—EVIDENCE—WITNESSES.

   The appeal from an order modifying decree of divorce is heard by the Supreme Court *de novo* on the record but grave consideration is given to the findings of the trial court who has a better opportunity to appraise the evidence and the credibility of the witness.

2. SAME—CHANCERY CASES—SUPREME COURT.

   The Supreme Court should not reverse the determination of a trial court in a chancery suit unless convinced that it must have reached a different conclusion had it occupied the position of the lower court, under like circumstances.

3. DIVORCE—CUSTODY OF CHILDREN—STATUTORY PREFERENCE OF MOTHER—BEST INTEREST OF CHILD.

   The statutory preference as to custody of children under 12 years of age will not be accorded mother in suit for divorce, where the best interests of the child impel the court to make a different order (CL 1948, § 722.541).

4. SAME—CUSTODY OF CHILDREN—CHANGE OF CIRCUMSTANCES—MODIFICATION OF DECREE.

   Modification of decree of divorce as to custody of 5-year-old boy, made on father's petition so as to accord him custody, is affirmed, where record supports trial court's findings that sufficient change of circumstances since the original decree warranted the change of custody from mother who had been accorded technical custody but required to leave child in foster home, it appearing the father had a more suitable home environment and had frequently visited the boy and the mother had done so infrequently (CL 1948, § 722.541).

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 815.
[1, 2] 3 Am Jur, Appeal and Error § 912.
[3] 17A Am Jur, Divorce and Separation § 819.
[4] 17A Am Jur, Divorce and Separation § 839 *et seq.*

Appeal from Saginaw; Huff (Eugene Snow), J. Submitted April 10, 1959. (Docket No. 43, Calendar No. 47,749.) Decided July 13, 1959.

Divorce proceedings between Lewis Hensley and Roselma Hensley resulted in decree for defendant on cross bill. Petition by plaintiff to modify decree granting him custody of child. Decree so modified. Defendant appeals. Affirmed.

Joseph J. Mainolfi, for plaintiff.

Curry & Curry, for defendant.

VOELKER, J. On June 10, 1955, defendant-appellant, Roselma Hensley, upon her cross bill of complaint was granted a decree of divorce from plaintiff-appellee, Lewis Hensley. Pursuant to that decree defendant was given custody of their one child, Lynn Lewis Hensley, subject to the following condition, "and the said child shall remain and be cared for at his present residence unless otherwise agreed upon by the parties or until the further order of the court."

At the time of that decree the child was in a foster home. The child was about 5 years old at the time the present action was instituted and the foster parent felt that she could no longer properly manage him. The plaintiff-father petitioned the circuit court to modify the original decree so as to allow him custody of the child. The defendant-mother answered that petition and filed a cross petition praying that the quoted condition be deleted from the original decree, thus giving her absolute custody.

After a full hearing on the petitions the trial court asked both sides for briefs on the law involved, and allowed ample time for the preparation and filing of such. Only the plaintiff submitted a brief.

The court then rendered an oral opinion from the bench and decreed that the plaintiff-father should have custody of the child subject to certain rights of visitation in the defendant-mother. From that decree the defendant has appealed, setting out the following as questions involved:

"1. Should the decree of divorce dissolving the marriage between the plaintiff and defendant be modified so as to award the custody of the minor child to the plaintiff father?

"2. Should the decree of divorce be modified so as to strike therefrom the provision thereof reading as follows, to-wit: 'and the said child shall remain and be cared for at his present residence unless otherwise agreed upon by the parties or until the further order of the court' and thus leave the custody of the child in the defendant?"

From the record and the opinion of the chancellor it appears (largely from the testimony of the foster mother, originally selected by the mother) that the mother took little or no interest in the welfare of the child while it was in the foster home, visiting it only infrequently over a period of several years, although the child was in the same general area. It further appears that the father visited the child regularly. The chancellor also found that the father had a more suitable home environment for the child.

In essence it appears that the defendant is not happy with the result reached by the chancellor and wants this Court to review the facts. This being an appeal from a chancery decree, we hear it *de novo* on the record, necessarily according grave consideration to the findings of the trial court, however, who manifestly has the better opportunity to appraise the evidence and the credibility of the witness. As we said in *Gorton* v. *Gorton,* 316 Mich. 375, 382, and prior cases:

" '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.' "

The law in this State seems to pose 3 questions which must be answered in cases of this type:

1. What effect does the statute, CL 1948, § 722.541 (Stat Ann 1957 Rev § 25.311) have upon the case?

2. Is a modification of the original decree in the best interest of the child? See, generally, *Remus* v. *Remus*, 325 Mich 641; *Knowles* v. *Knowles*, 340 Mich 238.

3. Has the petitioner shown a change of circumstances sufficient to warrant a modification of the original decree? See, generally, *Sweet* v. *Sweet*, 329 Mich 251.

We think that the first question is well answered in *Vines* v. *Vines*, 344 Mich 222, 225, where we said:

"We are mindful of the statute, CL 1948, § 722.541 (Stat Ann § 25.311), which provides that the mother of children under 12 shall be entitled to their custody, although a court of competent jurisdiction may deem it just and proper to make a different order. The question before us is what is best for the child."

We have gone over the trial transcript as well as the briefs and records on appeal. We agree with the decision of the trial court, as indicated in its opinion, that there was a sufficient change in circumstances since the original decree and that its modification was in the best interest of the child. A detailed review of the evidence presented in the trial court would be surplusage and of no value to the profession, and will not here be set out.

The decree of the chancellor is affirmed, costs to appellee.

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

BALLENTINE *v.* BALLENTINE.

1. DIVORCE—ALIMONY—DECREE.
   A court is powerless to grant alimony in the future following final decree of absolute divorce in which no provision is made for alimony or the question is not reserved.

2. SAME—ALIMONY—MODIFICATION OF DECREE.
   Decree of absolute divorce in which no provision was made for alimony to wife who had supported defendant husband while he was a medical student, interne and resident for specialized training is modified to require husband to pay $10 per month alimony to plaintiff until further order.

Appeal from St. Clair; Kane (Edward T.), J. Submitted June 2, 1959. (Docket No. 10, Calendar No. 47,759.) Decided July 13, 1959.

Bill by Rosemary M. Ballentine against Charles N. Ballentine for divorce. Decree for plaintiff. Plaintiff appeals asking provision for alimony presently and reservation of question for the future. Decree modified and amended accordingly.

Walsh, O'Sullivan, Stommel & Sharp, for plaintiff.

REFERENCES FOR POINTS IN HEADNOTES

[1] 17 Am Jur, Divorce and Separation § 710.
[2] 17 Am Jur, Divorce and Separation § 715.

VOELKER, J. The appellant obtained a divorce from her husband on the grounds of extreme cruelty. The parties were married in 1944 while students at the University of Michigan and their only child, a daughter, was born in 1946. The proofs below also showed that the wife devoted most of an inheritance from her grandfather to support the defendant and their daughter during the husband's medical studies and later during his internship and a rather extensive series of residencies for specialized medical training; and that following the separation of the parties in 1952 the plaintiff was obliged to go to work to support herself and the child.

In his decree below granting the plaintiff and appellant her divorce the chancellor made some provision for support of the child, the custody of which he awarded the mother. He did not, however, make any provision for alimony or reserve the question for possible future consideration, expressing the opinion that he felt both parties would be better off if they were forever freed from any possible future ties and obligations, one to the other.

We have frequently held that where an absolute divorce is granted and no provision is made for alimony or the question is not reserved, the court is powerless to grant any alimony in the future. See *Moross* v. *Moross,* 129 Mich 27; *Mack* v. *Mack,* 283 Mich 365 and *Marrobie* v. *Marrobie,* 334 Mich 447 for typical cases.

Making all due allowance for the present financial situation of the defendant, and his present distaste for the loyal wife who supported him while he got his education, we think the chancellor might have reached a fairer result had he not under the circumstances permanently foreclosed the question of possible future alimony. The decree below may accordingly be modified and amended so as to re-

quire that the defendant pay $10 per month alimony to the plaintiff until the further order of the court. Costs to plaintiff.

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

MILLER *v.* BATH ELEVATOR COMPANY.

1. WORKMEN'S COMPENSATION—DEATH—REMEDY.
   Workmen's compensation is in no respects a damage remedy, and the right thereto does not die with the injured person.

2. SAME—ILLEGALLY EMPLOYED MINOR—SUFFOCATION—DOUBLE COMPENSATION—DEPENDENT PARENTS.
   Dependent parents of an illegally employed minor 17 years of age, who was suffocated during the course of his employment, are entitled to double compensation, where there was an absence of fraudulent use of permits or certificates of age (CLS 1956, § 411.7).

3. SAME—FINDINGS OF APPEAL BOARD—EVIDENCE—PARENTS—DEPENDENTS.
   The finding of fact of the workmen's compensation appeal board that plaintiffs, parents of 17-year-old minor who was employed at defendant grain elevator without a work permit and was suffocated in the course of employment, were partially dependent upon their deceased son and that he had contributed 75% of his annual income to them *held*, sustained by competent evidence (CLS 1956, § 411.7).

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

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Workmen's Compensation § 577 *et seq.*
[2] 58 Am Jur, Workmen's Compensation §§ 152, 305.
[3] 58 Am Jur, Workmen's Compensation § 180.

Appeal from Workmen's Compensation Appeal Board. Submitted April 10, 1959. (Docket No. 42, Calendar No. 48,071.) Decided July 13, 1959.

Henry Miller and Josephine Miller presented their claim, as dependent parents of Robert Miller, deceased, against Bath Elevator Company, employer, and Globe Indemnity Company, insurer, arising from death of illegally employed minor. Double compensation denied in award to plaintiffs. Plaintiffs appeal. Defendants cross-appeal. Reversed.

Marcus, Kelman, Loria, McCroskey & Finucan and *McArthur & Sullivan* (*Benjamin Marcus* and *Robert Libner,* of counsel), for plaintiffs.

Carl L. Reagh, for defendants.

KELLY, J. (*dissenting*). Plaintiffs and appellants are the father and mother of deceased Robert Miller. Deceased, under 17 years of age, was employed by defendant Bath Elevator Company, without a working permit or the necessary job approval from the department of labor. Deceased's body was found in a wheat bin at the elevator. His death was determined to be due to suffocation, while in the course of his employment. The workmen's compensation appeal board approved the referee's finding that as partial dependents, appellants were not entitled to double compensation benefits.

Appellees filed a cross appeal, claiming the appeal board erred in approving the hearing referee's award granting compensation to appellants "at the rate of $26.63 per week as partial dependents of Robert Miller, deceased, from July 25, 1955, until further order of the department but not to exceed 450 weeks from the date of death of said employee

together with reimbursement in the amount of $500 for funeral expenses."

Section 7, part 1, of the workmen's compensation act, being CLS 1956, § 411.7 (Stat Ann 1957 Cum Supp § 17.147) provides, in part, as follows: "Provided, That any minor under 18 years of age whose employment at the time of injury shall be shown to be illegal shall, in the absence of fraudulent use of permits or certificates of age, in which case only single compensation shall be paid, receive compensation double that provided elsewhere in this act."

Section 7 was construed in *Gordon* v. *Smith Brothers,* 284 Mich 456, and if we follow this decision we will affirm the appeal board's denial of double compensation to appellants herein.

Appellants ask this Court to override the *Gordon* decision, advancing 2 reasons: (1) "The *Gordon* case has been impliedly overruled by this Court;" and (2) "The *Gordon* decision was based upon erroneous construction of the workmen's compensation act, particularly that the workmen's compensation act must be strictly construed."

To sustain the conclusion that we have impliedly overruled *Gordon,* appellants quote the following from *Stuart* v. *Spencer Coal Co.,* 307 Mich 685, 688:

"We need not speculate on whether the legislature intended by this provision to penalize the employment of minors, as claimed by appellant, or whether the legislature had in mind a greater need for compensation by a minor under 18 years of age because of lesser earning capacity, a longer life period of a crippling condition, or for some other reason. The statute plainly refers to the payment as *compensation* and we see no impelling reason for calling it otherwise."

The *Stuart Case, supra,* involved a double compensation award to a minor for an injury to his hand.

The employer's insurer endeavored to escape double compensation. This decision did not involve the question before us on this appeal and did not constitute an implied overruling of the *Gordon Case.*

Asserting that the *Gordon* decision was a strict construction of the statute, appellants claim that recent decisions of this Court disclose that a majority have abandoned this rule of construction and, in support of such declaration, quote Justice SMITH in *Sheppard* v. *Michigan National Bank,* 348 Mich 577, 589, as follows:

"In this connection we reject, without qualification, the asserted 'general rule of interpretation' quoted to us this date, to the effect that 'the workmen's compensation law, being in derogation of the common law, must be strictly construed.' "

A fair and reasonable construction of the controlling legislative enactment, rather than a strict or liberal construction, sustains and indorses the reasoning and conclusions of the *Gordon Case.*

In this appeal we are asked to construe a short paragraph of clear and unambiguous language dealing with a definite, small group of employees. The fact that the legislature intended that this section of the statute be separate and apart from other sections is evidenced by the legislative words, "receive compensation double that provided elsewhere in this act."

The legislature provided "that any minor under 18 years of age whose employment at the time of injury shall be shown to be illegal shall * * * receive compensation double that provided elsewhere" in the act. The double compensation is provided for the minor. There is no such provision for the parents of the minor.

That appellants' reasoning revolves around the concept that the section in question was enacted as

a punitive measure, rather than a measure of compensation, is disclosed by the following from their brief:

"The public policy of this State should be and obviously is to discourage employers from allowing hazardous, illegal employment in the case of minors who die, as well as in the case of those who survive and are disabled. It is equally consonant with the legislature intent to call for the payment of double compensation in cases where the illegal employment results in death. To hold otherwise is to say that while the legislature intended to deter the practice of hazardous employment of minors in cases of occupational injury and disability, they never contemplated that hazardous employment of minors might also result in death."

No provision in either the title of the compensation act or in the section applicable sustains the punitive theory.

The legislature protected minors and punished those who failed to do so by passing the Hittle juvenile employment act (PA 1947, No 157 [CL 1948, § 409.1 *et seq.;* Stat Ann 1950 Rev § 17.701 *et seq.*]), as is disclosed by the title, which reads:

"An act to provide for the legal employment and protection of minors under 18 years of age; to define legal employment; to prohibit the employment of minors under 18 years of age without work permit, except as otherwise provided in this act; to provide for the issuance and revocation of work permits and age certificates; to provide for the regulation of hours and conditions of employment of minors; and to provide for the enforcement of this act and prescribe penalties for the violation of this act."

It is not necessary to determine the legislature's motive because of the clear and unambiguous provisions of the enactment; but, if such an indulgence

were desirable, it would be more logical to conclude that this unusual provision of double compensation was provided realizing the unusual loss, both physical and mental, administered to a youth under 18 years, rather than to conclude that the act was intended to punish the employer and doubly compensate the parents, who, as in this case, acquiesced in the illegal employment and received a major part of the youth's weekly pay check.

We do not agree with appellants that this Court in the *Gordon* decision overlooked *City of Grand Rapids* v. *Crocker,* 219 Mich 178, and that if we follow the *Crocker* decision we would overrule *Gordon.* The *Crocker Case* involved the construction of section 15, part 3, of the workmen's compensation act, providing that where the injury was caused by some person other than the employer, the employee may proceed either at law against the third person for damages or against the employer for compensation, but not against both.* In determining whether the provisions relating to employee should apply to dependents, the Court reviewed the numerous sections of the act where the word "employee" was used, and concluded (p 188) "that the word 'employee' was intended to be used in these sections in a somewhat collective sense; that it was intended to embrace the dependents of the employee as well as the employee himself. Unless so interpreted, the act contains no provision for enforcing the rights of dependents in many particulars."

The present appeal differs from the *Crocker* decision. Here we are dealing with a provision of the act not applicable to the general classification of employees, but a definite group of employees, namely: Minors, less than 18 years of age, illegally

* This provision has since been repealed. See, currently, CLS 1956, § 413.15 (Stat Ann 1957 Cum Supp § 17.189).—REPORTER.

employed; and does not deal with compensation, but deals with double compensation.

We are not overruling *Gordon* v. *Smith Brothers, supra.* We are affirming the appeal board's decision that appellants are not entitled to double compensation.

Appellee's cross appeal:

The referee's "finding that both the father and mother are partial dependents of the deceased and that he contributed 75% of his earnings to them," is commented upon in the appeal board's opinion on review, as follows:

"The defendant further contends that 'there was no testimony to support the referee's finding that the parents were dependents within the meaning of the act.' The plaintiff father operates a garage business and gasoline station. The plaintiff's only income was about $3,500. They had 4 children living at home including the deceased. The question is not whether or not they could have gotten by without the deceased's contribution but whether or not they did in fact rely upon these contributions for their support. We believe it obvious that they did. The conclusion necessarily follows from the fact that they had themselves and 4 children to support on only $3,500 a year. With that income the deceased's income must have been of vital importance and the record indicates that the deceased took the job with the defendant with the idea that his earnings there would help his parents more than could his working with his father in the garage and gasoline station.

"The defendant further contends that 'There was no testimony to support the referee's finding that the deceased contributed 75% of his income to the parents.' It elaborates this contention by stating that there was no proof of 'annual earnings.' The deceased worked for wages only for the defendant during the year prior to his death. The record

indicates his total earnings from the defendant during that year. If the record is in error the fault is with the defendant. It is based upon its records.

"The defendant also questions the referee's finding of a weekly wage of $53.25. The referee arrived at this figure by averaging the plaintiff's wages for his last 2-week pay period. This 2-weeks' pay was the smallest 2-weeks' pay that the deceased had during his last 6 weeks at work. The wages earned by the deceased prior to said 6-weeks' period were part-time earnings. If anyone could complain about the referee's finding of a weekly wage it would be the plaintiffs herein and they have not raised the question on appeal.

"The defendant also contends that the referee did not take into consideration the costs of the deceased's support when determining the amount of contributions. The testimony is clear and uncontradicted that the deceased worked in his father's garage and gasoline station about 30 hours a week while not working for the defendant and about 10 hours a week while working for the defendant. This work was without pay and easily overbalanced any consideration of the cost of his own support."

In *Kostamo* v. *H. G. Christman Co.*, 214 Mich 652, 658, 659, we stated:

"Upon the first 2 points urged, we are unable to agree with the contention of defendants. We do not think that the record is barren of any testimony from which a conclusion can be drawn that after decedent left home the mother was in any way dependent upon him. We think there was evidence that she was partially dependent upon him. That evidence we shall not weigh. Because decedent had not contributed anything for a period of 7 weeks it is urged that there was no dependency at the time of the accident. It should be borne in mind that he gave his mother $51 before leaving home. What inference should be drawn from this circumstance?

"In *Turner* v. *Miller & Richards,* 3 BWCC 305, a workman who had been a sailor had been accustomed to send money home to his parents. On taking up work on shore for his father he gave a certain amount to his mother each week. On going to sea as a sailor again he was drowned, not having at that time sent anything home. It was held that there was evidence to support a finding that the deceased had been a contributor for years, and would have continued as such had he lived, and that the family was therefore dependent upon him.

The evidence upon which the board may act need not be direct, but may be circumstantial. *Meyers* v. *Michigan Central R. Co.,* 199 Mich 134."

The finding of fact of the appeal board that plaintiffs were partially dependent upon their deceased son and that he contributed 75% of his annual income to appellants, is supported by competent evidence.

The award of the workmen's compensation appeal board should be affirmed. No costs, neither party having prevailed.

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

SMITH, J. Under the common law of earlier times it was often cheaper to kill a man than merely to maim him. "In a civil court," said Lord Ellenborough in *Baker* v. *Bolton,* 1 Camp 493 (170 Eng Rep 1033), "the death of a human being could not be complained of as an injury."

It was inevitable that a doctrine so monstrous, its origins so obscure and puzzling, should receive legislative amelioration and such has been the case.* Even with relation to workmen's compensation,

* The doctrine is examined in some detail in *Courtney* v. *Apple,* 345 Mich 223, dissenting opinion, 237.

which is in no respects a damage remedy, it is provided by statute that compensation for an industrial injury shall not be interred with the body. Yet, despite the express mandate of an enlightened public conscience, clearly stated in the compensation act itself, we are besought to read this provision out of the act by a process of judicial interpretation. We are invited to engraft this grotesque stalk of the common law, long discredited and unlamented, upon one of the great remedial acts of our times, thus infusing the ancient obscenity with new life and vigor. This we cannot do. The people have said otherwise.

They have provided in section 1 of part 2 of the workmen's compensation act[1] that compensation payable an injured employee shall "in case of his death * * * be paid to his dependents." To my way of thinking this settles the matter.

It was once argued, and successfully (See *Gordon* v. *Smith Brothers,* 284 Mich 456), that the double payment to be made to an illegally employed minor according to the act[2] is not "compensation" at all, and since only compensation goes to dependents, these payments need not be made to them. The jurisprudential theory thus invoked is the jurisprudence of the dictionary. But here it serves not even its advocates. For the act itself describes the payment as double "compensation."[3]

If there were any merit at any time to the argument that double compensation is not really double compensation at all, but single compensation plus penalty in equal amount, it has long since been dis-

[1] CLS 1956, § 412.1 (Stat Ann 1957 Cum Supp § 17.151).

[2] CLS 1956, § 411.7 (Stat Ann 1957 Cum Supp § 17.147).

[3] "Provided, That any minor under 18 years of age whose employment at the time of injury shall be shown to be illegal shall, in the absence of fraudulent use of permits or certificates of age, in which case only single compensation shall be paid, receive compensation double that provided elsewhere in this act."

posed of. We examined it, and we rejected it, in *Stuart* v. *Spencer Coal Co.*, 307 Mich 685, 688. "The statute," we held, "plainly refers to the payment as *compensation* [the emphasis is in the original] and we see no impelling reason for calling it otherwise." Nor do we. Compensation (double in amount) is what the act authorizes and compensation (double in amount) is what is paid. (The words, in fact, of the statute are just that. It speaks of the payment to illegally employed minors as "compensation double that provided elsewhere in the act.") So far as *Gordon* v. *Smith Brothers, supra,* may be thought to have any authority after the *Stuart* decision it is explicitly overruled herewith.

The finding of the appeal board as to dependency was properly supported by competent evidence.

Reversed. Costs to appellants.

BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred with SMITH, J.

In re GRAND HAVEN HIGHWAY.

STATE HIGHWAY COMMISSIONER *v.* DAKE CORPORATION.

1. EMINENT DOMAIN—HEARING—PRETRIAL BRIEF—SERVICE ON OPPOSING PARTY.

   No reversible error was committed by filing pretrial brief with the appointed commissioners prior to hearing on damages, where such brief did not misstate the law and was not prejudicial in tone, and on the day of the hearing was served on condemnor's counsel who took ample opportunity thereafter to explain its position; although the filing of brief at such time is not condoned (CL 1948, § 213.171 *et seq.*).

2. COURTS—PRETRIAL BRIEF.

   A pretrial brief should never be presented to the tribunal who makes the final decision unless under the supervision and with the consent of the presiding judicial officer.

3. EMINENT DOMAIN—CONDEMNATION OF PART OF MANUFACTURING PLANT—DECREASED VALUE OF BALANCE.

   The decreased value of remaining buildings, no longer usable because of condemnation of part of buildings used by manufacturer, is allowable as compensation.

4. SAME—CONDEMNATION OF PART OF TRACT—DECREASED VALUE OF BALANCE.

   Direct compensation is allowable for the portion of a tract actually taken in condemnation proceedings and, in addition, the

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 53 Am Jur, Trial § 11.
[3, 4] 18 Am Jur, Eminent Domain § 265 *et seq.*
[5, 6] 18 Am Jur, Eminent Domain § 247.
[7] 18 Am Jur, Eminent Domain § 240.
[8] 18 Am Jur, Eminent Domain § 279.
[9, 11, 12] 18 Am Jur, Eminent Domain §§ 365, 366, 376.
[14] 18 Am Jur, Eminent Domain § 364 *et seq.*
[16] 18 Am Jur, Eminent Domain § 259.
[17] 18 Am Jur, Eminent Domain § 255.
[18] 18 Am Jur, Eminent Domain § 376.
[20] 18 Am Jur, Eminent Domain § 373 *et seq.*

amount by which the value of the parcel from which it is taken is diminished on account of the use made of the land taken.

5. SAME—SPECIAL USE AS AN ELEMENT OF VALUE.

The adaptability of land for a special purpose or use may be considered as an element of value in condemnation proceedings to which the owner has a right to compensation.

6. SAME—SPECIAL USE—MARKET VALUE.

The special use to which property is devoted when it is sought to be condemned for public use is taken into consideration as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which, in a general sense, may be said to be the market value, market value being, always, the ultimate test.

7. SAME—NECESSITY—MEASURE OF DAMAGES.

A landowner must yield to the public necessity in condemnation proceedings, the "just compensation" which he should receive, meaning at no sacrifice on his part, and putting him in as good a condition as he would have been if the injury had not occurred (Const 1908, art 13, § 1).

8. SAME—HIGHWAY PURPOSES—DETERMINATION OF VALUE.

The determination of value in condemnation proceedings for highway purposes is not a matter of formula or artificial rules but of sound judgment and discretion by the court commissioners based upon a consideration of all relevent facts in a particular case (CL 1948, § 213.171 *et seq.*).

9. SAME—EVIDENCE—SUPREME COURT.

An award by court commissioners in a proceeding to condemn property for highway uses may not be disturbed by the Supreme Court unless palpably contrary to the evidence, the province of the Court being to review the evidence to see that the finding is supported thereby (CL 1948, § 213.171 *et seq.*).

10. SAME—COMMISSIONERS—CREDIBILITY OF WITNESSES.

The court commissioners in a proceeding to condemn property for highway purposes are the judges of the credibility of the witnesses and the truthfulness of their statements (CL 1948, § 213.171 *et seq.*).

11. SAME—COMMISSIONERS—DAMAGES.

The court commissioners in a proceeding to condemn land for highway purposes hear the testimony, examine the property, consider the estimates placed upon the damages which should

be awarded to the respective parties and make a final determination (CL 1948, § 213.171 *et seq.*).

12. SAME—DAMAGES—EVIDENCE.

An award made by court commissioners in a proceeding to condemn land for highway purposes that is within the minimum and maximum amounts of damages, as disclosed by the record, is supported by the evidence (CL 1948, § 213.171 *et seq.*).

13. SAME—LUMP-SUM AWARD—LAND AND BUILDINGS—BUSINESS INTERRUPTION—RELOCATION OF MACHINERY AND EQUIPMENT.

No determination can be made as to what part of a lump-sum award by court commissioners in a proceeding to condemn part of a tract of land for highway purposes was based on damages to land and buildings, where the condemnee, operating an arbor and hydraulic press factory, also presented proofs as to expenses occasioned by business interruption and of relocating machinery and equipment and neither party appears to have requested a finding other than a lump-sum award (CL 1948, § 213.171 *et seq.*).

14. SAME—DAMAGES—EVIDENCE—VIEW OF PREMISES.

The persons entrusted with the duty of determining damages in condemnation proceedings are judges of both the law and the facts and are not bound, as to value of property taken, by testimony of witnesses alone, but may exercise their own judgment, based not only on the testimony, but from knowledge gained from view of premises.

15. SAME—FACTORY—LAND AND BUILDINGS—VALUE—EVIDENCE.

It was not improper for condemnee in proceeding by State highway department to condemn 17% of the area of a 5-acre tract devoted to manufacture of arbor and hydraulic presses, including 4 of the 11 buildings and 40% of the manufacturing floor space to introduce proof of damages in regard to land and buildings (CL 1948, § 213.171 *et seq.*).

16. SAME—EVIDENCE—BUSINESS INTERRUPTION.

Evidence, presented in proceeding to condemn for highway purposes a portion of 5-acre tract devoted to manufacture of arbor and hydraulic presses, as to expenses occasioned by business interruption, compiled by the condemnee's employees pursuant to a plan designed to hold the business interruption to a minimum and audited by an independent accounting firm, was properly introduced for consideration as to value and weight by commissioners making the award, where it was not speculative and had a reasonable degree of certainty; it being permissible to recover expenses, but not loss of profits due to interruption of business (Const 1908, art 13, § 1; CL 1948, § 213.171 *et seq.*).

17. SAME—DAMAGES—REMOVAL AND REATTACHMENT OF FIXTURES.
The landowner's cost of removing and reattaching fixtures, or the purchase of new fixtures, necessitated by condemnation of part of tract devoted to manufacturing operations is a proper element to be included in an award of just compensation (Const 1908, art 13, § 1; CL 1948, § 213.171 *et seq.*).

18. SAME—COMMISSIONERS—EVIDENCE—SUPREME COURT.
It is not the Supreme Court's duty, or right, to assay the weight and value of the evidence introduced in proceeding to condemn land for highway purposes, but rather to determine whether the evidence was of such a nature that it could be properly considered by the court commissioners (CL 1948, § 213.171 *et seq.*).

19. SAME—DAMAGES—EVIDENCE.
Award by court commissioners of $393,296 to manufacturer of arbor and hydraulic presses in proceeding to condemn such a portion of their 5-acre tract as to necessitate removal of the entire productive facility to a new location *held*, within the range of testimony showing a maximum damage of $438,847.13 and minimum of $187,360 (CL 1948, § 213.171 *et seq.*).

20. SAME—CONDUCT OF COMMISSIONERS—EVIDENCE—DAMAGES.
Record on appeal from award to manufacturer of arbor and hydraulic presses for portion of 5-acre tract of land and 4 of 11 buildings condemned for highway purposes *held*, not to have disclosed any circumstances of fraud, misconduct, gross error, mistake, undue influence, partiality, bias, prejudice or unfaithfulness, on the part of the court commissioners or erroneous rejection or admission of testimony affecting the rights of the parties or that damages awarded were either inadequate or excessive, hence, petition for appointment of new commissioners is denied (CL 1948, § 213.171 *et seq.*).

Appeal from Ottawa; Smith (Raymond L.), J. Submitted January 19, 1959. (Docket No. 43, Calendar No. 47,739.) Decided July 13, 1959.

Condemnation proceedings instituted by Charles M. Ziegler, State Highway Commissioner, to take property of Dake Corporation, a Michigan corporation, for highway purposes in the City of Grand

Haven. From determination of compensation, plaintiff appeals. Award affirmed.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *Victor H. Meier, Don Binkowski* and *Samuel D. Frane,* Assistants Attorney General, for plaintiff.

Warner, Norcross & Judd (*Harold S. Sawyer* and *Peter Van Domelen,* of counsel), for defendant.

KELLY, J. The Dake Corporation (appellee), located in Grand Haven, Michigan, manufactures arbor and hydraulic presses. Since 1953 its annual business has exceeded $1,250,000, and in 1956 approximated $1,900,000.

The factory is built on a rectangular parcel of land with an area of approximately 5 acres, with 11 buildings, plus a loading dock, concrete driveways, and fences.

In order to widen US–31, the highway department of the State of Michigan (hereinafter referred to as the department) condemned a strip of land involving 4 buildings, resulting in Dake's loss of 40% of its manufacturing floor space and 17% of its land area, forcing Dake to move its entire productive facility to a new location.

In its presentation to the court commissioners* Dake divided its proof as to damages in 3 general categories: (1) Damage to land and buildings; (2) Expense occasioned by business interruption; (3) Expense of relocating machinery and equipment.

This opinion will be written in respect to the propriety of testimony supporting Dake's 3 claimed items of damages and the department's contention

* See CL 1948, § 213.171 *et seq.* (Stat Ann and Stat Ann 1957 Cum Supp § 8.171 *et seq.*).—REPORTER.

that prejudicial error resulted through Dake's mailing a brief to the commissioners before the hearing.

No. 1. *In re Dake's mailing of brief.*

A few days before hearing Dake mailed to the 3 commissioners a 22-page brief entitled "Memorandum on Behalf of Dake Corporation" and failed to present a copy to the department until the day of hearing.

In claiming prejudicial error, the department only refers to one paragraph of the memorandum reading as follows:

"In the final analysis the nature of this proceeding is such that its outcome will be determined by the exercise of a sound sense of values and good business judgment, rather than by resort to the many, and oftentimes perplexing, technicalities of the law."

Ruling on the question of reversible error, the trial court stated:

"Counsel for the State makes an issue of the failure of the other side to provide it with a copy of the pretrial brief filed with the commissioners until the first day of the hearing. While the court understands that the ethics of the profession require that briefs be filed with opposing counsel at the same time as they are filed with the court, failure to adhere thereto does not seem a proper ground to upset this award in view of the fact that the brief so filed did not misstate the law nor was it prejudicial in tone and in view of the fact that counsel for the State took ample opportunity thereafter to explain its position."

In concurring with the trial court that the filing of the brief did not constitute reversible error, we do not condone such practice in the future and emphatically state that a pretrial brief should never be presented to the tribunal who makes the final de-

cision unless under supervision and with the consent of the presiding judicial officer.

No. 2. *In re damages to land and buildings.*

Appellant contends that appellee failed to submit proper proof of fair market value *before* and *after* condemnation because its witness Nedeau testified as to the value as a "going concern use" and not the market value.

Nedeau's 23-page appraisal report, showing $338,000 as a fair market value *before* taking and $90,000 as value *after* taking, was admitted without objection. This report established that he considered both the capitalization-of-income method and the depreciated-reconstruction-cost approach and that he rejected the income method as not being applicable.

The department's expert witnesses used the depreciated-reconstruction-cost approach, one reducing Nedeau's $338,000 figure to $306,350, and the other reducing it to $277,920.

The problems of manufacturing heavy arbor and hydraulic presses compelled Dake to have a "special purpose building" and, being unable to acquire an existing building, was required to construct a new building. After condemnation Dake had no use for the remaining buildings, other than resale, and this decreased value of these buildings is allowable as compensation under our decision in *In re Widening of Michigan Avenue, Roosevelt to Livernois,* 280 Mich 539, 548, 549, wherein we said:

"Where only part of a parcel is taken, just compensation is to be determined by the amount which the value of the parcel from which it is taken is diminished. The value of the part actually taken is allowed as direct compensation, but the decreased value of the residue of the parcel on account of the use made of the land taken is also allowable as compensation. *Port Huron & South-Western R. Co.*

v. *Voorheis,* 50 Mich 506; *Fitzsimons & Galvin, Inc.,* v. *Rogers,* 243 Mich 649; *Johnstone* v. *Detroit, G. H. & M. R. Co.,* 245 Mich 65 (67 ALR 373); *In re Widening of Bagley Avenue,* 248 Mich 1. Where only a part of a building is taken, if the remaining portion is of great value and there can be advantageous reconstruction, rearrangement and new adjustment, then the cost of altering the building and all consequential damages because of such alteration, plus the value of the part taken, furnishes the rule for measuring the compensation to be awarded. If what remains after a part is taken is worthless, the jury should allow the whole value of the building. If not, they should consider what may be done with the remainder and the cost of doing it. *City of Detroit* v. *Loula,* 227 Mich 189; *In re Widening of Bagley Avenue, supra.*"

Nedeau based his judgment on the special nature of the buildings and that there was economic justification for their existence. He was justified in so doing, and in support thereof we quote from 18 Am Jur, Eminent Domain, § 247, p 885, as follows:

"The adaptability of the land, sought to be taken in eminent domain, for a special purpose or use may be considered as an element of value. If the land possesses a special value to the owner which can be measured in money, he has the right to have that value considered in the estimate of compensation and damages.

"While market value is always the ultimate test, it occasionally happens that the property taken is of a class not commonly bought and sold, as a church or a college or a cemetery or the fee of a public street, or some other piece of property which may have an actual value to the owner, but which under ordinary conditions he would be unable to sell for an amount even approximating its real value. As market value presupposes a willing buyer, the usual test breaks down in such a case, and hence it is sometimes said that such property has no market

value. In one sense this is true; but it is certain that for that reason it cannot be taken for nothing. From the necessity of the case the value must be arrived at from the opinions of well-informed persons, based upon the purposes for which the property is suitable. This is not taking the 'value in use' to the owner as contradistinguished from the market value. What is done is merely to take into consideration the purposes for which the property is suitable as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which in a general sense may be said to be the market value."

Michigan Constitution 1908, art 13, § 1, provides:

"Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law."

This Court has repeatedly construed what is meant by the words "just compensation" and has steadfastly held to the holdings in *In re Petition of Rogers,* 243 Mich 517, that while, in condemnation proceedings, the landowner must yield to public necessity, he should receive just compensation and that this means at no sacrifice, and in *In re Widening of Bagley Avenue,* 248 Mich 1, 5, that "Nothing can be fairly termed just compensation which does not put the party injured in as good a condition as he would have been if the injury had not occurred."

The commissioners were not bound by formula in determining damages, as is disclosed in *In re Widening of Gratiot Avenue,* 294 Mich 569, wherein we held that the determination of value in condemnation proceedings is not a matter of formula or artificial rules but of sound judgment and discretion

based upon a consideration of all relevant facts in a particular case.

In a recent decision, *In re Civic Center* (*Detroit* v. *D. & C. Nav. Co.*), 335 Mich 528, we established the following principles:

"A jury's award in condemnation proceedings may not be disturbed by the Supreme Court unless palpably contrary to the evidence, the province of the Court being to review the evidence to see that the finding is supported thereby."

"The jury in a condemnation case is the judge of the credibility of the witnesses and the truthfulness of their statements."

"The jury in a condemnation case hears the testimony, examines the property, considers the estimates placed upon the damages which should be awarded to the respective parties and makes the final determination."

"An award made by the jury in condemnation proceedings within the minimum and maximum amounts of damages, as disclosed by the record, is supported by the evidence." (Syllabi.)

In regard to land and buildings, Dake offered proof of a maximum *before* value of $338,000, less minimum *after* value of $78,810, and consequently a difference of $259,190. The department endeavored to prove $260,360 minimum *before* value, less a maximum *after* value of $150,000, resulting in a difference of $110,360.

The award of $393,296 did not specify as to the amount allowed for each of the 3 general categories of damages hereinbefore set forth and, therefore, no determination can be made as to what part of the award was based on damages to land and buildings. The record does not disclose that either the department or Dake requested a finding other than a lump-sum award.

In *In re Widening of Bagley Avenue, supra,* we held that those entrusted with the duty of determining damages in condemnation proceedings were judges of both the law and the facts and that they are not bound, as to value of property taken, by testimony of witnesses alone but could exercise their own judgment, based not only upon testimony, but from knowledge gained from view of premises.

The department had ample opportunity to introduce testimony of its own choosing as to what should be considered damages. We cannot agree with the department that Dake's submission of proof of damages in regards to land and buildings was improper, calling for a reversal of the award.

No. 3. *Expenses incurred by business interruption and relocating machinery and equipment.*

The department contends that this Court "without specifically saying" so has overruled the *Moesta* and *Weiden* decisions (hereinafter cited) and further states that if this is not so, requests we overrule these decisions in deciding this appeal. In *Grand Rapids & I. R. Co.* v. *Weiden,* 70 Mich 390, this Court allowed loss occasioned by the interruption of business, as is disclosed by the following quotation from page 395:

"Apart from the money value of the property itself, they (the owners) were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of business facilities may lead to serious results. There may be cases when the loss of a particular location may destroy business altogether, for want of access to any other that is suitable for it. Whatever damage is suffered, must be compensated. Appellants are not legally bound to suffer for petitioner's benefit. Petitioner can

only be authorized to oust them from their possessions by making up to them the whole of their losses."

In *Commissioners of Parks of Detroit* v. *Moesta,* 91 Mich 149, 154, this court said:

"The constitutional provision entitling the owner of private property, taken for public use, to just compensation, has uniformly been construed to require full and adequate compensation. The rules to be applied in fixing the compensation are not necessarily the same as obtain in fixing damages in actions upon contracts. The correct rule of compensation in such cases is more nearly analogous to the remedy afforded in an action in tort in which property rights have been interfered with without the owner's assent. In such cases damages for the interruption of the owner's business are allowed. *Allison* v. *Chandler,* 11 Mich 542, 549."

Appellant contends that:

"In the fairly recent cases of *In re Park Site, City of Detroit,* 247 Mich 1, 3, 4; *In re Jeffries Homes Housing Project,* 306 Mich 638; *In re Slum Clearance,* 332 Mich 485, 496; and *In re Condemnation for Battle Creek Park,* 341 Mich 412, 422, the Supreme Court repudiated the tort theory set forth in the *Weiden Case* and in the *Moesta Case,* and denied recovery of losses due to interruption of business."

An examination of the 4 above cases cited by appellant discloses that this Court held that the property owner could not recover loss of profits because of damages caused by business interruption, but did not repudiate *Moesta* or *Weiden* in regards to expenses incurred by business interruption. To eliminate any doubt of this Court's position, we hold that the evidence introduced in this condemnation proceeding showing expenses occasioned by business interruption was properly introduced for considera-

tion as to value and weight by the commissioners making the award.

To recover damages from business interruptions the proof must not be speculative and must possess a reasonable degree of certainty.

Dake formulated a plan whereby production could be maintained during the move from the condemned property to its new location. This required a zone moving plan, so that operations could be carried on in the zone being moved without stopping operations in the other zones.

To carry forward the plan, 180 different metal working machines, plus such accessories as air compressors, water pumps, job clocks, ADT systems, autocall systems, electric capacitors, compressed air piping, heavy duty electric bus duct, et cetera, had to be detached and installed in the new location. The record discloses that after study 4 plans were suggested:

1. Moving to a new site with exact duplicate layout, using all existing material possible.

2. Moving to a new site with exact duplicate layout and using sufficient new materials to correlate the reinstallation time to the actual moving time, thereby reducing interruption to a minimum.

3. Relocating on the remaining portion of the present site using all existing material possible.

4. Relocating on the remaining portion of the present site and using sufficient new material to correlate the reinstallation time to actual moving time, thereby reducing interruption to a minimum.

Dake employed the accounting firm of Ernst & Ernst to determine the mathematical accuracy and procedure of each of these 4 plans. This firm's report was placed in exhibit form and introduced and explained by competent testimony at the hearing before the commissioners.

Dake's expenses occasioned by business interruption, under plan 2, were estimated as follows:

"Additional direct labor costs	$20,633.32
"Additional indirect labor costs	7,091.67
"Efficiency loss of direct productive labor	7,970.10
"Estimated additional cost of operating dual facilities during the relocation period	17,371.00
"Total	$53,066.09."

We disagree with the department's claim that Dake's testimony should not be considered because it was speculative and conjectural. We quote the following from the testimony of the department's expert witness, Wally E. George:

" 'For nearly a year now, the company has been engaged in a large-scale project to appraise various means of developing the new plant required by the loss of land to the State. After much debate and consideration of many ideas, the officers decided that they would like to remain in Grand Haven, and they reduced their thinking to 4 possible plans. * * *

" 'The management has carefully undertaken a program of projecting out-of-pocket costs, as they see them, for making such moves as the 4 plans would contemplate. They have had their auditors, Ernst & Ernst, analyze their computations primarily on plan No. 2, and prepare a report on this subject. We were given a confidential opportunity to preview this report before it was given to their client. * * *

" 'We think the Dake Corporation has done an extremely careful job in projecting the contemplated move. One might quarrel with them on the size of some of their figures, but can hardly question the sincerity behind the computations.

" 'Summing it all up, we see the present manufacturing business of the corporation as being an efficient one. The management is turning out an excellent product line, and economically running their business to produce a good profit. If the highway were not going to interrupt, they might well continue where they are, and reasonably maintain and expand their present facilities over the next decade, without need of earlier finding a new manufacturing location.' "

Attached to defendant's exhibit 1, purporting to constitute a resume of exhibits E–1, E–2, E–3 and E–4, was a letter from Ernst & Ernst. The department, complaining, quotes the following from that letter:

"Our review of the details of the computations under plan 2 consisted of (1) testing the arithmetical accuracy of the computations and summarizations and (2) reconciling the amounts included therein for services to be performed by outside contractors with the quotations submitted by the contractors. Our review disclosed no significant exceptions to the amounts computed by employees of the corporation.

"There is included herewith an estimate of the additional costs which will be incurred as a result of operating dual plant facilities during the moving period under the conditions assumed under plan 2.

* * *

"Based upon our review, as outlined herein, we believe that the accompanying summary of estimated costs of relocating the productive facilities of Dake Corporation constitutes a reasonable estimate of such costs on the basis of the various assumptions made in connection with 'plan 2.' Such estimate does not include any amounts for cost of replacing the present building and site."

The department, referring to this letter, states:

"It is fair to assume that the members of the commission were well impressed by the reputation of Ernst & Ernst for accuracy and integrity. It is equally obvious that Dake sought to avail itself of such direct benefit from that reputation as would be permitted by Ernst & Ernst. * * *

"But it is also evident that anyone reading the schedule either without reading the accompanying letter or after reading same casually would gather the impression that what is set forth as a problem in arithmetic takes on the appearance of an opinion by Ernst & Ernst."

The department did not, and could not, challenge the integrity or business ability of the commissioners. We cannot agree with the department that the letter and the introduction of a large number of work sheets confused the commissioners, thereby calling for reversal of the award.

Throughout the proceedings the department took the position (and argued to the commissioners) that moving costs were not a damage item because cost of fixture removal can only be recovered by a lessee and not by an owner in possession. The department states:

"It is the State's contention that the ambiguous Michigan law should be clarified to follow the weight of authority. This overwhelming authority is to the effect that the cost of moving machinery and equipment, which strictly is personal property, resulting from condemnation is an improper element of compensation."

Plaintiff turns to text writers and decisions of other States to support its contention. We find that Michigan law is not ambiguous on this point, and in support of this conclusion quote from *In re Widening of Gratiot Ave.*, 294 Mich 569; *In re Slum*

Clearance (Appeal of United Platers, Inc.), 332 Mich 485; and *In re John C. Lodge Highway*, 340 Mich 254.

In re Widening of Gratiot Ave., supra, 573:

"The sole question on this appeal is whether it was proper for the jury to award damages for removal costs of trade fixtures. * * *

"As to the owner of land, the fixtures enhance the value of the land and, in awarding compensation where the owner removes the fixtures, the proper measure of damages is the value of the land as so enhanced, less the value of the fixtures in view of the necessity of severing them. * * * Since the value of the fixtures as severed will be decreased to the extent of the cost of detaching and reattaching them elsewhere, the cost of such removal is to be considered in awarding damages."

In re Slum Clearance, supra, 489, 490, we approved the following instruction of the trial court:

"'As to those fixtures which the owner elects to take, the owner is entitled to just compensation. * * * Therefore, in considering the damages to be awarded for fixtures, as I have defined them, you may consider the value of the fixtures to have been decreased to the extent of the cost of detaching them and reattaching them elsewhere, and you should make an allowance in your award by such an amount as representing the damage to such respondents claiming compensation for the diminished value of their fixtures.'"

In re John C. Lodge Highway, supra, 263, 264:

"There is no question in the present case that the value of appellants' fixtures, as severed, will be decreased to the extent of the cost of detaching and reattaching them elsewhere; that the appellee as the condemning authority proposes to take the buildings stripped of the trade fixtures and pay nothing to appellants for the damages and costs sus-

tained. Under the decision of *In re Widening of Gratiot Avenue, supra,* appellee's contention that appellants should suffer this damage without compensation is not justified. * * *

"The separate computation and awarding of fixture removal damage was approved in *In re Slum Clearance* (*Appeal of United Platers, Inc.*), 332 Mich 485."

The department states:

"As fixtures they were part of the realty and were so appraised in the damages to the land and buildings. Of necessity and definition, fixtures are part of the realty.

"The reprehensibility of the factory owner's position is increased by the admission that their demand for fixture removal damages includes fixtures for their new building."

The record does not sustain the department's contention that the commissioners included fixtures in determining damage to land and buildings. The cost of certain new fixtures was submitted to the commissioners because, in regard to those fixtures, it was less costly to purchase them than to detach and reattach. That the submission of such proof was proper is disclosed in *In re Slum Clearance, supra,* where, in approving an instruction of the trial court, we said (p 489):

"The trial judge agreed that appellant's tanks, pipes and other machinery were trade fixtures and permitted the jury to hear evidence as to the cost of disassembling and reinstalling the movable equipment, and as to the value of equipment which could not be moved without destruction or at cost exceeding value."

Appellant's position in regards to removal costs can be summed up from the following paragraph in its brief:

"In respect of fixture removal damages, Michigan is truly unique. Therefore, at least, as to owners, we ask the Court to follow the overwhelming weight of authority and refuse the allowance of fixture removal damages for machinery and equipment."

In refusing the department's request, we hold that Dake was entitled to allowance of fixture removal damages. We do not agree with the department's theory that "Since the State does not take the machinery, it should not be compelled to pay for its removal."

This was not an ordinary or "run-of-the mine" condemnation case. A large, successful, operating manufacturer was forced to desist further operations on its land because of the department's demand of said land for road purposes.

There is no doubt that Dake spent extensive time and effort in computing damages and that its computations were made after careful survey and study and such computations were made available to the department before the hearing. There is no claim by the department that it requested, or was denied, additional time to analyze Dake's claim before the hearing, or that the department was denied ample opportunity at the hearing to present its proof controverting Dake's claim.

It is not this Court's duty, or right, to assay the weight and value of the evidence introduced, but, rather, to determine whether the evidence was of such a nature that it could be properly considered by the commissioners. We hold that it was.

We are not called upon to determine whether we would have added to or subtracted from the commissioners' award of $393,296. Dake offered proof of $438,847.13 maximum amount of damages, and the department's minimum limit of damages was $187,360. The award was within the range of testimony.

In its brief, the department lists 5 different circumstances under which the Supreme Court will set aside confirmation awards. They are:

1. For fraud or misconduct affecting the rights of the parties;

2. For gross errors or mistakes;

3. For the erroneous rejection or admission of testimony affecting the rights of the parties;

4. For errors of such an extraordinary character or grossness as furnished a just inference of the existence of undue influence, partiality, bias, and prejudice, or unfaithfulness in the discharge of the duty imposed;

5. When it is apparent that the damages awarded are either inadequate or excessive.

We agree with appellant, but we do not feel that such circumstances existed in this appeal.

Therefore, we deny the department's petition that new commissioners be appointed to determine the just compensation to be paid.

The award is affirmed.

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

KAVANAGH, J., did not sit.

JOHNSON *v.* NEW YORK CENTRAL RAILROAD COMPANY.

RAILROADS—GASOLINE TANK TRUCK AND TRAILER—CONTRIBUTORY NEGLIGENCE—EQUALLY DIVIDED COURT.

Directed verdict and judgment for defendant railroad company in action by truck driver for personal injuries received when his tractor and trailers, loaded with 7,890 gallons of gasoline, were struck at railroad crossing is affirmed by a court equally divided as to whether or not plaintiff was guilty of contributory negligence as a matter of law under circumstances presented (CLS 1956, § 257.669).

Appeal from Jackson; Hartrick (George B.), J., presiding. Submitted October 14, 1958. (Docket No. 45, Calendar No. 47,396.) Decided July 13, 1959. Rehearing denied October 12, 1959.

Case by George E. Johnson against the New York Central Railroad Company, a Michigan corporation, for personal injuries sustained when gasoline truck was struck by passenger train. Directed verdict and judgment for defendant. Plaintiff appeals. Affirmed by an equally divided court.

Alexander, Cholette, Buchanan, Perkins & Conklin (*Edward D. Wells,* of counsel), for plaintiff.

McKone, Badgley, Domke & Kline (*Maxwell F. Badgley,* of counsel), for defendant.

REFERENCES FOR POINTS IN HEADNOTES

3 Am Jur, Appeal and Error § 1160.

KAVANAGH, J. (*for reversal*). Plaintiff brought this action to recover from defendant railroad company for personal injuries suffered when defendant's passenger train collided with plaintiff employer's tractor and trailers loaded with 7,890 gallons of gasoline. This equipment was being driven by plaintiff in a westerly direction over an angle crossing known as Rex or White's Crossing, about 8 miles east of Kalamazoo, where defendant's railroad tracks intersect US–12A.

The accident occurred about 2 p.m., on a bright chilly day, on November 30, 1951.

Plaintiff alleged in his declaration that the defendant's employees were negligent in operating and causing to be operated its train at a high and reckless rate of speed; that defendant was negligent in maintaining a dangerous and hazardous crossing; that defendant's employees negligently failed to warn plaintiff of the approach of defendant's Mercury passenger train from the east although they were aware it was due; that defendant's employees were negligent in that they placed a switch engine at the intersection which activated the warning signals at the crossing; that defendant negligently failed to station a guard at the intersection.

Plaintiff's declaration further alleged that defendant's engineer on the Mercury passenger train was negligent in releasing the brakes on the train at a time when the engineer knew or should have known that in so doing a collision would result; that defendant's train failed to avoid a collision with the vehicle operated by plaintiff when the same could have been done with the use of ordinary care. Plaintiff further averred that he had exercised reasonable and proper care; that he was not guilty of negligence contributing to the accident; and that defendant employees' negligence was the proximate cause of the accident and his resulting injuries.

Defendant by answer denied negligence on the part of its employees and alleged that plaintiff was guilty of contributory negligence in that plaintiff had failed to make proper observation before attempting to cross the railroad tracks.

Defendant urges that plaintiff failed to comply with Michigan public service commission rule No 43, which provides as follows:

"No driver of any motor vehicle under certificate or permit from this commission, shall drive such vehicle across railroad tracks at grade without first bringing the vehicle to a full stop and shall not proceed until he shall have determined that it is safe to cross." (1954 Administrative Code, No R 460.122, p 5631.)

Defendant further urges that plaintiff failed to comply with CLS 1956, § 257.669 (Stat Ann 1952 Rev § 9.2369), which provides as follows:

"(a) The driver of any motor vehicle carrying passengers for hire, or of any school bus carrying any school child, or of any vehicle carrying explosive substances or flammable liquids as a cargo or part of a cargo, or any motor vehicle weighing over 10,000 pounds, including the load thereon, before crossing at grade any track or tracks of a railroad, shall stop such vehicle within 50 feet but not less than 10 feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train, and for signals indicating the approach of a train, except as hereinafter provided, and shall not proceed until he can do so safely. After stopping as required herein, and upon proceeding when it is safe to do so the driver of any said vehicle shall cross only in such gear of the vehicle that there will be no necessity for changing gears while traversing such crossing and the driver shall not shift gears while crossing the track or tracks.

"(b) No stop need be made at any such crossing where a police officer or a traffic-control signal directs traffic to proceed."

Defendant contends that plaintiff violated this statute and public service commission rule and was, therefore, guilty of contributory negligence as a matter of law.

The case was tried before a jury for nearly 3 days. At the conclusion of plaintiff's proofs defendant moved for a directed verdict on the grounds that: (1) no negligence on the part of defendant had been proved; (2) under the record as it then stood plaintiff was guilty of contributory negligence as a matter of law; (3) there was no evidence of any kind which would justify submitting the question of subsequent negligence to the jury.

The trial judge, apparently agreeing with all 3 reasons, directed a verdict of no cause for action and judgment was entered accordingly. From this judgment plaintiff makes his appeal to this Court on 3 grounds:

(1) Is there a question of fact for the jury as to whether the defendant was guilty of negligence on the following issues:

(a) Whether the passenger engineer of the defendant used due care and caution under the circumstances then and there existing;

(b) Whether the crew on the switching locomotive, which was standing near the crossing activating the flasher signal, used due care and caution under the circumstances then and there existing?

(2) Is there a question for the jury whether the passenger engineer was guilty of subsequent negligence under the circumstances then and there existing?

(3) Is there a question for the jury whether plaintiff was guilty of contributory negligence under the circumstances then and there existing?

The law is well established that on an appeal from a directed verdict in favor of the defendant at the conclusion of plaintiff's proofs the testimony must be viewed in a light most favorable to the plaintiff.

In *Hammerbacher* v. *Babechenko,* 348 Mich 139, 150, the Court said:

"Testimony and all legitimate inferences therefrom must be viewed in the light most favorable to plaintiff in determining whether denial of defendant's motion for directed verdict was proper—*Douglas* v. *Holcomb,* 340 Mich 43."

In *Levesque* v. *LaFortune,* 348 Mich 443, 445, the Court said:

"In appeal from judgment entered for defendants under the statute, as here, we are bound, however, to view the testimony in the light most favorable to plaintiff and to draw the reasonable inferences therefrom which are in his favor. *Warwick* v. *Blackney,* 272 Mich 231; *Paw Paw Depositors Corp.* v. *John W. Free State Bank,* 278 Mich 637; *Poundstone* v. *Niles Creamery,* 293 Mich 455; *Longfellow* v. *City of Detroit,* 302 Mich 542; *Savas* v. *Beals,* 304 Mich 84; *Routhier* v. *City of Detroit,* 338 Mich 449 (40 ALR2d 1114)."

In *Wadsworth* v. *New York Life Insurance Company,* 349 Mich 240, the syllabi read:

"1. The Supreme Court examines the record on appeal from directed verdict and judgment for defendant at close of plaintiff's case to see whether there was competent evidence from which the jury could have found for plaintiff.

"2. A jury may draw reasonable inferences from the established facts and circumstances, in the absence of direct proofs."

See, also, *Lane* v. *B & J Theatres, Inc.,* 314 Mich 666; *Michigan Fire & Marine Insurance Co.* v. *Pretty Lake Vacation Camp, Inc.,* 316 Mich 197; *Cole* v. *Austin,* 321 Mich 548; *Greenberg* v. *Greenberg,* 337 Mich 390; *Hopkins* v. *Lake,* 348 Mich 382; *Stewart* v. *Eldred,* 349 Mich 28; *Indiana Lumbermens Mutual Insurance Co.* v. *Matthew Stores, Inc.,* 349 Mich 441; *Shandor* v. *Lischer,* 349 Mich 556.

In light of these decisions, it is necessary to relate at some length facts the proofs developed during the course of the trial in order to properly understand a disposition of the questions presented in this case.

At the time and place aforementioned plaintiff was driving his tractor and equipment over an angle railroad crossing. The equipment was loaded with 7,890 gallons of gasoline that was to be delivered in Kalamazoo. The over-all length of the equipment from the front bumper to the rear bumper of the 4-wheel trailer was about 50 feet, and the equipment was about 8 feet wide.

Plaintiff had left a plant at Jackson, Michigan, and followed US–12, branching off on US–12A near Comstock, and approached the railroad tracks on a highway which runs parallel to the tracks, crosses the tracks at an angle in a northwesterly direction, and then runs to the west again parallel to the tracks.

Plaintiff approached the crossing from the east. When about one block east of the crossing he noticed the crossing signal flashers blinking. He coasted up and stopped his equipment with the front end about 15 feet from the planking of the tracks. At this particular crossing there are 2 sets of rails and the distance from outer rail to outer rail is 41 feet. It is a distance of 58 feet on the angle from the most southerly rail to the most northerly rail. From the place where the truck stopped, it would have to travel a distance of about 128 feet (5 feet plus 15 feet plus 50 feet plus 58 feet equals 128 feet)

before the rear would clear the northerly rail, and about 133 feet for it to clear the planking along the north edge of the rail. This distance is computed as follows: 5 feet of planking; 15 feet from place stopped in back of planking; length of equipment: 50 feet; crossing: 58 feet.

When plaintiff pulled up and stopped he noticed the flasher lights blinking and heard the bell ringing. While stopped he noticed a switch engine about 100 to 150 feet away on the south main track. He noticed traffic coming from the opposite direction, which would stop, observe the situation, and then pull across the crossing. He sat there wondering which way the switch engine was going to go or how long it was going to be there. From the driver's seat in the truck he could not see down the track to the right, or east, because of the angle in crossing. Finally he pulled the hand brake that sets the whole unit to keep it from rolling backwards or moving, moved over to the opposite side of the truck, stuck his head out the right window and looked all the way up the track. He could see east to the curve approximately 5/10 of a mile away and there was no train approaching in that distance. He then got back underneath the wheel, released the brake, put the truck in second gear, which is the fast accelerating gear from a standstill, and started. From the time he took his eyes away from the view to the east and started up, he estimated the time would be 3 to 5 seconds. Having looked to the east and having seen no train approaching, he reasoned the switch engine to his left was activating the bell and flasher lights. As he approached near the middle of the tracks, the switch engine started blowing its whistle and he watched the switch engine wondering what it was going to do. He knew it was evidently signaling to make a move one way or the other. He continued across the crossing, accelerating his speed

as much as he could. His tractor and semitrailer were completely off the crossing when the train, approaching from the east on the north track, hit his 4-wheel trailer.

Two witnesses who were driving trucks in the opposite direction and approaching the crossing from the west saw the accident.

Witnesses Kelly and Northrup both saw plaintiff slide over in his truck, put his head out the window and look east before starting. They testified they were both in a position to see up to the curve at that point and the Mercury train was not in sight.

Bernard Kelly testified that the left rear wheel of the 4-wheel trailer was on the north rail of the westbound track when struck by the train.

William Northrup stated the 4-wheel trailer was almost clear, just the back axle of the 4-wheel trailer was on the track.

When struck the truck gave a big lunge forward, the front axle of the 4-wheel trailer and the back axles of the semitrailer came off the ground and doubled up. The 4-wheel trailer then went over backwards and exploded.

Plaintiff had crossed the crossing 4 to 6 times during a 3-year period. He did not know the passenger train was due.

Witness Kelly testified that he had crossed the crossing many times before, approximately 500 to 1,000 times, and on numerous occasions had observed the switch engine working in that area and the flashers would be operating, and traffic, after making an observation, would make the crossing.

On the day of the accident the switch engine had been switching the Rex Paper Mill, which is located just west of the crossing 300 or 400 feet on a branch track. The switching engine had been on the main eastbound tracks switching for 10 or 15

minutes prior to the accident and during all that time the flashers were working at the crossing.

The engineer and fireman of the switch engine, at the time they were sitting there, knew that the Mercury passenger train was due. The engineer of the switch engine called the attention of the fireman to the truck and said: "Watch out for 355." The fireman testified that he first saw the truck when the front of the truck was just about on the east-bound tracks and the passenger train was about 800 feet away from the crossing. The switch engine engineer blew the switch engine whistle 6 or 8 times in short blasts and then called to the fireman to jump. The fireman remained in the cab until the impact.

The engine on the passenger train was a diesel. The switch engine fireman heard no horn on the diesel although he was sitting on the left of the switch engine with the left window down. Plaintiff, whose window was down on the right side, heard no horn blow on the diesel. He did hear the whistle on the switching steam locomotive and he would swear that the diesel wasn't blowing.

Witnesses Kelly and Northrup both testified they did not hear the diesel horn as they approached the crossing.

Mr. Cole, the engineer of the passenger train, testified he blew the horn several times. He further testified that he had been traveling about 81 miles per hour; that before reaching Rex Crossing there are 2 curves, one through Comstock and one 2,200 feet east of the crossing. His first view of Rex Crossing was 2,200 feet east of the crossing. There was a slow board sign 638 feet east of the crossing. The rules require the train speed must be reduced to 65 miles per hour at the sign. He had applied the service application of the brakes about 3,500 feet before the crossing. It was testified that

there is a time lag of 8 to 10 seconds between application of the service brakes and their taking effect.

The Mercury diesel engine contained a speed recorder tape, which records automatically as the locomotive moves along the tracks the speed of the locomotive, the miles per hour, any stops, and the point of application of the brakes.

Defendant's employee Carlton S. Hulbert testified the recording tape disclosed that the service brakes became effective about 2,600 feet east of the crossing. The tape further disclosed that from 81 miles per hour at 2,600 feet from the crossing the train was going 79 miles per hour at 2,200 feet, 77 miles per hour at 2,000 feet, 73 miles per hour at 1,600 feet, 69 miles per hour at 1,200 feet, 65 miles per hour at 800 feet. During the space of travel from 2,000 feet to 750 feet east of the crossing there was only service application of the brakes of 15 pounds. The rate of deceleration during the entire time was 1 mile per hour in each 100 feet. The effect of the brakes was released 750 feet east of the crossing, and at that point the train began coasting and coasted while the engineer was changing from service application of the brakes to emergency application. During this distance the usual time lag between application of the emergency brakes and the taking effect took place.

The tape disclosed that when the engine reached 400 feet from the crossing the emergency application took place. The train thus coasted without effective brakes for a distance of over 300 feet.

The engineer on the passenger train testified he knew that the truck was loaded with inflammable liquids when he first saw it. He further testified that he could have slowed up more if he had kept his brakes applied. The engineer further testified that if he had applied the brakes effectively at a

point 2,200 feet away that he could have brought his train to a complete stop before it reached the intersection, or slowed down so that it would have been close to a stop if the brakes had been on emergency.

Defendant's engineer Cole further testified that as he came around the curve at about 2,200 feet east of the crossing he noticed plaintiff's truck stopped some distance back from the south track and he did not expect it to start up and cross the tracks in front of him. He further testified that he did not make any move to apply the emergency brake power until after he realized the truck was going to cross; that he then frantically blew the diesel horn and switched to the emergency brakes, but that it was then too late to avoid the accident.

Defense counsel admits that, according to the speed tape which was in evidence, the train was in view from 2,600 feet or 25.4 seconds before arriving at the crossing.

It is the contention of defendant railroad company that plaintiff is guilty of contributory negligence as a matter of law for having violated both the statute and the public service commission rule by proceeding before he could safely do so, and because it is not affirmatively disclosed that plaintiff not only looked but listened in compliance with the statute and the rule.

The trial court in granting the directed verdict, and in holding plaintiff guilty of negligence for violation of the statute, said:

"Now, under such circumstances, with the ringing of the bell and the flashing signals, he had no right to assume or to take it for granted that the flashing of the signals or the ringing of the bell was occasioned by the switch engine. Also, in the testimony, there is some indication that he may have looked but he did not fully comply with the statute as far as the testimony is concerned as to listening; and I think,

because of the very fact that this statute is on the books and is made to cover a situation such as we have here, that his superficial approach to the problem in the light of the statute, in the light of his testimony taken in its most favorable light, warrants the court in finding that he violated the statute and was guilty of negligence in that regard as a matter of law.

"I also am of the opinion that there was sufficient distance between the crossing and the point where the train could be observed when the plaintiff approached the crossing that, by making a proper observation, by making the observation of an ordinarily prudent person, especially carrying the load of cargo that he was carrying and which he was well aware that he was carrying, would require him to make a more careful observation and the train was there where he could have observed it and, by the proper approach to the crossing and by the proper observation of the ordinarily prudent person charged with the responsibility of the situation there at hand, the accident would not have happened; and, as a matter of fact, he should have seen what was there to be seen, and that he again must be found, because of such failure, guilty of negligence as a matter of law."

We believe that, under the circumstances in this case, a question of fact arose for the jury to decide whether or not a reasonably prudent person, under the circumstances in this case, would have reached the same conclusion reached by plaintiff.

The duty imposed by the public service commission rule and by the statute appears to be a restatement of the common-law rule with respect to negligence, that is, a person is required to use that degree of care which an ordinarily prudent person would use under the same or similar circumstances.

A much higher degree of care would be required of the plaintiff in this case since he was driving a

truck transporting 7,890 gallons of highly inflammable gasoline; a truck that because of its size was slow in acceleration; a crossing that was not only at an angle to 2 sets of tracks, but provided a poor view to the east. These were all circumstances which must necessarily be taken into consideration in arriving at the question of whether a reasonably prudent person would have acted as plaintiff did under these circumstances. Neither the common-law rule nor the statute prohibits him from passing over the crossing. In order to form an opinion that he may do so with safety, which is the statutory duty, he must take into consideration all of the facts we have just enumerated. If reasonable minds would differ as to whether he acted in a reasonable manner in view of all of the circumstances, we believe, a jury question is raised.

There is a dispute in the testimony of engineer Cole, plaintiff, and witnesses Kelly and Northrup as to whether the passenger train was in view when the truck started across the tracks. Engineer Cole testified it was; the other 3 testified it was not. The physical facts seem to support the plaintiff. After looking east plaintiff spent 8 seconds before he began to move: 5 seconds looking at the switch engine and 3 seconds moving back under the wheel before getting under way.

There was testimony that the average speed of plaintiff's vehicle during the crossing was about 3 miles per hour. At an average speed of 3 miles per hour, it would take plaintiff's vehicle 28 seconds to travel 128 feet in order to clear the northbound rail. Since all of the testimony seems to indicate the rear of the truck was about to leave the northbound rail, and since some 36 seconds had intervened since plaintiff, Kelly and Northrup were looking to the east, it is a reasonable deduction that the

train had not as yet come in sight. At least reasonable minds might differ as to whether or not the train was actually in sight at the time plaintiff made his observation.

A jury could reasonably infer that during the entire time in which defendant's train was traveling 2,200 feet approaching the crossing plaintiff's gasoline truck was already moving forward on the crossing. Under these facts and circumstances, it is at least a question of fact for the jury to decide whether plaintiff was guilty of contributory negligence. Defendant's engineer did not apply his emergency brakes until approximately 640 feet east of the crossing when, as he stated, it became obvious to him that the truck was not going to stop, even though when he rounded the curve 2,200 feet east of the tracks he testified he saw plaintiff's long gasoline truck. He also saw and knew the switch engine standing on the south main tracks was activating the flasher signals. He also knew that highway US–12A crossed the tracks on an angle in a northwesterly direction, making it difficult for the driver to see to the east. Despite all of this information, rather than applying the emergency brakes immediately, he simply applied the service brakes and then during the last few seconds switched to the emergency brakes. Since reasonable minds might differ as to whether his actions constituted reasonable care and caution under these circumstances, we feel a question of fact for the jury was created.

It is not necessary to restate the rule laid down in *Davis* v. *New York Central R. Co.,* 348 Mich 262, or the authorities therein cited by Justices CARR and BLACK. References made in both opinions in the *Davis Case* are in support of our finding in this case.

Under the proofs in the case at bar, opinions may well differ, not merely as to the facts, but as to the inferences to be drawn from the facts.

Whether plaintiff failed to exercise proper care for his own safety involves consideration of the circumstances attending the accident. The same situation is true with reference to the alleged negligence of defendant's employees.

We conclude that the issues in this case should have been submitted to the jury.

The judgment should be reversed and the cause remanded for new trial. Appellant should have costs.

DETHMERS, C. J., and CARR and VOELKER, JJ., concurred with KAVANAGH, J.

SMITH, J. (*for affirmance*). Another intersection accident is before us, this time involving a fast railroad passenger train and a train of vehicles carrying gasoline. We need not restate the facts. Nor need we enter upon a lengthy discussion of the common-law standard of care or the degree of care necessary to be exercised thereunder. All of this we have discussed recently and at some length.

The key to this case is the statute set out in full in the margin hereof.* It concerns a compounding of hazards, those of the railroad crossing with those of certain classes of cargoes. The hazard of the

* "The driver of any motor vehicle carrying passengers for hire, or of any school bus carrying any school child, or of any vehicle carrying explosive substances or flammable liquids as a cargo or part of a cargo, or any motor vehicle weighing over 10,000 pounds, including the load thereon, before crossing at grade any track or tracks of a railroad, shall stop such vehicle within 50 feet but not less than 10 feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train, and for signals indicating the approach of a train, except as hereinafter provided, and shall not proceed until he can do so safely. After stopping as required herein, and upon proceeding when it is safe to do so the driver of any said vehicle shall cross only in such gear of the vehicle that there will be no necessity for changing gears while traversing such crossing and the driver shall not shift gears while crossing the track or tracks." (CLS 1956, § 257.699 [Stat Ann 1952 Rev § 9.2369].)

railroad is a matter of common knowledge. The trains travel at high speeds on fixed tracks. They cannot maneuver or dodge. Their momentum is such that their stop must be slow and gradual. Their force of impact is such that disaster inevitably follows collision, and may well involve the passengers on the train as well as those in the object struck. There is no need to belabor the obvious. All of this was established as early as *Lake Shore & Michigan Southern R. Co.* v. *Miller,* 25 Mich 274. And the dangers have worsened since that time, not bettered.

Since tragedy upon impact is almost inevitable, our people have required the protection of various devices, bells, lights, barriers, watchmen, and, more recently, the extensive use of underpasses and overpasses. In addition, with respect to the crossing of railroad tracks by certain classes of vehicles (those carrying school children, those carrying explosives, and those carrying flammable liquids) our statutory law commands the most extreme precautions. Whether the common law itself, without statute, would or would not be equally demanding, in view of the hazard, is not material. We have the statute. It requires that the drivers of such vehicles shall stop within so many feet of the track, while stopped shall listen and shall look ("in both directions") not only for trains but for signals. Only then, having determined that it is "safe" to proceed, may the vehicles move and, so great was the legislative concern as to this particular situation, it is provided that the gear used in crossing shall be such that it need not be changed in crossing the tracks and the driver is commanded not to do so.

We have, thus, a statutory requirement of care the most exacting and diligence the most demanding. Why? Because of the potentialities for holocaust. The collisions between private car and pedestrian,

or car and car, tragic though they are, normally involve only the immediate principals, with occasional guests. But the gasoline-laden trains of vehicles traversing our highways with their explosive and vulnerable cargoes are an ever-present hazard to all who travel and nowhere is the danger more acute than at the railroad intersection. At such crossings, where collision is sought to be prevented by statute not only between trains and vehicles carrying gasoline or explosives, but between trains and school buses, there exist, constantly, possibilities of appalling disaster. Endangered are not only those in the vehicle but those on the train. The statute must be interpreted by us in the light of its evident intent and for the accomplishment of its obvious purpose, the prevention of mass incineration and slaughter.

In this situation, then, governed by the quoted statute, we rule upon the case of a driver of a train of vehicles carrying thousands of gallons of gasoline. He was about to cross what he knew was the main line of the New York Central railroad. Not only did he know and realize that passenger trains and freights might be expected at any time, but he also knew they might appear traveling at a high rate of speed around a curve only some 2,200 to 2,600 feet from the crossing. Knowing also that he could not see this curve from his driver's seat (due to the angle at which he was crossing the tracks) he satisfied himself with one look from the right-hand window of his cab, resumed his seat "underneath the wheel of the truck and released the brake and started to cross the track." All of this had taken "3 or 4 or 5 seconds. I really don't know the exact amount of time it would take." Armed, then, with this one observation he entered upon the main line tracks with his explosive cargo despite flashing red lights and warning bells which, he "assumed"

(since his last observation of the curve had been several seconds prior thereto) were being activated solely by a nearby switch engine. As he proceeded across the tracks he was relatively blind so far as trains from the east, and especially, this particular train was concerned, due to the angle of the intersection. He had, as he puts it, "not very much" of a view to the east, from which direction the train was approaching. The switching crew referred to observed the express when it was some 800 feet from the intersection. The switch engineer sounded warning blasts from his whistle, then jumped. (He was only some 200 feet from the reasonably-to-be-expected explosion and fire.) The truck driver heard these blasts, not taking them as a signal, looked at the switch engine, and to the east (though in this direction his view was limited), and proceeded on across the tracks until he was struck. He had at no time seen the train which struck him.

It is our opinion that reasonable men could not differ upon the issue presented. The above described conduct on the part of the driver does not satisfy the statutory mandate that he proceed only under such conditions that he can do so with safety. In plain terms this driver gambled, consciously or not, upon no train's arrival during the time his observations were elsewhere, and he lost. This conduct is proscribed by statute. In our view of the case the doctrine of subsequent negligence is not applicable. Nor is there a jury question before us.

Affirmed. Costs to appellee.

KELLY, BLACK, and EDWARDS, JJ., concurred with SMITH, J.

VOELKER, J. (*concurring in reversal*). Boiled down to its essentials, the basic question in this case is whether the trial judge was warranted, under the

rule of favorable view, in taking the questions of negligence and contributory negligence away from the jury. Under the circumstances of this case we think he was not. We have recently been at some pains to declare that the question of plaintiff's contributory negligence should usually be judged not alone by what the plaintiff did or failed to do, but also by the conjoining facts of what in the way of legal duty the plaintiff reasonably had a right to expect from the defendant (*Hoffman* v. *Burkhead,* 353 Mich 47, 56, quoting approvingly from *Weller* v. *Mancha,* 351 Mich 50, 67).

Had the crew of the switch engine dismounted and waved the plaintiff across the tracks or, again, had some other railroad employee done so, erroneously telling the plaintiff that the flasher signals were out of order, could the defendant railroad have blandly wrapped the mantle of the statute around itself to avoid possible liability? We think not. While its conduct in this case was scarcely so blatant and "invitational" we do think that reasonable men might well conclude under these circumstances that the defendant may have negligently lulled the plaintiff into a false sense of security and in effect have negligently lured him to his harm. At least we think a fair jury question was presented on that score. Moreover, that trained lawyers on this Court should in this case split over the question is perhaps some further indication that the disputed issues should more properly have been left to the jury under appropriate instructions.

TOWNSHIP OF SOUTHFIELD *v.* DRAINAGE BOARD FOR TWELVE TOWNS RELIEF DRAINS.

CITY OF TROY *v.* SAME.

1. TOWNSHIPS—DRAINS—TAX LIMITATION—CONSTITUTIONAL LAW.
   Unchartered townships located within district assessable at large for benefits from intracounty drain are not municipal corporations within the meaning of the excepting clause of the 15-mill tax-limitation amendment of the Constitution, hence, are subject to the 15-mill tax-limitation provision (Const 1908, art 10, § 21, as amended in 1948).

2. CONSTITUTIONAL LAW—CONSTRUCTION OF AMENDMENT—TAX LIMITATION—MUNICIPAL CORPORATIONS.
   "Municipal corporations", as the term was fixed by usage and subsequent judicial decisions in excepting clause of 15-mill tax-limitation amendment to the Constitution, includes incorporated villages, fourth class cities, special charter cities, home-rule cities, charter townships and school districts which are organized as full-fledged public corporations (Const 1908, art 10, § 21, as added in 1932 and amended in 1948).

3. SAME—CONSTRUCTION OF AMENDMENT—TAX LIMITATION—TOWNSHIPS.
   The language of the 15-mill tax-limitation amendment of the Constitution is clear and unambiguous as it applies to unchartered townships and limits the taxing power of a township to what it may receive from the allocation of the 15 mills plus any increase voted by its electors (Const 1908, art 10, § 21, as amended in 1948).

REFERENCES FOR POINTS IN HEADNOTES

[1] 17A Am Jur, Drains and Sewers § 60 *et seq.*
[2] 37 Am Jur, Municipal Corporations §§ 3–6.
[4] 37 Am Jur, Municipal Corporations § 91.
[5, 6] 17A Am Jur, Drains and Sewers § 65.
[7] 50 Am Jur, Statutes § 28.
[10] 17 Am Jur, Drains and Sewers § 27.
[12] 17A Am Jur, Drains and Sewers § 67.
[15] 17A Am Jur, Drains and Sewers § 41 *et seq.*

4. MUNICIPAL CORPORATIONS—TAXATION—LEGISLATURE.

The legislature may, in the absence of constitutional restriction, impose compulsory taxation on a municipal corporation, where the municipality acts as the agency of the State government.

5. HEALTH—LEGISLATURE—DRAINS.

The legislature has supreme power in matters affecting the public health and may provide for financing of drainage projects in the furtherance thereof in the absence of constitutional limitations.

6. DRAINS — STATUTES — HEALTH — COUNTIES — TOWNSHIPS — PUBLIC FUNDS — SALES TAX MONEYS.

The legislature properly exercised its prerogative in providing that moneys belonging to a township could be used for a health project, such as a drain, but provision that deductions for reimbursement of county advancements to the township could be made from "any moneys * * * then or thereafter payable" to the township was in conflict with mandate of Constitution that county treasurer "*shall* remit to the * * * townships * * * on a per capita basis" a portion of the sales tax moneys returned to local governmental units, hence, the county treasurer may not retain such funds (Const 1908, art 10, § 23, as amended in 1954; CLS 1956, § 280.474).

7. WORDS AND PHRASES—SHALL—DISCRETION OF OFFICERS.

The word "shall" is mandatory and imperative and when used in a command to a public official, it excludes the idea of discretion.

8. MUNICIPAL CORPORATIONS—DRAINS—STATUTES—CHARTERS.

Mandatory statutory provisions in the drain code are read into and become a part of the charters of cities involved so as to remove the indebtedness resulting from participation in an intracounty drain from statutory or charter limitations (CLS 1956, §§ 280.473, 280.475).

9. DRAINS—METROPOLITAN DISTRICTS—STATUTES—CONSTITUTIONAL LAW.

The chapter of the drain code relative to intracounty drains for public health *held*, not unconstitutional because of the metropolitan district amendment of the Constitution, since there was no provision in such amendment evincing an intention to abolish the drain procedure which had been established long before adoption of the amendment (Const 1908, art 8, § 31; CLS 1956, § 280.461 *et seq.*).

10. SAME—INTRACOUNTY DRAIN—PUBLIC HEALTH—PETITIONS.

Provision of drain code empowering 2 or more public corporations to petition county drain commissioner for the establishment of a county drain for public health purposes was not invalid because of provision for assessment of other public corporations which had not signed the petition, where they had notice and an opportunity to be heard prior to assessment (CLS 1956, § 280.463).

11. SAME—ASSESSMENT—ZOO—GOLF COURSE—COUNTIES.

Assumption by county of apportionment of drain assessment on account of zoological garden and golf course, owned and operated by city located in adjacent county but not subject to special assessment for drains, was authorized to be made by favorable vote of 2/3 of the members-elect, since counties may contribute to the operation of public parks and public zoological gardens (CL 1948, §§ 318.51–318.54; CLS 1956, § 280.468).

12. SAME—PUBLIC HEALTH—MUNICIPAL CORPORATIONS—ASSESSMENT AT LARGE.

A city as a unit is responsible for the health of the entire city and each part thereof, hence, the assessment of an entire city for apportionment based on fact that 2% of its area was included within district of intracounty public health drain was proper (CLS 1956, § 280.461 *et seq.*).

13. SAME—COUNTIES—BONDS—DEFICIENCY.

The legislature has full power to require a county to pay from its general fund any deficiency accruing on drainage bonds.

14. COUNTIES—PUBLIC FUNDS—GRANT OF CREDIT.

The fact that the legislature directs one unit of county government to use its funds in the aid of another unit does not operate as a grant of credit in violation of the Constitution (Const 1908, art 10, § 12; CLS 1956, § 280.461 *et seq.*).

15. DRAINS—FINAL ORDER OF DETERMINATION—REHEARING—PREJUDICE.

A rehearing after entry of final order of determination as to route of proposed intracounty public health drain after route and district were altered as to 2 public corporations is not ordered, where such corporations fail to show any prejudice or damage due to such alteration (CLS 1956, § 280.461 *et seq.*).

16. COSTS—PUBLIC QUESTION—PUBLIC HEALTH DRAINS.

No costs are allowed in suits involving determination of validity of intracounty public health drain, where public question and public corporations are involved (CLS 1956, § 280.461 *et seq.*).

Appeal from Oakland; Holland (H. Russel), J. Submitted January 13, 1959. (Docket Nos. 57, 75, Calendar Nos. 47,947, 47,981.) Decided July 13, 1959.

Two separate bills, one by the Township of Southfield and one by the City of Troy against Ralph H. Main, Oakland county drain commissioner, succeeded in office by Daniel W. Barry, other county officials and their successors, constituting and acting as the Drainage Board for the Twelve Towns Relief Drains, to enjoin certain actions in the construction of, and assessment for, an intracounty drain system. The Township of Royal Oak, the City of Southfield and the Village of Westwood intervened as parties plaintiff in first action. The City of Ferndale intervened as party defendant in second action. The City of Huntington Woods, City of Oak Park, City of Hazel Park, City of Madison Heights, City of Royal Oak and City of Berkley intervened as parties defendant in both actions. Actions consolidated for hearing and appeal. Paul L. Adams, Attorney General, intervened in the public interest. Temporary restraining orders dissolved and bills dismissed with certain findings of fact and law. Plaintiff City of Troy and intervening plaintiff City of Southfield, now asserting rights originally claimed by the plaintiff Township of Southfield, and the intervening plaintiff Township of Royal Oak appeal. Principal defendants cross appeal. Affirmed in part, reversed in part and remanded.

James C. Allen, for intervening plaintiff City of Southfield.

Burke & Osgood (*Stanley E. Burke,* of counsel), for plaintiff City of Troy.

Maurice A. Merritt, for intervening plaintiff Township of Royal Oak.

Norman R. Barnard, Corporation Counsel of County of Oakland, *Charles A. Davis* and *Robert P. Allen,* Assistant Corporation Counsel (*Claude H. Stevens,* of counsel), for defendants.

James S. Thorburn, for intervening defendant City of Huntington Woods.

Carl Forsythe, for intervening defendant City of Oak Park.

Jack Moskowitz, for intervening defendant City of Hazel Park.

H. Eugene Field, for intervening defendant City of Madison Heights.

Allan G. Hertler, for intervening defendant City of Royal Oak.

John H. Norton, for intervening defendant City of Berkley.

Orph C. Holmes, for intervening defendant City of Ferndale.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *G. Douglas Clapperton* and

Florence N. Clement, Assistants Attorney General, for intervening Attorney General.

KAVANAGH, J. The plaintiffs township of Southfield and city of Troy filed separate bills of complaint to enjoin certain actions of the drainage board in connection with the financing, construction and assessment of the cost of the relief drains proposed to be constructed between 8-Mile road and 15-Mile road and between John R road and Southfield road in Oakland county. Defendants are the Oakland county drain commissioner, chairman of the Oakland county board of auditors, and the chairman of the Oakland county board of supervisors, acting as the drainage board for the Twelve Towns Relief Drains. The city of Huntington Woods, the city of Oak Park, the city of Hazel Park, the city of Madison Heights, the city of Royal Oak, the city of Berkley, the city of Ferndale, the city of Southfield, the village of Westwood, and the township of Royal Oak have intervened. Each municipality is a party by virtue of an order allowing said intervention. Paul L. Adams, attorney general of the State of Michigan, intervened under his general powers and is presently a party by virtue of an order of intervention.

The 2 cases were consolidated for trial by order of the court and as combined are here on appeal. These cases involve the interpretation and application of chapter 20, PA 1956, No 40, or the drain code, commencing with CLS 1956, § 280.461 (Stat Ann 1957 Cum Supp § 11.1461).

A lengthy record is presented on appeal, together with exhibits in excess of 50, giving some indication of the complexity of the problems.

The estimated cost of the relief drains involved is in the neighborhood of $44,000,000. No one disputes the matter of the drains being necessary for

public health. Therefore, no discussion will be given to that particular point.

Numerous changes have taken place in the governments of the respective municipalities since the institution of these proceedings. The original petition to establish a system of relief drains was signed by the cities of Birmingham, Ferndale, Hazel Park, Huntington Woods, Oak Park, Pleasant Ridge, Royal Oak and the townships of Royal Oak and Troy. Neither the township of Southfield nor the city of Troy, nor any of the intervening parties hereto, except as above named, joined in said petition. In about 1952 preliminary investigations paid for by most of these communities were carried on. The townships of Southfield and Troy shared in the cost of this exploratory effort. However, Southfield never, by any action of its governing body, agreed to become a part of the plan which was ultimately devised. Since the filing of the petition the township of Royal Oak has been reduced in size by reason of the incorporation of the city of Madison Heights from said township territory. Since the trial Southfield has been reduced by the incorporation of the village of Westwood. Since the trial the city of Southfield has been formed out of the township of Southfield. Earlier, after the petition was filed, practically all of the township of Troy was incorporated into the city of Troy.

At a meeting of the drainage board on November 10, 1955, the board considered the petition and by resolution adopted at said meeting set December 15, 1955, as the date of the first hearing. Determination by the drainage board was made as follows:

"It has become necessary for the public health to supplement said existing county drains by the construction of relief drains as set forth in said petition."

The December 15, 1955, hearing was adjourned until January 17, 1956, at 10 a.m. At said hearings on both December 15, 1955, and January 17, 1956, no objections were made to the petition, to the project or to the designation of the public corporations to be assessed. The meeting of January 17, 1956, was adjourned to January 27, 1956. At the meeting on January 27, 1956, two minor changes were made in the routes of the relief drains from those set forth in the petition. No question is raised in this case with respect to said changes.

A final order of determination was made and entered by the drainage board on January 27, 1956. Neither the final order of determination nor the resolution in support thereof contains any statement or findings concerning the matter of public health. However, the minutes of the board meeting of January 27, 1956, recite that "the necessary proceedings have been taken in respect to said petition including the holding of a hearing for the purpose of receiving any objections to the proposed project." The minutes further recite that "said petition is sufficient in all respects."

On January 27, 1956, three separate engineering firms were retained to do the engineering work. Cost estimates were presented by the 3 engineering firms on August 13, 1956. The total estimated cost was $38,581,000.

On September 4, 1956, the board approved the plans and specifications and the estimates of cost aggregating $38,581,000 and adopted a tentative apportionment setting forth the percentage of the cost to be borne by each of the public corporations to be assessed.

At a meeting of the board on September 4, 1956, October 12, 1956, was set as the date of hearing upon apportionments. This hearing was not held,

restraining orders having been issued upon the institution of these suits.

At the time of the original planning of the Twelve Towns Relief Drains no portion of the said system was to be physically located within Southfield township. At the time the final order of determination was entered on January 27, 1956, and as late as October, 1956, when the drainage board proposed to enter its final order of apportionment, it was thought that no physical part of the system was to be constructed in Southfield township. Since the dates mentioned the board, without any new hearings or any new or amended final order of determination, extended the course of the relief-drains system into a portion of the township and increased the cost to be borne by Southfield township from $811,046.80 to $4,295,893.91.

The court in its opinion made a finding that due to the topography of Southfield township approximately the easterly 1/12 of said township can be benefited by the Twelve Towns system. About 11/12 of the entire township must drain westward into the Rouge River system.

Although it was not initially anticipated that any of the Twelve Towns system would be physically located in the plaintiff township, there were 596.336 acres of land in said township included in the drainage district, which acreage was to be served by the Twelve Towns system. Under the latest revised plans some of the physical structures of the drains will be located in the township and 1,948.714 acres of land in said township have been included in the drainage district. This revision in plans came about apparently by testimony of witnesses that the River Rouge is now overloaded and is not in a position to take storm waters not in an area within the River Rouge basin.

The court in its opinion made a finding that the area within Southfield township now included in the Twelve Towns district has been for many years in the drain district for the Royal Oak drain, which empties into Red Run drain, which discharges into the Clinton river. The court further made a finding in its opinion that it is logical, feasible and necessary for that part of Southfield township which is proposed to be a part of the Twelve Towns system to remain a part of the Clinton basin as opposed to being a part of the River Rouge basin.

The tentative apportionments of cost made on September 4, 1956, were later rescinded after changes were made in the plans and specifications by the engineers at the direction of the drainage board which would enlarge a portion of the drains and permit the inclusion of 1,352.78 acres in Southfield township, which had been previously in the Royal Oak drainage district. The acreage in the city of Troy was reduced by 370.516 acres because of the elimination of acreage in the city of Troy, which was not within one of the original drain districts, except for 2 small parcels.

The formula used to determine the apportionment of a particular municipality's share in the drainage project was as follows: Cost of the new drains plus today's value of the old existing drains, multiplied by the percentage of the area in each public corporation within the drainage system, minus the contributions by the particular municipality for the old drains, but which contribution was appreciated in terms of today's values.

Approximately 2% of the total area of the city of Troy is in the proposed drainage district to be relieved, and properties and persons in the north and northeasterly portion of the city of Trov receive no tangible or direct benefits by reason of the inclusion

of the 2% area of the city of Troy in the drainage area.

Additional facts necessary to understand the questions presented are that when Royal Oak township officials signed the original petition the township consisted of the area now known as Madison Heights and the township's present area, then known as the west end of the township. The city of Madison Heights came into being on December 9, 1955. Royal Oak Township has an area of 424.408 acres, all of which is in the proposed drain area. Four school districts lie partially within said township. The voted millage to be used for assessment purposes for School District No. 3 Fractional, Royal Oak, Southfield and city of Oak Park is 47.85 mills. The other 3 school districts each have a voted millage of less than the said 47.85 mills.

In the cities of Huntington Woods and Royal Oak there are located the Detroit Zoological Park and the Rackham Golf Course, which are owned and operated by the city of Detroit. These properties constitute 246.730 acres and are not subject to *ad valorem* taxation. The amount which was to be assessed on account of these properties was distributed among the several public corporations to be assessed. Upon objection, the board of supervisors of Oakland county, by resolution adopted March 8, 1957, agreed to assume and pay the cost attributable to these 2 Detroit properties.

It is contended that article 10, § 21, of the Michigan Constitution of 1908, as amended in 1948, limits the total amount of taxes assessed against property for all purposes for a period not to exceed 20 years, at 50 mills, if a majority vote should approve an increase to that limit.

The assessed valuation of Royal Oak township, as presently constituted, and at State equalized figures,

is $5,477,315. No voted increase has been authorized to the constitutional tax limitation of 50 mills.

The lower court held as follows:

"1. That the petition (exhibit 1) need not have been signed by all of those included in the Twelve Towns System in order to give the board jurisdiction—only 2 or more subject to assessments being necessary.

"2. That chapter 20 of the code is constitutional and valid.

"3. That the constitutional tax limitation contained in article 10, § 21 of the Michigan Constitution of 1908 has application as to the extent to which the townships may participate in the cost of said drain.

"4. That said constitutional tax limitation contained in article 10, § 21 of the Michigan Constitution of 1908 does not limit the cities as to the extent to which they may participate in the cost of said drain.

"5. That the construction of the Twelve Towns drain is necessary for the public health and that the board was justified in so finding in its initial resolution.

"6. That the successive steps taken by the board were in compliance with the code.

"7. That further notice be given the public corporations constituting the Twelve Towns System prior to the hearing of objections to the tentative apportionments, and the making of the 'final order of apportionment.'

"8. That the restraining orders heretofore issued be dissolved."

Intervening plaintiff Royal Oak township appeals and raises 2 questions:

1. "Is the drain code (sections 473 and 475 of PA 1956, No 40), insofar as it authorizes assessments of taxes by the county drainage board, without regard for debt limitation of unchartered townships, unconstitutional?"

2. "Is section 474 of the drain code an indirect attempt to flout the constitutional debt limitation of unchartered townships?"

The city of Troy and the city of Southfield appeal and raise 5 questions:

1. "Is chapter 20 of the drain code of 1956 unconstitutional because of the provisions of section 31 of article 8 of the Michigan Constitution pertaining to metropolitan districts?"
2. "Under chapter 20, of PA 1956, No 40, may a public corporation which did not authorize the signing of the required petition, and which did not sign the petition, be charged with liability for the payment of a part of the cost of the proposed drain?"
3. "Should the cities of Detroit, Royal Oak and Huntington Woods have been included in the drainage board's final order of determination as a municipality to be taxed for some portion of the drain by reason of the golf course and the zoo located partially in Huntington Woods and Royal Oak?"
4. "Is the inclusion of that portion of the service area (described in the drainage board resolution of September 25, 1957), of the Twelve Towns Relief Drains lying within the city of Troy a proper exercise of the powers of the drainage board and not contrary to law?"
5. "Under chapter 20 of PA 1956, No 40, may the drainage board after the entry of its 'Final Order of Determination' change the route of the proposed drain without holding further hearings and without entering a new final order of determination?"

We think the lower court was correct in its ruling that Royal Oak township and the other townships involved in the Twelve Towns Relief Drains were bound by the 15-mill tax limitation prescribed in article 10, § 21,* of the Michigan Constitution of 1908, as amended in 1948. It is not necessary for us

* Added in 1932.—REPORTER.

in this case to restate the history and legal background of the 15-mill amendment as discussed by Justice BLACK in *Bacon* v. *Kent-Ottawa Metropolitan Water Authority,* 354 Mich 159. Suffice it to say that this is another in a long line of attempts by subterfuge to circumvent the effect of the 15-mill limitation in the Constitution. It is true, as urged by defendants, that a township has been defined as a municipality for certain purposes and under Michigan law, " 'as fixed by usage and recognition' when the amendment was adopted, incorporated villages, fourth-class cities, special charter cities and home-rule cities were known as and commonly referred to as municipal corporations." See *Bacon* v. *Kent-Ottawa Metropolitan Water Authority, supra,* at pp 171, 172. Subsequently we have added by case law charter townships and school districts. Now we are asked by defendants to add to this growing list townships themselves.

Defendants argue that the township of Royal Oak is a municipal corporation; that the statutes of the State of Michigan are its charter; and that the provisions of sections 474 and 475 of the drain code (CLS 1956, §§ 280.474, 280.475 [Stat Ann 1957 Cum Supp §§ 11.1474, 11.1475]) operate as a charter increase of the 15-mill tax limitation.

We again refer, as did Justice BLACK in *Bacon* v. *Kent-Ottawa Metropolitan Water Authority, supra,* to American Jurisprudence for a distinction between public corporations and municipal corporations. We quote, as did he (pp 172, 173), from 37 Am Jur Municipal Corporations, § 6, pp 623, 624:

" 'All municipal corporations are public bodies created for civil or political purposes; but all civil, political, public corporations are not, in the proper use of language, municipal corporations. A municipal corporation must be distinguished, on the one hand, from other governmental bodies which al-

though municipal are not corporations, and, on the other hand, from corporations which although public are not municipal. While the term "municipal corporation" is sometimes used, in its broader meaning, to include such public bodies as the State and each of the governmental subdivisions of the State,—such as counties, parishes, townships, hundreds, et cetera,—it ordinarily applies only to cities, villages, and towns which are organized as full-fledged public corporations.' "

We conclude, as did Justice BLACK, that on these premises the townships involved in the Twelve Towns Relief Drains are not municipal corporations within the meaning, purpose, spirit, or intent of the 15-mill amendment.

Charter Township of Warren v. *Municipal Finance Commission,* 341 Mich 607, is not authority for the position of defendants since Warren township was a charter township. Those townships in the instant case are not. Neither are *Hall* v. *Ira Township,* 348 Mich 402, or *Kent County Board of Education* v. *Kent County Tax Allocation Board,* 350 Mich 327, authority or support for the position of defendants. We feel the lower court was correct in this statement of the law when he said:

"Townships are subject to the tax limitation imposed by the Constitution of 1½% of the assessed valuation of said property."

The language of article 10, § 21, of the Constitution of 1908, as amended in 1948, is clear and unambiguous as it relates to townships. There is no case law which would be persuasive of a contrary holding. The taxing power of a township is what it may receive from the allocation of the 15-mills plus any increase voted by its electors. Any participation by the townships shall be so limited.

The second question raised by Royal Oak township is: Is section 474 of the drain code an indirect attempt to flout the constitutional tax limitation of unchartered townships, and is it as a consequence in violation thereof? Section 474 complained of reads as follows:

"If any such public corporation shall fail or neglect to so account to the county treasurer for the amount of any such installment and interest, then the county treasurer shall advance the amount thereof from county funds and deduct the same from any moneys (other than those pledged for the payment of debts) then or thereafter payable by him to such public corporation. The board of supervisors of any county which shall have advanced any money for a public corporation and which shall not have been reimbursed therefor, may order such public corporation and its officers to levy upon its next tax roll an amount sufficient to make such reimbursement on or before the date when its taxes become delinquent; and it shall be the duty of such public corporation and its tax levying and collecting officials to levy and collect such taxes and to reimburse the county: Provided, That the foregoing shall not prevent the county from obtaining reimbursement by any other legal method." (CLS 1956, § 280.474 [Stat Ann 1957 Cum Supp § 11.1474].)

It is the contention of Royal Oak township that the provisions in section 474 of the drain code are in conflict with article 10, § 23, of the State Constitution of 1908, as amended in 1954, which reads as follows:

"On and after July 1, 1955, there shall be returned to local governmental units by the method hereinafter set forth, 1/2 cent of a State sales tax levy on each dollar of sales of tangible personal property on the 1946 statutory base (not rate). The State disbursing authority shall remit to counties as a

whole on a population basis and payment shall be made to the county treasurer who shall remit to the respective cities, townships and villages within the county on a per capita basis."

The legislature has lately provided that the township board in its discretion may provide for the payment of a township-at-large drain assessment out of the general or contingent fund of the township. CLS 1956, § 280.263 (Stat Ann 1957 Cum Supp § 11.1263).

Under chapter 20, § 474, of the drain code, each public corporation is required to pay the full amount of the installment on or before the due date thereof. The section further provides for the levying of a tax sufficient to pay each installment with interest as the same becomes due unless there shall have been set aside moneys sufficient therefor.

It is admitted that the Twelve Towns Drains is a health project. The legislature in the absence of constitutional limitations can and has provided how this drainage project will be financed. This principle is recognized and stated in 17A Am Jur, Drains and Sewers, § 64, pp 486, 487. The general rule is also stated in 16 McQuillin, Municipal Corporations (3d ed), § 44.33, p 96, as follows:

"In the absence of constitutional restriction, compulsory taxation may be imposed on a municipal corporation by the legislature in all those cases wherein the municipality acts as the agency of the State government."

The general principle that the legislature has supreme power in matters affecting the public health was stated by Justice COOLEY in *Sheley* v. *City of Detroit,* 45 Mich 431, 432, 433, as follows:

"The questions, then, are questions of legislative power. Whether this method of apportioning the

cost of pavement or of repavement is equitable or just or politic, is in no way involved in this suit, and we should depart from our legitimate province if we were to volunteer an opinion upon it. The legislature, acting within the sphere of its powers in the making of laws, judges, and judges finally, upon all questions of policy and of equity. If the legislature declares the cost shall be collected by general levy, or on the other hand shall be levied upon abutting lots or their owners according to values, or to assessed benefits or to frontage, the determination binds us absolutely and conclusively, provided we discover no want of legislative authority."

In adopting section 474 of the drain code the legislature exercised its prerogative that moneys belonging to the township could be used for a health project. This they had a right to do. There is no question here as to the misuse of such moneys by reason of section 474 of the drain code. The only violation of article 10, § 23, of the Constitution consists in that portion of section 474 of the drain code which reads as follows:

"and deduct the same from any moneys (other than those pledged for the payment of debts) then or thereafter payable by him to such public corporation."

This language of the drain code is in conflict with article 10, § 23, of the Constitution of 1908, as amended in 1954. The provision in this article provides, in part, that "there shall be returned to local governmental units" and further provides, in part, the county treasurer shall "remit to the respective cities, townships and villages."

The use of the word "shall" is mandatory and imperative and, when used in a command to a public official, it excludes the idea of discretion. *People*

v. *De La Mater,* 213 Mich 167; *Ladies of the Maccabees* v. *Commissioner of Insurance,* 235 Mich 459. This provision of the drain code, being in conflict with the above constitutional direction, is void and therefore cannot authorize retention by the county treasurer.

Royal Oak township contends that section 473 of said act (CLS 1956, § 280.473 [Stat Ann Spec 1956 Drain Code Supp § 11.1473]) is unconstitutional in that it authorizes levy of property taxes unlimited as to rate and amount by authorizing the drainage board through its chairman to prepare a special assessment roll assessing the estimated (or actual, if ascertained) cost of the drain against the several public corporations in accordance with the confirmed apportionments. The township also contends that section 475 of the act (CLS 1956, § 280.475 [Stat Ann 1957 Cum Supp § 11.1475]) is unconstitutional in that it tends to put all such tax assessments outside the constitutional tax limitation by removing the resulting indebtedness from the statutory or charter limitation.

With the exception of unchartered townships, which we have disposed of above, there is no question as to the right of the statute being read into and becoming a part of the charter of the cities involved so as to remove the resulting indebtedness from statutory or charter limitations. *School District of City of Pontiac* v. *City of Pontiac,* 262 Mich 338; *City of Hazel Park* v. *Municipal Finance Commission,* 317 Mich 582; *Saginaw Council* v. *Board of Trustees,* 321 Mich 641.

It is further contended that chapter 20 of the drain code is unconstitutional because of the provisions of article 8, § 31, of the Michigan Constitution of 1908 pertaining to metropolitan districts, and providing for the incorporation of such districts

by 2 or more cities, villages or townships for the purpose, among others, of supplying sewage disposal or drainage.

We do not think the electors, in adopting the metropolitan district amendment, intended to abolish the drain procedure, which was established by statute long before the metropolitan drainage district constitutional amendment. If the people intended to do so, they would have added a specific provision to that effect. We find no constitutional problem in this regard.

Under the drain code it is argued that public corporations which did not authorize the signing of the required petition, and did not sign the petition, cannot be charged with liability for part of the payment of the cost of the drain.

At the time of filing of the petition, it was governed by section 3 of chapter 18-A of the former drain act (CLS 1954, § 278A.3 [Stat Ann 1952 Rev § 11.147(3)]). Said section, without change in wording, was incorporated in the drain code of 1956 as section 463 of chapter 20 (CLS 1956, § 280.463 [Stat Ann 1957 Cum Supp § 11.1463]). The pertinent part of said section reads as follows:

"Whenever it shall be necessary for the public health to locate, establish and construct a county drain, then a petition therefor may be filed with the county drain commissioner signed by 2 or more public corporations which will be subject to assessments to pay the cost thereof."

If the legislature had intended to require the signatures of all public corporations to be assessed it would have said so. A public health question is involved. The legislature had a right to indicate what type of drain petition could institute the procedure. We find no requirement in law that would require all municipalities to join in the original petition.

in order to start the action. As long as they have had notice and an opportunity to be heard prior to assessment, legal requirements have been met. We believe they are met under this statute.

Another question raised is whether or not the county of Oakland had a right to assume the apportionment on account of the zoo and golf course properties, which are owned and operated by the city of Detroit and located in the cities of Huntington Woods and Royal Oak.

City of Detroit v. *Oakland County,* 353 Mich 609, held that both said zoo and golf course are owned by the city of Detroit and used for governmental purposes, and, therefore, said properties are not subject to a special assessment for drains.

Section 468, chapter 20 of the drain code (CLS 1956, § 280.468 [Stat Ann Spec 1956 Drain Code Supp § 11.1468]), provides, in part, as follows:

"Nothing herein contained shall prohibit the county from assuming any additional cost of said drain if 2/3 of the members-elect of the county board of supervisors shall vote in favor thereof."

Counties are authorized by statute to contribute to the operation of public parks and public zoological gardens.* The zoo and golf course are within the terms of the definition of a public park. A large portion of the population of Oakland county either use or have available for their use if they desire both the golf course and the park. The operation of these has been held a governmental purpose. The legislature was within its rights in providing the means by which the county might assume such additional cost.

A question has been raised as to whether or not assessments can be made against the city of Troy

* See CL 1948, §§ 318.51–318.54 (Stat Ann 1958 Rev §§ 13.1031–13.1034).—REPORTER.

in view of the fact that only a small portion of the city lies within the drainage area of the Twelve Towns Relief Drains.

The city of Troy as a unit is responsible for the health of the entire city and each part thereof. Contaminations and diseases do not respect lot lines or even city border lines.

Mr. Justice LONG in *Davock* v. *Moore,* 105 Mich 120, 132, 133 (28 LRA 783) makes the following statement:

"The care of the public health is a police power. The several States of the Union possess a general police power, by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general health, comfort, and prosperity of the State. Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals. They belong emphatically to that class of objects which demand the application of the maxim, '*Salus populi suprema lex;*' and they are to be attained and provided for by such appropriate means as the legislature may devise."

We believe the whole city is concerned with the health of its citizens and that the apportionment of these assessments to the entire city is proper under the circumstances.

The legislature had full power to require a county to pay from its general fund any deficiency accruing on drainage bonds. In the proper exercise of its plenary power, the legislature directed one unit of county government to use its funds in the aid of another unit. It does not operate as a grant of credit in violation of article 10, § 12, of the Constitution of

1908. *Oakland County Drain Commissioner* v. *City of Royal Oak,* 306 Mich 124.

The final question raised is: May the drainage board after the entry of its final order of determination change the route of the proposed drain without holding further hearings and without entering a new final order of determination?

While the letter of the drain code was not followed in this respect, it would appear from the findings of fact made by the lower court that the township of Southfield and the city of Troy were unable to produce testimony that would convince the lower court that they had in any way been prejudiced or damaged. It would appear, therefore, that nothing could be accomplished by any new hearing. Therefore, we find no basis exists to hold that a rehearing should be held under the circumstances.

The matter will be referred back to the circuit court for the entry of a decree in accordance with this opinion. A public question and public corporations being involved, no costs are allowed.

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

PULLUM WINDOW CORPORATION *v.* FELDSTEIN.

1. COURTS—PENAL LAWS OF OTHER STATES.

   Generally, courts of one State will not enforce the penal laws of another State or jurisdiction.

2. CORPORATIONS — OFFICERS — DIRECTORS — NONCOMPLIANCE WITH STATUTES — REMEDY.

   Provisions of Indiana statute imposing liability upon officers and directors of a corporation in the carrying on of the business in which the indebtedness is incurred in violation of the statutes relative to conditions that must be complied with before a newly-formed corporation begins business and for improper withdrawal of assets, without therein imposing a penalty as for a criminal offense, are construed as remedial, not penal, statutes, since they give to creditors for their added protection, a right of action against officers and directors for noncompliance with the statute (Indiana Acts 1929, ch 215, §§ 20, 52).

3. SAME — OFFICERS — DIRECTORS — PERSONAL LIABILITY — STATUTES — EVIDENCE.

   Proofs fully supported finding of jury that defendants, officers and directors of a newly-formed Indiana corporation, were individually liable for indebtedness to plaintiff incurred by them on behalf of corporation, where they had failed to comply with Indiana statutes relative to acts which must be done before a corporation could commence to do business (Indiana Acts 1929, ch 215, § 20).

4. ACTION—REMEDY—STATUTE.

   A State statute which gives a civil remedy at the private suit of the creditor only, that is measured by the amount of his debt is, as to him, clearly remedial, since it is simply to enforce a private right, hence, it is enforceable in a sister State.

5. CORPORATIONS—OFFICERS—DIRECTORS—EVIDENCE.

   Finding of jury that appellants were officers and directors of newly-formed Indiana corporation at time indebtedness to plaintiff creditor of the corporation was incurred and that they had not complied with conditions imposed by Indiana

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 11 Am Jur, Conflict of Laws § 6.
[2, 4] 11 Am Jur, Conflict of Laws § 186.
[6] 39 Am Jur, Parties § 34 *et seq.*
[7, 8] 41 Am Jur, Pleading § 106.

statute as a condition precedent to the right to do business and that they had improperly withdrawn assets of the corporation *held,* supported by evidence (Indiana Acts 1929, ch 215, §§ 20, 52).

6. PARTIES—JOINDER—CORPORATE OFFICERS AND DIRECTORS.
There was not an improper joinder of parties defendant by plaintiff creditor where a single cause of action was asserted against defendants who were alleged and proved to be officers or directors of newly-formed Indiana corporation and had not complied with provisions of Indiana statute imposed as a condition precedent to the right to do business as a corporation (Indiana Acts 1929, ch 215, § 20).

7. PLEADING—DIFFERENT GROUNDS OF LIABILITY.
A right of recovery may be pleaded and proved on different grounds of liability in more than 1 count.

8. SAME—EVIDENCE.
A pleader may state his case in as many ways as he sees fit in separate counts in order to meet any possible phase of evidence, and he will not be required to elect on which count he will proceed.

Appeal from Wayne; Bowles (George E.), J. Submitted June 2, 1959. (Docket No. 4, Calendar No. 47,783.) Decided July 13, 1959. Rehearing denied October 12, 1959.

Case by Pullum Window Corporation, a Michigan corporation, against Joseph Feldstein, Gabriel Glantz, Lawrence Benderoff and others to impress personal liability for goods sold to corporation in which they were directors. Judgment for plaintiff. Defendants Feldstein and Glantz appeal. Affirmed.

Dell, Heber & Leenhouts, for plaintiff.

Donald W. Grant, for defendants Feldstein and Glantz.

Gabriel Glantz, in propria persona, on application for rehearing.

CARR, J. In June of 1955 three of the named defendants, Glantz, Benderoff and Chisik, undertook to form a corporation under the laws of the State of Indiana for the purpose of carrying on business in the purchase and sale of windows. Articles of incorporation setting forth the corporate name as Indiana Window Distributors, Inc., were prepared and filed in the office of the secretary of State of Indiana on June 21, 1955. No copy of said articles was filed in the office of the county recorder of Marion county, Indiana, nor was there an affidavit by a majority of the board of directors stating that the amount of paid-in capital indicated by the articles had in fact been paid, as required by the Indiana statute.

No stock was issued by said corporation and no minute books of its proceedings was kept. Benderoff acted as president, Chisik as vice-president or secretary, and Glantz as treasurer. Apparently Benderoff and Glantz each paid in $2,500 to the corporation, but Chisik failed to make any payment. Some 3 or 4 weeks after the corporation was formed defendant Joseph Feldstein joined the incorporators in the enterprise, contributing the sum of $3,000. The parties by mutual agreement fixed the interest that each should have in the business.

Business operations were conducted in the corporate name, in the course of which merchandise was purchased from the plaintiff in the sum of approximately $6,000. This was paid in part, but it is undisputed that at the time of the institution of the present action indebtedness in the sum of $4,709.72 was unpaid. It further appears that, during

the period of said business transactions, the defendants, or some of them, were carrying on the business of selling windows at retail under the name of Indianapolis Storm Window Distributors. No part of the funds used in such operation was contributed by defendants. The money for the institution of the "assumed name" business came from Indiana Window Distributors, Inc. Not less than $2,500 was so transferred, and the amount may have exceeded that sum. It does not appear that any purchases were made from plaintiff other than in the name of the corporation.

The present suit against the 5 defendants named was instituted in the circuit court of Wayne county, Michigan, on June 28, 1956. Chisik and Morton Feldstein were not served with process, and the action was discontinued as to them. Defendant Benderoff entered an appearance but failed to file answer to the declaration and his default was entered. Defendants Joseph Feldstein and Glantz filed answer denying liability.

The declaration in the case set forth plaintiff's cause of action in different counts. The liability of defendants under the first count was predicated on the failure to comply with the Indiana statute with reference to the completion of acts of incorporation before engaging in business. Section 20 of the Indiana code,* relating to the organization of domestic corporations for profit, reads as follows:

"A corporation formed under this act shall not transact any business or incur any indebtedness, except such as shall be incidental to its organization or to obtaining subscriptions to or payment for shares of its capital stock, until:

"(a) One of the triplicate copies of the articles of incorporation, bearing the indorsement of the

* Acts 1929, ch 215; 6 (pt 1) Burns Ind Stat Ann § 25-101 *et seq.*

approval of the secretary of State, as provided in section 17 [§ 25–216], has been filed for record with the county recorder of the county in which the principal office is located;

"(b) The amount of paid-in capital with which it will begin business, as stated in the articles of incorporation, has been fully paid in; and

"(c) There has been filed in the office of the recorder of the county in which the principal office is located the affidavit of not less than a majority of the board of directors stating that the amount of paid-in capital with which it will begin business, as stated in the articles of incorporation, has been fully paid in.

"If a corporation transacts any business or incurs any indebtedness in violation of this section, the officers who participated therein and the directors, except those who dissented therefrom and caused their written dissent to be filed at the time in the principal office of the corporation, or who, being absent, filed their dissent upon learning of the action, shall be severally liable for the debts or liabilities of the corporation so incurred or arising therefrom." (Acts 1929, ch 215, § 20, p 725; 6 [pt 1] Burns Ind Stat Ann, § 25–219.)

The pleading averred failure to comply with the section quoted, and liability was asserted on the basis of the express provision of the statute imposing liability on officers and directors for debts and liabilities of the corporation arising from the carrying on of business before complying with the statutory requirement. It was specifically alleged that each of the defendants was an officer and director.

The second count of plaintiff's declaration asserted violation by defendants, as directors of Indiana Window Distributors, Inc., of the provision of section 52 of the code which at the time of the transactions in question here read as follows:

"The directors of a corporation shall jointly and severally be liable for the debts and contracts of the corporation in the following cases:

"(1) For knowingly and wilfully declaring or assenting to the payment of a dividend or the withdrawal or distribution to stockholders of the assets of the corporation if the corporation is, or is thereby rendered, insolvent or its capital is thereby impaired, in an amount equal to such dividend, withdrawal or distribution;

"(2) For knowingly and wilfully making or assenting to a loan to an officer or director, to the extent of the debts contracted between the time of making or assenting to such loan and the time of its repayment, in an amount equal to such loan.

"Unless a director was absent from the meeting at which such dividend, withdrawal or distribution was declared or loan made, or unless his dissent therefrom shall be filed in writing with the secretary of the company, he shall be conclusively presumed to have assented thereto." (Acts 1929, ch 215, § 52, p 725; 6 [pt 1] Burns Ind Stat Ann, § 25–252.)

The declaration specifically averred the operations carried on by individual defendants under the assumed name of Indianapolis Storm Window Distributors, and the turning over of funds by the corporation to be used in the operation conducted under the assumed name. Such conduct was alleged to have been fraudulent and prejudicial to plaintiff. It was further alleged that defendants Joseph Feldstein and Morton Feldstein undertook to purchase the "assumed name business", and that, in connection therewith, they agreed to assume liability for and to pay the indebtedness of the corporation.

The right of recovery by plaintiff was further pleaded on the theory that defendants were liable individually and collectively as partners, under the statutes of Indiana, and also liable under the common counts in assumpsit, particularly for mer-

chandise sold and delivered and upon account stated. The answer of defendants Joseph Feldstein and Glantz denied all material averments in the declaration, and by way of special defense alleged that the action could not be maintained in Michigan because based on penal provisions of the Indiana statute not enforceable in this State. A motion to dismiss, or in the alternative to strike parties defendant on the ground of misjoinder and motion for judgment on the pleadings were denied. The case was submitted to the jury following the introduction of proofs and general verdict returned for plaintiff in the sum of $4,709.72. A special verdict was also returned in the following form:

"SPECIAL VERDICT

"A written demand having been made for a special verdict as to defendants Joseph Feldstein, Gabriel Glantz, and Lawrence Benderoff as to each of the 3 counts in the declaration the jury say upon their oath that the defendants Joseph Feldstein, Gabriel Glantz and Lawrence Benderoff are liable as to:

"Count 1, section 20 of the statute;

"Count 2, section 52 of the statute; and

"Count 3, in assumpsit for merchandise had and received."

Special questions as to the connection of defendants Joseph Feldstein and Glantz with the corporation were also submitted to the jury, and each answered in plaintiff's favor. From the judgment entered in accordance with the findings of the jury as evidenced by the general and special verdicts, defendants Feldstein and Glantz have appealed.

It is generally recognized that the courts of one State will not enforce the penal laws of another State or jurisdiction. Counsel for appellants contends that the provisions of the Indiana corporation

code on which plaintiff relies in the instant case are penal in character, and that, in consequence, the action should have been dismissed in the trial court. It will be noted that neither of the sections above quoted imposes a penalty as for a criminal offense. Section 20, primarily involved in the case, prescribes conditions that must be complied with before a newly-formed corporation begins business. The requirement as to the filing in the office of the recorder of the county is inferentially imposed for the information and protection of parties engaging in business transactions with the corporation. The sole result of failure to so file is liability on the part of the officers and directors participating in the carrying on of the business in which the indebtedness is incurred. In other sections of the code failure of compliance with obligations imposed is made a criminal offense, but such is not the case under section 20. In form it is remedial. It gives to creditors for their added protection a right of action against officers and directors if there is noncompliance with the statute. The special verdict of the jury indicates a finding of a right of recovery under the first count of the declaration. The proofs fully support that finding, thus obviating certain questions raised with reference to other counts. Plaintiff sought recovery on a single cause of action. It may be noted, however, that the same considerations apply to section 52 as are controlling with reference to section 20.

One of the leading cases in the country on the question as to the distinction between penal and nonpenal statutes is *Huntington* v. *Attrill,* 146 US 657 (13 S Ct 224, 36 L ed 1123). In that case it appears that the plaintiff recovered judgment against defendant in a New York court in the sum of approximately $100,000, said judgment being predicated on

the claim that defendant, as director of a corporation, had signed a certificate stating that the whole of the capital stock of such corporation had been paid in, that the certificate was false, and that, under the law of the State of New York, Attrill incurred liability for the debts of said corporation contracted prior to a certain date. Action was brought in a Maryland court to set aside transfers of stock by defendant, and to subject the same to the satisfaction of the New York judgment. The Maryland supreme court dismissed the case on the ground that the proceeding in New York was in effect an action for penalty. On appeal to the United States supreme court the question at issue was discussed at some length. The purposes of the New York statute in question were considered, and with reference thereto it was said (pp 676, 677):

"But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign state or country."

The court further in the course of the opinion discussed at some length, in the light of prior decisions, the concept of a penal statute, pointing out that the word in its primary sense indicates punishment for an offense against the laws of a State, and indicating further that under some circumstances a statute may be remedial insofar as it grants protection by way of right of action to a creditor, and penal if it provides a penalty for the violation of the public policy of the State as evidenced by its laws. In accordance

with the conclusions expressed the order of the Maryland supreme court was reversed.

The Supreme Court of Michigan in *Commercial Bank* v. *Weidman,* 301 Mich 405, considered the question whether a provision of the corporation code of this State imposing liability on the directors of a corporation for a false report, certificate, or other statement, was penal in its nature and, therefore, subject to strict interpretation. In considering the claim of the defendant in this regard, it was said (p 417):

"It is claimed on behalf of defendant Evan S. Weidman that section 50* of the corporation act is a penal statute which must be most strictly construed, and that, therefore, he cannot be held liable unless it is shown that he actively participated in the issuance of the statements. The statute is not penal in character. It is remedial and only compensates the injured person to the extent of his loss. It imposes liability in favor of creditors of a corporation by providing for payment of existing obligations in their favor. It merely provides for reimbursement and reparations. *E. S. Park Shellac Co.* v. *Harris,* 237 Mass 312 (129 NE 617). 3 Fletcher, Cyclopedia Corporations (Perm ed), § 1209; *Huntington* v. *Attrill,* 146 US 657 (13 S Ct 224, 36 L ed 1123)."

The case of *Breitung* v. *Lindauer,* 37 Mich 217, cited and relied on by counsel for appellants, involved the question as to whether the legislature, by repealing a statutory provision imposing liability on directors of a company failing to file its annual report, could deprive plaintiff of the right to recover on a cause of action accruing before such repeal. Plaintiff relied on the theory of a contractual obligation that could not constitutionally be impaired. The Court, however, concluded that the statutory

* CL 1948, § 450.50 (Stat Ann § 21.50).—REPORTER.

liability was not contractual in nature, that it might be created as a result of the acts of persons other than the defendant sought to be held, and that it did not properly rest on the basis of a contractual relationship between a creditor and the directors of a corporation. It was accordingly held that the repeal of the civil liability provision of the statute deprived plaintiff of his remedy. The facts and issues involved in the case differ materially from those presented in the litigation now before us. In the case at bar we are in accord with the finding of the circuit judge that sections 20 and 52 of the Indiana corporation code are not penal in the proper sense of the term, and that plaintiff was entitled to assert liability against defendants in the Michigan courts.

On behalf of appellants Feldstein and Glantz it is argued that they were not officers or directors of the Indiana Window Distributors, Inc., at the time of the purchases from plaintiff and, hence, that there was no liability on their part under the provisions of the Indiana corporation code on which plaintiff relies. It appears that following the formation of the corporation and the designation of Glantz to act as treasurer thereof he wrote to the president, Benderoff, suggesting that in the interests of economy he would turn the duties of his office over to Benderoff. Nothing was said in the communication with reference to resigning from the position of director. There is some testimony indicating that following the sending of this letter, receipt of which was duly acknowledged, Glantz was less active in the affairs of the corporation than previously. However, there is proof in the record before us that he participated to some extent at least in the carrying on of the business and the management of corporate

affairs generally. A like condition existed insofar as appellant Feldstein was concerned.

The record fully justifies the conclusion that during the latter part of 1955 Benderoff, Glantz, and Feldstein were in active charge of the business that the corporation was formed to conduct. The jury, passing on special questions submitted, determined that both Glantz and Feldstein were officers and directors during the period that the indebtedness to the plaintiff was incurred. It may not be said that the answers to the special questions do not find support in the proofs. The conclusion is fully justified that appellants were managing the corporate affairs in cooperation with Benderoff. In other words, they were acting as officers and directors of a corporation may reasonably be expected to function.

This brings us to the claim of the appellants that their motion alleging an improper joinder of parties defendant was erroneously denied. Reliance is placed on the decision of this Court in *Coke* v. *Brunswick-Balke-Collender Co.,* 270 Mich 233. There, however, the plaintiff asserted different causes of action against the defendants, and this Court properly held that they could not be joined under the Michigan statute pertaining thereto. We think the general situation presented in the instant case fairly brings it within the rule recognized and applied in *Gilmer* v. *Miller,* 319 Mich 136, in construing the statute with reference to joinder of causes of action and parties. See CL 1948, § 608.1 (Stat Ann § 27.591).

Plaintiff here is asserting a single cause of action. Each of the counts in the declaration relies thereon. That a right of recovery may be pleaded and proved on different grounds of liability has been recognized. See 71 CJS, Pleading, § 88, p 215, *et seq.,* and cases there cited; *Barton* v. *Gray,* 48 Mich 164; *Cusack*

v. *DeWitt-Jenkins Realty Co.*, 104 Ohio App 457 (149 NE2d 924). The general rule is stated in 41 Am Jur, Pleading, § 106, p 363, as follows:

"It is a familiar rule of pleading that when the plaintiff has 2 or more distinct reasons for obtaining the relief sought, or when there is more or less uncertainty as to the grounds of recovery or as to the exigencies of proof, the petition may set forth a single claim in more than 1 count. The pleader may state his case in as many ways as he sees fit in separate counts in order to meet any possible phase of the evidence, and he will not be required to elect on which count he will proceed."

Under the special verdicts returned by the jury against defendants Benderoff, Blantz, and Feldstein, it is apparent that liability against all 3 was found under the first count of the declaration, which was based on the action of the corporation in beginning business before compliance with the requirement of the Indiana code with reference to filing in the office of the county recorder. The right of recovery of the amount claimed by plaintiff being so determined, questions that have been raised with reference to the submission of the other counts become immaterial. Such questions could not affect the conclusion of the jury with reference to their verdict in plaintiff's favor under count one.

In *In re Thayer's Estate*, 188 Mich 261, which was a will contest, the jury in answer to a special question determined that the testator was mentally incompetent at the time of the execution of the will in dispute. The court also submitted to the jury the question of undue influence. It was contended on behalf of proponent that such submission was error for the reason that there was no competent testimony to support the claim. Commenting thereon, it was said (pp 264, 265):

"But in answer thereto it is said that, even if this were conceded, it would be wholly immaterial, as, the jury having found by its answer to the special question which was submitted to it that the testator was mentally incompetent to execute the will in question, the will cannot stand, irrespective of the question of undue influence. While we are not satisfied that it can be said that there was no evidence of undue influence which warranted the submission of that question to the jury, in our opinion, even if there were none, the error committed in submitting the question must be said to have been harmless, in view of the special finding of the jury on the question of mental competency."

The holding in the *Thayer Case* is in accord with the opinion of the Court on a similar question in *N. & M. Friedman Co.* v. *Atlas Assurance Co.,* 133 Mich 212. It was there held:

"In an action on a fire policy providing that the insurer should not be liable for any loss caused by explosion unless fire should ensue, and then only for the damage by fire, and that the liability of the company should cease if the building should fall, except as the result of fire, the jury found the company liable for its stipulated proportion of the total loss. *Held,* that as this finding necessarily involved a determination that the fall of the building was caused by fire, and not by an explosion, error, if any, in submitting to the jury the question of whether the building fell as the result of an explosion, as well as in admitting testimony as to the proportion of the loss caused by fire, on the assumption that there had been an explosion, was harmless." (Syllabus 2.)

Of like import are: *Schneider* v. *Shepherd,* 192 Mich 82 (LRA 1916F, 399); *Julian Foundry Co.* v. *Fidelity & Casualty Co.,* 4 Ill App 2d 301 (124 NE2d 48).

In view of the conclusions reached with reference to the questions above discussed, consideration of

other matters raised by counsel in their briefs is not required. The record in the case fully sustains the finding of the jury that plaintiff was entitled to recover under the first count of the declaration. We find no reversible error. The judgment is affirmed.

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

KARVONEN *v.* STANKOVICH.

1. WORKMEN'S COMPENSATION—PAPER MANUFACTURER—CONTRACTOR.
   Paper company which was engaged in the manufacture of paper from pulpwood was liable for workmen's compensation to injured employee of its contractor for procuring pulpwood, where the company, but not the contractor, was subject to the workmen's compensation act, since the procurement of the pulpwood may fairly be said to be a part of the paper company's business under record showing the contractor was paid for the wood at specified price per cord but that the company paid stumpage price to the owner of the land from which the wood was taken and deducted such stumpage payment from payments made to the contractor (CLS 1956, §§ 411.10, 414.1).

2. SAME—APPEAL AND ERROR—APPENDIX.
   Testimony taken at hearing before referee of department of labor in proceeding to recover workmen's compensation before appellant paper company was made a defendant was improperly included in appendix, is deemed stricken and not considered in determining appeal.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Workmen's Compensation § 139.
[2] 58 Am Jur, Workmen's Compensation § 531.

Appeal from Workmen's Compensation Appeal Board. Submitted June 3, 1959. (Docket No. 21, Calendar No. 47,953.) Decided July 13, 1959.

Otto J. Karvonen presented his claim against John Stankovich, employer, and the Munising Paper Company, as a principal party contracting with employer, for compensation following injury. Award to plaintiff. Defendant Munising Paper Company appeals. Affirmed.

L. E. Garvin, for plaintiff.

Davidson & Clancey (*Walter L. Hansen,* of counsel), for defendant Munising Paper Company.

CARR, J. During the summer of 1954 plaintiff was employed by defendant John Stankovich to haul pulpwood to the place of business of the other defendant. On September 23d of said year plaintiff fell from a load of wood and was injured. On December 9th following he filed application under the workmen's compensation act,* liability being asserted on the part of Stankovich. Following the taking of proofs, a new or amended application was filed on March 24, 1955, designating Stankovich and the Munising Paper Company as defendants. On the hearing liability was asserted against the latter defendant under the provisions of part 1, § 10, of said act (CLS 1956, § 411.10 [Stat Ann 1957 Cum Supp § 17.150]). Said section, insofar as pertinent to the present controversy, reads as follows:

"(a) Where any employer subject to the provisions of this act (in this section referred to as the principal), contracts with any other person (in

* PA 1912 (1st Ex Sess), No 10, as amended (CL 1948, § 411.1 *et seq.,* as amended [Stat Ann 1950 Rev § 17.141 *et seq.,* as amended]).

this section referred to as the contractor), who is not subject to this act or who has not complied with the provisions of section 1 of part 4 and who does not become subject to this act or comply with the provisions of section 1 of part 4 prior to the date of the injury or death for which claim is made for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed: Provided, That the term 'contractor' shall be deemed to include subcontractors in all cases where the principal gives permission that the work or any part thereof be performed under subcontract."

The referee before whom the matter was heard entered an award against the Munising Paper Company, the appeal board affirmed, and on leave granted said defendant has appealed to this Court, claiming that under the facts established by the record it was not liable. It is insisted that the evidence does not support the award.

The Munising Paper Company, herein referred to as the defendant, was engaged in 1954 in the manufacture of paper from pulpwood. Under date of June 7, 1954, it entered into a written agreement with Stankovich whereby the latter in terms sold and agreed to deliver, prior to October 31st following, certain quantities of spruce and balsam pulpwood at specified prices per cord. The agreement

further set forth that the paper company should employ a scaler to measure the pulpwood and that the finding of such employee should conclusively bind the parties. It was further agreed that defendant should have the right to suspend or otherwise regulate deliveries in the event of congestion at the receiving mill. Attached to the contract were specifications relating to the size and character of the pulpwood to be delivered and the transportation thereof.

Presumably for the purpose of enabling him to carry out his agreement with defendant, Stankovich obtained from the Cleveland-Cliffs Iron Company a permit or license to cut spruce and balsam timber "suitable for pulpwood meeting the specifications of the Munising Paper Company" from certain described lands in Alger county. The permit specified that it was granted upon the representation by Stankovich that he had a contract with defendant for the sale and delivery of pulpwood covered by the permit. Provision was made for payment at specified rates for timber removed, and for termination of the permit under certain circumstances.

It may be noted that the agreement for the cutting of the pulpwood stated that if defendant, during the life of the permit, increased the prices paid for pulpwood the stumpage prices stipulated should be increased by an amount equal to 1/2 of defendant's added prices. The permit, which did not in terms transfer title to the pulpwood to Stankovich, contained the following significant provision:

"Licensee agrees to pay licensor for all timber removed from said land hereunder at the following rates: $9.50 per cord for all spruce pulpwood and $5.50 per cord for all balsam pulpwood, and hereby assigns to licensor and authorizes the Munising Paper Company to deduct the sum of $9.50 per cord

for all spruce pulpwood and $5.50 per cord for all balsam pulpwood from moneys payable to licensee for such delivery of pulpwood and to pay the sums so deducted to licensor in payment of the consideration of this permit. Such deduction to be made for each 50-inch cord (133-1/3 cubic feet) and to be based on the scale thereof made by said the Munising Paper Company."

Attached to the permit was the written undertaking of defendant to make payments to the Cleveland-Cliffs Iron Company as specified in the language above quoted, such payments to be made on the 20th day of each month for all pulpwood delivered by Stankovich during the preceding calendar month. Defendant also confirmed the statement that it had entered into contract with Stankovich for the purchase and delivery of the spruce and balsam, and agreed to furnish to the licensor duplicate scale reports for all deliveries received under the contract therefor.

It is conceded that Stankovich had not complied with the provisions of part 4, § 1, of the workmen's compensation act (CLS 1956, § 414.1 [Stat Ann 1957 Cum Supp, § 17.195]). In consequence, defendant paper company was properly held liable for compensation to plaintiff if it contracted with Stankovich for the performance of any part of the work undertaken by it. The referee and the appeal board concluded that the arrangement made between the parties for the furnishing of pulpwood to defendant was of such nature as to subject the latter to the provisions of part 1, § 10. That the conduct of defendant's business involved the procuring of pulpwood suitable for the manufacture of paper is obvious. The question at issue is whether in connection with its operations it engaged Stankovich to perform a function constituting a part thereof.

This Court has in prior cases had occasion to consider the interpretation and application of section 10, above quoted in part. In *Burt* v. *Munising Woodenware Co.*, 222 Mich 699, the defendant, which was engaged in the manufacture of certain utensils and veneers, contracted with a partnership for the repair of a boiler in its factory. It was held that the work to be performed was a part of the business of the defendant, and that under the language of the statute it was liable for the payment of compensation to the plaintiff. The award was accordingly affirmed.

In many respects the situation in the instant case is analogous to that in *Heyman* v. *Volkman,* 326 Mich 179. In that case defendant Powell was engaged in carrying on business as a sawmill operator. Defendant Volkman was a logging contractor. Powell bought stumpage to which he executed a bill of sale to Volkman, with the apparent understanding that the timber cut and removed would be delivered to Powell for use in his operations. The plaintiff, while working for Volkman in cutting timber on such stumpage, was injured. An award of compensation was made to plaintiff against defendant Powell on the ground that the facts brought the situation within the purview of part 1, § 10, of the workmen's compensation act. This Court concluded that there was competent evidence to support the finding of the commission in favor of plaintiff and affirmed the award. CL 1948, § 413.12 (Stat Ann 1950 Rev § 17.186). In *Roman* v. *Delta Broadcasting Company,* 334 Mich 669, the Court, citing prior decisions, indicated the test to be applied in determining the application of part 1, § 10.

The proofs in the instant case, taken before the referee, indicate that defendant paper company in carrying on its manufacturing business was faced

with the problem of procuring pulpwood to be manufactured into paper in its mills. Accordingly it arranged with Stankovich to deliver to it the spruce and balsam cut by the latter on the land of the Cleveland-Cliffs Iron Company pursuant to license or permit. It undertook to make payments therefor directly to Cleveland-Cliffs. Such was the agreement between the latter company and Stankovich. In effect we have a 3-party arrangement with Stankovich cutting the pulpwood, hauling it to the mills of defendant, and receiving pay for his services. The permit or license did not undertake to transfer title to him. The proofs support the conclusion that he was, under contract, performing a part of the work undertaken by defendant in connection with its manufacture of paper. As in *Heyman* v. *Volkman, supra,* there was testimony to support the factual findings of the appeal board.

Prior to the joinder of the Munising Paper Company as a party defendant in the proceeding testimony had been taken before the referee. On this appeal counsel for plaintiff has included part of such testimony in the appendix filed by him. Counsel for appellant have moved to strike such testimony on the ground that not having been a party to the proceeding when it was taken it was not competent as against it, and should not have been included in the appendix filed by counsel. The objection is a proper one, and the testimony in question will be deemed stricken in accordance with the motion. It has not been considered in determining this appeal, nor does it appear that the finding of the referee or of the appeal board was influenced thereby. As a practical proposition it adds nothing of moment to the proofs offered with reference to the liability of appellant. We do not, however, approve the practice of including in an appendix testi-

mony taken under circumstances of the character here involved.

For the reasons hereinbefore stated, the award is affirmed, with costs to plaintiff.

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

VOELKER, J., did not sit.

In re KAISER ESTATE.

CLAIM OF SULLIVAN.

1. WITNESSES — MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED — EVIDENCE.

   Testimony of plaintiff was properly excluded in her proceeding to recover compensation for use of her apartment and garage by deceased and for personal services rendered to him, where such testimony related to matters that, if true, were equally within the knowledge of deceased (CL 1948, § 617.65).

2. ESTATES OF DECEDENTS—CLAIMS AGAINST ESTATES—BURDEN OF PROOF.

   A claimant against the estate of a deceased person for services rendered to the latter has the burden of proof to establish by competent evidence an implied contract obligating the deceased to compensate the claimant for services rendered.

3. WORK AND LABOR—IMPLIED CONTRACTS—EXPECTATION OF TESTAMENTARY REQUEST.

   An expectation by a party who performs a service for another by way of storing personal property for the latter with the

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REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Witnesses § 214 *et seq.*
[2] 21 Am Jur, Executors and Administrators §§ 327, 383.
[3–9] 21 Am Jur, Executors and Administrators § 327; 58 Am Jur, Work and Labor § 7.

expectation that the latter would leave property by will would furnish no basis for a finding of an implied contract.

4. ESTATES OF DECEDENTS—CLAIMS AGAINST ESTATES—REQUEST FOR PAYMENT.

A claimant's failure to request compensation for storage of personal effects of deceased during his lifetime is not consistent with her claim that she expected that deceased would compensate her for the services rendered.

5. SAME—CLAIMS AGAINST ESTATES—IMPLIED CONTRACTS—EVIDENCE—VALUE.

A claimant against an estate of a deceased person raises a contract implied in fact by a showing that when services were performed she, at the time, expected compensation from the decedent who expected to pay therefor, and it is essential that the claimant establish by competent evidence the fair amount of each item for which compensation is claimed.

6. SAME—CLAIMS AGAINST ESTATES—IMPLIED CONTRACT—INTENTION AS TO COMPENSATION.

Statement of a decedent to a third person evidencing a testamentary intent to leave property to claimant for services latter had rendered without requesting compensation from decedent during his lifetime *held,* insufficient to serve as a basis for an implied contract, the test being whether payment was understood and intended and naturally anticipated.

7. CONTRACTS—VOLUNTEERED SERVICES.

One is not bound to pay for volunteered services rendered under circumstances which do not fairly indicate an expectation of reward.

8. ESTATES OF DECEDENTS—CLAIMS AGAINST ESTATES—ADMISSIONS.

An unsigned document in decedent's handwriting which would have left a part of the remainder of his estate to claimant for services rendered by way of storage of personal effects in plaintiff-claimant's apartment, basement and garage *held,* not an admission, where the document contains nothing to indicate the writer considered himself obligated in any way to claimant.

9. SAME—CLAIMS AGAINST ESTATES—EVIDENCE.

Finding of referee, probate judge and circuit judge that plaintiff had failed to substantiate her claim for services rendered in storage of decedent's personal effects in her apartment, basement and garage *held,* not against the weight of the evidence, statement by decedent to his nephew that claimant knew she would get paid being insufficient to raise implication of in-

tention to make monetary payment, where decedent did painting and carpenter work for claimant.

10. EVIDENCE—HYPOTHETICAL QUESTION—STATEMENT OF FACTS. An answer to hypothetical question to real-estate man as to value of service rendered by claimant to decedent in the storage of some of latter's personal effects in her apartment, basement and garage and for use of her living room, *held*, insufficient to fix value even if implied contract were established, where there was a failure to state the facts with proper accuracy and clarity.

Appeal from Wayne; Fitzgerald (Neal), J. Submitted June 4, 1959. (Docket No. 39, Calendar No. 48,007.) Decided July 13, 1959.

Florence Sullivan filed her claim in the estate of William R. Kaiser, deceased, for rental value of portions of apartment premises. Claim disallowed in probate and circuit courts. Plaintiff appeals. Affirmed.

Charles A. Bryan, for plaintiff.

Carl P. Roehl (Costello, Sullivan & Barkey, of counsel), for defendant estate.

CARR, J. In August, 1950, the decedent, William R. Kaiser, removed from his prior home on Meldrum avenue in the city of Detroit to a residence on Outer drive. He was at the time in possession of a quantity of personal property, part of which he took with him to his new home, the balance being stored in a 2-family residence owned by Florence Sullivan, herein referred to as the plaintiff, at 12039 Wade street in Detroit. It appears that plaintiff occupied an apartment on the second floor of her building, the lower apartment being rented to a tenant, and that there was a double garage constituting a part of

the premises, 1/2 of which was used by the said tenant.

Some of Mr. Kaiser's personal effects, consisting of clothing, books, and hunting and fishing equipment, were stored in plaintiff's apartment, a utility room and closets being utilized for that purpose. Whether such use was exclusive does not appear. Other articles were stored in the basement, a portion of which the tenant occupying the first floor was entitled to use, and a boat was placed in a portion of the garage not rented. It further appears that Mr. Kaiser made some use of plaintiff's apartment for the purpose of entertaining friends and for consulting with others on business matters. A portion of the stored articles was removed in 1953, the balance remaining until after the death of Mr. Kaiser in January, 1956.

Proceedings having been instituted in the probate court of Wayne County for the administration of Mr. Kaiser's estate, the plaintiff filed a claim seeking compensation as follows:

"For use and occupation of basement room, utility room and garage for storing of miscellaneous personal property from August 1950 to January 25, 1956 (including personal use and occupation of entire upper flat), at $60 per month. That $60 per month is reasonable value of space occupied $3,960.00."

It may be noted that the words in parentheses were not contained in the claim as originally filed but were subsequently added by amendment. Plaintiff also sought recovery for laundry services asserted to have been performed by her for Mr. Kaiser from September, 1950, to January, 1956, but such portion of the claim is not urged on this appeal.

Proofs with reference to plaintiff's claim were taken before a referee appointed by the probate

court, and a transcript of the testimony, together with the referee's recommendations, was duly filed. The referee concluded that there was insufficient competent evidence to support plaintiff's alleged right to recover, and made recommendation accordingly. The judge of probate agreed with the referee and an order was entered denying the claim. On appeal the matter was, by stipulation of the parties, submitted to a circuit judge for determination on the probate file, including the testimony taken before the referee. Following argument and consideration of the proofs the judge filed an opinion in which he indicated that plaintiff had not established her right to recover, that the controversy had been determined correctly by the judge of probate, and that the estate was entitled to judgment. An order was entered accordingly and plaintiff has appealed, insisting that under the evidence she should have been permitted recovery.

There is nothing in the record before us tending to show that at the time Mr. Kaiser stored the property in question in plaintiff's house and garage any agreement, either express or implied, was reached concerning payment for the use of portions of plaintiff's apartment and the half of the garage not rented to the tenant of the lower flat. There is no proof of any conversation or acts of such nature as to furnish a basis for a determination as to the intention of the parties at the time.

The principal question in the case arises from plaintiff's insistence that the circumstances disclosed by the record were of such nature as to fairly indicate that Mr. Kaiser expected to pay for the accommodation that he received, and that plaintiff expected to receive reasonable compensation. On the taking of the testimony objections were interposed by counsel representing the administrator of the

estate to testimony of plaintiff concerning matters that, if true, were equally within the knowledge of the deceased. It is not questioned that such objections were well-founded. CL 1948, § 617.65 (Stat Ann § 27.914). All testimony appearing in the transcript offending the statutory rule was properly rejected by the referee, the probate court, and the circuit court. The burden of proof rested on plaintiff to establish her claim by competent evidence sufficient to show an implied contract obligating Mr. Kaiser to compensate her for services rendered.

There is no proof before us indicating that plaintiff at any time requested that Mr. Kaiser pay her for the privilege of storing his personal property in her house and garage. In answer to a question of the referee, she admitted that she had not made any such demand. She further explained, in answer to her counsel's question, that she anticipated that Mr. Kaiser would by his will leave property to her. Her hope, or expectation, in this regard was not realized. Such an expectation on her part furnished no basis for a finding of an implied contract. Plaintiff's failure to request compensation during the lifetime of Mr. Kaiser is scarcely consistent with a claim that she expected that he would pay her for the services rendered. *In re Pierson's Estate,* 282 Mich 411, 415.

It is a fair inference from the record that plaintiff and Mr. Kaiser were on friendly terms, and that such fact prompted her to allow him to store some of his personal effects in her apartment and garage. It does not appear that her occupancy and use of the premises were interfered with to her material prejudice. Neither does it appear that she sustained any financial loss in connection with the storage service rendered by her to Mr. Kaiser. The factual situation here presented differs materially from that in *In re Jorgenson's Estate,* 321 Mich 594, in which

this Court, referring to prior decisions, indicated general principles to be applied. Of significance is the language quoted (p 598) from the opinion in *In re Pierson's Estate, supra,* that:

"'A contract implied in fact arises when services are performed by one who at the time expects compensation from another who expects at the time to pay therefor.'"

Likewise, in *In re Dolgy's Estate,* 338 Mich 567, 574, it was stated that:

"It is also essential that claimant prove that the services rendered and money expended were done with the expectation and intent on the part of each of them that claimant would be compensated therefor. It is also essential that claimant establish by competent evidence the fair amount of each item for which he claims compensation pay."

In *In re Spenger Estate,* 341 Mich 491, the facts were analogous to those in the case at bar. There plaintiff filed a claim against the estate of a decedent on the theory of an implied contract. It appeared that decedent had made a will in plaintiff's favor designating him as sole beneficiary thereunder. Plaintiff was aware of the nature of the will which, however, was subsequently changed by codicil. There was also testimony from a witness who stated that decedent said that she was going to leave her home to plaintiff because he had been so good to her. Referring to the rule above quoted from *In re Pierson's Estate, supra,* it was said (pp 493, 494):

"Such facts were not shown here. In the *Pierson Case,* in denying plaintiffs' claim for the value of services on implied contract, this Court further said (p 418), on the authority of *Estate of Miller,* 136 Pa 239 (20 A 796):

" 'That when one renders personal services to another merely upon the expectation of a legacy promised without a contract obligation, the promisee takes his chances on receiving the legacy, and, if his expectations are disappointed, he can recover nothing.'

"Hence, plaintiff's knowledge of the provisions of decedent's will benefiting him and even statements by decedent to a third person evidencing a testamentary intent to leave the home to plaintiff because he had been so good to her are insufficient to serve as the basis for an implied contract. The test is whether payment was understood and intended, *Spence* v. *Sturgis Steel Go-Cart Co.*, 217 Mich 147; whether it was naturally anticipated, *Miller* v. *Stevens*, 224 Mich 626. An agreement to pay cannot be implied from the mere fact that services were rendered. *Godfrey* v. *White*, 43 Mich 171; *Notley* v. *First State Bank*, 154 Mich 676.

" 'No one is bound to pay for volunteered services rendered under circumstances which do not fairly indicate an expectation of reward.' *Coe* v. *Wager*, 42 Mich 49, 51.

"Where the testimony fails, as here, to show that the defendant expected to pay and that the plaintiff expected to charge for the services at the time they were rendered no implied contract to pay arises. *Covel* v. *Turner*, 74 Mich 408. The finding of the trial court was not against the clear preponderance of the evidence."

In an attempt to show that Mr. Kaiser had acknowledged liability to pay her compensation for the storage space furnished to him, plaintiff offered in evidence a writing claimed to have been prepared by Mr. Kaiser in the general form of a will, in which it was stated that plaintiff should receive decedent's automobile and, subject to other specific bequests, 3/10 of the remainder of his estate. However, the paper was not signed and, in fact, Mr. Kaiser made

no testamentary provision for plaintiff's benefit. If he had intended to do so at one time it is apparent that he changed his mind. It may be noted that nothing in the exhibit offered by plaintiff indicated that the writer considered himself obligated in any way to plaintiff. In other words, the unsigned paper may not be regarded as an admission of indebtedness because of any services that may have been rendered by plaintiff to Mr. Kaiser.

Objection was made to the exhibit, and properly so under the holding of this Court in *Oliver* v. *Jessup's Estate,* 137 Mich 642, 645. There it was shown that Mr. Jessup had made a will, to which some years later he attached a written statement in terms giving to plaintiff the sum of $500 and certain personal property. Commenting on the admissibility of the writing, it was said:

"It is said this was in the nature of an admission that the services were regarded by Mr. Jessup as worth $850 at least, and this was so argued to the jury. This paper was not signed by Mr. Jessup. It is not shown under what circumstances he wrote it—whether he expected it would take the place of the lease or whether it was a voluntary gift. It is clear that, whatever he had in mind, he did not see fit to give it effect by attaching his signature. It should have been excluded."

The exhibit in Mr. Kaiser's handwriting may not be construed as supporting plaintiff's claim of a right to recover on the theory of an implied contract. No admission of liability was made thereby. It is quite possible that Mr. Kaiser had in mind at the time he wrote the provisions in the exhibit the making of some provision by will for plaintiff's benefit. If such was the case he did not carry out his intention, which may at the time have been prompted solely by the friendly relations between the parties.

Plaintiff also relies on a statement claimed to have been made by William R. Kaiser to his nephew, with reference to the storage of the property in question, to the effect that the plaintiff "knows she will be paid." Such statement may not be regarded as indicating recognition of an implied contract. If Mr. Kaiser had in mind at the time of the alleged conversation with his nephew, in the summer of 1953, the making of some provision by will for plaintiff's benefit, he did not carry out such intent. Neither does the statement, if made, imply that he intended to make monetary payment for the privilege of storing some of his effects in plaintiff's residence. The testimony of the nephew indicates that at one time he worked with his uncle in doing painting and carpenter work on plaintiff's house. The witness was paid, but whether William R. Kaiser was likewise paid by plaintiff does not appear. If services of the character suggested were rendered by decedent to plaintiff from time to time, it is a permissible inference that it was his thought that what he was doing for her would offset her act in allowing him to store his effects in the manner indicated. The entire situation is left by the proofs in the realm of conjecture. It may not be said on the record before us that the referee, the probate judge, and the circuit judge hearing the matter on appeal were in error in concluding that the proofs submitted on behalf of plaintiff were not sufficient to authorize allowance of the claim. The finding was not against the weight of the evidence.

If it be assumed that the proofs offered by plaintiff were sufficient to establish the existence of an implied contract of the nature claimed by her, the further fact appears that there was a failure to prove the fair compensation for the service rendered. In an attempt to show such value plaintiff

called as a witness a real-estate broker of extended experience, who had not viewed the premises but to whom there was propounded a hypothetical question as to the value of the storage space indicated therein to have been used by Mr. Kaiser. The question, to which objection was interposed, was so worded as to indicate that Mr. Kaiser had the use of the entire basement and of a garage, as well as a second-floor apartment where his goods were stored. It omitted any reference to the fact that the tenant of the lower flat had the use of a part of the basement, that plaintiff occupied the second floor apartment as her home, that the service rendered to Mr. Kaiser was not shown to have interfered with such occupancy, and that decedent actually lived on Outer drive. The testimony of the witness indicates that he was somewhat confused, and that he had answered the hypothetical question on the assumption that Mr. Kaiser lived in the apartment where his personal effects were stored. It may be noted also that the question did not indicate whether the occupancy of the closets and utility room was such as to exclude any use thereof by plaintiff, nor was the extent and frequency of the use of the living room and kitchen by Mr. Kaiser set forth with any degree of particularity. It may be assumed that plaintiff was not deprived of the free and full use of her apartment. In any event the proofs do not disclose any objectionable interference with her rights.

In answer to the question plaintiff's witness expressed the opinion that $60 per month would constitute a fair rental. We think it obvious that the hypothetical question was open to objection for failure to state the facts with proper accuracy and clarity, and was so worded as to create uncertainty in the mind of the witness as to the extent of the

use made by decedent of the facilities made available to him. Obviously the fair rental value of the upper apartment, considered in its entirety, did not constitute the measure of damages, assuming plaintiff entitled to recover on the theory of an implied contract. The essentials of a proper hypothetical question were considered in *Bosch* v. *Damm*, 296 Mich 522. The answer to the question propounded in the instant case may not be regarded as sufficiently indicating the amount of recovery under an implied contract of the character claimed by plaintiff. However, as before indicated, the proofs were insufficient to establish such contract.

The holding of the trial judge on the issues in the case may not be said to be against the weight of the evidence. We are impressed that the affirmance of the order of the probate court is fully supported by the record. The judgment entered is accordingly affirmed, with costs to appellee.

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

ELLIS *v.* WAYNE REAL ESTATE COMPANY.

1. MORTGAGES—CONSTRUCTION OF DEED—PAROL EVIDENCE.
   It is competent to show by parol that a deed, absolute in form, was in fact made as security for a loan.

2. SAME—CONSTRUCTION OF DEED—EVIDENCE.
   The proof required of a plaintiff in a suit to have a deed, absolute in form, declared a mortgage should be clear and convincing and sufficient to overcome the presumption that the instrument truly represents the transaction in its entirety.

3. SAME—CONSTRUCTION OF DEED—INADEQUACY OF CONSIDERATION.
   The fact that there was a considerable inadequacy of consideration and the fact that originally the plaintiffs had sought a loan while financially embarrassed are deemed of weight and importance in determining whether a deed, absolute in form, was a mortgage.

4. SAME—CONSTRUCTION OF DEED—CONSIDERATION—USURY.
   Transaction whereby plaintiffs gave a quitclaim deed to defendants who furnished a consideration of $4,800 and gave plaintiffs the privilege of reacquiring the place for $7,878.47, *held*, to constitute a loan secured by a mortgage, no question of usury having been raised.

Appeal from Wayne; McDonald (Archie D.), J., presiding. Submitted April 10, 1959. (Docket No. 36, Calendar No. 47,888.) Decided July 14, 1959.

REFERENCES FOR POINTS IN HEADNOTES

[1] 36 Am Jur, Mortgages §§ 136–146.
Exception to rule of admissibility of parol evidence to show that deed absolute on its face was intended as a mortgage. 111 ALR 448.
[2] 36 Am Jur, Mortgages §§ 132, 133.
[3] 36 Am Jur, Mortgages §§ 148, 153.

Bill by Veronica T. Ellis, the surviving plaintiff, and Theodore A. Ellis against Wayne Real Estate Company, a copartnership, Tom Donigan and Leo Donigan, partners, to declare deed, assignment and land contract a mortgage loan transaction. Bill dismissed. Plaintiffs appeal. Reversed and remanded for entry of decree granting relief prayed.

George L. Ginger (*Meyer Weisenfeld,* of counsel), for plaintiffs.

Taylor, Patrick, Bailer & Lee (*George E. Lee,* of counsel), for defendants.

Plaintiffs seek decretal declaration that a quitclaim deed executed by them in favor of defendants as grantees, and a simultaneously executed land contract naming plaintiffs as vendees and defendants as vendors (the subject matter of each instrument being plaintiffs' home property in Detroit), unitedly evidence a loan of money secured by equitable mortgage. From a decree dismissing the bill, plaintiffs appeal.

Originally, plaintiffs were purchasing the home from other parties by executory contract. The then agreed purchase consideration was $6,300, which plaintiffs had reduced to an unpaid balance of approximately $3,400. In September of 1954, following default by plaintiffs and institution of forfeiture proceedings by the original vendors, the latter obtained a possessory judgment against plaintiffs. The final day for redemption being imminent, plaintiffs unsuccessfully sought refinancing assistance of banks and other lending institutions. Thereupon, responding to an advertisement of defendant Wayne Real Estate Company, plaintiffs arranged a hurried meeting with defendant Tom Donigan; their purpose being that of obtaining a loan

with which to redeem from such judgment. The meeting resulted in execution of the 2 instruments mentioned above. Defendants thereupon satisfied the possessory judgment and paid out other items in plaintiffs' behalf, including delinquent taxes and a loan to plaintiffs theretofore made by one Patsalis.* The total amount paid by defendants on such account was $2,528. They have not as yet acquired the remaining equity of the original vendors, the possessory judgment having been entered for unpaid instalments rather than for an accelerated balance.

The new executory contract specified an agreed sale price of $7,500. Shortly after consummation of the new transaction the sum of $378.47 was added to the unpaid principal balance of the new contract. This was done by supplemental agreement of the parties, and was brought about by representation of defendants that the total amount of unpaid taxes had been under-calculated in making up the determination of amount to be paid under the new contract.

Plaintiffs made 6 monthly payments as called for by the new contract. Default then occurred, and defendants instituted forfeiture proceedings. To arrest such proceedings, and to obtain decretal relief as mentioned, plaintiffs thereupon filed this bill.

BLACK, J. (*after stating the facts*). We think this case is governed properly by the conclusions and authorities assembled in *Schmidt* v. *Barclay,* 161 Mich 1 (20 Ann Cas 1194). In that case (p 11), by way of quotation from *McArthur* v. *Robinson,* 104 Mich 540, 549, 550, it was said:

* Patsalis had loaned plaintiffs $500 on their note, secured by an assignment of plaintiffs' interest as shown by the original executory contract.

" 'It is settled that it is competent to show by parol that a deed absolute in form was in fact made as security for a loan. *McMillan* v. *Bissell,* 63 Mich 66, 69, 70. It is true that in this class of cases the proof ought to be clear and convincing, and sufficient to overcome the presumption that the instrument in question truly represents the transaction in its entirety; but, in weighing the testimony in such cases, the fact that there was a considerable inadequacy of consideration, which fact appears in this case, as well as the fact that the original application was for a loan, which appears beyond question to have been the fact here, are deemed of weight and importance in determining the main question. See 1 Jones, Mortgages (6th ed), §§ 266, 329.' "

Here the embarrassed circumstances of the grantors, one of whom (Theodore Ellis) was suffering at the time from a fatal illness, was shown with convincing clarity. Here, too, "there was a considerable inadequacy of consideration"* as well as callous disparity between the cash investment by defendants and the exacted repurchase price. These items we shall presently consider in detail. Finally, and since these grantors did seek assistance from the defendants for the purpose of obtaining a loan with which to redeem, and not for the purpose of selling their home, a fair case was made below for application of the beneficent rules this Court has adopted (see *Schmidt* v. *Barclay, supra,* at pages 11 and 12 of report) from *Reed* v. *Reed,* 75 Me 264. Such rules are quoted at length in *Schmidt* and, due comparison having been made, it will be seen that they merely complement that which led this Court, in *Emerson* v. *Atwater,* 12 Mich 314, to reverse for entry of

* We have recently noted, in *Sheets* v. *Huben,* 354 Mich 536, 540, that inadequacy of consideration "is an indication that the parties did not consider the conveyance to be absolute," citing *Simington* v. *Goldstein,* 330 Mich 536; and *Schmidt* v. *Barclay, supra.*

decree in favor of the then complainant. In *Emerson* Mr. Justice MANNING wrote as follows (p 317):

"The bill was filed to have a deed given by complainant to Atwater declared a mortgage. In such cases the pecuniary embarrassment of the grantor, his indebtedness to the grantee, and inadequacy of consideration, are circumstances the court looks to in determining the true character of the instrument. They were all set forth in the bill. And of the 3, inadequacy of consideration is the most important. For without that, why declare a deed a mortgage? No good would come of it; and there would be nothing to warrant the inference of undue advantage, always relied on by the court, and made the basis of its action in this class of cases."

This case, properly summarized, is one where the plaintiffs purportedly conveyed their home, against which there existed a total indebtedness (unpaid taxes and all including the Patsalis note) of $4,800, in return for the privilege of reacquiring it for $7,878.47. To put it bluntly, defendants claim they have acquired legal title to plaintiffs' home for a total of past and prospective expenditures—that already made plus the amount yet to be paid the original vendors—of $4,800. The home having been valued according to the testimony at prices ranging between $6,000 and $9,500, and defendants themselves by the executory instrument having placed a value on it of $7,847.47, it seems manifest that affirmance of the circuit court's decree would do violence to the principles by which this and other courts determine the true effect of conveyances executed in like circumstances.

Reversed and remanded for entry of decree adjudging that the instruments in question constitute

a loan secured by mortgage.* Costs to surviving plaintiff, Veronica T. Ellis.

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

* To avoid possible misunderstanding of the scope of our opinion in this case, it is noted that no question of usury has been raised. See, on that score, *Wilcox* v. *Moore*, 354 Mich 499.

YARABEK *v.* BROWN.

1. AUTOMOBILES—PASSENGERS—DUTY OF VIGILANCE.

The front-seat passenger in a passenger automobile is now burdened with no greater duty of vigilance than the rear-seat passenger, since any other conduct than silence or inaction on the part of a passenger may be fraught with danger.

2. SAME—PASSENGERS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

The evidence is viewed in a light most favorable to defendant on a plaintiff's motion to eliminate the question of contributory negligence from consideration by the jury in an automobile passenger's action against motorist in colliding car.

3. SAME — PASSENGERS — CONTRIBUTORY NEGLIGENCE — SPEED — EVIDENCE.

Plaintiff, a passenger in northbound car on 6-lane through highway, in action against defendants whose car had been southbound and turned left while traffic light was green, *held*, to have sustained her burden of disproof of contributory negligence under record showing, at most, that car was exceeding 35-mile-an-hour speed limit by less than 10 miles per hour without remonstrance from her.

4. APPEAL AND ERROR—AFFLUENCE—UNEMPLOYMENT—INSURANCE.

Defendants' improper effort to get across to jury the combination of assumed affluence of plaintiffs and the fact and duration of defendant driver's unemployment and plaintiffs' improper effort to get across to jury on *voir dire* examination defendants' insured status effected a nonreversible standoff.

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

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 5A Am Jur, Automobiles and Highway Traffic § 795 *et seq.*

Personal care required of one riding in automobile driven by another as affecting his right to recover against third persons. 18 ALR 309, 22 ALR 1294, 41 ALR 767, 47 ALR 293, 63 ALR 1432.

Appeal from Oakland; Adams (Clark J.), J. Submitted April 14, 1959. (Docket No. 44, Calendar No. 47,768.) Decided July 14, 1959.

Case by Margaret Yarabek against Raymond O. Brown and Georgia M. Brown for personal injuries sustained in automobile collision. Verdict and judgment for defendants. Plaintiff appeals. Reversed and remanded.

van Benschoten & van Benschoten, for plaintiff.

Cary, BeGole & Martin, for defendants.

This is a negligence case, arising from a collision of 2 automobiles in a highway intersection. Telegraph road skirts the westerly limits of Pontiac. It is a 6-lane north-south superhighway where it crosses east-west Elizabeth Lake road. Traffic passing through the intersection is controlled by the usual control signal, which is suspended overhead in the center of the intersection. Here 2 automobiles, one occupied by plaintiff Margaret Yarabek and the other driven by defendant Raymond O. Brown, came together with untoward results.

Plaintiff Margaret Yarabek was riding in the front seat with her husband-driver. The Yarabek car was proceeding north on the right side of Telegraph road. Defendant Raymond O. Brown was driving south on Telegraph road, and intended to make a left turn into Elizabeth Lake road. Mr. Brown slowed up, in the easternmost lane designed for southbound Telegraph road traffic, and came to a complete stop with the left front portion of his car standing directly beneath the mentioned traffic signal. Having waited in such position for a truck and 2 or 3 other northbound cars to proceed through the

intersection, and having observed, as he says, what turned out to be the oncoming Yarabek car at an estimated distance of 400 to 500 feet, Mr. Brown started the intended turn and partially completed it before the collision, presently described, took place. He did not observe the Yarabek car again, after having noticed its approach as above.

According to the testimony of Mr. and Mrs. Yarabek, the Brown car started forward, from its stopped position under the traffic light, when their car was a bare 50 to 75 feet from the intersection. All parties agree that the collision was that of the front portion of the Yarabek car with the right side of the Brown car, and that the collision occurred either in the center lane, of the 3 northbound traffic lanes, or in the extreme easterly lane. It is also agreed that the traffic light showed "green" for traffic on Telegraph road, and that its signal remained so at all times under present consideration. It was shown further that Telegraph road was posted, with respect to vehicular speed in the vicinity, at a maximum rate of 35 miles per hour.

There was no direct evidence of the approach-speed of the Yarabek car excepting the testimony of Mr. and Mrs. Yarabek (that the car was proceeding at approximately 35 miles per hour) and excepting the testimony of the investigating traffic officer. The traffic officer testified that Mr. Yarabek, shortly after the accident, said his rate of speed "would be closer to 45 than it would be 35."

Mrs. Yarabek's ensuing suit for negligence, brought against Mr. Brown as driver and defendant Georgia M. Brown as owner, came to trial before the court and a jury. The jury returned a verdict in favor of defendants, on which judgment was entered. Plaintiff appeals.

BLACK, J. (*after stating the facts*). The principal question brought here is whether the trial judge should have eliminated the issue of contributory negligence from jury consideration. Having compared —at request of all counsel—*Jones* v. *Daniels,* 328 Mich 402 and its predecessor cases with *Tracy* v. *Rublein,* 342 Mich 623; and *Sherman* v. *Korff,* 353 Mich 387, we conclude that such should have been done and that the judgment of the trial court must on that account be reversed.

The distinction, made in *June* v. *Grand Trunk Western R. Co.,* 232 Mich 449 (citing in support *Bradley* v. *Interurban R. Co.,* 191 Iowa 1351 [183 NW 493], and *Weidlich* v. *New York, N. H. & H. R. Co.,* 93 Conn 438 [106 A 323]), between the duties of front- and rear-seat vehicular passengers has, we think, passed into history by force of reasoning shown in *Jones* and *Sherman, supra.* The front-seat passenger ordinarily—and this Yarabek case is quite ordinary in such regard—is burdened in the motoring circumstances of today with no greater duty of personal vigilance than the rear-seat passenger. The reason is known to all veteran motorists.

In the early days of the automobile, and of the dirt road, motoring speeds in excess of 20 miles per hour were regarded as dangerous and foolhardy. There was both reason and occasion, then, for certain passenger participation in the action and inaction of the driver. What is more, and this factor is worthy of comparative emphasis, there usually was time—some time at least—for passenger observance and occasional warning of the driver against fancied or real perils ahead and to left or right. In extreme circumstances it was even possible that a passenger might, in the parlance of veteran railroad trainmen, safely "hit the real estate."

All these factors have now disappeared,* principally because motoring hazards develop too fast for warning or personal action by a passenger even though he has spotted imminent danger before the driver has. As was recently made clear in *Sherman,* any action of a passenger, admonitory or otherwise, is apt to increase rather than decrease the swift rush of danger—if danger be imminent. " 'Generally,' it was well put in a Federal case, 'it is the duty of the passenger to sit still and say nothing. It is his duty, because any other course is fraught with danger.' " (Quotation from *Sherman* at page 395.)

Let us consider for a moment *June* v. *Grand Trunk Western R. Co., supra,* and the remaining "back seat" cases on which its rule was predicated (*Bradley* v. *Interurban R. Co.* and *Weidlich* v. *New York, N. H. & H. R. Co., supra*). In *June* the passenger was riding (in the back seat) in a Ford touring car. Its rate of speed was "from 6 to 10 miles per hour" as it approached the fatal grade crossing. In *Weidlich* the corresponding rate of speed of approach was 15 miles per hour. Today, such are starting speeds only and, however we may deplore the transition from miles per hour to feet per second in the compared speeds of motor traffic, the change appears to be a permanent one. It dictates a new view, and a plainly declared revision of earlier judicial thought, upon the question of personal contributory negligence of a motorcar passenger.

In this case of Yarabek, and granting that a plaintiff's motion for peremptory instruction (in a negligence case) is to be judged exactly as we judge a defendant's motion for such instruction (*Parsons* v. *Hoffman,* 352 Mich 8), we cannot find on favorable-to-defendant view of the record any proof or inference by which the question of contributory negli-

* Note the unique method of their burial in *Mitcham* v. *City of Detroit,* 355 Mich 182, 188.

gence should have been submitted to the jury. To make it plain, we think Mrs. Yarabek fully met, as a matter of law, her then burden of disproof of contributory negligence. This pursues the essence of our holding in *Jones, supra,* and places in distant setting any thought that *Tracy, supra;* and *Mitchell* v. *De Vitt,* 313 Mich 428; and *White* v. *Huffmaster,* 326 Mich 108, are authority for the proposition that the question of a motor passenger's contributory negligence is always one of fact.

This is not to say that a specific factual situation may not present either a question of fact or the requirement of a directed verdict (where the issue is that of a passenger's contributory negligence). It is to say that the ordinary case calls for elimination of the question from jury consideration. Any other ruling, in the case—as here—where moderately excessive speed of the car occupied by the plaintiff is assigned as ground for a holding or finding of contributory negligence, would place on the passenger the unseemly burden of steady duty-watch of the car's speedometer (something which is not easy to do, with accuracy, considering the oblique view from the right); the corresponding burden-duty of constant observation of highway speed control signs, and the final duty of reproof as indicated by such watchfulness. We are not ready, in these times, to so burden front- or back-seat passengers.

In view of our holding, declared above, it is unlikely that other stated and counterstated questions will arise on retrial. We are constrained to say, however, that defendants' improper effort to get across to the jury the combination of assumed affluence of the Yarabeks and the fact and duration of defendant Raymond O. Brown's unemployment, was matched by plaintiff's successful (and, as we have recently held [*Darr* v. *Buckley,* 355 Mich 392]

quite improper) effort to inject into the case, on *voir dire,* the insured status of defendants. We find a nonreversible standoff here.

Judgment reversed. New trial ordered. Costs to plaintiff.

SMITH, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred with BLACK, J.

CARR, J. (*dissenting*). Plaintiff was injured in a traffic accident occurring in Oakland County on December 30, 1955, at approximately 2 o'clock in the afternoon, and brought this action to recover damages. She was at the time a passenger in an automobile operated in a northerly direction on Telegraph road, the driver being her husband. Defendant Raymond O. Brown was driving south on said road in a car owned by himself and the other defendant. Mr. Brown desired to make a left turn at the intersection of Telegraph road with Elizabeth Lake road, and came to a complete stop before undertaking to do so. After awaiting the passage of other vehicles he started to complete the turn, and was struck by the Yarabek car approximately in the center of the east half of Telegraph. On the trial of the case it was the claim of plaintiff that the negligence of defendant Raymond Brown was a proximate cause of the accident and injury, and that there was no negligence on her part. It is conceded that if Mr. Yarabek was guilty of negligence it was not imputable to plaintiff.

The case was tried before a jury, the testimony of the parties being contradictory, particularly with reference to the position of the Yarabek car at the time Mr. Brown started his car in motion for the purpose of completing his turn to the left. The proofs indicated that he traveled a distance of not less than 20 feet. On behalf of plaintiff it was con-

tended that the car in which she was riding was approximately 75 feet from the point of impact when defendants' car started to move in an easterly direction.

Defendant Raymond Brown testified that after waiting for other vehicles to pass in front of him on Telegraph road he made an observation to the south and saw the Yarabek car approaching at a distance of 400 or 500 feet. He claimed further that he concluded that he could cross in front of it and undertook to do so. Plaintiff's motion for a directed verdict, based on her claim that she was free from contributory negligence as a matter of law and that defendant Raymond Brown was guilty of negligence constituting a proximate cause of the collision, was denied. The issues of negligence, contributory negligence, and proximate cause were submitted to the jury for determination. Verdict was returned in favor of defendants, plaintiff's motion for a new trial was denied, and she has appealed.

The principal question at issue is whether the trial judge was in error in submitting to the jury the issue of contributory negligence on the part of plaintiff. She was riding in the front seat of the automobile beside her husband, noted that their car was being driven in the center lane for northbound traffic, that the traffic light at the intersection was green for such traffic, and that the color did not change prior to the collision. She also stated that she observed defendants' car undertaking to make a left-hand turn. No claim is made in her behalf that she called her husband's attention to the situation. At the time of the trial the burden rested on her of establishing freedom from contributory negligence on her part as a condition prerequisite to recovery of damages.

Testifying in plaintiff's behalf her husband stated that he was driving at 35 miles per hour, that at the time defendants' car was starting to go east on Elizabeth Lake road he was approximately 75 feet distant, that he was driving in the center lane for northbound traffic, and that he struck defendants' car in such lane. He further expressed the opinion that the latter vehicle was proceeding at about 2 miles per hour. A deputy sheriff of the county, who investigated the accident, was called as a witness on behalf of plaintiff and testified that Mr. Yarabek admitted to him that he was driving between 35 and 45 miles per hour, "closer to 45." The record indicates that the posted speed limit was 35 miles per hour. The witness further stated that there were no skid marks made by the Yarabek car on either side of the place where the collision occurred.

Without discussing the proofs in detail, it clearly appears that there was a material contradiction in the testimony of the parties, particularly with reference to the distance of the Yarabek car from the intersection at the time defendant driver started his automobile for the purpose of crossing the east half of Telegraph road. The fact that he had proceeded for a distance of at least 20 feet before being struck by the Yarabek car would indicate that, if he was driving at a speed of 2 miles per hour, the vehicle in which plaintiff was riding, if driven 35 miles per hour or more in the center lane of traffic, would not have come in contact with defendants' automobile. Because of the contradictory nature of the testimony, the trial judge concluded that the issues as to defendants' negligence and plaintiff's freedom from contributory negligence should be submitted to the jury.

In denying the motion for a directed verdict, Judge Adams stated:

"The defendant testified that after he had stopped at the intersection, preliminary to making a left hand turn, he looked to the south for oncoming traffic and saw the car in which the plaintiff was riding some 400 to 500 feet away. That testimony was confirmed by other testimony to the effect that the plaintiff's car was moving some 17–1/2 times as fast as the defendants' car and that the defendant went upwards of 20 feet at 2 miles per hour from the place where he stopped and made his observations, to the point of the impact. The speed limit in that area is 35 miles per hour.

"Hence it cannot be said as a matter of law that the plaintiff's car constituted an immediate hazard to the defendant when he started to turn. If those were the facts, he had the legal right-of-way under the statute to complete his turn. Having made the turn he was justified in then turning his attention to oncoming traffic on Elizabeth Lake road and away from the road that he was leaving. There was, of course, much testimony to dispute the defendant's story, but it cannot be said as a matter of law that the defendant was guilty of negligence. It is the province of the jury to determine where the truth lies as between conflicting statements.

"Nor was the plaintiff free of contributory negligence as a matter of law. If the plaintiff's car was 400 to 500 feet away when the defendant started to complete his turn, then the plaintiff had a duty to warn her husband of the danger in his continued and unabated speed for she testified that she was sitting in the front seat of the automobile, that there was nothing to obstruct her view, and that she saw the defendant start to turn into Elizabeth Lake road."

In passing on the motion for a new trial, which was based principally on alleged errors in the charge to the jury and on the refusal to give certain requests submitted on behalf of plaintiff with reference to questions of negligence, the judge incorpor-

ated as a part of the opinion the prior opinion on the motion for directed verdict, concluding for the reasons given by him that the issues in the case were properly submitted to the jury for determination.

This Court has repeatedly held in prior decisions that a passenger in an automobile, who is injured in an accident and seeks damages therefor, must show facts indicating freedom from contributory negligence on his or her part in order to sustain the burden of proof.* Unless the evidence introduced was sufficient to establish that such plaintiff had not failed to exercise reasonable care for his or her safety, the question of contributory negligence, or freedom therefrom, was considered a matter for determination by the jury. In *June* v. *Grand Trunk Western R. Co.*, 232 Mich 449, 456, it was said:

> "It is the undoubted rule that the invited passenger is not absolved from the duty to exercise reasonable care for his own safety. Whether he had done so under the circumstances shown and situation in which he is placed usually becomes a question of fact for the jury."

In *White* v. *Huffmaster*, 326 Mich 108, the general rule was recognized and applied. The facts in that case were somewhat analogous to those in the case at bar. Plaintiff was a passenger on a motorcycle, riding behind the driver. She observed defendants' automobile approaching the intersection where the accident occurred, at a distance of approximately 200 feet therefrom, and that said car was traveling at a rate of approximately 35 miles per hour. When at a like distance from the intersection, the operator

* The cases referred to were decided before the adoption of Court Rule No 23, § 3a, effective June 1, 1958, which declares contributory negligence a matter of affirmative defense to be pleaded and proved as such by the defendant. The case at bar was tried in circuit court before said amendment became operative.

of the motorcycle indicated by signal his intention to make a left-hand turn. The Court concluded that such fact must have been known to plaintiff, and that she was in a position to appreciate the hazard presented by the movements of the motorcycle and the defendants' car. Admittedly she did nothing towards warning the driver of the motorcycle of the impending danger. This Court on appeal held that the trial court was right in submitting the issue of contributory negligence to the jury. It was specifically held that the plaintiff's motion for a directed verdict and subsequent motion for judgment notwithstanding the verdict of the jury were properly denied. Judgment in defendants' favor was accordingly affirmed. The above cited cases are typical of the decisions of this Court on the matter in issue in the case at bar.

Counsel for appellant have called attention to *Jones* v. *Daniels,* 328 Mich 402. There the plaintiffs, whose cases were consolidated for trial and on appeal, were guest passengers in an automobile which collided with defendants' car. The proofs introduced on the trial, which were uncontradicted in this respect, disclosed that one of the plaintiffs was riding in the back seat, and that he was at the time relaxing, and that he did not see defendants' car or know what happened. The other plaintiff was sitting beside the driver and at the time of the collision was watching another vehicle that the car in which she was riding was passing. Said plaintiff was apparently not familiar with the road, did not know that the car operated by the driver was approaching a curve, and did not see any yellow line on the pavement. The general rule was recognized as laid down in the cases above cited, but the Court concluded, in view of the undisputed proofs, that plaintiffs were not aware of any impending traffic

hazard, and that, as a matter of law, they were not guilty of contributory negligence.

In the case at bar the plaintiff was looking ahead and, according to her own testimony, observed the traffic light and the automobile of the defendants. She was in position to realize that an accident might happen if her husband continued to drive at his then rate of speed. She could scarcely have failed to note that he was not decreasing such speed or exercising precautions to avoid the impending danger. Plaintiff's proofs disclosed that the impact took place in the center lane for northbound traffic, indicating that Mr. Yarabek did not change the direction in which he was traveling. As before noted, the deputy sheriff of the county, who testified as a witness for plaintiff, discovered no skid marks on the pavement. The jury may have concluded from the testimony that Mr. Yarabek, while presumably watching the road before him, did not for some reason realize the possible consequences of his continuing on his course in apparent disregard of the movement of defendants' automobile. If he was in fact 400 to 500 feet from the intersection when defendants' car started to cross the east half of Telegraph road, he had plenty of opportunity to exercise precautions to avoid an accident, and likewise plaintiff, observing the situation, and charged with notice of what might occur if her husband did not exercise reasonable care, was not prevented from calling his attention to the situation with perhaps a warning as to his rate of speed. This she did not do, and we think an issue of fact as to her contributory negligence was thereby presented.

In *Tracy* v. *Rublein,* 342 Mich 623, cited by counsel, the driver of an automobile in which plaintiff was a passenger ran into a disabled truck parked partly on the highway. While the facts were scarce-

ly analogous to those in the case at bar, this Court, in affirming a judgment for the plaintiff, held that the issue of defendant's negligence as well as the question of contributory negligence of the plaintiff were properly submitted to the jury. In *Sherman* v. *Korff,* 353 Mich 387, the plaintiff-appellant was riding in an automobile owned by himself and his wife jointly, and driven by the latter, which came in collision with defendants' car with resulting injury to plaintiff. Actions were brought by both husband and wife on the theory that the sole proximate cause of the accident was the negligence of defendants' driver. Special questions were submitted to the jury, the answers to which indicated that the jury had determined that neither driver had established freedom from negligence. Such answers disposed of the wife's case. Involved in the litigation was the issue as to whether Mr. and Mrs. Sherman were at the time engaged in a joint enterprise. Such question, on which this Court divided, was basically one involving imputed negligence. It was, however, recognized that under some circumstances a passenger may himself be guilty of negligence if he owes a duty to warn the driver of an impending danger and fails to do so. Such is the situation in the case at bar.

No issue of imputed negligence is here involved. Rather, the question presented is whether the plaintiff, in the exercise of due care for her own safety, should have called her husband's attention to the impending danger which she must have observed. If the facts were as claimed by defendants, she had ample opportunity to give the requisite warning challenging her husband's attention to the situation before them. This she did not do. Whether her failure constituted negligence presented on the trial a question concerning which differences of

opinion might exist. The trial judge was not in error in submitting the issue to the jury as one of fact.

Other questions argued by counsel do not require discussion. The case was fully and fairly submitted to the jury, and there was no error prejudicial to plaintiff in the charge as given or in the denial of the requests submitted. The judgment should be affirmed.

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

LAWRENCE *v.* FOX.

1. LIBEL AND SLANDER—QUALIFIED PRIVILEGE—COMMENT ON CONDUCT OF PUBLIC OFFICIAL—NEWSPAPERS.

   Judgment for plaintiff, who was a deputy police commissioner for 8 years, in his action against newspapers and their publishers for libellous articles charging plaintiff with fraud, corruption, protection of criminals, manipulation of liquor licenses, perjury, trickery and deceit is reversed, where trial judge had failed to inform jury that defendants had a qualified privilege as a matter of law in commenting upon the conduct of a public official.

2. COSTS—REVERSAL—NEW TRIAL.

   Costs in libel case are ordered to abide result of new trial ordered upon reversal of judgment for plaintiff because of error on part of trial court.

Appeal from Wayne; O'Hara (Chester P.), J. Submitted April 9, 1959. (Docket No. 25, Calendar No. 47,076.) Decided July 14, 1959.

REFERENCES FOR POINTS IN HEADNOTES

[1] 33 Am Jur, Libel and Slander § 169.

Case by Kennedy Lawrence against J. M. Fox and Jack E. MacGriff, doing business as the Redford Record, the Brightmoor Journal, and the Home Gazette, Strathmoor Edition, Floyd E. McGriff and the Redford Printing Company, a Michigan corporation, for libel. Verdict and judgment for plaintiff against defendants MacGriff and McGriff, who appeal. Reversed and remanded.

Charles S. Toy, for plaintiff.

Leo W. Hoffman, for defendant MacGriff.

Floyd McGriff, in propria persona.

SMITH, J. The plaintiff in the case before us, Kennedy Lawrence, was deputy superintendent of police in Detroit from 1947 to 1955. The action he brings is for libel. The libel consisted, according to the pretrial statement, "of a series of articles written by defendants Jack E. MacGriff and Floyd E. McGriff and published in the defendant newspapers, the Redford Record, The Brightmoor Journal and the Home Gazette, which publications were printed by defendant The Redford Printing Company."

We will not preserve for posterity in our printed reports the language employed. It was abusive and extreme, vitriolic in its terms. Suffice for our purposes to say that plaintiff was charged with fraud and corruption, with protection of criminals and manipulation of liquor licenses, with perjury, trickery, and deceit. Few offenses known to the litany of prostitution of public trust were omitted. The plaintiff asserted that these charges were false, that they were known to defendants to be false, and that they were published with malicious intent. In short, that, despite his exemplary record to which eminent

commissioners of police bore witness, and despite his reputation as "an honest cop," the defendants deliberately set out to ruin him personally and professionally from the most evil of motives. Defendants, on the other hand, asserted that they had acted in entire good faith, that their purpose in so writing was to bring to the people of the community the truth concerning corruption in government and that the public responsibilities of a newspaper in exposing wrongdoing in high places gives it a qualified privilege to print such articles in the public interest. The case went to the jury, which awarded plaintiff the sum of $20,000. Defendants-appellants are before us on a general appeal.

There are few areas of the law so obscure in detail as that of the law of defamation. The New Hampshire supreme court recently remarked that "For the most part any thoughtful consideration of the present state of the law of libel either begins or ends with a combined apology and lament." *Blanchard* v. *Claremont Eagle, Inc.*, 95 NH 375, 377 (63 A2d 791). This is due in part to conflicting precedents, many of them having their roots in courts long forgotten, such as the seignorial courts, one of which heard, in the year 1275, a charge that Maud, wife of John, had "attacked the wife of the said Thomas with contumelious words calling her whore and sorceress."[1] At a later period the ecclesiastical courts contributed their doctrine and precedents, followed by that court of evil repute, the court of star chamber.[2] The controlling principles in modern law, however, are neither obscure nor unique. The ultimate problem in the law of defamation, the balancing of

[1] See 1 Select Pleas in Manorial Courts, 2 Selden Society, pp 143, 145, discussed in Donnelly, History of Defamation, 1949 Wisconsin L Rev 99.

[2] See, generally, Veeder, The History and Theory of the Law of Defamation, 3 Col L Rev 546; 4 Col L Rev 33; 2 Pollock and Maitland, The History of English Law (2d ed), pp 536–538.

one man's interests against another's acts, is common to all areas of the law of torts. In respect of negligence we find it in the concept of the reasonable man, in cases of assault and battery, and trespass, we speak of justification and excuse. In the law of defamation the term employed is "privilege."[3]

There is no need, at this date in our history, to urge that it is necessary to free institutions that the press itself be free. Today it is. The real issue before us is how free. Governmental interference is not the only threat to its freedom. On the contrary, a narrow or restrictive interpretation of the law of privilege in libel actions is equally dangerous. The publisher often faces a cruel dilemma: The more serious the charge of wrongdoing by a public official, more urgent the need for its airing. Yet, the more serious the charge, the greater the libel. It is in this uneasy and menacing situation that the law provides the publisher a sanctuary of sorts, the defense of privilege. It is no fortress, as we shall see. The defense interposed is that of privilege.

This defense rests upon considerations of public policy. "The great underlying principle upon which the doctrine of privileged communication stands," we held in *Bacon* v. *Michigan Central R. Co.*, 66 Mich 166, 169, 170, "is public policy. This is more especially the case with absolute privilege, where the interests and necessities of society require that the time and occasion of the publication or utterance, even though it be both false and malicious, shall protect the defamer from all liability to prosecution for the sake of the public good. It rests upon the same necessity that requires the individual to surrender his personal rights and to suffer loss for the benefit of the common welfare." The term privilege, then, having such origins, relates to a situation or occasion

[3] See Harper, Privileged Defamation, 22 Va L Rev 642, 643.

in which the importance of the criticism uttered by the defendant (for reasons to which we will in due course advert) justifies a modification, or, indeed, a withdrawal, of the protection normally afforded our citizens. See 1 Harper and James, Torts, § 5.25.

The privilege thus afforded is not, however, as the mathematicians would put it, a constant. It varies with the situation, with what is regarded as the importance of the social issues at stake. At one extreme we have loose gossip, thoughtless or malevolent. Here the damage to the individual's reputation is balanced only against the social desirability of the unbridled tongue, the frenetic lashings of the scorpion's tail. Under the statutes of Edgar and Canute the tongue itself was forfeited.[4] Modern law is more lenient. We class it simply as a case of "no privilege" and leave the parties to their proofs. At the other extreme are those occasions wherein the social interest involved in publication is so great as to immunize even deliberately malicious attacks upon one's character. Thus of judicial utterances, "A communication absolutely privileged—as, for instance, words spoken by a judge in his judicial capacity in a court of justice—is not actionable, even though spoken maliciously." *Trimble* v. *Morrish,* 152 Mich 624, 627 (16 LRA NS 1017). So, also, of words spoken in the course of legislative debate.[5]

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[4] 3 Edgar, 4 (c. 946); 2 Canute, 16 (c. 1027–c. 1034), translated in The Law of the Kings of England from Edmund to Henry I (Robertson ed 1925), pp 25, 183.

[5] See Yankwich, The Immunity of Congressional Speech—Its Origin, Meaning and Scope, 99 U of Pa L Rev 960, 962, quoting from a petition addressed by Thomas Jefferson to the Virginia house of delegates:

"'that in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, judiciary and executive.'" (7 Writings of Thomas Jefferson [Ford ed 1896] 158.)

Considerations of social policy similar in principle, but of lesser intensity, result in a privilege not absolute but conditional, or, as sometimes put, qualified, or defeasible. These situations are of a great variety, all of them responding more or less directly to Baron Parke's famous statement in *Toogood* v. *Spyring* (Ex 1834), 1 CM&R 181, 193 (149 Eng Rep 1044) that a publication is privileged when it is "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." These are the occasions in which one has not an absolute but a limited immunity to speak or publish words in and of themselves defamatory. What circumstances, then, present this "occasion" of qualified privilege? Who decides whether or not the occasion presented is such? These are our initial questions.

They are not new to our Court. In *Bowerman* v. *Detroit Free Press,* 287 Mich 443 (120 ALR 1230) we described the term *occasion* as meaning "the extrinsic situation" presented. In that case, as the court pointed out (p 447), "The extrinsic circumstances in the instant case are that defendant's newspaper was reporting a judicial proceeding." Likewise in *Westerhouse* v. *DeWitt,* 215 Mich 295, we approved an instruction defining the occasion as a meeting of the elders of a church, called to consider, investigate, and adjust the differences between its members. The term *occasion,* then, refers to time, place, and people. Was it a testimonial dinner or a gathering in a saloon? Was it a trial at law, legislative debate, or a brawl in the alley? At this point we are looking at the stage, not at the script.

As is true generally with respect to matters of privilege, it is for the court to determine whether or not the external circumstances surrounding the publication are such as to give rise to a privileged

occasion. In so doing, the court is exercising its normal exclusive function of determining what principles of substantive law are applicable to the situation presented. In making the determination as to the privilege of the occasion, the malice charged by the plaintiff is not considered. We so held (in accordance with the great weight of authority) in *Westerhouse* v. *DeWitt, supra,* 299, stating that "the question of privilege is to be determined by the occasion and not the language used." In *Garn* v. *Lockard,* 108 Mich 196, quoting an earlier case, we had held similarly, stating (p 198) that " 'The occasion determines the question of privilege. The language is only proper to be considered in connection with the question of malice.' " See, also, *Fortney* v. *Stephan,* 237 Mich 603, where, as here, the publications charged a law-enforcement official with criminal acts. It was there insisted, on behalf of plaintiff, that there was no question of privilege in the case, since "the publications charge the plaintiff with criminal conduct, and an intentional neglect of his duties as sheriff." We held to the contrary. "Counsel is in error," we held (p 609), "because it is the occasion and not the language of the publication that creates the privilege." Of course, a question may be presented as to whether the extrinsic facts (as distinguished from the words themselves) are such as to justify the finding of an occasion of privilege in the first place. An issue may arise as to whether the defamatory words were spoken on the floor of a senate or the floor of a tavern. But lacking such factual issue as to the occasion, the matter of privilege is for the court.

3 Restatement of Torts, § 619, comment (a), phrases the matter thus:

"Whether a privilege exists at all is a question for the court. This requires the court to determine whether the circumstances under which the publica-

tion was made were such as, under the rules stated in §§ 585–599, to make the occasion privileged. This is true whether the issue involves the existence of an absolutely privileged occasion or one that is only conditionally privileged. If the facts are in dispute, the jury is called upon to consider the evidence and pass upon the issues thus raised. It is for the court, however, to decide whether the facts found by the jury made the occasion privileged or to instruct the jury as to what facts they must find in order to hold the occasion privileged."

With respect, also, to this phase of the case, namely, the establishment of the privilege of the occasion, we will note that the burden is on the defendant. As Prosser puts it (Torts [2d ed], § 95 at p 629):

"The burden is upon the defendant in the first instance to establish the existence of a privileged occasion for the publication, by proof of a recognized public or private interest which would justify the utterance of the words."

To like effect is our decision in *Day* v. *Backus,* 31 Mich 241, wherein it was held (syllabus 1) that:

"In an action of slander for words contained in a letter written by defendant * * * the burden of proof is on the defendant to show that it was thus privileged."

To be distinguished from the privilege of the occasion is the matter of the abuse thereof. The conditional privilege, asserted by defendants in the case before us, is, as the terminology suggests, a privilege subject to defeasance, subject to a condition, the condition being its exercise without abuse. Abuse may take place in many ways. It may arise from lack of good faith in making the publication, *Mundy* v. *Hoard,* 216 Mich 478, the primary motive being the gratification of personal hostility, spite, or ill-

will, or, as sometimes put, *Fortney* v. *Stephan, supra,* publication "with actual malice." Abuse, also, may arise "if the extent of its publication be excessive," *Smith* v. *Smith,* 73 Mich 445, 446 (3 LRA 52, 16 Am St Rep 594). In other words, the protection which the occasion gives is "conditioned upon the manner in which the privilege is exercised. The unreasonable exercise of privilege is an abuse of the occasion which defeats the protection otherwise afforded." 3 Restatement of Torts, § 599, comment (a). The case before us, in fact, involves allegations of precisely such abuse. Here it was asserted not only that the charges against plaintiff were false, but that "they were made maliciously and with spite," whereas in defense thereof it was asserted not only that the newspapers had a qualified privilege but that the statements made were said "in good faith and without malice."

The fact, then, that it is determined that the occasion is conditionally privileged does not mean that the publisher (whether newspaper or other) has carte blanche to deal recklessly with the most jealously guarded possession of a public official, or, indeed, of any citizen, his good reputation. Yet the conditional privilege does afford the publisher a degree of protection. He is not liable for absolute truth, it being required only, as we held in *Powers* v. *Vaughan,* 312 Mich 297, 305, quoting *McAllister* v. *Detroit Free Press,* 76 Mich 338, 356 (15 Am St Rep 318), that the statement made be "honestly believed to be true, and published in good faith." See, also, *Howard* v. *Dickie,* 120 Mich 238, 241;[6] 15 MLP,

[6] "The case, then, must turn upon the question whether malice was made out by proof that the charges made were not true in fact, without additional evidence that they were known by the defendant to be true. If the privilege is to prove of actual value to the defendant, it would seem that it is quite unsafe to say that evidence that the statements made are untrue in fact establishes malice. The truth of the words may always constitute a defense. To remove privilege by

Libel and Slander, § 21. It was once held (*Owen* v. *Dewey,* 107 Mich 67) that a publisher's reasonable belief in the truth of the publication made, or probable cause for belief in truth, or good faith belief in truth, would not relieve him of responsibility for libel, but this case was obviously overruled *sub silentio* in later cases noted herein and has not been cited to this point in the last 50 years.

Here we see the importance of the sources relied upon by the publisher. If the source of the publisher's information is a person or organization of probity and good repute the jury would have warrant to find that he honestly believed that what he published was the truth and, thus, that his qualified privilege was not abused. On the other hand, if his source were notably mendacious there might well be warrant to find otherwise. For this reason, evidence bearing upon the source of the publisher's information is not only relevant but crucial to the question of the protection of the qualified privilege.

The immunity of the conditional privilege, then, fragile though it may be, is not without value to the defendant charged with defamation. The newspaper (or any) publisher, commenting upon the performance of duties by a public official, stands before the jury initially (unlike the malevolently officious fishwife) wearing his vulnerable cloak of privilege. It is

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evidence of the untruth of the words spoken would therefore leave one acting under a qualified privilege in practically no better attitude than one who can plead no such privilege. This question was before the court of queen's bench in *Fountain* v. *Boodle,* 3 QB (Adolph & E NS) 5 (114 Eng Rep 408). It was said by Patteson, J. (p 10), 'Falsehood in fact is no proof of malice, unless the proof involves knowledge of the truth.' In *Sommerville* v. *Hawkins,* 10 CB 583 (138 Eng Rep 231), it was said that the supposition that defendant believed the charge is always to be made when the question is whether a communication is privileged or not. In *Harris* v. *Thompson,* 13 CB 333, 352 (138 Eng Rep 1228), it was said by Williams, J., citing *Fountain* v. *Boodle*: 'The mere circumstance of the statement being false will not suffice to show malice, unless there is some evidence to show that the defendant knew it to be false.' "

the plaintiff's burden to destroy it, to prove such abuse that the privilege is lost. "Where it appears that the occasion is subject to a qualified privilege, the burden is upon the plaintiff to prove the untruth of the statements and actual malice." *Van Vliet* v. *Vander Naald,* 290 Mich 365, 371; see, also, *Timmis* v. *Bennett,* 352 Mich 355; *Bostetter* v. *Kirsch Company,* 319 Mich 547.

In short, at this point 2 questions are presented. The first is whether or not the occasion upon which the words were spoken was a privileged occasion. This determination is for the court and the burden of proof is upon the defendant asserting the privilege. If, however, the privilege is qualified, a further question remains, whether or not the privilege of the occasion was abused. Here the problem is one for the jury, under proper instructions, and with respect to it the plaintiff carries the burden of proof. "The question whether the occasion is such as to rebut the inference of malice if the communication be bona fide is one of law for the court; but whether *bona fides* exist is one of fact for the jury." *Timmis* v. *Bennett, supra* 367, quoting *Bacon* v. *Michigan Central R. Company,* 66 Mich 166, 173.[7]

Such are the controlling issues and such are the parties' burdens with respect thereto. It is just at this point that we find appellants' primary assertion of error. "Was it error," runs appellants' first question, "for the trial court to submit the question of qualified privilege to the jury and to refuse to charge the jury that defendants were protected by qualified privilege as a matter of law?" In more detail, the court, assert appellants, "after defining qualified privilege in general terms, left it to the jury to determine as a matter of fact whether or not defendants

[7] A recent review of the problems presented in comment upon public officers and candidates for office is found in *Catalfo* v. *Shenton* (1959), 102 NH 47 (149 A2d 871).

were entitled to the defense of qualified privilege." The court's charge with respect hereto was in large and pertinent part as follows:

"Now, what is a qualified privilege as claimed by the defense? You are charged that by reason of the circumstances surrounding the publication of the articles and the position and business of the parties a qualified privilege may exist. A qualified privilege is a right to publish the articles if the publishers have reason to believe them to be true, publish them in good faith and without malice. In determining whether or not a qualified privilege did exist in this case, you are charged that the publishers of newspapers owe a duty to publish matters of public interest and are not required to determine the exact truth or falsity of what they publish, provided they believed what they published to be the truth and published them in good faith. You are also charged that facts and circumstances may give rise to a qualified privilege for the protection of the defendants, provided such facts and circumstances exist or are reasonably believed by defendants to exist which cast a duty upon them in the interest of society to write and publish concerning said facts and circumstances.

"Now, there are places in this law suit where without question a qualified privilege would exist, but the declaration is so long, with so many things in it, that it would take me hours to go over the specification, allegation by allegation. If there was an occasion such as I am going to define now to you that did exist in connection with any of these various claims of libel on the part of plaintiff, then the qualified privilege would arise and the burden would be upon the plaintiff, as I will tell you in a moment, to prove both falsity and actual malice."

In so charging, the court was in error. This question of privilege is one for the court itself, and it is not to be divided between court and jury, despite the length and complexity of the charges and counter-

charges, unless there are questions relating to the extrinsic circumstances of the occasion requiring the jury's resolution. Such are not pointed out to us and our examination of the record discloses none. The occasion was clear. A newspaper was commenting upon the performance of duty by a public official. In such circumstances the law does not leave it to a jury to say whether or not the occasion is one of qualified privilege. This question, as we have seen, and for the reasons we have seen, is one of law for the court. Here, as defendants correctly asserted, the circumstances were such as to invest the defendants with a qualified privilege and the jury should have been so informed. It then remains for the jury, under proper instructions, to pass upon the maintenance or the destruction of the privilege.

In view of our remand for new trial a caveat should be observed. With respect to unprivileged defamation, malice in law is implied. "The existence of ill will or the absence of honest belief remains important where the exercise of a qualified privilege is in question, and it may affect the measure of damages to be imposed, particularly as to punitive damages, but it is not at all essential to liability in the first instance."[8] Thus we have held, in a case not involving privilege, that the fact that defendant merely repeated defamatory matter, current in the community, that he believed to be true, went only to mitigation of damages. *Darling* v. *Mansfield,* 222 Mich 278 (34 ALR 1). Here, however, we are in the area of qualified privilege. The showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff, and evidence of lack of malice (*e.g.,* source and bases of information) may be introduced to sustain the privilege in the face of attack upon it, as well as in mitigation

[8] Prosser, Torts (2d ed), § 94, p 602.

of damages should the privilege fall. See *Fortney* v. *Stephan, supra.* Moreover, if evidence of what defendants published concerning others is to be received as evidence of their state of mind, and intent, and as bearing upon the presence or absence of actual malice, it follows from what has been held that they are not to be foreclosed from a showing of their sources of information with respect thereto and their grounds therefor.

Assignments of error not included within the foregoing are deemed unnecessary to decision in the case. There is no merit in the additional issue raised by joint defendant and appellant Floyd McGriff, in his appeal *in propria persona,* that the trial judge "erred in denying his personal bias, prejudice and interest against the defendant in favor of plaintiff and his attorney." The record does not sustain such allegations, either as a matter of fact or of law.

Reversed and remanded for new trial. Costs to abide the final determination of the case.

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

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

EDWARDS and KAVANAGH, JJ., did not sit.

BOARD OF EDUCATION OF PRESQUE ISLE TOWNSHIP SCHOOL DISTRICT NO. 8 *v.* PRESQUE ISLE COUNTY BOARD OF EDUCATION.

1. SCHOOLS AND SCHOOL DISTRICTS—ANNEXATION—OFFICERS.
   An annexed school district must retain its legal entity, and the officers of the district their official duties and responsibilities, for the purpose of winding up the affairs of the district, from and after an official and valid declaration of annexation (CLS 1956, §§ 340.431, 340.440).

2. SAME—ANNEXATION—DECLARATION OF RIGHTS—WINDING UP AFFAIRS.
   The board of education of an annexed school district after an order of annexation by the county school district following a period of nonoperation of a school for more than 2 years may, incident to winding up the affairs of the school district, file a bill for declaration of rights as to validity of the necessary transfers and conveyances of property (CLS 1956, §§ 340.431, 340.440).

3. SAME—LEGISLATURE—CONSTITUTIONAL LAW.
   The legislature has plenary power over the schools and school districts of the State, subject only to constitutional restraint.

4. DECLARATORY JUDGMENT—MOTION TO DISMISS.
   A motion to dismiss a bill for declaration of rights was properly presented, where the bill failed to present a justiciable issue for determination.

5. SCHOOLS AND SCHOOL DISTRICTS—COMPULSORY ANNEXATION—CONSTRUCTION OF STATUTES.
   Allegation that annexed school district had the continued obligation to provide for the education of its children and the right to administer the affairs of such district subject only to the

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 47 Am Jur, Schools § 18 *et seq.*
[4] 16 Am Jur, Declaratory Judgments §§ 9–11.

loss of such financial benefits as may be appropriated by the State legislature *held*, not to have stated a cause of action in that it involved an erroneous interpretation of statute making compulsory the annexation of a school district to one or more operating districts where it has not operated a school for 2 or more years (CLS 1956, §§ 340.431, 340.440).

6. DECLARATORY JUDGMENT—AMENDMENT—CONSTRUCTION OF STATUTES.

Plaintiff school district is accorded 30 days in which to file an amended bill, where original bill for declaration of rights failed to aver a cause of action in that statute was misinterpreted (CLS 1956, §§ 340.431, 340.440; CL 1948, § 650.18).

7. COSTS—SCHOOLS AND SCHOOL DISTRICTS—DECLARATION OF RIGHTS—AMENDMENT OF BILL.

No costs are allowed in suit for declaration of rights by board of education of township school district against county board of education on appeal from order granting latter's motion to dismiss, where such order was based upon a twofold misinterpretation of statutes and additional time is granted for filing an amended bill (CLS 1956, §§ 340.431, 340.440; CL 1948, § 650.18).

Appeal from Presque Isle; Glennie (Philip J.) J. Submitted April 10, 1959. (Docket No. 35, Calendar No. 47,870.) Decided July 14, 1959.

Bill by Board of Education of Presque Isle Township School District No. 8 against Presque Isle County Board of Education, Alpena Board of Education, State Board of Education and Lynn M. Bartlett, Superintendant of Public Instruction, for declaration of rights and injunctive relief. Bill dismissed. Plaintiff appeals. Affirmed, with right granted to file amended bill.

Habermehl & Mandenberg (*Donald M. Habermehl,* of counsel), for plaintiff.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *Eugene Krasicky* and *Joseph*

G. O'Reilly, Assistants Attorney General, for defendants.

BLACK, J. This case, originally assigned to a Brother Justice, was reassigned to the writer during the present June term.

Plaintiff is the board of education of Presque Isle Township School District No. 8.* The school district lies entirely within the township of Presque Isle, in Presque Isle county. No school is or has been operated in the district for some little time. Counsel explain that the "plaintiff board has been endeavoring to build its own school, and had since December, 1955, sought the advice of various school authorities and architects on a building program." Having no school of its own the district transports its pupils to the adjoining Thunder Bay school district and to the Alpena school district.

The school code provides, in section 440 thereof (CLS 1956, § 340.440 [Stat Ann 1957 Cum Supp § 15.3440]), as follows:

"On or after July 1, 1956, any school district which shall not have operated a school within the district for a period of the 2 immediately prior years thereto or for any 2-year period thereafter shall be subject to the provisions of sections 440, 441, 442 and 443 of this chapter.

"On the first day of June 1956, and each June first thereafter, the county superintendent of schools in each county of the State shall compile a list of school districts in such county which have not operated school within the district during the preceding 2 or more years, and within 10 days he shall notify in writing the board of education of each such district that it must comply with the provisions of

* The briefs of both parties apply interchangeably the term plaintiff to both the board and the school district. We shall restrict the term "plaintiff" to the technical plaintiff, which is the board; the school district to be described as such.

sections 440, 441, 442 and 443 of this chapter.* Each such district shall within a period of 1 year following this official notification, (1) attach itself as provided by this act either totally or in part to 1 or more operating districts, or (2) reopen and operate its own school."

Pursuant to such provisions, and on June 8, 1956, the county superintendent of schools notified plaintiff that the school district must, within 1 year, reopen and operate its own school or attach itself to 1 or more operating districts. Plaintiff, and the district, refused to comply with either alternative. Thereafter the county board of education, under date of July 18, 1957, officially declared that the school district "was annexed to the city of Alpena school district, said annexation to become effective August 1, 1957." Plaintiff then appealed (as was its right) to the State board of education, which board confirmed the statutory declaration of the county board. Plaintiff subsequently filed this bill for declaration of rights and injunctive relief against the county board of education, the State board of education, and other named defendants. The State board moved to dismiss. Such motion was granted and a decree of dismissal was entered. From such decree plaintiff appeals.

The position of defendants is, in essence, that the school district has been nonexistent since the effective date of the annexation as determined by the State board. Upon this premise it is asserted that plaintiff cannot bring action in the courts, for declaration of rights or otherwise. The legislature, say defendants, "is enabled to dissolve its own creature," has done so, and therefore there can be no controversy and no appeal because "the final voice

* CLS 1956, §§ 340.440–340.443 (Stat Ann 1957 Cum Supp §§ 15.3440–15.3443). Note that provision in section 441 relative to appeal has been amended by PA 1958, No 195.—REPORTER.

of authority, the state legislature, has spoken, has ordered their [the school district's] dissolution, and * * * has proceeded with finality." We do not agree.

Under defendants' theory, combined with the doctrine of exhaustion of administrative remedies, judicial review would be unavailable as well as unavailing following an order of annexation made on actual or claimed authority of the mentioned statutory provisions. Prior to final action of the State board there could be no exhaustion of the administrative remedies set forth in the act. Subsequent to action of the State board the district has lost its legal capacity to sue. Thus, following defendants to their asserted conclusion, it appears that the door to judicial review has been closed and bolted, from the very first, with the mortal remains of this school district left outside.

The statute makes no attempt to so neatly abrogate judicial review. If it did, a new question might present itself. The school code provides (section 431), with respect to annexation procedures:

"Any school district shall become annexed to another school district whenever the board of the annexing district shall have by resolution so determined and a majority of the qualified school electors of the district becoming annexed, voting on the question at an annual or special election shall have approved such annexation. The vote on the question shall be by printed or duplicated ballot: Provided, That before such election shall be held, the board of the annexing district shall obtain the approval of the superintendent of public instruction of the proposed annexation: Provided further, That the election in the district to be annexed must be held within 90 days after the passage of the resolution by the board of the annexing district.

"It shall be the duty of the secretary of the board of the district in which the election was held to file within 10 days after such election in said district a certified statement of the vote for annexation with the secretary of the board of the annexing district. Within 15 days after such election approving the annexation, the members of the board of the annexed district shall account to the board of the annexing district for the funds and property in their hands as such officers, and shall turn over the same to the board of the annexing district. All property and moneys belonging to the annexed district shall become the property of the annexing district and, except as hereinafter provided, all outstanding indebtedness of the annexed school district shall become the liability of the annexing district. Upon receipt of such funds and property by the board of the annexing school district, the officers of the annexed district shall be released from liability therefor and their offices terminated. The effective date of annexation shall be the date of the annexation election: Provided, That if an election is required in the annexing district under section 437 of this act, the effective date of the annexation shall be the date of the election in the annexing district." (CLS 1956, § 340.431, as amended by PA 1957, No 9 [Stat Ann 1957 Cum Supp § 15.3431].)

We find and hold from these and correlative provisions of the code that an annexed school district must retain its legal entity, and the officers of the district their official duties and responsibilities, for the purpose of winding up the affairs of the district, from and after an official and valid declaration of annexation. There must, for instance, be conveyances and transfers of properties and funds of the district. So much the attorney general concedes by opinion No 3114 of December 6, 1957 (1 OAG 1957, p 537), and it is at this exact point that plaintiff's legal position becomes clear. Asserting that there

is genuine doubt and controversy as to the right of the ordered transferee to receive such funds and properties, and as to the duty of the ordered transferor, plaintiff seeks a judicial determination of validity of such necessary transfers and conveyances. The matters with respect to which plaintiff seeks such determination are essential to the consummation of the annexation as ordered and may reasonably be regarded as a part of the requisite winding up of the affairs of the district. In these circumstances there is no legal incapacity on the part of plaintiff to seek judicial aid or review provided, of course, its pleadings fairly present a justiciable controversy in some meritorious respect.

This is not to suggest that there is some legal infirmity in the statutory proceedings exhibited by this bill. We have repeatedly held that the legislature has plenary power over the schools and school districts of the State, subject only to constitutional restraint (See *Child Welfare Society of Flint* v. *Kennedy School District,* 220 Mich 290). In this instance the legislature has provided that the county board (subject to the specified administrative powers of the State board) may take certain prescribed action in respect of school districts which have failed to operate schools for a given period of time. After proper warning and notice they are to be annexed or attached to another operating district. The statute does not, as plaintiff asserts, contemplate the continued indefinite existence of the closed school district. To the contrary, the statute in its present application directs final dissolution of the district so annexed, subject only to necessary winding up processes.

The chancellor dismissed plaintiff's bill on ground that the school district had lost its corporate entity and so had no legal authority to bring this action.

This, as we have seen, was error. The dismissal, however, was proper for another reason. No issue of fact was presented by the bill, and its declaratory ground is pure legal quicksand, that is, the bill stands or falls on plaintiff's impotent allegation that the annexed school district had "the continued obligation to provide for the education of its children, and has the right to administer the affairs of Presque Isle Township School District No. 8, subject only to the loss of such financial benefits as may be appropriated by the Michigan legislature." Such is not a proper interpretation of the statute and, no constitutional or other ground of judicial consideration having been pleaded, we find that no cause, and no subject of declaratory consideration, is presented by this bill. It follows that the motion to dismiss was properly granted.

The chancellor's decree of dismissal will be affirmed, subject to right of the plaintiff, and of the township school district in case it should ask and obtain leave to enter as a party plaintiff, to file within 30 days an amended bill. For proper practice in such respect, see CL 1948, § 650.18 (Stat Ann 1943 Rev § 27.2608); *Lamb* v. *Jeffrey,* 41 Mich 719; *Melvin* v. *Reading,* 346 Mich 348. No costs.

DETHMERS, C. J., and CARR, KELLY, EDWARDS, and VOELKER, JJ., concurred.

SMITH and KAVANAGH, JJ., did not sit.

TRIPLEX ENGINEERING COMPANY *v.* COMMERCIAL CONTRACTING CORPORATION.

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE—CONTRACTS—CHANGE OF DESIGN.

   Questions presented for consideration by the Supreme Court in review of action of assumpsit for sums alleged to be due in the manufacture of new automation equipment were not reviewable, where based on erroneous premise that the only valid undertakings of the parties were as shown in the written instruments and it appears there were changes of design and specifications found to be necessary as work progressed on the special equipment.

2. SAME—NONJURY CASE—AUTOMATION EQUIPMENT—EXTRAS—SET-OFF AND RECOUPMENT.

   Finding of trial court in nonjury case that plaintiff was entitled to compensation for "extras" and denial of relief to defendant in its claim of set-off and recoupment in action to recover balance due on work performed in the manufacture of new automation equipment *held,* well within the range of the testimony.

Appeal from Wayne; Fitzgerald (Neal E.), J. Submitted May 12, 1959. (Docket No. 69, Calendar No. 47,716.) Decided July 14, 1959.

Assumpsit by Triplex Engineering Company, a Michigan corporation, against Commercial Contracting Corporation, a Michigan corporation, for sums due on construction of factory equipment. Claim of set-off and recoupment. Judgment for plaintiff. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 12 Am Jur, Contracts § 427 *et seq.*
[2] 12 Am Jur, Contracts § 325.

Glassen, Parr & Rhead and *Burgess & Mead,* for plaintiff.

Schaeffner & Sanders, for defendant.

BLACK, J. Between March 6, 1956, and May 25, 1956, defendant issued to plaintiff 4 purchase orders for the designing, manufacturing and installation of special machine tool and foundry equipment in the "new foundry building" of the New Haven Foundry Company, of New Haven. The contemplated work was new to both contracting parties (it is referred to in the record as "the automation equipment"). Difficulties, ultimately found insurmountable, led to changes of design and specifications and, finally, to dispute and litigation. Certain payments were made by defendant to plaintiff on account of the agreed venture leaving, according to plaintiff, a balance of $11,286.28 owing plaintiff by defendant.

For the recovery of such disputed amount this suit was instituted. Defendant denied owing plaintiff any balance and filed notice of set-off and recoupment planted upon defective workmanship and breach of contract "by stopping all work and performance on such contracts." Trial to the court without a jury resulted in an opinion of the trial judge holding generally for plaintiff and determining that defendant was obligated to plaintiff in the sum of $7,700. Judgment for plaintiff entered accordingly. Defendant appeals.

This is another case where our membership finds it difficult to locate and define a reviewable question of substance. As the trial judge noted at outset of his opinion, "This case presents a pure question of fact." Against this apparent background of disputed fact defendant insists that the trial judge

was wrong. It proffers, for review here, 3 stated questions, which questions appear in the margin.*

Stated questions 1 and 2 present no point for appellate consideration since the major premise of each proceeds on the erroneous theory (see *Jacob* v. *Cummings,* 213 Mich 373) that the only valid undertakings of the parties were as shown in the written instruments (and related writings) to which we have referred.

This leaves stated question 3 only for consideration. With respect to such question we find that defendant's brief fails to support its "clear preponderance" thrust. Far from being persuaded that the trial judge erred in appraising the proof for and against the disputed claims of plaintiff for "extras" and of defendant for recovery by cross-action for breach, it appears—so far as printed words alone may disclose—that the proof amply supports the trial court's judgment. That the experiment was costly no one can deny. That plaintiff duly performed its progressively agreed part of the bargain is a finding of fact which is well within the range of the testimony. Nothing further need be said.

Affirmed. Costs to plaintiff.

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

* "1. Did the trial court ignore the express and unambiguous terms of the contracts between the parties in finding that plaintiff was entitled to further compensation?

"2. In an action to recover for services rendered where each party relies upon the existence of an express contract, unambiguous in its terms, is it error for the court to receive testimony as to the total value or cost of plaintiff's services for the purpose of recovery under the common counts?

"3. Is the finding of the trial court contrary to the clear weight of the evidence?"

KEISER *v.* ENTERPRISE FOUNDRY COMPANY.

MASTER AND SERVANT—FACTORY EXPEDITER—CONTRACTS—DAMAGES—SCOPE OF AUTHORITY.

Factual issues in action against foundry company by factory expediter on (1) terms of contract, (2) amount of damages and (3) scope of authority of person who hired plaintiff under an oral contract of employment, submitted to jury *held,* properly determined in favor of plaintiff under record presented.

Appeal from Wayne; Weideman (Carl M.), J. Submitted June 2, 1959. (Docket No. 8, Calendar No. 47,645.) Decided July 14, 1959.

Assumpsit by William M. Keiser against Enterprise Foundry Company, a Michigan corporation, for sums due on employment contract. Verdict and judgment in common pleas court upheld in circuit court. Defendant appeals. Affirmed.

Langs, Molyneaux & Armstrong (*Neil A. Patterson,* of counsel), for plaintiff.

Martin J. Ewald, for defendant.

BLACK, J. This is another of the mounting plethora of cases, presenting no substantial question for review, we find coming here by appeal of right. Like others of its kind, it bids us hasten toward presently considered amendments of section 1 of Court Rule No 60 (1945).

REFERENCES FOR POINTS IN HEADNOTES

35 Am Jur, Master and Servant § 62.

Plaintiff, formerly employed by defendant, sued defendant in Detroit common pleas to recover the sum of allegedly unpaid salary and bonus said to be owing him on account of breach, by defendant, of an oral contract of employment. The terms of the contract were and are in dispute. Such dispute of fact is the core of the case.

Plaintiff alleged and testified that he was engaged by defendant as a factory expediter; that the agreement of the parties stipulated he would be given a minimum of 90 days of employment at a monthly salary of $600 and, in addition, would receive a bonus "that would be in an amount sufficient to assure him a monthly income at least equal to his average monthly income of $900" (at previous employment); that he commenced working for defendant March 5, 1956 and worked until April 27, 1956, on which latter date he was discharged by defendant; that his discharge constituted a breach of the mentioned contract of employment and, on account of such breach, that he was and is entitled to recover from defendant the sum of $1,630.78.

Defendant denied that it hired plaintiff for any minimal period whatever. It insisted below and insists here that plaintiff was hired "on a trial basis and could be discharged without notice." Such was the naked and triable single issue.

Such issue was tried to court and jury in common pleas and resulted in a verdict and judgment for plaintiff in the above amount. Defendant duly appealed to the Wayne circuit court. That court found no error and entered a judgment of affirmance. From such judgment defendant has appealed to this Court.

Defendant claims, on appeal, that Judge Vokes (of common pleas) erred (a) in excluding certain testimony offered by defendant; (b) in permitting the jury to return a verdict in the above amount

because such verdict "under the facts most favorable to the plaintiff, would have been at least $300 less than that amount," and (c) in failing to hold that a Mr. Cuddy, "a director, shareholder and supervisor of defendant corporation" with whom plaintiff negotiated and concluded the contract in question, had no authority to contract in behalf of defendant for payment of a bonus to any employee.

We have examined the presented questions and find no merit in any one of them. As noted at outset of this opinion, a factual issue only was proffered. Such issue was determined by the appointed triers of fact and no error affected their deliberations. Having so concluded our appellate function is exhausted.

Affirmed. Costs to plaintiff.

KELLY, SMITH, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred with BLACK, J.

DETHMERS, C. J., and CARR, J., concurred in the result.

PEOPLE *v.* HEFLIN.

APPEAL OF MICHIGAN SURETY COMPANY.

1. RECOGNIZANCES—EXTENT OF LIABILITY—DISCRETION OF COURT.
Trial judge who forfeited full amount of bail bond for non-appearance of accused at time of opening day of court and at time of trial did not abuse discretion in not limiting amount of judgment to amount of out-of-pocket loss suffered by county on account of accused's failure of timely appearance for trial (CL 1948, § 765.28).

2. SAME—DISQUALIFICATION OF JUDGE.
Judge before whom person accused of crime failed to make timely appearance was not disqualified from conducting proceedings relative to forfeiture of the bond, especially where it shows various means were used in attempting to apply pressure on the judge in favor of relief from the recognizance (CL 1948, § 765.28).

Appeal from Lenawee; Martin (Rex B.), J. Submitted June 4, 1959. (Docket No. 33, Calendar No. 47,760.) Decided July 14, 1959.

Andrew Heflin did not appear at time set for his criminal trial and his bond was forfeited. On order to show cause, judgment was entered against Michigan Surety Company, from which it appeals. Affirmed.

Paul L. Adams, Attorney General, *Samuel J. Torina*, Solicitor General, and *Kenneth B. Glaser, Jr.*, Prosecuting Attorney, for the people.

Williams & Williams (*Lewis R. Williams, Jr.*, of counsel), for defendant surety company.

REFERENCES FOR POINTS IN HEADNOTES

[1] 6 Am Jur, Bail and Recognizance § 221.

One Andrew Heflin, formerly of Chicago, was charged in Lenawee county "with the crime of carrying a concealed weapon contrary to the statutes in such case made and provided." He was released pending trial upon filing of a statutory recognizance. The recognizance was executed by appellant Michigan Surety Company in the penal sum of $1,000.

Trial counsel for Heflin was appointed by the court. Heflin did not appear at the opening of the term as conditioned by the bond. The following record was made January 13, 1958, on the occasion:

"Court being in session, The people being represented by Mr. Kenneth B. Glaser, Jr., prosecuting attorney, the respondent not present in court, but represented by his counsel, Mr. James C. Beardsley, the case was called at the opening of the January term of court, as follows:

"The Court: People vs. Andrew Heflin. Mr. Beardsley, is your client here?

"Mr. Beardsley: He is not here, Your Honor, not entirely his fault. I have a very uncertain address where he is concerned. He may not have received my letter in time. I assume he will be here by the trial date.

"The Court: Are we going to try that matter or aren't we?

"Mr. Beardsley: I assume so, yes.

"The Court: Set that down for the 28th then."

Moved to action by the foregoing, defense counsel wrote Heflin January 13th as follows:

"Since speaking to you I have learned that your case is set for Tuesday, 28 January at 9 a. m. Please plan to call upon me at my office not later than the afternoon of 27 January."

The letter was sent by registered mail. It was received by Heflin in Chicago on January 16th.

The case was called up for trial at the opening of court, January 28th. The jury panel was present. So were the people's witnesses. Heflin was not on hand. After some colloquy between the trial judge and defense counsel, the trial judge formally ordered that Heflin's bail be forfeited and that a bench warrant for Heflin's rearrest should be issued forthwith.

About noon the same day Heflin appeared at the Lenawee county courthouse, insisting that the delay of his appearance before the court was due to his missing a bus the night before. Heflin then was arrested. Five days later he entered a plea of guilty as charged. Sentence followed later. So much for Mr. Heflin.

February 13, 1958, on petition of the prosecuting attorney, the trial judge (Hon. Rex B. Martin of the 39th circuit) issued an order directing appellant's appearance before the court to show cause why judgment should not enter against it in the amount of the statutory recognizance, pursuant to CL 1948, § 765.28 (Stat Ann 1954 Rev § 28.915). Appellant thereupon petitioned the court "for an outside judge," which petition was denied. Judgment against appellant followed, under the mentioned statute. From such judgment the named surety has taken this appeal.

BLACK, J. (*after stating facts*). Two allegations of error are presented. The first is that Judge Martin was guilty of an abuse of discretion in refusing to grant appellant's motion for limitation of judgment to the sum of $126.06, which sum represents appellant's proven calculation of the out-of-pocket loss suffered by Lenawee county on account of Heflin's failure of timely appearance for trial. The second is that Judge Martin should have disqualified himself with respect to proceedings under the above statute.

As in *People* v. *Benmore,* 298 Mich 701, we find no evidence of an abuse of discretion in this record. Appellant became responsible for Heflin's timely appearance and agreed to pay in default thereof. Heflin did not appear on time. His excuse is not very convincing considering the delay of start, from Chicago for Adrian, until late in the evening previous to the morning of trial. More might be said of the excuse, including the round-about route selected for travel (Chicago to Toledo to Adrian), but we think it quite unnecessary.

The second point—that Judge Martin should have disqualified himself—borders on the frivolous. That the judge was exercised is evident; also understandable. The record shows that appellant, by various means, attempted to apply pressure on the judge in favor of relief from the recognizance. The judge indignantly rejected such effort. Far from criticizing his action in such regard, we are led to commendation thereof. He said, among other things, leading up to his decision:

"In addition to that the court got some other calls from other persons, one call from a Democratic State senator in Detroit who had been called by the bonding company agent. He asked me to do everything I could not to hurt his good friend. * * *

"The prosecutor's office got calls from people who claimed they were near the Republican headquarters up in Lansing—which I hardly think was proper in this case—and asked in behalf of the grand old party that no action be taken. * * *

"Harry Goldfarb, claiming to be the general manager of the bonding company, called me * * * [later] and informed me in no uncertain terms the court had no business to forfeit the bond and that wasn't the way things were done, and the court should learn better than that.

"I asked him if he had offered to send the money in. He said that he would gladly send the $1,000 over in this case provided we didn't cash it, a check for the $1,000.

"Now counsel here has likewise made an offer to have the money turned in. No money has been forthcoming."

Affirmed. Costs to plaintiff.

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

LOBER *v.* SKLAR.

LYNN *v.* SAME.

1. AUTOMOBILES—MOTORCYCLES—INTERSECTIONS—THROUGH HIGHWAYS—SPEED—NEGLIGENCE.

   Whether westbound defendant motorist on cross street, who had stopped before entering intersection with through highway and had proceeded past center line thereof when hit by southbound motorcycle on which plaintiff minors were riding, was guilty of negligence was properly left to jury, where testimony was in conflict as to speed of motorcycle.

2. SAME—MOTORCYCLES—INTERSECTIONS—UNAVOIDABLE ACCIDENT—INSTRUCTIONS—CORRECTIVE SUGGESTION.

   Instruction in action arising from collision at intersection between westbound motorist and southbound motorcyclist that "if the accident was unavoidable and did not result from any negligence of the defendant, then there can be no recovery

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REFERENCES FOR POINTS IN HEADNOTES

[1] 5A Am Jur, Automobiles and Highway Traffic § 321 *et seq.*
[3] 53 Am Jur, Trial § 842.

by either plaintiff" although erroneous, was not reversible, in view of proper instructions given on issues of negligence, proximate cause and contributory negligence, where neither party gave corrective suggestions.

3. APPEAL AND ERROR—INSTRUCTIONS—CHARGE AS A WHOLE.
The presence or absence of reversible error in jury instruction is properly judged by reading and considering the charge as a whole.

Appeal from Wayne; O'Hara (Chester P.), J. Submitted June 5, 1959. (Docket Nos. 42, 43, 44, 45, Calendar Nos. 48,034, 48,035, 48,036, 48,037.) Decided July 14, 1959. Rehearing denied October 12, 1959.

Case by Alan Lober, a minor by his next friend, Esther Lober, against Eugene Sklar, Elmer Marcus and Lillian Marcus for personal injuries sustained in collision of motorcycle and automobile. Similar action by Wilson B. Lynn, a minor by his next friend, Jean Lynn. Derivative suits by Mack Lober and John Lynn.

Four cases consolidated for trial and appeal. Verdict and judgment for defendants. Plaintiffs appeal. Affirmed.

I. Goodman Cohen, for plaintiffs.

Cary, BeGole & Martin (*Laurence A. Bohall,* of counsel), for defendants.

BLACK, J. Four suits for negligence are before us. Two of the 4 are derivative. All were consolidated for trial to court and jury. The jury found in favor of defendants with respect to all causes. Judgment thereupon entered according to the common verdict. Plaintiffs appeal.

Plaintiff Wilson B. Lynn was riding his motorcycle in a southerly direction on Wyoming avenue, in Detroit, approaching the intersection of Thatcher avenue. Plaintiff Alan Lober was riding on the rear seat of the motorcycle. Defendant Eugene Sklar, driving an automobile owned by defendants Marcus, approached the intersection on Thatcher from the east. Wyoming is a so-called "through street." Traffic approaching Wyoming from either direction on Thatcher is required to stop, prior to entry into the intersection, by command of a standard "stop" sign. Thus we perceive the setting of an intersectional collision with usual result.

Sklar brought defendants' car to a stop several feet east of the stop sign. Here his view each way on Wyoming was partially obstructed. He proceeded slowly out into the intersection to a point where his car was "approximately even" with cars parked on the east side of Wyoming. Here his view to the northward—on and along Wyoming—was unobstructed for the length at least of a long city block. Continuing, as he says, to make observations each way, Sklar proceeded slowly out into the intersection with intention of continuing westward on Thatcher. He says, with respect to his observations northward, that he saw a car approaching from that direction. Such car, driven by witness Beyer, was on the occasion of Sklar's last observation "a little over 3/4 of the way down" (meaning 3/4 of the city block to northward). Sklar did not see the southbound motorcycle at any time. The motorcycle, proceeding straight ahead on the west side of Wyoming—at the plaintiff-testified rate of 20 to 25 miles per hour—, overtook and passed the southbound Beyer car when the latter was about 600 feet from the intersection of Thatcher. It collided in the intersection with the right rear portion of de-

fendant's car after that car had fully cleared the center line of Wyoming. The impact was severe, sufficient to drive the rear end of defendant's car southward and southwestward to extent of an arc measuring, according to witness Beyer, "between 45 and 60 degrees, I would say."

First: Citing *Zuidema* v. *Bekkering,* 256 Mich 327; *Kok* v. *Lattin,* 261 Mich 362; *Cramer* v. *Brictson,* 286 Mich 224; *Hubbard* v. *Canavara,* 295 Mich 499; *Heckler* v. *Laing,* 300 Mich 139; and *Carrothers* v. *French,* 309 Mich 340, plaintiffs insist that the trial judge should have found defendant Sklar guilty of causal negligence as a matter of law and that the jury, on their motion, should have been so instructed with respect to all 4 cases, leaving only the question of contributory negligence of plaintiff Wilson B. Lynn (and damages if allowed) open to jury consideration. Plaintiffs' motion in such regard is built upon the familiar (if not over-familiar; see discussion in *McKinney* v. *Yelavich,* 352 Mich 687, 697–699) proposition that the oncoming motor vehicle "was plainly there to be seen" and that Sklar, not having observed it at any time despite successive observations in that direction, must be held by the court as having negligently proceeded into and across the intersection with causal effect. The motion was properly denied considering *McKinney* and *Baker* v. *Gushwa,* 354 Mich 241, 247, and we find by force of *McKinney's* reasoning that the trial judge did not err either in refusing to direct a verdict for any one of the respective plaintiffs or in refusing to peremptorily instruct that defendant Sklar was guilty of causal negligence.* Whether a motorist of

* See *Parsons* v. *Hoffman,* 352 Mich 8, holding that a motion for directed verdict by the plaintiff in a negligence case is to be considered the same as a corresponding motion for directed verdict by the defendant, that is to say, the testimonial record and legitimate inferences to be drawn therefrom are to be considered in light most favorable to the party against whom the movant would have per-

reasonable prudence would and should, in the presented circumstances, have made timely discovery of imminent approach of the motorcycle depended on sharply disputed issues of fact (especially the contentious question whether the rate of approach-speed of the motorcycle was as claimed by plaintiffs). Manifestly, such issues were properly and exclusively solvable in the jury room.

Second: The trial judge instructed the jury:

"If the accident was unavoidable and did not result from any negligence of the defendant, then there can be no recovery by either plaintiff."

Relying on *McClarren* v. *Buck,* 343 Mich 300, plaintiffs say the quoted instruction was erroneous. We agree, for reasons given in *McClarren.* In most negligence cases, and so is it here, an allegation (whether denied or not) that the "accident" was "unavoidable" constitutes a false and immaterial issue. In these cases of Lober and Lynn the jury was properly instructed upon the triable issues of negligence, proximate cause and contributory negligence (and damages if right to recover damages be found). The trial judge should have stopped there. Why? Because the conflicting allegations and testimony of the parties admitted of no middle ground; no finding of an "unavoidable accident."

Plaintiffs' undeviating theory was and is that defendant Sklar was guilty of actionable negligence. Defendants' opposing and consistent theory is that the proximate cause of the collision was excessive speed of the motorcycle and careless driving thereof. Such were the issues to which and only which (plus the subject of damages) the trial judge should have confined himself in addressing the jury. One theory

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emptory instruction. The only difference is that the plaintiff, bearing as he does the general burden of proof, finds his motion more difficult of persuasion and inducement.

or the other was right in point of fact. There was no proof, or inference or claim from proof, that the collision could have occurred without causally connected negligence on the part of either, or both, of the 2 vehicle operators. We hold in these circumstances that the quoted instruction constituted error.

Third: Was the quoted instruction prejudicial and so reversible? We hold in negation. In *Gilson* v. *Bronkhorst,* 353 Mich 148, a majority of our membership recorded dim view of allegations of reversibly erroneous jury instructions where the trial judge's aberration is minor and complaining counsel indicate—even on request of the trial judge for corrective suggestions—no thought at the time that such aberration is or will be prejudicial. Here, like *Gilson,* the trial judge inquired of counsel whether they wished "anything else?" To this plaintiffs' counsel responded with respect to other phases of the charge but made no mention of the judge's journey into the realm of "unavoidable accident." In these circumstances our ruling pursues *Gilson* and, lest it be misunderstood, we affirm again that which was said in *Gilson* by footnote (p 160):

"We do not intimate that counsel must except to the charge either as to parts or the whole thereof. Neither must objection be made to save for review that which fairly amounts to reversible error of instruction or failure of instruction. We do suggest, following *Labar, Robertson and Kaminski,** that counsel will do well—preferably at chambers after the jury has retired—to call up for immediate repair as indicated any apparent inadvertence or possibly confusing ambiguity of language the trial judge has isolatedly employed. We judge the importance of errors of such nature, and their consequent effect as being either reversible or harmless, in part

* *Labar* v. *Crane,* 56 Mich 585; *Robertson* v. *Hayes,* 261 Mich 200; *Kaminski* v. *Grand Trunk W. R. Co.,* 347 Mich 417.—REPORTER.

by the attitude of counsel toward same when time yet remains to set things right in the jury room."

Generally, this conclusion was presaged by *Huffman* v. *First Baptist Church,* 355 Mich 437, 445, 446. On that occasion Mr. Justice VOELKER, having first redeclared the general rule that the presence or absence of reversible error of jury instruction is properly judged by reading and considering the charge as a whole, said for us:

"We are so often compelled to repeat this elementary proposition that we are moved to observe that it is probable that few trial judges, however experienced or learned, if given more time for meditation and research, would again give precisely the same jury instructions that they actually gave. Upon further reflection their instructions would doubtless be less halting and redundant, infinitely clearer and more cogent and more on target—much like the compelling jury arguments most lawyers make to their bedroom ceilings the night after the trial is over. It follows that the job of an appellate court in appraising jury instructions (usually given by the busy trial judge immediately following the tug and heat of the trial) is not to determine whether we would select his instructions as models of literary excellence and pearls of legal wisdom were we editing a form book on the subject; rather our role is mercifully more limited and our test less severe, namely: Did the instructions as given adequately inform the jury on the applicable law reflecting and reflected by the various evidentiary claims in the particular case? In other words, in the idiom of the day, we simply ask ourselves: Were the instructions understandable and did they give both sides a 'fair shake'? We must not also demand the subtle reasoning of a Socrates or the gem-like prose of a Walter Pater. Few jury verdicts anywhere would stand if that were the criterion."

No other allegation of error requires discussion. Judgment affirmed. Costs to defendants.

SMITH, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred with BLACK, J.

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

CHURUKIAN *v.* LAGEST.

1. APPEAL AND ERROR—DIRECTED VERDICT—EVIDENCE.

   The Supreme Court views the facts from the point of view favorable to plaintiff which a jury might have taken of them on an appeal from judgment entered after verdict was directed for defendant on the ground of plaintiff's contributory negligence.

2. AUTOMOBILES—THROUGH HIGHWAYS—STOPPING—YIELDING RIGHT-OF-WAY.

   A motorist approaching a through highway on a subordinate street has the duty to stop and yield the right-of-way to traffic lawfully approaching on the through highway, the purpose of the requirement of stopping being to require that he yield the right-of-way to such lawfully approaching traffic on the through highway (CLS 1956, §§ 257.614, 257.651).

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 945.

[2–4] 5A Am Jur, Automobiles and Highway Traffic § 321 *et seq.*

Liability for accident at highway intersection as affected by reliance upon or disregard of traffic sign, signal or marking. 164 ALR 8.

[5] 3 Am Jur, Appeal and Error § 246.

[6] 38 Am Jur, Negligence § 217 *et seq.*

Doctrine of last clear chance. 92 ALR 47, 119 ALR 1041.

[7] 38 Am Jur, Negligence § 293.

3. SAME—THROUGH HIGHWAYS—YIELDING RIGHT-OF-WAY—INTERSECTIONS.

The purpose of a through highway, to move a large volume of traffic at relatively high speeds, requires that drivers thereon be accorded more than the privilege of going through the intersection in advance of a car on a subordinate road which reaches the intersection at the same time (CLS 1956, § 257.651).

4. SAME—THROUGH HIGHWAYS—STOPPING—YIELDING RIGHT-OF-WAY—CONTRIBUTORY NEGLIGENCE.

Plaintiff motorist who approached a through highway at 1:30 a.m. and stopped in obedience to a red flasher light but started up again still had the duty to yield the right-of-way to defendant's visibly approaching car on the through highway that was travelling at a legal speed and which did not change its course or take any unexpected action, hence, directed verdict for defendant on ground of contributory negligence of plaintiff was proper (CLS 1956, §§ 257.614, 257.651).

5. APPEAL AND ERROR—QUESTIONS REVIEWABLE—ISSUE NOT PRESENTED TO TRIAL COURT.

An issue which was not presented to the trial court for determination may not be raised on appeal.

6. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE—SUBSEQUENT NEGLIGENCE.

The doctrine of last clear chance or subsequent negligence would not apply where plaintiff's contributory negligence continued up to the very point of impact.

7. SAME—CONTRIBUTORY NEGLIGENCE—PRESUMPTIONS—EVIDENCE.

A plaintiff is not entitled to the benefit of a presumption of freedom from contributory negligence, where there is ample testimony from plaintiff to establish her own negligence.

Appeal from Oakland; Hartrick (George B.), J. Submitted January 7, 1959. (Docket No. 21, Calendar No. 47,554.) Decided July 14, 1959.

Case by Mary Churukian against Clayton LaGest for injuries sustained in automobile collision. Directed verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Davidow & Davidow (*Larry S. Davidow,* of counsel), for plaintiff.

Patterson & Patterson and Barrett, for defendant.

EDWARDS, J. Plaintiff suffered severe injuries in an automobile accident which occurred Sunday, June 20, 1954, at approximately 1:30 a.m., at the intersection of Chicago boulevard and Telegraph road. She sued the owner of the other automobile involved in the collision, in Oakland county circuit court under the owner liability act (CLS 1956, § 257.401 [Stat Ann 1952 Rev § 9.2101]). After the completion of plaintiff's proofs the judge directed a verdict for defendant on the grounds of plaintiff's contributory negligence.

On appeal to this Court in such a situation we have repeatedly emphasized that we view the facts from the point of view favorable to plaintiff which a jury might have taken of them. *Gapske* v. *Hatch,* 347 Mich 648; *Hopkins* v. *Lake,* 348 Mich 382.

These then are the facts for purposes of this appeal:

Plaintiff was returning from a graduation party at a married sister's home. With her in the car were her mother, her sister and a friend. There had been no drinking.

Plaintiff's testimony concerning the crucial facts of the accident is as follows:

"*A.* As I approached Telegraph, I slowed. I could see the flasher from far away and I slowed down slowly. I didn't come to an abrupt stop. I came to a stop at Telegraph road. There was a red blinker light there. I came to a complete stop. After I stopped—Chicago is 2 lanes, like this, and then there is a cement part where you can turn, it widens out and I was in the second lane and I

stopped and looked to my right and then I looked to my left for approaching traffic and I saw nothing.

"*Q.* Did you see any traffic on your right when you looked?

"*A.* No, there were no cars that way.

"*Q.* When you looked to your left was there any traffic approaching from your left?

"*A.* No.

"*Q.* Then what did you do?

"*A.* I put my car in motion and again I thought I better look to the right again and I looked and saw some lights, it had been raining that day and it was misty outside and I could see some lights far away. I thought I had plenty of time to get through.

"Having looked to my right and to my left, I saw nothing at that time and of course I thought I should start up, I couldn't sit there all night and I started up. I couldn't tell you how far away those lights were. I could just see them. I couldn't see what they were, just some lights. And I thought I had plenty of time to get through. If I stopped there might be traffic coming from the left. I had made a complete stop and I had observed and upon not seeing anything, I thought I could cross. * * * I saw the lights but I didn't know what they were at the time or how close they were to me and that is the only thing I knew about it.

"*Q.* Have you any recollection of a collision?

"*A.* No, sir.

"*Q.* What is the last you remember that night?

"*A.* Putting the car in motion and observing the lights and then the lights in the hospital."

And on cross-examination:

"*Q.* Now, could you give me an estimate as to how fast your car was traveling at that time in miles per hour, whether 10 miles an hour or 5 or 15?

"*A.* Might I ask, previous to stopping or after?

"*Q.* Perhaps I didn't ask it correctly. At the time you made the observation you just described, how fast would you say you were going at that time?

"*A.* I had started up from a standstill, I wouldn't say more than 5 miles an hour.

"*Q.* Approximately 5 miles an hour?

"*A.* Yes, not any more.

"*Q.* Then you looked to the south at that time and I believe you said you saw some lights, is that correct?

"*A.* At that time I saw some lights, yes.

"*Q.* Were they south of this dip you referred to or had they come over this rise? Where were those lights?

"*A.* I have no idea how far away they were. They were at my right.

"*Q.* You didn't form any judgment as to the distance they were away?

"*A.* No, I didn't. They just seemed far away.

"*Q.* But you had formulated at that time no judgment how far away they were?

"*A.* It looked to me that they were far enough away so I could safely go across."

The dip in Telegraph road referred to above is identified by other testimony as 600 feet from Chicago boulevard.

The driver of the other automobile was called by plaintiff to testify under the statute.* He was 1 of 6 young servicemen returning home from Fort Knox, Kentucky, on a 42-hour leave. One of the young men was also the son of the owner of the car, the defendant here.

The driver testified that he had gotten up on Saturday at 5:30 a.m. but had had "at the most" 3 hours sleep, in the car. He also testified that there had been no drinking amongst the occupants of the car.

The defendant's car was proceeding north on Telegraph road—a main 4-lane highway. Approaching Chicago boulevard, while still 1/2 mile away the

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

driver saw a yellow flasher confronting him, and a red flasher light confronting cross-traffic on Chicago. He was familiar with the intersection. He testified his speed was 30 to 35 miles per hour. The speed limit at that point on Telegraph was 45 miles per hour.

Concerning his observations immediately before the crash, the driver of defendant's car testified:

"*A.* I don't recall making a definite observation to the left but I recall as I approached the intersection I could see a car coming or stopped in the intersection."

He also testified that he was looking to his right immediately prior to the accident and only saw the plaintiff's car just before the impact. As to the accident itself, he testified:

"*Q.* Now, do you mean to say that the front of her car struck the side of your car the way you made the drawing?

"*A.* Yes, sir, the front left fender and door was all damaged and I was thrown through the window and struck my shoulder on the door like that, so the impact was at the front fender.

"*Q.* You say it was the side of your car that came in contact with the Ford?

"*A.* The very point of the left front fender.

"*Q.* Of the Ford?

"*A.* Of our car.

"*Q.* The left front fender of your car came in contact with the side of the Ford, is that right?

"*A.* No, sir, the front of the Ford."

On this same point, plaintiff testified that she did not know what portion of her car came in contact with defendant's.

The trial judge summarized the crucial testimony thus just prior to granting the motion for a directed verdict:

"*The Court:* I have the factual situation in mind. Taking the case in its most favorable light, here she is, stopped at a red flasher. Next she starts out. There is nothing in view. All of a sudden she sees lights. She did not form any judgment where they were and the best we can say is that when she saw lights she kept on going because she thought she had time to make it."

This Court has in recent years frequently reiterated that it must be a very clear case to justify a trial judge in taking a negligence action from the jury on grounds of contributory negligence. *Kaminski* v. *Grand Trunk Western R. Co.,* 347 Mich 417; *Ware* v. *Nelson,* 351 Mich 390.

See, also, *Detroit & Milwaukee R. Co.* v. *Van Steinburg,* 17 Mich 99.

This seems to us to be such a case.

Plaintiff was traveling on a subordinate street, approaching a main through highway. She had a plain duty to stop, signaled by a red flasher light. CLS 1956, §§ 257.614, 257.651 (Stat Ann 1952 Rev §§ 9.2314, 9.2351). She had the duty likewise to yield the right-of-way to traffic lawfully approaching on the through highway. The purpose of the statute in requiring the driver on the inferior road to stop is plainly to require him to yield the right-of-way to traffic lawfully approaching on the main highway. *Shoniker* v. *English,* 254 Mich 76; *Leader* v. *Straver,* 278 Mich 234; *Breker* v. *Rosema,* 301 Mich 685 (141 ALR 867); *Krause* v. *Ryan,* 344 Mich 428. On the facts in this case stated in the light most favorable to her, plaintiff obviously failed to perform this duty.

Plaintiff seems to present her case on the basis of an understanding that once she had stopped for the red flasher as required, she had discharged her statutory obligation, and that she then had equal rights at the crossing with cars on the main high-

way. This is not our concept of the intent and purpose of the statute. Her duty to yield the right-of-way continued, and it was her obligation to know that traffic on the main highway was clear before she undertook to cross. While this duty might not continue *ad infinitum* under extreme traffic conditions, no such extreme traffic conditions on Telegraph road at 1:30 a.m. on the morning in question are indicated in this record.

In *McGuire* v. *Rabaut,* 354 Mich 230, this Court said (pp 238, 239):

"The purpose of the through highway is to move great volumes of traffic at relatively high speeds. Such purpose cannot be accomplished if our application of the standard of due care does not take into account the unique function of the arterial highway. Thus it was that we said in *Arnold* v. *Krug,* 279 Mich 702, 707, that, 'The right-of-way accorded to a driver upon a trunk-line highway is something more than the privilege of going through the intersection in advance of a car which reaches it at the same time.'"

The defendant in this case was traveling on one of the busiest of Michigan's great arterial highways. He was the favored driver. The undisputed facts make it obvious that the plaintiff, in this case the subordinate driver, failed to yield the right-of-way. If we seek for excuse for her failure in this record, we find none. She could not depend on the defendant's driver stopping. He had no duty to do so. She had no problem as to visibility. See *Henry* v. *Sanderson,* 260 Mich 563. There was no change of course or unexpected action by defendant's driver which intervened. See *Vukich* v. *City of Detroit,* 325 Mich 644. There was no illegal speed on the part of the other automobile. See *Boyson* v. *Hurst,* 347 Mich 302.

At an intersection where she was required by law to yield the right-of-way, plaintiff drove across 2 traffic lanes and collided with defendant's car while it was traveling at a legal speed, where it had the right to be.

We fail to see how this driving could be regarded as other than negligence which contributed as a proximate cause to the happening of the accident. The circuit judge did not err in directing a verdict on this ground.

Plaintiff-appellant also asserts that she was entitled to have a jury consider her case under a gross-negligence or last-clear-chance doctrine. Defendant claims that there is nothing in plaintiff's declaration referring to the doctrine of last-clear-chance or subsequent negligence and that plaintiff cannot now raise this issue on appeal. *City of St. Clair Shores* v. *Conley,* 350 Mich 458. Even if plaintiff had properly raised this issue, for the doctrine to be applicable, plaintiff's negligence must have come to rest leaving her in a place of danger about which defendant's driver knew, or should have known. *Szost* v. *Dykman,* 252 Mich 151; *Morrison* v. *Hall,* 314 Mich 522. We do not view these facts as presenting such a case. Plaintiff's negligent conduct continued up to the very point of impact.

Nor do we believe that plaintiff was entitled on this factual record to any presumption of freedom from contributory negligence. There is ample testimony from plaintiff to establish her own negligence.

Affirmed. Costs to appellee.

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

SMITH, J. (*concurring*). Here again we consider one of the most difficult of the contemporary tort

problems, the adjustment of the relative rights and duties between the automobile driver on an arterial highway, protected by stop signs or traffic lights, and the driver entering such highway from a subordinate road. The difficulty arises from the fact that if the arterial highway is to fulfill its function it must permit traffic to move in great volume and at relatively high rates of speed. Yet the arterial driver remains at all times under a duty to exercise (and the subordinate driver may lawfully demand that he exercise) due care. What is due care under such circumstances?

We gave the problem exhaustive consideration recently in *McGuire* v. *Rabaut,* 354 Mich 230. There is no need here to repeat what was there held by a unanimous court. It remains only to apply the principles enunciated.

Taking the view of the facts most favorable to plaintiff, as we are required to do in the posture of the case before us, the defendant's car was being driven in a northerly direction upon Telegraph road, an arterial highway, at a speed under the maximum rate allowed. The driver, as we know, was under a duty to exercise due care. He must make reasonable allowance for traffic conditions, for fog, snow, or other adverse weather conditions, and for curves and road conditions. But due care for such a driver does not demand that he slacken his speed or prepare to stop at successive street intersections in the anticipation that side-street drivers will contest his right-of-way. Not only would such action impede the flow of arterial traffic but it would be hazardous to both the driver and those following him. Due care, then, for the arterial driver includes his right to assume that he will be accorded the right-of-way. This assumption may be relied upon by him until he is aware, or as a reasonably prudent driver,

should be aware, that his right-of-way is being challenged.

The weather was clear on the night in question and the visibility good. As defendant's car approached the Chicago street intersection the driver noted, generally, the intersection conditions. The lights of other cars were visible, as well as traffic lights. There was a restaurant on the right, partially obstructing his view in that direction. On the west side of Telegraph, to his left, there was a drive-in theater. And, although a "definite" observation of traffic to the left was not made, the driver testified, "I recall, as I approached the intersection I could see a car coming or stopped in the intersection." We have, up to this point, no testimony from which a jury would be entitled to find warning of hazard, nothing in the situation to require of the arterial driver a slackening of his speed or a change of his course.

When did such duty arise? When must he (in the exercise of due care) take steps to avoid collision with a subordinate driver who ventures into his path? Only, as we have noted, when it becomes obvious, or should become obvious to the reasonably prudent arterial driver, that his right-of-way is, in truth, being contested. "It is at this time that his duty of care with respect to the subordinate driver arises, and his post-observation negligence, or lack thereof, is measured by his actions after this point." *McGuire* v. *Rabaut, supra,* 236. If he, at this point, does not act with reasonable care he may be forced to respond in damages, but reasonable care at this point is the care of one confronted with an emergency not of his creation, in the light of which his actions will be judged. The doctrine of proximate cause, also, must be examined. It may well be that there has been negligence on the part of the arterial

driver but that his permissible speed, and the traffic conditions, were then such that, even had he been alert, looked, discovered the danger, and responded instantaneously and properly, no action on his part could have averted collision once the subordinate driver came into his path. If this were the case his negligence in not properly observing or acting could not be a proximate cause of the accident. It is only after consideration of these factors that we reach the problem of contributory negligence on the part of the subordinate driver, a problem which (since *McKinney* v. *Yelavich,* 352 Mich 687, 697, 698) is considered not in terms of what a driver "could have seen, as a matter of physical fact, but what he should have seen in the exercise of due care. These are vastly different propositions." No decision was reached as to this phase of the case before us for reasons that will appear.

The trial court (the decision was made prior both to *McGuire* v. *Rabaut, supra,* and *McKinney* v. *Yelavich, supra*), confining the discussion upon defendant's motion for a directed verdict "to the issue of contributory negligence on the part of the plaintiff," granted such motion. Strictly speaking, however, there can be no contributory negligence on the part of the plaintiff without negligence for which the defendant is responsible. Upon the facts before us there is the most serious question as to any negligence whatever on the part of the defendant. Nevertheless, we will not disturb the result thus reached, since even if plaintiff's actions were not the sole proximate cause of her injuries they contributed thereto. We recognize that the determination of the negligence of a driver crossing an arterial intersection is normally a question for the jury. It involves not only the fact that a car is "there to be seen" on the arterial highway but a weighing of

many factors such as visibility, the condition of the surface of the road, the speed of the oncoming automobile, the width of the intersection, and other factors, the ultimate question being a matter of human judgment, namely, whether the arterial car constitutes an immediate hazard to a safe crossing. Upon the facts before us, however, the conduct of the plaintiff was such that reasonable men could not differ that the judgment made was palpably inconsistent with the exercise of due care. The question was, therefore, properly taken from the jury and resolved by the court.

Affirmed. Costs to appellee.

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

OCTOBER TERM, 1959.

TOWNSHIP OF BLACKMAN *v.* KOLLER.

1. TOWNSHIPS — ZONING ORDINANCE — RESIDENCES — DISCRIMINATORY APPLICATION.

   Township zoning ordinance which zoned, as residential and farming, a block surrounded on 3 sides by airport with nonconforming structures, a commercial zone and 2 other mobile homes, although placed subsequent to enactment of the zoning ordinance, had been permitted to remain on lots across street *held,* unconstitutional as applied to defendants' lot so as not to preclude use of lot for mobile home, where evidence shows they were unable to obtain financing arrangements for construction of a permanent home and sanitary arrangements were made as required by township zoning inspector, since application of the zoning ordinance to defendants' property was unlawfully discriminatory.

2. MUNICIPAL CORPORATIONS—ZONING ORDINANCES—ESTOPPEL.

   A municipality cannot be estopped from enforcing a zoning ordinance because of the unauthorized action of its agents and administrative employees in granting permissive authority contrary to the terms of the ordinance.

Appeal from Jackson; Simpson (John), J. Submitted April 8, 1959. (Docket No. 20, Calendar No. 47,580.) Decided October 12, 1959.

Bill by the Township of Blackman, a municipal corporation, Mabel Lincoln, Robert Hill and others against Wells Koller and Janet J. Koller to abate

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Zoning § 20.

[2] 58 Am Jur, Zoning § 193.

Right of municipality or other public authority to enforce zoning regulations as affected by its previous conduct in permitting or encouraging violation thereof. 119 ALR 1509.

nuisance and restrain defendants from maintaining trailer coach home on property zoned as residential area. Decree for plaintiffs. Defendants appeal. Reversed.

H. A. Kinch, for plaintiff township.

Dudley & Rogers, for individual plaintiffs.

Phillip C. Kelly and *George R. Campbell,* for defendants.

VOELKER, J. The plaintiffs in this case, Blackman township and certain residents thereof, seek to enforce against the defendants, Wells and Janet Koller, the provisions of a zoning ordinance adopted by that township in 1952. That ordinance in effect prevents the use of mobile homes in the township except in commercial trailer parks that are located in a small portion of the township that is zoned commercial or industrial. The defendants are living in a trailer that they have placed on a lot they own in the township, which lot is zoned residential and farming. The trial court decreed that the ordinance was valid, that the defendants' violation thereof constituted a nuisance per se, and enjoined further habitation in the trailer on their lot. From that decree the defendants have appealed. The appeal presents several technical questions which we shall not now discuss, turning our attention first to what we conceive to be the controlling issue in the case: Has the ordinance been unequally and discriminatorily applied to defendants?

To help clarify our discussion of that question we need more facts. Defendants' lot is located on the west side of Brentwood road, in a block that is about 1/8th of a mile long, bounded on the south by Wildwood street and on the north by Housman street.

Approximately 1,000 feet to the west of the defendants' lot, in the same zone, is the Jackson airport, which includes, in addition to the usual attributes of a small airport, several nonconforming buildings of a commercial nature, some of which were built before and some after the enactment of the ordinance. There is also a nonconforming gravel pit in the zoned area. On the north side of Housman street is a large section of property known as the west prison farm (now owned by the airport). On the east side of Brentwood street, across the street and in the same block as defendants' trailer, are 2 other trailers that were placed there subsequent to the enactment of the ordinance and upon which adjoining properties the township has since regularly collected real estate taxes. The brief of the township concedes that no action has ever been taken by the township for such other trailer violations. The north side of Wildwood street (south of defendants' lot) is zoned commercial. Thus the block in which defendants' lot is located is bounded on the west and north by airport property and the noted nonconforming buildings, on the south by a developed commercial and industrial area, and on the east by at least 2 other house trailers.

The defendants bought the lot in question on April 27, 1953 (about 1 year after the zoning ordinance was adopted), intending to build their home on it. At the time of purchase the lot was an eyesore to the area. It was overgrown with tall weeds, strewn with about 10,000 scattered bricks, and was generally in a run-down and unsightly condition. The defendants cut the weeds, hauled away the bricks, leveled the lot, and planted grass. In the words of the trial judge who viewed the scene: "There is no question but what the defendants cleaned up the lot, fixed it up very nice, and have a very fine yard there."

After cleaning up the lot the defendants obtained plans for a large ranch type home which they hoped

to build on the lot. They then went to several banks and lending agencies in an attempt to borrow money with which to build that home. In every attempt to borrow they were refused because of the proximity of the lot to the airport and the general substandard nature of the neighborhood. Defendants then reviewed their situation, obtained plans for a smaller home, and again attempted to borrow money for the construction. Again they were refused for the same reasons. In a final effort to make some residential use of their property the defendants bought a modern mobile home and moved it onto the lot. Shortly thereafter the township zoning inspector visited the premises and told them that they could keep the trailer there and live in it provided they made the necessary sanitary arrangements. Such arrangements were made.

Perhaps we can now restate the question more precisely as: Does the enforcement of the ordinance against these defendants, while an identical nonconforming use of other property in the immediate zoned area has been permitted and continues to be permitted, constitute an unequal and unlawfully discriminatory application of said ordinance? We think it does.

We are aware that a municipality cannot be estopped from enforcing a zoning ordinance because of the unauthorized action of its agents and administrative employees in granting permissive authority contrary to the terms of the ordinance (*Fass* v. *City of Highland Park,* 326 Mich 19; see also 1 ALR2d 338 and 6 ALR2d 960 at 965), and we are not grounding our decision on estoppel. Nor are we basing our decision on the fact that the defendants could not finance the building of a house. Rather we are basing it upon the unconstitutionality of the ordinance as to these defendants because of unequal and discriminatory enforcement, and we are doing so under the

authority of our unanimous decision in *Morris G. Laramie & Son, Inc.*, v. *Southfield Township Building Inspector,* 326 Mich 410.

In that case we squarely held that when the township suffered others to use their property in a similar nonconforming manner, that to enforce the zoning ordinance against the defendant alone would be discriminatory and unlawful. We there said (p 414):

"In this case, the permitted nonconforming use on the McManus property for so great a period of time, which permitted use had its inception after the enactment of the ordinance in question, undermines the restrictions of the ordinance as applied to the immediate locality.

"The trial court, after consideration of the testimony in the case, concluded that 'plaintiff, for all intents and purposes, seeks to make the same use of its property as is made of the McManus property.' We agree with such finding. We are satisfied that the action of the township, through its officer, is discriminatory. The judgment of the trial court granted a writ of mandamus to require the building inspector to issue the building permit sought by plaintiff. The judgment appealed from is affirmed."

To the same effect also see *Senefsky* v. *City of Huntington Woods,* 307 Mich 728 (149 ALR 1433).

Having thus decided the primary question involved in this appeal the remaining questions need not be discussed. The decree of the court below is reversed, with costs to appellants.

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

In re SCHWEIER.

1. GUARDIAN AND WARD—UNITED STATES SAVINGS BONDS—CO-OWNERSHIP OF WARD WITH DAUGHTER.

Order of circuit court remanding case to probate court for further inquiry as to extent of ward's interest in United States savings bonds, of which ward and her daughter appeared on the face thereof to be co-owners, was proper, where there was evidence that the bonds had been purchased with joint funds, that the mother might not be the absolute owner of the bonds notwithstanding they were in her possession at the time of adjudication of her mental incompetency; hence, guardian was properly held not surchargeable with the face amount of the bonds with interest, under record presented, the question of the value of the bonds to the ward not being properly before the circuit court.

2. UNITED STATES—SAVINGS BONDS—OWNERSHIP.

United States treasury department regulation providing that one co-owner of a savings bond may cash it without permission of the other co-owner and terminating the interest of both upon redemption by one does not cover or establish ownership or a determination of the interest of the co-owners as between themselves (U. S. Treasury Dept. Regulations, Circular No 530, § 315.45).

Appeal from Wayne; Hadsell (Philip A.), J., presiding. Submitted April 8, 1959. (Docket No. 23, Calendar No. 47,747.) Decided October 12, 1959.

In the matter of the estate of Marion Schweier, mentally incompetent, the ward, restored to sanity,

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REFERENCES FOR POINTS IN HEADNOTES

[1] 25 Am Jur, Guardian and Ward § 174.

[2] 43 Am Jur, Public Securities and Obligations § 15 (Supp).

Judicial decisions involving United States war savings bonds. 168 ALR 245, 173 ALR 550.

objected to allowance of final account of Paul E. Gilleo, guardian. Determination in circuit court that guardian should be surcharged because of delivery of bonds to ward's daughter as co-owner, and case referred to probate court to determine interest of estate therein. Ward appeals claiming full value of bonds. Referral to probate court affirmed.

Meyer R. Rubin, for appellant ward.

T. G. Daines, for appellee guardian.

VOELKER, J. Subsequent to the filing of a petition by her daughter, Jean Lorang, the probate court for the county of Wayne on June 27, 1952, found the appellant, Marion Schweier, to be a mentally incompetent person and insane. On that date she was ordered institutionalized and the appellee Paul E. Gilleo was appointed as her guardian. As such guardian for Mrs. Schweier, appellee received and inventoried all of his ward's property except 15 United States savings bonds with a total face value of $7,900 (the face of which indicated that they were owned jointly by appellant and her daughter), which he received and turned over to the daughter. On the advice of his attorney, the appellee required that the daughter give the following receipt for the bonds:

"I, Jean Lorang acknowledge the receipt of the above bonds and declare the same to be my property, and in the event it should be determined that the above bonds should be declared to be part of the estate of my mother, Marion Schweier, I agree to return said bonds or their value to either my mother, Marion Schweier or to the person in charge of her estate."

Appellant was restored to sanity by an order of the probate court on March 13, 1957, and shortly thereafter the appellee-guardian filed his final ac-

counting. During April of 1957 the appellant retained counsel and filed objections to the guardian's final account, which objections, among other things, concerned the aforementioned government bonds. The probate court overruled appellant's objections and allowed the account. From that order the appellant took an appeal to the circuit court where, after a full hearing, that court found and held as follows:

"A. I find that on August 26, 1948, Marion Schweier did establish and maintain with the National Bank of Detroit, a banking institution, under her own single name, account number 10,136, for safe keeping United States war savings bonds. That the said account was closed on July 10, 1952, by Paul E. Gilleo, who was on June 27, 1952 duly appointed and qualified as guardian of Marion Schweier. The said guardian did on said date take possession and custody of 15 bonds from the said bank. I find further that on July 17, 1952 the said guardian, without judicial determination, voluntarily did surrender and give up possession and control over the said bonds to Jean Lorang, the daughter of Marion Schweier, by turning over to her 13 bonds pursuant to a receipt signed by her, which bonds are described as follows:
* * *

"I further find that Marion Schweier had the possession, custody, control and use of said bonds and did not lose it by virtue of the guardianship proceedings. I find further that the said bonds were improperly omitted from the inventory and account filed by Paul E. Gilleo, the guardian, with the probate court, which facts should have been included in said reports.

"B. I find that the guardian's delivery of these United States war savings bonds to Jean Lorang, which bonds are registered and listed in the names of Marion Schweier and her daughter, Jean Lorang, as co-owners, of the face value of $7,900, was a tort and breach of duty.

"C. I find that the guardian is liable for this breach and is liable to Marion Schweier, M. I., for the loss of the value of her interest in said bonds. I find and adjudge that the probate court committed error in allowing the guardian's final account without surcharging him in that regard.

"D. I find and adjudge and determine that the guardian must account to the ward, Marion Schweier, for the value of her interest in these bonds on July 17, 1952 plus interest to the present date. I find, order and adjudge that the bonds should be included in the estate and the guardian should file an amended inventory and file an amended account to include said bonds.

"E. I further find that there is no proof in this record and cause to show the values of these bonds on the date and occasion of this wrongful transfer. Therefore, I order that the matter be and the same is hereby referred to the probate court of Wayne county, to take proofs and determine and find the value of the estate's interest in said bonds, plus the interest due thereon from July 17, 1952.

"F. I further order and instruct the probate court of Wayne county to order the guardian, Paul E. Gilleo, to file an amendment to the inventory so as to include these bonds and values determined and found by the probate judge and file a corrected and amended first and final account to include the said bonds and values thereof. I further order and instruct the probate court to surcharge the guardian the value plus interest to date of this judgment on the loss of these bonds and order him to repay said amount to the ward."

From this order the ward, Mrs. Schweier, has appealed, setting out the following question on appeal:

"Did the circuit court on ward's appeal commit error in failing to surcharge the guardian for the full value of United States bonds and in remanding case to probate court with an order to determine the interest of ward in said bonds, where circuit

court entered judgment and found the guardian unlawfully and without authority or right and in breach of his duties to the ward, had wrongfully surrendered the possession of said bonds to the ward's daughter?"

In essence the appellant is asking this Court to order the circuit court to enter a final judgment surcharging the guardian with the face value of the bonds plus interest. We agree that normally this would be an accepted procedure in a case of this type. In the present case, however, the mother and daughter were listed on the face of the bonds as co-owners, and there was some evidence adduced at the proceedings in circuit court to indicate that the bonds may have been purchased with joint funds. This indicates that upon further inquiry it might develop that the mother was not the absolute owner of the bonds and that consequently the guardian should not be charged with the full amount thereof.

Appellant argued in the circuit court and here that because the mother was the sole possessor of the bonds prior to the delivery by the guardian that therefore she was the sole owner, and that the daughter's interest could not come into being until the mother died or delivered the bonds to her. To support this argument appellant cites us to United States Treasury Department Regulations, Circular No 530 (May 21, 1952) § 315.45, which indeed states that a co-owner in possession may cash in the bonds without the permission of the other, and that when one owner redeems a bond, the interest of both is deemed forfeited. It appears to us, however, that the cited regulation sets up provisions of redemption only, but does not purport to cover or establish ownership. Therefore in the light of the noted evidence of joint ownership it is our opinion that the circuit court properly remanded the case to probate court to allow the guardian the opportunity to offer proofs

of the proportionate value of the disputed property to the joint owners. The question of the value of the bonds to the appellant was therefore not properly before the circuit court in the appeal.

Judgment affirmed, costs to appellee.

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

GREENE *v.* GREENE.

1. DIVORCE—PROPERTY SETTLEMENT—MODIFICATION OF DECREE—EXCEPTIONS.

   Decretal provisions for adjustment of property rights in a suit for divorce cannot be set aside, modified or altered in the absence of a showing of fraud, necessity for clarification or ambiguity, except that a court of equity normally possesses inherent authority to enforce its own directives.

2. EQUITY—ENFORCEMENT OF DECREES—DISCRETION OF COURT.

   The inherent authority of a court of equity to enforce its own directives, such as property settlement provisions of decrees for divorce, includes the exercise of some discretion in interpreting them, since the court necessarily reserves some latitude to construe the basic intent and purpose of the decreed directive.

3. DIVORCE—PROPERTY SETTLEMENT—DISCRETION OF COURT.

   The property settlement provisions of a decree of divorce are a part of the trial court's own decree, presumably reached by

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REFERENCES FOR POINTS IN HEADNOTES

[1] 17A Am Jur, Divorce and Separation § 937.
[2] 19 Am Jur, Equity § 188.
[3, 6] 17A Am Jur, Divorce and Separation § 931.
[4] 17A Am Jur, Divorce and Separation § 938.
[7] 17 Am Jur, Divorce and Separation § 645.

him only after profound deliberation and in the exercise of his traditional broad discretion, hence, when enforcement thereof is later sought, he has an equally broad discretion in interpreting and determining what it was and why he had originally so decreed.

4. SAME — PROPERTY SETTLEMENT — MATERIAL AND SUBSTANTIAL BREACH.

Relief for breach of plain and unambiguous property settlement provision of decree of divorce may only be granted where it is found that there has been a default or breach thereof and that such a breach was material and substantial.

5. EQUITY—SUPPLEMENTAL ORDER TO END LITIGATION.

A trial court may enter an appropriate supplemental order in an equity case, implementing his former order, so as to resolve the controversy and conclude the litigation, whether or not he is requested to do so by the litigants.

6. DIVORCE—PROPERTY SETTLEMENT—DISCRETION OF COURT.

Denial of relief to plaintiff wife on her petition for enforcement of property settlement provisions of divorce decree wherein she was to obtain interest as tenant in common upon defendant husband's default in paying off $8,000 in monthly instalments of $400 each *held*, within discretion of trial court, where husband had made prompt payment of $7,200, admittedly defaulted a few days on remaining $800 but did pay it into court, the default not having been substantial.

7. SAME—COSTS.

No costs are allowed on wife's appeal from denial of relief to her on petition to enforce property settlement provisions of decree of divorce, where admitted breach was not of a substantial nature.

Appeal from Muskegon; Fox (Noel P.), J. Submitted April 14, 1959. (Docket No. 45, Calendar No. 47,989.) Decided October 12, 1959.

Bill by Golden Greene and cross bill by Henry P. Greene resulted in decree of divorce to plaintiff with negotiated property settlement. Each party, with plaintiff claiming a breach of terms thereof and defendant claiming compliance, petitioned court for enforcement of decree. Order entered dismissing

plaintiff's petition and determining ownership of property in defendant. Plaintiff appeals. Affirmed.

Alexis J. Rogoski and *Robert Bunker Rogoski,* for plaintiff.

Charles M. Waugh (*Fredric A. Grimm,* of counsel), for defendant.

VOELKER, J. In 1955 plaintiff-appellant, Golden Greene, filed a bill for separate maintenance. Contest developed and by stipulation of the parties the husband's cross bill for absolute divorce was dismissed and the wife's bill amended to pray for absolute divorce. On January 18, 1957, the divorce was granted. The property settlement provisions of the decree among other things awarded to the defendant former husband certain properties then being purchased by them under land contract, upon condition that he pay his wife $8,000 for her just share in the property, the payments to be made to her through the friend of the court in consecutive monthly instalments of $400. This portion of the decree then went on to provide as follows:

"It is further ordered, adjudged and decreed, that, in the event the said defendant shall be in default of any of the aforesaid payments for more than 7 days, the then remaining unpaid balance shall bear interest at the rate of 6 per cent per annum until fully paid and it is further ordered, that in the event the said defendant shall make default in any of the aforesaid payments for more than 30 days, the provision awarding said properties to the defendant shall be null and void and the title to said property shall vest in the parties hereto as tenants in common and the rentals therefrom divided accordingly; and, it is further ordered that the said defendant shall, from the date of this decree, receive and retain as his own

all rental money obtained from the use and occupancy of any part of the aforesaid properties during the period in which said monetary payments are made by the defendant to the plaintiff under the provisions of this decree; and it is also further ordered that, upon the completion of the payment of said sums, by the defendant to the plaintiff, the said Golden Greene shall thereupon forthwith execute a quit-claim deed conveying to the said Henry P. Greene all of her right, title and interest in and to the aforesaid properties, and that, in default thereof, a copy of this decree may be recorded in the office of the register of deeds for the county of Muskegon, Michigan, and shall act in and of itself as a complete conveyance from the said Golden Greene to the said Henry P. Greene."

The decree when entered bore the written approval of the attorneys for both parties and no appeal was taken. The time for any rehearing has also expired, and the original decree remains in full force and effect.

Defendant-appellee, Henry P. Greene, paid the monthly instalments without default, up until the next to the last instalment, whereupon he defaulted. The reason for his default does not appear. He later paid the last 2 instalments of $800 to the friend of the court, who tendered them to the plaintiff. The plaintiff refused to accept the belated tender of payment and instead petitioned the circuit court for enforcement of the provisions of the decree, among other things praying:

"That the court enter an order herein adjudging, declaring and confirming plaintiff's right, title and interest to and in the above-described parcels of land as a tenant in common, and to the rentals therefrom, determining her obligation for the payment of any part of the purchase price of either of such parcels remaining unpaid, for the payment of taxes, insurance premiums, and the cost of the mainte-

nance thereof, requiring defendant to recognize her rights therein, and granting to plaintiff such other and further relief as the exigencies of the case may require, and as shall be agreeable to equity and good conscience."

On August 27, 1958, defendant filed a cross petition praying:

"That the court enter an order herein directing the plaintiff to accept payment of the $800 on deposit for her with the friend of the court and direct the plaintiff to execute a quitclaim deed conveying to the defendant all of her right, title and interest in and to the aforesaid properties."

On September 8, 1958, the matter was heard on the foregoing petition and cross petition, following which the chancellor entered an order denying plaintiff's petition and granting the prayer of defendant's cross petition, saying in his opinion:

"*The Court:* Well, I'm inclined to try to be equitable again. I probably might be reversed, but it seems to me as though when you pay in $7,200, on a property settlement agreement the amount of which is $8,000, and there is not a substantial forfeiture, but a forfeiture over a very short period of time—it would have to be, because here we are in September, and the petition is before us, and all the money is in the friend of the court's office. I elect to follow the course of equity and to disregard the strict letter of the agreement. I deny the petition. I'm well aware of all the opinions cited by counsel for the plaintiff, I have read all of them previously in other cases, but my conscience tells me that I must again decide on the side of equity. I think it would be inequitable and unconscionable to hold otherwise, and in a situation of this kind my conscience comes first in controlling my decision, and that's my decision."

It is unfortunately not clear from the record before us just how late the defendant was with his belated payment. Apparently, however, it was but a matter of a few days past the permissible 30 days, as the defendant's cross petition states "That the defendant was more than 30 days late in the June 4, 1958 instalment, as alleged in plaintiff's petition, but that the same was paid in just over 30 days after due and that said payment was next to the last payment due the plaintiff," and this statement nowhere appears to be disputed by the plaintiff. We also note that nowhere in her petition does the plaintiff on her part say what she proposes to do with the $7,200 already paid her by defendant under the $8,000 settlement; there is no offer or proffer of any refund; and we can only conclude that she means, if she can, along with our cooperation, to keep the money and retain a share in the land as well.

Plaintiff insists that the terms of a property settlement in a divorce decree are not subject to later modification, short of a showing of fraud (citing *Roddy* v. *Roddy,* 342 Mich 66, and numerous other cases, of which more presently), which fraud this cross-petitioning defendant concededly has neither alleged nor proved. Appellant urges that this rule should all the more apply when, as here, the provisions in question were the result of careful negotiations between the parties and their attorneys, and the terms approved by the latter in writing.

Appellant has correctly stated the prevailing rule of law in Michigan to the effect that decretal provisions for adjustment of property rights cannot be set aside, modified or altered in the absence of a showing of fraud or like reasons. (See cases collected in 10 Callaghan's Michigan Pleading & Practice, § 70.147, p 178; and in 9 MLP, Divorce, § 147, pp 598, 599.) An apparent exception is where it may

be said that the provisions require clarification (*Mitchell* v. *Mitchell,* 307 Mich 366) or where specific terms are ambiguous (*Nemecheck* v. *Nemecheck,* 250 Mich 641; see, also, *Johnson* v. *Johnson,* 291 Mich 237; and 10 Callaghan's Michigan Pleading & Practice, § 70.145, p 176). But the quoted terms and provisions of this particular decree are so plain that it would be a clear case of semantic juggling and evasion to say that their particular terms are obscure or ambiguous.

Another apparent and related exception to the general rule arises from the circumstance that a court of equity normally possesses inherent authority to enforce its own directives. This necessarily includes the exercise of some discretion in interpreting them; and where enforcement of a property settlement provision is sought in situations where the court in the original decree has directed that one of the parties perform specific acts, it is felt that the court necessarily reserves some latitude to construe the basic intent and purpose of the decreed directive, and may enter an appropriate supplemental order accordingly, despite the fact that the precise language of the original decree may not have spelled out exactly what was later found necessary to be done to achieve those broad purposes. This apparent exception proceeds from the proposition that decretal provisions as to property settlement, no matter how much haggled over and ultimately agreed on by the litigants prior to decree, are after all a part of the chancellor's own decree, presumably reached by him only after profound deliberation and in the exercise of his traditional broad discretion, and that when he is later besought by either of the parties on matters of enforcement, he has an equally broad discretion in interpreting and determining what it was and why he had originally so decreed.

Thus in *Rotzell* v. *Rotzell,* 241 Mich 122, the divorce decree incorporated an agreed property settlement, including disposition of certain real estate being sold by the parties on land contract, as follows:

"That the party of the first part, William Rotzell, shall sign and set over to party of the second part, by proper assignment, all his right, title and interest to a certain land contract now owned by the parties and on which there still remains due and owing to said parties the sum of, to wit: $3,300."

The husband duly executed such an assignment of the contract, as ordered by the decree, but did not execute any quitclaim deed, which accordingly left the record title standing in his name. Nearly 3 years after the entry of the decree the former wife petitioned the same court that he be compelled to do so. No fraud was alleged or shown. In holding that the former husband should be compelled to execute a quitclaim deed, this Court, after paying due homage to our venerable rule against later modification of a property settlement, in the absence of fraud, rather laconically spoke as follows (p 124):

"We shall not split hairs over the language of the agreement. It clearly contemplated a transfer of plaintiff's interest in the lands. A quitclaim deed would be an appropriate instrument to convey such interest and no good reason appears why it was not long ago executed."

The instant case presents the other side of the enforcement coin. Plaintiff has voluntarily submitted herself to the chancellor, alleging breach in and seeking enforcement of the quoted provisions of the decretal property settlement. Defendant admits breach but claims it was technical and not material. Before he may ever grant relief in such circumstances the chancellor must manifestly determine 2 things: first, was there in fact any default in or

breach of the decreed provisions as to property settlement? If so, and considering the basic purposes of the original provisions decreed by him, was the acknowledged breach material and substantial?

In our view this is what in effect was done by the chancellor below. He found an undeniable breach in the precise terms of the property settlement, but further found that such breach was technical and not substantial. He entered an order accordingly. This is the broad rationale of the *Rotzell Case* applied in reverse. In *Rotzell* we in effect read words into the property settlement which admittedly were not there in order (1) to find a breach and, (2) to belatedly order the performance of a specific affirmative act—all calculated to achieve what we conceived to be the basic purpose of the original provision. We think that decision is sound, but in this case we scarcely need go so far; there is no occasion to supply missing words; we can take the unaltered provision as it stands. Thus viewed we find (1) that indeed there was a breach in the precise terms of the decreed property settlement, but, (2) that such breach was merely technical and not material or substantial—again having in mind the basic purpose of the original provision, which in this case was that the former wife should be paid a fair amount for her just interest in the property in regular periodic instalments and without undue delay. To our mind those purposes were achieved.

As in *Rotzell,* and again without splitting hairs over the precise language of the agreement, we think the chancellor acted wisely, equitably, and within the necessary scope of his broad authority. Being requested and having assumed to act in the premises, in these circumstances the chancellor is not limited to a mere denial of the relief requested; to finally resolve the controversy and conclude the litigation he may also enter an appropriate supple-

mental order implementing his decision, and this whether or not he is requested to do so by any of the litigants. That is what was done here, and we approve the action. Unless the chancellor is to be reduced to the role of a rubber stamp he must be allowed some latitude and discretion in these circumstances, else proceedings looking toward the enforcement of decretal provisions as to property settlements might better be addressed to his clerk. At least that might be faster. The action below of this particular chancellor is both commended and affirmed, but without costs.

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

In re VAN ETTEN ESTATE.

DEPARTMENT OF REVENUE *v.* SELANDER.

WAYNE COUNTY DEPARTMENT OF SOCIAL WELFARE *v.* SAME.

PAUPERS—LIABILITY FOR SUPPORT—ESTATES OF DECEDENTS.

Claims for reimbursement, filed against the estate of a deceased person, for sums expended by State and county in the care of indigent, adult, emancipated children of decedent as public charges while inmates of mental hospitals for periods of time decedent is stipulated as not "being of sufficient ability" to pay are disallowed, the liability of the patient, spouse, parent, grandparent or child for such support being limited to such as have sufficient ability to pay at time such expenses are incurred, not as of the time a claim therefor is presented (CL 1948, § 330.21, as amended by PA 1957, No 313).

Appeal from Wayne; Rashid (Joseph G.), J. Submitted April 15, 1959. (Docket Nos. 55, 56, Calendar Nos. 47,900, 47,904.) Decided October 12, 1959.

In the matter of the estate of Wilhelmina Van Etten, mentally incompetent, the State of Michigan, Department of Revenue, and the County of Wayne, Department of Social Welfare, filed claims for hospital services rendered her indigent adult children. Claims denied in probate court. Cases consolidated in circuit court, with Milton C. Selander and the National Bank of Detroit, special administrators

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REFERENCES FOR POINTS IN HEADNOTES

41 Am Jur, Poor and Poor Laws § 43.

of the estate of Wilhelmina Van Etten, now deceased, defending. Claims allowed. Defendant administrators appeal. Reversed.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, and *Percival R. Piper,* Assistant Attorney General, for plaintiff State of Michigan, Department of Revenue.

Samuel H. Olsen, Prosecuting Attorney, *Hobart Taylor, Jr.,* and *Alan Walt,* Assistant Prosecuting Attorneys, for plaintiff County of Wayne, Department of Social Welfare.

Allen, Haass & Selander, for defendants.

KAVANAGH, J. These are general appeals from the orders of the circuit court in Wayne county reversing the probate court and allowing claims against the estate of Wilhelmina Van Etten for reimbursement of expenditures paid by the county and State for the daily care, support and maintenance of the children of Wilhelmina Van Etten. The claim of the State is for the support of Ida Bruschitsky at the Wayne County General Hospital from March 22, 1931, to August 31, 1957, in the amount of $21,390.66, and for reimbursement of like expenditures paid and to be paid since August 31, 1957. The county's claim is for care rendered Ida Bruschitsky up to October 14, 1957, and for expenses incurred for support given George and Alma Van Etten, 2 other emancipated, adult indigent children of Wilhelmina Van Etten.

The facts have been stipulated by appellants and the State of Michigan as follows:

"Ida Bruschitsky, also known as Ida Burschitske, is a natural daughter of Wilhelmina Van Etten. She

was admitted to the Eloise Hospital (now Wayne County General Hospital) on March 22, 1930 and has been a patient there continuously since that date.

"At the time of her admission Ida Bruschitsky was living apart from her mother and receiving no support from her. She was of full age, had a husband and was the mother of several children. She was at the time of her commitment and has been during the time of her confinement, an indigent person. Her husband is now deceased.

"Wilhelmina Van Etten is 104 years of age. She was 77 years of age at the time Ida Bruschitsky was admitted to the hospital, was a widow and was supporting herself as a charwoman. She was herself hospitalized on May 31, 1955 and was declared a mental incompetent on October 13, 1955.

"Neither Wilhelmina Van Etten, nor her estate, were of sufficient ability to support, care for or maintain Ida Bruschitsky at any time prior to July 9, 1957.

"On July 9, 1957, Wilhelmina Van Etten's estate received the sum of $300,000 in settlement of a contest in New York State relative to the purported will of one Agnes Momand, also a daughter of Wilhelmina Van Etten. That sum, together with $1,000 in United States postal savings certificates, constituted the entire assets of her estate on that date. Those assets have since been reduced by the payment by order of the probate court of Wayne county, as follows: $121,957.75 for attorneys' fees and $1,650 for guardian ad litem fees. A claim against the assets of the estate for hospital and medical services rendered to Wilhelmina Van Etten by Haynes Memorial Hospital has been settled for the sum of $15,488.25 of which $10,000 has been paid. The estate has assets at present of approximately $155,000.

"Appellant* has petitioned for reimbursement for expenditures already paid by it for the daily care, support and maintenance of Ida Bruschitsky at the

* *I. e.*, appellant in the circuit court, appellee here.—REPORTER.

Wayne County General Hospital from March 22, 1931 to August 31, 1957 in the amount of $21,390.66 and for reimbursement of like expenditures paid and to be paid since August 31, 1957. The county of Wayne has a similar claim pending for expenses incurred by it in the sum of $16,181.85.

"Wilhelmina Van Etten, as stated above, has been hospitalized since May 31, 1955. In view of her advanced age, she is likely to remain in a hospital or convalescent home until her death.* She is presently a patient at the Evangelical Deaconess Hospital, 3245 East Jefferson, Detroit, Michigan, and has been such since October 21, 1957. Her current care at this hospital costs $22 per diem, or $8,030 per annum. In addition her estate is incurring and will continue to incur additional expenses for medical care and normal administration services, the amounts of which cannot be forecast.

"3½% to 4% per annum would appear to be the return which can be realized from normal prudent investment of the assets of Wilhelmina Van Etten's estate by appellees.

"*Q.* Whether the mother of Ida Bruschitsky is legally liable for the expenses already incurred for her mentally incompetent daughter and to be incurred?

"The appellant† says 'Yes.'

"The appellee says 'No.'"

An additional stipulation was entered into by appellants and Wayne county in which they adopt the State of Michigan's stipulation except paragraph 4 thereof dealing with the question of sufficient ability to support, care for or maintain. They substitute in lieu of paragraph 4 in the State stipulation the following facts: that from 1937 to 1951 Minnie Van Etten had 3 separate bank accounts in Detroit area banks carrying various balances; that a guardian

* The claim, originally filed in guardianship proceedings, is now defended by administrators.—REPORTER.

† *I. e.*, appellant in the circuit court, appellee here.—REPORTER.

was appointed for her on November 16, 1951, and the account of the guardian filed on August 19, 1952, shows that at the time he took over a savings account existed at the Bank of the Commonwealth in the amount of $2,228.75, and a net estate after expenses and disbursements in the amount of $1,675.25; that certain real estate was transferred to and from Minnie Van Etten from May 18, 1922, up to the year 1949 (The proceeds of these sales could be and probably are the deposits made to the various bank accounts during this same period of time.); that the Wayne county department of social welfare has filed a claim against the estate of Wilhelmina Van Etten in the amount of $987.89 for expenses incurred by it in the hospitalization of George Van Etten, $5,584.47 for expenses incurred by it in the hospitalization of Alma Van Etten, and $9,609.49 for expenses incurred by it in the hospitalization of Ida Bruschitsky. The total amount of the claim is $16,181.85.

George Van Etten was a son of Wilhelmina Van Etten. He was hospitalized at public expense during the various periods set forth in the claim filed by Wayne county. He was during those periods an indigent person. The last period for which Wayne county claims compensation for services to George Van Etten ended April 13, 1953.

Alma Van Etten, now deceased, was a daughter of Wilhelmina Van Etten. She was hospitalized at public expense during the various periods set forth in the claim filed by Wayne county. She was during those periods an indigent person. She died in 1953.

Ida Bruschitsky, also known as Ida Burschitske, is a daughter of Wilhelmina Van Etten. She has been hospitalized continuously since March 22, 1930, at public expense, and is presently a patient at Wayne County General Hospital. She is now, and has been at all times during the period of her hospitalization, an indigent person.

Wilhelmina Van Etten was removed to a nursing home on February 21, 1958. She died there on March 16, 1958. The assets of her estate at the time of trial totaled approximately $155,000.

The questions on appeal to this Court are:

1. Whether, as a matter of law, ability on the part of Wilhelmina Van Etten or her estate, to support her children at the time services were rendered to them as indigents, is a condition precedent to any present liability on the part of her estate to reimburse the State and county for such services.

2. Whether the stipulated facts show inability on the part of Wilhelmina Van Etten or her estate to support, care for and maintain her children prior to July 9, 1957, so that the judgment of the circuit court allowing amounts for services rendered to said children prior to said date is against the preponderance of the evidence.

The circuit court did not specifically rule on this second question.

The appellants have stipulated ability to pay and have agreed to pay from July 9, 1957, the date on which they received the settlement from the estate of Wilhelmina Van Etten's daughter, Agnes Momand.

The circuit court held that the date of acquisition of the assets is immaterial; that the determining factor is ability to pay at the time the claim is filed against the estate and not the ability to pay during the period of time in which the services were being rendered.

The issue in this case is whether the estate of Wilhelmina Van Etten, deceased, is now liable for the above claims in view of the following provision in CL 1948, § 330.21, as last amended by PA 1957, No 313 (Stat Ann 1957 Cum Supp § 14.811):

"The patient, husband, wife, father, mother, grandfather, grandmother and children of any age, being

of sufficient ability, shall jointly and severally be liable for the care and maintenance of any patient."

In determining the question of ability to pay, it is to be kept in mind that the deceased, who at the time of her death was 104 years of age and against whose estate the claims have been filed in the instant case, was a charwoman; that at the time her married daughter, Ida Bruschitsky, the mother of several children, was admitted to the hospital Wilhelmina Van Etten was a widow; that although she did have meager bank accounts they were barely enough for her own existence; and that the claims involved are for the support of her adult children, who were adults at the time of their commitments.

The probate court disallowed the claim of Michigan and the county of Wayne on the theory that the State and county had not shown that the deceased, prior to July 9, 1957, was possessed of sufficient ability within the meaning of the statute to reimburse the State of Michigan and the county of Wayne for any part of the cost, care or maintenance of the adult children. The circuit court reversed this finding for the reasons above given.

Justice EDWARD M. SHARPE, in the minority opinion in the case of *In re Linstead Estate,* 340 Mich 653, 659, said:

"In our opinion sufficient ability is a condition precedent to attaching liability, but it does not follow that failure of sufficient ability to pay for a part of the time, during which time deceased could become liable, is a cover-all for the entire period. It readily follows that whether Paul Linstead, during his lifetime, had sufficient ability to pay becomes a question of fact."

This opinion, concurred in by Justices CARR and BOYLES, then proceeded to state (p 660):

"In our opinion the State of Michigan has a claim against the estate of Paul Linstead for such period of time as he had sufficient ability to pay."

Justice BUSHNELL, speaking for a majority of the Court, did not dispute the finding of law set forth by Justice SHARPE, but held that the lower court found as a matter of fact inability to pay and indicated that this Court does not reverse the findings of fact of the trial judge, sitting without a jury, unless the evidence clearly preponderates in the opposite direction. Affirmance in the disallowance of the claim was based on the fact that deceased in his lifetime was never in a position where it could be held that he was of sufficient ability to provide for the care and maintenance of his emancipated, married and divorced daughter.

In the instant case, so far as the State of Michigan is concerned, it has stipulated inability to pay until July 9, 1957. Therefore, the allowance of this claim must be reversed.

Under the authority of *In re Linstead Estate, supra,* we do not think that the stipulated facts on behalf of Wayne county disclose a sufficient ability to pay prior to July 9, 1957. The county of Wayne has failed by a preponderance of the evidence to show that Wilhelmina Van Etten, prior to July 9, 1957, had sufficient ability to be liable under the meaning of the statute for the maintenance and care of her adult children. The statute uses the words "being of sufficient ability." Justice BUSHNELL in the majority opinion in the *Linstead Case* quotes from the trial court's opinion as follows (pp 660, 661):

" 'This court's answer to the first of questions hereinbefore stated is in the negative. In reaching this factual conclusion the court, among other things, holds that a man in his later years is entitled to and it is wise that he does make some provisions for his

maintenance in his old age. To rule otherwise would be to invite further additions to our already overloaded welfare rolls. In this connection it is also interesting to note the considerable amount of property and assets that a man may own and possess and still qualify under the proper statute for old-age assistance. * * * Certainly a man should be allowed to possess more of such property and assets before he is required to support someone else for whom under the common law he was not liable.' "

The stipulations show that Wilhelmina Van Etten had belongings and cash of a very modest nature—certainly insufficient to maintain her during her long lifetime—and of such a small amount that she continued to work at the age of 77 as a charwoman in order to make sure she had sufficient finances to sustain herself.

If we were constrained to reach the interpretation the State and county desire placed upon this legislation, a young person, despite the fact his parent may have been committed to a State mental institution and admittedly was an indigent person at the time of his admission, would find that, even if he were successful in pulling himself up to a position where he acquired a sufficient education and ability to provide for himself and his own family, he would be subject to claims of the State and county that would prevent him from providing for his own family needs and eventually make them subject for public support. We do not feel the legislature had this intent.

The judgment of the circuit court is reversed, with costs to appellants.

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

SOUTH LOOKING GLASS DRAINAGE DISTRICT BOARD *v.* GRAND TRUNK WESTERN RAILROAD COMPANY.

1. JUDGMENT — VACATION — MANDAMUS — JURISDICTION — DISCRETION OF COURT.

   Sua sponte vacation of judgment for plaintiff intercounty drainage board in its mandamus proceeding to compel defendant railroad company to remove obstruction to intercounty drain was proper, where accomplished before plaintiff had made application for leave to appeal from portion of judgment requiring plaintiff to bear 1/2 of the cost of such removal, as the circuit court still had jurisdiction in the proceedings and did not abuse its discretion in taking such action (CLS 1956, §§ 280.421, 280.422).

2. MANDAMUS—REVIEW—SUPREME COURT—FINDING OF COURT—EVIDENCE.

   The Supreme Court's duty on review of mandamus proceeding is to determine whether there is any evidence to support the trial court's findings.

3. DRAINS—OBSTRUCTION—MANDAMUS—EVIDENCE.

   Evidence presented in mandamus proceeding by intercounty drainage board *held*, sufficient to raise a question of fact and law whether the obstruction, of which plaintiff board sought removal, had been constructed by the defendant railroad company or by the drainage board itself (CLS 1956, §§ 280.421, 280.422).

4. MANDAMUS—DISCRETION OF COURT—SUPREME COURT.

   Mandamus is a discretionary writ and where there is evidence to support the circuit judge's denial thereof, the Supreme Court will not disturb it.

REFERENCES FOR POINTS IN HEADNOTES

[1] 30A Am Jur, Judgments §§ 632, 648.
[2, 4] 35 Am Jur, Mandamus § 394.
[3] 17A Am Jur, Drains and Sewers § 93.

Appeal from Ingham; McDonald (Archie D.), J., presiding. Submitted May 26, 1959. (Calendar No. 47,892.) Decided October 12, 1959.

Mandamus by John Hudson, deputy director of agriculture, C. K. Colby, Shiawassee county drain commissioner, and Gerald L. Graham, Ingham county drain commissioner, comprising the Drainage Board of South Looking Glass Drainage District, against the Grand Trunk Western Railroad Company to compel removal of obstructions to intercounty drain. Writ denied. Plaintiffs appeal. Affirmed.

Rosenburg, Painter & Stanton, for plaintiffs.

F. B. Henderson and *E. C. Opperthauser,* for defendant.

KAVANAGH, J. Plaintiff-appellant filed a petition for a writ of mandamus in the circuit court under the provisions of CLS 1956, §§ 280.421, 280.422 (Stat Ann 1957 Cum Supp §§ 11.1421, 11.1422).

CLS 1956, § 280.421 (Stat Ann 1957 Cum Supp § 11.1421), provides, in part, as follows:

"Whenever any person shall obstruct any established drain, it shall be the duty of the commissioner to cause such obstruction to be removed. Any lessening of the area of a drain, which area shall be a cross section of the drain, shall be deemed to be an obstruction. The person causing such obstruction shall be liable for the expense attendant upon the removal thereof, together with the charges of the commissioner, and the same shall be a lien upon the lands of the party causing or permitting such obstruction, and all of the expense shall by the commissioner be reported to the board of supervisors, together with the report of his doings in the premises, and by said board ordered spread upon the land of the offending party, should the same remain unpaid."

CLS 1956, § 280.422 (Stat Ann 1957 Cum Supp § 11.1422), provides, in part, as follows:

"Railroad or railway companies, telephone and telegraph companies shall not obstruct established drains, nor shall they lessen the area of any drain through their track bed. The area herein referred to is a cross section of the drain. * * * In case any railroad or railway company, telephone or telegraph company shall obstruct any established drain, or has constructed or shall construct any bridge or culvert over the same, leaving less capacity to the drain than such drain is legally entitled to, the commissioner or the drainage board, as the case may be, may, by mandamus proceedings in the circuit court of the county in which such obstruction shall occur, compel the removal of such obstruction."

It is alleged that the defendant had constructed and placed obstructions in the South Looking Glass drain, an established intercounty drain located in Shiawassee and Ingham counties.

Plaintiff prayed for a writ of mandamus to compel defendant railroad to remove the obstructions.

By stipulation most of the basic facts were agreed upon. They are essentially as follows.

The drain basically follows the old natural watercourse of Vermillion creek. This drain services an agricultural area of 20,000 acres of land within its watershed. The South Looking Glass drain is an intercounty drain established by appropriate order on October 11, 1895. At that time the defendant had a single-track bridge crossing the drain. There are no records indicating the type of that bridge, but it is assumed to have been a trestle type.

In 1902 defendant railroad removed the single-track bridge and installed a double-track, 2-span steel girder bridge approximately 70 feet in width, with a large concrete center pier. The right-of-way at that time was changed to a double-track system.

In 1919 the railroad installed wooden timbers, technically described as helper bents, as additional supports for the bridge for the purpose of strengthening the bridge due to increased speed of traffic and increased weight of locomotive power.

In 1929 and 1930 the defendant railroad reconstructed this helper bent under the west span of the bridge and installed a large cement foundation in the stream bed, under the timbers or helper bents, that reinforced the bridge resting thereon.

The drain, as initially established in 1895 at this railroad bridge, was 12 feet wide at the bottom and had a maximum depth of 4.56 feet and a top width of 21.12 feet.

Over a period of years since 1925 defendant railroad has dumped fill consisting of rocks and broken cement under the bridge. The railroad admits dumping at least a couple of carloads of slag. There have been 2 clean-outs of the drain by the drainage board since its establishment, one in 1925 and the other in 1941.

At the request of the railroad, the drainage board drove steel sheet piling along the edges of the center pier and the west helper bent pier and also installed a concrete slab between the 2 piers. This work raised the bottom of the drain, since about 18 inches of fill were put in plus a concrete apron about 1 foot thick.

Defendant railroad claimed that the work it did did not constitute an obstruction of the drain; that the drain had been deepened and the installation of the cement slab and the fill in the bottom of the drain were done by the drainage board and not by the railroad. It further contended that the drainage board was guilty of laches by not earlier starting a suit to compel the removal of these obstructions.

Upon a hearing of the cause, the trial court rendered an opinion and made a specific finding that the west helper bent and the cement pier supporting

the same, installed by the railroad, were obstructing the drain. The court also found that the concrete apron installed by the drainage board was an obstruction. The opinion granted plaintiff a writ of mandamus ordering the railroad to remove the obstructions, but also ordered plaintiff to bear one-half of the costs incident to such removal. This opinion was dated March 5, 1957.

March 28, 1957, plaintiff made a motion to modify the opinion and for entry of judgment. The motion sought to have the court delete the requirement that plaintiff pay 1/2 of the cost incident to the removal of the obstructions and the reinforcement of the defendant's railroad bridge.

May 17, 1957, a judgment was entered, in effect denying the motion and granting a peremptory writ of mandamus and requiring the Grand Trunk Western Railroad Company to remove from under its bridge the timbers constituting the west helper bent under the bridge, and the cement foundation supporting the west helper bent, and the cement wings on each end thereof, and remove the steel sheet piling and the concrete poured between the steel sheet piling and the westerly face of the center pier of said bridge, as well as the steel sheet piling and the concrete poured between said piling and the easterly face of the cement foundation under the west helper bent, and also the concrete apron under said bridge lying between the center pier and the west helper bent. The judgment further provided that "the cost of said removal when made, shall be borne equally 1/2 by the plaintiff-petitioner drainage district and 1/2 by the defendant railroad company."

May 27, 1957, plaintiff prepared a notice of settlement of statement of proceedings and facts in which it gave notice that it intended to apply to the Supreme Court for leave to appeal from the judgment heretofore rendered, and that on the 3d day of June,

1957, at 1:30 p.m., a proposed statement of proceedings and facts in support of such application for leave to appeal would be presented to the circuit court for settlement. This notice was filed June 4, 1957.

June 3, 1957, the court on its own motion set aside and held for naught the judgment heretofore entered and filed in this cause on May 17, 1957, for a further consideration of the matter.

Briefs and reply briefs were made by both plaintiff and defendant over the next several months.

March 21, 1958, the court filed a supplemental opinion. The court now found that supports were placed under the span, they being known as helper bents, but that did not necessarily say that they constituted such an obstruction as prevents the flow of water. The court did not find that there was an obstruction, "in view of the holding that the cement floor placed there by the commission is the bottom of the drain." The court further said:

"It seems to this court that the history of cleanouts and maintaining support of bridge together with the intention to deepen the drain does not furnish sufficient grounds for the issuance of the writ."

A judgment was filed April 17, 1958, so holding.

Plaintiff-petitioner has appealed to this Court. It raises the following questions:

"1. Where the trial court granted plaintiff's petition for a writ of mandamus upon the finding that a supporting bridge structure of the defendant constituted an obstruction to a drain, did the trial court have authority to *sua sponte* vacate plaintiff's judgment upon plaintiff making an application for leave to appeal from that part of the judgment requiring plaintiff to pay 1/2 the costs of reinforcing defendant's bridge?

"2. Under the statutory mandamus proceeding for

the removal of a bridge support obstructing an established drain, did the trial court err in requiring plaintiff to absorb 1/2 of the estimated $43,000 costs for the removal of the obstruction placed therein by the defendant and for the reinforcement of the bridge?

"3. Where a concrete and timber bridge support was constructed by the defendant in the middle of an established drain and obstructs the drain, did the court err in dismissing the action in disregard of his findings thereon?

"4. Did the court err in finally dismissing the action for the reason that plaintiff was proposing to deepen the drain, there being no evidence thereon in the record?

"5. Under the undisputed evidence that the defendant railroad constructed within the drain a concrete supporting structure under its railroad bridge, is the plaintiff as a matter of law entitled to a writ of mandamus ordering the removal thereof?

"6. In view of the findings of the trial court in its initial opinion, did the trial court err in his conclusions of law in dismissing the action and in disregarding the judgment initially entered?

"7. Is the final judgment of the court dismissing the action contrary to the evidence and the law?

"8. Does a claim of laches constitute a defense against the removal of obstructions?"

Plaintiff had not yet made an application for leave to appeal from the judgment entered in the circuit court when the trial judge on his own motion vacated plaintiff's judgment. Therefore, the ordinary rules with respect to setting aside a judgment of the circuit court apply.

This Court has on numerous occasions held that a circuit court could set aside its judgment on its own motion as long as it retained jurisdiction. *J. L. Hudson Co.* v. *Barnett,* 255 Mich 465; *Raridan* v. *Bick,* 259 Mich 200; *Freedman* v. *Burton,* 281 Mich 208;

Strausser v. *Sovereign Camp of the Woodmen of the World,* 283 Mich 370.

The trial court still had jurisdiction of this case and did not abuse its discretion in setting aside its judgment on its own motion.

The other questions raised by plaintiff do not need discussion in view of our conclusion above reached, except to note that this was a mandamus proceeding and on review this Court's duty is to determine whether there is any evidence to support the trial court's findings. *Tanton* v. *McKenney,* 226 Mich 245 (33 ALR 1175).

There was testimony on the part of both plaintiff's and defendant's witnesses to the effect that the drainage board inserted the cement apron in the bottom of the drain and consequently raised the level of the drain and created the obstruction that was preventing the water from passing through. There was further testimony that the drainage board's agents had improperly and irregularly constructed sheet metal piling. There was sufficient evidence to raise a question as a matter of fact and law whether the obstruction in the drain was constructed by the defendant railroad company or by the drainage board itself.

It has been held many times by this Court that mandamus is a discretionary writ and where there is evidence to support the circuit judge's denial thereof this Court will not disturb it. *Winter* v. *Royal Oak City Manager,* 317 Mich 259; *Kosiba* v. *Wayne County Board of Auditors,* 320 Mich 322; *City of Berkley* v. *Township of Royal Oak,* 320 Mich 597; *State Highway Commissioner* v. *Ottawa Circuit Judge,* 339 Mich 390.

The judgment of the trial court is affirmed, with costs in favor of defendant.

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

HOUGHTON *v.* ROBERTS.

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

   The Supreme Court will not substitute its judgment for that of a trial court in a nonjury case on a question of fact unless the evidence clearly preponderates in the opposite direction, since the trial court had an opportunity to see the witnesses testify and observe their demeanor in the courtroom and was in a far better position to determine which witness was telling the truth.

2. CONTRACTS — FINDING OF CANCELLATION — DEMAND — TIME — EVIDENCE.

   Finding of trial court in nonjury case that contract for sale of stock to plaintiff for breach of which he sought damages from defendant had been canceled *held,* not against preponderance of the evidence including subsequent transactions between plaintiff and defendant and others not in accordance with the contract sued on and lapse of over 5 years without demand for compliance.

Appeal from St. Joseph; Andrews (Mark S.), J. Submitted June 2, 1959. (Docket No. 2, Calendar No. 47,919.) Decided October 12, 1959.

Assumpsit by Elmer Houghton against William F. Roberts for value of corporate stock claimed by reason of liquidation and purchase arrangement. Judgment for defendant. Plaintiff appeals. Affirmed.

Dresser & Dresser, for plaintiff.

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 896.
[2] 9 Am Jur, Cancellation of Instruments § 63.

Megargle & Megargle and *Roy H. Hagerman,* for defendant.

KAVANAGH, J. Plaintiff brought this action in assumpsit claiming damages for breach by defendant of a written contract between plaintiff, defendant, and 2 other parties.

The alleged breach consisted of the refusal of defendant in June of 1956 to sell to plaintiff certain stock in accordance with a written contract entered into on December 3, 1948, and attached to plaintiff's declaration as exhibit A.

Defendant answered and admitted the execution of the agreement, but denied that plaintiff was entitled to recover under the contract for the following reasons: (1) Plaintiff agreed to and did cancel the December 3, 1948, contract. (2) The agreement provided for a sale in the event plaintiff and Bruce Kaufman were able to complete a dissolution of K & L Tool & Die Company, on such dissolution obtain certain of the machinery, tools, and equipment in lieu of their stock in the K & L company, sell these to the Bronson Tool & Die Company and take in payment therefor common stock of the Bronson Tool & Die Company. (3) After the issuance of the common stock of Bronson Tool & Die Company to Kaufman and Houghton for the assets of K & L Tool & Die Company, defendant William F. Roberts agreed to sell to said Kaufman and Houghton such additional shares of the common stock of Bronson Tool & Die Company which he owned so that the total holdings of Kaufman and Houghton would each be 25% of the outstanding capital stock of Bronson Tool & Die Company, except the stock held by T. E. St. Clair. This additional stock was to be sold to Kaufman and Houghton on the basis of 80¢ per share and was to be paid by the said Kaufman and Houghton out of the dividends and/or bonus which

they in the future would receive from Bronson Tool & Die Company on all their stock. (4) The agreement was never performed by plaintiff Houghton and Kaufman. (5) The contract was altered and changed, both by action of the parties as officers of Bronson Tool & Die Company and as officers of K & L Tool & Die Company, and was particularly canceled and changed by a new agreement dated January 10, 1951. (6) Bronson Tool & Die Company has not paid and has never been in a position to pay any dividends or stock bonus. (7) Plaintiff is estopped now to claim rights under the December 3, 1948, contract because of its alterations and cancellations agreed to by plaintiff, and because of plaintiff's participation in the alleged new agreement from January 10, 1951, to May, 1956.

The case was tried by the trial judge without a jury. The court entered a judgment of no cause of action.

Plaintiff appeals and claims: (1) The judgment of the trial court was against the preponderance of the evidence when it held that the intent of the contract between the parties prevented plaintiff from suing on a breach of the contract at the time of this suit or any other time. (2) The court erred in holding that plaintiff did not have a separate cause of action against defendant for his failure to sell to plaintiff the stock, which plaintiff claims he was entitled to under the agreement of December 3, 1948. (3) The court erred in holding in effect that where an actual agreement to form a joint adventure is shown, one party is denied his rights under the agreement when another party attempts to abandon the adventure. (4) The court erred in holding that defendant, a party to the joint adventure, can enrich himself from the profits of the joint adventure at the expense of the plaintiff, another joint adventurer. (5) The court erred in answering 6 additional ques-

tions, which plaintiff claims are pertinent to a decision of this case.

The facts material to a proper understanding and decision of this case disclose that on the date of the written instrument, December 3, 1948, plaintiff, defendant, and one Kaufman owned all of the stock of K & L Tool & Die Company, and defendant and one St. Clair owned all of the issued stock of Bronson Tool & Die Company, both being Michigan corporations. Defendant owned the controlling interest in both corporations. Bronson had been performing work brought to it by K & L. Defendant, plaintiff, F. B. Roberts, defendant's son, and Bruce Kaufman executed the instrument that is the subject matter of this litigation, apparently intending to consolidate their forces and operations and carry on the tool and die business as Bronson Tool & Die Company under an arrangement whereby each of the 4 would eventually own 25% of the holdings of Bronson. The result was plaintiff's exhibit A, which reads as follows:

"Agreement, made this 3d day of December, 1948, by and between Bruce Kaufman, Elmer Houghton, F. B. Roberts, and W. F. Roberts, all of Bronson, Michigan, as follows:

"Whereas, W. F. Roberts, now is owner of 40,500 shares of the common stock of Bronson Tool & Die Co., and he desires to have associated with him in said business, Bruce Kaufman, Elmer Houghton, and F. B. Roberts, and the parties desire that an agreement be made whereby each of the 4 parties will own 25% of the common stock of the Bronson Tool & Die Co. now owned by W. F. Roberts, and each of them to eventually acquire 25% of the common stock now owned by T. E. St. Clair, and to so hold the common stock of Bronson Tool & Die Co. at all times, so that each of the 4 parties shall own 25% of the common stock of said corporation;

"Therefore, it is agreed as follows, to wit:

"1. That Bruce Kaufman, Elmer Houghton, and W. F. Roberts now own all of the common stock of K & L Tool & Die Co., which they have agreed to liquidate, and in the liquidation it is proposed that said Kaufman and Houghton will acquire certain of the machinery, tools and equipment of said company, which they are to sell to the Bronson Tool & Die Co. and take in payment therefor common stock of the said Bronson Tool & Die Co.

"2. W. F. Roberts agrees that after the issuance of the common stock of Bronson Tool & Die Co. to said Kaufman and Houghton, for the assets of the K & L Tool & Die Co., he will sell to the said Kaufman and Houghton such additional shares of the common stock of the Bronson Tool & Die Co. which he owns so that the total holdings of said Kaufman and Houghton shall each be 25% of the outstanding capital stock of the Bronson Tool & Die Co., except the stock held by the said T. E. St. Clair. This additional stock which W. F. Roberts agrees to sell to the said Kaufman and Houghton shall be sold to them on a basis of 80¢ per share, and shall be paid for by the said Kaufman and Houghton out of the dividends and/or bonus which they shall in the future receive from the Bronson Tool & Die Co. on all their stock. The stock shall be delivered by the said Roberts to the said Kaufman and Houghton when the same has been paid for in accordance with this agreement. The said Kaufman and Houghton shall have the right to vote the stock which the said Roberts has herein agreed to sell, while there is no default in the payment thereon.

"3. W. F. Roberts also agrees to see that there is sold, assigned or transferred to his son, F. B. Roberts, 25% of the common stock of the Bronson Tool & Die Co., which shall equal 25% of the outstanding capital stock except that of T. E. St. Clair.

"4. It is agreed by all 4 of the parties hereto that if and when the shares of stock now owned by T. E. St. Clair are purchased by them, or any of them,

said shares of stock shall be distributed and owned equally by the 4 parties hereto.

"5. This agreement is to be so construed that the 4 parties hereto shall become each a 1/4 owner of the Bronson Tool & Die Co., when the terms of this agreement have been carried out, as that is the intention of the parties, that they will each own 1/4 of said business.

"6. It is agreed that the parties hereto will do all things necessary to carry this agreement into effect, including the joining in and voting on any resolutions as stockholders or directors of the companies involved, and that they will execute all instruments and papers necessary to carry this agreement into effect.

"In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

"W. F. ROBERTS
"ELMER HOUGHTON
"BRUCE KAUFMAN
"F. B. ROBERTS."

On December 9, 1949, the directors and stockholders of K & L took formal action and authorized the sale of its assets at book value to Bronson, for which said stockholders were to receive stock in Bronson at par according to their holdings, and K & L was to be dissolved.

On April 1, 1950, at a meeting of Bronson stockholders, it was voted to buy the assets of K & L at the book value of $30,000. It is to be noted that this arrangement was not in accordance with the written contract sued upon and constituted an alteration of said contract.

On April 15, 1950, plaintiff and Kaufman assigned their stock in K & L to Bronson and each received 6,000 shares of Bronson stock. On the same date, St. Clair assigned all of his stock to defendant's wife, and the 6,000 shares Kaufman and plaintiff

each received came from this stock, not from Bronson Tool & Die Company. Plaintiff still owns his shares, and defendant acquired Kaufman's stock on December 20, 1951.

Plaintiff and Kaufman became employees of Bronson about December 1, 1948, and plaintiff continued in such employment until June 11, 1956, when he left because defendant would not sell him the stock in Bronson, to which he claims he is entitled under the 1948 instrument. It appears that Kaufman left the employ of Bronson about the time he assigned his stock to the defendant in 1951, but returned subsequently.

According to plaintiff's exhibit 5, between March 31, 1949, and October 31, 1956, Bronson increased its total assets from $130,339.58 to $483,653.34. However, it is undisputed that the company was never in a position to pay a dividend or bonus during that period of time.

It is the position of plaintiff that the 1948 instrument should be construed to bind defendant to sell to plaintiff at 80¢ per share sufficient of the shares then owned by defendant and of the St. Clair shares, which plaintiff claims defendant owns, so that, with the 6,000 shares plaintiff acquired for his interest in K & L, he would own 25% of the issued shares in Bronson; although plaintiff contends he was not required to pay more for the St. Clair stock than defendant paid for it.

One of defendant's claims is that the sale of stock by defendant was conditional upon the payment of a dividend and/or bonus by Bronson.

The lower court held that in reading the 1948 contract it is apparent that it was the intention of the parties, as disclosed by the language of paragraph 1, that plaintiff and Kaufman were to receive Bronson stock for their interest as stockholders in K & L. To that end it was stated that plaintiff, defendant

and Kaufman, constituting all of the stockholders of K & L, were to liquidate this company, and in the liquidation it was contemplated that Kaufman and plaintiff would acquire certain machinery, tools, and equipment of K & L which they were to sell to Bronson and take Bronson stock in payment.

The court found as a matter of fact that the original plan was changed by action of the stockholders and directors of K & L on December 9, 1949, when it was voted to sell the assets of K & L at book value to Bronson and receive in exchange stock in Bronson at par and distribute the same to K & L stockholders. The court also found as a matter of fact that although the stockholders of Bronson voted to buy the assets of K & L at book value this was not done, and instead defendant Roberts caused to be tranferred from the St. Clair stock 6,000 shares to Kaufman and 6,000 shares to plaintiff, which they accepted for the 1/5th interest each had in K & L.

The court further found that plaintiff could not complain as to the provisions of paragraph 1 of the December 3, 1948, contract because he had received the 6,000 shares of Bronson stock for his interest in K & L.

The circuit court found as a matter of fact that paragraph 2 of the severable contract of December 3, 1948, specified the manner in which Kaufman and plaintiff could acquire additional stock in Bronson. It states that defendant will sell to the said Kaufman and Houghton such additional shares of Bronson Tool & Die Company which he owns so that the total holdings of Kaufman and Houghton would each equal 25% of Bronson stock, except St. Clair holdings, said additional shares to be sold to them on a basis of 80¢ per share, "and shall be paid for by the said Kaufman and Houghton out of the dividends and/or bonus which they shall in the future receive

from the Bronson Tool & Die Co. on all their stock. The stock shall be delivered by the said Roberts to the said Kaufman and Houghton when the same has been paid for in accordance with this agreement."

The court found as a matter of fact that the instrument disclosed an intention by the parties to impose 2 conditions concerning the sale of Bronson stock by defendant. The first condition was that such sale was to be made to both Kaufman and plaintiff concurrently. The court found as a matter of fact that the language of the instrument does not disclose an intention that defendant is bound to sell to plaintiff the shares which he demanded since the agreement to sell was to both Kaufman and plaintiff concurrently, and at the time of the demand in May and June of 1956 no agreement to sell to plaintiff alone existed.

The court further held, as a second condition, that the language of the instrument does not disclose an intention to bind Kaufman and plaintiff to buy the stock irrespective of a dividend and/or bonus from Bronson, and does not disclose an intention to bind defendant to sell to plaintiff and Kaufman for cash. It was the intention of the parties that defendant would be bound to sell only if Bronson paid or should have paid a dividend and/or bonus. The court then found as a matter of fact that Bronson was never in a financial position to justify a dividend and/or bonus.

This is a law action in which the judge tried the case without a jury. His opinion discloses certain findings of fact supported by competent evidence. It has been repeatedly stated that this Court will not substitute its judgment in such a case unless the evidence clearly preponderates in the opposite direction. *Patton* v. *Oakman,* 298 Mich 672; *Mallory* v. *Pitcairn,* 307 Mich 40; *Rose* v. *Paint Manufacturers, Inc.,* 311

Mich 428; *Moller* v. *Sirhal*, 342 Mich 391; *Zarzecki* v. *Hatch*, 347 Mich 138 (62 ALR2d 284).

We recognize that the court had an opportunity to see the witnesses testify, to observe their demeanor in the courtroom, and was in a far better position than is the appellate court to determine which one of the witnesses was telling the truth.

The record discloses testimony by the defendant that the plaintiff was present at the stockholders' meeting on January 10, 1951, and actually signed the minutes which contained a clause cancelling all previous contracts as to purchase of company stock. It was the testimony of plaintiff that this clause was not in the minutes at the time they were signed by him. There was testimony by witnesses that it was in the minutes, that it was understood by plaintiff, and that it was the subject of discussion for weeks prior to the meeting.

The trial court, sitting without a jury, determined the fact to be that the December 3, 1948, agreement was canceled.

The record discloses that plaintiff worked for Bronson from January 10, 1951, until May, 1956, without making any demand upon defendant for the stock. This would seem to reasonable people to indicate that he too believed the stock arrangement had been canceled. The fact that he had his salary increased many times by the incentive arrangement made at the January 10, 1951, meeting, and that he accepted it from then until May, 1956, might indicate to the trial court that he fully understood that the stock arrangement had been canceled. The court having so found from the instruments themselves, the record and testimony of the parties, we cannot say that such a finding was against the preponderance of the evidence.

It is apparent that if the stock arrangement was canceled January 10, 1951, then plaintiff had no right

of action for damages against defendant based upon the 1948 written agreement in May and June of 1956 when demand was made.

In view of this disposition of the main problem, the other arguments and contentions of plaintiff-appellant, which have been given serious consideration, need not be answered.

The judgment of no cause for action must be affirmed. Costs shall be taxed in favor of appellee.

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

INSEALATOR, INC., *v.* WALLACE.

WALLACE *v.* INSEALATOR, INC.

1. CONTRACTS—COMMISSIONS OF MANUFACTURER'S AGENT—BOOKS AND RECORDS.

Finding of trial court that plaintiff manufacturer's agent had failed to substantiate his claim that defendant corporation had wrongfully manipulated or altered its books and records so as to preclude plaintiff from getting all commissions due him although limited to "50% of the total net profit before taxes" *held,* not against the preponderance of the evidence.

REFERENCES FOR POINTS IN HEADNOTES

[1] 2 Am Jur, Agency § 311.
[2] 3 Am Jur, Appeal and Error § 900.
[3–6] 28 Am Jur, Injunctions §§ 72, 102.
[7] 20 Am Jur, Evidence § 910.
[8] 20 Am Jur, Evidence § 558.
[9] 20 Am Jur, Evidence § 740.
[10] 20 Am Jur, Evidence §§ 418, 430.
[11] 16 Am Jur, Depositions § 114.
[12] 28 Am Jur, Injunctions § 73.
In camera trial or hearing and other procedures to safeguard trade secret or the like against undue disclosure in course of civil action involving such secret. 62 ALR2d 509.
[13] 14 Am Jur, Costs § 92.

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

The Supreme Court does not substitute its judgment on questions of fact in a nonjury case unless the evidence clearly preponderates in the opposite direction.

3. INJUNCTION—TRADE SECRETS.

It is essential to a suit to enjoin use of alleged trade secrets by defendant, a manufacturer's agent formerly employed by plaintiff, that plaintiff establish a disclosure in confidence to defendant of certain trade secrets and the wrongful misappropriation of such secrets by defendant to plaintiff's damage.

4. SAME—TRADE SECRET—COMMON KNOWLEDGE.

There must be a trade secret before there can be a betrayal thereof that is the subject of injunctive relief, as the law does not protect knowledge so general as to be common property in the trade.

5. SAME—TRADE SECRET—COMMON KNOWLEDGE.

There is no legally recognizable trade secret in an idea that was well known or easily ascertainable.

6. SAME—TRADE SECRETS—STOP-LEAK.

Plaintiff in suit to enjoin alleged improper use of trade secret by defendant who had been its manufacturer's agent in the sale of a stop-leak product for automobile radiators *held*, to have failed to show that ingredients were the same or were used in the same proportion, that the method of production was unique, that packaging was the same or was sold as plaintiff's product.

7. SAME—EVIDENCE—UNIDENTIFIED DOCUMENT.

Exclusion of document as to method of operation of defendant corporation, not identified as to authorship or time it was drafted, *held*, proper, in suit to enjoin defendant's use of alleged trade secret.

8. SAME—SELF-SERVING DECLARATIONS.

Self-serving declarations were properly excluded in suit to enjoin defendant's use of alleged trade secrets.

9. SAME—TRADE SECRETS—UNIDENTIFIED MODELS.

Exhibits that were not identified as exact models in use at time defendant left employ of plaintiff in suit to enjoin defendant's use of alleged trade secrets were properly excluded.

10. SAME—EVIDENCE—TRADE SECRET—PATENTS.

Exhibit that was shown to have been obtained from the patent office although not certified to by that office was properly admitted to reveal purpose of a patent that had been issued to another person some 27 years before contract had been made between plaintiff and defendant in suit to enjoin latter's use of alleged trade secret.

11. DISCOVERY—DEPOSITIONS CONTAINING IRRELEVANT AND IMMATERIAL MATTER—ADMISSION—IMPEACHMENT.

It was not error for trial court to exclude discovery depositions containing irrelevant and immaterial testimony because of such content when counsel would not accept court's offer to go through them and make a ruling as to the admissibility of testimony therein but insisted on their admission in their entirety under court rule providing for use of such depositions "so far as admissible under the rules of evidence," where opportunity was afforded counsel to use them to contradict or impeach (Court Rule No 35, § 6 [1945]).

12. COURTS—TAKING TESTIMONY IN SECRET—TRADE SECRETS.

It was not error for trial court not to take testimony in secret in the court's chambers in suit to enjoin defendant's use of alleged trade secrets, where it is held that no legal trade secrets, as such, were involved in case.

13. COSTS—CONSOLIDATED CASES—FAILURE OF EITHER APPELLANT TO PREVAIL.

No costs are allowed in suit to enjoin defendant's use of alleged trade secrets consolidated with latter's action against plaintiff for commissions, where both parties have appealed and neither has prevailed in his position.

Appeal from Wayne; Fenlon (Edward H.), J., presiding. Submitted June 2, 1959. (Docket No. 11, Calendar No. 47,757.) Decided October 12, 1959.

Bill by Insealator, Inc., a Michigan corporation, against William P. Wallace, the American Waterlock Corporation, an Illinois corporation, and others to enjoin use of secret knowledge, information and ingredients in a manufacturing process. Case consolidated with previously instituted law action by William P. Wallace against Insealator, Inc., for sales

commissions. Bill dismissed. Judgment of no cause of action entered in law case. Plaintiff in chancery appeals and defendants cross-appeal, defendant Wallace asking judgment in law case. Affirmed.

Butzel, Eaman, Long, Gust & Kennedy (*Percy M. Lovett, James D. Ritchie* and *Rockwell T. Gust, Jr.*, of counsel), for plaintiff Insealator, Inc.

Roy S. Lasswell and *Gordon E. Gable,* for defendant Wallace and others.

KAVANAGH, J. William P. Wallace instituted a law action in the circuit court for Wayne county against Insealator, Inc., for claimed commissions allegedly earned as a manufacturer's agent under contracts with Insealator beginning February 9, 1954, and ending subsequent to discharge of Wallace by Insealator on April 7, 1955.

It is Wallace's position that the commissions have been earned but not paid. Such commissions arose out of sales made by Wallace by delivery of a radiator stop-leak product in the form of pellets in large quantities to automobile manufacturers.

The pertinent contracts are 3 in number and were dated February 9, 1954, June 5, 1954, and December 16, 1954. They are as follows:

"February 9, 1954

"*To whom it may concern*:

"As of February 1st, I have engaged a manufacturers' agent, whose name is W. P. Wallace, who will act as an agent for the Insealator pellets, also all industrial sales of Gasketelper. He will be paid a straight commission of 25% on all gross sales when the money is collected by us, subject to amendment below.

"BAR'S PRODUCTS SUPPLY, INC.
/s/ "FRED D. BARTON
"President

"cc: Mr. Fred D. Barton
Mr. W. P. Wallace
Mr. James B. Eaman

"Amendment:

"When total commissions earned have reached $25,000, there will be a modification of the 25% basis. The exact adjustment to be agreed upon at a later date."

"June 5, 1954

"Supplement to replace memorandum agreement under date of February 9, 1954

"Re: William P. Wallace

"1. William P. Wallace will act as an agent for the sale of Insealator pellets and also for all industrial sales of Gasketelper.

"2. Mr. Wallace's territory coincides with that of Bar's Products Supply, Inc., and thus excludes the territory serviced by Bar's Products, Inc. (a California corporation).

"3. Mr. Wallace will be paid a straight commission of 25% on all of his gross sales to the automotive and engine manufacturers alone. Engine and/or motor rebuilders are specifically excluded.

"4. Mr. Wallace will receive a commission of 5% on sales to automotive manufacturers of Bar's Leaks under private label, excepting sales to Buick Motor Division, General Motors Corporation.

"5. The above commissions will be paid when the money is collected by us, following completion of the sale.

"6. Total commissions earned will be paid at the rate of 25%, will (*sic*) the exception as noted in paragraph 4, and with the additional condition that the total commissions paid Mr. Wallace cannot exceed 50% of the total net profit after taxes of Insealator, Incorporated.

"INSEALATOR, INCORPORATED
/s/ "FRED D. BARTON,
"President

"Approved:
/s/ "WILLIAM P. WALLACE"

"December 16, 1954

"Supplement to replace memo agreements under dates of February 9, 1954 and April 19, 1954. Re: W. P. Wallace

"W. P. Wallace will act as an agent for the Insealator pellets, also all industrial sales of Gasketelper. He will be paid a straight commission of 25% on all gross sales to the automotive manufacturers alone. Rebuilders are specifically excluded. W. P. Wallace will receive a commission of 5% on sale of Bar's Leaks under private label to the automotive manufacturers alone, with the exception of Buick business.

"The above commission will be paid when the money is collected by us. Completed sale only.

"This agreement is applicable to the territory covered in the continental United States by Bar's Products Supply, Inc. and Insealator, Inc., with the exception of the territory covered by the California corporations, Bar's Products, Inc., and Bar's Leaks Western, both located at 226 South 24th street, San Jose, California, and W. P. Wallace waives right to commissions on shipments of Insealator pellets made in the territory of the above corporations which covers the Pacific coast territory only.

"When the total commission earned have reached $25,000 per year there will be a nodification (*sic*) of the 25% basis on Gasketelper and and (*sic*) Insealator pellets by mutual agreement.

"Under no circumstances can the total commission exceed 50% of the total net profit before taxes of Insealator, Incorporated.

"BAR'S PRODUCTS SUPPLY, INC.
/s/ "FRED D. BARTON,
"President.

"Approved
/s/ "W. P. WALLACE"

It is to be noted that under the February 9, 1954, contract Wallace's total commissions were limited by the following factors: (1) 25% of gross sales when money is collected, subject to an amendment as

follows: When total commissions earned reach $25,000, there will be a modification of the 25% basis. Under the June 5, 1954, contract the limitations were as follows: (1) Commissions of 25% on all gross sales to automotive and engine manufacturers alone; (2) Commission of 5% on sale of Bar's Leaks, with a certain designated exception; (3) Money must first be collected and sale completed; (4) Total commissions cannot exceed 50% of the total net profit of Insealator after taxes. The December 16, 1954, contract contained the following commission limitations: (1) 25% on all gross sales to automotive manufacturers alone; 5% on sale of Bar's Leaks to automotive manufacturers alone, with one exception; (2) Money must first be collected and sale completed; (3) Agreement does not cover sales in the Pacific coast territory covered by Insealator's California corporations; (4) When total commissions reach $25,000 there will be a mutually agreed upon modification of the 25% basis; (5) Total commissions cannot exceed 50% of the total net profit of Insealator before taxes.

Fred D. Barton executed the required contracts on behalf of Insealator, Inc., a Michigan corporation, whose stock he controlled. Insealator manufactured the pellets under license granted to it by another corporation whose stock was also controlled by Mr. Barton.

In this action for claimed commissions, defense is made by Insealator that Wallace has forfeited his right to commissions because of his activity while a manufacturer's agent for Insealator in helping organize a competitive corporation, American Waterlock Corporation, and using the information gained as trade secrets for his own benefit as a stockholder of the rival in the field of stop-leakage products.

Subsequent to the filing of Wallace's action for commissions, Insealator filed a bill in chancery seek-

ing injunctive relief and damages against Wallace and the American Waterlock Corporation. The chancery action was predicated upon an alleged confidential relationship between Wallace and Barton, breached by Wallace's appropriation to his own benefit of information of trade secrets entrusted to Wallace. It is claimed circumstances show bad faith in said use, calling forth equitable jurisdiction to declare an implied trust for the benefit of Insealator in the unjust enrichment and gains made by Wallace.

It is the contention of Wallace, as defendant in the chancery action, that no trade secrets were involved; that no confidential relationship existed between Wallace, Insealator, and Barton; that the alleged trade secrets were all available to the public through the registering of Barton's patent, and the source of the material used and the combination of it had been used in the trade for years; that the claimed development of an extruding machine attachment was nothing unusual and was known to all manufacturers and agents of extruding equipment; that since there was no confidential relationship and no trade secrets involved, plaintiff in the chancery case was not entitled to injunctive relief or damages.

The 2 cases were combined for trial in the Wayne circuit court.

The trial judge, at the conclusion of proofs, rendered a written opinion in which he dismissed the law action for commissions with a 1-paragraph statement in a 20-page opinion to the effect that Wallace had failed by a preponderance of the evidence to substantiate his claim. He entered a judgment of no cause of action in the law case. Likewise, in the chancery case, the trial court held Insealator failed to substantiate its claims for damages or injunctive relief and dismissed plaintiff's bill of complaint. In dismissing the bill of complaint, the trial judge in his

opinion held that the alleged secrets were not trade secrets in the legal sense from which could arise a confidence reposed by Barton in Wallace and breached by him in the competitive field of stop-leakage devices; that the relationship was one for mutual benefit; that there was no misappropriation of information upon which to claim bad faith; that there was no intent by Wallace to wreck Barton's Buick business; that the admitted dealings of the parties negative any possible showing of advantage taken by one at the expense of the other requiring compensation; that with a patent background, Barton cannot impose on Wallace a relationship based on bad faith in departing from the purpose in giving the information, since the purpose was to use the information for a common benefit.

From the order dismissing the bill of complaint and the entry of a judgment of no cause for action in the law case, both parties have appealed.

Appellant Insealator presents 13 individual claims of error by the trial court. Seven of these claims relate directly to the alleged theft of trade secrets. These are 3 through 9, and can be stated in 1 question: Were the use and source of supply, method of mixing, and proportions of materials used in the manufacture of the pellets, and the adaptations and modifications made to the extruding machine trade secrets? The lower court said "no." Appellant claims "yes." The first 2 questions presented by appellant can be stated in one: Was Wallace acting in a confidential and fiduciary capacity and under duty to keep inviolate the confidential disclosures of trade secrets made to him during the course of his employment with Insealator? The lower court said "no." Appellant says "yes." Three other questions have to do with the admission of certain exhibits and depositions in evidence, the lower court either having refused to admit them or admitting some of them

over objection. The last question is: "Should the testimony as to some of the trade secrets have been taken in secret in the court's chambers as requested by appellant's attorney?" The lower court said "no." Appellant claims it should have been accorded this right.

Wallace, on appeal, proposes 4 questions. In each instance Wallace contends the lower court failed to rule on these points. He contends the answers should have been "yes." They are as follows:

"1. Did Wallace prove his case on his contract for commissions earned and unpaid in the amount of $11,252.72 through April 7, 1955 when he was discharged?

"2. Did Wallace prove his case for commissions earned on shipments to Ford, Chevrolet and Nash after the date of his discharge on April 7, 1955 for the unexpired term of original purchase orders for said companies procured by Wallace prior to April 7, 1955?

"3. Does Wallace have a right to commissions based upon a full 5¢ per unit price for the Ford, Chevrolet and Nash purchase orders procured by him prior to April 7, 1955, but completed after said date of discharge?

"4. Were there sufficient profits in Insealator to allow payment to Wallace of all commissions proved regardless of his contract provision limiting his 25% commission to 50% of the total profits of Insealator?"

The determining facts upon which these causes of action stand or fall are as follows.

Fred D. Barton had experimented in the field of rust-proof and stop-leak devices. In 1947 he made application for a patent, which was granted in January, 1952, of a liquid composition which he called "Bar's Leaks." Its basic ingredients were ginger-root flour and soluble oil, with a recommendation that

crushed or ground nut shells, such as almond shells, would constitute a beneficial addition to the preparation. The patent claim sets out the proportions of ginger-root flour and soluble oil as roughly 2 pounds of ginger-root flour to a gallon of soluble oil. The patent search in 1947, when application was made, revealed a patent granted to one Wright on May 3, 1927, for a stop-leak product for radiators, described as follows: "For use in old radiators that may leak due to the solvent action of the solution on crystalized salts that may be present because of the use of bad water or otherwise, there may be introduced a small quantity of commercial ginger or other similar substance to stop or counteract the leak."

The use of ginger-root with its starch content was not new as a stop-leak ingredient. Raw ginger-root before extraction of ginger oil was more expensive than "spent" ginger since the latter is the waste product after extraction of the oil. The source of supply for this "spent" ginger was with the ginger ale companies, principally Canada Dry and Vernor's. Its cost was approximately 5¢ per pound, while the raw root was 35¢ or more per pound. Almond shells were purchased from California almond growers. The binder of soluble oil was purchased on the open market. It was a mixture of these elements that Barton produced in liquid form in a small bottle sold to retail users as "Bar's Leaks."

In about 1952 it was suggested to Barton by an engineer of General Motors that the automobile industry would be interested in such a mixture provided it was furnished in pellet form to be placed in radiators as they came off the production line. Shortly thereafter Barton organized a Michigan corporation known as Insealator, Inc., which began the manufacture of pellets in small quantities. His mechanical process was ineffective. He used a flour mixer and molded the pellets by hand labor. Barton

was not an engineer by training. He needed help, both to sell his pellet product and develop a mechanical process to produce the pellets in large quantities. He met Wallace, a manufacturer's agent, in the Detroit area. Wallace, with some training as a mechanical engineer, had been a sales representative for Perfect Circle Company and as such had sold piston rings to the large automobile companies. He knew their engineers and sales staffs and was in a position to obtain orders from them for the pellets. Wallace entered into an agreement with Insealator to be its manufacturer's agent for the sale of the pellets in accordance with the written agreements dated February 9, 1954, June 5, 1954, and December 16, 1954. Wallace, before meeting Barton, had looked up Barton's patent and had learned the possibilities of Barton's product. Its ingredients were published knowledge and available to all in the business.

As a result of Wallace's sales ability and connection with the automobile companies, Wallace secured blanket orders for pellets from various of the automobile companies.

Barton had no mechanical process of extrusion of his mixture to meet the demand. He could only produce 50,000 pellets per month. The demand exceeded 500,000 per month.

In June, July and August, 1954, Wallace, with his own aide, one Raymond, by mutual understanding with Barton and Insealator, went into Insealator's plant to endeavor to perfect a method of extruding pellets with speed and efficiency. Wallace advanced $1,306 of his own money, which was later repaid by Barton, in the purchase and development of a machine which he hoped would extrude the material faster.

It is to be remembered that Wallace was still a manufacturer's agent. He was not a factory em-

ployee. He went into the plant to assist in finding ways and means to increase production so that the pellets, for which purchase orders had been made, might be delivered and he receive his commission. Barton naturally wanted the production increased so that Insealator could meet the increased orders and insure additional profits.

The mechanical experimentation carried on by Wallace, Raymond, and other employees of Insealator resulted in the mechanical difficulties being solved and pellets produced in quantities sufficient to fill the orders, both parties benefiting therefrom.

It is to be noted that no attempt was made by Insealator or Barton to insist on Wallace signing an agreement to treat any knowledge gained as trade secrets.

Wallace was discharged on April 7, 1955, the reason given being Wallace's use of information gained from his visits to the plant for his personal use and advantage.

It is developed that on January 13, 1955, Wallace, with other friends, organized the American Waterlock Corporation and took a lease at Ortonville, Michigan, where subsequent to April 7, 1955, they began the manufacture of a pellet composed of "spent" ginger-root, powdered almond shells in 4-to-1 mixture, and a liquid binder of 1/3 water, 1/3 alcohol, and 1/3 petronate. These ingredients were purchased on the open market. A wrapping film or sealing product was purchased from Mono-Sol-Corporation, which manufactures such film with a base of "Elvanol" powder purchased from DuPont. Waterlock never used a dip at any time, while Insealator does employ such method of coating its pellets. Waterlock's pellets are wrapped with a film which dissolves when the pellets are submerged in water. Waterlock now puts up a box which it sells to auto manufacturers consisting of a sealing pel-

let for radiators and a chemical pellet for rust inhibiting purposes.

In connection with the claim of Wallace for commissions, Wallace claims $11,252.72 in unpaid commissions from the time of his employment by Insealator until his discharge. A certified public accountant calculated total sales under Wallace's contracts during the period of his association with Insealator at $173,157.93, of which 25% totals $43,289.48. The agreed amount paid during Wallace's employment totaled $32,036.76. Wallace claims the difference of $11,252.72 remains unpaid.

Wallace also alleges his right to commissions due on sales made on purchase orders procured by him prior to his April 7, 1955, discharge by Insealator, but on which shipments and collections were not accomplished until after the discharge. Wallace says figures produced by his certified public accountant witness showed total sales under these contracts of $88,963.25, of which 25% totals $22,281.63 due him. These figures were based on the reduced price-per-pellet charge by Insealator on sales subsequent to Wallace's discharge.

Another element in Wallace's claim for commissions relates to the fact the orders procured by him called for a unit price of 5¢ per pellet. Shortly after Wallace's discharge Insealator voluntarily reduced its price to 4¢ and subsequently to 3¢ per pellet and its gross sales figures were totaled on such reduced price sales. It is Wallace's contention that his commissions on sales made after his discharge on purchase orders procured by him prior to his discharge should be figured on a 5¢ per pellet figure. His 25% would equal in this instance $26,784.17, rather than the $22,281.63 figure stated above. Wallace further claims interest in the amount of $3,327.60 figured at the rate of 5% from the time the commissions became owing to the date of trial. The total

amount of commissions and interest claimed by Wallace to the date of trial amounts to $41,364.46.

Wallace claims Insealator had no right or reason to reduce the price of its pellet subsequent to his discharge, and for that reason his commissions should be computed on the 5¢ figure.

Lastly, it is contended by Wallace that regardless of the contract provisions limiting commissions to 50% of Insealator's total profits, Insealator made sufficient profits to allow payment to Wallace of all of his claimed commissions. Despite the fact that the financial statements of Insealator show a profit, Wallace contends that Insealator changed its method of accounting and increased salaries and expense accounts to employees, together with royalty payments, to show a small profit by Insealator so as to limit Wallace's commissions under the contracts.

It would seem that Wallace's entire claim for commissions is contingent on his producing sufficient proof of Insealator's profits to get around the 50% limitation clause in his contracts.

The trial judge in his opinion held that Wallace's suit failed because he failed by a preponderance of the evidence to substantiate his claim.

There is no question that using the $58,251.11 figure used by counsel in argument, or even the figure of $63,543.51, which would appear as net profits before taxes, as per Insealator's operating statements, and applying to it the 50% commission limitation, Wallace would not have been entitled to any further commissions. By use of his accounting witness, Wallace attempted to show such a change in accounting procedure during the years 1955 and 1956 as compared with 1954 to show an attempt by Insealator to deprive Wallace of additional commissions.

There was testimony that the reason for the payment of employees travel and entertainment expenses was that in 1955 and 1956 Insealator changed

from a manufacturing concern to a selling concern, and a part of this expense was royalties paid to the manufacturing company. The reduction in price from 5¢ per pellet to 4¢ and eventually to 3¢ certainly constituted a significant drop in gross income and profit in 1955 and 1956.

It would appear that the burden rested upon Wallace to show such a deliberate distortion of Insealator's records as to make clear the bookkeeping changes were done to defeat Wallace's claims for commissions.

The trial court believed he had failed in his attempt to show wrongful manipulation or alteration of Insealator's books and records.

A reading of the entire voluminous record fails to indicate to this Court that the trial judge was wrong in this respect. As has been stated by this Court so many times, this Court does not substitute its judgment on questions of fact in a nonjury case unless the evidence clearly preponderates in the opposite direction. Here it seems such evidence as presented fails to preponderate against the judgment of the lower court. Consequently the judgment of no cause for action in the law case must be upheld.

As to the questions involving the alleged theft of trade secrets, it would seem there are no trade secrets involved. The modifications on the extruder machine, partially developed by Wallace, seem to be far from secret. A witness, Anthony C. Fortunski, a registered professional engineer, testified that there was nothing unusual or unique about the modification on the machine or anything new or ingenious connected with it. The alleged improvements were actually known to all manufacturers and operators of extruder machines.

The use and source of supply of "spent" ginger and almond shells seem hardly to qualify as trade secrets. Both are fairly easily obtained on the open

market and the source of their supply readily apparent. Many firms were using these ingredients in stop-leak products before Wallace began using them. The formula and mixing of the ingredients should not be considered a trade secret since the various raw materials (ginger-root flour, soluble oil and almond shells) used in the manufacture of the pellets were spelled out in the Barton patent. Also, the proportions of ginger-root flour and soluble oil were also contained in the patent formula. Further, it is clear American Waterlock Corporation neither uses the same raw materials in its pellets as does Insealator nor are the proportions of the ingredients identical. American Waterlock Corporation uses no soluble oil as a binder and its pellets are coated with a film wrapper made by Mono-Sol-Corporation. Insealator employs a soluble oil binder, an "Elvanol" dip coating, and different proportions of the other raw materials than does American Waterlock Corporation.

In the case of *Dow Chemical Co.* v. *American Bromine Co.,* 210 Mich 262, Justice BROOKE held that no trade secrets in a legal sense ever existed in plaintiff's plant where a suit by a corporation engaged in the manufacture of bromine and bromine compounds sought to enjoin a defendant corporation and a former employee of plaintiff from using certain processes in the manufacture of like products, claiming that defendants were using plaintiff's patents and also using trade secrets obtained by said employee while in plaintiff's employ. Justice BROOKE further held that all said alleged trade secrets were made public under the patent law in the application for the patent; that there were no trade secrets involved, particularly where part of them are so simple, obvious and open to one skilled in electrochemistry that no novelty or secrecy can be claimed

with respect to them. The court then proceeded to refuse to enjoin their use by the former employee.

It is essential to Insealator's case that it establish a disclosure in confidence to Wallace of certain trade secrets and the wrongful misappropriation of such secrets by Wallace to Insealator's damage.

As was said by Justice SMITH in *Russell* v. *Wall Wire Products Co.*, 346 Mich 581, 585, 586:

"The essence of the wrong is the breach of confidence, the betrayal of the trust placed in the recipient. As phrased in 4 Restatement, Torts, § 757, p 4:

" 'The theory that has prevailed is that the protection is afforded only by a general duty of good faith and that the liability rests upon breach of this duty; that is, breach of contract, abuse of confidence or impropriety in the method of ascertaining the secret.' "

Before there can be a betrayal of anything in the nature of a trade secret, there must be a secret. Under the testimony in the instant case, there was nothing secret about the process used by Insealator. The law does not protect knowledge so general as to be common property in the trade, and there can be no legally recognizable trade secret in an idea that is well known or is easily ascertainable.

In the *Russell Case* Justice SMITH went on to hold (p 591) that the plaintiff could not thrust upon the defendant an unwanted fiduciary status and thus deprive him, except upon levy of toll, of the freedom of action enjoyed by his competitors.

In the instant case, anyone desiring to go into the stop-leak product business could obtain a copy of the various patents and the information necessary for the manufacture and preparation of a stop-leak material and would not need to visit Insealator corporation or any other corporation to learn how to

manufacture such a product. Therefore, none of the alleged sources of supply or ingredients were in effect legal trade secrets which Wallace or the American Waterlock Corporation were prohibited from using. It is not contended that Wallace or the American Waterlock Corporation by fraudulent practices sold their product as the goods of Barton or Insealator. Wallace owed no duty to Barton relative to the acquirement of his knowledge. At no time did Wallace divert his interest in the sale of Barton's products while he was under contract with Insealator, but the record is replete with evidence that through his sales efforts the market for Insealator's products was greatly increased. After being discharged Wallace's company did not use the same process—the mixture was different in proportions, a different binder was used, a film or wrapper was used, and no "Elvanol" as a dip was used in the product now marketed by American Waterlock. No express agreement, oral or written, existed between Insealator and Wallace to keep secret the process of plaintiff Insealator, including the developments and modifications of the extruding machine. We think, therefore, that the lower court was correct in its determination that Insealator failed to substantiate its claim for damages or injunctive relief based upon an illegal use of alleged trade secrets.

The other 4 questions have to do with the admission of certain exhibits in evidence and the failure of the court to allow other exhibits in evidence, the failure to allow the use of certain depositions, and the court's alleged refusal to take certain testimony in secret.

Exhibit 9 was purported to be a document dealing with the method of operation of American Waterlock Corporation. It was never established who drafted the document, it contained no date, and it was not

established as to when it was drafted. A serious question as to its materiality might have been raised. We think the court, in the use of his discretion, properly excluded it.

Exhibits 20-A, 20-C, and 20-D, were merely self-serving declarations and were properly excluded.

Exhibit 85 was properly excluded from evidence since it was not identified as an exact model in use at the time Wallace left the employ of Insealator.

Exhibits 83-A–E were properly excluded for the same reason.

Exhibit 48 was admitted in evidence. It is contended that it was never properly identified or certified to by the patent office. While this is true, it was established that it was obtained directly from the patent office. For the purposes used, it was properly admissible.

It is contended that the discovery depositions of William P. Wallace and Douglas Raymond should have been admitted in evidence under Court Rule No 35, §6, subd (d) (2) (1945),* which reads as follows:

"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."

This section as well as others are a part of section (d), which contains the following language: "So far as admissible under the rules of evidence."

The court offered to go through the depositions and make a ruling as to the admissibility of testimony therein. Insealator insisted that they should be admitted in their entirety under this rule. The court properly ruled them out on objection to the

* Added 1952. See 334 Mich xl.—REPORTER.

effect that they contained irrelevant and immaterial testimony. Opportunity was afforded counsel to use them to contradict or impeach. This counsel apparently did not care to do. No error exists by reason of their exclusion under these circumstances.

The remaining point raised by Insealator is whether or not the trial court erred in not taking in secret in the court's chambers testimony in regard to the alleged trade secrets. The court was not asked for a ruling on this point and made none.

In view of our holding that no legal trade secrets as such were involved in this case, it would certainly appear no reason existed for invoking such a rule.

The decree dismissing Insealator's bill of complaint is affirmed.

In view of the unusual situation where both sides are appellants in this case and neither has prevailed in his position, no costs will be allowed.

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

JOHNSON *v.* KRAMER BROS. FREIGHT LINES, INC.

1. STATUTES—PRESUMPTION OF CONSTITUTIONALITY.
   A statute is presumed to be constitutional.

2. CONSTITUTIONAL LAW—DISCRETION OF COURT.
   Judicial discretion upon good cause shown is a standard in itself sufficient to satisfy all constitutional requirements.

3. SAME—COURTS—LEGISLATURE.
   The power given to a court under the Constitution is judicial power, a power which may neither be lessened nor increased by the legislature.

4. COURTS—CONSTRUCTION AND APPLICATION OF STATUTES.
   It is the peculiar province of the judicial department to adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws.

5. SAME—DISCRETION OF COURTS.
   Courts, by their very nature, are compelled to use their discretion upon good cause shown to protect the rights of parties and to prevent injustices.

6. SAME—ABUSE OF PROCESS.
   Abuse of process is not limited to issuance thereof but extends to oppressive use after issuance.

7. SAME—SUPERVISORY CONTROL OF PROCESS—ABUSE OF PROCESS.
   Every court has supervisory control over use of its process and power to prevent abuse thereof by oppressive use.

REFERENCES FOR POINTS IN HEADNOTES

[1] 11 Am Jur, Constitutional Law § 128.
[2] 11 Am Jur, Constitutional Law § 228; 14 Am Jur, Courts § 54.
[3] 11 Am Jur, Constitutional Law § 206.
[4] 50 Am Jur, Statutes § 219.
[5, 9] 14 Am Jur, Courts § 54.
[6] 1 Am Jur, Abuse of Process § 3.
[8] 4 Am Jur, Attachment and Garnishment §§ 21, 499.
[10, 11] 5 Am Jur, Attachment and Garnishment § 738 *et seq.*
[12] 3 Am Jur, Appeal and Error § 900.
[13] 5 Am Jur, Attachment and Garnishment § 747.

8. GARNISHMENT—PURPOSE OF WRIT—PREREQUISITE SHOWING.
The purpose of garnishment is to impound security for satisfaction of a demand but the statute requires the prerequisite of a showing by affidavit that the plaintiff or affiant is justly apprehensive of the loss of the demand unless a writ of garnishment issue (CL 1948, § 628.1).

9. COURTS—DISCRETION OF COURT.
Courts are given broad discretionary powers to determine whether or not orders and decrees shall be rendered under such circumstances as may appear to the court to be reasonable and proper upon good cause shown.

10. GARNISHMENT—DISMISSAL OF WRIT—DISCRETION OF COURT.
Statute authorizing a court to discontinue garnishment proceedings against the garnishee, or make such other reasonable order as in its discretion seems advisable, does not constitute an unlawful delegation of legislative power to the judicial branch of the government (CL 1948, § 628.41).

11. SAME—DISMISSAL OF WRIT—DISCRETION OF COURT—SPECIAL INTERROGATORIES—DISCOVERY—EXAMINATION OF GARNISHEE.
Trial court did not abuse its discretion in dismissing writ of garnishment on claim of $25,000, where principal defendant filed 2 financial statements by its vice-president and comptroller showing total assets of $4,122,331.44, tangible property amounting to $2,278,822.37 and current assets amounting to $1,680,037.66; an opportunity was afforded plaintiff to cross-examine officers of the defendant company; hearings were had before denying plaintiff's motion for discovery; and plaintiff failed to file special interrogatories in regard to the disclosure of the garnishee or to file a demand for an examination of such garnishee before the judge of the court (CL 1948, §§ 628.3, 628.41).

12. APPEAL AND ERROR—DISCRETION OF COURT.
The Supreme Court will not reverse the determination of a factual issue unless there has been a clear abuse of discretion.

13. GARNISHMENT—ABUSE OF PROCESS.
To permit garnishment to stand constitutes an abuse of process, where the principal defendant showed it was well able to respond in damages to the extent of plaintiff's claims.

Appeal from Wayne; Bowles (George E.), J. Submitted June 3, 1959 (Docket No. 19, Calendar No. 48,018.) Decided October 12, 1959.

Assumpsit by Allen Johnson against Kramer Bros. Freight Lines, Inc., a Michigan corporation. Writ of garnishment against defendant's depository, Detroit Bank & Trust Company, quashed. Plaintiff appeals. Affirmed.

Hugh K. Davidson and *J. Connor Austin,* for plaintiff.

Devine, Kent & Devine, for defendant.

KAVANAGH, J. Plaintiff commenced an action against the defendant in the Wayne circuit court in a plea of trespass upon the case upon promises and assumpsit, attaching to his declaration a bill of particulars alleging damages in the amount of $33,280.79. Subsequently, plaintiff caused a writ of garnishment to be directed to the Detroit Bank & Trust Company as garnishee of the principal defendant, Kramer Bros. Freight Lines, Inc. In his writ, plaintiff claimed that the defendant was indebted to plaintiff in the sum of $25,000. The Detroit Bank & Trust Company filed a disclosure admitting liability in the amount of $89,100, subject, however, to prior writs in 3 other related cases. Subsequently, the bank filed an amended disclosure admitting liability in the amount of $25,700.

A motion to quash the writ of garnishment in the instant case was filed by the defendant on July 21, 1958, and in support thereof 2 financial statements were submitted together with supporting affidavits by the vice-president and comptroller of defendant company.

Two hearings were held on the motion. At the second hearing the defendant had present in court its senior auditor and offered to have him testify under oath concerning any questions the plaintiff's attorney might care to ask. The court offered to take the testimony of the auditor. The plaintiff declined.

The court concluded, upon the evidence submitted and the arguments made, that the defendant had shown that its assets were sufficient to satisfy any judgment for the amount claimed in plaintiff's writ. The motion to dismiss was therefore granted.

Plaintiff appeals to this Court and raises 2 questions:

1. "Does the amendment to the garnishment statute 'and the court may, at any time before judgment, for good cause shown, discontinue proceedings against the garnishee, or make such other reasonable order as in its discretion seems advisable' CLS 1956, § 628.41 (Stat Ann 1957 Cum Supp § 27.1895), constitute an unlawful delegation of legislative power to the judicial branch of the government?"

2. "Was the court in error in dismissing the garnishment under this discretionary power without conducting a hearing, without affording to plaintiff an opportunity to examine the defendant's records, cross-examine defendant's officers and adduce testimony for a judicial determination?"

It is an elementary principle of legal construction, pertaining to the constitutionality of legislation, that an act is presumed to be constitutional.

Appellant relies upon a series of authorities which hold that the legislature cannot constitutionally delegate by ordinance or statute to an administrative agency or public official discretion without prescribing a definite rule of guidance for those with whom discretion has been vested. He then argues that it is likewise an unconstitutional delegation of legislative power to vest in the courts judicial discretion upon good cause shown.

Judicial discretion upon good cause shown is a standard in itself sufficient to satisfy all constitutional requirements. The power given to a court

under the Constitution is judicial power. It is beyond the power of the legislature to take from it that judicial power, and it is equally beyond the authority of the legislature to confer upon it power not judicial.

"To adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department." Cooley, Constitutional Limitations (7th ed), p 132.

"The primary functions of the judiciary are to declare what the law is and to determine the rights of parties conformably thereto." 16 CJS, Constitutional Law § 144, p 687.

In *Risser* v. *Hoyt,* 53 Mich 185, 193, it is said:

"The judicial power referred to is the authority to hear and decide controversies, and to make binding orders and judgments respecting them."

Judicial power is vested in the courts under the Constitution. *Anway* v. *Grand Rapids R. Co.,* 211 Mich 592, 622 (12 ALR 26); *Bielecki* v. *United Trucking Service,* 247 Mich 661.

By their very nature courts are compelled to use their discretion upon good cause shown to protect the rights of parties and prevent injustices. As was said by Justice WIEST in *Tsingos* v. *Michigan Packing Co.,* 272 Mich 7, 9–11:

"Abuse of process is not limited to issuance thereof but extends to oppressive use after issuance.

"Every court has supervisory control over use of its process and power to prevent abuse thereof by oppressive use. Process of garnishment was available to plaintiff upon making the needful showing. The purpose of garnishment is to impound security for satisfaction of a demand but the statute, CL 1929, § 14857,* requires the prerequisite of a

* CL 1948, § 628.1 (Stat Ann § 27.1855).—REPORTER.

showing by affdavit that: 'the plaintiff or affiant is justly apprehensive of the loss of the same (the demand), unless a writ of garnishment issue.'

"When plaintiff sued out the second series of writs he already had $3,000 impounded. Just apprehension of loss of such security had been removed by defendants' unsuccessful efforts to quash. This left but $621.50 of his demand unsecured, and for this the writs in question were issued and $10,000 additional funds impounded.

"We pass the showing of defendants' ample financial ability to meet their obligations and come to the question of whether plaintiff is on firm ground in standing by the oppressive consequences of the last series of writs.

"Of course, the defendant, by bond, could release the impounded funds. This right, however, does not serve as an answer to the question of abuse of process. If the court may not, upon a proper showing, adjust use of its process to fit rights, then an abuse in use of the process will be permitted to run its intended course.

"When plaintiff rejected the just method of securing payment of his asserted demand, if and when reduced to judgment, and insisted upon keeping impounded 4 times the amount of his claim, he disclosed his real animus and the court was not in error in finding use of the process for an oppressive and unjustifiable purpose."

It is too well settled to need the citation of supporting authorities that courts are given broad discretionary powers to determine whether or not orders and decrees shall be rendered under such circumstances as may appear to the court to be reasonable and proper upon good cause shown.

CLS 1956, § 628.41 (Stat Ann 1957 Cum Supp § 27.1895), a portion of the garnishment statute, does not constitute an unlawful delegation of legislative authority to the judicial branch of the government.

In reply to the second question of appellant, 2 hearings were had, and an opportunity to cross-examine officers of defendant company was afforded the plaintiff. This he refused. Two financial statements, sworn to by the vice-president and comptroller of the company, were before the court showing total assets of $4,122,331.44, total tangible property in the amount of $2,278,822.37, and total current assets in the amount of $1,680,037.66. It would appear that full and extensive hearings were had by the trial judge before denying plaintiff's motion for discovery.

The garnishment statute, CL 1948, § 628.3 (Stat Ann § 27.1857), provides a manner by which the plaintiff within 10 days may file special interrogatories in regard to the disclosure of the garnishee defendant or file a demand for an examination of such garnishee before the judge of the court. This plaintiff failed to do. In the exercise of discretion the court decided in favor of defendant. No authority need be cited for the fact that the Supreme Court will not reverse unless there has been a clear abuse of discretion in deciding a factual matter. We believe that the evidence clearly shows that the defendant company was well able to respond in damages to the extent of plaintiff's claims. To have permitted the garnishment to stand would have been an abuse of process of the court.

The decision of the lower court is affirmed, with costs in favor of defendant.

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

POCH *v.* URLAUB.

1. APPEAL AND ERROR—DIRECTED VERDICT—EVIDENCE.
   The Supreme Court will view the facts in the light most favorable to plaintiff on his appeal from direction of a verdict for defendant.

2. BOUNDARIES—SURVEYORS—STARTING POINTS—VESTED RIGHTS—ENCROACHMENT.
   Surveyors have no greater right than other persons to determine starting-points and boundaries and cannot disturb vested rights in land or settle controversies as to titles and their *ex parte* action is entitled to no special authority in regard to true lines and the fact of encroachment.

3. WATERS AND WATERCOURSES—OWNERSHIP AND DIVISION OF WATER RIGHTS.
   Whatever water rights belong to any part of a subdivision of land must necessarily fall within those that belonged to the whole of it at the time when it was made ready for sale by the United States government, and no change, if any took place, in the shore line could enlarge that grant at the expense of any other, it being the right of the owner of water rights within the subdivision to determine for himself in what way he would subdivide and parcel out his own property.

4. BOUNDARIES—SURVEYORS.
   A surveyor cannot fix private rights or lines by any theory of his own.

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 886.
[2, 4] 8 Am Jur, Boundaries § 99.
[3] 56 Am Jur, Waters § 275.
[5, 8, 11, 12] 8 Am Jur, Boundaries § 101.
[6, 7] 8 Am Jur, Boundaries § 33.
[9, 10] 8 Am Jur, Boundaries §§ 62, 63.
[13] 42 Am Jur, Public Lands § 40.

5. SAME—ORIGINAL GOVERNMENT SURVEY.

A boundary line between adjoining proprietors, unless fixed by agreement, acquiescence, or adverse possession, is to be determined in accordance with the original government survey.

6. SAME—SUBDIVISION OF FRACTIONAL SECTIONS—LINE FIXED AT ONE END.

The subdivision of fractional sections in a fractional township, where the division line has but one end fixed and certain, is accomplished under a special statutory provision that the line shall run due north, south, east or west, as the case may be, to the watercourse, Indian boundary line, or other external boundary (43 USCA, § 725).

7. SAME—FRACTIONAL LOTS—WATER FRONTAGE—AREA.

Fractional lots in a United States government survey are those irregular tracts of land designated on the plats of surveys by the land department of the government, not by the surveyors, and are so arranged as to be the most convenient and equitable form for both the purchaser and the government, dividing a shore line along a navigable stream or lake so as to give as many lots with a substantial water frontage as the situation will permit on the theory that water-front lots are more valuable than an equal area of land not touched by water.

8. SAME—GOVERNMENT SURVEY.

The location of a boundary line appearing on an official plat of the United States government survey, approved by the surveyor general, is controlling when government lands have been disposed of in conformity to such line.

9. SAME—NATURAL MONUMENTS—DISTANCE—QUANTITY.

Generally, where the original survey and government plat of a tract of land appears to have as its boundary a body of water, such body of water is a natural monument, and will constitute the boundary, however distant or variant from the position indicated for it by the meander line, and hence will control as a call of the survey over either distances or quantity of land designated in the conveyance or on the government plat.

10. SAME—NATURAL MONUMENTS—COURSES AND DISTANCES.

The lines of a United States government patent of lands must substantially conform to natural objects called for therein at the expense of courses and distances, and distances may be shortened or lengthened in order to conform the location of the patent to and with the natural objects called for.

11. SAME—GOVERNMENT SURVEY LINES—WATER FRONTAGE.
United States government survey lines are controlling as between parties claiming water frontage land along arm of lake in the absence of private agreements altering the boundaries, where the lake appears as a natural object in the patents of the land as lots.

12. SAME—GOVERNMENT SURVEY—DISTANCES—QUANTITY.
Definite and permanent monuments in a United States government survey are to control distance and quantity.

13. PUBLIC LANDS—GOVERNMENT SURVEY—COLLATERAL ATTACK.
A plat of United States government survey, together with the field-notes, lines, descriptions and land-marks, are as much a part of the grant as if the descriptive features were written in the deed or grant and not open to challenge by any collateral attack in the courts.

Appeal from Presque Isle; Glennie (Philip J.), J. Submitted June 4, 1959. (Docket No. 36, Calendar No. 47,874.) Decided October 12, 1959.

Ejectment by Lyman Poch, Dorothy Poch, Guy Flegal, Reba Flegal and Luella Brown against LeRoy Urlaub, Florence Urlaub, Gustav Grulke, Lena Grulke, Elmer Claus and Grace Claus to recover possession of lands bordering on lake. Cause dismissed on motion made at conclusion of plaintiffs' proofs and taken under advisement pending completion of testimony. Plaintiffs appeal. Reversed and remanded.

Louis G. Jarboe, for plaintiffs.

Elmer L. Radka, for defendants.

KAVANAGH, J. This is an action in ejectment, plaintiffs claiming that defendants wrongfully are in possession of certain lands owned in fee by plaintiffs abutting on the south shore of an arm of Lake Nettie located in section 32, Bismarck township, Presque Isle county, Michigan.

Originally plaintiffs filed a bill to remove cloud from title and for an injunction restraining defendants from interfering with plaintiffs' possession.

Defendants made a motion to dismiss and the court held, in a written opinion, that plaintiffs had an adequate remedy at law. Upon motion of plaintiffs, the cause was transferred to the law side, and proceedings were stayed pending trial of the issue.

After pleadings were filed and the matter was at issue, a stipulation was entered into in open court that plaintiffs claimed title by record title and not by adverse possession.

Plaintiffs claimed to be owners in fee of the following parcels: Guy Flegal and Reba Flegal, the east 70 feet of the west 1250 feet of government lot 4, section 32, town 34 north, range 4 east, north of the Ocqueoc river. Luella Brown, the east 50 feet of the west 1200 feet of government lot 4, section 32, town 34 north, range 4 east, north of the Ocqueoc river. Lyman Poch and Dorothy Poch, the east 50 feet of government lot 4, section 32, town 34 north, range 4 east. Plaintiffs acquired title thereto during the years 1937 to 1943.

Defendants, by virtue of a conveyance dated July 1, 1953, claim ownership in fee of lands abutting on the south shore of the arm of Lake Nettie in said section, town and range, purporting to be in government lot 3, and described as:

"Beginning at a point 83.1 feet due north and 67.6 feet due west of the center corner of the southwest quarter of section 32, town 34 north, range 4 east, thence running north 38 degrees 53 minutes west 216 feet to the shore of Lake Nettie; thence north 72 degrees 02 minutes east along the lake shore 73.5 feet; thence south 22 degrees 49 minutes east 208 feet; thence north 86 degrees 28 minutes west 15 feet to the point of beginning, being a part of lot 3, said section."

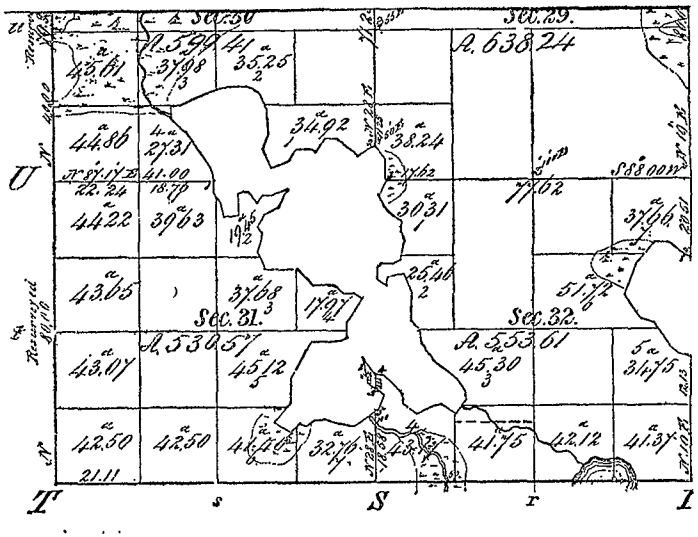
Also:

"Beginning at a point 82.1 feet due north and 52.6 feet due west of the center corner of the southwest quarter of section 32, town 34 north, range 4 east, thence running north 22 degrees 49 minutes west 208 feet to the shore of Lake Nettie; thence south 80 degrees 40 minutes east along the lake shore 72.9 feet; thence south 10 degrees 48 minutes east 185.0 feet; thence north 86 degrees 28 minutes west 26 feet to the point of beginning, being a part of lot 3, said section."

Defendants' title and right of possession depend upon the validity and legality of an amended boundary line between said government lots 3 and 4 established in 1948 by a private surveyor, namely, G. T. DeLaMater. This line runs from the east boundary line of lot 4 extending north in a straight line from the southeast corner of the lot to a point where it would intersect the south line of lot 3, as such line is located on maps prepared from private surveys, and from there to run north 38 degrees 53 minutes west to the actual waters' edge. The above descriptions of land first appeared as such in the records of Presque Isle county on May 20, 1948.

A reference to the following plat should aid in understanding the questions at issue:

ENLARGED MAP OF ORIGINAL GOVERNMENT SURVEY OF SECTIONS 29, 30, 31 and 32, town 34 north, range 4 east.



The south line of lot 3 as shown on recent surveys is indicated by a broken line.

The solid line is the government survey.

The plat is a part of plaintiffs' exhibit 2, which was admitted in evidence as a true copy of the survey of township 34 north, range 4 east.

A reference to a copy of the official government plat shows section 32 to be fractional, made so by an inland lake, with an arm of the lake extending easterly into what would ordinarily be the southwest quarter of the said section.

Lot 4, in which the plaintiffs claim the disputed lands are located, is shown in the southwest corner of the section bounded on the south and west by the section lines, on the entire north by the lake, and by an indicated interior line running north perpendicular from its south boundary in a straight line until it runs into the lake to form its east boundary line.

Lot 3, in which the defendants claim the lands in dispute are located, is shown to be bounded on the entire west by the lake, on the north and east by indicated quarter lines and by an indicated interior line running west perpendicular from its east boundary in a straight line until it runs into the lake at the mouth of the outlet to form its south boundary line. No part of lot 3 is shown to include any lands on the south shore of the arm of the lake.

Plaintiffs introduced in evidence the original deeds to them containing the descriptions as above set forth. They introduced in evidence exhibit 2, above referred to, and the survey plat of township 34 north, range 4 east, indicating that it was surveyed by the United States government surveyors as to township lines in the second quarter of 1840, as to subdivisions in the second quarter of 1856, and certified by the surveyor general's office under date of December 6, 1856, as being strictly conformable to the field notes of the survey thereof on file in the surveyor general's office. Plaintiffs introduced in evidence abstracts of title certified from the United States government to

substantially the date of trial, showing a United States patent issued to Luther C. Pratt, dated March 10, 1874, recorded February 5, 1907, in liber 31 of deeds on page 325, covering lot 4, section 32, town 34 north, range 4 east. The abstracts show the transfers of title by mesne conveyances from Luther C. Pratt to the respective plaintiffs.

Plaintiffs' exhibit 1, received in evidence, is a true copy of the United States government field notes pertaining to this section 32, town 34 north, range 4 east, including references to all witnesses, monuments, distances, and courses, including waters of Lake Nettie.

Plaintiffs testified that upon receiving conveyance of their property they went into immediate possession of the same and have continued in that possession until dispossessed by the defendants.

Mr. Dean DeLaMater, a registered land surveyor in Michigan, in reply to a question by defendants' counsel, outlined generally what was done with reference to original surveys:

"*A.* I will try to be as brief as possible. Specifically, Michigan in the "thirties," after it became a State, by order of the surveyor general, was ordered to be surveyed into townships and sections. And deputy surveyors were sent out throughout the State, and they surveyed this particular township in the second quarter as is contained here, in 1840, with directions to run a 6-mile square township as near as possible, and conforming to the correction that might be on either side of it, above or below it. With every mile setting a section corner, so-called, and witnessing it with adjacent trees. And every half-mile, setting a quarter section post; witnessing that with any adjacent trees or rocks, or whatever might be near there, and in running the survey lines to take notice of any rock out-crop. In other words, to get a picture of the line as they cross; and to set stakes every half-mile of boundary of your township.

"And then at a later date, and in this case, 16 years later, Mr. Alfred Millard, a deputy surveyor, was sent in to subdivide the township; divide it into 36 sections. And again, he was instructed to run these section lines at half-mile intervals; to set the quarter section corner, and at every mile to set a section corner.

"I am skipping over some of the methods we had to use. But basically, they arrived at 36 sections, containing, they hoped, 640 acres. And wherever they encountered lakes they set on the bank of the lake, on the section line, what we call a meander post. They then meandered or mapped the lake, take notes and drawing them on their plats. Winding up with a map of a township containing 36 sections; of all lakes and streams, of all the swamps, all of the pine forests; because actually they were making the original survey."

Private survey was made beginning in October, 1945. This survey was finished some time early in 1946 by the father of registered surveyor Dean DeLaMater and locates the south line of lot 3 approximately 300 feet south from that shown on the government plat. The survey indicates that it would intersect the east line of lot 4 at a point in excess of 200 feet south of the lake, rather than in the waters, if extended, as shown on the government plat; and that the southeast quarter of the southwest quarter does not abut on the lake as shown on the government plat.

Private surveys also show the meander line of the lake, according to the official copy of the field notes as run by the original government survey, to be north of the intersection of the east line of lot 4, and the south line of lot 3, as such line is located on maps prepared from the latest surveys at a distance of approximately 300 feet south from that shown on the government plat.

Plaintiffs claim that the legal east boundary line of lot 4 is shown on the government plat, extending north in a straight line from the south boundary to the actual waters' edge. Defendants claim the east boundary line of lot 4 extends north in a straight line from the southeast corner of the lot to a point where it would intersect the south line of lot 3, as such line is located on maps prepared from private surveys, and from there to run north 38 degrees 53 minutes west to the actual waters' edge. Defendants claim to own the disputed portion by reason of conveyance from the owners of lot 3.

The sole question in the case was: Does the east boundary line of lot 4 extend to the waters' edge? If so, plaintiffs own the disputed property and are entitled to a judgment of possession.

At the conclusion of plaintiffs' proofs, defendants made a motion to dismiss. This motion was reserved by the court. Defendants entered their proofs. The motion to dismiss by defendants was made on the grounds of CL 1948, § 629.8 (Stat Ann § 27.1921), which, defendants' counsel argued, sets forth that before an ejectment action can prevail it is necessary that the property be sufficiently described and be sufficiently definite so that possession can be given by the court. He further contended that there was no evidence to indicate the lines of plaintiffs' property, and nothing specific was introduced to clearly lay down the property involved so the court could find what property plaintiffs owned, particularly since 2 of the descriptions of the plaintiffs' property indicate there possibly was a 20-foot overlap.

The trial court, almost 2 years after the trial was concluded, found that:

"There appears to be nothing else in support of plaintiffs' case other than general allegations of ownership and specific descriptions which are located

somewhere within the confines of government lot 4.
* * *

"It is obvious from the case made by plaintiffs on the limited proofs offered that it leaves this court in such a state that it cannot say that the plaintiffs have established their title so as to determine the real issue presented. The court finds itself in a position where the motion for the directed verdict must be granted."

Plaintiffs appeal and claim (1) that they had established sufficient record title to make a prima facie case in ejectment; (2) that although the court didn't determine what is the legal east boundary line of government lot 4, section 32, town 34 north, range 4 east, Bismarck township, Presque Isle county, Michigan, as a matter of law it is actually a straight line from a point on the south section line, midway between the southwest corner and the south quarter corner of the section, north to the actual waters' edge of Lake Nettie.

It is difficult to imagine how the trial court could expect plaintiffs to introduce in evidence any more proof of their ownership of this property. They introduced their recorded deeds; they introduced abstracts of title showing the original patent and mesne conveyances from the government to the plaintiffs; they introduced the original survey plat; they introduced the original survey notes; they produced evidence that they had taken possession and maintained possession of this property for a number of years prior to their dispossession by defendants.

If, as a matter of law, the east boundary line of lot 4 is as claimed by plaintiffs, they have established a prima facie case.

It has been stated so often by this Court as to not require citation of authority that on appeal by plaintiff from direction of a verdict for defendant, the

Supreme Court will view the facts in the light most favorable to plaintiff.

In *Diehl* v. *Zanger*, 39 Mich 601, 605, Justice COOLEY said:

"Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity."

In *Gregory* v. *Knight*, 50 Mich 61, it was stated:

"Surveyors and commissioners of highways have no greater right than other persons to determine starting-points and boundaries; they cannot disturb vested rights in land or settle controversies as to titles and their *ex parte* action is entitled to no special authority in regard to true lines and the fact of encroachment." (Syllabus.)

In *O'Brien* v. *Cavanaugh*, 61 Mich 368, 370, the Court said:

"There was no testimony of any other right, except that of a surveyor, who undertook to change the line as the result of an *ex parte* survey, based on certain starting points, which threw out of place all the lots in the neighborhood.

"We agree with the judge below that this survey could not lawfully be regarded. A surveyor has no more right than any one else to decide upon starting points and other elements of location. We have had frequent occasion to refer to the mischief done by the officious meddling of such persons under some notion that it is within their province to unsettle possessions and landmarks."

In *Fisher* v. *Dowling*, 66 Mich 370, 371, 372, again the Court said:

"We have had frequent occasion to condemn the assumptions of surveyors in determining lines and landmarks according to their own notions. They have no such right, and their assumptions are not lawful. There are few evils more annoying to public or private peace than the intermeddling with land boundaries, and the disturbance of peaceable possessions."

In *Jones* v. *Lee*, 77 Mich 35, 41, the Court said:

"Whatever water-rights belong to any part of that subdivision must necessarily fall within those that belonged to the whole of it at the time when it was made ready for sale by the United States government, and no change, if any took place, in the shore line could enlarge that grant at the expense of any other. *It is also beyond question that any owner of water-rights within that subdivision could determine for himself in what way he would subdivide and parcel out his own property.*" (Emphasis supplied.)

And further, after commentation (p 42) on the surveyor's assumed technical knowledge of the right method of division, the Court said (p 43):

"We have had occasion, in several instances, to point out that a surveyor cannot be allowed, under any circumstances, to fix private rights or lines by any theory of his own."

Clark in his work, On Surveying & Boundaries (2d ed), § 54, p 53, states:

"It has been held that where the official plat and approved survey located premises in the northeast quarter of a section and the patent under which plaintiff claimed the land, described it as the southeast quarter of the section 'according to the official plat of the survey returned to the general land-office by the surveyor-general,' neither parol evidence nor

a private survey could be shown to establish that the premises were located in the southeast quarter of the section."

In *Woodbury* v. *Venia,* 114 Mich 251, it was said:

"A boundary line between adjoining proprietors, unless fixed by agreement, acquiescence, or adverse possession, is to be determined in accordance with the original government survey." (Syllabus 1.)

In Clark, On Surveying & Boundaries (2d ed), § 136, p 125, are found the following excerpts:

"The subdivision of fractional sections in a fractional township, where the division line has but one end fixed and certain, is accomplished under a special provision of the statutes.* This rule provides that the division line shall run due north, south, east or west, as the case may be, to the watercourse, Indian boundary line, or other external boundary."

Section 144, p 131:

"Surveyors and members of the bar are not always familiar with the method pursued by the government in parting off and numbering the lots in fractional sections. That a set of uniform rules has been laid down for the guidance of the government officials whose duty it is to part off and number such lots does not seem to have been much considered by local surveyors."

Section 145, p 133:

"Fractional lots are those irregular tracts of land designated on the plats of surveys by the land department of the government."

Section 146, p 133:

"The subdivision of the various fractional sections * * * is performed by the draftsmen in the office to which reports and notes are sent, and not by the

* See 43 USCA, § 752.—REPORTER.

surveyor who did the field work. In so subdividing, forming, and numbering the lots, the officials are required to use their best skill and judgment to 'arrange the lots in the most convenient and equitable form for both the purchaser and the government.' The idea is to divide the shore-line along a navigable stream or lake so as to give as many lots with a substantial water-frontage as the situation will admit. This is on the theory that water-frontage is generally regarded as more valuable than an equal area of land not touched by water."

In 5A Thompson on Real Property, § 2721, p 1132, it is said:

"When government lands have been disposed of in conformity to a line appearing on an official plat of the government survey, approved by the surveyor general, the location of the line shown on the official plat is controlling."

In 6 Thompson on Real Property, § 3332, p 529, it is said:

"As a general rule where by the original survey and government plat a tract of land appears to have as its boundary a body of water, such body of water is a natural monument, and will constitute the boundary, however distant or variant from the position indicated for it by the meander line, and hence will control as a call of the survey over either distances or quantity of land designated in the conveyance or on the government plat."

In 5A Thompson on Real Property, § 2725, p 1158, it is said:

"Where natural objects are called for, the lines of the patent must substantially conform to them at the expense of courses and distances, and distances may be shortened or lengthened in order to conform the location of the patent to and with the natural objects called for."

In *Bransfield* v. *Wallace,* 195 Mich 41, it was said:

"In such action, where the finding of the court was based upon a plat made by the government's surveyor, which is presumed to be correct, and which there was evidence to sustain, it not being within the province of this Court to weigh the evidence *pro* and *con,* the finding of the court will not be reversed." (Syllabus 2.)

In the *Bransfield Case,* plaintiff, the owner of government lots 1 and 2, sought ejectment against defendants, the owners of government lot 3. Lots 1 and 2 were shown on the original government plat to be on the north side of Twin lake. Lot 3 on the same plat was shown to be on the south side. Plaintiff claimed that lots 1 and 2 included all the land and water that would be embraced if the lines of his property were so extended as to make the description thereof the northeast quarter of said section 2, and that to reach the south boundary thereof he could extend the lines of his subdivisions into and across the entire width of the lake, thereby excluding defendants from the water frontage of said lot 3 as shown by the government plat. The Court there said (pp 47, 48):

"While the meander lines of the government plat might not be controlling in case an error was shown in the original survey, yet in the absence of such showing the lines will be presumed to be correct. * * *

"The property in question was conveyed by the government not as fractional parts of the NE 1/4 of section 2, but as lots 1 and 2 of that section. There is nothing in the record to indicate that the government intended to convey any land south of the lake, but the evidence and the presumption of law indicate the contrary, and that no mistake was made. But it is said that the plaintiff is short in his acreage; that is not a controlling consideration."

In the instant case the property in question was conveyed by the government not as fractional parts, but as lots 3 and 4. There is nothing in the record to indicate that the government intended to convey any land south of the lake as lot 3, but the evidence and presumption of law indicate the contrary.

In the case of *Brown* v. *Milliman,* 119 Mich 606, 611, 612, the Court said:

"In *County of St. Clair* v. *Lovingston,* 23 Wall (90 US) 46, 62 (23 L ed 59), Justice Swayne said:

" 'It is a universal rule that course and distance yield to natural and ascertained objects. A call for a natural object, as a river, a spring, or even a marked line, will control both course and distance.'

"Practically the same language is used by Justice CHAMPLIN in *Turner* v. *Holland,* 65 Mich 453.

"In *Gilman* v. *Riopelle,* 18 Mich 145, 164, 165, Justice COOLEY said:

" 'Where definite and permanent boundaries are given, the deed must be held to convey all the land within those boundaries, notwithstanding the quantity is much greater than that mentioned. This is on the familiar principle that the incorrect portion of the description is to be rejected where that which remains is sufficient, and that definite and permanent monuments are to control distance and quantity.'

"See *Bruckner's Lessee* v. *Lawrence,* 1 Doug (Mich) 19, 29, and cases there cited; *Morrow* v. *Whitney,* 95 US 551 (24 L ed 456), *Forsyth* v. *Smale,* 7 Biss (CCA 7) 201.

"In *Cragin* v. *Powell,* 128 US 691 (9 S Ct 203, 32 L ed 566), it is held that when the general land office has once made and approved a government survey of public lands, and the plats, maps, field notes, and certificates have been filed in the proper office, and the lands are granted according to an official plat of their survey, the plat, with its notes, lines, descriptions, and land-marks, becomes as much a part of the grant, and, so far as limits are concerned, controls as much, as if such descriptive features were

written in the deed or grant. In *Russell* v. *Maxwell Land-Grant Co.*, 158 US 253 (15 S Ct 827, 39 L ed 971), it is held a survey made by the proper officers of the United States, and confirmed by the land department, is not open to challenge by any collateral attack in the courts."

In the case of *Porter* v. *Selleck*, 236 Mich 655, plaintiff acquired title to government lot 13. In 1838 the township itself was surveyed by the government, and the subdivision thereof in 1852, and the plat of the original survey was filed with the general land office. Meander lines were run around Goose lake, a fresh water pond or lake having an area of 133 acres. Lot 13 was bounded on the north and east by the lake. Meandered lot 13 included a tongue or peninsula of land projecting into the lake in a northeasterly direction. The map and survey showed no land or island beyond, nothing to indicate any reservation by the government. The map showed a meander line cut across this peninsula. Lot 13, within its boundaries, contained 39 acres. The portion of the peninsula north of and beyond the meander line contained about 15 acres. Defendant acquired title to this 15 acres from the government and made conveyances. Plaintiff filed an action to quiet title, including the 15 acres. This Court upheld his right to the entire lot 13, including the 15 acres. In doing so, the Court said (pp 660–662):

"In *Mitchell* v. *Smale*, 140 US 406, 414, 412, 413 (11 S Ct 819, 35 L ed 442), it was said, citing cases:

" 'It has been decided again and again that the meander line is not a boundary, but that the body of water whose margin is meandered is the true boundary.' * * *

" 'Our general views with regard to the effect of patents granted for lands around the margin of a nonnavigable lake, and shown by the plat referred to therein to bind on the lake, were expressed in the

preceding case of *Hardin* v. *Jordan,* 140 US 371 (11 S Ct 808, 35 L ed 428), and need not be repeated here. We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more or less than taking from the first grantee a most valuable, and often *the* most valuable part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned. The pretence for making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases, exist.' "

In *Arnold* v. *Brechtel,* 174 Mich 147, 159, 160, Justice KUHN said:

"Brewster, in his work on Conveyancing § 96, pp 115, 116, said:

" 'Where, as is often the case, the map does not correctly represent the actual portion of land as staked out or otherwise marked on the earth, and there is a conflict between the map and the monuments on the land, the monuments will control the description. These monuments on the land are facts. Plats and maps and notes regarding them are but descriptions which serve to assist in ascertaining the facts. Parol evidence will therefore be received to show that the map as drawn does not correspond with the survey as made and marked on the ground.'

"In the case of *Palmer* v. *Dodd,* 64 Mich 474, 475, this Court said:

" 'The meanders have no significance as boundaries, and are not intended as such. They are run simply to afford a means of computing the area contained in the fraction which the United States requires payment for on sale of the public domain.' * * *

"In the case of *Brown* v. *Parker,* 127 Mich 390, 392, cited by defendant, this court said:

" 'The meander lines of rivers and inland lakes, where the title to the bed is in the riparian owner, are of comparatively little significance, and it has frequently been said that they were not run to bound the possessions of the riparian owner, whose title might extend beyond them.' "

In *Woodbury* v. *Venia,* 114 Mich 251, 257, 258, Justice LONG said:

"It is a well-settled law in this State that monuments control courses and distances, and that, when monuments and measurements vary, the monuments always control; but this reference is to monuments and measurements made by the original survey. Courses and distances would not be controlled by monuments made by some person unauthorized to make them; and the whole trouble with defendant's contention is that he was unable to locate the northeast corner of section 3, unable to show that the north and south highway was on the section line between 2 and 3, or that these division fences upon section 3 were located with reference to any measurements from the true northeast corner of section 3. He found a stone at that corner, but there is no showing that it was one of the original monuments marking the corner. On the other hand, the testimony of the plaintiff's surveyor is that he was able to find and locate upon the ground the southeast corner of section 34, and that, in accordance with the original survey, and following the field notes with courses and distances eastward 6–14/100 chains, he

discovered evidences of an old stake in the ground, and located that as the northeast corner of section 3. There was no evidence in this case of any monuments shown by the defendant which the court was bound to instruct the jury would be better evidence of the actual location of the northeast corner of section 3 than the surveys and measurements made by the plaintiff's surveyors. * * *

"If Mr. Winney and the other surveyors with him found the original corner as established by the United States survey of section 34, and then followed the field notes which located the northeast corner of section 3, it would necessarily fix and determine that corner of section 3, and Winney and the other surveyors claim that they found evidences of the old stake there."

In this case the line as meandered by the government surveyors and followed by plaintiff Lyman Poch* from the government surveyors' field notes is substantially the same as the actual waters' edge.

We believe that the east boundary line of government lot 4, section 32, town 34 north, range 4 east, extends from a point on the south boundary line of said section 32 which is equally distant from the intersection therewith of the quarter line running north and south through said section and the southwest corner of said section and runs thence north in a straight line to the waters' edge of Lake Nettie.

We think, therefore, that the court was wrong in granting the motion to dismiss since plaintiffs had established a prima facie case for the ejectment of defendants.

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* "*Q.* Have you had occasion to follow the meander of the lake as set out in the government field notes?

"*A.* Yes.

"*Q.* From what point did you start?

"*A.* I started from the point toward,—the same point the government engineer started from. And that would be the north,—west corner of this section we are speaking of. That is 32, isn't it? Where the north line, going west, of section 32 intersects the lake."

The order of dismissal is reversed and the cause remanded for a new trial in accordance with this opinion. Costs in favor of appellants.

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

BLACK, J., did not sit.

PANHANDLE EASTERN PIPE LINE COMPANY *v.* PUBLIC SERVICE COMMISSION.

1. PUBLIC SERVICE COMMISSIONS—ORDER ON RETURN WITH ADDITIONAL TESTIMONY—APPEAL TO CIRCUIT COURT.

   Pipe line company, which had first been granted a certificate to sell natural gas to a single customer and after intervenor distributor had appealed to circuit court which took additional testimony and returned it with case to commission, whereupon application was denied, was an aggrieved party by such denial and had a right of appeal from such ultimate order of denial (CL 1948, §§ 460.4, 460.506).

2. SAME—REVIEWABILITY OF ORDERS.

   An order of the public service commission is reviewable by party who is aggrieved thereby, irrespective of the fact that it may be termed a "negative order," as the pertinent statute does not make appealability dependent upon whether the certificate or authority sought was granted or denied (CL 1948, §§ 460.4, 460.506).

3. SAME—QUESTIONS REVIEWABLE—JURISDICTION OF CIRCUIT COURT.

   Questions raised by plaintiff pipe line company on appeal from circuit court order denying, for asserted lack of jurisdiction, such plaintiffs right to review order of public service commis-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 43 Am Jur, Public Utilities and Services § 224.
[2] 43 Am Jur, Public Utilities and Services § 230.
[3] 43 Am Jur, Public Utilities and Services § 225.

sion which had rescinded a previous order granting plaintiff's application to sell natural gas to a single customer after intervenor distributor's appeal of such previous order and remand to commission, are not discussed, since such matters must first be determined by the circuit court which had erroneously dismissed the appeal from the commission's second order (CL 1948, §§ 460.4, 460.506).

Appeal from Ingham; Salmon (Marvin J.), J. Submitted April 10, 1959. (Docket No. 37, Calendar No. 47,667.) Decided October 12, 1959.

Bill by Panhandle Eastern Pipe Line Company against Michigan Public Service Commission and Michigan Consolidated Gas Company to review an order of the commission. Application by Panhandle for certificate of public convenience and necessity relative to expansion of its service resulted in original order of commission granting certificate. Following action by Michigan Consolidated Gas Company in circuit court and transmittal of additional evidence, commission rescinded its order, and the pending circuit court action was dismissed. Plaintiff Panhandle's bill challenging commission's rescinding order dismissed on motion. Plaintiff appeals. Reversed and remanded.

Jennings, Fraser, Parsons & Trebilcock (*Bodman, Longley, Bogle, Armstrong & Dahling,* of counsel), for plaintiff.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, *Robert A. Derengoski* and *John E. Tormey,* Assistants Attorney General, for defendant commission.

Dyer, Meek, Ruegsegger & Bullard, for defendant Michigan Consolidated Gas Company.

DETHMERS, C. J. This case presents questions concerning appellate practice and the review available with respect to determinations of the Michigan public service commission.

Plaintiff, Panhandle Eastern Pipe Line Company, filed application with the commission for a certificate of public convenience and necessity to permit its making a direct sale of natural gas to McLouth Steel Company in Brownstown township, Wayne county, Michigan. Defendant, Michigan Consolidated Gas Company, a distributor of natural gas in the area, was a party to the cause. The commission granted Panhandle the certificate. Consolidated appealed to the Ingham county circuit court under CLS 1956, § 462.26 (Stat Ann 1957 Cum Supp § 22.45) and other applicable statutes. Panhandle intervened as party defendant. Additional and other evidence was adduced in that court, which it transmitted to the commission as provided by statute. Thereafter the commission rescinded its original order, which had granted Panhandle a certificate, and reported its action to the court. As required by the statute, the court then dismissed the action. From that order of dismissal Panhandle appealed to this Court. Later, however, it dropped that appeal after having taken a statutory appeal to the circuit court from the commission's order rescinding its original order. Upon motion of defendants the circuit court then dismissed Panhandle's appeal. From that dismissal, Panhandle takes this appeal here.

The court dismissed Panhandle's appeal on the grounds that there is no statutory authority for such appeal from the commission's second order rescinding its original order after transmittal to it of additional evidence by the circuit court, that an appeal to circuit court from the commission's second order does not lie because that order is negative in character, that Panhandle's appeal represents a collateral

attack on the court's earlier order dismissing Consolidated's appeal, and that the court's decision in that connection rendered the matters raised by Panhandle's appeal *res judicata.*

To support the position that there is no statutory authority for Panhandle's appeal to the circuit court, defendants point to the language of CLS 1956, § 462-.26 (Stat Ann 1957 Cum Supp § 22.45), listing the commission orders which are appealable thereunder, and stress that that list does not include the kind of order here involved. CL 1948, § 460.4 (Stat Ann 1957 Cum Supp § 22.13[4], provides that "any order or decree of the Michigan public service commission shall be subject to review." Section 6 of the act (PA 1929, No 69) under which the commission made its order here complained of (CL 1948, § 460-.506 [Stat Ann § 22.146]), provides that any person aggrieved by the order of the commission, made upon an application for the kind of certificate here sought, may review such order in the manner therein prescribed, that being the manner here employed by Panhandle. The fact that the commission first entered an order granting Panhandle a certificate and then, after appeal to circuit court and transmittal of additional evidence back to it, rescinded its original order rather than having denied the application in the first instance, leaves the net effect of the commission action and final order no less an order made upon Panhandle's application, denying it a certificate on an express finding that public convenience and necessity would not be served thereby. Panhandle is a party aggrieved by that order. The statutory provisions above mentioned would have authorized Panhandle to appeal to circuit court if its application for a certificate had been denied in the first place, and they do so as well when the certificate is denied, as here, after appeal to circuit court and transmittal

of additional evidence by that court to the commission.

May there be no review of so-called negative orders of the commission? As observed by the United States supreme court in *Rochester Telephone Corp.* v. *United States,* 307 US 125 (59 S Ct 754, 83 L ed 1147, 28 PUR NS 78), the terms "negative orders" and "affirmative orders" are not appropriate terms of art and an order negative in form may be affirmative in substance. Thus, an order denying one utility a certificate may well result in granting the business sought to another. If, however, by urging a doctrine of nonappealability of negative orders, defendants mean, as applied to present considerations, that an order granting a certificate is appealable but an order denying one is not, we reject it. The statutes above considered provide that "any person aggrieved by the order of the commission made upon said application (for certificate) may review such order." The statute imposes no limitations on that right of review to make it dependent on whether the order grants a certificate as distinguished from denying it. There is no ambiguity in the statutory language permitting creation of such limitation through statutory construction by the court. We need not consider the constitutionality of a statute allowing an appeal to 1 of 2 adversaries, if aggrieved by an order, but not to the other when so aggrieved, inasmuch as it is evident that such was not the legislative intent or meaning of the statute. That it was the view of this Court that an appeal does lie from an order denying a certificate appears from its expression, termed dicta by defendants, that:

"If the commission, after such a hearing, should deny such a certificate to Panhandle, the statute affords it a remedy for review in the courts; and, on the contrary, if at such hearing the commission should grant such a certificate to Panhandle, the

intervenor herein or any other interested party would likewise have the same right of review. The statute so provides. CL 1948, § 460.506 (Stat Ann § 22.146)." *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 328 Mich 650, 655 (86 PUR NS 1) affirmed 341 US 329 (71 S Ct 777, 95 L ed 993, 89 PUR NS 1).

Such review was had, without challenge, in the circuit court and here in *Giaras* v. *Michigan Public Service Commission,* 301 Mich 262 (43 PUR NS 531, 533), with respect to the commission's denial of an intrastate carrier permit, and in *Chicago, M. St. P. & P. R. Co.* v. *Public Service Commission,* 338 Mich 9 (1 PUR 3d 579), involving a commission denial of a carrier's application to discontinue service. Defendants urge, however, that *Sparta Foundry Co.* v. *Michigan Public Utilities Commission,* 275 Mich 562 (14 PUR NS 530, 534), holds that no appeal lies from commission orders which are negative in character. The holding in that case must be held to apply strictly to what was involved in that case, namely, a so-called reparation order sought under CL 1948, § 462.10, subd (g) (Stat Ann § 22.29, subd [g]). While that section provides that if it finds the rate exacted irregular or exorbitant, the commission shall "make an order authorizing and directing the carrier to pay" a reparation or refund, the evident purpose of such so-called order is, as expressed in the statute, to relieve the carrier, if it makes such payment, from liability for any penalty, forfeiture or prosecution for having made a refund. The statute gives no compulsion to such "order." In fact, it provides merely that if the carrier refuses to make the refund the shipper may bring an action to recover the excessive charge "in the courts of this State," not just in the Ingham county circuit court as in the case of appeals from the commission, and that on trial thereof the finding by the

commission of excessive charge shall be prima facie evidence of the truth of the facts found by the commission. No other office than these 2 is served by the commission action in this connection. Involved in *Sparta Foundry,* then, was a refusal of the commission to make such finding of fact which the shipper might thereafter use in a suit in any court as prima facie evidence of an excessive charge. Failure of the commission to make such finding would not bar such suit. Clearly, neither a finding of that kind by the commission or a failure to make such finding of facts, to stand as prima facie evidence in a subsequent court proceeding, amounts in essence to an order or decree of the commission from which, as previously noted, the statutes provide for an appeal to circuit court. It is to be noted that the discussion in *Sparta* of "negative orders" being non-appealable drew for its support on *Standard Oil Co.* v. *United States,* 283 US 235 (51 S Ct 429, 75 L ed 999, PUR1931D 529, 532), and that the espousal therein of that doctrine has been completely repudiated in the later *Rochester Telephone Case, supra;* and subsequent decisions of the United States supreme court.

Were the issues sought to be raised by Panhandle in its appeal to circuit court from the commission's rescinding order, such as questions of public convenience and necessity, the authority conferred by the statute under which the commission acted, the constitutionality of that statute, and the disqualification of one of the commission members, determined by the circuit court's dismissal, under mandate of the statute, of Consolidated's appeal, leaving those matters now *res judicata* and Panhandle's appeal a collateral attack? Was Panhandle's only remedy, therefore, the prosecution of its appeal here from the court's dismissal of Consolidated's circuit court appeal? Not at all. The commission had granted Pan-

handle a certificate. Consolidated appealed to circuit court. Other and additional evidence was adduced before that court, which it transmitted to the commission as provided by statute. The commission thereafter rescinded its original order and the court, as required by statute, dismissed the action. In so doing, the court decided nothing. There remained in full force and effect a commission order which denied Panhandle's application for a certificate. Panhandle was aggrieved thereby and, under the statute, was entitled to an appeal to circuit court. On presentation of such appeal there the issues above mentioned could, for the first time, properly be before that court. We do not, as Panhandle requests, decide those issues now and here. That is for the circuit court.

Decree below dismissing Panhandle's appeal reversed and the cause remanded to the circuit court for determination thereof. Costs of this appeal to Panhandle against Consolidated.

CARR, KELLY, SMITH, BLACK, and VOELKER, JJ., concurred.

EDWARDS and KAVANAGH, JJ., did not sit.

SHANK *v.* CASTLE.

1. TRIAL—MOTION TO QUASH—APPEARANCE—PLEADING.
   A specially-appearing defendant, upon denial of his motion to quash service of process in a civil case, has 15 days' time within which to appear generally and plead (Court Rule No 18, § 4; No 27, §§ 3, 8 [1945]).

2. SAME—MOTION TO QUASH—PLEADING—WAIVER OF OBJECTIONS.
   The court rule permitting a specially-appearing defendant to make an attack on the service of process does not require any possible attack on the pleadings to be included in such motion to quash, hence, the waiver of unstated objections to the pleadings is not effected (Court Rule No 18, § 4; No 27, § 6 [1945]).

3. PLEADING—DECLARATION—RES JUDICATA—MOTION TO DISMISS.
   The defense of *res judicata* may be raised by a motion to dismiss a declaration which incorporates the former adjudication (Court Rule No 18, § 1[e] [1945]).

4. JUDGMENT—RES JUDICATA.
   A court of competent jurisdiction requires parties to bring forward their whole case and normally will not permit the same parties to open the same subject of litigation in respect of matter which might have been, but was not, brought forward as part of the subject in contest, only because from negligence, inadvertence or even accident it was omitted.

5. SAME—RES JUDICATA—CUSTODY OF CHILD—DAMAGES.
   Plea of *res judicata* was applicable, where plaintiff in action against her parents for damages for breach of agreement relative to custody of her son had, in a previous suit by them

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REFERENCES FOR POINTS IN HEADNOTES

[1] 41 Am Jur, Pleading § 321.
[2] 3 Am Jur, Appearances § 42.
[3] 30A Am Jur, Judgments § 448.
Pleading waiver, estoppel, and res judicata. 120 ALR 8.
[4] 30A Am Jur, Judgments § 324.
[5] 30A Am Jur, Judgments § 367.

for the child's custody, filed a cross bill in which she could have sought an injunction against interference with her custody, which had been awarded to her in a divorce action, as well as damages for such interference, but did not seek such relief.

Appeal from Macomb; Spier (James E.), J. Submitted June 2, 1959. (Docket No. 12, Calendar No. 47,966.) Decided October 12, 1959.

Case by Phyllis Shank against John H. Castle and Phyllis L. Castle for damages resulting from withholding custody of child including expense of litigation arising therefrom. Cause dismissed on motion. Plaintiff appeals. Affirmed.

J. Lynn Fewlass, for plaintiff.

Bailey & Robbins, for defendants.

DETHMERS, C. J. Plaintiff's declaration alleges, in substance, the following: that plaintiff is the daughter of defendants; that by decree of divorce from her first husband she was awarded custody of her son; that from the time of his birth until her remarriage 4 years later she and her son lived with defendants; that at the time of her remarriage the parties agreed that the son was to live with defendants during the week and spend weekends with plaintiff until she could establish a home; that about a year and a half later the parties hereto agreed that the son should live with plaintiff, except for intermittent visits with defendants; that in breach and violation of the latter agreement defendants took and kept the son for a period of 20 days and brought a chancery action seeking his custody on the grounds that plaintiff had abandoned him and was not a proper person to have his custody; that in that chancery action a consent decree entered providing, in substance, the same as the last previous

agreement of the parties, that plaintiff was to have custody of the son but the defendants, during the next 2 years, were to have him weekends; that defendants' said breach of the last mentioned agreement, prior to the entry of said decree, by keeping the child for the 20-day period and bringing said chancery action, caused plaintiff mental anguish, pain, suffering, illness, medical expenses and expenses in defending said chancery action, for which she seeks damages as for breach of said agreement.

The trial court granted defendants' motion to dismiss on the ground that the chancery action rendered the issues herein *res judicata.* Plaintiff appeals.

Plaintiff says that a copy of her declaration was received by defendants' attorneys by mail, not later than March 1, 1958, although they had not then entered an appearance. On March 4th they entered a special appearance and filed a motion to quash the service of process because made on Washington's birthday. No other grounds for dismissal were asserted. On March 10th the court denied the motion and extended for 15 days thereafter the time within which defendants might plead. On March 24th defendants filed the motion to dismiss on the ground, *inter alia,* of *res judicata,* attaching the bill of complaint, answer, cross bill and decree in the mentioned chancery action between these parties. This is the motion which, as above stated, the court granted, prompting this appeal.

Michigan Court Rule No 27, § 6 (1945), reads:

"A motion attacking a pleading or any part thereof must be filed and served within 15 days after the receipt of the pleading attacked. Such motion shall include all objections to the pleading attacked and to the proceedings up to that date in the case. And all objections to pleadings or proceedings not stated in the motion shall be deemed waived."

Plaintiff contends that under the above-quoted rule defendants waived their rights to object to the declaration and to urge *res judicata* because they failed to do so within 15 days after receipt of a copy of the declaration and because they failed to include such objections and claim in their motion to quash. Rule No 18, § 4 (1945), provides for filing, within the time for appearing, of a motion to quash the service of process and that every denial thereof "shall be without prejudice, whereupon the defendant shall have the right to appear generally and plead." This contemplates that after denial of the motion to quash defendant shall have time within which to appear generally and plead. This is precisely what the order of the court below provided, as also authorized under Rule No 27, § 8. Section 3 of that rule provides that in case a special motion is made the 15-day period for answering commences with final determination of such motion. In *Reaume & Silloway, Inc.*, v. *Tetzlaff*, 315 Mich 95, this Court, in affirming the trial court's order denying a motion to quash service of process, provided in its opinion, "Defendants shall have 15 days after this opinion is filed within which to plead to or answer plaintiff's declaration." From all this it is clear that there is no foundation to plaintiff's claim that defendants' motion to dismiss came too late.

As for plaintiff's contention that defendants waived their right to make the second motion on the grounds therein urged by failing to include the same in their first motion, it is to be observed that Rule No 27, § 6, relied on by plaintiff in that connection, requires that "A motion attacking a pleading * * * shall include all objections to the pleading attacked," failure to do so working a waiver of those not included. Defendants' first motion was not an attack on a pleading, but, after special appearance, an attack on the service of process. The

rule does not require any possible attack on the pleadings to be included in such motion to quash and, hence, the waiver provision of section 6 has no application here.

Rule No 18, § 1(e), provides that within the time for pleading defendant may file a motion to dismiss on the ground that the cause of action is barred by a prior judgment, if that fact appears on the face of the declaration. When, as here, the declaration by reference incorporates the former adjudication, *res judicata* may be raised by motion to dismiss. *Bocinski* v. *Krzeminski,* 253 Mich 48; *Corkins* v. *Ritter,* 326 Mich 563.

The allegations of the bill of complaint and those of the cross bill which plaintiff herein filed in the chancery action between these parties, relate entirely to the rights of the parties to custody of the son. The subject matter is the same as that of the plaintiff's declaration. While the cross bill did not pray for the damages here sought, it did allege the same anguish and suffering resulting from defendants' breach of the claimed agreement urged in plaintiff's declaration here. The alleged facts out of which plaintiff here claims her damages to have arisen are all contained and involved in the pleadings and decree in the chancery action which was between the same parties as those in the instant case. Inasmuch as the damages here sought spring from the facts and subject matter set forth in the chancery pleadings, the claim for those damages, if valid, could and properly should have been pressed by plaintiff in that action.

"Whether *res judicata* is applicable to the case at bar depends upon: * * *

"(2) Whether it is necessary in this State that the point in controversy shall have actually been litigated in the prior suit or if it is sufficient that the party had an opportunity to present the claim

or defense? This question was answered in *Harrington* v. *Huff & Mitchell Co.,* 155 Mich 139, 141, by quoting from *Henderson* v. *Henderson,* 3 Hare 100, 114, 115 (67 Eng Rep 313), where the vice-chancellor said:

" 'In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

"See, also, *Jungnitsch* v. *Michigan Malleable Iron Co.,* 121 Mich 460; *Andreas* v. *School District No. 4, Township of Leavitt,* 138 Mich 54, and *La Vasser* v. *Chesbrough Lumber Co.,* 190 Mich 403." *McDannel* v. *Black,* 270 Mich 305, 310, 311.

Plaintiff says that the decree in the chancery action is a nullity and cannot stand as a bar to this action because the court which granted plaintiff her decree of divorce and awarded her custody of the son retained continuing jurisdiction over the matter of that custody to the exclusion of the exercise of any jurisdiction thereover by another court in the chancery action between these parties. The court in the latter action did have jurisdiction to grant the prayer of plaintiff's cross bill that defendants be enjoined from interfering with her custody of the

child and that they be required to surrender him to her. It would have had jurisdiction to entertain, had it been presented in that action, the claim for damages here asserted arising out of defendants' interference with her custody of the son. The jurisdiction of that court plaintiff invoked by her cross bill. She cannot now disavow it for the purposes of this suit.

The court was correct in holding *res judicata* applicable here.

Affirmed, with costs to defendants.

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

SPENCER *v.* WALL WIRE PRODUCTS COMPANY.

GOOCH *v.* SAME.

1. LABOR RELATIONS—UNION CONTRACTS—SENIORITY—ACTION FOR BREACH—GRIEVANCES.

Exhaustion of grievance procedure provided by union contract with defendant employer was a prerequisite to bringing actions for damages by 2 members of the union for their discharges as breaches of the seniority provisions of such contract.

2. CONTRACTS—BREACH—UNION GRIEVANCE PROCEDURE.

Evidence presented in actions by 2 former employees for damages for breach of seniority provisions of their union's contract with defendant employer *held,* to show as a matter of law that plaintiffs, who had been discharged for having been involved in

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REFERENCES FOR POINTS IN HEADNOTES

[1–4] 31 Am Jur, Labor § 124.

Effect and necessity of resort to means of adjustment provided for by collective labor agreement. 95 ALR 10, 52.

passing forged checks drawn on defendant's bank account, had failed to employ or exhaust the grievance procedure provided by the union contract and that defendant had not been shown to have prevented them from doing so.

3. PLEADING—MOTION TO DISMISS—AFFIRMATIVE DEFENSES—WAIVER.
The affirmative defense of failure to exhaust grievance remedies provided by contract between defendant employer and union of which plaintiffs were members was properly raised by defendant's answers, no waiver having resulted from defendant's failure to make a motion to stay or to dismiss before trial.

4. LABOR RELATIONS—GRIEVANCE PROCEDURE—EVIDENCE.
Motions for judgments *non obstante veredicto* in actions for breach of seniority provisions of union contract with defendant employer were properly granted, where evidence failed to support plaintiffs' claim that defendant had balked, interfered with and prevented plaintiffs from doing so and that the defense had been waived by defendant's refusal to entertain, process, or discuss plaintiffs' grievances.

Appeals from Wayne; Brown (Charles L.), J., presiding. Submitted June 4, 1959. (Docket Nos. 37, 38, Calendar Nos. 47,788, 47,789.) Decided October 12, 1959.

Case by Raymond Spencer against Wall Wire Products Company, a Michigan corporation, for damages arising under union contract by reason of discharge from employment. Judgment *non obstante veredicto* for defendant. Similar action by Burl Gooch with similar result. Plaintiffs appeal. Cases consolidated on appeal. Affirmed.

Dee Edwards, for plaintiffs.

Charles A. Bryan (*Clark, Ladner, Fortenbaugh & Young,* of counsel), for defendant.

DETHMERS, C. J. Defendant discharged plaintiffs from its employ for reasons set forth in *Gooch* v. *Wachowiak,* 352 Mich 347, believing them to have been involved in passing forged checks drawn on

defendant's bank account. Plaintiffs were members of a union which had a labor contract with defendant. Plaintiffs sued in separate suits, declaring on their discharges as constituting breaches of the seniority provisions of that contract. Defendant answered, raising as an affirmative defense that plaintiffs had failed to resort to the grievance procedure provided by the contract. Plaintiffs filed replies alleging that defendant had balked, interfered with, and prevented their attempts to do so, thereby becoming estopped from raising such defense, and also that the defense had been waived by defendant's refusal to entertain, process, or discuss plaintiffs' grievances.

Grievances were presented for plaintiffs to defendant by union representatives. The undisputed testimony reveals that at meetings between representatives of the union and of defendant the former informed the latter that they were withdrawing the grievances because plaintiffs had not filed them in accordance with the grievance procedure provisions of the contract; and they were thus withdrawn. The only testimony even remotely bearing on the alleged refusal of defendant to observe the grievance procedure is that of the former chairman of the local union to the effect that defendant's officials had told him that they intended to see that the discharges would stand, and that they were going to spend a lot of money to see that they did. No other grievances in this connection were submitted after withdrawal of the first ones, either by plaintiffs or the union, no demands for arbitration as provided in the contract were ever made thereafter by plaintiffs or the union, and the plaintiffs never approached defendant's officers in an effort to regain their jobs. There is no testimony or evidence that demands upon defendant for arbitration would have been futile, or that defendant refused to consider or process plaintiffs' grievances in accord with the contract provisions.

On the above state of the record the court properly entered judgments *non obstante veredicto* for defendant, after holding that plaintiffs had failed to employ or exhaust the grievance procedure provided by contract, a prerequisite to bringing suit (See *Mayo* v. *Great Lakes Greyhound Lines,* 333 Mich 205, and *Sewell* v. *Detroit Electrical Contractors Association,* 345 Mich 93), and that there were no proofs that defendant was guilty of preventing them from doing so.

Plaintiffs say that the mentioned defense of failure to exhaust grievance remedies was waived by defendant's failure to raise it by motion to stay or to dismiss before trial, and by going to trial on the merits. That defense was raised, as an affirmative defense, in defendant's answers. That fact distinguishes these cases from *Lewis-Hall Iron Works* v. *Bethel African Methodist Episcopal Church,* 242 Mich 126, in which the defense was not raised until after the testimony had been completed on trial, and other cases of like import cited by plaintiffs. Plaintiffs, in their replies, alleged, as already noted, that they were prevented by defendant from having recourse to the grievance procedure. Thus an issue of fact was presented by the pleadings, not to be disposed of on motion before trial and the taking of proofs. *Watts Construction Co.* v. *Joint Clutch & Gear Service, Inc.,* 325 Mich 548. No waiver resulted from defendant's failure to make such motion. After plaintiffs' proofs were in on this issue, the court, as above indicated, properly granted defendant's motions for judgments *non obstante veredicto* for lack of proofs to support plaintiffs' position thereon.

Affirmed, with costs to defendant.

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

PEOPLE *v.* HENDERSHOT.

1. CRIMINAL LAW—CONSTRUCTION OF STATUTES—DISPOSITION OF UNTRIED CHARGES.

   The meaning of the term "brought to trial," as used in act relative to disposition of untried charges filed against prisoners, is to be gathered from the entire act (PA 1957, No 177, § 1).

2. SAME—TRIAL OF UNTRIED CHARGES—JURISDICTION.

   The circuit court had not lost jurisdiction in 1958 to try defendant on 1951 charge of having unlawfully carried concealed weapons, where department of corrections delivered a notice to the prosecuting attorney and apparent good-faith action on his part met condition of statute as to bringing case on for trial within statutory period of 180 days from receipt of notice by being ready for trial within such time, hence, trial thereafter was not barred by reason of expiration of such 180-day period due to defendant's delaying motions, since the action had been timely commenced and proceeded with promptly (PA 1957, No 177, §§ 1, 3).

3. SAME—SERVICE OF WARRANT—DETAINER FILED WITH PRISON AUTHORITIES—STATUTE OF LIMITATIONS.

   The service of a warrant by the filing of a detainer against defendant with the prison authorities where he was incarcerated served to toll the statute of limitations (CLS 1956, § 767.24).

Kenneth Hendershot, after conviction of manslaughter, now charged with carrying concealed weapon, brings habeas corpus claiming late prosecution and resulting loss of jurisdiction under statutes. Submitted June 2, 1959. (Calendar No. 48,157.) Writ dismissed October 12, 1959.

REFERENCES FOR POINTS IN HEADNOTES

[2] 14 Am Jur, Criminal Law § 214 *et seq.*; 15 Am Jur, Criminal Law § 347 *et seq.*

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, and *James S. Bicknell, III,* Clare County Prosecuting Attorney, for the people.

Linsey, Shivel, Phelps & Vander Wal (*Robert B. Linsey* and *Dale M. Strain,* of counsel), for defendant.

DETHMERS, C. J. In January, 1951, defendant was convicted of manslaughter and sentenced to be imprisoned from 14 years 11 months to 15 years. On April 16, 1951, on complaint filed, a warrant issued charging him with unlawfully having carried a concealed weapon and a detainer was filed against him with prison authorities.

On June 14, 1958, the department of corrections caused a notice to be delivered to the prosecuting attorney, pursuant to PA 1957, No 177 (CL 1948, § 780.131 *et seq.* [Stat Ann 1957 Cum Supp § 28.969 (1) *et seq.*]), requesting that action be taken toward final disposition of the untried concealed weapons charge.

On October 23, 1958, the prosecuting attorney, by means of a writ of habeas corpus, caused defendant to be returned from prison to the county jail. On that date defendant was arraigned before the justice of the peace on the concealed weapons charge. On demand of the prosecuting attorney a preliminary examination was held on October 27, 1958, and defendant was bound over to circuit court. On October 29, 1958, the prosecuting attorney filed a petition in the circuit court for examination into the defendant's sanity. The court ordered that examination on November 3d and set the hearing for December 3, 1958. On the basis of medical reports, the court, on the latter date, granted the prosecuting attorney's motion to dismiss the sanity proceedings. On that

same date defendant moved that the cause be remanded to the justice of the peace for further examination or, in the alternative, that the cause be dismissed for lack of showing of probable cause at the previous examination. The court took these motions under advisement, awaiting briefs from counsel. On December 5th defendant's brief and on December 11th the people's brief were submitted. On December 18, 1958, defendant filed his petition for habeas corpus in this Court, contending that the circuit court had lost jurisdiction of the case and that further action on the charge was barred under the mentioned statute. We permitted the writ of habeas corpus and ancillary writ of certiorari to issue.

Section 1 of the act provides, in part:

"Whenever the department of corrections shall receive notice that there is pending in this State any untried warrant, indictment, information or complaint setting forth against any inmate of a penal institution of this State a criminal offense for which a prison sentence might be imposed upon conviction, such inmate shall be brought to trial within 180 days after the department of corrections shall cause to be delivered to the prosecuting attorney of the county in which such warrant, indictment, information or complaint is pending written notice of the place of imprisonment of such inmate and a request for final disposition of such warrant, indictment, information or complaint."

Section 3 provides:

"In the event that, within the time limitation set forth in section 1 of this act, action is not commenced on the matter for which request for disposition was made, no court of this State shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

Defendant says that the 180-day period specified in the statute expired on December 12, 1958, that the defendant had not yet been "brought to trial" as in section 1 provided, that, therefore, the trial court lost jurisdiction and defendant is entitled to dismissal of the complaint and warrant with prejudice, as provided in section 3. The people point to the language of section 3, requiring such dismissal only if "action is not commenced on the matter" within the period limited in section 1. The people say that such action was commenced on October 23d, that further action was taken on October 27th, October 29th, November 3d and December 3d, well within the 180-day period, all as above outlined, that the people stood ready for trial on the latter date, and that defendant's 2 motions, filed on that date, were responsible for the fact that actual trial did not occur on or before December 12, 1958, when the 180 days ran out.

It is to be noted that, while section 1 directs that the inmate "shall be brought to trial" within 180 days, the statute does not deprive the court of jurisdiction and require dismissal unless "action is not commenced on the matter" within that period.

The language of section 1 is not that the inmate shall be "tried" or that his "trial shall commence" within 180 days, but, instead, that he "shall be brought to trial" within that time. The legislative intent and meaning in its use of the term "brought to trial" is to be gathered from the entire act. Section 3's provision for action to be commenced on the matter within the mentioned time throws strong light on the question. Clearly, if no action is taken and no trial occurs within 180 days, the statute applies. If some preliminary step or action is taken, followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial promptly, the statute opens the door to a finding by the court

that good-faith action was not commenced as contemplated by section 3, thus requiring dismissal. The statute does not require the action to be commenced so early within the 180-day period as to insure trial or completion of trial within that period. If, as here, apparent good-faith action is taken well within the period and the people proceed promptly and with dispatch thereafter toward readying the case for trial, the condition of the statute for the court's retention of jurisdiction is met. When the people have moved the case to the point of readiness for trial and stand ready for trial within the 180-day period, defendant's delaying motions, carrying the matter beyond that period before the trial can occur, may not be said to have brought the statute into operation, barring trial thereafter.

Defendant says the statute of limitations (CLS 1956, § 767.24 [Stat Ann 1954 Rev § 28.964]) has run because the warrant, when issued, was not placed in the hands of an officer for service, so as to toll the running of the statute. The record contains no support for the factual assertion. It does disclose that upon issue of the warrant a detainer was filed against the defendant with prison authorities. That is the extent of what an officer properly could have done about serving the warrant at the time. This served to toll the statute.

Writ of habeas corpus dismissed.

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

HARVEY *v.* LEWIS.

1. CONSPIRACY—FRAUD—EVIDENCE.
   Finding of trial court that conspiracy and fraud involving formation of syndicate, acquisition of property and formation of corporations by defendants and conduct of rural cemetery by one cemetery association had not been established by plaintiffs *held,* supported by evidence.

2. SAME—FRAUD—EQUITY—EVIDENCE.
   Neither conspiracy nor fraud may be assumed in any case but when relied on as the bases for equitable relief, they must be established by clear and satisfactory proof.

3. SAME—FRAUD—EVIDENCE.
   The fact that a financial venture has proved unsatisfactory to those engaging in it does not suggest conspiracy or fraud on the part of others, contributing to bring about the unfortunate result.

4. CEMETERIES—TITLE—EVIDENCE.
   Evidence presented in suit to obtain equitable relief based on alleged conspiracy and fraud on the part of certain defendants *held,* to show that legal title to remainder of property involved reposed in cemetery association, burials having already taken place.

5. RECEIVERS—APPOINTMENT—DISCRETION OF COURT.
   Appointment of receiver for 2 corporations involved in alleged conspiracy and fraud against plaintiffs *held,* not an abuse of discretion under record presented showing the financial future appears to be unencouraging.

REFERENCES FOR POINTS IN HEADNOTES

[1–4] 11 Am Jur, Conspiracy § 56.
[5] 45 Am Jur, Receivers § 22.
[6, 7] 45 Am Jur, Receivers §§ 385 *et seq.,* 391.
[8] 14 Am Jur, Costs § 98.

6. SAME—SALE OF ASSETS—CEMETERIES.
Order authorizing receiver's sale of assets of cemetery association is modified to provide that any sale of the real estate shall be subject to the condition that existing graves shall not be disturbed, proceedings for the vacation of a burying ground being subject to statute (CL 1948, § 456.21).

7. CEMETERIES—CORPORATIONS—RECEIVERS—MODIFICATION OF DECREE.
Decree appointing receiver and ordering sale of cemetery association's assets is modified to provide that land used for cemetery purposes must be sold accordingly so as not to disturb existing graves and that plaintiffs, claiming conspiracy and fraud, are limited to their rights as stockholders of the association or its holding company.

8. COSTS—EQUITY—MODIFICATION OF DECREE.
No costs are allowed in suit to obtain equitable relief based on alleged conspiracy and fraud, where decree is substantially modified.

Appeal from Wayne; Rashid (Joseph G.), J. Submitted April 10, 1959. (Docket No. 41, Calendar No. 48,011.) Decided October 12, 1959. Rehearing denied November 24, 1959.

Bill by Sidney M. Harvey, William T. McAlonan, Emma Moist and others against Daniel L. Lewis, *et al.*, doing business as Lewis Bros., Brookdale Cemetery Association and Brookdale, Inc., *de facto* corporations, and others claiming damages by reason of conspiracy and fraud in corporate organization and sales of property to other cemetery associations. Opinion filed. Case partially completed by decrees entered affirming title in 2 purchasers. Receiver for corporations petitioned for sale of remaining property used as cemetery. Guardian *ad litem* appointed to represent known and unknown persons who may be interested. Decree of sale entered. Guardian *ad litem* appeals. Modified and affirmed.

Walter M. Nelson (*Burger & Sullivan* and *Frank Iannelli,* of counsel, for plaintiffs Harvey and McAlonan; *Clarence T. Wilson,* of counsel, for plaintiff Moist and other original plaintiffs and their successors in interest), for plaintiffs.

Stanley E. Beattie (*Thomas C. Mayer,* of counsel), for John R. Starrs, receiver.

Ralph W. McKenney, guardian *ad litem.*

CARR, J. This case was instituted on behalf of the plaintiffs by bill in equity filed November 22, 1952, relief being sought primarily on the bases of conspiracy and fraud. In the course of the proceeding a receiver was appointed in circuit court to take charge of the assets of the defendant corporations, Brookdale Cemetery Association and Brookdale, Inc. The initial receiver having resigned, his successor was appointed and petitioned the court for authority to sell corporate assets for the purpose of paying outstanding obligations. An order was entered, in accordance with the prayer of the petition, on October 7, 1958. The guardian *ad litem* appointed by the court to represent persons who might be interested in the proposed decree of sale, and who might for any reason be incapable of representing themselves, appealed from the decree for reasons previously set forth in objections filed by him.

The case as presented to us involves the action of the trial court in authorizing the sale of assets, and particularly of certain real estate, and also the issue raised in circuit court under the pleadings there filed as to the legal title and ownership of the land embraced in the order of sale. To the end that the latter question might be properly submitted here, it was deemed necessary to request that counsel file a transcript of the testimony taken at a hearing con-

ducted by the Honorable John V. Brennan, circuit judge, for a period of approximately 3 months following the 20th of April, 1955, together with supplemental briefs and appendices. Counsel duly complied with the request, and the first question for consideration now presented is whether the land directed to be sold by decree of the circuit court belonged to one of the corporate entities in receivership, the Brookdale Cemetery Association, as an asset of such nature that the receiver may properly be authorized to sell it for the purposes of the receivership. Obviously the determination of this question is necessary in considering the issue directly presented by the appeal relating to the action of the circuit judge in entering the decree of sale.

The issues in the case relate to matters of fact which are somewhat involved. The land in question is part of a tract of 140 acres claimed to be suitable for use for cemetery purposes. It lies within the present limits of the city of Livonia and is described in the record before us as the:

"South 7/8 of the southwest 1/4 of section 12 town 1 south, range 9 east, containing 140 acres of land, more or less."

The acreage was reduced to some extent as a result of the widening of a public thoroughfare known as Six Mile road.

The property was acquired from former owners by a corporation formed under the Michigan statute, known as Triada Orthodox Cemetery Association, the articles of incorporation of which were filed May 30, 1930. At the time of the purchase of the tract a mortgage was given to the grantors which was subsequently foreclosed with the result that the mortgagor, under date of August 10, 1936, conveyed the property by deed to the holder of the mortgagee's interest. Prior to that date the holder of said inter-

est (subject to the rights of the mortgagor) gave an option to Archie L. Waters to purchase the property for a consideration of $40,000 with a down payment of $7,500. It appears from the record that the purpose of Mr. Waters, and of others with whom he was associated, contemplated the formation of a corporation to take over the property.

A so-called syndicate was first formed, designated as Brookdale Syndicate No. 1, the managers of which were Mr. Waters and George C. Johnston. To this syndicate the plaintiffs in this case, or those under whom they claim, made subscriptions, amounting in the aggregate to $6,500, during a period from December 8, 1936, to December 15, 1937. Articles of incorporation of the Brookdale Cemetery Association were filed on September 22, 1937. Prior thereto the holder of the legal title to the 140 acres of land in question executed a quitclaim deed to Waters of said property, taking back a purchase money mortgage for $32,500. It appears that of the down payment the sum of $5,000 was advanced by defendants Lewis Brothers, and that such advance made possible the exercise of the option held by Waters.

In September, 1937, Waters, his wife joining in the conveyance, executed a quitclaim deed of the property to Reuben A. Stahl, as trustee, and the latter on the same day conveyed to Brookdale Cemetery Association. A corporation known as Brookdale Sales Company was organized in January, 1938, as a medium for the sale of lots in the cemetery, title to which had been acquired by Brookdale Cemetery Association. Shortly thereafter the defendant Brookdale, Inc., was organized, several of the plaintiffs appearing as incorporators, apparently designed to act as a holding company for the stock of Brookdale Cemetery Association. Certificates of stock in Brookdale, Inc., were issued to the plaintiffs, or to those under whom they claim.

The bill of complaint filed on behalf of plaintiffs asserts that defendant corporations, Brookdale Cemetery Association and Brookdale, Inc., were fraudulently established for the purpose of deceiving and defrauding the plaintiffs, that the Lewis Brothers, Daniel, George and Saul, were primary movers in a conspiracy to accomplish the result indicated, and that Waters and Johnston worked with them and, hence, were parties to the conspiracy. At the time suit was started in 1952, Saul Lewis, Waters, and Johnston were deceased. The bill of complaint asked that the corporate entities in question be disregarded, that the title to the property be deemed to be held in trust for plaintiffs, and that their ownership thereof be decreed by the court. Answers filed to the bill of complaint denied the charges made and denied that plaintiffs were entitled to the relief sought, or to any relief in a court of equity. Such were the issues tried on the hearing before Judge Brennan, and the proofs of the parties we find in the transcript of testimony hereinbefore referred to, comprising over 4,000 pages, which has been returned here as a part of the original record in the cause. It may be noted also that the case was dismissed as to defendants Rollings and Callahan.

Following the conclusion of the hearing Judge Brennan filed a carefully considered opinion on the various questions involved in the case. It was his conclusion that plaintiffs had failed to show any conspiracy or any fraud as charged, and that in the inception of the plan involving the formation of the syndicate, the acquiring of the property, the formation of a corporation or of corporations, and the conducting of a rural cemetery by Brookdale Cemetery Association, the parties concerned had acted in good faith and without any attempt to defraud or deceive the plaintiffs. An examination of the testimony brings us to the conclusion that Judge Brennan, who

had the advantage of seeing the witnesses, was not in error in weighing the testimony.

Particular consideration has been given to the claims of the plaintiffs as witnesses on the hearing. Their testimony does not justify a belief that they were misled in any material respect. When they signed the articles of incorporation of Brookdale, Inc., and received the certificates of stock issued to them it is a fair conclusion from the record that they knew what they were doing, and that throughout the proceeding of which they now complain they understood that, with the limited resources at its command, Brookdale Cemetery Association was endeavoring to act in accordance with the purposes for which it was formed. The testimony of plaintiffs Harvey and McAlonan indicates that they were men of practical experience in business affairs, and that until persuaded to join in the present suit they were convinced that the project into which they had entered was not financially profitable. Neither conspiracy nor fraud may be assumed in any case. When relied on as the bases for equitable relief they must be established by clear and satisfactory proof. The fact that a financial venture has proved unsatisfactory to those engaging in it does not suggest wrongdoing on the part of others, contributing to bring about the unfortunate result.

A discussion in detail of the testimony in this voluminous record would serve no useful purpose. We are impressed that Judge Brennan was right in his conclusions, that on the basis of the opinion filed by him a decree might properly have entered adjudging the title and ownership of the property in question to be in Brookdale Cemetery Association, and dismissing the bill of complaint without prejudice to the right of the plaintiffs individually to file claims as stockholders if they so desired.

Apparently for the purpose of improving its financial situation, Brookdale Cemetery Association sold certain portions of the land, remaining after the widening of Six Mile road, to Congregation Beth El, and to Mount Sinai Memorial Cemetery Association to the rights of which Congregation Adas Shalom has succeeded. Plaintiffs asserted in their bill of complaint that these conveyances were fraudulent and that the grantees were in effect parties to the fraud. Judge Brennan rejected the claim, holding in his opinion that each of the Congregations referred to held title to the lands conveyed to it free and clear of any claim on the part of the plaintiffs or any of them. Following the filing of Judge Brennan's opinion on February 29, 1956, a final decree was entered as to defendant Congregation Beth El, under date of March 20, 1956, adjudging it to be the owner and holder of the legal title to the land conveyed to it by Brookdale Cemetery Association. A like decree was filed April 3d following in favor of Congregation Adas Shalom. Under each decree plaintiffs' bill of complaint was dismissed as to the defendant named. These decrees are not before us in the instant proceeding, but they serve to emphasize the holding of the trial judge in his opinion as to the legal title and rights of ownership of Brookdale Cemetery Association in the land involved in the present appeal.

This brings us to the question whether the order or decree of sale was improperly entered by the trial court. Said decree, made October 7, 1958, recited the hearing on the petition of the receiver and the conclusion of the court that the sale should be authorized "in the best interest of creditors and of stockholders of said corporations, and necessary for the decent maintenance of the burial places of hundreds of persons." In terms, the court authorized the sale of all assets of Brookdale Cemetery Association and

Brookdale, Inc., including the land, burial rights, and stock held by Brookdale, Inc., in the Association. It further directed notice of the holding of the sale, and specified that all sales made should be subject to confirmation by order of the court. Description of the real estate, comprising 68 acres more or less, was inserted in the order presumably to avoid any possible confusion in that respect.

The guardian *ad litem* objected to the decree of sale on the ground that the alleged necessity therefor was based in part on claims not yet allowed, and that burial rights in the cemetery were not adequately protected. Such claims have been renewed on the appeal. On behalf of plaintiffs the order is challenged on the basis of claims alleged in the bill of complaint and advanced on the hearing before Judge Brennan. We have, however, concluded that Brookdale Cemetery Association held the legal title and was and is the owner of the property in question. It is apparent also from the record in the case that there was no abuse of discretion in the appointment of a receiver for these 2 corporations.

We are not prepared to say that the conclusion of the circuit judge that the sale should be made in the interests of those most directly concerned was incorrect. The history of the venture does not lend encouragement as to the future. It is also true that the pending litigation has undoubtedly exercised a prejudicial effect. It further appears that accounting actions have been or will be instituted for the purpose of determining adverse claims of certain parties. Taking all of the circumstances as disclosed by the record into consideration, and particularly the financial situation of these corporations, we conclude that this Court ought not to interfere with the discretion of the trial judge in authorizing the sale by the receiver.

It is in evidence that following the organization of Triada Orthodox Cemetery Association, and the acquiring of the 140-acre tract described, 22 burials were made on the property. In more recent years it is claimed that approximately 400 other burials have been made subsequent to the acquiring of title by Brookdale Cemetery Association. The order or decree from which the appeal has been taken should be modified to provide that any sale of the real estate shall be subject to the condition that existing graves shall not be disturbed. Proceedings for the vacation of a burying ground are subject to the provisions of CL 1948, § 456.21 (Stat Ann § 21.841). Such portion of the 68 acres as has been used for cemetery purposes must be sold accordingly. The extent of acreage not so used, if any, and subject to sale for other purposes, is not ascertainable from the record before us. Any issue involving such matter may be considered and determined on hearing of objections to confirmation of sale.

A decree will enter in this Court modifying the decree of sale of the trial court in the respects indicated. It will specifically adjudge the legal title to the land in question, and the ownership thereof as against any claims of the plaintiffs, to be in Brookdale Cemetery Association and subject to the jurisdiction of the court in the receivership proceeding. It will further decree and adjudge that plaintiffs have no interest of any kind or description in said land as an asset of the corporation, and that the rights of plaintiffs are limited to such as may be possessed by them as stockholders in Brookdale, Inc., or Brookdale Cemetery Association. Further modification with reference to the sale will be made as above indicated. In other respects the decree as entered

in the circuit court will stand affirmed. No costs are allowed.

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

KAVANAGH, J., did not sit.

PACE v. GIBSON.

1. APPEAL AND ERROR—RECORD—EVIDENCE TAKEN IN ADVANCE OF TRIAL.

   Testimony of witness subpoenaed by defendant, taken in advance of the impaneling of the jury for the convenience of the witness, but not introduced by either party at the trial, may not be considered on appeal from directed verdict and judgment for defendant in the determination of questions before the Supreme Court even though included in the record.

2. NEGLIGENCE—VOLUNTEER.

   One who is merely a volunteer in rendering service to another cannot recover if injured because of negligence, there being no duty other than not to injure him by willful or wanton act.

3. SAME—VOLUNTEER.

   One with an interest, who is requested by another's servant to assist in adjusting or fixing an instrumentality, is not a mere volunteer, but is within the rule requiring the exercise of due care and need not show the tort-feasor to have been guilty of willful and wanton misconduct in order to recover for injuries sustained.

4. SAME—VOLUNTEER—UNLOADING TRUCK BY COMMON CARRIER'S TRUCK DRIVER.

   Common carrier's truck driver who was requested by consignee to

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REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error §§ 812, 836.
[2–4] 35 Am Jur, Master and Servant § 166.
[5] 38 Am Jur, Negligence §§ 335, 336.

assist in unloading two 700-pound boxes and was injured by reason of latter's negligence, had an interest along with the carrier in effecting prompt delivery, hence, it may not be said that he was a volunteer chargeable with contributory negligence on basis of having assumed the risk of being injured by ordinary negligence on part of defendant or his employee.

5. SAME—UNLOADING TRUCK OF COMMON CARRIER BY TRUCK DRIVER—CONTRIBUTORY NEGLIGENCE.

Common carrier's truck driver who was requested by the consignee of two 700-pound wooden boxes to assist in unloading them and was injured when second box fell as the consignee and his employee suddenly released it without warning plaintiff, contrary to method that should have been followed, was not guilty of contributory negligence as a matter of law, since he was not bound to anticipate their failure to comply with instructions as to method of unloading.

Appeal from Oakland; Doty (Frank L.), J. Submitted June 2, 1959. (Docket No. 13, Calendar No. 47,784.) Decided October 12, 1959.

Case by Hurles E. Pace against Robert C. Gibson and Betty Gibson, doing business as Harley Davidson Sales Company, for personal injuries sustained while assisting in unloading shipment of merchandise at defendants' place of business. Directed verdict and judgment for defendants. Plaintiff appeals. Reversed and remanded.

Anthony Renne, for plaintiff.

David C. Pence, for defendants.

CARR, J. This is an action for damages for injuries sustained by plaintiff because of alleged negligence on the part of the defendants. On June 4, 1957, plaintiff was employed by the Trans-American Freight Line as a truck driver working out of the Pontiac terminal of the company. The defendants were at the time engaged in business in the city of

Pontiac, said business involving the servicing and sale of motorcycles. In the course of his employment plaintiff, operating a semi-trailer, went to defendants' establishment for the purpose of delivering 2 large wooden boxes each containing merchandise weighing approximately 700 pounds.

Plaintiff alleged in his declaration that at the request of defendants he assisted in the unloading operation, that in unloading 1 of the crates or boxes defendant Robert C. Gibson and his employee suddenly and without warning released their hold on the box whereupon it fell against plaintiff and upon his feet, causing injuries to him. The pleading averred that such conduct was negligent and resulted in the injuries for which plaintiff sought to recover damages. Defendants by answer denied all claims of negligence on their part, averred that the duty rested on the common carrier by which plaintiff was employed to deliver the merchandise, and that plaintiff requested assistance from defendants and their employee in unloading it. It was further pleaded that the carrier was guilty of negligence in not properly equipping the truck with facilities for unloading.

The case came to trial before the circuit judge and a jury. At the conclusion of plaintiff's proofs counsel for defendants moved for a directed verdict in their favor, asserting that negligence on the part of defendants had not been established, that under plaintiff's theory of the case he was merely a volunteer, that the duty rested on the carrier to unload the merchandise, and that as a result of his conduct plaintiff was guilty of contributory negligence as a matter of law. The trial judge concluded that under plaintiff's proofs he was a volunteer, and as such assumed the risk of being injured, that he could not recover except on a showing of willful or wanton misconduct on the part of the defendants, and that there

was no proof of such misconduct, or of ordinary negligence. In accordance with the conclusions reached the motion was granted and verdict directed accordingly. Plaintiff's motion for a new trial was denied and he has appealed, claiming that the directed verdict was erroneous.

The record before us indicates that defendants' employee, Charles Robert Gabelman, assisted in the unloading of the boxes of merchandise. It further appears that the testimony of Gabelman, who had been subpoenaed by defendants as a witness, was, for the convenience of such witness, taken in advance of the impaneling of the jury. He was not a witness on the trial nor was the testimony so taken introduced by either party. Counsel for appellant has caused it to be included in the record, but under the circumstances it cannot be considered in the determination of the questions now before us. In consequence, insofar as factual issues are concerned, we are limited to plaintiff's testimony and to facts that are admitted under the pleadings.

Testifying as a witness in his own behalf plaintiff claimed that when he took the merchandise to defendants' place of business he discovered that there was no unloading dock, that such facility was necessary to the proper handling of the boxes, and that he stated to defendants that he should return the shipment to his employer's terminal and have it delivered through another carrier. He claimed further that defendants objected to such procedure, claiming that it would materially increase the cost to them, and that he was assured by Mr. Gibson, hereinafter referred to as the defendant, that if plaintiff would assist the defendant and his employee Gabelman the 3 could unload the boxes.

Plaintiff testified that he finally agreed to help in the unloading process, that defendant procured a large automobile or truck tire which he placed on

the ground immediately at the rear of the trailer, that defendant stated in substance that each box would be moved to the rear of the trailer, the floor of which was approximately 4 feet above the ground, that the 3 men would then slide it down to within a few inches of the tire, and that it would then be released and permitted to drop. It was explained by defendant that this would permit each to withdraw his hands from the crate or box to prevent injury. The first crate of merchandise was unloaded in the manner indicated, the parties releasing their hold when it was some 3 or 4 inches above the tire. The second crate after being moved to the rear of the trailer was lowered to a point, according to plaintiff's testimony, approximately 2–1/2 feet above the ground when he suddenly discovered that he could not stop its downward course, that it struck his legs, throwing him backward and down, and landed on his feet, causing serious injuries.

It was the claim of the plaintiff in substance that defendant and Gabelman suddenly released their hold on the box, and that because of his inability to control it alone the result indicated followed. He further testified that no warning was given to him of any intention on the part of defendant or Gabelman to release the box, that such conduct was not in accord with the plan of unloading as outlined by defendant, and that the action of the latter and of his employee constituted negligence.

As above indicated it was the claim of the defendants in the trial court that plaintiff was, under his own testimony, a volunteer and that as such he assumed the risk of any negligent injuries that he might suffer in the course of the unloading operation. This Court in *Diefenbach* v. *Great Atlantic & Pacific Tea Co.*, 280 Mich 507, recognized the general rule that one who is merely a volunteer in rendering service to another cannot recover if injured because

of negligence, there being no duty other than not to injure him by willful or wanton act. In the instant case there is no testimony justifying the conclusion that defendant, or his employee, was guilty of willfulness or wantonness resulting in the injury to the plaintiff. It does not appear that any such claim is made on behalf of appellant. If, therefore, he was in fact a volunteer assuming the risk of negligent injury he is not entitled to recover. *Smedley* v. *Mashek Chemical & Iron Co.*, 189 Mich 64; *Diefenbach* v. *Great Atlantic & Pacific Tea Co.*, *supra*.

Does plaintiff's testimony establish that he was a volunteer in the commonly accepted meaning of that term? We think the answer to the question depends on whether it can be said that he or his employer had an interest in the performance of the work in which he undertook to assist. In discussing the subject it is said in 92 CJS, Volunteer, p 1032:

"It has been said that no definition of a volunteer can be given without qualification, since each case must be decided on its own merits. In a general sense a 'volunteer' is one who does or undertakes to do that which he is not legally or morally bound to do, and which is not in pursuance or protection of any interest; one who intrudes himself into matters which do not concern him. The word is more particularly defined as meaning one who enters into service of his own free will; one who gives his services without any express or implied promise of remuneration; one who has no interest in the work, but nevertheless undertakes to assist therein; one who merely offers his service on his own free will, as opposed to one who is conscripted. Under these definitions, a person who, although not obliged to do an act, yet has an interest in doing it, is not necessarily a volunteer."

In view of certain arguments in the briefs of counsel with reference to the status of the plaintiff, the following statement found in 99 CJS, Workmen's Compensation § 75, pp 298, 299, is of interest:

"In general, a person who does work for another while in the status of a volunteer is not entitled to the benefits of a workmen's compensation act as an employee; thus, an act under which only those who perform a service for hire are employees does not apply to a volunteer, and the mere doing of work without authorization by the person for whom it is done will not entitle the worker to compensation. Where an employee acts in the interest of his employer in coming to the assistance of a third person, he does not become an emergency employee of the person to whom he renders such assistance."

The pertinent provision of the Michigan workmen's compensation law found in part 1, § 7*, of the act is in accord with the general statement above quoted, and contains specific reference to a "contract of hire, express or implied." See, also, *Powell* v. *Twin Drilling Co.*, 300 Mich 566.

In accord with the exception to the general rule as to the right of a volunteer to recover damages on the basis of ordinary negligence is the following statement in 56 CJS, Master and Servant § 177, p 865:

"Where the servant of one master has an interest in the work in any proper capacity and at the request or with the consent of another servant undertakes to assist in the work, he does not do so at his own risk, and, if he is injured by their carelessness, their master is responsible."

In *Johnson* v. *E. C. Clark Motor Co.*, 173 Mich 277 (44 LRA NS 830) the plaintiff was sent by his em-

* CLS 1956, § 411.7 (Stat Ann 1957 Cum Supp § 17.147).

ployer to defendant's factory to see that certain motors were tested in accordance with a contractual arrangement between the parties. While there he undertook to adjust a pulley upon the transmission shaft of a motor. Such an undertaking was not a part of his ordinary duties. While he was doing so, an employee of defendant turned a switch, setting the pulley in motion and causing serious injury to plaintiff's right arm resulting in amputation. The claim was made that plaintiff was a mere volunteer, but this Court concluded otherwise on the theory, above indicated, that plaintiff's employer was interested in the work that was being done.

Among other authorities cited in support of the conclusion reached in the case above cited was *Kelly* v. *Tyra*, 103 Minn 176 (114 NW 750, 115 NW 636, 17 LRA NS 334). There plaintiff, while endeavoring to protect property of his employer, was injured by the negligence of employees of a subcontractor whom he was assisting for the purpose indicated. The court rejected a claim that plaintiff was a mere volunteer, saying, after referring to the general rule (pp 180, 181):

"There is, however, an increasing class of cases in which the exercise of proportionate care is held to be due to servants of different masters who assist in the performance of a service mutually beneficial to such employers. Thus a servant of a shipper, who, to prevent delay, aids the servants of a carrier in shunting cars, is not a mere volunteer assisting defendant's servants, although on request, but is regarded as having been on defendant's premises with a purpose of expediting the delivery of his own goods. The carrier is liable to him for the negligence of its servants. *Holmes* v. *Northeastern R. Co.*, 4 LR Ex 254; 6 LR Ex 123; *Wright* v. *London & N. W. R. Co.*, 1 LR QB 252; *Abraham* v. *Reynolds*, 5 Hurlst & N 142 (157 Eng Rep 1133). And see

Hannigan v. *Union Warehouse Co.,* 3 App Div 618 (38 NYS 272); *Connors* v. *Great Northern Elevator Co.,* 90 App Div 311 (85 NYS 644). *Cf. Elliott* v. *Hall,* 15 LR QB 315. So one with an interest, who is requested by another's servant to assist in adjusting or fixing an instrumentality, is not a mere volunteer, but is within the rule requiring the exercise of due care. *Meyer* v. *Kenyon-Rosing Machinery Co.,* 95 Minn 329 (104 NW 132); *Empire Laundry Machinery Co.* v. *Brady,* 60 Ill App 379. 'The distinction running through all the cases is this: That where a mere volunteer, that is, one who has no interest in the work, undertakes to assist the servants of another, he does so at his own risk. In such a case the maxim of *respondeat superior* does not apply. But where one has an interest in the work, either as consignee or the servant of a consignee, or in any other capacity, and, at the request or with the consent of another's servants, undertakes to assist them, he does not do so at his own risk, and, if injured by their carelessness, their master is responsible. In such a case the maxim of *respondeat superior* does apply. The hinge on which the cases turn is the presence or absence of self-interest. In the one case, the person injured is a mere intruder or officious intermeddler. In the other, he is a person in the regular pursuit of his own business and entitled to the same protection as any one whose business relations with the master expose him to injury from the carelessness of the master's servants.' *Welch* v. *Maine Central R. Co.,* 86 Me 552, 565, 566 (30 A 116, 25 LRA 658)."

Involved in *Schiano* v. *McCarthy Freight System,* 72 RI 455 (53 A2d 527), were facts analogous to those in the case at bar. There the plaintiff was injured while assisting in loading a barrel of scrap silver, weighing between 300 and 400 pounds, on a truck operated by the defendant as a common carrier. Apparently it was not the duty of plaintiff to render assistance of the character in question,

but he was requested or directed to do so by his employer's manager to whom the truck driver had applied for assistance. Plaintiff claimed that he was injured because of the negligence of the defendant's employee. It was argued that plaintiff was a mere volunteer. The court, however, rejected the contention under the proofs, pointing out in the opinion that the plaintiff's employer and defendant had a common interest in the transportation of the barrel of scrap silver. Among other decisions in accord with the cases above cited are: *Krull* v. *Triangle Dairy, Inc.*, 59 Ohio App 107 (17 NE2d 291); *Welch* v. *Maine Central R. Co.*, 86 Me 552 (30 A 116, 25 LRA 658); *Transport Co. of Texas* v. *Arkansas Fuel Oil Co.*, 210 Ark 862 (198 SW2d 175); *O'Shea* v. *Pacific Gas & Electric Company*, 18 Cal App2d 32 (62 P2d 1066); *Hughes* v. *Shanafelt*, 203 Okla 80 (218 P2d 350); *Lambert* v. *Paul W. Senne Funeral Home, Inc.*, 343 Ill App 136 (98 NE2d 519); *Hughes* v. *Weekley Elevator Co.*, 37 Ga App 130 (138 SE 633).

In the instant case the testimony of the plaintiff fairly discloses that he and his employer were interested in the unloading of the merchandise. Said employer was engaged as a common carrier in the transportation and delivery of freight by motor truck. It was to its interest that the equipment operated by plaintiff should be unloaded to the end that it would be available for other transportation, and that the merchandise be delivered to the consignee. Plaintiff was also interested in turning the merchandise over to the consignee in lieu of hauling it back to the terminal and taking action to have it delivered by another facility. We have, in consequence, a situation in which plaintiff and his employer as well as the defendants were interested in the unloading of the boxes or crates. In view

of the testimony to the effect that defendants authorized and induced plaintiff to assist in the unloading operation, we are not here concerned with the question, involved in some of the decisions above cited, as to the authority of an agent or employee enlisting the aid of another.

Under the circumstances here presented it cannot be said as a matter of law that plaintiff was a mere volunteer. He did not, in consequence, assume the risk of being injured by ordinary negligence on the part of defendant or his employee, and may not be charged with contributory negligence on such basis. In viewing the situation, we have in mind the general rule that the testimony must be construed as strongly as reasonably possible in favor of the plaintiff.

Neither may it be said as a matter of law, on the basis of his conduct as shown by his testimony, that plaintiff failed to establish his freedom from contributory negligence. Under the circumstances defendant owed him the duty of exercising ordinary care for his safety. He had a right to rely on the instructions that defendant had given as to the method that should be followed in unloading the crates, and to assume that defendant and his employee would be governed accordingly. He was not required to anticipate that either, or both, would suddenly release his hold on the crate or box without a proper warning to him, thereby permitting the crate to slide against him with the resulting injury. *Hunter* v. *Baldwin*, 268 Mich 106; *Kavigian* v. *Lonero*, 312 Mass 603 (45 NE2d 823). See, also, *Klein* v. *Detroit Metallic Casket Company*, 336 Mich 157.

The conclusions reached with reference to the issues above discussed render it unnecessary to consider other questions referred to by counsel in their briefs. The judgment entered on the directed ver-

dict is reversed and the case remanded for a new trial.

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

LEWIS *v.* ZUKERMAN.

1. WORK AND LABOR—NONJURY CASE—SCRAP IRON BALER—EVIDENCE.
   Evidence supported trial judge's finding in nonjury case that plaintiffs had failed to show scrap iron baler was to have been built at defendant scrap iron dealer's risk, hence, judgment for defendant for sums he had paid to plaintiffs for material and work in connection with its construction less amount defendant admittedly owed for other services not connected with the baler was proper (CL 1948, §§ 615.5, 615.10).

2. JUDGMENT—SET-OFF AND RECOUPMENT.
   Entry of judgment for excess of set-off over plaintiffs' claim was not error under pertinent statutes (CL 1948, §§ 615.5, 615.10).

Appeal from Kent; Searl (Fred N.), J. Submitted June 2, 1959. (Docket No. 14, Calendar No. 47,943.) Decided October 12, 1959.

Assumpsit by Russell F. Lewis and Isabelle J. Lewis, doing business as Russell's Body Shop against Morris Zukerman, doing business as Morris Zukerman Company, for sums due for construction of machine and for miscellaneous services. Defendant filed recoupment and set-off. Judgment for de-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Work and Labor § 60.
[2] 47 Am Jur, Setoff and Counterclaim § 105.

fendant in amount of excess. Plaintiffs appeal. Affirmed.

Irving H. Smith, for plaintiff.

Luyendyk, Hainer, Hillman, Karr & Dutcher, for defendant.

KELLY, J. Plaintiff Russell F. Lewis agreed to build a baler to bale scrap metal and stainless steel for defendant at a price not to exceed $500. Plaintiffs, who operate a body shop, had never before built a baler. Defendant, who is in the scrap iron business, knew nothing about machinery nor how to build a baler and did not give to plaintiffs instructions as to method or means of construction.

The baler did not function and after several attempts to make it work, plaintiffs built a second baler. The second baler, while an improvement over the first one, did not meet requirements and it (the second baler) was in plaintiffs' possession at the time plaintiffs commenced this action.

Kent County Circuit Judge Searl, without a jury, decided plaintiffs had never delivered a baler that would bale and, therefore, had not met the burden of proof entitling plaintiffs to their claim of $995.27 for the construction of baler No. 2, and rejected plaintiffs' contention that the agreement was that the baler was to be built at defendant's risk and plaintiffs were to be paid even though the baler failed to function.

Plaintiffs sued for an additional amount of $588.40 (count 2 of their declaration) for services rendered defendant not in any way connected with the construction of the baler, and at the start of trial defendant admitted that he owed this amount.

Judge Searl found defendant was entitled to recover under his claim of recoupment and set-off the

sum of $773.32, which amount he had paid to plaintiffs for material and work in constructing the baler, less $588.40 which defendant admitted he owed (count 2), and rendered a judgment for the difference, in the amount of $184.92, to defendant.

This appeal brings before us a record showing a sharp conflict between plaintiffs and defendant as to what kind of an oral agreement was entered into. Judge Searl had an opportunity denied us—namely, of observing witnesses as testimony was offered.*

The record submitted does not justify a finding on our part that the trial judge erred, and we would not serve bench or bar by setting forth the testimony offered at the trial.

We see no merit in plaintiffs' claim that the court erred in adopting the procedure that he did—that is, in entering a judgment of $184.92 for defendant, instead of a judgment for plaintiffs on their count 2 in the amount of $588.40 and a judgment for defendant of $773.32 on his claim of set-off. The judgment entered is in accord with the statutes, CL 1948, §§ 615.5, 615.10 (Stat Ann §§ 27.830, 27.835), and the decisions of this Court. *Watson-Higgins Milling Co.* v. *Pere Marquette R. Co.*, 328 Mich 5, 10; *Lyons* v. *City of Grand Rapids*, 305 Mich 309, 314.

Judgment affirmed. Costs to appellee.

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

* See *Allen* v. *Currier Lumber Co.*, 337 Mich 696; *Hayes Construction Co.* v. *Silverthorn*, 343 Mich 421; *In re Calhoun Estate*, 346 Mich 227; *Barnes* v. *Beck*, 348 Mich 286.

VAN DYK *v.* UTTER.

1. REPLEVIN—DEMAND FOR RETURN—QUESTION FOR TRIER OF FACTS—EVIDENCE.

   Finding of trial court in nonjury case that an oral demand had been made against defendant before starting replevin action for return of the goods is not disturbed on appeal, where issue was one of fact under evidence presented.

2. SAME—BOND.

   The plaintiff's failure to file original of bond in replevin action with clerk of court until time of trial afforded no ground for dismissal of action, especially where a bond had been procured and given to the deputy sheriff and notice of the amount and names of the sureties sent to the clerk and defendant's attorneys.

3. SAME—TITLE-RETAINING CONTRACT—TRANSFER OF POSSESSION BY BUYER.

   Plaintiff seller of hardware merchandise under title-retaining contract which also provided that the goods were to be kept by the buyer who was to use it "in his possession in the city of Grand Rapids" was not to be denied relief by way of replevin by virtue of sale of the property at auction, where testimony as to plaintiff's knowledge of such sale was in conflict and trial court gave judgment to plaintiff for balance due after deducting appraised amount of property returned under writ.

4. SAME—WRONGFUL TRANSFER OF POSSESSION.

   The right to bring replevin cannot be destroyed by defendant wrongfully transferring possession of the property.

REFERENCES FOR POINTS IN HEADNOTES

[1] 46 Am Jur, Replevin § 59.
Demand for possession as condition of seller's right to retake property or otherwise enforce forfeiture under conditional sale. 59 ALR 134.
[2] 46 Am Jur, Replevin §§ 53–59, 75.
[3, 4] 46 Am Jur, Replevin §§ 50, 61.
[5] 14 Am Jur, Costs § 92.

5. COSTS—BRIEF.

No costs on appeal are allowed plaintiff upon affirmance of judgment for him in action of replevin, where he filed no brief.

Appeal from Kent; Souter (Dale), J. Submitted June 3, 1959. (Docket No. 22, Calendar No. 47,484.) Decided October 12, 1959.

Replevin by Kenneth R. Van Dyk against Earl H. Utter. Money judgment for plaintiff. Defendant appeals. Affirmed.

Henry J. Milanowski, for defendant.

KELLY, J. Defendant and appellant appeals from the court's judgment for plaintiff and appellee in a replevin action.

March 14, 1955, the parties entered into a contract by which defendant was to purchase from plaintiff a quantity of hardware merchandise for the price of $2,200, payable $100 at the time the contract was signed, $400 on or before March 21, 1955, and the balance of $1,700 by April 11, 1955.

The contract provided that "the title to, and ownership of, the said goods, and the right to the possession in case of any default, shall be and remain in the seller, until the purchase price is fully paid, with interest as aforesaid" and, also, that "the buyer shall keep and use said property in his possession in the city of Grand Rapids."

On April 11, 1955, the contract date when the $2,200 should have been paid, defendant had paid only $813. Plaintiff endeavored, without success, to obtain a return of the merchandise and sought possession by replevin.

The merchandise returned under the writ of replevin was appraised by 2 disinterested persons at the sum of $100 and $125, respectively. The court

accepted the higher appraisal and found there was a principal balance due plaintiff of $1,262.

Appellant does not claim fraud, nor in any way dispute the court's finding that he owed plaintiff $1,262, but seeks to interpose technical defenses.

Defendant contends plaintiff never made a demand for the return of the goods and that such demand is a necessary condition precedent to the bringing of the replevin action. Plaintiff contends in his declaration and so testified that he did make such a demand. This defense is answered by quoting the following from *United States Hoffman Machinery Corp.* v. *Talkow,* 308 Mich 318, 322, 323:

"Defendant claims that the replevin action is defective in that no legal demand for possession was made prior to obtaining the writ. While it is true that apparently no written demand was made, yet the plaintiff's attorney testified that he personally made a demand. The defendant partially denied such a demand having been made. The question became one of fact, determinable by the circuit judge hearing the case without a jury. The circuit judge found demand was made, otherwise he could not have rendered judgment for plaintiff. The record supports plaintiff's contention that demand before suit was made."

Defendant does not impress this Court with his claim that we should set aside the judgment because of plaintiff's failure to file a bond with the court. The facts disclose that plaintiff procured a bond, gave same to the deputy sheriff and sent notice of the amount of the bond and names of the sureties to the clerk of the court and to defendant's attorney, but failed to file the original of the bond with the court until the time of trial. In *McGuire* v. *Galligan,* 57 Mich 38, we held that failure to give bond in replevin is not ground for dismissing the suit, which can still be tried on the merits.

Finally, defendant insists that judgment is erroneous, not because it is for an amount not due and payable, but because defendant had sold at auction some of the merchandise and that this fact was known to plaintiff when he commenced his replevin.

Plaintiff stated that he first ascertained defendant had disposed of some of the merchandise when he endeavored to collect the full amount at the time the final note became due on April 11, 1955, but denied knowing that the goods were going to be sold or that he gave permission to defendant to sell.

The written contract did not authorize a sale of the goods in the less than 30 days elapsing between the date of purchase and the day when final and full payment was to be made (March 14, 1955—April 11, 1955), but provided that title was to remain in plaintiff until payment was made and that the goods were to remain in the city of Grand Rapids.

Defendant's position can be summarized as follows —I owe the money the court has found I should pay, but I should not be compelled to pay what I owe until plaintiff starts an action in assumpsit—an action to which I will have no defense.

The following from *McBrian* v. *Morrison,* 55 Mich 351, 353, is applicable to the facts in this appeal and the answer to defendant's contention:

"The question is whether a defendant is exonerated from liability for such wrongful possession by turning it over to some one else. In most cases a cause of action cannot be destroyed by the act of the wrongdoer alone. And if a right to bring replevin can be destroyed by the defendant, without the fault or even the knowledge of the plaintiff, the case would certainly be exceptional. It would not be a difficult matter, by a series of concealed transfers, to cut him off entirely from this action."

To grant defendant's contention in the case before us would amount to a miscarriage of justice and,

therefore, this Court finds that the judgment of the lower court should be sustained.

Affirmed. No costs, appellee not having filed a brief.

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

GALEA v. DETROIT WABEEK BANK & TRUST COMPANY.

1. NUISANCE—AWNING OVERHANGING PUBLIC SIDEWALK—EVIDENCE.
   Plaintiff, injured from fall of awning from defendants' building, while he was passing on public sidewalk, failed to establish an action for injuries due to nuisance, where it appears the awning came down suddenly through the deliberate intervention of some human agency.

2. NEGLIGENCE—AWNINGS—EVIDENCE.
   Evidence did not preponderate against finding of trial court in nonjury case that defendant bank, as owner, and other defendant, as prospective tenant, were not guilty of negligence in any manner with respect to awning on building which fell and injured plaintiff on adjoining public sidewalk.

3. TRIAL—NONJURY CASE—MOTION FOR JUDGMENT—EVIDENCE.
   A plaintiff is entitled to have his proofs viewed in the light most favorable to him when a defendant interposes a motion for judgment in a nonjury case.

BLACK, VOELKER, and KAVANAGH, JJ., dissenting in part.

REFERENCES FOR POINTS IN HEADNOTES

[1] 25 Am Jur, Highways §§ 285, 294.
[2] 38 Am Jur, Negligence § 332.
[3] 3 Am Jur, Appeal and Error § 817.

Appeal from Wayne; McCree, Jr. (Wade H.), J. Submitted April 9, 1959. (Docket No. 31, Calendar No. 47,509.) Decided October 12, 1959.

Case by Paul Galea against Detroit Wabeek Bank & Trust Company, subsequently designated as Detroit Bank & Trust Company, and Younis Abrams, answering as Younis Abraham, for personal injuries sustained from fall of awning overhanging public sidewalk. Dismissed as to defendant Abraham. Judgment for defendant bank. Plaintiff appeals. Affirmed.

George A. Jones, for plaintiff.

Butzel, Eaman, Long, Gust & Kennedy (*A. Hilliard Williams,* of counsel), for defendant bank.

Saul L. Krieger (*Max Chomsky,* of counsel), for defendant Abraham.

VOELKER, J. (*dissenting in part*). On June 27, 1955, the plaintiff Galea was walking down Michigan avenue in Detroit when an awning on an adjoining business building suddenly broke away from its moorings and fell on him, breaking his nose and injuring his head and requiring 10 stitches in the latter and an 8-day stay at the hospital. In due course he filed his declaration against the owner bank (which held title to the premises as testamentary trustee) and also against the prospective tenant of the premises from which the awning fell, basing his case on a theory of nuisance in addition to negligence. Both defendants by answer denied any liability. Defendant owner further answered that the awning dropped or fell because certain persons, unknown to and unauthorized by it, had attempted to

remove the awning. The case came on for trial before the court without a jury.

The plaintiff recounted on his main case the simple circumstances of his accident. He also produced an investigating police officer who testified that shortly after the accident he had talked with 2 workmen with a ladder who said they had been taking down the awning when it broke away from the building. The officer learned that the 2 men had removed the bolts and cut the awning when it suddenly collapsed and fell on Galea. The officer was either unable to or at least failed to relate who had employed the workmen. The 2 workmen did not testify and there is no explanation in the record before us for their absence.

The plaintiff also called a representative of the owner bank for cross-examination under the statute (CL 1948, § 617.66 [Stat Ann § 27.915]). He testified in substance that on June 23, 1955 (4 days before the accident) the owner had leased the premises to the defendant Abraham, a wholesale clothier, on a monthly basis; that while the formal term was not to start until July 1, 1955, the keys and possession were, on June 23, 1955, delivered to Abraham so that he might make certain unspecified repairs and preparations for the purpose of his occupancy; that the defendant owner caused an inspection to be made of the awning the next day (June 24th) and then found it securely attached to the building and in good condition except for a hole burned in the fabric; that after the accident further inspection by it disclosed that the awning had been cut and the bolts and nuts removed from the awning arms and that the awning was down; and finally that neither the bank nor its representatives had ever authorized Abraham or anyone to tamper with or remove the awning and knew nothing about the incident.

The tenant Abraham was likewise called for cross-examination under the statute, and it is fair to say that in a rather extensive number of well-chosen words he testified that he knew nothing about anything. At the conclusion of the plaintiff's proofs the defendant Abraham moved for a dismissal as to himself, which the court granted, evidently treating the motion as one for a directed verdict. The court then considered the case against the bank on the merits and found no cause for action as to it. The plaintiff has appealed here from the result below as to both defendants, urging that he should have prevailed against both defendants, either on a theory of nuisance or of negligence and also that the Abraham motion should not have been granted.

We will dispose of the nuisance theory first. We cannot see where any actionable nuisance is possibly involved in this case. It seems plain from both the pleadings and proofs that the awning came down suddenly through the deliberate intervention of some human agency. If the job of removal was done carelessly that might well support an action for negligence against the person or persons responsible, but that still doesn't constitute a nuisance. See Mr. Justice CARR's scholarly and searching opinion on this whole nuisance doctrine, defining and illustrating the 2 main types of nuisances, and giving numerous instances where the landlord and tenant may or may not be jointly or severally liable therefor, in the recent case of *Bluemer* v. *Saginaw Central Oil & Gas Service, Inc.*, 356 Mich 399. Under the proofs in this case the trial court correctly concluded that no action for any nuisance existed against either defendant in this case.

We next consider the appeal as to the owner bank. As noted, the trial court was also the trier of the facts. It found against the plaintiff finding among other things that there was insufficient evi-

dence to connect the defendant bank in any manner with the accident. On balance, we cannot say that the proofs preponderate the other way. The result reached below as to the defendant owner is therefore affirmed, with costs to it.

Lastly we consider the propriety of the court's action in granting the noted motion of the defendant Abraham. No formal opinion was filed in this regard, but we gather, by implication at least, that the court may have felt somewhat constrained to this action by certain of our past decisions to the effect that a plaintiff is bound by the testimony of an adverse party whom he chooses to call for cross-examination under the statute, at least where the plaintiff is otherwise unable to impeach or rebut that testimony. While the court below thus had undeniable precedent for its action, we think that the rule thus stated and evidently applied here is both too harsh and too broad. This was to lend to the defendant Abraham's voluble denials and claimed lack of knowledge a dignity and weight it would not have possessed had the same testimony been elicited from him in his own defense.

In our view the present plaintiff, with the aid of the Michigan doctrine of *res ipsa loquitur,* recently discussed in *Mitcham* v. *City of Detroit,* 355 Mich 182, had made out a sufficient prima facie case to defeat the motion of the defendant Abraham, which motion we think the court under the circumstances properly treated as one for the nonjury equivalent of a motion for directed verdict—of which more presently. This is tantamount to our saying that the issue of their possible liability should more properly have been left to the trier of the facts as to both defendants.

A defense motion for a directed verdict is in many respects essentially a demurrer to the evidence. Although by statute (CL 1948, § 618.14 [Stat

Ann § 27.994]) nonjury cases are to be tried "as near as may be" as cases tried with a jury, it is the more usual and accurate practice in nonjury cases to refer to what would normally be called a motion for directed verdict in a jury case as a motion for judgment (or, sometimes alternatively, a motion for entry of judgment) when the case is tried nonjury. See *Hilliker* v. *Jewel Oil & Gas Co.* (on rehearing), 277 Mich 615; *Stolt* v. *Shalogian*, 326 Mich 435; and *Hearst Publishing Co.* v. *Litsky*, 339 Mich 642. But aside from the difference in name, the legal considerations involved in the motion are largely the same.

Once we reach the point (as we have here reached) of finding that the plaintiff has made out a prima facie showing, the case should survive a defense motion for peremptory victory, tagged by whatever label, and the issues should go to the trier of the facts. Making all due allowance for the fact that the following quotation obviously is talking about a motion for a directed verdict in a jury case, we think 6 Callaghan's Michigan Pleading & Practice, § 38.88, p 132, pretty well sums up the true judicial province of the trial court when confronted with such a motion, as follows: "The trial judge cannot, however, supplant the jury. His conclusion is accordingly one of law. He is not permitted to 'weigh' the evidence, but only to determine whether there is any jury issue [citing authority]."

If the defendant Abraham had not been called for cross-examination under the statute but had instead made his denials in his own defense after the plaintiff had rested, in our opinion the case should still have gone to the trier of facts. The result should normally not be any different when the plaintiff, having once made out a prima facie case, in an excess of zeal or caution or uncertainty (in view of some of our past decisions) calls the

defendant for cross-examination under the statute. The issue of whether the defendant is telling the truth still remains one of fact to be decided by the trier of the facts. Otherwise the statute permitting adversary cross-examination ahead of time becomes a trap for the trusting and unwary, a mere device to reward the blandest perjury, not an instrument for more speedily getting at the merits of a controversy. Mr. Justice BLACK has written eloquently to the same general effect in his scholarly opinion tracing the curious case history of this statute in *Monaghan* v. *Pavsner,* 347 Mich 511, beginning at page 527. See, also, our comment thereon in *Mitcham* v. *City of Detroit, supra,* at page 198.

Perhaps in this particular case we strain at a gnat, since, as already noted, the judicial and fact-finding functions were united in one individual, namely, the trial judge, and as a practical matter it may well be said that if the trial judge felt as he did in the exercise of his judicial function on the motion, it is rather unlikely that he will change his mind in the future, or that he would have felt much different in his role as a fact finder had he denied the defendant's motion in his judicial capacity at the trial below and instead let the case go to himself on the merits in his dual role as fact finder—as we think he should have done. But the 2 roles are separate, of course, and however dim the practical prospects may appear that this present plaintiff will ever ultimately gain very much by our action on this appeal, the basic principles involved are the same as though this were a jury case, and in nonjury cases the distinction between the 2 roles must at all times be carefully preserved.

One final word. The motion for a directed verdict has a proper and needed place in our law. All who toil in the vineyards of the law know there are many dubious cases that should never even have

been started, let alone permitted to go to a jury. But granting all that, the motion was never intended as a general substitute for a jury trial nor, indeed, as a happy labor-saving device by which preoccupied trial judges might avoid the dreary task of preparing and delivering instructions to a jury. At the risk of laboring the point, we do not seek to destroy the motion, but simply to restore it to the proper and relatively modest place it once enjoyed in our law. We now turn back to the case at hand.

The plaintiff was upon Abraham's motion entitled to have his proofs viewed in the light most favorable to his case. This included, of course, all necessary or reasonable inferences therefrom. It seems rather improbable that the 2 mysterious workmen were, for example, in broad daylight engaged in the act of removing and stealing an old used awning with a hole it it—and then standing around after it had fallen on the head of a pedestrian to discuss the situation with an investigating policeman. In any event the more probable and reasonable inference from the proofs appears to be that someone with real or apparent authority had previously authorized the 2 workmen to remove the awning. Since the trial court at approximately the same time on the same proofs in effect found as a fact that the landlord had nothing to do with any such authorization, the only remaining candidate discernible on the horizon appears to have been the tenant, the defendant Abraham. More bluntly, we suggest the possibility that someone in this case might have been lying. That is an issue of fact and not one of law. We do not say that Abraham did hire these workmen or that he should be held liable in this case. We say only that upon favorable view of all the testimony, along with the reasonable inferences to be drawn therefrom, the issue of his possible liability for negligence should more properly have gone to the trier of the

facts, as did that of the defendant bank. The order granting Abraham's motion is accordingly set aside and the cause remanded for further proceedings, including a new trial as to Abraham, if that should prove necessary, with costs to the plaintiff.

BLACK and KAVANAGH, JJ., concurred with VOELKER, J.

DETHMERS, C. J. I concur with Mr. Justice Voelker's holding that no case of nuisance was made against either defendant and that the trial court's finding of no cause for action against defendant bank is not against the clear preponderance of the evidence, and, therefore, must be affirmed.

I do not agree that plaintiff should be granted a new trial against defendant Abraham.

At the conclusion of the proofs the defendant bank calmly awaited the court's decision. The court, as trier of the facts without a jury, found, as stated by Mr. Justice VOELKER, "that there was insufficient evidence to connect the defendant bank in any manner with the accident" and accordingly rendered judgment for it of no cause for action.

At the conclusion of plaintiff's proofs counsel for defendant Abraham, with less display of patience, made a motion to dismiss. The trial judge, after reviewing and commenting upon the pertinent evidence, granted the motion, stating "I think, even regarding the testimony in the most favorable light for the plaintiff, that the defendant Abraham is not involved here at all." From this it is clear that the judge did not, as now gathered, apply any rule that defendant Abraham's testimony was binding on plaintiff and must be given added weight because he was called as plaintiff's witness under the statute. On the contrary, the judge indulged no weighing process with respect to his testimony whatsoever,

but, instead, regarded the testimony in the case in the light most favorable to plaintiff.

The finding which the trial judge made as to both defendants was the same, namely, that there were no proofs to connect them with the accident. Plaintiff can scarcely complain of the fact that the court arrived at that determination as to defendant Abraham by applying to the testimony in the case the test most advantageous to plaintiff, namely, the "most favorable view" test rather than the "clear preponderance" test. How can it profit him to remand the case for new trial and application of the latter test, less favorable and more difficult for him? It is no answer to "suggest the possibility that someone in this case," presumably defendant Abraham, "might have been lying" and to say that this presented an issue of fact to be tried as such and not as one of law. As already stated, with respect to the truth of testimony and determination of what were the facts, plaintiff had the benefit of the most favorable test available to him.

The constitutionally guaranteed right to trial by jury presents involvements in jury cases when the court undertakes to direct a verdict or enter judgment *non obstante veredicto*. There the problem arises whether the court, in thus deciding a question as though it were a question of law, has erred in so doing because the question actually was one of fact which should have been left to the jury, the court thereby having deprived the losing party of his constitutional right to determination of that question by jury. When, as here, the parties have waived their rights to jury trial by voluntarily submitting their case to the judge without a jury, that problem is absent. When the judge, sitting as trier of the facts, has found as a fact that 1 of 2 defendants was not shown by the proofs to be connected with the accident and we affirm that finding as not against

the clear preponderance of the evidence, no constitutional or other right of plaintiff is infringed by the mere fact that that selfsame judge, in making the identical finding, on those proofs, with respect to the other defendant, inadvertently and in response to counsel's ill-conceived motion, employs the nomenclature and terminology and applies the test, more favorable to plaintiff, applicable to determination of questions of law. In the final analysis, the conclusion cannot be escaped that when the judge, as above noted, made the same finding in respect to and in favor of both defendants, he was, in both instances, making a finding of fact which was in accord with the clear preponderance of the evidence. Plaintiff is not entitled to a second determination of this factual question. There being no proof on the record that connects either defendant with the accident or responsibility therefor, the action of the lower court should be affirmed, with costs to defendants.

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

STILLWELL *v.* GRUBAUGH.

1. AUTOMOBILES — INTERSECTIONS — TRAFFIC LIGHTS — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

   Whether or not plaintiff, westbound motorist in north lane of 4-lane highway, who had stopped for traffic light was guilty of contributory negligence in proceeding into northbound lanes of intersecting 4-lane highway after change of the light *held,* question for jury in his action against northbound motorist who crashed into plaintiff's car.

2. SAME—INTERSECTIONS—TRAFFIC LIGHTS.

   A motorist cannot totally disregard the circumstances that exist at the time he approaches an intersection governed by a traffic light but he has good reason to believe he is protected from danger by the red light so far as traffic approaching the light.

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

   The facts in relation to plaintiff's negligence should be very clear to warrant deprivation of a citizen's right to a jury trial.

4. SAME—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT—JUDGMENT NOTWITHSTANDING VERDICT.

   Neither a motion for directed verdict nor for judgment for defendant notwithstanding verdict for plaintiff will be granted on the issue of latter's contributory negligence, where evidence as to it presents a question of fact.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 5A Am Jur, Automobiles and Highway Traffic § 1067.
Liability for accident at street or highway intersection as affected by reliance on or disregard of traffic sign, signal, or marking. 164 ALR 8.
[3] 38 Am Jur, Negligence §§ 335, 336.
[4] 38 Am Jur, Negligence § 348.
[5] 5A Am Jur, Automobiles and Highway Traffic § 1097.
[6] 5A Am Jur, Automobiles and Highway Traffic §§ 991–993.

5. AUTOMOBILES—INTERSECTIONS—TRAFFIC LIGHT—INSTRUCTIONS.
Claim of error in instruction in automobile accident case arising from collision at an intersection controlled by a red and green traffic light that was premised on the idea that plaintiff did not have the right to rely upon the fact that he was protected to his left when he entered intersection with the green light in his favor *held,* without merit.

6. SAME—INTERSECTIONS—EVIDENCE—CONCLUSIONS.
It was not an abuse of discretion to permit a witness to an automobile accident at an intersection controlled by a traffic light to testify he did not think that northbound defendant could have entered the intersection before the light turned in favor of westbound plaintiff and the witness who was in car in the south westbound lane alongside plaintiff's car, had testified as to the length of time the car in which he was riding had stopped, waiting for the light to change, that such car had not started up immediately subsequent to the change of light and the distance it had traveled before the impact between defendant's and plaintiff's cars, since such witness had given the facts upon which his alleged conclusion was based.

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

Appeal from Gratiot; Cash (Paul R.), J. Submitted April 16, 1959. (Docket No. 49, Calendar No. 47,792.) Decided October 12, 1959.

Case by Don Stillwell and Preferred Insurance Company, subrogee, against Lawrence Grubaugh for property damage resulting from automobile collision. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Netzorg & Plaxton, for plaintiffs.

Karl E. Mikko, for defendant.

KAVANAGH, J. Plaintiffs brought this action in the circuit court for the county of Gratiot to recover alleged damages to plaintiff Stillwell's automobile in a stipulated amount of $835.99.

Plaintiffs alleged that defendant was guilty of negligence which was the proximate cause of plaintiff Stillwell's damages; that plaintiff Stillwell was free from contributory negligence; and that the negligence of the defendant was a violation of CLS 1956, § 257.611 (Stat Ann 1952 Rev § 9.2311) in failing to observe the traffic light.

Defendant answered denying negligence on his part and claiming plaintiff Stillwell was guilty of contributory negligence by reason of the fact he entered the intersection without making proper observation that he could do so safely contrary to the statute.

The case was tried to a jury. At the conclusion of plaintiffs' proofs and at the close of all proofs, defendant made a motion for a directed verdict of no cause for action on the theory that plaintiff Stillwell was guilty of contributory negligence. This motion was denied. The jury returned a verdict in the amount of $835.99, the amount of the damages having been stipulated. Defendant then made a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial. The circuit judge denied this motion.

Defendant appeals and contends:

(1) The court erred in not directing a verdict for the defendant on the ground of contributory negligence on the part of plaintiff Stillwell as a matter of law.

(2) The court erred in refusing to render a judgment notwithstanding the verdict, or, in the alternative, to grant a new trial.

(3) The court erred in its instructions to the jury.

(4) The court erred in permitting into evidence a portion of the testimony of one of plaintiffs' witnesses.

The accident out of which this action arose took place in the city of St. Johns, Michigan, at the

intersection of highways M–21 and US–27, at about 2:30 p.m. on January 31, 1957. Traffic at this intersection is governed by the usual intersection traffic light. Plaintiff Stillwell was traveling in a westerly direction on highway M–21. As he approached the intersection he observed the light was red and he made a stop in the extreme north lane of M–21. Both M–21 and US–27 are 4-lane highways at this point, permitting 2 lanes of traffic to travel each way. Immediately to the left of plaintiff Stillwell when he completed his stop was another motor vehicle stopped parallel to him awaiting a change of the light from red to green so that they might pass into the intersection.

Plaintiff Stillwell testified as follows:

"*Q.* Now Mr. Stillwell when you came to that light was the light just changing or was it necessary for you to come to a complete stop there?

"*A.* I had to come to a complete stop.

"*Q.* You stopped all the way on there?

"*A.* Stopped dead, yes.

"*Q.* All right, then what happened?

"*A.* Well, when the light changed I proceeded on out to the highway.

"*Q.* When the light changed from—

"*A.* My direction.

"*Q.* The light changed, in other words it went from red to green?

"*A.* That's right.

"*Q.* And you proceeded on. Now in which direction were you going?

"*A.* I was headed straight west.

"*Q.* And you proceeded out into the intersection?

"*A.* Out into the intersection.

"*Q.* What happened at that time?

"*A.* I don't remember. All I know is that I was suddenly hit from the left side."

Under cross-examination he was questioned as to whether or not he had looked to the north or

to the south. The following constitutes his testimony in this regard:

"*Q.* Then when it turned green you moved out in the intersection?

"*A.* That's right.

"*Q.* Did you look to the north on US–27 before you moved out?

"*A.* I don't remember whether I looked north or not.

"*Q.* Did you look south on US-27?

"*A.* I don't recall that either.

"*Q.* How far into the intersection had you gotten when the impact occurred?

"*A.* Just about into the line of traffic that was headed north."

Merlin Durbin, a disinterested witness who was riding in the automobile to plaintiff Stillwell's left, testified the driver of the automobile in which he was riding stopped because the light was red; that he noticed plaintiff Stillwell's vehicle stopped in the lane immediately to the right from the automobile in which he was riding. He further testified that when the light changed to green the vehicle in which he was riding started up and moved just a few feet, at which time the driver slammed on the brakes and defendant's automobile passed in front of them and crashed into plaintiff Stillwell's automobile. He testified that the vehicle in which he was riding did not start until after the red light had turned to green; that the Stillwell automobile did not move until the light turned green.

Mr. Durbin was called for rebuttal testimony and testified as follows:

"*Q.* Will you tell the jury what that discussion was please?

"*A.* Well, after we made our left turn we got out of our vehicle we was riding in, and they come over to take our names for a witness; and during

the discussion why I asked Mr. Grubaugh why he run the light, or what made him go through it, or something like that I said; and he made the statement, 'I didn't see the light.' "

Defendant Grubaugh testified on direct examination that the visibility was good; that he had power brakes; that he was traveling north on US–27 at approximately 30 miles per hour; that he had first observed the traffic light about 40 feet before he entered the intersection and it was green at that time; that he last observed the traffic light when he was about 10 feet south of the curb before entering the intersection and it was green at that time. He further testified that he continued on into the intersection and he noticed 2 other vehicles near the intersection headed west on M–21 and stopped for the light. He testified that he did not see the automobile in which witness Durbin was riding move at all; that he first noticed the Stillwell automobile when he was approximately the length of an automobile to the south of the Stillwell automobile and the Stillwell automobile was then about 8 to 10 feet into the intersection.

Under cross-examination defendant Grubaugh testified as follows:

"*Q.* Well, supposing that you come up to a green light and that green light is changing, it changes from green to amber?

"*A.* Yes.

"*Q.* Which is caution?

"*A.* That's right.

"*Q.* And then to red and stop, does it not?

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

"*Q.* And then when it comes time to change again it changes directly from red to green, does it not?

"*A.* Yes.

"*Q.* Now as I understand it you first—or, you last observed the traffic light when you were 10 feet to the south of the intersection?

"*A.* Yes.

"*Q.* At that time it was green?

"*A.* That's right.

"*Q.* You first observed Mr. Stillwell's car proceeding into the intersection when you were still a car length away from it, is that right?

"*A.* Oh, I believe I said a third of a car.

"*Q.* A third of a car. In other words then Mr. Grubaugh this light changed from green to amber to red while you were traveling from a point south of the intersection until you were down into the intersection, is that what you want us to believe?

"*A.* I didn't run a red light.

"*Q.* Now will you answer my question. Is that what you want us to believe? We will come to that. * * *

"*Q.* You wish us to believe that in the point 10 feet south of the intersection down into the intersection there was time for that traffic signal to change from green to amber to red?

"*A.* No.

"*Q.* And also for this car to pull out into it?

"*A.* No, I don't think so.

"*Q.* Well now, you have heard Mr. Stillwell say that the light turned to green before he ever got out in here, before he ever started to move, didn't you?

"*A.* I think that is what he stated.

"*Q.* Well, your light had turned from green to amber to red from the time you last observed it until you got down to this point in the intersection?

"*A.* I had—

"*Q.* Now, as a practical matter, wasn't it considerably further south than 10 feet when you last observed that light?

"*A.* No, it wasn't."

Clearly, under the above testimony, a question of fact existed as to whether plaintiff Stillwell had

acted as an ordinary careful and prudent man under the circumstances. While it is true that one cannot totally disregard the circumstances that exist at the time he approaches and enters an intersection that is governed by a traffic signal, he has good reason to believe he is protected from danger by the red light so far as traffic approaching the light. If one crossing with a green light cannot depend upon the safety the law affords him, but must wait each time to see whether the driver approaching the red light will observe the light and stop, he may find himself in a dangerous position, particularly if the light changes against him before he has completed his trip across the street. *Travis* v. *Eisenlord,* 256 Mich 264; *Barron* v. *City of Detroit,* 348 Mich 213. In so far as *Boyd* v. *Maruski,* 321 Mich 71, and *Morse* v. *Bishop,* 329 Mich 488, are in conflict with the rule as established in this case and in *Travis* v. *Eisenlord* and *Barron* v. *City of Detroit,* the *Boyd* and *Morse Cases* are overruled.

Mr. Justice BLACK spoke for a majority of the Court in *Barron* v. *City of Detroit, supra,* where he compared the ability of a jury to determine the question as opposed to a court, and said (p 217):

"Our competence in such regard fades when arrayed against the comparably better experience and judgment of 12 citizens of the community who, literally, are 'on location.' * * * I answer that in all but the rarest of cases the former (court) are less apt to be rightly equipped to decide such an issue."

Justice EDWARDS in *Ware* v. *Nelson,* 351 Mich 390, 397, said:

"The facts in relation to plaintiff's negligence should be very clear to warrant our depriving a citizen of his right to a jury trial."

In the case of *Landon* v. *Shepherd,* 353 Mich 500, 508, the Court said:

"Were plaintiff's actions those of an ordinary careful and prudent man under like circumstances? Can the minds of reasonable men differ in answering this question? If so, the evidence should have been submitted to the jury. *Detroit & Milwaukee R. Co.* v. *Van Steinburg,* 17 Mich 99; *Adams* v. *Canfield,* 263 Mich 666; *Davis* v. *New York Central R. Co.,* 348 Mich 262."

Clearly, with the dispute and conflict of testimony in this case, the court did not err in refusing to grant the motion for a directed verdict or in submitting the case to the jury.

The reasoning applied in answer to the first question satisfactorily disposes of the second question as to whether the court erred in refusing to render a judgment notwithstanding the verdict.

The third error alleged by appellant is with reference to the instructions to the jury. In view of our ruling with respect to the duty of plaintiff Stillwell in this case and the reliance he had a right to make upon the fact that the light was red for approaching traffic on US–27 from the south, the argument of appellant with respect to the charge, on the face of it, must fail. It is built upon a false premise that *plaintiff did not have the right to rely upon the fact that he was protected to his left.* Therefore, reading the instruction complained of together with the rest of the charge, in view of what has been said above, we discover no reversible error in the charge given. A comparison of the charge in this case and the charge in *Barron* v. *City of Detroit, supra,* discloses that almost the exact words were used. At page 220 of that decision Justice BLACK said:

"In view of what has been said above, I discover no reversible error in the charge as quoted."

The remaining position relied upon by defendant for reversal is that the trial court erred in permitting into evidence alleged conclusion testimony on the part of one of the witnesses.

Witness Durbin was asked the following question and made the following answer:

"*Q.* Now would you say that this car (defendant's) could have started into the intersection before the light turned, the car coming from Lansing?

"*A.* No, I don't think he could of."

Defendant contends that permitting this question and answer to stand over his objection was error in that this testimony was opinion evidence which pervades the province of the jury.

Control of such testimony is largely a matter of discretion with the trial court. Undoubtedly it is true that witnesses should not in general be allowed to state conclusions, although this rule is qualified (*Zuidema* v. *Bekkering,* 256 Mich 327), and where a witness gives fully and definitely the facts upon which a conclusion is based, there is no presumption of prejudice.

In the instant case witness Durbin had previously testified that he was riding in the automobile immediately to plaintiff Stillwell's left and the automobile in which he was riding was stopped waiting for the light to change. He had described the length of time the automobile in which he was riding was stopped, the fact that the automobile had not immediately started up subsequent to the change of the light. He had further testified as to the approximate distance the automobile in which he was riding had moved before the impact. The witness, having given the facts upon which the alleged conclusion was based, makes the statement more one of fact than a conclusion, and its admission was within the discretion of the court. *Vezina* v. *Shermer,* 198 Mich 757.

No reversible error was committed in receiving this testimony.

Judgment affirmed, with costs in favor of plaintiffs.

SMITH, BLACK, EDWARDS, and VOELKER, JJ., concurred with KAVANAGH, J.

DETHMERS, C. J. (*dissenting*). I do not concur in affirmance. In both *Ortisi* v. *Oderfer,* 341 Mich 254, and *Buehler* v. *Beadia,* 343 Mich 692, in which this Court divided equally, the opinions set forth many of the Michigan decisions relating to the duty reposing on one crossing an intersection under protection of a green traffic light to make and maintain a reasonable and proper lookout for approaching traffic and holding him, for failure therein, to be guilty of contributory negligence as a matter of law. It is suggested that that division on this Court and the problem involved were resolved by the opinion for affirmance in *Barron* v. *City of Detroit,* 348 Mich 213, concurred in by 3 of the Justices, with its result concurred in by a fourth, 3 Justices dissenting and 1 taking no part in the decision. It is to be observed that in *Barron* the question presented was whether plaintiff, after having observed all approaching traffic and concluded that she could cross the intersection in safety, was under the duty of continuing such observation while crossing with the light green in her favor. The affirming opinion (p 219) approved the instruction of the trial court that:

" 'Now, in that connection it is the law that before you start across the street you must look to see if you can do so in safety, but having started on a green light and having looked to make sure whether you can cross in safety, and then having started to cross on the green light, it becomes a question of fact for the jury to determine, whether if the light is still

green at the time of the accident, whether or not an ordinary, prudent person would have looked again to the south to see where the streetcar was.' "

The instant case is different. Here there is a complete lack of showing that plaintiff looked either to the right or left before entering the intersection or at any time thereafter. He testified that he had no recollection of having done so and that he never saw defendant at all before the impact. He made no effort, as an ordinary, careful and prudent person would have done under like circumstances, to look and to ascertain whether a vehicle was approaching from his right or left at such speed or in such manner or so near the intersection at the instant the light changed that such vehicle could not or might not be able to stop short of the intersection. Had he looked and acted as did the driver of the automobile alongside and immediately to his left, no accident would have occurred. Not yet has this Court held that on precisely such facts plaintiff is not guilty of contributory negligence as a matter of law. If it is to be the law in Michigan that one entering an intersection under cover of a green traffic light may do so without making any observation of approaching traffic whatever, literally with eyes closed to everything but the traffic light, and yet escape being held guilty of contributory negligence as a matter of law, here is the case which affords the opportunity for its announcement. It is a view I do not share.

Defendant was entitled to a directed verdict of no cause for action. The judgment should be reversed, without new trial and with costs to defendant.

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

BLACK, J. (*concurring*). The Chief Justice has written in this case consistently with that which appears over his signature in *Boyd* v. *Maruski,* 321

Mich 71; *Morse* v. *Bishop,* 329 Mich 488; *Ortisi* v. *Oderfer,* 341 Mich 254; *Buehler* v. *Beadia,* 343 Mich 692, and *Barron* v. *City of Detroit,* 348 Mich 213. The doctrine espoused by him in such previous cases has prevailed or failed by the gossamer weight of manufactured fantasy; that of arbitrary assumption—as in this case—that the luckless plaintiff has entered or proceeded into and upon the intersection or crosswalk "literally with eyes closed to everything but the traffic light."

This word-picture, of a motorist proceeding forward like a bridled horse with special over and under as well as side blinders affixed, seems a bit overstretched. The human eye (unlike most cameras) is not equipped with a rotary shutter, and the unsupported suggestion that Mr. Stillwell proceeded into this 4-and-4-lane intersection with vision thus peripherally limited offends our rule of favorable view. True, if Mr. Stillwell actually had testified—much though such testimony might tax our credulity—that he was guilty of any such vision-restrictive effort, I would agree that the question of contributory negligence in this case would have been one for the court rather than the jury. But there is no such testimony, and certainly no right on our part to infer that Mr. Stillwell's conduct was so well-nigh impossible. It would require a consciously steady and difficult squint of the eyes to so restrict—if one could do it at all—the orbital focus of normal driving vision and, assuming that it was within the province of the triers of fact to draw such an inference from Stillwell's testimony, the most that can be said of its evidentiary utility is that due appraisal thereof was made in the Gratiot county circuit court jury room.

I do not believe in lip service of our requirement of favorable view when the defendant in a negligence case moves for an instructed verdict on assigned ground of contributory negligence. See in such re-

gard the vigorous comment of the court of appeals of the 6th circuit in *Patterson* v. *Pennsylvania R. Co.* (CCA 6), 238 F2d 645 (a case arising under and determinable by the Michigan law of contributory negligence).* Neither do I regard it a proper function of this Court to presume or guess that the scope of vision of a licensed motor vehicle operator has been so confined. Rather, I suggest that it is our obligation to assume—in the course of test of this motion for directed verdict—that the plaintiff motorist's gaze ahead included, within the zone of fairly required watchfulness, not only the traffic signal but that which, in the judgment of fair appraisers of fact, is reasonably expectable and possibly avoidable in and near the peripherally viewable path of travel ahead.

This brings us to the real crux of our continuing disagreement; the controversial doctrine that the degree of ordinary care, exacted of a motorist to protect himself from injury in like circumstances, requires as a matter of law that he constantly swivel his head and eyeballs from one side to the other as he proceeds into an intersection by authority of "the green light." Such—in the language of the Chief Justice—"is a view I do not share." My reason, so far as precedent is concerned, goes back to intelligent and reasonable authority.

Back in 1951, no one of the undersigned being around to object at the time, this Court speaking through the present Chief Justice cavalierly cast aside (in *Morse* v. *Bishop, supra*) that which—surely

* Having quoted at length from Justice COOLEY'S opinion in *Detroit & Milwaukee R. Co.* v. *Van Steinburg*, 17 Mich 99, the court of appeals went on to say (page 650 of *Patterson's* report):

"Some of us have noted a modern tendency—perhaps a growing one—to give mere lip service to these sound principles. Trial by jury is our established constitutional safeguard against assumption of unwarranted judicial authority and should be honored by steadfast observance rather than discarded by dictatorial breach."

to the traffic-signal-familiar layman at least—is the common sense of *Travis* v. *Eisenlord,* 256 Mich 264. I refer to these passages (pp 265, 266 of *Travis'* report).

"The court was wrong in holding that the plaintiffs were guilty of contributory negligence as a matter of law. If he were correct in so holding, it would mean that the driver of the plaintiffs' car must at his peril assume that the defendant would disobey the law and rush the red light. The contrary is true. He had a right to assume that defendant understood the red signal and that he would not undertake to make the crossing until it had changed to green. If he had looked, as the court says he should have done, it is true that he would have seen the defendant approaching, but he would have had a right to rest on the assumption that defendant would stop before the red light and wait until it had changed."

Travis' doctrine, like old time religion, is good enough for me. It became the linchpin of that which, in *Barron,* brought confirmation of denial of a demand for directed verdict by another adjudged violator of the lawful command of a traffic signal. Thus, by force of the foregoing opinion of Mr. Justice KAVANAGH, it definitely may now be said—in paraphrase of the Chief Justice—that it is the law of Michigan that one entering an intersection under beckon of a green light may and should escape being held guilty of contributory negligence (as a matter of law, of course) even though it be affirmatively shown that he did not—at any time—turn his head or his gaze to the left or the right to discover possible approach of another motorist engaged in violating what is now a universally known law of traffic control. The reason, given in *Travis,* is that a motorist proceeding under such "go" signal has good reason to believe that he is protected from danger in the direction or directions faced by red lights while

the signal light facing him is green. Whether, and at what stage, he is required to abandon reliance on such protection and go into emergency action is, at best and as against a motion for directed verdict assigning contributory negligence, a question for the trier or triers of fact.*

I concur in Mr. Justice KAVANAGH's opinion.

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

KELLY, J. (*concurring*). *Ortisi* v. *Oderfer* (1954), 341 Mich 254, and *Buehler* v. *Beadia* (1955), 343 Mich 692, each affirmed the trial court and reaffirmed the early Michigan decision of *Travis* v. *Eisenlord,* 256 Mich 264.

In the *Ortisi* decision, Justice BUTZEL, after commenting upon the fact that if the traffic light affords no protection to pedestrian or driver then their duties are the same as though the light did not exist, expressed himself on this point as follows (p 259): "This cannot, and should not, be the case. The light must afford some protection. The question is—how much?"

Justice BUTZEL answered his question of "how much" in both *Ortisi* and *Buehler,* by stating:—That a driver or a pedestrian crossing an intersection with

* If it were necessary to excuse, as against this motion for directed verdict, Mr. Stillwell's omission of gaze or glance to his left before starting forth into the intersection, such excuse would not be difficult in point of fact. Because M–21 (likewise US–27) was a 4-lane highway at the point of intersection, 2 westbound cars drew up abreast (for the then red light) at the eastern boundary of the intersection. One was Mr. Stillwell's car. It was in the northernmost lane of M–21. Both westbound cars started forward when the traffic signal changed to green. Thus it is easy to perceive why Mr. Stillwell did not see the approach of defendant's northbound car as soon as did the westbound driver at the left. *Stillwell could not see it,* until the situation had become one of unavoidable collision, because the other westbound car blocked his vision until the last and too-late moment. This, at least, is my notion of favorable view of the testimonial record.

a green light in his favor has a right to assume that the defendant will not disobey the law and rush the red light;—if the driver or pedestrian had looked and seen defendant approaching he or she would have the right to rest on the assumption that the defendant would stop before the red light and wait until it had changed;—a green light is an invitation to a pedestrian or a driver to proceed across the street and the red light is a command to stop until the light turns green;—whether plaintiff is pedestrian or driver of a car, if he is struck and injured while crossing the intersection under protection of a traffic light, he is not negligent as a matter of law even in the absence of testimony that he attempted to observe approaching vehicles;—if the crossing at the intersection is being made with a favorable green light, the question of contributory negligence is a jury question, namely: Did plaintiff attempt the crossing in the face of a peril that was reasonably apparent?

That this principle is recognized beyond the confines of this State is evidenced by the following from 164 ALR 8, 234:

"One entering a street or highway intersection with a green light, semaphore go signal, or officer's gesture to proceed is entitled to assume that persons on the intersecting street will obey the unfavorable signal facing them; while this does not excuse the person enjoying the favorable signal from acting with reasonable care in the light of all the circumstances, it does tend to make the question whether he exercised such care in the manner with which he entered or passed over the crossing one for the trier of the facts, and the view has accordingly been taken under the facts involved in numerous cases that the circumstance that one charged with negligence or contributory negligence entered the intersection where the accident occurred with the traffic signal in

his favor operates, or at least tends, to prevent a holding that he was guilty of negligence or contributory negligence as a matter of law, despite a showing that he was guilty of acts or omissions which might otherwise have justified that conclusion."

The early Michigan decision of *Travis* v. *Eisenlord, supra* (relied upon and which formed a base for *Ortisi* and *Buehler*), was recognized and approved in 1945 by the California district court of appeals in *Taylor* v. *Sims,* 72 Cal App 2d 60, 63, 64 (164 P2d 17), wherein it was stated:

"Since the intersection here involved was controlled by an electric traffic signal plaintiff was not required to look into the cross streets before entering the intersection. The signal permitted him to move in an easterly and westerly direction. The rule being that where the intersection movement of traffic is governed by signaling devices the determination of the question as to whether the one driver or the other is responsible for a collision at the intersection depends primarily upon the showing as to whether one vehicle or the other was being operated in conformity with the signal. The driver proceeding pursuant to the 'Go' signal is not to be deemed negligent because he fails to maintain a lookout for a vehicle which might enter the intersection in violation of the signal. (*Travis* v. *Eisenlord,* 256 Mich 264; *Church* v. *Shaffer,* 162 Wash 126, 129 [297 P 1097, 1098]; *cf. Randall* v. *Evans,* 4 Cal App 2d 575, 576 [41 P2d 561].)"

I concurred with Justice BUTZEL in the *Ortisi* and *Buehler* decisions, and I concur with Justice KAVANAGH in this appeal.

LaFOND *v.* CITY OF DETROIT.

1. WILLS—BEQUEST INVOLVING RACIAL DISCRIMINATION—CONSTRUCTION OF WILL—EQUALLY DIVIDED COURT.

   Decree construing provision of will giving the bulk of testatrix's estate for the establishment of a "playfield for white children" as void is affirmed by an equally divided court.

2. SAME—COURTS—JURISDICTION—RESIDENCE—PARTIES.

   Courts of county in which testatrix resided at time of her death had jurisdiction to probate will and construe it, hence refusal to allow prosecuting attorney of another county in which testatrix had lived and in which city was located that was residuary legatee, to become a defendant, was not error.

Appeal from Ingham; Coash (Louis E.), J. Submitted April 9, 1959. (Docket No. 34, Calendar No. 47,781.) Decided October 12, 1959.

Bill by Doris Dormire LaFond, Phillip James Dormire, Sr., and Phyllis M. Dormire Carless against the City of Detroit, a municipal corporation, and Carl L. Reagh, administrator with the will annexed of the estate of Emma Katharine Sagendorph, deceased, to construe residuary clause in will void. Decree for plaintiffs. Defendant City of Detroit appeals. Affirmed by an equally divided court.

Glassen, Parr & Rhead (*R. F. Rhead,* of counsel), for plaintiffs.

Nathaniel H. Goldstick, Corporation Counsel, and *Andrew DiMaggio,* Assistant Corporation Counsel, for defendant City of Detroit.

REFERENCES FOR POINTS IN HEADNOTES

[1] 10 Am Jur, Charities § 81; 57 Am Jur, Wills § 148.
[2] 57 Am Jur, Wills § 766.

Kelly, J. (*for affirmance*). Plaintiffs, as heirs of Emma Katharine Sagendorph, deceased (hereinafter referred to as deceased), on October 28, 1954, filed their bill of complaint requesting the circuit court of Ingham county to construe as void the residuary clause in deceased's will, which provided:

"The balance of my estate after deducting the above bequests is to be given to the city of Detroit, Wayne county, Michigan for a playfield for white children, and known as the 'Sagendorph Field'."

Defendant city of Detroit filed its answer (November 15, 1954) claiming plaintiffs should be denied relief because "the bequest made under said residuary clause was for an educational purpose and valid by reason of the provisions of PA 1915, No 280, being CL 1948, §§ 554.351–554.353 (Stat Ann 1953 Rev §§ 26.1191–26.1193), and by reason of the provisions of PA 1925, No 373, being CL 1948, §§ 554.381, 554.382 (Stat Ann 1953 Rev §§ 26.1201, 26.1202), and by reason of PA 1913, No 380, being CL 1948, § 123.871 (Stat Ann 1958 Rev § 5.3421), and by reason of the doctrine of cy pres in force in the State of Michigan, and for the further reason that the words in said residuary clause, to-wit, 'for white children' are merely precatory."

February 17, 1955, defendant city filed its motion to dismiss plaintiffs' bill of complaint "because the (Wayne county) prosecuting attorney has not been made a party defendant" and "because the court of chancery for the county of Wayne is the proper court having jurisdiction to construe the residuary clause in said will."

On July 14, 1955, Detroit's corporation counsel's memorandum to the common council and the resolution of the Detroit common council were filed. The corporation counsel's memo to the common council alleged: (1) That deceased left an estate of $32,-

830.11 and after payment of bequests in the will, plus claims and administration costs, there would be about $25,000 for the residuary legatee, the city of Detroit; (2) That "because of the onerous conditions imposed by the said testatrix in the residuary clause of her will, as aforesaid, it is legally necessary for your honorable body to determine by resolution, before the final hearing of said cause, whether the city accepts or rejects the aforesaid bequest."

The Detroit common council's resolution, unanimously adopted, stated:

"Resolved, that the city of Detroit, a municipal corporation, accept and it does hereby accept the bequest of Emma Katharine Sagendorph, deceased, as stated in the residuary clause of her will, heretofore admitted to probate in the Ingham county probate court, provided the court will construe the said residuary clause as giving the city of Detroit the right to make the playfield available to all children, without regard to race, color or creed, and be it further

"Resolved, that after payment of said bequest to the city, the parks and recreation commission be, and it is hereby authorized to provide a playfield for children in the city of Detroit, in accordance with the court's construction of said residuary clause, and to name such field 'Sagendorph Field.' "

November 23, 1956, the prosecuting attorney for the county of Wayne filed his petition for leave to intervene as party defendant, alleging that deceased's will (dated September 15, 1948) was executed while she was a resident of the city of Detroit and that PA 1915, No 280 (CL 1948, § 554.351 *et seq.* [Stat Ann 1953 Rev § 26.1191 *et seq.*]) and "all of the facts which can be reviewed at this time, indicate that it was the intention of the testatrix that jurisdiction be in the circuit court for the county of Wayne and accordingly, that your petitioner as pros-

ecuting attorney in and for said county, should represent the beneficiaries of this trust."

The prosecuting attorney's petition was denied. The city of Detroit then petitioned this Court for a writ of prohibition and mandamus, which we denied, and the Ingham county circuit court retained jurisdiction. On March 27, 1958, it filed its opinion. The following are excerpts therefrom:

"The city of Detroit in attempting to accept this bequest adopted a resolution by their common council in which they stated that they would not carry out the bequest, and establish a playfield for white children, but would establish a playground for all races. In the will of the deceased she requested that the terms of her will be 'carried out to the letter.' The resolution of the council of the city of Detroit expressly states that her wishes would not be carried out, but that they would accept the money and then do exactly contrary to the wishes of the deceased. * * *

"The bequest of the deceased is not indefinite nor uncertain, but is a very positive order. She states in her last will that she wanted a playfield established for white children. Nothing could be more positive or definite than her statement, but to carry out this bequest would be contrary to the laws of the State of Michigan, and the United States of America. * * *

"The words 'a playfield for white children' were 'words of command', and would not allow the city of Detroit to accept this bequest and then do exactly opposite from that commanded by the deceased.

"It is the claim of the defendants that the doctrine of 'cy pres' would apply in this case and would validate the bequest of the deceased. This court cannot find where this doctrine applies because such doctrine does not apply where it is impossible to carry out the object of the bequest. In this cause as hereinbefore stated, in order to carry out the bequest of the

deceased it would be necessary to violate the laws of this State and of this country."

Appellant submits 3 questions. The first challenges the court's jurisdiction; the second question deals with the court's refusal to recognize the prosecuting attorney of Wayne county as "a necessary party at the trial;" and because the third question is the major one and most important, it shall be considered first in this opinion. It reads as follows:

"Did racial restriction—white—in residuary trust bequest to appellant city of Detroit in the will of Emma Katharine Sagendorph, deceased, limiting availability of playfield to white children, render entire bequest void as against public policy, or was the racial restriction therein void and the bequest otherwise legal thus making playfield available to all the children?"

We are considering a gift of the bulk of deceased's estate to the city, and deceased's express wish must be respected and carried out irrespective of this Court's desire to aid and encourage the creation of city playgrounds for children of all races and color. The words in the will commanding that the will "be carried out to the letter" cannot be forgotten or disregarded. Deceased expressed in unambiguous language that she was making a bequest for the establishment of "a playfield for white children."

The city of Detroit by its corporation counsel's memorandum to the common council (prior to the adoption of the council's resolution) disclosed it did not consider the words "a playfield for white children" as unimportant and incidental, but characterized these words as creating "onerous conditions imposed by the said testatrix."

I disagree that by providing for a playground for white children the aged testatrix, who desired to create a memorial for her deceased husband, ex-

pressed "hatred for children of all races except white" or that her "intentions were more of a striking back at the Negro population than as a charitable effort." There is nothing in the will nor in the record that sustains a conclusion that she made the bequest because she wanted to make certain her legal heirs would not share in her estate.

Justice Edwards, endeavoring to apply the cy pres doctrine, quotes the American Law Institute's Restatement of Trusts to the effect that where the gift or bequest is impractical to carry out, or illegal, and where it is manifest there was "a more general intention to devote the property to charitable purposes," "the doctrine of cy pres is applicable unless" there is "manifested an intention that the property should be applied solely to the purpose." There is nothing in the will nor in the record disclosing a more general purpose than the specified purpose—a playfield for white children—and there is nothing in the will or record which in the slightest way indicates deceased desired the money to be applied to any other purpose than "a playfield for white children."

The cy pres doctrine is used to aid the court in carrying out the true intention of the donor and cannot be used for the purpose of eliminating the unambiguous words found in deceased's will.

The general rule govering the cy pres doctrine is clearly set forth in 74 ALR 671, as follows:

"It not infrequently occurs that the method of executing a charitable trust defined by the terms of the instrument creating it is impracticable or illegal. In those jurisdictions wherein the cy pres doctrine is recognized, it is quite generally held in such circumstances that, if the instrument indicates a general intention or dominant purpose on the part of the donor that the property is to be devoted to charitable purposes regardless of the peculiar method of execution, the cy pres doctrine will be applied. Numer-

ous authorities support this rule and its converse,—that where the charitable purpose is limited to a particular object or to a particular institution, and no general charitable intent is manifest from the instrument, then, if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, the doctrine of cy pres does not apply, and in the absence of any limitation over, or other provision, the legacy lapses."

Appellant calls attention to PA 1915, No 280, § 1 (CL 1948, § 554.351 [Stat Ann 1953 Rev § 26.1191]), which provides:

"No gift, grant, bequest or devise * * * to religious, educational, charitable or benevolent uses * * * which shall in other respects be valid under the laws of this State, shall be invalid by reason of the indefiniteness or uncertainty of the object of such trust or of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities."

This statute does not apply because we do not have an "indefiniteness or uncertainty of the object of such trust" or a bequest contrary to "any statute or rule against perpetuities."

We agree with the trial court "for white children" are words of command and the cy pres doctrine cannot be invoked to validate the residuary bequest.

The will does not indicate a general intention to provide for a general charitable purpose rather than for a particular designated object. The cy pres doctrine is used to aid the court in carrying out the true intention of the donor and cannot be used for the purpose of eliminating the unambiguous words found in deceased's will. See 74 ALR 671, 678.

Subsequent to drawing the will in Detroit, deceased became a resident of Webberville, Ingham county, where she resided at the time of her death,

and her will was admitted to probate in Ingham county.

We do not agree with appellant's contention that the circuit court of Ingham county lacked jurisdiction, or that error was committed in refusing to allow the prosecuting attorney of Wayne county to be made a party defendant.

Affirmed. No costs, a public question being involved.

Dethmers, C. J., and Carr and Kavanagh, JJ., concurred with Kelly, J.

Edwards, J. (*for reversal*). The basic question in this case is whether an old lady, in setting up a memorial trust in honor of her deceased husband, had as her basic intent a charitable purpose toward the children of the city of Detroit, or an expression of hatred for children of all races except white.

The words she used were:

"The balance of my estate after deducting the above bequests is to be given to the city of Detroit, Wayne county, Michigan for a playfield for white children, and known as the 'Sagendorph Field.' "

All parties to this litigation concur that the 14th Amendment to the Constitution of the United States forbids the city of Detroit from maintaining an exclusively white playground if, indeed, the term "exclusive" be deemed a part of Mrs. Sagendorph's intention.

The alternatives before this Court are (1) to give such legal effect to Mrs. Sagendorph's bequest as may be consistent with the Constitution of the United States in the providing of a playground for white and all other children of the city of Detroit; or (2) to defeat the charitable trust in its entirety and have the trust *res* distributed to heirs to whom it is patent

Mrs. Sagendorph did not intend to leave this money.

Charitable bequests have been a source of difficulty and concern for all of the past history of the courts. And under a doctrine broadly, and perhaps loosely, called the cy pres doctrine,* the courts have come to a general rule requiring liberal construction of charitable trusts to preserve as nearly as may be the charitable purposes of the donor in the event of some ambiguity, or some impossible or illegal condition. *In re Estate of Lundquist,* 193 Minn 474 (259 NW 9); *Bruce* v. *Maxwell,* 311 Ill 479 (143 NE 82); *Jackson* v. *Phillips,* 14 Allen (96 Mass) 539.

Michigan has long recognized that a memorial bequest to a municipality for playground purposes is a charitable bequest. *Greenman* v. *Phillips,* 241 Mich 464. Michigan has also recognized the cy pres doctrine in case law. *Gifford* v. *First National Bank of Menominee,* 285 Mich 58; *In re Hannan's Estate,* 227 Mich 569, 577.

The essence of the cy pres doctrine has been recognized by legislative enactment:

"*No gift, grant, bequest or devise,* whether in trust or otherwise to religious, educational, charitable or benevolent uses, or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, or anything therein contained which shall in other respects be valid under the laws of this State, *shall be invalid by reason of the in-*

* At common law in England, the crown exercised its prerogative power to apply funds given for a charitable, but illegal, purpose to some valid charitable purpose without regard for the settlor's intention. Property otherwise given for a particular charitable purpose which became incapable of fulfillment was directed by the chancellor under the doctrine of cy pres to another charitable purpose which fell within the general charitable intention of the settlor.

The prerogative power, of course, does not exist in this country. The cy pres doctrine applied in the United States is a rule of judicial construction designed to approximate as closely as possible the desires of the settlor. *Jackson* v. *Phillips* (1867), 14 Allen (96 Mass) 539, 578–581; 2 Restatement, Trusts 2d, § 399h, p 301; 10 Am Jur, Charities, § 123, p 676.

definiteness or uncertainty of the object of such trust or of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities." CL 1948, § 554.351 (Stat Ann 1953 Rev § 26.1191).

"The court of chancery for the proper county shall have jurisdiction and control over the gifts, grants, bequests and devises in all cases provided for by section 1 of this act. *Every such trust shall be liberally construed by such court so that the intentions of the creator thereof shall be carried out whenever possible.*" CL 1948, § 554.352 (Stat Ann 1953 Rev § 26.1192). (Emphasis supplied.)

In addition, the legislature has provided authority to cities to receive such bequests. CL 1948, § 123.871 (Stat Ann 1958 Rev § 5.3421).

We believe the italicized statutory language was designed to preserve charitable bequests from invalidity in just such a situation of uncertainty pertaining to object or beneficiaries as is here presented. *In re Jones' Estate,* 334 Mich 392.

The American Law Institute's Restatement of Trusts provides the following general rule as to the cy pres doctrine:

"If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor." 2 Restatement, Trusts 2d, § 399, p 297.

Specifically as to an illegal condition, the Restatement continues:

"A disposition for charitable purposes may fail, in whole or in part, either at the outset or subsequently, because the purposes or some of them are or become illegal. In such a case the doctrine of cy pres is applicable unless the settlor manifested an intention that the property should be applied solely to the purpose which is or has become illegal." 2 Restatement, Trusts 2d, § 399n, p 305.

As to testatrix' intentions, appellees' brief has stated their position vividly: "Emma Katharine Sagendorph's intentions were more of a striking back at the Negro population than as a charitable effort." We entertain no doubt that testatrix' language implies some prejudice. And we note also that she desired the entire will "carried out to the letter."

But we do not find in this will any provision for gift over in the event of failure of the condition referred to. And forfeiture because of restrictive conditions attached to grants or conveyances of land is not generally favored. *Conrad* v. *Long,* 33 Mich. 78; *Adams* v. *First Baptist Church of St. Charles,* 148 Mich 140 (11 LRA NS 509, 12 Ann Cas 224).

See, also, CL 1948, § 554.46 (Stat Ann 1957 Rev § 26.46).

Nor do we find any impelling reason to construe the words of the testatrix so as to hold that her sole purpose was one of exclusion. This will on its face bestows the bulk of an old lady's estate upon the city where she and her husband spent their lives. It provides for an obvious charitable purpose—a playground. It provides for the playground to carry the family name.

It would take clearer and more dramatic language than we find in this will for us to hold that testatrix' real intention was one of revenge rather than one of charity. Even if the word "white" contained in her bequest be thought of as a word of exclusion (and the testatrix did not so require), we believe the basic

purpose of the bequest is patently that of a memorial to her husband and herself to perpetuate their memory in a playground for children in the city of Detroit.

The trustee, city of Detroit, has by resolution effectively provided for the carrying out of the purpose of the bequest, excluding, of course, any condition which would violate the United States Constitution. This fulfills her intention as nearly as may be.

We note that appellees cite the *Girard College Cases* to us (*Girard Will Case,* 386 Pa 548 [127 A2d 287]; *Pennsylvania* v. *Board of Directors of City Trusts of the City of Philadelphia,* 353 US 230 [77 S Ct 806, 1 L ed 2d 792]; *Girard College Trusteeship,* 391 Pa 434 [138 A2d 844], appeal dismissed and certiorari denied, 357 US 570 [78 S Ct 1383, 2 L ed 2d 1546]).* For our present facts, the most significant thing about these cases is that no court held the bequest to the college invalid.

As to the other questions presented, we concur with Mr. Justice Kelly's opinion.

Reversed for the entrance of a decree giving effect to the bequest in accordance with this opinion. Costs to appellant.

Smith, Black, and Voelker, JJ., concurred with Edwards, J.

* For a discussion of the impact of these cases on charitable trusts generally, see 66 Yale LJ 979, Clark's Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard.

WOJEWODA *v.* EMPLOYMENT SECURITY COMMISSION.

1. UNEMPLOYMENT COMPENSATION—CARPENTERS—STRIKE OF REINFORCED STEELWORKERS IN SAME PLANT.

   Carpenter was not entitled to unemployment compensation benefits for period he was out of work due to strike in same plant of reinforced steel workers who were employed at same plant as claimant, notwithstanding he was not concerned with matters involved in such strike, the plant was not picketed by the strikers and plaintiff received no word from his union officers (CLS 1956, § 421.29).

2. COSTS—PUBLIC QUESTION—UNEMPLOYMENT COMPENSATION.

   No costs are allowed in proceeding to recover unemployment compensation, where a public question was involved.

3. CONSTITUTIONAL LAW—COURTS—STATUTES—POLICY.

   Courts have no power or authority to pass upon the wisdom, policy or equity of legislation.

Appeal from Wayne; Dehnke (Herman), J., presiding. Submitted June 4, 1959. (Docket No. 31, Calendar No. 47,709.) Decided October 12, 1959.

Leonard Wojewoda presented his claim to the Employment Security Commission for unemployment compensation by reason of work stoppage at John Westphal, Inc., a Michigan corporation, employer.

REFERENCES FOR POINTS IN HEADNOTES

[1] 48 Am Jur, Social Security, Unemployment Insurance and Retirement Funds § 36.

Construction and application of provisions of unemployment compensation or social security acts regarding disqualification for benefit because of labor disputes or strikes. 28 ALR2d 287.

[2] 14 Am Jur, Costs § 37.

[3] 11 Am Jur, Constitutional Law §§ 136–138.

Award denied by commission and appeal board and, upon review, by circuit court. Plaintiff appeals. Affirmed.

Schwartz & O'Hare (*Rolland R. O'Hare,* of counsel), for plaintiff.

Fildew, DeGree, Fleming & Gilbride (*Leslie W. Fleming,* of counsel), for defendant employer.

KELLY, J. (*concurring*). Appellant and appellees agree upon the following statement of facts:

Appellant Wojewoda was employed by John Westphal, Inc., as a carpenter on the construction of a school prior to May 17, 1956. On that date a strike occurred among the reinforced steel workers employed at the school project by John Westphal, Inc. Because no other work on that project could continue until settlement of the dispute with the reinforced steel men, the employer laid off appellant on May 17, 1956.

Appellant is a member of the carpenters' union. He did not know a strike was going to occur among the members of the reinforced steel workers union; he received no word concerning the strike from any business agent or other officer of the carpenters' union; no picket line was established by the reinforced steel men after they went on strike. There is no indication in the record that the strike by the reinforced steel workers union concerned any matter which also could affect employees in other unions, such as the carpenters.

Appellant filed for unemployment benefits under the Michigan employment security act. On November 30, 1956, the commission allowed his claim for benefits but upon redetermination it "held that during the weeks ending 5/26/56, 6/2/56 and 6/9/56 a stoppage of work due to a labor dispute existed at

John Westphal, Inc. Those individuals, including claimant, who were employed in work classifications other than reinforced steel work, and who became unemployed and filed claims for benefits covering the weeks ending 5/26/56, 6/2/56 and 6/9/56, are held subject to disqualification for unemployment benefits for such weeks under the provisions of section 29 (1)(b)(4) of the act."

The commission's redetermination was affirmed by the referee on May 3, 1957, and by the appeal board of the commission on September 11, 1957. An appeal was heard by the circuit court for the county of Wayne, Hon. Herman D. Dehnke presiding, on January 24, 1958, and the decision of the appeal board was affirmed. From this judgment appellant appeals.

CLS 1956, § 421.29 (Stat Ann 1957 Cum Supp § 17.531), being section 29 of the Michigan employment security act, reads in part:

"(1) An individual shall be disqualified for benefits: * * *

"(b) For any week with respect to which his total or partial unemployment is due to a stoppage of work existing because of a labor dispute in the establishment in which he is or was last employed: Provided, however, That no individual shall be disqualified under this section if he shall establish that he is not directly involved in such dispute. For the purpose of this section, no individual shall be deemed to be directly involved in a labor dispute unless it is established: * * *

"(4) That at any time, there being no labor dispute in the particular department or unit in which he was then employed, or there being no labor dispute among the grade or class of workers within the employing unit to which he belongs, he shall have become unemployed because of a stoppage of work in his particular department or unit, or among the grade or class of workers to which he belongs, which stoppage of work is due to a labor dispute which was or is in

progress in some other department or unit or among a different grade or class of workers of the same employing unit by whom he was then employed."

The question presented in this appeal was decided in *General Motors Corporation* v. *Unemployment Compensation Commission,* 321 Mich 724, and reaffirmed in *Buzza* v. *Unemployment Compensation Commission,* 330 Mich 223, wherein we stated (pp 235, 236):

"We conclude that the stoppage of work in consequence of which plaintiffs were laid off was caused by the labor dispute involved in the foremen's strike then in progress. Under section 29, subd (c), par (4), plaintiffs herein were disqualified from receiving unemployment benefits. * * *

"In consequence of the factual aspect of this case, the contention is made in behalf of plaintiffs that they became unemployed through no fault of their own, and therefore they should not be deemed to be disqualified. The answer to such contention is contained in our former decision in *General Motors Corp.* v. *Unemployment Compensation Commission, supra,* wherein a headnote reads:

" 'Whether or not amendment [par (4) of § 29 (c)] of unemployment compensation act unduly restricted employee in obtaining unemployment compensation is a matter for legislative determination, as courts have no power or authority to pass upon the wisdom, policy or equity of legislation (PA 1936 [Ex Sess], No 1, § 29, subd [c], par 4, as added by PA 1943, No 246.)' "

Affirmed. No costs, a public question being involved.

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

KAVANAGH, J. In view of the finding of fact of the appeal board and the circuit court that plaintiff was

employed by the same employer or employing unit, we concur in the result reached in the opinion of Justice KELLY.

We do not agree that the question here presented was decided in *General Motors Corporation* v. *Unemployment Compensation Commission,* 321 Mich 724, and only partially in *Buzza* v. *Unemployment Compensation Commission,* 330 Mich 223, for the reason that in the *General Motors Case* the cause of action arose prior to the effective date of the statutory amendments adopted by PA 1947, No 360, ordered to take immediate effect, approved July 8th, and containing a provision that it "shall take effect on July 1, 1947", and in the *Buzza Case* only that portion of the action arising from July 8th to July 16th, the date on which the work stoppage ended, after the amendments were effective.

The amendments to section 29 (1) (b) (3) and (4) (CL 1948, § 421.29 [Stat Ann 1950 Rev § 17.531]) were as follows: At the end of subsection (1) (b) (3) the period was removed and a comma placed following the word "progress" and the word "or" inserted following the comma. To subsection (1) (b) (4) was added the material set forth in italics below:

"That at any time, there being no labor dispute in the particular department or unit in which he was then employed, *or there being no labor dispute among the grade or class of workers within the employing unit to which he belongs,* he shall have become unemployed because of a stoppage of work in his particular department or unit, *or among the grade or class of workers to which he belongs, which* stoppage of work *is* due to a labor dispute which was *or is* in progress in some other department or unit *or among a different grade or class of workers* of the same employing unit by whom he was then employed."

Although many of us might not agree with the wisdom, or lack of it, on the part of the legislature

in making these changes, courts have no power or authority to pass upon the wisdom, policy or equity of legislation.

SMITH, BLACK, EDWARDS, and VOELKER, JJ., concurred with KAVANAGH, J.

LORRAINE CAB v. CITY OF DETROIT.

1. EVIDENCE—JUDICIAL NOTICE—TAXICAB BUSINESS.

   The Supreme Court takes judicial notice of the fact that taxicabs in a large city operate day and night and carry to all parts of the area persons who cannot utilize public transportation and that the protection of the public necessitates that a business of such a nature be regulated and controlled by public authorities.

2. STATUTES—CONSTRUCTION.

   The interpretation to be given a particular word in one section of an act is arrived at after due consideration is given to every other section so as to produce, if possible, a harmonious and consistent enactment as a whole.

3. CARRIERS—PASSENGERS—STATUTES—TAXICABS.

   State statute regulating the operation of common carriers of passengers for hire does not apply to operation of taxicabs in a home-rule city, since latter do not have time tables, fixed termini or routes or regular stations or stops (CL 1948, § 475.1 [g]; 1954 Administrative Code, §§ R 460.109, R 460.110, R 460.142).

REFERENCES FOR POINTS IN HEADNOTES

[1] 20 Am Jur, Evidence § 110.
[2] 50 Am Jur, Statutes § 363.
[3] 37 Am Jur, Motor Transportation §§ 4.1, 5.
[4] 42 Am Jur, Public Administrative Law § 78.
[5] 37 Am Jur, Municipal Corporations §§ 177, 178.
[6] 14 Am Jur, Costs § 37.

4. STATUTES—CONSTRUCTION—ADMINISTRATIVE INTERPRETATION.
The Supreme Court is not bound by an administrative body's interpretation of its own empowering act but does give it respectful consideration as a factor in arriving at the probable legislative intent.

5. MUNICIPAL CORPORATIONS—TAXICAB LICENSE FEE—PRESUMPTIONS—EVIDENCE.
Home-rule city's $100 license fee for taxicabs is presumed valid under record devoid of evidence supporting claim that such fee was excessive and unreasonable (Detroit Municipal Code [1945], ch 145, as amended).

6. COSTS—PUBLIC QUESTION—HOME-RULE CITY TAXICAB ORDINANCE.
No costs are allowed in suit to enjoin enforcement of home-rule city's taxicab license ordinance against taxicab operators who were duly licensed in suburbs, when driving patrons from points within the city to the suburbs (Detroit Municipal Code [1945], ch 145, as amended).

Appeal from Wayne; Kane (Edward T.), J., presiding. Submitted January 8, 1959. (Docket No. 31, Calendar No. 47,743.) Decided October 13, 1959. Rehearing denied November 24, 1959.

Bill by Lorraine Cab, a Michigan corporation, and 4 other parties plaintiff against the City of Detroit, a municipal corporation, and the Detroit Police Department to enjoin enforcement of ordinance regulating the operation of taxicabs. Decree for plaintiffs. Defendants appeal. Reversed.

Rex Eames and *Robert A. Sullivan (Sullivan, Elmer, Eames & Moody,* of counsel), for plaintiffs.

Nathaniel H. Goldstick, Corporation Counsel, and *Arthur L. Barkey* and *Lawrence E. Eaton,* Assistants Corporation Counsel, for defendants.

Amicus Curiae:

Philip J. Neudeck, for Checker Cab Company.

SMITH, J. This is a suit to restrain the city of Detroit and the Detroit police department from enforcing an ordinance regulating the operation of taxicabs (Municipal Code, City of Detroit [1945], p 349, ch 145, as amended). Plaintiffs, duly licensed in their home communities (Dearborn, Redford, Grosse Pointe Park, and Harper Woods), provide suburban taxicab service. On numerous occasions, while driving patrons from points within Detroit to the suburbs, their drivers have been arrested for failure to comply with the licensing provisions of the Detroit ordinance. Some drivers have applied for taxicab drivers' licenses and have been denied same. No appeals have been taken from such denials. It is agreed that the Detroit police department would now deny any application for such licenses, if applied for, on the ground that such drivers are not employed by a taxicab company licensed under Detroit's taxicab ordinance.

There is no doubt that Detroit's regulation of taxicabs is broad and comprehensive. In order to obtain a license to provide taxicab service under the ordinance, one must satisfy the mayor that public convenience and necessity require the additional service proposed. The driver must be of good moral character and the police commissioner must certify to his worth. The cab must be equipped with a properly inspected and regulated taximeter. Each licensee must name an agent for service of process. Insurance against death or personal injury must be assumed, or security bond posted. Drivers may not, without good reason, refuse a prospective customer for the service licensed. We need not recite the applicable regulations in full. We are impressed, as are appellants, with the need for regulation and control of the situation by the public authorities as we take judicial notice that the cabs operate day and night to proximate and remote parts of the area

carrying the innocent young, helpless old, strangers in the community, business travelers and others who, because of infirmity or for other reasons, cannot utilize public transportation. In fact, the legislative body, in the passage of the ordinance before us, has determined that such control by the municipality is necessary for the protection of the public. Is the city of Detroit without power to assert and enforce the prescribed control?

The plaintiffs say that it is. Although they do not question the general authority of Detroit to regulate the operation of taxicabs on its streets they urge that, by adoption of the motor carrier act, CL 1948, § 475.1 *et seq.*, as amended (Stat Ann § 22.531 *et seq.*, as amended), the legislature intended to supersede municipal regulation respecting operations not exempted thereunder. Their argument rests upon the premise that plaintiffs are "common motor carriers of passengers" within the meaning of the act. Thus it is pointed out that article 1, § 1, of the act provides, in part, as follows:

"(g) The term 'common motor carrier of passengers,' when used in this act, shall mean any person who holds himself out to the public as willing to undertake for hire to transport by motor vehicle from place to place over the public highways of this State persons who may choose to employ him for such purpose or for the purpose of transporting package express, excess baggage, newspapers and/or United States mail in the same vehicle used to transport passengers." (CL 1948, § 475.1[g], [Stat Ann § 22.531(g)]).*

* As to the "common motor carrier of property" the act employs the following definition:

"(f) The term 'common motor carrier of property,' when used in this act, shall mean any person who holds himself out to the public as being engaged in the business of a common carrier as at the common law, either directly or through any device or arrangement, including those who operate over fixed routes or between fixed termini, in the transportation by motor vehicle from place to place upon or

The court below concluded that plaintiffs were subject to regulation under the act, relying upon *North Star Line, Inc.*, v. *City of Grand Rapids,* 259 Mich 654, and entered the injunction prayed.

Despite the generality of the language used, it does not suffice, for a proper interpretation of the act, that we confine our attention to the definition above quoted. "The entire act must be read," as we held in *City of Grand Rapids* v. *Crocker,* 219 Mich 178, 182, 183, "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."

Turning, then, to the entire act we find that its provisions require carriers under the act to "keep open to public inspection in each of its depots and offices, schedules showing all rates, fares and charges for transportation of passengers and property between different points on its route."[1] It is required also that the commission "regulate operating and time schedules so as to meet the needs of any community, and so as to insure adequate transportation service" to the area under consideration.[2] We find, in addition, that a common motor carrier of passengers shall have " the right to do a charter or special coach business in the transporting of persons for hire from place to place, provided such charter or special coach business shall originate at one of their termini or on, or adjacent to, the route regularly served by such common carrier."[3] The clear implication here (reinforced elsewhere in the act) is that a common car-

over the highways of this State, the property, or any property, or any class thereof of others who may choose to employ him." (CL 1948 § 475.1 [f], as amended by PA 1957, No 173 [Stat Ann 1957 Cum Supp § 22.531(f)]).

[1] CL 1948, § 476.6 (Stat Ann § 22.539).

[2] CL 1948, § 476.10 (Stat Ann § 22.543).

[3] CL 1948, § 476.5 (Stat Ann § 22.538).

rier of passengers shall operate between termini designated by the commission and shall provide regular service along designated routes. That it may, in addition to such service, engage in certain collateral operations does not suggest that authority might be conferred under a certificate to engage simply in those operations characteristic of taxicabs.

Viewing the act as a whole it would be difficult to frame a code less applicable to the operation of taxicabs. The above provisions relative to time tables for trips, to schedules of fares between "different points on the route," to depots, and to termini, all of which are completely inapplicable to the operation of taxicabs, are not merely appurtenant to the act but are of its very essence. And while we are not bound by any administrative body's interpretation of its own empowering act, we, in common with all modern courts, give it "respectful consideration" as one of the factors to be considered in arriving at the probable legislative intent. *Howard Pore, Inc.,* v. *State Commissioner of Revenue,* 322 Mich 49 (4 ALR 2d 1041). It is with this canon of construction in mind that we observe that the rules and regulations of the public service commission, also, are utterly inconsistent with the notion that the common carrier of passengers referred to in the act embraces the operation of taxicabs. Thus we find that:

"Every common carrier doing a passenger business shall file with the commission a time table showing the time of arrival and departure of its bus or buses at each regular station or stop, and such time table shall further show the number of trips to be made daily over each route or routes." (1954 Administrative Code, § R 460.109, p 5624.)

"No carrier shall allow any of its motor vehicles to be operated over any route other than that prescribed in its authorized certificate or permit with-

out the express consent of the commission, unless such authorized route be blocked or otherwise rendered temporarily impassable. * * *

"When any route upon which a regulated carrier is entitled to travel * * * shall have been changed to include territory not theretofore served by such carrier, the carrier shall have no right to the new route unless and until the right to travel said new route shall have been granted to him on application to and order of the commission." (1954 Administrative Code, § R 460.110, p 5625.)

"No common carrier of passengers by motor vehicle authorized to perform seasonal operations over regular routes may do a charter or special coach business except during the period in which such regular route operations may be performed." (1954 Administrative Code, § R 460.142, p 5637.)

In opposition to the view of exclusion thus apparently imposed upon us by the language and provisions of the act itself, plaintiffs argue that the change from the language employed in prior legislation (referring to common carriers of persons or of property by motor vehicle by means of the limiting phrase, "over fixed routes or between fixed termini,"*) to the language presently employed in the definitional section hereinabove quoted indicates an intention to regulate all transportation by motor vehicle (excepting that specifically exempted), whether over fixed routes or between fixed termini or not. The act itself refutes the argument made. Although, as to common carriers of property, specific provision is made for operations over irregular routes and without adherence to a regular schedule,† there is no such corresponding provision with respect to the common carriers of passengers. We conclude that

* This phrase occurs in definitions in PA 1923, No 209, § 1, PA 1931, No 212 § 1, subd (i), PA 1931, No 312 § 1, subd (i).

† CL 1948, § 476.5 (Stat Ann § 22.538).

the legislature did not intend, by the slight change made, to assert regulatory powers of the sweeping nature asserted by appellees.

With respect to the validity of the $100 license fee imposed by the Detroit taxicab ordinance, the record is devoid of any evidence supporting appellees' claim that it is excessive and unreasonable. Its presumption of validity has not, therefore, been rebutted. See *Merrelli* v. *City of St. Clair Shores,* 355 Mich 575.

Under the views above expressed there is no need to discuss additional points argued by counsel.

Reversed. No costs, a public question.

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

AWAD *v.* McCOLGAN.

1. NUISANCE—NEGLIGENCE.
   Negligence is not necessary to nuisance.
2. SAME—NATURE.
   Nuisance comprehends interference with an owner's reasonable use and enjoyment of his property by means of smoke, noise, vibration, obstruction of private easements and rights of support, interference with public rights such as free passage along streams and highways, enjoyment of public parks and places of recreation, or activities and structures prohibited as statutory nuisances, and it may be either public or private.
3. LANDLORD AND TENANT—COLLAPSE OF PORCH—INJURY TO TENANT—NUISANCE.
   The fact that porch of leased premises collapsed while tenant

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REFERENCES FOR POINTS IN HEADNOTES

[1] 39 Am Jur, Nuisances § 24.

[3, 5] 32 Am Jur, Landlord and Tenant §§ 237, 688, 702.
Liability of landlord for personal injuries due to defective porch for use of different tenants. 25 ALR 1321, 39 ALR 304, 75 ALR 169, 97 ALR 236.

[4] 32 Am Jur, Landlord and Tenant § 714.
Rights and remedies of tenant upon landlord's breach of covenant to repair. 28 ALR 1448, 28 ALR2d 446.

was thereon does not impose liability upon the landlord on theory of nuisance.

4. SAME—BREACH OF AGREEMENT TO MAKE REPAIRS—TORTS.
An action in tort cannot be predicated by a tenant upon a breach by the lessor of an agreement to make repairs.

5. SAME — NUISANCE — REPAIRS — DILAPIDATED PORCH — INJURY TO TENANT.
Tenant's injury on leased premises when dilapidated porch collapsed after landlord had agreed to repair it did not impose liability upon landlord for tort on theory of nuisance.

Appeal from Saginaw; Dehnke (Herman), J., presiding. Submitted June 2, 1959. (Docket Nos. 6, 7, Calendar Nos. 47,424, 47,425.) Decided October 13, 1959.

Case by Stella Awad against Arthur J. McColgan, Elizabeth McColgan and others for personal injuries sustained by reason of deterioration and collapse of porch at rented premises. Similar action by Ally Awad for expenses. Cases tried together. Judgments for defendants *non obstante veredicto*. Plaintiffs appeal. Affirmed.

Heilman & Purcell (*Maurice C. Perkins*, of counsel), for plaintiffs.

Stanton & MacKenzie, for defendants.

SMITH, J. Defendants were the owners of a building in Saginaw, comprising a restaurant on the ground floor and living quarters on the floor above. They had leased the upper floor to Ally Awad, plaintiff herein, for some 7 years prior to the accident. At the rear of the building there was a porch, with steps leading to the ground. Mr. Awad had complained to the owners that the porch and steps, which were obviously in process of deterioration, needed repairs.

These they agreed to make, but did not. The porch later collapsed, injuring Stella Awad, his wife.*

The declaration charged in part as follows:

"That plaintiff was free from any negligence and/or contributory negligence in the premises, and her injuries were caused by a breach of the covenants to keep said premises in repair by said defendants and/or their negligence in allowing said premises to become so dilapidated and run down as to constitute a nuisance and a dangerous instrumentality to those having a right to use the same."

During the trial, however, after deliberations which were apparently not reported, the following was placed in the record by the trial court:

"*The Court:* Let the record show that plaintiffs' counsel has indicated that plaintiffs will abandon the contract theory and wish to go to the jury only on the nuisance theory."

The jury were subsequently instructed, in substance, that a verdict might be returned in favor of plaintiffs if they should find (a) that defendants had permitted the porch to deteriorate to such a dangerous condition that it constituted a nuisance, (b) that defendants knew, or in the exercise of reasonable care should have known, of the existence of the said condition, (c) that Stella Awad exercised reasonable care for her own safety, and (d) that the said condition was the proximate cause of the injuries sustained. A general verdict was returned in favor of plaintiffs. The court below granted a motion for judgment *non obstante veredicto,* and plaintiffs have taken an appeal.

We note in passing that exactly what plaintiffs' nuisance theory comprehended was never made clear

* Two actions were brought, one by the husband, the other by the wife, tried together before a jury. The plaintiffs and causes will occasionally be referred to in the singular for purposes of clarity.

to the trial court[1] nor has the obscurity been relieved in proceedings before this Court.

We thus approach the theory of nuisance *ab initio*. Nuisance is the great grab bag, the dust bin, of the law.[2] It comprehends interference with an owner's reasonable use and enjoyment of his property by means of smoke, noise, or vibration; the obstruction of private easements and rights of support; interference with public rights, such as free passage along streams and highways, the enjoyment of public parks and places of recreation, and, in addition, activities and structures prohibited as statutory nuisances. Negligence is not necessary to nuisance, though many wrongs thus denominated are made so through the defendants omitting to perform a duty, such as Mr. Justice Cardozo's example of "The coal hole, built under a license, [which] may involve a liability for nuisance, if there is negligence in covering it."[3] It may be either public or private, and there is no need that we here enumerate the distinctions. In short, nuisance, as was well put by Thayer,[4] "is a good word to beg a question with. It is so comprehensive a term, and its content is so heterogeneous, that it scarcely does more than state a legal conclusion that

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[1] The following appears in the opinion on motion for judgment *non obstante veredicto:*

"I have not been successful in obtaining a clear-cut, unequivocal statement of plaintiffs' position on this point [the relation of plaintiffs' nuisance theory to the housing law, CL 1948, § 125.401 *et seq.* (Stat Ann 1958 Rev § 5.2771 *et seq.*)] notwithstanding several attempts to clarify it. * * *

"Under date of May 9th, plaintiffs' counsel wrote me: 'We think the charge will show the situation is probably limited to a nuisance, and we are going to see if we can find a few cases on nuisance for your consideration.' To date I have had no further clarification of plaintiffs' position, or citation of authorities satisfactorily answering those supplied in behalf of defendant."

[2] See Seavey's recent discussion of the law of nuisance in 65 Harv L Rev, 984.

[3] *McFarlane* v. *City of Niagara Falls,* 247 NY 340, 343 (160 NE 391, 57 ALR 1).

[4] Public Wrong and Private Action, 27 Harv L Rev, 317, 326.

for one or another of widely varying reasons the thing stigmatized as a nuisance violates the rights of others."

Let us see, then, in what respects, if any, the defendants have violated the rights of the plaintiffs. Mrs. Awad was injured when the porch of the premises she occupied as a tenant collapsed. This does not impose liability upon the landlord. A tenant may rent tumble-down property if he wishes and if it does in fact tumble down during his occupancy, the landlord, without more, is not liable. Statutes may conceivably affect such result, particularly that act known as the housing law,* but the act was not in effect in this area, nor are we cited to any ordinance similar in scope. But we have more in this case than mere tenancy. We have a promise by the landlord to repair, and he did not. There thus may be a cause of action for breach of contract but in our jurisdiction it has been settled law for some time that, in the words of Mr. Justice WIEST, in *Kuyk* v. *Green*, 219 Mich 423, 425, "an action in tort cannot be predicated, by a tenant, upon a breach by a lessor of an agreement to make repairs." We would not be understood as speaking too broadly in an area of such unlimited expanse. We do not hold that the negligence-nuisance type of action referred to above may never be brought. In a proper case it may be, and, if so, it partakes of the essentials of a negligence action, including such defenses as that of contributory negligence. (See annotation, 57 ALR 7.) The name (negligence or nuisance) does not control the result. The point is, however, that the gravamen of the action must sound in tort and a landlord's breach of promise to repair does not so sound. *Kuyk* v. *Green*, *supra*.

* PA 1917, No 167, as amended (CL 1948, § 125.401 *et seq.* [Stat Ann 1958 Rev § 5.2771 *et seq.*]).

The authorities cited by plaintiffs as justifying recovery upon some theory of nuisance are all inapplicable to the situation before us. *Kern* v. *Myll,* 94 Mich 477, turned on whether the landlord had actual knowledge of a concealed dangerous condition, which his tenant urged he had failed to disclose. In *Harris* v. *Cohen,* 50 Mich 324, the liability of a landlord for the maintenance of a nuisance was indeed put in issue, but it was a liability with respect to the owner of adjacent land. *Fisher* v. *Thirkell,* 21 Mich 1 (4 Am Rep 422), involved an action by a member of the general public against both tenants and owners to recover damages received by her by falling into a "hole in the sidewalk on Woodward avenue, Detroit." None of these cases involved an action by a tenant against his landlord arising out of a promise to repair. We are not persuaded that *Kuyk* v. *Green, supra,* is in error. See, also, *Huey* v. *Barton,* 328 Mich 584.

Affirmed. Costs to appellees.

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

MOYER *v.* SHAMPO.

1. DAMAGES—BURDEN OF PROOF.

A plaintiff in a tort action has the burden of proof as to damages he sustained, such as lessened earning capacity.

REFERENCES FOR POINTS IN HEADNOTES

[1] 15 Am Jur, Damages § 358.
[2, 3] 15 Am Jur, Damages § 205.

2. SAME—EVIDENCE—EARNING CAPACITY—PAIN AND SUFFERING.

Jury's award of $1,500 to plaintiff for personal injuries sustained in automobile accident *held*, within its reasonable discretion under evidence adduced as to loss of earning capacity and pain and suffering involved.

3. SAME—EVIDENCE—SUPREME COURT.

The Supreme Court will not disturb the evaluation a jury makes of the evidence as to damages in a tort case, if satisfied that its findings are supported by the evidence presented.

Appeal from Hillsdale; Arch (Charles O.), J. Submitted June 2, 1959. (Docket No. 15, Calendar No. 48,061.) Decided October 13, 1959.

Case by Oakley Barrett Moyer against Francis L. Shampo for personal injuries and property damage resulting from automobile collision. Verdict and judgment for plaintiff, who claims them inadequate. Motion for new trial denied. Plaintiff appeals. Affirmed.

Felix F. Best, for plaintiff

Dimmers & MacRitchie, for defendant.

SMITH, J. Plaintiff was injured in an automobile accident. Defendant admitted his negligence and plaintiff's freedom from contributory negligence but contested, as excessive, plaintiff's damage claim of $25,000. The case having gone to a jury on the question of damages, a verdict was returned in the sum of $1,500. A motion for a new trial was made on the grounds that the verdict was grossly inadequate, and that it was contrary to the great weight of the evidence. From a denial of the motion, this appeal has been taken. The trial judge declared, in an opinion on the motion: "In simple language, they did not believe his story and awarded damages accordingly."

Plaintiff had testified that he had returned to work 6 weeks after the accident, had worked for a week (for which he was paid $98.40), but had been unable to continue due to severe pains he felt in exerting the muscles in his shoulder and neck. He was out of work for approximately 9 weeks thereafter, then worked at a reduced rate, and only part time, for a period of 2 weeks. His claim of compensation for loss of earnings is posited upon continuing physical impairment and the availability of work, full time, at $98.40 a week, had he been well. Upon these facts, of course, he carries the burden of proof. If the jury had credited plaintiff's testimony, it might have found that his earnings were reduced, as a consequence of the accident, by a sum in excess of $1,500. The testimony that he experienced severe and crippling pains some 16 weeks after the accident conflicted with inferences that might reasonably have been drawn from other testimony regarding the nature and extent of his injuries.

The jury might have found that plaintiff's earning capacity was impaired only during the 6 weeks following the accident. Such a conclusion would not have been contrary to the great weight of the evidence: plaintiff did indeed return to work at the end of that period. The jury thus might have found a loss of 6 weeks' earnings at the testified rate of $98.40 per week, awarding such sum, together with $500 or $600 to compensate for pain and suffering. Such amount would be within the reasonable discretion of the jury. See *Sebring* v. *Mawby,* 251 Mich 628.

We do not wish to suggest that the testimony necessitates such findings or that we are assured of the probability that they were made. Judicial review does not involve such conjecture. We must be satisfied merely that a basis for the verdict of the

jury may be found in a sound evaluation of the evidence. And we are so satisfied.

Affirmed, with costs to defendant.

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

COMMERCE ACCEPTANCE COMPANY *v.* DENTON.

1. CHATTEL MORTGAGES—REMOVAL TO ANOTHER JURISDICTION—SALE.
   The lien of an original chattel mortgage, valid under the laws of the jurisdiction where executed, cannot be destroyed by a mortgagor's criminal act in removing the property from the jurisdiction and selling it (CL 1948, § 566.140a).

2. SAME—AUTOMOBILES—CERTIFICATE OF TITLE—ESTOPPEL.
   Oklahoma chattel mortgagee was not estopped from asserting lien on automobile, where his mortgage was duly executed and recorded in that State, by reason of the fact that the Oklahoma certificate of title did not bear a notation of such lien, the statutes of that State permitting though not requiring such entry on the certificate, but which certificate did contain a printed warning that existing liens might not be indicated thereon.

3. COSTS—BRIEFS.
   No costs are allowed upon affirmance of judgment for nonresident chattel mortgagee in replevin action, where plaintiff filed no brief.

Appeal from Muskegon; Kane (Edward T.), J., presiding. Submitted June 3, 1959. (Docket No. 23, Calendar No. 47,530.) Decided October 13, 1959.

REFERENCES FOR POINTS IN HEADNOTES

[1] 10 Am Jur, Chattel Mortgages § 21.
Removal of property into another state after lien of chattel mortgage has attached. 57 ALR 711, 13 ALR2d 1318.
[3] 14 Am Jur, Costs § 92.

Replevin by Commerce Acceptance Company, Inc., a Kansas corporation, against Hubert (Denny) Denton, doing business as Denny Denton Trailer and Auto Sales, of automobile subject to chattel mortgage recorded in another State. Money judgment for plaintiff. Defendant appeals. Affirmed.

Parmenter & Forsythe, for defendant.

SMITH, J. The question in this case concerns a fraud practiced through the sale in Michigan of an automobile licensed in Oklahoma. It was represented by the seller to be free from any liens. In truth, however, it was subject to a mortgage properly executed and recorded in Oklahoma.

Specifically, one Roger Frank Allen came to defendant Denny Denton's Trailer and Auto Sales, driving a current model Plymouth convertible with Oklahoma license plates. He said that he had recently purchased the car for cash from a new car dealer at Bartlesville, Oklahoma, but that he now wanted a less expensive car and a house trailer. A deal was effectuated, Allen securing an older car, a trailer and a sum in cash in exchange for the Plymouth.

The Plymouth, however, was mortgaged, in Oklahoma, to the plaintiff herein. Suit in replevin was had and judgment rendered in favor of plaintiff by the trial court sitting without a jury. The court, noting that defendant had had "ten years' experience in the field of dealing with titles to trailers and various things," found that he had purchased the new car within 7 days of its original sale in Bartlesville, Oklahoma, without making any attempt to ascertain from the Bartlesville dealer, or the county clerk in Bartlesville (who had, in truth, recorded the mortgage), whether the title was free and clear. He did, however, call our motor vehicle

division in Muskegon to "ask them about an Oklahoma title that didn't show any liens," but for just what reason or purpose, is not clear, though defendant asserts that his suspicions had not been aroused respecting title to the car. All of this, found the trial judge, in substance, amounted to a showing of bad faith in making the purchase. The defendant is before us on a general appeal.

An overwhelming majority of the States of the nation (some 45 in number prior to the admission of the newer states to the Union), the Restatement of the Law,* and noted scholars† all agree that the lien of the original mortgage, valid under the laws of his jurisdiction, cannot be destroyed by a mortgagor's (usually) criminal act in removing the property from the jurisdiction and selling to another.

We, however, tenaciously clung to the opposing view, following our earliest holding on the subject in the case of *Montgomery* v. *Wight,* 8 Mich 143, decided in the year 1860. It was an action to recover a chestnut stallion. The animal had been mortgaged to the plaintiff Montgomery in Canada and the mortgage there recorded. It was, however, later returned to Detroit for training and was there levied upon and purchased by defendant. We held that the mortgage of the plaintiff was invalid as against the levy and sale under the defendant's execution. "If the mortgagees desire to be protected where no notice can be made effectual," said the Court (p 150), "they must take possession, and not allow the mortgagor to take the property where third parties have no means of ascertaining its title."

Although the rule of conduct may well have been workable with respect to horse traders before the Civil War, it is manifestly unworkable in today's

* Restatement, Conflict of Laws, § 268(1).

† *E.g.,* Beale, Jurisdiction Over Title of Absent Owner in a Chattel, 40 Harv L Rev 805.

economy. The automobile subject to a mortgage normally remains, today, in the possession of the mortgagor. Otherwise he might as well not own the car. Yet to require the mortgagee to record his mortgage from Alaska to Texas, and Maine to Hawaii, under penalty of being defrauded by an unscrupulous mortgagor is a manifest absurdity.

Thus it is noted that most jurisdictions hold that the lien of a mortgage valid in the State of its execution is not lost by the mortgagor's unilateral act of removal of the security from the State, and that the chain of the innocent purchaser in the foreign jurisdiction is no stronger than its weakest link, namely, the title of the wrongdoer from whom it is claimed.

The Restatement of the Law of Conflict of Laws, § 268(1), puts the matter thus:

"If, after a chattel is validly mortgaged, it is taken into another State without the consent of the mortgagee, the interest of the mortgagee is not divested as a result of any dealings with the chattel in the second State."

Comment (c) thereupon reads as follows:

"Under the rule stated in this section, the interest of the mortgagee is not divested by any dealings with the chattel in the second State whether such dealings consist of a sale by the mortgagor to a purchaser for value and without notice, or of an attachment or execution levied by a creditor of the mortgagor. It is immaterial that the mortgage has not been recorded in the second State."

When the situation was last before our Court* we divided 4-4 on the matter of aligning ourselves with the overwhelming majority of the jurisdictions of this country. Those who opposed the overruling of the old cases did so principally upon the

* *Metro Plan, Inc.*, v. *Kotcher-Turner, Inc.*, 296 Mich 400.

ground that the legislature should deal with the problem. Their position was stated (p 412) in the following terms:

"Mr. Justice BUTZEL would except from this statute all chattel mortgages executed and filed or recorded in a proper manner in another State. I do not question but that this might be a salutary exception as applied to motor vehicles under present-day conditions. However, it should not be put into the law of this State by judicial decision. Any such obvious amendment to [CL 1929] section 13424 should be left to legislative enactment."

The legislature promptly acted, adopting PA 1941, No 181,* which provides as follows:

"The provisions of this chapter shall not be applicable to any mortgage or conveyance intended to operate as a mortgage of goods and chattels owned by a nonresident of this State and located at the time of the execution thereof outside of the State, if such property was brought into the State without the written consent of the mortgagee or the then holder of such mortgage or conveyance. The validity of such mortgage or conveyance shall, in such case, be determined by the applicable provisions of the law of the State in which such mortgage or conveyance was executed."

So much by way of the background against which this statute is to be interpreted. Defendant is silent as to the statute or the effect thereof. He relies entirely upon the assertion of an estoppel, insisting that plaintiff is "estopped" to assert the priority of its lien upon the ground that it did not cause a notation of its lien to be placed upon the certificate of title in blank spaces thereon that could have been utilized for the purpose. We say "could" have been advisedly, however, since there was no mandatory

* CL 1948, § 566.140a (Stat Ann 1953 Rev § 26.929[1]).

requirement under Oklahoma law that such be done, clear warning of which lack appears on the certificate itself in the following words: "This is not an office of record for the filing of liens and does not guarantee the statement as to liens in this certificate of title." What this says, in language somewhat less formal, is that so far as the certificate of title is concerned the buyer takes his chances as to liens. Having thus taken his chances the defendant before us is in a poor position to complain that he lost.

As a matter of fact the loose use of the word "estoppel" in connection with a problem of ownership can only lead to confusion. The case in which we would estop an owner out of his property, real or personal, must be a most unusual one. As a matter of fact, the grounds for an estoppel do not here exist. There is no language here amounting to a misrepresentation or concealment of the lien, in fact, notice is clearly given that the certificate cannot be used as a source of such information. On the mortgagee's part there can have been no reasonable expectation (in view of such disclaimer) that another would "naturally and probably" assume from the representation made that there was no lien. And further, the defendant here could not reasonably have relied upon the absence of lien through the words of disclaimer as to liens above quoted, and found on the certificate itself.

The statute before us requires no more for the validity of a foreign lien than that it be valid according to "the applicable provisions of the law of the State in which such mortgage" was executed. There is not even a claim here that the mortgage before us was invalidly executed or recorded in the State of Oklahoma.

Affirmed. There will be no costs allowed appellee in view of its failure to file a brief.

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

PEOPLE *v.* MILLER.

1. CRIMINAL LAW—EVIDENCE OF INTOXICATION—BLOOD TEST—URINALYSIS.

   A suspect's sample of urine shown to have been taken at a time reasonably soon after the incident giving rise to prosecution for driving a motor vehicle under the influence of intoxicating liquors, subjected to a test having general scientific recognition, with results correlated to the probable blood alcohol concentration at the time of the violation charged, is properly admissible as bearing upon the issue of intoxication (CLS 1956, § 257.625).

2. SAME—URINALYSIS—MATTERS OF DEFENSE—EVIDENCE.

   Abnormality of the individual, use of faulty techniques or unclean instruments in making a urinalysis to determine alcoholic content of blood of person charged with having operated a motor vehicle while under the influence of intoxicating liquors, are properly matters of defense, going to the weight to be given the evidence, but not grounds for its complete exclusion (CLS 1956, § 257.625).

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 5A Am Jur, Automobiles and Highway Traffic §§ 1245–1250.
Admissibility and weight of evidence based on scientific test for intoxication or presence of alcohol in system. 127 ALR 1513, 159 ALR 209.
Driving while intoxicated as a substantive criminal offense. 42 ALR 1498, 49 ALR 1392, 68 ALR 1356.

[4] 25 Am Jur, Habitual Criminals and Subsequent Offenders § 5.
Constitutionality and construction of statute enhancing penalty for second or subsequent offense. 58 ALR 20, 82 ALR 345, 116 ALR 209, 132 ALR 91, 139 ALR 673.

[5] 5A Am Jur, Automobiles and Highway Traffic § 1092.

3. EVIDENCE—URINALYSIS—INTOXICATION.

Results of urinalysis, taken and interpreted by experts and which showed an alcoholic content of .20% in defendant's blood from sample of urine voluntarily furnished by defendant *held*, relevant and competent in prosecution for driving a motor vehicle while under the influence of intoxicating liquor, the weight of the opinion of the experts, together with that of the other evidence in the case being for the trier of the facts (CLS 1956, § 257.625).

4. STATUTES—AMENDMENT—RETROACTIVE EFFECT—PROSECUTION OF SECOND OFFENSE.

Fact that statute was amended to provide a more severe penalty for second offense of driving motor vehicle while defendant was under the influence of intoxicating liquor after first offense had been committed is not construed as having a retroactive effect, in prosecution of the second offense, since it is the subsequent offense which is punished more harshly, not the first (CLS 1956, § 257.625).

5. CRIMINAL LAW—REQUESTS TO CHARGE—INSTRUCTIONS.

It was not error for trial court to refuse to give defendant's requests to charge in prosecution for driving a motor vehicle while under the influence of intoxicating liquor, either in verbatim form or otherwise, where the instruction as given fairly covered the issues and the material substance embodied in the requests (CLS 1956, § 257.625).

Appeal from Kalamazoo; Fox (Raymond W.), J. Submitted June 4, 1959. (Docket No. 32, Calendar No. 47,634.) Decided October 13, 1959.

William I. Miller was convicted of operating a motor vehicle while under the influence of intoxicating liquor, second offense. Affirmed.

Paul L. Adams, Attorney General, *Samuel J. Torina*, Solicitor General, and *John J. Peters*, Assistant Prosecuting Attorney, for the people.

James B. Stanley, for defendant.

SMITH, J. The appeal here made is from a conviction for drunken driving.*

A police officer, in the early hours of the morning, observed a pick-up truck being driven in an erratic manner, weaving back and forth across the road. The car was stopped with some difficulty, the driver disregarding the red light and siren employed by the first officer attempting to stop him. Help having been obtained from other officers, the car was finally brought under control. As the driver got out of the truck "he just about fell as he was stepping off of his running board." He smelled of liquor. He had difficulty in getting his driver's license out of his pocket. He was taken immediately to the township police department. Here his eyes were checked, and found bloodshot, and his speech was observed to be slurred. When asked to place his right finger on his nose, "he took his left hand and put it flush, the complete hand, flush on the front of his face." It was the testimony of a second officer that the defendant had had too much to drink and was unable to drive a car. The defendant also voluntarily furnished a sample of urine when he was taken to the police station. It was analyzed for alcoholic content and evidence thereof admitted. With respect to it the defendant asserts that such a test is not of sufficient reliability to be admissible in evidence "to prove, at least in part, that the defendant is under the influence of alcohol to the extent that he should not drive a motor vehicle."

The people introduced on the subject the testimony of 2 witnesses, Dr. Edgar W. Kivela, a toxicologist with the Michigan department of health and assistant director of the State crime laboratory, and Robert M. Johnson, in charge of the laboratory

* The charge was brought under CLS 1956, § 257.625 (Stat Ann 1957 Cum Supp, § 9.2325), for an offense claimed to have been committed February 23, 1957.

of the city health department of the city of Kalamazoo. The defendant produced no witnesses to challenge the testimony adduced, but did challenge, upon cross-examination, the witnesses' conclusions, employing for such purposes extracts from learned articles in technical journals.

Mr. Johnson, who had analyzed the sample, described the test performed by him and testified that its reliability was recognized by chemists throughout the country. The sample so taken, and so analyzed, showed, he testified, a presence in the urine of .25% by weight of alcohol, corresponding to a blood content of .20% alcohol. (The alcoholic content of the body fluids, blood, spinal fluids, urine, and other, depends upon the water content of the fluid.* In the urine it is about 25% higher than that in the blood.)

The testimony of Dr. Kivela, also, was to the effect that the presence of alcohol in the human body may be detected by several commonly accepted tests, one of which is urinalysis, which test was described by him as being "very accurate." The trial court, after observing that "the *Morse Case* [*People* v. *Morse*, 325 Mich 270, dealing with the so-called Harger Drunkometer test] pointed out that there was no testimony that there was general acceptance by the medical profession or general scientific recognition of the results of the test," permitted ample and searching cross-examination of the expert on the point of a generally accepted standard before proceeding with further testimony. Such having been properly established, Dr. Kivela was then permitted to testify in part as follows:

"This value I just mentioned was from zero up to or through .04%, and at that stage the amount of

* See, also, Barclay, Miller and Nickolls, Blood and Urine Alcohol Tests in Cases of "Driving Under the Influence," 19 Medico-Legal Journal (Eng), 98.

alcohol influence is not sufficient to materially impair the individual. Now from .05% up through .14% individuals will vary. Now, the majority of your individuals are definitely under the influence when they get up to about .10%. Some individuals are definitely under influence below .10%. The majority are under the influence at .10%. At .14% it has been my findings in the people with whom I have worked, at .14% even the most resistant system was definitely under the influence.

"*Q.* Is there a point where it is almost universally accepted and agreed that everybody would have their driving ability affected to a point where they should not be driving?

"*A.* Yes. That is the point I was getting to. At .15% or above, every person who has yet been tested in all of the thousands that have been tested, everyone was definitely under the influence of alcohol at .15% or above to the point where that person was incapable of operating a motor vehicle with the same care and prudence that he would normally possess due to the impairment produced in the individual by the alcohol concentration in his or her blood. * * *

"*Q.* Doctor, if any person is tested and their blood alcohol level was determined to be .20% which is this figure which we have here, would that person be under the influence to the point where he would not be able to drive a car safely?

"*A.* It is my opinion that anyone with .20% alcohol in their blood, which, of course, is above the .15%, would not be capable of operating a motor vehicle with the same care and prudence that they would normally possess and would not constitute a safe driver on the highway."*

* The opinion here expressed is conservative. The following, from Donigan's Chemical Tests and the Law (Traffic Institute, Northwestern University, 1957), indicates that concentrations of alcohol in the blood lower than .20% are considered by many authorities to establish the drinker as being under the influence of intoxicants:

"Of particular interest in this respect is the report of Michigan State University concerning its research project conducted for the National Safety Council during 1948–1951. Of the many persons

The defendant attacks the foregoing findings and conclusions upon various grounds. It is asserted

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tested as part of this project designed to evaluate the comparability and reliability of chemical tests to determine alcoholic influence, it was verified that, when the concentration of alcohol had reached or exceeded .15 per cent in the blood, as indicated by analysis of either the blood or breath, impairment of some type was noted in every case. In most cases, impairment was evident 'far below' this .15 percentage point.

"Of special importance are the following recommendations in that report:

" 'The results of a chemical test should be employed to confirm conclusions drawn from clinical and physical diagnoses. It should also be emphasized that arbitrary decisions based upon the so-called ".15% line of demarcation" be avoided. This value has often been advanced as the dividing line between the "drunk" and the "sober." Such a position is not in accordance with the observed facts, for the vast majority of persons who have .12% or .13% alcohol in their blood are decidedly impaired with respect to their automobile-driving capabilities.

" 'Serious consideration should be given to a downward revision of this figure which has become so firmly entrenched in the minds of many who are confronted with this problem daily. Greater emphasis should be placed on corroborating factors which are invariably brought to light in the "borderline" cases.

" 'The recommended uniform vehicle code delineates 3 zones of blood alcohol concentration for the guidance of law enforcement officials: *i.e.*, .00–.05% safe; .05–.15% questionable; above .15%, definitely under the influence. As a result of the work described in this paper, it is recommended that the lines of demarcation be amplified in the following manner: .00%–.05% safe; .05%–.10% *possibly* under the influence; .10%–.15% *probably* under the influence; above .15% *definitely* under the influence.'

"In the consideration of the validity and fairness of the now well-recognized standard in this country that every motorist with as much as .15% alcohol in his blood is under the influence of intoxicants to the point that his driving ability definitely has been impaired, a comparison of standards in this respect in European countries is in order. In some of those countries experience and experimentation in the field of chemical tests to determine alcoholic influence have been much more intensive over a longer period of time than in this country. Therefore, the development of techniques and public acceptance of standards in this particular field have been more firmly established. Public education and knowledge of the scientific principles involved are much further advanced than here. This has resulted in correspondingly more stringent restrictions as far as the drinking driver is concerned in some of those countries.

"As examples, a statutory presumption has been established in Norway that a driver of a motor vehicle is under the influence of intoxicating liquor when as little as .05% alcohol is in his blood. In Sweden, a driver with as much as .08% alcohol in his blood while operating a motor vehicle is subject to 'a fine proportionate to his income or by imprisonment of not more than 6 months.' A driver with an alcoholic concentration exceeding .15% 'is punished by im-

that urinalysis is "not reliable in establishing the alcohol blood level," pointing out that the receptacles used might be unclean, or that a defendant's overlong retention of urine might impeach the accuracy of the test made. It is argued, also that some individuals may be exceptions to general rules, able to withstand (without impairment of faculties) quantities of alcohol that would put others less rugged in a coma. If such be true it obviously has no bearing on the case before us. The defendant's weaving car, his staggering walk, and slurred speech are commonly recognized indicia of the influence of alcohol, not of rugged resistance thereto.

The evidentiary situation in this area of the law presents an odd combination of faith and of skepticism. Courts will freely admit as evidence of intoxication the testimony of untrained observers that a defendant had difficulty with his speech or his walking.* At the same time some courts will adamantly set their faces against the testimony of a scientific test because the results may be jeopardized by an abnormality of the individual, or the use of faulty techniques or unclean instruments in making the test. But even in respect of such commonly accepted lay indicia of intoxication as staggering, or impaired speech, these in truth may have resulted from pathological conditions entirely unconnected with intoxication, such as the results of cerebral concussion or of mild insulin shock.† If so, these

prisonment.' In Denmark, motor vehicle drivers ordinarily are found guilty of driving while under the influence when their blood alcohol concentration is found to exceed .10%. In Switzerland, it is usual for the courts to follow the same rule—when the blood alcohol concentration of a person operating a motor vehicle exceeds .10%, he is guilty of driving while under the influence. Thus, the nationally recognized standard in this country of .15% alcoholic concentration at which a motorist is considered definitely to be under the influence of intoxicants with respect to his driving ability is eminently fair to the driver." (pp 20, 21.)

* See *Suppe* v. *Sako*, 311 Ill App 459 (36 NE2d 603).

† Newman, Proof of Alcoholic Intoxication, 34 Ky L J 250, 253.

are proper matters to be shown in defense. A suspect's sample of urine shown to have been taken at a time reasonably soon after the incident complained of, subjected to a test having general scientific recognition, with results correlated to the probable blood alcohol concentration at the time of the violation charged, is properly admissible as bearing upon the issue of intoxication. Should the figure thus obtained and interpreted be misleading as to any particular individual's condition, because of abnormality of the person or the circumstances, these likewise are properly matters of defense, going to the weight to be given the evidence, but not, as argued, grounds for its complete exclusion.

So well established have these principles become at the time of this writing that, as it was noted in *Breithaupt* v. *Abram,* 352 US 432, 436, footnote 3 (77 S Ct 408, 1 L ed 2d 448):

"Forty-seven States use chemical tests, including blood tests, to aid in the determination of intoxication in cases involving charges of driving while under the influence of alcohol. Twenty-three of these States sanction the use of the tests by statute. * * * The finding of the presence of a certain percentage of alcohol, by weight, in the blood of a person gives rise to a presumption that he was under the influence of intoxicating liquor. * * * Other States have accepted the use of chemical tests for intoxication without statutory authority but with court approval."

(We note, in passing, this comparison: the statutory presumption of intoxication in many States is set at a figure of .15% or more by weight of alcohol in the blood,* whereas in the case before us the

* See Donigan, Chemical Tests and the Law (1957).
"Certain findings and knowledge of the scientists and medical experts have been incorporated into the uniform vehicle code in the form of legal presumptions as follows:
"(a) It is unlawful and punishable as provided in paragraph (d)

alcohol concentration in the blood was determined to be .20%.)

The state of the law in this country has been summarized in an annotation in 159 ALR 209, 210, in the following terms:

"From the cases generally, it is apparent that, subject to compliance with conditions as to relevancy in point of time, tracing and identification of the specimen, accuracy of the analysis, and qualifications of the witness as an expert in the field, there is rather general agreement that where the prosecution in a criminal case seeks to establish the intoxication of the accused, evidence as to the obtaining of a specimen of his body fluid at or near the time in question, evidence as to the alcoholic content of such specimen, as determined by scientific analysis, and expert opinion testimony as to what the presence of the ascertained amount of alcohol in the blood, urine, or other body fluid of an individual indicates with respect to the matter of such individual's intoxication or sobriety, is ordinarily admissible as

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of this section for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any vehicle within this State.

"(b) In any criminal prosecution for a violation of paragraph (a) of this section relating to driving a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the defendant's blood at the time alleged as shown by chemical analysis of the defendant's blood, urine, breath or other bodily substance shall give rise to the following presumptions:

"1. If there was at that time .05% or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of intoxicating liquor;

"2. If there was at that time in excess of .05% but less than .15% by weight of alcohol in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant;

"3. If there was at that time .15% or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor;

"4. The foregoing provisions of paragraph (b) shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not the defendant was under the influence of intoxicating liquor." (pp 18, 19).

relevant and competent evidence upon the issue of intoxication, at least where the accused voluntarily furnished the specimen for the test, or submitted without objection to its taking."

It is our holding that the results of the urinalysis taken and interpreted under the conditions described in the record before us were properly admissible as bearing upon the issue of whether or not defendant was under the influence of alcohol. We are not, it will be noted, holding that the finding of .25% of alcohol in the urine is conclusive evidence of intoxication, but rather that it is relevant and competent. The weight of the opinion of the experts, together with that of the other evidence in the case, is for the trier of the facts.

In the 1954 session (Act No 10) of the legislature, section 625, subparagraph (c) of the vehicle code* was amended by adding the italicized words thereto:

"On a second or subsequent conviction under this section *or a local ordinance substantially corresponding thereto,* he shall be guilty of a misdemeanor and punished."

In the case before us the people called to the stand the clerk of the Kalamazoo municipal court, who testified that he had charge of the records of such court. There was then offered in evidence, and received, an exhibit which, in the words of the court, "recites over the signature of the municipal justice in the warrant that William I. Miller did drive said motor vehicle while he the said William I. Miller was under the influence of intoxicating liquor in violation of chapter 5, section 2(a) of the police and license code of the city of Kalamazoo, Michigan, upon the public streets, highways, and places of said city." In the court's instructions to the jury

* CLS 1956, § 257.625, subd (c) (Stat Ann 1957 Cum Supp § 9.2325, subd [c]).

they were charged, in part, that they must find not only that defendant was the same person as was convicted in 1949, but that such conviction was for violation of an ordinance substantially corresponding to the statute. In this procedure there was no error. But appellant urges, also, that the amendment above set forth is being given a "retroactive" effect unintended by the legislature if convictions occurring prior to the passage of the amendment are considered in applying the penalties of the act. The argument of retroactivity as applied to statutes prescribing more onerous penalties for multiple infractions has been considered often by this court. See *People* v. *Mellor,* 302 Mich 537; *People* v. *Palm,* 245 Mich 396; and *In re Brazel,* 293 Mich 632. Heavier penalties for a second offense are well known to the law. They are in no manner *ex post facto,* nor do such amendments as we have before use have a retroactive effect. It is the subsequent offense that is punished more harshly, not the first.

There was no error in refusing to give appellant's requested instructions in verbatim form, or otherwise, in the charge. The instruction as given fairly covered the issues and the material substance embodied in the requests. *People* v. *Knoll,* 258 Mich 89.

Affirmed.

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

JOHNSON *v.* HALEY.

1. CONSTITUTIONAL LAW—DUE PROCESS.

   Due process requires only a "day in court," not a series of such days.

2. JUDGMENT—JURISDICTION—COLLATERAL ATTACK.

   The parties are precluded from collaterally attacking a judgment on the ground that the court had no jurisdiction over defendant, where he has appeared in the action to object that the court has no jurisdiction over him and the court overrules the objection and judgment is rendered against him.

3. SAME—RES JUDICATA—JURISDICTION—SPECIALLY-APPEARING DEFENDANT.

   Determination by court that it has jurisdiction over defendant is *res judicata,* precluding relitigation, even though such determination be erroneous on the facts or on the law, where the question is raised by specially-appearing defendant and he fails to appeal or final result of appeal is adverse.

4. SAME—JURISDICTION—DUE PROCESS.

   A defendant who appears for the purpose of objecting that the court has no jurisdiction over him thereby submits to the court for its determination the question whether the court has jurisdiction over him that is *res judicata* and a judgment based thereon does not deprive him of property without due process in the absence of a reversal on appeal.

5. SAME—PUBLIC POLICY.

   Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that the matters once tried shall be considered forever settled as between the parties.

REFERENCES FOR POINTS IN HEADNOTES

[1] 12 Am Jur, Constitutional Law § 573.
[2] 3 Am Jur, Appearances § 11; 30A Am Jur, Judgments § 880.
[3] 30A Am Jur, Judgments § 342.
[4] 3 Am Jur, Appearances, §§ 4, 42.
[5] 30A Am Jur, Judgments § 326.
[7] 30A Am Jur, Judgments § 241.

6. CONSTITUTIONAL LAW—DUE PROCESS—JURISDICTION.

The refusal of the enforcing court to examine the jurisdiction of the court of the sister State which rendered the judgment, after the question of jurisdiction had been litigated, is not a denial of due process (US Const, art 4, § 1).

7. JUDGMENT — RES JUDICATA — JURISDICTION — FULL FAITH AND CREDIT — COLLATERAL ATTACK.

Unappealed determination by California court that it had jurisdiction over the person of specially-appearing defendant made the question *res judicata* in the courts of that State and must be accorded full faith and credit and is not subject to collateral attack in this, the enforcing State (US Const, art 4, § 1).

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted June 5, 1959. (Docket No. 41, Calendar No. 47,802.) Decided October 13, 1959. Rehearing denied November 24, 1959.

Case by Helen Johnson against Catherine Ella Rae Haley based on judgment entered in California under provision in motor vehicle code for service of process on nonresidents. Judgment for defendant. Plaintiff appeals. Reversed.

Albert M. Colman, for plaintiff.

Berris, Poindexter & Berris (*Thomas L. Poindexter,* of counsel), for defendant.

SMITH, J. The validity of a California judgment, rendered against a resident of Michigan, is before us.

Defendant Catherine Haley is, in the words of the pretrial statement, in the "automobile driveaway business with office in Detroit." She arranges the delivery of cars from Detroit to distant points. Her legal status with respect to the owner of the car and driver thereof is controverted. One of the cars being delivered under this arrangement, whatever it may be, was involved in an accident in the city of Oakland, California, causing plaintiff to suffer personal injuries.

Plaintiff filed suit in the superior court of Alameda county, California, against defendant Haley, and against the driver of the car, James Caldwell, and the owner, Frank Loney, alleging that Caldwell was acting as Haley's agent and that the accident occurred while he was acting within the course of his agency.

Service of summons was made upon the director of motor vehicles of the State of California, under section 404 of the California vehicle code,* with copies, as required by the statute, to defendant in Detroit by registered mail. She appeared specially in the California court, moving to quash service of summons upon the grounds that she was not a resident of California, was not the owner of the car, had never operated any car described in the complaint within the State of California, and that the driver, James Caldwell, was neither her agent nor her servant but was, rather, an independent contractor. In support of these assertions defendant attached her affidavit, describing in detail her arrange-

* "The acceptance by a nonresident of the rights and privileges conferred upon him by this code or any use of the highways of this State as evidenced by the operation by himself or agent of a motor vehicle upon the highways of this State or in the event such nonresident is the owner of a motor vehicle then by the operation of such vehicle upon the highways of this State by any person with his express or implied permission, is equivalent to an appointment by such nonresident of the director or his successor in office to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against said nonresident operator or nonresident owner growing out of any accident or collision resulting from the operation of any motor vehicle upon the highways of this State by himself or agent, which appointment shall also be irrevocable and binding upon his executor or administrator. Where the nonresident has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such nonresident in the same manner and on the same notice as is provided in the case of the nonresident. Where an action has been duly commenced under the provisions of this section by service upon a defendant who dies thereafter, the court must allow the action to be continued against his executor or administrator upon motion with such notice as the court deems proper." (California vehicle code, § 404[a], Deering's California Codes Annotated, 1957 Supp.)

ments both with the driver of the car, defendant Caldwell, and the owner of the car, defendant Loney, denied control over Caldwell, and submitted a copy of the contract which, she says, she "arranged" between Caldwell and Loney. The California court thereafter held that defendant Haley's motion to appear specially for the purpose of moving to quash service of summons be granted but, as to the motion itself, held that "the motion of said defendant Catherine Ella Rae Haley to quash service of summons is denied." Subsequent thereto, in defendant Haley's words, she "did not appear and defend and was subjected to judgment by default."

Suit was then commenced in the circuit court for Wayne county, praying for judgment in Michigan based upon the California judgment, an authenticated copy of which was placed in evidence. Plaintiff prays, in effect, that we give full faith and credit* to the California judgment.

Defendant, however, contended again in the Wayne circuit, as she had before the California court, that the driver of the car was an independent contractor, that she (Haley) neither owned nor operated the car, and that the State of California had no jurisdiction over her. This argument as to agency was here more successful than in California. The circuit judge entered judgment of no cause for action.

Before us defendant argues that the circuit judge has made his decision upon a question of fact (was or was not driver Caldwell the agent of defendant Haley?) and, decision having been made in defendant's favor, "fully supported by the evidence," this court should not disturb.

The difficulties with the argument thus presented are several. In the first place the fact-law dichotomy relied upon, save in the simplest of contexts, is slip-

* U.S. Constitution, art 4, § 1.

pery and ambiguous.* Whether John Doe is the husband of Mary Roe, rather than Mary's son, or her brother, may be described as an issue of fact in a controversy over identity. But if John has 2 alleged former wives living, one divorced by mail from Latin America, the other divorced in this country but with questionable service of process, the question whether Mary is the wife of John may be a legal question of enormous complexity. Likewise here, whether driver Caldwell was the agent of defendant Haley presents one of the knottiest legal problems our courts face today, the distinction between agent and independent contractor. In the context here presented it is not merely a question of fact.

Even, however, if the question could reasonably be regarded as one merely of simple fact, we would have made but little progress towards the resolution of the controversy before us. True it is that we are reluctant to disturb on appeal determinations of fact below. But this self-imposed canon of our scope of review does not embody a whole code of justice, answering, willy-nilly, any constitutional or procedural problem presented to us, even if involving (as here, for example) the scope of *res judicata* or the interpretation of the full faith and credit clause.

The controlling issue may be very simply stated: In how many courts may a party litigate his case? If he loses in, say Ohio, can he relitigate in Indiana, in Illinois, in Michigan, as his judgment-creditor pursues him across the nation?

Modern courts say not. Due process requires only 1 day in court, not a series of days. The Restatement of the Conflict of Laws (1948 Supp, § 451) states with accuracy the current law in the following terms:

* See Brown, Fact and Law in Judicial Review, 56 Harv L Rev 899.

"(1) Where a defendant appears in an action to object that the court has no jurisdiction over him and the court overrules the objection and judgment is rendered against him, the parties are precluded from collaterally attacking the judgment on the ground that the court has no jurisdiction over the defendant."

The Restatement of Judgments, § 9, embracing cognate material, contains the following:

"Where, however, the defendant appears in the action only to object that the court has no jurisdiction over him, that is where he enters a special appearance, the court does not acquire jurisdiction over him because of his appearance (see § 20), except to decide the question so raised. But if the court determines that it has jurisdiction over him, even though that determination is erroneous on the facts (see illustrations 1 and 2) or on the law (see illustration 3), the determination is *res judicata* between the parties. This is an application of the general principle of *res judicata,* precluding the parties from relitigating a matter determined by a court after a fair opportunity has been afforded to them to litigate the matter (see § 1).

"If the defendant appears in an action for the purpose of objecting that the court has no jurisdiction over him, he thereby submits to the court for its determination the question whether the court has jurisdiction over him. If the court erroneously determines that it has jurisdiction over the defendant, he has ground for reversal in an appellate court, and ground for carrying the case to the supreme court of the United States since a judgment rendered against him by a court having no jurisdiction over him deprives him of property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States. If, however, he does not avail himself of these remedies, or if the judgment is affirmed, or if the appellate court or the supreme court of the United States de-

clines to consider the case, the defendant cannot thereafter successfully contend that the judgment was void, even though in fact the court had no jurisdiction over him. The defendant, having submitted the question of jurisdiction to the court, the court has jurisdiction to determine the question of its jurisdiction over the defendant, and the determination of that question is *res judicata.*"

The leading case on this phase of the narrow issue before us is *Baldwin* v. *Iowa State Traveling Men's Association,* 283 US 522 (51 S Ct 517, 75 L ed 1244). There the defendant appeared specially in the Federal district court in Missouri and moved to set aside service of process, quash the return, and dismiss the case for want of personal jurisdiction. The motion was overruled, with leave to plead within 30 days. No plea was filed and the cause proceeded to judgment. The district court for southern Iowa, having reheard the attack upon jurisdiction, dismissed action brought on the judgment.

In reversing such holding the court held as follows (pp 524–526):

"The substantial matter for determination is whether the judgment amounts to *res judicata* on the question of the jurisdiction of the court which rendered it over the person of the respondent. It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction. That fact would be important upon appeal from the judgment, and would save the question of the propriety of the court's decision on the matter even though after the motion had been overruled the respondent had proceeded, subject to a reserved objection and exception, to a trial on the merits (citing cases). The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance,

the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction (citing cases). It had also the right to appeal from the decision of the Missouri district court, as is shown by *Harkness* v. *Hyde,* 98 US 476 (25 L ed 237), and the other authorities cited. It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

It may be noted, in passing, that in an action to enforce a foreign judgment, the refusal of the enforcing court to examine the jurisdiction of the court of the sister State which rendered the judgment, after the question of jurisdiction had been litigated, is not a denial of due process. *Chicago Life Insurance Co.* v. *Cherry,* 244 US 25 (37 S Ct 492, 61 L ed 966).

The superior court of Alameda county, California, then, having ruled as to the controverted issue presented in the special appearance that it had jurisdiction over the person of the defendant Haley, and no appeal having been taken therefrom, that question was *res judicata* in the courts of California. See *Estate of Estrem,* 16 Cal 2d 563 (107 P2d 36). The full faith and credit clause requires that upon the facts before us we give the judgment the same effect

that it has in the State of its rendition. We hold in accordance with the rulings of the supreme court of the United States (See *Sherrer* v. *Sherrer,* 334 US 343, 350 [68 S Ct 1087 and 68 S Ct 1097, 92 L ed 1429, 1 ALR2d 1355]; *American Surety Company* v. *Baldwin,* 287 US 156 [53 S Ct 98, 77 L ed 231, 86 ALR 298]) that "the doctrine of *res judicata* must be applied to questions of jurisdiction arising in State courts involving the application of the full faith and credit clause where, under the law of the State in which the original judgment was rendered, such adjudications are not susceptible to collateral attack." The reasons for such holding are not obscure. Among others, without full faith and credit, our nation would remain merely a loose aggregation of independent sovereignties, uninterested in, and oblivious to, the rights and duties imposed by the laws and judgments of sister sovereign States. See the opinion of Mr. Chief Justice Stone, speaking for the court in *Magnolia Petroleum Co.* v. *Hunt,* 320 US 430, 439, 440 (64 S Ct 208, 88 L ed 149, 150 ALR 413). We would not be taken as ruling beyond the facts before us. This is an action for money judgment rendered in a civil action in a foreign State after contest and decision in such State upon jurisdiction over the person of the defendant.

The circuit court was in error in entering judgment of no cause for action. The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion. Costs to appellant.

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

JOHNSON *v.* GRAPENTIEN.

VENDOR AND PURCHASER—ASSIGNMENTS—CONSENT OF LANDLORD AND LICENSOR—WAIVER.

Waiver of defendant vendors' obligation to obtain written consent of landlord to assignment of lease and of ice cream confection licensor to assignment of license *held*, established in purchasers' suit for rescission by written agreements entered into at time closing arrangements were effected, such obligation as to assignments being deferred until balance of purchase price of the business was paid in full.

Appeal from Wayne; Baum (Victor J.), J. Submitted June 3, 1959. (Docket No. 16, Calendar No. 48,130.) Decided October 13, 1959.

Bill by Fred Johnson and F. L. Reams, doing business as Reams and Johnson Dairy Queen, against Frank Grapentien and Elizabeth Grapentien for rescission of contract as to purchase of business. Bill dismissed. Plaintiffs appeal. Affirmed.

John L. Potter, for plaintiffs.

McClintock, Fulton, Donovan & Waterman (*Thomas A. Roach,* of counsel), for defendants.

BLACK, J. Defendants, occupying leased premises for the purpose, were engaged prior to March 20,

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REFERENCES FOR POINTS IN HEADNOTES

32 Am Jur, Landlord and Tenant § 341; 33 Am Jur, Licenses § 6.

Waiver by lessor of failure to comply with conditions of lease as to manner or terms of assignment by lessee. 42 ALR 1108.

1956 in carrying on what is known in the record as a "Dairy Queen business." The business was one of retail sale of an ice cream confection which is manufactured by patented machinery and sold by authorized retailers under license. On the given date certain written agreements (pursuing in general but not in all particulars a previous preliminary agreement) were entered into between plaintiffs as purchasers and defendants as sellers, whereby defendants agreed for executory consideration to transfer their interest in the business to plaintiffs; to assign plaintiffs their interest in the business lease and the business license, and to turn over the business and leasehold forthwith to plaintiffs. In pursuance of such stipulations plaintiffs were given possession of the leasehold and undertook business. However, certain originally stipulated consents, on the part of landlord and licensor respectively, to the agreed assignment of lease and license, were never obtained. Why they were not, and whether plaintiffs later waived strict performance of defendants' original undertaking in such regard, became a cause if not the prime cause of this litigation.

Business did not pan out well. Disputes arose between the parties with respect to representations and breach. Finally, and on July 6, 1956, plaintiffs wrote a letter of rescission to defendants and commenced this suit to rescind, alleging fraud, breach of contract and failure of consideration. Issue having been joined, the matter came to hearing before the Honorable Victor J. Baum, circuit judge of the third circuit, and resulted in an opinion and decree by which it was ruled that "plaintiffs have no cause for equitable relief." From such decree plaintiffs have appealed.

The chancellor's opinion is lengthy, able and painstaking. Comparison thereof with the appendices of the parties, and of the respective briefs as re-

ceived, leads to unanimous conviction that the case was exhaustively tried and fairly decided below and that the chancellor's conclusions upon typical and decisive issues of fact, arising as such do from the chronic disputes which seem to attend the purchase and sale of small businesses, must be sustained in view of our oft-stated position respecting review of similar issues in chancery cases.

Plaintiffs insist, and this in essence is their appeal, "That there was a failure of consideration in the contract of purchase by not obtaining written consents to the assignment of the lease and franchise." However, plaintiffs were unable to persuade the chancellor, and are unable to so persuade here, that the original stipulation by defendants—to immediately obtain such consents—was not waived by subsequent agreement or agreements of the parties. The chancellor found and ruled, and we approve:

"Thus, under the preliminary agreement, the following situation obtained. The sellers were to deliver a marketable title to the business assets, including their franchise rights and leasehold rights at the time of closing. If the landlords' consent to the assignment of the lease were required by its terms, the sellers were also to obtain such consent by the time of closing. The preliminary agreement was silent concerning any consent from the licensors which the franchise agreement might require for an assignment of the licensees' interest. However, the preliminary agreement included the 'Dairy Queen franchise' among the assets for which a marketable title was to be conveyed, and this, presumably called for a valid and effective assignment of the licensees' franchise rights at the time of closing. In view of the fact that the franchise agreement required the Grapentiens to have the written approval of the licensors before making an assignment, it is fair to conclude that they were required by the preliminary agreement to deliver such written consent

at the time of closing. Thus, under the preliminary agreement, it was the Grapentiens' obligation at the time of closing to deliver assignments of both their leasehold and franchise rights accompanied by appropriate written consents in each case. * * *

"Although, as we have just concluded, the preliminary agreement obligated the Grapentiens to assign their leasehold and franchise rights at the time of closing, all this was changed during the closing negotiations. On March 20, 1956, the night of the closing, the parties entered into 2 written agreements altering the Grapentiens' obligation. They are plaintiffs' exhibits 10 and 11. By these written agreements, the sellers' obligation to assign their leasehold and franchise rights was deferred until such time as the balance of the purchase price should be paid in full—which could be expected to occur many years thereafter under the payment schedule provided for in the preliminary agreement."

This case calls for no lengthy discussion. That may be found in the 81-page opinion below with which, in general, we find ourselves in agreement.

Decree affirmed. Costs to defendants.

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

SWANSON *v.* CITY OF MARQUETTE.

1. APPEAL AND ERROR—MOTION TO DISMISS.

   The Supreme Court accepts as true all well-pleaded facts in declaration on appeal from order granting defendant's motion to dismiss.

2. INFANTS—TRESPASS—LANDOWNER'S KNOWLEDGE OF DANGEROUS CONDITION.

   Infants are not barred, by reason of being trespassers, from all rights of recovery against a landowner whose premises contain a hazardous condition of which he had actual or constructive knowledge.

3. NEGLIGENCE—PLEADING—DANGEROUS INSTRUMENTALITY—ELECTRIC SUBSTATION—FENCES.

   Declaration stated a cause of action, where it alleged that defendant city maintained an electric substation containing high-voltage wires that constituted a dangerous instrumentality surrounded by a fence or wall with holes in it that made it dangerous to children playing in the vicinity and that such negligence was the proximate cause of injury to plaintiff's 8-year-old son who was severely injured by reason of contact.

4. SAME—ARTIFICIAL CONDITION—DANGER TO CHILDREN.

   A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by an artificial condition which he maintained, where the place is one upon which the possessor knows or should know children are likely to trespass, the condition involves an unreasonable risk of death or serious bodily harm to such children and the children do not, because of their youth, realize the risk involved in intermeddling in it or in coming within the area, and the utility to the possessor of maintaining the condition is slight as compared to the risk to the young children involved.

5. MUNICIPAL CORPORATIONS—ELECTRIC SUBSTATIONS—NOTICE.

   Allegation of timely notice to city, as owner of electric substation which was specific as to place, time and nature and result of the accident and which gave the city ample notice and opportunity to investigate *held*, sufficient allegation of

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REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error §§ 831, 933.
[2] 38 Am Jur, Negligence §§ 40, 109.
[3, 4] 38 Am Jur, Negligence § 89.
[5] 18 Am Jur, Electricity § 57.
[6] 38 Am Jur, Municipal Corporations § 675.

compliance with pertinent provisions of city charter (Marquette Charter, § 17.5).

6. SAME—CONSTRUCTION OF CHARTER—NOTICE OF TORT.

A provision of city charter relative to notice of claim against city for damages for injuries due to tort of city is to be liberally construed.

7. PLEADING—MOTION TO DISMISS—NOTICE OF CLAIM TO MUNICIPAL CORPORATION.

Allegations in declarations in actions for injuries to 8-year-old boy by reason of his contact with high voltage wires in electrical substation that it was a city public utility operated for profit, and as such not subject to charter requirements as to notice of claim, must be accepted on its face in determining whether to grant or deny motion to dismiss (Court Rule No 18, § 3 [1945]; Marquette Charter, § 17.5).

Appeal from Marquette; Jackson (Glenn W.), J. Submitted January 6, 1959. (Docket Nos. 1, 2, Calendar Nos. 47,647, 47,648.) Decided October 13, 1959.

Cases by Eugene Swanson, individually and as guardian of Keith Swanson, a minor, against the City of Marquette, a municipal corporation, for medical expense and for personal injuries sustained by minor when he came in contact with high-voltage electrical equipment. Cases consolidated and dismissed on motion. Plaintiff appeals. Reversed and remanded.

Baldwin & Kendricks (*George T. Kendricks,* of counsel), for plaintiff.

Waldo A. McCrea, for defendant.

EDWARDS, J. These are other negligence actions dismissed upon motions, without answer or trial. They involve claims for the injuries and medical expenses of an 8-year-old boy who was seriously burned by coming into contact with high-voltage equipment of defendant's public lighting commission.

In appeals from such dismissals, we, of course, accept as true all well-pleaded facts in the declaration.

Appellant's amended declarations recite that on March 5, 1955, defendant city of Marquette "owned, maintained and operated for profit an electric public utility supplying electrical energy to the city," and that on that date, as a portion of its electrical transmission system, defendant maintained an electrical substation or transformer vault on the premises of St. Luke's hospital, in the city of Marquette. The declarations further allege that defendant had a duty to exercise a high degree of care in the operation of this substation as to persons on the premises, and more particularly as to plaintiff's 8-year-old son; and that such duty required the construction and maintenance of the vault and fence so that children could not easily enter same and come in contact with the high-voltage wires contained therein.

The declarations further allege that, although there was a vault and there was a wooden fence around the substation in question, there were holes in the fence and in the top of the vault which defendant either knew existed, or should have known existed, on March 5, 1955. The declarations further allege that the substation was located within 100 feet of playground apparatus and some construction materials placed on the hospital site for the purpose of construction work being engaged in, and that defendant either knew, or should have known, that small children played in the immediate vicinity.

The declarations further allege that plaintiff's 8-year-old son did, in fact, fall or enter through 1 of the holes in the fence and through a hole in the transformer vault, and in seeking to escape therefrom came in contact with high-voltage wires with his subsequent serious injury.

The declarations also set forth timely notice to the city of Marquette of the happening of the injury, but they do not allege the filing of any attested claim prior to the institution of suit some 2 years after the happening of the injuries (which alleged defendant's negligence in detail).

As we read Judge Jackson's opinion granting defendant's motions to dismiss, he felt constrained to grant the motions primarily on the ground that Michigan case law barred recovery for this 8-year-old child's injuries because he was not shown by the declarations to have been at the time of his injuries other than a trespasser. His opinion said:

"Michigan has clearly adopted and maintained the rule that trespassers have no rights of action for injuries sustained upon the property of others. The person whose property is trespassed upon owes no duty to the trespasser, except not to wilfully or wantonly injure him. *Ryan* v. *Towar,* 128 Mich 463 (55 LRA 310, 92 Am St Rep 481), clearly laid down this rule that owners of real property owed no duty to trespassers, even though they be children.

"*Ryan* v. *Towar, supra,* is in line with *Formall* v. *Standard Oil Co.,* 127 Mich 496 (10 Am Neg Rep 402).

"The cases are reviewed at length in *LeDuc* v. *Detroit Edison Co.,* 254 Mich 86, particularly with reference to attractive nuisance cases, where the rule is announced (p 89):

" 'The doctrine has not been permitted to seriously impair the rule that a property owner owes no duty to protect trespassers, adult or infant, from injury other than wanton or wilful, as has been done in some States.' "

Judge Jackson's opinion in these matters is dated November 23, 1957. On March 4, 1958, this Court decided *Lyshak* v. *City of Detroit,* 351 Mich 230, the effect of which was to modify prior Michigan cases

which held, or implied, that infant trespass automatically barred all rights of recovery against a landowner whose premises contained a hazardous condition of which he had actual or constructive knowledge: *Hargreaves* v. *Deacon,* 25 Mich 1; *Formall* v. *Standard Oil Co.,* 127 Mich 496 (10 Am Neg Rep 402); *Ryan* v. *Towar,* 128 Mich 463 (55 LRA 310, 92 Am St Rep 481); *LeDuc* v. *Detroit Edison Co.,* 254 Mich 86; *Holland* v. *Wisconsin Michigan Power Co.,* 296 Mich 668 (9 NCCA NS 570); *Morris* v. *Lewis Manfg. Co.,* 331 Mich 252 (28 ALR2d 214).

In the instant cases we have the allegation of an electrical substation containing high-voltage wires constituting a dangerous instrumentality. See *Warren* v. *City Electric R. Co.,* 141 Mich 298 (19 Am Neg Rep 21); *Clumfoot* v. *St. Clair Tunnel Co.,* 221 Mich 113; *Detroit Edison Co.* v. *Ewing* (CCA6), 122 F2d 852. We have the allegation that defendant had knowledge, or in the course of ordinary care should have had knowledge, of holes in the fences or walls surrounding the substation, making same dangerous to children in the vicinity. See *Clumfoot* v. *St. Clair Tunnel Co., supra; Siegel* v. *Detroit City Ice & Fuel Co.,* 324 Mich 205; *Yarington* v. *Huck,* 218 Mich 100. We have the allegation that children played in the vicinity of the substation and that defendant either knew, or in the exercise of ordinary care should have known, that fact. See *Bridges* v. *Dahl* (CCA6), 108 F2d 228; *Lyshak* v. *City of Detroit, supra.* And finally, we have the allegation that defendant's negligence as recited was the proximate cause of the injuries complained of.

In 2 Restatement, Torts, § 339,* our instant problem is dealt with as follows:

* In *Hyndman* v. *Pennsylvania R. Co.,* 396 Pa 190 (152 A2d 251) (decided May 8, 1959), involving a trespassing minor injured in contact with a transformer, the Pennsylvania supreme court relied squarely upon section 339 of Restatement in sustaining a jury verdict.

"A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if

"(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

"(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and

"(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

"(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

We believe the declarations stated a cause of action and should not have been dismissed on defendant-appellee's motions.

The circuit judge's opinion dismissing these suits also stated that under the charter of the city of Marquette plaintiff's suits were prematurely filed because of failure to comply with city charter requirements pertaining to the filing of sworn claims.

Although no testimony was taken before the circuit judge on the motions to dismiss in accordance with Court Rule No 18, § 3 (1945), it seems that he considered that the charter provision was before him as a result of an affidavit from the city clerk attached to defendant's motions to dismiss. Appellant raises no issue before us in this regard and does not dispute the authenticity of the quoted charter provisions. The notice and claim relied upon by plaintiff, we find attached to his amended declarations.

The circuit judge found the notice deficient in this language:

"The original notice required to have been filed within 60 days, asserts that the damages were sustained and due to the negligence of defendant, or its employees, but it fails to state any particular defect or act of negligence of the defendant, or its officers, or employees. Such mere general allegation of negligence furnished no information upon which to investigate the same."

The notice, timely served within the 2-month requirement, did say:

"Eugene Swanson and Joan Swanson, each individually, and Eugene Swanson, as guardian of the person and estate of Keith Swanson, minor, for and on behalf of said minor, all of the city of Marquette, Michigan, pursuant to the provisions of the city charter of the city of Marquette, section 17.5 of chapter 17, hereby give notice to the city of Marquette that Keith Swanson, minor, on or about March 5, 1955, at about 5:30 in the afternoon of said day, was severely and permanently burned and injured when he either fell into or crawled into the electrical substation enclosure, property of the city of Marquette, as located upon the St. Luke's hospital grounds adjacent to and immediately north of the laundry building on said premises in the city of Marquette, Michigan; that said injuries and burns were to the left side of said minor's face, both wrists, both hands, both knees and left eye.

"They further state that the total extent of the damages to said minor cannot now be ascertained; that, in fact, the minor is confined to the University hospital at Ann Arbor, Michigan, and that they have been advised that he may be so confined for a period up to 5 years; that several fingers on both hands have been amputated and that possibly both hands may be amputated, depending upon his future condition.

"They further advise that, because of the physical and mental condition of the minor, it is considered inadvisable by hospital authorities to question said

minor in detail to determine exactly how the accident occurred.

"They further state that the witnesses to the accident known at this time are Louis Langlois, Mrs. Jean St. Onge, Miss Audrey Shade, Wilfred Sayen, George Johnson, and 2 people yet unidentified, 1 of which allegedly was a blond girl about 16 years of age.

"They further assert that damages have been sustained by each and all of them due to the negligence of the said city, its officers and/or employees in the construction, operation and maintenance of the substation; that each of them intends to hold the city of Marquette, and others, liable for such damages as may have been sustained."

The notice was specific as to place, time, and nature and result of the accident. Under the circumstances existing in this case, we feel defendant city was given ample notice and opportunity to investigate.

In *Pearll* v. *City of Bay City,* 174 Mich 643, 647, Justice STEERE discussed a similarly technical objection to a notice of injury in language we think applicable here:

"The purpose of the charter provision is to furnish the municipal authorities promptly with notice that a claim for damages is made, and advise them of the time, place, nature, and result of the alleged accident, and a sufficient statement of the main facts, together with names of witnesses, to direct them to the sources of information that they conveniently may make an investigation. It is said our courts are inclined to favor a liberal construction of these requirements so long as they tend in that direction and are not misleading. In *Ridgeway* v. *City of Escanaba,* 154 Mich 68, 70, this Court said:

" 'We have been inclined to favor a liberal construction of statutes requiring notice of claims, and have not denied relief when by any reasonable interpretation the notice could be said to be in sub-

stantial compliance with the statute, or where the defect had been waived by the council.'

"See, also, *Brown* v. *City of Owosso,* 126 Mich 91 (9 Am Neg Rep 505); *Oesterreich* v. *City of Detroit,* 137 Mich 415. We regard the contention of defendant in this particular as demanding a more technical construction than is requisite or reasonable under the authorities in this State, and think the notice, taken as a whole, sufficiently complied with the requirements in informing defendant as to the extent and nature of complainant's injuries, so far as then known."

See, also, *Knapp* v. *City of Detroit,* 295 Mich 311; *Hummel* v. *City of Grand Rapids,* 319 Mich 616; *Penix* v. *City of St. Johns,* 354 Mich 259, 261.

Further, the declarations filed by plaintiff allege that this is a city public utility operated for profit. Such an allegation, accepted on its face as we are required to do for purposes of the motion to dismiss (*Kaufman* v. *Nystrom,* 341 Mich 228), would bring the present cases within the rule as laid down by this court in *Borski* v. *City of Wakefield,* 239 Mich 656.

See, also, *Andrews* v. *City of South Haven,* 187 Mich 294 (LRA1916A, 908, Ann Cas 1918B, 100). *Cf. Northrup* v. *City of Jackson,* 273 Mich 20, decided upon somewhat different facts.

Reversed and remanded for trial. Costs to appellant.

SMITH, BLACK, VOELKER, and KAVANAGH, JJ., concurred with EDWARDS, J.

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

BOEREMA *v.* JOHNSON.

1. APPEAL AND ERROR—CHANCERY CASES—DE NOVO REVIEW.
   An appeal from decree dismissing executors' bill to set aside deed given by decedent to defendant on ground of fraud, undue influence and mental incompetency is heard by the Supreme Court *de novo* on the record.

2. DEEDS—SETTING ASIDE—FRAUD—UNDUE INFLUENCE—EVIDENCE.
   Record in suit to set aside deed by decedent widower to landlady where he had roomed most of the time following his wife's death *held,* without direct proof of fraud or undue influence on part of defendant grantee.

3. SAME—MENTAL COMPETENCY—EVIDENCE.
   Trial court's finding that elderly grantor widower was of sound mind at time he executed deed of cottage property some 6 months before he died, which deed his executors seek to have set aside, is not disturbed under record showing deceased had never been committed or subjected to guardianship, that while his consumption of beer was frequent and in some quantity, the testimony as to his condition at time of the execution of the deed was not such as to cause the Supreme Court to reverse the trial judge.

4. SAME—OLD AGE—ADDICTION TO ALCOHOL—MENTAL COMPETENCY.
   Proof of old age and alcoholic addiction, standing alone, do not constitute proof of incompetence to execute a deed.

5. SAME—MENTAL COMPETENCY—INTOXICATING LIQUORS.
   Mental incompetency to execute a deed, claimed to be due to addiction to alcohol, must be shown to have resulted from actual intoxication clouding his understanding or dethroning his reason at the time of executing the deed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 3 Am Jur, Appeal and Error § 815.
[2] 9 Am Jur, Cancellation of Instruments § 63.
[3–5] 16 Am Jur, Deeds § 85; 28 Am Jur, Insane and Other Incompetent Persons §§ 67, 72, 135, 136.
[6] 9 Am Jur, Cancellation of Instruments §§ 24, 25.

6. SAME—OVERREACHING—FRAUD—CONSIDERATION.
The Supreme Court scrutinizes carefully the transactions between strangers and the aged and infirm, where no consideration or inadequate consideration is shown, and will intervene to set aside a deed, if overreaching or fraud is proved or reasonably implied.

7. SAME—WIDOWER'S LANDLADY—STEPGRANDDAUGHTER.
Deed by elderly widower to defendant, his landlady of some 2 or 3 years following death of his wife, is not set aside at suit of executors and his stepgranddaughter, where deceased had left them both substantially more than his relationship with either or the services provided him by either would normally call for.

Appeal from Leelanau; Brown (Charles L.), J. Submitted April 8, 1959. (Docket No. 19, Calendar No. 47,787.) Decided October 13, 1959.

Bill by John Boerema and David Thomasma, executors of the estate of John G. Holden, deceased, and Geraldine Glynn against Belva Johnson to set aside deed. Bill dismissed. Plaintiff appeals. Affirmed.

Linsey, Shivel, Phelps & Vander Wal (*Leland D. Phelps,* of counsel) and *James Fitzpatrick,* for plaintiffs.

Charles H. Menmuir and *Glenn Aylsworth,* for defendant.

EDWARDS, J. This is an appeal in chancery from the order of a circuit judge, entered after hearing, dismissing a bill of complaint to set aside a deed. The deed was given by one John Holden, now deceased, to defendant-appellee Belva Johnson, his landlady in the last 2 years of his life. Plaintiffs-appellants are the 2 executors and the residual legatee of his estate under a will executed prior to the deed in question. The bill of complaint

claimed the deed was void because of fraud, undue influence and mental incompetence on the part of decedent.

This being a chancery appeal we, of course, hear it *de novo* on the record. The only question is whether plaintiffs sustained the burden of proof as to the grounds alleged for setting the deed aside.

John Holden was born in Belfast, Ireland, in 1878. He died September 14, 1955, in Leelanau county, Michigan where he had lived most of his 77 years. By the time of his death he had outlived most of his close relatives and he had accumulated a modest estate.

For many years Holden and his wife operated a resort at Burdickville on Glen lake in Leelanau county consisting of cabins, a gasoline station and a dining room and tavern where wine and beer were sold. In 1945 the Holdens sold their resort and moved to Grand Rapids. They invested the proceeds of the sale in land contracts. Mrs. Holden died in 1952 in Grand Rapids and the following year John Holden moved back to Leelanau county.

He left his Grand Rapids affairs in the hands of an attorney, who had a power of attorney and made collections and transacted business generally for him. In 1953 the attorney turned Holden's affairs over to 2 Grand Rapids men who owned cottages at Glen lake, John Boerema and David Thomasma, plaintiffs herein and executors under the will.

Holden had a habit which was at least partly responsible for this power of attorney arrangement. He was very fond of beer. Indeed there is testimony that for the last 20 years of his life he rarely went a day without consumption of that beverage in some quantity. It appears that this habit made him something of a spendthrift.

After Holden went back to Leelanau county in the winter of 1953-1954 he roomed with a Mr. and

Mrs. Charles Johnson. The testimony indicates that by then he was an object of some pity. His clothing was dirty; he frequently wet himself; he was old and lonely; he drank too much beer.

There is no dispute but that Mr. and Mrs. Johnson were good to him—that Mrs. Johnson got him cleaned up and that Mrs. Johnson and some other ladies took him out occasionally.

It appears that toward the end of his life Holden had much advice about the disposition of his property—much of it conflicting.

At the urging of his relatives and of John Boerema on January 2, 1954, Holden made a will. The will made appellant Geraldine Glynn residuary legatee. It contained no other bequests. The will said specifically:

"It is particularly my desire that she receive my cottage at Glen lake, Michigan, if the condition and circumstances of my estate will permit."

Mrs. Glynn was the granddaughter of Mrs. Holden by another marriage and had lived with the Holdens while she was growing up. When she married and moved to Grand Rapids she saw little of John Holden. She did not want him around her children when he was drinking. This apparently precluded much contact.

On June 21, 1954, Holden gave a deed of property to Harold Holden, a nephew. On August 10, 1954, he gave another deed to J. Scott Moore, another nephew.

On March 28, 1955, Holden went to the courthouse at Leland and signed a deed to defendant Belva Johnson for the Glen lake cottage. There was no monetary consideration.

Much testimony was presented by the parties as to John Holden's condition that day. The register of deeds who drew the deed at Holden's instruction

testified that Holden knew what he was doing, that he recited the lot and block number of the property from memory and that, "he didn't appear to be any different than any other time that I ever saw him." On the other hand Emelia Schaub, an attorney who saw him at the courthouse that day thought that he was under the influence of intoxicating liquor.

There is also much testimony about what John himself said about the day in question. One of his advisers, a Mrs. Salzwedel, reported him to have said that he was drunk and didn't know what he had done that day. To John Boerema he denied that he could remember the whole affair. One of his cronies however reported him as saying that he had "willed" the cottage to Belva Johnson because "they have been awful good to me."

In each of these conversations what Holden said about the giving of this deed appears directly related to the interest of the persons to whom he was talking.

The deed was signed March 28, 1955. John Holden died September 14, 1955. Death was caused by a heart attack and Holden had been up and about until it occurred. In the 6 months which intervened Holden had taken no steps to set the deed aside.

Holden died in the Johnsons' home and the Johnsons made the funeral arrangements. Mrs. Glynn was unable to attend.

On October 20, 1955, Holden's will was offered for probate and Mrs. Boerema testified that on January 2, 1954, when the will was made out in her opinion John Holden was of sound mind.

As of the time of trial Holden's estate as to which Mrs. Glynn is sole heir had assets of approximately $12,000 aside from the cottage property in dispute here.

So much for the facts. Actually none of them are in real dispute. What is in dispute is the de-

duction as to mental competence (particularly on March 28, 1955) drawn from them by various witnesses.

The chancellor who heard the witnesses concluded at the end of the hearing:

"That the record does not in any way show that there was any fraud, duress, undue influence, misrepresentation or overreaching used or practiced by defendant on the deceased in the obtaining of the warranty deed to the property."

We also are unable to find any direct proof of fraud or undue influence and it appears that appellant has abandoned these claims on appeal.

The chancellor also found that the deceased was of "sound mind * * * at the time he executed the deed."

Proofs of old age and alcoholic addiction standing alone do not constitute proof of incompetence. The evidence must show that at the time in question the person's reason was overthrown. The general rule was stated early by this court in *Wright* v. *Fisher*, 65 Mich 275, 284 (8 Am St Rep 886):

"A drunkard is not an incompetent, like an idiot, or one generally insane. He is simply incompetent upon proof that, at the time of the act, his understanding was clouded, or his reason dethroned, by actual intoxication."

See, also, *Somers* v. *Ferris*, 182 Mich 392; *Burns* v. *Misura*, 228 Mich 152.

John Holden had never been committed or subjected to guardianship. He transacted his own affairs (sometimes with assistance, which he himself secured) all of his life. Plaintiffs in this action are acting under and relying on a will executed less than 15 months preceding this deed. In that 15-month period Holden also had sold or deeded other

properties without his competence being challenged. There is no convincing showing that Holden's general condition had changed materially as of March of 1955.

As to the day in question when the deed was made out we have pointed to a conflict of testimony as to whether or not Holden was intoxicated. The only witness who had testified to Holden's being under the influence of liquor on the day the deed was given was Emelia Schaub, an attorney. The chancellor's interest in Holden's condition on that day produced this significant question and answer:

"*The Court*: But he could seem to talk sensibly and rationally when he didn't have too much, or could you tell? Did you know him well enough to know that?

"*The Witness*: Well, I haven't thought that over. Let's see, I just can't remember. It just seemed to me he always was just like that; but I don't know that he ever talked in a way that wouldn't be rational. I don't remember such an occasion as that."

This Court generally views with a jaundiced eye the transactions between strangers and the aged and infirm where no consideration or inadequate consideration is shown. And where overreaching or fraud is proved or reasonably implied we will not hesitate to intervene. *Noban* v. *Shoup*, 171 Mich 191; *Wagbo* v. *Smiseth*, 227 Mich 313.

We do not see this as such a case. Holden was old and probably much too fond of beer—but we believe there is no proof direct or implied that his reason was overthrown.

This is a contest between Holden's step-granddaughter and his former landlady over the disposition of a cottage. The truth of the matter is that John Holden left both of them substantially more than his relationship with either or the services

provided him by either would normally call for. But this record discloses no more logical objects of his bounty. We believe (as did the chancellor below) that John Holden knew exactly what he had done—and intended it that way all the time.

Affirmed. Costs to appellee.

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

LATREILLE *v.* STATE BOARD OF CHIROPRACTIC EXAMINERS.

1. PHYSICIANS AND SURGEONS—CHIROPRACTORS—LICENSE—FRAUD—BASIC SCIENCE EXAMINATION.

   Finding of trial court that plaintiff's license to practice as a chiropractor had been obtained by fraud *held*, fully justified by record showing false statement in application which then exempted him from taking basic science examination (CL 1948, § 338.1 *et seq.*)

2. SAME—CHIROPRACTOR—SUSPENSION OF LICENSE—FRAUD—TIME LIMITATION.

   The State board of chiropractic examiners acted within a specific statutory grant of power in suspending plaintiff's license as a chiropractor, where it suspended his license because it had been procured by amply proven fraud some 7 years before complaint, and pertinent statute does not contain a time limitation for suspension for such cause (CL 1948, § 338.157).

REFERENCES FOR POINTS IN HEADNOTES

[1, 8, 9] 41 Am Jur, Physicians and Surgeons § 48.
Fraud or misconduct connected with application for license as ground for revocation of license. 165 ALR 1141.
[2, 6, 7] 41 Am Jur, Physicians and Surgeons § 58.
[3] 33 Am Jur, Licenses §§ 21, 65.
[5] 33 Am Jur, Licenses § 65.
[10] 41 Am Jur, Physicians and Surgeons § 59.

3. LICENSES—PROFESSIONS—VESTED INTEREST.

Generally, a State license to practice a profession creates no vested interest, and the right which the license grants may be withdrawn for proper cause by the authority which granted it.

4. SAME—FRAUD—REVOCATION—SUSPENSION.

Material fraud in application for a State license is a proper cause for revocation or suspension.

5. SAME—SUSPENSION—STATUTES—POLICE POWERS.

The suspension of a professional license until statutory qualifications are met may not be considered as punishment, since it is rather an exercise of the State's discretion as to whether the person is properly qualified to continue holding the license, an exercise of the State's police powers.

6. LIMITATION OF ACTIONS—SUSPENSION OF LICENSES—CHIROPRACTORS.

A complaint to and ensuing hearing by the State board of chiropractic examiners as to the suspension of a license issued by the board is not a cause of action in any of the courts of this State to which the general statute of limitations is applicable (CL 1948, § 338.157; CLS 1956, § 609.13).

7. PHYSICIANS AND SURGEONS—CHIROPRACTIC EXAMINERS—LIMITATION OF ACTIONS.

The continuing responsibility of the State board of chiropractic examiners to see to it that only qualified persons practice prevents the application of the general statute of limitations to proceedings to suspend a license issued by the board (CL 1948, § 338.157; CLS 1956, § 609.13).

8. LICENSES—SUSPENSION—CHIROPRACTORS—FRAUD.

Person who obtained, by fraud, a license to practice as chiropractor never had a legal right so to practice and order suspending his license to do so until he had complied with statutory conditions presently applicable to him deprived him of nothing to which he was entitled (CL 1948, § 338.1 *et seq.*; § 338.157).

9. PHYSICIANS AND SURGEONS—CHIROPRACTORS—SUSPENSION OF LICENSE—BASIC SCIENCE EXAMINATION—FRAUD—RECIPROCITY.

A license to practice as a chiropractor, granted upon reciprocity in such matters with Kentucky was properly suspended for noncompliance with basic science act, where fraud involved a forged matriculation certificate indicating alternative to basic science examination was applicable (CL 1948, § 338.1 *et seq.*; § 338.157).

10. SAME—SUSPENSION OF LICENSE—SUFFICIENCY OF NOTICE.

Complaint and notice to plaintiff as to proceeding to suspend his license to practice as chiropractor until he had passed basic science examination *held*, to have been signed by proper parties and to have been sufficiently informative to meet requirements of the statute relative to suspending his license and to apprise him of the nature of the charge against him (CL 1948, § 338.1 *et seq.*; § 338.157).

Appeal from Genesee; Gadola (Paul V.), J. Submitted April 9, 1959. (Docket No. 27, Calendar No. 47,799.) Decided October 13, 1959.

Appeal by James W. Latreille to review order of Michigan State Board of Chiropractic Examiners suspending his license to practice. Judgment affirming suspension. Plaintiff appeals. Affirmed.

Harold Helper, for plaintiff.

Paul L. Adams, Attorney General, *Samuel J. Torina*, Solicitor General, and *Gregory H. Frederick*, Assistant Attorney General, for defendant.

EDWARDS, J. This is an appeal from a judgment entered in the circuit court of Genesee county affirming an order of the State board of chiropractic examiners suspending the license of appellant James W. Latreille "until such time as he complies with the Michigan basic science act, PA 1937, No 59, as amended."

The action of the State board was taken after a hearing upon charges that appellant's license to practice chiropractic in Michigan was obtained through fraud and deceit. Appellant appealed to the circuit court. The circuit judge, after hearing the evidence on the fact question involved, found that appellant's license was procured by fraud.

The significant questions posed on appeal are:

(1) Do the proofs show fraud in the obtaining of the license in question?

(2) Was the suspension barred by the fact that the complaint was filed more than 7 years after issuance of the license?

The application for the license, which appellant signed under oath, set forth dates of birth and graduation from high school which appellant admits were false. Attached to the filed application and admitted in evidence was a photostatic copy of a certificate of matriculation in the Ross College of Chiropractic. The date of matriculation thereon stated is September 16, 1936. It is not disputed that on that date James W. Latreille was 13 years of age, and that in fact he never attended Ross College. The significance of this certificate is indicated by comparison with another exhibit—a handwritten Ross College matriculation certificate identical with the photostat except for showing the name of James *H.* Latreille (the appellant's father, from whose file in the State board of chiropractic examiners' office the exhibit was taken) and except for showing the date of matriculation as September 16, *1931.*

The most casual examination of the photostatic copy shows that it had been altered by writing a "W" over the "H" of the middle initial in the certificate, and the figure "6" over the last figure in the date September 16, 1931.

At the time of appellant's application a State law, CL 1948, § 338.1 *et seq.* (Stat Ann 1951 Cum Supp § 14.791[1] *et seq.*), required any person practicing healing in Michigan to take a basic science examination. The statute exempted any person matriculated in any chiropractic school or college on or before October 15, 1937. The false dates and the false certificate of matriculation served to qualify appellant for this exemption.

The burden of appellant's argument is not really a denial that fraud was committed. It is that appellant did not personally commit the fraud and hence should not be penalized for it. His claim is that the application which he signed was filled out by a Dr. Charles Tennant, former secretary of the State board (now dead), and that appellant did not read it. He also claims that the Ross College matriculation photostat was procured by Dr. Tennant, and that he (appellant) didn't know how it got into the State board file attached to the application. But, on cross-examination, appellant clearly indicated that he knew, at the time of his application, of the procurement and filing of the Ross College matriculation certificate and that the purpose was to exempt him from the requirement of taking the basic science examination.

The circuit judge was fully justified in finding that "his [appellant's] license was obtained by a fraud."

Nor do we believe that the 7-year lapse between issuance of the license and the complaint barred the suspension entered by the State board.

The board acted within a specific statutory grant of power.

"The board shall have power to refuse, or to suspend for a limited period, the license of any chiropractor for any of the following causes: * * *

"(c) For fraud or deceit in procuring admission to practice." CL 1948, § 338.157 (Stat Ann 1956 Rev § 14.597).

No limitation in time is stated as to the board's right to refuse or suspend under subsection (c).

Generally, a State license to practice a profession creates no vested interest, and the right which the license grants may be withdrawn for proper cause by the authority which granted it: *Schireson* v.

Shafer, 354 Pa 458 (47 A2d 665), 165 ALR 1133); *State* v. *Schaeffer,* 129 Wis 459 (109 NW 522).

Material fraud in application for a State license is a proper cause for revocation or suspension. *Andrews* v. *Auer,* 177 Mich 244; *Mower* v. *State Department of Health,* 108 Conn 74 (142 A 473), appeal dismissed 278 US 570 (49 S Ct 82, 73 L ed 511).

See, also, *In re Price,* 226 App Div 460 (235 NYS 601); *In re Leonard,* 127 App Div 493 (111 NYS 905), affirmed 193 NY 655 (87 NE 1121); Annotation 165 ALR 1138, Public license as revocable for fraud or other misconduct before, or at the time of, its issuance.

The suspension of a professional license until statutory qualifications are met may not be considered as punishment. Rather it is an exercise of the State's discretion as to whether the person is properly qualified to continue holding the license. *Hawker* v. *New York,* 170 US 189 (18 S Ct 573, 42 L ed 1002); *Klafter* v. *State Board of Examiners of Architects,* 259 Ill 15 (102 NE 193, 46 LRA NS 532, Ann Cas 1914B, 1221). Our Court has held such actions to be founded upon the State's police powers. *Kennedy* v. *State Board of Registration in Medicine,* 145 Mich 241 (9 Ann Cas 125); *Hanson* v. *State Board of Registration in Medicine,* 253 Mich 601; *Applegate* v. *State Board of Dentistry,* 336 Mich 42.

We do not believe that the general statute of limitations is applicable to the present proceedings. The complaint and hearing before the State board was not a "cause of action" commenced "in any of the courts of this State." *Cf.* CLS 1956, § 609.13 (Stat Ann 1957 Cum Supp § 27.605).

The State board has a continuing responsibility to protect the public by seeing to it that only qualified persons practice. This argues strongly against application by analogy of the general statute of

limitation to this case as suggested by appellant. See *In re Leonard, supra*; *State* v. *Schaeffer, supra.*

The order of the State board is specifically related to appellant's present qualifications. We deal here not with a revocation, but with suspension until the appellant takes the basic science examination. Obviously, on these facts, he never had a legal right to practice until he had taken it, and the order deprives him of nothing to which he was ever entitled.

We have examined carefully appellant's other questions. The exhibits show that the grant of appellant's license was based, not upon the reciprocity, but upon the fraudulent Ross College matriculation certificate. In addition, in 1947, the language of the basic science statute (CL 1948, § 338.1 *et seq.* [Stat Ann 1951 Cum Supp § 14.791(1) *et seq.*]) showed that a license issued by reciprocity had to be based upon meeting all 4 conditions then set forth in section 5. This file contains no evidence that the requirements of the State of Kentucky at the time in question were "not less than those required by this act," or that appellant had secured the basic science eligibility certificate required by section 6.

We believe also that, on the facts in this case, the complaint and notice to appellant were sufficiently informative to meet the requirements of the statute and to apprise appellant of the nature of the charge. *In re Van Hyning,* 257 Mich 146. The individuals who signed the complaint were proper parties to initiate it.

Affirmed.

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

KAVANAGH, J., did not sit.

In re McKAY ESTATE.

EULITT *v.* LITTLE SISTERS OF THE POOR.

1. WILLS—DISINHERITANCE OF HEIRS—CONSTRUCTION OF WILL.
   Strong language of disinheritance does not effect a determination as to the construction of a will for if the will fails in whole or in part, the legal heirs take by law of intestacy even against the expressed opposition of the testatrix.

2. SAME—CONSTRUCTION—PRESUMPTION AGAINST INTESTACY.
   There is a strong presumption against intestacy when a will is being construed.

3. SAME—CONSTRUCTION—INTENT.
   The cardinal rule of construction of a will is to give effect to the intention of the testator if the intention was expressed.

4. SAME—PRECATORY WORDS.
   Precatory words in a will, such as "I request," may be treated as mandatory if such an intent is manifest.

5. SAME—CONSTRUCTION.
   The whole will is examined to ascertain the intention of the testatrix as the will itself is a dictionary from which the meaning of the words used in it is to be ascertained.

6. SAME—CONSTRUCTION OF "I REQUEST".
   The term "I request," as used in handwritten will by testatrix who was poorly schooled in spelling and grammar and with little knowledge of the legal effect of words, to introduce a bequest *held,* intended as a direction.

REFERENCES FOR POINTS IN HEADNOTES

[1] 57 Am Jur, Wills § 1170.
[2] 57 Am Jur, Wills § 1158.
[3] 57 Am Jur, Wills § 1133.
[4, 6] 57 Am Jur, Wills § 1180.
Precatory trusts. 107 ALR 896.
[5] 57 Am Jur, Wills § 1137.
[7] 57 Am Jur, Wills § 1327.

7. SAME—CONSTRUCTION—"SHARE IN MY ESTATE."

Clause "share in my estate," in handwriting of testatrix who was poorly schooled in spelling and grammar and with little knowledge of the legal effect of words leaving the residue of her estate to 3 charities, when compared to the specific quality of all the other devises in the will, is construed as leaving residue to the charities in equal shares.

Appeal from Wayne; Targonski (Victor), J. Submitted April 14, 1959. (Docket No. 46, Calendar No. 47,805.) Decided October 13, 1959.

Austin Grant, executor of the will of Helen A. McKay, deceased, petitioned for construction of will and partial distribution of residue. Will construed to give residue of estate in equal shares to 3 named charities. Mary McCusker Eulitt and Edward G. McCusker, heirs, appeal. Affirmed.

Fildew, DeGree, Fleming & Gilbride, for appellant heirs.

Paul V. Rahaley, for beneficiary Little Sisters of the Poor.

Hayes, McEvoy & Owens, for beneficiaries St. Christopher Inn of Graymor, New York, and Mariann Hill Fathers of Ann Arbor Trail, Michigan.

EDWARDS, J. This is the second time the will of Helen A. McKay has been before this Court. In the first case (*In re McKay Estate*, 347 Mich 153), this Court held a codicil and a partial revocation invalid because of testatrix' failure to follow statutory requirements and because of the doctrine of dependent relative revocation. The case was then remanded to the probate court for hearing and for construction of the will as originally written.

The pertinent portion of the will follows:

"FIRST, I will and direct that all my just debts and funeral expenses be paid in full.

"SECOND, I give, devise and bequeath Edward G. McCusker of Detroit one dollar For reason known to him and one dollar to Mary Eullitt of Chicago and for same reason. They never bother about me in life. So I remember them in Death.

"I Direct that one thousand dollars be paid for my burail G. R. & R G Harris at 15251 Harper Detroit be the (undertakers) And should I not buy the marker for my Husband Gordon D. McKay and myself During my life time, They are to be bought by my estate and be exact of one's now on lot's 15 and 31. In Woodmere Cemertery. In Sec. N. I also direct that one thousand Dollars or more if required by Woodmere Cemertery at time of my death be paid for perputal care On lots 15 and 31 in Section N. I request I be buried in my grave beside my Husband Gordon D. McKay. and that the (Little Sisters of the Poor Share in my estate With (St. Christper Inn of Graymor N. York.) And (Maryan hill Fathers of Ann Abor trail a mission to be used to edcate Navities priest*

"I also request that my Rings or any thing belonging to me or my late husband G. D. McKay is not to be sold to any one known or other Wise concet with us any way business or otherWise. And should Mary Eulitt of Chicago or Edward G. McCusker be not living at the time of my death Their bequest is to pass their heirs their (Children only)"

It should be noted that the words italicized above are a part of a printed form, while the balance is written in testatrix' own hand.

* Grammatical construction and variance in spelling have previously been subject of footnotes. 347 Mich 155, 156. The above version from the photostatic copy of the will follows, as closely as possible, the spelling, capitalization and punctuation of the testatrix.—Reporter.

No testimony was offered before the probate judge and he construed its provisions from the instrument alone:

"It is ordered, adjudged and decreed that the intention of testatrix, based upon all of the provisions of the will, was that the residue of her estate was devised and bequeathed, in equal shares, to Little Sisters of the Poor, St. Christopher Inn of Graymoor, New York, and to Maryann Hill Fathers of Ann Arbor Trail, and the will is construed accordingly."

On appeal this construction was upheld by the circuit court and the heirs-at-law now appeal from that decision. They argue (1) that the validity of the disputed clause pertaining to the 3 charities cannot be determined by reference to the language by which testatrix sought to disinherit the appellants; (2) that the words "I request" in said clause are purely precatory and ineffective to constitute a bequest; and (3) that the words "Share in my estate with" are too ambiguous both as to subject and apportionment of the bequest to constitute a valid bequest.

We agree that the strong language of the disinheritance clause does not determine this case. If the will fails in whole or part, the legal heirs take by law of intestacy even against the expressed opposition of the testatrix. *Southgate* v. *Karp,* 154 Mich 697; *In re Weinaker's Will,* 113 NYS2d 334; *Lawes* v. *Lynch,* 7 NJ Super 584 (72 A2d 414).

There is, however, a strong presumption against intestacy. *Mann* v. *Hyde,* 71 Mich 278; *Foster* v. *Stevens,* 146 Mich 131.

The cardinal rule of construction of a will is to give effect to the intention of the testator if the intention was expressed. *In re Darmstaetter's Estate,* 293 Mich 596; *In re Lawton Estate,* 347 Mich

143; *Detroit Wabeek Bank & Trust Co.* v. *City of Adrian,* 349 Mich 136.

The most difficult problem lies in the words "I request." They are not ordinarily understood as words of command, and on occasion this Court has held them insufficient to constitute a bequest. *Holloway* v. *Atherton,* 205 Mich 129; *In re Stuart's Estate,* 274 Mich 282. In both of these cases, however, the "request" was directed to a beneficiary and not, as here, to the executor. And in both, the Court dealt with a much more literate will.

On the other hand, precatory words may be treated as mandatory if such an intent is manifest. *Gilchrist* v. *Corliss,* 155 Mich 126 (130 Am St Rep 568); *Floyd* v. *Smith,* 303 Mich 137.

See, also, *Trustees of Hillsdale College* v. *Wood,* 145 Mich 257.

To ascertain the intention of testatrix, we look at the whole will. *In re Farwell's Estate,* 306 Mich 208. It is easy to observe, as the circuit judge pointed out, that testatrix was poorly schooled in spelling and grammar and had little knowledge of the legal effect of words. To find her intent, we look to the use of words as she employed them in her will.

"The will itself is a dictionary from which the meaning of the words used in it is to be ascertained." *Grace* v. *Thompson* (*Continental Trust Co.*), 169 Md 653, 657 (182 A 573, 575; 103 ALR 589, 592).

If there is one topic on which the testator ordinarily "directs" disposition, it is the place of his own burial. Yet testatrix' language was:

"I request I be buried in my grave beside my Husband Gordon D. McKay. and that the (Little Sisters of the Poor Share in my estate With (St. Christper Inn of Graymor N. York.) And Maryan

hill Fathers of Ann Abor trail a mission to be used to edcate Navities priest"

Taking the will as a whole, we believe that the quoted phrase was intended as a direction.

As to the last of the questions posed, again taking the will as a whole, we have little difficulty holding that the intention of the testatrix was to leave the residue of her estate to the 3 charities, share and share alike. We find the residuary feature in the general nature of the clause "share in my estate," when compared to the specific quality of all the other devises.

It seems to us only logical construction also to hold that where 3 charities are mentioned in immediate sequence in the same clause with the words "share in my estate" applicable to all, that the sharing was meant to be equal.

Affirmed. Costs to appellees.

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

RANNELS *v.* MARX.

1. EASEMENTS—IMPLIED GRANT OR RESERVATION.

   An apparently permanent and obvious servitude imposed upon one part of an estate in favor of another by the common owner, which is in use at the time of severance, raises an easement by implied grant or reservation of the right to continue such use.

2. VENDOR AND PURCHASER—PRESUMPTIONS—PRESENT CONDITION OF PROPERTY.

   Parties purchasing real estate are presumed to have contracted with reference to the condition of the property at the time of the sale and to have intended that the grantee should have the means of using the property granted with such rights and privileges in, or over, the premises remaining in the grantor as might be requisite for that purpose.

3. EASEMENTS—COMMON OWNER—WAY OF ACCESS.

   The common owner of an entire estate who makes one part of it visibly dependent for means of access, upon another, and creates a way for its benefit over the other, and then grants the dependent part, causes the other part to become subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee, as accessorial to the beneficial use and enjoyment of the land.

4. SAME—JOINT DRIVEWAY—INJUNCTION.

   Trial court's finding that joint driveway between plaintiff's and defendants' property and their garages were so located that access from any other direction was impractical when they went into possession *held*, justified and decisive, entitling plaintiff to injunction against defendants' interference with such driveway located in part on each lot.

REFERENCES FOR POINTS IN HEADNOTES

[1] 17A Am Jur, Easements §§ 41, 45.
[3] 17A Am Jur, Easements §§ 9, 149.
[4] 17A Am Jur, Easements § 128.
[5] 17A Am Jur, Easements §§ 13, 41.

5. SAME—COMMON OWNER—IMPLIED OR QUASI-EASEMENT—INTENT.
The previous use of property in possession of the common grantor which is visible and apparent even to a casual observer and which is continuous and necessary to convenient use of the property constitutes a so-called quasi-easement, an easement by implication being raised because of the obvious intention of the parties.

Appeal from Jackson; Simpson (John), J. Submitted April 16, 1959. (Docket No. 66, Calendar No. 47,908.) Decided October 13, 1959.

Bill by Abbie F. Rannels against Joseph W. Marx and Ruth Marx to confirm and establish driveway rights and enjoin interference therewith. Decree for plaintiff. Defendants appeal. Affirmed.

Dudley & Rogers and *C. Edwin Carraher,* for plaintiff.

Norman E. Leslie and *Kleinstiver & Anderson,* for defendants.

EDWARDS, J. This is a dispute about a joint driveway along the property line of adjoining neighbors. Defendants below, Mr. and Mrs. Marx, appeal from a decree in favor of plaintiff-appellee, Mrs. Rannels, entered in Jackson county circuit court. The decree provided a permanent driveway easement for Mrs. Rannels over 3 1/2 feet of the lot owned by Mr. and Mrs. Marx. It also prohibited any interference with Mrs. Rannels' use of the joint driveway.

In 1924 the 2 lots, 2 houses and 2 garages, now owned by the separate disputing parties, were owned by one party, a George Morehouse. He had built a drive between the 2 houses and along the platted lot line. The garages were so built that access from any other direction was impractical.

The original purchasers from Morehouse in 1924, Miller and Duffy, testified at the hearing. Both Miller and Duffy testified as to the existence of the joint driveway at the time of their purchase from the common grantor. Both also testified that Morehouse, the common grantor, had pointed out the joint driveway to them at the time of their purchase.

Miller and Duffy graveled the joint driveway. They and their tenants used it jointly until 1937 when Duffy sold to Mrs. Rannels. Mrs. Rannels continued to make use of the joint driveway while Miller and his successor in title, Walker, owned the adjoining lot and house. From 1949 to 1955, Mrs. Rannels' use of the driveway was sporadic since she didn't have an automobile of her own. But there is testimony of continued use of it by her visitors, and by coal and other trucks making deliveries to her.

In 1952 Walker sold to Mr. and Mrs. Marx. At the hearing Walker testified that he told Mr. Marx at the time that there was a joint driveway.

When Mr. and Mrs. Marx purchased, the driveway was gravel and stone. Mr. Marx put in a cement driveway—partly on Mrs. Rannels' lot. At the time, she offered to pay half but he declined the offer.

Some mutual use continued until 1955 when Mrs. Rannels rented her garage to a tenant who started to use the joint driveway. At this point appellants had a survey made to locate the property line, moved the steps and front door of their house so that the driveway could be expanded on their side, and put in a curb roughly on the property line to keep Mrs. Rannels and her tenants from using the former joint driveway.

It is undisputed that no written easement is included at any point in the deeds which constitute the chain of title. But both present parties hold by deeds which recite the description, "together with all

and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining."

Mrs. Rannels brought this action immediately following the installation of the curb referred to above. After a full hearing, the chancellor held that Mrs. Rannels had established her right to use of the joint driveway. He based his decree upon the doctrine of implied easements.

The creation of an easement by implication is described thus by the leading case of *Rischall* v. *Bauchmann,* 132 Conn 637, 642, 643 (46 A2d 898, 165 ALR 559):

"'Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case, the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made. *John Hancock Mutual Life Insurance Co.* v. *Patterson,* 103 Ind 582, 586 (2 NE 188, 53 Am Rep 550).' *Slachter* v. *Olderman,* 116 Conn 156, 158 (164 A 202); 1 Thompson Real Property (Perm ed), § 337 and cases cited."

We recently dealt with the doctrine of implied easements and reiterated this long-standing rule in Michigan:

"The parties are presumed to have contracted with reference to the condition of the property at the

time of the sale, and to have intended that the grantee should have the means of using the property granted, and, therefore, that he should have such rights and privileges in, or over, the premises remaining in the grantor as might be requisite for that purpose.

"It is a well-settled doctrine of the law of easements that where there are no restrictive words in the grant the conveyance of the land will pass to the grantee, all those apparent and continuous easements which have been used, and are at the time of the grant used by the owner of the entirety for the benefit of the parcel granted; and also, all that appear to belong to it, as between it, and the property which the vendor retains; and, hence, when the owner of an entire estate, makes one part of it visibly dependent for the means of access, upon another, and creates a way for its benefit over the other, and then grants the dependent part, the other part becomes subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee, as accessorial to the beneficial use and enjoyment of the land." *Kamm* v. *Bygrave*, 356 Mich 189, 196.

See, also, *Smith* v. *Dresselhouse*, 152 Mich 451; *Bean* v. *Bean*, 163 Mich 379; 41 ALR 1442; 155 ALR 543; 165 ALR 567; 17A Am Jur, Easements, § 41 *et seq.*

We appreciate, of course, that appellants in this case dispute the basic assumption upon which the legal propositions above are postulated—namely, that there was a visible and obvious easement necessary to reasonable enjoyment of the property existing at the time of conveyance from a common grantor. The chancellor who heard the testimony said in his opinion:

"In 1924 or 1925 George Morehouse entered into land contracts to sell lot 23 to Ralph Duffy and lot 22 to George Miller. The driveways and the garages

were located as shown in plaintiff's exhibit 1 when they went into possession."

Our review of the evidence convinces us that he was justified in this finding and that it is decisive.

This is an instance where previous use in possession of the common grantor was visible, apparent even to a casual observer, continuous, and necessary to convenient use of the property. *Federal Savings & Loan Insurance Corp.* v. *Urschel,* 159 Kan 674 (157 P2d 805). Such a use prior to division of the property has been referred to as a quasi-easement. At time of sale of the property without reference to the quasi-easement, an easement is held to exist by implication because of the obvious intention of the parties. 3 Tiffany, Real Property (3d ed), § 781; 1 Thompson on Real Property (Perm ed), § 392 *et seq.*; 5 Restatement, Property (Servitudes), §§ 474–476.

This case hinges on rights acquired from a common grantor where the quasi-easement existed before the grants. It is to be distinguished from the cases where 2 neighbors agree orally to mutual use of a joint driveway. This Court has held that such an arrangement, being permissive and not adverse, does not ripen into an easement by prescription but creates a revocable license only. *Wilkinson* v. *Hutzel,* 142 Mich 674. The *Wilkinson Case* is not in point on our present facts; nor is it before us for review.

The cases principally relied on by appellants are not, however, as readily distinguished. *Worden* v. *Assiff,* 317 Mich 436; *Wasilewski* v. *Kowal,* 320 Mich 473; *Banach* v. *Lawera,* 330 Mich 436. In these this Court considered joint driveway situations where the use originated with a common grantor. The easement claims were apparently argued on the ground of easement by prescription through adverse

use. This Court denied the easements by finding the use permissive. We do not think these cases can be regarded as considered rejection of the doctrine of implied easements adopted by the chancellor below in the present proceeding. And careful review convinces us that the weight of authority requires our affirmance.

Affirmed. Costs to appellee.

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

CARR, J., concurred in result.

McCLAIN *v.* CITY OF HAZEL PARK.

MUNICIPAL CORPORATIONS—ZONING—RESIDENCE STRIP BEHIND COMMERCIAL PROPERTY—SETBACK LINE.

Zoning ordinance amendment whereby plaintiffs' property, extending from a busy street to a strictly residential street in the rear, was rezoned as commercial except for 30' next to the residential street, effecting a commonplace setback line for residential streets *held*, constitutional as well within the discretionary authority of the municipality.

Appeal from Oakland; Doty (Frank L.), J. Submitted April 7, 1959. (Calendar No. 47,567.) Decided October 13, 1959.

REFERENCES FOR POINTS IN HEADNOTES

58 Am Jur, Zoning § 51.

Power to establish building line along street. 53 ALR 1222.

Mandamus by Merl P. McClain and Elsie R. McClain against the City of Hazel Park, a municipal corporation, and its servants, agents and employees, to compel issuance of building permit. Writ denied. Plaintiffs appeal. Affirmed.

Kasoff & Young (*Gilbert M. Frimet,* of counsel), for plaintiffs.

Jack Moskowitz, for defendants.

EDWARDS, J. This is another appeal directed to this Court on the mistaken assumption that we sit as a final zoning board.

Appellants sought a writ of mandamus against the city of Hazel Park directing it to issue a building permit for a portion of their property as to which commercial building was prohibited by the zoning ordinance. The trial judge found the ordinance as it was applied reasonable and denied the writ. This appeal followed.

Appellants, Mr. and Mrs. McClain, purchased some lots fronting on the busy thoroughfare of Eight Mile road and extending 117 feet to the rear to a residential street called Muir street. When the lots were purchased, they were zoned residential. Appellants promptly sought a change and the common council of Hazel Park granted a zoning amendment which rezoned the McClains' property to a commercial classification. The amendment reads as follows:

"That the area between John R and West End streets and between Eight Mile (Baseline) road and West Muir street, be rezoned from residence district 'B' and 'C' to business 'D', with the provision that 30 feet next to Muir street be reserved and required to be beautified and landscaped."

Appellants erected a building for a plumbing supply business upon their property in accordance with this amendment.

In 1956, however, they sought a building permit to extend their building onto the 30 feet next to Muir street which was reserved by the ordinance above. On the city's refusal of the permit, this litigation followed.

At trial appellants contended that the reservation was unreasonable in a constitutional sense in that its sole purpose was aesthetic.

Testimony showed that Muir street on the opposite side of the street is entirely residential. It also showed that 10 residences exist on the same side of Muir street where appellants' lots are located.

Basing his opinion on expert testimony to the effect that the reservation was important to the residential community for light and air and traffic safety over and above aesthetic considerations, the circuit judge denied the writ.

We believe he should have.

The city council had the task of reconciling the interests of property owners on a busy business street with the interests of a residential district immediately to the rear. Their task was made more awkward by a highway widening which truncated the block concerned. The ordinance went to some lengths to allow appellants to make commercial use of most of their property, while maintaining some protection for abutting homes. What the reservation accomplished is merely a setback commonplace to residential streets and long since held constitutional when provided by ordinance. *Gorieb* v. *Fox,* 274 US 603 (47 S Ct 675, 71 L ed 1228, 53 ALR 1210).

See, also, CL 1948, § 125.582 (Stat Ann 1958 Rev § 5.2932); *Faucher* v. *Grosse Ile Township Building Inspector,* 321 Mich 193.

This ordinance is well within the discretionary authority of the municipality. *Brae Burn, Inc.*, v. *City of Bloomfield Hills,* 350 Mich 425.

Nothing presented here approaches proof of unreasonableness in the constitutional sense. Absent such proofs, the determination of the legislative body is final. *Northwood Properties Co.* v. *Royal Oak City Inspector,* 325 Mich 419.

Affirmed. Costs to appellees.

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

GIEGLING *v.* HELMBOLD.

1. ESTATES—ABUTTING OWNER'S RIGHT OF ACCESS TO HIGHWAY OR ALLEY.
   An abutting owner's right of access to a public street or alley is an interest in the land concerned.
2. QUIETING TITLE—PARTIES.
   A decree quieting title does not extinguish the property rights of persons not made parties to the action.
3. JUDGMENT—RES JUDICATA—PARTIES.
   The doctrine of *res judicata* applies when the issues and the parties or their privies in the prior litigation are identical.
4. SAME—QUIETING TITLE—PARTIES—RES JUDICATA.
   Prior suit in which title to disputed land was quieted in plaintiffs was not *res judicata* of title issue in plaintiffs' suit to enjoin use of such land as a public way and to enjoin interference with fencing thereof, where defendants had not been parties to the prior suit.

REFERENCES FOR POINTS IN HEADNOTES

[2] 44 Am Jur, Quieting Title § 77.
[3] 30A Am Jur, Judgments §§ 363, 397.
[4] 30A Am Jur, Judgments §§ 396, 397.

Appeal from Genesee; Gadola (Paul V.), J. Submitted June 2, 1959. (Docket No. 9, Calendar No. 48,038.) Decided October 13, 1959.

Bill by Henry E. Giegling, Gladys F. Giegling and Edith Gertrude Barnes against Hubert N. Helmbold and Viola Helmbold to enjoin use of parcel of property claimed as public way and to enjoin interference with fencing thereof. Cross bill to set aside previous decree quieting title. Decree for plaintiffs. Defendants appeal. Reversed and remanded.

Bellairs & Dean (*C. Rees Dean,* of counsel), for plaintiffs.

C. M. Van Benschoten, for defendants.

EDWARDS, J. Defendants and appellants, Mr. and Mrs. Helmbold, appeal from a decree entered by Circuit Judge Gadola. The decree granted plaintiffs, Mr. and Mrs. Giegling and Mrs. Barnes, an injunction and dismissed the Helmbolds' cross bill. The injunction restrained the Helmbolds from removing a fence which the Gieglings, as titleholders under a prior circuit court decree, had erected on a 6′ x 23′ piece of property. The Helmbolds' cross bill sought to dispute plaintiffs' title to the strip, asserting that it was actually part of a public street and that the Helmbolds had rights of ingress and egress across it.

This is the third equity action pertaining to this sliver of property at the end of Edwards Place—a dead-end street in the city of Flint.

The Gieglings own a lot fronting on Edwards Place. The Helmbolds own a lot fronting on Beach street, with the rear abutting the 6′ x 23′ piece at the end of Edwards Place. The Helmbolds' use of a rear driveway across this piece of ground into

Edwards Place occasioned a neighborhood controversy of some magnitude.

In the first chancery action the Gieglings sought to quiet title to the same piece of property in dispute in all of these actions as against the city of Flint and a number of private parties. It is conceded that the Helmbolds were not made parties and had no knowledge of that suit. None of the parties served contested the suit, and Judge Gadola entered a decree quieting title in plaintiffs.

In the second action the Helmbolds were plaintiffs and sought to enjoin the Gieglings' use of the disputed property. The bill of complaint was dismissed on procedural grounds. No appeal was taken. But thereafter Mr. Helmbold simply took the fence down and resumed using the rear driveway.

In the third of these equity actions, after a partial hearing on the matters in dispute, Judge Gadola granted the injunction sought by the Gieglings and dismissed the Helmbolds' cross bill on the ground that the title issue which it sought to present was rendered *res judicata* by the prior decree quieting title in the Gieglings.

The only question to be decided by this appeal is therefore: Could the Helmbolds' claimed right of access, as an abutting property holder to a public street, be adjudicated as to them in a suit in which they were not parties?

Once the question is thus phrased, the answer appears axiomatic. Every man is entitled to his day in court. And, on this record, the Helmbolds have not had theirs.

It has long been decided law in this State that an abutting owner's right of access to a public street or alley is an interest in the land concerned. *Horton* v. *Williams,* 99 Mich 423.

See, also, *Phelps* v. *Stott Realty Co.,* 233 Mich 486.

A decree quieting title does not extinguish the property rights of persons not made parties to the action. *Jenness* v. *Smith,* 58 Mich 280; *Schweikart* v. *Stivala,* 329 Mich 180.

The doctrine of *res judicata* relied upon by the chancellor below applies only when the issues *and the parties* or their privies in the prior litigation are identical. *Tucker* v. *Rohrback,* 13 Mich 73; *Reid* v. *Gooden,* 282 Mich 495.

Since the parties in the action to quiet title were not identical with present parties, the title issue should have been heard in this proceeding.

In fact, the question of title to this small piece of property has never been tried on its merits in any adversary proceeding. Yet there was an adverse party asserting an interest all the while. It is obvious that the plaintiffs herein knew that the Helmbolds were the interested opposite party at the time they brought their bill to quiet title. Much time and effort would have been saved at that point by joining them.

Reversed, decree vacated, and the cause remanded for further hearing. Costs to appellants.

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

BRITTEN *v.* UPDYKE.

1. TRIAL—ADMISSION OF EVIDENCE—COMMENT ON EVIDENCE.

   Trial judge's rulings as to admissibility of evidence and comments made by him in course of trial arising from fatal injuries received by plaintiff's decedent while a passenger on left side of defendant's 14'6" inboard motor boat as it passed under a low bridge, including comment to witness, a passenger sitting between decedent and defendant, "at least, you didn't get hit when you were sitting there" *held,* not shown to have had any prejudicial effect upon jury warranting a finding of prejudicial error.

2. NEGLIGENCE—MOTORBOATS—INSTRUCTIONS—LOW BRIDGE—SPEED—INTOXICATING LIQUORS.

   Trial court's charge to jury in action by administrator of estate of passenger on left side of defendant's boat for fatal injuries sustained when driven under low bridge, which carefully stated appellant's theory of defendant's negligence that boat was there driven by intoxicated defendant at a high speed and caused to bank steeply in making a sharp turn to the right causing fatal injuries, *held,* not reversible for not having been given in language of plaintiff's requests, although subject to some improvement had it contained reference to statutes cited and to the fact that violation of them was negligence *per se.*

3. SAME—CONTRIBUTORY NEGLIGENCE—PRESUMPTION OF DUE CARE—INSTRUCTIONS—VERDICTS.

   Refusal of trial court to give plaintiff administrator's request to charge pertaining to a presumption of due care on the part of decedent, a passenger on left side of defendant's boat who was fatally injured when boat passed under low bridge, a request

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REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur, Trial § 76.
[2] 38 Am Jur, Negligence § 369.
[3] 38 Am Jur, Negligence §§ 364, 367.
[4] 3 Am Jur, Appeal and Error § 1003.

to which plaintiff was entitled *held*, nevertheless not reversible error, where jury's verdict specifically found defendant was not guilty of negligence, since the issue of contributory negligence was not reached.

4. APPEAL AND ERROR—NEW TRIAL—PREJUDICE.
A new trial will not be granted unless the error pointed out was such as to prejudice the result.

Appeal from Jackson; Simpson (John), J. Submitted June 4, 1959. (Docket No. 34, Calendar No. 47,845). Decided October 13, 1959. Rehearing denied November 24, 1959.

Case by Gordon W. Britten, administrator of the estate of Earl H. Walkey, deceased, against Clarence Updyke under the death act for damages arising from fatal injury to motor boat passenger. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Kelly, Kelly & Kelly, for plaintiff.

Haskell L. Nichols and *H. Attix Kinch,* for defendant.

EDWARDS, J. Plaintiff appeals from denial of his motion for new trial after a Jackson county jury had rendered a verdict in favor of the defendant. The substantial questions presented pertain to claimed errors in the trial judge's charge to the jury.

Plaintiff's decedent, Earl Walkey, was killed almost instantaneously in a boating accident which occurred shortly after noon on Saturday, November 6, 1954, in the channel between Moon and Price lakes in Jackson county. The deceased was riding on the left side of the front seat of a 14′ 6″ motorboat driven by a 65-horsepower inboard motor. He was seated beside a friend named Howard Smith and the defendant, Clarence Updyke, who was driving from the right-hand driver's seat. As the boat was

going underneath a low bridge in the channel, deceased's head struck the last 2 of the beams or stringers which supported the bridge, with such force that he died almost immediately.

Physical facts of the accident showed that the left side of the boat struck the concrete piling, which was on the far side of the bridge, as the boat was emerging from under the bridge and after decedent's head had struck the bridge stringers. The point of impact was at and below the water line, at a point estimated to be 3′ 8″ to the rear of the seat in which the 3 men were riding. The markings made by the boat on the piling strongly suggested that the left side of the boat was heeled at least a foot out of the water at the time of impact with the piling.

Plaintiff's theory of the accident was that the defendant driver was intoxicated and that, as he was going under the bridge, he swung the boat in a sharp right turn, causing the left side of the boat to rise out of the water and decedent's head to strike the stringers.

Defendant's theory of the accident was that Walkey stood up while the boat was going under the bridge, and that the force of the blow to his head threw the boat off course.

Both of the other persons in the boat at the time of the accident testified. There were no other eyewitnesses.

Howard Smith related that he and plaintiff's decedent, Earl Walkey, were in a tavern together on the morning in question when a call came inviting them to take a ride in defendant Updyke's motorboat. Updyke sat in the front right-side driver's seat, Walkey sat on the far left front seat, and Smith sat between them. Smith estimated the speed of the boat at about 8 to 10 miles per hour as it approached the low level bridge from the west, traveling in an

easterly direction. He stated that the boat was being driven straight under the bridge's center, between the piers or pilings. He then gave the following testimony in relation to the events leading up to and immediately following the moment of accident:

"*A.* Well, just as we were coming to the bridge, my hair came blowing in my face, and Earl [decedent] says, 'Well, take his hat.' I told him I didn't need it. And he says, 'Go ahead and wear it.' And just as we got under the bridge, he turned around and started to put it on my head, and that is when he slumped over in my lap.

"*Q.* And you say that his body was against your body in the seat?

"*A.* It was, yes, sir.

"*Q.* Did you feel him raise up with your body?

"*A.* I did, sir. * * *

"*Q.* So that you say you felt him raise up?

"*A.* Yes.

"*Q.* And turn around—

"*A.* Yes.

"*Q.* (Continuing)—and put this cap on your head?

"*A.* Yes sir.

"*Q.* And, then, his head fell on your lap.

"*A.* Yes.

"*Q.* It all happened in how long?

"*A.* Well, just like that (indicating).

"*Q.* Just an instant?

"*A.* Yes. * * *

"*Q.* Then, what did you do when his head fell in your lap?

"*A.* I yelled to Clarence [defendant.]. * * *

"*Q.* State whether or not when Mr. Walkey's head came in contact with that first beam, state whether or not that beam was west of the northeast abutment?

"*A.* Yes, it would be. * * *

"*Q.* What happened to the boat after his head hit the beam?

"*A.* Well, that swerved it * * * to the left."

Defendant Clarence Updyke's testimony was substantially the same as Howard Smith's in relation to the events leading up to the boat ride, the speed of the boat as it proceeded under the bridge, and its course. Updyke further testified that as he was proceeding under the bridge Smith yelled to him that decedent was hurt. He turned his head and saw decedent's head tilted back, blood rushing from his head and nose. He did not see decedent until after he was hurt, and could not recall any swerving of the boat. He also denied having had any intoxicating drinks prior to or during the boat ride.

Other relevant testimony included a conflict of opinion between a deputy sheriff and a State policeman who reported to the scene of the accident as to defendant Updyke's condition. The deputy testified that he thought defendant was under the influence of intoxicating liquor, and the State policeman testified that he was not.

Mrs. Walkey testified on the issue of damages and on cross-examination, bearing on the question of her husband's contribution to her support, related a conversation with an acquaintance who expressed regret at her husband's death. She denied responding "good riddance." The acquaintance was produced by defendant's counsel as their last witness and testified emphatically that she had, indeed, used just those words applicable to her recently deceased spouse. His testimony was not shaken on cross-examination. This testimony was admitted as bearing on the issue of pecuniary damages, and no issue as to it is brought to us on appeal.

The trial judge reserved decision on a motion for a directed verdict and submitted the case to the jury. The jury returned a verdict for the defendant in these words: "We, the jury, find the defendant not guilty of negligence."

Appellant presents 15 issues for our review on appeal. The first 6 represent claims of error in the trial judge's charge to the jury. The next 8 issues pertain to claimed errors in ruling on or commenting on evidence in the course of the trial, while the 15th suggests error in the trial judge's denial of a motion for new trial.

We have reviewed all of the issues pertaining to rulings during the course of the trial. In relation to all of the issues except one, we agree with the trial judge's reasoning or consider his ruling well within his discretion. The exception pertains to his refusing to strike his own comment to witness Smith, "At least, you didn't get hit when you were sitting there." Whether this comment from the judge had any prejudicial effect would depend in large measure upon how it was said. As to this, we have no guide from this record. We certainly do not find warrant for considering it reversible error.

Appellant places his principal reliance upon his first stated issue, pertaining to the charge, which he states as follows:

"The court erred in refusing to give plaintiff's requested charges Nos 7, 8 and 9.

"This is the principal ground for this appeal in view of the jury's specific finding that defendant was 'not guilty of negligence.'

"Plaintiff's theory of his case, as it pertained to defendant's negligence, was clearly set out in his declaration.

"Plaintiff charges that 'defendant steered, operated and propelled his said motorboat in a careless, reckless, willful, wanton, and grossly negligent manner, and at a high and dangerous rate of speed, and while under the influence of intoxicating liquor while passing through said channel and under said bridge as a direct result of which' the accident occurred and plaintiff's decedent was killed."

The cited requests to charge detailed appellant's claims as to excessive speed and intoxicated driving and made reference to statutes prohibiting same in relation to driving motorboats.

We note that the trial judge did not make reference to the statutes in his charge as given.

But in the charge we do find a careful statement of appellant's theory:

"It is the plaintiff's claim that the distance from the top of the water to the underside of the bridge was approximately 42 inches. The plaintiff claims that the defendant was fully aware of the low clearance of the bridge.

"The plaintiff further claims that while the defendant was under the influence of intoxicating liquor, defendant drove his boat under the low bridge at a high and dangerous rate of speed, and while passing under the low bridge, caused the boat to make a sudden sharp turn to the right. That the boat banked steeply in the turn and Mr. Walkey's head was thrust up into the underside of the bridge and struck the crossbeams or stringers with great force and violence, thereby causing serious injuries to Mr. Walkey which resulted in his death."

We also find that he instructed the jury that plaintiff had to establish by a fair preponderance of the evidence:

"That Mr. Updyke was guilty of negligence in the manner charged in the plaintiff's declaration, and that reads as follows:

" 'That the defendant steered, operated and propelled his said motorboat in a careless, reckless, wilful, wanton and grossly negligent manner, and at a high and dangerous rate of speed, and while under the influence of intoxicating liquor while passing through said channel and under said bridge as a direct result of which said motorboat was driven into, against and upon the pilings of said bridge with great force and violence and the head of plaintiff's de-

cedent struck the underside of said bridge with great force and violence, inflicting personal injuries upon plaintiff's decedent that caused his death.' "

The judge did not give the requested charges in appellant's own words. He had no obligation to do so. *Schattilly* v. *Yonker*, 347 Mich 660. We think the charge would have been improved by reference to the statutes cited by appellant and to the fact that violation of them was negligence *per se*. Yet the trial judge did submit in his own words an accurate version of plaintiff's theory and the essential elements of plaintiff's claims of negligence. Taking the charge as a whole, we believe it informed the jury that if they found proof of intoxicated driving or excessive speed on the part of defendant, such acts constituted negligence.

The only other issue of substance pertaining to the charge concerns the trial judge's refusal to give plaintiff's requested instruction pertaining to a presumption of due care on the part of decedent.

Plaintiff was, of course, deprived of decedent's testimony by his death. The trial judge apparently felt, however, that the testimony of witness Smith and defendant Updyke on decedent's contributory negligence* was "so conclusive that reasonable and unprejudiced minds could not fail to be convinced that decedent was careless." *Gillett* v. *Michigan United Traction Co.*, 205 Mich 410, 421. In any event, he did not charge that the jury should entertain a presumption that decedent was acting with due care unless they found contrary and credible testimony.

On this record, we think he should have. We believe that the basic issues were properly submitted

* This case was tried before the adoption of the rule requiring defendant to bear the burden of proof on the issue of plaintiff's contributory negligence. Court Rule No 23, § 3a, adopted April 14, 1958. 352 Mich xiv.

to the jury, but that plaintiff was entitled to a charge concerning a presumption of due care on the part of decedent. *Gillett* v. *Michigan United Traction Co., supra; Steger* v. *Blanchard,* 353 Mich 140; *Weller* v. *Mancha,* 353 Mich 189. *Cf. Tien* v. *Barkel,* 351 Mich 276.

We do not, however, feel impelled to reverse on this issue. The jury, having expressly found that the defendant was not guilty of negligence as charged against him, manifestly accepted as to that question the testimony of witness Smith and defendant Updyke.

The form of the jury's verdict as reported was not made the subject of objection or motion. We regard it, as the trial judge apparently did, both as a specific finding of no negligence as charged and a general verdict for the defendant. We believe that the issue of decedent's contributory negligence was not reached by the jury and that the absence of instruction on the subject of presumed due care did not, in such circumstances, amount to reversible error. *Hulett* v. *Great Atlantic & Pacific Tea Co.,* 299 Mich 59; *Brown* v. *Berles,* 234 Mich 353; *Warwick* v. *Blackney,* 272 Mich 231.

We do not reverse for new trial unless the error pointed out was such as to prejudice the result.

Affirmed. Costs to appellee.

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

ROUSE *v.* GROSS.

1. JURY—VOIR DIRE—MUTUAL INSURANCE COMPANY.

   Trial judge's refusal to allow questioning at *voir dire* examination as to membership of prospective jurors in any mutual insurance company was not error where it is undisputed defendant was not represented by a mutual insurance company and the trial judge had been so informed.

2. AUTOMOBILES—THROUGH HIGHWAY—STOP SIGN—ENFORCEMENT OF TRAFFIC CONTROL ORDER.

   Admission in evidence of statutorily authorized traffic control order designating paved street on which westbound defendant was traveling as a through street was not error, where trial court carefully instructed jury that no stop sign had actually been erected at the gravel street intersection approached by northbound car in which plaintiff was a passenger and court read portion of statute prohibiting enforcement until erection of such sign giving notice of the traffic regulation (CLS 1954, § 257.606).

3. SAME—NEGLIGENCE—QUESTION FOR JURY—INTERSECTIONS—RIGHT-OF-WAY.

   Whether or not westbound defendant motorist was guilty of negligence was a question for the jury in action by passenger of northbound car for injuries sustained at intersection on Christmas eve, where defendant was traveling 35 miles per hour, saw northbound car slow down but not stop as it skidded across ice-covered eastbound lane into defendant's lane, since if the cars entered the intersection at the same time, defendant had the right-of-way (CLS 1954, § 257.649).

REFERENCES FOR POINTS IN HEADNOTES

[1] 31 Am Jur, Jury § 208.
Questioning jurors on voir dire regarding insurance. 4 ALR2d 792.
[2] 5A Am Jur, Automobiles and Highway Traffic §§ 296, 311, 321.
[3] 5A Am Jur, Automobiles and Highway Traffic § 1028.
[4] 5A Am Jur, Automobiles and Highway Traffic § 1092.
[5] 3 Am Jur, Appeal and Error § 1122.
[6] 5A Am Jur, Automobiles and Highway Traffic § 1100.
[7] 3 Am Jur, Appeal and Error § 1003.

4. SAME—INTERSECTIONS—RIGHT-OF-WAY—INSTRUCTIONS.
Instructions to jury in intersection accident case which did charge on plaintiff's theory of the case, as to duties of the parties relative to stopping and right-of-way at an open intersection, *held,* not to have contained reversible error, although not in the language requested by plaintiff.

5. APPEAL AND ERROR—INSTRUCTIONS—WORKMEN'S COMPENSATION.
Plaintiff, injured while responding to call as a volunteer fireman en route to fire, *held,* to have no justifiable complaint as to instructions given on the workmen's compensation aspect of the case, the workmen's compensation insurer having intervened in action against third-party tort-feasor.

6. AUTOMOBILES—NEGLIGENCE—PROXIMATE CAUSE—INSTRUCTIONS.
Charge to jury that plaintiff, a passenger in northbound car which collided with defendant's westbound car on Christmas eve at an intersection, that plaintiff could not recover unless defendant's negligence "was the proximate and direct cause of the deceased's death" although obviously inadvertent in that plaintiff had not died and correct rule merely required proof that defendant's negligence be only *a* proximate cause *held,* not reversible in view of other parts of charge that negligence of plaintiff's driver could not be imputed to plaintiff and no request for correction of the error was made.

7. APPEAL AND ERROR—NEW TRIAL—PREJUDICIAL ERROR.
The error which calls for a new jury trial is one of such significance as to have prejudiced the result, one without which the Supreme Court can say that the result might well have been different.

Appeal from Oakland; Adams (Clark J.), J. Submitted June 9, 1959. (Docket No. 46, Calendar No. 47,702.) Decided October 13, 1959.

Case by Stewart J. Rouse against Matt C. Gross for personal injuries sustained in automobile collision. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Cozadd & Shangle (*Ben W. Boutell,* of counsel), for plaintiff.

Carl F. Davidson, for defendant.

EDWARDS, J. Appellant Rouse appeals from a jury verdict and judgment of no cause for action entered in the Oakland county circuit court. He states 14 issues on appeal, 2 of which concern the trial judge's rulings, and 11 others his charge to the jury. The 14th issue is a claim that the jury verdict was against the overwhelming weight of the evidence.

Stewart Rouse was a volunter fireman in the Farmington township fire department. As such he was paid a minimum rate of $3 for each fire to which he reported.

On December 24, 1953, Rouse and his wife were driving home from Christmas shopping when the fire siren blew. Rouse drove directly to the firehouse, picked up his equipment and got into a private automobile owned and driven by a fellow fireman, Maurice Frederick.

Traveling to the fire, Frederick was driving north on Springbrook road, approaching the intersection of Nine Mile road.

It is undisputed that Springbrook is a gravel road carrying less traffic than Nine Mile which is a paved road designated by the commissioner of State police and the Oakland county road commission as a through street. No stop sign, however, was or ever had been erected at the Springbrook intersection—although other nearby roads paralleling Springbrook had stop signs at their Nine Mile road intersections.

Frederick testified that as he approached Nine Mile road he took his foot off the gas, slowed down, and then seeing an approaching automobile put his foot on the brake. His car slid on the icy surface of Springbrook road, into the Nine Mile intersection, and collided there with a car being driven in a westerly direction by defendant-appellee Matt C. Gross.

Mr. Rouse was thrown from the Frederick vehicle and suffered severe injuries claimed to be permanent in nature.

Mr. Rouse sought and received workmen's compensation benefits available as a result of his employment with Farmington township. Subsequently he filed suit against defendant Gross, and the workmen's compensation insurance carrier, Michigan Mutual Liability Company, intervened as plaintiff, claiming subrogation to the rights of Rouse to the extent of approximately $1,800 medical and hospital and compensation benefits paid.

The case was tried before an Oakland county jury which returned a verdict of no cause for action. Circuit Judge Clark Adams subsequently entered this verdict as the judgment of the court and denied Rouse's motion for new trial. After plaintiff served notice of appeal, a stipulation was entered under which the cause of action was discontinued as to Michigan Mutual Liability Company only.

Appellant's first issue dealt with the trial judge's refusal to allow questioning at voir dire examination as to the membership of prospective jurors in any mutual insurance company. It appears undisputed that defendant was not represented by a mutual insurance company, and the trial judge was so informed.

Subsequent to filing of appellant's brief, this Court decided *Darr* v. *Buckley*, 355 Mich 392. We consider it authority for affirmance of the trial judge as to this issue.

Appellant's second issue pertains to admission at trial of a defendant's exhibit 4. This was a traffic control order signed by the commissioner of State police and 3 members of the Oakland county road commission designating Nine Mile road (among others) as a through street. Statutory authority for

this order is provided by CLS 1954, § 257.606 (Stat Ann 1953 Cum Supp § 9.2306).

While the trial judge ruled the order admissible, he carefully included in his instructions to the jury the fact that no stop sign was actually erected at the Springbrook intersection, and also read the portion of the statute (CLS 1954, § 257.606, subd [c] [Stat Ann 1953 Cum Supp § 9.2306, subd (c)]) which prohibits enforcement until signs giving notice of the traffic regulation are erected.

We find no error in his ruling. The traffic control order did not establish a statutory duty to stop on the part of plaintiff's driver. The judge was careful to say so. But the order does seem relevant to the general nature of the intersection and, hence, to be admissible.

The 14th claim of error asserts that the verdict is against the overwhelming weight of the evidence. We cannot agree. The testimony shows that defendant Gross was proceeding west at a rate of 35 miles per hour, approaching Springbrook, that on the intersecting gravel road he saw a car approaching which was slowing down, and that the car did not stop but skidded into and across the eastbound lane, into the lane in which defendant was traveling. Under the right-of-way statute (CLS 1954, § 257.649 [Stat Ann 1952 Rev § 9.2349]), defendant, as the party on the right, had the right-of-way if the jury found both automobiles entered the intersection at the same time. Under these circumstances, the question of whether defendant's conduct was negligent was a question of fact for the jury. The weight of the evidence is not overwhelmingly against their verdict of no cause for action.

Appellant also presents 11 claims of error pertaining to the trial judge's charge. Of these, we shall deal specifically with only the most important.

Examining the charge, we find that the trial judge did charge as to the plaintiff's theory of the case.

The trial judge carefully cited the 2 statutes applicable to this open-intersection accident. As we have noted, he took care to inform the jury that plaintiff's driver did not have a legal duty to stop at the Nine Mile road crossing absent any stop sign (CLS 1954, § 257.606, subd [c] [Stat Ann 1953 Cum Supp § 9.2306, subd (c)]). He also instructed as to the right-of-way statute (CLS 1954, § 257.649 [Stat Ann 1952 Rev § 9.2349]) which gave the right-of-way to defendant as the party on *the right* if the jury found both automobiles entered the intersection at the same time.

Although the charge was not in the language requested by plaintiff, it appears to us to have been adequate and fair.

We believe also that plaintiff has no justifiable complaint as to the trial court's instructions on the workmen's compensation aspect of the case.

It is true, however, that the trial judge was mistaken when he charged "plaintiff cannot recover in this case against the defendant unless you find he has established the following propositions by a fair preponderance of the evidence. * * * Third: The said negligence was the proximate and direct cause of the deceased's death."

Plaintiff did not die—as the jury very well knew. Also, the correct rule requires proof of negligence which was *a* proximate cause of the injury complained of. *Gleason* v. *Hanafin,* 308 Mich 31; *Gapske* v. *Hatch,* 347 Mich 648.

However, immediately following use of the language above, the trial judge charged the jury as follows:

"In that connection let me point out to you that the plaintiff in this cause was not driving the automobile, and regardless of whether or not the driver, Mr. Frederick, was negligent or not, you cannot impute or impose upon the plaintiff the responsibility for the negligence of Mr. Frederick. To repeat, I am not passing on whether Mr. Frederick was negligent or not, but if he was, you cannot shoulder that burden of negligence upon the plaintiff in this cause because you cannot impute negligence to a passenger from the conduct of the driver."

It is hard to read this language without concluding that, even if the jury considered plaintiff's driver negligent, plaintiff could still recover against defendant if he were found guilty of negligence which was a proximate cause of the accident.

We find no indication that the obviously inadvertent error we have referred to was noted by counsel for plaintiff at trial—or, if noted, thought of such significance as to warrant a request for correction.

As to the issues which deal with the judge's charge, we determine these by taking the charge as a whole. Tested on this basis, we find no prejudicial error.

The right of trial by jury ordinarily refers to a right to present or defend an actionable claim to 1 jury to the point of jury verdict and judgment.

Reversal for new trial does not follow automatically from a showing of error in the course of a generally fair trial. There probably never was, and never will be, a perfectly conducted jury trial. The error which calls for a new jury trial is one of such significance as to have prejudiced the result. *Miskiewicz* v. *Smolenski,* 249 Mich 63; *Sheehan* v. *Dalrymple,* 19 Mich 239. It must be one without

which we can say that the result might well have been different. *Gapske* v. *Hatch, supra.*

Affirmed. Costs to appellee.

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

THOMPSON *v.* OGEMAW COUNTY BOARD OF ROAD COMMISSIONERS.

1. DEATH—MINORS—PECUNIARY INJURY OF PARENT.
   Consideration of loss of services of a minor is permitted in an action under the death act in determining pecuniary injury of a parent (CL 1948, §§ 691.581, 691.582).

2. PARENT AND CHILD—SUPPORT OF PARENT.
   An adult child may be ordered to contribute to the support of parent under proper circumstances (CL 1948, § 401.1 *et seq.*, as amended).

3. DEATH—PARENT'S EXPECTATION OF SUPPORT—AGE OF CHILD.
   The reasonable expectation of support of a parent, rather than any particular age at the time of the death of the child is the test of whether recovery may be had by the parent under the death act for the death of the child (CL 1948, §§ 691.581, 691.582).

REFERENCES FOR POINTS IN HEADNOTES

[1] 16 Am Jur, Death § 153.
[2] 39 Am Jur, Parent and Child § 70; 41 Am Jur, Poor and Poor Laws § 7.
[3] 16 Am Jur, Death §§ 196, 209.
[4] 16 Am Jur, Death § 361 *et seq.*
[5] 16 Am Jur, Death §§ 44, 60, 62.
[6] 11 Am Jur, Constitutional Law § 139.
[7] 16 Am Jur, Death § 243.

4. SAME—INSTRUCTIONS—SUPPORT OF PARENTS AFTER MINOR REACHED MAJORITY.

Instruction to jury in action under death act for death of 15-year-old girl, which permitted jury to award damages for loss of support after she would have attained her majority, *held*, not a proper basis for granting a new trial, under evidence presented (CL 1948, §§ 691.581, 691.582).

5. SAME—PURPOSE OF ACT—COMMON LAW—EVIDENCE.

The wrongful death act is a remedial measure designed to alleviate the common-law rule generally forbidding compensation for wrongful death and lack of proofs of an exact quality should not be allowed to defeat the legislative purpose (CL 1948, §§ 691.581, 691.582).

6. CONSTITUTIONAL LAW—PUBLIC POLICY.

The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.

7. DEATH—MINORS—DAMAGES.

Jury's award of $12,072 under death act to father as special administrator of estate of his 15-year-old daughter who had been killed because of defendant's negligence in maintaining county road, *held*, "fair and just" compensation under evidence showing that father, at time of her death, had been unemployable for several years because of a heart condition, daughter had contributed to family support by $5 per week in addition to performance of household services which permitted the mother to be employed outside the home, funeral expenses amounted to $800.27, and $10,000 was claimed as present worth of services during minority, and daughter contemplated taking over mother's outside job when high school course was completed (CLS 1956, § 242.1; CL 1948, §§ 691.581, 691.582).

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

Appeal from Ogemaw; Shaffer (John C.), J. Submitted January 9, 1959. (Docket No. 44, Calendar No. 47,683.) Decided October 13, 1959.

Case by John L. Thompson, special administrator, estate of Elda L. Thompson, deceased, against Ogemaw County Board of Road Commissioners for damages under the death act arising from automobile

collision caused by defective road. Verdict for plaintiff. New trial granted. Plaintiff appeals. Reversed and remanded for entry of judgment on verdict.

Peter F. Cicinelli and *van Benschoten & van Benschoten,* for plaintiff.

Smith & Brooker (*Carl H. Smith, Sr.,* of counsel), and *Randall B. Clemence,* for defendant.

EDWARDS, J. This is a suit under the wrongful death act brought by a father acting as special administrator of the estate of his deceased 15-year-old daughter.

The declaration alleged that the girl's death was caused by the negligence of the defendant Ogemaw county board of road commissioners in failing to keep a county road reasonably fit and safe for travel, in violation of its statutory duty. See CLS 1956, § 242.1 (Stat Ann 1958 Rev § 9.591).

Evidence at the trial showed the existence of a large hole in the west half of Damon road, in Ogemaw county, south of the crest of Darling hill, that the hole had been there for some months prior to the date in question, and that defendant had actual knowledge of its existence.

Plaintiff's daughter was a passenger in an automobile traveling south on Damon road on the night of November 6, 1953. The car she was in struck the hole referred to, went out of control and swerved into the left-hand lane where it collided head-on with an automobile being driven in the opposite direction. Plaintiff's daughter and 3 other persons in the car were killed.

The case was tried before an Ogemaw county jury which brought in a verdict of $12,072 in favor of plaintiff.

Subsequent to verdict, defendant-appellee sought and obtained a new trial on the ground that the judge incorrectly charged the jury on the issue of damages by allowing the jury to consider loss of possible contributions, due to parental dependency, which the minor child might otherwise have made subsequent to her 21st birthday.

On appeal, the issue is presented to us thus:

"In the event of the wrongful death of a minor, may the jury consider and award damages for 'pecuniary injuries' suffered by the surviving parents after the period of the child's minority?"

The testimony pertaining to pecuniary damages upon which the jury apparently based its award may be summarized under 3 headings:

(1) Funeral expenses of $800.27—stipulated.

(2) Loss of services. This item was estimated by plaintiff at $10,000 when asked for a bill of particulars pertaining to his $25,000 damage clause. The testimony presented in relation to the daughter's services included the following:

At the time of death, decedent was 15 years old. She was an intelligent, healthy girl, completing her high school requirements. She earned money as a baby-sitter and contributed to her parents, on an average, $5 to $5.50 per week. Decedent's father suffered from heart trouble, arthritis and hardening of the arteries, sufficiently incapacitating him so that he had been unemployed since 1948. The principal source of family income was derived from earnings of decedent's mother, a cook in a restaurant. In order for the mother to retain this employment, the daughter performed cooking, washing and general housework for the family to the extent of 4 to 6 hours of work each day.

(3) Loss of prospective contributions beyond the age of 21.

In addition to the facts recited above, decedent's father testified:

"*Q.* Mr. Thompson, do you know what was planned for your daughter after she would graduate from high school?

"*A.* She was going to take mother's place and let mother come home.

"*Q.* You mean she was going to work in the restaurant?

"*A.* Yes. * * *

"*Q.* Is that the present job that your wife holds?

"*A.* Yes, sir.

"*Q.* Was Elda agreeable to that plan, sir?

"*A.* Yes, her and her mother used to talk about it. She used to tell her mother she could cook just as good as she could.

"*Q.* Then your wife, what was she going to do at that time?

"*A.* She was supposed to come home. * * *

"*Q.* At the time of the death of your daughter, Mr. Thompson, were you in need of her help both services and contributions?

"*A.* Yes. * * *

"*Q.* Now, Mr. Thompson, in your opinion, under the family circumstances as you have described them here, would you have been in need of your daughter's services and money contributions even after she reached the age of 21 years if she had lived? * * *

"*A.* Yes."

The court's charge on the issue of damages concerned 3 elements: (1) Funeral expenses; (2) The loss of services of the deceased during her minority; and (3) The loss of her future contributions after the 21st birthday.

This appeal pertains to the claimed invalidity of the charge regarding this third element. The trial judge's words follow:

"Now so far as damages that you may find after she would have reached the age of 21 years, they

would be computed and allowed for such period of time as you may find a condition of dependency on the part of the parents to exist, taking into consideration the fact that she might be relieved of such dependency by inability after age 21 through her own death, sickness or otherwise to contribute to her parents; and taking into consideration the fact that such dependency would cease in any event at such time as you may determine from the age, condition of health and life expectancy of her parents that they or the surviving survivor of them would die. Again I caution you that it is the present worth of these various amounts, as I have explained it to you, that it is essential to find."

The trial judge's charge also defined pecuniary injury:

"Pecuniary loss means the money loss, the money injury caused by such death. Now in that connection I might also say that the law does not provide for any damages for sentimental reasons. It uses the word 'pecuniary' which distinguishes it from those other matters which are matters of sentiment, of love and affection and of companionship, and those sort of things which are always present when anyone dies, but the law refers to pecuniary injury."

The question presented by this appeal requires interpretation of the meaning of the Michigan wrongful death act. CL 1948, §§ 691.581, 691.582 (Stat Ann 1957 Cum Supp §§ 27.711, 27.712).* The controlling

* The relevant portions of the statute follow:

"Be it enacted by the senate and house of representatives of the State of Michigan, whenever the death of a person or injuries resulting in death, shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. All actions for such death, or injuries

statutory language in relation to this case is, "in every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just, with reference to the pecuniary injury resulting from such death."

The trial judge in granting defendant's motion for new trial held that he had erred in his jury instruction by allowing consideration of possible future contributions to her parents by this minor after the age of 21.

The statute and Michigan case law interpreting it allow consideration of loss of services of a minor in determining pecuniary injury of a parent. *Black* v. *Michigan Central R. Co.*, 146 Mich 568; *Sceba* v. *Manistee R. Co.*, 189 Mich 308 (LRA1918C, 1090); *Morris* v. *Radley*, 306 Mich 689; *Rajnowski* v. *Detroit, Bay City & Alpena R. Co.*, 74 Mich 20; *Hurst* v. *Detroit City Railway*, 84 Mich 539.

There is, however, a clear distinction between the services of a minor and the contributions of an adult son or daughter to a dependent parent. Such contributions are more than a moral obligation. Under proper circumstances an adult son or daughter may be ordered to contribute such support. CL 1948 and CLS 1956, § 401.1 *et seq.* (Stat Ann 1950 Rev and 1957 Cum Supp § 16.121 *et seq.*).

The pecuniary value of such obligation, voluntarily assumed, has been recognized in Michigan case law.

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resulting in death, shall hereafter be brought only under this act." CL 1948, § 691.581 (Stat Ann 1957 Cum Supp § 27.711).

"Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and in every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered and also damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death." CL 1948, § 691.582 (Stat Ann 1957 Cum Supp § 27.712).

In the case of a dependent parent, proofs that a son 23 years of age had voluntarily undertaken and continued support were held to allow the jury to consider whether or not there was reasonable expectation of continued support in determining damages arising from the son's death. *Judis* v. *Borg-Warner Corporation,* 339 Mich 313. See, also, *MacDonald* v. *Quimby,* 350 Mich 21.

A large majority of State courts hold that recovery may be had for the loss of benefits reasonably to be expected after the majority of the deceased. *Inspiration Consolidated Copper Co.* v. *Bryan,* 35 Ariz 285 (276 P 846); *Bohrman* v. *Pennsylvania R. Co.,* 23 NJ Super 399 (93 A2d 190); *Foerster* v. *Direito,* 75 Cal App2d 323 (170 P2d 986). See, also, *Van Cleave* v. *Lynch,* 109 Utah 149 (166 P2d 244); annotation, 14 ALR2d 485, Measure and elements of damages for personal injury resulting in death of infant.

We do not believe that the age of the child at death (whether before or after majority) is decisive as to consideration of loss of possible future support after the 21st birthday. Nothing in the Michigan statute pertaining to wrongful death suggests such a distinction. CL 1948, § 691.581 *et seq.* (Stat Ann 1957 Cum Supp § 27.711 *et seq.*). The language of the *Judis* and *MacDonald Cases* suggest that the test is reasonable expectation of support rather than any particular age at the time of death.

We note that the trial judge felt that the language contained in *Covell* v. *Colburn,* 308 Mich 240, required him to grant the motion for new trial. Although we read the facts therein as quite different from these, to the extent that the *Covell Case* suggests a different conclusion, it is overruled.

While this decides the basic legal question presented in this appeal some comment may be desirable in this case upon the most difficult of all questions involved in wrongful death cases—how definite must

the evidence bearing upon pecuniary injury be to support a jury award?

It must be recognized at this point that some uncertainty of proof is implicit in the terms of the statute we seek to interpret. The pecuniary injury contemplated by the act requires consideration of the probability of the happening of events which, as of the date of trial, have been permanently barred by the intervention of death.

Briefly put, there can be no such thing as direct evidence of future support when the supporter is dead. This fact alone guarantees that no testimony can be offered in proof of otherwise probable future support or contribution which completely avoids speculation. Indeed the only certainty in relation to such testimony is that no one will ever be able to prove or disprove its validity. It is perhaps for this reason that the statute places emphasis upon "such damages as the court or jury shall deem fair and just."

Lack of proofs of an exact quality should not, however, be allowed to defeat the legislative purpose. The Michigan wrongful death act is a remedial measure designed to alleviate the harsh provisions of the common law which has generally been interpreted as forbidding compensation for wrongful death.* Mr.

* The source of the rule is usually attributed to a statement made by Lord Chief Justice Ellenborough in a case decided in 1808. In *Baker* v. *Bolton*, 1 Camp 493 (170 Eng Rep 1033), he said: "In a civil court the death of a human being could not be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence."

Indeed, the preamble to Lord Campbell's act, 9 and 10 Vict c 93, begins with this language: "Whereas no action at law is now maintainable against a person, who by his wrongful act, neglect, or default, may have caused the death of another person."

The historic origin of this strange rule apparently lay in exclusively criminal nature of actions for wrongful death. One of the penalties was forfeiture to the crown of all goods and chattels of the wrongdoer—thus effectively eliminating any civil action on the part of survivors.

For an interesting discussion of historic background, see *Simp-*

Justice Cardozo, writing for the United States supreme court in relation to a similar enactment, offered this guide for judicial interpretation:

"Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of the law, a new generative impulse transmitted to the legal system. 'The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.' Its intimation is clear enough in the statutes now before us that their effects shall not be stifled, without the warrant of clear necessity by the perpetuation of a policy which now has had its day." *Van Beeck* v. *Sabine Towing Co.*, 300 US 342, 350, 351 (57 S Ct 452, 81 L ed 685).

Fortunately for purposes of our present decision, this case does not present the wrongful death problem in its most difficult form as did *Courtney* v. *Apple,* 345 Mich 223, which recently divided this Court. There is no need here to consider a presumption as to damages. There is substantial evidence tending to prove the pecuniary injury present in the instant case.

Among the important facts we note these: The father of the family was unemployable. The deceased was a healthy and intelligent 15-year-old. She had proved to be a willing worker. She earned money outside the home and contributed it to the family support. She performed household work which freed the mother as a wage earner. The need of this family

son v. *Beardsley*, Muskegon county circuit court No 14,769, Noel Fox, circuit judge. (Opinion available in State law library.)

could reasonably be forecast into the future as could a continuation of the daughter's help and contribution.

It may, of course, be suggested that coincident with or preceding her majority would come a probability of marriage and other responsibilities which would tend to decrease her opportunity to help. This possibility was, we are certain, as much available to the minds of the jurors as it is to ours. Another consideration equally clear from human experience, and equally available to the jurors, is the probability of increased need for and possibility of assistance in the later years of paternal life when a son's or daughter's circumstances are likely to be more stable than in the days of early marriage.

The jury awarded $12,072. Much of this sum is justified by the funeral expenses plus the value of the services of the girl up to majority.

It is obvious that the trial judge felt that if consideration could legally be given to possible contributions beyond the 21st birthday the evidence was sufficient to support the jury award.

We agree with him in this regard. We do not think the award went beyond the stated purpose of the statute or the legitimate limits of the evidence. What the jury deemed "fair and just" compensation for pecuniary injury to this plaintiff finds support in this record.

Reversed and remanded for entry of judgment based on the jury verdict. Costs to appellant.

SMITH, BLACK, VOELKER, and KAVANAGH, JJ., concurred with EDWARDS, J.

CARR, J. (*dissenting*). Plaintiff's decedent sustained injuries in a traffic accident occurring on November 6, 1953, between the hours of 10 and 11 p.m., on a public highway in Ogemaw county. Her death

resulted from such injuries, the proofs indicating that she did not recover consciousness following a collision between the automobile in which she was a passenger and another vehicle. This action was instituted by plaintiff, decedent's father, a special administrator of the estate to recover damages under the provisions of the so-called wrongful death act.* It was the claim of the plaintiff that the defendant board negligently failed to maintain the highway where the accident occurred in a condition reasonably safe for travel thereon, and that such negligence was the proximate cause of the accident.

Defendant by answer denied that it was guilty of negligence, and the case was tried in circuit court on the question of liability and the damages recoverable. The jury returned a verdict in plaintiff's favor in the sum of $12,072. Defendant's motion for judgment notwithstanding the verdict was denied, but its motion for a new trial was granted. Plaintiff's motion that a new trial, if granted, should be limited to the question of damages only was denied. Plaintiff, on leave granted, has appealed, claiming that the trial judge was in error in granting a new trial.

The principal question submitted on the appeal has reference to the matter of damages. At the time of the accident plaintiff's decedent, Elda Thompson, was 15 years of age. Plaintiff's claim with reference to recoverable damages resulting from the death was set forth in paragraph 13 of the declaration, as amended, in the following language:

"That in said accident of November 6, 1953, plaintiff's decedent, Elda Thompson, suffered fatal injuries and that as the proximate cause as the result of said accident and from said injuries she died on November 7, 1953; that as a result of said accident, fatal injuries and death, that she, Elda Thompson, then

* PA 1848, No 38, as amended by PA 1939, No 297 (CL 1948, § 691.581 *et seq.* [Stat Ann 1957 Cum Supp § 27.711 *et seq.*]).

being 15 years of age, her birth date being December 16, 1937, did leave surviving her the following heirs at law or next of kin, John L. Thompson, father, age 63; Irene V. Thompson, mother, age 47; Velvae Van Wormer, sister, age 29; Olive Thompson, sister, age 26; Ellen Bailey, sister, age 24; Marjorie Brown, sister, age 23; Leah Belle Gifford, sister, age 22; John Thompson, brother, age 18; Walter Thompson, brother, age 14; that her said father, mother and other next of kin and heirs at law were partially dependent upon said Elda L. Thompson, deceased, and that they suffered loss of her earnings by virtue of such death; further, the father and mother of said minor were entitled to her services from the time of her death until she would have otherwise attained the age of 21 years; further, plaintiff claims damages for the special expenses incurred on account of the hospital, doctor and burial expenses which were caused by this accident, these fatal injuries, and said minor child's resulting death; that further the plaintiff claims such damages as are fair and just with reference to the pecuniary loss suffered by the next of kin and/or by her said estate. * * *

"With reference to the pecuniary injury resulting from such death to those persons who may be entitled to such damages when recovered; and also damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable, pursuant to PA 1848, No 38, as amended by PA 1939, No 297."

It was apparently agreed by counsel trying the case in circuit court for the respective parties thereto that the language quoted fairly supported a claim that plaintiff was entitled to damages for pecuniary injury based on contributions that Elda might have made to the support of her parents, after she reached the age of 21, had the fatal accident not occurred. The jury was permitted to consider such claim and presumably arrived at the verdict returned accordingly. The trial judge in submitting the case to the jury charged as follows:

"You should compute and allow the value of the financial support you may find the decedent, under the testimony in this case, would have given to her parents, taking into consideration their need, if any, for such support after she would have become 21 years of age, and you also determine the present worth of that sum if you find there is such testimony.
* * *

"Now so far as damages that you may find after she would have reached the age of 21 years, they would be computed and allowed for such period of time as you may find a condition of dependency on the part of the parents to exist, taking into consideration the fact that she might be relieved of such dependency by inability after age 21 through her own death, sickness or otherwise to contribute to her parents; and taking into consideration the fact that such dependency would cease in any event at such time as you may determine from the age, condition of health and life expectancy of her parents that they or the surviving survivor of them would die. Again I caution you that it is the present worth of these various amounts, as I have explained it to you, that it is essential to find."

The motion for a new trial submitted by counsel for defendant alleged, among other bases, that the charge with reference to the damages in question was erroneous. The trial judge so concluded and granted the motion for a new trial, indicating that he considered it unnecessary to pass on other questions raised by said motion. The other grounds presented have not been argued by counsel on this appeal, and, in consequence, we express no opinion as to their merit or lack of it.

The statute on which the instant action is based, the wrongful death act, contemplates the allowance of damages for pain and suffering, for reasonable medical, hospital, and funeral expenses for which the estate of a decedent may be held liable, and also for

the "pecuniary injury" resulting from the death to the persons entitled to the damages recovered. The allowance of damages in a case of this nature must rest on the basis of the proofs submitted on the trial. This Court so held in *Baker* v. *Slack,* 319 Mich 703, with reference to damages for pain and suffering, and the same rule is applicable with regard to the right to recover on the basis of a pecuniary injury on the part of those entitled to such damages as may be awarded under a judgment therefor. In consequence, we are here confronted with the question whether the proofs on the trial in circuit court were sufficient to justify or permit submitting to the jury the question of the allowance of damages to the plaintiff on the ground that by the wrongful conduct of defendant her parents were deprived of contributions that Elda might otherwise have made to their support after she attained her majority.

Plaintiff testified that he was in poor health and unable, because of a heart condition and arthritis, to engage in gainful labor. At the time of the trial the mother, Mrs. Thompson, was working in a restaurant where she had been employed for 2 or 3 months. She was not called as a witness in the case. The claim of the plaintiff with reference to the specific question under discussion appears in the following excerpts from his testimony:

"*Q.* (*By Mr. van Benschoten*): Mr. Thompson, do you know what was planned for your daughter after she would graduate from high school?

"*A.* She was going to take mother's place and let mother come home.

"*Q.* You mean she was going to work in the restaurant?

"*A.* Yes. * * *

"*Q.* Was Elda agreeable to that plan, sir?

"*A.* Yes, her and her mother used to talk about it. She used to tell her mother she could cook just as good as she could.

"*Q.* Then your wife, what was she going to do at that time?

"*A.* She was supposed to come home. * * *

"*Q.* At the time of the death of your daughter, Mr. Thompson, were you in need of her help both services and contributions?

"*A.* Yes. * * *

"*Q.* (*By Mr. van Benschoten*): Now, Mr. Thompson, in your opinion, under the family circumstances as you have described them here, would you have been in need of your daughter's services and money contributions even after she reached the age of 21 years if she had lived?

"*Mr. Smith*: Objected to as incompetent.

"*The Court*: Answer.

"*A.* Yes."

The record discloses that Elda had 5 sisters and a brother older than she, and also a younger brother. It does not appear that any of the older children, after they reached their majority, had contributed in any appreciable amount to plaintiff's support or to that of Mrs. Thompson. In fact, plaintiff stated specifically that they had not contributed to him. Whether they were able to do so, or would have such ability in the future, is a matter of conjecture under the testimony in the case.

It is not disputed that the parents were entitled to damages for the pecuniary injuries sustained by them in being deprived of Elda's services and earnings prior to her reaching the age of 21, less the reasonable cost of her care, maintenance, and education prior to that time. She was on the date of the accident a student in the 10th grade of a high school, and it is a fair inference from the record that it was the purpose of the parents and of Elda that she would complete the high school course. The

so-called plan that when she had graduated from high school she would take her mother's job in the restaurant, so that the latter could return home, was not only tentative merely but is unsupported by any proof that such an arrangement was to be of permanent character, or should extend beyond the daughter's minority.

There is nothing in the testimony before us, including the excerpts therefrom above quoted, to justify a conclusion that the parents had undertaken to bind their 15-year-old daughter by an agreement to contribute her earnings to their support after she reached her majority, or that Elda contemplated any such situation. Obviously if she on attaining majority followed the course mapped out by her older sisters, such contributions would not have been made. The proofs show that Elda assisted in the ordinary housework, and that on occasions she did "baby-sitting" for others for which she received money. It does not appear that the amount so earned exceeded $5 per week, a part of which she, as it is claimed, gave to her mother. It must be borne in mind also that this 15-year-old girl was scarcely in position to bind herself by any definite agreement as to her future. As before stated, it does not appear that she undertook to do so. She was merely a normal child and conducted herself accordingly. The showing made by plaintiff is not sufficient to constitute proof that in later years, after attaining majority, she would assume any obligation to support her parents by contributions from earnings that she might have. Neither may it be assumed that if proceedings were at any time instituted to compel the children to contribute to the support of plaintiff, or of their mother, any obligation so resulting would have rested solely on Elda.

In *Cooper* v. *Lake Shore & M. S. R. Co.*, 66 Mich 261 (11 Am St Rep 482), the action was brought to

recover damages for negligently causing the death of a girl 11 years of age. Verdict was returned for the plaintiff in the sum of $1,550. Defendant appealed, asserting that the trial judge was in error in submitting to the jury the question of possible damages sustained by the parents of the child for the loss of pecuniary benefit that they would, save for her death, have received from her earnings for the balance of her probable life. In criticizing the charge as given, this Court pointed out (p 270) that it permitted the jury to speculate upon the future and consider "the probabilities or the possibilities of its unknown and unknowable contingencies." The following excerpt from the opinion indicates the conclusion reached by the Court (pp 271, 272):

"The statute authorizes the jury, in every case of this kind, to give such amount of damages as they shall deem fair and just to the persons who may be entitled to the same when recovered. Under this statute the jury are not warranted in giving damages not founded upon the testimony, or beyond the measure of compensation for the injury inflicted. They cannot give damages founded upon their fancy, or based upon visionary estimates of probabilities or chances. The rule of damages in actions for torts does not apply to actions of this kind. The statute gives the right to damages; but it has been held, with rare exceptions, that they must be confined to those damages which are capable of being measured by a pecuniary standard. Cooley, Torts (1st ed), p 271, and cases cited in note 2.

"In actions brought under the statute, where the parents are the persons entitled to damages, if the evidence shows that the deceased had been in the habit of making contributions from his own means to his parents, their damages might be based and estimated upon the customary contributions of deceased proven before the jury. *Chicago & N. W.*

R. Co. v. *Bayfield,* 37 Mich 205 (16 Am Neg Cas 87). But this rule is not applicable in the case of a very young child who has never made any contributions, and whom it is impossible to show ever will."

In the case at bar the parents were entitled to the earnings of Elda until she reached the age of 21, and were charged with the obligation of supporting her. The small amount that she earned and shared with her mother the parents were entitled to receive. She made no contribution from her own means, and obviously she was not in position to do so. The situation that might have been presented had she lived past her majority is a matter of conjecture only. The difficulty in presenting proof relating to future possibilities does not justify the allowance of damages in the absence of such proof. A jury may not be permitted to speculate and allow damages on the basis of sentiment.

In *Morris* v. *Radley,* 306 Mich 689, damages were sought for the death of a child less than 5 years of age. There was no basis in the record for any allowance of damages based on possible contributions that the child, after attaining majority, might have made to her parents, and this Court held that the trial court properly limited the recovery of damages to medical, hospital, and funeral expenses, and deceased's future earnings and contributions to her parents until her 21st birthday, less the reasonable expenses incurred by her parents in the child's maintenance. *Morris* v. *Radley* was cited with approval and followed in *Covell* v. *Colburn,* 308 Mich 240. Plaintiff's decedent in that case was 15 years of age at the time of the accident in which she received fatal injuries. There was no proof on which to base a finding that had she lived past the age of 21 she would then, during her majority, have made contributions to her parents.

Counsel for appellant have directed attention to *Judis* v. *Borg-Warner Corporation*, 339 Mich 313. There the action was brought by the father as administrator of the estate of his 23-year-old son. The proofs indicated that after attaining his majority the son had helped his father on the latter's farm, and had also contributed to his support in the sum of approximately $25 per month. Under the particular facts involved, and established by the proofs, it was held that, although the son had voluntarily assumed the obligation of assisting his father without any court order requiring him to do so, the parent, who was physically incapacitated, was entitled to the allowance of damages for his loss of the contributions made to him for his support by the adult son. In reaching such conclusion the Court (p 326) quoted with approval from *Clinton* v. *Laning*, 61 Mich 355, 360, as follows:

" 'We think that the voluntary assumption of this duty may fairly be regarded as performing a legal obligation, and that expenditures to a proper extent, within the limit which could be laid down by compulsion, are as valid charges as if they had been compelled, and may be considered as on a similar footing.' "

The holding in the *Judis Case* is not in point under the facts involved in the matter now before us, the decision of the Court there being based on what was actually being done by the adult son at the time of his death and not on any claimed plan of the parent made during the son's minority. The parents here could not bind Elda, even with her acquiescence, to follow a particular course of conduct after her majority. Because of her age and the fact that she was under parental control, she could not bind herself by any express agreement to support, or contribute to the support of, her parents after she

reached the age of 21. As before noted, however, it does not appear that any such arrangement was actually made between Elda and her parents. The "plan" related, so far as the testimony of the plaintiff indicates, only to the daughter's minority.

Attention is directed by counsel for appellant to decisions from other States which under the particular statutes and facts involved are said to recognize the right to recover damages for possible future contributions by a decedent, after attaining majority, to a parent or other dependent. Typical of such cases is *Bohrman* v. *Pennsylvania R. Co.*, 23 NJ Super 399 (93 A2d 190). There damages were sought on behalf of the parents of a girl 18 years and 7 months of age at the time of her alleged negligent killing. The proofs disclosed that the parents owned and operated, with the help of their daughter, a beauty shop, that the daughter had graduated from high school and had nearly completed a course in a beauty culture school, and that it was contemplated by the parties that the business of the parents was to be turned over to the daughter who was to assume its operation. The court concluded that the proofs justified submitting to the jury the question of allowing damages for loss of contributions of the daughter to her parents after attaining her majority, as well as the loss of her earnings during minority. The court concluded from the proofs that there was a "reasonable expectancy" of such contributions, and that the plaintiff had established the parents' claim of dependency on the services and earnings of their daughter. The fact that the daughter was to receive the business was naturally a matter for consideration. As suggested, the sufficiency of the proofs was in dispute, an issue as to which opinions may properly differ. Obviously, however, the situation developed by the evidence in the case differed materially from that in the case at bar.

It will be noted that the excerpts above quoted from the charge of the trial judge in the case at bar, which he concluded to be erroneous, permitted the jury to conjecture that dependency on the part of the parents might continue until their death, and that Elda, after attaining majority, would continue to make contributions to their support from her own earnings or other means unless and until prevented by inability on her part to do so due to death, sickness, or other causes. The door was thus opened to the jury to speculate concerning the possibilities of the future, and to indulge in the assumption that Elda might have assumed, or been charged with, the obligation for the sole support of her parents without assistance from her brothers and sisters. No reference was made to possible contributions to plaintiff's support by his other children. The charge also made no distinction between the parents as to dependency, although under the proofs it is apparent that Mrs. Thompson was fully capable of caring for herself and was, in fact, the main support of the family.

The trial judge was not in error in concluding that the charge as given by him was erroneous and that a new trial should be granted. The proofs in the case showed merely the ordinary situation of a 15-year-old child taking a normal part as a member of the household. No factual basis was established on which to predicate a finding of a "reasonable expectancy" that she would, after attaining the age of 21, make contributions to her parents or to either of them. In view of the situation presented by the record in this respect the court was in error in permitting the jury to determine damages on the basis that decedent, if she had lived to attain her majority, would have made contributions for the support of her parents from her earnings or other means possessed by her. Damages may not be awarded on

the basis of mere possibilities or conjectures as to what may happen in the future. The motion for a new trial was properly granted, and the discretion of the trial judge in declining to limit the issues thereon to the matter of damages should not be disturbed.

The order from which the appeal has been taken should be affirmed.

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

OHIO DEPARTMENT OF TAXATION *v.* KLEITCH BROS., INC.

1. TAXATION—PROCESS—COURTS—JUDGMENT.

   Claim that terms of Ohio statute relative to taxation of truckers had not been complied with in that defendant trucker had not been served with process issuing out of an Ohio court prior to entry of judgment therein, based upon defendant's return, *held*, without merit, where Ohio statute contains no requirement that the trucker be served with such process, a summary proceeding for taxation purposes being utilized (Ohio Rev Code Ann 1958 Supp §§ 5717.02–5717.04, 5728.10, 5728.12).

2. COMMERCE—INTERSTATE COMMERCE—TAXATION—HIGHWAY MAINTENANCE.

   A State has the right to tax interstate commerce in reasonable relationship to its use of the State's highways for the purpose of maintaining them.

3. HIGHWAYS AND STREETS—LICENSES—TAXATION—TRUCKS.

   A trucker which applied for a license to use Ohio highways and sent its trucks over them submitted itself to the jurisdiction of that State and its highway use tax law (Ohio Rev Code Ann 1958 Supp §§ 5717.02–5717.04, 5728.10, 5728.12).

REFERENCES FOR POINTS IN HEADNOTES

[1, 4–6, 8] 51 Am Jur, Taxation § 980.
[2] 51 Am Jur, Taxation § 202 *et seq.*
[7] 30A Am Jur, Judgments § 880.
[10] 12 Am Jur, Constitutional Law § 705.
[11] 11 Am Jur, Constitutional Law § 125.

4. TAXATION—ENFORCEMENT OF TAX CLAIMS—COURTS—DUE PROCESS.
   Proceedings to enforce tax claims, generally summary in nature, and which customarily reduce the claim to lien and execution without any judicial proceedings whatever are not invalid for lack of due process, since due process of law does not necessarily include judicial process.

5. SAME—DUE PROCESS—COURTS—HEARING.
   Due process of law does not necessarily require a judicial hearing in matters of taxation, if at some stage in the proceedings the parties affected have an opportunity to be heard.

6. SAME—OHIO—TRUCKS—DUE PROCESS—COURTS.
   An Ohio statute which provided all the requirements of due process with respect to the taxation of truckers which used Ohio highways and provided such requirements prior to the point where the statute called for entry of a summary judgment in an Ohio court, may not be said to be unconstitutional for lack of a judicial hearing (Ohio Rev Code Ann 1958 Supp §§ 5717-.02–5717.04, 5728.10, 5728.12).

7. JUDGMENT—COLLATERAL ATTACK—JURISDICTION.
   A collateral attack may be made in the courts of this State upon the judgment of a court in another State by showing that the judgment sought to be enforced was void for want of jurisdiction in the court which issued it.

8. SAME—OHIO—JURISDICTION—HEARING—TAXATION—HIGHWAYS—TRUCKS.
   A summary judgment entered by a common pleas court of Ohio was not void for lack of jurisdiction over trucker against whom it was entered for amount of taxes assessed for use of Ohio highways notwithstanding judicial hearing had not been afforded, where Ohio had jurisdiction of the taxpayer by its application for license and opportunities for administrative hearing and appeal afforded by Ohio statutes which led directly to the entry of the judgment (Ohio Rev Code Ann 1958 Supp §§ 5717.02–5717.04, 5728.10, 5728.12).

9. CONSTITUTIONAL LAW—STATES—SEPARATION OF POWERS—COURTS.
   Claim that procedure which a State employed in its highway use tax law merged functions of separate branches of the government should be addressed to the courts of such State which pass on the constitutional problems of that State rather than the courts of State where resulting "judgment" is sought to be enforced.

10. STATES—FULL FAITH AND CREDIT—RECORDS.
    A summary judgment, entered by an Ohio common pleas court pursuant to Ohio tax statute, even though not a "judgment"

in a judicial proceeding is, at least, a record entitled to full faith and credit by courts of this State (US Const, art 4, § 1).

11. APPEAL AND ERROR—QUESTIONS REVIEWABLE—CONSTITUTIONAL LAW—OHIO STATUTE.

Claim of unconstitutionality of Ohio statute, not pleaded as an affirmative defense in action by Ohio in court of this State on summary judgment entered in Ohio common pleas court pursuant to statute imposing tax on truckers using Ohio highways is not considered, since not passed upon by trial court and also because appellant has not shown any injury due to lack of such determination (Ohio Rev Code Ann 1958 Supp §§ 5712.02–5712.04, 5728.10, 5728.12).

Appeal from Wayne; Bowles (George E.), J. Submitted June 3, 1959. (Docket No. 17, Calendar No. 48,012.) Decided October 13, 1959.

Assumpsit by the State of Ohio, Department of Taxation, against Kleitch Bros., Inc., a Michigan corporation, on Ohio judgment rendered to enforce payment of delinquent highway use tax. Summary judgment for plaintiff. Defendant appeals. Affirmed.

Snider, Feikens, Dice & Thompson, for plaintiff.

Matheson, Dixon & Brady, for defendant.

EDWARDS, J. This suit represents an effort by the State of Ohio to enforce in the Michigan courts 3 tax judgments previously entered in Ohio courts against a Michigan corporation. The taxpayer, a Michigan trucking corporation, contested the suit filed in Wayne circuit court. It claimed that the Ohio judgments were void (1) because of failure to follow the Ohio highway use tax statute, (2) because the Ohio highway use tax was an unconstitutional burden on commerce, and (3) because the statute levying the tax failed to provide legal notice

of suit, thus depriving the taxpayer of due process of law. Finding against appellant on all 3 grounds, and relying upon the full faith and credit clause of the United States Constitution (art 4, § 1), the Wayne circuit court judge entered judgment. This appeal followed.

The facts which form the background for this controversy are not in dispute; and the Michigan proceedings were based on a motion for summary judgment after the taking of testimony under Michigan Court Rule No 30 (1945).

The defendant corporation applied for and received licenses to use its trucks on Ohio highways. Under Ohio law, this act made the secretary of State of Ohio its agent for "service of process or notice in any assessment, action or proceeding instituted in this State [Ohio]." Page's Ohio Rev Code Ann, title 57, Taxation, 1958 Supp § 5728.12.

Subsequently defendant received Ohio highway use tax return forms from the State of Ohio department of taxation. In 3 instances defendant corporation's accountant prepared the required reports as to the axle mileage of its trucks in Ohio and forwarded the tax returns to the Ohio department of taxation.

Although defendant filed the tax returns, it did not (then or later) pay any tax.

It is undisputed that the Ohio judgments (and the Michigan judgments based thereon totaling $11,-440.70) were arrived at by taking defendant's own estimate of tax due from these 3 reports—plus the statutory penalty provided by the Ohio statute for failure to pay by due date.

Subsequent to filing of its 3 reports, defendant was served in each instance with notice of assessment of the tax based on the amount shown on its own return. This notice of assessment was served on defendant through service on the Ohio secretary of

State, and through registered mail at its business address in Michigan.

This assessment constituted a demand for payment and included the following notice to the taxpayer:

"IMPORTANT

"This assessment is based on assessee's failure to comply with the Ohio highway use tax laws, and shall be deemed conclusive 30 days after receipt thereof if not contested.

"If the assessee wishes to contest the assessment or any portion of it, he may secure a hearing by filing with the tax commissioner within 30 days from receipt of this notice, a petition for reassessment in the form prescribed by section 5728.10 of the Revised Code. A printed form will be furnished by the department of taxation, division of sales and highway use taxes, 68 East Gay street, Columbus 15, Ohio at the request of the taxpayer.

"In addition to the filing of a petition for reassessment the assessee must post a cash or corporate surety bond satisfactory to the commissioner, in the amount of the assessment including penalty, conditioned upon payment of the tax finally determined to be due.

"If the assessment is paid in its entirety within 30 days after the date on which the notice of assessment is received by the person assessed, the tax commissioner may remit such part of the penalty as he may deem proper. Request for remission of the penalty must be filed in writing."

The section of the Revised Code referred to above made available to the taxpayer the general appeal procedure provided by Ohio statutes in tax matters (Ohio Rev Code Ann and Ohio Rev Code Ann 1958 Supp §§ 5717.02, 5717.03, 5717.04), including a hearing before the State tax board, and right of appeal therefrom to the supreme court of Ohio. In one instance appellant sought to appeal the final assess-

ment, claiming it unconstitutional as a burden on commerce. However, it posted no bond and its appeal was dismissed for that reason.

Stapled to the assessment was still another notice which informed the taxpayer:

"NOTICE

"Unless the person to whom the attached order or assessment is directed pays the amount stated within 30 days after receipt thereof, or contests same in the manner provided by law, judgment will be entered in the proper county and all highway use permits issued to such person will be suspended."

On the back of the notice the applicable provisions of the Ohio highway use tax statute were printed.

The record shows that, in addition to being served on the Ohio secretary of State, these assessments and notices were actually received by defendant.

On continued failure of the taxpayer to pay, and after time for appeal had run, summary judgments were entered in the court of common pleas of Franklin county, Ohio. No summons or other notice than those referred to above were issued out of that court prior to entry of judgments.

While this litigation was pending, the constitutionality of the Ohio highway use tax was upheld against a claim that it was an unreasonable burden upon interstate commerce. A decision on this point by the Ohio State supreme court (*Geo. F. Alger Co.* v. *Bowers, Tax Commissioner*, 166 Ohio St 427 [143 NE2d 835]) was appealed to the United States supreme court. In a *per curiam* opinion, the United States supreme court refused to review the matter, finding no "substantial Federal question." *Geo. F. Alger Co.* v. *Bowers, Tax Commissioner of Ohio*, 358 US 43 (79 S Ct 21, 3 L ed 2d 43), rehearing denied 358 US 901 (79 S Ct 218, 3 L ed 2d 151).

As to appellant's claim that the procedure outlined in the statement of facts above did not comply with the terms of the Ohio statute in that appellant was not served with process issuing out of the Ohio court prior to entry of judgment, we can only answer that we find no such requirement in the statute. The statute clearly contemplates a summary proceeding and requires entry of judgment "immediately" on filing of a certificate of the final assessment by the tax commissioner. Ohio Rev Code Ann 1958 Supp § 5728.10.

We note, of course, appellant's argument that the statute should be construed as imposing a requirement of process or notice out of the court itself to save it from unconstitutionality. This really poses the same basic issue as appellant's basic claim, namely, that absent notice or process issued out of the Franklin county common pleas court defendant was deprived of due process of law. This issue we shall turn to now.

Concerning the essential validity of the tax and the reasonableness of its application to defendant, we have no doubt. Ohio certainly has the right to tax even interstate commerce in reasonable relationship to its use of Ohio highways for the purpose of maintaining them. *Geo. F. Alger Co.* v. *Bowers, Tax Commissioner, supra*; *Postal Telegraph-Cable Co.* v. *City of Richmond*, 249 US 252 (39 S Ct 265, 63 L ed 590); *Interstate Busses Corporation* v. *Blodgett*, 276 US 245 (48 S Ct 230, 72 L ed 551); *Western Live Stock* v. *Bureau of Revenue*, 303 US 250, see cases cited, p 254 (58 S Ct 546, 82 L ed 823, 115 ALR 944).

In addition, appellant by applying for a license and by sending its trucks over Ohio highways plainly submitted itself to the jurisdiction of that State and its highway use tax law. *Hess* v. *Pawloski*, 274 US 352 (47 S Ct 632, 71 L ed 1091); *Henry L. Doherty & Co.* v. *Goodman*, 294 US 623 (55 S Ct 553, 79 L ed

1097); *International Shoe Co.* v. *State of Washington,* 326 US 310 (66 S Ct 154, 90 L ed 95, 161 ALR 1057).

See, also, *Olberding* v. *Illinois Central R. Co., Inc.,* 346 US 338 (74 S Ct 83, 98 L ed 39).

The objection we now consider is based on the "due process" clause of the 14th Amendment and is addressed to a narrow—almost formalistic—point. Appellant in effect admits operating its trucks in Ohio; it admits receipt of tax forms and filling same out; it does not dispute the accuracy of the computation of the tax which was based on its own returns; it admits notice of the final assessment of the tax and its rights of hearing and appeal; it admits notice likewise of the summary procedure set forth in the Ohio statute in event of failure to pay the tax; it concedes the reason it did not pay was it did not have the money; but it now claims that the judgments entered in the Ohio court are void as to it because no process or notices issued out of the common pleas court of Franklin county prior to entry of judgments.

Proceedings to enforce payment of taxes are generally summary in nature. Indeed, in many States, including Michigan, tax claims are customarily reduced to lien and execution without any judicial proceedings whatsoever. Any objection to such proceedings based on due process has long since been overruled. *McMillen* v. *Anderson,* 95 US 37 (24 L ed 335); *Weimer* v. *Bunbury,* 30 Mich 201.

In the *Weimer Case,* Justice COOLEY wrote (pp 210–212):

"In this case there has been no prosecution or suit; the county treasurer has adjudged the case without a hearing, and issued final process to seize property in enforcement of his conclusion. Such summary process, it is said, which gives the party whose property is seized no opportunity to contest the claim set up against him, cannot be due process of law.

"There is nothing in these words, however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. * * * The proceedings for the levy and collection of the public revenue afford still better illustration. Almost universally these are conducted without judicial forms, and without the intervention of the judicial authority; the few cases in which statutes have required the action of courts being exceptional. Where such action is not required, the proceedings are regarded as purely administrative, and any hearing allowed to parties in their progress has not been in the nature of a trial, but as a means of enlightening the revenue officers upon the facts which should govern their action. This has been so from time immemorial, and it has never been supposed that the taxpayer had a constitutional right to resist the tax because he had never had any judgment against him on a judicial hearing to fix its amount."

The minimum requirements of due process in tax matters have been spelled out thus:

"Due process of law does not necessarily require a judicial hearing in matters of taxation. To constitute due process, the matter of assessment need not ever come before a court, if at some stage in the proceedings the parties affected have an opportunity to be heard. Taxpayers, while entitled to be heard by the taxing authorities before the tax is conclusively settled against them, need not be afforded a further appeal to a court of law. It is competent to enact that the decision of a designated board shall be final without rehearing or review." 3 Cooley on Taxation (4th ed), § 1118.

It is plain that the Ohio statute complained of herein provided all of the requirements of due process referred to above, and that it provided them prior to the point where the statute called for sum-

mary judgment to be entered in an Ohio court. *Cf. International Shoe Co.* v. *State of Washington, supra.*

But we are told that judgment is nonetheless void because the court never acquired jurisdiction of the taxpayer in that no court process was served upon it. We, of course, recognized that collateral attack may be made in the courts of this State by showing that the judgment sought to be enforced was void for want of jurisdiction in the court which issued it. *Stewart* v. *Eaton,* 287 Mich 466 (120 ALR 1354); *Smithman* v. *Gray,* 203 Mich 317; *Farrow* v. *Railway Conductors' Co-operative Protective Association,* 178 Mich 639; *People* v. *Dawell,* 25 Mich 247 (12 Am Rep 260).

Our question then becomes: Was jurisdiction lacking?

Ohio had jurisdiction of this taxpayer. The taxpayer submitted to the terms of the tax statute, including its summary judgments provisions, by applying for a license and using the highways. The taxpayer had notice of the assessment of the tax, and of the opportunities for hearing and appeal afforded by the statute. These administrative proceedings led directly to the entry of the judgment complained of. Was the judgment nonetheless void because no special court notice or summons preceded it?

Our real difficulty with this question is due to the fact that the entry of judgment in the common pleas court of Franklin county was not really a judicial proceeding in the ordinary sense of the term. The statute required the clerk of the court to enter judgment as a matter of course. There was no hearing. The court exercised no discretion—made no determination. No notice was provided for prior to entry of summary judgment because no hearing was called for or permitted under the statute at this point.

We could perhaps regard the Ohio court as having acquired jurisdiction by dint of preceding administratively issued notice. This conclusion appears warranted by the form of the statute. In fact, however, the Ohio court adjudicated nothing. It was simply designated by the statute as the place of record of a final order to pay taxes determined through administrative processes which we have held to meet the tests of due process.

In a leading case directly in point as to this question, the California supreme court said:

"'"From all the authorities, it is evident that the State has the power to assess taxes and fix methods for the collection thereof, and it does not matter if these remedies be summary in their nature, so long as the taxpayer is in some way, at some stage of the proceedings, given an opportunity to be heard and have his rights determined before some competent tribunal.

"'"The statute in this case directed the issuance of a distress warrant upon certain conditions made to appear to the clerk of the county court.

"'"The statute might have prescribed that notice be given to the delinquent taxpayer before the issuance of a warrant; but the legislature did not see proper to include such a provision, and it was entirely within their power to omit it, inasmuch as the taxpayer has open to him the several methods, heretofore pointed out, of calling in question the validity of the demand made against him."

"'Unquestionably the "first section of the Fourteenth Amendment places a limit upon all the powers of the State, including, among others, that of taxation." (*County of Santa Clara* v. *Southern Pacific R. Co.*, 18 Fed 385, 397.) But the limit in respect to the levy and collection of taxes is well exemplified by the authorities herein discussed. The conclusion to be drawn therefrom is that the provisions of section 26 of the retail sales tax act do not contravene the constitutional inhibitions upon the legislature.

The retailer knows or should know the amount of tax due on the sales reported by him. The statute provides for adequate notice of any additional assessment and an opportunity for mistakes to be rectified upon the filing of a petition within the time prescribed. He is notified by the provisions of the statute that the tax will become delinquent and collectible summarily and without further notice unless he makes objection within the specified time. Nothing further is necessary insofar as the objections raised by the defendant are concerned. No contrary significance may be inferred from the provision that a "judgment" is to be entered against the retailer upon the filing of the board's certificate, or that the lien created thereby "shall have the force, effect and priority of a judgment lien." The fact that the word "judgment" was used to designate the method of the summary procedure does not of itself require all the antecedent steps in a judicial tribunal usually applicable when private debts are the subject of collection. The foregoing authorities are clear to the effect that the sovereign may adopt any appropriate procedure known to the law for the purpose of collecting taxes and that it is not required to provide for a hearing in a judicial tribunal before it may use the processes which follow upon the entry of a judgment in such tribunal. It is plain that a hearing in a judicial tribunal was not intended and is not required by the statute here in question. * * *

"'Such a "judgment," not being ordered by a judicial tribunal, is not governed by provisions of the code of civil procedure in like matters, such as the requirement for notice of entry of judgment, with the right to resort to an appellate tribunal.'" *People* v. *Skinner,* 18 Cal2d 349, 360, 361 (115 P2d 488, 494, 495, 149 ALR 299, 308–310).

If added complaint there be about the procedure employed in the Ohio statute, on the ground that it merges the functions of separate branches of the government (see dissent, *People* v. *Skinner, supra,*

p 363), such complaint must be addressed not to this Court, but to the courts of Ohio which pass on the constitutional problems of that State. The United States Constitution, art 4, § 1, requires Michigan to give "full faith and credit" to "the public acts, records, and judicial proceedings of every other State." We deal here with an Ohio tax statute and Ohio assessments, and judgments entered thereunder in an Ohio court.

Even if we do not conceive of the Ohio "judgments" as "judicial proceedings," they plainly represent "records" of that State entered in compliance with one of its "public acts" and should be given full faith and credit. Michigan certainly has no public policy against collection of taxes which should be weighed against the unifying principle of the full faith and credit clause. See *Hughes* v. *Fetter,* 341 US 609 (71 S Ct 980, 95 L ed 1212).

Appellant seeks also to present a belated contention that the Ohio statute violated due process by requiring posting of bond prior to hearing and appeal of the assessments. This falls on 2 grounds. First, it was not pleaded as an affirmative defense before, nor considered or decided by, the Michigan court below. *Krause* v. *Faulkner,* 318 Mich 422; *Fowler* v. *McQuigg,* 222 Mich 178; *Auditor General* v. *Chase,* 132 Mich 630. Second, although appellant has in many ways disputed Ohio's right to levy this tax, there is no showing in this record that it has ever asserted any meritorious grounds for appeal of the assessments. We decline to decide a constitutional question not properly raised below where it is plain that appellant has suffered no injury from the statutory provisions complained of.

Affirmed. Costs to appellee.

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

LOCKWOOD v. COMMISSIONER OF REVENUE.

1. TAXATION—CONSTRUCTION OF STATUTES—USE TAXES—AMENDMENT.

   Statute, amending the use tax act and providing for the levy and collection of a 1% tax upon use of tangible personal property to be collected by the seller in addition to a 3% sales tax, is construed as exceeding the 3% limitation upon sales taxes set forth in the present sales tax diversion amendment to the Constitution (Const 1908, art 10, § 23, as amended in 1954; CL 1948, §§ 205.93, 205.95–205.97, as amended by PA 1959, No 263).

2. EVIDENCE—JUDICIAL NOTICE.

   The Supreme Court takes judicial notice of what every citizen of the State knows from his daily life.

3. CONSTITUTIONAL LAW—CONSTRUCTION OF SALES TAX DIVERSION AMENDMENT.

   The presently effective sales tax diversion amendment to the Constitution is construed to accomplish its manifest objective and intent to limit the rate of taxation on the retail sale of tangible personal property (Const 1908, art 10, § 23, as amended in 1954).

4. SAME—CONSTRUCTION BY COURTS.

   Courts must construe provisions of the Constitution to arrive at that meaning which accomplishes the manifest objective intended by the people, as determined from judicial notice taken of common experience in daily life.

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 47 Am Jur, Sales and Use Taxes §§ 14, 54.
Constitutionality, construction, and application of general use tax or other compensating tax designed to complement state sales tax. 129 ALR 222, 153 ALR 609.
[2] 20 Am Jur, Evidence § 18.
[4] 11 Am Jur, Constitutional Law § 61.
[5] 11 Am Jur, Constitutional Law § 57.
[7] 11 Am Jur, Constitutional Law § 129.
[8] 47 Am Jur, Sales and Use Taxes § 15.
[10] 14 Am Jur, Costs § 37.

5. SAME—CONSTRUCTION.

A constitutional limitation must be construed to effectuate, not to abolish, the protection sought by it to be afforded.

6. SAME—CONSTRUCTION.

The people have a right to have the limitations in a State Constitution respected and given the fair and legitimate force which its terms require.

7. SAME—PRESUMPTIONS—STATUTES.

The presumption of constitutionality accorded to acts of the legislature cannot prevail, where the statute is prohibited by the express language of the Constitution or by necessary implication.

8. TAXATION—USE TAXES—SALES TAXES—CONSTITUTIONAL LAW.

Provisions of act, amending the use tax act, whereby an additional 1% specific tax is levied upon transactions occurring within this State, that is measured by the same price paid for the article as the 3% sales tax, and is paid at the same time, and whereby the tax burden of the consumer of tangible personal property is intended to be increased *held*, unconstitutional as violative of provision of Constitution limiting sales tax to 3% (Const 1908, art 10, § 23, as amended in 1954; CL 1948, §§ 205.93, 205.95–205.97, as amended by PA 1959, No 263).

9. COURTS—CONSTRUCTION OF OPINION.

The language of a court's opinion is to be read, and interpreted, in the light of the facts the court faced when it employed the language in question.

10. COSTS—PUBLIC QUESTION—USE TAX.

No costs are allowed in mandamus proceeding to declare act amending the use tax act void, a public question being involved (CL 1948, §§ 205.93, 205.95–205.97, as amended by PA 1959, No 263).

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

Original mandamus by Charles C. Lockwood and Charles P. Lockwood seeking to restrain Louis M. Nims, State Commissioner of Revenue, and Sanford Brown, State Treasurer, from collecting tax and praying that PA 1959, No 263, amending the use tax act be declared unconstitutional and void. Attorney General intervenes as party plaintiff. Submitted October 5, 1959. (Calendar No. 48,442.) Writ granted October 22, 1959.

Charles C. Lockwood and *Charles P. Lockwood,* each *in propria persona.*

Paul L. Adams, Attorney General, *Joseph B. Bilitzke,* Deputy Attorney General, *Samuel J. Torina,* Solicitor General, and *Leon S. Cohan,* Assistant Attorney General, for intervening Attorney General.

Stanton S. Faville, Chief Assistant Attorney General, *T. Carl Holbrook* and *William D. Dexter,* Assistants Attorney General, for defendants by direction of the Attorney General.

CARR, J. *(dissenting).* The legislature of the State at its current session undertook to increase revenues deemed necessary to defray governmental expenses. To accomplish that end PA 1959, No 263, was enacted as an amendment to the use tax act of 1937.* Said amendment followed in terminology the language of the statute as originally adopted. By section 3 thereof provision was made for an increase of the use tax to 4%, subject to the further provision that if the property used, stored or consumed, had been acquired in a transaction on which the 3% sales tax† had been paid then the use tax should be 1% of the price of the property involved. In practical effect the exemption contained in the 1937 use tax act applicable to instances in which the sales tax had been paid to the State was continued to the extent of such payment.

At the general November election in 1946 an amendment to the Constitution was adopted adding thereto article 10, § 23, providing for the return to local governmental units and school districts of

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

† PA 1933, No 167, as amended (CL 1948, § 205.51 *et seq.,* as amended [Stat Ann 1950 Rev § 7.521 *et seq.,* as amended]).

certain portions of the sales tax collected. As amended at the general November election of 1954, said section of the Constitution reads as follows:

"On and after July 1, 1955, there shall be returned to local governmental units by the method hereinafter set forth, 1/2 cent of a State sales tax levy on each dollar of sales of tangible personal property on the 1946 statutory base (not rate). The State disbursing authority shall remit to counties as a whole on a population basis and payment shall be made to the county treasurer who shall remit to the respective cities, townships and villages within the county on a per capita basis. Population computation shall be based on the last and each succeeding State-wide Federal census for purposes of division among counties and upon the same basis or upon any special Federal county-wide census, whichever is later, for intra-county division purposes: Provided, That there shall be excluded from such computation 50% of the total number of persons who are wards, patients and/or convicts committed to and/or domiciled in any city institution located outside the boundaries of said city or committed to or domiciled in any county, State or federal tax supported institution, provided such persons were included in said Federal census. All remittances provided shall be made on a quarterly basis.

"On and after July 1, 1955, there shall be set aside for the school districts 2 cents of a State sales tax levy on each dollar of sales of tangible personal property on the 1946 statutory base (not rate), to be allocated among said school districts by law. Such taxes so collected shall be deposited in a special school aid fund and be expendable only by legislative appropriations for aid to the school districts and school employees retirement purposes as shall be provided by law. Said school aid fund shall be separate and distinct from the State general fund.

"Prior to any division or allocation of the sales tax, the cost of collection as determined by the de-

partment of revenue shall be deducted from total collections and credited to the general fund of the State.

"The legislature shall by law appropriate from the school aid fund for such public school employees' retirement system as shall from time to time be in effect under the laws of this State an amount which shall not be less than 5% nor more than 7-1/2% of the salaries of school district employees participating in the respective retirement systems: Provided, That such percentages shall apply only to that portion of salary as may be provided by law: Provided, That at no time shall the legislature levy a sales tax of more than 3%.

"The provisions of section 23 of article 10 as constituted prior to the effective date of this amendment shall continue in force and effect until July 1, 1955, and all sums collected and payable thereunder shall be paid."

Plaintiffs in the instant mandamus proceeding instituted said action by petition for the issuance of a writ restraining the defendant State officers from collecting the added use tax imposed by the amendment of 1959, claiming that the said act is unconstitutional in that it undertakes to provide for an increase in the sales tax and as such is within the inhibition of the Constitutional provision above quoted limiting the amount of the sales tax to 3%. The attorney general of the State has intervened in the case as a party plaintiff, asking that the relief sought be granted and that the Court find that all provisions of the amendment of 1959 relating to the 1% increase in the use tax be held unconstitutional. On behalf of defendants answer has been filed to plaintiffs' petition, denying the right to the relief thereby sought and asserting that the State legislature has not exceeded its powers in the adoption of PA 1959, No 263. Briefs have been filed

on each side of the controversy, and counsel have also advanced their claims in oral argument.

The attack on the statute is directed primarily against the provisions of section 3, which reads as follows:

"There is hereby levied upon and there shall be collected from every person in this State a specific tax for the privilege of using, storing or consuming tangible personal property in this State, which tax shall be equal to 4% of the price of such property, except that the tax shall equal only 1% of the price of such property when acquired in a transaction on which a tax is payable under the provisions of Act No. 167 of the Public Acts of 1933, as amended, being sections 205.51 to 205.78 of the Compiled Laws of 1948, and to such tax there shall be added penalties and interest where applicable as hereinafter provided. For the purpose of the proper administration of this act and to prevent the evasion of the tax hereby levied, it shall be presumed that tangible personal property purchased by any person for delivery in this State is purchased for storage, use or other consumption in this State.

"The tax imposed by this section for the privilege of using, storing or consuming a vehicle shall be collected prior to the transfer of any vehicle title, except transfers to a licensed dealer for purposes of resale, that arises by reason of a transaction made by a person who does not transfer vehicles in the ordinary course of his business done in this State. Notwithstanding any limitation contained in section 2 of this act, the price of any vehicle subject to taxation hereunder shall be measured by the value in money thereof as fixed pursuant to rules and regulations promulgated by the department: Provided, That no value in money shall be established when the transaction is made by reason of a bona fide gift including transfer as a gift to a beneficiary in the administration of an estate or when the trans-

action is a sale by a public official in the administration or enforcement of law.

"The department is hereby authorized to utilize the services, information or records of any other department or agency of the State government in the performance of its duties hereunder, and other departments or agencies of the State government are required to furnish such services, information or records upon the request of the department."

The question at issue is whether the section above quoted does in fact, as plaintiffs assert, undertake to provide for an increase in the sales tax, or, on the contrary, as counsel for defendants insist, is it a proper exercise of the legislative authority to levy a tax on the use, storage or consumption in this State of tangible personal property. In determining the legislative intent we must look primarily to the language employed. As before noted, in specifying the nature of the excise tax to be levied the language of the enactment of 1937 was followed. In specific terms the burden of the tax is on the privilege of "using, storing or consuming" tangible personal property acquired for the purpose indicated. No claim is made that PA 1937, No 94 is invalid, or that there is any uncertainty as to the nature of the tax thereby imposed, or that the construction placed thereon by this Court in *Banner Laundering Co.* v. *State Board of Tax Administration,* 297 Mich 419, in which the validity of the enactment was sustained, was not correct.

On behalf of plaintiffs it is contended that the statement by the legislature as to the nature of the tax is not of material significance. In view of the fact that the question before us is primarily one of statutory construction we cannot agree that the intention of the legislature, clearly expressed by the language used, can be ignored. The correct rule on this subject, which should be deemed ap-

plicable in the instant case, was set forth by the United States supreme court in *Flint* v. *Stone Tracy Company,* 220 US 107, 145 (31 S Ct 342, 55 L ed 389, Ann Cas 1912B, 1312), as follows:

"While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, nevertheless the declaration of the lawmaking power is entitled to much weight, and in this statute the intention is expressly declared to impose a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company. It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof."

It has been repeatedly recognized by this Court and by other courts as well that a legislative enactment is presumed to be constitutional. It cannot be held otherwise unless it clearly appears that it violates some provision of the Constitution of the State, or is in conflict with Federal law. Such rule has been emphasized in tax cases. In *Thoman* v. *City of Lansing,* 315 Mich 566, 576, it was said:

" 'The presumption of constitutionality following taxing statutes is stronger than applies to laws generally and only where a taxing system clearly and palpably violates the fundamental law will it be held invalid.' *Michigan Central R. Co.* v. *Powers,* 201 US 245, 267 (26 S Ct 459, 50 L ed 744), citing numerous decisions of the United States supreme court."

Among other decisions of like import is *Evans Products Co.* v. *State Board of Escheats,* 307 Mich 506, in which the constitutionality of PA 1941, No 170 was assailed. It was there said (p 533):

"Courts are bound, whenever possible, so to construe statutes as to give them validity and a reasonable construction (*Van Fleet* v. *Van Fleet,* 49 Mich 610); courts should lean toward that construction which will give the statute force and validity (*Thomas Canning Co.* v. *Southern Pacific Co.,* 219 Mich 388); the validity of a statute must be sustained unless it is prohibited by the express language of the Constitution or by necessary implication (*Child Welfare Society of Flint* v. *Kennedy School District,* 220 Mich 290); and it is our duty to adopt such a construction, if admissible, which will uphold validity rather than destroy a legislative enactment (*People* v. *Lockhart,* 242 Mich 491; *In re Harrand,* 254 Mich 584). Since 1844 (*Green* v. *Graves,* 1 Doug [Mich] 351), it has been a frequently repeated rule in construing statutes in this State that a statute should not be declared unconstitutional unless the conflict between the Constitution and the statute is palpable and free from reasonable doubt."

Of like import are: *In re Watson,* 293 Mich 263, 275; *1426 Woodward Avenue Corp.* v. *Wolff,* 312 Mich 352, 370; *Stadle* v. *Township of Battle Creek,* 346 Mich 64, 69. The rule is equally well established that the burden rests on one challenging the validity of a legislative enactment to establish objections thereto on constitutional grounds. *Newark Fire Insurance Co.* v. *State Board of Tax Appeals,* 307 US 313, 324 (59 S Ct 918, 83 L ed 1312).

Any assumption that a sales tax and a use tax are without substantial differences is unfounded. They are alike in that each is an excise tax levied on a privilege. However, those privileges are not

identical. The sales tax is imposed, as the statute creating it plainly specified, on the privilege of engaging in the business of making sales at retail as defined in the act, said tax being based on gross proceeds. CLS 1956, § 205.52 (Stat Ann 1950 Rev § 7.522). As pointed out in *City of Wyandotte* v. *State Board of Tax Administration,* 278 Mich 47, 53, the tax is not imposed upon the consumer, but, rather, on those engaging in the business of making retail sales. The taxpayer, that is, the retailer, may include the amount of the tax in the selling price but is not required to do so. *Swain Lumber Co.* v. *Newman Development Co.,* 314 Mich 437. The act further provides that a person engaged in the business of selling tangible personal property at retail shall not advertise or hold out to the public that the tax is not included in the price, and it is also specifically declared (CLS 1956, § 205.73 [Stat Ann 1950 Rev § 7.544]) that the taxpayer shall not be deemed prohibited by anything in the statute from reimbursing himself by adding to his sale price the amount of the sales tax. That the retailer is the taxpayer under the specific language of the sales tax act has been repeatedly recognized. The legal incidence of such tax falls on him. *Federal Reserve Bank of Chicago* v. *Department of Revenue,* 339 Mich 587; *National Bank of Detroit* v. *Department of Revenue,* 340 Mich 573.

The language of the use tax act of 1937 definitely indicated the nature of the said tax as an excise or privilege tax imposed on the privilege of using, storing or consuming "tangible personal property," which one has caused to become located in this State, and which is not within any of the exemptions specified in the act. It has been so construed by this Court. *Western Electric Co.* v. *Department of Revenue,* 312 Mich 582; *Kress* v. *Department of Revenue,* 322 Mich 590. The latter case expressly

recognized the fact that in some respects the use tax act was complementary to the prior sales tax act. Reference has been made repeatedly in decisions dealing with use taxes that legislation providing for such method of raising revenue was found to be expedient because, for obvious reasons, the sales tax could not be imposed on purchases of personal property outside of a State, even though the property was intended to be brought into such State and used, stored or consumed there. A result of that situation was to encourage to some extent at least the making of purchases by residents of Michigan in interstate commerce, thus avoiding the burden of the sales tax. This created what was regarded as an inequality and a discrimination against those selling goods at retail in this State. The use tax has been considered as complementary to the sales tax in that it did away with the alleged inequality and discrimination, the net result being to increase the revenues of the State.

This consideration of the excise taxes in question as being complementary, each to the other, carries with it the recognition of the fact that they are not identical. As a practical proposition they are assessed on different privileges, and the legal incidence of the tax falls in one case on the retailer and in the other on the user, storer or consumer. The fact that the seller of the goods designed for use, storage or consumption in Michigan is required by the statute to collect on behalf of the State the amount due from the purchaser does not alter the situation. The use tax is not imposed on such seller, but, rather, on the party exercising the privilege of use, storage or consumption, as the case may be. One may be charged with the duty of collecting a tax on behalf of government although the ultimate burden of such tax does not rest on him. In *Colorado National Bank of Denver* v. *Bedford,* 310 US

41 (60 S Ct 800, 84 L ed 1067), there was involved the validity of a statute of the State of Colorado requiring banks to collect from those to whom they rendered services for hire the amount of the tax levied under the State statute on such services, including the use of safety vaults. The State treasurer instituted action to recover from the defendant bank the amount of the tax that the latter was required to collect. Recovery was resisted on the ground that the bank was a Federal agency and not subject to taxation by the State. In rejecting such claim it was said (pp 52, 53):

"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. As the user directly furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but by section 12 of the act as the responsible obligor, we conclude the tax is upon him, not upon the bank. The Constitution or laws of the United States do not forbid such a tax.

"The tax being a permissible tax on customers of the bank, it is settled by our prior decisions that the statutory provisions requiring collection and remission of the taxes do not impose an unconstitutional burden on a Federal instrumentality. Especially is this true since the bank under the Colorado act is allowed 3% of the tax for the financial burden put upon it by the obligation to collect."

As declared in *Nelson* v. *Sears, Roebuck & Co.*, 312 US 359, 363 (61 S Ct 586, 85 L ed 888, 132 ALR 475):

"The validity of such a tax (use tax), so far as the purchaser is concerned, 'has been withdrawn from the arena of debate.'"

It was also pointed out, quoting from a prior decision, that the use tax is assessed on the privilege of use after commerce is at an end.

The use tax act of Michigan as adopted by the legislature in 1937 followed the general form of such statutes that had been previously adopted in other States. Among such was the Washington statute which is of particular interest in view of the discussion in the briefs of counsel in the instant case with reference to the nature of the sales and use taxes and their relationship. The State of Washington prior to the adoption of the use tax act by its legislature had imposed a sales tax in the sum of 2% on retail sales of tangible personal property. The use tax act contained a specific provision that:

"If any article of tangible personal property has already been subjected to a tax by this or any other State in respect to its sale or use in an amount less than the tax imposed by this title, the provisions of this title shall apply, but at a rate measured by the difference only between the rate herein fixed and the rate by which the previous tax upon the sale or use was computed."

The Washington statute was before the supreme court of the United States on appeal in *Henneford* v. *Silas Mason Co.*, 300 US 577 (57 S Ct 524, 81 L ed 814), and was sustained. Speaking through Justice Cardozo attention was called to the fact that the exemption under the use tax was not in all cases complete because of payment under a sales tax in Washington or elsewhere, or a use tax. Commenting on the statute, Justice Cardozo concluded that

the objections urged against its validity were not well-founded, saying in part (p 581):

"The plan embodied in these provisions is neither hidden nor uncertain. A use tax is never payable where the user has acquired property by retail purchase in the State of Washington, except in the rare instances in which retail purchases in Washington are not subjected to a sales tax. On the other hand, a use tax is always payable where the user has acquired property by retail purchase in or from another State, unless he has paid a sales or use tax elsewhere before bringing it to Washington. The tax presupposes everywhere a retail purchase by the user before the time of use. If he has manufactured the chattel for himself, or has received it from the manufacturer as a legacy or gift, he is exempt from the use tax, whether title was acquired in Washington or elsewhere. The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other States who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the State, buyers being no longer tempted to place their orders in other States in the effort to escape payment of the tax on local sales."

In the case at bar the charge is made on behalf of plaintiffs that the legislature, in the enactment of the amendment here in question in terms imposing a use tax, resorted to a "subterfuge." Such claim is obviously based on the theory that the tax imposed by the amendment is actually a sales tax, an assumption with which we cannot agree. The language of the statute does not warrant such conclusion, and the fact that the tax is imposed on the one using, storing or consuming the goods, rather than on the retailer for the privilege of sell-

ing, must be taken to indicate that the legislature intended exactly what it specified, namely, a use tax. The fact that the value of such use is measured by the purchase price has no controlling significance, nor does the manner of collection of the tax make it other than what the legislature has declared it to be.

It must be borne in mind also that we are not dealing here with any attempt to raise funds for an unauthorized purpose under the guise of a legitimate exercise of the taxing power. Decisions involving situations of such character have no bearing. The legislature of this State unquestionably is endowed with authority to levy a use tax. It has exercised that authority. Where is there any element of a subterfuge in the proper meaning of that term? In view of the claim made, it may be noted that in *Henneford* v. *Silas Mason Co., supra,* a like argument was advanced in the attack made on the use tax of the State of Washington. With reference thereto Justice Cardozo said (pp 587, 588):

"Finally, there is argument that the tax now in question, though in form upon the use, was in fact upon the foreign sale, and not upon the use at all, the form being a subterfuge. The supposed basis for that argument is a reading of the statute whereby the use shall not be taxable if the chattel was manufactured by the user or received as a legacy or acquired in any way except through the medium of purchase, and a retail one at that. But the fact that the legislature has chosen to lay a tax upon the use of chattels that have been bought does not make the tax upon the use a tax upon the sale. One could argue with as much reason that there would be a tax upon the sale if a property tax were limited to chattels so acquired. A legislature has a wide range of choice in classifying and limiting the subjects of taxation. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 US 232, 237 (10 S Ct 533, 33 L ed 892); *Ohio Oil Co.*

v. *Conway,* 281 US 146, 159 (50 S Ct 310, 74 L ed 775). The choice is as broad where the tax is laid upon one or a few of the attributes of ownership as when laid upon them all. *Flint* v. *Stone Tracy Co.,* 220 US 107, 158, 159 (31 S Ct 342, 55 L ed 389, Ann Cas 1912B, 1312). True, collections might be larger if the use were not dependent upon a prior purchase by the user. On the other hand, economy in administration or a fairer distribution of social benefits and burdens may have been promoted when the lines were drawn as they were. Such questions of fiscal policy will not be answered by a court. The legislature might make the tax base as broad or as narrow as it pleased."

The language above quoted may well be applied to the claim of plaintiffs in the instant case in characterizing the legislative action in the manner indicated. If resorting to the use tax act as a medium for the raising of necessary funds for State purposes was actually a subterfuge because of the fact that an increase in the sales tax was inhibited by the Constitution, it is apparent that a like charge might be made with reference to the enactment of the use tax act of 1937, which, as counsel suggests, was prompted, at least in part, by the inability of the State to tax retail sales of personal property made elsewhere, but intended for use and enjoyment in Michigan, due to restrictions imposed by the Federal Constitution. The obvious answer is that accomplishing a desired purpose in a certain authorized manner is not open to criticism because of the fact that a different method might have been adopted is permissible. So far as the instant case is concerned the legislature is clothed with authority to provide for raising revenue by a use tax. Its action in so doing is not subject to attack on constitutional grounds.

The principles recognized and applied in the *Henneford Case,* above cited, have been accepted in subsequent decisions. In *McLeod* v. *Dilworth Co.,* 322 US 327 (64 S Ct 1023, 88 L ed 1304), the Federal supreme court had under consideration a statute of the State of Arkansas, the issue being the right of the State to collect a sales tax on purchases made outside of the State. Discussing the difference between sales and use taxes, Justice Frankfurter, speaking for the majority of the court, said (p 330):

"A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these 2 taxes and the differences in the relation of the taxing State to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the commerce clause was meant to end."

The statement that the sales tax and the use tax are complementary may not be taken to mean that one may not be enacted without the other, or, more specifically, that a use tax cannot be adopted by a legislature of a State other than for the purpose of complementing a prior enacted sales tax. Counsel make no specific claim in this respect nor do they cite authorities indicating any such situation. As above noted, the Washington use tax act involved in the *Henneford Case* granted an exemption *to the extent* that a sales tax had been paid in that State on the sale of the property involved in the use, or

that such a tax or a use tax had been paid in another State. The act in question in the case now before us, PA 1959, No 263, in practical effect accomplishes a like result. Fixing the use tax at 1% where a sales tax has been paid on the transaction in which the consumer acquired the property is, of course, identical with regarding the use tax as 4% with an exemption of the amount of sales tax paid either in Michigan or elsewhere.

No claim is made that any provision of our Constitution restricts the right of the legislature to levy a use tax. The fact that, as a matter of policy, the use and sales taxes imposed in the State have heretofore been kept on a like basis as to amount does not necessitate, as a legal proposition, that such policy be continued. If by force of circumstances a departure therefrom has been found necessary or expedient what provision of our Constitution is violated thereby? The rule seems to be well-settled by authority that 2 or more excise taxes may be imposed "where the privileges or activities taxed are clearly separable and distinct." 51 Am Jur, Taxation, § 293, p 346. *Harder's Fire Proof Storage and Van Co.* v. *Chicago,* 235 Ill 58 (85 NE 245, 14 Ann Cas 536); *Corn* v. *Fort,* 170 Tenn 377 (95 SW2d 620, 106 ALR 647).

On behalf of plaintiffs it is claimed that the sales tax and use tax, in operation, are merged and collected as one. If such were the actual situation the constitutionality of the amendatory act of 1959 in question here would not be affected. We are concerned with the measure as enacted by the legislature, rather than with the administrative procedure followed in the collection of taxes and the handling of revenue. However, any merger of the collections made under the sales tax act and the use tax act would scarcely be permissible in view of the fact that the proceeds of the sales tax must be

apportioned and distributed in the manner specified in article 10, § 23, of the Constitution (1908). Such requirement is not imposed with reference to funds derived by the State from the use tax. The section of the Constitution in question and the proper procedure thereunder were discussed by this Court in *City of Jackson* v. *Commissioner of Revenue,* 316 Mich 694. It must be assumed that the requirements imposed by said amendment to the Constitution have been, and are being, observed. The argument based on manner of collection and alleged merger does not require further consideration. Likewise, the validity of PA 1959, No 263, is not open to attack on the basis of the method selected by the legislature for determining the value to the taxpayer of the privilege of using, storing or consuming tangible personal property purchased at retail sale. The plenary control of the State through its legislature with reference to matters of taxation has been repeatedly recognized, not only by State courts of last resort but by the supreme court of the United States. *Citizens' Telephone Co. of Grand Rapids* v. *Fuller,* 229 US 322 (33 S Ct 833, 57 L ed 1206).

As above pointed out, the arguments advanced against the constitutionality of PA 1959, No 263, are based on the claim that the tax thereby imposed is in violation of article 10, § 23, of the Constitution, and specifically of the inhibition therein contained with reference to imposing a sales tax of more than 3%. The briefs filed do not refer to any other provision of the Constitution claimed to be contravened by the enactment. For the reasons above set forth the tax imposed by said act is not a sales tax. The controlling features of the measure are in accord with the declaration of the legislature as to the nature of the tax imposed. It is based on the privilege of using, storing and consuming tangible personal property that has been purchased at retail for such

use and enjoyment within this State. The burden of the tax falls on the user and not, as under the sales tax act, on the seller of the property. The privilege of making the sale is not the basis of the use tax.

The amendatory act of the legislature at issue in the present case does not violate the provision of article 10, § 23, of the State Constitution (1908) forbidding the legislature to levy a *sales tax* in excess of 3%. The language of said provision is clear and unequivocal. It indicates the purpose stated and nothing more. It does not apply to the use tax and may not be so interpreted without reading into the amended section of the State Constitution an unwarranted inhibition on the power of the legislature that is neither expressed nor implied.

It will be noted that article 10, § 23, hereinbefore set forth as modified at the general election in November, 1954, provides for the apportionment of the revenues received from a tax levy on sales of tangible personal property. That reference was intended to the sales tax act of 1933 is not questioned, nor is it open to question. No mention is made of the diversion of funds received by the State under the use tax act of 1937, and such funds are not apportioned, in part, to school districts and municipalities of the State. We have in consequence a practical and accepted construction of the term "sales tax." No claim has been made in the past, or in the briefs and oral argument in the instant case, that the revenues received by the State under the use tax act are subject to apportionment in the same manner as are the proceeds of the sales tax levy.

It is incredible that the legislature in submitting to popular vote the proposed amendment at the general election in 1954, or that the people in voting

thereon, intended that the term "sales tax" as used in the clauses of said amendment providing for the apportionment of sales tax funds in the manner stated therein, and in inhibiting the legislature from increasing the sales tax above 3%, intended to use the term in question with different meanings. In other words, it must be assumed that the designation was used in the proviso imposing limitation on the power of the legislature with reference to the increase in the sales tax with exactly the same meaning as clearly intended in the so-called diversion clauses.

On the oral argument of the case the suggestion was made by counsel for plaintiffs that the people in adopting the Constitutional amendment at the general election in 1954 contemplated that the sales tax limitation as to amount should be applicable to an increase in the use tax over and above 3%. There is no logical basis for such claim. Certainly the language of said amendment does not indicate it, nor may it be assumed that voters in passing on the adoption of the amendment did not fully realize the natural import of the language contained therein. It is a matter of general knowledge that both the sales tax act and the use tax act were publicized, and information concerning each disseminated to the people of the State. We are not justified in assuming that the voters adopting the amendment in question did not understand fully the conditions giving rise to the enactment of the sales tax act of 1933 and of the use tax act of 1937, the necessity for such measures for the production of revenue for governmental purposes, the administration of each of said acts, and the litigation which led to the upholding thereof as proper exercise of legislative authority. There is nothing in the language of article 10, § 23, or in the situation existing at the time of the adoption thereof in its present form, that may

properly be said to indicate a belief on the part of voters that the term "sales tax" included the use tax. Had it been intended to extend the limitation on the power of the legislature to the latter tax the conclusion cannot be avoided that appropriate language to that end would have been used. How may this Court determine such question of intent other than by reference to the plain language of the amendment as adopted? Such language is so clear and specific that there is no justification or excuse for ignoring it or for indulging in conjecture or speculation as to the existence of some hidden intent not indicated in any way. If such there was, it was not incorporated in the amendment.

It may be noted further in this connection that Michigan is said to be the only State, among the many levying a tax on the sale of tangible personal property at retail, that has imposed a limitation on the power of the legislature. It thus appears that the prohibition actually set forth in the amendment with reference to the sales tax is unique, a fact that itself suggests the impropriety of extending it beyond its specific terms. There is no tangible basis whatever for the claim that the people in adopting the Constitutional amendment intended to impose a limitation of the same kind on the power of the legislature to enact a use tax as expressly declared with reference to the sales tax. If any such meaning were to be given to the language of such limiting proviso, a like construction must also be accepted with reference to the meaning of the provisions of the amendment requiring the apportionment among school districts and municipalities of the greater part of the sales tax. If "sales tax" includes "use tax," then the revenues derived from the latter tax would of necessity be subject to apportionment. As noted, however, such claim is not made in this case, nor has it been suggested that

such a situation has existed since the adoption of the constitutional amendment. Obviously we cannot logically give 2 different meanings to the term "sales tax" as used in such amendment. The conclusion cannot be avoided that it has but 1 meaning and does not, in either instance in which it is used, include the use tax. We repeat that there is no justification for extending the scope of article 10, § 23, beyond its express provisions. There is no basis on which this Court may do so.

This case was argued and submitted for determination Monday afternoon, October 5th. On October 9th the foregoing opinion was distributed to the members of the Court. Justice SMITH, under date of October 16th, served his opinion, indicating therein his reasons for concluding that the relief sought by plaintiffs should be granted. We are not in accord with such reasons or with the conclusion based thereon, and wish to comment briefly with reference to the issues presented.

The act in question was enacted by the legislature and was given immediate effect by more than the 2/3 vote required by the Constitution (1908), article 5, § 21. It was signed by the governor of the State and became effective on September 1, 1959. It seeks to raise revenue essential for the support of our State government and the performance of functions vital to the welfare of the State and its people. It is entitled to every presumption in favor of its validity, and it may not be held a nullity unless it clearly and beyond reasonable doubt violates some provision of the State Constitution or paramount Federal law.

The constitutionality of the act is challenged solely on the ground that it violates the provision of article 10, § 23, of the State Constitution as amended by the people at the November, 1954, general election. The specific clause of said section that is in-

voked is the limitation on the power of the legislature to enact a *sales tax* in excess of 3%. No other provision of our Constitution is relied on to support the claim of invalidity of the act, nor is it asserted that it in any way conflicts with Federal law. The basic question at issue is, in consequence, whether the amendment of 1959 to the use tax act of 1937 falls within the scope of the inhibition with reference to the sales tax. Justice SMITH contends that it does, basing his argument in that respect on the theory that such was the intent of the people in adopting the constitutional provision—notwithstanding the fact that no reference to a use tax was made therein.

Basically the question is: How shall the language of the constitutional inhibition against the sales tax be construed? No claim is made that the expression "sales tax" as used with reference to the apportionment of said tax was intended to apply to proceeds of the use tax as enacted in 1937 and amended by PA 1949, No 273. Neither is it claimed that the language of the amendment is ambiguous in any respect. On the contrary, it is clear and specific. The intent expressed thereby is not open to question. The rule of construction heretofore recognized by this Court and by courts of other States, as well as by the supreme court of the United States, was well expressed in *Attorney General* v. *State Board of Assessors,* 143 Mich 73, 76, 77. Involved there was the meaning of article 14, § 11, of the State Constitution of 1850, which section provided for a uniform rule of taxation and for the rate of taxation for property assessed by the State board of assessors. In connection with its conclusion that the Constitutional provisions must be interpreted in accordance with the language used therein, it was said:

"But 2 principles of construction need be referred to, both of which are well settled in this State. The first is that the legislature has power to adopt a statute, except as it is prohibited by the Constitution (*Smith* v. *Lake Shore & M. S. R. Co.,* 114 Mich 460); and that a statute will not be declared in conflict with the Constitution while serious doubt exists as to such conflict. The other principle is that the first resort, in all cases where a constitutional provision is to be interpreted, is to the natural signification of the words employed in the order and grammatical arrangement in which the framers of the instrument have placed them; and, if thus regarded, the words used convey a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then the meaning apparent on the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such cases there is no room for construction. Cooley, Constitutional Limitations (5th ed), pp 69, 70."

The rule announced in the language quoted has been repeatedly recognized by this Court and is in accord with the language of the opinion of the Federal supreme court in *McPherson* v. *Blacker,* 146 US 1 (13 S Ct 3, 36 L ed 869). It was there recognized by the court, in sustaining an act of the legislature of Michigan, that the framers of the Federal Constitution had employed words in their natural sense, and (p 27) that where the language used is plain and clear "resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text."

The general rule with reference to interpretation of constitutional provisions conforms with that of this State as above set forth, and is summarized in 16 CJS, Constitutional Law § 19, pp 81 to 84, as follows:

"If the language used is clear and unambiguous its meaning and intent are to be ascertained from the instrument itself by construing the language as it is written. Unless the context suggests otherwise, words are to be given their natural obvious, or ordinary meaning. To ascertain the meaning of a Constitution, therefore, the first resort in all cases is to the natural signification of the words used, in the order and grammatical arrangement in which the framers have placed them. If, thus regarded, the words used convey a definite meaning which involves no absurdity and no contradiction between parts of the same writing, then the meaning apparent on the face of the instrument is the one which alone courts are at liberty to say was intended to be conveyed. There is no occasion for construction where the language is plain and definite."

In accord is 11 Am Jur, Constitutional Law § 65, p 682, where it was said:

"The courts are not at liberty to disregard the plain meaning of words of a Constitution in order to search for some other conjectured intent."

In the case at bar we may not interpret the clear language of the constitutional inhibition against an increase in sales tax above 3% other than by giving thereto the clear and specific meaning of the language used. We may not enlarge the scope of the restriction by indulging in speculation or by conjecturing that the people in adopting the amendment intended something not expressed therein. Justice SMITH cites in his opinion *Bacon* v. *Kent-Ottawa Metropolitan Water Authority,* 354 Mich 159, to support the theory that a constitutional provision should not be subjected by the Court to a process of "erosion" or "attrition." *By like process of reasoning a provision of the fundamental law of the State may not be enlarged beyond the scope of its unambiguous expression by reading into it a purpose,*

intent, or meaning not within its terms. The people, and only the people acting in their sovereign capacity, may change the provisions of their Constitution, or of an amendment thereto. This Court in the instant case may not assume the prerogative of enlarging the scope of the provision of article 10, § 23, for the obvious reason that such action would constitute an amendment of said section by court action. The "obvious purpose" of the people in adopting such amendment is clearly expressed in the language used and by that language this Court is bound.

Justice SMITH suggests in his opinion that the reason the legislature was not limited by the constitutional amendment in the imposition of a use tax was due to a lack of need therefor at the time of the adoption of the amendment. It must be assumed that the sponsors of the constitutional amendment, and the people in voting on it, were well aware of the existing use tax and of the authority of the legislature with reference thereto. However, if it be assumed that specific reference thereto was omitted for the reason suggested, by what process of reasoning can this Court now read into the amendment a provision intentionally omitted? The Court may not broaden the clause relating to the sales tax on the theory that a like provision might have been made, or should have been made, with reference to the use tax. Whatever the reason, the fact is that the latter limitation was not imposed and this Court may not amend the action of the people by interpolating it.

In assailing the validity of the 1959 amendment to the use tax act emphasis is placed on the method of collection. It must be borne in mind, however, that such method is identical with that employed in the use tax act as first enacted. It is also the method employed in such acts adopted in other

States, the validity of which has been sustained uniformly by decisions of State and Federal courts. The answer is that manner of collection, and the selection of those who shall act for the State in that respect, was for the determination of the legislature as a matter of policy. If the legislature had prescribed other means for collection and the enforcement of payment, would the situation be in any way changed insofar as the validity of the act is concerned? Suppose, by way of illustration, that recourse had been had to the tax collection machinery of local units of government, with the duty to make periodic reports and payments thereto, or to a procedure analogous to that prescribed in the intangible tax law*, would this objection to the act be obviated? The legislature adopted the method deemed to be the most practical, particularly so in the light of the experience in the administration of the sales tax and of the use tax of 1937.

The differences between a sales tax and a use tax are clearly apparent. The decisions of the United States supreme court involving such question leave no doubt in this respect. The first tax is based on the privilege of selling tangible personal property at retail. The use tax is imposed on the privilege coming into being subsequent to the sale, of using, storing or consuming the property. They are alike in being excise taxes but obviously the privileges taxed are separate and clearly defined. The modification of article 10, § 23, at the general election in 1954 was proposed by resolution of the legislature. It may not be doubted that the sponsors of the modification, and the members of the legislature generally, had clearly in mind the history of the sales tax and of the use tax and the basis on which each rested. It may not be assumed that the legis-

* PA 1939, No 301 (CL 1948, § 205.131 *et seq.*, as amended [Stat Ann 1950 Rev § 7.556(1) *et seq.*, as amended]).

lature in submitting the question to the people, or that the people in voting for the proposed changes, including the limitation on the sales tax, did not fully understand the obvious meaning of the language used. The only possible conclusion is that it was not intended to limit the authority of the legislature with reference to the use tax. Had it been so intended, we must conclude that such intent would have been expressed. Neither is the claim tenable that the use tax as imposed under the amendment of 1959 is actually on the sale of the property. As under the act of 1937, the tax is on the privilege of using, storing or consuming, and the duty to pay such tax rests on the one exercising such privilege. The 2 taxes are not based on the same transaction and the nature of the use tax is not changed because of the means prescribed by the legislature for the collection of such tax.

An order should enter sustaining the constitutionality of PA 1959, No 263, and dismissing the petition. In view of the nature of the controversy, no costs are allowed.

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

SMITH, J. The principal question in this case is the meaning of the constitutional provision that "at no time shall the legislature levy a sales tax of more than 3%."*

The sales tax came to us in the depth of a great depression in order to provide the means for fulfilling desperate governmental needs. It was a tax easily collected and possessing the power of producing vast revenue. No meal could be consumed without its payment, no shelter built, no clothing

* Const (1908), art 10, § 23, as amended in 1954.

purchased without meeting its exaction, and in advance. It fell on all alike, and without regard to want or ability to bear the tax. Vast sums poured into the State treasury. We will, shortly, look to the distribution of these funds, since therein lies the origin of the situation resulting in the controversy before us. But first we look to the other tax here involved, the use tax.

The sales tax, powerful though it was, was vulnerable to avoidance. If the purchase, possibly of an automobile, were made not in Michigan but in a neighboring State the Michigan sales tax would not apply. Thus not only did the State of Michigan lose the tax moneys but a Michigan merchant lost the sale. It was a double-edged sword. To meet the threat of avoidance a tax was enacted. The article purchased in another State would be taxed in Michigan by virtue of its use here, and at the same rate as if sold in Michigan in the first place. This was the use tax. Through its enactment the flight across the border was blocked, the Michigan merchant protected in his competitive position, and the State tax funds safeguarded.

These, then, in broad outline, are the 2 taxes before the adoption of the constitutional limitation. We now seek the background and the meaning of the constitutional limitation. It did not come to us as an abstract concept. There was a reason for its passage and the reason is clear from a reading of the history of the times.

The sales tax, as we have seen, was a tax of great revenue potentialities to the State, easily collectible, constantly available, and, for the bulk of our people (with respect to their day-by-day purchases), impossible to evade or avoid. It soon became our leading

source of revenue[1] but (and here arises our problem) its resources did not long remain subject to legislative discretion. The first constitutional amendment[2] respecting sales tax moneys took out of the hands of the legislature the spending of most of the 3 cents paid in. One-half of 1 cent went back to the counties and the other half to school districts. These diversions left 2 cents of the tax, but of those 2 cents almost half in turn, also was earmarked by the same amendment,[3] leaving the legislature only a little over one-fifth of the total sales tax moneys available for distribution in its discretion. The source was not drying up, but the bulk of the money was no longer available for the general expenses of government. The next proposal for withdrawing these sales-tax funds from legislative jurisdiction went even further. It proposed to remove from legislative control roughly 1/2 of the relatively meager sum left to it by the first diversion amendment, thus leaving to the legislature for use for general appropriations only 1/2 cent out of each 3 cents collected in tax. It requires no great acuity to anticipate the next step since the path is worn smooth by constant use. It was simply to increase the tax. We need only glance at the history of our income taxes, our gasoline taxes, and other levies, which, starting as taxes in modest amounts, had risen constantly through the years. The sales tax, said our people, was not to follow this well-worn path of constant increases. It was to be limited to 3 cents on every dollar. "At no time," they said, "shall the legislature levy a sales tax of more than 3%."

[1] In the year preceding adoption of the prohibition on legislative increase of the sales tax beyond 3%, the sales tax collections totalled 286 millions of dollars. For the same period the sum of 15 million dollars was collected by the use tax. Annual Report, Michigan Department of Revenue, 1954–1955, p 57.

[2] Const (1908), art 10, § 23, added in 1946.

[3] See O.A.G. 1947–1948, p 306, for computation.

It is not enough to solve the problem before us, simply to compare the 2 taxes as they have been applied in the past, and to observe the differences originally existing between them. There is no argument whatever on the point that the sales tax and the use tax had their origins as 2 separate taxes, easily distinguishable and so sustainable. The cases so holding we need not even discuss. If the taxes had been kept so separated this case would not be before us. It is the fitting of the 2 together that has given rise to our problem, just as it is the fitting of the cartridge to the gun that creates the dangerous weapon.

Nor is it helpful that we review decisions of other jurisdictions, passing upon various phases of sales and use taxation and their relation to interstate commerce. They are not in point. Thus in the case of *Henneford* v. *Silas Mason Co.*, 300 US 577 (57 S Ct 524, 81 L ed 814), relied upon by defendants, the challenge to the application of the use tax of the State of Washington to a purchase made in a foreign State was made under the interstate commerce clause of the Federal Constitution. Likewise, in *McLeod* v. *J. E. Dilworth Co.*, 322 US 327 (64 S Ct 1023, 88 L ed 1304), the problem involved the taxability in Arkansas of purchases made outstate. But, again, we would not be sitting in this case upon such facts. The very essence of the case before us is that the purchase was *not* made in a foreign State but in our own. Moreover, none of the language relied upon by defendants involves a specific State constitutional prohibition against an increase in the sales tax. Thus there is actually no precedent whatever for what has been done. What we must rule upon is actually a 3-cornered problem, involving sales tax, use tax, and specific constitutional prohibition applicable to this type of taxation.

Has the recent "use" tax amendment, taken in conjunction with the existing sales tax, offended the constitutional prohibition? We will go at once to the core of the controversy, a retail purchase, over the counter, of tangible personal property in a Michigan community. The first matter to observe is that this purchase, made within this State, in this manner, still is subject to a 3% sales tax. Thus far nothing has been added. The constitutional limitation has been observed. But, according to the recent amendment, a "use" tax of 1% must also now be paid. Does its payment serve to protect the merchant from the competition of an outstate dealer in similar commodities? Obviously not. The seller is a Michigan merchant. Does its payment reimburse the State treasury for a tax payment otherwise payable but lost? Again, no. The sales tax has already been paid. This is something added. Added for what? What is being taxed, not already taxed under the sales tax?

We will look at the words of the law itself. It is contended that the amendment levies the 1% increase upon different persons, a different subject, and by a different measure than does the sales tax.

As to persons and subject, those arguing that the constitutional prohibition on increasing the sales tax does not apply, rely on the following language quoted from the 1% increase amendment:

"Sec. 3. There is hereby levied upon and there shall be collected from every person in this State a specific tax for the privilege of using, storing or consuming tangible personal property in this State, which tax shall be equal to 4% of the price of such property, except that the tax shall equal only 1% of the price of such property when acquired in a transaction on which a tax is payable under the provisions of Act No. 167 of the Public Acts of 1933, as amended, being sections 205.51 to 205.78 of the Complied Laws

of 1948, and to such tax there shall be added penalties and interest where applicable as hereinafter provided."

"Sec. 6. Every person storing, using or consuming tangible personal property or services, the storage, use or consumption of which is subject to the tax imposed by this act, * * * shall, on or before the fifteenth day of each calendar month file with the department a return for the preceding calendar month in such form as may be prescribed by the department, showing the price of each such purchase of tangible personal property or services during such preceding month, and such other information as the department may deem necessary for the proper administration of this act. At the same time each such person shall pay to the department the amount of tax imposed by this act with respect to the purchases covered by such return. Returns shall be signed by the person liable for the tax, or his duly authorized agent if the return is prepared by any person other than the taxpayer, said return shall also be signed by such person and show his address.

"Sec. 7. Each consumer storing, using or otherwise consuming in this State tangible personal property or services purchased for or subsequently converted to such purpose or purposes shall be liable for the tax imposed by this act, and such liability shall not be extinguished until the tax has been paid to the department."

This language standing alone purports to levy the increase upon every user of personal property in Michigan, and purports to require every user to make a monthly report on all purchases of personal property during the preceding calendar month showing every purchase and its price, and to accompany this report with his tax payment.

To give stated effect to this purpose would turn every citizen of Michigan into very nearly a full-

time bookkeeper for the State. Its enforcement problems would beggar description.

In fact, however, the amendment contemplates no such scheme. For by dint of other sections of the amendment and an exception in the sections we have quoted, inserted at the asterisk points, every requirement applicable to the user which is not likewise a requirement under the sales tax is eliminated.

In this regard, we adopt the terminology of the chief assistant attorney general, representing the defendants, in his oral argument before our Court. He termed one of the more important of those alternatives by which any use tax effect is eliminated from this amendment "an accommodation device."

In section 6, in the sentence purporting to require users to keep records of every purchase and file a monthly report thereon, we find inserted where we have printed asterisks an accommodation device. Its language is, "when such tax was not paid to a seller."

This would still imply that the matter was optional with the user, but we find still another accommodation device in section 5 requiring registration of every person engaged in selling tangible personal property, and stating further:

"Any person required to be registered under this act shall collect the tax imposed by this act from the consumer and in the following manner:"

And in section 16 we find criminal penalties provided for any seller who fails or refuses to collect the tax.

The combined effect of these accommodation devices is to convert the tax from one purportedly levied upon the user for his use of personal property, and to be reported and paid by him, into a tax to be collected by the seller at the point of sale and for the

collection and reporting of which he, and he alone, is responsible.

In short, in everything but words which have deliberately been rendered meaningless, the accommodation devices inserted in this amendment, taken in conjunction with the still applicable sales tax provisions, result in exceeding the constitutional limitation of 3% by 1%.

One other distinction between the 1% increase amendment and the sales tax is cited to us. The measure is different. And, indeed, in section 5 we find:

"(2) If the tax rate of 1% is applicable, 1 cent on each dollar of the price of such property, except that where the price includes a fractional part of a dollar, the following rate of collection is applicable to such fractional part:

"(I) Fifty cents to 99 cents, inclusive, 1 cent."

As to the 1% increase, this would apparently mean that no tax was levied or could legally be collected on purchases below 50 cents. And in every supermarket each customer could thus save a quarter of his tax by insisting that every purchase below that figure was a separate transaction. This would indeed be a distinction, for the sales tax act allows the seller to collect and requires him to remit 3% of all gross sales. CLS 1956, §§ 205.52, 205.73 (Stat Ann 1950 Rev §§ 7.522, 7.544).

Here, too, however, we find the accommodation device which eliminates the distinction in the actual operation of the act. Section 9 provides:

"Any seller who remits to the department an amount equal to 4% or 1%, whichever is applicable, of his total taxable sale prices for the period, or the amount of tax actually collected from consumers, whichever is greater, plus penalties and interest, if

any, shall be presumed to have discharged his liability under this act."

In these words any possible remaining differences in measure or in enforcement between the tax increase amendment and the sales tax are eliminated in favor of allowing the seller to collect from the purchaser a 4% tax on sales and discharge his obligation to the State by forwarding same. With these words present, it cannot be said that the language of the statute previously cited requires the seller to collect the 2 taxes separately and report them separately. Every practical motive demands that the seller collect the 2 taxes as 1. And we search the statute in vain to discover any enforceable prohibition against his doing so.

This plainly means that PA 1959, No 263, purporting to increase the use tax by 1%, actually results in an increase in the burden sought to be limited by the constitutional safeguard. The language of the act compels the conclusion that the use tax features of this act were inserted to accomplish what is prohibited by the Constitution, and that the practical effect of the act spelled out in the "accommodation devices" is to attempt to enact a constitutionally prohibited tax increase. We recognize, of course, that some of the language of these accommodation devices was drawn from the preceding use tax statute. It has, however, never been applied before in any manner possibly offensive to the constitutional prohibition we construe here.

At this point we take judicial notice of what every citizen of this State knows from his daily life. In actual operation of the tax, the accommodation devices are being given their intended effect. A tax of 4% upon retail sales is now being collected by retailers in every city and village and township of Michigan. The citizens of this State are under no illusion—the tax payable by them upon their retail

purchases has been increased above the 3% rate despite the prohibition in their Constitution.

We have seen the situation giving rise to the constitutional enactment, and we have seen the words employed by the people. How are they to be interpreted? At this point the defendants find themselves in a dilemma. If they reply that the people were interested in self-protection, in limiting the threat, clearly visible, of taxes on retail sales mounting as the income tax and other taxes have mounted, then they are bound to hold this tax bad for, in conjunction with the sales tax already imposed, it exceeds the 3% limitation. It is the first step in the familiar pattern of tax increases. But they may take the other horn of the dilemma. They may say that the words used, "sales tax," means *literally* that, namely, the sales tax levied by the particular statute which the citizen was subject to, at the time of the constitutional limitation.

But this would freeze, for the life of the constitutional amendment, the sales tax in the precise form used at the time of the amendment, for after change, no matter how slight, it would be no longer the same statute the citizen knew at the time of the constitutional amendment. This literal construction of the words "sales tax" forces the inescapable conclusion that the people have done a futile thing: they have voted themselves a constitutional protection good only until the next session of the legislature. It is a fact readily ascertainable from the public records that the sales tax has been under constant change, both before and after the passage of the constitutional amendment.

There is no middle ground. Either we construe the constitutional limitation literally or we construe it to accomplish its manifest objective and intent.

Which is to be our choice? Actually, there is no choice but one. The unanimous opinion of this

Court, written by Mr. Justice COOLEY close to a hundred years ago,* sets our course in its enunciation of immutable principles:

"Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power."

The thought is controlling and it is variously expressed. In *People* v. *Barltz,* 212 Mich 580, 585 (12 ALR 520), we ruled that in construing the Constitution we would give it the meaning the people intended it should have. As the *Barltz Case* (relating to the equality of women in the exercise of certain constitutional rights) well demonstrates, the meaning taken to be intended by the people is to be found in their common experience, here of daily retail purchases, not of some unique or isolated incident.

Construing the constitutional words before us, then, in accordance with these principles, their meaning clearly emerges. In their use the people were protecting themselves from the threat of unrestrained taxation of a well-known kind, the more formidable because of the time and the occasion of its exaction. It was an economic threat they faced.

* *People, ex rel. Bay City,* v. *State Treasurer,* 23 Mich 499; 506.

It was this they sought to limit. Tax lawyers argue that the amendment before us taxes a "privilege" separate and distinct from that involved in the sales tax. Here we reach the heart of the fallacy in defendants' argument. This is not a simple question of the differences between sales and use taxes. All of this is old straw. It has been threshed again and again. Our question is a new one, without parallel in the cases cited: May tax be piled upon tax despite a constitutional limitation prohibiting the pyramid? Is the accumulation unobjectionable provided only that the added taxes are taxes upon different "privileges"? If so, the constitutional limitation is utterly without meaning for the only limitation upon the number of "privileges" of the citizen subject to taxation is the ingenuity of the tax collector. But why did the people not similarly limit, we are asked, the use tax? Again the answer is clear. There was no need to limit the use tax that the people knew at the time the constitutional prohibition was passed. It was not, as we have heretofore pointed out, then used as it is now sought to be used. In fact, if a sales tax were paid, a use tax was not imposed.

To say that we will construe the words "sales tax" literally, as described above, despite the manifest purpose of the constitutional limitation, is to open the door to the process of erosion so well described by Mr. Justice BLACK in *Bacon* v. *Kent-Ottawa Metropolitan Water Authority,* 354 Mich 159, 164, as "an attritional series of judicial decisions" rendering innocuous, and without the intervention of the electorate, a constitutional prohibition.

The literal construction of the words, without regard to their obvious purpose of protection, is to make the constitutional safeguard no more than a shabby hoax, a barrier of words, easily destroyed by other words. This canon of constitutional construc-

tion we reject. A constitutional limitation must be construed to effectuate, not to abolish, the protection sought by it to be afforded. It was Mr. Justice CAMPBELL who wrote as long ago as the 13th volume of the Michigan reports* that:

"If the people, in establishing their government, see fit to place restrictions upon the exercise of any privilege, it must be assumed that in their view the exercise of the privilege without the restriction would be inexpedient and dangerous, and would not, therefore, have been permitted. Every restriction imposed by the Constitution must be considered as something which was designed to guard the public welfare, and it would be a violation of duty to give it any less than the fair and legitimate force which its terms require. What the people have said they design, they have an absolute and paramount right to have respected."

We come face to face, then, with what has been termed† "the most pressing rule for constitutional construction," namely, that "the provisions for the protection of life, liberty and property are to be largely and liberally construed in favor of the citizen."

The reasons behind this "most pressing rule" are clear if we will but bear in mind, with Marshall, that it is a Constitution we are construing, our basic charter of government. Here the people have erected their safeguards, not only against tyranny and brutality, but against the oppression of temporary majorities, and the rapacious demands of government itself. Here are found words that are beyond words, principles for which men have died and reckoned not the cost. It is a charter heavy with history, pregnant with the pride of a free people.

* *People* v. *Blodgett*, 13 Mich 127, 139.

† *United States, ex rel. Flannery,* v. *Commanding General* (SD NY), 69 Fed Supp 661, 665.

In it they have said to the government itself, in clause after clause: Thus far you may go, but you shall not cross the line we draw. In our country their prohibition is ironclad. It may refer to encroachment on the citizen's person, on his property, or on his purse. That this is "merely" a tax limitation and not one on freedom of speech, or worship, is immaterial. There are no differences in degrees of protection afforded in the constitutional safeguards. With equal alacrity we halt in his tracks, once his foot crosses the line, the inquisitor, the policeman, the tax collector, the legislator, or the executive. Our question is not how far he has passed over the forbidden line, how serious his encroachment, or how aggravated the arrogance. Our duty arises with the trespass itself.

The presumption of constitutionality cloaking all the acts of our co-ordinate branch of government cannot prevail where the statute is "prohibited by the express language of the Constitution or by necessary implication." *Child Welfare Society of Flint* v. *Kennedy School District,* 220 Mich 290. When we put these taxing acts, as we must, to the acid test of examination in terms of their "practical operation,"[1] when we, again as is our duty, "look through forms and behind labels to substance,"[2] what do we find?

Stripped of legalisms and the technical jargon of the tax experts, this is what finally emerges as a result of the legislative act: two taxes, one of 3 cents, and another of 1 cent, are now levied on each dollar of purchase. Both taxes are measured in the same manner, namely, the price paid for the article. Both are paid at the same time, the time of the

[1] *Lawrence* v. *State Tax Commission,* 286 US 276, 280 (52 S Ct 556, 76 L ed 1102).

[2] *City of Detroit* v. *Murray Corporation of America,* 355 US 489, 492 (78 S Ct 458, 2 L ed 2d 441).

sale. Both are imposed because tangible personal property is intended for consumption or use. Both apply to transactions wholly within the borders of this State. Both are paid, as a matter of economic fact, and are intended to be paid,[1] by the same person, the consumer. In short a levy of 4% is now made on the sale of every loaf of bread, every pair of shoes, and every stick of furniture despite the constitution limitation of 3%.

Thus our answer: So examined and tested, denying, as we must, "a literal and technical construction" of the Constitution (COOLEY, *supra,* in *People, ex rel. Bay City,* v. *State Treasurer*), we find "a taxing system clearly and palpably violat[ing] the fundamental law." *Thoman* v. *City of Lansing,* 315 Mich 566.

A caveat should be observed: Aware, as we are, that the language of an opinion is to be read, and interpreted, in the light of the facts the court faced when it employed the language in question, we emphasize that such construction applies with added emphasis when the subject matter is one affecting directly the validity of taxation and thus, indirectly, the financial stability of the State. Specifically, as we have observed heretofore, we are ruling upon the correlation of 3 distinct factors: a sales tax, a use tax and a constitutional limitation.

The attorney general prays for relief as follows:

"That this Court rule to be void and in contravention of article 10, § 23 of the State Constitution.

[1] We held in *National Bank of Detroit* v. *Department of Revenue,* 334 Mich 132, 138, that: "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." To precisely the same effect was our holding in *C. F. Smith Co.* v. *Fitzgerald,* 270 Mich 659, 677, wherein we said:

"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."

(1908) those provisions of PA 1959, No 263, which attempt to impose an additional tax of 1% upon transactions involving the collection of the sales tax levied under the provisions of PA 1933, No 167, as amended."

The constitutional limitation before us compels the grant of such relief.

Mandamus will, accordingly, issue to the defendants, their servants, agents and employees commanding them to desist and refrain from levying, assessing or collecting the additional 1% tax imposed under the provisions of PA 1959, No 263, in addition to the taxes imposed by PA 1933, No 167.

No costs, a public question.

BLACK, EDWARDS, VOELKER, and KAVANAGH, JJ., concurred with SMITH, J.

BLACK, J. (*concurring*). Mr. Justice Holmes, writing at the time in another politically momentous "great case" (*Northern Securities Co.* v. *United States,* 193 US 197 [24 S Ct 436, 48 L ed 679]), has provided an appropriate introduction to this consequential showdown between an emergency-tagged statute and a restrictive provision of our Constitution. We refer to this writing of more than a half century ago (pp 400, 401):

"Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try, I have tried, to do it with the same freedom of

natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention and was of importance only to a prisoner before the court."

Some recent history is in order. Last winter, and at least until it became too late to submit to the people today's constitutional question, everything debated in this case of Lockwood was seemingly clear throughout the legislative halls of the Capitol. This is evident from the journals of House and Senate, to which reference shall presently be made. No one seems then to have doubted that the people were possessed of right to regard this constitutional tax limitation* as remaining in fully understood effect unless and until, acting at the polls, they should choose to repeal or modify its terms. The limitation prohibits legislation designed to increase the original rate of taxation upon and against what people know for what it really is: the ordinary transaction of purchase and sale, at retail, of tangible personal property. But Michigan's financial crisis grew to alarming proportions. Election day passed without legislative agreement upon any one of the suggested ways of obtaining relief—at the polls—from the limitation. The legislature thereupon decided to and did levy an additional tax of 1% on all such transactions by amendment of the use tax law, not the sales tax law. Its action is shown by PA 1959, No 263. A rather manifest question of constitutional law was thus left for judicial consideration, the legislature not having sought relevant advices of the attorney general and the question having been repeatedly raised on the floor of each house prior to the enactment.

* "Provided, That at no time shall the legislature levy a sales tax of more than 3%." (Const 1908, art 10, § 23, as amended in 1954.)

All these events, and the rather obvious consequences of financial difficulty that are due to attend a judicial determination that the new tax collides with the quoted limitation, have in the words of Holmes brought down upon this Court "a kind of hydraulic pressure" which seemingly makes doubtful, in some respected legal minds, that which was so clearly understandable heretofore.

As in the *Northern Securities Case,* what we have now to do is to find the meaning and purpose of some not very difficult words; words appearing in the Constitution—not the statute before us. Once that meaning and purpose is ascertained, the remainder of our task presents but little difficulty. Our judgment then becomes the determination, not of a great case but of a case the decision of which should have been (and must yet be if it is to be decided as the legislature would have it) referred to the people on general election day.

The real question in this case—the decisive question—is not the brilliantly argued yet irrelevant point that there was and is a known difference between sales and use taxes. Of course there is a difference. Legislation hitherto effective in our State makes the distinction clear, and so we tug not at that oar, which at best would turn us around and about in aimless circles. Rather, our task as primary guardians of the Constitution is to determine whether the legislature may—the quoted restriction considered and interpreted—impose the present sales tax levy *and* a use tax levy *upon each transaction of retail sale* without offending this simply written and pointed restriction on the power of taxation of such transactions.

Phrasing the question so—and it seems the only honest way of phrasing it unless we are to shut our eyes to and see not that which all of the people of our State have clearly perceived and understood—,

we find no difficulty in holding that said Act No 263, to the extent shown in Mr. Justice SMITH's opinion, collides with and falls before the Constitution.

Mr. Justice SMITH has considered and lucidly covered the strict legal phases of the case. But more remains to be said concerning the actual reason for our present disagreement. That we now undertake. We shall also here and there insert a few observations in defense of all constitutional limitations against erosion or defeat by judicial as well as legislative misconception or misunderstanding of settled rules of constitutional law.

Why the Divisive Opinions in this Case?

Prior to the people-initiated amendment of 1939,* judges and justices of Michigan courts of record were nominated and elected as partisan party candidates. The amendment purposefully changed all this, yet by continued inaction of the legislature, members of this Court—even though elected by the nonpartisan "separate judicial ballot"—are still nominated as partisans at partisan party conventions. Naturally, this situation has brought to our Court judicial officers the nomination or successive nominations of whom have been made by different political parties. Until corrected it continues to bring up a subject we would open and dwell upon before it is re-opened after the opinions in this case are handed down.

We divide in this case. Our veteran Brothers adhere to the ways of metaphysical, rather than understandable, interpretation of constitutional restriction upon the legislative power of taxation.

* The people-intended design of the 1939 amendment was that of removing the judiciary (of the courts of record of Michigan) from partisan politics. Yet the legislature has been slow—mighty slow for 2 decades now—to effectuate such purpose so far as concerns nominations for the office of Supreme Court justice (See Const 1908, art 7, § 23, as amended).

This they do despite *Bacon's** recent guide to the authoritative view. Manifestly, then, and no matter how devoutly our elders may protest otherwise, and no matter the corresponding protestations of newcomers seated here, these divisive opinions are bound to appear—we say "appear"—to some thoughtful folk as well as the cynics of professional politics as having been induced by considerations other than those of orderly constitutional interpretation. This is not good for the Court and it is not good for society. Hence we feel constrained to record this unusual statement of reasons why 5 of our members find themselves bound to rule as they do.† There must be no misunderstanding of our division.

These words are not addressed to partisans, who will no doubt fulminate despite this message, but are addressed solely to the people, to those whose honest interest is that of appraising our divergent views and ascertaining the real reasons for the divergence.

Whatever the ensuing noisy clamor of politics and the forthcoming arguments of necessity grounded on Michigan's acknowledged financial emergency, we do not consider the one and cannot consider the other. Necessity is the "argument of tyrants, the creed of slaves." Like the fabled judge of the old West, it knows no law. And an emergency can never create legislative power. It may, at best, call into exercise "a living power already enjoyed." (*Home Building & Loan Association* v. *Blaisdell*, 290 US 398, 426 [54 S Ct 231, 78 L ed 413, 88 ALR 1481].) In this case no such power lives. It was slain by the Constitution.

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* *Bacon* v. *Kent-Ottawa Authority* (October, 1958), 354 Mich 159.

† Our elders fail to perceive that the Constitution must not be interpreted by the ordinary rules and tests we apply to the words of a doubtful statute, a commercial transaction, an ambiguous will, a complex agreement of corporate structure, or a corner notary's draft of deed or land contract.

Our Constitution being the primary object of the present inquiry, we have read and listened throughout the presentation of this case with the historic twin admonitions of Marshall and COOLEY constantly in mind. "We must never forget that it is a Constitution we are expounding;"* we shall not "subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress." (*People, ex rel. Bay City,* v. *State Treasurer,* 23 Mich 499, 506, quoted *post* at greater length.)

Each provision of a State Constitution is the direct word of the people of the State, not that of the scriveners thereof. It is the State's voice of democracy. So, when called upon as we now are to expound the meaning and effect thereof in the instance of a tax controversy, our single concern—our undeviating inquiry—is easily refined to and defined by simple questions. We proceed to ask some of them. What meaning and purpose did the people themselves have in mind when they considered and ratified the provision in question? *What did the people,* having ratified it, *have a right to expect from it in the way of protection from further taxation?* What meaning did the words "naturally convey to the popular mind"? What is the sense, of the words in question, "most obvious to the common understanding at the time of its adoption"? Of the diverse interpre-

* "A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. * * * In considering this question, then, we must never forget that it is a Constitution we are expounding." (*M'Culloch* v. *Maryland,* 17 US 316, 407 [4 L ed 576].)

tations that are said to be available to us may we *(No, Brothers, should we?)* select the one "which will defeat rather than effect the constitutional purpose"? And—should we adopt the legalistic construction defendants urge upon us—, what is left to the people excepting the hollow and helpless shell of a completely disemboweled constitutional limitation? If a "foot-in-the-door" additional tax—on purchases and sales at retail—of 1 cent is good, why can't it be 10 cents at the next term of the legislature?

As Mr. Justice SMITH has persuasively demonstrated, questions such as these speak clear answer in favor of supremacy of the Constitution over this 6-weeks-old act of 1959. Doubtless our Brothers would agree with us on that score, could they agree that the simple questions themselves are proper. But, in effect, say they (and here comes the real point of our total disagreement), "the questions are not right; *our* teaching, *our* legal philosophy, *our* settled convictions, lead us to examine the Constitution by other and more technical modes of test, just as we have done in the past, and we listen more to the voice of the legislature than to the voice of the people as we confront a case like this." In opposition we in effect reply: "But *our* teaching, *our* legal philosophy, *our* settled convictions, lead us to examine the Constitution by other precepts for we hear only the voice of the people in determining the construction and applicability of its terms."

If this opinion does no more than to reveal fully and for all to see the actual ground and cause for today's division, it will have served its purpose. Through the *quodlibets* of Mr. Justice CARR the veteran members of this Court have explained their past and present philosophic and legal reasons for approaching decision of this case. The value of their presentation and ours will have to be appraised over the years by society as well as by the profession.

So far as we are concerned there need only be recorded here what surely seems to be, by all respectable authority extant (starting with Chief Justice Marshall's quoted declarations and extending through the great works of Story and COOLEY to the solid front of uniform judicial agreement), the right way to undertake solution of a constitutional problem as at bar. Here, then, not in our words but in those of the great writers and scholars of constitutional law, are the plain reasons why we choose to ascertain the people's meaning of their Constitution before we undertake any consideration whatever of the legislation in question.

Mr. Justice Story:

"Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." (1 Story, Constitution [5th ed], § 451, p 345.)

Mr. Justice COOLEY:

"Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the

duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power. In these cases we thought we could arrive at it from the public history of the times." (*People, ex rel. Bay City,* v. *State Treasurer,* 23 Mich 499, 506.)

"And in seeking for its real meaning [Const 1850] we must take into consideration the times and circumstances under which the State Constitution was formed—the general spirit of the times and the prevailing sentiments among the people. Every Constitution has a *history* of its own which is likely to be more or less peculiar; and unless interpreted in the light of this *history, is liable to be made to express purposes which were never within the minds of the people in agreeing to it.* This the Court must keep in mind when called upon to interpret it; for their duty is to enforce the law which the people have made, and not some other law which the words of the Constitution may possibly be made to express." (*People* v. *Harding,* 53 Mich 481, 485.)

Mr. Justice CAMPBELL (Mr. Justice COOLEY concurring):

"The cardinal rule of construction, concerning language, is to apply to it that meaning which it would naturally convey to the popular mind, in all cases where the propriety of such construction is not negatived by some settled rule of law. In all instruments which are submitted for confirmation to the people themselves, and which derive all their validity from a popular vote, such a construction is peculiarly necessary; for otherwise they would be defrauded of the right to frame their own government according to their own will." (*People* v. *Dean,* 14 Mich 406, 417, 418.)

Mr. Justice COOLEY (quoted in *May* v. *Topping,* 65 W Va 656, 660 [64 SE 848]):

"A Constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.* 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding,* and ratified the instrument in the belief that that was the sense designed to be conveyed.' (Cooley's Const Lim 81*)."

United States supreme court (modern declarations):

"If we remember that 'it is a Constitution we are expounding,' we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose." (*United States* v. *Classic,* 313 US 299, 316 [61 S Ct 1031, 85 L ed 1368].)

"Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written." (*United States* v. *South-Eastern Underwriters Asso.,* 322 US 533, 539 [64 S Ct 1162, 88 L ed 1440].)

General text-statements:

"The question in interpreting a Constitution is not so much how it was understood by its framers

* Page reference is to volume 1, 6th ed. See 1 Cooley's Constitutional Limitations (8th ed), p 143.

as how it was understood by the people adopting it." (11 Am Jur, Constitutional Law, § 84, p 707.)

"Words or terms used in a Constitution, being dependent on ratification by the people voting upon it, must be understood in the sense most obvious to the common understanding at the time of its adoption, although a different rule might be applied in interpreting statutes and acts of the legislature. This gives rise to the universally recognized and incontrovertibly established rule of construction that it is presumed that words appearing in a Constitution have been used according to their plain, natural, and usual signification and import." (11 Am Jur, Constitutional Law, § 65, pp 680, 681.)

We shall now proceed to demonstrate from our decided cases why some of our members undertake constitutional construction with the wrong rules. For illustration let us recall the sad history of judicial evisceration of another tax-limitational provision—the so-called 15-mill amendment.*

That amendment was, when it was adopted by the people, trustingly regarded as having limited to the constitutional rate of 1-1/2% the "total amount of taxes assessed against property in any one year." Yet when the right of protection against "special" assessment was asserted under the amendment, our predecessors seized upon the technical distinction (just as they again do here between *sales* taxes and *use* taxes) between *general* taxes and *special* assessments (*Graham* v. *City of Saginaw,* 317 Mich 427). They then proceeded to tell the people that by their amendment they had succeeded only in protecting themselves from higher *general* taxes; that the amendment did not include "special" assessments within its protective scope, and that the respective legislative bodies of the State remained free to levy,

* For such history, see the outline with citations appearing in *Bacon, supra,* commencing on page 164 of report.

without limit and without regard for the constitutional limitation, all kinds of "special" assessments. Thus was a big gouge torn from the intended muscle of the limitation, simply because the Court forgot or overlooked the guide of Marshall and COOLEY.

Now it has always been clear to us that special assessments are "taxes" and that ordinary people by common understanding of their Constitution had an amendment which protected them from additional property taxation, no matter the brand name which any legislative act or judicial decision might stamp on the particular impost or levy against such property. (One's home can be lost just as quickly and finally for nonpayment of "special" assessments as for nonpayment of "general" taxes.) By the same token, and if the defendants are right in the case before us, an ordinary citizen can be denied the right to purchase groceries or, say, a motor car, should he refuse to pay this 1959 imposed tax on that which he would purchase at retail.

Here, then, is the old game of cat with mouse the defendants would have us play with the people when similar constitutional limitations are before us. If the Constitution restrict the amount of "taxes" levied against property, we are presumably to tell the complaining taxpayer—"Ah, yes, but these are *special* assessments." If the Constitution restrict the amount of taxes levied on purchases and sales at retail, we are to say—to the appealing taxpayer—"Sure, you are right, but these are *use* taxes" (and so on). Thus, by the doctrinaire notions of our Brothers, the people cannot prevail, no matter what they may write into their Constitution for the purpose of limiting the power of taxation, unless, possibly, they go about the task of writing and adopting a limitational provision in the fine print form—with at least as many words—of an insurance policy. This is something Marshall tells us does not belong

in a Constitution. So does our common sense. And there is no need or occasion for it, Marshall's searching analysis considered.

What then is our essential difference of opinion in this case?

Our minority still stands, despite *Bacon's* recent about-face on construction of constitutional tax limitations, just as it did before. From the pre-*Bacon* record of the past, such limitations seem to have been looked upon by them "as great public enemies standing in the way of progress." Indeed our Brothers still appear to regard it the "duty of every good citizen" to give such limitations "a damaging thrust whenever convenient."*

Our majority, on the other hand, stands for a people's construction of such limitations, a construction which perforce is of greater breadth by the might of popularly understood intention at the time of adoption.

Our view stands for the people's understanding of tax limitations that are created by the people. The other view stands for the legislators' and lawyers' interpretation of a tax limitation created by the people. This is where we part.

And so our good Brothers would in effect say to the legislature: You may with our blessing levy any tax on the transaction of retail sales, in any amount, so long as you call it by some other name than a sales tax and are careful not to levy it by amendment of the sales tax law. Thus may you get around the Constitution. We say to the legislature, on the other hand: Your membership like our own should always inquire (before enacting or approving tax legislation scrutinized under a constitutional tax limitation) what the people by popular understanding

* The quotations are taken from Justice COOLEY'S opinion in *People, ex rel. Bay City,* v. *State Treasurer,* followed in *Bacon,* both *supra.*

had a right, from the beginning, to expect from the limitation.

In these portentous days of October we are not just deciding this case of Lockwood. We are declaring again, in the same language and according to the identical convictions of 88 years ago, a great principle of constitutional law for the guidance of legislators, governors, judges and lawyers. The people's intent is supreme. When the constitutionality of legislation is challenged here the Constitution is our first line of inquiry. And we obtain the answer when we look to the laws and the usages, and to the popular knowledge thereof as of the time of adoption of the provision in question. Here the popular conception of retail sales taxation, theretofore created by law and painfully ingrained into the people's comprehension by the retail practices of the years leading to adoption of this amendment, must lead "all reasonable minds" to the inevitable conclusion that the legislature has erred in the present instance.

The Question of Legislative Motive

Defendants rely in their brief to great extent on the established rule that constitutionally questioned legislation comes into court armed with a conclusive presumption of "proper motive" on the part of the legislature. Here again there is no disagreement. We may and do look upon the legislature as consisting of 144 dedicated apostles of the people intent always on ascertaining and carrying out the people's will (in spite of that which appears in the legislative journals)*.

* The legislature was not exactly unaware of the well-understood restrictive nature of the limitational proviso, conjoined as it is with other known restrictions contained in the 1954 amendment of section 23. February 5, 1959 house joint resolution "H" was introduced by Representative Warner and others. Such resolution pro-

Sure, all members of the legislature are honorable men. But all that is quite irrelevant to the present problem. The legislature, good intent and all, has made a mistake. We may concede it was an honest one. Doubtless it was partly encouraged to enact the legislation in question by faith and reliance on past decisions of this Court in similar cases, an abrupt halt of which was called in *Bacon.* Such reasoning is fully consistent with that which defendants' counsel themselves point out (by quotation from *People* v. *Gibbs,* 186 Mich 127, 135 [Ann Cas 1917B, 830]):

"Bad motives might inspire a law which appeared on its face and proved valid and beneficial, while a bad and invalid law might be, and sometimes is, passed with good intent and the best of motives."

Upon these premises we may attribute to the legislature the loftiest motives and yet find that it should have pursued one or more of its earlier proposed resolutions to obtain from the people the desired relief; that it should not in lieu thereof have enacted a bill which, if given effect, would amount to a constructive fraud on the right of the people

posed that a redraft of section 23 be submitted. Its thrust was that of obtaining, from the people, direct authority to levy, upon "all persons engaged in the business of making sales at retail, in addition to all other taxes authorized by law, an annual tax for the privilege of engaging in such business equal to 1% of the gross proceeds thereof." February 27, 1959 senate joint resolution "H" was introduced by Senators Nichols, Andrews, Geerlings, Beadle, Minnema, Francis, Graebner, Younger and Lodge. This resolution proposed that section 10 (of article 10) be amended by the people in such way as to authorize borrowing by the State of a sum not to exceed $100,000,000 and, relevantly here, to authorize the legislature to "levy a sales tax of 1% in addition to and upon the same base as the sales tax authorized by section 23 of this article 10, which additional tax shall expire not later than June 30, 1961." Finally, by house joint resolution "Y", introduced May 14, 1959, it was proposed by Representative O'Brien and another that said section 23 be submitted to the people *for outright repeal.* No one of these resolutions was adopted, and so the people have not been permitted to decide what some members of the legislature wanted—properly—the people to decide.

to decide these grave issues for themselves. Thus the present enactment—conceived as it was of desperation and frustration, chaos and crisis, temper and distemper—was passed while a sort of legislative delirium was running its course. This was "hydraulic pressure" with a vengeance.

We would pursue this point of good motive further. The legislature may have assumed that this Court would continue its inhospitable attitude toward constitutional limitations of tax rates, evidenced by its treatment of the 15-mill amendment during the past 15 years. The Court visibly and admittedly has looked with jaundiced eye on efforts of the people to restrict taxation by constitutional means. So this case is not one for suggestion of "bad motive" on the part of the legislature. Rather, it is one for recognition of that which has been the post-1933 policy of the judicial branch (until the halt was called in *Bacon*); for advising the legislature that the present Court turned in *Bacon* from the disproved doctrines Mr. Justice CARR has again written, and that a majority of this Court will, in the future, continue adherence to the rules of constitutional interpretation which this Court followed for more than 60 years, beginning in COOLEY'S time. We seek not to change constitutional interpretation but only to return to the hallowed and time-tested doctrine of our great predecessors.

Conclusion

Even an appellate court judge, living as he must in a measure of social detachment, must on occasion get down to the earthy level where groceries and other necessaries of mortal sustenance are sold and bought at retail, for even judges must eat. Lined up with his fellow purchasers at the checkout station, Mr. Justice gets the same look—from the point

of view of people generally—of that which is taking place all over Michigan as millions of retail sales of "tangible personal property" are contracted, concluded and taxed under the asserted aegis of a combination of laws authorizing sales and use taxation. What is that look, from the actual point of view of the queue of buyers as each proceeds in procession to ante up? (Does not the carefully budgeting wife figure in the 4% tax before she goes to the store? Is it not simply that she pays an actual levy of 4% on the transaction of bargain and sale?) The sum of agreed prices of each purchased item is totted up and the checkout operator thereupon presses the "TX" button, which adds an actual tax of 4% to the sum of the buyer's retail purchase. He pays the exacted tax—not 2 separate taxes by fact or common understanding—and gets his receipt showing the aforesaid total plus the machine-calculated tax of 4%. He has—all artful legal syllogism aside—paid what to him and his fellows is no less than a levied sales tax of 4%, a tax which in part has been levied by unconstitutional legislation.

No member of this Court is unaware of the temporary yet dismaying consequences that are due to attend a determination that Act No 263 is invalid, even in part. The prospect is no rosier here than on the legislative and executive floors below. Yet we have no alternative when the people have spoken, clearly and forcefully, by their basic instrument of government by law. The remedy, even though it be slower, lies in another forum; that of submission to and decision by the people themselves. They wrote this proviso into the Constitution. Ours is not to rewrite it, or to interpret its intended purpose in such way as will leave it a puppet of the legislature.

If a judge could have his own way, if his personal predilections might lawfully be brought into play

when the judicial process works upon a limitation as at bar, we doubt not that each of us would prefer to pay more in the way of sales taxation than to assume another and presumably more progressively burdensome mode of taxation. But decisions of such nature, the Constitution considered, are not to be made by judges as judges. They are to be made by the casting of our ballots—as citizens—on general election day. And so we say judges have no right to cast ballots, the effect of which is judicial defeat of a properly adopted constitutional amendment, by means of an opinion or opinions deposited in our clerk's office.

This illusion that from our cloistered heights we are unable to perceive what every citizen knows from his daily experience, namely, that he now is paying—by purpose and administration of this enactment—a tax of 4% instead of 3% on the necessities of life, is still another example of that which Mr. Justice VOELKER has recently dubbed "judicial somnambulism."

By the quoted constitutional proviso the people enjoined the legislature, firmly, this way:

You may proceed to levy sales taxes or sin taxes, use taxes or abuse taxes, privilege taxes or personal taxes, special assessments or general assessments, duties, imposts and excises. But you shall not levy, directly or indirectly, taxes on the transaction of retail sales at a rate or sum of rates greater than 3%.

The Supreme Court, too, advises and consents. We advise the legislature in this instance that it has transgressed and that we consent to the enactment of challenged legislation only when it passes muster under the Constitution.

We agree that the writ should issue.

VOELKER, J., concurred with BLACK, J.

LAHTI *v.* FOSTERLING.

1. WORKMEN'S COMPENSATION—PURPOSE OF ACT—CONSTRUCTION OF AMENDMENT.

   The original aims and purposes of the workmen's compensation act must be examined in order to understand the rights of the parties involved in proceeding to recover compensation benefits provided for by an amendatory act (CLS 1956, § 412.4).

2. SAME—PURPOSE OF ACT—ACTIONS—HOSPITAL AND MEDICAL EXPENSE—SUPPORT DURING INCAPACITY.

   The workmen's compensation act was originally adopted to give employers protection against common-law actions and to place upon industry the expense of hospital and medical bills of the injured employee and the burden of making a reasonable contribution to the sustenance of that employee and his dependents during the period of incapacity.

3. SAME—MEDICAL AND HOSPITAL EXPENSES—RETROACTIVE AMENDMENT.

   The amendment of the workmen's compensation act whereby the 2-year maximum was removed from medical and hospital expense clause did not afford the injured employee a new cause of action but merely expanded the remedies then in effect and operated retroactively to apply to claims which had arisen prior to the amendment (CL 1948, § 412.4, as amended by PA 1955, No 250).

4. STATUTES—CONSTRUCTION OF AMENDMENT.

   An amendatory act has a repealing force, by the mechanics of legislation, different from that of an independent statute,

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4] 58 Am Jur, Workmen's Compensation § 26 *et seq.*
[2, 12] 58 Am Jur, Workmen's Compensation §§ 2, 9.
[3, 11, 13, 14, 16] 58 Am Jur, Workmen's Compensation § 33.
[5] 50 Am Jur, Statutes § 468.
[6, 7, 8] 11 Am Jur, Constitutional Law §§ 377, 378.
[10] 50 Am Jur, Statutes § 210 *et seq.*
[15] 58 Am Jur, Workmen's Compensation § 45.

repugnancy not being an essential element of implied repeal of specifically amended sections, since the original ceases to exist and the section as amended supersedes the original and becomes a part of the statute for all intents and purposes as if the amendment had always been there and the portions carried over have their force from the new act and not the former.

5. SAME—AMENDMENT—SAVING CLAUSE.

The effect of an act amending a specific section of a former act, in the absence of a saving clause, is to strike the former section from the law, obliterate it entirely and substitute the new section in its place.

6. SAME—VESTED RIGHTS.

A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it.

7. SAME—VESTED RIGHTS—REPEAL.

There can be no vested right in an existing law which precludes its change or repeal.

8. SAME—RESTORATION OF REMEDY.

No right is destroyed when the law restores a remedy which had been lost.

9. ACTION—WORKMEN'S COMPENSATION—RESTORATION OF LOST REMEDY.

The remedy of an employee for *full* recovery for medical and hospital expenses due to injury received arising out of and in the course of employment, was lost under the workmen's compensation act until amendment lifting restriction to 2-year maximum was enacted, and such enactment merely effected the restoration of a lost remedy (CL 1948, § 412.4, as amended by PA 1955, No 250).

10. STATUTES—RESTORATION OF REVOKED REMEDY.

The legislature may restore a remedy it had theretofore revoked.

11. SAME—INTENT OF AMENDMENT—RETROACTIVE EFFECT.

Courts must look to the facts and circumstances surrounding the adoption of an amendatory act to determine whether or not the legislature intended it to be retroactive.

12. WORKMEN'S COMPENSATION—PURPOSE OF ACT.

The workmen's compensation act is a remedial one, enacted primarily for the benefit of the man who works in the pursuits subject to its provisions.

13. SAME—AMENDMENT—INCREASE OF BURDEN ON EMPLOYER—RETROACTIVE EFFECT.

The legislature has the power to increase the burden on the employer for disability or expenses occurring or continuing after the date of an enactment of an amendment of the workmen's compensation act, even though the accident which gave rise to the disability or expenses had occurred prior to that time, since the act is an exercise of the police power and the amendment, even though it affects the due process of law and impairment of contract clauses, would not be unconstitutional (CL 1948, § 412.4, as amended by PA 1955, No 250).

14. STATUTES—AMENDMENT—CONSTRUCTION—RETROSPECTIVE EFFECT.

A court is reluctant to interpret statutes retrospectively but does do so when the amendment applies to remedies and not to substantive law.

15. WORKMEN'S COMPENSATION—CONTRACTS—AMENDMENT OF STATUTE.

Parties to a contractual relationship, entered into subject to the workmen's compensation act do so with the knowledge of the right and power of the legislature to enact any new law relating to the subject matter, not in conflict with any constitutional provision, and must be presumed to have agreed to any such change.

16. SAME—AMENDMENT OF ACT—RETROACTIVE EFFECT—REMOVAL OF RESTRICTION OF MEDICAL AND HOSPITAL EXPENSE.

The substitution of an expansion of existing remedies by way of removal of limitation to 2 years as period during which an employer is required to pay injured employee's medical and hospital expenses was within the power of the legislature and since no vested right or contractual right exists that prohibits the legislature from making a change in remedies afforded the employees under the workmen's compensation act, it is construed as applicable to employee who was injured prior to time amendment was effective (CL 1948, § 412.4, as amended by PA 1955, No 250).

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

Appeal from Workmen's Compensation Appeal Board. Submitted April 8, 1959. (Docket No. 21, Calendar No. 47,766.) Decided November 24, 1959. Rehearing denied January 4, 1960.

John Lahti, by Alma Lahti, his guardian, presented his claim against Clinton Fosterling, employer, and Employers Mutual Liability Insurance Company, insurer, for additional and continuing medical expense under statute amended subsequent to injury. Claim disallowed. Plaintiff appeals. Reversed and remanded.

Aaron Lowenstein, for plaintiff.

Davidson & Clancey (*Walter L. Hansen,* of counsel, *Frank E. Cooper,* of counsel on application for rehearing), for defendants.

KAVANAGH, J. John Lahti was injured on October 4, 1954, while working as a wood-cutter for the defendant employer. A spruce tree cut by him fell against a dead poplar which broke off and struck his head. He was a bed patient from that time until his death on February 10, 1958. He suffered a comminuted and compound fracture of the skull, permanent paralysis, loss of speech, and inability to consume food in the natural manner, and was totally and permanently disabled, requiring continuous and substantial medical, nursing, and hospital care.

The expense of the continuous hospitalization and medical care was voluntarily assumed by the defendants through October 4, 1956, a period of 2 years, or 4 six-month periods from the date of the injury. Compensation at the regular rate was also paid plaintiff.

On October 25, 1956, an application for hearing and adjustment of claim was filed. The application indicated that the only person dependent upon John Lahti on the date of injury was Alma Lahti, his wife.

The hearing referee found, after a hearing, that the employee did receive a personal injury arising

out of and in the course of his employment and ordered payment of compensation at the rate of $34 per week until the further order of the department. He also ordered "that said defendants shall reimburse said employee for all medical care furnished to and made necessary because of his injury for a period of 24 months immediately following October 4, 1954." The referee further found that "defendants have paid or caused to be paid to the plaintiff or his guardian all of the medical bills which they are obligated to pay in this cause."

Plaintiff took the matter to the appeal board. The award of the hearing referee was affirmed. Application for leave to appeal to this Court was granted.

Two questions are presented to this Court for decision:

(1) "Is appellant's right to payment of medical and hospital expenses fixed by the statute in effect at the time of the injury?"

(2) "Does the fact of voluntary payment of medical and hospital expenses by appellees, without requiring appellant to first make written application to the commission therefor, during the first 2 years following the injury give appellant a right to recover further compensation for medical and hospital expenses?"

At the time of the injury on October 4, 1954, part 2, § 4, of the workmen's compensation law provided, insofar as is relevant here, as follows:

"The employer shall furnish, or cause to be furnished, reasonable medical, surgical, and hospital services and medicines when they are needed, for the first 6 months after the injury and thereafter for not more than 3 additional 6 month periods in the discretion of the commission, upon written request of the employee to the commission for each period and after the employer or his insurer has been given an opportunity to file objections thereto

and to be heard thereon." (CLS 1954, § 412.4 [Stat Ann 1950 Rev § 17.154].)

Pursuant to the above section, defendants furnished medical and hospital care to John Lahti for a period of 2 years immediately following his injury.

Effective June 25, 1955, part 2, § 4, of the workmen's compensation law was amended* to provide as follows:

"The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of his employment, reasonable medical, surgical and hospital services and medicines or other attendance or treatment recognized by the laws of this State as legal, when they are needed, for the first 6 months after the injury and thereafter for such additional 6 month periods as the commission may in its discretion order. Such additional 6 month periods shall be granted only upon written request of the employee to the commission for each period and after the employer or his insurer has been given an opportunity to file objections thereto and to be heard thereon." (CLS 1956, § 412.4 [Stat Ann 1957 Cum Supp § 17.154].)

Plaintiff contends that the 1955 amendment is retroactive in effect and that the appeal board could, in its discretion, grant plaintiff further medical care. Plaintiff bases this claim on the fact that the amendment is remedial, that it is intended to correct an existing injustice, that it does not create a new cause of action, that the elimination of the restriction limiting medical benefits to 4 six-month periods was merely the removal of a statutory defense, and that, therefore, the amendment has retroactive effect.

It is the defendants' contention that the right to compensation becomes fixed at the time the cause

* PA 1955, No 250.—REPORTER.

of action accrues and that subsequent amendments will not operate to either enlarge or cut down such rights. In support of this theory they cite *Allen* v. *Kalamazoo Paraffine Co.*, 312 Mich 575; *Tarnow* v. *Railway Express Agency*, 331 Mich 558, and other cases in which this Court dealt with weekly benefits paid under the workmen's compensation law.

Defendants cite the case of *Dornbos* v. *Bloch & Guggenheimer, Inc.*, 326 Mich 626, as authority for the position that medical and hospital bills are compensation. They also cite *Munson* v. *Christie*, 270 Mich 94, and *Kurtz* v. *Shawley Motor Freight Co.*, 270 Mich 112, which cover sick benefits and death benefits.

In the *Dornbos Case* Justice CARR ruled that hospital and medical services are within the term compensation as the term is used in the statute of limitations in part 2, § 15, of the act.*

It is to be noted that in all of these cases this Court has emphasized that such benefits are a form of compensation for some purposes but not necessarily for all.

All of these cases are decided upon the theory that rights vested at the time of injury, and since the workmen's compensation act is statutory, and since the employment is based upon a contract, for the legislature to change the remedies would be a violation of the rights of the parties and the contract.

In dealing with the workmen's compensation act it is necessary occasionally to bring ourselves back to the original aims and purposes of the act in order to better understand the rights of the parties involved. Naturally, in the construction of the act over a great many years, some unfortunate language has crept into opinions, which, by process of repeti-

* See, currently, CLS 1956, § 412.15 (Stat Ann 1957 Cum Supp § 17.165).—REPORTER.

tion, has become looked upon as the proper construction of the act.

The act was originally adopted to give employers protection against common-law actions and to place upon industry, where it properly belongs, not only the expense of the hospital and medical bills of the injured employee, but place upon it the burden of making a reasonable contribution to the sustenance of that employee and his dependents during the period of time he is incapacitated from work. This was the express intent of the legislature in adopting this law.

Justice NORTH, writing in *Munson* v. *Christie,* 270 Mich 94, 97–99, said:

"Consideration of the act discloses that insofar as it provides for remedial action, it concerns only 2 classes of persons—employers and employees, the latter term being used in its broader sense as including dependents. *City of Grand Rapids* v. *Crocker,* 219 Mich 178. Herein we are concerned only with employers and employees who are under the workmen's compensation law. All rights and remedies provided by the act are to be asserted and obtained through the commission created by the act. Part 3, § 16 (CL 1929, § 8455).* In no other forum can such rights or remedies be considered and determined. This necessarily follows because employers and employees who are under the terms of the act may not resort to common-law actions to secure adjudication of rights and liabilities arising from industrial accidents. Part 3, § 16. As to employers and employees under the act 'the right to compensation or damage' incident to an industrial injury suffered by an employee is restricted to such as the act provides. It appears from the title the act is one providing that as against the employer the injured employee and his dependents have no rights

* See, currently, CL 1948, § 413.16 (Stat Ann 1950 Rev § 17.190).—REPORTER.

and can enforce no liability except those provided in the act. We need not read beyond the title of the act to find this intent and purpose of the legislature clearly expressed. In the body of the act this provision reads:

" 'If the employee, or his dependents, in case of his death, of any employer subject to the provisions of this act files any claim with, or accepts any payment from such employer, or any insurance company carrying such risks, or from the commissioner of insurance on account of personal injury, or makes any agreement, or submits any question to arbitration under this act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.' Part 6, § 1 (CL 1929, § 8478).*

"See, also, part 3, § 16.

"The workmen's compensation act by legislative fiat fixes the rights and liabilities of employers and injured employees and provides a means or forum for determining such rights and liabilities in cases of controversy between employers and injured employees or their dependents. The primary purpose of this legislation is to secure to the injured employee, and in the event of his death resulting from such injury, to his dependents, compensation which the legislature believed should be a charge upon the industry and made payable through the employer."

During the years, with the development of industry and the employment of larger and larger numbers of employees in the business world, the legislature has progressively, even if slowly, kept the act up to date by meeting the changing conditions and requiring industry to assume its share of the new responsibilities. The employers who were happy to be relieved of the old liabilities have sought by

* Part 6, § 1 is currently, CL 1948 § 416.1 (Stat Ann 1950 Rev § 17.212).—REPORTER.

legalistic approach of narrow and limited construction of the act to defeat its humanitarian purposes.

One of the changes made through the years was the adoption, effective June 25, 1955, of the amendment to part 2, § 4, of the act (CLS 1956, § 412.4 [Stat Ann 1957 Cum Supp § 17.154]) so that the commission, in its discretion, might order the payment of medical, surgical, and hospital services and medicines for a longer period of time than under the old act. This new amendment did not afford the employee a new cause of action, but merely expanded the remedies then in effect. As was said by Justice BUSHNELL in *Rookledge* v. *Garwood,* 340 Mich 444, 453, in dealing with a similar amendment:

"There can be no doubt that the legislature, in enacting this amendment, intended to remedy an existing injustice."

Justice BUSHNELL then went on to say (p 454):

"At the same time it is not amiss to recognize the wisdom of the legislature in remedying a situation which had become detrimental to the public interest.

"The legislature, in adopting the new section 15,* completely abolished the prior section and must, therefore, have intended that the amendment to the act would have sufficient retroactive effect to apply to claims which had arisen prior to the enactment. * * * The intent thus expressed by legislative action should not be altered by judicial construction."

This Court in *People* v. *Lowell,* 250 Mich 349, 354–356, said:

"An amendatory act has a repealing force, by the mechanics of legislation, different from that of an independent statute. Repugnancy is not the essen-

* CLS 1956, § 413.15 (Stat Ann 1957 Cum Supp § 17.189).—REPORTER.

tial element of implied repeal of specifically amended sections. The rule is:

"'Where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there.' 25 RCL, Statutes § 159, p 907. * * *

"Nevertheless, the old section is deemed stricken from the law, and the provisions carried over have their force from the new act, not from the former. 1 Lewis' Sutherland Statutory Construction (2d ed), § 237.

"It is plain from the authorities in this State and elsewhere that the effect of an act amending a specific section of a former act, in the absence of a saving clause, is to strike the former section from the law, obliterate it entirely and substitute the new section in its place. This effect is not an arbitrary rule adopted by the courts. It is the natural and logical effect of an amendment 'to read as follows.' It accomplishes precisely what the words import. Any other construction would do violence to the plain language of the legislature."

Justice CARR writing in the case of *Johnson* v. *Motor City Sales Corp.*, 352 Mich 56, citing *Rookledge* v. *Garwood*, 340 Mich 444, as authority for construction of the particular amendment of the workmen's compensation law then under consideration, said (p 62):

"The scope and construction of the amendment were considered by this Court in *Rookledge* v. *Garwood*, 340 Mich 444, it being there held that the amendment was remedial in character and retroactive in its operation."

The question of determining what is a vested right has always been a source of much difficulty to all courts. The right which defendants claim sprang from the kindness and grace of the legisla-

ture. It is the general rule that that which the legislature gives, it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it.

This Court in *Harsha* v. *City of Detroit,* 261 Mich 586, 594 (90 ALR 853), said:

"There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal."

In the case of *Evans Products Co.* v. *State Board of Escheats,* 307 Mich 506, 545, this Court quoted with approval from *Campbell* v. *Holt,* 115 US 620 (6 S Ct 209, 29 L ed 483), as follows:

" 'The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost.' "

The remedy petitioner seeks here would have existed under the common law, but was lost to him under the workmen's compensation act until such time as the present amendment went into effect, and by the amendment this remedy was restored to him. The legislature had the authority to revoke this remedy and, therefore, certainly had the authority to restore it when it saw fit to do so. In the absence of an express intent to make the amendment prospective only, courts must look to the facts and circumstances surrounding the adoption of the amendment to determine whether or not the legislature intended it to be retroactive.

The nature of the workmen's compensation act has been passed upon by this Court on numerous occasions, and in the case of *City of Grand Rapids* v. *Crocker,* 219 Mich 178, 189, the Court said:

"The statute is a remedial one, enacted primarily for the benefit of the man who works in the pursuits subject to its provisions."

Outside of the State of Michigan, New York, in the case of *Matter of Hogan* v. *Lawlor & Cavanaugh Co.*, 286 App Div 600 (146 NYS2d 119), dealt with a provision of the workmen's compensation law where the act in 1932, at the time of the occurrence of the accident, provided that the employer was not liable for medical treatment or medical expenses incurred after the bringing of a third-party action by the injured employee, even though the recovery in the third-party action turned out to be insufficient to cover all such expenses. Furthermore, at that time it was held that medical treatment did not include board, clothing and maintenance provided by a mental hospital in which the claimant was confined for custodial care as the result of the injury. The court there said (p 602):

"Both of these rules were harsh in their operation. They had the effect of relieving the employer of liability for expenses which were unquestionably due to the industrial accident, and throwing the whole burden of such expenses upon the injured employee. In 1944, the legislature decided to remove these inequities from the compensation law."

The amendments took effect on April 1 and April 7, 1944.

The principal question was whether the compensation carrier could be held liable for custodial care of the claimant subsequent to the date of the taking effect of the 1944 amendments, notwithstanding the fact that the accident, as a result of which the claimant had been injured, had occurred prior to that date. The court went on to say (p 603):

"The question is no longer an open one. It was held in *Matter of Metzger* v. *Metzger Press,* 276 App Div 936 (94 NYS2d 220), affirmed 301 NY 781 (96 NE2d 90), that the 1944 amendment to sections 13 and 29 applied to accidents which had occurred

prior to the date of the taking effect of the amendment."

In the *Hogan Case* the appellant argued that it was illegal and unjust to impose liability upon the carrier for custodial care occurring after the 1944 amendments because the insurance premiums collected by it from its insured had been based upon liability of a less burdensome character. The court said (p 604):

"Considerations of that kind are solely for the legislature to weigh, in determining whether to increase the burden of future disability or expenses in pending compensation cases."

The court went on to say (p 604):

"If by the words 'illegal and unjust', the appellant means to question the constitutionality of the statute construed as we have construed it here and as it was construed in the *Metzger Case,* that question was settled in *Matter of Schmidt* v. *Wolf Contracting Co.,* 269 App Div 201 (55 NYS2d 162), affirmed 295 NY 748 (65 NE2d 568). In that case, it was held that the legislature had the power to amend the workmen's compensation law so as to increase the rate of weekly compensation payments to be made thereafter to employees who had been injured prior to the taking effect of the amendment. As this court pointed out in the *Schmidt Case* (p 208), 'The amendment in question was enacted in the exercise of the police power of the State and hence violates neither its constitution nor the Federal Constitution. The principle of workmen's compensation is the promotion of public good.'"

Returning to the *Hogan Case,* the court said (p 604):

"The due process clause of the State and Federal Constitutions does not freeze the burden of compensation liability as of the date of the occurrence

of an industrial accident, beyond the power of legislative change. In carrying out its social purpose, the legislature has the power to increase the burden on the employer for disability or expenses occurring or continuing after the date of the enactment of the amendatory statute, even though the accident which gave rise to the disability or expenses had occurred prior to that time."

In *Matter of Schmidt* v. *Wolf Contracting Co.*, 269 App Div 201 (55 NYS2d 162), the court considered the aims and purposes of the workmen's compensation law in attempting to arrive at the intent of the legislature to apply a retroactive amendment to workmen injured prior to the effective date of the act, held the legislature had the right to so amend, and applied retrospectively the amended provisions. It further stated it was unreasonable to assume that the legislature intended that a workman who suffers injury on one date is any less affected than one injured on a subsequent date of the same year. With reference to the defense that the contract between the employer and its insurance carrier is impaired by such an amendment and that the statute violates the due process clauses of the State constitution and the Constitution of the United States, the court said (pp 207, 208):

"That argument is without merit. * * *

"Liability under the workmen's compensation law is contractual, the amendment is not thereby violative of the provisions of the Constitution of the United States. The police power of the State may be exercised to affect the due process of law clause as well as the impairment of contract clause of the Federal Constitution.

"The subject matter of workmen's compensation reposes within the control of the legislature.

"A law enacted pursuant to rightful authority is proper, and private contracts are entered into subject to that governmental authority."

Even though it is a dissenting opinion, Justice Hugo L. Black in *Wood* v. *Lovett,* 313 US 362, 382 (61 S Ct 983, 85 L ed 1404), correctly states the rule with respect to the contract clause:

"Societies exercise a positive control as well over the inception, construction, and fulfilment of contracts as over the form and measure of the remedy to enforce them. The accuracy of this statement cannot be questioned by one who reflects upon the extent to which contracts and agreements are a part of the daily activities of our society. For, so nearly universal are contractual relationships that it is difficult if not impossible to conceive of laws which do not have either direct or indirect bearing upon contractual obligations. *Therefore, it would go far towards paralyzing the legislative arm of State governments to say that no legislative body could ever pass a law which would impair in any manner any contractual obligation of any kind.* * * * No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge." (Emphasis supplied.)

Justice SHARPE in the case of *Allen* v. *Kalamazoo Paraffine Co.,* 312 Mich 575, 576, 577, said:

"Defendants offered to pay compensation for the lesser amount and urge on appeal that the right to compensation arises from the contractual relation between the employer and employee; and that the compensation act in force at the time the contractual relations were entered into governs the substantive rights and obligations of the parties.

"We are not in accord with this theory. Defendant company elected to accept the benefit of the act

providing for workmen's compensation as well as such amendments to the act as the legislature might deem proper to make. See *Cooley* v. *Boice Brothers,* 245 Mich 325."

This Court, although reluctant to interpret statutes retrospectively, has done so when the amendment applied to remedies and not to substantive law. Justice COOLEY in *Gibson* v. *Hibbard,* 13 Mich 214, 219, said:

"As the Constitution does not prohibit the passing of retrospective laws, except when they are of the class technically known as *ex post facto,* congress may unquestionably pass them, even though private rights are affected thereby, unless they are invalid for some other reason than their retrospective character."

In *Peak* v. *State Compensation Commissioner,* 141 W Va 453, 458, 459 (91 SE2d 625), a death case rather than injury, the supreme court of appeals of West Virginia said:

"An act of the legislature, though it have retrospective effect, is not necessarily invalid, and does not, for that reason, come into conflict with any constitutional provision, unless vested, not potential, rights, are disturbed. See *Huntington Water Corp.* v. *City of Huntington,* 115 W Va 531 (177 SE 290); *City of Benwood* v. *Public Service Commission,* 75 W Va 127 (83 SE 295, LRA1915C 261). It is true that this court has held, we believe correctly, that the basis of liability of employers under the workmen's compensation statutes, is contractual. But we can not say that such contractual relationship or liability necessarily precludes a subsequent legislature from effecting changes in the workmen's compensation laws. Those who enter into such contractual relationships do so with knowledge of the right and power of the legislature to enact any new law relating to the subject matter, not in conflict

with any constitutional provision, and must be presumed to have agreed to any such change."

18 NACCA Law Journal 128 states as follows:

"Furthermore, these same laws which originally modified contracts of employment by substituting workmen's compensation for employers' liability did not except existing contracts from their operation, and their constitutionality has long been established. *New York C. R. Co.* v. *White* (1917), 243 US 188 (37 S Ct 247, 61 L ed 667, LRA1917D 1). If it is constitutional to totally deprive an employee of the right to seek unlimited damages against his employer by prohibition of common-law suits and substitution of a statutory scheme for payment of fixed benefits, surely it cannot be unconstitutional to so amend the benefit scale provisions as to insure that the amounts to be awarded remain sufficient to carry out the purpose for which the substitution was originally made."

Believing as we do that no vested right or contractual right exists that prohibits the legislature from making a change in the remedies afforded employees under the workmen's compensation law, and keeping in mind the express primary purpose of the act to transfer to industry the expense of injuries to employees growing out of and in the course of their employment, it is apparent to us that the legislature intended, as was held in the *Rookledge Case, supra,* to substitute for the existing remedies under the act some expansion thereof. We find from all facts and circumstances that the legislature intended the amendment to be applicable to an existing award entered prior to the effective date of the amendment and intended to allow, upon proper application and proofs, additional medical benefits even though all previous benefit periods had been exhausted. We must hold that those cases in conflict with this position are overruled.

In view of the disposition of this first question, it becomes unnecessary to discuss the other question raised.

The appeal board is reversed and the matter remanded for the entry of relief in accordance with this opinion. Costs in favor of appellant.

SMITH, BLACK, EDWARDS, and VOELKER, JJ., concurred with KAVANAGH, J.

CARR, J. (*dissenting*). Plaintiff instituted this proceeding under the provisions of the workmen's compensation law of the State.* The question at issue is whether an employee suffering a compensable injury arising out of and in the course of his employment is subject, as to medical and hospital expenses, to the provision of the statute in effect at the time of such disability. The facts are not in dispute, and in submitting the case to the referee, counsel entered into a stipulation relating thereto in lieu of proofs.

It appears that on October 4, 1954, defendant employer was subject to the provisions of the workmen's compensation law, that plaintiff John Lahti was on said date employed in cutting pulpwood, and that plaintiff was seriously injured as the result of being struck by a falling tree. It was further agreed as follows:

"That respondent insurance company has provided, on behalf of said defendant, adequate and reasonable medical, surgical and hospital services and medicines for 4 consecutive 6-month periods beginning on the date of said accident and ending October 4, 1956. Said insurer has further paid the said plaintiff, on behalf of said defendant, the sum

* PA 1912 (1st Ex Sess), No 10, as amended (CL 1948, § 411.1 *et seq.*, as amended [Stat Ann 1950 Rev § 17.141 *et seq.*, as amended]).

of $20 per week as compensation for said plaintiff's wage loss, from October 4, 1954 and continues to pay said sum weekly to plaintiff."

Plaintiff sought an award including payment for medical and hospital services rendered to him subsequent to the expiration of the 24-month period for which such expenses had been voluntarily paid by the employer's insurance carrier. The referee in rendering his decision granted plaintiff compensation at the rate of $34 per week for total disability until further order of the department. Liability for the medical and hospital expenses that had been paid was recognized, but the referee found that defendants had paid to the plaintiff or his guardian "all of the medical bills which they are obligated to pay in this cause." Defendants were also given credit for the compensation that had been voluntarily paid. The workmen's compensation appeal board affirmed the award as made by the referee, and plaintiff has appealed.

At the time plaintiff sustained his disabling injury, part 2, § 4, of the workmen's compensation act, as amended (CLS 1954, § 412.4 [Stat Ann 1950 Rev § 17.154]), read as follows:

"The employer shall furnish, or cause to be furnished, reasonable medical, surgical, and hospital services and medicines when they are needed, for the first 6 months after the injury and thereafter for not more than 3 additional 6 month periods in the discretion of the commission, upon written request of the employee to the commission for each period and after the employer or his insurer has been given an opportunity to file objections thereto and to be heard thereon. The employer shall also supply to such injured employee dental service, crutches, artificial limbs, eyes, teeth, eye glasses, hearing apparatus and such other appliances as may be necessary to cure, so far as reasonably possible, and relieve from

the effects of the injury. If the employer shall fail, neglect or refuse so to do such employee shall be reimbursed for the reasonable expense incurred by or on his behalf in providing the same, by an award of the commission."

Said section was further amended by PA 1955, No 250, effective June 25, 1955 (CLS 1956, § 412.4 [Stat Ann 1957 Cum Supp § 17.154]). As so amended the section reads:

"The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of his employment, reasonable medical, surgical and hospital services and medicines or other attendance or treatment recognized by the laws of this State as legal, when they are needed, for the first 6 months after the injury and thereafter for such additional 6 month periods as the commission may in its discretion order. Such additional 6 month periods shall be granted only upon written request of the employee to the commission for each period and after the employer or his insurer has been given an opportunity to file objections thereto and to be heard thereon. The employer shall also supply to such injured employee dental service, crutches, artificial limbs, eyes, teeth, eye glasses, hearing apparatus and such other appliances as may be necessary to cure, so far as reasonably possible, and relieve from the effects of the injury. If the employer shall fail, neglect or refuse so to do such employee shall be reimbursed for the reasonable expense incurred by or on his behalf in providing the same, by an award of the commission."

It thus appears that at the time the plaintiff was injured and became disabled the statute granted him the right to have the expenses of reasonable medical and hospital services incurred by him during the first 6 months after the injury, and thereafter for not more than 3 additional 6-month periods "in the

discretion of the commission," paid by the employer or his insurance carrier. By the amendment of 1955 the commission was authorized to award such payments for additional 6-month periods with no limitation as to the number thereof being imposed. It is the claim of appellant in this case that the referee and the workmen's compensation appeal board were authorized to make a further award covering medical and hospital expenses, notwithstanding that defendants had voluntarily paid for such services in accordance with the statute in effect at the time the disability occurred. The referee and the appeal board declined to accept such interpretation of the law, finding that plaintiff had already received at the time the award was made the maximum amount of payment for medical and hospital services that he was entitled to receive. Mr. Justice KAVANAGH has written to reverse the action of the appeal board and to remand the proceeding "for the entry of relief in accordance with this opinion." We are not in accord with his conclusion. In our opinion the referee and the appeal board correctly determined the question of law involved, and the award as made should be affirmed.

It is not questioned that the right to compensation under the statute is subject to the provisions thereof in effect at the time such right accrues. *Mason* v. *Michigan Trading Corp.*, 308 Mich 702; *Thomas* v. *Continental Motors Corp.*, 315 Mich 27. In the latter case it was said (p 37):

"In the instant case the department awarded dependency compensation in accordance with the statute in effect at the time the disability arose. The department also awarded death benefits (expenses of last sickness and funeral) in accordance with the statute in effect at the time the death of the employee occurred. The awards are affirmed."

In *Tarnow* v. *Railway Express Agency,* 331 Mich 558, plaintiff employee's injury was sustained in October, 1938. He was paid compensation for approximately 10 weeks, at the expiration of which period he returned to work. His physical condition became worse, however, with the lapse of time, and in September, 1949, he filed an application for hearing and adjustment of his claim for compensation. Under a 1943 amendment to the statute, if applicable, the claim was barred, such amendment precluding the allowance of compensation for more than 1 year prior to the date of filing same. In said case the beginning of such 1-year period was subsequent to the expiration of the compensable period of 500 weeks as prescribed by the statute. In consequence, the question was squarely presented as to whether the amendment of the statute subsequent to plaintiff's injury controlled with reference to his right to an award of further compensation. On behalf of defendant it was contended, as in the case at bar, that said amendment related to procedure rather than to a substantive right and should, in consequence, be given a retroactive effect. This Court, in rejecting such claim, said, in part (pp 565, 566):

"The amendment here in question may not be regarded as wholly procedural in character, as defendant contends. Obviously its effect, if so applied under the facts before us in this case, would result in taking from the plaintiff a right which the statute, in force at the time of his injury, granted to him. There is nothing in the amendment in question here indicating that the legislature intended any such possible result. In other words, there is nothing to overcome the presumption that prospective operation only was intended. It seems obvious that the purpose of the amendment was to limit the amount of recovery in certain cases. Such result must follow in any instance where the statute in its present form

is invoked to defeat recovery, partially or wholly, and is applicable. The amendment may not be regarded as relating merely to procedure, nor may it be classed as remedial legislation. Under the general rule followed by this Court in the cases above cited, it should not be given a retroactive effect in the instant case."

In accordance with the conclusion indicated in the opinion, the award to plaintiff was affirmed. We believe the *Tarnow Case* was correctly decided and that an amendment to the workmen's compensation law enacted after the disability occurred and affecting the right to an award or the amount thereof is not applicable, if giving it effect would bar or decrease an award to an injured employee, or would create or increase liability on the part of the employer. The provisions in effect at the time the right to compensation accrues are controlling.

This brings us to a consideration of the question as to whether the payment of expenses for medical and hospital services furnished to an injured employee is to be regarded as compensation. It will be noted that the provisions of the statute relating to such expenses are in part 2 thereof, which deals with the subject of compensation. The title of the statute, likewise, indicates that the purpose of the legislature in enacting the law was "providing compensation for the disability or death resulting from occupational injuries or disease or accidental injury to or death of employees." It appears from the provisions of the act that the purpose thereof was to allow the payment of compensation to the employee in accordance with the provisions of the enactment for loss of earning ability, for the expense of medical and hospital services incurred as the result of a compensable disability, and for funeral expenses in certain cases. In *Munson* v. *Christie,* 270 Mich 94, 99, it was said:

"The 'compensation' provided for the employee and his dependents is not only the award in lieu of prospective earnings which the employee loses in consequence of his injury, but 'compensation' in its broader sense as used in this statute includes what may be termed sick benefits for the 90-day period next ensuing the accident and 'in addition' it includes in the event of his death as a result of the injury, the expense of his last sickness and burial, this latter item being limited to $200. These provisions for his care during the first 90 days and for the expense of last sickness and burial are clearly compensation to the employee and his dependents in that they are thereby saved from and compensated for the burden and expense to which they or some of them presumably would otherwise be subjected. While it is true that in some instances in the workmen's compensation act the expression 'compensation' is not used in this broad sense and that the respective phases of compensation are specifically referred to in other terms, still consideration of the act as a whole leads to the conclusion that in order to carry out the legislative intent and to properly construe the act, 'compensation' recoverable by the employee and his dependents must usually be understood in its broader sense."

In *Michigan Boiler & Sheet Iron Works* v. *Dressler,* 286 Mich 502, the question was raised whether funeral expenses were to be considered compensation. Commenting thereon, it was said (p 513):

"Defendant finally contends that funeral expenses are not compensation and that therefore they cannot be recovered in this action. Under statutes in effect in other jurisdictions, hospital, medical, and surgical bills have been held to be 'compensation,' recoverable in a suit by an employer against a negligent third party who has injured an employee. *Klotz* v. *Pfister & Vogel Leather Co.,* 220 Wis 57 (264 NW 495); *Bruso's Case,* 295 Mass 531 (4 NE2d 308). We believe it to have been the legislative intent that

funeral expenses should be recoverable as 'compensation' in this particular instance."

In *Dornbos* v. *Bloch & Guggenheimer, Inc.*, 326 Mich 626, certain provisions of the workmen's compensation act were considered, and decisions of this Court and of courts in other States, as well as the supreme court of the United States, were discussed. The conclusion reached was indicated in the following language (p 637):

"Construing the provisions of the statute here in issue in the light of the general purpose of the entire act, and in conjunction with other pertinent provisions indicating the legislative intent, we think a claim for medical and hospital expenses must be regarded as one for compensation and subject accordingly to the prescribed requirements as to the time within which such claim shall be made."

See, also, *Bennish* v. *Cadillac Show Case Co.*, 306 Mich 244, where it was recognized that:

"The date of disability is the controlling factor insofar as the right to medical services is concerned."

In support of his claim that the 1955 amendment should be given retroactive effect in the instant case, counsel for appellant calls attention to *Rookledge* v. *Garwood*, 340 Mich 444. In that case, however, the change in the law made by amendment to part 3, § 15, did not operate to either lessen or increase liability imposed by the provisions of the statute in force and effect at the time of plaintiff's injury. On the contrary, it affected matters relating to procedure. It operated to deprive an alleged tortfeasor of the possible defense of election of remedies, previously existing. There was no vested right in such defense. The *Rookledge Case* was followed in *Horn* v. *Davis Brothers, Inc.*, 340 Mich 460; *Woods* v. *Ford Motor Company*, 342 Mich 518; and *Johnson* v. *Motor City Sales Corporation*, 352 Mich 56.

The case at bar is clearly distinguishable on the facts. Here we are concerned with a subsequent amendment to the law that, if applicable, would permit an increase in the amount of compensation recoverable over and above that provided by the statute in effect when the injury and disability occurred and consequently would impose on the employer a greater measure of liability than was created under the statute in force at the time the right to compensation accrued.

The 1955 amendment did not operate to remove a defense that might be interposed to a claim. The right to compensation rests wholly on the statute, and the legislature in its discretion imposed a limitation in effect at the time plaintiff was injured. It did not, in other words, grant an unlimited right to compensation for medical and hospital expenses. The amendment of 1955 was designed to permit an increase in an award for such expenses. In other words, it contemplated an extension of liability. It affected the substantive rights of the employee with a corresponding increase in the obligation of the employer. That it was intended by the legislature to be prospective in operation is scarcely open to question. Obviously, if given a retroactive effect a like claim may be made as to any amendment to the act changing rates of compensation for loss of earning ability, or compensation otherwise based.

It is further suggested on behalf of appellant that, since the payments made by defendant were voluntary and not made pursuant to an award based on a written request from the plaintiff, they should not be regarded as made in accordance with the statute. The claim is without merit. Defendants may not be penalized because they voluntarily made the payments for medical and hospital expenses necessitated by the injury to plaintiff instead of waiting for an award to be made. Such payments must

be regarded as in compliance with the obligation imposed by the statute, and should be considered accordingly. Their status is the same as that of disability payments voluntarily made, for which credit, as a matter of practice, is properly allowed. This was done in the instant case and apparently is not questioned. See *Marlowe* v. *Huron Mountain Club,* 271 Mich 107, 112; *Tomes* v. *General Motors Corporation,* 318 Mich 168, 173, 174.

Payment by an employer of expenses for hospital and medical services required by an employee as a result of a compensable disability is compensation, and liability therefor is governed by the provisions of the statute in effect at the time of the disability. It is then that the right accrues to the employee with a corresponding obligation on the part of the employer. A subsequent amendment to the law altering the amount of compensation to be paid involves substantive rights and duties, and may not be regarded as merely a procedural change. The previously created rights and obligations of the parties to the instant proceeding were not affected by the 1955 amendment in question. It does not appear that the legislature intended that said amendment should operate retroactively.

The award as made by the referee and sustained by the workmen's compensation appeal board should be affirmed. The questions at issue being matters of public concern, no costs should be allowed.

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

CREW *v.* ZABOWSKY.

CHRYSLER CORPORATION, GARNISHEE.

1. JUDGMENT—VACATION—DISCRETION OF COURT.
   A motion to vacate a judgment is addressed to the discretion of the trial court whose order thereon will not be reversed on appeal to the Supreme Court except in the case of a clear abuse of discretion.

2. GARNISHMENT—VACATION OF JUDGMENT—DISCRETION OF COURT.
   Trial court's vacation of judgment against garnishee defendant, a corporation, upon latter's showing by employees' affidavits that the garnishee defendant had, through an error, confused the names of 2 of its creditors and had wrongfully filed a disclosure admitting liability to the principal defendant, when, in fact it owed nothing to that defendant *held*, not an abuse of discretion.

3. SAME—DISCLOSURE—DEFAULT—JUDGMENT.
   A judgment entered against a garnishee defendant who had filed a disclosure was not a default judgment, since the disclosure constituted an answer, hence, the 4-months' rule applicable to default judgments does not apply (CL 1948, § 628.42; Court Rule No 28, § 4 [1945]).

4. JUDGMENT—DEFAULT.
   A defendant who omits to plead within the time allowed therefor "makes default" and the judgment entered is a judgment by "default."

5. GARNISHMENT—VACATION OF JUDGMENT—LACHES—RECORD.
   Plaintiff's claim that garnishee defendant was guilty of laches in not moving to set aside judgment against it until approximately 5 months had elapsed, not sustained by the trial court, is not upheld by Supreme Court under record showing interim correspondence and negotiation between attorneys for plaintiff and garnishee defendant, hence, order setting aside the judgment and permitting filing of an amended disclosure denying liability is affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 30A Am Jur, Judgments § 632.
[2] 5 Am Jur, Attachment and Garnishment § 738.

Appeal from Wayne; Ferguson (Frank B.), J. Submitted June 4, 1959. (Docket No. 28, Calendar No. 47,967.) Decided November 24, 1959.

Action by Fred W. Crew against Cass Zabowsky and others, doing business as Paramount Die Casting Products Company, resulted in judgment for plaintiff, following which garnishment was issued and judgment was taken against Chrsyler Corporation, a Delaware corporation, on its disclosure. Order entered setting aside judgment against garnishee defendant and permitting it to file amended disclosure. Plaintiff appeals. Affirmed.

Louis Rosenzweig, for plaintiff.

Dickinson, Wright, Davis, McKean & Cudlip (*Charles R. Moon* and *George E. McKean*, of counsel), for garnishee defendant.

KAVANAGH, J. Plaintiff commenced suit against the principal defendants by summons, filed his declaration and secured a default judgment. Thereafter, on February 7, 1958, plaintiff caused a writ of garnishment to be issued against Chrysler Corporation, defendant and appellee.

On February 24, 1958, Chrysler Corporation filed its disclosure admitting an indebtedness to the principal defendants in the sum of $1,117.84, subject to a prior garnishment in the sum of $182.95.

On February 25, 1958, a motion for judgment upon the disclosure was filed and served upon Chrysler Corporation. No answer having been filed or denial of liability having been made, judgment was entered against the garnishee defendant in the amount of $929.99, together with costs in the sum of $4.90.

On March 3, 1958, plaintiff's attorney sent Chrysler Corporation a copy of the order of judgment entered

against it upon the disclosure, together with satisfaction of judgment, requesting that a check for the amount of the judgment be mailed to the attorney. Again, on April 7, 1958, plaintiff's attorney wrote Chrysler Corporation informing the garnishee defendant that the time for appeal had expired and requesting payment.

On April 14, 1958, a letter was mailed from the legal department of Chrysler Corporation to plaintiff's attorney advising him that by a clerical error an erroneous disclosure had been filed and that actually there was no indebtedness due. This letter read, in part, as follows:

"As I mentioned to you in our telephone conversation a few weeks ago, it was not until judgment had been taken against Chrysler Corporation as garnishee defendant that we discovered our disclosure was incorrect. * * * If you desire, we will file an amended disclosure denying liability in this case."

On April 28, 1958, plaintiff's attorney responded to the letter. He advised garnishee defendant that there was nothing he could do in the matter and requested that Chrysler Corporation send a check in accordance with the judgment.

On May 19, 1958, present counsel was substituted for plaintiff's original attorney, and on June 10, 1958, plaintiff, through his present counsel, filed a petition to set aside and cancel the satisfaction of judgment, which in the interim had been filed by garnishee defendant.

On July 10, 1958, a stipulation was entered into between counsel for plaintiff and garnishee defendant setting aside and cancelling the satisfaction of judgment, and an order setting aside the satisfaction of judgment was entered.

On July 22, 1958, garnishee defendant filed a motion to set aside the judgment and for leave to file an amended disclosure. Plaintiff filed an answer to this motion denying garnishee defendant's right to have the motion set aside on the grounds that time for appeal had elapsed, and assuming the judgment to be a default judgment, more than 4 months had elapsed since the entry of judgment; that it was final and could not be set aside under the court rules; and, also, that the garnishee defendant was guilty of laches in failing to take any steps to file an amended disclosure after having knowledge of its error in admitting liability.

The circuit judge, following hearing on the motion, granted the motion and entered an order setting aside the judgment and permitting the filing of an amended disclosure denying liability. From this order plaintiff appeals, claiming the court erred in setting aside the judgment and permitting the filing of an amended disclosure.

A motion to vacate a judgment is addressed to the discretion of the trial court and except in the case of a clear abuse of discretion will not be reversed on appeal to this Court. *Fort Wayne & Belle Isle R. Co.* v. *Wayne Circuit Judge,* 110 Mich 173; *Alspaugh* v. *Ionia Circuit Judge,* 126 Mich 67; *J. L. Hudson Co.* v. *Barnett,* 255 Mich 465; *Mack International Truck Corp.* v. *Palmer,* 259 Mich 234.

The motion of Chrysler Corporation and the 2 affidavits of Chrysler's employees fully stated the grounds for such relief, which in substance were that the garnishee defendant had, through an error, confused the names of 2 of its creditors and had, therefore, wrongfully filed a disclosure admitting liability to the principal defendant, when, in fact, there were no funds in its possession due to the said defendant.

It is also apparent that representatives of Chrysler's legal department notified plaintiff's original attorney that the error had been made and that reliance was made upon the telephone conversation and letter with reference to the error and the offer to file an amended disclosure if needed.

This Court in the case of *Kirn* v. *Ioor,* 266 Mich 335, 338, said:

"It is long-settled textbook law, sustained by abundant decisions in this Court and elsewhere that, in cases within jurisdiction of the trial court, its ruling on application for an order setting aside a judgment or decree is strictly discretionary and will not be disturbed by an appellate court, unless a clear instance of abuse of discretion is shown."

The contention of plaintiff that the judgment entered was a default judgment, consequently subject to the 4-months' rule,* and cannot be set aside except upon the showing that the default was entered irregularly, cannot be sustained.

Justice MONTGOMERY, speaking for the Court in *Leahy* v. *Wayne Circuit Judge,* 144 Mich 304, 307 (115 Am St Rep 443), said:

"An issue of fact was joined between the parties, the case was regularly set and called for trial. We do not understand that a judgment by default properly speaking is entered in such circumstances. It is incumbent upon the plaintiff in such a case to make proof of his title. Such was the practice pursued in this case. Judgment was not pronounced upon defendants' default, but upon the case made by plaintiff's proofs. The term 'default' has been often loosely used."

Justice MONTGOMERY then proceeded to quote from Anderson's Law Dictionary with reference to the word "default" as follows (p 307):

* See Court Rule No 28, § 4 (1945).—REPORTER.

" 'When a defendant omits to plead within the time allowed for that purpose or fails to appear at the trial he "makes default" and the judgment entered in the former case is a judgment by default.' "

In the instant case the disclosure constituted an answer and became a part of the proofs of plaintiff. The judgment was not a default judgment.

CL 1948, § 628.42 (Stat Ann § 27.1896) reads as follows:

"Any judgment or final order in a suit in garnishment may be set aside or removed to the Supreme Court, in like manner and with the same effect as in other personal actions."

Appellant contends garnishee defendant was guilty of laches for failing to file an amended disclosure and for failing to move to set aside the judgment until approximately 5 months had expired. The trial court thought otherwise. With this we agree, particularly in view of the fact that the attorney for plaintiff and the legal department of Chrysler Corporation were in the interim corresponding and negotiating with reference to disposition of the matter.

The order setting aside the judgment and permitting filing of an amended disclosure is affirmed, with costs in favor of defendant-appellee.

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

KAPLAN *v.* CITY OF HUNTINGTON WOODS.

1. COVENANTS—BUILDING RESTRICTIONS.

   Building restrictions are private property, an interest in real estate in the nature of an easement, go with the land, and are a property right of value.

2. MUNICIPAL CORPORATIONS—CHARTERS—IMPOSITION OF BUILDING RESTRICTIONS.

   The failure to comply with charter requirements as to disposition of city property voided agreement imposing building restriction on vacant city lots which restriction rendered valueless.

3. SAME—PROPERTY—CHARTER.

   A city commission, mayor and city clerk may not give away a valuable property right of the city without complying with charter provisions relative to disposition of property, where not for a corporate purpose.

4. CONTRACTS—PUBLIC MONEY TO FURTHER PRIVATE ENTERPRISE.

   Contracts which involve an attempt to use public money for the furtherance of a private enterprise are void.

5. MUNICIPAL CORPORATIONS—CREDIT—PUBLIC PURPOSE.

   No city may loan its credit for any other than a public purpose (Const 1908, art 8, § 25).

6. SAME—PROPERTY—GIFT—CONSTITUTIONAL LAW.

   A gift or donation of money or property for a private purpose by a city such as participation with others in an agreement to restrict the use of city-owned lots to single-family dwellings, violates provisions of the Constitution relative to use of the credit of the State and cities and is *ultra vires* (Const 1908, art 8, § 25; art 10, § 12).

REFERENCES FOR POINTS IN HEADNOTES

[1] 14 Am Jur, Covenants, Conditions and Restrictions §§ 193, 194.
[3, 8] 38 Am Jur, Municipal Corporations § 487.
[4, 5, 6] 37 Am Jur, Municipal Corporations §§ 119, 120.

7. OFFICERS—NOTICE OF LIMITATIONS ON POWERS.
   Those dealing with public officials must take notice of their powers.

8. MUNICIPAL CORPORATIONS—PROPERTY—CHARTERS.
   Charter requirements for the sale of municipal property must be substantially complied with.

9. SAME—COVENANTS—CHARTERS—PROPERTY—VALUE.
   The participation by a city in the imposition of a restrictive agreement relative to the use of city-owned lots which rendered them valueless, with or without consideration and without compliance with charter requirement, resulted in a void agreement.

10. COSTS—PUBLIC QUESTION—CONSTRUCTION OF PLAYGROUND.
    No costs are allowed in suit to enjoin city from constructing a playground on city property, claimed to be subject to restrictive covenants not permitting such use, a public question being involved.

Appeal from Oakland; Doty (Frank L.), J. Submitted October 8, 1959. (Docket No. 36, Calendar No. 48,060.) Decided November 24, 1959.

Bill by Sheldon Kaplan and Phyllis Kaplan against the City of Huntington Woods, a municipal corporation, to enjoin construction of playground on lots restricted by agreement for residential purposes. Decree for plaintiffs. Defendant appeals. Reversed and remanded.

James S. Thorburn, City Attorney, for defendant.

KAVANAGH, J. Plaintiffs filed a bill of complaint in the Oakland county circuit court to restrain defendant city of Huntington Woods from constructing a playground on certain lots fronting on Woodward avenue, described as lots 73 and 74 of Huntington Woods subdivision, Oakland county, Michigan. Plaintiffs are the owners of lot 125 which immediately adjoins lot 73 on the rear. The defendant

city prior to 1950 acquired the fee title to considerable property along the west side of Woodward avenue and on the south side of Eleven Mile road in the city of Huntington Woods. In addition to lots 73 and 74, the city owns lots 57, 64, 67 and 80 along Woodward avenue. All of the Woodward avenue lots owned by defendant except lot 67 are included in the restriction agreement involved in this controversy.

Sometime between June 22, 1950, and August 12, 1950, the defendant, by its then mayor and clerk, signed a restriction agreement, which agreement was pursuant to a resolution of the city commission of the city of Huntington Woods. The agreement was passed at a meeting of the city commission on June 22, 1950. This restriction agreement, together with other sets of restriction agreements, required, among other things, that the land so bound "shall be used for residence purposes only with but one single residence to each lot."

All of the land in the city of Huntington Woods fronting on Woodward avenue was restricted by building restrictions for single-family-dwelling use prior to June, 1950. By the restriction agreement above referred to single-family-dwelling building restrictions as to the 5 city-owned lots were extended. Other than the 5 city-owned lots, only the owners of lots 62 and 81 on Woodward avenue signed the building restrictions. Thus, of the 29 lots facing Woodward avenue in the Huntington Woods subdivision, only 7 lots were covered by the restriction agreement. The remaining 22 lots subsequent to the decision of this Court in *Bassey* v. *City of Huntington Woods,* 344 Mich 701, which voided a city zoning ordinance purporting to restrict the Woodward avenue lots to single-family-dwelling use, were open for commercial development and use.

The charter of the city of Huntington Woods at the time of the execution of the said restriction agreement and ever since that time provides:

"CHAPTER 2—GENERAL POWERS

* * *

"Section 2. The city shall have power:

"(1) To acquire by purchase, gift, condemnation, lease, or otherwise, real and personal property, or any interest therein, for any public use or purpose within the scope of its powers, located either within or without its corporate limits and either within or without the limits of the county of Oakland, unless prohibited by the Constitution or laws of the State; and to hold, manage, control, lease, sell or otherwise dispose of the same; provided that no property of a value in excess of $2 per capita according to the last preceding United States census, or any park, cemetery or any part thereof, or any property bordering on a waterfront, shall be sold unless approved by 3/5 of the electors voting thereon at a general or special election, and no property of a value of more than $500 shall be sold until sealed proposals therefor have first been advertised for and received. The city commission may appropriate funds for the maintenance and upkeep of property acquired by it. Any gift of property may be accepted whether made directly or in trust and if in trust the commission shall have full power to carry out the terms of such trust."

It is agreed that the population of the city of Huntington Woods, by United States census of 1950, was 4,949 persons. It is further agreed that no election was held and no sealed bids were taken pursuant to the charter in connection with the execution of the restriction agreement in question. The sole consideration for the execution of said restriction agreement by the city of Huntington Woods was the mutual promises that appear in said restriction

agreement. Proofs further disclose that all of the land on Woodward avenue in the city of Huntington Woods owned by the city of Huntington Woods immediately prior to the execution of the restriction agreement was worth $42,100. Testimony discloses that the present value of the said lots is $120,000 to $130,000. Testimony further discloses that restricted to residential purposes only, the land in 1950 was worth practically nothing. In 1956 this Court in the case of *Bassey* v. *City of Huntington Woods,* 344 Mich 701, determined that all of this Woodward avenue frontage was utterly worthless for residential purposes.

The record does not disclose any evidence of a general plan to restrict all of the Woodward avenue lots to single-family-dwelling purposes, but to the contrary only 5 out of 6 lots owned by the city were restricted and those were not contiguous but scattered.

The plaintiff sought injunctive relief restraining the defendant city from constructing a playground on the 2 lots in question.

The city claims: 1. No consideration passed to the defendant city for the restrictive agreement. 2. Under the charter provisions a property interest could not be transferred or sold unless authorized and approved by 3/5ths of the electors voting at a general or special election. 3. No sale involving property of a value of more than $500 may be sold until sealed proposals therefor have been first advertised for and received. 4. Since the charter requirements had not been met, the restrictive agreement was void and of no force and effect. 5. There appears to be no general plan for restriction for residential purposes only with 1 single residence to each lot for the lots along Woodward avenue in the city of Huntington Woods. 6. Said agreement was not binding upon the city of Huntington Woods.

The trial judge, in a written opinion, found that the execution of the restrictive agreement in question was not an *ultra vires* act; that it was not necessary to follow charter requirements since the execution of the restrictive agreement was not a sale of city-owned real estate and the charter requirements mentioned applied only to sales.

Defendant, city of Huntington Woods, appeals to this Court and presents 3 questions:

1. "Did the city of Huntington Woods have the power to enter into the restriction agreement in question?"

2. "Was there a general plan binding on all of the Woodward avenue lots?"

3. "Are city owned lots bound by single-family-dwelling restrictions imposed by the city when a zoning ordinance restricted to single-family use has been declared to be unconstitutional as to the same lots?"

In the early case of *Allen* v. *City of Detroit,* 167 Mich 464 (36 LRA NS 890), Justice STEERE, writing for a unanimous Court, said (p 473):

"Building restrictions are private property, an interest in real estate in the nature of an easement, go with the land, and are a property right of value, which cannot be taken for the public use without due process of law and compensation therefor; the validity of such restriction not being affected by the character of the parties in interest. (Citing authorities.)"

Justice POTTER, writing for the Court in *Bigham* v. *Locklin,* 275 Mich 545, 553, said: "These building restrictions constitute property."

Under the above authorities, the imposition of a restriction is the loss of the use of a valuable property right, and it would appear that such right was disposed of by the city of Huntington Woods

either as a sale or a gift. It becomes unnecessary for this Court to determine which it is. If the mutual or reciprocal promises of the parties to the restriction agreement were a consideration for the execution of the said agreement, then clearly a sale was involved. Since the charter required an advertisement and sealed bids to sell or otherwise dispose of the same, and since the charter further provided that in the case of this type, where the property disposed of was of a value in excess of $2 per capita, to wit $9,898, approval of 3/5ths of the electors voting at a general or special election was necessary to authorize a sale. Failure to comply with the charter requirements voided the restriction agreement. On the other hand if no consideration moved to the city, the disposition of the valuable property right by the city commission, the mayor and the clerk constituted an actual gift of the property right.

10 McQuillin, Municipal Corporations (3d ed), § 28.43, p 106, states as follows:

"It has been shown that a municipality cannot give away its property or expend money for purposes other than corporate ones, and it follows that a municipality has no power in any manner to dispose of property of the corporation without consideration, where not for a corporate purpose."

In *Skutt* v. *City of Grand Rapids,* 275 Mich 258, 266, Justice BUSHNELL, speaking for a majority of this Court, said:

"Contracts which involve an attempt to use public money for the furtherance of a private enterprise are void. 3 McQuillin on Municipal Corporations (2d ed), § 1270. See Constitution of 1908, art 10, § 12, art 8, § 25; and title 5, § 21, of the city charter of Grand Rapids."

Article 10, § 12, of the Constitution of Michigan (1908) provides:

"The credit of the State shall not be granted to, nor in aid of any person, association or corporation, public or private."

Article 8, § 25, of the same document provides:

"No city or village shall have power * * * to loan its credit, nor to assess, levy or collect any tax or assessment for other than a public purpose."

A gift or donation of money or property by the city would, in our opinion, constitute a violation of both the constitutional provisions quoted above. *People, ex rel. Detroit & Howell R. Co.,* v. *Salem,* 20 Mich 452 (4 Am Rep 400); *Bay City* v. *State Treasurer,* 23 Mich 499; *Dodge* v. *Van Buren Circuit Judge,* 118 Mich 189; *Michigan Sugar Co.* v. *Auditor General,* 124 Mich 674 (56 LRA 329, 83 Am St Rep 354); *Michigan Corn Improvement Association* v. *Auditor General,* 150 Mich 69; *Detroit Museum of Art* v. *Engel,* 187 Mich 432.

Municipalities may not give away public property without a consideration. The action of the city of Huntington Woods constituted an *ultra vires* act which voided the restrictive agreement in question.

Appellees might argue that they were not aware of the restrictions in the city charter. This argument, in some cases valid in controversy with an individual, is an empty argument when used in litigation with a city. The case of *Utica State Savings Bank* v. *Village of Oak Park,* 279 Mich 568, 578, 579, states the rule in this regard:

" 'It is fundamental that those dealing with public officials must take notice of their powers. *McBrian* v. *City of Grand Rapids,* 56 Mich 95, 108; *Campau* v. *City of Detroit,* 106 Mich 414, 418.' *Schneider* v. *City of Ann Arbor,* 195 Mich 599, 608.

" 'Persons dealing with a municipal corporation through its officers must at their peril take notice of the authority of the particular officer to bind

the corporation. If his act is beyond the limits of his authority, the municipality is not bound.' *Rens* v. *City of Grand Rapids,* 73 Mich 237, 247."

Charter requirements for sale of municipal property must be substantially complied with. *Kalamazoo Municipal Utilities Association* v. *City of Kalamazoo,* 345 Mich 318 (61 ALR2d 583).

Since it is apparent that the decree of the lower court must be reversed, we do not consider it necessary to answer the other questions.

The case is remanded to the circuit court for the entry of a decree in accordance with this opinion. A public question being involved, no costs will be allowed.

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

STRECH *v.* BLISSFIELD COMMUNITY SCHOOLS DISTRICT.

1. JUDGMENT—RES JUDICATA.

   The defense of *res judicata* applies not only to issues which were determined on their merits but also to matters which the parties had an opportunity to present for adjudication on the merits.

2. FRAUD—PLEADING—PRESUMPTIONS.

   Allegation in bill of complaint to set aside an award in condemnation proceedings on the ground of fraud *held,* not

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REFERENCES FOR POINTS IN HEADNOTES

[1] 30A Am Jur, Judgments §§ 375, 376.
[2] 24 Am Jur, Fraud and Deceit § 256.
[3, 4] 31 Am Jur, Jury § 229 *et seq.*
[5] 31 Am Jur, Jury § 231.

substantiated, where no facts supporting such an allegation are found in the bill and the facts alleged, taken as true, do not constitute fraud, fraud not being presumed.

3. EMINENT DOMAIN—SCHOOL DISTRICTS—CHALLENGE OF JURORS.
Statute empowering school districts to condemn private property for use of the district, which provides standards as to disqualifications of jurors for cause, which are sufficient to justify determination of whether or not a proposed juror is in a position to enter a fair and just verdict is constitutional, since it meets all the requirements of the constitutional provisions, peremptory challenges of jurors in civil proceedings not being a requirement of due process (US Const, ams 5, 14; Mich Const 1908, art 2, § 16; art 13, §§ 1, 2; CLS 1956, § 340.714; CL 1948, § 602.19).

4. JURY—CHALLENGES FOR CAUSE—PEREMPTORY CHALLENGES.
Challenges for cause are necessary in all inquiries by jury, but peremptory challenges in other than criminal proceedings are confined to cases where the statutes have directly provided for them.

5. SAME—PEREMPTORY CHALLENGE.
It is error to allow a peremptory challenge of a juror in a civil proceeding, where it is not authorized by statute.

6. EMINENT DOMAIN—SCHOOL DISTRICT—SELECTION OF JURORS—STATUTES.
Due process of law was accorded defendant property owner so far as selection of jurors was concerned in proceeding to condemn his property by school district, where the circuit judge made a careful examination of the jurors and insisted that defendant property owner have the right to dismiss jurors for cause, there being no right to peremptory challenges accorded by controlling statute (US Const ams 5, 14; Mich Const 1908, art 2, § 16; art 13, §§ 1, 2; CLS 1956, § 340.714; CL 1948, § 602.19).

Appeal from Lenawee; Martin (Rex B.), J. Submitted October 13, 1959. (Docket No. 56, Calendar No. 48,066.) Decided November 24, 1959. Rehearing denied January 13, 1960.

Bill by Karl Strech against the Blissfield Community Schools District to set aside condemnation

award. Bill dismissed on motion. Plaintiff appeals. Affirmed.

Robert E. Childs, for plaintiff.

Aloysius B. O'Mara, for defendant.

KAVANAGH, J. Plaintiff filed a bill of complaint in the circuit court for Lenawee county on March 11, 1958, seeking to set aside a condemnation award originally made in a law proceeding instituted in the Lenawee county circuit court on September 6, 1955, and subsequently tried on October 4 and 5, 1955. On the latter date the condemnation jury made its award. Motion for new trial was shortly thereafter filed and followed by an amended motion for a new trial. On denial of these motions an appeal was taken to the Michigan Supreme Court. On June 28, 1956, this Court filed its opinion affirming the condemnation award. This opinion is reported in 346 Mich 186.*

In the present action plaintiff alleges that because of the interest, prejudice and bias of the jurors and because of the peculiar method of selection, which interest, prejudice and bias first came to his attention after the time had expired for filing a petition for a rehearing in the Michigan Supreme Court, he was deprived of his land without due process as is required by the United States Constitution, Fifth and Fourteenth Amendments, and the Michigan Constitution (1908), art 2, § 16; that he was deprived of his land in a manner not contemplated by article 13, §§ 1, 2, of the Michigan Constitution (1908) because the jury of 12 freeholders residing in the vicinity of such property was biased, prejudiced and chosen in a manner which was fraudulent and that the fraud was perpetrated upon him; that the bias,

* *Blissfield Community Schools District* v. *Strech.*

interest and prejudice of these 12 freeholders, who acted not only as jurors but also as judges of the law, were not known to him at the time of the commencement of the condemnation trial, at the time counsel filed a motion for new trial, or at the time the oral and written arguments were submitted to the Michigan Supreme Court, but were discovered by him subsequent to that time.

The school district filed its motion to dismiss the bill of complaint on April 19, 1958.

Defendant alleges Blissfield is a community of approximately 2,800 people, and Strech, except for the period of time in service and while working in Detroit, was born, reared, educated and lived in the village. The facts claimed to be fraudulent would certainly be common knowledge to residents of this small village. If not, normal diligence in the preparation of trial would have disclosed them to Strech.

After oral and written arguments, on November 14, 1958, the circuit judge filed a written opinion granting the motion to dismiss. On December 29, 1958, the decree for the school district was filed. From this decree, plaintiff appeals.

The opinion of the lower court indicates that the circuit judge made an extensive study of the allegations in the bill of complaint and the law applicable thereto. We think he reached the right conclusion.

No questions are raised by the bill of complaint with respect to the bias, prejudice and disqualification of the jurors or errors in selecting the jurors that were not raised or passed upon by this Court or should have been raised or passed upon by this Court in the previous case.

Res judicata applies not only to issues which were determined on their merits but also to matters which the parties had an opportunity to present for adjudication on the merits. *Porth* v. *Cadillac Motor Car Co.,* 209 Mich 89; *Thompson* v. *Doore,* 269 Mich

466; *McDannel* v. *Black,* 270 Mich 305; *Boyich* v. *J. A. Utley Co.,* 306 Mich 625.

Plaintiff attempts to rely upon the allegation that he has been defrauded. He seeks to set aside the previous award. No facts supporting such an allegation are found in the bill of complaint. The facts alleged, taken as true, do not constitute fraud. Fraud is not to be presumed.

The only questions that need consideration are the questions regarding the constitutionality of the condemnation statute. Plaintiff alleges lack of constitutionality in the statutes because no peremptory challenges are permitted, and the challenges for cause are limited by CL 1948, § 602.139 (Stat Ann 1957 Cum Supp § 27.264). Standards as to disqualifications for cause are set up in the statute* sufficiently to justify determination as to whether a proposed juror is in a position to enter a fair and just verdict. These meet all the requirements of the constitutional provisions. Peremptory challenges have never been held to be a requirement of due process. Peremptory challenges in civil causes were unknown to the English common law, but Justice CAMPBELL defined the Michigan law when he stated:

"Challenges for cause are necessary in all inquires by jury, but peremptory challenges in other than criminal proceedings are confined to cases where the statutes have directly provided for them." *Matter of Convers,* 18 Mich 459, 468.

It is error to allow a peremptory challenge not authorized by statute. *Eldridge* v. *Hubbell,* 119 Mich 61.

The legislature has failed to provide for peremptory challenges under the act used in this particular condemnation proceeding. This it had a right to

* See CLS 1956, § 340.714 (Stat Ann 1959 Rev § 15.3714).—REPORTER.

do. Due process of law under the constitutional provisions was more than met by the careful examination of the jurors by the circuit judge and by the insistence of the circuit judge in giving the plaintiff the right to dismiss jurors for cause.

The decree of the lower court is affirmed. Defendant-appellee may have costs.

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

SINAI HOSPITAL OF DETROIT *v.* WELBORN.

WELBORN *v.* MICHIGAN HOSPITAL SERVICE, INC.

1. APPEAL AND ERROR—COMMON PLEAS COURT—CIRCUIT COURT—EVIDENCE.

   The circuit court on appeal to it from the common pleas court of Detroit should not reverse the judgment below on an evidentiary basis unless the testimony taken below clearly preponderates against the judgment entered or unless the facts found were contrary to the uncontroverted testimony (CLS 1956, § 728.4; Court Rule No 77, as added in 1949).

2. SAME—COMMON PLEAS COURT—CIRCUIT COURT—SUPREME COURT.

   Appeals to circuit court from the court of common pleas of Detroit are not to be tried *de novo* but are to be reviewed in the same manner, as near as may be, as cases appealed from the circuit court are now reviewed in the Supreme Court (CLS 1956, § 728.4; Court Rule No 77, as added in 1949).

3. HOSPITALS—PAY FOR SERVICES—INSURANCE—WORKMEN'S COMPENSATION.

   Evidence presented in hospital's action against patient for services rendered and in consolidated case of patient against hos-

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 3 Am Jur, Appeal and Error §§ 895, 896.
[3] 58 Am Jur, Workmen's Compensation § 327 *et seq.*

pital service insurer to recover hospitalization costs, brought in common pleas court of Detroit and appealed to the circuit, *held,* to justify findings of both courts that plaintiff hospital was entitled to recover from patient but latter was not entitled to recover under insurance policy excluding coverage of hospitalization costs arising from industrial injuries or diseases for which an employer was required to make reimbursement (CLS 1956, § 728.4; Court Rule No 77, as added in 1949).

4. APPEAL AND ERROR—WEIGHT OF EVIDENCE.

The weight to be accorded an admission and the contradiction thereof is to be determined by the trial, rather than an appellate, court.

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted October 13, 1959. (Docket Nos. 67, 68, Calendar Nos. 47,848, 47,849.) Decided November 24, 1959.

Action in Detroit common pleas court by Sinai Hospital of Detroit against Katie Welborn for charges incurred.

Action by Katie Welborn against Michigan Hospital Service, Inc., for recovery of hospitalization costs.

Cases consolidated for trial and appeals. Judgments in common pleas court for plaintiff Sinai Hospital and for defendant Michigan Hospital Service, Inc., affirmed in circuit court. Katie Welborn appeals. Affirmed.

Stanford M. Rubach, for plaintiff Sinai Hospital.

Dann, Rosenbaum & Bloom (*Bernard L. Kaufman,* of counsel), for appellant defendant and plaintiff Katie Welborn.

Benjamin H. Long, David M. Preston and *L. Stanford Evans, Jr.,* for defendant Michigan Hospital Service, Inc.

KAVANAGH, J. These 2 cases were separately commenced in the common pleas court in the city of Detroit and because of the subject matter they were consolidated for the purposes of trial, for appeal to the Wayne county circuit court, and for appeal to this Court.

Sinai Hospital v. Katie Welborn was brought to recover charges incurred by Mrs. Welborn for hospital services rendered by plaintiff November 5–19, 1955, and December 4–16, 1955. The companion case of Katie Welborn v. Michigan Hospital Service is for recovery for the cost of such hospitalization and is based on a Michigan Hospital Service comprehensive hospital care certificate. Mrs. Welborn claims that under her policy Sinai Hospital should be paid by Michigan Hospital Service.

In the first case it is admitted that services were rendered by Sinai Hospital to Katie Welborn in the amount of $690 and that the hospital has not been paid for these particular services. It is contended by defendant Katie Welborn that Sinai Hospital is a participating hospital in the Blue Cross Service and that Michigan Hospital Service is obligated under her certificate to pay the amount of the charges to Sinai Hospital.

In the second case Katie Welborn contends that in the event Sinai Hospital is determined to be entitled to a judgment for the amount of the services, she is entitled to a judgment against Michigan Hospital Service for the same sum under her hospital contract.

The pertinent facts that gave rise to these suits are as follows: Katie Welborn, on May 8, 1955, while employed as a waitress at the Sea Food Grotto, slipped and fell to the floor, sustaining certain injuries. The nature of those injuries and their relationship to subsequent hospitalization is contested. It is uncontested that she was treated by a physician,

Dr. Jorgenson, for a period of about 2 weeks after the injury, and again by the same physician in October for a period of about 2 weeks. In the latter part of October Mrs. Welborn went to another physician, Dr. Goldstein, who ordered her admission to Sinai Hospital. She remained in the hospital for the period November 5–19, 1955, incurring certain charges, a portion of which are involved in these suits. During this period of hospitalization Dr. Harvey Gass, a neuro-surgeon, was called into consultation. He examined Mrs. Welborn and received a history of her injury and condition from her.

On December 4, 1955, Mrs. Welborn was again admitted to the hospital. She remained in the hospital until December 16, 1955. During this time she was operated on by Dr. Gass. The operation was a laminectomy and removal of a herniated disc.

On the trial the evidence on behalf of Mrs. Welborn consisted of her statement that she hurt her right ankle in the fall of May 8, 1955; that she received treatment for approximately 2 weeks; that she received further treatment for approximately 2 weeks in October; that her pain at the time of her confinement in the hospital in November of 1955 was in her hip as well as her right leg; that she returned to the hospital about 2 weeks after the first period of hospitalization and had an operation on her back by Dr. Gass.

Dr. Gass testified that he was called into consultation during the first period of hospitalization, received a history of low back pain and right sciatic pain running over a period of approximately 2 years; that his tests showed nerve root compression and pain in the right leg; that he had at his disposal a myelogram test and that he operated on Mrs. Welborn. He gave it as his opinion, in response to a hypothetical question, that the fall in May was not related to the condition for which he operated.

The evidence of appellee Michigan Hospital Service consisted entirely of correspondence with Mrs. Welborn, a statement signed by her in response to such correspondence, certain documents from the file of the Michigan workmen's compensation commission, and certificate of insurance, particularly section 6 (B) 5 thereof. In summary, this evidence is as follows: On November 9, 1955, Michigan Hospital Service wrote Mrs. Welborn and requested information regarding her admission to Sinai Hospital on November 5, 1955. A questionnaire was submitted to Mrs. Welborn with this letter. On November 25th another letter was written stating that a response had not been received and enclosing another questionnaire. In response Mrs. Welborn submitted a questionnaire signed by her and received by Michigan Hospital Service on November 28, 1955, containing the following statements:

"Date on which injury occurred or was first noticed: May 8, 1955.
"Place where injury occurred: Sea Food Grotto Restaurant.
"Describe fully how injury happened: I slipped & fell on my buttocks hurt them and my right ankle."

The questionnaire contained further information that she was working as a waitress, that the injury occurred on her employer's premises and that she reported the injury to her employer.

After Mrs. Welborn was released from the hospital in December 1955, and on January 19, 1956, she signed a notice to her employer of claim for injury, addressed to the Sea Food Grotto, which read as follows:

"To Employer: Sea Food Grotto
"Address: 24010 W. Seven Mile Road, Detroit 19, Mich.

"Take notice that in accordance with the provisions of the Michigan workmen's compensation law, employee Kay Welborn hereby gives you notice of injury and makes claim for compensation upon you for injury received by her while in your employ.

"The accident, personal injury and/or occupational disease occurred on or about the 8th day of May A.D., 1955, at Detroit, Michigan.

"The foregoing injury occurred in following manner: Slipped and fell on wet floor.

"Nature of disability: Injuries to back, head, upper and lower extremities, and internal injuries.

"Dated at Detroit, Michigan, this 19th day of January A.D., 1956.

"Employee: /s/ KAY WELBORN

"Address: 12696 W. Outer Drive, Detroit 23."

On the same day, January 19, 1956, Mrs. Welborn signed an application for hearing and adjustment of claim on a form supplied by the workmen's compensation commission, the pertinent parts of which read as follows:

"Employee: Kay Welborn, 12696 W. Outer Drive, Detroit, 23.

"Employer: Sea Food Grotto 24010 W. Seven Mile rd., Detroit, 19 * * *

"The applicant respectfully shows:

"1. That this claim relates to a personal injury which occurred on or about May 8, 1955. * * *

"2. That the injury or disablement occurred at Detroit, Wayne County, Michigan and in the following manner: Slipped and fell on wet floor.

"3. Nature of disability: Injuries to back, head, upper and lower extremities, and internal injuries. * * *

"Wherefore applicant requests that he be granted such relief as he is entitled to under the workmen's compensation law of Michigan and that the commission set this matter for hearing so that the parties hereto may have a determination of their rights under the compensation law.

"Dated at Detroit, Michigan, this 19th day of January, 1956.

"Signed: KAY WELBORN
"Address 12696 W. Outer Drive,
Detroit 23, Michigan."

On May 17, 1956, Michigan Hospital Service wrote Mrs. Welborn with respect to her hearing before the workmen's compensation commission and reminded her that Michigan Hospital Service had made no payment in her case and that in the event of a compromise redemption settlement, or if the case was found to be a compensable case, the cost of the hospital treatment should be included in the settlement, since Michigan Hospital Service would have no liability.

Under Mrs. Welborn's comprehensive hospital care certificate section 6 (B) 5 reads as follows:

"6. Conditions of eligibility for hospital service:
"(B) Hospital service is not available hereunder:
* * *

"5. For care for industrial injuries or diseases for a period for which the employer is required to furnish, pay for, or provide reimbursement for hospital services or expenses under the provisions of any law of the United States or any State or political subdivision thereof; or for a period for which such hospital service, payment or reimbursement may be obtained by the member under such laws, even though he waives or fails to assert his rights thereto."

On August 31, 1956, an agreement to redeem liability was entered into between Mrs. Welborn, Sea Food Grotto and Employers Mutual Liability Insurance Company, the compensation insurance carrier, reading, in part, as follows:

"Plaintiff has offered to settle her disputed claim for compensation benefits of every nature including past, present and future compensation and any and all medical benefits for $1,223.

"Defendants agree to pay the sum of $1,223 in full settlement as aforementioned."

On the same day, August 31, 1956, an order was entered by a hearing referee of the workmen's compensation commission approving the agreement to redeem liability.

All of these instruments were admitted in evidence as exhibits.

At the completion of the trial, Judge Kenney in common pleas court, after hearing the testimony, examining the written evidence, and considering the oral arguments and briefs, entered a judgment in favor of Sinai Hospital in its case for the sum of $690. Judgment of no cause of action was entered in favor of Michigan Hospital Service in the case of Katie Welborn v. Michigan Hospital Service. Appeal was made to the Wayne circuit court. The same written and oral evidence was presented in both cases to the circuit court judge. The judgments entered by the common pleas court in each case were affirmed by the circuit judge.

Katie Welborn appeals both cases to this Court, raising 2 questions:

1. "Were the judgments entered in favor of Sinai Hospital of Detroit and Michigan Hospital Service against the preponderance of the evidence?"

2. "Were the judgments entered in favor of Sinai Hospital of Detroit and Michigan Hospital Service contrary to the law applicable to the facts of the cause?"

On behalf of Katie Welborn reliance is made on the testimony of Dr. Gass offered at the trial. It is urged that since Dr. Gass's testimony was not rebutted, contradicted, or successfully challenged, either by oral testimony or written evidence, there was no evidence to show a causal relationship between the industrial accident on May 8, 1955, and

the condition for which appellant was hospitalized, and consequently the judgments of the lower courts were against the preponderance of the evidence.

This Court in the case of *Book Furniture Company* v. *Chance,* 352 Mich 521, 524, said:

"This Court has held that upon appeals to circuit court from common pleas court, the circuit judge should not reverse the judgment below upon an evidentiary basis, unless the testimony taken below clearly preponderates against the judgment there entered (*Michael* v. *Kircher,* 335 Mich 566), or unless the facts found were contrary to the uncontroverted testimony (*Cummins* v. *John Hancock Mutual Life Insurance Co.,* 337 Mich 629).

"It would appear that the function of the circuit judge in this instance was to review the testimony and to decide whether or not it supported Judge Sharp's opinion and judgment. This examination should be carried on in the same fashion as the Supreme Court does under like circumstances on appeal from the circuit court to this Court. *Berman* v. *Vigliotti,* 337 Mich 454; *Freedman* v. *Palmer Park Theater Co.,* 345 Mich 657."

Justice VOELKER, writing for the Court, in the case of *Fruchter* v. *Martin,* 350 Mich 12, outlined the question of appeals from the common pleas court of Detroit to the circuit court (p 15):

"We find that appeals to circuit court from the court of common pleas of Detroit are provided for by both general statute and court rule. The statute (CLS 1956, § 728.4 [Stat Ann 1955 Cum Supp § 27.3654]) provides that all such appeals shall be regarded as appeals to a court of review instead of a trial *de novo,* and that upon appeal the case 'shall be reviewed in the same manner as near as may be, as cases appealed from circuit court are now reviewed in the Supreme Court.'"

Court Rule No 77* is to the same effect as CLS 1956, § 728.4 (Stat Ann 1957 Cum Supp § 27.3654).

The circuit judge correctly stated the position in regard to the first question in his opinion when he said:

"It appears to this court that the lower court could have decided the issues involved, reasoning that Sinai Hospital had made out its case by a preponderance of the evidence and denying the case of Mrs. Welborn against the Hospital Service for the same reason. I feel that on the same grounds he could have disposed of Dr. Gass's testimony on the basis of its weight, taking into consideration all of the matters and things presented in the records of these cases."

An examination of the entire record fails to convince us that we should disturb the finding of the common pleas judge and the circuit judge. We certainly cannot say that their opinions were contrary to the preponderance of the evidence. The trial courts saw the witnesses and were in a position to evaluate their testimony far better than we. We feel the circuit judge correctly disposed of this first question.

The second allegation of error that the judgments were contrary to the law applicable to the facts of the cause appears to be based upon the fact that in the claim filed with the workmen's compensation commission the appellant, by inserting the words "injuries to back," did not make a conclusive admission that the herniated disc was caused by the fall of May 8, 1955; that such admission, though admissible as evidence, is not conclusive and can be varied or contradicted. We cannot disagree with this rule of law, but hasten to say that the weight to be given to both the admission and the contradiction

* Added in 1949. See 326 Mich lvi.

is to be determined by the trial court. In this instance it was determined against Katie Welborn. We cannot say that error was committed in so doing, particularly when the application for workmen's compensation was filed and the settlement was made after the operation and after notice from Michigan Hospital Service that it would not be liable under the contract of insurance if it was an industrial accident covered by the workmen's compensation law. Michigan Hospital Service also warned Katie Welborn that if a redemption of the liability was had before the workmen's compensation commission the hospital services should be taken into consideration.

We are inclined to say that in the event we were to make a finding contrary to that of the common pleas court and the circuit court we would have to disregard the clear preponderance of the evidence.

The judgments of the Detroit common pleas court and the Wayne county circuit court are affirmed, with costs in favor of appellee.

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

VERBERG *v.* SIMPLICITY PATTERN COMPANY.

1. WORKMEN'S COMPENSATION—PERMANENT AND TOTAL DISABILITY —CONSTRUCTION OF STATUTE.

   The transposition of the word "total" in the terms "permanent and total disability" and "total and permanent disability" in the workmen's compensation act is of no significance in interpreting the statute (CL 1948, § 412.9, as amended by PA 1955, No 250).

2. SAME—SECOND-INJURY FUND—DIFFERENTIAL BENEFITS.

   Differential benefits, under the workmen's compensation act payable to an injured employee from the second-injury fund for amount of difference between benefits payable at time of subsequent amendment of the act providing for such differential benefits are not payable to persons totally and permanently disabled other than as provided for enumerated losses (CL 1948, § 412.8a; § 412.9, as amended by PA 1955, No 250).

3. SAME—PURPOSE OF SECOND-INJURY FUND—HANDICAPPED PERSONS.

   The purpose of the amendatory act establishing the second-injury fund was to enhance the prospects for employment of certain handicapped persons who had previously sustained specific losses, so that they and their families would have a means of livelihood by relieving an employer of liability for payment of workmen's compensation for an injury in an amount greater than it would be for an injury to a person not so handicapped (CL 1948, § 412.8a).

4. SAME — SECOND-INJURY FUND — CLASSIFICATION — DIFFERENTIAL BENEFITS.

   The selection of persons suffering permanent and total disability as defined in statute providing for payment of differential benefits from the second-injury fund was a proper classification of recipients of such benefits (CL 1948, § 412.8a; § 412.9 as amended by PA 1955, No 250).

5. STATUTES—CLASSIFICATION.

   Classification for the purpose of legislation must not be arbitrary and is not reviewable unless palpably arbitrary and unreasonable, and it may rest on narrow distinctions.

REFERENCES FOR POINTS IN HEADNOTES

[2, 3] 58 Am Jur, Workmen's Compensation § 296.
[5] 12 Am Jur, Constitutional Law § 476 *et seq.*
[6, 7] 12 Am Jur, Constitutional Law § 521.
[8] 12 Am Jur, Constitutional Law § 477.

6. SAME—CLASSIFICATION.

The existence of any state of facts that can reasonably be conceived must be assumed in order to sustain a legislative classification.

7. SAME—CLASSIFICATION—BURDEN OF SHOWING ARBITRARINESS.

One who assails a legislative classification must carry the burden of showing the action is arbitrary by a resort to common knowledge or other matters which must be judicially noticed.

8. SAME—CLASSIFICATION.

A State may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses.

Appeal from Workmen's Compensation Appeal Board. Submitted June 3, 1959. (Docket No. 20, Calendar No. 48,080.) Decided November 24, 1959.

Arthur Verberg presented his claim against Simplicity Pattern Company, employer, Massachusetts Bonding & Insurance Company, insurer, and the State of Michigan (Second-Injury Fund) for additional workmen's compensation and differential benefits provided by legislation subsequent to development of his disability. Award of additional compensation but denial of differential benefits. Plaintiff appeals. Affirmed.

Marcus, Kelman, Loria, McCroskey & Finucan (*Thomas W. Finucan,* of counsel), for plaintiff.

Paul L. Adams, Attorney General, *Samuel J. Torina,* Solicitor General, and *Myron A. McMillan,* Assistant Attorney General, for defendant State of Michigan (Second-Injury Fund).

Amicus Curiae:

Alexander, Cholette, Buchanan, Perkins & Conklin (*Edward D. Wells,* of counsel), for original defendant employer and insurer.

DETHMERS, C. J. Plaintiff became disabled on December 10, 1947, from long exposure to and inhalation of chrome in the course of his employment. He has not since been gainfully employed. He received $21 per week compensation for 500 weeks, from December 10, 1947, until July 1, 1957.

On July 15, 1957, he filed application for additional benefits for permanent and total disability. The hearing referee, after finding plaintiff permanently and totally disabled as a matter of fact, granted him, by an award later affirmed by the appeal board, an additional 250 weeks compensation from his employer, as provided, at the time of his injury in 1947, by the then language of part 2, § 9, of the act (CL 1948, § 412.9 [Stat Ann 1943 Cum Supp § 17.159]), this being in accord with our construction thereof in *Springer* v. *Reed Foundry & Machine Co.*, 346 Mich 11; but he was denied differential benefits from the second-injury fund as provided for under that same section as amended by PA 1955, No 250, because it was found that his disability was not permanent and total as defined in part 2, § 10, of the act. The mentioned differential is the difference between the weekly amounts payable under the law in effect when the disability was incurred and the weekly amounts presently provided by law. Plaintiff appeals here from denial of the differential benefits.

Part 2, § 9, subd (a), of the act, as amended by PA 1955, No 250, read:

"While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee, a weekly compensation of 66–2/3% of his average weekly wages, but not more than $32 if such injured employee has no dependents; $34 per week if 1 dependent; $36 if 2 dependents; $38 if 3 dependents; $40 if 4 dependents and $42 if 5 or more depend-

ents. Weekly payments shall in no event be less than $18 if there are no dependents; $20 if 1 dependent; $22 if 2 dependents; $24 if 3 dependents; $26 if 4 dependents; and $28 if 5 or more dependents, and in no case shall the period covered by such compensation be greater than 500 weeks from the date of injury, nor shall the total compensation exceed an amount equal to 500 times the total weekly amount payable under this section 9, except for permanent and total disability as defined in section 10, when the compensation shall be paid for the duration of such permanent and total disability: Provided, That the conclusive presumption of total and permanent disability shall not extend beyond 800 weeks from the date of injury, and thereafter the question of permanent and total disability shall be determined in accordance with the fact, as the fact may be at that time. Any person who is permanently and totally disabled and who is receiving payments of workmen's compensation which are payable to such person under this act in amounts per week of less than is presently provided in the workmen's compensation schedule of benefits for permanent and total disability and for a lesser number of weeks than the duration of such permanent and total disability shall hereafter receive weekly, without application, from the second injury fund, an amount equal to the difference between what he is now receiving per week and the amount per week now provided for permanent and total disability with appropriate application of the provisions of paragraphs (b), (c), (d) and (e) of this section since the date of injury. Payments from this second injury fund shall continue after the period for which any such person is otherwise entitled to compensation under this act for the duration of such permanent and total disability according to the full rate provided in the schedule of benefits."

The question on this appeal is whether a person who is permanently and totally disabled as a matter of fact, but not as defined in part 2, § 10, of the act,

is entitled to the differential benefits under § 9(a) as above quoted. This question was answered in 1956 in an opinion of the attorney general reported in 2 OAG 1955–1956, p 592, in which, after quoting § 9(a) as above quoted, he said:

"It is clear that the employer of an injured workman, totally disabled, will be liable for compensation for not more than 500 weeks unless the disability is 'permanent and total disability as defined in section 10.' In that event, the liability continues for the duration of permanent and total disability with a conclusive presumption of total and permanent disability for 800 weeks.

"The legislature has used 4 phrases in this section which relate to permanent and total disability; they are: 'permanent and total disability as defined in section 10'; 'such permanent and total disability'; 'total and permanent disability'; and 'permanent and total disability.' The first time that the phrase 'such permanent and total disability' and the phrase 'total and permanent disability' are used, they clearly mean 'permanent and total disability as defined in section 10.'

"At this point it should be noted that while section 9 says 'permanent and total disability as defined in section 10,' section 10 says 'total and permanent disability, compensation for which is provided in section 9.' The transposition of the terms 'total' and 'permanent,' therefore, has no significance in the proper interpretation of the statute.

"The phrase 'permanent and total disability' wherever used thereafter must, in my opinion, have the same meaning as when first used. I, therefore, conclude that the permanent and total disability which will justify differential payments from the second-injury fund must be 'permanent and total disability as defined in section 10.'

"The changes made by amendments to sections 9 and 10 compel the same construction. Part 2, § 9, as it read after the 1943 amendment by Act No 245

provided for permanent and total disability as a matter of fact. See *Springer* v. *Reed Foundry & Machine Company,* 346 Mich 11; *Edwards* v. *Michigan Light Alloys Corporation,* 346 Mich 169.

"In 1954 by Act No 175 the legal significance of section 9, insofar as permanent and total disability is concerned, was radically changed by the amendment to section 10. In the amendment to that section, the legislature said:

" 'Total and permanent disability, compensation for which is provided in section 9 hereof, means:

(1) Total and permanent loss of sight of both eyes.

(2) Loss of both legs or both feet at or above the ankle.

(3) Loss of both arms or both hands at or above the wrist.

(4) Loss of any 2 of the members or faculties enumerated in (1), (2) or (3).

(5) Permanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm.

(6) Incurable insanity or imbecility.'

"The effect of this amendment to section 10 was to limit permanent and total disability in section 9 to the items defined in section 10. In the 1955 amendments any remaining doubt as to whether total and permanent disability was limited to the definition in section 10 was dispelled by the language above quoted, viz: 'except for permanent and total disability as defined in section 10.'

"All of the language in section 9 relating to payments from the second-injury fund was added by the 1955 amendment. The legislature, having clearly evidenced its intent to limit permanent and total disability to that which was defined in section 10, payments from the second-injury fund provided for in section 9 must also be so limited."

We approve and adopt the quoted language from the attorney general's opinion. As above quoted, section 10 provides that: "Total and permanent disability, compensation for which is provided in section

9 hereof, means:" thereafter follows the list of specific injuries or losses as set forth in the above quotation of section 10. The majority of the appeal board said, concerning that, in the instant case:

"It is not logical to conclude that the words 'permanent and total' used in providing differential benefits were used in a different sense than they were used elsewhere in the same section and there is nothing in section 9 as amended by PA 1955, No 250 which purported to repeal or qualify the express words of section 10."

We agree.

Are the provisions of section 9, subd (a), as above construed, barring plaintiff from the differential benefits allowed out of the second-injury fund to those with permanent and total disabilities as defined in section 10, unconstitutional as establishing an unreasonable classification? The Michigan act and those of most States, from the very beginning, provided compensation payments for fixed numbers of weeks for certain specific losses even though the injuries were not disabling as a matter of fact for such length of time, while granting compensation for other injuries only during the period of the resultant disablement. Nowhere yet has this been held to be an unreasonable classification. The very nature of such specific losses, never to be retrieved, appeals to reason, common sense and humane considerations as placing them in a class by themselves. If the classification be reasonable for the purpose of thus fixing the period of compensation, is it any less so for fixing the rate, as by addition of the differential benefits? We think not. In creating the second-injury fund the legislature provided, in part 2, § 8a, of the act (CL 1948, § 412.8a [Stat Ann § 17.158(1)]):

"If an employee has at the time of injury permanent disability in the form of the loss of a hand or

arm or foot or leg or eye and at the time of such injury incurs further permanent disability in the form of the loss of a hand or arm or foot or leg or eye, he shall be deemed to be totally and permanently disabled and shall be paid, from the funds provided in this section, compensation for total and permanent disability after subtracting the amount of compensation received by the employee for both such losses."

Similar statutes have been enacted in 45 other states, including Massachusetts. Of the purpose of such act the Massachusetts court in *Robert S. McLean's Case,* 326 Mass 72, 74 (93 NE2d 233), said:

"The purpose of the statute was to encourage the employment of persons who have previously suffered certain defined personal injuries by relieving the employer or the insurer from the burden of paying the entire compensation for further disability of the employee due to the combined effect of his previous injury and one later received in the course of his employment."

See, also, *Arview* v. *Industrial Commission,* 415 Ill 522 (114 NE2d 698). Clearly, the purpose of the above statutory provision was to enhance the prospects for employment of certain handicapped persons who had previously sustained specific losses, so that they and their families would have a means of livelihood. The statute made it certain, as an inducement to an employer to employ such persons, that in employing a handicapped person he would be required to pay no more if such handicapped person should suffer further injury than he would have been required to pay for such further injury had the person not been handicapped in the first place. 2 Larson, Workmen's Compensation Law, § 59.31. If the selection of persons suffering permanent and total disability as defined in section 10 is a reasonable classification for permitting payment to them, out of the specially created second-injury fund, of the

benefits which were provided for when the fund was originally created by statute, is it not as reasonable for purposes of payment to them from that fund of the more recently conceived differential benefits? Its effect is merely to add to the special benefits accorded this particularly unfortunate group. In *Fitzpatrick* v. *Liquor Control Commission,* 316 Mich 83, 93, 94 (172 ALR 608), this Court said:

"However, all discrimination, or so-called class legislation is not unconstitutional. *1426 Woodward Avenue Corp.* v. *Wolff,* 312 Mich 352, 374.

" 'The fundamental rule of classification for the purpose of legislation is that it shall not be arbitrary; and it is not reviewable unless palpably arbitrary and unreasonable. *Haynes* v. *Lapeer Circuit Judge,* 201 Mich 138 (LRA1918D, 233); *Straus* v. *Elless Co.,* 245 Mich 558. * * * In *German Alliance Ins. Co.* v. *Lewis,* 233 US 389, 418 (34 S Ct 612, 58 L ed 1011, LRA1915C, 1189), it is said:

" ' "A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise."

" 'If any state of facts reasonably can be conceived that would sustain statutory classification, its existence must be assumed. *Naudzius* v. *Lahr,* 253 Mich 216 (74 ALR 1189, 30 NCCA 179).

" 'In *Borden's Farm Products Co., Inc.,* v. *Baldwin,* 293 US 194, 209 (55 S Ct 187, 79 L ed 281), it is said:

" ' "When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 US 61 (31 S Ct 337, 55 L ed 369, Ann Cas 1912C, 160); *Ohio, ex rel. Clarke,* v. *Deckebach,* 274 US 392, 397 (47 S Ct

630, 71 L ed 1115); *Lawrence* v. *State Tax Commission of Mississippi,* 286 US 276, 283 (52 S Ct 556, 76 L ed 1102, 87 ALR 374)."' * * * *Baker* v. *State Land Office Board,* 294 Mich 587, 602–605."

"Even if there were some strained grounds for plaintiff's claim that the statute is not all embracing, that of itself would not affect the constitutionality of the act. As we said in *Kelley* v. *Judge of Recorder's Court of Detroit,* 239 Mich 204, 215 (53 ALR 273) (quoting from *Whitney* v. *California,* 274 US 357, 370 [47 S Ct 641, 71 L ed 1095]):

"'A State may properly direct its legislation against what it deems an existing evil without covering a whole field of possible abuses. * * * The statute must be presumed to be aimed at an evil where experience shows it to be most felt, and to be deemed by the legislature coextensive with the practical need; and is not to be overthrown merely because other instances may be suggested to which also it might have been applied; that being a matter for the legislature to determine unless the case is very clear. * * * And it is not open to objection unless the classification is so lacking in any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of the legislative judgment and discretion.'" *Metropolitan Funeral System Association* v. *Commissioner of Insurance,* 331 Mich 185, 194.

Affirmed.

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

BLACK, J. (*concurring*). I agree fully with the reasoning of and conclusions reached by Chief Justice DETHMERS yet find myself unable to sign his opinion for one reason, that of unnecessary reaffirmance therein of what to me are extreme constitutional test-doctrines this Court adopted in *Fitzpatrick* v. *Liquor*

Control Commission, 316 Mich 83 (172 ALR 608) and *Metropolitan Funeral System Association* v. *Commissioner of Insurance,* 331 Mich 185. The extended quotations from *Fitzpatrick* and *Metropolitan* which appear in the opinion of the Chief Justice are surely due, some day, for majority re-examination. That day has not as yet arrived. In the meantime I do not care to add my signature of approval to that which has been so quoted from the 2 cases.

Under such doctrine it would be quite difficult to conceive any case where this Court might conclude that challenged legislation discriminates unconstitutionally in favor of 1 or more classes against another or others. Consequently, and so far as concerns the point of unconstitutional discrimination in this case of Verberg, I confine concurrence to the eminently proper conclusion of the Chief Justice that the selection of persons suffering permanent and total disability, as defined in section 10, is a reasonable classification in that the pertinent legislative purpose was "merely to add to the special benefits accorded this particularly unfortunate group."

I agree, on above ground, that the determination of the appeal board should be affirmed.

VOELKER, J., concurred with BLACK, J.

NATIONAL BANK OF DETROIT *v.* VOIGT ESTATE.

1. ESTATES OF DECEDENTS—LANDLORD AND TENANT—FUTURE RENT, TAXES, INSURANCE, REPAIRS—CONTINGENT CLAIMS.

   Claim of lessor for amounts to become due and payable in the future under 99-year lease for rent, taxes, insurance premiums and expenses for repairs is a liability of deceased lessee upon a fixed and definite contract in writing, and is not a contingent claim, since its existence or nonexistence does not depend upon some future event which may or may not happen, and, therefore, statutory provisions relating to contingent claims have no application (CL 1948, § 708.25 *et seq.*).

2. LANDLORD AND TENANT—DEATH OF LESSEE.

   Death of the holder of the lessee's interest does not entitle the lessor to additional security or benefits not provided for in the lease and not enjoyed by the lessor during deceased's lifetime, such as having the lessee's assets sequestered or a surety bond furnished to guarantee payments becoming due in the future.

3. ESTATES OF DECEDENTS—CLAIMS AGAINST ESTATES—LANDLORD AND TENANT—REPAIRS.

   Lessors are not entitled to the cost of making repairs under a 99-year lease which the lessee was obligated to make, as a fifth-class claim against the estate of the deceased lessor where there is no proof of injury done to the reversion.

4. LANDLORD AND TENANT—MEASURE OF DAMAGES—INJURY TO REVERSION.

   Injury done to the reversion, not cost of making repairs, is the measure of damages in an action begun by landlord before termination of the lease.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 32 Am Jur, Landlord and Tenant §§ 65, 431.
[3, 6] 21 Am Jur, Executors and Administrators § 294.
[5] 32 Am Jur, Landlord and Tenant § 816.
[7] 14 Am Jur, Costs § 11.

5. SAME—REPAIRS—ACTION AT END OF TERM—MEASURE OF DAMAGES.
The cost of making repairs becomes the measure of damages in an action by the landlord at the expiration of the term of a lease imposing obligation on tenant to make repairs.

6. ESTATES OF DECEDENTS—LANDLORD AND TENANT—REPAIRS—CONTINGENT CLAIM.
Estimated cost of repairs presently necessary under 99-year lease is ordered to be retained by administrator of estate of deceased lessee who was obligated to make them, to insure payment of the claim if and when it shall become absolute, as the situation at the end of the lease resulting from the failure to make repairs, is now uncertain, inasmuch as the estate may have the repairs made (CL 1948, § 708.26).

7. COSTS—LANDLORD AND TENANT—ESTATE OF DECEDENTS—NEITHER PARTY PREVAILING IN FULL.
No costs are allowed in landlord's proceeding against estate of deceased lessee, where neither party has prevailed in full.

Appeal from Wayne; Brennan (Leo J.), J., presiding. Submitted June 4, 1959. (Docket No. 29, Calendar No. 48,016.) Decided November 24, 1959. Rehearing denied January 13, 1960.

Claim by National Bank of Detroit, Leonard Borin and Claudia Borin, executors of the will of Jacob Borin, deceased, and National Bank of Detroit and Theodore Levin, surviving trustees under the will of Nathan Borin, deceased, against the estate of Augusta L. Voigt, deceased, the Detroit Bank & Trust Company, administrator, for future rent, taxes, insurance premiums and repairs under terms of lease. Claim allowed as contingent, and provisions to insure payment in future ordered. Defendant estate appeals. Reversed and remanded for allowance of present expense of repairs as contingent claim.

Levin, Levin, Garvett & Dill (*Earlmont H. Dill, Gordon I. Ginsberg* and *Frank H. Janiga,* of counsel), for plaintiffs.

Leo J. Carrigan, for defendant.

DETHMERS, C. J. Plaintiffs are the executors of the will of Jacob Borin, deceased, and the trustees under the will of Nathan Borin, deceased. The 2 decedents died possessed of the lessor's interest in a 99-year lease of real estate. Defendant bank is the administrator *c.t.a.* of the estate of Augusta L. Voigt, deceased, who held the lessee's interest at her death. Involved in this matter are plaintiffs' claims, filed against defendant estate, for rent, taxes, insurance premiums and expenses for repairs to become due and payable in the future under the lease. The probate court disallowed the claims. On appeal the circuit court allowed them. Defendant appeals.

The circuit court allowed the claims as "contingent claims", applying the provisions of CL 1948, § 708.25 *et seq.* (Stat Ann 1943 Rev § 27.3178[435] *et seq.*), and ordered defendant bank, as fiduciary of the Voigt estate:

"to retain in his possession funds and assets of the estate to pay the same as and when it becomes absolute; and further ordering said fiduciary not to close the estate until the appellants' contingent claim has become absolute and an opportunity for its presentation and its allowance given as provided by law, or until any liability on the part of the estate upon such claim has been terminated, or until appellant-claimant has been fully and adequately protected by the giving of a surety bond in such amount and in such form as may meet the approval of the probate court for the county of Wayne, conditioned for payment of said contingent claim."

Plaintiffs urge *In re Beecher's Estate,* 113 Mich 667, in support of the circuit judge's holding that the claims are contingent. In that case "The question presented is one simply of power." Did the probate court, upon application of the administrator of an estate holding the lessee's interest in a 100-year lease, have the power to authorize him, as it did in that case,

to compromise the lessor's continuing claim for rent and, in effecting that compromise, to purchase the leased property for the estate? The statute in effect at that time expressly provided therefor, as it does now. No problem was presented as to whether the claim for rent in *Beecher* was contingent or absolute or whether the lessor was entitled to have assets of lessee's estate set aside to meet future rent. Following the plain language of the statute, the Court simply held that the probate court did have power to make the order for compromise settlement and purchase requested by the administrator, rejecting the claim that the heirs were thereby deprived of vested rights to have the money of the estate divided among them rather than to have it invested in the real estate. That is not the problem in the instant case. The decision in *Beecher* is of no assistance here.

Plaintiffs also urge 2 divorce cases, *Braffett* v. *Braffett,* 308 Mich 506, and *LaBarge* v. *LaBarge,* 312 Mich 157, in support of their position. A holding that the possible right to future alimony, which the chancery court granting the decree may at any time increase, decrease or terminate, gives rise to a claim of such contingent nature as to come within the meaning of the statute here invoked is no authority for a like holding with respect to the express and specific obligations assumed by a lessee under a lease.

In the case of *In re Estate of Jeffers,* 272 Mich 127, plaintiffs were the vendors in a land contract and decedent the vendee. Plaintiffs filed a claim against decedent's estate for the unpaid balance under the contract, and filed a chancery action seeking to have a trust impressed in the amount of such claim upon the assets of the estate. The 2 matters were considered together on appeal here. With respect to plaintiffs' claim in that case this Court, in denying them the relief prayed for, said (p 136):

"Plaintiffs' claim was not a contingent claim (*Osmun* v. *Oakland Circuit Judge,* 107 Mich 27); it was a liability upon a fixed and definite contract in writing. Its existence or nonexistence did not depend upon some contingency which might never happen (24 CJ p 293), a contingent claim being one where the liability depends upon some future event which may or may not happen, and, therefore, makes it now wholly uncertain whether there ever will be a liability. *Sargent's Adm'r* v. *Kimball's Adm'r,* 37 Vt 320.

"A contingent claim is one which does not exist but may possibly hereafter arise, one whose possible existence depends upon an uncertain future event—upon a contingency.

"The claim here involved was not contingent, but absolute—fixed by definite contract in writing signed by the deceased in his lifetime, and, therefore, the statutory provisions (CL 1929, §§ 15708–15723) relating to contingent claims have no application."

Plaintiffs here say that the quoted language was not necessary to decision in *Jeffers,* and was "dictum in its entirety." That this Court did not then think so, as we do not now, appears from the statement in the *Jeffers* opinion (p 137) that the bill of complaint "asks substantially the same relief in equity that might have been had in probate court had plaintiffs' claim been a contingent one properly proved and established." Dictum or not, we deem it expressive of a sound view of the law, which effectuates the manifest intent of the legislature in enacting the statutory provisions here considered. Plaintiffs say, however, that even if it be held, in accord with *Jeffers,* that the claims here are not contingent, they are, nevertheless, entitled to the relief granted below under CL 1948, § 708.25 (Stat Ann 1943 Rev § 27-.3178[435]) because that section no longer speaks in terms of "contingent claims" as it did at the time of *Osmun* v. *Oakland Circuit Judge,* 107 Mich 27,

relied upon in the *Jeffers* opinion, and that the section expressly applies to rent to become due under a lease. The difficulty for plaintiffs is that that is not the section providing for retention of funds in an estate for the payment of future claims. It provides only, with respect to such claims for rent, that, as done in *Beecher,* the administrator *may* compromise the claim and, if he wishes and the court approves, he *may,* in effecting such compromise, purchase the property for the estate. As before noted, that is not the problem in this case. It is the next section upon which plaintiffs must rely for power in the court to order retention of estate assets, as done by the circuit court in this case, to meet future payments when due. That section, as is true also of the succeeding sections, makes no mention of rent as such but speaks in express terms of "contingent claims". Hence the applicability of *Jeffers* to the case at bar.

We hold that the claims for amounts to become due in the future under the lease are not contingent, and that the court erred in granting the relief it did under the statute here considered. Death of the holder of the lessee's interest does not entitle the lessor to additional security or benefits not provided for in the lease and not enjoyed by the lessor during lessee's lifetime, such as having the lessee's assets sequestered or, in lieu thereof, a surety bond to guarantee payments becoming due in the future.

The circuit court also allowed as an absolute fifth class claim the sum of $15,000 as the amount necessary to place the building on the leased premises in good condition and repair at the present time, which the court found the lessee had failed but was required to do under the lease. This amount was allowed on the strength of testimony of plaintiffs' witnesses that they estimated that the cost of necessary repairs would come to that total. Plaintiffs have not made these repairs. If they were allowed and

paid this sum, there is no assurance that they would make the repairs during defendant's tenancy. If necessary to defendant's use and enjoyment of the premises defendant might be left with the necessity of making these repairs after having paid plaintiffs for them. Clearly plaintiffs are not entitled to payment of the cost of such repairs under such circumstances. No proofs of injury done to the reversion were adduced. In an action begun before termination of the lease, that, not cost of repairs, is the measure of damages. *Pennsylvania Cement Co.* v. *Bradley Contracting Co.* (CCA2), 11 F2d 687; *Glickman* v. *DeBerry* (Tex Civ App 1928), 11 SW2d 367; *Bloom* v. *Southern Amusement Company,* 228 La 44 (81 S2d 763). It follows that plaintiffs have made no case for allowance of this item as an absolute claim. In the *Pennsylvania Cement Case* it was said, however (p 688), that:

"At the expiration of the term the rule changes, and the cost of the repairs becomes the measure of damages."

Because the situation at the end of the lease, resulting from defendant's failure at this time to make the repairs presently necessary, is now uncertain, inasmuch as defendant may make the necessary repairs before the lease expires, the claim therefor may now be deemed to be contingent, rendering the above considered statutory provisions applicable. Because the measure of damages at the end of the lease would be the cost of repairs, that sum, as now established by the proofs, cannot be said to be an unfair amount to be required to be retained in the hands of the fiduciary to insure payment of the claim if and when it shall become absolute, or until the repairs have been made by defendant. Such retention should be required.

Reversed and remanded for entry of orders in accord herewith. No costs, neither party having prevailed in full.

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

DUNCAN *v.* STRATING.

1. AUTOMOBILES — PEDESTRIANS — REQUEST TO CHARGE — ASSURED CLEAR DISTANCE AHEAD.

   Plaintiff pedestrian's request to charge jury relative to defendant motorist's duties with reference to the assured clear distance rule was properly declined, where the request, if given, would have instructed the jury that defendant was guilty of negligence as a matter of law, the testimony was not such as to justify such a holding and request did not conform to facts as claimed by plaintiff (PA 1949, No 300, § 627).

2. TRIAL—TRIAL JUDGE'S FAILURE TO REWRITE REQUEST TO CHARGE.

   A trial judge may properly decline to give a requested charge which includes an erroneous proposition, and does not commit error in failing to rewrite the request in proper language.

3. AUTOMOBILES — PEDESTRIANS — REQUEST TO CHARGE — ASSURED CLEAR DISTANCE AHEAD.

   The trial judge was not required to reframe plaintiff pedestrian's request to charge relative to defendant motorist's duties under the assured clear distance rule, where such request was tantamount to instructing jury defendant was guilty as a matter of law, evidence as to defendant's conduct and where

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 5A Am Jur, Automobiles and Highway Traffic §§ 290, 291, 1098.
[2] 53 Am Jur, Trial § 525.
[4, 5] 5A Am Jur, Automobiles and Highway Traffic § 965.

accident happened was in conflict and instructions that were given fully stated the theory of plaintiff's cause of action (PA 1949, No 300, § 627).

4. SAME — EVIDENCE — REPORTS — ADMISSIONS — PHYSICAL FACTS—STATUTES—REFRESHING RECOLLECTION.

The statutory bar to use in any court action of reports required in the motor vehicle code to be made with reference to cars involved in accidents applies to reports made by drivers of vehicles involved and garage keepers under certain circumstances and has no application to notes or to reports made by investigating police officers of physical facts they have observed and admissions made to them by drivers of motor vehicles at the scene of the accident for use either as evidence or refreshing a witness's recollection (PA 1949, No 300, § 624).

5. SAME—EVIDENCE—MICROFILMED NOTES OF INVESTIGATING OFFICER.

Testimony of deputy sheriff who used microfilm of notes he had taken of his observations at scene of accident in which plaintiff pedestrian was struck by defendant motorist, to refresh his recollection of events which had occurred some 5 years theretofore was not subject to exclusion by statute barring use of reports of accidents required of motorists and garage keepers (PA 1949, No 300, § 624).

Appeal from Kent; Souter (Dale), J. Submitted June 4, 1959. (Docket No. 30, Calendar No. 47,826.) Decided November 24, 1959.

Case by William B. Duncan, Jr., against Roland Strating for personal injuries sustained when struck by automobile. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Cornelius Wiarda, for plaintiff.

Alexander, Cholette, Buchanan, Perkins & Conklin (*Edward D. Wells,* of counsel), for defendant.

CARR, J. Plaintiff was injured in a pedestrian-automobile accident occurring on 44th street in Paris

township, Kent county, at approximately 10 o'clock in the evening of August 3, 1952. During the afternoon of the day in question plaintiff, with his wife and relatives, attended a picnic held on premises located south of said street. About 8:30 in the evening he left in advance of the others in his party, walking to 44th street with the intention of taking a bus unless he was overtaken by Mrs. Duncan driving his automobile. It began to rain, and Mrs. Duncan and the remaining members of the family attending the picnic left the grounds with the intention of overtaking plaintiff.

The driver, after proceeding for some distance on 44th street, concluded that she had passed plaintiff on the road, undertook to turn around, and, in the process, drove the front end of the car into a ditch on the north side of the highway. Plaintiff had proceeded a short distance past the point, but, hearing the noise, returned and attempted to get the automobile back on the paved portion of the highway. Attempts failed, however, with the result that plaintiff telephoned a garage for a wrecker. The weather at the time was dark and rainy. Instead of remaining at the site of his automobile plaintiff walked a short distance down the road for the purpose, as he claimed, of taking shelter under a large tree on the south side of 44th street.

The Duncan car remained in such position that it projected approximately 4 feet upon the paved portion of the road, the pavement at the point being approximately 20 feet in width. The testimony was in dispute as to whether the lights were left on on the Duncan car. Plaintiff offered proof indicating that they were, which was contradicted by the testimony of a witness who had endeavored to assist in getting the vehicle out of the ditch and who testified in substance that the lights were turned off at plaintiff's direction.

Defendant was operating his automobile on the highway in a westerly direction as he approached the Duncan car. He observed it when some distance to the east and turned to his left to pass it. It was his claim that he had been driving approximately 35 miles per hour, and that he decreased his speed as he approached and passed the automobile of the plaintiff, keeping a lookout for anyone who might be in proximity to the vehicle. At that time plaintiff was, as he claimed, on his way to seek shelter under the tree referred to, with the intention of signalling the wrecker when it appeared. It was the claim of plaintiff that he had crossed the pavement, and was south of the traveled portion of the road when struck by defendant's automobile. He claimed also that another car had preceded, by a short distance, the automobile that struck him. On the other hand, it was the claim of the defendant that when he first observed plaintiff the latter was standing approximately 2 feet south of the center line of the paved portion of the highway, that he immediately applied his brakes and attempted to avoid an accident, but that his left headlight came in contact with plaintiff. On behalf of defendant it was denied that there was any automobile immediately preceding him.

The case was submitted to the jury in a charge that set forth at some length the claims of the respective parties, the trial judge carefully defining the issues as to negligence, contributory negligence, and proximate cause. Verdict was returned in favor of the defendant. A motion for a new trial was made and denied, and plaintiff has appealed, claiming reversible errors in the course of the proceeding.

As before noted, it was the claim of the plaintiff that he was off the pavement on the south side of the road at the time he was struck by defendant's car. Defendant claimed that the impact occurred near the

center of the pavement. Among other requests to charge, counsel for plaintiff submitted the following:

"It is the law of this State that a motor vehicle must be operated so as to be able to stop within the assured clear distance ahead. This means that a motorist must not drive beyond where he can see and do everything necessary to bring his motor vehicle to a stop before striking an object or a person in the roadway ahead of him. This means that he must not only be able to take his foot off the accelerator and to place it on the brake but it means that he must bring his vehicle to a stop before striking the object ahead of him within the assured clear distance ahead. This does not permit him to say that he could not see the object or person ahead of him because of the rain or the darkness because he must under penalty of being charged with negligence see what is in the road ahead of him and does not excuse him if he is going around another object. In short, he cannot drive and hit an object ahead of him within the assured clear distance ahead if it is dark or raining or the lights of an oncoming vehicle are shining. He must be able to stop within the range of his lights or beyond the lights of the oncoming vehicle before striking an object or a person in the road ahead.

"Therefore, if you find that the defendant struck the plaintiff while the plaintiff was in the highway because he did not see him in time to do everything necessary to bring defendant's motor vehicle under control and to stop it before hitting the plaintiff, his failure to do so would be a violation of the rule concerning the assured clear distance ahead and under such a finding the defendant would be negligent and if plaintiff was free of contributory negligence, your verdict will be for the plaintiff."

Presumably the request was based on the provision of PA 1949, No 300, § 627 (CLS 1956, § 257.627 [Stat Ann 1952 Rev § 9.2327]) stating that:

"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 trial judge declined to give the request as submitted, and, in his opinion denying a new trial, stated that he did not consider the instruction applicable under the proofs in the case and, further, that the request as worded was open to the objection that, if given, it would have instructed the jury that the defendant was guilty of negligence as a matter of law.

We are in accord with the conclusion of the trial judge that if the request had been given in the form submitted the jury might well have understood that if defendant's car struck the plaintiff "while the plaintiff was in the highway" defendant was guilty of negligence. The request was not in accord with the claim of the plaintiff as to his location at the time of the impact, and in view of the conflicting testimony in the case and the unusual circumstances under which the accident occurred the plaintiff was not entitled to an instruction that the defendant was guilty of negligence as a matter of law. That his automobile came in contact with plaintiff is not open to question.

In *Nickels* v. *Hallen,* 247 Mich 291, 295, this Court held that an instruction to the jury that "it was the duty of the defendant to have his automobile under such control as to be able to stop the same immediately, if necessary, and therefore avoid coming into collision with the plaintiff" was erroneous. In *Corpron* v. *Skiprick,* 334 Mich 311, counsel for plaintiff requested the trial judge 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 within the assured clear distance ahead and failed to see the plaintiff prior to the impact. Citing *Nickels* v. *Hallen, supra,*

it was held that plaintiff was not entitled to the requested instruction under the disputed testimony as to how the accident occurred. In the case at bar, according to plaintiff's proofs and his claims on the trial he was not in front of defendant's automobile on the highway. See, also, *Paskvan* v. *Allouez Mining Co.*, 185 Mich 329; *Severson* v. *Family Creamery Co.*, 268 Mich 348; *Maloney* v. *Moore*, 293 Mich 428. In the case at bar the trial judge was not in error in declining to charge the jury in the language of the request.

The argument of counsel for appellant in his brief suggests the theory that if the request to charge as submitted was not in proper form nonetheless the court should have charged on the assured clear distance ahead rule. The theory of plaintiff's alleged cause of action was fully stated to the jury in the charge as given. No claim is made that the issues raised by the proofs were not fully covered. On the basis of the record before us we do not think that the duty rested on the trial judge to rewrite the requested instruction in such manner as to remove inaccurate statements and argumentative assertions, and to include reference to factual issues essential to a determination of the question as to defendant's negligence on the basis asserted. In *Williams* v. *City of Lansing*, 152 Mich 169, it was held that:

"A trial judge may properly decline to give a requested charge which includes an erroneous proposition, and does not commit error in failing to rewrite the request in proper language." (Syllabus 9.)

A like conclusion was reached in *Moss* v. *Shreve*, 278 Mich 665, 672, where it was said:

"It is not error for a trial court to refuse to give a request to charge which does not accurately state the law applicable to the case."

In *Rossien* v. *Berry,* 305 Mich 693, 702, an instruction was requested under the assured clear distance rule of the statute to the effect that it was the duty of the operator of an automobile to proceed at such a rate of speed that he can stop within the assured clear distance ahead and avoid striking objects upon the highway, and that such driver must avoid striking moving or stationary objects as well. The court was asked to charge the jury that if the defendant in the case did not observe the rule as so stated in the request he would be guilty of negligence. Commenting thereon it was said:

"The requested instruction as worded was not a proper statement of the law as applied to the case at bar. It purports to direct the jury to find the defendant guilty of negligence under the assured clear distance rule, unless he avoided striking an object ahead. In effect, this would instruct the jury that the defendant was guilty of negligence as a matter of law, because it was not disputed that the defendant's automobile did strike that of the plaintiffs."

See, also, *Elias* v. *Hess,* 327 Mich 323. The trial judge in the instant case was not required to reframe the request as submitted by counsel for plaintiff.

Shortly after the accident occurred a deputy sheriff of the county, who had received a radio call with reference to it, went to the scene and made an investigation of the situation. He talked with plaintiff and with Mrs. Duncan, who was a witness on the trial, making notes of what he observed and of statements made to him. The officer was called as a witness on behalf of defendant, testifying that his original pencil notes had been destroyed but that, prior thereto, they had been microfilmed. The microfilm was produced in court, and the deputy was permitted to examine it for the purpose of refreshing his recollection. It may be noted in this connection that the trial took place in November, 1957, over 5 years fol-

lowing the accident. Referring to the record that he had made, preserved in the manner indicated, the officer testified to statements made to him by Mr. and Mrs. Duncan which were at variance with their testimony on the trial. He also testified, apparently without objection, to his observations at the scene of the accident. It is claimed on behalf of appellant that such testimony was erroneously received, was prejudicial to him, and that the judgment entered should be reversed on that ground.

It was the position of counsel for plaintiff on the trial that the notes made by the deputy and microfilmed could not be used for any purpose. Apparently the objection rested on the theory that the microfilm was a statutory report intended for the furnishing of statistical information and declared not available for use in any court action by section 624 of the motor vehicle code of 1949.* Such was not the situation. We are not concerned with a report made by a party to an accident in which car damage or personal injury has occurred, but, rather, with the notes made by an investigating officer, not required by statute or otherwise, and used by such officer in testifying with reference to his observations and related matters. The question here at issue was considered at some length in *Wallace* v. *Skrzycki,* 338 Mich 164, and in prior decisions there cited.

In *Carlson* v. *Brunette,* 339 Mich 188, it was held:

"The statutory bar to use in any court action of reports required in the motor vehicle code to be made with reference to cars involved in accidents applies to reports made by drivers of vehicles involved and garage keepers under certain circumstances and has no application to notes or to reports made by investigating police officers of physical facts they have observed and admissions made

* PA 1949, No 300, § 624 (CLS 1956, § 257.624 [Stat Ann 1952 Rev § 9.2324]).

to them by drivers of motor vehicles at the scene of the accident for use either as evidence or refreshing a witness's recollection (PA 1949, No 300, § 624)." (Syllabus 2.)

The notes in question in this case, made by the deputy sheriff and used on the trial in connection with his testimony, were not subject to exclusion under the statutory provision above cited. The case was properly tried and the issues submitted to the jury in a comprehensive charge fairly covering the matters in controversy. We conclude that appellant's claims of error are not well-founded, and the judgment is affirmed.

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

ROBBINS v. WAYNE COUNTY BOARD OF AUDITORS.

1. OFFICERS—INCUMBENTS—VESTED INTEREST—PROPERTY.
   The incumbent of a public office has no vested property interest therein.

2. CORONERS — ABOLITION OF OFFICE — ATTORNEY AND CLIENT — COUNTY EXPENSE.
   The right of incumbent coroners to employ counsel to represent them in their effort to prevent the county board of supervisors from adopting resolution to submit to electorate the question of adopting the medical examiner system to replace the coroners did not entitle the coroners to employ such counsel at the expense of the county, since the con-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 42 Am Jur, Public Officers § 9.
[2] 43 Am Jur, Public Officers § 293.

troversy for which the attorneys were employed did not arise in connection with or out of the performance of their duties as coroners (PA 1953, No 181).

3. COUNTIES—ABOLITION OF OFFICE OF CORONER—ATTORNEY AND CLIENT.

Efforts of incumbent coroners, made to prevent abolition of their office by resolution of county board of supervisors submitting question to electors, did not concern the public welfare in such manner as to render the county liable for the payment of compensation to attorneys representing the coroners (PA 1953, No 181).

Appeal from Wayne; Weideman (Carl M.), J. Submitted October 6, 1959. (Docket No. 4, Calendar No. 47,617.) Decided November 24, 1959.

Action by Arthur L. Robbins against Wayne County Board of Auditors to enforce payment of attorney fees for services rendered coroners opposing abolition of office. Claim denied and case dismissed. Plaintiff appeals. Affirmed.

Robbins & Wechsler (*Arthur L. Robbins* and *Meyer Weisenfeld,* of counsel), for plaintiff.

Samuel H. Olsen, Prosecuting Attorney, *Aloysius J. Suchy, David E. Flayer* and *Hobart Taylor, Jr.,* Assistant Prosecuting Attorneys, for defendant.

CARR, J. It does not appear that the facts involved in this controversy are in dispute. By PA 1953, No 181 (CLS 1956, § 52.201 *et seq.* [Stat Ann 1957 Cum Supp § 5.953(1) *et seq.*]), the legislature of the State made provision for abolishing the office of coroner and substituting therefor a medical examiner system. It was provided in the act that it should not become effective in any county unless and until submitted to popular vote by resolution of the board of supervisors and approved by a majority of the electors voting on such proposition.

Following the adoption of said act the Wayne county board of supervisors gave consideration to the question of submission to popular vote, and hearings were had before the sheriff's and coroner's committee of said board. The then incumbents of the office of coroner in said county were desirous of preventing affirmative action by the board of supervisors and to that end sought advice and assistance from an assistant prosecuting attorney of the county. They were informed, however, that the prosecutor's office could not represent them in the matter, whereupon they retained plaintiff, a practicing attorney of the city of Detroit, to act in their behalf. It does not appear that approval for such action was sought from the county board of auditors, from the prosecutor's office, or from the board of supervisors.

It is undisputed that plaintiff expended time and effort on behalf of his clients, appearing at hearings conducted by the committee of the board of supervisors and endeavoring to prevent favorable action on a resolution providing for submission of the question of abolishing the office of coroner. A suit in equity was instituted to enjoin such action and apparently plaintiff took an active part therein. Likewise, he intervened on behalf of his clients in an action instituted by third parties to compel the election commission to place the question on the ballot notwithstanding that a motion for reconsideration of the action taken by the board of supervisors was then pending.

The litigation did not affect the final result. The question was submitted to a vote of the people in accordance with the statute, and as a result the medical examiner system was substituted for the office of coroner which, in consequence, was abolished in Wayne county. Thereafter plaintiff's clients issued a voucher for the payment of his services, which the defendant board of auditors rejected. On appeal to

the circuit court defendant's action was sustained on the ground that there was no liability on the part of the county to pay for the services rendered to the coroners by the plaintiff. From the order of dismissal entered plaintiff has appealed.

From the record before us it is apparent that plaintiff was not retained by the coroners to advise them in connection with the performance of the duties of their office, or to represent them in any controversy arising out of the performance of such duties. He was retained to prevent, if possible, the submission to a vote of the electors the question of adopting the provisions of the State statute, which question the legislature had specifically committed for determination to the judgment and discretion of the board of supervisors of each county of the State. It is not denied that the coroners, and of course other citizens of the county as well, were entitled to be heard at the hearings conducted before the committee of the Wayne county board. The issue here, however, is whether the services rendered by plaintiff to his clients were of such nature as to impose on the county the legal obligation to pay therefor.

The following excerpt from the testimony of the plaintiff, given on cross examination in circuit court, indicates the purpose for which he was employed by his clients and the nature of the services that he rendered:

"*Q.* And throughout all of your activities on behalf of the coroner's office, you were interested in either influencing the decision of a legislative body, or in restraining this legislative body from proceeding in making a determination of whether they wanted to submit the question to the electorate, pursuant to the enabling act, PA 1953, No 181?

"*A.* I will be happy to give an unqualified affirmative answer to that question, and I will say, further, that in my opinion the most important and crucial

phase of my services was in connection with the proceedings before the board of supervisors, for the reason that if the resolution was once adopted, it was well known that the vote would go to the electorate, and the resolution would be adopted by the people because of the political climate that existed, and I therefore considered it my duty as an attorney, for the purpose for which I was employed, to do everything within my power, legally, to try to stop, if possible, a resolution coming out of the board of supervisors."

It thus appears that the result sought to be attained by plaintiff and his clients was the prevention of favorable action on the resolution for submission of the adoption of the statute to a popular vote. The determination of the matter was for the board of supervisors in its official capacity. There was involved no dispute between departments or agencies of the county government. The question did not involve the performance of duties pertaining under the then existing law to the office of coroner, or the assertion of liability because of alleged nonperformance or improper performance of such duties. The office of coroner was created by the legislature and no question is raised as to the right to abolish it in like manner. The constitutionality of PA 1953, No 181, is not challenged in this proceeding. It may be observed also that the incumbent of a public office has no vested property interest therein. *Attorney General, ex rel. Rich,* v. *Jochim,* 99 Mich 358, 367 (23 LRA 699, 41 Am St Rep 606); *City of Detroit* v. *Division 26 of the Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America,* 332 Mich 237, 251. While the Wayne county coroners concededly had the right to employ an attorney to represent them, it does not follow that, under the facts disclosed by the record before us,

they were entitled to do so at the expense of said county.

Counsel for plaintiff have called attention to numerous decisions from other States and rely thereon in support of their claim that the trial court was in error in dismissing the appeal from the action of the board of auditors. Among such decisions is *Carter* v. *Town of Muscle Shoals,* 242 Ala 519 (7 S2d 74). The question there at issue was whether the governing body of a city faced with a dissolution proceeding had implied power to employ counsel to represent it and to authorize payment of an attorney's fee for the services rendered. It was held that under the laws of the State a legally constituted municipal corporation had an interest in its continued existence and, hence, a right to be heard concerning the dissolution. It will be noted that the right involved was that of the municipality by which the obligation was incurred. The case at bar does not involve an analogous situation.

Counsel also cite *Meehan* v. *Parsons,* 271 Ill 546 (111 NE 529). There the plaintiff sought to enjoin the payment by the city of Cairo of a claim for expenses presented by the mayor of the city and allowed by the city council. The expenses in question were incurred by the mayor in attending congressional sessions and committee hearings in order to obtain a possible appropriation from the Federal government for the construction of levees and embankments in and about the city of Cairo and for a drainage district adjacent thereto. Apparently the mission was successful, and it was claimed on behalf of the mayor that the expenses were properly incurred because the repairing and strengthening of the levees was essential to the welfare of said city and its people. It was held that the city had the right to seek Federal aid for the purpose and to appear before congressional committees through its authorized

agent. Such being the situation the claim for expenses was a proper one. It will be noted that the case did not involve a claim for compensation and that in his efforts to obtain the Federal appropriation the mayor of Cairo acted on behalf of the city in a matter in which the municipality and its people were vitally concerned. The facts involved are not in accord with those in the proceeding before us. Like comment may be made with reference to *Meeske* v. *Baumann,* 122 Neb 786 (241 NW 550, 83 ALR 131), the question at issue being the right of a municipality to retain special counsel to represent it.

Other cases cited by counsel for appellant have been examined and found to involve the authority of municipalities to engage and pay for legal services incurred for the public benefit and welfare, or situations involving the performance of municipal functions, or the acts of public officers pertaining to the duties of their offices. Decisions of such character may not be regarded as supporting appellant's position in the present case, in view of the nature and purpose of his employment by the Wayne county coroners and his acts in connection therewith.

Counsel for defendant call attention to *Hodges* v. *Kauffman,* 95 Cal App 598 (273 P 125). There it appears that a petition had been filed for the recall of 3 of the members of the board of trustees of the city of South San Francisco, the trustees named constituting a majority of said board. A proceeding in mandamus was instituted to compel the calling of an election, and a writ was issued, presumably based on a finding that the petition was legally sufficient and that, in consequence, the board of trustees, defendant in the mandamus action, had no discretion. The 3 trustees whose recall was sought then issued warrants to the city treasurer for the payment of certain expenses claimed to have been incurred in defending the mandamus action. In a proceeding instituted

to compel payment of the warrants it was held that payment was properly refused. On appeal the judgment of the trial court was affirmed on the ground that (p 601):

"Under the circumstances there could be no reasonable ground for the contention that the expense incurred was a municipal charge."

In the instant case we think that plaintiff's claim for fees because of services rendered to the coroners at their request is not a proper charge against Wayne county. The sole purpose of such services was to prevent the board of supervisors from submitting to a popular vote the adoption of the legislative act of 1953 abolishing the office of coroner and substituting therefor the medical examiner system. There was no dispute between departments of county government, nor was there a controversy involving the performance or nonperformance of the functions of any officer, agency, or department of such government. The question for determination was one committed solely to the discretion of the board of supervisors. Efforts to prevent affirmative action with reference to the submission of the issue did not concern the public welfare in such manner as to render the county liable for the payment of compensation therefor.

The judgment of the circuit court is affirmed, with costs to defendant.

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

WERNER *v.* WERNER.

1. MORTGAGES—FORECLOSURE—PAYMENT—EVIDENCE.
   Record in suit by former husband to foreclose mortgage of premises wife had given to him pursuant to decree of divorce *held*, to support findings of trial court that payment had been effected by furnishing of board, room and other services and that plaintiff had not substantiated his claim of any indebtedness to him for anything over and above the amount of the mortgage-secured note and interest, hence denial of foreclosure was correct.

2. SAME—FORECLOSURE—DECREE—PAYMENT—RECORDING.
   The failure of the trial court, in denying foreclosure of mortgage that had been given to plaintiff by defendant, his former wife, pursuant to decree of divorce, to provide affirmatively that the mortgage indebtedness had been paid in full and that the mortgage should be cancelled and discharged *held*, not ground for foreclosure, where defendant had denied that the mortgage had not been paid, hearing was had primarily on that issue and proceeding is disposed of by requiring inclusion of provision to that effect and for recording of decree.

3. COSTS—MORTGAGES—FORECLOSURE.
   No costs are allowed upon denial of relief to plaintiff in suit to foreclose a mortgage, brought by mortgagee, who was the former husband of the mortgagor and which mortgage was a part of the property settlement of the parties in suit for divorce.

Appeal from Genesee; Gadola (Paul V.), J. Submitted October 7, 1959. (Docket No. 13, Calendar No. 47,875.) Decided November 24, 1959.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 36 Am Jur, Mortgages, § 427 *et seq.*; 37 Am Jur, Mortgages § 535.

Bill by Albert Werner against Minnie Werner to foreclose mortgage. Cross bill asserting claim for services. Bill and cross bill dismissed. Plaintiff appeals. Modified to provide for discharge of mortgage, and affirmed.

Skinner & Joseph, for plaintiff.

Edward Van Kinkle (*Baer, Mainprize & Parker,* of counsel), for defendant.

CARR, J. This is a suit in equity instituted by the plaintiff for the purpose of foreclosing a mortgage. It appears that the parties were divorced on March 13, 1953, the decree being granted to the defendant. Prior thereto a property settlement had been entered into in accordance with which defendant was to receive certain real estate, including the home of the parties. The settlement, in substance, was incorporated in the decree of divorce, which provided that plaintiff was to receive the sum of $3,000, payable $500 on or before March 15, 1953, and the balance at the rate of $50 or more per month thereafter, with interest. In accordance with the provisions of the decree defendant executed a promissory note to plaintiff in the sum of $2,500, secured by a mortgage on the property that had been previously occupied as the home. No payments were made after the initial amount specified. At the time the case was tried in circuit court, June 17, 1958, the total amount of the indebtedness, including interest, was $3,131.25. This proceeding to foreclose the mortgage was instituted March 5, 1957.

In her answer to the bill of complaint filed by plaintiff, defendant admitted the execution of the mortgage but denied plaintiff's allegation that the indebtedness had not been paid. She filed a cross-bill in connection with her answer alleging that sub-

sequent to the divorce she had provided board and room, as well as other services, to the plaintiff, and that the reasonable value thereof was $3,420. She did not in her cross-bill specifically request that the amount so claimed should be set off against the debt, but made a plea for equitable relief.

On the hearing of the cause defendant offered proofs in support of her cross-bill with reference to the rendition of the services for which she alleged she was entitled to compensation. Plaintiff admitted that services of the character mentioned were rendered to him, but the parties were in dispute as to the length of time that plaintiff stayed in defendant's home subsequent to the divorce and prior to the bringing of the foreclosure suit. Defendant claimed that the aggregate time that plaintiff boarded and roomed in her home was approximately 137 weeks. Plaintiff, in his answer to the cross-bill and in his testimony, admitted that he had been furnished board and room and other services by defendant for about 40 weeks. Plaintiff further claimed, as a witness in his own behalf, that he had worked for defendant at her request, that, generally, he had performed numerous tasks about the home, that he had constructed 450 feet of fence, and had done some painting and similar work. He also claimed that he had purchased half of the groceries used while living in defendant's home. To a limited extent plaintiff's claim that he had worked about the home was corroborated by his witnesses. Defendant denied that plaintiff had rendered any appreciable services to her, and further denied that he had purchased any groceries for the use of the parties while living in her home. Her testimony was corroborated in many respects by that of the daughter and son-in-law of the parties.

After listening to the testimony the trial judge rendered an opinion in which he commented on the unsatisfactory nature of the proofs and concluded

that the ends of justice would be best served by dismissing both the bill and the cross-bill, thus leaving the parties in the position in which they placed themselves. A decree, from which plaintiff has appealed, was entered accordingly, the material part thereof reading as follows:

"Now therefore, upon due consideration thereof, it is ordered, adjudged and decreed and the court now here doth order, adjudge and decree that the plaintiff's bill of complaint with all amended pleadings thereto be and the same is hereby dismissed, and that the said defendant's cross bill and all amended pleadings thereto be and the same is hereby dismissed, and the court finds that it will do equity by leaving the parties where it found them."

We think it must be assumed from the provisions of the decree that the circuit judge concluded that the proofs offered by the parties were sufficient to establish that the indebtedness secured by the mortgage had been paid by the furnishing of board, room, and other services to plaintiff by defendant, but that no proper basis was established on which an indebtedness to defendant by plaintiff, over and above the amount of the note with interest, could be determined. The record before us supports the conclusions indicated, and we are in accord therewith.

It does not appear that there was any agreement, express or implied, by virtue of which plaintiff was to be paid for any tasks that he performed about the home of the defendant. It does appear, however, that the parties discussed the matter of compensation to defendant for board and room furnished by her to plaintiff, and for other services rendered, which services it appears were necessary because of plaintiff's ill health. There is testimony also indicating that the parties discussed the matter of remarrying. Plaintiff had instituted a foreclosure

suit prior to bringing the present proceeding and had discontinued it, the parties apparently reconciling certain differences that had arisen between them. Without discussing in detail the claims and conflicting testimony of the parties and their witnesses, we conclude that the trial judge was right in denying a foreclosure of the mortgage and also in declining to grant to defendant and cross-plaintiff the right to recover any specific amount over and above the indebtedness secured by the mortgage.

Attention is directed by counsel for defendant to the failure of the trial judge to provide affirmatively in the decree entered by him that the mortgage indebtedness had been paid in full and that the mortgage should be canceled and discharged. On behalf of plaintiff it is urged that defendant and cross-plaintiff is not entitled to such relief because it was not specifically sought by her cross-bill. As before noted, she denied in her answer plaintiff's allegations that the mortgage indebtedness had not been paid, and it is apparent that the case was heard in the trial court primarily on such issue. The proceeding should be disposed of accordingly, thus obviating possible further litigation.

A decree will enter in this Court modifying the decree from which the appeal has been taken by specifically declaring that the debt secured by plaintiff's mortgage has been fully paid and extinguished, and that said mortgage shall be canceled and discharged. Such decree will further provide that defendant and cross-plaintiff is not entitled to recover against plaintiff and cross-defendant in an amount over and above the mortgage indebtedness decreed extinguished by allowance to that extent of her claim. The decree will further provide that either party may cause it to be recorded in the office of the register of deeds of the county in which the mortgaged property is located. Unless counsel can stipulate as

to the substance and form of the decree to be entered here, either party may prepare a proposed decree and notice it for settlement. No costs are allowed.

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

LYTLE *v.* LYTLE.

1. DIVORCE—CONSTRUCTION OF DECREE—ALIMONY.
   Finding of trial judge that provisions of so-called property settlement agreement, included in decree of divorce under heading "alimony" and providing for weekly payments of $200 for first 5 years following divorce and $100 weekly for next 5 years or until wife remarried was for alimony *held,* proper under record presented on appeal from order modifying decree with respect to time alimony payments were to be made.

2. SAME—ALIMONY—MODIFICATION OF DECREE.
   A trial court has power to modify alimony provisions of a decree for divorce.

3. SAME—ALIMONY—MODIFICATION OF DECREE—CONTEMPT.
   The showing by husband of his changed financial circumstances *held,* sufficient to justify trial court's modification of decree of divorce as to time when alimony should be paid without cancellation of the obligation to repay it, further modification being accorded by Supreme Court by staying trial court's order of contempt, where it appears the husband was awarded custody of their 2 children, both parties have remarried and wife has not shown she is now in need of the payments she seeks to have defendant compelled to make.

REFERENCES FOR POINTS IN HEADNOTES

[1] 17A Am Jur, Divorce and Separation § 904 *et seq.*
[2] 17 Am Jur, Divorce and Separation § 729.
[3] 17 Am Jur, Divorce and Separation § 742 *et seq.*

4. SAME—COSTS—ALIMONY—MODIFICATION OF DECREE—CONTEMPT. No costs are allowed on appeal from order modifying decree of divorce as to alimony, where defendant husband's change of circumstances justifies additional relief to that accorded by the trial court by staying of contempt proceeding.

Appeal from Oakland; Holland (H. Russel), J. Submitted October 7, 1959. (Docket No. 26, Calendar No. 47,880.) Decided November 24, 1959.

Bill by Ellen E. Lytle against Robert J. Lytle resulted in decree of divorce with provision for alimony based on property settlement agreement. Petition by plaintiff to enforce payment and petition by defendant to modify. Order determining arrears and directing instalment payments. Defendant appeals. Modified and affirmed.

Davis & Thorburn, for plaintiff.

Philip E. Rowston, for defendant.

CARR, J. This case involves the interpretation and modification of certain provisions of a divorce decree. Said decree was entered on November 29, 1954, in a suit brought by the plaintiff. Defendant filed answer and cross-bill. Prior to the hearing the parties entered into a "property settlement agreement" that the decree should provide under the designation "alimony" that defendant pay to plaintiff on December 6, 1954, and each week thereafter, the sum of $200, for a period of 5 years, and thereafter the payments should be reduced to $100 per week. It was further stipulated that if the plaintiff remarried during the 5-year period following the granting of the decree, the payments should be reduced during the balance of said period to the sum of $100 per week; and that if plaintiff remarried after the expiration of

the said 5-year period, payments should be terminated. The agreement was offered in evidence on the hearing of the cause and incorporated into the decree under the heading of "alimony," in accordance with Court Rule No 51, § 5 (1945).* Pursuant to the agreement it was further ordered that defendant should pay to plaintiff the sum of $7,500 by way of property settlement.

Defendant made the payments as required until March 28, 1957, on which date plaintiff remarried. It is conceded that defendant was not in default at that time. Further payments were not made and plaintiff, under date of October 7, 1957, petitioned the court for the issuance of an order directed to defendant requiring him to show cause why he should not be adjudged guilty of contempt. Such order was issued as requested. Defendant filed answer to the petition, asserting that the provision of the decree with reference to periodic payments, as agreed to by the parties, was actually in the nature of a property settlement rather than a requirement for the payment of alimony.

Defendant also filed a petition asking that if the court determined that the provision of the decree in question was an award of alimony, it should be stricken and defendant relieved of further obligation on the ground that his financial circumstances had materially changed following the granting of the divorce. Specifically it was alleged by defendant that his income had materially decreased, that a manufacturing company of which he was the president and principal stockholder had no profits for the prior 2 years and, in fact, had suffered a deficit in excess of $500,000, that the bid value of the stock had declined from $4 per share to 12-1/2¢ per share, and that as

* See amendment, 335 Mich xliii.—REPORTER.

a result substantial cuts had been made in his salary. It was also alleged that defendant was indebted personally in excess of $40,000, that he had remarried, and that he was caring for the 2 children the custody of whom was awarded to him by the decree. It was further asserted that plaintiff's then husband was of sufficient earning power to support plaintiff, which allegation was not denied by the latter in her answer to defendant's petition.

Following a hearing at which defendant testified at some length in his own behalf the trial judge, after referring specifically to the property settlement agreement and to the decree, concluded that the provisions with reference to periodic payments in fact contemplated alimony and therefore were subject to modification. With reference to defendant's claim that because of his changed financial condition payments that had accrued should be canceled and the obligation to make future payments terminated, the following statement from the opinion filed indicates the factual findings of the trial judge and his conclusions as to the extent to which relief should be granted to defendant.

"At the time of the decree the defendant was president of Modern Homes, Inc., doing business in 30 States. The corporation is now in receivership. In 1954 defendant made $45,000 net and was worth some $150,000. Defendant on date of hearing had uncertain earnings, cash of $300, and owed about $50,000. Defendant is remarried and supports the 2 children of the parties hereto. The court believes that this man's earnings and fortunes are down only temporarily and that said back alimony due the wife since her marriage should not be canceled but that the total amount that the defendant is obligated to pay under the decree (from the date of wife's remarriage until said alimony ceases in accordance with the specific terms of the decree) should be paid

at a rate of *not less than* $25 per week, commencing with the entry of an order which will implement this opinion. The foregoing is conditioned upon the further proviso that all of said alimony due and to become due under the decree shall be paid within a period of 5 years."

An order was entered in accordance with the opinion, adjudging that the provisions of the property settlement and the divorce decree with reference to periodic payments by defendant to plaintiff should be construed as imposing an obligation to pay alimony and were not by way of property settlement. Defendant was adjudged guilty of contempt for his failure to make such payments, and it was ordered that the amount due and to become due in the future under the decree, which amount was fixed at the sum of $14,000, should be paid in instalments of not less than $25 per week beginning on June 2, 1958, the total amount to be paid within a period of 5 years. From said order defendant has appealed, alleging that the trial court was in error in holding that the paragraph of the divorce decree in question provided for the payment of alimony, and, further, that if so interpreted the decree should have been modified in view of the undisputed testimony as to defendant's financial condition, at the time of the hearing, by canceling accrued payments and terminating future obligation.

It is obvious from the language of the property settlement that the parties considered that the periodic payments specified therein should be by way of alimony rather than as constituting a part of a property settlement. It is significant in this regard that the parties inserted a provision in their agreement that neither would seek a modification of said provision. Each was represented by counsel and presumably was advised as to the legal aspects of the

problems involved. The agreement was obviously construed by the trial judge in accordance with the language used therein, which was in substance incorporated in the decree. We are in accord with the finding of the trial judge in this respect. *Kyte* v. *Kyte,* 325 Mich 149, and prior decisions there cited.

The power of the court to modify alimony provisions of a decree of divorce is not questioned. It may be presumed in the instant case that the agreement of the parties was executed in the light of the situation existing at the time. It is undisputed that defendant's financial condition has changed materially, that his earnings have decreased, and the value of his property at the time of the hearing in circuit court had so depreciated as to render him insolvent in view of the amount of his indebtedness as found by the trial court. It will be noted also that he has been and is supporting the children of the parties, custody of whom was given him by the decree. No claim is made on behalf of plaintiff that she is now in need of the payments that she seeks to compel defendant to make for her support.

It is quite possible that defendant's financial condition, as shown by the proofs at the hearing on plaintiff's petition and defendant's counter-petition, will improve. We note the opinion of the trial judge in this respect, but the record before us furnishes no assurance of any immediate change for the better. Viewing all aspects of the situation, we conclude that, at this time, the accrued alimony should not be canceled and the obligation as to future payments terminated. In this respect we are in accord with the finding of the trial judge. Such matter may be left to future determination. We think, however, that defendant is entitled to a greater measure of relief than the order entered by the circuit judge extends to him. Under the proofs and the fair inferences to

be drawn therefrom we conclude that the order should recognize defendant's obligation but hold in abeyance the making of periodic payments pending further proofs as to the situation of the respective parties, subject to the express provision that either may seek a further hearing or the trial judge may order such on his own motion. In the meantime further action in the contempt proceeding should be stayed.

The cause will be remanded to the circuit court for entry of an order in accordance herewith. No costs are allowed.

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

SCHOOLCRAFT COMMUNITY SCHOOL DISTRICT NO. 50 *v.* BURSON.

1. DEEDS—BASE FEE—ATTEMPT TO CONVEY POSSIBILITY OF REVERTER—EXTINGUISHMENT OF RIGHT OF RE-ENTRY.

   Deed, executed in 1837, of 6 rods square tract of property to school district "so long as such district desire or wish to occupy the same for the use of a school * * * and no longer" and entitling the district to remove improvements when school site was changed created a possibility of reverter that could not be conveyed or assigned and an attempt to do so before breach of the condition subsequent extinguished the right to re-enter.

2. STATUTES—BASE FEE—CONVEYANCE OF REVERSIONARY INTEREST—PROSPECTIVE CHANGE OF COMMON LAW.

   Statute providing for conveyance of the reversionary interest

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REFERENCES FOR POINTS IN HEADNOTES

[1] 33 Am Jur, Life Estates, Remainders, and Reversions § 206.

in lands conveyed on a condition subsequent either before or after the right of re-entry became effective but also providing such statute should not affect any such interest created before the statute took effect altered the common-law rule only as to transactions occurring after the effective date of the statute (PA 1931, No 219).

Appeal from Kalamazoo; Sweet (Lucien F.), J. Submitted October 8, 1959. (Docket No. 40, Calendar No. 48,014.) Decided November 24, 1959.

Bill by Schoolcraft Community School District No. 50, Kalamazoo County, against David Burson, Lee R. Coburn, Lucille M. Coburn and others to quiet title. Decree for plaintiff. Defendants Coburn appeal. Affirmed.

Ford, Kriekard & Brown (*Garry E. Brown,* of counsel), for plaintiff.

Fox, Fox & Thompson (*Gould Fox,* of counsel), for defendants Coburn.

CARR, J. This is a suit in equity to quiet title to a parcel of land, 6 rods square, located in Schoolcraft township, Kalamazoo county. None of the defendants named in the suit contested plaintiff's right to the relief sought other than appellants Lee R. Coburn and Lucille M. Coburn. It is agreed by counsel that the material facts are set forth correctly in the bill of complaint.

Plaintiff school district is a consolidation of a number of districts, including School District No. 1 of Schoolcraft to the property interests of which plaintiff has succeeded. Under date of September 28, 1837, Joseph and Ann Burson, husband and wife, conveyed by quitclaim deed to said School District No. 1 the land in question here. Inserted in said deed was the following language:

"To have and to hold the rights, privileges, possession and occupancy of the said 6 rods square, together with the appurtenances thereunto belonging for the proper use and benefit of sd. school district so long as such district desire or wish to occupy the same for the use of a school in behalf of sd. district, and no longer. And should sd. district at any future period change the site of its school it shall hereby be entitled to remove from said lot of 6 rods square all the improvements thereon put by said district."

Following the death of Joseph Burson his widow conveyed to the school district additional land containing 27 square rods, so that the school lot was then 7x9 rods in extent. The latter conveyance contained no provision similar to that above quoted from the 1837 deed. Mrs. Burson's ownership of the parcel conveyed by her is not in dispute. The land conveyed to the district was used for school purposes until 1951, during which year plaintiff's board of education concluded that, under changed conditions then existing, it was no longer feasible to maintain a school on said premises. Attempts to sell the property followed.

Following the conveyance by Mr. and Mrs. Burson in 1837, and after Mr. Burson's death, the widow and heirs at law, by conveyances of record, undertook to convey their rights in the premises without excepting any possible reversionary interest. Through mesne conveyances appellants Coburn acquired the record title to the land in which the school lot was contained and asserted reversionary rights in the parcel conveyed by Mr. and Mrs. Burson. Plaintiff's claims as set forth in its bill of complaint were predicated on the theory that the subsequent conveyances referred to, apparently made in 1861, terminated the possibility of reverter which counsel concede was created by the original conveyance to the school district. Apparently the claim made by

appellants interfered with the desired disposition of the property. Plaintiff alleged that such claim was made without merit, and that it constituted a cloud on the title which equity should remove.

The plaintiff also asked for authority to sell the property pursuant to statute,* claimed applicable on the ground that changing conditions had rendered it inexpedient to continue to hold the land or to use it for educational purposes. The circuit judge before whom the case was heard found it unnecessary to pass on this question, basing his decree in plaintiff's favor on the ground that, construing the language of the 1837 deed as creating a condition subsequent, the right of re-entry and reversionary interest of the original grantors, in the event of a breach of said condition, was terminated by the subsequent conveyances by the record owners of the property.

In *Halpin* v. *Rural Agricultural School District No. 9, Gaines Township,* 224 Mich 308, the facts were analogous to those in the case at bar. There land was conveyed to the defendant school district in November, 1855, by the then owner, to be used as a site for a school house. The deed expressly provided that if the land ceased to be used for such purposes then the right and title thereto should revert to the party of the first part, his heirs and assigns. Thereafter the grantor and his wife, in 1861, conveyed their interest to another party whose devisees, in 1919, quitclaimed their interest to plaintiff Halpin. As in the case at bar, it was agreed that the conveyance by the original owner created a possibility of reverter. In considering the situation presented the Court concluded that a condition subsequent had been created, that the possibility of a reverter to

* PA 1925, No 258 (CL 1948, § 554.401 *et seq.* [Stat Ann 1953 Rev § 26.1211 *et seq.*]).

the grantor and his heirs was of such character that it could not be conveyed or assigned, and that under the pertinent rule of real property law the attempt on the part of the grantor to convey such possibility before breach of condition extinguished the right to re-enter. In support of the conclusion cases from other States were cited. In accordance with the opinion a decree was entered dismissing the bill of complaint filed by plaintiff Halpin.

The holding in the *Halpin Case* has been followed in subsequent decisions by this Court. In *County of Oakland* v. *Mack,* 243 Mich 279, property was conveyed, under date of June 30, 1823, to the county commissioners of Oakland county for the use of said county, subject to a provision that if the property was otherwise used, it should revert to the grantor. In a suit to quiet title it was held that the subsequent conveyance by successors to the interest of the grantor operated to extinguish the right of reverter, no breach of the condition subsequent having previously taken place. The Court (p 286) cited the *Halpin Case* with approval, and also quoted from 1 Tiffany on the Modern Law of Real Property (1903 ed), § 75, as follows:

" 'The right to take advantage of a condition subsequent belongs, at common law, exclusively to the grantor or lessor and his heirs, and he cannot reserve such right to others, even by express stipulation. Nor can the right to enforce a forfeiture, or, as it is usually called, the right of re-entry, be, at common law, assigned or transferred by the grantor to a third person before entry for the breach; this being in conformity with the common-law rule that "nothing in action, entry, or re-entry can be granted over." These restrictions as to the persons able to take advantage of a breach, and the inability to assign the right, have been generally recognized in this country, and not only will an

attempted assignment of the right of re-entry be void, but it will have the effect of destroying the grantor's right to enforce the condition, which is thereafter in effect nonexistent.' "

In accord with the above case is *Fractional School District No. 9, Waterford and Pontiac Townships,* v. *Beardslee,* 248 Mich 112, where it was held that:

"Where land was conveyed to school district subject to reversion to grantor, his heirs, and assigns in case it ceased to be used for school purposes, a right of reverter dependent upon breach of condition subsequent was reserved, which was extinguished by grantor's conveyance thereof before breach of condition subsequent, leaving title in school district without qualification." (Syllabus 3.)

Counsel for appellant in the instant case argue that the rule recognized in the above decisions, and by courts in other States, was incorrect, and that the holding in the *Halpin Case* should be overruled. Such claim was advanced in *Dolby* v. *State Highway Commissioner,* 283 Mich 609 (117 ALR 538), the Court refusing to overturn the recognized rule of property. We are in accord with the reasons advanced for such conclusion, notwithstanding the dissenting opinion of Mr. Justice POTTER. Unquestionably it was the rule of the common law that a right of reverter on breach of a condition subsequent in a conveyance of real estate could be reserved only to the grantor and his heirs. In the event of breach automatic termination of the estate did not occur but required entry on the part of those entitled to take advanage of such breach. The right of re-entry was deemed subject to waiver, and by an attempted conveyance of the right of reversion those entitled to declare and enforce the breach extinguished such right. It involved the surrender of what, in advance of breach, amounted to a mere possibility

which the common law did not recognize as subject to conveyance to another.

The legislature of Michigan by PA 1931, No 219 (CL 1948, § 554.111 [Stat Ann § 26.851]) undertook to change the rule of the common law by enacting that:

"The reversionary interest in lands conveyed on a condition subsequent may be granted, conveyed, transferred or devised by the owner of such interest, and by the subsequent grantees or devisees thereof, either before or after the right of re-entry becomes effective: Provided, That this act shall not affect any such interest created before it takes effect."

Obviously it was the purpose of the legislature in the enactment of this statute to change the rule of the common law, impliedly recognized by the act. The language of the proviso is significant as declaring an intent not to destroy or interfere with any prior existing interest. As pointed out in *Dolby* v. *State Highway Commissioner, supra,* 614, the statute is applicable to transactions occurring after its effective date. The attempt to affect or alter in any way rights or interests created prior thereto was expressly negatived. In other words, the common-law rule as recognized in Michigan was not in any way modified insofar as previously created rights and interests were concerned. We are not in accord with the claim that this Court should now declare that our decisions recognizing the common-law rule were erroneous, and that conveyances made in 1861 should be interpreted other than in accordance with said rule. The issues in the case were correctly determined in circuit court.

The conclusion reached on the principal question involved renders it unnecessary to consider the second ground on which plaintiff in its bill of complaint sought equitable relief, its title being cleared of

any claims on the part of the defendants, including particularly the appellants here. Its right to dispose of its property without reference to the claimed reversionary interest is established. The decree of the circuit court is affirmed, with costs to plaintiff against appellants.

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

SHUMATE *v.* AMERICAN STAMPING COMPANY.

1. WORKMEN'S COMPENSATION—FINDING BY APPEAL BOARD—RECORD—INDUSTRIAL USELESSNESS OF LEFT HAND.

   The finding of fact by the workmen's compensation appeal board that plaintiff's left hand was industrially useless is binding upon the Supreme Court, since it is sustained by the record (CL 1948, § 413.12).

2. SAME—SPECIFIC LOSS OF LEFT HAND—RIGHT-HANDED JOB—PRESS OPERATOR.

   An employee was entitled to an award for the specific loss of a hand less credit for prior payments, where the workmen's compensation appeal board found that his left hand had been rendered industrially useless by the injury received while at work in that its function was limited to that of an unsatisfactory pushing or pulling instrumentality, notwithstanding he was eventually able to work at same right-handed job as press operator he had when injured.

REFERENCES FOR POINTS IN HEADNOTES

[1] 58 Am Jur, Workmen's Compensation § 530.
[2] 58 Am Jur, Workmen's Compensation § 287.

Appeal from Workmen's Compensation Appeal Board. Submitted June 2, 1959. (Docket No. 5, Calendar No. 47,956.) Decided November 24, 1959.

Walter Shumate presented his claim against American Stamping Company, employer, and American Mutual Liability Insurance Company, insurer, for compensation for loss of hand. Award to plaintiff. Defendant appeals. Affirmed.

Russell W. Conroy, for plaintiff.

Troff, Lilly & Bonow (*Robert L. Piatt,* of counsel), for defendants.

KELLY, J. Defendants appeal from an order of the workmen's compensation appeal board awarding compensation for specific loss of a hand.

May 8, 1953, plaintiff was injured while operating a "Sherman press" when a spindle slipped and a roll of steel struck plaintiff on the left wrist, inflicting a deep laceration on the underside of the forearm. Plaintiff received medical treatment, which included surgery on his left hand, and received total compensation from the date of injury to August 23, 1954, and partial disability at various rates until April 2, 1955. He then returned to work for defendant American Stamping Company and after working for approximately 10 weeks as a night watchman and roustabout, he was assigned to his previous job operating a Sherman press.

Awarding compensation (March 6, 1958) for specific loss of the hand, less compensation paid from the date of injury (May 8, 1953), the appeal board in its opinion stated:

"Dr. Clarence Mercer described the hand as atrophic, shrunk, withered and as possessing a

peculiar cyanotic color. In his opinion the hand is useless. Dr. W. L. Green testified that the plaintiff's hand had lost all of its pinching ability, 60% of its gripping ability and 50% of its hooking ability. Much more understandable than these statistics and much more illustrative of the real condition of the plaintiff's hand than anything else in the record is the photograph introduced into evidence in accordance with the stipulation of the parties on May 9, 1957. The photograph, together with the rest of the testimony, leaves no room to question the industrial uselessness of the plaintiff's left hand as a hand. It is true that the plaintiff is doing the same job now operating a Sherman press that he was doing when injured. However, he is able to do this job not because his hand is not useless but because the job is a right-handed job where the left hand is important only as a pusher or guide and not as a hand. Plaintiff's left hand is industrially useless."

The finding of fact by the appeal board in regard to the industrial uselessness of plaintiff's hand is sustained by the record and is binding upon this Court. See CL 1948, § 413.12 (Stat Ann 1950 Rev § 17.186) and *Alexander* v. *Covel Manfg. Co.,* 336 Mich 140.

The main question in this appeal is whether an award for loss of hand can be sustained in the absence of amputation of the hand. This question was answered in *Lentz* v. *Mumy Well Service,* 340 Mich 1, which case dealt with an award for loss of a hand after compensation had been paid at the statutory rate for the loss of 4 fingers. In approving the award, Justice CARR, with the approval of the entire Court, stated (pp 4, 5):

"Whether plaintiff sustained the loss of the industrial use of his hand as a result of the accident in question was an issue of fact. *Rench* v. *Kala-*

mazoo Stove & Furnace Co., 286 Mich 314; *Rupp* v. *Hutter Construction Co.,* 288 Mich 105. If there was testimony before the commission supporting its factual conclusions, this Court is bound thereby. CL 1948, § 413.12 (Stat Ann § 17.186). *Shaw* v. *General Motors Corporation,* 320 Mich 338, 345. As above indicated, the testimony in the record before us supports the conclusion that without the aid of a prosthesis plaintiff cannot use his left hand for any ordinary industrial prehensile purpose. The primary function of the hand is completely lost. At most its use is limited to that of an unsatisfactory pushing or pulling instrumentality."

In the present appeal, the record sustains the same finding as in the *Lentz Case,* namely: "At most its use (the hand) is limited to that of an unsatisfactory pushing or pulling instrumentality."

We approve the finding of the workmen's compensation appeal board. We find no merit in plaintiff's contention that the appeal board erred in awarding the statutory 215 weeks of specific compensation less credit for prior payments made by defendants.

Affirmed. Costs to appellee.

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

DUNN v. GOEBEL BREWING COMPANY.

1. CONTRACTS—BEER DISTRIBUTOR—FRAUD—INDUCEMENT—PLEADING.
   Plaintiff beer distributor's claim that his written contract with defendant brewer was vitiated by reason of fraudulent concealment inducing plaintiff to enter into it *held,* untenable under pleadings showing it had replaced an oral contract terminable at will and the new contract contained a clause permitting termination upon receipt of notice, the relationship between the parties was not confidential, no affirmative representations were made before execution of the contract that defendant would not give notice of cancellation as provided in the contract, there was no allegation that plaintiff was induced by trick to sign the contract and plaintiff's real damage arose from defendant's discontinuance of sales of its products to plaintiff.

2. CONSPIRACY—GRAVAMEN OF CIVIL ACTION.
   The gist or gravamen of the civil action for conspiracy is not the conspiracy but the wrongful acts causing the damages.

3. SAME—DAMAGES.
   A conspiracy standing alone without the commission of acts causing damage would not be actionable as the cause of action does not result from the conspiracy but from the acts done.

4. ACTION—CASE—CONSPIRACY.
   An allegation of conspiracy does not change the nature of an action on the case for damages or add anything to its legal force and effect.

5. CONTRACTS—BEER DISTRIBUTOR—CANCELLATION—NOTICE—PLEADINGS—JUDGMENT—DELAY.
   The granting of defendant brewer's motion for judgment on the pleadings of plaintiff in action for damages for alleged breach

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REFERENCES FOR POINTS IN HEADNOTES

[1] 24 Am Jur, Fraud and Deceit § 264.
[2, 3] 11 Am Jur, Conspiracy § 6.

of written contract for distribution of beer and denial of latter's motion for leave to file an amended or supplemental declaration, which motions were filed some 22 months after transfer of case from equity to law side of the court *held*, not error, under record showing 7-days' notice of cancellation of written contract which had replaced oral contract terminable at will.

Appeal from Wayne; Fitzgerald (Neal), J. Submitted October 9, 1959. (Docket No. 48, Calendar No. 48,139.) Decided November 24, 1959.

Bill by Harry Dunn, doing business as North End Goebel Distributors, against Goebel Brewing Company, a Michigan corporation, for injunctive relief and damages for cancellation of distributor's agreement. Stipulation transferring case to law side of court. Plaintiff's motion to amend pleadings denied and defendant's motion for judgment on pleadings granted. Plaintiff appeals. Affirmed.

John L. Potter, for plaintiff.

Allen, Haass & Selander, for defendant.

CARR, J. This case was instituted in equity, plaintiff seeking injunctive relief with a prayer for damages in the alternative. The bill of complaint, which was filed November 29, 1956, alleged that on or about August 1, 1941, plaintiff entered into an oral agreement with the defendant for the sale and distribution of the latter's products, and that the arrangement between the parties continued until September 14, 1956. On the latter date a written contract was executed setting forth at some length the rights and obligations of the parties. Among other provisions said contract specified that either party might terminate the contract at any time by giving written notice to the other, such termination

to take place upon receipt of notice. Plaintiff further alleged in his pleading that during the 15-year period in which he had engaged in the purchase and sale of defendant's products, he had invested in necessary equipment, had conducted his business in a satisfactory manner, and had endeavored to comply to the best of his ability with suggestions and requests from defendant in connection with said business and the furnishing of desired information to defendant.

Following the execution of the written agreement above mentioned, and on or about November 23, 1956, plaintiff, as he alleged in his bill of complaint, was informed by a representative of the defendant that the latter was not satisfied with the existing business connection, and thereafter was given written notice that the contract would terminate as of November 30, 1956. Plaintiff claimed that defendant's action was taken pursuant to a conspiracy to injure him, that such action was arbitrary and capricious, and that it resulted in serious injury to him because of the refusal of the defendant to continue to sell its products to him for purposes of resale. Copy of the written contract of September 14, 1956, was attached as an exhibit to the bill of complaint. Defendant by answer denied plaintiff's right to the relief sought, alleging that the written contract was terminated in accordance with its express provisions and denying that such termination was the result of a conspiracy or was prompted by a desire to injure plaintiff.

On the filing of the bill of complaint an order was issued requiring defendant to show cause why a temporary injunction should not be granted as prayed, restraining defendant from refusing to continue sales to plaintiff. The relief sought was denied and a temporary restraining order previously issued was set aside. Following the filing of defendant's

answer a stipulation was filed by the parties and an order, based thereon, was entered on January 22, 1957, transferring the cause to the law side of the court. Approximately 22 months later defendant moved for judgment on the pleadings, and this was followed by a petition by plaintiff for leave to file an amended or supplemental declaration. In such proposed pleading plaintiff incorporated by reference the material averments of the bill of complaint, and further alleged that he had been induced by fraud and misrepresentations to execute the written contract of September 14, 1956, terminating the prior oral arrangement. It was averred that defendant concealed from plaintiff its intention to terminate the written agreement, and that such failure on the part of defendant to advise plaintiff operated to vitiate the written contract. Apparently it was the theory of the plaintiff in his proposed amended pleading that the written undertaking between the parties was a nullity, that the oral arrangement continued in force and effect, and that he was entitled to a reasonable notice of termination thereof.

Defendant's motion for judgment on the pleadings was granted, the trial court concluding that plaintiff had not set forth facts that, assuming their truth, entitled him to recover damages. It was the opinion of the circuit judge that the defendant had the right to cancel the written contract in accordance with the specific provision thereof, that the original oral contract was terminable at will at any time, and that, in consequence, what had happened under the written agreement might have occurred with equal effect with reference to the working arrangement existing prior thereto. In accordance with the opinion an order was entered denying plaintiff's motion for leave to amend and granting defendant's motion for judgment on the pleadings. Plaintiff has appealed.

Appellant's claim as set forth in his proposed amended pleading, that he was induced by fraudulent concealment on the part of the defendant to enter into the written contract, to his injury, and that the contract was thereby vitiated, is not tenable. No claim is made that defendant made any affirmative representations to the effect that it would not give notice of cancellation as provided in the written undertaking, or that statements of like import were made. The relationship between the parties was not confidential but involved merely the purchase and sale of defendant's products. In the final analysis it was the refusal of defendant to continue such sales to plaintiff that is the basis of his claim for damages. When he signed the written undertaking plaintiff was charged with notice that the thing that actually did happen might occur. With reference to plaintiff's proposed amended pleading, if there was fraud in the inducement to the written contract it did not render that instrument void but merely voidable. Counsel for plaintiff has called attention to *Rood* v. *Midwest Matrix Mart, Inc.*, 350 Mich 559, in support of his contention that the written contract was vitiated by fraud. However, the case cited involved a claim of fraud in the *execution* of a written contract as distinguished from fraud in the inducement. In the case at bar plaintiff does not allege in his pleading that he was induced by trick to sign the written contract of September 14, 1956, or that he was not fully familiar with its provisions at the time he did so.

Plaintiff refers in his bill of complaint, and in his proposed supplemental pleading, to a conspiracy between defendant and others to terminate the business relation existing between himself and defendant. However, the injury of which he complains was not the result of the conspiracy but, rather, fol-

lowed from the refusal of defendant to sell its products to him. In *Roche* v. *Blair,* 305 Mich 608, 613, 614, a situation of this character was expressly covered in the following statement of the law:

"The law is well established that in a civil action for damages resulting from wrongful acts alleged to have been committed in pursuance of a conspiracy, the gist or gravamen of the action is not the conspiracy but is the wrongful acts causing the damages. The conspiracy standing alone without the commission of acts causing damage would not be actionable. The cause of action does not result from the conspiracy but from the acts done. Therefore, in the present case the alleged conspiracy, which plaintiffs claimed to have first discovered in 1940, was not their cause of action. Their cause of action was the alleged wrongful acts of defendants, which caused their claimed damages. The allegations of conspiracy did not change the nature of plaintiffs' action."

In support of the conclusion reached the Court cited with approval a number of prior decisions, including *Bush* v. *Sprague,* 51 Mich 41, and *Auto Workers' Temple Ass'n* v. *Janson,* 227 Mich 430, as well as decisions from other States.

The trial judge concluded that had the oral agreement between the parties continued in force and effect rather than being superseded by the written contract the arrangement between the parties existing thereunder might have been terminated at any time by either party. The arrangement was obviously one existing at will. In *O'Connor* v. *Hayes Body Corp.,* 258 Mich 280, it was recognized that a contract of employment of such character was subject to termination without notice. By analogy the same rule must be applicable to a situation of the character here involved. In *Reed* v. *Kurdziel,* 352 Mich 287, there was involved an agreement for the sale

and distribution by an agent of defendants' manufactured products. Defendants terminated the contract, and it was recognized by this Court that they had the right to do so, the Court citing in support of such conclusion American Law Institute, 2 Restatement, Agency, § 442; *O'Connor* v. *Hayes Body Corp., supra; Powers & Company, Inc.,* v. *American Society of Tool Engineers,* 345 Mich 392.

In support of his claim that he would have been entitled to a reasonable notice of termination of the oral arrangement between the parties, appellant relies on *Mueller* v. *Bethesda Mineral Spring Co.,* 88 Mich 390. There plaintiff sued for damages for breach of a contract whereby he was made sole representative in certain territory for the sale of defendant's product. In correspondence between the parties defendant made reference to the period from October 1, 1887, to October 1, 1888, promising plaintiff a credit, or bonus, if his sales during such period amounted to $500. It is obvious from the opinion in the case that this Court regarded the contract as one for a period of 1 year, specifically holding that damages should be determined on such basis. Defendant had terminated the agreement some 5 months before the expiration of said period, and plaintiff was held entitled to offer proof as to the profits that he would have received during the 5 months if he had been permitted to continue under his contract. In the case at bar the oral agreement was not limited as to time and, hence, the *Mueller Case* is not in point.

Counsel for appellant also cites and relies on *Erskine* v. *Chevrolet Motors Co.,* 185 NC 479 (117 SE 706, 32 ALR 196). In that case a written contract was entered into between the parties containing a provision that it might be cancelled by either party by 5-days' written notice. There was, how-

ever, testimony indicating that there was a subsequent parol modification of the written agreement under which defendant through its authorized representative bound itself not to cancel the agency created and to ship goods ordered at the time specified therefor. In the case at bar an analogous situation is not asserted by plaintiff in his pleadings. No claim is made, in other words, that the written agreement on which plaintiff's cause of action was first based was altered by parol.

In the case at bar we conclude that the trial judge did not abuse his discretion in denying plaintiff's motion for leave to file an amended or supplemental pleading, and that he was not in error in entering judgment in defendant's favor on the pleadings. The judgment so entered is affirmed, with costs to appellee.

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

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ABOLITION OF OFFICE—See CORONERS; COUNTIES (2).

ABUSE OF PROCESS—See COURTS (6, 7); GARNISHMENT (4).

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ACQUIESCENCE—See BOUNDARIES (3).

ACTION.

1. A State statute which gives a civil remedy at the private suit of the creditor only, that is measured by the amount of his debt is, as to him, clearly remedial, since it is simply to enforce a private right, hence, it is enforceable in a sister State. *Pullum Window Corporation* v. *Feldstein*, 82.
2. The remedy of an employee for *full* recovery for medical and hospital expenses due to injury received arising out of and in the course of employment, was lost under the workmen's compensation act until amendment lifting restriction to 2-year maximum was enacted, and such enactment merely effected the restoration of a lost remedy (CL 1948, § 412.4, as amended by PA 1955, No 250). *Lahti* v. *Fosterling*, 579.
3. An allegation of conspiracy does not change the nature of an action on the case for damages or add anything to its legal force and effect. *Dunn* v. *Goebel Brewing Company*, 693.

See CONSPIRACY (4); CORPORATIONS (1); DECLARATORY JUDGMENT (2); LABOR RELATIONS (2); SCHOOLS AND SCHOOL DISTRICTS (4); WORKMEN'S COMPENSATION (7).

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ANNEXATION—See SCHOOLS AND SCHOOL DISTRICTS (1, 2, 4).

ANSWER—See GARNISHMENT (6); PLEADING (4).

APPEAL AND ERROR.

1. The appeal from an order modifying decree of divorce is heard by the Supreme Court *de novo* on the record but grave consideration is given to the findings of the trial court who has a better opportunity to appraise the evidence and the credibility of the witness. *Hensley* v. *Hensley*, 3.
2. The Supreme Court should not reverse the determination of a trial court in a chancery suit unless convinced that it must have reached a different conclusion had it occupied the position of the lower court, under like circumstances. *Id.*
3. Defendants' improper effort to get across to jury the combination of assumed affluence of plaintiffs and the fact and duration of defendant driver's unemployment and plaintiffs' improper effort to get across to jury on *voir dire* examination defendants' insured status effected a nonreversible standoff. *Yarabek* v. *Brown*, 120.
4. Questions presented for consideration by the Supreme Court in review of action of assumpsit for sums alleged to be due in the manufacture of new automation equipment were not reviewable, where based on erroneous premise that the only valid undertakings of the parties were as shown in the written instruments and it appears there were changes of design and specifications found to be necessary as work progressed on the special equipment. *Triplex Engineering Company* v. *Commercial Contracting Corporation*, 156.
5. Finding of trial court in nonjury case that plaintiff was entitled to compensation for "extras" and denial of relief to defendant in its claim of set-off and recoupment in action to recover balance due on work performed in the manufacture of new automation equipment *held*, well within the range of the testimony. *Id.*

APPEAL AND ERROR—Continued.

6. The presence or absence of reversible error in jury instruction is properly judged by reading and considering the charge as a whole. *Lober* v. *Sklar (Lynn* v. *Same),* 167.

7. The Supreme Court views the facts from the point of view favorable to plaintiff which a jury might have taken of them on an appeal from judgment entered after verdict was directed for defendant on the ground of plaintiff's contributory negligence. *Churukian* v. *LaGest,* 173.

8. An issue which was not presented to the trial court for determination may not be raised on appeal. *Id.* 174.

9. The Supreme Court will not substitute its judgment for that of a trial court in a nonjury case on a question of fact unless the evidence clearly preponderates in the opposite direction, since the trial court had an opportunity to see the witnesses testify and observe their demeanor in the courtroom and was in a far better position to determine which witness was telling the truth. *Houghton* v. *Roberts,* 223.

10. The Supreme Court does not substitute its judgment on questions of fact in a nonjury case unless the evidence clearly preponderates in the opposite direction. *Inscalator, Inc.,* v. *Wallace,* 234.

11. The Supreme Court will not reverse the determination of a factual issue unless there has been a clear abuse of discretion. *Johnson* v. *Kramer Bros. Freight Lines, Inc.,* 255.

12. The Supreme Court will view the facts in the light most favorable to plaintiff on his appeal from direction of a verdict for defendant. *Poch* v. *Urlaub,* 261.

13. Testimony of witness subpoenaed by defendant, taken in advance of the impaneling of the jury for the convenience of the witness, but not introduced by either party at the trial, may not be considered on appeal from directed verdict and judgment for defendant in the determination of questions before the Supreme Court even though included in the record. *Pace* v. *Gibson,* 315.

14. The Supreme Court accepts as true all well-pleaded facts in declaration on appeal from order granting defendant's motion to dismiss. *Swanson* v. *City of Marquette,* 424.

15. An appeal from decree dismissing executors' bill to set aside deed given by decedent to defendant on ground of fraud, undue influence and mental incompetency is heard by the Supreme Court *de novo* on the record. *Boerema* v. *Johnson,* 433.

16. A new trial will not be granted unless the error pointed out was such as to prejudice the result. *Britten* v. *Updyke,* 467.

17. Plaintiff, injured while responding to call as a volunteer fireman en route to fire, *held,* to have no justifiable complaint as to instructions given on the workmen's compensation aspect of the case, the workmen's compensation insurer having intervened in action against third-party tort-feasor. *Rouse* v. *Gross,* 476.

18. The error which calls for a new jury trial is one of such significance as to have prejudiced the result, one without which the

APPEAL AND ERROR—Continued.

Supreme Court can say that the result might well have been different. *Id.*

19. Claim of unconstitutionality of Ohio statute, not pleaded as an affirmative defense in action by Ohio in court of this State on summary judgment entered in Ohio common pleas court pursuant to statute imposing tax on truckers using Ohio highways is not considered, since not passed upon by trial court and also because appellant has not shown any injury due to lack of such determination (Ohio Rev Code Ann 1958 Supp §§ 5712.02–5712.04, 5728.10, 5728.12). *Ohio Department of Taxation* v. *Kleitch Bros., Inc.*, 506.

20. The circuit court on appeal to it from the common pleas court of Detroit should not reverse the judgment below on an evidentiary basis unless the testimony taken below clearly preponderates against the judgment entered or unless the facts found were contrary to the uncontroverted testimony (CLS 1956, § 728.4; Court Rule No 77, as added in 1949). *Sinai Hospital of Detroit* v. *Welborn (Welborn* v. *Michigan Hospital Service, Inc.)*, 625.

21. Appeals to circuit court from the court of common pleas of Detroit are not to be tried *de novo* but are to be reviewed in the same manner, as near as may be, as cases appealed from the circuit court are now reviewed in the Supreme Court (CLS 1956, § 728.4; Court Rule No 77, as added in 1949). *Id.*

22. The weight to be accorded an admission and the contradiction thereof is to be determined by the trial, rather than an appellate, court. *Id.* 626.

See JUDGMENT (6, 7); PUBLIC SERVICE COMMISSIONS; WORKMEN'S COMPENSATION (5).

APPEARANCE—See JUDGMENT (5); TRIAL (1).

APPENDIX—See WORKMEN'S COMPENSATION (5).

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ASSURED CLEAR DISTANCE AHEAD—See AUTOMOBILES (17, 18).

ATTORNEY AND CLIENT—See CORONERS; COUNTIES (2); GARNISHMENT (7); REPLEVIN (2).

AUTHORITY—See MASTER AND SERVANT.

AUTOMATION EQUIPMENT—See APPEAL AND ERROR (4, 5).

AUTOMOBILES.

1. The front-seat passenger in a passenger automobile is now burdened with no greater duty of vigilance than the rear-seat passenger, since any other conduct than silence or inaction on the part of a passenger may be fraught with danger. *Yarabek* v. *Brown*, 120.
2. The evidence is viewed in a light most favorable to defendant on a plaintiff's motion to eliminate the question of contributory negligence from consideration by the jury in an automobile passenger's action against motorist in colliding car. *Id.*
3. Plaintiff, a passenger in northbound car on 6-lane through highway, in action against defendants whose car had been southbound and turned left while traffic light was green, *held*, to have sustained her burden of disproof of contributory negligence under record showing, at most, that car was exceeding 35-mile-an-hour speed limit by less than 10 miles per hour without remonstrance from her. *Id.*
4. Whether westbound defendant motorist on cross street, who had stopped before entering intersection with through highway and had proceeded past center line thereof when hit by southbound motorcycle on which plaintiff minors were riding, was guilty of negligence was properly left to jury, where testimony was in conflict as to speed of motorcycle. *Lober* v. *Sklar (Lynn* v. *Same)*, 166.
5. Instruction in action arising from collision at intersection between westbound motorist and southbound motorcyclist that "if the accident was unavoidable and did not result from any negligence of the defendant, then there can be no recovery by either plaintiff" although erroneous, was not reversible, in view of proper instruction given on issues of negligence, proximate cause and contributory negligence, where neither party gave corrective suggestions. *Id.*
6. A motorist approaching a through highway on a subordinate street has the duty to stop and yield the right-of-way to traffic lawfully approaching on the through highway, the purpose of the requirement of stopping being to require that he yield the right-of-way to such lawfully approaching traffic on the through highway (CLS 1956, §§ 257.614, 257.651). *Churukian* v. *La-Gest*, 173.
7. The purpose of a through highway, to move a large volume of traffic at relatively high speeds, requires that drivers thereon be accorded more than the privilege of going through the intersection in advance of a car on a subordinate road which reaches the intersection at the same time (CLS 1956, § 257.651). *Id.* 174.

AUTOMOBILES—Continued.

8. Plaintiff motorist who approached a through highway at 1:30 a.m. and stopped in obedience to a red flasher light but started up again still had the duty to yield the right-of-way to defendant's visibly approaching car on the through highway that was travelling at a legal speed and which did not change its course or take any unexpected action, hence, directed verdict for defendant on ground of contributory negligence of plaintiff was proper (CLS 1956, §§ 257.614, 257.651). *Id.*

9. Whether or not plaintiff, westbound motorist in north lane of 4-lane highway, who had stopped for traffic light was guilty of contributory negligence in proceeding into northbound lanes of intersecting 4-lane highway after change of the light *held*, question for jury in his action against northbound motorist who crashed into plaintiff's car. *Stillwell* v. *Grubaugh*, 344.

10. A motorist cannot totally disregard the circumstances that exist at the time he approaches an intersection governed by a traffic light but he has good reason to believe he is protected from danger by the red light so far as traffic approaching the light. *Id.*

11. Claim of error in instruction in automobile accident case arising from collision at an intersection controlled by a red and green traffic light that was premised on the idea that plaintiff did not have the right to rely upon the fact that he was protected to his left when he entered intersection with the green light in his favor *held*, without merit. *Id.* 345.

12. It was not an abuse of discretion to permit a witness to an automobile accident at an intersection controlled by a traffic light to testify he did not think that northbound defendant could have entered the intersection before the light turned in favor of westbound plaintiff and the witness who was in car in the south westbound lane alongside plaintiff's car, had testified as to the length of time the car in which he was riding had stopped, waiting for the light to change, that such car had not started up immediately subsequent to the change of light and the distance it had traveled before the impact between defendant's and plaintiff's cars, since such witness had given the facts upon which his alleged conclusion was based. *Id.*

13. Admission in evidence of statutorily authorized traffic control order designating paved street on which westbound defendant was traveling as a through street was not error, where trial court carefully instructed jury that no stop sign had actually been erected at the gravel street intersection approached by northbound car in which plaintiff was a passenger and court read portion of statute prohibiting enforcement until erection of such sign giving notice of the traffic regulation (CLS 1954, § 257.606). *Rouse* v. *Gross*, 475.

14. Whether or not westbound defendant motorist was guilty of negligence was a question for the jury in action by passenger of northbound car for injuries sustained at intersection on Christmas eve, where defendant was traveling 35 miles per hour, saw northbound car slow down but not stop as it skidded across ice-covered eastbound lane into defendant's lane, since

AUTOMOBILES—Continued.

if the cars entered the intersection at the same time, defendant had the right-of-way (CLS 1954, § 257.649). *Id.*

15. Instructions to jury in intersection accident case which did charge on plaintiff's theory of the case, as to duties of the parties relative to stopping and right-of-way at an open intersection, *held*, not to have contained reversible error, although not in the language requested by plaintiff. *Id.* 476.

16. Charge to jury that plaintiff, a passenger in northbound car which collided with defendant's westbound car on Christmas eve at an intersection, that plaintiff could not recover unless defendant's negligence "was *the* proximate and direct cause of the deceased's death" although obviously inadvertent in that plaintiff had not died and correct rule merely required proof that defendant's negligence be only *a* proximate cause *held*, not reversible in view of other parts of charge that negligence of plaintiff's driver could not be imputed to plaintiff and no request for correction of the error was made. *Id.*

17. Plaintiff pedestrian's request to charge jury relative to defendant motorist's duties with reference to the assured clear distance rule was properly declined, where the request, if given, would have instructed the jury that defendant was guilty of negligence as a matter of law, the testimony was not such as to justify such a holding and request did not conform to facts as claimed by plaintiff (PA 1949, No 300, § 627). *Duncan* v. *Strating*, 654.

18. The trial judge was not required to reframe plaintiff pedestrian's request to charge relative to defendant motorist's duties under the assured clear distance rule, where such request was tantamount to instructing jury defendant was guilty as a matter of law, evidence as to defendant's conduct and where accident happened was in conflict and instructions that were given fully stated the theory of plaintiff's cause of action (PA 1949, No 300, § 627). *Id.*

19. The statutory bar to use in any court action of reports required in the motor vehicle code to be made with reference to cars involved in accidents applies to reports made by drivers of vehicles involved and garage keepers under certain circumstances and has no application to notes or to reports made by investigating police officers of physical facts they have observed and admissions made to them by drivers of motor vehicles at the scene of the accident for use either as evidence or refreshing a witness's recollection (PA 1949, No 300, § 624). *Id.* 655.

20. Testimony of deputy sheriff who used microfilm of notes he had taken of his observations at scene of accident in which plaintiff pedestrian was struck by defendant motorist, to refresh his recollection of events which had occurred some 5 years theretofore was not subject to exclusion by statute barring use of reports of accidents required of motorists and garage keepers (PA 1949, No 300, § 624). *Id.*

See CHATTEL MORTGAGES (2); CRIMINAL LAW (4); DAMAGES (2); EVIDENCE (3); INJUNCTION (4); STATUTES (4).

AWNINGS—See NEGLIGENCE (7); NUISANCE (1).

BALERS—See WORK AND LABOR (2).

BASE FEE—See DEEDS (7); STATUTES (17).

BASIC SCIENCE EXAMINATION—See PHYSICIANS AND SURGEONS (1, 4).

BEER—See DEEDS (2).

BEER DISTRIBUTOR—See CONTRACTS (6, 7).

BIAS—See EMINENT DOMAIN (19).

BLOOD TEST—See CRIMINAL LAW (4, 5); EVIDENCE (3).

BOARD AND ROOM—See MORTGAGES (5).

BOATING—See NEGLIGENCE (12); TRIAL (4).

BONDS—See DRAINS (6); GUARDIAN AND WARD; LANDLORD AND TENANT (4); RECOGNIZANCES (2); REPLEVIN (2).

BOOKS AND RECORDS—See CONTRACTS (3).

BOUNDARIES.

1. Surveyors have no greater right than other persons to determine starting-points and boundaries and cannot disturb vested rights in land or settle controversies as to titles and their *ex parte* action is entitled to no special authority in regard to true lines and the fact of encroachment. *Poch* v. *Urlaub*, 261.
2. A surveyor cannot fix private rights or lines by any theory of his own. *Id.*
3. A boundary line between adjoining proprietors, unless fixed by agreement, acquiescence, or adverse possession, is to be determined in accordance with the original government survey. *Id.* 262.
4. The subdivision of fractional sections in a fractional township, where the division line has but one end fixed and certain, is accomplished under a special statutory provision that the line shall run due north, south, east or west, as the case may be, to the watercourse, Indian boundary line, or other external boundary (43 USCA, § 725). *Id.*
5. Fractional lots in a United States government survey are those irregular tracts of land designated on the plats of surveys by the land department of the government, not by the surveyors, and are so arranged as to be the most convenient and equitable form for both the purchaser and the government, dividing a shore line along a navigable stream or lake so as to give as many lots with a substantial water frontage as the situation will permit on the theory that water-front lots are more valuable than an equal area of land not touched by water. *Id.*
6. The location of a boundary line appearing on an official plat of the United States government survey, approved by the surveyor general, is controlling when government lands have been disposed of in conformity to such line. *Id.*

BOUNDARIES—Continued.

7. Generally, where the original survey and government plat of a tract of land appears to have as its boundary a body of water, such body of water is a natural monument, and will constitute the boundary, however distant or variant from the position indicated for it by the meander line, and hence will control as a call of the survey over either distances or quantity of land designated in the conveyance or on the government plat. *Id.*
8. The lines of a United States government patent of lands must substantially conform to natural objects called for therein at the expense of courses and distances, and distances may be shortened or lengthened in order to conform the location of the patent to and with the natural objects called for. *Id.*
9. United States government survey lines are controlling as between parties claiming water frontage land along arm of lake in the absence of private agreements altering the boundaries, where the lake appears as a natural object in the patents of the land as lots. *Id.* 263.
10. Definite and permanent monuments in a United States government survey are to control distance and quantity. *Id.*

See PUBLIC LANDS.

BREACH OF CONTRACT—See CONTRACTS (4); LABOR RELATIONS (2, 3); LANDLORD AND TENANT (2).

BRIDGES—See NEGLIGENCE (12, 13); TRIAL (4).

BRIEFS—See COSTS (6, 9); EMINENT DOMAIN (1).

BUILDING RESTRICTIONS—See COVENANTS; MUNICIPAL CORPORATIONS (8).

BUILDINGS—See EMINENT DOMAIN (2, 12, 14).

BURDEN OF PROOF—See AUTOMOBILES (3); DAMAGES (1); ESTATES OF DECEDENTS (1); STATUTES (15).

BUSINESS INTERRUPTION—See EMINENT DOMAIN (12, 15).

CALIFORNIA—See JUDGMENT (9).

CANCELLATION OF INSTRUMENTS—See CONTRACTS (2, 6, 7).

CARE AND KEEP—See MORTGAGES (5).

CARPENTERS—See UNEMPLOYMENT COMPENSATION.

CARRIERS.

State statute regulating the operation of common carriers of passengers for hire does not apply to operation of taxicabs in a home-rule city, since latter do not have time tables, fixed termini or routes or regular stations or stops (CL 1948, § 475.1 [g]; 1954 Administrative Code, §§ R 460.109, R 460.110, R 460.142). *Lorraine Cab* v. *City of Detroit*, 379.

See NEGLIGENCE (5, 6).

CASE—See ACTION (3).

CEMETERIES.

1. Evidence presented in suit to obtain equitable relief based on alleged conspiracy and fraud on the part of certain defendants *held*, to show that legal title to remainder of property involved reposed in cemetery association, burials having already taken place. *Harvey* v. *Lewis*, 305.

2. Decree appointing receiver and ordering sale of cemetery association's assets is modified to provide that land used for cemetery purposes must be sold accordingly so as not to disturb existing graves and that plaintiffs, claiming conspiracy and fraud, are limited to their rights as stockholders of the association or its holding company. *Id.* 306.

See CONSPIRACY (1); RECEIVERS (2).

CERTIFICATE OF AUTHORITY—See PUBLIC SERVICE COMMISSIONS (2).

CERTIFICATE OF TITLE—See CHATTEL MORTGAGES (2).

CHALLENGE OF JURORS—See EMINENT DOMAIN (20, 21); JURY (2).

CHANCERY CASES—See APPEAL AND ERROR (1, 2, 15).

CHANGE OF CIRCUMSTANCES—See DIVORCE (2, 12).

CHANGE OF DESIGN—See APPEAL AND ERROR (4).

CHANGE OF LIGHT—See AUTOMOBILES (9, 12).

CHARITIES—See WILLS (9).

CHARTERS—See MUNICIPAL CORPORATIONS (2, 5, 6, 8, 9, 12, 13); PLEADING (5).

CHARTER TOWNSHIPS—See CONSTITUTIONAL LAW (1).

CHATTEL MORTGAGES.

1. The lien of an original chattel mortgage, valid under the laws of the jurisdiction where executed, cannot be destroyed by a mortgagor's criminal act in removing the property from the jurisdiction and selling it (CL 1948, § 566.140a). *Commerce Acceptance Company* v. *Denton*, 394.

2. Oklahoma chattel mortgagee was not estopped from asserting lien on automobile, where his mortgage was duly executed and recorded in that State, by reason of the fact that the Oklahoma certificate of title did not bear a notation of such lien, the statutes of that State permitting though not requiring such entry on the certificate, but which certificate did contain a printed warning that existing liens might not be indicated thereon. *Id.*

See COSTS (9).

CHECKS—See CONTRACTS (4).

CHIROPRACTIC EXAMINERS, STATE BOARD OF—See LIMITATION OF ACTIONS; PHYSICIANS AND SURGEONS (2, 3).

CHIROPRACTORS—See LICENSES (4); LIMITATION OF ACTIONS; PHYSICIANS AND SURGEONS (1, 2, 4, 5).

CHRISTMAS EVE—See AUTOMOBILES (14, 16).

CIRCUIT COURT—See APPEAL AND ERROR (20, 21); ESTATES OF DECEDENTS (6); HOSPITALS; JUDGMENT (1); PUBLIC SERVICE COMMISSIONS (1, 3).

CITY CLERK—See MUNICIPAL CORPORATIONS (9).

CITY COMMISSION—See MUNICIPAL CORPORATIONS (9).

CLAIMS AGAINST ESTATES—See ESTATES OF DECEDENTS (1-6, 8); EVIDENCE (1); WITNESSES.

CLASSIFICATION—See STATUTES (13-16); WORKMEN'S COMPENSATION (15).

CLERK OF COURT—See REPLEVIN (2).

COLLATERAL ATTACK—See JUDGMENT (5, 9, 12); PUBLIC LANDS.

COMMENT ON CONDUCT OF PUBLIC OFFICIAL—See LIBEL AND SLANDER.

COMMENT ON EVIDENCE—See TRIAL (4).

COMMERCE.

A State has the right to tax interstate commerce in reasonable relationship to its use of the State's highways for the purpose of maintaining them. *Ohio Department of Taxation* v. *Kleitch Bros., Inc.*, 504.

See LABOR RELATIONS (1).

COMMERCIAL PROPERTY—See MUNICIPAL CORPORATIONS (7).

COMMISSIONS—See CONTRACTS (3); COSTS (4).

COMMON KNOWLEDGE—See INJUNCTION (2, 3); STATUTES (15).

COMMON LAW—See DEATH (4); STATUTES (17); WORKMEN'S COMPENSATION (7).

COMMON OWNER—See EASEMENTS (1, 2, 4).

COMMON PLEAS COURT—See APPEAL AND ERROR (20, 21); HOSPITALS.

COMPENSATION—See EMINENT DOMAIN (2-4, 6, 16).

COMPTROLLER—See GARNISHMENT (3).

CONCEALED WEAPONS—See CRIMINAL LAW (2).

CONCLUSIONS—See AUTOMOBILES (12).

CONDEMNATION PROCEEDINGS—See EMINENT DOMAIN; FRAUD.

CONDITIONS—See CORPORATIONS (1, 3); PARTIES.

CONDITIONS SUBSEQUENT—See DEEDS (7); STATUTES (17).

CONSENT—See VENDOR AND PURCHASER (1).

CONSIDERATION—See DEEDS (5); MORTGAGES (3, 4); MUNICIPAL CORPORATIONS (13).

CONSOLIDATED CASES—See COSTS (4).

CONSPIRACY.

1. Finding of trial court that conspiracy and fraud involving formation of syndicate, acquisition of property and formation of corporations by defendants and conduct of rural cemetery by one cemetery association had not been established by plaintiffs *held*, supported by evidence. *Harvey* v. *Lewis*, 305.
2. Neither conspiracy nor fraud may be assumed in any case but when relied on as the bases for equitable relief, they must be established by clear and satisfactory proof. *Id.*
3. The fact that a financial venture has proved unsatisfactory to those engaging in it does not suggest conspiracy or fraud on the part of others, contributing to bring about the unfortunate result. *Id.*
4. The gist or gravamen of the civil action for conspiracy is not the conspiracy but the wrongful acts causing the damages. *Dunn* v. *Goebel Brewing Company*, 693.
5. A conspiracy standing alone without the commission of acts causing damage would not be actionable as the cause of action does not result from the conspiracy but from the acts done. *Id.*

See ACTION (3); CEMETERIES; COSTS (5); RECEIVERS (1).

CONSTITUTIONAL LAW.

1. "Municipal corporations," as the term was fixed by usage and subsequent judicial decisions in excepting clause of 15-mill tax-limitation amendment to the Constitution, includes incorporated villages, fourth class cities, special charter cities, home-rule cities, charter townships and school districts which are organized as full-fledged public corporations (Const 1908, art 10, § 21, as added in 1932 and amended in 1948). *Township of Southfield* v. *Drainage Board for Twelve Towns Relief Drains (City of Troy* v. *Same)*, 59.
2. The language of the 15-mill tax-limitation amendment of the Constitution is clear and unambiguous as it applies to unchartered townships and limits the taxing power of a township to what it may receive from the allocation of the 15 mills plus any increase voted by its electors (Const 1908, art 10, § 21, as amended in 1948). *Id.*
3. Judicial discretion upon good cause shown is a standard in itself sufficient to satisfy all constitutional requirements. *Johnson* v. *Kramer Bros. Freight Lines, Inc.*, 254.
4. The power given to a court under the Constitution is judicial power, a power which may neither be lessened nor increased by the legislature. *Id.*
5. Courts have no power or authority to pass upon the wisdom, policy or equity of legislation. *Wojewoda* v. *Employment Security Commission*, 374.

CONSTITUTIONAL LAW—Continued.

6. Due process requires only a "day in court," not a series of such days. *Johnson* v. *Haley*, 411.
7. The refusal of the enforcing court to examine the jurisdiction of the court of the sister State which rendered the judgment, after the question of jurisdiction had been litigated, is not a denial of due process (US Const, art 4, § 1). *Id.* 412.
8. The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. *Thompson* v. *Ogemaw County Board of Road Commissioners*, 483.
9. Claim that procedure which a State employed in its highway use tax law merged functions of separate branches of the government should be addressed to the courts of such State which pass on the constitutional problems of that State rather than the courts of State where resulting "judgment" is sought to be enforced. *Ohio Department of Taxation* v. *Kleitch Bros., Inc.*, 505.
10. The presently effective sales tax diversion amendment to the Constitution is construed to accomplish its manifest objective and intent to limit the rate of taxation on the retail sale of tangible personal property (Const 1908, art 10, § 23, as amended in 1954). *Lockwood* v. *Commissioner of Revenue*, 517.
11. Courts must construe provisions of the Constitution to arrive at that meaning which accomplished the manifest objective intended by the people, as determined from judicial notice taken of common experience in daily life. *Id.* 518.
12. A constitutional limitation must be construed to effectuate, not to abolish, the protection sought by it to be afforded. *Id.*
13. The people have a right to have the limitations in a State Constitution respected and given the fair and legitimate force which its terms require. *Id.*
14. The presumption of constitutionality accorded to acts of the legislature cannot prevail, where the statute is prohibited by the express language of the Constitution or by necessary implication. *Id.*

See APPEAL AND ERROR (19); COSTS (10); COUNTIES (1); DRAINS (1, 2); EMINENT DOMAIN (6, 15, 16, 20, 21); HEALTH; JUDGMENT (9); MUNICIPAL CORPORATIONS (7, 10, 11); SCHOOLS AND SCHOOL DISTRICTS (3); STATUTES (1); TAXATION (5, 6); TOWNSHIPS (1).

CONSTRUCTION OF AMENDMENT—See CONSTITUTIONAL LAW (1, 2).

CONSTRUCTION OF CHARTER—See MUNICIPAL CORPORATIONS (6).

CONSTRUCTION OF CONSTITUTION—See CONSTITUTIONAL LAW (10–14).

CONSTRUCTION OF DECREE—See DIVORCE (10); EQUITY (1).

CONSTRUCTION OF DEEDS—See MORTGAGES (1–4).

CONSTRUCTION OF STATUTES—See COURTS (4); CRIMINAL LAW (1); DECLARATORY JUDGMENT (2); SCHOOLS AND SCHOOL DISTRICTS (4); STATUTES (2–5, 12); TAXATION (5); WORKMEN'S COMPENSATION (6, 13).

CONSTRUCTION OF WILLS—See WILLS (1, 3–5, 7–9).

CONTEMPT—See DIVORCE (12, 13).

CONTINGENT CLAIMS—See ESTATES OF DECEDENTS (7, 9).

CONTRACTOR—See WORKMEN'S COMPENSATION (4).

CONTRACTS.

1. One is not bound to pay for volunteered services rendered under circumstances which do not fairly indicate an expectation of reward. *In re Kaiser Estate (Claim of Sullivan)*, 104.
2. Finding of trial court in nonjury case that contract for sale of stock to plaintiff for breach of which he sought damages from defendant had been canceled *held*, not against preponderance of the evidence including subsequent transactions between plaintiff and defendant and others not in accordance with the contract sued on and lapse of over 5 years without demand for compliance. *Houghton* v. *Roberts*, 223.
3. Finding of trial court that plaintiff manufacturer's agent had failed to substantiate his claim that defendant corporation had wrongfully manipulated or altered its books and records so as to preclude plaintiff from getting all commissions due him although limited to "50% of the total net profit before taxes" *held*, not against the preponderance of the evidence. *Insealator, Inc.*, v. *Wallace*, 233.
4. Evidence presented in actions by 2 former employees for damages for breach of seniority provisions of their union's contract with defendant employer *held*, to show as a matter of law that plaintiffs, who had been discharged for having been involved in passing forged checks drawn on defendant's bank account, had failed to employ or exhaust the grievance procedure provided by the union contract and that defendant had not been shown to have prevented them from doing so. *Spencer* v. *Wall Wire Products Company (Gooch* v. *Same)*, 296.
5. Contracts which invoke an attempt to use public money for the furtherance of a private enterprise are void. *Kaplan* v. *City of Huntington Woods*, 612.
6. Plaintiff beer distributor's claim that his written contract with defendant brewer was vitiated by reason of fraudulent concealment inducing plaintiff to enter into it *held*, untenable under pleadings showing it had replaced an oral contract terminable at will and the new contract contained a clause permitting termination upon receipt of notice, the relationship between the parties was not confidential, no affirmative representations were made before execution of the contract that defendant would not give notice of cancellation as provided in the contract, there was no allegation that plaintiff was induced by trick to sign the contract and plaintiff's real damage arose from defendant's discontinuance of sales of its products to plaintiff. *Dunn* v. *Goebel Brewing Company*, 693.

CONTRACTS—Continued.

7. The granting of defendant brewer's motion for judgment on the pleadings of plaintiff in action for damages for alleged breach of written contract for distribution of beer and denial of latter's motion for leave to file an amended or supplemental declaration, which motions were filed some 22 months after transfer of case from equity to law side of the court *held*, not error, under record showing 7-days' notice of cancellation of written contract which had replaced oral contract terminable at will. *Id.*

See APPEAL AND ERROR (4); ESTATES OF DECEDENTS (1); EVIDENCE (1); INJUNCTION (8); LABOR RELATIONS (2, 3); MASTER AND SERVANT; PLEADING (4); WORKMEN'S COMPENSATION (11).

CONTRIBUTORY NEGLIGENCE—See APPEAL AND ERROR (7); AUTOMOBILES (2, 3, 5, 8, 9); NEGLIGENCE (1, 2, 5, 6, 8, 9, 13); RAILROADS.

CONVEYANCES—See DEEDS (7); SCHOOLS AND SCHOOL DISTRICTS (2); STATUTES (17).

CORONERS.

The right of incumbent coroners to employ counsel to represent them in their effort to prevent the county board of supervisors from adopting resolution to submit to electorate the question of adopting the medical examiner system to replace the coroners did not entitle the coroners to employ such counsel at the expense of the county, since the controversy for which the attorneys were employed did not arise in connection with or out of the performance of their duties as coroners (PA 1953, No 181). *Robbins* v. *Wayne County Board of Auditors*, 663.

See COUNTIES (2).

CORPORATIONS.

1. Provisions of Indiana statute imposing liability upon officers and directors of a corporation in the carrying on of the business in which the indebtedness is incurred in violation of the statutes relative to conditions that must be complied with before a newly-formed corporation begins business and for improper withdrawal of assets, without therein imposing a penalty as for a criminal offense, are construed as remedial, not penal, statutes, since they give to creditors for their added protection, a right of action against officers and directors for noncompliance with the statute (Indiana Acts 1929, ch 215, §§ 20, 52). *Pullum Window Corporation* v. *Feldstein*, 82.

2. Proofs fully supported finding of jury that defendants, officers and directors of a newly-formed Indiana corporation, were individually liable for indebtedness to plaintiff incurred by them on behalf of corporation, where they had failed to comply with Indiana statutes relative to acts which must be done before a corporation could commence to do business (Indiana Acts 1929, ch 215, § 20). *Id.*

CORPORATIONS—Continued.

3. Finding of jury that appellants were officers and directors of newly-formed Indiana corporation at time indebtedness to plaintiff creditor of the corporation was incurred and that they had not complied with conditions imposed by Indiana statute as a condition precedent to the right to do business and that they had improperly withdrawn assets of the corporation *held*, supported by evidence (Indiana Acts 1929, ch 215, §§ 20, 52). *Id.*

See CEMETERIES (2); CONSPIRACY (1); CONTRACTS (3); GARNISHMENT (5); PARTIES.

CORRECTIONS DEPARTMENT—See CRIMINAL LAW (2).

COSTS.

1. No costs are allowed in suits involving determination of validity of intracounty public health drain, where public question and public corporations are involved (CLS 1956, § 280.461 *et seq.*). *Township of Southfield* v. *Drainage Board for Twelve Towns Relief Drains (City of Troy* v. *Same)*, 62.
2. Costs in libel case are ordered to abide result of new trial ordered upon reversal of judgment for plaintiff because of error on part of trial court. *Lawrence* v. *Fox*, 134.
3. No costs are allowed in suit for declaration of rights by board of education of township school district against county board of education on appeal from order granting latter's motion to dismiss, where such order was based upon a twofold misinterpretation of statutes and additional time is granted for filing an amended bill (CLS 1956, §§ 340.431, 340.440; CL 1948, § 650.18). *Board of Education of Presque Isle Township School District No. 8* v. *Presque Isle County Board of Education*, 149.
4. No costs are allowed in suit to enjoin defendant's use of alleged trade secrets consolidated with latter's action against plaintiff for commissions, where both parties have appealed and neither has prevailed in his position. *Insealator, Inc.*, v. *Wallace*, 235.
5. No costs are allowed in suit to obtain equitable relief based on alleged conspiracy and fraud, where decree is substantially modified. *Harvey* v. *Lewis*, 306.
6. No costs on appeal are allowed plaintiff upon affirmance of judgment for him in action of replevin, where he filed no brief. *Van Dyk* v. *Utter*, 330.
7. No costs are allowed in proceeding to recover unemployment compensation, where a public question was involved. *Wojewoda* v. *Employment Security Commission*, 374.
8. No costs are allowed in suit to enjoin enforcement of home-rule city's taxicab license ordinance against taxicab operators who were duly licensed in suburbs, when driving patrons from points within the city to the suburbs (Detroit Municipal Code [1945], ch 145, as amended). *Lorraine Cab* v. *City of Detroit*, 380.
9. No costs are allowed upon affirmance of judgment for non-

COSTS—Continued.

resident chattel mortgagee in replevin action, where plaintiff filed no brief. *Commerce Acceptance Company* v. *Denton*, 394.

10. No costs are allowed in mandamus proceeding to declare act amending the use tax act void, a public question being involved (CL 1948, §§ 205.93, 205.95–205.97, as amended by PA 1959, No 263). *Lockwood* v. *Commissioner of Revenue*, 518.

11. No costs are allowed in suit to enjoin city from constructing a playground on city property, claimed to be subject to restrictive covenants not permitting such use, a public question being involved. *Kaplan* v. *City of Huntington Woods*, 613.

12. No costs are allowed in landlord's proceeding against estate of deceased lessee, where neither party has prevailed in full. *National Bank of Detroit* v. *Voigt Estate*, 648.

13. No costs are allowed upon denial of relief to plaintiff in suit to foreclose a mortgage, brought by mortgagee, who was the former husband of the mortgagor and which mortgage was a part of the property settlement of the parties in suit for divorce. *Werner* v. *Werner*, 671.

See DIVORCE (9, 13).

COTTAGES—See DEEDS (2).

COUNTIES.

1. The fact that the legislature directs one unit of county government to use its funds in the aid of another unit does not operate as a grant of credit in violation of the Constitution (Const 1908, art 10, § 12; CLS 1956, § 280.461 *et seq.*). *Township of Southfield* v. *Drainage Board for Twelve Towns Relief Drains (City of Troy* v. *Same)*, 61.

2. Efforts of incumbent coroners, made to prevent abolition of their office by resolution of county board of supervisors submitting question to electors, did not concern the public welfare in such manner as to render the county liable for the payment of compensation to attorneys representing the coroners (PA 1953, No 181). *Robbins* v. *Wayne County Board of Auditors*, 664.

See CORONERS; DRAINS (1, 4, 6); PAUPERS; RECOGNIZANCES (1).

COUNTS—See PLEADING (1, 2).

COUNTY BOARD OF EDUCATION—See COSTS (3).

COUNTY TREASURER—See DRAINS (1).

COURSES AND DISTANCES—See BOUNDARIES (8).

COURT COMMISSIONERS—See EMINENT DOMAIN (1, 7–12, 17–19).

COURT RULES—See APPEAL AND ERROR (20, 21); DISCOVERY; GARNISHMENT (6); HOSPITALS; PLEADING (3, 5); TRIAL (1, 2).

COURTS.

1. A pretrial brief should never be presented to the tribunal who makes the final decision unless under the supervision and with the consent of the presiding judicial officer. *In re Grand*

COURTS—Continued.

Haven Highway (State Highway Commissioner v. *Dake Corporation)*, 20.

2. Generally, courts of one State will not enforce the penal laws of another State or jurisdiction. *Pullum Window Corporation* v. *Feldstein*, 82.
3. It was not error for trial court not to take testimony in secret in the court's chambers in suit to enjoin defendant's use of alleged trade secrets, where it is held that no legal trade secrets, as such, were involved in case. *Insealator, Inc.*, v. *Wallace*, 235.
4. It is the peculiar province of the judicial department to adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws. *Johnson* v. *Kramer Bros. Freight Lines, Inc.*, 254.
5. Courts, by their very nature, are compelled to use their discretion upon good cause shown to protect the rights of parties and to prevent injustices. *Id.*
6. Abuse of process is not limited to issuance thereof but extends to oppressive use after issuance. *Id.*
7. Every court has supervisory control over use of its process and power to prevent abuse thereof by oppressive use. *Id.*
8. Courts are given broad discretionary powers to determine whether or not orders and decrees shall be rendered under such circumstances as may appear to the court to be reasonable and proper upon good cause shown. *Id.* 255.
9. The language of a court's opinion is to be read, and interpreted, in the light of the facts the court faced when it employed the language in question. *Lockwood* v. *Commissioner of Revenue*, 518.

See CONSTITUTIONAL LAW (3–5, 11); GARNISHMENT (2); JUDGMENT (12, 13); PUBLIC LANDS; STATES; TAXATION (1–4); WILLS (2).

COVENANTS.

Building restrictions are private property, an interest in real estate in the nature of an easement, go with the land, and are a property right of value. *Kaplan* v. *City of Huntington Woods*, 612.

See COSTS (11); MUNICIPAL CORPORATIONS (13).

CREDIBILITY—See EMINENT DOMAIN (9).

CREDIT—See COUNTIES (1); MUNICIPAL CORPORATIONS (10, 11).

CREDITORS—See ACTION (1); CORPORATIONS (1); PARTIES.

CRIMINAL LAW.

1. The meaning of the term "brought to trial," as used in act relative to disposition of untried charges filed against prisoners, is to be gathered from the entire act (PA 1957, No 177, § 1). *People* v. *Hendershot*, 300.
2. The circuit court had not lost jurisdiction in 1958 to try defendant on 1951 charge of having unlawfully carried concealed

CRIMINAL LAW—Continued.

weapons, where department of corrections delivered a notice to the prosecuting attorney and apparent good-faith action on his part met condition of statute as to bringing case on for trial within statutory period of 180 days from receipt of notice by being ready for trial within such time, hence, trial thereafter was not barred by reason of expiration of such 180-day period due to defendant's delaying motions, since the action had been timely commenced and proceeded with promptly (PA 1957, No 177, §§ 1, 3). *Id.*

3. The service of a warrant by the filing of a detainer against defendant with the prison authorities where he was incarcerated served to toll the statute of limitations (CLS 1956, § 767.24). *Id.*

4. A suspect's sample of urine shown to have been taken at a time reasonably soon after the incident giving rise to prosecution for driving a motor vehicle under the influence of intoxicating liquors, subjected to a test having general scientific recognition, with results correlated to the probable blood alcohol concentration at the time of the violation charged, is properly admissible as bearing upon the issue of intoxication (CLS 1956, § 257.625). *People* v. *Miller*, 400.

5. Abnormality of the individual, use of faulty techniques or unclean instruments in making a urinalysis to determine alcoholic content of blood of person charged with having operated a motor vehicle while under the influence of intoxicating liquors, are properly matters of defense, going to the weight to be given the evidence, but not grounds for its complete exclusion (CLS 1956, § 257.625). *Id.*

6. It was not error for trial court to refuse to give defendant's requests to charge in prosecution for driving a motor vehicle while under the influence of intoxicating liquor, either in verbatim form or otherwise, where the instruction as given fairly covered the issues and the material substance embodied in the requests (CLS 1956, § 257.625). *Id.* 401.

See CHATTEL MORTGAGES (1); EVIDENCE (3); LIBEL AND SLANDER; STATUTES (4).

CROSSING—See RAILROADS.

CURING ERROR—See AUTOMOBILES (5).

CUSTODY OF CHILDREN—See DIVORCE (1, 2, 12); JUDGMENT (3).

DAMAGES.

1. A plaintiff in a tort action has the burden of proof as to damages he sustained, such as lessened earning capacity. *Moyer* v. *Shampo*, 391.

2. Jury's award of $1,500 to plaintiff for personal injuries sustained in automobile accident *held*, within its reasonable discretion under evidence adduced as to loss of earning capacity and pain and suffering involved. *Id.* 392.

3. The Supreme Court will not disturb the evaluation a jury makes of the evidence as to damages in a tort case, if satisfied that its findings are supported by the evidence presented. *Id.*

DAMAGES—Continued.

See CONSPIRACY (5); DEATH (5); EMINENT DOMAIN (6, 10, 11, 13, 16, 18, 19); JUDGMENT (3); LANDLORD AND TENANT (5, 6); MASTER AND SERVANT.

DANGEROUS INSTRUMENTALITY—See INFANTS (1); NEGLIGENCE (10, 11).

DAUGHTER—See GUARDIAN AND WARD.

DEATH.

1. Consideration of loss of services of a minor is permitted in an action under the death act in determining pecuniary injury of a parent (CL 1948, §§ 691.581, 691.582). *Thompson* v. *Ogemaw County Board of Road Commissioners*, 482.
2. The reasonable expectation of support of a parent, rather than any particular age at the time of the death of the child is the test of whether recovery may be had by the parent under the death act for the death of the child (CL 1948, §§ 691.581, 691.582). *Id.*
3. Instruction to jury in action under death act for death of 15-year-old girl, which permitted jury to award damages for loss of support after she would have attained her majority, *held*, not a proper basis for granting a new trial, under evidence presented (CL 1948, §§ 691.581, 691.582). *Id.* 483.
4. The wrongful death act is a remedial measure designed to alleviate the common-law rule generally forbidding compensation for wrongful death and lack of proofs of an exact quality should not be allowed to defeat the legislative purpose (CL 1948, §§ 691.581, 691.582). *Id.*
5. Jury's award of $12,072 under death act to father as special administrator of estate of his 15-year-old daughter who had been killed because of defendant's negligence in maintaining county road, *held*, "fair and just" compensation under evidence showing that father, at time of her death, had been unemployable for several years because of a heart condition, daughter had contributed to family support by $5 per week in addition to performance of household services which permitted the mother to be employed outside the home, funeral expenses amounted to $800.27, and $10,000 was claimed as present worth of services during minority, and daughter contemplated taking over mother's outside job when high school course was completed (CLS 1956, § 242.1; CL 1948, §§ 691.581, 691.582). *Id.*

See AUTOMOBILES (16); DEEDS (1, 2, 6); LANDLORD AND TENANT (4); NEGLIGENCE (11); TRIAL (4); WILLS (2); WORKMEN'S COMPENSATION (1).

DECLARATION—See PLEADING (3, 5).

DECLARATORY JUDGMENT.

1. A motion to dismiss a bill for declaration of rights was properly presented, where the bill failed to present a justiciable issue for determination. *Board of Education of Presque Isle Township School District No. 8* v. *Presque Isle County Board of Education*, 148.

DECLARATORY JUDGMENT—Continued.

2. Plaintiff school district is accorded 30 days in which to file an amended bill, where original bill for declaration of rights failed to aver a cause of action in that statute was misinterpreted (CLS 1956, §§ 340.431, 340.440; CL 1948, § 650.18). *Id.* 149.

See COSTS (3); SCHOOLS AND SCHOOL DISTRICTS (2).

DEEDS.

1. Record in suit to set aside deed by decedent widower to landlady where he had roomed most of the time following his wife's death *held*, without direct proof of fraud or undue influence on part of defendant grantee. *Boerema* v. *Johnson*, 433.
2. Trial court's finding that elderly grantor widower was of sound mind at time he executed deed of cottage property some 6 months before he died, which deed his executors seek to have set aside, is not disturbed under record showing deceased had never been committed or subjected to guardianship, that while his consumption of beer was frequent and in some quantity, the testimony as to his condition at time of the execution of the deed was not such as to cause the Supreme Court to reverse the trial judge. *Id.*
3. Proof of old age and alcoholic addiction, standing alone, do not constitute proof of incompetence to execute a deed. *Id.*
4. Mental incompetency to execute a deed, claimed to be due to addiction to alcohol, must be shown to have resulted from actual intoxication clouding his understanding or dethroning his reason at the time of executing the deed. *Id.*
5. The Supreme Court scrutinizes carefully the transactions between strangers and the aged and infirm, where no consideration or inadequate consideration is shown, and will intervene to set aside a deed, if overreaching or fraud is proved or reasonably implied. *Id.* 434.
6. Deed by elderly widower to defendant, his landlady of some 2 to 3 years following death of his wife, is not set aside at suit of executors and his stepgranddaughter, where deceased had left them both substantially more than his relationship with either or the services provided him by either would normally call for. *Id.*
7. Deed, executed in 1837, of 6 rods square tract of property to school district "so long as such district desire or wish to occupy the same for the use of a school * * * and no longer" and entitling the district to remove improvements when school site was changed created a possibility of reverter that could not be conveyed or assigned and an attempt to do so before breach of the condition subsequent extinguished the right to re-enter. *Schoolcraft Community School District No. 50* v. *Burson*, 682.

See APPEAL AND ERROR (15); MORTGAGES (1–4); PUBLIC LANDS.

DEFAULT—See DIVORCE (7, 8); GARNISHMENT (6); JUDGMENT (15).

DEFICIENCY—See DRAINS (6).

DELAY—See CONTRACTS (7).

DELEGATION OF POWERS—See GARNISHMENT (2).

DELIVERY—See NEGLIGENCE (5).

DEMAND—See CONTRACTS (2); GARNISHMENT (3); REPLEVIN (1).

DE NOVO REVIEW—See APPEAL AND ERROR (1, 15).

DEPENDENTS—See WORKMEN'S COMPENSATION (2, 3).

DEPOSITIONS—See DISCOVERY.

DEPUTIES AND ASSISTANTS—See AUTOMOBILES (20); REPLEVIN (2).

DEPUTY POLICE COMMISSIONER—See LIBEL AND SLANDER.

DESCENT AND DISTRIBUTION—See WILLS (3).

DETAINER—See CRIMINAL LAW (3).

DETROIT—See APPEAL AND ERROR (19, 20); COSTS (8); HOSPITALS; MUNICIPAL CORPORATIONS (4).

DIFFERENTIAL BENEFITS—See WORKMEN'S COMPENSATION (13, 15).

DIRECTED VERDICT—See APPEAL AND ERROR (7, 12, 13); AUTOMOBILES (8, 17, 18); NEGLIGENCE (8, 9).

DIRECTORS—See CORPORATIONS; PARTIES.

DISABILITY—See WORKMEN'S COMPENSATION (7, 10).

DISCLOSURE—See GARNISHMENT (3, 5–7).

DISCOVERY.

It was not error for trial court to exclude discovery depositions containing irrelevant and immaterial testimony because of such content when counsel would not accept court's offer to go through them and make a ruling as to the admissibility of testimony therein but insisted on their admission in their entirety under court rule providing for use of such depositions "so far as admissible under the rules of evidence," where opportunity was afforded counsel to use them to contradict or impeach (Court Rule No 35, § 6 [1945]). *Insealator, Inc.*, v. *Wallace*, 235.

See GARNISHMENT (3).

DISCRETION OF COURT—See APPEAL AND ERROR (11); CONSTITUTIONAL LAW (3); COURTS (5, 8); DAMAGES (2); DIVORCE (6, 8); EQUITY (1); GARNISHMENT (2, 3, 5); JUDGMENT (1, 14); MANDAMUS (2); RECEIVERS (1); RECOGNIZANCES (1).

DISCRETION OF OFFICERS—See WORDS AND PHRASES.

DISCRIMINATION—See TOWNSHIPS (2).

DISINHERITANCE OF HEIRS—See WILLS (3).

DISQUALIFICATION—See RECOGNIZANCES (2).

DISTANCE—See BOUNDARIES (7, 10).

DISTRIBUTOR—See PUBLIC SERVICE COMMISSIONS (1, 3).

DIVORCE.

1. The statutory preference as to custody of children under 12 years of age will not be accorded mother in suit for divorce, where the best interests of the child impel the court to make a different order (CL 1948, § 722.541). *Hensley* v. *Hensley*, 3.
2. Modification of decree of divorce as to custody of 5-year-old boy, made on father's petition so as to accord him custody, is affirmed, where record supports trial court's finding that sufficient change of circumstances since the original decree warranted the change of custody from mother who had been accorded technical custody but required to leave child in foster home, it appearing the father had a more suitable home environment and had frequently visited the boy and the mother had done so infrequently (CL 1948, § 722.541). *Id.*
3. A court is powerless to grant alimony in the future following final decree of absolute divorce in which no provision is made for alimony or the question is not reserved. *Ballentine* v. *Ballentine*, 7.
4. Decree of absolute divorce in which no provision was made for alimony to wife who had supported defendant husband while he was a medical student, interne and resident for specialized training is modified to require husband to pay $10 per month alimony to plaintiff until further order. *Id.*
5. Decretal provisions for adjustment of property rights in a suit for divorce cannot be set aside, modified or altered in the absence of a showing of fraud, necessity for clarification or ambiguity, except that a court of equity normally possesses inherent authority to enforce its own directives. *Greene* v. *Greene*, 196.
6. The property settlement provisions of a decree of divorce are a part of the trial court's own decree, presumably reached by him only after profound deliberation and in the exercise of his traditional broad discretion, hence, when enforcement thereof is later sought, he has an equally broad discretion in interpreting and determining what it was and why he had originally so decreed. *Id.*
7. Relief for breach of plain and unambiguous property settlement provision of decree of divorce may only be granted where it is found that there has been a default or breach thereof and that such a breach was material and substantial. *Id.* 197.
8. Denial of relief to plaintiff wife on her petition for enforcement of property settlement provisions of divorce decree wherein she was to obtain interest as tenant in common upon defendant husband's default in paying off $8,000 in monthly instalments of $400 each *held*, within discretion of trial court, where husband had made prompt payment of $7,200, admittedly defaulted a few days on remaining $800 but did pay it into court, the default not having been substantial. *Id.*
9. No costs are allowed on wife's appeal from denial of relief to her on petition to enforce property settlement provisions

DIVORCE—Continued.

of decree of divorce, where admitted breach was not of a substantial nature. *Id.*

10. Finding of trial judge that provisions of so-called property settlement agreement, included in decree of divorce under heading "alimony" and providing for weekly payments of $200 for first 5 years following divorce and $100 weekly for next 5 years or until wife remarried was for alimony *held*, proper under record presented on appeal from order modifying decree with respect to time alimony payments were to be made. *Lytle* v. *Lytle*, 676.
11. A trial court has power to modify alimony provisions of a decree for divorce. *Id.*
12. The showing by husband of his changed financial circumstances *held*, sufficient to justify trial court's modification of decree of divorce as to time when alimony should be paid without cancellation of the obligation to repay it, further modification being accorded by Supreme Court by staying trial court's order of contempt, where it appears the husband was awarded custody of their 2 children, both parties have remarried and wife has not shown she is now in need of the payments she seeks to have defendant compelled to make. *Id.*
13. No costs are allowed on appeal from order modifying decree of divorce as to alimony, where defendant husband's change of circumstances justifies additional relief to that accorded by the trial court by staying of contempt proceeding. *Id.* 677.

See COSTS (13); EQUITY (1); JUDGMENT (3).

DOING BUSINESS—See CORPORATIONS; PARTIES.

DOUBLE COMPENSATION—See WORKMEN'S COMPENSATION (2).

DRAINS.

1. The legislature properly exercised its prerogative in providing that moneys belonging to a township could be used for a health project, such as a drain, but provision that deductions for reimbursement of county advancements to the township could be made from "any moneys * * * then or thereafter payable" to the township was in conflict with mandate of Constitution that county treasurer "*shall* remit to the * * * townships * * * on a per capita basis" a portion of the sales tax moneys returned to local governmental units, hence, the county treasurer may not retain such funds (Const 1908, art 10, § 23, as amended in 1954; CLS 1956, § 280.474). *Township of Southfield* v. *Drainage Board for Twelve Towns Relief Drains (City of Troy* v. *Same)*, 60.
2. The chapter of the drain code relative to intracounty drains for public health *held*, not unconstitutional because of the metropolitan district amendment of the Constitution, since there was no provision in such amendment evincing an intention to abolish the drain procedure which had been established long before adoption of the amendment (Const 1908, art 8, § 31; CLS 1956, § 280.461 *et seq.*). *Id.*
3. Provision of drain code empowering 2 or more public corporations to petition county drain commissioner for the establish-

DRAINS—Continued.

ment of a county drain for public health purposes was not invalid because of provision for assessment of other public corporations which had not signed the petition, where they had notice and an opportunity to be heard prior to assessment (CLS 1956, § 280.463). *Id.* 61.

4. Assumption by county of apportionment of drain assessment on account of zoological garden and golf course, owned and operated by city located in adjacent county but not subject to special assessment for drains, was authorized to be made by favorable vote of 2/3 of the members-elect, since counties may contribute to the operation of public parks and public zoological gardens (CL 1948, §§ 318.51–318.54; CLS 1956, § 280.468). *Id.*
5. A city as a unit is responsible for the health of the entire city and each part thereof, hence, the assessment of an entire city for apportionment based on fact that 2% of its area was included within district of intracounty public health drain was proper (CLS 1956, § 280.461 *et seq.*). *Id.*
6. The legislature had full power to require a county to pay from its general fund any deficiency accruing on drainage bonds. *Id.*
7. A rehearing after entry of final order of determination as to route of proposed intracounty public health drain after route and district were altered as to 2 public corporations is not ordered, where such corporations fail to show any prejudice or damage due to such alteration (CLS 1956, § 280.461 *et seq.*). *Id.*
8. Evidence presented in mandamus proceeding by intercounty drainage board *held,* sufficient to raise a question of fact and law whether the obstruction, of which plaintiff board sought removal, had been constructed by the defendant railroad company or by the drainage board itself (CLS 1956, §§ 280.421, 280.422). *South Looking Glass Drainage District Board* v. *Grand Trunk Western Railroad Company,* 215.

See COSTS (1); HEALTH; JUDGMENT (1); MUNICIPAL CORPORATIONS (2); TOWNSHIPS (1).

DRIVING UNDER INFLUENCE OF INTOXICATING LIQUORS—See CRIMINAL LAW (4–6); EVIDENCE (3); STATUTES (4).

DUE PROCESS—See CONSTITUTIONAL LAW (6, 7); EMINENT DOMAIN (21); JUDGMENT (7); TAXATION (2–4); WORKMEN'S COMPENSATION (10).

EARNING CAPACITY—See DAMAGES (1, 2); DEATH (5).

EARNING POWER—See WORKMEN'S COMPENSATION (7).

EASEMENTS.

1. An apparently permanent and obvious servitude imposed upon one part of an estate in favor of another by the common owner, which is in use at the time of severance, raises an easement by implied grant or reservation of the right to continue such use. *Rannels* v. *Marx,* 453.
2. The common owner of an entire estate who makes one part

EASEMENTS—Continued.

of it visibly dependent for means of access, upon another, and creates a way for its benefit over the other, and then grants the dependent part, causes the other part to become subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee, as accessorial to the beneficial use and enjoyment of the land. *Id.*

3. Trial court's finding that joint driveway between plaintiff's and defendants' property and their garages were so located that access from any other direction was impractical when they went into possession *held,* justified and decisive, entitling plaintiff to injunction against defendants' interference with such driveway located in part on each lot. *Id.*

4. The previous use of property in possession of the common grantor which is visible and apparent even to a casual observer and which is continuous and necessary to convenient use of the property constitutes a so-called quasi-easement, an easement by implication being raised because of the obvious intention of the parties. *Id.* 454.

See NUISANCE (2); VENDOR AND PURCHASER (2).

ELECTRIC SUBSTATION—See MUNICIPAL CORPORATIONS (5); NEGLIGENCE (10); PLEADING (5).

ELEVATOR—See WORKMEN'S COMPENSATION (3).

EMINENT DOMAIN.

1. No reversible error was committed by filing pretrial brief with the appointed commissioners prior to hearing on damages, where such brief did not misstate the law and was not prejudicial in tone, and on the day of the hearing was served on condemnor's counsel who took ample opportunity thereafter to explain its position; although the filing of brief at such time is not condoned (CL 1948, § 213.171 *et seq.*). *In re Grand Haven Highway (State Highway Commissioner* v. *Dake Corporation),* 20.

2. The decreased value of remaining buildings, no longer usable because of condemnation of part of buildings used by manufacturer, is allowable as compensation. *Id.*

3. Direct compensation is allowable for the portion of a tract actually taken in condemnation proceedings and, in addition, the amount by which the value of the parcel from which it is taken is diminished on account of the use made of the land taken. *Id.*

4. The adaptability of land for a special purpose or use may be considered as an element of value in condemnation proceedings to which the owner has a right to compensation. *Id.* 21.

5. The special use to which property is devoted when it is sought to be condemned for public use is taken into consideration as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which, in a general sense, may be said to be the market value, market value being, always, the ultimate test. *Id.*

6. A landowner must yield to the public necessity in condemnation proceedings, the "just compensation" which he should

EMINENT DOMAIN—Continued.

receive, meaning at no sacrifice on his part, and putting him in as good a condition as he would have been if the injury had not occurred (Const 1908, art 13, § 1). *Id.*

7. The determination of value in condemnation proceedings for highway purposes is not a matter of formula or artificial rules but of sound judgment and discretion by the court commissioners based upon a consideration of all relevant facts in a particular case (CL 1948, § 213.171 *et seq.*). *Id.*

8. An award by court commissioners in a proceeding to condemn property for highway uses may not be disturbed by the Supreme Court unless palpably contrary to the evidence, the province of the Court being to review the evidence to see that the finding is supported thereby (CL 1948, § 213.171 *et seq.*). *Id.*

9. The court commissioners in a proceeding to condemn property for highway purposes are the judges of the credibility of the witnesses and the truthfulness of their statements (CL 1948, § 213.171 *et seq.*). *Id.*

10. The court commissioners in a proceeding to condemn land for highway purposes hear the testimony, examine the property, consider the estimates placed upon the damages which should be awarded to the respective parties and make a final determination (CL 1948, § 213.171 *et seq.*). *Id.*

11. An award made by court commissioners in a proceeding to condemn land for highway purposes that is within the minimum and maximum amounts of damages, as disclosed by the record, is supported by the evidence (CL 1948, § 213.171 *et seq.*). *Id.* 22.

12. No determination can be made as to what part of a lump-sum award by court commissioners in a proceeding to condemn part of tract of land for highway purposes was based on damages to land and buildings, where the condemnee, operating an arbor and hydraulic press factory, also presented proofs as to expenses occasioned by business interruption and of relocating machinery and equipment and neither party appears to have requested a finding other than a lump-sum award (CL 1948, § 213.171 *et seq.*). *Id.*

13. The persons entrusted with the duty of determining damages in condemnation proceedings are judges of both the law and the facts and are not bound, as to value of property taken, by testimony of witnesses alone, but may exercise their own judgment, based not only on the testimony, but from knowledge gained from view of premises. *Id.*

14. It was not improper for condemnee in proceeding by State highway department to condemn 17% of the area of a 5-acre tract devoted to manufacture of arbor and hydraulic presses, including 4 of the 11 buildings and 40% of the manufacturing floor space to introduce proof of damages in regard to land and buildings (CL 1948, § 213.171 *et seq.*). *Id.*

15. Evidence, presented in proceeding to condemn for highway purposes a portion of 5-acre tract devoted to manufacture of arbor and hydraulic presses, as to expenses occasioned by business interruption, compiled by the condemnee's employees pur-

EMINENT DOMAIN—Continued.

suant to a plan designed to hold the business interruption to a minimum and audited by an independent accounting firm, was properly introduced for consideration as to value and weight by commissioners making the award, where it was not speculative and had a reasonable degree of certainty; it being permissible to recover expenses, but not loss of profits due to interruption of business (Const 1908, art 13, § 1; CL 1948, § 213.171 *et seq.*). *Id.*

16. The landowner's cost of removing and reattaching fixtures, or the purchase of new fixtures, necessitated by condemnation of part of tract devoted to manufacturing operations is a proper element to be included in an award of just compensation (Const 1908, art 13, § 1; CL 1948, § 213.171 *et seq.*). *Id.* 23.
17. It is not the Supreme Court's duty, or right, to assay the weight and value of the evidence introduced in proceeding to condemn land for highway purposes, but rather to determine whether the evidence was of such a nature that it could be properly considered by the court commissioners (CL 1948, § 213.171 *et seq.*). *Id.*
18. Award by court commissioners of $393,296 to manufacturer of arbor and hydraulic presses in proceeding to condemn such a portion of their 5-acre tract as to necessitate removal of the entire productive facility to a new location *held*, within the range of testimony showing a maximum damage of $438,847.13 and minimum of $187,360 (CL 1948, § 213.171 *et seq.*). *Id.*
19. Record on appeal from award to manufacturer of arbor and hydraulic presses for portion of 5-acre tract of land and 4 of 11 buildings condemned for highway purposes *held*, not to have disclosed any circumstances of fraud, misconduct, gross error, mistake, undue influence, partiality, bias, prejudice or unfaithfulness, on the part of the court commissioners or erroneous rejection or admission of testimony affecting the rights of the parties or that damages awarded were either inadequate or excessive, hence, petition for appointment of new commissioners is denied (CL 1948, § 213.171 *et seq.*). *Id.*
20. Statute empowering school districts to condemn private property for use of the district, which provides standards as to disqualifications of jurors for cause, which are sufficient to justify determination of whether or not a proposed juror is in a position to enter a fair and just verdict is constitutional, since it meets all the requirements of the constitutional provisions, peremptory challenges of jurors in civil proceedings not being a requirement of due process (US Const, ams 5, 14; Mich Const 1908, art 2, § 16; art 13, §§ 1, 2; CLS 1956, § 340.714; CL 1948, § 602.19). *Streeh* v. *Blissfield Community Schools District*, 621.
21. Due process of law was accorded defendant property owner so far as selection of jurors was concerned in proceeding to condemn his property by school district, where the circuit judge made a careful examination of the jurors and insisted that defendant property owner have the right to dismiss jurors for cause, there being no right to peremptory challenges accorded by controlling statute (US Const, ams 5, 14; Mich Const 1908, art

EMINENT DOMAIN—Continued.

2, § 16; art 13, §§ 1, 2; CLS 1956, § 340.714; CL 1948, § 602.19). *Id.*

See FRAUD.

ENCROACHMENT—See BOUNDARIES (1).

ENFORCEMENT OF DECREES—See DIVORCE (5); EQUITY (1).

EQUALLY DIVIDED COURT—See RAILROADS; WILLS (1).

EQUIPMENT—See EMINENT DOMAIN (12).

EQUITY.

1. The inherent authority of a court of equity to enforce its own directives, such as property settlement provisions of decrees for divorce, includes the exercise of some discretion in interpreting them, since the court necessarily reserves some latitude to construe the basic intent and purpose of the decreed directive. *Greene* v. *Greene*, 196.
2. A trial court may enter an appropriate supplemental order in an equity case, implementing his former order, so as to resolve the controversy and conclude the litigation, whether or not he is requested to do so by the litigants. *Id.* 197.

See CEMETERIES (1); CONSPIRACY (2); COSTS (5); DIVORCE (5).

ESTATES.

An abutting owner's right of access to a public street or alley is an interest in the land concerned. *Giegling* v. *Helmbold*, 462.

ESTATES OF DECEDENTS.

1. A claimant against the estate of a deceased person for services rendered to the latter has the burden of proof to establish by competent evidence an implied contract obligating the deceased to compensate the claimant for services rendered. *In re Kaiser Estate (Claim of Sullivan)*, 103.
2. A claimant's failure to request compensation for storage of personal effects of deceased during his lifetime is not consistent with her claim that she expected that deceased would compensate her for the services rendered. *Id.* 104.
3. A claimant against an estate of a deceased person raises a contract implied in fact by a showing that when services were performed she, at the time, expected compensation from the decedent who expected to pay therefor, and it is essential that the claimant establish by competent evidence the fair amount of each item for which compensation is claimed. *Id.*
4. Statement of a decedent to a third person evidencing a testamentary intent to leave property to claimant for services latter had rendered without requesting compensation from decedent during his lifetime *held*, insufficient to serve as a basis for an implied contract, the test being whether payment was understood and intended and naturally anticipated. *Id.*
5. An unsigned document in decedent's handwriting which would have left a part of the remainder of his estate to claimant for

ESTATES OF DECEDENTS—Continued.

services rendered by way of storage of personal effects in plaintiff-claimant's apartment, basement and garage *held*, not an admission, where the document contains nothing to indicate writer considered himself obligated in any way to claimant. *Id.*

6. Finding of referee, probate judge and circuit judge that plaintiff had failed to substantiate her claim for services rendered in storage of decedent's personal effects in her apartment, basement and garage *held*, not against the weight of the evidence, statement by decedent to his nephew that claimant knew she would get paid being insufficient to raise implication of intention to make monetary payment, where decedent did painting and carpenter work for claimant. *Id.*
7. Claim of lessor for amounts to become due and payable in the future under 99-year lease for rent, taxes, insurance premiums and expenses for repairs is a liability of deceased lessee upon a fixed and definite contract in writing, and is not a contingent claim, since its existence or nonexistence does not depend upon some future event which may or may not happen, and, therefore, statutory provisions relating to contingent claims have no application (CL 1948, § 708.25 *et seq.*). *National Bank of Detroit* v. *Voigt Estate*, 647.
8. Lessors are not entitled to the cost of making repairs under a 99-year lease which the lessee was obligated to make, as a fifth-class claim against the estate of the deceased lessor, where there is no proof of injury done to the reversion. *Id.*
9. Estimated cost of repairs presently necessary under 99-year lease is ordered to be retained by administrator of estate of deceased lessee who was obligated to make them, to insure payment of the claim if and when it shall become absolute, as the situation at the end of the lease resulting from the failure to make repairs, is now uncertain, inasmuch as the estate may have the repairs made (CL 1948, § 708.26). *Id.* 648.

See COSTS (12); EVIDENCE (1); LANDLORD AND TENANT (4); PAUPERS; WITNESSES.

ESTOPPEL—See CHATTEL MORTGAGES (2); MUNICIPAL CORPORATIONS (3).

EVIDENCE.

1. An answer to hypothetical question to real-estate man as to value of service rendered by claimant to decedent in the storage of some of latter's personal effects in her apartment, basement and garage and for use of her living room, *held*, insufficient to fix value even if implied contract were established, where there was a failure to state the facts with proper accuracy and clarity. *In re Kaiser Estate (Claim of Sullivan)*, 105.
2. The Supreme Court takes judicial notice of the fact that taxicabs in a large city operate day and night and carry to all parts of the area persons who cannot utilize public transportation and that the protection of the public necessitates that a business of such a nature be regulated and controlled by public authorities. *Lorraine Cab* v. *City of Detroit*, 379.

EVIDENCE—Continued.

3. Results of urinalysis, taken and interpreted by experts and which showed an alcoholic content of .20% in defendant's blood from sample of urine voluntarily furnished by defendant *held*, relevant and competent in prosecution for driving a motor vehicle while under the influence of intoxicating liquor, the weight of the opinion of the experts, together with that of the other evidence in the case being for the trier of the facts (CLS 1956, § 257.625). *People* v. *Miller*, 401.

4. The Supreme Court takes judicial notice of what every citizen of the State knows from his daily life. *Lockwood* v. *Commissioner of Revenue*, 517.

See APPEAL AND ERROR (1, 5, 7, 9, 10, 12, 13, 20, 22); AUTOMOBILES (2, 3, 12, 13, 18–20); CEMETERIES (1); CONSPIRACY (1–3); CONTRACTS (2, 3); CORPORATIONS (2, 3); CRIMINAL LAW (4, 5); DAMAGES (2, 3); DEATH (3, 4); DEEDS (1–3, 5); DISCOVERY; DRAINS (8); EMINENT DOMAIN (8, 10, 11, 13–15, 17–19); ESTATES OF DECEDENTS (3, 4, 6); GUARDIAN AND WARD; HOSPITALS; INJUNCTION (5, 8); LABOR RELATIONS (3); MANDAMUS; MORTGAGES (1, 2, 5); MUNICIPAL CORPORATIONS (4); NEGLIGENCE (2, 7–9); NUISANCE (1); PHYSICIANS AND SURGEONS (2); PLEADING (2); REPLEVIN (1, 3); TRIAL (3); WITNESSES; WORK AND LABOR (2); WORKMEN'S COMPENSATION (3, 5).

EXAMINATION—See GARNISHMENT (3).

EXCEPTIONS—See DIVORCE (5).

EXECUTION OF INSTRUMENTS—See CHATTEL MORTGAGES; DEEDS (2–4).

EXECUTORS AND ADMINISTRATORS—See APPEAL AND ERROR (15); DEATH (5); DEEDS (2, 6); ESTATES OF DECEDENTS (9); NEGLIGENCE (12).

EXPECTATION OF TESTAMENTARY BEQUEST—See WORK AND LABOR.

EXPENSES—See EMINENT DOMAIN (15).

EXPERT WITNESSES—See EVIDENCE (3).

EX POST FACTO—See STATUTES (4).

EXTRAS—See APPEAL AND ERROR (5).

FACTORY—See EMINENT DOMAIN (12, 14, 18).

FACTORY EXPEDITER—See MASTER AND SERVANT.

FAILURE OF EITHER PARTY TO PREVAIL—See COSTS (4).

FARMS—See TOWNSHIPS (2).

FEE—See MUNICIPAL CORPORATIONS (4).

FENCES—See JUDGMENT (11); NEGLIGENCE (10, 11).

FIXTURES—See EMINENT DOMAIN (16).

FORECLOSURE—See COSTS (13); MORTGAGES (5, 6).

FORFEITURE—See RECOGNIZANCES.

FORGERY—See CONTRACTS (4).

FOSTER HOME—See DIVORCE (2).

FRACTIONAL LOTS—See BOUNDARIES (4, 5).

FRAUD.

Allegation in bill of complaint to set aside an award in condemnation proceedings on the ground of fraud *held*, not substantiated, where no facts supporting such an allegation are found in the bill and the facts alleged, taken as true, do not constitute fraud, fraud not being presumed. *Strech* v. *Blissfield Community Schools District*, 620.

See APPEAL AND ERROR (15); CEMETERIES; CONSPIRACY (1-3); CONTRACTS (6); COSTS (5); DEEDS (1, 5); DIVORCE (5); EMINENT DOMAIN (19); LIBEL AND SLANDER; LICENSES (2, 4); PHYSICIANS AND SURGEONS (1, 2, 4); RECEIVERS (1).

FULL FAITH AND CREDIT—See CONSTITUTIONAL LAW (7); JUDGMENT (9); STATES.

FUTURE PAYMENTS—See ESTATES OF DECEDENTS (7); LANDLORD AND TENANT (4).

GARAGE KEEPERS—See AUTOMOBILES (19, 20).

GARAGES—See EASEMENTS (3).

GARNISHMENT.

1. The purpose of garnishment is to impound security for satisfaction of a demand but the statute requires the prerequisite of a showing by affidavit that the plaintiff or affiant is justly apprehensive of the loss of the demand unless a writ of garnishment issue (CL 1948, § 628.1). *Johnson* v. *Kramer Bros. Freight Lines, Inc.*, 255.
2. Statute authorizing a court to discontinue garnishment proceedings against the garnishee, or make such other reasonable order as in its discretion seems advisable, does not constitute an unlawful delegation of legislative power to the judicial branch of the government (CL 1948, § 628.41). *Id.*
3. Trial court did not abuse its discretion in dismissing writ of garnishment on claim of $25,000, where principal defendant filed 2 financial statements by its vice-president and comptroller showing total assets of $4,122,331.44, tangible property amounting to $2,278,822.37 and current assets amounting to $1,680,037.66; an opportunity was afforded plaintiff to cross-examine officers of the defendant company; hearings were had before denying plaintiff's motion for discovery; and plaintiff failed to file special interrogatories in regard to the disclosure of the garnishee or to file a demand for an examination of such garnishee before the judge of the court (CL 1948, §§ 628.3, 628.41). *Id.*

GARNISHMENT—Continued.

4. To permit garnishment to stand constitutes an abuse of process, where the principal defendant showed it was well able to respond in damages to the extent of plaintiff's claims. *Id.*
5. Trial court's vacation of judgment against garnishee defendant, a corporation, upon latter's showing by employees' affidavits that the garnishee defendant had, through an error, confused the names of 2 of its creditors and had wrongfully filed a disclosure admitting liability to the principal defendant, when, in fact it owed nothing to that defendant *held*, not an abuse of discretion. *Crew* v. *Zabowsky*, 606.
6. A judgment entered against a garnishee defendant who had filed a disclosure was not a default judgment, since the disclosure constituted an answer, hence, the 4-months' rule applicable to default judgments does not apply (CL 1948, § 628.42; Court Rule No 28, § 4 [1945]). *Id.*
7. Plaintiff's claim that garnishee defendant was guilty of laches in not moving to set aside judgment against it until approximately 5 months had elapsed, not sustained by the trial court, is not upheld by Supreme Court under record showing interim correspondence and negotiation between attorneys for plaintiff and garnishee defendant, hence, order setting aside the judgment and permitting filing of an amended disclosure denying liability is affirmed. *Id.*

GAS—See PUBLIC SERVICE COMMISSIONS (1, 3).

GASOLINE TRACTOR AND TRAILERS—See RAILROADS.

GIFTS—See MUNICIPAL CORPORATIONS (11, 13).

GOLF COURSE—See DRAINS (4).

GOVERNMENT PATENT—See BOUNDARIES (8).

GOVERNMENT SURVEY—See BOUNDARIES (3, 5, 6, 9, 10); PUBLIC LANDS.

GRANDPARENTS—See PAUPERS.

GRAVES—See CEMETERIES (2); RECEIVERS (2).

GRIEVANCES—See CONTRACTS (4); LABOR RELATIONS (2, 3).

GUARDIAN AND WARD.

Order of circuit court remanding case to probate court for further inquiry as to extent of ward's interest in United States savings bonds, of which ward and her daughter appeared on the face thereof to be co-owners, was proper, where there was evidence that the bonds had been purchased with joint funds, that the mother might not be the absolute owner of the bonds notwithstanding they were in her possession at the time of adjudication of her mental incompetency; hence, guardian was properly held not surchargeable with the face amount of the bonds with interest, under record presented, the question of the value of the bonds to the ward not being properly before the circuit court. *In re Schweier*, 191.

See DEEDS (2).

HANDICAPPED PERSONS—See WORKMEN'S COMPENSATION (14).

HAND INJURY—See WORKMEN'S COMPENSATION (16, 17).

HARDWARE—See REPLEVIN (3).

HEALTH.

The legislature has supreme power in matters affecting the public health and may provide for financing of drainage projects in the furtherance thereof in the absence of constitutional limitations. *Township of Southfield* v. *Drainage Board for Twelve Towns Relief Drains (City of Troy* v. *Same)*, 60.

See COSTS (1); DRAINS (1-3, 5, 7).

HEARING—See EMINENT DOMAIN (1); GARNISHMENT (3); JUDGMENT (13); MORTGAGES (6); TAXATION (3, 4).

HIGHWAYS AND STREETS.

A trucker which applied for a license to use Ohio highways and sent its trucks over them submitted itself to the jurisdiction of that State and its highway use tax law (Ohio Rev Code Ann 1958 Supp §§ 5717.02-5717.04, 5728.10, 5728.12). *Ohio Department of Taxation* v. *Kleilch Bros., Inc.*, 504.

See APPEAL AND ERROR (19); AUTOMOBILES (4, 7, 9); COMMERCE; CONSTITUTIONAL LAW (9); EMINENT DOMAIN (7, 10-12, 14, 17); ESTATES; JUDGMENT (13); NUISANCE (3); TAXATION (4).

HOME-RULE CITY—See CONSTITUTIONAL LAW (1); COSTS (8); MUNICIPAL CORPORATIONS (4).

HOSPITAL EXPENSE—See ACTION (2); WORKMEN'S COMPENSATION (7, 8, 12).

HOSPITALS.

Evidence presented in hospital's action against patient for services rendered and in consolidated case of patient against hospital service insurer to recover hospitalization costs, brought in common pleas court of Detroit and appealed to the circuit, *held*, to justify findings of both courts that plaintiff hospital was entitled to recover from patient but latter was not entitled to recover under insurance policy excluding coverage of hospitalization costs arising from industrial injuries or diseases for which an employer was required to make reimbursement (CLS 1956, § 728.4; Court Rule No 77, as added in 1949). *Sinai Hospital of Detroit* v. *Welborn (Welborn* v. *Michigan Hospital Service, Inc.)*, 625.

HUSBAND AND WIFE—See PAUPERS.

HYDRAULIC PRESSES—See EMINENT DOMAIN (12, 14, 15, 18, 19).

HYPOTHETICAL QUESTION—See EVIDENCE (1).

ICE CREAM—See VENDOR AND PURCHASER (1).

ICY PAVEMENT—See AUTOMOBILES (14).

IDENTIFICATION—See INJUNCTION (5, 7).

ILLEGALLY EMPLOYED MINOR—See WORKMEN'S COMPENSATION (2).

IMPAIRMENT OF CONTRACTS—See WORKMEN'S COMPENSATION (10).

IMPEACHMENT—See DISCOVERY.

IMPLIED CONTRACTS—See ESTATES OF DECEDENTS (1, 3, 4); EVIDENCE (1); WORK AND LABOR (1).

IMPLIED EASEMENTS—See EASEMENTS (4).

IMPLIED GRANT OR RESERVATION—See EASEMENTS (1).

IMPLIED REPEAL—See STATUTES (5).

IMPROVEMENTS—See DEEDS (7).

IMPUTED NEGLIGENCE—See AUTOMOBILES (16).

INADEQUACY OF CONSIDERATION—See MORTGAGES (3).

INCUMBENTS—See OFFICERS (2).

INDIANA—See CORPORATIONS; PARTIES.

INDUCEMENT—See CONTRACTS (6).

INDUSTRIAL USELESSNESS—See WORKMEN'S COMPENSATION (16, 17).

INFANTS.

Infants are not barred, by reason of being trespassers, from all rights of recovery against a landowner whose premises contain a hazardous condition of which he had actual or constructive knowledge. *Swanson* v. *City of Marquette*, 424.

See AUTOMOBILES (4); DEATH (1, 3, 5); NEGLIGENCE (10, 11); PLEADING (5); WORKMEN'S COMPENSATION (2).

INJUNCTION.

1. It is essential to a suit to enjoin use of alleged trade secrets by defendant, a manufacturer's agent formerly employed by plaintiff, that plaintiff establish a disclosure in confidence to defendant of certain trade secrets and the wrongful misappropriation of such secrets by defendant to plaintiff's damage. *Insealator, Inc.*, v. *Wallace*, 234.
2. There must be a trade secret before there can be a betrayal thereof that is the subject of injunctive relief, as the law does not protect knowledge so general as to be common property in the trade. *Id.*
3. There is no legally recognizable trade secret in an idea that was well known or easily ascertainable. *Id.*
4. Plaintiff in suit to enjoin alleged improper use of trade secret by defendant who had been its manufacturer's agent in the sale of a stop-leak product for automobile radiators *held*, to have failed to show that ingredients were the same or were used in the same proportion, that the method of production was unique, that packaging was the same or was sold as plaintiff's product. *Id.*

INJUNCTION—Continued.

5. Exclusion of document as to method of operation of defendant corporation, not identified as to authorship or time it was drafted, *held*, proper, in suit to enjoin defendant's use of alleged trade secrets. *Id.*
6. Self-serving declarations were properly excluded in suit to enjoin defendant's use of alleged trade secrets. *Id.*
7. Exhibits that were not identified as exact models in use at time defendant left employ of plaintiff in suit to enjoin defendant's use of alleged trade secrets were properly excluded. *Id.*
8. Exhibit that was shown to have been obtained from the patent office although not certified to by that office was properly admitted to reveal purpose of a patent that had been issued to another person some 27 years before contract had been made between plaintiff and defendant in suit to enjoin latter's use of alleged trade secret. *Id.* 235.

See COSTS (8); COURTS (3); EASEMENTS (3); JUDGMENT (3, 11).

INSTRUCTIONS—See APPEAL AND ERROR (6, 17); AUTOMOBILES (5, 11, 15, 16, 18); CRIMINAL LAW (6); DEATH (3); NEGLIGENCE (12, 13).

INSURANCE—See APPEAL AND ERROR (3); ESTATES OF DECEDENTS (7); HOSPITALS; JURY (1).

INTENT—See CONSTITUTIONAL LAW (9); DRAINS (2); EASEMENTS (4); EQUITY (1); ESTATES OF DECEDENTS (4, 6); STATUTES (11); VENDOR AND PURCHASER (2); WILLS (5, 6, 8).

INTERCOUNTY DRAINS—See DRAINS (8); JUDGMENT (1).

INTEREST—See STATUTES (3).

INTERSECTIONS—See AUTOMOBILES (4, 5, 7, 9–16).

INTERSTATE COMMERCE—See COMMERCE.

INTERVENTION—See PUBLIC SERVICE COMMISSIONS (1, 3).

INTOXICATING LIQUORS—See CRIMINAL LAW (4–6); DEEDS (2–4); EVIDENCE (3); LIBEL AND SLANDER; NEGLIGENCE (12).

INTRACOUNTY DRAINS—See COSTS (1); DRAINS (2, 3, 5); MUNICIPAL CORPORATIONS (2); TOWNSHIPS (1).

INVESTIGATING OFFICER—See AUTOMOBILES (19, 20).

JOINDER—See PARTIES.

JOINT DRIVEWAY—See EASEMENTS (3).

JUDGES—See RECOGNIZANCES (2).

JUDGMENT.

1. *Sua sponte* vacation of judgment for plaintiff intercounty drainage board in its mandamus proceeding to compel defendant railroad company to remove obstruction to intercounty

JUDGMENT—Continued.

drain was proper, where accomplished before plaintiff had made application for leave to appeal from portion of judgment requiring plaintiff to bear 1/2 of the cost of such removal, as the circuit court still had jurisdiction in the proceedings and did not abuse its discretion in taking such action (CLS 1956, §§ 280.421, 280.422). *South Looking Glass Drainage District Board* v. *Grand Trunk Western Railroad Company*, 215.

2. A court of competent jurisdiction requires parties to bring forward their whole case and normally will not permit the same parties to open the same subject of litigation in respect of matter which might have been, but was not, brought forward as part of the subject in contest, only because from negligence, inadvertence or even accident it was omitted. *Shank* v. *Castle*, 290.

3. Plea of *res judicata* was applicable, where plaintiff in action against her parents for damages for breach of agreement relative to custody of her son had, in a previous suit by them for the child's custody, filed a cross bill in which she could have sought an injunction against interference with her custody, which had been awarded to her in a divorce action, as well as damages for such interference, but did not seek such relief. *Id.*

4. Entry of judgment for excess of set-off over plaintiffs' claim was not error under pertinent statutes (CL 1948, §§ 615.5, 615.10). *Lewis* v. *Zukerman*, 326.

5. The parties are precluded from collaterally attacking a judgment on the ground that the court had no jurisdiction over defendant, where he has appeared in the action to object that the court has no jurisdiction over him and the court overrules the objection and judgment is rendered against him. *Johnson* v. *Haley*, 411.

6. Determination by court that it has jurisdiction over defendant is *res judicata*, precluding relitigation, even though such determination be erroneous on the facts or on the law, where the question is raised by specially-appearing defendant and he fails to appeal or final result of appeal is adverse. *Id.*

7. A defendant who appears for the purpose of objecting that the court has no jurisdiction over him thereby submits to the court for its determination the question whether the court has jurisdiction over him that is *res judicata* and a judgment based thereon does not deprive him of property without due process in the absence of a reversal on appeal. *Id.*

8. Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that the matters once tried shall be considered forever settled as between the parties. *Id.*

9. Unappealed determination by California court that it had jurisdiction over the person of specially-appearing defendant made the question *res judicata* in the courts of that State and must be accorded full faith and credit and is not subject to collateral attack in this, the enforcing State (US Const, art 4, § 1). *Id.* 412.

10. The doctrine of *res judicata* applies when the issues and the

JUDGMENT—Continued.

parties or their privies in the prior litigation are identical. *Giegling* v. *Helmbold*, 462.

11. Prior suit in which title to disputed land was quieted in plaintiffs was not *res judicata* of title issue in plaintiffs' suit to enjoin use of such land as a public way and to enjoin interference with fencing thereof, where defendants had not been parties to the prior suit. *Id.*

12. A collateral attack may be made in the courts of this State upon the judgment of a court in another State by showing that the judgment sought to be enforced was void for want of jurisdiction in the court which issued it. *Ohio Department of Taxation* v. *Kleitch Bros., Inc.*, 505.

13. A summary judgment entered by a common pleas court of Ohio was not void for lack of jurisdiction over trucker against whom it was entered for amount of taxes assessed for use of Ohio highways notwithstanding judicial hearing had not been afforded, where Ohio had jurisdiction of the taxpayer by its application for license and opportunities for administrative hearing and appeal afforded by Ohio statutes which led directly to the entry of the judgment (Ohio Rev Code Ann 1958 Supp §§ 5717.02–5717.04, 5728.10, 5728.12). *Id.*

14. A motion to vacate a judgment is addressed to the discretion of the trial court whose order thereon will not be reversed on appeal to the Supreme Court except in the case of a clear abuse of discretion. *Crew* v. *Zabowsky*, 606.

15. A defendant who omits to plead within the time allowed therefor "makes default" and the judgment entered is a judgment by "default." *Id.*

16. The defense of *res judicata* applies not only to issues which were determined on their merits but also to matters which the parties had an opportunity to present for adjudication on the merits. *Strech* v. *Blissfield Community Schools District*, 620.

See CONSTITUTIONAL LAW (7, 9); CONTRACTS (7); GARNISHMENT (6); STATES; TAXATION (1); TRIAL (3).

JUDGMENT NOTWITHSTANDING VERDICT—See NEGLIGENCE (9).

JUDICIAL NOTICE—See CONSTITUTIONAL LAW (10); EVIDENCE (2, 4); STATUTES (15).

JURISDICTION—See CHATTEL MORTGAGES (1); CONSTITUTIONAL LAW (7); COURTS (2); CRIMINAL LAW (2); HIGHWAYS AND STREETS; JUDGMENT (1, 2, 5–7, 9, 12, 13); PUBLIC SERVICE COMMISSIONS (3); WILLS (2).

JURY.

1. Trial judge's refusal to allow questioning at *voir dire* examination as to membership of prospective jurors in any mutual insurance company was not error, where it is undisputed defendant was not represented by a mutual insurance company and the trial judge had been so informed. *Rouse* v. *Gross*, 475.

2. Challenges for cause are necessary in all inquiries by jury, but peremptory challenges in other than criminal proceedings

JURY—Continued.

are confined to cases where the statutes have directly provided for them. *Strech* v. *Blissfield Community Schools District*, 621.

3. It is error to allow a peremptory challenge of a juror in a civil proceeding, where it is not authorized by statute. *Id.*

See EMINENT DOMAIN (20, 21).

KENTUCKY—See PHYSICIANS AND SURGEONS (4).

LABOR RELATIONS.

1. Finding of trial court in suit to enjoin peaceful picketing that plaintiff builder was engaged in a business affecting commerce within the meaning of the national labor management relations act is affirmed, hence, the case is controlled by *Town & Country Motors, Inc.*, v. *Local Union No. 328*, 355 Mich 26, and *Davidson* v. *Michigan State Carpenters Council*, 356 Mich 557 (29 USCA, § 160[a]). *Johnson* v. *Grand Rapids Building & Construction Trades Council*, 1.
2. Exhaustion of grievance procedure provided by union contract with defendant employer was a prerequisite to bringing actions for damages by 2 members of the union for their discharges as breaches of the seniority provisions of such contract. *Spencer* v. *Wall Wire Products Company (Gooch* v. *Same)*, 296.
3. Motions for judgments *non obstante veredicto* in actions for breach of seniority provisions of union contract with defendant employer were properly granted, where evidence failed to support plaintiff's claim that defendant had balked, interfered with and prevented plaintiffs from doing so and that the defense had been waived by defendant's refusal to entertain, process, or discuss plaintiffs' grievances. *Id.* 297.

See CONTRACTS (4); UNEMPLOYMENT COMPENSATION.

LACHES—See GARNISHMENT (7).

LAKES—See BOUNDARIES (5, 9).

LANDLADY—See DEEDS (1, 6).

LANDLORD AND TENANT.

1. The fact that porch of leased premises collapsed while tenant was thereon does not impose liability upon the landlord on theory of nuisance. *Awad* v. *McColgan*, 386.
2. An action in tort cannot be predicated by a tenant upon a breach by the lessor of an agreement to make repairs. *Id.* 387.
3. Tenant's injury on leased premises when dilapidated porch collapsed after landlord had agreed to repair it did not impose liability upon landlord for tort on theory of nuisance. *Id.*
4. Death of the holder of the lessee's interest does not entitle the lessor to additional security or benefits not provided for in the lease and not enjoyed by the lessor during deceased's lifetime, such as having the lessee's assets sequestered or a surety bond furnished to guarantee payments becoming due in the future. *National Bank of Detroit* v. *Voigt Estate*, 647.
5. Injury done to the reversion, not cost of making repairs, is

LANDLORD AND TENANT—Continued.

the measure of damages in an action begun by landlord before termination of the lease. *Id.*

6. The cost of making repairs becomes the measure of damages in an action by the landlord at the expiration of the term of a lease imposing obligation on tenant to make repairs. *Id.* 648.

See COSTS (12); ESTATES OF DECEDENTS (7–9); NEGLIGENCE (7); VENDOR AND PURCHASER (1).

LAST CLEAR CHANCE—See NEGLIGENCE (1).

LEFT HAND—See WORKMEN'S COMPENSATION (16, 17).

LEGISLATURE—See CONSTITUTIONAL LAW (4); DRAINS (1); HEALTH; MUNICIPAL CORPORATIONS (1); SCHOOLS AND SCHOOL DISTRICTS (3).

LIBEL AND SLANDER.

Judgment for plaintiff, who was a deputy police commissioner for 8 years, in his action against newspapers and their publishers for libellous articles charging plaintiff with fraud, corruption, protection of criminals, manipulation of liquor licenses, perjury, trickery and deceit is reversed, where trial judge had failed to inform jury that defendants had a qualified privilege as a matter of law in commenting upon the conduct of a public official. *Lawrence* v. *Fox*, 134.

See COSTS (2).

LICENSES.

1. Generally, a State license to practice a profession creates no vested interest, and the right which the license grants may be withdrawn for proper cause by the authority which granted it. *Latreille* v. *State Board of Chiropractic Examiners*, 441.

2. Material fraud in application for a State license is a proper cause for revocation or suspension. *Id.*

3. The suspension of a professional license until statutory qualifications are met may not be considered as punishment, since it is rather an exercise of the State's discretion as to whether the person is properly qualified to continue holding the license, an exercise of the State's police powers. *Id.*

4. Person who obtained, by fraud, a license to practice as chiropractor never had a legal right so to practice and order suspending his license to do so until he had complied with statutory conditions presently applicable to him deprived him of nothing to which he was entitled (CL 1948, § 338.1 *et seq.*; § 338.157). *Id.*

See COSTS (8); HIGHWAYS AND STREETS; LIBEL AND SLANDER; LIMITATION OF ACTIONS; MUNICIPAL CORPORATIONS (4); PHYSICIANS AND SURGEONS (1, 2, 4, 5); VENDOR AND PURCHASER (1).

LIENS—See CHATTEL MORTGAGES.

LIMITATION OF ACTIONS.

A complaint to, and ensuing hearing by, the State board of chiropractic examiners as to the suspension of a license issued

LIMITATIONS OF ACTIONS—Continued.

by the board is not a cause of action in any of the courts of this State to which the general statute of limitations is applicable (CL 1948, § 338.157; CLS 1956, § 609.13). *Latreille* v. *State Board of Chiropractic Examiners*, 441.

See CRIMINAL LAW (3); PHYSICIANS AND SURGEONS (2, 3).

LUMP-SUM AWARD—See EMINENT DOMAIN (12).

MACHINERY—See EMINENT DOMAIN (12).

MANDAMUS.

1. The Supreme Court's duty on review of mandamus proceeding is to determine whether there is any evidence to support the trial court's findings. *South Looking Glass Drainage District Board* v. *Grand Trunk Western Railroad Company*, 215.
2. Mandamus is a discretionary writ and where there is evidence to support the circuit judge's denial thereof, the Supreme Court will not disturb it. *Id.*

See COSTS (10); DRAINS (8); JUDGMENT (1).

MANUFACTURER'S AGENT—See CONTRACTS (3); INJUNCTION (1).

MANUFACTURING PLANT—See EMINENT DOMAIN (2, 12, 14, 18, 19).

MARKET VALUE—See EMINENT DOMAIN (5).

MARQUETTE—See MUNICIPAL CORPORATIONS (5); PLEADING (5).

MASTER AND SERVANT.

Factual issues in action against foundry company by factory expediter on (1) terms of contract, (2) amount of damages and (3) scope of authority of person who hired plaintiff under an oral contract of employment, submitted to jury *held*, properly determined in favor of plaintiff under record presented. *Keiser* v. *Enterprise Foundry Company*, 159.

See CONTRACTS (4).

MATERIAL AND SUBSTANTIAL BREACH—See DIVORCE (7).

MATRICULATION CERTIFICATE—See PHYSICIANS AND SURGEONS (4).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—See WITNESSES.

MATTERS OF DEFENSE—See CRIMINAL LAW (5).

MAYOR—See MUNICIPAL CORPORATIONS (9).

MEANDER LINE—See BOUNDARIES (7).

MEDICAL EXAMINERS—See CORONERS.

MEDICAL EXPENSE—See ACTION (2); WORKMEN'S COMPENSATION (7, 8, 12).

MENTAL COMPETENCY—See APPEAL AND ERROR (15); DEEDS (2–4); GUARDIAN AND WARD.

METROPOLITAN DISTRICTS—See DRAINS (2).

MICROFILMED NOTES—See AUTOMOBILES (20).

MINORS—See AUTOMOBILES (4); DEATH (1, 3, 5); INFANTS; NEGLIGENCE (10, 11); PLEADING (5); WORKMEN'S COMPENSATION (2).

MISTAKE—See EMINENT DOMAIN (19); GARNISHMENT (5).

MOBILE HOMES—See TOWNSHIPS (2).

MODIFICATION OF DECREE—See APPEAL AND ERROR (1); CEMETERIES (2); COSTS (5); DIVORCE (2, 4, 5, 10–13).

MORTGAGES.

1. It is competent to show by parol that a deed, absolute in form, was in fact made as security for a loan. *Ellis* v. *Wayne Real Estate Company*, 115.
2. The proof required of a plaintiff in a suit to have a deed, absolute in form, declared a mortgage should be clear and convincing and sufficient to overcome the presumption that the instrument truly represents the transaction in its entirety. *Id.*
3. The fact that there was a considerable inadequacy of consideration and the fact that originally the plaintiffs had sought a loan while financially embarrassed are deemed of weight and importance in determining whether a deed, absolute in form, was a mortgage. *Id.*
4. Transaction whereby plaintiffs gave a quitclaim deed to defendants who furnished a consideration of $4,800 and gave plaintiffs the privilege of reacquiring the place for $7,878.47 *held*, to constitute a loan secured by a mortgage, no question of usury having been raised. *Id.*
5. Record in suit by former husband to foreclose mortgage of premises wife had given to him pursuant to decree of divorce *held*, to support findings of trial court that payment had been effected by furnishing of board, room and other services and that plaintiff had not substantiated his claim of any indebtedness to him for anything over and above the amount of the mortgage-secured note and interest, hence, denial of foreclosure was correct. *Werner* v. *Werner*, 671.
6. The failure of the trial court, in denying foreclosure of mortgage that had been given to plaintiff by defendant, his former wife, pursuant to decree of divorce, to provide affirmatively that the mortgage indebtedness had been paid in full and that the mortgage should be canceled and discharged *held*, not ground for foreclosure, where defendant had denied that the mortgage had not been paid, hearing was had primarily on that issue and proceeding is disposed of by requiring inclusion of provision to that effect and for recording of decree. *Id.*

See COSTS (13).

MOTIONS AND ORDERS—See CONTRACTS (7); PUBLIC SERVICE COMMISSIONS (1, 2); TRIAL (3).

MOTION TO DISMISS—See APPEAL AND ERROR (13); DECLARATORY JUDGMENT (1); PLEADING (3–5).

MOTION TO QUASH—See TRIAL (1, 2).

MOTORBOATS—See NEGLIGENCE (12); TRIAL (4).

MOTORCYCLES—See AUTOMOBILES (4, 5).

MUNICIPAL CORPORATIONS.

1. The legislature may, in the absence of constitutional restriction, impose compulsory taxation on a municipal corporation, where the municipality acts as the agency of the State government. *Township of Southfield* v. *Drainage Board for Twelve Towns Relief Drains (City of Troy* v. *Same)*, 60.
2. Mandatory statutory provisions in the drain code are read into and become a part of the charters of cities involved so as to remove the indebtedness resulting from participation in an intracounty drain from statutory or charter limitations (CLS 1956, §§ 280.473, 280.475). *Id.*
3. A municipality cannot be estopped from enforcing a zoning ordinance because of the unauthorized action of its agents and administrative employees in granting permissive authority contrary to the terms of the ordinance. *Township of Blackman* v. *Koller*, 186.
4. Home-rule city's $100 license fee for taxicabs is presumed valid under record devoid of evidence supporting claim that such fee was excessive and unreasonable (Detroit Municipal Code [1945], ch 145, as amended). *Lorraine Cab* v. *City of Detroit*, 380.
5. Allegation of timely notice to city, as owner of electric substation which was specific as to place, time and nature and result of the accident and which gave the city ample notice and opportunity to investigate *held*, sufficient allegation of compliance with pertinent provisions of city charter (Marquette Charter, § 17.5). *Swanson* v. *City of Marquette*, 424.
6. A provision of city charter relative to notice of claim against city for damages for injuries due to tort of city is to be liberally construed. *Id.* 425.
7. Zoning ordinance amendment whereby plaintiffs' property, extending from a busy street to a strictly residential street in the rear, was rezoned as commercial except for 30′ next to the residential street, effecting a commonplace setback line for residential streets *held*, constitutional as well within the discretionary authority of the municipality. *McClain* v. *City of Hazel Park*, 459.
8. The failure to comply with charter requirements as to disposition of city property voided agreement imposing building restriction on vacant city lots which restriction rendered valueless. *Kaplan* v. *City of Huntington Woods*, 612.
9. A city commission, mayor and city clerk may not give away a valuable property right of the city without complying with charter provisions relative to disposition of property, where not for a corporate purpose. *Id.*

MUNICIPAL CORPORATIONS—Continued.

10. No city may loan its credit for any other than a public purpose (Const 1908, art 8, § 25). *Id.*
11. A gift or donation of money or property for a private purpose by a city, such as participation with others in an agreement to restrict the use of city-owned lots to single-family dwellings, violates provisions of the Constitution relative to use of the credit of the State and cities and is *ultra vires* (Const 1908, art 8, § 25; art 10, § 12). *Id.*
12. Charter requirements for the sale of municipal property must be substantially complied with. *Id.* 613.
13. The participation by a city in the imposition of a restrictive agreement relative to the use of city-owned lots which rendered them valueless, with or without consideration and without compliance with charter requirement, resulted in a void agreement. *Id.*

See CONSTITUTIONAL LAW (1); COSTS (8, 11); DRAINS (5); PLEADING (5); TOWNSHIPS (1).

MUTUAL INSURANCE COMPANY—See JURY (1).

NATURAL MONUMENTS—See BOUNDARIES (7–9).

NAVIGABLE WATERS—See BOUNDARIES (5).

NECESSITY—See EMINENT DOMAIN (6).

NEGLIGENCE.

1. The doctrine of last clear chance or subsequent negligence would not apply where plaintiff's contributory negligence continued up to the very point of impact. *Churukian* v. *LaGest*, 174.
2. A plaintiff is not entitled to the benefit of a presumption of freedom from contributory negligence, where there is ample testimony from plaintiff to establish her own negligence. *Id.*
3. One who is merely a volunteer in rendering service to another cannot recover if injured because of negligence, there being no duty other than not to injure him by willful or wanton act. *Pace* v. *Gibson*, 315.
4. One with an interest, who is requested by another's servant to assist in adjusting or fixing an instrumentality, is not a mere volunteer, but is within the rule requiring the exercise of due care and need not show the tort-feasor to have been guilty of willful and wanton misconduct in order to recover for injuries sustained. *Id.*
5. Common carrier's truck driver who was requested by consignee to assist in unloading two 700-pound boxes and was injured by reason of latter's negligence, had an interest along with the carrier in effecting prompt delivery, hence, it may not be said that he was a volunteer chargeable with contributory negligence on basis of having assumed the risk of being injured by ordinary negligence on part of defendant or his employee. *Id.*
6. Common carrier's truck driver who was requested by the consignee of two 700-pound wooden boxes to assist in unloading them and was injured when second box fell as the consignee

NEGLIGENCE—Continued.

and his employee suddenly released it without warning plaintiff, contrary to method that should have been followed, was not guilty of contributory negligence as a matter of law, since he was not bound to anticipate their failure to comply with instructions as to method of unloading. *Id.*

7. Evidence did not preponderate against finding of trial court in nonjury case that defendant bank, as owner, and other defendant, as prospective tenant, were not guilty of negligence in any manner with respect to awning on building which fell and injured plaintiff on adjoining public sidewalk. *Galea* v. *Detroit Wabeek Bank & Trust Company*, 333.

8. The facts in relation to plaintiff's negligence should be very clear to warrant deprivation of a citizen's right to a jury trial. *Stillwell* v. *Grubaugh*, 344.

9. Neither a motion for directed verdict nor for judgment for defendant notwithstanding verdict for plaintiff will be granted on the issue of latter's contributory negligence, where evidence as to it presents a question of fact. *Id.*

10. Declaration stated a cause of action, where it alleged that defendant city maintained an electric substation containing high-voltage wires that constituted a dangerous instrumentality surrounded by a fence or wall with holes in it that made it dangerous to children playing in the vicinity and that such negligence was the proximate cause of injury to plaintiff's 8-year-old son who was severely injured by reason of contact. *Swanson* v. *City of Marquette*, 424.

11. A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by an artificial condition which he maintained, where the place is one upon which the possessor knows or should know children are likely to trespass, the condition involves an unreasonable risk of death or serious bodily harm to such children and the children do not, because of their youth, realize the risk involved in intermeddling in it or in coming within the area, and the utility to the possessor of maintaining the condition is slight as compared to the risk to the young children involved. *Id.*

12. Trial court's charge to jury in action by administrator of estate of passenger on left side of defendant's boat for fatal injuries sustained when driven under low bridge, which carefully stated appellant's theory of defendant's negligence that boat was there driven by intoxicated defendant at a high speed and caused to bank steeply in making a sharp turn to the right, causing fatal injuries, *held*, not reversible for not having been given in language of plaintiff's requests, although subject to some improvement had it contained reference to statutes cited and to the fact that violation of them was negligence *per se*. *Britten* v. *Updyke*, 466.

13. Refusal of trial court to give plaintiff administrator's request to charge pertaining to a presumption of due care on the part of decedent, a passenger on left side of defendant's boat who was fatally injured when boat passed under low bridge, a request to which plaintiff was entitled *held*, nevertheless not reversible error, where jury's verdict specifically found de-

NEGLIGENCE—Continued.

fendant was not guilty of negligence, since the issue of contributory negligence was not reached. *Id.*

See AUTOMOBILES (4, 5, 14, 16); JUDGMENT (2); NUISANCE (2).

NEITHER PARTY PREVAILING IN FULL—See COSTS (12).

NEWSPAPERS—See LIBEL AND SLANDER.

NEW TRIAL—See APPEAL AND ERROR (16, 18); COSTS (2); DEATH (3).

NIGHTTIME—See AUTOMOBILES (8).

NOISE—See NUISANCE (3).

NONJURY CASE—See APPEAL AND ERROR (5, 9, 10); CONTRACTS (2); NEGLIGENCE (7); REPLEVIN (1); TRIAL (3); WORK AND LABOR (2).

NONRESIDENT—See COSTS (9).

NOTICE—See CONTRACTS (6, 7); CRIMINAL LAW (2); DRAINS (3); MUNICIPAL CORPORATIONS (5, 6); OFFICERS (1); PHYSICIANS AND SURGEONS (5); PLEADING (5); REPLEVIN (2).

NUISANCE.

1. Plaintiff, injured from fall of awning from defendants' building, while he was passing on public sidewalk, failed to establish an action for injuries due to nuisance, where it appears the awning came down suddenly through the deliberate intervention of some human agency. *Galea* v. *Detroit Wabeek Bank & Trust Company*, 333.
2. Negligence is not necessary to nuisance. *Awad* v. *McColgan*, 386.
3. Nuisance comprehends interference with an owner's reasonable use and enjoyment of his property by means of smoke, noise, vibration, obstruction of private easements and rights of support, interference with public rights such as free passage along streams and highways, enjoyment of public parks and places of recreation, or activities and structures prohibited as statutory nuisances, and it may be either public or private. *Id.*

See LANDLORD AND TENANT (1, 3).

OBSTRUCTION—See DRAINS (8); JUDGMENT (1).

OFFICERS.

1. Those dealing with public officials must take notice of their powers. *Kaplan* v. *City of Huntington Woods*, 613.
2. The incumbent of a public office has no vested property interest therein. *Robbins* v. *Wayne County Board of Auditors*, 663.

See CORPORATIONS; COUNTIES (2); GARNISHMENT (3); LIBEL AND SLANDER; MUNICIPAL CORPORATIONS (9); PARTIES; SCHOOLS AND SCHOOL DISTRICTS (1); WORDS AND PHRASES.

OHIO—See APPEAL AND ERROR (19); HIGHWAYS AND STREETS; JUDGMENT (13); STATES; TAXATION (1, 4).

OKLAHOMA—See CHATTEL MORTGAGES (2).

OPINIONS—See COURTS (9).

OPINION TESTIMONY—See EVIDENCE (3).

ORAL CONTRACTS—See CONTRACTS (6, 7).

ORDER OF DETERMINATION—See DRAINS (7).

ORDINANCES—See COSTS (8); MUNICIPAL CORPORATIONS (3, 7); TOWNSHIPS (2).

OTHER STATES—See ACTION (1); CONSTITUTIONAL LAW (7); COURTS (2); JUDGMENT (12).

OVERREACHING—See DEEDS (5).

OWNERS—See NEGLIGENCE (7).

OWNERSHIP—See GUARDIAN AND WARD; UNITED STATES; WATERS AND WATERCOURSES.

PACKAGING—See INJUNCTION (4).

PAIN AND SUFFERING—See DAMAGES (2).

PAPER MANUFACTURER—See WORKMEN'S COMPENSATION (4, 5).

PARENT AND CHILD.

An adult child may be ordered to contribute to the support of parent under proper circumstances (CL 1948, § 401.1 *et seq.*, as amended). *Thompson* v. *Ogemaw County Board of Road Commissioners*, 482.

See DEATH (1–3, 5); GUARDIAN AND WARD; JUDGMENT (3); PAUPERS; WORKMEN'S COMPENSATION (2, 3).

PARKS—See DRAINS (4); NUISANCE (3).

PAROL EVIDENCE—See MORTGAGES (1).

PARTIES.

There was not an improper joinder of parties defendant by plaintiff creditor where a single cause of action was asserted against defendants who were alleged and proved to be officers or directors of newly-formed Indiana corporation and had not complied with provisions of Indiana statute imposed as a condition precedent to the right to do business as a corporation (Indiana Acts 1929, ch 215, § 20). *Pullum Window Corporation* v. *Feldstein*, 83.

See JUDGMENT (10, 11); QUIETING TITLE; WILLS (2).

PASSENGERS—See AUTOMOBILES (1–3, 13, 14, 16); CARRIERS; NEGLIGENCE (12); TRIAL (4).

PATENTS—See INJUNCTION (8).

PAUPERS.

Claims for reimbursement, filed against the estate of a deceased person, for sums expended by State and county in the care of

PAUPERS—Continued.

indigent, adult, emancipated children of decedent as public charges while inmates of mental hospitals for periods of time decedent is stipulated as not "being of sufficient ability" to pay are disallowed, the liability of the patient, spouse, parent, grandparent or child for such support being limited to such as have sufficient ability to pay at time such expenses are incurred, not as of the time a claim therefor is presented (CL 1948, § 330.21, as amended by PA 1957, No 313). *In re Van Etten Estate (Department of Revenue* v. *Selander)*, 206.

PAVEMENT—See AUTOMOBILES (14).

PAYMENT—See DIVORCE (12); MORTGAGES (5, 6).

PECUNIARY INJURY—See DEATH (1).

PEDESTRIANS—See AUTOMOBILES (17, 20).

PENAL LAWS—See CORPORATIONS (1); COURTS (2).

PENALTY—See STATUTES (4).

PEREMPTORY CHALLENGES—See EMINENT DOMAIN (20, 21); JURY (2, 3).

PERJURY—See LIBEL AND SLANDER.

PERMANENT DISABILITY—See WORKMEN'S COMPENSATION (14, 16).

PETITIONS—See DRAINS (3).

PHYSICAL FACTS—See AUTOMOBILES (19).

PHYSICIANS AND SURGEONS.

1. Finding of trial court that plaintiff's license to practice as a chiropractor had been obtained by fraud *held*, fully justified by record showing false statement in application which then exempted him from taking basic science examination (CL 1948, § 338.1 *et seq.*) *Latreille* v. *State Board of Chiropractic Examiners*, 440.
2. The State board of chiropractic examiners acted within a specific statutory grant of power in suspending plaintiff's license as a chiropractor, where it suspended his license because it had been procured by amply proven fraud some 7 years before complaint, and pertinent statute does not contain a time limitation for suspension for such cause (CL 1948, § 338.157). *Id.*
3. The continuing responsibility of the State board of chiropractic examiners to see to it that only qualified persons practice prevents the application of the general statute of limitations to proceedings to suspend a license issued by the board (CL 1948, § 338.157; CLS 1956, § 609.13). *Id.* 441.
4. A license to practice as a chiropractor, granted upon reciprocity in such matters with Kentucky, was properly suspended for noncompliance with basic science act, where fraud involved a forged matriculation certificate indicating alternative to basic

PHYSICIANS AND SURGEONS—Continued.

science examination was applicable (CL 1948, § 338.1 *et seq.*; § 338.157). *Id.*

5. Complaint and notice to plaintiff as to proceeding to suspend his license to practice as chiropractor until he had passed basic science examination *held*, to have been signed by proper parties and to have been sufficiently informative to meet requirements of the statute relative to suspending his license and to apprise him of the nature of the charge against him (CL 1948, § 338.1 *et seq.*; § 338.157). *Id.* 442.

See LICENSES (4); LIMITATION OF ACTIONS.

PICKETING—See LABOR RELATIONS (1); UNEMPLOYMENT COMPENSATION.

PIPE LINE COMPANY—See PUBLIC SERVICE COMMISSIONS (1, 3).

PLAYGROUND—See COSTS (11); WILLS (1).

PLEADING.

1. A right of recovery may be pleaded and proved on different grounds of liability in more than 1 count. *Pullum Window Corporation* v. *Feldstein*, 83.
2. A pleader may state his case in as many ways as he sees fit in separate counts in order to meet any possible phase of evidence, and he will not be required to elect on which count he will proceed. *Id.*
3. The defense of *res judicata* may be raised by a motion to dismiss a declaration which incorporates the former adjudication (Court Rule No 18, § 1[e] [1945]). *Shank* v. *Castle*, 290.
4. The affirmative defense of failure to exhaust grievance remedies provided by contract between defendant employer and union of which plaintiffs were members was properly raised by defendant's answers, no waiver having resulted from defendant's failure to make a motion to stay or to dismiss before trial. *Spencer* v. *Wall Wire Products Company (Gooch* v. *Same)*, 297.
5. Allegations in declarations in actions for injuries to 8-year-old boy by reason of his contact with high voltage wires in electrical substation that it was a city public utility operated for profit, and as such not subject to charter requirements as to notice of claim, must be accepted on its face in determining whether to grant or deny motion to dismiss (Court Rule No 18, § 3 [1945]; Marquette Charter, § 17.5). *Swanson* v. *City of Marquette*, 425.

See APPEAL AND ERROR (13, 18); CONTRACTS (6, 7); FRAUD; JUDGMENT (15); NEGLIGENCE (10); TRIAL (1, 2).

POLICEMEN—See AUTOMOBILES (19, 20); LIBEL AND SLANDER.

POLICE POWER—See LICENSES (3); WORKMEN'S COMPENSATION (10).

POLICY—See CONSTITUTIONAL LAW (5).

PORCH—See LANDLORD AND TENANT (1, 3).

POSSESSION—See REPLEVIN (3, 4).

POSSIBILITY OF REVERTER—See DEEDS (7).

PRECATORY WORDS—See WILLS (6).

PREFERENCES—See DIVORCE (1).

PREJUDICE—See APPEAL AND ERROR (15, 17); DRAINS (7); EMINENT DOMAIN (19); TRIAL (4).

PREPONDERANCE OF EVIDENCE—See APPEAL AND ERROR (9, 10, 20); CONTRACTS (2, 3).

PRESS OPERATOR—See WORKMEN'S COMPENSATION (17).

PRESUMPTIONS—See CONSTITUTIONAL LAW (13); FRAUD; MORTGAGES (2); MUNICIPAL CORPORATIONS (4); NEGLIGENCE (2, 13); STATUTES (1); VENDOR AND PURCHASER (2); WILLS (4).

PRETRIAL BRIEF—See COURTS (1); EMINENT DOMAIN (1).

PRISONS—See CRIMINAL LAW (3).

PRIVILEGES—See VENDOR AND PURCHASER (2).

PROBATE COURT—See ESTATES OF DECEDENTS (6); GUARDIAN AND WARD.

PROCESS—See COURTS (6, 7); GARNISHMENT (4); TAXATION (1); TRIAL (2).

PROFESSIONS—See LICENSES (1).

PROFITS—See CONTRACTS (3); EMINENT DOMAIN (15).

PROPERTY—See COVENANTS; INJUNCTION (2); MUNICIPAL CORPORATIONS (9, 11–13); OFFICERS (2); TAXATION (6); VENDOR AND PURCHASER (2).

PROPERTY SETTLEMENT—See COSTS (13); DIVORCE (5–8, 10).

PROSECUTING ATTORNEY—See CRIMINAL LAW (2); WILLS (2).

PROXIMATE CAUSE—See AUTOMOBILES (5, 16); NEGLIGENCE (10); NUISANCE (1).

PUBLIC FUNDS—See COUNTIES (1); DRAINS (1).

PUBLIC HEALTH—See COSTS (1); DRAINS (2, 3, 5, 7); HEALTH.

PUBLIC LANDS.

A plat of United States government survey, together with the field-notes, lines, descriptions and land-marks, are as much a part of the grant as if the descriptive features were written in the deed or grant and not open to challenge by any collateral attack in the courts. *Poch* v. *Urlaub*, 263.

PUBLIC MONEY—See CONTRACTS (5).

PUBLIC POLICY—See CONSTITUTIONAL LAW (5, 8); JUDGMENT (8).

PUBLIC PURPOSE—See MUNICIPAL CORPORATIONS (10).

PUBLIC QUESTION—See COSTS (1, 7, 8, 10, 11).

PUBLIC SERVICE COMMISSIONS.

1. Pipe line company, which had first been granted a certificate to sell natural gas to a single customer and after intervenor distributor had appealed to circuit court which took additional testimony and returned it with case to commission, whereupon application was denied, was an aggrieved party by such denial and had a right of appeal from such ultimate order of denial (CL 1948, §§ 460.4, 460.506). *Panhandle Eastern Pipe Line Company* v. *Public Service Commission*, 282.
2. An order of the public service commission is reviewable by party who is aggrieved thereby, irrespective of the fact that it may be termed a "negative order," as the pertinent statute does not make appealability dependent upon whether the certificate or authority sought was granted or denied (CL 1948, §§ 460.4, 460.506). *Id.*
3. Questions raised by plaintiff pipe line company on appeal from circuit court order denying, for asserted lack of jurisdiction, such plaintiffs right to review order of public service commission which had rescinded a previous order granting plaintiff's application to sell natural gas to a single customer after intervenor distributor's appeal of such previous order and remand to commission, are not discussed, since such matters must first be determined by the circuit court which had erroneously dismissed the appeal from the commission's second order (CL 1948, §§ 460.4, 460.506). *Id.*

PUBLIC UTILITY—See PLEADING (5).

PUBLIC WELFARE—See COUNTIES (2).

PULPWOOD—See WORKMEN'S COMPENSATION (4).

QUALIFIED PRIVILEGE—See LIBEL AND SLANDER.

QUANTITY—See BOUNDARIES (7, 10).

QUASI-EASEMENTS—See EASEMENTS (4).

QUESTION FOR TRIER OF FACTS—See APPEAL AND ERROR (10); AUTOMOBILES (9, 14); DRAINS (8); EVIDENCE (3); REPLEVIN (1).

QUESTIONS REVIEWABLE—See APPEAL AND ERROR (4, 8, 18); PUBLIC SERVICE COMMISSIONS (3).

QUIETING TITLE.

A decree quieting title does not extinguish the property rights of persons not made parties to the action. *Giegling* v. *Helmbold*, 462.

See JUDGMENT (11).

RACIAL DISCRIMINATION—See WILLS (1).

RADIATORS—See INJUNCTION (4).

RAILROADS.

Directed verdict and judgment for defendant railroad company in action by truck driver for personal injuries received when his tractor and trailers, loaded with 7,890 gallons of gasoline, were struck at railroad crossing is affirmed by a court equally divided as to whether or not plaintiff was guilty of contributory negligence as a matter of law under circumstances presented (CLS 1956, § 257.669). *Johnson* v. *New York Central Railroad Company*, 40.

See DRAINS (8); JUDGMENT (1).

RECEIVERS.

1. Appointment of receiver for 2 corporations involved in alleged conspiracy and fraud against plaintiffs *held*, not an abuse of discretion under record presented showing the financial future appears to be unencouraging. *Harvey* v. *Lewis*, 305.

2. Order authorizing receiver's sale of assets of cemetery association is modified to provide that any sale of the real estate shall be subject to the condition that existing graves shall not be disturbed, proceedings for the vacation of a burying ground being subject to statute (CL 1948, § 456.21). *Id.* 306.

See CEMETERIES (2).

RECIPROCITY—See PHYSICIANS AND SURGEONS (4).

RECOGNIZANCES.

1. Trial judge who forfeited full amount of bail bond for non-appearance of accused at time of opening day of court and at time of trial did not abuse discretion in not limiting amount of judgment to amount of out-of-pocket loss suffered by county on account of accused's failure of timely appearance for trial (CL 1948, § 765.28). *People* v. *Heflin (Appeal of Michigan Surety Company)*, 162.

2. Judge before whom person accused of crime failed to make timely appearance was not disqualified from conducting proceedings relative to forfeiture of the bond, especially where it shows various means were used in attempting to apply pressure on the judge in favor of relief from the recognizance (CL 1948, § 765.28). *Id.*

RECORD—See APPEAL AND ERROR (13, 15); AUTOMOBILES (3); CONTRACTS (7); DEEDS (2); DIVORCE (2); EMINENT DOMAIN (11); GARNISHMENT (7); MASTER AND SERVANT; PHYSICIANS AND SURGEONS (1); RECEIVERS (1); STATES; WORKMEN'S COMPENSATION (4, 16).

RECORDING—See MORTGAGES (6).

REDEMPTION—See UNITED STATES.

REFEREE—See ESTATES OF DECEDENTS (6).

REFRESHING RECOLLECTION—See AUTOMOBILES (19, 20).

REHEARING—See DRAINS (7).

REMARRIAGE—See DIVORCE (12).

REMEDY—See ACTION (1); CORPORATIONS (1); WORKMEN'S COMPENSATION (1, 9, 12).

RENT—See ESTATES OF DECEDENTS (7).

REPAIRS—See ESTATES OF DECEDENTS (7–9); LANDLORD AND TENANT (2, 3, 6).

REPEAL—See STATUTES (8).

REPLEVIN.

1. Finding of trial court in nonjury case that an oral demand had been made against defendant before starting replevin action for return of the goods is not disturbed on appeal, where issue was one of fact under evidence presented. *Van Dyk* v. *Utter*, 329.
2. The plaintiff's failure to file original of bond in replevin action with clerk of court until time of trial afforded no ground for dismissal of action, especially where a bond had been procured and given to the deputy sheriff and notice of the amount and names of the sureties sent to the clerk and defendant's attorneys. *Id.*
3. Plaintiff seller of hardware merchandise under title-retaining contract which also provided that the goods were to be kept by the buyer who was to use it "in his possession in the city of Grand Rapids" was not to be denied relief by way of replevin by virtue of sale of the property at auction, where testimony as to plaintiff's knowledge of such sale was in conflict and trial court gave judgment to plaintiff for balance due after deducting appraised amount of property returned under writ. *Id.*
4. The right to bring replevin cannot be destroyed by defendant wrongfully transferring possession of the property. *Id.*

See COSTS (6, 9).

REPORTS—See AUTOMOBILES (19, 20).

REQUEST FOR PAYMENT—See ESTATES OF DECEDENTS (2).

REQUEST TO CHARGE—See AUTOMOBILES (15, 17, 18); CRIMINAL LAW (6); NEGLIGENCE (12, 13); TRIAL (5).

RESCISSION—See VENDOR AND PURCHASER (1).

RESIDENCES—See MUNICIPAL CORPORATIONS (7); TOWNSHIPS (2); WILLS (2).

RESIDUE—See WILLS (9).

RES JUDICATA—See JUDGMENT (2, 3, 6, 7, 9–11, 16); PLEADING (3).

RESTORATION OF REMEDY—See ACTION (2); STATUTES (9, 10).

RETROACTIVE EFFECT—See STATUTES (4).

RETROACTIVE STATUTES—See STATUTES (11, 12); WORKMEN'S COMPENSATION (8, 10, 12).

REVERSION—See ESTATES OF DECEDENTS (8); LANDLORD AND TENANT (5); STATUTES (17).

REVERTER—See DEEDS (7).

REVOCATION—See LICENSES (2).

RIGHT-HANDED JOB—See WORKMEN'S COMPENSATION (17).

RIGHT OF RE-ENTRY—See DEEDS (7); STATUTES (17).

RIGHT-OF-WAY—See AUTOMOBILES (6–8, 14, 15).

ROUTE—See CARRIERS; DRAINS (7).

RULES AND REGULATIONS—See CARRIERS; UNITED STATES.

SALES—See CEMETERIES (2); CHATTEL MORTGAGES (1); INJUNCTION (4); RECEIVERS (2); REPLEVIN (3); VENDOR AND PURCHASER (2).

SALES TAX—See CONSTITUTIONAL LAW (9); TAXATION (5, 6).

SALES TAX MONEYS—See DRAINS (1).

SAVING CLAUSE—See STATUTES (6).

SAVINGS BONDS—See GUARDIAN AND WARD; UNITED STATES.

SCHOOLS AND SCHOOL DISTRICTS.

1. An annexed school district must retain its legal entity, and the officers of the district their official duties and responsibilities, for the purpose of winding up the affairs of the district, from and after an official and valid declaration of annexation (CLS 1956, §§ 340.431, 340.440). *Board of Education of Presque Isle Township School District No. 8* v. *Presque Isle County Board of Education*, 148.
2. The board of education of an annexed school district after an order of annexation by the county school board following a period of nonoperation of a school for more than 2 years may, incident to winding up the affairs of the school district, file a bill for declaration of rights as to validity of the necessary transfers and conveyances of property (CLS 1956, §§ 340.431, 340.440). *Id.*
3. The legislature has plenary power over the schools and school districts of the State, subject only to constitutional restraint. *Id.*
4. Allegation that annexed school district had the continued obligation to provide for the education of its children and the right to administer the affairs of such district subject only to the loss of such financial benefits as may be appropriated by the State legislature *held*, not to have stated a cause of action in that it involved an erroneous interpretation of statute making compulsory the annexation of a school district to one or more operating districts where it has not operated a school for 2 or more years (CLS 1956, §§ 340.431, 340.440). *Id.*

See CONSTITUTIONAL LAW (1); COSTS (3); DEEDS (7); EMINENT DOMAIN (20, 21).

SCRAP IRON BALER—See WORK AND LABOR (2).

SECOND-INJURY FUND—See WORKMEN'S COMPENSATION (13–15).

SECOND OFFENSE—See STATUTES (4).

SECRET TESTIMONY—See COURTS (3).

SELF-SERVING DECLARATIONS—See INJUNCTION (6).

SENIORITY—See CONTRACTS (4); LABOR RELATIONS (2, 3).

SEQUESTRATION OF ASSETS—See LANDLORD AND TENANT (4).

SERVICE OF PROCESS—See TRIAL (2).

SERVICE OF WARRANT—See CRIMINAL LAW (3).

SETBACK LINE—See MUNICIPAL CORPORATIONS (7).

SET-OFF AND RECOUPMENT—See APPEAL AND ERROR (5); JUDGMENT (4).

SETTING ASIDE DEED—See APPEAL AND ERROR (15); DEEDS (1, 2, 6).

SETTING ASIDE DEFAULT—See GARNISHMENT (6).

SHALL—See WORDS AND PHRASES.

"SHARE IN MY ESTATE"—See WILLS (9).

SHERIFFS AND CONSTABLES—See AUTOMOBILES (20); REPLEVIN (2).

SHORE LINE—See BOUNDARIES (5); WATERS AND WATERCOURSES.

SIDEWALKS—See NEGLIGENCE (7); NUISANCE (1).

SMOKE—See NUISANCE (2).

SPECIAL APPEARANCE—See JUDGMENT (6, 9); TRIAL (1, 2).

SPECIAL ASSESSMENT—See DRAINS (4).

SPECIAL INTERROGATORIES—See GARNISHMENT (3).

SPECIAL USE—See EMINENT DOMAIN (4, 5).

SPECIFICATIONS—See APPEAL AND ERROR (4).

SPECIFIC LOSS—See WORKMEN'S COMPENSATION (17).

SPECULATION—See EMINENT DOMAIN (15).

SPEED—See AUTOMOBILES (3, 4, 7, 8, 14); NEGLIGENCE (12).

STARTING POINTS—See BOUNDARIES (1).

STATES.

A summary judgment, entered by an Ohio common pleas court pursuant to Ohio tax statute, even though not a "judgment" in a judicial proceeding is, at least, a record entitled to full faith and credit by courts of this State (US Const, art 4, § 1). *Ohio Department of Taxation* v. *Kleitch Bros., Inc.*, 505.

See CONSTITUTIONAL LAW (9); JUDGMENT (12); PAUPERS.

STATUTE OF LIMITATIONS—See CRIMINAL LAW (3); LIMITATION OF ACTIONS; PHYSICIANS AND SURGEONS (3).

STATUTES.

1. A statute is presumed to be constitutional. *Johnson* v. *Kramer Bros. Freight Lines, Inc.*, 254.
2. The interpretation to be given a particular word in one section of an act is arrived at after due consideration is given to every other section so as to produce, if possible, a harmonious and consistent enactment as a whole. *Lorraine Cab* v. *City of Detroit*, 379.
3. The Supreme Court is not bound by an administrative body's interpretation of its own empowering act but does give it respectful consideration as a factor in arriving at the probable legislative intent. *Id.* 380.
4. Fact that statute was amended to provide a more severe penalty for second offense of driving motor vehicle while defendant was under the influence of intoxicating liquor after first offense had been committed is not construed as having a retroactive effect, in prosecution of the second offense, since it is the subsequent offense which is punished more harshly, not the first (CLS 1956, § 257.625). *People* v. *Miller*, 401.
5. An amendatory act has a repealing force, by the mechanics of legislation, different from that of an independent statute, repugnancy not being an essential element of implied repeal of specifically amended sections, since the original ceases to exist and the section as amended supersedes the original and becomes a part of the statute for all intents and purposes as if the amendment had always been there and the portions carried over have their force from the new act and not the former. *Lahti* v. *Fosterling*, 578.
6. The effect of an act amending a specific section of a former act, in the absence of a saving clause, is to strike the former section from the law, obliterate it entirely and substitute the new section in its place. *Id.* 579.
7. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it. *Id.*
8. There can be no vested right in an existing law which precludes its change or repeal. *Id.*
9. No right is destroyed when the law restores a remedy which had been lost. *Id.*
10. The legislature may restore a remedy it had theretofore revoked. *Id.*
11. Courts must look to the facts and circumstances surrounding the adoption of an amendatory act to determine whether or not the legislature intended it to be retroactive. *Id.*
12. A court is reluctant to interpret statutes retrospectively but does do so when the amendment applies to remedies and not to substantive law. *Id.* 580.
13. Classification for the purpose of legislation must not be arbitrary and is not reviewable unless palpably arbitrary and unreasonable, and it may rest on narrow distinctions. *Verberg* v. *Simplicity Pattern Company*, 636.

STATUTES—Continued.

14. The existence of any state of facts that can reasonably be conceived must be assumed in order to sustain a legislative classification. *Id.* 637.

15. One who assails a legislative classification must carry the burden of showing the action is arbitrary by a resort to common knowledge or other matters which must be judicially noticed. *Id.*

16. A State may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses. *Id.*

17. Statute providing for conveyance of the reversionary interest in lands conveyed on a condition subsequent either before or after the right of re-entry became effective but also providing such statute should not affect any such interest created before the statute took effect altered the common-law rule only as to transactions occurring after the effective date of the statute (PA 1931, No 219). *Schoolcraft Community School District No. 50* v. *Burson,* 682.

See ACTION (1, 2); APPEAL AND ERROR (19–21); AUTOMOBILES (6–8, 13, 17–20); BOUNDARIES (4); CARRIERS; CHATTEL MORTGAGES (2); CONSTITUTIONAL LAW (5, 13); CORONERS; CORPORATIONS; COSTS (3, 10); COUNTIES; CRIMINAL LAW; DEATH; DECLARATORY JUDGMENT (2); DIVORCE (1, 2); DRAINS (1–5, 7, 8); EMINENT DOMAIN (1, 7–12, 14–21); ESTATES OF DECEDENTS (7, 9); EVIDENCE (3); GARNISHMENT (1–3, 6); HIGHWAYS AND STREETS; HOSPITALS; JUDGMENT (1, 4, 13); JURY (2); LICENSES (3, 4); LIMITATION OF ACTIONS; MUNICIPAL CORPORATIONS (2); NEGLIGENCE (12); PARENT AND CHILD; PARTIES; PAUPERS; PHYSICIANS AND SURGEONS; PUBLIC SERVICE COMMISSIONS; RAILROADS; RECEIVERS (2); RECOGNIZANCES; SCHOOLS AND SCHOOL DISTRICTS (1, 2, 4); TAXATION (1, 4–6); UNEMPLOYMENT COMPENSATION; WITNESSES; WORKMEN'S COMPENSATION.

STEELWORKERS—See UNEMPLOYMENT COMPENSATION.

STEPGRANDDAUGHTER—See DEEDS (6).

STIPULATIONS—See PAUPERS.

STOCK AND STOCKHOLDERS—See CEMETERIES (2); CONTRACTS (2).

STOP-LEAK—See INJUNCTION (4).

STOPPING—See AUTOMOBILES (4, 6–8, 12, 14).

STOP SIGN—See AUTOMOBILES (13).

STORAGE—See ESTATES OF DECEDENTS (2, 5, 6); EVIDENCE (1); WORK AND LABOR (1).

STREAMS—See NUISANCE (3).

STRIKE—See UNEMPLOYMENT COMPENSATION.

STUMPAGE—See WORKMEN'S COMPENSATION (4).

SUBSEQUENT NEGLIGENCE—See NEGLIGENCE (1).

SUFFOCATION—See WORKMEN'S COMPENSATION (2, 3).

SUMMARY PROCEEDING—See APPEAL AND ERROR (19); TAXATION (1, 4).

SUPERVISORS, BOARD OF—See CORONERS; COUNTIES (2).

SUPPLEMENTAL ORDER TO END LITIGATION—See EQUITY (2).

SUPPORT—See PAUPERS.

SUPPORT OF PARENT—See DEATH (2, 3); PARENT AND CHILD.

SUPREME COURT—See APPEAL AND ERROR (2, 4, 7, 9–15, 18, 21); DAMAGES (3); DEEDS (2, 5); DIVORCE (12); EMINENT DOMAIN (8, 17); EVIDENCE (2, 4); GARNISHMENT (7); JUDGMENT (14); MANDAMUS; STATUTES (3); WORKMEN'S COMPENSATION (16).

SURVEYORS—See BOUNDARIES (1, 2).

SUSPENSION OF LICENSE—See LICENSES (2–4); LIMITATION OF ACTIONS; PHYSICIANS AND SURGEONS (2, 4, 5).

SYNDICATE—See CONSPIRACY (1).

TAXATION.

1. Claim that terms of Ohio statute relative to taxation of truckers had not been complied with in that defendant trucker had not been served with process issuing out of an Ohio court prior to entry of judgment therein, based upon defendant's return, *held*, without merit, where Ohio statute contains no requirement that the trucker be served with such process, a summary proceeding for taxation purposes being utilized (Ohio Rev Code Ann 1958 Supp §§ 5717.02–5717.04, 5728.10, 5728.12). *Ohio Department of Taxation* v. *Kleitch Bros., Inc.*, 504.
2. Proceedings to enforce tax claims, generally summary in nature, and which customarily reduce the claim to lien and execution without any judicial proceedings whatever are not invalid for lack of due process, since due process of law does not necessarily include judicial process. *Id.* 505.
3. Due process of law does not necessarily require a judicial hearing in matters of taxation, if at some stage in the proceedings the parties affected have an opportunity to be heard. *Id.*
4. An Ohio statute which provided all the requirements of due process with respect to the taxation of truckers which used Ohio highways and provided such requirements prior to the point where the statute called for entry of a summary judgment in an Ohio court, may not be said to be unconstitutional for lack of a judicial hearing (Ohio Rev Code Ann 1958 Supp §§ 5717.02–5717.04, 5728.10, 5728.12). *Id.*
5. Statute, amending the use tax act and providing for the levy and collection of a 1% tax upon use of tangible personal property to be collected by the seller in addition to a 3% sales tax, is construed as exceeding the 3% limitation upon sales

TAXATION—Continued.

taxes set forth in the present sales tax diversion amendment to the Constitution (Const 1908, art 10, § 23, as amended in 1954; CL 1948, §§ 205.93, 205.95–205.97, as amended by PA 1959, No 263). *Lockwood* v. *Commissioner of Revenue*, 517.

6. Provisions of act, amending the use tax act, whereby an additional 1% specific tax is levied upon transactions occurring within this State, that is measured by the same price paid for the article as the 3% sales tax, and is paid at the same time, and whereby the tax burden of the consumer of tangible personal property is intended to be increased *held*, unconstitutional as violative of provision of Constitution limiting sales taxes to 3% (Const 1908, art 10, § 23, as amended in 1954; CL 1948, §§ 205.93, 205.95–205.97, as amended by PA 1959, No 263). *Id.* 518.

See COMMERCE; CONSTITUTIONAL LAW (1, 2, 9, 10); ESTATES OF DECEDENTS (7); HIGHWAYS AND STREETS; JUDGMENT (13); MUNICIPAL CORPORATIONS (1); TOWNSHIPS (1).

TAXICABS—See CARRIERS; COSTS (8); EVIDENCE (2); MUNICIPAL CORPORATIONS (4).

TENANT IN COMMON—See DIVORCE (8).

THIRD-PARTY TORT-FEASOR—See APPEAL AND ERROR (17).

THROUGH HIGHWAY—See AUTOMOBILES (3, 4, 6–8, 13).

TIME—See CONTRACTS (2); COSTS (3); CRIMINAL LAW (4); DECLARATORY JUDGMENT (2); JUDGMENT (15); PHYSICIANS AND SURGEONS (2); TAXATION (6).

TIME TABLES—See CARRIERS.

TITLE—See BOUNDARIES (1); CEMETERIES (1); JUDGMENT (11).

TITLE-RETAINING CONTRACT—See REPLEVIN (3).

TORT-FEASOR—See APPEAL AND ERROR (17).

TORTS—See DAMAGES (3); LANDLORD AND TENANT (2, 3); MUNICIPAL CORPORATIONS (6); NEGLIGENCE (4).

TOTAL DISABILITY—See WORKMEN'S COMPENSATION (13, 14, 16).

TOWNSHIPS.

1. Unchartered townships located within district assessable at large for benefits from intracounty drain are not municipal corporations within the meaning of the excepting clause of the 15-mill tax-limitation amendment of the Constitution, hence, are subject to the 15-mill tax-limitation provision (Const 1908, art 10, § 21, as amended in 1948). *Township of Southfield* v. *Drainage Board for Twelve Towns Relief Drains (City of Troy* v. *Same)*, 59.

2. Township zoning ordinance which zoned, as residential and farming, a block surrounded on 3 sides by airport with nonconforming structures, a commercial zone and 2 other mobile homes, although placed subsequent to enactment of the zoning

TOWNSHIPS—Continued.

ordinance, had been permitted to remain on lots across street *held,* unconstitutional as applied to defendants' lot so as not to preclude use of lot for mobile home, where evidence shows they were unable to obtain financing arrangements for construction of a permanent home and sanitary arrangements were made as required by township zoning inspector, since application of the zoning ordinance to defendants' property was unlawfully discriminatory. *Township of Blackman* v. *Koller,* 186.

See CONSTITUTIONAL LAW (2); DRAINS (1).

TRADE SECRETS—See COSTS (4); COURTS (3); INJUNCTION (1–4, 6–8).

TRAFFIC CONTROL ORDER—See AUTOMOBILES (13).

TRAFFIC LIGHTS—See AUTOMOBILES (3, 8–12).

TRESPASS—See INFANTS; NEGLIGENCE (11).

TRIAL.

1. A specially-appearing defendant, upon denial of his motion to quash service of process in a civil case, has 15 days' time within which to appear generally and plead (Court Rule No 18, § 4; No 27, §§ 3, 8 [1945]). *Shank* v. *Castle,* 290.
2. The court rule permitting a specially-appearing defendant to make an attack on the service of process does not require any possible attack on the pleadings to be included in such motion to quash, hence, the waiver of unstated objections to the pleadings is not effected (Court Rule No 18, § 4; No 27, § 6 [1945]). *Id.*
3. A plaintiff is entitled to have his proofs viewed in the light most favorable to him when a defendant interposes a motion for judgment in a nonjury case. *Galea* v. *Detroit Wabeek Bank & Trust Company,* 333.
4. Trial judge's rulings as to admissibility of evidence and comments made by him in course of trial arising from fatal injuries received by plaintiff's decedent while a passenger on left side of defendant's 14'6" inboard motorboat as it passed under a low bridge, including comment to witness, a passenger sitting between decedent and defendant, "at least, you didn't get hit when you were sitting there" *held,* not shown to have had any prejudicial effect upon jury warranting a finding of prejudicial error. *Britten* v. *Updyke,* 466.
5. A trial judge may properly decline to give a requested charge which includes an erroneous proposition, and does not commit error in failing to rewrite the request in proper language. *Duncan* v. *Strating,* 654.

See CRIMINAL LAW (2).

TRUCKS—See HIGHWAYS AND STREETS; JUDGMENT (13); NEGLIGENCE (5, 6); RAILROADS; TAXATION (1, 4).

ULTRA VIRES—See MUNICIPAL CORPORATIONS (11).

UNDUE INFLUENCE—See APPEAL AND ERROR (15); DEEDS (1); EMINENT DOMAIN (19).

UNEMPLOYMENT COMPENSATION.

Carpenter was not entitled to unemployment compensation benefits for period he was out of work due to strike in same plant of reinforced steel workers who were employed at same plant as claimant, notwithstanding he was not concerned with matters involved in such strike, the plant was not picketed by the strikers and plaintiff received no word from his union officers (CLS 1956, § 421.29). *Wojewoda* v. *Employment Security Commission,* 374.

See COSTS (7).

UNIONS—See CONTRACTS (4); LABOR RELATIONS (2); PLEADING (4); UNEMPLOYMENT COMPENSATION.

UNITED STATES.

United States treasury department regulation providing that one co-owner of a savings bond may cash it without permission of the other co-owner and terminating the interest of both upon redemption by one does not cover or establish ownership or a determination of the interest of the co-owners as between themselves (U.S. Treasury Dept. Regulations, Circular No 530, § 315.45). *In re Schweier,* 191.

See GUARDIAN AND WARD.

UNTRIED CHARGES—See CRIMINAL LAW (1, 2).

URINALYSIS—See CRIMINAL LAW (4, 5); EVIDENCE (3).

USE TAXES—See COSTS (10); TAXATION (5, 6).

USURY—See MORTGAGES (4).

VACATION OF JUDGMENT—See GARNISHMENT (5, 7); JUDGMENT (1, 14).

VALUE—See COVENANTS; EMINENT DOMAIN (2–5, 7, 13, 14); ESTATES OF DECEDENTS (3); MUNICIPAL CORPORATIONS (8, 13).

VENDOR AND PURCHASER.

1. Waiver of defendant vendors' obligation to obtain written consent of landlord to assignment of lease and of ice cream confection licensor to assignment of license *held,* established in purchasers' suit for rescission by written agreements entered into at time closing arrangements were effected, such obligation as to assignments being deferred until balance of purchase price of the business was paid in full. *Johnson* v. *Grapentien,* 420.

2. Parties purchasing real estate are presumed to have contracted with reference to the condition of the property at the time of the sale and to have intended that the grantee should have the means of using the property granted with such rights and privileges in, or over, the premises remaining in the grantor as might be requisite for that purpose. *Rannels* v. *Marx,* 453.

VERDICTS AND FINDINGS—See APPEAL AND ERROR (1, 9); CONTRACTS (2); CORPORATIONS (2, 3); DAMAGES (3); DEEDS (2); DIVORCE (2); EASEMENTS (3); EMINENT DOMAIN (8); HOSPITALS; MANDAMUS (1); MORTGAGES (5); NEGLIGENCE (7, 13); PHYSICIANS AND SURGEONS (1); REPLEVIN (1); TRIAL (4); WORK AND LABOR; WORKMEN'S COMPENSATION (3, 16).

VESTED INTEREST—See LICENSES (1); OFFICERS (2); STATUTES (7, 8).

VESTED RIGHTS—See BOUNDARIES (1).

VIBRATION—See NUISANCE (3).

VICE-PRESIDENT—See GARNISHMENT (3).

VIEW OF PREMISES—See EMINENT DOMAIN (13).

VIGILANCE—See AUTOMOBILES (1).

VIOLATION OF STATUTE—See NEGLIGENCE (12).

VOIR DIRE—See APPEAL AND ERROR (3); JURY (1).

VOLUNTEER—See NEGLIGENCE (3–5).

VOLUNTEERED SERVICES—See CONTRACTS (1).

WAIVER—See LABOR RELATIONS (3); PLEADING (4); TRIAL (2); VENDOR AND PURCHASER (1).

WATERS AND WATERCOURSES.

Whatever water rights belong to any part of a subdivision of land must necessarily fall within those that belonged to the whole of it at the time when it was made ready for sale by the United States government, and no change, if any took place, in the shore line could enlarge that grant at the expense of any other, it being the right of the owner of water rights within the subdivision to determine for himself in what way he would subdivide and parcel out his own property. *Poch* v. *Urlaub*, 261.

See BOUNDARIES (4, 5, 7, 9).

WAY OF ACCESS—See EASEMENTS (2, 3).

WEAPONS—See CRIMINAL LAW (2).

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (22); CRIMINAL LAW (5).

WIDOWER—See DEEDS (1, 2, 6).

WILFUL AND WANTON MISCONDUCT—See NEGLIGENCE (3, 4).

WILLS.

1. Decree construing provision of will giving the bulk of testatrix's estate for the establishment of a "playfield for white children" as void is affirmed by an equally divided court. *LaFond* v. *City of Detroit*, 362.

WILLS—Continued.

2. Courts of county in which testatrix resided at time of her death had jurisdiction to probate will and construe it, hence refusal to allow prosecuting attorney of another county in which testatrix had lived and in which city was located that was residuary legatee, to become a defendant, was not error. *Id.*
3. Strong language of disinheritance does not effect a determination as to the construction of a will for if the will fails in whole or in part, the legal heirs take by law of intestacy even against the expressed opposition of the testatrix. *In re McKay Estate (Eulitt* v. *Little Sisters of the Poor),* 447.
4. There is a strong presumption against intestacy when a will is being construed. *Id.*
5. The cardinal rule of construction of a will is to give effect to the intention of the testator if the intention was expressed. *Id.*
6. Precatory words in a will such as "I request," may be treated as mandatory if such an intent is manifest. *Id.*
7. The whole will is examined to ascertain the intention of the testatrix as the will itself is a dictionary from which the meaning of the words used in it is to be ascertained. *Id.*
8. The term "I request," as used in handwritten will by testatrix who was poorly schooled in spelling and grammar and with little knowledge of the legal effect of words, to introduce a bequest *held,* intended as a direction. *Id.*
9. Clause "share in my estate," in handwriting of testatrix who was poorly schooled in spelling and grammar and with little knowledge of the legal effect of words leaving the residue of her estate to 3 charities, when compared to the specific quality of all the other devises in the will, is construed as leaving residue to the charities in equal shares. *Id.* 448.

See ESTATES OF DECEDENTS (4); WORK AND LABOR (1).

WINDING UP AFFAIRS—See SCHOOLS AND SCHOOL DISTRICTS (1, 2).

WITHDRAWAL OF ASSETS—See CORPORATIONS (1, 3).

WITNESSES.

Testimony of plaintiff was properly excluded in her proceeding to recover compensation for use of her apartment and garage by deceased and for personal services rendered to him, where such testimony related to matters that, if true, were equally within the knowledge of deceased (CL 1948, § 617.65). *In re Kaiser Estate (Claim of Sullivan),* 103.

See APPEAL AND ERROR (1, 9); AUTOMOBILES (19); EMINENT DOMAIN (9).

WORDS AND PHRASES.

The word "shall" is mandatory and imperative and when used in a command to a public official, it excludes the idea of discretion. *Township of Southfield* v. *Drainage Board for Twelve Towns Relief Drains (City of Troy* v. *Same),* 60.

WORK AND LABOR.

1. An expectation by a party who performs a service for another by way of storing personal property for the latter with the expectation that the latter would leave property by will would furnish no basis for a finding of an implied contract. *In re Kaiser Estate (Claim of Sullivan)*, 103.

2. Evidence supported trial judge's finding in nonjury case that plaintiffs had failed to show scrap iron baler was to have been built at defendant scrap iron dealer's risk, hence, judgment for defendant for sums he had paid to plaintiffs for material and work in connection with its construction less amount defendant admittedly owed for other services not connected with the baler was proper (CL 1948, §§ 615.5, 615.10). *Lewis* v. *Zukerman*, 326.

See ESTATES OF DECEDENTS (3); EVIDENCE (1).

WORKMEN'S COMPENSATION.

1. Workmen's compensation is in no respects a damage remedy, and the right thereto does not die with the injured person. *Miller* v. *Bath Elevator Company*, 9.

2. Dependent parents of an illegally employed minor 17 years of age, who was suffocated during the course of his employment, are entitled to double compensation, where there was an absence of fraudulent use of permits or certificates of age (CLS 1956, § 411.7). *Id.*

3. The finding of fact of the workmen's compensation appeal board that plaintiffs, parents of 17-year-old minor who was employed at defendant grain elevator without a work permit and was suffocated in the course of employment, were partially dependent upon their deceased son and that he had contributed 75% of his annual income to them *held*, sustained by competent evidence (CLS 1956, § 411.7). *Id.*

4. Paper company which was engaged in the manufacture of paper from pulpwood was liable for workmen's compensation to injured employee of its contractor for procuring pulpwood, where the company, but not the contractor, was subject to the workmen's compensation act, since the procurement of the pulpwood may fairly be said to be a part of the paper company's business under record showing the contractor was paid for the wood at specified price per cord but that the company paid stumpage price to the owner of the land from which the wood was taken and deducted such stumpage payment from payments made to the contractor (CLS 1956, §§ 411.10, 414.1). *Karvonen* v. *Stankovich*, 96.

5. Testimony taken at hearing before referee of department of labor in proceeding to recover workmen's compensation before appellant paper company was made a defendant was improperly included in appendix, is deemed stricken and not considered in determining appeal. *Id.*

6. The original aims and purposes of the workmen's compensation act must be examined in order to understand the rights of the parties involved in proceeding to recover compensation benefits provided for by an amendatory act (CLS 1956, § 412.4). *Lahti* v. *Fosterling*, 578.

WORKMEN'S COMPENSATION—Continued.

7. The workmen's compensation act was originally adopted to give employers protection against common-law actions and to place upon industry the expense of hospital and medical bills of the injured employee and the burden of making a reasonable contribution to the sustenance of that employee and his dependents during the period of incapacity. *Id.*

8. The amendment of the workmen's compensation act whereby the 2-year maximum was removed from medical and hospital expense clause did not afford the injured employee a new cause of action but merely expanded the remedies then in effect and operated retroactively to apply to claims which had arisen prior to the amendment (CL 1948, § 412.4, as amended by PA 1955, No 250). *Id.*

9. The workmen's compensation act is a remedial one, enacted primarily for the benefit of the man who works in the pursuits subject to its provisions. *Id.* 579

10. The legislature has the power to increase the burden on the employer for disability or expenses occurring or continuing after the date of an enactment of an amendment of the workmen's compensation act, even though the accident which gave rise to the disability or expenses had occurred prior to that time, since the act is an exercise of the police power and the amendment, even though it affects the due process of law and impairment of contract clauses, would not be unconstitutional (CL 1948, § 412.4, as amended by PA 1955, No 250). *Id.* 580.

11. Parties to a contractual relationship, entered into subject to the workmen's compensation act do so with the knowledge of the right and power of the legislature to enact any new law relating to the subject matter, not in conflict with any constitutional provision, and must be presumed to have agreed to any such change. *Id.*

12. The substitution of an expansion of existing remedies by way of removal of limitation to 2 years as period during which an employer is required to pay injured employee's medical and hospital expenses was within the power of the legislature and since no vested right or contractual right exists that prohibits the legislature from making a change in remedies afforded the employees under the workmen's compensation act, it is construed as applicable to employee who was injured prior to time amendment was effective (CL 1948, § 412.4, as amended by PA 1955, No 250). *Id.*

13. The transposition of the word "total" in the terms "permanent and total disability" and "total and permanent disability" in the workmen's compensation act is of no significance in interpreting the statute (CL 1948, § 412.9, as amended by PA 1955, No 250). *Verberg* v. *Simplicity Pattern Company*, 636.

14. Differential benefits, under the workmen's compensation act payable to an injured employee from the second-injury fund for amount of difference between benefits payable at time of subsequent amendment of the act providing for such differential benefits are not payable to persons totally and permanently disabled other than as provided for enumerated losses (CL

WORKMEN'S COMPENSATION—Continued.

1948, § 412.8a; § 412.9, as amended by PA 1955, No 250). *Id.*

15. The purpose of the amendatory act establishing the second-injury fund was to enhance the prospects for employment of certain handicapped persons who had previously sustained specific losses, so that they and their families would have a means of livelihood by relieving an employer of liability for payment of workmen's compensation for an injury in an amount greater than it would be for an injury to a person not so handicapped (CL 1948, § 412.8a). *Id.*

16. The selection of persons suffering permanent and total disability as defined in statute providing for payment of differential benefits from the second-injury fund was a proper classification of recipients of such benefits (CL 1948, § 412.8a; § 412.9 as amended by PA 1955, No 250). *Id.*

17. The finding of fact by the workmen's compensation appeal board that plaintiff's left hand was industrially useless is binding upon the Supreme Court, since it is sustained by the record (CL 1948, § 413.12). *Shumate* v. *American Stamping Company*, 689.

18. An employee was entitled to an award for the specific loss of a hand less credit for prior payments, where the workmen's compensation appeal board found that his left hand had been rendered industrially useless by the injury received while at work in that its function was limited to that of an unsatisfactory pushing or pulling instrumentality, notwithstanding he was eventually able to work at same right-handed job as press operator he had when injured. *Id.*

See ACTION (2); APPEAL AND ERROR (17); HOSPITALS.

WORKMEN'S COMPENSATION APPEAL BOARD—See WORKMEN'S COMPENSATION (3, 17).

YIELDING RIGHT-OF-WAY—See AUTOMOBILES (6–8).

ZONING—See MUNICIPAL CORPORATIONS (3, 7); TOWNSHIPS (2).

ZOO—See DRAINS (4).