MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

DECEMBER 29, 1937 to APRIL 4, 1938

HIRAM C. BOND
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SUPREME COURT.

Chief Justice.

	Term expires
LOUIS H. FEAD, Newberry,	Dec. 31, 1937
HOWARD WIEST, Lansing,	Dec. 31, 1939 [1]

Associate Justices.

HOWARD WIEST, Lansing,	Dec. 31, 1939 [2]
HENRY M. BUTZEL, Detroit,	Dec. 31, 1939
GEORGE E. BUSHNELL, Detroit,	Dec. 31, 1941
EDWARD M. SHARPE, Bay City,	Dec. 31, 1941
WILLIAM W. POTTER, Hastings,	Dec. 31, 1943
BERT D. CHANDLER, Hudson,	Dec. 31, 1943
WALTER H. NORTH, Battle Creek,	Dec. 31, 1945
THOMAS F. McALLISTER, Grand Rapids,	Dec. 31, 1945 [1]

Clerk—JAY MERTZ, Lansing.
Crier—DON M. CHILDS, Lansing.

Attorney General—RAYMOND W. STARR, Grand Rapids.

[1] From January 1, 1938.
[2] To December 31, 1937.

CIRCUIT JUDGES.

1.	MARK D. TAYLOR,	HILLSDALE.
2.	FREMONT EVANS,	ST. JOSEPH.
3.	CLYDE I. WEBSTER, HARRY J. DINGEMAN, ADOLPH F. MARSCHNER, IRA W. JAYNE, ARTHUR WEBSTER, JOSEPH A. MOYNIHAN, THEODORE J. RICHTER, VINCENT M. BRENNAN, DE WITT H. MERRIAM, GUY A. MILLER, HARRY B. KEIDAN, ROBERT M. TOMS, HOMER FERGUSON, SHERMAN D. CALLENDER, ALLAN CAMPBELL,	DETROIT.
	LESTER S. MOLL,	GROSSE POINTE.
	HENRY G. NICOL,	GROSSE POINTE PARK.
	JAMES E. CHENOT,	HIGHLAND PARK.
4.	BENJAMIN WILLIAMS, JOHN SIMPSON,	JACKSON.
5.	RUSSELL R. McPEEK,	CHARLOTTE.
6.	FRANK L. DOTY, H. RUSSEL HOLLAND,	PONTIAC.
	GEORGE B. HARTRICK,	ROYAL OAK.
7.	EDWARD D. BLACK, PAUL V. GADOLA, PHILIP ELLIOTT,	FLINT.
8.	ROYAL A. HAWLEY,	IONIA.
9.	GEORGE V. WEIMER,	KALAMAZOO.
10.	WILLIAM H. MARTIN, JAMES E. O'NEILL,	SAGINAW.
11.	HERBERT W. RUNNELS,	SAULT STE. MARIE.
12.	JOHN G. STONE,	HOUGHTON.
13.	PARM C. GILBERT,	TRAVERSE CITY.
14.	JOSEPH F. SANFORD,	MUSKEGON.
15.	THEO T. JACOBS,	STURGIS.
16.	NEIL E. REID, JAMES E. SPIER,	MT. CLEMENS.
17.	WILLIAM B. BROWN, LEONARD D. VERDIER, GLENWOOD C. FULLER,[1]	GRAND RAPIDS.

[1] Appointed March 15, 1938.

18.	JAMES L. McCORMICK,	BAY CITY.
19.	MAX E. NEAL,	MANISTEE.
20.	FRED T. MILES,	HOLLAND.
21.	RAY HART,	MIDLAND.
22.	GEORGE W. SAMPLE,	ANN ARBOR.
23.	HERMAN DEHNKE,	HARRISVILLE.
24.	XENOPHON A. BOOMHOWER,	BAD AXE.
25.	FRANK A. BELL,	NEGAUNEE.
26.	FRED P. SMITH,	ALPENA.
27.	EARL C. PUGSLEY,	HART.
28.	FRED S. LAMB,	CADILLAC.
29.	KELLY S. SEARL,	ST. JOHNS.
30.	LELAND W. CARR, CHARLES H. HAYDEN,	LANSING.
31.	FRED W. GEORGE, WILLIAM ROBERTSON,	PORT HURON.
32.	GEORGE O. DRISCOLL,	IRONWOOD.
33.	VICTOR D. SPRAGUE,	CHEBOYGAN.
34.	JOHN C. SHAFFER,	GLADWIN.
35.	JOSEPH H. COLLINS,	CORUNNA.
36.	GLENN E. WARNER,	PAW PAW.
37.	BLAINE W. HATCH,	MARSHALL.
38.	CLAYTON C. GOLDEN,	MONROE.
39.	GEORGE A. RATHBUN,	TECUMSEH.
40.	LOUIS C. CRAMTON,	LAPEER.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT.

EDWARD J. JEFFRIES,	ARTHUR E. GORDON,
DONALD VAN ZILE,	CHRISTOPHER E. STEIN,
W. McKAY SKILLMAN,	THOMAS M. COTTER,
JOHN P. SCALLEN,	JOHN V. BRENNAN,
GEORGE MURPHY,	JOHN J. MAHER.

THOMAS D. MAHER, GEORGE T. MURPHY, } TRAFFIC AND ORDINANCE DIVISION.

SUPERIOR COURT OF GRAND RAPIDS, THADDEUS B. TAYLOR.

JUDICIAL CIRCUITS.

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

TABLE OF CASES REPORTED.

	PAGE
Adams, Dunbar *v.*	48
Adolph *v.* Cookware Company of America	561
Albers *v.* Pommerening	389
Alfred F. Steiner Co., Bates *v.*	697
Allied Paper Mills, Brouwers *v.*	478
American Employers Ins. Co., Kent Probate Judge, for use of Heaney, *v.*	328
Andres *v.* National Loan & Investment Co.	663
Applied Arts Corp., Schnack *v.*	434
Austin *v.* Older	667
Auten *v.* Union Central Life Ins. Co.	165
Baker, Bard *v.*	337
Banks *v.* Banks	506
Barber *v.* Kolowich	97
Bard *v.* Baker	337
Bates *v.* Alfred F. Steiner Co.	697
Battle Creek College *v.* Sacre	513
Bay City Bank *v.* White	267
Bowen *v.* Kunkel	509
Brennan, Lowrie *v.*	63
Briggs Commercial & Development Co. *v.* Finley	1
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Hartley *v.*	201
Brouwers *v.* Allied Paper Mills	478
Burg, Geisel *v.*	73
Burton *v.* Yellow & Checker Cab & Transfer Co.	384

PAGE
Campbell *v.* Osterland 175
Case *v.* Klute 581
Cessante *v.* Ford Motor Co. 521
City of Detroit, Selman *v.* 413
——— Iron Mountain *v.* Dickinson County Road Commissioners 213
——— Menominee *v.* County of Menominee ... 146
Consumers Power Co., Nephew *v.* 12
Continental Die Casting Corp., Nagy *v.* 162
Continental Live Stock Co. *v.* King 495
Contract & Investment Co. *v.* Home Ins. Co. of New York 288
Cookware Company of America, Adolph *v.* 561
County of Menominee, City of Menominee *v.* .. 146
——— Wayne, Drolshagen *v.* 569
——— ———, Tetro *v.* 131
County Road Commissioners of Dickinson County, City of Iron Mountain *v.* 213
Currier Lumber Co., Thomas *v.* 134

Dausman, Friar *v.* 692
Davis, Tighe *v.* 244
Detroit, Selman *v.* 413
Detroit Edison Co. *v.* Oakland Circuit Judge ... 502
Detroit Trust Co. *v.* Struggles 471
———, Taylor Avenue Improvement Ass'n *v.* .. 304
Dickinson County Road Commissioners, City of Iron Mountain *v.* 213
Dolby *v.* State Highway Commissioner 609
Drolshagen *v.* County of Wayne 569
Dunbar *v.* Adams 48

Eckfeld, Melvindale State Bank *v.* 179
Emmons, King *v.* 116

PAGE
Estate of Evans, *In re*..... 275
——— Haskell, *In re*..... 513
——— Oliff, *In re*..... 43
——— Rezmer, *In re*..... 545
——— Richards, *In re*..... 485
——— Trombley, *In re*..... 604
Evans' Estate, *In re*..... 275

Ferris, People *v*..... 699
Finley, Briggs Commercial & Development Co. *v*. 1
Ford Motor Co., Cessante *v*..... 521
———, Roundtree *v*..... 141
Friar *v*. Dausman..... 692

Geisel *v*. Burg..... 73
Gloeser *v*. Moore..... 425
Graham-Paige Co. of Michigan, Lawson-Erb Lumber Co. *v*. 252
Grigg *v*. Hanna..... 443

Haines *v*. Haines 379
Hanna, Grigg *v*..... 443
Hartley *v*. Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees..... 201
Haskell's Estate, *In re*..... 513
Heaney, Kent Probate Judge, for use of, *v*. American Employers Ins. Co..... 337
Himmelein, People *v*..... 699
Home Ins. Co. of New York, Contract & Investment Co. *v*..... 288
Home Owners' Loan Corp., Sambor *v*..... 529

In re Evans' Estate..... 275
——— Haskell's Estate 513

PAGE
In re Oliff's Estate 43
——— Rezmer's Estate 545
——— Richards' Estate 485
——— Trombley's Estate 604
——— Widening Michigan Avenue (Parcels 27, 32, 32A, 33) 55
Iron Mountain *v.* Dickinson County Road Commissioners 213
Ironwood Amusement Corp., Seaman *v.* 220

Jefferson Park Land Co., Ltd., Pittelkow *v.* 374
June *v.* School District No. 11, Southfield Township, Oakland County 533

Kent Probate Judge, for use of Heaney, *v.* American Employers Ins. Co. 328
King, Continental Live Stock Co. *v.* 495
——— *v.* Emmons 116
Klute, Case *v.* 581
Kolowich, Barber *v.* 97
Konen, Zechlin *v.* 604
Kunkel, Bowen *v.* 509

Lawrence *v.* Taylor 43
Lawson-Erb Lumber Co. *v.* Graham-Paige Co. of Michigan 252
Levenseller *v.* Smith 275
Lincoln *v.* University Motor Sales Co. 587
Lincoln Mutual Casualty Co., Mondou *v.* 353
Lowrie *v.* Brennan 63

Mack *v.* Mack 365
Madyck *v.* Shelley 396
Meek *v.* Wilson 679
Melvindale State Bank *v.* Eckfeld 179
Menominee *v.* County of Menominee 146

PAGE
Metropolitan Life Ins. Co., Stuckum *v.* 297
Michigan, Standard Oil Co. *v.* 85
Michigan Aero Club *v.* Shelley 401
Michigan Avenue (Parcels 27, 32, 32A, 33), *In re* Widening 55
Mondou *v.* Lincoln Mutual Casualty Co. 353
Monick, People *v.* 195
Moore, Gloeser *v.* 425

Nagy *v.* Continental Die Casting Corp. 162
National Loan & Investment Co., Andres *v.* 663
Nephew *v.* Consumers Power Co. 12
Nickoloff, Smith *v.* 188
Nu-Way Service Stations, Inc., *v.* Vandenberg Bros. Oil Co. 551

Oakland Circuit Judge, Detroit Edison Co. *v.* ... 502
Older, Austin *v.* 667
Oliff's Estate, *In re* 43
Oliver, Wells *v.* 168
Osterland, Campbell *v.* 175

Paul *v.* University Motor Sales Co. 587
Pearce *v.* Rodell 19
People *v.* Ferris 699
——— *v.* Himmelein 699
——— *v.* Monick 195
——— *v.* Pettijohn 108
——— *v.* Rock 171
Pettijohn, People *v.* 108
Pittelkow *v.* Jefferson Park Land Co., Ltd. 374
Pommerening, Albers *v.* 389

Renihan, Wosinski *v.* 319
Rezmer's Estate, *In re* 545
Richards' Estate, *In re* 485

PAGE
Richards *v.* Stone 485
Rock, People *v.* 171
Rodell, Pearce *v.* 19
Rollin *v.* Van Tine 208
Roundtree *v.* Ford Motor Co. 141

Sacre, Battle Creek College *v.* 513
Sambor *v.* Home Owners' Loan Corp. 529
Schnack *v.* Applied Arts Corp. 434
School District No. 11, Southfield Township, Oakland County, June *v.* 533
Seaman *v.* Ironwood Amusement Corp. 220
Selman *v.* City of Detroit 413
Shelley, Madyck *v.* 396
———, Michigan Aero Club *v.* 401
Shiekick *v.* Varkle Iron & Metal Co. 38
Slingerland *v.* Snell 524
Smith, Levenseller *v.* 275
——— *v.* Nickoloff 188
Snell, Slingerland *v.* 524
Sovereign Camp of the Woodmen of the World, Strausser *v.* 370
Speaker *v.* Speaker 184
Standard Oil Co. *v.* State of Michigan 85
State Highway Commissioner, Dolby *v.* 609
———, Taylor *v.* 215
State of Michigan, Standard Oil Co. *v.* 85
Steiner (Alfred F.) Co., Bates *v.* 697
Stone, Richards *v.* 485
Strausser *v.* Sovereign Camp of the Woodmen of the World 370
Struggles, Detroit Trust Co. *v.* 471
Stuckum *v.* Metropolitan Life Ins. Co. 297

Taylor, Lawrence *v.* 43
——— *v.* State Highway Commissioner 215

PAGE

Taylor Avenue Improvement Ass'n *v.* Detroit Trust Co. 304
Tetro *v.* County of Wayne 131
Thomas *v.* Currier Lumber Co. 134
Tighe *v.* Davis 244
Trombley's Estate, *In re* 604
Tyson *v.* Tyson 192

Union Central Life Ins. Co., Auten *v.* 165
University Motor Sales Co., Lincoln *v.* 587
———, Paul *v.* 587

Vandenberg Bros. Oil Co., Nu-Way Service Stations, Inc., *v.* 551
Van Tine, Rollin *v.* 208
Varkle Iron & Metal Co., Shiekick *v.* 38

Wall *v.* Zynda 260
Wayne County, Drolshagen *v.* 569
———, Tetro *v.* 131
Wells *v.* Oliver 168
Weronka *v.* Weronka 493
White, Bay City Bank *v.* 267
Widening Michigan Avenue (Parcels 27, 32, 32A, 33), *In re* 55
Wilcox *v.* Wilcox 313
Wilson, Meek *v.* 679
Wosinski *v.* Renihan 319

Yellow & Checker Cab & Transfer Co., Burton *v.* 384

Zechlin *v.* Konen 604
Zynda, Wall *v.* 260

TABLE OF CASES CITED.

PAGE

Abbott *v.* Chaffee, 83 Mich. 256 585
Abel's Estate, *In re,* 173 Mich. 93 549
Adair *v.* Cummin, 48 Mich. 375 456
——— *v.* Shaw, 1 Sch. & Lef. (Irish Ch.) 243 464
Adams *v.* Hubbard, 30 Mich. 104 363
——— *v.* Kalamazoo Ice & Fuel Co., 245 Mich. 261 674
Adolph *v.* Railroad Co., 76 N. Y. 530 35
Aggeler *v.* Dominguez, 217 Cal. 429 71
Allen *v.* Carpenter, 15 Mich. 25 363
——— *v.* Hook, 198 Mich. 122 183
——— *v.* Merrill, 223 Mich. 467 490
——— *v.* Wolverine Express, Inc., 279 Mich. 621 164
Allen's Estate, *In re,* 230 Mich. 584 ..... 283, 520
A. M. Campau Realty Co. *v.* City of Detroit, 268 Mich. 417 61
American Cedar & Lumber Co. *v.* Gustin, 236 Mich. 351 689
American Wood Products Co. *v.* City of Minneapolis, 21 Fed. (2d) 440 676
Amick *v.* Empire Trust Co., 317 Mo. 157 183
Antisdel *v.* Canfield, 119 Mich. 229 378
Arnold *v.* Knoxville, 115 Tenn. 195 658
——— *v.* Krug, 279 Mich. 702 177
Atlas *v.* Wayne County Board of Auditors, 281 Mich. 596 133
Attorney General *v.* Railway, 210 Mich. 227 543
———, *ex rel.* Common Council of the City of Detroit, *v.* Marx, 203 Mich. 331 543
———, ——— Lockwood, *v.* Moliter, 26 Mich. 444 363
———, ——— Owen, *v.* Joyce, 233 Mich. 619 531
———, ——— Wolverine Fish Co., *v.* A. Booth & Co., 143 Mich. 89 363
Auditor General *v.* Bolt, 147 Mich. 283 689
Austin *v.* Older, 278 Mich. 518 670
——— *v.* Van Horn, 245 Mich. 344 308
——— *v.* ———, 255 Mich. 117 310
Avery *v.* Consumers Power Co., 265 Mich. 696 ..... 613, 614, 616
———, for the use of Aultman, *v.* Miller, 81 Mich. 85 265
Awotin *v.* Atlas Exchange National Bank of Chicago, 295 U. S. 209 ..... 2, 11
Axe *v.* Tolbert, 179 Mich. 556 377

Babcock *v.* Babcock, 150 Mich. 558 456
Backus *v.* Trumbull Motor Car Co., 194 Mich. 199 362
Bacon *v.* McKay, 227 Mich. 667 388

PAGE
Bade *v.* Nies, 239 Mich. 37 140
Bailey *v.* Grover, 237 Mich. 548 553
Baily *v.* Hornthal, 154 N. Y. 648 460
Baird *v.* Abbey, 73 Mich. 347 410
Baker *v.* Frischkorn, 271 Mich. 485 470
——— *v.* Hellner Realty Co., 263 Mich. 625 104
——— *v.* Spokane Saving Bank (C. C. A.), 71 Fed. (2d) 487 .. 243
Baldwin *v.* City of Norwalk, 96 Conn. 1 343
Baltimore & Ohio Telegraph Co. *v.* Interstate Telegraph Co., 4 C. C. A. 184 602
Bancroft *v.* Board of Regents of University of Michigan, 192 Mich. 168 362
——— *v.* Union Embossing Co., 72 N. H. 402 440
Barlow *v.* Lambert, 28 Ala. 704 625
Barnesley *v.* Powel, 1 Ves. Sr. 284 (27 Eng. Rep. 1034) 459
Barras *v.* Barras, 192 Mich. 584 249
Barribeau *v.* City of Detroit, 146 Mich. 392 362
Baumgartner *v.* St. Armour, 276 Mich. 650 210
Bay City Bank *v.* White, 283 Mich. 267 687
Bayley *v.* Garrison, 190 Cal. 690 ..... 571, 575
Beach *v.* Botsford, 1 Doug. (Mich.) 199 363
Beckman *v.* Baraga Township School District, 271 Mich. 195 .341, 347
Beer *v.* Beer, 52 Ohio App. 276 139
Beiser *v.* Railway Co., 152 Ky. 522 422
Bendykson *v.* Lyons Evangelistic Committee, 195 Mich. 490 43
Benedict *v.* Rinna, 257 Mich. 349 395
Benneson *v.* Aiken, 102 Ill. 284 251
Benson *v.* Bawden, 149 Mich. 584 11
Bernard *v.* Michigan United Traction Co., 188 Mich. 504 42
Bialy *v.* Bialy, 167 Mich. 559 194
Bielecki *v.* United Trucking Service, 247 Mich. 661 ..... 341, 347
Billingsley *v.* Gulick, 252 Mich. 235 26
Black *v.* Elkhorn Min. Co., 49 Fed. 549 642
——— *v.* Powell, 248 Mich. 150 532
Blackman *v.* Andrews, 150 Mich. 322 394
Blackwood *v.* Brown, 29 Mich. 483 362
Block *v.* Railway Co., 89 Wis. 371 32
Board of Commissioners of Muskogee County *v.* Hart, 29 Okla. 693 575
——— Education of Humphreys County *v.* Baker, 124 Tenn. 39 ..... 617, 618
——— Street Com'rs of Hagerstown *v.* Williams, 96 Md. 232 .. 72
——— Trustees for Vincennes University *v.* Indiana, 14 How. (55 U. S.) 268 627
Bodell *v.* City of Battle Creek, 270 Mich. 445 ..... 570, 576
Boesky Bros. Twelfth Street Corp. *v.* United States Fidelity & Guaranty Co., 267 Mich. 628 358
Bogart *v.* City of Detroit, 252 Mich. 534 420
Bollman, *Ex parte,* 4 Cranch (8 U. S.), 75 657
Bond *v.* Markstrum, 102 Mich. 11 456
Bonnet *v.* First National Bank of Eagle Pass, 24 Tex. Civ. App. 613 243

PAGE

Born *v.* Born, 237 Mich. 323 194
Boston-Edison Protective Ass'n *v.* Goodlove, 248 Mich. 625 309
Boston Piano & Music Co. *v.* Pontiac Clothing Co., 199 Mich. 141. 688
Boyer's Estate, *In re,* 281 Mich. 618 584
Brackett (C. S.) Co. *v.* Lofgren, 140 Minn. 52 259
Bradfield *v.* Bradfield, 154 Mich. 115 363
Brady *v.* Railroad Co., 73 Mich. 457 362
Brebner *v.* Sidney Hill Health System, Inc., 269 Mich. 541 410
Brodie *v.* City of Detroit, 275 Mich. 626 170
Bromley's Estate, *In re,* 113 Mich. 53 .....516, 519
Brooks *v.* Hargrave, 179 Mich. 136 455
——— *v.* Leathers, 112 Mich. 463 378
Brown *v.* Adler, 282 Mich. 264 364
——— *v.* Lilli, 281 Mich. 170 388
——— *v.* O'Donnell, 123 Mich. 100 .....324, 325
——— *v.* Railroad Co., 18 Misc. (N. Y.) 584 32
——— *v.* Union Banking Co., 274 Mich. 499 .....2, 3, 10
——— *v.* Weightman, 62 Mich. 557 585
———, *ex rel.* Gray, *v.* Quintilian, 121 Conn. 300 72
Browne's Estate, *In re,* 217 Mich. 621 .....282, 516, 519
Bruckner *v.* Lawrence, 1 Doug. (Mich.) 19 .....632, 656
Budgett *v.* Soo Sky Ways, Inc., 64 S. D. 243 411
Budnick *v.* Peterson, 215 Mich. 678 .....34, 37
Buechele *v.* Petty, 265 Ky. 321 .....571, 576
Bullard *v.* Spoor, 2 Cow. (N. Y.) 430 125
Bulthuis' Estate, *In re,* 232 Mich. 129 283
Burchard *v.* Otis Elevator Co., 261 Mich. 142 383
Burgan *v.* New Jersey Civil Service Commission, 84 N. J. Law, 219 69
Burgess *v.* Jackson Circuit Judge, 249 Mich. 558 455
Burke *v.* Central Trust Co., 258 Mich. 588 .....490, 491
Burnham *v.* Interstate Casualty Co., 117 Mich. 142 301
Burns *v.* Burns, 132 Mich. 441 80
——— *v.* Railroad Co., 233 Pa. 304 422
Butler *v.* Green, 65 Hun (N. Y.) 99 642

Caldwell *v.* Lyon, 168 Tenn. 607 71
——— *v.* United States Fidelity & Guaranty Co., 205 Ala. 463. 360
Cameron *v.* Oakland County Gas & Oil Co., 277 Mich. 442 652
Campau (A. M.) Realty Co. *v.* City of Detroit, 268 Mich. 417 .. 61
Canfield *v.* West Virginia Central Gas Co., 80 W. Va. 731 18
Cardinal *v.* Reinecke, 280 Mich. 15 139
Carlson's Estate, *In re,* 218 Mich. 262 283
Carpenter *v.* Dennison, 208 Mich. 441 363
——— *v.* Harris, 51 Mich. 223 363
——— *v.* Herpolsheimer's Co., 278 Mich. 697 .....423, 424
Carrington *v.* Goddin, 13 Gratt. (54 Va.) 587 .....645, 647
Carter *v.* Marvel Carburetor Co., 263 Mich. 48 440
Carvalho *v.* Cass Putnam Hotel Co., 239 Mich. 508 41
Cass *v.* Railroad Co., 20 App. Div. (N. Y.) 591 32
Caudle *v.* Zenor, 217 Iowa, 77 349
Central Holding Co. *v.* Bushman, 238 Mich. 261 130

PAGE
Chaddock *v.* Chaddock, 134 Mich. 48.....80, 83
Chamberlain *v.* Eddy, 154 Mich. 593..... 476
Chambers *v.* Chambers, 75 Neb. 850..... 368
Chapin *v.* Chapin, 229 Mich. 515.....46, 467
Chappus *v.* Lucke, 246 Mich. 272..... 46
Chas. J. Smith Co., Inc., *v.* Anderson, 84 N. J. Eq. 681..... 559
Chaves County Building & Loan Ass'n *v.* Hodges, 40 N. M. 326.....272, 687
Chisholm *v.* Atlanta Gas-Light Co., 67 Ga. 28.....17, 18
C. H. Larkin Co. *v.* Dawson, 37 Tex. Civ. App. 345..... 183
Christy *v.* Farlin, 49 Mich. 319..... 265
Church *v.* Spicer, 85 Conn. 579..... 35
Citizens Central Nat. Bank of New York *v.* Appleton, 216 U. S. 196..... 3
City Mortgage Co. *v.* Diller, 180 Wash. 499..... 259
City of Grand Rapids *v.* Blakely, 40 Mich. 367..... 96
——— Iron Mountain *v.* Dickinson County Road Commissioners, 283 Mich. 213..... 157
——— Lansing *v.* Dawley, 247 Mich. 394..... 674
——— Menominee *v.* County of Menominee, 283 Mich. 146..214, 215
——— Pleasant Ridge *v.* Cooper, 267 Mich. 603..... 674
Claerhout *v.* Tromley, 282 Mich. 649..... 258
Claflin *v.* U. S. Credit System Co., 165 Mass. 501..... 690
Clague *v.* Hodgson, 16 Minn. 329..... 702
Clapp *v.* Wilder, 167 Mass. 332..... 628
Clark *v.* Holmes, 1 Doug. (Mich.) 390..... 363
——— *v.* Utah Construction Co., 51 Idaho, 587..... 690
Clarke *v.* Ormonde, Jac. 108 (37 Eng. Rep. 791)..... 466
Cloyes *v.* Beebe, 14 Ark. 489.....617, 643
——— *v.* Newton, 14 Ark. 489..... 643
Coburn *v.* Harvey, 18 Wis. 147..... 627
Cochrane's Estate, *In re*, 211 Mich. 370.....517, 519
Colhoun, *In re*, 18 Mich. Law Rev. p. 21..... 626
Collar *v.* Maycroft, 274 Mich. 376.....395, 410
Collins *v.* Lamotte, 244 Mich. 504..... 249
Columbia Casualty Co. *v.* Klettke, 259 Mich. 564..... 456
Columbus & G. R. Co. *v.* Coleman, 172 Miss. 514..... 412
Commercial Nat'l Bank *v.* Pirie, 27 C. C. A. 171..... 10
Commonwealth *v.* Ewald Iron Co., 153 Ky. 116.....576, 577
——— *v.* Higgins, 4 Gray (70 Mass.), 34..... 70
Conaway *v.* Atlantic City, 107 N. J. Law, 404..... 673
Conklin *v.* United Construction & Supply Co., 166 App. Div. (N. Y.) 284..... 242
Connell's Nomination, 27 Pa. Co. Ct. 305..... 538
Contested Election of Owen Cusick, 136 Pa. 459..... 540
Cook *v.* City of Otsego, 282 Mich. 248..... 348
——— *v.* Donner, 145 Kan. 674.....272, 273, 686, 687
Cornell *v.* Whitney, 132 Mich. 300..... 641
Costello *v.* Railway Co., 205 Iowa, 1077.....422, 424
Cotcher's Estate, *In re*, 274 Mich. 154.....516, 520
County Com'rs of Anne Arundel County *v.* Goodman, 172 Md. 559..... 574
County of Oakland *v.* Mack, 243 Mich. 279.....614, 616, 619

PAGE
Cowie *v.* Fisher, 45 Mich. 629 394
Coyne *v.* Railway Co., 62 Hun (N. Y.), 620 32
Craig *v.* Inhabitants of Franklin County, 58 Me. 479 617
Crake *v.* Crake, 18 Ind. 156 625
Crane *v.* Reeder, 21 Mich. 24 627
Crawford *v.* Cicotte, 186 Mich. 269 377
Creek *v.* Laski, 248 Mich. 425 456
Crichfield *v.* Bermudez Asphalt Paving Co., 174 Ill. 466 690
Crigler *v.* Shepler, 79 Kan. 834 660
Crooks *v.* Rust, 119 Wash. 154 ..... 343, 349
C. S. Brackett Co. *v.* Lofgren, 140 Minn. 52 259
Culhane's Estate, *In re*, 269 Mich. 68 458
Cullison *v.* Downing, 42 Ore. 377 690
Curth *v.* New York Life Ins. Co., 274 Mich. 513 302

Darrah *v.* Boyce, 62 Mich. 480 460
Darrow *v.* Harlow, 21 Wis. 302 379
Davis *v.* Ætna Acceptance Co., 293 U. S. 328 501
——— *v.* McCamman, 165 Mich. 287 455
Davis-Fisher Co. *v.* Hall, 182 Mich. 574 377
Dawson *v.* Hall, 2 Mich. 390 249
Dean *v.* Mumford, 102 Mich. 510 491
Decker *v.* Kanous' Estate, 129 Mich. 146 548
DeCoopman *v.* Hammond, 279 Mich. 619 170
Deery *v.* Hall, 96 Ind. App. 683 412
DeGalan *v.* Barak, 223 Mich. 378 190
DeGroot *v.* Winter, 261 Mich. 660 ..... 29, 31
DeHaan *v.* Winter, 258 Mich. 293 ..... 28, 29, 31
Delaney *v.* Michigan Elm Hoop & Lumber Co., 144 Mich. 351 .. 362
Delta Asbestos Co., Inc., *v.* Sanders, 259 Mich. 317 430
DeTroyer *v.* Ernst Kern Co., 282 Mich. 689 145
Detzur *v.* B. Stroh Brewing Co., 119 Mich. 282 585
DeVito *v.* Pearsall, 115 N. J. Law, 323 675
Diederichs *v.* Duke, 234 Mich. 136 348
Dodd *v.* Mitchell, 77 Ind. 388 360
Dodge Brothers, *In re*, 241 Mich. 665 88
Donnelly *v.* Lyons, 173 Mich. 515 470
Donoho *v.* Rawleigh, 230 Ky. 11 51
Dorgan *v.* Birney, 272 Mich. 145 431
Dornford *v.* Dornford, 12 Ves. Jr. 127 (33 Eng. Rep. 49) 464
Dorris *v.* Bridgman & Co., 289 Pa. 533 ..... 343, 349
Doucet v. Massachusetts Bonding & Ins. Co., 180 App. Div. (N. Y.) 599 690
Douville *v.* Comstock, 110 Mich. 693 378
Dudley *v.* Conely, 125 Mich. 300 336
——— *v.* Duval, 29 Wash. 528 412
Duflo *v.* Juif, 63 Mich. 513 585
Dundas *v.* City of Lansing, 75 Mich. 499 29
Dunham *v.* W. Steele Packing & Provision Co., 100 Mich. 75 599
Dunn *v.* Dunn's Estate, 127 Mich. 385 187
Dusenbury *v.* Railroad Co., 95 Misc. (N. Y.) 241 423

PAGE
Dyer *v.* Rosenthal, 45 Mich. 588 702
——— *v.* Siano, — Mass. — (11 N. E. [2d] 451) 617

Egan *v.* Grece, 79 Mich. 629 ..... 457, 468, 470
Eisenberg *v.* C. F. Battenfeld Oil Co., 251 Mich. 654 259
Eldred's Estate, *In re,* 234 Mich. 131 519
Ellis *v.* Frawley, 165 Wis. 381 690
Elmendorf *v.* Lansing, 4 Johns. Ch. (N. Y.) 562 466
Elrich *v.* Schwaderer, 251 Mich. 33 341
Empire City Racing Ass'n *v.* City of Yonkers, 132 Misc. (N. Y.) 816 677
Engler *v.* Garrett, 100 Md. 387 560
Erickson *v.* Barber Bros., 83 Iowa, 367 32
Essmeister *v.* Roadway Transit Co., 275 Mich. 387 410
Euclid Village *v.* Ambler Realty Co., 272 U. S. 365 ..... 674, 678
Eureka Co. *v.* Bailey Co., 11 Wall. (78 U. S.) 488 440
Evans *v.* Orttenburger, 242 Mich. 57 423
——— *v.* People, 12 Mich. 27 30
Ewing *v.* Lamphere, 147 Mich. 659 456
Excelsior Foundry Co. *v.* Western Assurance Co., 135 Mich. 467. 295
Ex parte Bollman, 4 Cranch (8 U. S.), 75 657
——— Shakeshaft in the matter of Kempson, 3 Bro. Ch. 197 (29 Eng. Rep. 487) 466
——— Swartwout, 4 Cranch (8 U. S.), 75 657

Farmers & Mechanics Savings Bank *v.* Crookston State Bank, 169 Minn. 249 10
Farrand *v.* Bentley, 6 Mich. 281 363
——— *v.* Petit, 84 Mich. 671 490
Faulkner *v.* Davis, 18 Gratt. (59 Va.) 651 647
Faustman *v.* Hewitt, 274 Mich. 458 526
Fay's Estate, *In re,* 197 Mich. 675 ..... 517, 519
First Citizens Bank & Trust Co. of Utica *v.* Speaker, 159 Misc. 427; 250 App. Div. (N. Y.) 824 ..... 272, 687
First National Bank & Trust Co. *v.* Huntley, 251 Mich. 483 83
First National Bank of Blakely *v.* Hattaway, 172 Ga. 731 183
Fisher *v.* Hampton Transportation Co., 136 Mich. 218 689
Fleegar *v.* Consumers Power Co., 262 Mich. 537 ..... 17, 410
Flood's Estate, *In re,* 270 Mich. 655 282
Ford Heights Land Co. *v.* Schanert, 279 Mich. 693 512
Forncrook Manfg. Co. *v.* E. T. Barnum Wire & Iron Works, 54 Mich. 552 440
Fourth National Bank of Grand Rapids *v.* Olney, 63 Mich. 58.. 603
Fox *v.* Barrett's Estate, 117 Mich. 162 82
Fractional School District *v.* Beardslee, 248 Mich. 112 ..... 614, 616
Fraley *v.* J. Calvert's Sons, 266 Mich. 460 352
Freedman *v.* Burton, 281 Mich. 208 372
Frey *v.* Farmers & Mechanics Bank, 273 Mich. 284 183
Frigo *v.* Janek, 237 Mich. 642 310
Fuday *v.* Gill, 195 Mich. 613 377
Fur & Wool Trading Co., Ltd., *v.* George I. Fox, Inc., 245 N. Y. 215 475

PAGE
Gammill *v.* Culverhouse, 217 Ala. 65 178
Gardner *v.* City National Bank & Trust Co., 267 Mich. 270 ..... 489–492, 599
Garelik *v.* Rennard, 116 Misc. (N. Y.) 352 558
Garner *v.* Railway Co., 211 Ill. App. 201 422
Garrison *v.* City of Detroit, 270 Mich. 237 342
——— *v.* Union Trust Co., 164 Mich. 345 80
Gates *v.* Shannon, 200 Ky. 387 561
Gelder *v.* Welsh, 169 Mich. 490 600
Gibney *v.* Allen, 156 Mich. 301 46
Gibson *v.* Dymon, 281 Mich. 137 249
Gifford *v.* Livingston, 2 Denio (N. Y.), 380 658
Gilbert *v.* Kennedy, 22 Mich. 117 702
Gilfillan's Permit, *In re*, 291 Pa. 358 677
Gill *v.* Backus, 108 Mich. 417 336
Gillespie *v.* Board of County Auditors of Oakland County, 267 Mich. 483 575
Gillette *v.* Michigan United Traction Co., 205 Mich. 410 ..... 399, 517
Gilmore *v.* Bolio, 165 Mich. 633 379
Gleason *v.* Lowe, 232 Mich. 300 ..... 347, 348
Glover *v.* Radford, 120 Mich. 542 431
Godfroy *v.* Disbrow, Walk. Ch. (Mich.) 260 632
Golden *v.* Davis, 266 Mich. 7 310
Gonte *v.* Rosenberg, 221 Mich. 283 377
Goodrich *v.* Hubbard, 51 Mich. 62 360
Goodright *v.* Forester, 1 Taunt. 578 (127 Eng. Rep. 958) 631
Gordon *v.* Heller, 271 Mich. 240 394
Gould *v.* Gould, 245 U. S. 151 88
Grady *v.* Hughes, 64 Mich. 540 125
——— *v.* ———, 80 Mich. 184 334
Graham *v.* Evening Press Co., 135 Mich. 298 ..... 35, 36
——— *v.* Graham, 171 Mich. 307 ..... 455, 458, 460
——— *v.* ———, 184 Mich. 638 478
Grand Rapids *v.* Blakely, 40 Mich. 367 96
Grand Rapids Trust Co. *v.* Herbst, 220 Mich. 321 ..... 490, 491
Gray *v.* Aspironal Laboratories (C. C. A.), 24 Fed. (2d) 97 238
Greenvault *v.* Farmers' & Mechanics' Bank of Michigan, 2 Doug. (Mich.) 498 363
Gregory *v.* Williams, 3 Meriv. 582 (36 Eng. Rep. 224) 460
Griffin *v.* Johnson, 37 Mich. 87 324
Griswold *v.* Railroad Co., 115 N. Y. 61 32
Gwitt *v.* Foss, 230 Mich. 8 543

Haas *v.* St. Paul Gaslight Co., 113 Minn. 379 17
Hall Manfg. Co. of Grand Rapids *v.* American Railway Supply Co., 48 Mich. 331 440
Hallgren *v.* Campbell, 82 Mich. 255 ..... 578, 579
Hallock *v.* Income Guaranty Co., 270 Mich. 448 ..... 358, 594
Halpin *v.* Rural Agricultural School District, 224 Mich. 308 ..... 614–616, 619, 620, 624, 625, 627–629, 631–633, 638, 639, 641, 651, 653, 657, 659, 661, 662
Halzle *v.* Hargreaves, 233 Mich. 234 ..... 170, 528

PAGE
Hamilton *v.* Elliott, 5 Ser. & R. (Pa.) 375 643
——— *v.* Park & McKay Co., 112 Mich. 138 ..... 440, 442
——— *v.* Wead, 122 Neb. 854 360
Hammond *v.* Edison Illuminating Company of Detroit, 131 Mich. 79 240
Hanna *v.* McClave, 271 Mich. 133 400
Hapke *v.* Davidson, 180 Mich. 138 359
Harker *v.* Bushouse, 254 Mich. 187 178
Harner *v.* Harner, 255 Mich. 515 367
Harper *v.* Corcoran, 166 Mich. 474 460
Harris' Estate, *In re,* 247 Mich. 690 29
Harrold *v.* Barnum, 8 Cal. App. 21 575
Hauer *v.* Sampsell, 153 Ill. App. 66 412
Hayward *v.* School District No. 9 of the Township of Hope, 139 Mich. 539 652
Heap *v.* Heap, 258 Mich. 250 ..... 335, 456, 462
Heath *v.* Waters, 40 Mich. 457 ..... 459, 462
Heaton *v.* Edwards, 90 Mich. 500 377
Heffron *v.* Daly, 133 Mich. 613 689
Helden *v.* Helden, 11 Wis. 554 369
Hennessey *v.* Taylor, 189 Mass. 583 35
Higginbotham *v.* Phillips, 192 Mich. 49 652
Hilt *v.* Weber, 252 Mich. 198 ..... 614, 659
Hintz *v.* Wayne Circuit Judge, 245 Mich. 306 368
Hiscock *v.* Hiscock, 257 Mich. 16 394
Hitchcock *v.* Burgett, 38 Mich. 501 ..... 29, 30
Hoffman *v.* Security Trust Co. of Detroit, 256 Mich. 383 362
Hoffman's Estate, *In re,* 200 Mich. 464 549
——— Will, *In re,* 18 Mich. Law Rev. p. 27 626
Holden *v.* Lathrop, 65 Mich. 652 ..... 334, 336
Holgate *v.* Chrysler Corp., 279 Mich. 24 411
Hollaway *v.* Nassar, 276 Mich. 212 178
Holmes *v.* McDonald, 119 Mich. 563 80
Holsaple *v.* Superintendents of Poor of Menominee County, 232 Mich 603 ..... 341, 347
Home Life Insurance Co. *v.* Elwell, 111 Mich. 689 392
Horsley *v.* Woodley, 12 Ga. App. 456 690
Horton *v.* Howard, 79 Mich. 642 363
Hovey *v.* Sebring, 24 Mich. 232 362
Hoyt *v.* Shenango Valley Steel Co., 207 Pa. 208 240
Hubbard *v.* Smith, 2 Mich. 207 632
Hughes *v.* Buckingham, 5 S. & M. (13 Miss.) 632 72
Hull *v.* Hull, 149 Mich. 500 363
Hutchins *v.* Lee, 1 Atk. 447 (26 Eng. Rep. 284) 460
Huxley *v.* Rice, 40 Mich. 73 460

Indemnity Insurance Co. of North America *v.* Geist, 270 Mich. 510 358
Indian Motorcycle Co. v. United States, 283 U. S. 570 95
In re Abel's Estate, 173 Mich. 93 549
——— Allen's Estate, 230 Mich. 584 ..... 283, 520
——— Boyer's Estate, 281 Mich. 618 584

PAGE
In re Bromley's Estate, 113 Mich. 53 ..... 516, 519
——— Browne's Estate, 217 Mich. 621 ..... 282, 516, 519
——— Bulthuis' Estate, 232 Mich. 129 283
——— Carlson's Estate, 218 Mich. 262 283
——— Cochrane's Estate, 211 Mich. 370 ..... 517, 519
——— Colhoun, 18 Mich. Law Rev. p. 21 626
——— Cotcher's Estate, 274 Mich. 154 ..... 516, 520
——— Culhane's Estate, 269 Mich. 68 458
——— Dodge Brothers, 241 Mich. 665 88
——— Eldred's Estate, 234 Mich. 131 519
——— Fay's Estate, 197 Mich. 675 ..... 517, 519
——— Flood's Estate, 270 Mich. 655 282
——— Gilfillan's Permit, 291 Pa. 358 677
——— Harris' Estate, 247 Mich. 690 29
——— Hoffman's Estate, 200 Mich. 464 549
———, ——— Will, 18 Mich. Law Rev. p. 27 626
——— Lacroix's Estate, 265 Mich. 59 282
——— Lamphere, 61 Mich. 105 627
——— Lembrich's Estate, 243 Mich. 39 702
——— Mathiason Manfg. Co., 122 Mo. App. 437 238
——— McMaster's Estate, 163 Mich. 210 ..... 518, 519
——— Meredith's Estate, 275 Mich. 278 125
——— Pierson's Estate, 282 Mich. 411 547
——— Rahn's Estate, 241 Mich. 29 ..... 127, 455, 456, 462
——— Rosa's Estate, 210 Mich. 628 520
——— Sir J. Rivett-Carnac's Will, 30 Ch. Div. (Eng.) 136 642
——— Spinner's Estate, 248 Mich. 263 ..... 283, 516
——— Vetter's Estate, 162 Mich. 109 362
——— Ward's Estate, 152 Mich. 218 456
——— Widening of Michigan Avenue, Roosevelt to Livernois, (Parcel 68), 280 Mich. 539 63
Iron Mountain *v.* Dickinson County Road Commissioners, 283 Mich. 213 157
Irwin *v.* Nichols, 87 Ark. 97 360
Isaacs *v.* McLean, 106 Mich. 79 594

Jacoby *v.* Schafsnitz, 270 Mich. 515 383
J. B. Simpson, Inc., *v.* O'Hara, 277 Mich. 55 89
Jefferson County *v.* Cole, 204 Ky. 27 576
Jenkins *v.* Stewart, 271 Mich. 522 361
Jessewich *v.* Abbene, 154 Misc. (N. Y.) 768 ..... 272, 687
Jirasek *v.* Wayne Circuit Judge, 248 Mich. 676 362
Johns *v.* Wisconsin Land & Lumber Co., 268 Mich. 675 613
Johnson *v.* First Nat'l Bank of Shellman, 53 Ga. App. 56 .. 183, 184
——— *v.* Fremont Canning Co., 270 Mich. 524 352
——— *v.* Meade's Estate, 252 Mich. 357 393
Jones *v.* Phelps, 5 Mich. 218 599
——— *v.* Village of Portland, 88 Mich. 598 29
Jordan *v.* Jordan, 53 Mich. 550 368
Judson *v.* Gray, 11 N. Y. 408 658
——— *v.* Pratt, 208 Mich. 286 393

PAGE
Kadlec *v.* Al. Johnson Construction Co., 217 Iowa, 299..... 343
Kaifer *v.* Georgia Casualty Co. (C. C. A.), 67 Fed. (2d) 309.. 359
Kantner *v.* Railway Co., 236 Pa. 283..... 422
Kaplan *v.* Lanzner, 193 N. Y. Supp. 2..... 412
Kay *v.* United States, 303 U. S. 1..... 686
Kelsey *v.* Detroit Trust Co., 265 Mich. 358..... 458
Kerr *v.* Day, 14 Pa. 112..... 561
——— *v.* Hayes, 250 Mich. 19.....170, 527
King *v.* Brisac, 4 East, 164 (102 Eng. Rep. 792)..... 114
——— *v.* Railroad Co., 75 Hun (N. Y.) 17..... 32
Kirby *v.* Gibson Refrigerator Co., 274 Mich. 395..... 470
Kirkwood *v.* Hoxie, 95 Mich. 62..... 363
Klink *v.* State, *ex rel.* Budd, 207 Ind. 628..... 72
Klinkener *v.* School Directors of M'Keesport, 1 Jones (11 Pa.), 444..... 643
Knass *v.* Madison & Kedzie State Bank, 354 Ill. 554..... 10
Knight *v.* Merignac, 281 Mich. 684..... 527
Korstange *v.* Kroeze, 261 Mich. 298..... 36
Kutchai *v.* Kutchai, 233 Mich. 569..... 367

Lacroix's Estate, *In re,* 265 Mich. 59..... 282
LaDow *v.* E. Bement & Sons, 119 Mich. 685..... 554
Laidlaw *v.* City of Ludington, 272 Mich. 11..... 532
Laird *v.* Laird, 115 Mich. 352.....186, 187
Lamb *v.* Lippincott, 115 Mich. 611..... 282
Lamphere, *In re,* 61 Mich. 105..... 627
Langworthy *v.* Green Township, 88 Mich. 207..... 32
Lanigan *v.* New York Gas-Light Co., 71 N. Y. 29.....17, 18
Lansing *v.* Dawley, 247 Mich. 394..... 674
La Prise *v.* Wayne Circuit Judge, 234 Mich. 371..... 433
Larkin (C. H.) Co. *v.* Dawson, 37 Tex. Civ. App. 345..... 183
LaRoche *v.* Singsen, 281 Mass. 369..... 388
Latimer *v.* Piper, 261 Mich. 123..... 458
Lautenshlager *v.* Lautenshlager, 80 Mich. 285..... 83
Lavalle *v.* Strobel, 89 Ill. 370..... 625
Lee *v.* U. S. Graphite Co., 161 Mich. 157..... 688
Lehigh & H. R. R. Co. *v.* Marchant, 28 C. C. A. 544..... 32
Lembrich's Estate, *In re,* 243 Mich. 39..... 702
Lendberg *v.* Brotherton Iron Mining Co., 75 Mich. 84..394, 400, 410
Leonard *v.* Hey, 269 Mich. 491..... 210
Lester *v.* Thompson, 91 Mich. 245..... 392
Lett *v.* Summerfield & Hecht, 239 Mich. 699..... 348
Lewis *v.* Bricker, 232 Mich. 388..... 362
——— *v.* Sheldon, 103 Mich. 102.....615, 616
Liberty Lumber Co. *v.* City of Tacoma, 142 Wash. 377..... 678
Lightfoot *v.* Davis, 198 N. Y. 261..... 475
Loomis *v.* Armstrong, 63 Mich. 355..... 458
Lord *v.* Goldberg, 81 Cal. 596..... 568
Lorman *v.* Benson, 8 Mich. 18..... 627
Louisville Gas Co. *v.* Gutenkuntz, 82 Ky. 432..... 17
Louisville, N. A. & C. R. Co. *v.* Falvey, 104 Ind. 409..... 32
Lowe *v.* Crocker, 154 Wis. 497..... 10

PAGE

Luttenton *v.* Railway Co., 209 Mich. 20 31
Lynas *v.* Maxwell Farms, 279 Mich. 684 568
Lyon *v.* Richmond, 2 Johns. Ch. (N. Y.) 51 660
Lyons *v.* City of Grand Rapids, 274 Mich. 588 523
Lytle *v.* State, 17 Ark. 608 650

MacKenzie *v.* Union Guardian Trust Co., 262 Mich. 563 ..... 456, 458, 465
Magoffin *v.* Holt, 62 Ky. 95 554
Maki *v.* School District of Wakefield Township, 235 Mich. 689 42
Mansfield C. & L. M. R. Co. *v.* Swan, 111 U. S. 379 364
Marcellus *v.* Wright, 61 Mont. 274 69
Marek *v.* City of Alpena, 258 Mich. 637 342
Marlowe *v.* Huron Mountain Club, 271 Mich. 107 164
Marquette County *v.* Ward, 50 Mich. 174 410
Marshall Field & Co. *v.* Himelstein, 253 Mich. 355 457
Martin *v.* J. A. Mercier Co., 255 Mich. 587 341
——— *v.* McCord, 5 Watts (Pa.), 493 643
Maslen *v.* Anderson, 163 Mich. 477 363
Massachusetts National Bank *v.* Shinn, 163 N. Y. 360 690
Mathiason Manfg. Co., *In re,* 122 Mo. App. 437 238
May *v.* Rumney, 1 Mich. 1 626
Mayer *v.* Mayer, 154 Mich. 386 367
——— *v.* Railway Co., 152 Mich. 276 383
Mayhew *v.* Wilhelm, 249 Mich. 640 318
McDannel *v.* Black, 270 Mich. 305 ..... 456, 458
McDonald *v.* Bœing, 43 Mich. 394 378
McEvoy *v.* City of Saulte Ste. Marie, 136 Mich. 172 615
McGarvin *v.* Wilson (Mich. Terr. 1809), 36 Mich. Pion. & Hist. Soc. Coll. p. 363 626
McGavock *v.* Woodlief, 20 How. (61 U. S.) 221 379
McGee *v.* McDonald's Estate, 66 Mich. 628 82
McGovern *v.* Bennett, 146 Mich. 558 377
McGuire *v.* Armstrong, 268 Mich. 152 ..... 138, 139
McHugh *v.* Dowd's Estate, 86 Mich. 412 82
McKelvey *v.* Hill, 259 Mich. 16 170
McKenzie *v.* Harrison, 120 N. Y. 260 259
McKissick *v.* Pickle, 16 Pa. 140 642
McMann *v.* General Accident Assurance Corp., 276 Mich. 108 468
McMaster *v.* Warner, 44 Idaho, 544 412
McMaster's Estate, *In re,* 163 Mich. 210 ..... 518, 519
Mechler *v.* McMahon, 184 Minn. 476 343
Menominee *v.* County of Menominee, 283 Mich. 146 ..... 214, 215
Mercer *v.* Williams, Walk. Ch. (Mich.) 85 626
Meredith's Estate, *In re,* 275 Mich. 278 125
Merritt *v.* Dickey, 38 Mich. 41 335
Mestaer *v.* Gillespie, 11 Ves. Jr. 621 (32 Eng. Rep. 1230) 459
Michigan Avenue, Roosevelt to Livernois, *In re* Widening of (Parcel 68), 280 Mich. 539 63
Michigan Ins. Co. of Detroit *v.* Brown, 11 Mich. 265 393
Michigan Trust Co. *v.* Baker, 226 Mich. 72 489
Miles *v.* Department of Treasury, 209 Ind. 172 91
Miller *v.* City Ice & Fuel Co., 279 Mich. 592 ..... 144, 145

PAGE
Miller *v.* Miller, 91 Kan. 1 650
——— *v.* Railroad Co., 167 Mich. 21 33
Minks *v.* Stenberg, 217 Iowa, 119 349
Moebus *v.* Herrmann, 108 N. Y. 349 35
Money Corporation *v.* Draggoo, 274 Mich. 527 501
Montford *v.* Lord Cadogan, 17 Ves. Jr. 485 (34 Eng. Rep. 188) . 465
Montgomery Ward & Co., Inc., *v.* Fry, 277 Mich. 260 89
Moons *v.* DeBernales, 1 Russ. 301 (38 Eng. Rep. 117) 465
Moore *v.* Ellis, 18 Mich. 77 363
——— *v.* Northoek, 280 Mich. 431 388
——— *v.* Sharpe, 91 Ark. 407 ..... 617, 647
——— *v.* State, 17 Ohio St. 521 30
Moross *v.* Moross, 129 Mich. 27 368
Morris *v.* Gilmer, 129 U. S. 315 364
Morse *v.* Goold, 11 N. Y. 281 658
Morton *v.* Johnston, 124 Mich. 561 456
Moyer *v.* Scott, 30 Mich. 345 362
Murphy *v.* Railway Co., 71 N. J. Law, 5 412
Murphy Chair Co. *v.* American Radiator Co., 172 Mich. 14 456

Nashville, C. & St. L. R. *v.* Pollard, 14 Tenn. App. 388 412
Nelson *v.* Ironwood & Bessemer Railway & Light Co., 204 Mich. 347 42
Newkerk *v.* Newkerk, 2 Caine (N. Y.), 345 643
Newton *v.* McKay, 29 Mich. 1 359
Nolan *v.* Garrison, 156 Mich. 397 455
Noonan *v.* Volek, 246 Mich. 377 584
Nowell *v.* Equitable Trust Co., 249 Mass. 585 10
Nugent *v.* Teachout, 67 Mich. 571 408
Nutter *v.* Russell, 3 Metc. (60 Ky.) 163 ..... 645, 647

Oakland County *v.* Mack, 243 Mich. 279 ..... 614, 616, 619
O'Connor *v.* City of Saratoga Springs (1933), 146 Misc. (N. Y.) 892 617
Ohio River Junction R. Co. *v.* Pennsylvania Co., 222 Pa. 573 561
Ombrello *v.* Railway Co., 252 Mich. 396 456
O'Neil *v.* Railway Co., 101 Mich. 437 408
O'Neill *v.* Kunkle, 244 Mich. 653 431
Opinion of the Justices, 239 Mass. 603 70
———, 275 Mass. 575 69
Orth *v.* Gregg, 217 Iowa, 516 388
Osborn *v.* Bank of United States, 9 Wheat. (22 U. S.) 738 660
——— *v.* Potter, 101 Mich. 300 652
Oskaloosa Water Co. *v.* Board of Equalization of City of Oskaloosa, 84 Iowa, 407 642
Otis *v.* Arntz, 198 Mich. 196 490
Ott *v.* Wilson, 216 Mich. 499 341
Ottinger *v.* Railway, 166 Mich. 106 419

Palms *v.* Palms, 68 Mich. 355 ..... 490, 491
Parish *v.* United States, 8 Wall. (75 U. S.) 489 603
Paton *v.* Stealy, 272 Mich. 57 210
Patt *v.* Dilley, 273 Mich. 601 ..... 400, 410
Paye *v.* City of Grosse Pointe, 279 Mich. 254 672

PAGE
Pearson *v.* Horne, 139 Ga. 453 559
Peninsular Savings Bank *v.* Ward, 118 Mich. 87 .....336, 363
Penny *v.* Little, 3 Scam. (4 Ill.) 301 625
People *v.* Arnold, 46 Mich. 268 114
——— *v.* Baker, 251 Mich. 322 174
——— *v.* Blandford, 23 Porto Rico, 580 35
——— *v.* Brenham, 3 Cal. 477 71
——— *v.* Corder, 244 Mich. 274 174
——— *v.* Dochstader, 274 Mich. 238 .....199, 200
——— *v.* Evans, 72 Mich. 367 199
——— *v.* Farrell, 263 Mich. 669 200
——— *v.* Gregory, 30 Mich. 371 200
——— *v.* Hare, 57 Mich. 505 29
——— *v.* Hudson, 35 Cal. App. 234 200
——— *v.* Knoll, 258 Mich. 89 115
——— *v.* Meloche, 186 Mich. 536 363
——— *v.* Ryczek, 224 Mich. 106 26
——— *v.* Saunders, 25 Mich. 119 115
——— *v.* Sims, 257 Mich. 478 200
——— *v.* Spence, 250 Mich. 573 200
——— *v.* Stewart, 44 Mich. 484 199
——— *v.* Wright, 89 Mich. 70 199
———, *ex rel.* Brundage, v. Hansen, 234 Ill. App. 483 577
———, ——— Green, *v.* Eaton Probate Judge, 40 Mich. 244 .. 362
———, for use of Clinton, *v.* Laning, 73 Mich. 284 334
Peoples *v.* Evening News Ass'n, 51 Mich. 11 457
Perfection Socket Co. *v.* American Forging & Socket Co., 222 Mich. 396 440
Perkins *v.* Cheney, 114 Mich. 567 335
——— *v.* Jackson Cushion Spring Co., 206 Mich. 98 164
Perrin *v.* Lepper, 49 Mich. 347 462
——— *v.* ———, 72 Mich. 454 .....458, 460, 462
Petersen *v.* Lundin, 236 Mich. 590 388
Petrie *v.* E. A. Myers Co., 269 Pa. 134 35
Phillips *v.* Farmers' Mutual Fire Ins. Co. of Kalamazoo County, 208 Mich. 84 318
Phinney *v.* Railway Co., 285 Mass. 207 422
Piccolo *v.* Town of West Haven, 120 Conn. 449 673
Pickett *v.* Loggon, 14 Ves. Jr. 215 (33 Eng. Rep. 503) 459
Pierce *v.* Pierce, 55 Mich. 629 470
Pierson's Estate, *In re*, 282 Mich. 411 547
Pitcher *v.* Railway Co., 196 Mass. 69 421
Plate *v.* Detroit Fidelity & Surety Co., 229 Mich. 482 429
Pleasant Lake Hills Corp. *v.* Eppinger, 235 Mich. 174 615
Pleasant Ridge *v.* Cooper, 267 Mich. 603 674
Polk Manor Co. *v.* Manton, 274 Mich. 539 .....309, 311
Pollard *v.* Hagan, 3 How. (44 U. S.) 212 627
Pollock *v.* McCarty, 198 Mich. 66 249
Porter *v.* Long, 124 Mich. 584 456
Powell *v.* Pennock, 181 Mich. 588 456
Powers *v.* Fisher, 279 Mich. 442 476
Probst *v.* Jones, 262 Mich. 678 501

PAGE
Pupaza *v.* Laity, 268 Mich. 250....548, 549
Putnam *v.* Ernst, 232 Mich. 682....308, 312

Rahn's Estate, *In re,* 241 Mich. 29....127, 455, 456, 462
Railroad Co. *v.* Stout, 84 U. S. 657.... 528
Ranson *v.* Weston, 110 Mich. 240.... 377
Rapid Railway Co. *v.* Michigan Public Utilities Commission, 225 Mich. 425.... 543
Raridan *v.* Bick, 259 Mich. 200.... 372
Raseman *v.* Raseman, 234 Mich. 237.... 127
Raymond *v.* Hill, 168 Cal. 473.... 35
Rehfeld *v.* City of San Francisco, 218 Cal. 83....675, 676
Reichert *v.* Metropolitan Trust Co., 262 Mich. 123....9, 11
——— *v.* Reichert, 124 Mich. 694.... 368
Reynolds *v.* Gaertner, 117 Mich. 532.... 614
Rhines *v.* Consumers Power Co., 259 Mich. 236.... 613
Rice *v.* Railroad Corp., 12 Allen (94 Mass.), 141....617, 618
——— *v.* Rice, 50 Mich. 448.... 702
Richardson *v.* Buhl, 77 Mich. 632....11, 689
——— *v.* Crandall, 48 N. Y. 348.... 688
——— *v.* Williams, 249 Mich. 350.... 170
Ridge Investment Corp. *v.* Nicolosi, 15 N. J. Misc. 569....272, 274
Rivett-Carnac's (Sir J.) Will, *In re,* 30 Ch. Div. (Eng.) 136.... 642
Robbins *v.* Original Gas Engine Co., 191 Mich. 122.... 523
———, for use of Wood, *v.* Burridge, 128 Mich. 25.... 334
Rock Island Plow Co. *v.* Cut Bank Imp. Co., 101 Mont. 117.... 412
Rogers *v.* Anderson, 40 Mich. 290.... 392
——— *v.* Burr, 97 Ga. 10.... 555
——— *v.* Detroit Automobile Inter-Insurance Exchange, 275 Mich. 374.... 456
Rohde *v.* Wayne Circuit Judge, 168 Mich. 683.... 573
Rosa's Estate, *In re,* 210 Mich. 628.... 520
Ross *v.* Hoffman (Mo. App.), 269 S. W. 679.... 343
Rossing *v.* State Bank of Bode, 181 Iowa, 1013.... 238
Rossman *v.* Rossman, 62 Mich. 429.... 368
Rowell *v.* City of Battle Creek, 169 Mich. 19.... 72
Ruell *v.* City of Alpena, 108 Mich. 290.... 574
Rumsey *v.* Railroad Co., 133 N. Y. 79.... 658
Runnells *v.* Village of Pentwater, 109 Mich. 512.... 585
Russell *v.* Szczawinski, 268 Mich. 112....341, 342
——— *v.* Wheeler, 129 Mich. 41.... 335
Ruth *v.* Vroom, 245 Mich. 88....341, 348
Ryan *v.* Railroad Co., 267 Mich. 202....206, 207

Sage *v.* Hampe, 235 U. S. 99.... 688
Saginaw City Council *v.* Saginaw Board of Estimates, 256 Mich. 624.... 531
Sanborn *v.* McLean, 233 Mich. 227.... 219
Sanders *v.* Campbell, 231 Mich. 592.... 308
Sauder *v.* District Board of School District No. 10, Township of Royal Oak, Oakland County, 271 Mich. 413.... 542
Sauer *v.* Detroit Fidelity & Surety Co., 237 Mich. 697.... 334
Scalf *v.* L'Anse Township Single School District, 276 Mich. 662. 542

PAGE
Scendar *v.* Winona Copper Co., 169 Mich. 665 594
Schlaf *v.* Schlaf, 237 Mich. 543 194
School District No. 5 of Delhi *v.* Everett, 52 Mich. 314 652
Schuffert *v.* Grote, 88 Mich. 650 318
Schultz *v.* Railways Co., 158 Mich. 665 419
Schulz *v.* Steffey, 275 Mich. 409 187
Schwier *v.* Atlas Assurance Co., 227 Mich. 104 363
Scurfield *v.* Howes, 3 Bro. Ch. 90 (29 Eng. Rep. 425) 464
Scurlock *v.* Peglow, 263 Mich. 658 171
Sebastian *v.* Sherwood, 270 Mich. 339 325
Sellon *v.* Tanner, 252 Mich. 231 ..... 351, 352
Severance *v.* Severance, 90 Mich. 417 282
Shapleigh *v.* Wyman, 134 Mass. 118 35
Sharrow *v.* McMichael, 280 Mich. 114 470
Sheetz (W. F.) & Co. *v.* Commonwealth Commercial State Bank, 282 Mich. 96 183
Shell Petroleum Corp. *v.* Hollow (C. C. A.), 70 Fed. (2d) 811 ..... 617, 651
Shepard *v.* Shepard, 164 Mich. 183 80
Shiovitz *v.* New York Life Ins. Co., 281 Mich. 382 302
Simpson (J. B.), Inc., *v.* O'Hara, 277 Mich. 55 89
Sinkiewicz *v.* Lee & Cady, 254 Mich. 218 164
Smalley *v.* Mitchell, 110 Mich. 650 568
——— *v.* Railway Co., 131 Mich. 560 419
Smith *v.* Atterby (Alterly), 3 Chan. Rep. 93 (21 Eng. Rep. 739) 641
——— *v.* Bryan, 100 Va. 199 580
——— *v.* Ormiston, 242 Mich. 600 140
——— (Chas. J.) Co., Inc., *v.* Anderson, 84 N. J. Eq. 681 559
Snow *v.* Griesheimer, 220 Ill. 106 259
Snyder *v.* Snyder, 131 Mich. 658 80
Somers *v.* State, 5 S. D. 321 ..... 571, 575
Southern Electric Securities Co. *v.* State, 91 Miss. 195 602
Southern R. Co. *v.* Lee, 167 Ala. 268 412
Spear *v.* Carter, 1 Mich. 19 363
Spencer *v.* Taylor, 219 Mich. 110 ..... 341, 348
Spinner's Estate, *In re,* 248 Mich. 263 ..... 283, 516
Stager *v.* Junker, 14 N. J. Misc. 913 ..... 272, 273
State *v.* Cawood, 2 Stew. (Ala.) 360 625
——— *v.* Hillman, 110 Conn. 92 677
——— *v.* Holmes, 115 Mich. 456 490
———, *ex rel.* Carter, v. Harper, 182 Wis. 148 ..... 673, 676
———, ——— City Ice & Fuel Co., *v.* Stegner, 120 Ohio St. 418. 676
———, ——— Dixon, *v.* Van Patten, 26 Nev. 273 541
———, ——— Gilbert, *v.* Board of Commissioners of Sierra County, 29 N. M. 209 575
———, ——— Holland, *v.* Ledwith, 14 Fla. 220 577
———, ——— Kane, *v.* Johnson, 123 Mo. 43 576
———, ——— Little, *v.* Mitchell, 50 Kan. 289 577
———, ——— Matlack, *v.* Oklahoma City, 38 Okla. 349 ..575, 577
———, ——— Rumbold, *v.* Gordon, 238 Mo. 168 578
———, ——— Sweeney, *v.* Stevens, 46 N. J. Law, 344 577
———, ——— Wine, *v.* Railroad Co., 99 Mo. 30 659

PAGE
Steel *v.* Clinton Circuit Judge, 133 Mich. 695 362
Stevens *v.* Railway Co. (Tex. Civ. App.), 169 S. W. 644 617
——— *v.* Stevens, 49 Mich. 504 195
Stewart *v.* Ashley, 34 Mich. 183 410
——— *v.* Kidd, 262 Ky. 90 576
Stobbelaar *v.* Berg, 247 Mich. 121 388
Stone *v.* State, *ex rel.* Strain, 18 Ala. App. 228 575
Stong's Estate, 160 Pa. 13 466
Stout *v.* Keyes, 2 Doug. (Mich.) 184 626
Stowe *v.* Mather, 234 Mich. 385 ..... 431, 434
Streeter *v.* Locke, — Mass. — (4 N. E. [2d] 297) 139
Streicher *v.* Streicher, 202 Mich. 588 194
Stringer *v.* Frost, 116 Ind. 477 35
——— *v.* Stevens' Estate, 146 Mich. 181 265
Strong *v.* Carver Cotton Gin Co., 197 Mass. 53 440
Struthers *v.* Peckham, 22 R. I. 8 690
Sullivan *v.* Godkin, 172 Mich. 257 600
Swaine *v.* Hemphill, 165 Mich. 561 457
Swan *v.* Williams, 2 Mich. 427 ..... 625, 626
Swartwout, *Ex parte*, 4 Cranch (8 U. S.), 75 657
Sweet *v.* Ellis, 109 Mich. 460 393
Swift & Co. *v.* McMullen, 169 Mich. 1 410
Swing *v.* Cameron, 145 Mich. 175 689

Taylor *v.* Benham, 5 How. (46 U. S.) 233 466
——— *v.* City of Philadelphia, 126 Pa. Super. Ct. 196 574
——— *v.* Horde (1757), 1 Burr. 60 (97 Eng. Rep. 190) 632
——— *v.* Town of Monroe, 43 Conn. 36 31
Ten Eyck *v.* Wing, 1 Mich. 40 393
Ter Keurst *v.* First State Bank, 271 Mich. 259 ..... 3, 10
Thames *v.* Central City Ins. Co., 49 Ala. 577 238
Thatcher *v.* Wardens & Vestrymen of St. Andrew's Church of Ann Arbor, 37 Mich. 264 248
Thayer *v.* Hartford Board of Appeals, 114 Conn. 15 675
Thomas *v.* Morton Salt Co., 258 Mich. 231 689
Thompson *v.* Michigan Cab Co., 279 Mich. 370 528
——— *v.* Michigan Mutual Benefit Ass'n, 52 Mich. 522 363
——— *v.* Southern Mich. Transportation Co., 261 Mich. 440 ..... 341, 342, 410
——— *v.* Thompson, 205 Mich. 124 194
Thorbahn *v.* Walker's Estate, 269 Mich. 586 82
Thuner *v.* Kanter, 102 Mich. 59 378
Tice *v.* Bay City, 78 Mich. 209 29
Timmerman *v.* Bidwell, 62 Mich. 205 585
Tio *v.* Molter, 262 Mich. 655 ..... 35, 36
Tompkins *v.* Hollister, 60 Mich. 470 ..... 458, 460
Townsend *v.* Kurtz, 83 Md. 331 ..... 572, 577, 579
Township of Port Huron *v.* Board of Auditors of St. Clair County, 269 Mich. 326 531
Trainor *v.* Board of Auditors of Wayne, 89 Mich. 162 ..... 573, 578
Tregonning *v.* Castantini, 243 Mich. 233 388
Tromble *v.* Hoffman, 130 Mich. 676 363

PAGE
Turner *v.* People, 33 Mich. 363 199
——— *v.* Schmidt Brewing Co., 278 Mich. 464 .....10, 11
Tuttle *v.* Railway Co., 193 Mich. 390 419

Underhill *v.* Railroad Co., 20 Barb. (N. Y.) 455 .....617, 620
United States *v.* Kreidler, 11 Fed. Supp. 402 687
——— *v.* Milwaukee Refrigerator Transit Co., 142 Fed. 247 ... 602
Upington *v.* Corrigan, 151 N. Y. 143 628

Van Auken *v.* Monroe, 38 Mich. 725 410
Van Deusen *v.* Newcomer, 40 Mich. 90 30
Van Winkle *v.* Railroad Co., 46 Hun (N. Y.) 564 423
Vaughan *v.* Langford, 81 S. C. 282 628
Veeser *v.* Robinson Hotel Co., 275 Mich. 133 104
Vetter's Estate, *In re,* 162 Mich. 109 362
Village of Euclid *v.* Ambler Realty Co., 272 U. S. 365 .....674, 678
Voorheis *v.* Powell, 261 Mich. 378 311

Wagner *v.* Wallowa County, 76 Ore. 453 .....617, 618, 620, 628
Waites *v.* Briggs Manfg. Co., 280 Mich. 185 164
Wales *v.* Bank of Michigan, Harr. Ch. (Mich.) 308 182
Walker *v.* McGraw, 279 Mich. 97 388
Ward's Estate, *In re,* 152 Mich. 218 456
Warren *v.* Holbrook, 95 Mich. 185 475
——— *v.* Lee, 2 Dyer, 126b (73 Eng. Rep. 276) 617, 630
Warwick *v.* Blackney, 272 Mich. 231 36
Washington County Bank *v.* Jerome, 8 Mich. 490 359
Washington Gas Light Co. *v.* District of Columbia, 161 U. S. 316 17
Waters *v.* Wambach, 140 Md. 253 560
Watkins *v.* Prudential Insurance Co., 315 Pa. 497 301
Waubun Beach Ass'n *v.* Wilson, 274 Mich. 598 363
Waverly Park Amusement Co. *v.* Michigan United Traction Co., 197 Mich. 92 652
Waynick *v.* Walrond, 155 Va. 400 .....343, 349
Webber *v.* Detroit Fidelity & Surety Co., 263 Mich. 144 335
Weber *v.* Enoch C. Roberts Iron Ore Co., 270 Mich. 38 362
——— *v.* Ford Motor Co., 245 Mich. 213 613
Weigand *v.* Rutschke, 253 Ill. 260 251
Welch *v.* Palmer, 85 Mich. 310 594
Wertman *v.* Michigan Mutual Liability Co., 267 Mich. 508 358
Wessborg *v.* Merrill, 195 Mich. 556 46
Wessinger *v.* Roberts, 67 S. C. 240 549
West *v.* Newton, 229 Mich. 68 377
W. F. Sheetz Co. *v.* Commonwealth Commercial State Bank, 282 Mich. 96 183
Wheelock *v.* Freiwald (C. C. A.), 66 Fed. (2d) 694 412
Whitlatch *v.* City of Iowa Falls, 199 Iowa, 73 343
Whitworth *v.* Riley, 132 Okla. 72 .....343, 349
Wicker *v.* North States Construction Co., 183 Minn. 79 343
Wiel *v.* Wright, 55 Hun (N. Y.), 611 35
Wilbur *v.* Grover, 140 Mich. 187 249

PAGE
Williams *v.* Grealy, 112 Mass. 79 35
——— *v.* National Cash Register Co., 272 Mich. 553 164
Willoughby *v.* Willoughby, 1 Term Rep. (Durn. & East's) 763 (99 Eng. Rep. 1366) 640
Wilson *v.* Bank of Montgomery County, 29 Pa. 537 240
——— *v.* Davis, 1 Mich. 156 363
——— *v.* Langhorne, 102 Va. 631 647
——— *v.* People, 4 Park. Crim. R. (N. Y.) 619 30
Windemere-Grand Improvement & Protective Ass'n *v.* American State Bank of Highland Park, 205 Mich. 539 310
Windoes *v.* Colwell, 247 Mich. 372 127
Wineman Realty Co. *v.* Pelavin, 267 Mich. 594 310
Witte *v.* Hobolth, 224 Mich. 286 431
Wolford *v.* Herrington, 74 Pa. 311 460
Wood *v.* Brady, 150 U. S. 18 657
——— *v.* Railway Co., 49 Mich. 370 419
——— *v.* Smith, 162 Mich. 334 378
Woodmansee *v.* Ann Arbor Brick Co., 164 Mich. 688 130
Woodruff *v.* Ives, 34 Mich. 320 363
Woolcott *v.* Woolcott, 133 Mich. 643 641
Woughter *v.* Van Marter, 281 Mich. 408 190
Wright *v.* Linn, 9 Barr (9 Pa.), 433 643

Young *v.* Martinich, 279 Mich. 267 170
——— *v.* Peachy, 2 Atk. 254 (26 Eng. Rep. 557) 460
——— *v.* Young, 89 Va. 675 ..... 617, 647
Youngblood *v.* Sexton, 32 Mich. 406 363

Zabonick *v.* Ralston, 272 Mich. 247 358
Zahn *v.* Board of Public Works of Los Angeles, 195 Cal. 497 .. 674
Zeitler *v.* Concordia Fire Insurance Co., 169 Mich. 555 293
Zuidema *v.* Bekkering, 256 Mich. 327 527

LAWS CITED AND CONSTRUED.

UNITED STATES STATUTES.

	PAGE
42 Stat. at L. p. 354	497
44 —— p. 568 *et seq.*	405
47 —— p. 259	94
48 —— pp. 206, 764	94
—— —— chap. 64	268, 682, 684
49 —— p. 570	405
11 USCA, § 35	497
12 USCA, § 1461 *et seq.*	268, 682, 684
49 USCA, §§ 171 *et seq.*, 173(e)	405

MICHIGAN CONSTITUTION.

	PAGE
Art. 5, § 21	532
Art. 14, §§ 2–4	324
Sched. § 1	638

TERRITORIAL LAWS.

	PAGE
1 Terr. Laws, pp. 796, 805, § 40, p. 815	635

REVISED STATUTES 1838.

	PAGE
Pt. 3, title 3, chap. 1	637

REVISED STATUTES 1846.

	PAGE
Chap. 62	653, 654
——, § 3	635
——, §§ 7–9, 12, 35	654
Chap. 65	655, 656
——, §§ 7, 8	656
Chap. 108, § 2	637

COMPILED LAWS 1871.

	PAGE
§§ 4692, 4693	459
7164, 7165	392

COMPILED LAWS 1915.

	PAGE
§ 2029	65
11417	367
11564	619

COMPILED LAWS 1929.

	PAGE
§§ 402	64, 65, 67, 68
1122	133
3976 *et seq.*	159
3998, 4294	214
4314 *et seq.*	151
4454 *et seq.*	217
4648	136, 507, 586
4697	33, 34, 140, 341, 347, 387
4712	527
4736, 4738	34
4738 (a)	350, 351
4738 (b)	344, 349, 351
4759	340
4788	211
5469	701
8407 *et seq.*	40
8411	41
8412	41, 42
8451	523
8454	179
9773 (d)	228
9806 *et seq.*	375
9846, 9861	457
9869 *et seq.*	335
9871, 9877	457
10138, 10139	228
11922	101, 104, 107
12735	368, 369
12748	367, 369
12921 *et seq.*	654
12923	635
12927, 12928	654
12929, 12932	653, 654
12934, 12935	489
12955	620, 653, 654
12966	619
13278 *et seq.*	266
13278	632, 634, 650, 653, 655
§§ 13280	633
13283	633, 634, 645, 656
13309	266, 642
13411	259, 459
13412	459
13417	568
13478	634
13513	126, 128
13537	689
13593	653
13875	570, 576
13964, subd. (3), 13966	662
13976	263, 266, 391, 546
13981	263
13984	391
13988	391, 392
14018, 14021	127
14036	125
14040	397
14061, 14062	14
14219	82, 186, 256, 258, 583
14220	103, 394
14531	503
14531 *et seq.*	387, 419, 592
14535	419
14608	324
14904	637
15421	503, 504
15708	263
15800 *et seq.*, 15805	325
15844–15847	324
15865, 15866	46
15899	124
15902, 15903	46
17377	64, 65, 67
17379	66
17380	64–67

COMP. LAWS SUPP. 1933.

	PAGE
§ 14444–1 *et seq.*	530

COMP. LAWS SUPP. 1935.

PAGE

§§ 3594..... 149
3663–1..... 87
4018–1 *et seq.*.....152, 214
4514—4521–2.....60, 61
4638..... 150
4651.....149, 150
4697..33, 34, 140, 341, 347, 387
4736..... 34
4738.....34, 350, 351
4738 (b) 344, 349

PAGE

§§ 4759.....340, 347
4801 *et seq.*..... 405
7381–1..... 535
12966–2.....614, 619, 629
14444–8..... 531
17115–43..... 406
17115–44, 17115–45..... 407
17115–531..... 197
17380..... 65–67

COMP. LAWS SUPP. 1937.

PAGE

§ 4018–1a.....214, 215

SESSION LAWS.

PAGE

1877, Act 146.....64, 68, 72, 73
1893, Act 92.....60, 61
1912 (1st Ex. Sess.), Act 10. 40
——, ——, part 1, §§ 5(2), 6. 41
1913, Act 105.....64–66, 68, 72
——, ——, §§ 7, 10.....64, 65
——, ——, § 9..... 66
1915, Act 302..... 150
1917, Act 158..... 391
1921, Act 84..... 237
——, Act 85, §§ 3, 3a..... 228
—— (1st Ex. Sess.), Act 22. 349
—— (2d Ex. Sess.), Act 3.. 349
1925, Act 114.....58, 61
1927, Act 175, chap. 11, §§ 7, 10.....64, 65
——, Act 318, § 46 (b).... 349
——, Act 340..... 217
1929, Act 66, § 25.....100, 107
——, Act 113..... 42
1931, Act 19..... 536
——, ——, § 22a..... 535
——, Act 53..... 405
——, Act 59....34, 344, 349–351
——, ——, § 46 (b)..... 349
——, Act 64..... 34
——, Act 130.....149, 151–157, 159–161, 214
——, ——, §§ 2, 5..... 152
——, ——, §§ 8, 11..... 154
——, Act 219.....614, 619, 629
——, Act 308.....65–67
——, Act 327, §§ 19, 43... 236

PAGE

1931, Act 328, § 43..... 406
——, ——, §§ 44, 45..... 407
——, ——, § 531..... 197
——, Act 335.....58, 60, 61
——, ——, § 8..... 61
1932 (1st Ex. Sess.), Act 41. 154
——, ——, § 19a, subd. (4). 153
1933, Act 98.....530, 531
——, ——, § 8.....531–533
——, Act 119..140, 341, 347, 387
——, Act 167.....87, 91, 96
——, ——, § 1 (b1) (c)... .....87, 89, 93
——, Act 253.....340, 347
1934 (1st Ex. Sess.), Act 7. .....148, 150, 158, 160
——, ——, § 34, subd. (4). 149–151, 153, 155–158, 161, 214, 215
——, ——, ——, subd. (5). 150, 156, 160
——, Act 8.....148, 153, 155, 158, 160
——, ——, § 19, subd. (d [4]).....149, 214, 215
——, Act 20..... 530
1935, Act 3..... 530
——, Act 119..... 405
——, Act 158..... 530
1937, Act 1.....530, 694
——, ——, § 4..... 530
——, Act 320.....157, 160, 161
——, Act 340.....157, 160, 161

ARKANSAS.

PAGE
Digest 1848, chap. 37, p. 265, §§ 6, 7 644

ENGLAND.

PAGE
32 Henry 8, chap. 1 633
——, chap. 9 ..... 649, 653
——, chap. 34 ..... 617, 628
34 & 35 Henry 8, chap. 5 633
3 & 4 Will. 4, chap. 105, § 3 ..... 638, 656
Will. 4 & 1 Vict. chap. 26, § 3 ..... 638, 656
8 & 9 Vict. chap. 106, § 6 ..... 638, 646, 656

MASSACHUSETTS.

PAGE
Gen. Laws 1921, chap. 11, § 2 69

NEBRASKA.

PAGE
Comp. Stat., chap. 25, § 12 369

NEVADA.

PAGE
Comp. Laws 1900, § 1804 541

NEW YORK.

PAGE
1 Rev. Stat. 1829, p. 725, § 35 620
——, pt. 2, chap. 1, title 2, art. 4, §§ 136, 137 655
——, ——, ——, ——, ——, § 138 656
——, ——, ——, ——, ——, § 147 ..... 655, 656

PENNSYLVANIA.

PAGE
1881, Pa. Laws, Act 148, p. 128 539

VIRGINIA.

PAGE
1 Rev. Code 1819, chap. 99, § 29, p. 370; chap. 103, p. 375 646
Rev. Code 1849, chap. 116, § 5, p. 500 646
Code of 1888, § 2418 647

WASHINGTON.

PAGE
Laws of 1933, chap. 191, § 1 (8) 90

WISCONSIN.

PAGE
R. S. 1858, chap. 111, § 28 369

MICHIGAN COURT RULES (1933).

PAGE
No. 23, § 3 593
No. 30 432
No. 37, § 13 ..... 503, 504
No. 55 361
No. 56, § 1, subds. (a), (b) 362
No. 57 505
No. 66 362
No. 67 613
——, § 1 325

OCTOBER TERM, 1937.*

BRIGGS COMMERCIAL & DEVELOPMENT CO. *v.* FINLEY.

1. CONTRACTS—PUBLIC POLICY—PARTIAL REPUDIATION—STATUTES.
   There is no public policy which permits persons or corporations to retain advantages and repudiate the obligations which produce them, except when the transaction is condemned as immoral or by positive statute and the only method of rendering the law effective is to leave the parties where they put themselves.

2. BANKS AND BANKING—STATUTES—PUBLIC POLICY.
   Every banking statute does not raise a public policy which wholly condemns a transaction.

3. SAME—TRUST COMPANY—REALTORS—UNJUST ENRICHMENT—SINGLE AND ISOLATED TRANSACTION.
   Liquidating trustees of trust company which had made extensive loans to realtor, had acted as his fiscal agent for many subdivisions he had developed and held his interest in subdivision involved as security for loans and advances made to him *held*, liable in action of assumpsit on its guaranty for full amount of notes issued by realtor, to plaintiff for sum borrowed to buy up outstanding prior lien where trust company obtained a direct enrichment from a single and isolated transaction in excess of amount involved in its agreement with plaintiff.

BUTZEL, BUSHNELL, and SHARPE, JJ., dissenting.

Appeal from Wayne; Nicol (Henry G.), J. Submitted June 16, 1937. (Docket No. 119, Calendar No. 39,595.) Decided December 29, 1937. Rehearing denied February 25, 1938.

* Continued from Vol. 282.

Assumpsit by Briggs Commercial & Development Company, a Michigan corporation, against Edward B. Finley, Jr., Millard E. Bowlus and Edwin A. Edwards, liquidating trustees of Union Guardian Trust Company, a Michigan corporation, on contract to purchase notes. Judgment for plaintiff. Defendants appeal. Affirmed.

Beaumont, Smith & Harris (*Lewis S. Robinson,* of counsel), for plaintiff.

Jason L. Honigman (*Milton J. Miller,* of counsel), for defendants.

FEAD, C. J. I think the judgment should be affirmed.

Wholly aside from the views expressed in *Brown* v. *Union Banking Co.,* 274 Mich. 499, I find no trace of a public policy applicable here. There was no statute expressly prohibiting the transaction and which would be nullified if any semblance of recovery were permitted the plaintiff on any theory, as was the situation in *Awotin* v. *Atlas Exchange National Bank of Chicago,* 295 U. S. 209 (55 Sup. Ct. 674), where there was a sale of bonds with agreement to repurchase in direct violation of the national banking law.

The Union Guardian Trust Company received an affirmative enrichment by the transaction, in the form of greater security for Harrah's obligations to it, and it would be grossly unjust to permit it to retain such advantage and repudiate the agreements by which it was obtained. In the *Awotin Case* no such condition appeared, the bank received no affirmative benefit in the form of a gain of assets, but, on the contrary, it assumed contingent liabilities.

There was no statute expressly forbidding the agreement at bar. There is no public policy which permits persons or corporations to retain advantages and repudiate the obligations which produce them, except when the transaction is condemned as immoral or by positive statute and the only method of rendering the law effective is to leave the parties where they put themselves. Every banking statute does not raise a public policy which wholly condemns a transaction. If it were otherwise, then a customer who borrows more money than the bank is entitled to loan him would not need to pay his debt.

The case falls within *Citizens Central Nat. Bank of New York* v. *Appleton,* 216 U. S. 196 (30 Sup. Ct. 364), where, although in violation of the national banking law, a bank guaranteed payment of a customer's note at another bank where the loan from the latter was made to enable the customer to pay his note at the bank making the guaranty. The court recognized the invalidity of the contract as in violation of the statute but held that recovery could be had for money had and received, at least to the amount that the bank of guaranty had received from the loan.

Another distinction that could be made is that the transaction at bar was a single and isolated one, and could be approved under *Ter Keurst* v. *First State Bank,* 271 Mich. 259, which should be read in connection with *Brown* v. *Union Banking Co., supra,* in order to appreciate the distinction between general and isolated transactions.

As the direct enrichment of the Union Guardian Trust Company from the transaction was of value in excess of the amount involved in its agreement with plaintiff, plaintiff is entitled to judgment for the full amount thereof, with costs.

NORTH, WIEST, POTTER, and CHANDLER, JJ., concurred with FEAD, C. J.

BUTZEL, J. (*dissenting*). Charles W. Harrah of Detroit, a realtor, was heavily interested in subdivision property located either in or near the city of Detroit. The Union Trust Company, which subsequently became the Union Guardian Trust Company, acted as fiscal agent and trustee of his many subdivisions. It looked after the collection of payments on land contracts for the sale of lots in the subdivisions, and also made certain expenditures for Harrah. It made large loans to Harrah, which were partly evidenced by notes but in the main consisted of overdrafts on an open account. The trust company, for payment of the open account, largely relied on collections from the land contracts. On March 1, 1929, Harrah's total indebtedness to the trust company amounted to approximately $710,000, of which $200,000 was evidenced by Harrah's notes and the balance consisted of advancements. The trust company held as security Harrah's interest in the subdivisions. He had interested John M. Mulkey and others, herein called the Mulkey group, in one subdivision known as "C. W. Harrah's 3-Mile, No. 2 Subdivision," in Allen Park, Michigan. The Mulkey group had advanced $50,000 with which to make a down payment to the fee owners of the property. It was agreed that the moneys received on sale of the lots were to be deposited with the Union Trust Company or some other bank for the time being, that all disbursements be made by check drawn on the trust company, and that, in consideration of the advances by the Mulkey group, the latter were to be repaid the $50,000 together with a $50,000 bonus prior to any division of moneys between the parties. Thereafter Harrah and the Mulkey group

were to divide evenly any further net proceeds from the subdivision.

Subsequently, the Mulkey group agreed to accept $65,000 in full for their interest in the subdivision and Harrah asked the Union Trust Company, through its vice-president and secretary, Merrill C. Adams, to advance the required amount. The loan was refused, not because Harrah's credit was poor, or that his prior indebtedness was not properly secured, but because the trust company thought his loan was as large as it cared to make to one individual. Harrah thereupon enlisted the aid of Briggs Commercial & Development Company, plaintiff. It was willing to make the loan upon proper security. As a result of negotiations, Mr. Adams, as vice-president and secretary of the trust company, wrote the following letter to plaintiff under date of February 28, 1929:

"UNION TRUST COMPANY

February 28, 1929.

"The Briggs Commercial & Development Co.,
"1800 Buhl Building,
"Detroit, Michigan.

"*Gentlemen:*

"It is our understanding that C. W. Harrah has negotiated a loan with your company to enable him to purchase from J. M. Mulkey and his associates their one-half interest in C. W. Harrah's Three Mile No. 2 Subdivision, the loan to be granted him on the following terms:

"Amount of loan	$65,000.00
Interest rate 6 per cent. payable s/a–	
Maturity of Principal	
Note due 3½ years from date	3,250.00
Note due 4 years from date	3,250.00
Note due 4½ years from date	3,250.00
Note due 5 years from date	55,250.00
	$65,000.00

it being understood, however, that General Harrah shall be privileged to make payment in full at any time prior to the maturity of the notes.

"It is our opinion that collections on the subdivision above mentioned, which General Harrah will own in its entirety if this loan is made, will be sufficient to meet the required payments of interest and principal on his loan as they mature. We agree, however, in the event that these notes are not paid as they shall mature or in the event that the interest payments are not made as they become due, to purchase the notes at face value plus accrued interest.

Yours very truly
M. C. ADAMS,
Vice-Pres. and Sec'y.
"MCA:D Approved by Counsel,
R. H. C."

Upon receipt of the letter, the plaintiff wrote that it was making the loan upon the basis of assurances contained in the letter. On November 1, 1929, interest not having been paid, plaintiff wrote the trust company calling its attention to the default and also its letter of February 28, 1929. Some question arose as to the legality of the transaction and counsel were consulted. It finally resulted in the trust company on November 25, 1929, writing as follows to plaintiff:

"UNION TRUST COMPANY
November 25, 1929.

"Briggs Commercial and Development Co.,
"1800 Buhl Building,
"Detroit, Michigan.
"*Dear Sirs:*

"In connection with our letter of February 28, 1929, in which we agree to purchase the notes of C. W. Harrah held by you, we wish to assure you that sufficient consideration moved to us in this

transaction to support our undertakings in said letter and that our relationship and business dealings with General Harrah were such that we are benefited by this loan, and had you not made it we would have felt obligated to have advanced the money to him ourselves.

"If you accept the interest tendered to you at this time, and if in the future, you will send us notice of interest and/or principal payment dates in line with customary business practice, we agree to waive any and all technical defenses which we might have to any valid claim which you may reasonably make under the terms of our letter of February 28, 1929.

"Yours very truly,
JOHN N. STALKER,
"JNS:D Executive Vice-President."

When the letter of February 28, 1929, was received by plaintiff, it gave Harrah a check for $63,050, in return for Harrah's notes for $65,000, as set forth in the letter, the sum of $1,950, being a bonus charged by plaintiff. Proceeds of the loan were received by the trust company and placed to Harrah's credit on the open account with the trust company and a few days later $59,808 was disbursed from this account to buy out the Mulkey group, and on the same day other disbursements were made from the account so that Harrah's debit to the trust company again was further increased by approximately $8,000. By these transactions, Harrah's interest in the subdivision was released from a prior claim of $100,000 and he also gained a half interest previously held by the Mulkey group in the equity in the subdivision and the proceeds from the sale of lots therein.

Appellant contends that Adams, as vice-president and secretary of the trust company, did not have the authority to execute the letter of February 28,

1929. Adams testified that he acted with the approval of the president and the executive vice-president of the company, the latter writing the supplemental letter of November 25, 1929, with the knowledge and consent of the president of the company; that he was authorized to make loans independently for the trust company and to bind it by an agreement which would incidentally benefit the collateral loan then held by the trust company. The agreement was not submitted at the time to any executive committee or board of directors. Only one note held by plaintiff was paid.

The trust company subsequently failed and plaintiff brought suit on the agreement to purchase against the liquidating trustees of the trust company for the sole purpose of establishing its claim to participate, as a general and not as a preferred creditor, in any dividends that might be paid. The trial judge rendered judgment for plaintiff for the full amount claimed by it.

There was a mortgage on the subdivision of $413,800 due the former owners. Land contracts, having an aggregate face value of $175,127.90, were transferred to the mortgagee in full settlement of the mortgage indebtedness. A large amount has already been netted by the trust company from the subdivision collections and passed to Harrah's credit, but additional large advances were made to him. He subsequently went into bankruptcy, owing the trust company approximately a million dollars. The trust company released its claim against the bankrupt's estate as it believed it could not expect any dividends. At the bankruptcy sale in 1935, defendants purchased Harrah's equity in all of his subdivisions for $1,200, or thereabouts.

At the trial of the case, defendants claimed that the agreement of February 28, 1929, to purchase the

notes in event of default, was *ultra vires* and was also illegal, it being against public policy for a trust company to guarantee notes of third parties. Other questions raised as to the authority of the officers need not be considered.

In view of the fact that the moneys received from the plaintiff were shown to have been used to extinguish a lien of $100,000 prior to that of Harrah and that the trust company benefited thereby, counsel were asked to file additional briefs on the following questions: Even if the agreement on the part of the trust company was *ultra vires,* should not plaintiff nevertheless have some equitable remedy to recover dividends on the moneys collected by the trust company from the subdivision and applied on Harrah's account, which moneys would otherwise have gone to the Mulkey group? Should not plaintiff have a lien on the remaining lots of the subdivision for the moneys it advanced? And should not the case be transferred to the equity side of the court to determine these questions?

The trial court rendered a judgment for the full amount of the notes and interest against the defendant. While there may be some strong equity in plaintiff's favor, it has been the policy of the law, as expressed in our previous opinions, and borne out also by cases in other jurisdictions, that when an agreement is against public policy, a plaintiff has no redress whatsoever, at least until all the other creditors are paid in full.

The guaranteeing of the notes of a third party by a trust company is so far beyond the power of the company and so dangerous and prejudicial to the rights of the *cestuis* of a trust company, that it needs no extended comment on our part to show its illegality. We have previously passed upon the question in *Reichert* v. *Metropolitan Trust Co.*, 262

Mich. 123, and *Brown* v. *Union Banking Co.,* 274 Mich. 499. See, also, *Knass* v. *Madison & Kedzie State Bank,* 354 Ill. 554 (188 N. E. 836); *Nowell* v. *Equitable Trust Co.,* 249 Mass. 585 (144 N. E. 749); *Lowe* v. *Crocker,* 154 Wis. 497 (143 N. W. 176); *Commercial Nat'l Bank* v. *Pirie,* 27 C. C. A. 171 (82 Fed. 799); *Farmers & Mechanics Savings Bank* v. *Crookston State Bank,* 169 Minn. 249 (210 N. W. 998).

In the case of *Ter Keurst* v. *First State Bank,* 271 Mich. 259, relied upon by appellee, we called particular attention to the fact that it consisted of a single transaction for the purpose of settling threatened litigation. In the instant case, the transaction was not entered into for the purpose of settling present litigation, nor does the letter of November 25, 1929, bring it within that category. At the time the letter of November 25, 1929, was written, the legality of the transaction was already questioned. A contract against public policy cannot be ratified by writing a letter withdrawing objections to that which is illegal and forbidden by law. That which the law forbids cannot be legalized in such manner by the parties. The claimed inequity, which plaintiff alleges it will suffer if denied recovery, has made us hesitate, but again we are bound by a rule of law. If the law prohibits a contract as a matter of general public policy, it cannot be legalized by ratification. *Turner* v. *Schmidt Brewing Co.,* 278 Mich. 464.

In *Brown* v. *Union Banking Co., supra,* in quoting with approval from *Lowe* v. *Crocker, supra,* we stated that anyone entering into an illegal contract should be left where he had placed himself. Under any other rule, enforcement of the contract upon equitable grounds would furnish as adequate remedy as enforcement upon legal grounds.

In *Awotin* v. *Atlas Exchange Nat'l Bank of Chicago,* 295 U. S. 209 (55 Sup. Ct. 674), the court said:

"The invalidity of the contract was not due to the mere absence of power in the bank to enter into it, in which case restitution, not inequitable to the bank or inimical to the public interest, might be compelled. * * * The contract is invalid because it is within the broad sweep of the statute which by mandatory language sets up definite limits upon the liability which may be incurred by a national bank, in the course of its business of dealing in securities, by confining the business to buying and selling 'without recourse.' The phrase is broader than a mere limitation upon the power to contract, although embracing that limitation. It is a prohibition of liability, whatever its form, by way of 'recourse' growing out of the transaction of the business. * * * National banks are public institutions and the purpose and effect of the statute is to protect their depositors and stockholders and the public from the hazards of contingent liabilities, attendant upon the assumption by the bank of the risk of loss by its customers, resulting from the permitted dealing in securities by the bank. The prohibition would be nullified and the evil sought to be avoided would persist, if, notwithstanding the illegality of the contract to repurchase, the buyer, upon tender of the bonds, could recover all that he had paid for them. Such a construction of the statute is inadmissible."

In *Richardson* v. *Buhl,* 77 Mich. 632, 661 (6 L. R. A. 457), this court stated:

"Courts will take notice, of their own motion, of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves."

Also, see, *Benson* v. *Bawden,* 149 Mich. 584 (13 L. R. A. [N. S.] 721); *Reichert* v. *Metropolitan Trust Co., supra; Turner* v. *Schmidt Brewing Co., supra.*

In coming to our conclusion, we are not unmindful of the statement in the letter of February 28, 1929, that the collections from the subdivision "which General Harrah will own in its entirety * * * will be sufficient to make the required payments of interest and principal on his loan." Harrah did not see fit to use these collections to pay off his notes and it was beyond the power of the trust company to agree to make such payments in the event of Harrah's default.

The judgment should be reversed, with costs to defendants.

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

NEPHEW *v.* CONSUMERS POWER CO.

1. GAS—DANGER OF ESCAPE—DUTY OF GAS COMPANY.

In view of the dangerous character of gas for domestic use and its tendency to escape, gas company has duty to use a degree of care to prevent injury and damage commensurate with the danger which it has to avoid and it is liable for damage resulting from failure to exercise such degree of care.

2. SAME—OWNERSHIP OF PIPING AND SHUT-OFF VALVE—DUTY OF GAS COMPANY.

Gas company may not escape liability because piping and shut-off valve on the premises were paid for by the owner of premises where plaintiff's decedent lived and died as it is not thereby excused from its failure to exercise necessary degree of care to avoid injury and damage commensurate with danger which it was its duty to avoid.

3. SAME—NEGLIGENCE OF GAS COMPANY EMPLOYEES IN TURNING OFF GAS.

Regardless of ownership of service pipes and shut-off valve on private premises, a gas company is liable for negligent manner in which its employees sent to turn off the gas perform their duty.

4. SAME—NEGLIGENCE IN SHUTTING OFF GAS—EVIDENCE.

Although the failure of a gas company to shut off gas at the street is not negligence in and of itself, such failure may be considered by jury as bearing upon the exercise of due care by the gas company.

5. SAME—NEGLIGENCE—EVIDENCE—DEATH ACT.

In action under death act for asphyxiation of plaintiff's decedent, occupant of a house to which defendant gas company's employee had been called to turn off the gas, evidence tending to show he was negligent in shutting off and sealing the shut-off valve under the house *held,* sufficient to present question of negligence for jury (3 Comp. Laws 1929, §§ 14061, 14062).

Appeal from Oakland; Doty (Frank L.), J. Submitted October 15, 1937. (Docket No. 135, Calendar No. 39,599.) Decided December 29, 1937. Rehearing denied February 25, 1938.

Case by Gladys Nephew, administratrix of the estate of Orrin Nephew, deceased, against Consumers Power Company, a Maine corporation, for damages sustained when plaintiff's decedent was killed by escaping gas. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Dennis H. Dwyer, William J. Donovan and *Earl Nash,* for plaintiff.

Glenn C. Gillespie, for defendant.

POTTER, J. Plaintiff, adminstratrix of the estate of deceased, brought suit against defendant to recover damages under the death act,* for the death of decedent, February 10, 1934. It was plaintiff's claim decedent was asphyxiated by gas which escaped and filled the apartment where he lived, because of the negligence of the defendant in installing defective gas service equipment, not properly inspecting it after installation and not shutting off the gas at the street when service to the apartment was discontinued. Defendant contended the equipment was proper and purchased from a reputable manufacturer; it made monthly inspection of the premises; the death of decedent was due to the forcible damaging, by some unknown person, of the shut-off valve; and the failure of defendant to shut off the gas at the street was not the proximate cause of decedent's death. Plaintiff had verdict and judgment, motions for judgment notwithstanding the verdict and for a new trial were made by defendant and denied, and defendant appeals.

After the installation of the shut-off valve, claimed to have leaked, as the property of the landowner it continued to be used for some time. At the time of the death of decedent, it had been installed about four years and had been shut off for a period of more than two years. No complaint had ever been made to defendant as to leaking gas. Parties who visited decedent's apartment the night before his death did not detect the odor of gas. This shut-off valve was not accessible from inside the house, but

* See 3 Comp. Laws 1929, §§ 14061, 14062.—REPORTER.

was accessible from outside the house through a small door. After the death of decedent, the valve under the house was found to be open and leaking gas, which gas could pass upward, through the floor, into the apartment occupied by decedent.

There was testimony internal corrosion of the valve might take place after a period of four years; the valve had been screwed up and pounded and the thread broken, that it was not tightened up and reset when shut off, and, if it had been properly tightened up and reset when shut off, there would have been no play in the valve and no chance for gas to escape therefrom; if the valve was reset in the condition in which it was found, it would have been improper; when the nut was screwed down on the valve to shut it, it was punched with two punch marks so as to push the metal against the thread and effectively lock the valve; but it did not appear that after it had been shut off the last time it had been punched. There were no other gas jets or stoves in the house occupied by decedent. Defendant failed to produce the man or men who shut off the gas from this apartment in September, 1931. There was testimony that weather conditions and moisture tended to contract and expand the valve; that it was the custom, in turning off the gas, with such a valve, to back the nut off with a wrench; that this had been done and it had been reset and resealed, but was screwed up and pounded with a hammer, the thread broken and the cylinder loosened; that it was never tightened up and reset in a proper manner, and, if it had been, there would have been no play in the valve and no leaking. The valve itself showed it had never been reset, or set twice, according to the punch marks on the valve head—that if it had been, there would have been four sealing or punch marks, rather than two. There was no proof defendant's inspectors in-

spected the valve in question after it was shut off in September, 1931.

A meter reader of defendant testified he read the meters, notwithstanding the gas was shut off, but did not remember inspecting the valve in question; but if he had inspected it, he would only have looked at it to see whether or not the seal had been tampered with. On cross-examination, he admitted he never made an inspection of the valve in question and it might have been loose a quarter of an inch for all he knew.

It was suggested by appellant the valve had been damaged so that gas could escape; that the controlling question was, Who damaged the valve so the gas could escape? It was suggested it might have been done by persons attempting to steal gas, or by mischievous or inquisitive children.

There was apparently no escaping gas the night before decedent's death. The valve was not accessible from the inside of the house. It could be reached only from the outside of the house. The sergeant of police of Ferndale was called and opened the door by which the valve was reached. He said the floor of the house was about two feet from the ground; at the corner was a door leading under it about two feet high which opened on the outside; this door was opened when he started his investigation, and he could hear the escaping gas hissing from the valve before the door was opened; there was about an inch of dirt and snow and leaves at the bottom of the door, which they scraped away and they used quite a bit of pressure to open the door because the bottom of it was frozen; and it looked to him as though the door had not been opened for quite awhile and had been frozen for some time previous to the time they opened it. While he would not say the door had not been opened for 17 days

prior to the death of decedent, he did say it looked as though it had not been opened for considerable time. This officer testified, when he discovered the gas leaking from the valve, he called the gas company and their employees arrived in about 20 minutes; the employee of defendant put a wrench on the valve, and said "I don't have to use a wrench on it" and turned it with his fingers, and then turned the gas off in the street.

In view of the dangerous character of gas such as that sold by defendant, and its tendency to escape, it was the duty of defendant to use a degree of care to prevent injury and damage commensurate with the danger which it was its duty to avoid. *Fleegar* v. *Consumers Power Co.*, 262 Mich. 537; 28 C. J. p. 591. If it failed to exercise this degree of care, and injury and damage resulted by reason of such failure, it is liable. 12 R. C. L. p. 905.

Defendant may not escape liability because the piping and shut-off valve on the premises were paid for by the owner of the property where decedent lived and died. This does not excuse defendant from its failure to exercise the degree of care to avoid injury and damage above stated. Defendant cannot avoid liability because it did not own the pipes and shut-off valve on the premises where they were installed. *Washington Gas Light Co.* v. *District of Columbia,* 161 U. S. 316 (16 Sup. Ct. 564). Regardless of the ownership of the service pipes and shut-off valve on private premises, a gas company is liable for the negligent manner in which its employees sent to turn off the gas perform their duty. *Lanigan* v. *New York Gas-Light Co.*, 71 N. Y. 29; *Haas* v. *St. Paul Gaslight Co.*, 113 Minn. 379 (129 N. W. 759); *Louisville Gas Co.* v. *Gutenkuntz,* 82 Ky. 432; *Chisholm* v. *Atlanta Gas-Light Co.*, 57 Ga. 28; 28 C. J. p. 595.

The failure of the gas company to shut the gas off at the street is not negligence in and of itself; but the authorities, generally, hold such failure may be considered by the jury as bearing upon the exercise of due care by the gas company. *Chisholm* v. *Atlanta Gas-Light Co., supra; Canfield* v. *West Virginia Central Gas Co.,* 80 W. Va. 731 (93 S. E. 815, L. R. A. 1918 A, 808). If the death of plaintiff's decedent had been caused solely by the negligence of defendant in failing to shut the gas off at the street valve, it would be liable. *Lanigan* v. *New York Gas-Light Co., supra.* But the testimony indicates, if defendant is liable, it is not because of its negligent failure to close the valve at the street, but because of the negligent failure of its employee properly to close and seal the shut-off valve under the house.

There was sufficient testimony tending to show the negligence of defendant's employee in not properly shutting off and sealing the shut-off valve under the house to carry the case to the jury. There was no direct and positive testimony of what defendant's employee did. The employee who shut off the gas under the house in which decedent lived and died was not produced by defendant. There was testimony of facts and circumstances from which the jury might draw a legitimate inference that defendant's employee negligently failed to close and seal properly the valve when the gas was turned off. We find no reversible error.

Judgment affirmed, with costs.

FEAD, C. J., and NORTH, WIEST, BUTZEL, BUSHNELL, SHARPE, and CHANDLER, JJ., concurred.

PEARCE *v.* RODELL.

1. AUTOMOBILES — PEDESTRIANS — TESTIMONY AS TO TRACKS SEEN MORNING AFTER ACCIDENT.

   In pedestrian's action against motorist for injuries received at about 7:30 p. m. on October 13th, where testimony was in direct conflict as to whether plaintiff and companion were on the pavement or berm, admission of testimony of nearby resident as to location of automobile tracks as he observed them the next morning and showing that foot tracks were next to the ditch where automobile's tracks were deepest *held,* proper.

2. EVIDENCE—PHOTOGRAPHS.

   Admission of photographs taken some time after accident at the location thereof and showing plaintiff *held,* not error for purpose of showing general relative location of things at time pedestrian was injured.

3. SAME—EXPERT WITNESSES—PROVINCE OF JURY.

   While the answer of a properly qualified expert witness as to what might cause a given result, the ultimate fact to be proved, would not be inadmissible, his answer as to what did cause it would be erroneous as an invasion of the province of the jury.

4. SAME—PHYSICIANS—CAUSE OF PAIN—PERMANENCY OF INJURY.

   Physician's testimony in pedestrian's action against motorist that pain, as to which plaintiff testified, was caused by adhesions which tended to limit function of limb, that is, fibrous unions between two tissues brought about as the result of inflammation, and that he would say such condition of the muscles and bones would be permanent and that the pain would continue *held,* not inadmissible as invading province of the jury where witness testified his answer was based upon his actual observations of the tendons, condition of the legs, knowledge and history of the patient.

5. SAME—PHYSICIANS—CAUSE OF PAIN.

Testimony of physician who took X-rays of plaintiff's legs that his pain was due to atrophy of muscles, to shortening of both legs, to the angulation of the fragments and that change in the weight-bearing line existed because of the bowing and angulation of the lower left leg *held*, not inadmissible as an invasion of the province of the jury.

6. SAME—EXPERT TESTIMONY—TEST OF ADMISSIBILITY.

The test of the admissibility of testimony of experts is not whether the subject-matter is common or uncommon or whether many or few persons have knowledge of the matter but whether persons offered as experts have any peculiar knowledge or experience not common to the world, which renders their opinions founded on such knowledge or experience any aid to court or jury in determining questions at issue.

7. SAME — PHYSICIANS — EXTENT, PERMANENCY OF, AND RECOVERY FROM, INJURIES.

A physician may testify as to the extent of certain injuries, whether the injury is permanent or not, the probability of recovery, or the probable results of the injury.

8. SAME—MEDICAL OPINION—SCOPE.

The opinion of a medical man is admissible upon the condition of the human system, upon the probability of recovery from an injury, upon the question as to whether or not physical injuries are, or are not, of a permanent character and upon other questions peculiarly within his knowledge as such.

9. AUTOMOBILES—SPEED—ASSURED CLEAR DISTANCE AHEAD.

A motorist has no right to drive his automobile on the public highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead and it is *prima facie* unlawful for him to exceed such limitation of speed (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933).

10. SAME—LIGHTS.

A motorist is required to have his automobile equipped with headlights that would at all times, under normal atmospheric conditions, on a level road, produce a light sufficient to render clearly discernible a person 200 feet ahead (1 Comp. Laws 1929, § 4736, as amended by Act No. 64, Pub. Acts 1931, § 4738, as amended by Act No. 59, Pub. Acts 1931).

11. SAME—NEGLIGENCE—SPEED—LIGHTS—STOPPING.

Motorist whose car struck pedestrian *held,* guilty of negligence as a matter of law where he was driving car at such a speed as not to have it under sufficient control to bring it to a stop within the assured clear distance ahead even though his vision was obscured by glaring lights of an approaching automobile as it was then his duty to slacken his speed and have car under such control that he might stop it immediately if necessary (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933).

12. SAME—PEDESTRIANS—CARE REQUIRED OF MOTORISTS.

A pedestrian may walk on any part of a public highway and motorists must use reasonable and ordinary care not to run down pedestrians upon such highways.

13. SAME—PEDESTRIANS—PRESUMPTION THAT MOTORIST WILL USE DUE CARE.

A pedestrian has a right to rely upon the presumption that a motorist will exercise due care and is not, as a matter of law, required to look back for approaching vehicles.

14. SAME—PEDESTRIANS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether or not pedestrian who was walking along highway at 7:30 p. m. on October 13th was guilty of contributory negligence when hit by righthand fender and headlight of defendant's car which approached from rear *held,* a question for jury.

15. SAME—INSTRUCTIONS—PEDESTRIANS ON BERMS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

Instruction that if jury found pedestrian was walking on the berm and not on the paved portion of the highway then he was exercising ordinary care and not guilty of contributory negligence *held,* proper.

16. SAME—REQUESTS TO CHARGE—CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN.

Failure to give request to charge that if plaintiff pedestrian saw or could have seen defendant's car approaching from rear it was a circumstance to consider in determining whether plaintiff was guilty of contributory negligence *held,* not error where court fully charged jury as to matter of plaintiff's contributory negligence and charge as given was without error.

17. APPEAL AND ERROR—AMOUNT OF JURY'S VERDICT—CONSCIENCE OF COURT.

The amount of a verdict as fixed by a jury in an action for personal injuries ought not to be set aside unless it is such as to shock the conscience of the court.

18. DAMAGES — EARNING CAPACITY — FRACTURED BONES OF LEGS — PERMANENT INJURIES.

Verdict of $6,296.15 to 28-year old man who was receiving $65 a month and his board at time of injuries consisting of several comminuted fractures of leg bones and which required him to wear steel brace at time of trial, and which seriously angulated or bowed left leg, a condition that will in all probability prove permanent and disable him from doing work he had been doing *held*, not excessive.

Appeal from Berrien; Evans (Fremont), J. Submitted October 20, 1937. (Docket No. 136, Calendar No. 39,764.) Decided December 29, 1937.

Case by Robert Pearce against Victor Rodell for personal injuries sustained when he was struck by defendant's automobile. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

White & White, for plaintiff.

Gore, Harvey & Fisher (*Harry C. Howard*, of counsel), for defendant.

POTTER, J. Plaintiff, claiming to have been injured by being struck by defendant's automobile negligently operated by him, brought suit and had verdict by a jury for $6,296.15. A motion for a new trial was made and denied and judgment entered on the verdict, with costs. Defendant appeals, claiming error in the introduction of testimony, the introduction of photographs made after the accident, the introduction of expert testimony, charging

the jury, overruling the motion of defendant for a new trial, and in not reducing the damages awarded.

On the evening of October 13, 1935, at about 7:30 p. m., plaintiff and his companion, one Cooper, were walking along the righthand side of a road in Berrien county. Plaintiff claims he was not walking upon the pavement, but outside the pavement; while defendant claims plaintiff was walking on the pavement. Defendant and his companions came along in defendant's automobile talking together, without much concern about the traffic, speed or anything else. Defendant saw the headlights of an approaching automobile and claims he passed the approaching automobile and, just as he was meeting this automobile, his car struck plaintiff. Some of defendant's companions thought the automobile defendant met was pretty well by when plaintiff was struck.

Defendant testified he had passed an intersection where he slowed down, he was blinded by the lights of the oncoming automobile, and "just as I was right along broadside of him I noticed something in front of him, I put on the brakes, I didn't have time to honk the horn or speak; I knew I hit something and when I, after I hit him I went, not over 20 feet, and applied the brakes the moment I see I was going to hit something and stopped and went back and see I hit a man. * * * I had plenty of room on the pavement on my side of the road. My car was on my own side of the road as we were passing this other car. I was on the pavement. * * * I didn't see anybody in front of me before I hit him. I didn't know at the time of the impact what part of my car struck this object. I afterwards examined my car to find out in what manner or what way my car was damaged. I discovered the glass on the right

headlight was broken, the lamp was bent back and the upper right corner of the radiator was pushed back about two inches. * * * I afterwards discovered that Mr. Pearce here was the man I hit. * * * I backed off of the pavement so we wouldn't have so far to carry him. * * * I know the right wheels were on the shoulder or berm. I backed up about 20 feet so I was opposite of him. Then Charles and Mr. Cooper and I loaded him in the car. * * * I swung to the right as I met that other car,—just to my own side of the road. If there was any swinging I still stayed on my side of the road. We didn't swing in far enough to go off the pavement."

Charles Ferguson, who was riding with defendant, said:

"There was a time before our car hit Pearce that I saw Pearce, approximately 10 feet I think that I saw him. * * * If I had been looking ahead, might have seen them 200 or 300 feet, but I wasn't looking. * * * The reason I didn't see them before was, as far as I am concerned, probably because I was talking and not particularly looking ahead, just happened to glance ahead and there they were. * * * According to my estimate it was practically a tie as far as setting the brakes and hitting the man is concerned. I wasn't conscious of the car slowing down any before he was hit. Whatever speed we were going it hit at about that speed. * * * Ten feet I think would absolutely cover the distance he was knocked."

The testimony of the parties was in direct conflict as to whether plaintiff was on the paved portion of the highway when struck. Defendant insists plaintiff was on the pavement. Plaintiff and his companion testify they were not on the pavement, but were walking upon the berm. Dr. Hubbard, of Eau

Claire, was present when plaintiff was operated on and testified:

"I had some talk with Mr. Rodell about how this accident happened. He said they were coming down the Shanghai road and they didn't stop at the crossing, and the car was coming up, and they had to swerve out in order to miss that car, and that is when he caught these fellows. He said that was when he hit Robert."

Roy Laberty, a fruit farmer, living near Eau Claire, testified:

"I saw Mr. Rodell there that night, this young man. I talked to him just a little. He told me something about how the accident happened. He said he was coming in from the Shanghai road and he said another car was coming from the south, and in turning out to miss the other car he struck Robert. He claimed he didn't see him."

There is other testimony bearing upon the place where the accident occurred. Testimony was received, over defendant's objection, that the next morning Laberty went to the scene of the accident at the request of plaintiff who said he had lost some things and wanted Laberty to see if he could find them. Laberty testified he saw automobile tracks where they left the pavement, went toward the ditch on the righthand side, ran along the ditch parallel thereto and back onto the pavement, the tracks were deeper near the ditch, and, near the deepest part of the track, were foot tracks, near the bank, and that there were no other automobile tracks. Defendant attempted to claim the tracks were probably those where he backed up his automobile at the time plaintiff was loaded in after he was struck. But the track in question indicates it could not have been made in the manner defendant

claims, and the only question for consideration is whether the court was in error in receiving this testimony.

Defendant relies upon *Billingsley* v. *Gulick,* 252 Mich. 235. In that case, the accident happened between 11 and 12 o'clock at night, upon a much traveled road, and testimony was admitted as to finding certain articles of personal property the next morning. The court said it was error to receive the testimony of the finding and location of the articles without affirmative proof there had been no change of position after the accident. The court said:

"The accident caused other automobile drivers to stop and a crowd to gather. There was testimony of blood on the pavement about six feet from the edge, and that defendants' car was upon the pavement when it struck the deceased, and also testimony that after the car struck the deceased it left the pavement for a short distance.

"It is difficult, from this record, to say whether the deceased was struck while upon the gravel or while upon the pavement."

Under the testimony here, it was proper to show the location of these tracks.

In *People* v. *Ryczek,* 224 Mich. 106, exception was taken to offered testimony as to automobile tracks in the highway near the place of accident. The observations testified to were made 24 hours after the accident. It was said:

"The testimony showed that the cross road was a dirt road; that the tracks made by the automobile were still plain. That no other automobile tracks had been over that part of the road, but that there were some wagon tracks. This testimony showed that the left wheel of the automobile was in the foot path about 20 inches from the ditch. It also appeared that the broken cart lay where it was

wrecked. We think it fairly appears that there had been no such change in the *locus in quo* as to make the testimony inadmissible."

There was no error in receiving the testimony in relation to the tracks along the side of the road.

Photographs taken some time after the accident, at the location thereof, were introduced in evidence and received over defendant's objection that the pictures were taken with the plaintiff himself there. Exhibits 1 to 4 were photographs taken at the scene of the accident some time after it occurred. As to exhibit 1, the photographer testified "That picture is a correct representation of that scene from that point. I finished these photographs myself." As to exhibit 2, he testified "That correctly represents that scene. I finished this photograph." As to exhibit 3, he testified "That picture correctly represents the scene within the scope of my camera at that time." And as to exhibit 4, he testified "This photograph is a correct representation of the situation from that point." In addition to this testimony, the photographer testified to the location of his camera upon the taking of each of the photographs.

The trial court said: "The photographs will be received for the purpose of showing the general relative location of things at this point," and cautioned the jury as to the use of the photographs.

Counsel for plaintiff said:

"We do not claim for these photographs that the location of these two men or as they are located in the photographs is any proof whatever that they were at that place at the time of the accident. Our claim for it is that the jury may take the testimony of the witnesses themselves as fixing the location, and I wish you would instruct the jury upon that point."

Whereupon the trial court said:

"I accept the statement of Judge White as correct instructions of the court on that point."

"It is a constant practice to receive as evidence pictures and drawings of objects which cannot be brought into court, after these have been proved to be accurate representations of the subject. In like manner photographs are often admitted, when the proper preliminary proof as to their exactness and accuracy is offered. They are of the same character of evidence as diagrams and pictures drawn by hand; not necessarily carrying the same degree of probative force, but still of the same character; not in themselves evidence at all, but representing to the eye what the witness declares was the real appearance of the thing at the time he saw it. Diagrams, drawings, and photographs are resorted to only because the witness cannot with language as clearly convey to the minds of the court and jury the scene as the light printed it on the retina of his own eye at the time of which he is testifying." 3 Jones, Commentaries on Evidence (Horwitz Ed.) § 581.

It was not error to receive the photographs in evidence.

Two physicians, who examined plaintiff and took X-rays, testified, and defendant contends that in receiving their testimony the court violated the rule laid down in *DeHaan* v. *Winter,* 258 Mich. 293.

In *DeHaan* v. *Winter, supra,* 299, a physician was asked— "Assuming the facts to be true that I have stated in my hypothetical question, what is your opinion as to the cause, the proximate cause, of the bow in that leg?" Plaintiff had sued defendant for malpractice, claiming such malpractice resulted in a bow in his leg. This court said this invaded the province of the jury. As far as the expert could

go was to state that the alleged malpractice might have caused the bow in the leg. The ultimate issue of fact for determination by the jury was whether the malpractice of defendant caused the condition of plaintiff. And, in holding it was error to permit such question to be answered for the reasons above stated, this court cited *Dundas* v. *City of Lansing,* 75 Mich. 499 (5 L. R. A. 143, 13 Am. St. Rep. 457); *Tice* v. *Bay City,* 78 Mich. 209; *Jones* v. *Village of Portland,* 88 Mich. 598 (16 L. R. A. 437).

In *DeGroot* v. *Winter,* 261 Mich. 660, 671, it was said:

"The rule violated in this case was early announced by this court, repeatedly followed, supported by the weight of authority, has led to no injustice, and has kept medical experts from invading the province of the jury and should be maintained."

The court cited *Hitchcock* v. *Burgett,* 38 Mich. 501; *People* v. *Hare,* 57 Mich. 505; *Jones* v. *Village of Portland, supra; In re Harris' Estate,* 247 Mich. 690; *DeHaan* v. *Winter, supra.*

Probably as clear a statement of the rule, restated in *DeHaan* v. *Winter* and *DeGroot* v. *Winter,* is contained in *People* v. *Hare, supra,* where defendant was on trial for murder:

"Counsel for the people then asked the following question: 'From the appearance of the wound, what would you say it was caused by?' This and a subsequent question of the same import were objected to, upon the ground that the witness could not give an opinion upon the matter. The objection was overruled.

"We think the objection to this question was well taken, and clearly comes within the decisions of this Court heretofore made. The question calls for the

fact which was to be found by the jury. What might have caused it would have been proper, but what did cause it was the real question for the jury. *Wilson* v. *People,* 4 Park. Crim. R. (N. Y.) 619, 649; *Evans* v. *People,* 12 Mich. 27, 35; *Moore* v. *State,* 17 Ohio St. 521; *Hitchcock* v. *Burgett,* 38 Mich. 501, 506; *Van Deusen* v. *Newcomer,* 40 Mich. 90."

The testimony offered in this case was not objectionable within the rule established by the authorities above cited. One of the questions asked of a physician was in relation to the pain which plaintiff testified he suffered. The physician was asked his opinion as to the cause of such pain and, against defendant's objection, gave his opinion that the pain was caused by adhesions which tended to limit the function of the limb, that is, fibrous unions between two tissues brought about as the result of inflammation. The physician was then asked whether, in his opinion, the conditions existing by reason of the adhesions were likely to be permanent. This was objected to as invading the province of the jury, but the physician answered "With the nature of the injury as I saw it and the condition of the muscles and bones I would say it would be permanent." This answer was based upon what the physician testified were his actual observations of the tendons, condition of the legs, knowledge and history of the patient. Subsequently this physician was asked whether he had an opinion whether or not this pain would continue in the future with reasonable certainty and be permanent. This was objected to, and the objection was overruled and the witness permitted to answer. Dr. Lawrence Fisher was examined and testified to taking various X-rays. It appeared from plaintiff's testimony that after any sustained use of his leg he suffered pain in the region of these

fractures. The physician was asked if he had an opinion as to what that pain might be attributed to, and answered:

"To the atrophy of the muscles, to the shortening of both legs, to the angulation of the fragments and the change in the weight-bearing line."

He further testified that an impairment of the weight-bearing line existed by reason of the bowing and angulation of the lower left leg. This was objected to, but the witness was permitted to answer.

The testimony excluded in *DeHaan* v. *Winter, supra,* and *DeGroot* v. *Winter, supra,* and the cases relied upon in those opinions, was testimony as to the ultimate fact for the determination of the jury, and the testimony was held improper because it invaded the province of the jury. The testimony involved in this case does not come within that rule.

"The true test of the admissibility of such testimony is not whether the subject-matter is common or uncommon, or whether many persons or few have knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue." *Luttenton* v. *Railway Co.,* 209 Mich. 20; *Taylor* v. *Town of Monroe,* 43 Conn. 36, 44.

"A physician may testify as to the extent of certain injuries, whether the injury is permanent or not, the probability of recovery, or the probable results of the injury." Rogers, Expert Testimony (2d Ed.), p. 122.

The opinion of a medical man is admissible upon the condition of the human system, and upon the probability of recovery from an injury, or upon

other questions peculiarly within his knowledge as such. 1 Lawson, Expert and Opinion Evidence (2d Ed.), p. 123. So, it is said a physician is competent to give his opinion as to the probability of recovery, generally. *Brown* v. *Railroad Co.,* 18 Misc. 584 (42 N. Y. Supp. 700); *Griswold* v. *Railroad Co.,* 115 N. Y. 61 (21 N. E. 726, 12 Am. St. Rep. 775); *King* v. *Railroad Co.,* 75 Hun, 17 (26 N. Y. Supp. 973); *Block* v. *Railway Co.,* 89 Wis. 371 (61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849); *Lehigh & H. R. R. Co.* v. *Marchant,* 28 C. C. A. 544 (84 Fed. 870). He may give his opinion that physical injuries are, or are not, of a permanent character. *Cass* v. *Railroad Co.,* 20 App. Div. 591 (47 N. Y. Supp. 356); *Coyne* v. *Railway Co.,* 62 Hun, 620 (16 N. Y. Supp. 686); *Louisville, N. A. & C. R. Co.* v. *Falvey,* 104 Ind. 409 (3 N. E. 389, 4 N. E. 908); *Erickson* v. *Barber Bros.,* 83 Iowa, 367 (49 N. W. 838).

In *Langworthy* v. *Green Township,* 88 Mich. 207, 213, the attending physician was asked his opinion as to what effect the injury would have upon plaintiff as he grew older, and whether or not the "natural tendency of such a fracture would be to increase his disability as he gets older." The witness was permitted to answer the questions, and error was assigned thereon. The court said:

"Plaintiff was entitled to show the probable effects of an injury of this character, and it could only be shown by the opinion of a competent physician."

In that case, it was said, p. 215:

"The rule is that, where the court or jury can make their own deductions, they shall not be made by those testifying; but where the witness gives fully and succinctly, as in this instance, the facts upon which he bases that conclusion, there is no presumption of prejudice."

In the case here, not only did the physicians testify very fully as to the facts upon which they based their conclusions, but they were entitled to give the opinion which they did give on the probable effects of the injury which plaintiff received. The probable effects of an injury such as that suffered by the plaintiff could be shown only by the opinion of a competent physician. Substantially the same rule was followed in *Miller* v. *Railroad Co.*, 167 Mich. 21. We find no error in the receipt of this testimony.

Appellant claims the court was in error in saying there was no imperative rule of law requiring a pedestrian to be looking or listening continuously for automobiles approaching from the rear, and in refusing to give the defendant's ninth request to charge bearing upon the plaintiff's contributory negligence. That request was as follows:

"If the plaintiff looked and the defendant's car was in the range of his vision, and you so find, it was then the plaintiff's duty to see the car and take precaution for his own safety accordingly.

"If you find the plaintiff was in a position where his range of vision, had he looked back, would take in the oncoming car, or should have taken in the oncoming car, that fact, if you find it to be a fact, is a circumstance you have to consider on the subject of plaintiff's contributory negligence, if any. For I instruct you that the law is that a man is in law bound to see what the facts in the case indicate could have been seen if he looked."

The defendant had no right to drive his automobile on the public highway at the place and at the time the injury to plaintiff occurred at a speed greater than would permit him to bring it to a stop within the assured clear distance ahead (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933 [Comp. Laws Supp. 1935, § 4697]); and it

was *prima facie* unlawful for him to exceed that limitation in speed (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933 [Comp. Laws Supp. 1935, § 4697]). Defendant was required by statute to have his automobile equipped with headlights (1 Comp. Laws 1929, § 4736, as amended by Act No. 64, Pub. Acts 1931 [Comp. Laws Supp. 1935, § 4736]) that would at all times, under normal atmospheric conditions, on a level road, produce a light sufficient to render clearly discernible a person 200 feet ahead (1 Comp. Laws 1929, § 4738, as amended by Act No. 59, Pub. Acts 1931 [Comp. Laws Supp. 1935, § 4738]). It is clear if he was driving his automobile at a rate of speed so he could not bring it to a stop within the assured clear distance ahead, he was guilty of negligence as a matter of law. If defendant's vision was obscured by the glaring lights of the approaching automobile, it was his duty to slacken his speed and have his car under such control that he might stop it immediately if necessary. *Budnick* v. *Peterson,* 215 Mich. 678. We do not understand the question of defendant's negligence is disputed.

Defendant contends plaintiff was guilty of contributory negligence. Plaintiff was injured either while walking on the berm of the road where he had a right to walk, or he was injured while walking on the right side of the pavement as the defendant claims.

There is no statute which says a person shall walk on any particular portion of a public highway which is open for the use of all the people without distinction for passage and repassage at their pleasure. A pedestrian may walk on any part of a public highway, and persons operating automobiles must use reasonable and ordinary care not to run down pedestrians upon such highways. A pedestrian has a

right to rely upon the presumption the driver of an automobile will exercise due care and is not, as a matter of law, required to look back for approaching vehicles. *Wiel* v. *Wright,* 55 Hun, 611 (8 N. Y. Supp. 776); *Adolph* v. *Railroad Co.,* 76 N. Y. 530; *Church* v. *Spicer,* 85 Conn. 579 (83 Atl. 1115); *Stringer* v. *Frost,* 116 Ind. 477 (19 N. E. 331, 2 L. R. A. 614, 9 Am. St. Rep. 875); *Shapleigh* v. *Wyman,* 134 Mass. 118; *Williams* v. *Grealy,* 112 Mass. 79; *Moebus* v. *Herrmann,* 108 N. Y. 349 (15 N. E. 415, 2 Am. St. Rep. 440); *Raymond* v. *Hill,* 168 Cal. 473 (143 Pac. 743); *Petrie* v. *E. A. Myers Co.,* 269 Pa. 134 (112 Atl. 240); *Hennessey* v. *Taylor,* 189 Mass. 583 (76 N. E. 224, 3 L. R. A. [N. S.] 345, 4 Ann. Cas. 396); *People* v. *Blandford,* 23 Porto Rico, 580; *Graham* v. *Evening Press Co.,* 135 Mich. 298; *Tio* v. *Molter,* 262 Mich. 655.

In *Adolph* v. *Railroad Co., supra,* 533, it was said:

"Each individual of the entire public, as a general rule and in the absence of especial regulation by law, has as good right to be upon the common street or highway as any other individual thereof. * * * Hence, he is not bound to look back, or to listen for the coming of another, so as to make clear the way before him."

In *Petrie* v. *E. A. Myers Co., supra,* it was said:

"It seems to us that, as decedent was lawfully upon the highway, using the extreme right-hand paved roadway, he could safely assume, as his rights were equal with those of the users of motor or horse-driven vehicles, that he would not be struck from the rear by any such vehicles."

In *Church* v. *Spicer, supra,* a charge by the trial court that—"one is not obliged, as a matter of law, under ordinary circumstances, to look back and see whether he is in danger of being run into by teams

going in the same direction that he is traveling; but it is for you to consider whether, as a matter of fact, under the circumstances of this case, a man in his senses ought not to look back and see whether he is about to be run into by a team traveling in the same direction on the highway. This is not a question of law; it is a question of fact for you to decide," was approved.

In *Korstange* v. *Kroeze,* 261 Mich. 298, it was held plaintiff had a right to walk on any part of the pavement, exercising, however, the care of a reasonably prudent man for his own protection and preservation.

In *Warwick* v. *Blackney,* 272 Mich. 231, it was held that pedestrians have a right to assume the driver of an automobile will use ordinary care for their protection; but they must, at the same time, use reasonable care for their own safety.

In *Graham* v. *Evening Press Co., supra,* 303, it was said:

"We are cited to no case, and know of none, which casts upon a pedestrian traveling the street the duty of keeping a constant lookout to the rear as matter of law. The question of what constitutes due care in such a case is for the jury."

In *Tio* v. *Molter, supra,* 661, it was said:

"If struck by an auto coming behind him, his negligence presents a jury question."

Even though plaintiff was walking upon the right-hand side of the pavement, as plaintiff claims, so that he was struck by the righthand fender and headlight of defendant's automobile, still it was a question for the jury whether or not plaintiff was guilty of contributory negligence. The trial court charged the jury:

"Pedestrians upon the public highway have a right to assume in the first instance the driver of an automobile will use ordinary care and caution for the protection of pedestrians, nevertheless the pedestrian must not rest content on such assumption, if there comes a time where he knows, or ought to know by the exercise of reasonable care, he is being placed in danger. He must take such care for his own safety as a reasonable, careful, prudent person would do under similar circumstances."

The court very fully charged the jury in relation to the contributory negligence of the plaintiff, and we find no error in the charge. The trial court further charged the jury that if they found plaintiff at the time of his injury was walking upon the berm, and not upon the paved portion of the highway, then he was in the exercise of ordinary care and caution and was not guilty of contributory negligence. This part of the charge was proper. *Budnick* v. *Peterson, supra.*

The trial court did not err in refusing to grant a new trial.

This brings us to the question of whether or not the verdict in the case was excessive. Plaintiff was 28 years of age at the time of the trial, weighed 220 pounds, was used to hard work, made from $3 to $3.50 a day, was frugal and saved money, had never been sick, and at the time of his injury he was receiving $65 a month and his board. At the time of the injury, plaintiff was thrown a considerable distance and landed on the bank alongside the ditch at the side of the highway. Both legs were broken and all the bones were sticking through the sides of each leg. He sustained comminuted fractures of both bones of both lower legs. There was quite a patch of bone lost from the left leg. He was given an anæsthetic and a plate was put in. One of the pieces

of bone was hanging on the outside at the time he was picked up, and they did not find the other piece of the bone. He was wearing a steel brace at the time of the trial. He contracted pneumonia in the hospital from the shock. His left leg is seriously angulated or bowed. His medical expenses and hospital bills totaled over $1,500. And there is testimony that in all probability his injuries will prove permanent and he will be disabled from carrying on the kind of work he was in the habit of doing, and of earning a living. The amount of the verdict in this kind of a case, fixed by a jury, ought not to be set aside unless it is such as to shock the conscience of the court. The amount of the verdict is, within the rules of law, a matter for the jury, and we think the jury was not in error in fixing the award of damages to plaintiff.

Judgment affirmed, with costs.

FEAD, C. J., and NORTH, WIEST, BUTZEL, BUSHNELL, SHARPE, and CHANDLER, JJ., concurred.

SHIEKICK *v.* VARKLE IRON & METAL CO.

1. WORKMEN'S COMPENSATION—POWERS OF DEPARTMENT OF LABOR AND INDUSTRY.

   The department of labor and industry has those powers expressly conferred upon it by the workmen's compensation act and those necessarily implied therefrom (2 Comp. Laws 1929, § 8407 *et seq.*).

2. SAME—REVOCATION OF ACCEPTANCE OF ACT—IMPLIED POWERS.
The department of labor and industry had the implied power to revoke an acceptance of the workmen's compensation act by an employer upon latter's failure to provide an acceptable certificate of insurance to guarantee payment of compensation prior to amendment expressly conferring such power (2 Comp. Laws 1915, § 5428, as amended by Act No. 64, Pub. Acts 1919, and Act No. 113, Pub. Acts 1929 [2 Comp. Laws 1929, § 8412]).

3. SAME—REVOCATION OF ACCEPTANCE OF ACT—AGREEMENT AS TO COMPENSATION.
In proceeding to recover compensation under workmen's compensation act by way of petition for vacation of order revoking employer's acceptance of the workmen's compensation act, payments made under an unapproved agreement for compensation for accidental injury which had been suffered while employer's acceptance of the act stood revoked *held,* not binding upon employer and insurer (2 Comp. Laws 1929, § 8407 *et seq.*).

4. SAME—REVOCATION OF ACCEPTANCE.
Since the department of labor and industry has no authority to make an award of compensation for an injury occurring while acceptance of the workmen's compensation act stands revoked and prior to time second acceptance is filed and an approval of an agreement for workmen's compensation is the equivalent of an award by the department, it has no authority to approve an agreement for such injuries.

Appeal from Department of Labor and Industry. Submitted October 7, 1937. (Docket No. 55, Calendar No. 39,664.) Decided December 29, 1937. Rehearing denied February 25, 1938.

Joe Shiekick filed petition against Varkle Iron & Metal Company, employer, and General Accident Fire & Life Assurance Corporation, insurer, to have an order revoking employer's acceptance set aside and for an order approving an agreement for compensation. Award to defendants. Plaintiff appeals. Affirmed.

Charles Bowles, for plaintiff.

Kerr, Lacey & Scroggie, for defendants.

CHANDLER, J. The defendant, Varkle Iron & Metal Company, filed its acceptance of the provisions of the workmen's compensation act (Act No. 10, Pub. Acts 1912 [1st Ex. Sess.], as amended [2 Comp. Laws 1929, § 8407 *et seq.*]) on February 29, 1928, which was approved by the department of labor and industry on the same date. On January 23, 1929, the insurance carrier gave notice of termination of the insurance contract, termination to be effective February 23, 1929. The department thereupon issued an order to show cause as to why the employer's acceptance of the act should not be revoked in the absence of the filing of a new certificate of insurance. This was followed by an order on February 23, 1929, revoking the employer's acceptance. In the interim, however, under date of February 19, 1929, a new insurance certificate was obtained naming the defendant, General Accident Fire & Life Assurance Corporation, Ltd., as the insurer, which, together with a new acceptance dated May 25, 1929, was received by the department on May 31, 1929, and approved August 29, 1929.

The plaintiff was injured on April 6, 1929, subsequent to the issuance of the new insurance certificate but prior to the approval of the employer's new acceptance. A report of the accident was filed on May 15th and on May 25, 1929, an agreement for compensation was filed with the department, and although never approved, payments were made thereunder to the plaintiff until on or about July 14, 1929, at which time the insurer declined to continue the same.

On March 19, 1937, plaintiff filed a petition with the department praying that the order of February

23, 1929, revoking the employer's acceptance, be vacated, that an order be entered approving the agreement for compensation, and that a certificate of judgment issue. The department denied the petition and it is from this order that plaintiff appeals.

It is plaintiff's contention that in view of the statutory provisions controlling at the time he was injured, the employer, once having filed an acceptance of the provisions of the act, remained subject to the provisions thereof unless and until he took the necessary steps to withdraw; that the acceptance could be terminated only in the manner provided therein; and that the order of the department revoking the acceptance was a nullity.

Plaintiff relies upon the provisions of part 1, § 5(2) of the act, as amended (2 Comp. Laws, 1929, § 8411) and part 1, § 6 thereof, as amended (2 Comp. Laws, 1929, § 8412), in support of his contention that the employer, once having elected to become subject to the provisions of the statute, remained thereunder until his voluntary withdrawal.

The department of labor and industry has those powers expressly conferred upon it by the statute and those necessarily implied therefrom. *Carvalho* v. *Cass Putnam Hotel Co.*, 239 Mich. 508. Certainly, an employer's acceptance of the act would not receive approval unless satisfactory provision was made for the payment of any compensation that might become due by reason of an accidental injury to an employee. We are of the opinion that the department possessed the implied power to revoke the acceptance of the defendant employer upon its failure to provide an acceptable certificate of insurance to guarantee payment of any compensation to which an employee might become entitled under the provisions of the statute. We are of the further opinion

that this implied power existed prior * to the amendment of 1929 (Act No. 113, Pub. Acts 1929 [2 Comp. Laws 1929, § 8412]) and that this amendatory act merely expressly conferred a power upon the department which had theretofore existed by implication. To arrive at the conclusion that the department had no power to revoke the employer's acceptance for the indicated reason, would permit the unreasonable and unjust result, that the employer could obtain the advantages and benefits of the statute, and at the same time fail to provide any security whatsoever for the payment of compensation to which the employees might become entitled.

Plaintiff, however, submits that the execution of the agreement for compensation with him and payments made thereunder constitute an acknowledgment by defendant of liability and that the agreement should have been approved. This point might have merit had the defendant been subject to the provisions of the act as was the employer in *Maki* v. *School District of Wakefield Township,* 235 Mich. 689. In the instant case, however, the employer's acceptance had been revoked by a valid and binding order of the department from which no appeal was ever taken. A new acceptance was not filed until subsequent to the time plaintiff was injured. Under these circumstances, the defendants cannot be held to be bound by the payments made under the unapproved agreement. See, *Bernard* v. *Michigan United Traction Co.,* 188 Mich. 504; *Nelson* v. *Ironwood & Bessemer Railway & Light Co.,* 204 Mich. 347. The department has no authority to make an award where the employee's injury is sustained prior to the date upon which the employer's acceptance of the act is filed. *Bendykson* v. *Lyons Evan-*

* See 2 Comp. Laws 1915, § 5428, as amended by Act No. 64, Pub. Acts 1919.—REPORTER.

gelistic Committee, 195 Mich. 490. And, as an approved agreement for compensation is the equivalent of an award, it follows that the department would have no authority to approve the agreement involved in the instant case inasmuch as the injury occurred prior to the time the employer's second acceptance of the act was filed.

The order of the department is affirmed, with costs to defendants.

FEAD, C. J., and NORTH, WIEST, BUTZEL, BUSHNELL, SHARPE, and POTTER, JJ., concurred.

In re OLIFF'S ESTATE.

LAWRENCE *v.* TAYLOR.

1. TRUSTS—APPOINTMENT OF TESTAMENTARY TRUSTEES.

Order of probate court reciting that due to oversight testator's nominee for executor and trustee was not appointed as trustee when filing account as executor, that no trustee was hitherto appointed and ordering that such nominee be appointed and give bond *held,* not to serve as letters of trusteeship, *nunc pro tunc,* as of date of filing final account as executor, but a present appointment, inoperative without compliance with statutory provisions as to trustees (3 Comp. Laws 1929, §§ 15865, 15866, 15902, 15903).

2. SAME—TESTAMENTARY TRUSTEES—BONDS.
Statutory requirement that a testamentary trustee give bond before entering upon duties of his office is mandatory (3 Comp. Laws 1929, § 15865).

3. SAME—EXECUTORS—TRUSTEES—APPOINTMENT—AUTHORITY.
Under will nominating same person as executor and trustee, acts of such person after appointment as executor and before issuance of letters of trusteeship are, in law, acts as executor and not as trustee even though performed in honest belief of power to act in latter capacity (3 Comp. Laws 1929, §§ 15865, 15866, 15902, 15903).

4. SAME—EXECUTORS—TESTAMENTARY TRUSTEES.
Offices of executor and testamentary trustee are distinct, and fact that same person is nominated in a will to fill both does not and cannot bring relation of his acts in one capacity with those in the other.

5. SAME—FINAL ACCOUNT—DIRECTED VERDICT.
Motion for directed verdict for allowance of testamentary trustee's account from time of his appointment as such because during such period there was no contest should have been granted on contest of residuary legatee to testamentary trustee's final account where derelictions complained of occurred during his term as executor when he assumed to act as trustee before his appointment as such.

6. SAME—DIRECTED VERDICT—FINAL ACCOUNT.
Since entry of judgment on verdict allowing testamentary trustee's final account in amount which should have been directed on such trustee's motion, because of no contest for actual period of trusteeship, accomplished same result as directed verdict, the judgment is affirmed.

Appeal from Genesee; Gadola (Paul V.), J. Submitted October 6, 1937. (Docket No. 36, Calendar No. 39,672.) Decided December 29, 1937.

In the matter of the estate of Thomas Oliff, deceased. Mabel O. Lawrence filed objection to the final account of Charles E. Taylor, testamentary trustee. Order surcharging account with negligent

loss entered. Trustee appealed to circuit court. Verdict and judgment allowing account of trustee. Contestant appeals. Affirmed.

J. Don Lawrence and *Rosenburg & Painter,* for contestant.

Cook & Stipes (*Harry G. Gault,* of counsel), for trustee appellee.

WIEST, J. Mabel O. Lawrence, a residuary legatee under the will of Thomas Oliff, deceased, contested the final account of Charles E. Taylor, testamentary trustee. In the probate court the account was surcharged with a negligent loss and the trustee appealed to the circuit court where, upon trial by jury, the account was allowed as presented by the trustee. The contestant reviews by appeal.

Under the will of Mr. Oliff, who died October 14, 1926, Charles E. Taylor was nominated as executor and trustee, and he was appointed executor on December 4, 1926, qualified and acted as such and his final account as executor was allowed April 4, 1930. Thereafter, he assumed to act as testamentary trustee and filed annual accounts as trustee, but was not discharged as executor until July 14, 1933, at which time he was appointed trustee, received his letters of trusteeship and qualified by giving bond.

We find a previous order of the probate court, dated May 27, 1933, reciting:

"It appearing from examinations of the records and the will in the above matter that Charles E. Taylor of Clio was nominated as trustee under the will but due to an oversight of this court at the time of filing his account as administrator (executor) no trustee was appointed.

"It is therefore ordered that the said Charles E. Taylor be appointed trustee and that he give bond in the amount of $2,000."

That order did not serve as letters of trusteeship, *nunc pro tunc,* as of the date of the filing of the final account of the executor. It expressly negatived former action of such import. It was a present appointment, inoperative without compliance with statutory provisions hereinafter mentioned. It could in no event permit statutory qualifications to have prior operation. Mr. Taylor did not qualify under that order of appointment but did qualify under the later appointment of July 14, 1933.

The statute, 3 Comp. Laws 1929, § 15865, is mandatory in requiring that:

"Every testamentary trustee before he enters upon his duties as trustee, shall give bond."

Mr. Taylor could not exercise, or have any power or authority to act as testamentary trustee until granted the letters of trusteeship on July 14, 1933. 3 Comp. Laws 1929, §§ 15865, 15866; *Gibney* v. *Allen,* 156 Mich. 301; *Wessborg* v. *Merrill,* 195 Mich. 556 (L. R. A. 1918E, 1074); *Chapin* v. *Chapin,* 229 Mich. 515.

"His assuming to act even in honest belief in his power does not confer power upon him." *Chappus* v. *Lucke,* 246 Mich. 272, 276.

See, also, 3 Comp. Laws 1929, §§ 15902, 15903, relative to testamentary trustees.

The acts of Mr. Taylor, after his appointment as executor and before the issue of letters of trusteeship on July 14, 1933, were, in law, his acts as executor and not as trustee. *Chapin* v. *Chapin, supra.*

The offices of executor and testamentary trustee are distinct, and the fact that the same person is nominated in a will to fill both does not and cannot bring relation of his acts in one capacity with those in the other.

The charges here made by contestant of dereliction and mismanagement by the trustee antedated his letters of trusteeship and his lawful entry upon the duties of such office and were, in point of law, his acts as executor and not chargeable to him as trustee and bring liability to his surety.

When this appeared at the trial counsel for the trustee moved for a directed verdict allowing the trustee's account from the time of his appointment as such because, during such period, there was no contest. This motion should have been granted.

The court, however, submitted the issues presented by the objections to the jury. The jury allowed the account as presented by the trustee and judgment was entered on the verdict.

The judgment accomplished what we have said should have been done by the court upon the motion to direct the verdict and it is affirmed, with costs to appellee.

FEAD, C. J., and NORTH, BUTZEL, BUSHNELL, SHARPE, POTTER, and CHANDLER, JJ., concurred.

DUNBAR *v.* ADAMS.

1. PHYSICIANS AND SURGEONS—RES IPSA LOQUITUR—FRACTURED JAW—IMPACTED WISDOM TOOTH.

   Negligence of dentist in extracting an impacted wisdom tooth *held*, not established by sole fact that jaw was fractured in the course of the extraction since to do so would employ the doctrine of *res ipsa loquitur*, which is not permissible in this jurisdiction.

2. SAME—NEGLIGENCE OF DENTIST—EXTRACTION OF IMPACTED WISDOM TOOTH—PROXIMATE CAUSE.

   To establish actionable negligence on part of dentist who was engaged to extract an impacted wisdom tooth it is necessary to show he failed to follow the usual and ordinary practice of dentists of average ability practicing in same or similar localities and that the alleged negligence was the proximate cause of claimed injuries.

3. MALPRACTICE—EXTRACTION OF IMPACTED WISDOM TOOTH—EXPERT TESTIMONY—CONJECTURE—X-RAYS.

   Expert testimony upon which plaintiff based his case in action for malpractice against dentist who fractured plaintiff's jaw in extracting an impacted wisdom tooth *held*, insufficient to establish negligence of defendant where opinion as to practice of taking X-rays, when difficulty was encountered, left matter conjectural that such procedure would have dictated a different method than the continued use of forceps after they had slipped off tooth several times.

4. SAME—NEGLIGENCE—PROXIMATE CAUSE.

   Adjudged malpractice must rest upon negligence in commission or omission and, when charged upon omission, it must be made to appear that the negligence was the proximate cause of the injury.

5. NEW TRIAL—MALPRACTICE—DENTIST—FRACTURING JAW—POST-OPERATIVE TREATMENT—DAMAGES.

   Denial of new trial to defendants, a dentist and his operator, in action for malpractice based on alleged negligence in fractur-

ing plaintiff's jaw when extracting an impacted wisdom tooth and for malpractice in post-operative treatment *held,* error, where evidence as to negligence in fracturing jaw was insufficient to take case to jury, there was evidence of malpractice as to post-operative treatment, and damages awarded for both alleged acts of malpractice were in one sum and cannot now be separated.

Appeal from Wayne; Marschner (Adolph F.), J. Submitted October 15, 1937. (Docket No. 108, Calendar No. 39,732.) Decided December 29, 1937.

Case by Harold B. Dunbar against Dr. Charles W. Adams, doing business as Dr. Adams Dentists and Associated Dentists, and Dr. S. W. Sanborn for personal injuries sustained by reason of malpractice. Verdict and judgment for plaintiff upon remittitur. Defendants appeal. Reversed and new trial granted.

Douglas, Barbour, Desenberg & Purdy, for plaintiff.

Mason, Davidson & Mansfield (*Carl F. Davidson,* of counsel), for defendants.

WIEST, J. This is an action against a dentist and his operator to recover damages for alleged malpractice in fracturing plaintiff's jaw while extracting the third molar or wisdom tooth on the right side. Trial was by jury, with verdict for $10,000 and judgment under ordered remittitur for $6,000. A new trial was denied and defendants prosecute review.

Plaintiff went to defendants to have 14 teeth on his lower jaw extracted. He was placed in an operating chair, with his hands strapped, cotton placed in his mouth to prevent downward passage of blood; his mouth propped open and a gas anesthetic administered. It is not claimed that this was out of the ordinary.

Plaintiff claims he was insensible until the operator started to extract the mentioned molar, and then the pain to his jaw was such that he endeavored to stop the operator but, with the cotton in his mouth and his hands strapped, he could only struggle and the operator paid no heed, although the forceps "slipped off the tooth a couple of times" and he heard the operator say to his assistant:

" 'Well,' he says, 'I think I better leave this go, it is not going to come,'—or something to that effect, and the assistant said to him, * * * 'Go ahead, if you let this man get out of the chair you will never get him back in again.' * * *

"So far as I know, Dr. Sanborn applied the forceps, or whatever instrument he was using, to the best of my knowledge, as near as I would say, six or seven times he slipped off that tooth before he finally managed to get it out. That six or seven times includes the first two or three times before he spoke to his assistant, that is, six or seven times altogether."

And when the tooth came out he sensed a cracking sound. The jaw was, in fact, fractured in the course of pulling the tooth, and when plaintiff was released from the mentioned restraint he claims he told the operator that he believed his jaw was fractured, but no examination was then made, nor when he renewed his complaint two days later, and only a verbal assurance given that he would be all right in time.

Four days after the tooth was extracted plaintiff went to a hospital, and there the fracture of his jaw was treated for an infection, known as osteomyelitis, and a silver wiring applied.

Plaintiff claims malpractice by defendants in failure to apply separate and individual treatment to the tooth when difficulty in pulling it was encoun-

tered manifesting an abnormality requiring special investigation; failure to desist from using an ordinary pulling forceps; failure to employ an operative procedure under disclosure of an X-ray picture, showing condition, position and nature of the roots of the tooth, and failure to give post-operative care.

Defendant Sanborn, the operator, testified that the tooth was partially unerupted; that he was familiar with that type of tooth and knew it would take more effort to extract it, but knew, just by manipulation, that it would come out. He could tell from looking at the tooth in what direction the roots were going; he used a regular lower forceps; he experienced some difficulty, but no more than usual for that type of tooth; there was nothing about the tooth to warrant taking an X-ray, and there was nothing to the extraction which he noticed that would lead him to believe the jaw was fractured.

The appearance of the tooth before extraction necessarily depends upon the description given by the operator. The fracture of the jaw in extracting the impacted wisdom tooth did not, in and of itself, establish negligence. No presumption of negligence could be based upon the sole fact that, in extracting the tooth, the jaw was fractured. To do so would employ the doctrine of *res ipsa loquitur* which is not permissible in this jurisdiction.

In *Donoho* v. *Rawleigh,* 230 Ky. 11 (18 S. W. [2d] 311, 69 A. L. R. 1135), an X-ray was taken and an elevator used and yet the jaw was fractured in extracting an impacted wisdom tooth.

Counsel for plaintiff recognized that, in order to establish negligence on the part of defendants, it was necessary to show that the operator failed to follow the usual and ordinary practice of dentists of average ability practicing in that or similar local-

ities, and also evidence showing that the alleged negligence was the proximate cause of plaintiff's injuries. To meet this burden plaintiff called experts who, in answer to hypothetical questions, expressed their views relative to the usual and ordinary practice of dentists of average ability in the locality, both in the extraction, when difficulty is experienced indicating an abnormality requiring investigation by X-ray and special appliances, and the giving of post-operative care.

The testimony of one of the experts related to the claim of negligence in the failure to give attention and treatment following the extraction.

Plaintiff's claim of malpractice, in extracting the tooth, rested upon the testimony of Dr. Muir, relative to the practice of taking an X-ray when difficulty in diagnosis or in the extracting of an impacted wisdom tooth is experienced, but his testimony lost probative force by his answers to questions propounded by counsel for plaintiff. The expert testified:

"A good operator would never proceed when he runs into difficulty without stopping and taking an X-ray. He can determine if he is running into difficulty by the sense of touch. It shouldn't be necessary for him to take hold several times and slip and do all those things as you describe.

"*Q.* What would the purpose of the X-ray be, doctor?

"*A.* The X-ray—it depends on the condition of the tooth in the first place. Oftentimes it is an unerupted or impacted wisdom tooth—I don't know whether this was or not—but if it is, take an X-ray to determine what you have to operate on; the position of the tooth; the way it lays and whether you should use forceps or an elevator.

"*Q.* That is the usual and ordinary practice?

"*A.* That is the usual practice.

"*Q.* Doctor, let us assume the same facts of that question, and add to it the tooth is erupted; then what is the ordinary practice?

"*A.* Then, if it is erupted, take an X-ray to go into further examination. X-rays are oftentimes avoided because of the cost. * * *

"*Q.* Assuming that the doctor paused in extracting the tooth and had taken the X-ray, and assuming that the—I will change that—let us assume, doctor, that the tooth was extracted and that the patient's jaw was broken. Now if the usual and ordinary practice had been followed, as you have described it, and an X-ray had been taken, do you believe that the fracture of the plaintiff's jaw might not have occurred? * * *

"*A.* I answer that by saying it depends entirely upon the skill of the operator and the judgment he would use from that point on; the experience he has had; and the equipment he has to go on further with the operation.

"*Q.* Do you believe, doctor, it might have been avoided?

"*A.* It might have been avoided, yes, because he could more intelligently see what field and know what to do. Perhaps he wouldn't have done all he did do; I mean, use the same instruments; the same method of procedure."

This did not show negligence in the use of forceps, nor did the expert so claim. The opinion that, had the operator obtained the benefit of an X-ray—"perhaps, he wouldn't have done all he did do; I mean, use the same instruments; the same method of procedure," was but conjectural as to whether an X-ray would have dictated a different method than the one employed.

Adjudged malpractice must rest upon negligence in commission or omission and, when charged upon omission, it must be made to appear that the negligence was the proximate cause of the injury.

The dental establishment of defendant Adams had an X-ray apparatus available for use by the operator in case of need, but it was not employed in the instance at bar, because, by view and manipulation of the tooth, the operator claims he was aware of the full situation, and that the forceps would fully meet the purpose.

Under the testimony of the operator he extracted the tooth with the knowledge an X-ray picture would have afforded.

There is no showing that the X-ray would have commanded a different method of operation and, therefore, the charge of malpractice resulting in fracturing the jaw was one of mere conjecture.

The damages awarded for malpractice in extracting the tooth and for post-operative negligence were in one sum, and cannot now be separated. There was evidence of post-operative malpractice.

Under the evidence plaintiff made no case warranting the jury in finding defendants guilty of malpractice in extracting the tooth and the court, on that ground, should have granted a new trial.

The judgment is reversed and a new trial granted, with costs to defendants.

FEAD, C. J., and NORTH, BUTZEL, BUSHNELL, SHARPE, POTTER, and CHANDLER, JJ., concurred.

In re WIDENING MICHIGAN AVENUE (PARCELS 27, 32, 32A, 33).

1. EMINENT DOMAIN—RAILROAD GRADE SEPARATIONS.

   Statute regulating proceedings for separation and reconstruction or alteration of existing separations of railroad and public highway grades *held*, not to require that grade separation proceedings be had prior to condemnation proceedings for widening of streets (1 Comp. Laws 1929, §§ 4481–4513; §§ 4514–4521, as amended by Act No. 335, Pub. Acts 1931).

2. SAME—RAILROAD GRADE SEPARATION—RIGHTS OF WAY FOR HIGHWAY.

   Under statute regulating proceedings for separation of railroad and public highway grades and the reconstruction or alteration of existing structures for increased highway or railroad facilities, the right of way and other property rights for the highway across the land and tracks of the railroad company, unless otherwise agreed upon, must be acquired in same manner as property is acquired for other highway purposes and may not be acquired under the grade separation statute (1 Comp. Laws 1929, § 4521, as amended by Act No. 335, Pub. Acts 1931).

3. SAME—GRADE SEPARATIONS—DAMAGES.

   Grade separation damages may not be given in proceedings to condemn railroad rights of way for widening a street (1 Comp. Laws 1929, § 4521, as amended by Act No. 335, Pub. Acts 1931).

4. SAME—RAILROAD RIGHTS OF WAY FOR STREET WIDENING—NOMINAL DAMAGES—GRADE SEPARATIONS.

   Awards of six cents each to railroad companies for damages to portions of their rights of way taken by city for street widening purposes are affirmed where within range of testimony, and rights of litigants will not be affected by such affirmation since it does not preclude steps being taken to accomplish proposed reconstruction or alteration of existing grade separations (1 Comp. Laws 1929, §§ 4514–4521, as amended by Act No. 335, Pub. Acts 1931).

5. SAME—DAMAGES—LEASEHOLD INTEREST IN FRAME WAREHOUSE.
Award of deduction of $2,280 to lessee from joint award of $4,263.23 as damages to land and $660 damages to frame warehouse, owned by railroad company, in proceedings to condemn land taken for street widening purposes *held,* not excessive but within fair range of testimony and facts which jury may have learned in examining property, the lease being a profitable one to lessee and entitling it to possession for 41½ months from the time of trial and its heavy machinery being located in portion taken.

Appeal from Recorder's Court for the City of Detroit; Jeffries (Edward J.), J. Submitted October 5, 1937. (Docket No. 12, Calendar No. 39,506.) Decided December 29, 1937. Rehearing denied April 4, 1938.

Condemnation proceedings by City of Detroit to widen Michigan avenue from Roosevelt to Livernois avenues where not already widened as a public street. Joint award to Michigan Central Railroad Company, Guaranty Trust Company of New York, Bankers Trust Company, City of Detroit and County of Wayne as to parcel No. 27. Joint award to Michigan Central Railroad Company, New York Central Railroad Company, Grand Rapids Plaster Company, City of Detroit and County of Wayne as to parcel No. 32. Joint award to Michigan Central Railroad Company, New York Central Railroad Company, City of Detroit and County of Wayne as to parcel No. 32A. Joint award to Chicago, Detroit & Canada Grand Trunk Junction Railroad Company and Grand Trunk Railroad Company of Canada as to parcel No. 33. Michigan Central Railroad Company, New York Central Railroad Company and Grand Trunk Western Railroad Company, successor by consolidation to Chicago, Detroit & Canada Grand Trunk Junction Railroad Company and the Grand Trunk Railroad Company of Canada, appeal. Affirmed.

Raymond J. Kelly, Corporation Counsel, and *James H. Lee,* Assistant Corporation Counsel, for petitioner City of Detroit.

John J. Danhof and *Harold H. McLean,* for Michigan Central and New York Central Railroad Companies.

H. V. Spike and *John J. Gafill,* for Grand Trunk Western Railroad Company.

Edward R. Stanton (*Thomas L. Poindexter,* of counsel), for Grand Plaster Company.

BUSHNELL, J. The tracks of the Michigan Central Railroad Company, the New York Central Railroad Company and the Grand Trunk Western Railroad Company all cross Michigan avenue in the city of Detroit near Clark avenue. In 1903 a grade separation contract was entered into between certain railroad companies, the city of Detroit and the Detroit United Railway Company (which at that time owned and operated the street railways of the city), whereby various grade crossings were to be discontinued. Subsequent thereto, the street level of Michigan avenue was lowered and the railroads have since used overhead viaduct crossings. Michigan avenue at this railroad viaduct is 66 feet wide.

In November, 1930, the city of Detroit, under the provisions of title 8, chap. 1, of its charter, filed a petition in the recorder's court of the city of Detroit to condemn property for the purpose of widening Michigan avenue from Roosevelt to Livernois avenues. The easterly property line of the railroad right of way at the viaduct runs north 28° 39′ 45″ east, and Michigan avenue runs north 88° 52′

45″ west. It is proposed to take 60.91 feet of the railroad frontage on the south side of Michigan as measured along the easterly and westerly lines of the rights of way. Parcels 27, 32, 32A and 33 of the condemnation project involved in this appeal are all owned by one or another of the various railroads. There is located on parcel 32 a frame warehouse owned by appellant New York Central Railroad Company and leased by it to appellee Grand Rapids Plaster Company, a Michigan corporation.

Nothing was done in the widening case from 1930 until late in 1935. After a jury was impaneled in December of the latter year, the railroads moved to dismiss the widening petition as to their parcels. They claimed that the court lacked jurisdiction to condemn the portion of their right of way where a grade separation structure has already been established until after a determination by the Michigan public utilities commission, as required by Act No. 335, Pub. Acts 1931, amending Act No. 114, Pub. Acts 1925, unless compensation is provided for the necessary structural changes.

As sometimes happens, because of the loose manner in which condemnation cases are tried in the city of Detroit without the presence of the trial judge, except when he is called into the court room to rule upon objections, the case proceeded for a matter of six months before the railroad parcels were reached, and not until then was a ruling by the trial judge sought on this motion. Then, as expressed by the trial judge, the parties found themselves "in the middle of the stream" and the court denied the several motions, saying:

"I fully appreciate the responsibilities. I am taking them. I am in the middle of the stream, and I might as well go to the other end of it and see what

it is, go through and get over to the other bank if I can, as to back out; because it won't make any difference. * * *

"Now, I disposed of it. I am fully conscious of it. If I am in the middle, somebody is going to get me out, and it looks to me that the Supreme Court is the only one that can get me out, because there is no use backing up on this matter now."

About two weeks later, at a time when the judge was about to leave the court room, appellants offered in evidence the 1903 grade separation contract, on the theory that the city was precluded from requiring a change in the grade separation structures unless it assumed the additional cost. The court refused to admit the written agreement in evidence, nevertheless it appears in the record before us as an exhibit. There also appear the railroads' estimate of the cost of reconstruction, although it was not admitted by the trial judge.

The record also contains what is evidently only a portion of the corporation counsel's argument to the jury, some of which is unsupported by any testimony whatever and contains highly prejudicial statements to the effect that similar tactics were used by appellants in the Woodward widening. We quote, by way of illustration, the following:

"*Mr. Lee:* Now, there are three railroads involved in this proceedings. Two of the railroads cross on an elevated bridge. The other railroad crosses at grade.

"Now, the railroads have come into this proceeding and now attempt to—you heard the argument; you heard the judge's ruling; you should be bound by his ruling because he is right.

"They attempt to collect from the city of Detroit the cost of reconstructing those two viaducts, know-

ing full well that they would never spend a nickel to reconstruct them. Every dollar for the cost of reconstructing these new viaducts, which it is estimated will cost half a million dollars apiece,—every dollar will come from the Federal government. But still they would like to collect it if they could.

"They tried it on Woodward. They went to the Supreme Court even. But the bridge is there and they didn't pay a nickel for the bridge.

"That is why we have to fight with these fellows so much. That is why we have to be at them constantly, because if we give it to them and the verdict becomes confirmed and something else happens, there is no way to get it back.

"They are only entitled to six cents to the land, because the easement is still imposed upon the right of way. If in addition to the land in the right of way we have any other land outside of the right of way, we pay them for it. Also, we pay them for any building affected in the right of way."

In support of the court's action in dismissing the motion, the city argues that:

"Act No. 335, Pub. Acts 1931 (Comp. Laws Supp. 1935, §§ 4514–4521-2), was not applicable to this proceeding, because the condemnation case was commenced prior to the enactment of the said statute; because land only was taken in the condemnation proceeding; because a separate proceeding will subsequently be instituted and tried to determine the damages growing out of the grade separation of the street, as widened. In said proceeding the cost of the viaduct structures will be determined and the payment of said costs will be allocated partly to the city of Detroit and partly to the railroad companies, under the provisions of Act No. 92, Pub. Acts 1893 (1 Comp. Laws 1929, §§ 4481–4513)."

We are of the opinion that, contrary to appellants' contention, Act No. 335, Pub. Acts 1931 (Comp. Laws

Supp. 1935, §§ 4514–4521-2), which amended Act No. 114, Pub. Acts 1925 (1 Comp. Laws 1929, §§ 4514–4521), does not require that grade separation proceedings be had prior to condemnation. See *A. M. Campau Realty Co.* v. *City of Detroit,* 268 Mich. 417, involving Act No. 92, Pub. Acts 1893.

Appellants rely on Act No. 335, § 8, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 4521) as supporting their view. This section reads as follows:

"Whenever permission is granted * * * for the reconstruction of existing grade separations * * * and the alteration of existing grade separations for increased highway or railroad facilities, the right of way and other property rights, if any, for said highway across the land and tracks of the railroad company shall, unless otherwise agreed upon, be acquired in the same manner as property is acquired for other highway purposes."

This section means merely that, if the municipality elects to proceed first under the grade separation statute, it cannot acquire necessary property rights in such proceeding but must resort to a separate condemnation action. This conclusion makes it unnecessary to consider appellants' argument that Act No. 335 is applicable to an action pending at the time of its enactment.

The holding in the *Campau Realty Case, supra,* is adverse to appellants' contention that grade separation damages may be given in condemnation proceedings. Except as to the matters herein expressly discussed we do not pass upon the issues involved in the grade separation phase of the instant case.

The jury awarded six cents to each of appellants for damages to their land as described in parcels 27, 32A and 33. This does not preclude steps being taken to accomplish the proposed reconstruction or

alteration of existing grade separations or any new ones if required. The right of any litigants in such respect will not be affected by an affirmation of the award for damages to the land embraced in the parcels named. The amount allowed being within the range of the testimony, these awards should be affirmed.

The New York Central Railroad Company also appeals from that portion of an award on parcel 32 of $4,263.23 as damages to the land and $660 damages to the building, which requires the sum of $2,280 to be deducted therefrom as leasehold damages to Grand Rapids Plaster Company, appellee. It is claimed that the award to the Grand Rapids Plaster Company is excessive and unsupported by the evidence.

The lease in question was entered into for a period of one year on July 1, 1931, "subject to termination by either party on 30 days' notice," and provides for an annual rental of $720, which was reduced in October, 1933, to $480. Because of improvements installed by the lessee, the lessor, on November 14, 1934, agreed in writing that "the lease will not be disturbed by this company within five years from this date."

Lessee's heavy machinery, consisting of a sand dryer and mixing machine, one of which weighs six tons, is located in the portion taken. Appellee had a profitable lease at a low rental and could not be disturbed by the lessor in its possession of the premises for 41½ months from the time of trial. The testimony presented was fair and reasonable and wholly uncontradicted by the lessor.

An examination of the record indicates that the damages awarded the lessee were within the fair range of the testimony and of the facts which the

jury may have learned in their examination of the property. *In re Widening of Michigan Avenue, Roosevelt to Livernois (Parcel 68)*, 280 Mich. 539.

There is no reason to disturb the award as to parcel 32 and it is affirmed, with costs.

The various awards as to parcels 27, 32A and 33 are also affirmed, with costs.

FEAD, C. J., and NORTH, WIEST, BUTZEL, SHARPE, POTTER, and CHANDLER, JJ., concurred.

LOWRIE *v.* BRENNAN.

OFFICERS—TERM OF OFFICE—REMOVAL—PROBATION OFFICERS—STATUTES.

Statute providing that court probation officers be appointed and removed by the governor upon recommendation of respective courts and providing method of removal *held*, not in conflict with, but within exception of, statute defining and limiting term of office of officers and commissioners, appointed by the governor, in cases not otherwise defined and limited since statute relative to probation officers had effect of creating a tenure of office during good conduct and not for a definite period and entitled appointee to hearing upon removal in accordance with statute pursuant to which he held office (Comp. Laws 1929, § 402, and §§ 17377 and 17380, as amended by Act No. 308, Pub. Acts 1931).

SHARPE and POTTER, JJ., dissenting.

Appeal from Wayne; Sprague (Victor D.), J., presiding. Submitted October 6, 1937. (Docket No. 30, Calendar No. 39,659.) Decided December 29, 1937. Rehearing denied February 25, 1938.

Bill by Kathleen J. Lowrie and others against John V. Brennan and others for declaration of rights of plaintiffs to the office of assistant probation officers of the recorder's court of the city of Detroit. Decree for defendants. Plaintiffs appeal. Reversed and decree ordered entered in accordance with opinion.

Lewis & Watkins, for plaintiffs.

Duncan C. McCrea, for defendants.

BUSHNELL, J. I am unable to concur in the result reached by Mr. Justice SHARPE. In determining the effect of Act No. 146, Pub. Acts 1877 (1 Comp. Laws 1929, § 402) and Act No. 105, Pub. Acts 1913, as amended, particularly sections 7 and 10 thereof, the same being reenacted by Act No. 175, chap. 11, §§ 7, 10, Pub. Acts 1927 (3 Comp. Laws 1929, §§ 17377, 17380), Mr. Justice SHARPE applies the rule of interpretation found in 46 C. J. p. 965, which states:

"If the language of a statute specifying the term of office of an official is ambiguous, the interpretation which limits the term to the shortest time will be adopted."

I cannot find any ambiguity in either act.

The title of Act No. 146, Pub. Acts 1877, reads: "An act to define and limit the term of office of officers and commissioners, appointed by the governor, in cases *not otherwise defined and limited,*" and the body of the act states that such term "in

cases not otherwise provided, or where no term is specified in the act creating such officer or commission, shall expire'' in two years, etc.

The title of Act No. 105, Pub. Acts 1913, reads:

''An act to provide a uniform system of probation throughout the State of Michigan; the appointment of probation officers,'' etc. (1 Comp. Laws 1915, § 2029).

Section 7 of the latter act requires that probation officers ''shall be appointed by the governor,'' and section 10 gives the power of removal to the governor and provides the manner in which such removal may be accomplished. Section 10 of Act No. 175, Pub. Acts 1927, reenacting Act No. 105, Pub. Acts 1913 was amended by Act No. 308, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 17380), to broaden the grounds for removal, but no change was made in the method.

Section 17377, controlled the appointment of plaintiffs and section 17380, their removal. The act of 1913 is within the exception recognized by the language, ''otherwise defined and limited'' or ''otherwise provided.'' See 1 Comp. Laws 1929, § 402.

There is no conflict in the application of the respective acts and no ambiguity in their language so far as the facts presented by this record are concerned.

Section 17380 had the effect of creating a tenure of office during good conduct and not for a definite period. Plaintiffs' tenure could be terminated only by the method provided in this section.

The decree of the trial court is vacated and one may be entered here in accordance with this opinion.

FEAD, C. J., and NORTH, WIEST, BUTZEL and CHANDLER, JJ., concurred with BUSHNELL, J.

SHARPE, J. (*dissenting*). This is an action for a declaratory judgment and for supplemental relief brought by five persons who had been appointed assistant probation officers of the recorder's court of Detroit on various dates from 1918 to 1930.

The plaintiffs were so appointed as follows: Kathleen J. Lowrie, on or about December 8, 1925; Harry Z. Gordon, June 15, 1924; Fred C. Wenskay, August 3, 1918; Hubert L. Keils, January 2, 1930; and Alex Berndt, December 1, 1922. On or about November 1, 1927, after the repeal, revision, and reenactment of Act No. 105, Pub. Acts 1913, creating their office, all of the plaintiffs, except Keils, were notified by the governor of the State of Michigan that they had been reappointed to said offices. They severally qualified by taking and signing the constitutional oath of office as required by Act No. 105, § 9, Pub. Acts 1913. See 3 Comp. Laws 1929, § 17379. There were no subsequent reappointments and the plaintiffs held and continued to discharge the duties of their offices as assistant probation officers and were paid therefor, continuously from the dates of their appointments and reappointments to December 31, 1935, when they were prevented from continuing their work and were denied further compensation by the defendants.

On or about December 31, 1935, each of the plaintiffs was advised in writing by defendant Gaston that he was not reappointed to the position of assistant probation officer of the recorder's court. Accordingly, upon receipt of Gaston's notice, the plaintiffs severally protested to the defendants that the attempted dismissal was improper, wrongful, unauthorized and unlawful. Further, that it was contrary to the statute for the reason that the provisions of 3 Comp. Laws 1929, § 17380, as amended by Act No. 308, Pub. Acts 1931 (Comp. Laws Supp.

1935, § 17380), were not complied with. The plaintiffs also severally notified the defendants that they were ready to perform the duties of their respective offices, and they formally tendered performance thereof.

The defendants denied the claims of the plaintiffs, ignored their protests and rejected their tenders of performance, contending that the terms of office of all of the plaintiffs expired on December 31, 1935, and that, inasmuch as they had not been recommended for reappointment and reappointed, they were no longer assistant probation officers of the recorder's court of Detroit.

The plaintiffs were never charged with incompetency, misconduct, failure to carry out the orders of the court or neglect of any duty imposed upon them by the court or the statutes of the State of Michigan; no hearing was ever had on any such charges; and no determination was ever made that the plaintiffs, or any of them, were incompetent or guilty of misconduct, neglect of duty or refusal to carry out the orders of the Court.

The plaintiffs contend that under 3 Comp. Laws 1929, § 17377, they were respectively appointed to act as assistant probation officers until they should be removed for cause as provided for in 3 Comp. Laws 1929, § 17380, as amended by Act No. 308, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 17380); and that their legal status was not affected by the notice of nonappointment, while it is the claim of the defendants that the tenure of office of all of the plaintiffs is controlled by 1 Comp. Laws 1929, § 402; that under said section the term of office of all plaintiffs expired on December 31, 1935; and that after said date they were no longer assistant probation officers of the recorder's court of Detroit.

The trial court held that by virtue of 1 Comp. Laws 1929, § 402, the term of office of plaintiffs expired December 31, 1935, and dismissed their bill of complaint.

Act No. 146, Pub. Acts 1877 (1 Comp. Laws 1929, § 402), provides:

"That the term of office of officers and commissioners appointed by the governor, in cases not otherwise provided, or where no term is specified in the act creating such officer or commission, shall expire two years from the first day of January of the year when the appointment is made, unless the appointment shall be by the commission limited to a shorter term, in which case it shall cease as limited, or unless the appointment be to fill a vacancy, in which case it shall continue for the remainder of the term; Provided, that in cases where by law the office does not expire with the term, such officers shall hold the office and continue to act until their successors are appointed and have qualified."

It is contended by the plaintiffs that the above act is not applicable to the office of assistant probation officers for the reason that probation officers are not "appointed by the governor;" that the act creating the office of assistant probation officer creates a case "otherwise provided" or does specify a term, *i. e.*, during good behavior.

We are of the opinion that the assistant probation officers are appointed by the governor. While the act provides that the recommendation may come from the judge, yet it also provides that the appointment *shall* be made by the governor. Under the terms of this act, there is no provision for making such appointment except by the governor.

When Act No. 105, Pub. Acts 1913, was enacted, the legislature had before it the provisions of the 1877 act, and we must presume that they gave it due

consideration. In 25 R. C. L. p. 959, the rule is stated to be that, "Statutes are to be read in the light of attendant conditions and the state of the law existent at the time of their enactment."

In 46 C. J. p. 964, it is said:

"Whether a public officer has a fixed term of office can be determined only by reference to the law creating the office, but a term of office may be fixed by law, although not so stated in express terms by the statute, where such a result is properly inferred from the construction of the statute as a whole."

See, also, *Burgan* v. *New Jersey Civil Service Commission,* 84 N. J. Law, 219 (86 Atl. 929).

And in 46 C. J. p. 965:

"If the language of a statute specifying the term of office of an official is ambiguous the interpretation which limits the term to the shortest time will be adopted."

In *Marcellus* v. *Wright,* 61 Mont. 274, 285 (202 Pac. 381), the court said:

"The law will not tolerate the thought that the tenure of office can begin or end at a time other than that fixed by the authority creating the office, or in any manner other than that so provided. * * *

"If the language employed were of doubtful meaning, that interpretation which limits the term to the shortest time should be adopted" (citing Mechem, Public Offices and Officers, § 390).

In *Opinion of the Justices,* 275 Mass. 575 (175 N. E. 644), the question submitted to the court was as to the tenure of office of a deputy auditor general appointed under a statute (Gen. Laws 1921, chap. 11, § 2) providing that the auditor "shall with the consent of the governor and council, appoint a first deputy auditor, at a salary to be fixed by the auditor,

with the approval of the governor and council, who shall perform such duties as may be assigned to him by the auditor *and who may be removed by him for cause at any time,* with the consent of the governor and council. If by reason of sickness, absence or other cause, the auditor is temporarily unable to perform the duties of his office, the first deputy shall perform the same until such disability ceases. In the event of a vacancy in the office of auditor, the first deputy shall be continued in office and shall perform all statutory duties of the auditor until an auditor shall be duly qualified." The court held that an auditor upon assuming office is authorized to appoint a new deputy without first removing the incumbent for cause and obtaining consent to such removal, that the tenure of office of the deputy is during good behavior for the term of the auditor appointing him (unless sooner removed for cause), during any period of vacancy in the office of auditor arising during the term of the auditor appointing him, and during any period of holdover due to the fact that his successor as deputy has not been appointed and qualified, that the term of the deputy expires with term of the auditor by whom he was appointed; and that it does not continue until he is removed for cause.

The court in determining the tenure of office said in words applicable to the case at bar:

"No statute in terms fixes the tenure of office of the first deputy. The inference is not permissible that he holds office for life or during good behavior without any statute to that effect.

"It is the general rule of the common law apart from statute that a public officer cannot give an appointee a tenure of office beyond his own. *Commonwealth* v. *Higgins,* 4 Gray (70 Mass.), 34; *Opinion of the Justices,* 239 Mass. 603 (133 N. E. 452)."

In *Aggeler* v. *Dominguez,* 217 Cal. 429 (19 Pac. [2d] 241), the question involved was whether the statute, providing for appointment of judges to fill certain vacancies, provided for the appointees to hold office for an unexpired term or for six years from the date of appointment. The court held that the former was the correct construction; and such appointees merely served for the balance of any unexpired term, and cited Mechem, Public Offices and Officers, § 390, and Throop, Public Officers, § 308, which states:

"But other considerations being equal, that construction of a doubtful provision of a statute or constitution will be followed which limits the term of office to the shortest time."

The court also quoted from *People* v. *Brenham,* 3 Cal. 477, 487, the following statement:

"We should not extend official terms beyond the time clearly defined but rather by implication, if necessary, shorten the duration of a term, than prolong it."

In *Caldwell* v. *Lyon,* 168 Tenn. 607, 615 (80 S. W. [2d] 80, 100 A. L. R. 1152), it is said:

"Public interest requires that all possible certainty exist in the election of officers and the beginning and expiration of their terms, and forbids that either be left to the discretion or vacillation of the person holding the office or body having the appointive power."

In 22 R. C. L. p. 550, it is said:

"The practical construction of the statute as exemplified either by the former conduct of the public officer interested in the question, or by the long continued action of other officials, is likewise a factor of

considerable importance in reaching a proper construction of a law regulating the tenure of office."

Another obvious rule is that a term fixed by statute cannot be changed by the appointing power. *Brown, ex rel. Gray,* v. *Quintilian,* 121 Conn. 300 (184 Atl. 382).

In *Hughes* v. *Buckingham,* 5 S. & M. (13 Miss.) 632, an act passed in March of 1833 clothed the chancellor with power to appoint a clerk, but the tenure of his office was not fixed by the act. By a general law passed in December of 1833, the tenure of all offices, not otherwise provided for, was limited to four years. The court held that the term of that officer was fixed at four years from the date of his appointment.

Plaintiffs cite *Board of Street Com'rs of Hagerstown* v. *Williams,* 96 Md. 232 (53 Atl. 923); *Rowell* v. *City of Battle Creek,* 169 Mich. 19 (Ann. Cas. 1913D 1204); and *Klink* v. *State, ex rel. Budd,* 207 Ind. 628 (194 N. E. 352, 99 A. L. R. 317), as authority for the proposition that when a constitution or statute creates an office and leaves its tenure undefined, that tenure is for life or good behavior. We think the above cited cases have no application to the principle involved in the case at bar. In the *Williams Case, supra,* there was no statute limiting the tenure of employees such as policemen, such as our 1877 act. In the *Rowell Case,* the act under which the police matron was appointed provided that she should "hold office until removal," while in the *Klink Case* the rule there adopted is that where there is a provision in a statute providing that public officers shall serve during good behavior, such statute declares the duration of the term.

In our opinion the 1913 probation act does not specify a term of office. The provision in said act

relating to the removal of officers has application only to removal during their term of office. The 1877 act is controlling and limits the term of office to two years.

The judgment should be affirmed. Defendants should recover costs.

POTTER, J., concurred with SHARPE, J.

GEISEL *v.* BURG.

1. GIFTS—DELIVERY—INDORSED CERTIFICATES OF DEPOSIT.
   Certificates of deposit found in shoe box under deceased payee's bed and which had been indorsed for payment to various relatives upon death of payee *held,* part of deceased payee's estate since there was no delivery.

2. SAME—INTER VIVOS—DELIVERY—ACCEPTANCE.
   To constitute a valid gift *inter vivos* there must be a gratuitous and absolute transfer of property from donor to donee, taking effect immediately, and fully executed by a delivery of the property by donor and acceptance thereof by donee.

3. SAME—INTER VIVOS—DELIVERY.
   To effectuate a gift *inter vivos,* there must be an unconditional delivery either to donee direct or to some one for him and the right of disposition must be wholly beyond the power of donor.

4. LIMITATIONS OF ACTIONS—WAIVER—ADMINISTRATORS.
   Generally an administrator cannot waive the statute of limitations.

5. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED —WAIVER—ADMINISTRATORS.

An administrator may not waive provisions of statute prohibiting a claimant against estate from testifying to facts, tending to support his claim, which were equally within knowledge of deceased except where administrator examines or calls the opposite party to testify as to matters equally within knowledge of deceased (3 Comp. Laws 1929, § 14219).

6. SAME — MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED — ADMINISTRATORS—FAILURE TO OBJECT NOT A WAIVER.

Failure of an administrator to object to testimony of a witness who testifies as to matters equally within knowledge of deceased *held,* not a waiver of benefit of such statute (3 Comp. Laws 1929, § 14219).

7. GIFTS—DELIVERY—EVIDENCE—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED.

In administrator's suit to determine ownership of certificate of deposit which was made payable to deceased purchaser or nephew, with whom it was left, where his testimony as to delivery to him was inadmissible as being equally within knowledge of deceased and there was no other evidence that it was a gift, certificate *held,* intestate property (3 Comp. Laws 1929, § 14219).

8. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED —CERTIFICATES OF DEPOSIT.

In administrator's suit to determine ownership of various certificates of deposit which had been purchased by deceased and were made payable to her or designated nephews and niece, testimony as to delivery by nephew with whom they were deposited and who had acted as deceased's agent *held,* inadmissible as to certificate in which he was designated as alternate payee but admissible as to certificates made payable to deceased and brothers and sister of witness as alternate payees (3 Comp. Laws 1929, § 14219).

9. GIFTS—INTER VIVOS—DELIVERY—RECALL BY DONOR.

Certificates of deposit which had been purchased by deceased and made payable to various relatives and left with nephew subject to recall by deceased *held,* not to have been delivered so as to effect a gift *inter vivos.*

10. WILLS—FORM—STATUTES—OPERATION.

In determining whether an instrument is a will or not, its form is of little consequence for if statutory formalities are com-

plied with and instrument is to operate only after death of maker it is a will.

11. EVIDENCE—HEARSAY.
Testimony of bank employee as to statement which deceased's nephew made relative to passage of title to certificates of deposit which had been purchased by deceased *held,* inadmissible as hearsay in administrator's suit to determine ownership of the certificates.

12. WILLS—EVIDENCE—INTENT.
In suit by administrator to determine ownership of various certificates of deposit which were made payable to deceased or certain relatives in the event of her death and were found in a shoe box underneath deceased's bed or which had been left with a nephew subject to her recall, evidence *held,* insufficient to establish intent of deceased to make a will as to any certificate in favor of any one.

Appeal from Washtenaw; Sample (George W.), J. Submitted October 8, 1937. (Docket No. 79, Calendar No. 39,510.) Decided December 29, 1937.

Bill by George J. Geisel, administrator of the estate of Lucetta Burg, deceased, against Charles, Pharo C., Grover F., Marie G., Ralph E., Charles S., and John A. Burg to determine ownership of certificates of deposit. Cross-bill by defendant Charles Burg against plaintiff, other defendants and others to determine ownership of certain certificates of deposit, for an injunction and other relief. From decree rendered, plaintiff and defendant Grover F. Burg filed separate appeals, defendant and cross-plaintiff Charles Burg cross-appeals. Reversed.

Arch D. Wilson, for plaintiff.

Roscoe O. Bonisteel and *Burke & Burke,* for defendant and cross-plaintiff.

Frank B. DeVine, for defendant Grover F. Burg.

SHARPE, J. Lucetta Burg, an unmarried woman, died September 18, 1934, and was survived by the following heirs, Charles Burg, a brother; Pharo C. Burg, Grover F. Burg, John A. Burg, Ralph E. Burg, Charles S. Burg, nephews, and Marie G. Burg, a niece, all of which nephews and the niece were children of a deceased brother Frank Burg.

At the time of her death, Lucetta Burg had in her possession, in a shoe box under her bed, the following certificates of deposit:

Certificate of deposit dated September 17, 1934, in the sum of $4,462 issued by the Citizens Bank of Saline, payable to the order of herself and on the back of which was the following statement, not in the handwriting of the deceased: "In the event of my death pay to the order of my brother, Charles Burg." This certificate was not indorsed.

Certificate of deposit dated July 29, 1934, in the sum of $3,946 issued by the Citizens Bank of Saline, payable to the order of herself and on the back of which appeared the following indorsement: "In the event of my death pay to the order of Grace M. Burg, Lucetta Burg."

A certificate of deposit dated July 29, 1934, in the sum of $4,412 issued by the Citizens Bank of Saline, payable to the order of herself and on the back of which appeared the following indorsement: "In the event of my death pay to the order of Pharo C. Burg, Lucetta Burg."

A certificate of deposit dated June 15, 1934, in the sum of $9,400 issued by the Citizens Bank of Saline, payable to the order of herself and on the back of which the following appeared which was not in the handwriting of the deceased: "In the event of my death pay to the order of Charles Burg, brother, of Colorado Springs, Col."

A certificate of deposit dated April 9, 1934, in the sum of $8,932 issued by the Citizens Bank of Saline,

payable to the order of herself and on the back of which appeared the following: "In the event of my death pay to the order of Charles Burg, brother, of Colorado Springs, Col., Lucetta Burg."

At the time of her death, Grover Burg, a nephew, had in his possession the following certificates of deposit:

A certificate of deposit purchased by Lucetta Burg May 15, 1934, from the State Savings Bank of Ann Arbor for $8,000 payable to the order of self or Charles Burg which was not indorsed.

A certificate of deposit in the sum of $16,359 purchased from the Farmers & Mechanics Bank of Ann Arbor. This certificate of deposit was payable to the order of Lucetta Burg and on the reverse side of the certificate was the following: "In the event of my death pay to the order of my brother Charles Burg," signed by Lucetta Burg and witnessed by Mildred Hallen and B. A. Van Sickle, employees of the Farmers & Mechanics Bank.

At the same time, Grover Burg also had in his possession the following certificates of deposit purchased from the First National Bank of Ann Arbor, dated May 15, 1934:

One in the sum of $4,075 payable to the order of Lucetta Burg or Pharo C. Burg, with no indorsement;

One in the sum of $8,487 payable to the order of Lucetta Burg or Ralph E. Burg, with no indorsement;

One in the sum of $8,487 payable to the order of Lucetta Burg or John A. Burg, with no indorsement;

One in the sum of $8,487 payable to the order of Lucetta Burg or Grover F. Burg, with no indorsement.

The administrator did not know of the last four certificates of deposit until after he filed the inventory. The question naturally arose as to the ownership of these various certificates of deposit and the administrator filed a bill in the chancery court of Washtenaw county to determine this question. During the trial of the cause it developed that, of the certificates in possession of Grover F. Burg at the time of Lucetta Burg's death, he at first delivered to the administrator all of the certificates upon which Charles Burg's name appeared and retained those in which the names of his brothers and sister appeared; that Grover F. Burg took care of many of the financial transactions of Lucetta Burg and filed a claim against the estate in the sum of $30,000.

The trial court held that it was the intention of Lucetta Burg to make gifts of the funds represented by the various certificates of deposit to the donees named in said certificates and entered a decree accordingly. The administrator and Grover F. Burg appeal and Charles Burg cross-appeals.

The defendant and cross-defendant Grover F. Burg contends that the certificates of deposit purchased by Lucetta Burg and which were found in the shoe box are not the property of the persons whose names appear on the back thereof, but that they are the property of the estate as there was no transfer of the property by the donor, she having retained possession of the box until her death; that the certificate of deposit in the sum of $16,359 purchased from the Farmers & Mechanics Bank upon which she had indorsed a memorandum to the effect that in the event of her death, the certificate of deposit was to be paid to Charles Burg, her brother, became intestate property as she made no declaration during her lifetime of an intent to give the same to Charles

Burg; that the certificate of deposit in the sum of $8,000 purchased from the State Savings Bank and made payable to the order of "self or Charles Burg (brother)" also became intestate property for the reasons stated above; and that the certificates of deposit made payable to Lucetta Burg and her nephews and niece are the property of the nephews and niece as delivery of the same was made to Grover F. Burg as agent of his brothers and sister.

It is contended by Charles Burg, cross-plaintiff, that the certificate of deposit of the Farmers & Mechanics Bank indorsed to Charles Burg should be declared a will; and that as to all of the other certificates of deposit, they are valid gifts and should go to the respective donees named therein, or, in the alternative, that they were attempted testamentary dispositions and, having failed to pass any interest to the co-payee or indorsee named thereon because of the lack of statutory testamentary formalities required to make a valid will, the same now become intestate property.

It is the claim of the administrator that the four certificates of deposit purchased by Lucetta Burg from the First National Bank of Ann Arbor and made out to the nephews and niece as alternate payees are not the property of the persons whose names appear on the face of the certificates, but are the property of the estate; and that as to the other certificates of deposit, there being no evidence of delivery, they are the property of the estate.

In our examination of the record and the law applicable thereto we are constrained to hold that as to the certificates of deposit found in the so-called "shoe box," there was no delivery and the same now become the property of the estate.

In *Garrison* v. *Union Trust Co.,* 164 Mich. 345 (32 L. R. A. [N. S.] 219), we said:

"To constitute a valid gift *inter vivos,* there must be a gratuitous and absolute transfer of the property from the donor to the donee, taking effect immediately, and fully executed by a delivery of the property by the donor and an acceptance thereof by the donee."

See, also, *Shepard* v. *Shepard,* 164 Mich. 183.

In *Chaddock* v. *Chaddock,* 134 Mich. 48, we said:

"To effectuate a gift *inter vivos,* there must be an unconditional delivery, either to the donee direct or to some one for him, and the right of disposition must be wholly beyond the power of the donor. *Holmes* v. *McDonald,* 119 Mich. 563 (75 Am. St. Rep. 430); *Burns* v. *Burns,* 132 Mich. 441; *Snyder* v. *Snyder,* 131 Mich. 658; 14 Am. & Eng. Enc. Law (2d Ed.), 1014."

From the facts as shown in this cause, Lucetta Burg retained until the last her control of the above certificates of deposit. In fact there is no evidence of a showing to the contrary.

When called as a witness, Grover F. Burg testified that prior to the death of Lucetta Burg, he had in his possession six certificates of deposit, four from the First National Bank of Ann Arbor, one from the State Savings Bank of Ann Arbor, and one from the Farmers & Mechanics Bank of Ann Arbor; that as to the certificates in which the name of Charles Burg appeared, no instructions were given him by Lucetta Burg to deliver them to Charles Burg prior or subsequent to her death; and that the four certificates, in which the names of his brothers and sister appear, were given to him to be delivered to his brothers and sister.

Upon cross-examination, Grover F. Burg gave the following testimony:

"*Q.* Mr. Burg, you had in your possession at different times prior to the death of your aunt, certain certificates of deposit, you testified?

"*A.* Yes, sir.

"*Q.* There isn't any question but what if she had asked you to return them to her you would have returned them?

"*A.* I surely would. She directed them and I surely would hand them back to her.

"*Q.* No matter whose name was on them and what indorsement?

"*A.* My name or her name, she was just as much entitled to them as I was and I would have handed them back.

"*Q.* So all the time up to the time of her death, if she asked you to return any certificates, your or Charles' or Pharo's, you would have turned them back to her?

"*A.* Absolutely.

"*Q.* In other words, these certificates that came into your possession, any of them, you treated them all in the same manner, that she was entitled to recall any of them she wanted to?

"*A.* I did.

"*Q.* And the certificate of the Farmers' & Mechanics' Bank and the one on the State Savings Bank, if she had asked you for them, you would have returned them at any time?

"*A.* Any time."

The record shows that during the trial of the cause no objection was raised by the administrator to any testimony of Grover F. Burg and it is now contended by the administrator that this testimony is incompetent as much of it relates to matters equally within the knowledge of the deceased. 3 Comp.

Laws 1929, § 14219. However, it is claimed that the failure of the administrator to object to the testimony of the witness Grover F. Burg waived the provisions of the above statute.

The general rule is that the administrator cannot waive the statute of limitations. *McGee* v. *McDonald's Estate,* 66 Mich. 628. In *McHugh* v. *Dowd's Estate,* 86 Mich. 412, we there held that an administrator may not waive the provisions of the statute which prohibits a claimant against the estate from testifying to facts, tending to support his claim, which were equally within the knowledge of the deceased. An exception to this rule is where the administrator examines the opposite party, he has waived the benefit of the statute, or as in *Fox* v. *Barrett's Estate,* 117 Mich. 162, where the administrator called the opposite party to testify as to matters equally within the knowledge of the deceased. In our opinion the failure by the administrator to object to the testimony of a witness who testifies as to such matters is not a waiver of the statute. See *Thorbahn* v. *Walker's Estate,* 269 Mich. 586.

Under the above rule the testimony of Grover F. Burg as to the certificate of deposit purchased from the First National Bank of Ann Arbor dated May 15, 1934, payable to the order of Lucetta Burg or Grover F. Burg was inadmissible. There being no other evidence of a gift to him of this certificate, it became intestate property.

However, we think the testimony of Grover F. Burg as to the other certificates of deposit in his possession at the time of Lucetta's death was admissible. An examination of this testimony discloses that Grover F. Burg acted in the capacity of an agent for deceased in some matters connected with her financial affairs. He held certain certificates which he

claimed were to be delivered to his brothers and sister subsequent to the death of Lucetta Burg, but he further testified that he would have returned these certificates to the deceased at any time she asked him to do so.

In our opinion the delivery of the certificates to Grover F. Burg was on condition that they could be recalled at any time upon request of the deceased. Lucetta Burg during her lifetime never placed these certificates beyond her control. The situation in the case at bar is similar to that in *First National Bank & Trust Co.* v. *Huntley,* 251 Mich. 483, where we said:

"It is clear that neither Elmer nor his father understood that a gift *inter vivos* was made. Elmer exercised no individual control of the fund during his father's lifetime, but handled it only at the latter's order. His possession of the book was merely for convenience in complying with the father's wishes."

There was not such a delivery as is required under the rule enunciated in *Chaddock* v. *Chaddock, supra,* to effectuate a gift. Nor does the fact that these certificates were not recalled change the above rule. In view of the fact that there is no other testimony upon this question, the certificates became intestate property.

It is the claim of the cross-plaintiff that the certificate of deposit in the sum of $16,359 indorsed to the order of Charles Burg, signed by the decedent and witnessed by two competent witnesses is a valid will.

In *Lautenshlager* v. *Lautenshlager,* 80 Mich. 285, we said:

"The form of any instrument is of little consequence in determining whether it is a will or not.

If it is executed with the formalities required by the statute, and if it is to operate only after the death of the maker, it is a will."

The only testimony in addition to that given by Grover F. Burg as to when the above certificate of deposit was to pass title was given by Mildred Hallen, an employee of the bank, who testified as follows:

"*Q.* And Grover told you that she didn't want Charles to have any interest in it during her lifetime?

"*A.* No, but she wanted him to have it after her death."

This testimony does not purport to come from the decedent. It is only a restatement of what Grover F. Burg said and as such comes within the hearsay rule. We cannot find in the record any intention on the part of Lucetta Burg to make a will in favor of any particular heir and conclude that the record does not sustain such a claim. The conclusion is inevitable that all of decedent's property is intestate property and as such is to be administered in accordance with the laws of this State.

The decree of the circuit court is reversed and one will be entered in accordance with this opinion. No costs will be allowed.

FEAD, C. J., and NORTH, WIEST, BUTZEL, BUSHNELL, POTTER, and CHANDLER, JJ., concurred.

STANDARD OIL CO. *v.* STATE OF MICHIGAN.

1. STATUTES—CONSTRUCTION OF TAX LAWS.
   Generally tax laws are to be construed liberally in favor of the taxpayer, they are not to be extended beyond the clear import of their language and doubts therein are construed most strongly against the government.

2. TAXATION—COLLECTING OFFICERS.
   Tax collecting officers must be able to point to express statutory authority for making tax exactions.

3. SAME—SALES—DISCOUNTS.
   "Discounts," as that term is employed in section 1 of the general sales tax act, refers to discounts paid by the vendor to a bank or other discounting agency to have bills of exchange or promissory notes and other negotiable paper paid before maturity (Act No. 167, § 1, Pub. Acts 1933).

4. SAME—SALES—CASH DISCOUNTS.
   Cash discounts, if taken by a customer, *held,* no part of gross proceeds of sale at retail under definition of "gross proceeds" contained in general sales tax act, hence are not taxable (Act No. 167, § 1, Pub. Acts 1933).

5. SAME—SALES—TRADE OR QUANTITY DISCOUNTS.
   Trade or quantity discounts, based on agreements between retailer and customer entered into in advance of sale, which are off list price and vary according to quantity of merchandise purchased and customers do not contemplate refunds on purchase price, are no part of gross proceeds of sale at retail as those terms are defined in general sales tax act, hence are not taxable thereunder (Act No. 167, § 1, Pub. Acts 1933).

6. SAME—RETAIL SALES TAX ON TANGIBLE PERSONAL PROPERTY.
   The State sales tax is a privilege tax, exacted for privilege of engaging in business of selling tangible personal property at retail within the State (Act No. 167, Pub. Acts 1933).

7. SAME—FEDERAL EXCISE AND STATE SALES TAXES ON SAME ARTICLES.

Both the Federal excise tax upon sale of gasoline and lubricating oils and State sales tax attach the instant a sale thereof is made to the consumer, hence neither is a part of the sale price, the Federal tax being a fund payable by the manufacturer to the Federal government when collected but which never does become a part of manufacturer's gross proceeds of the sale subject to State sales tax (47 Stat. at L. p. 259, 48 Stat. at L. pp. 206, 764; Act No. 167, § 1, Pub. Acts 1933).

8. SAME—PAYMENT UNDER PROTEST—RECOVERY—INTEREST.

Interest on sales tax paid under protest of taxpayer *held,* allowable where taxpayer is permitted to recover tax exacted (Act No. 167, Pub. Acts 1933).

Appeal from Wayne; Callender (Sherman D.), J. Submitted October 19, 1937. (Docket No. 91, Calendar No. 39,390.) Decided December 29, 1937.

Assumpsit by Standard Oil Company, an Indiana corporation, against the State of Michigan and others to recover sums paid as a sales tax under protest. Judgment for plaintiff. Defendants appeal. Affirmed.

Arthur J. Abbott, for plaintiff.

Raymond W. Starr, Attorney General, and *Edmund E. Shepherd,* Assistant Attorney General, for defendant.

SHARPE, J. This is an action for the recovery of sales taxes paid by plaintiff to the State of Michigan. The facts are not in dispute. The State of Michigan through its State board of tax administration assessed the plaintiff company $484.05 on what is known as cash discounts; $994.85 on what is known as quantity discounts and $27,599.48 as sales tax on the amount of the Federal excise tax on gasoline and

lubricating oil sold in retail sales transactions by plaintiff as the manufacturer to consumers for use. Plaintiff paid the above taxes and brings suit for refund. This case involves the validity of sales taxes as to the items above enumerated assessed by appellants on plaintiff's retail sales transactions throughout the State of Michigan for the period of July 1, 1933, to and including August 31, 1934. This action does not challenge the general constitutionality of the Michigan sales tax statute, Act No. 167, Pub. Acts 1933 (Comp. Laws Supp. 1935, § 3663–1 *et seq.*), but the legality of its administration.

During the period above mentioned plaintiff was assessed the sum of $484.05 as sales tax on the amount of cash discounts allowed by it to its customers in the regular course of its business within the State of Michigan.

The assessment was made upon the theory that the excise exacted by the general sales tax act is an annual "tax imposed upon the privilege of making retail sales, measured by the *gross proceeds* of such sales, less deductions allowed by statute;" that under the above act, section 1 (b. 1) (Comp. Laws Supp. 1935, § 3663–1), the term "sale at retail" means "any transaction by which is transferred for consideration the ownership of tangible personal property;" that "gross proceeds" means "the amount received in money, credits, property or other money's worth in consideration of sales at retail within this State, without any deduction on account of the cost of the property sold, the cost of the materials used, the cost of labor or services purchased, amounts paid for interest or discounts, or any other expenses whatsoever, nor shall any deduction be allowed for losses. Credits or refunds for returned goods may be deducted." Act No. 167, Pub. Acts 1933, § 1 (c); and that a "cash discount" is purely

an element of business expense and may not be deducted from gross proceeds. Plaintiff contends that a "cash discount" is not a "proceed" of a sale and cannot be considered as a basis for the imposition of the sales tax; and that such a tax is a tax on money never received as a part of gross proceeds.

The trial court held that in the allowance of a cash discount, the seller gives the buyer an option to pay either one of two prices, the invoice price less discount if paid within 10 days or a specified time or the invoice price without discount if not paid within such time; and that if the customer elects to pay the discount price within the discount period, the amount so paid is the "gross proceeds" of the transaction.

In our discussion of this case and the construction of the statutes applicable thereto, we shall have in mind the general rule that tax laws are to be construed liberally in favor of the taxpayer.

"In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen." *Gould* v. *Gould,* 245 U. S. 151 (38 Sup. Ct. 53).

In the case of *In re Dodge Brothers,* 241 Mich. 665, this court said:

"Tax exactions, property or excise, must rest upon legislative enactment, and collecting officers can only act within express authority conferred by law. Tax collectors must be able to point to such express authority so that it may be read when it is questioned in court. The scope of tax laws may not be extended by implication or forced construction. Such laws may be made plain, and the lan-

guage thereof, if dubious, is not resolved against the taxpayer."

See, also, *J. B. Simpson, Inc.*, v. *O'Hara*, 277 Mich. 55; and *Montgomery Ward & Co., Inc.*, v. *Fry*, 277 Mich. 260.

Under our present sales tax law, there is no specific provision for cash or trade discount. The word "discounts" as employed in section 1 of the act refers to "discounts" paid by the vendor to a bank or other discounting agency to have bills of exchange or promissory notes and other negotiable paper paid before maturity. Appellants contend that a *cash discount* is an expense of operation and therefore should be included in the term "gross proceeds."

In Arizona, California, Indiana, Mississippi, South Dakota and West Virginia the statutes expressly provide that cash discounts allowed and taken are not to be included within the tax. Haig & Shoup, "The Sales Tax in the American States," p. 629. In Haig & Shoup on page 629 the authors state that the New York regulations provide that trade and cash discounts taken are not to be taxed, although the statute makes no specific provision for either trade or cash discounts. The authors further say:

"A similar ruling may be expected elsewhere, despite general language common to all the statutes except those of North Carolina and Utah, to the effect that no deduction is to be allowed for 'any other expense whatever' and the possibility of argument that the discount is the price paid or the expense incurred by the seller for procuring immediate payment."

The department of taxation and finance of the State of New York in construing a New York statute which is similar to ours says:

"The 'total amount of the sale price' does not include trade and cash discounts. This is obviously true of trade discounts, and in the case of a cash discount, the seller gives the buyer an option to pay either one of two prices, *viz:* The price less discount if paid within a specified time or the price without discount if not paid within such time. For instance, if A sells to B a bill of goods for $100, net 30 days, with two per cent. off for cash in 10 days, B may choose which option or price he will select. If he pays in 10 days, A accepted $98 as the selling price of the goods and that is the sum which should be included by A in taxable receipts. If, on the other hand, B elects not to pay in 10 days, the selling price is $100 and that is the sum which A must include in receipts." (Regulation No. 7)

The State of Washington has a sales tax law which provides:

"The term 'gross proceeds of sales' means the value proceeding or accruing from the sale of property without any deduction on account of the cost of property sold, expenses of any kind, or losses." Laws of 1933, Chap. 191, § 1 (8).

Under this law the following regulations were adopted:

"Art. 450.03 Cash discounts—In computing tax there may be excluded or deducted, whichever is applicable, by the seller only, the amount of cash discount actually taken by the purchaser. 'Cash discount' means a deduction from the invoice price of goods or articles or charges for services allowed if the bill is paid on or before its due date (8–16–34).

"Art. 450.04 Trade discounts—In computing tax there may be excluded or deducted, whichever is applicable, by the seller only, amounts attributable to trade discount. The term 'trade discount' as here used, applies to the amount by which a seller reduces, in accordance with a contract of sale, either

by discount or rebate, the list or invoice price of articles sold. It does not include discounts or rebates given to a purchaser in return for services rendered for the seller by the purchaser (8–16–34)."

In *Miles* v. *Department of Treasury,* 209 Ind. 172 (199 N. E. 372, 101 A. L. R. 1359), the Supreme Court of Indiana held that discounts are not a part of gross income, the court saying:

"Clause f of section 1 of the act defines the term 'gross income' as the gross receipts of the taxpayer from all sources, but exempts from the income covered by the definition, cash discounts on sales, freight prepaid and repaid by the purchaser, goods sold and returned when the sale price is refunded, and the sale price of an article accepted as part payment on any new article sold, when the full price of the new article is included in the gross income. * * * The first sentence is obviously intended to simplify accounting (referring to the sentence involving discounts) since it excludes things which are not, in fact, income. * * *

"It is contended that the word 'income' as used in the title of the act, is not broad enough to cover gross receipts or gross income within the intent of the act. But the term 'gross income' is used in the title. This term is understood by lexicographers, and in common usage, to mean total receipts."

In our opinion a cash discount, if taken by the customer is no part of the "gross proceeds" of a retail sale under the definition of "gross proceeds" as contained in Act No. 167, Pub. Acts 1933, and the judgment of the trial court is affirmed in the amount allowed for cash discounts.

The next item in plaintiff's declaration is a claim for $994.85 which represents the amount paid to the State of Michigan as sales tax on the amount of quantity or trade discounts during the period from July 1, 1933, to and including August 31, 1934. Inas-

much as plaintiff never received this amount either in money or credits, it is their claim that it constituted no part of "gross proceeds" and should not be considered as a basis for the tax. Plaintiff paid the disputed tax item May 28, 1935.

The testimony in the record shows that the terms "trade discounts" and "quantity discounts" are synonymous and refer to the discount that is off a price known as the "list price" for quantity, and varies according to the quantities purchased. The record also shows that such discounts are based upon prior contracts entered into between plaintiff and its customers, the contract determining in advance of the sale the trade or quantity discount to which the customer should be entitled.

It is the claim of the defendants that such discounts are not deductible as they are rebates upon the purchase price and an expense of doing business. The trial court allowed plaintiff's claim.

The record shows that under the tank wagon delivery contract, it is agreed between plaintiff and its customers that in case total deliveries of gasoline shall amount to 1,000 gallons or more per calendar month the discount shall be one and one-half cent per gallon on Red Crown Ethyl gasoline, one and one-half cent per gallon on Standard Red Crown gasoline, and one-half cent per gallon on Stanolind gasoline; that in motor oil contracts entered into with customers the discount is determined in advance and depends upon the amount and kind of oil used. In the so called black oil contracts the discount is one cent per gallon on purchases of from 16 to 99 barrels and one and one-half cent per gallon on purchases of 100 barrels or more. The "trade" or "quantity" discount agreements are entered into in advance.

In our opinion quantity discounts are no part of the "gross proceeds" of a retail sale, under the definition of "gross proceeds" as contained in section 1 (c) of the sales tax statute. All of the evidence submitted tends to the conclusion that the quantity discount agreements entered into in advance between plaintiff and its customers do not contemplate refunds on the purchase price of merchandise, but determine the purchase price in advance of the actual sale. To hold otherwise would result in charging plaintiff more than three per cent. of the proceeds of the retail sales during the period above mentioned. The judgment of the trial court is affirmed in the amount allowed for trade or quantity discounts.

We now come to the following question: Is it lawful for defendants to assess the sales tax on the amount paid to the United States government as Federal excise tax collected on retail sales of gasoline and lubricating oil, in the case of retail sales direct from producer to consumer?

It is the claim of plaintiff that in the case of retail sales made direct from producer to consumer, the amount of the Federal excise tax on gasoline and lubricating oil is no part of the retail sale price, or "gross proceeds" thereof at the time the State sales tax attaches; that the Federal excise tax is a sales tax itself—not a tax on manufacture—and does not attach until the instant the sale is made; that the State sales tax attaches at the same instant, namely, upon consummation of the last sale prior to use or consumption (Michigan sales tax regulations of January 1, 1934) with the result that when the State sales tax attaches, the Federal tax is not a part of the price of the merchandise; and that the inclusion of the Federal tax as a part of the price or "gross

proceeds'' of the sale, and imposition of the State sales tax thereon is, without question, a tax on a tax.

The defendants contend that, in the retail sale of products sold by plaintiff, the Federal excise tax becomes a part of the sale price, and a sales tax computed upon the gross proceeds, including such excise tax is entirely lawful and proper; that the exaction of the Michigan sales tax does not impose a burden upon the effectual exercise of a Federal governmental power.

The facts from which this question arises are that the State of Michigan collected from plaintiff a sales tax from January 1, 1934, to and including August 31, 1934, in the sum of $27,599.48; that during this period the plaintiff company manufactured, produced and refined all the gasoline and lubricating oils which it sold at retail in the State of Michigan; that such sales transactions involved in the above claim are those in which the sales were made by plaintiff company to consumers for use without prior sale to any intermediate distributor; that section 601 (c) of the United States revenue act of 1932 (47 Stat. at L. p. 259) imposes upon lubricating oil sold in the United States a tax of four cents a gallon; that section 617 of the revenue act of 1932, as amended by section 211 of the national industrial recovery act (48 Stat. at L. p. 206) and further amended by section 603 (b) of the revenue act of 1934 (48 Stat. at L. p. 764) imposes on gasoline sold a tax of one cent a gallon. The trial court held that both of the above mentioned Federal taxes are taxes on the sale of gasoline and lubricating oil and not taxes upon their manufacture and permitted plaintiff to recover.

Appellants admit that the Federal excise tax above mentioned is not a tax on the manufacture, but is a tax on the sale.

See, also, *Indian Motorcycle Co.* v. *United States,* 283 U. S. 570 (51 Sup. Ct. 601).

Regulation 44, art. 4 (under the Revenue Act of 1932, as amended) of the United States treasury department relative to the Federal excise tax on gasoline and lubricating oil provides:

"When tax attaches: In the case of a sale, the tax attaches at the instant the sale is made."

The State sales tax is a privilege tax, exacted for the privilege of engaging in the business of selling tangible personal property at retail within the State of Michigan. It is limited in amount to three per cent. of the gross proceeds of the sale at retail. It naturally follows that unless the Federal excise tax had become an integral part of the sale price of the merchandise when the State sales tax attaches thereto, it is illegal to include the amount of the Federal tax in arriving at "gross proceeds."

Rule 3 of Regulations of Michigan State board of tax administration issued July 20, 1933, provides:

"In general, the (sales) tax is imposed upon all persons engaged in the business of selling tangible personal property to the consumer for use. It is intended to cover receipts from a sale which constitutes the last actual transaction prior to ultimate use or consumption; that is the transaction by the last person in the chain prior to actual use or consumption."

Under the above rule, when sales are made directly from producer to consumer the sales tax attaches the instant a sale is made. In view of the fact that the Federal excise tax and the State sales tax attach at the instant a sale is made, it follows that the Federal tax has not become a part of the sale price, but is a fund, which when collected is payable by the manufacturer to the Federal government. Such fund does not become a part of the "gross pro-

ceeds'' realized by the manufacturer from the sale and is *not subject to taxation* within the meaning of Act No. 167, Pub. Acts 1933.

We have had under consideration the sales tax laws and regulations of other States.* In some States such as Utah, the manufacturer or producer of an article sold for consumption or use may deduct the Federal excise tax, while in such States as North Dakota, Illinois, Colorado, and South Dakota, such exemptions are made by administrative rulings. In Haig & Shoup, The Sales Tax in the American States, p. 660, it is said:

''Exemption of the receipts of other State or Federal taxes. It is likely * * * that tax money actually collected by the tax payer as agent for the State, or Federal government will be generally deducted as moneys in which he has no interest, specifically provided for in the regulations of Indiana and South Dakota, and implicit in the other statutes which purport generally to tax the principal and not his agent.''

The conclusion is inevitable that the Federal excise tax may not be considered as a part of the retail price and the judgment of the trial court is affirmed.

The remaining question concerns interest on the amount of the tax paid by plaintiff under protest on May 28, 1935. In *City of Grand Rapids* v. *Blakely,* 40 Mich. 367 (29 Am. Rep. 539), we held that interest will be allowed against a municipality on the recovery of money exacted as a tax and paid under protest.

The judgment of the trial court is affirmed. Plaintiff may recover costs.

FEAD, C. J., and NORTH, WIEST, BUTZEL, BUSHNELL, POTTER, and CHANDLER, JJ., concurred.

* See ''The Sales Tax in the American States'' by Haig & Shoup, p. 659 *et seq.*

JANUARY TERM, 1938.

BARBER *v.* KOLOWICH.

1. BANKS AND BANKING—LOANS TO PRESIDENT IN EXCESS OF STATUTORY LIMIT.

   President of bank, as borrower therefrom, who, after having obtained maximum loan permitted by law, obtains an additional loan through an irresponsible "dummy" would be guilty of fraud and where such borrower obtains the additional loan through his wife, even though she be financially responsible and collateral deposited was adequate, the transaction is regarded with suspicion (3 Comp. Laws 1929, § 11922).

2. CORPORATIONS—OFFICERS AND DIRECTORS DEALING WITH CORPORATION—GOOD FAITH.

   Directors and officers of a corporation stand in a fiduciary position and may deal with it only in good faith and with all material facts made known to the other directors.

3. SAME—DIRECTORS—BURDEN OF PROOF.

   A director has the burden of proving the fairness and honesty of his dealings with the corporation.

4. BANKS AND BANKING—LOANS TO OFFICERS AND DIRECTORS—DISCLOSURE.

   An officer and director of a bank may not obtain a loan from it directly or indirectly without disclosing all facts to other directors and appropriate officers and first obtaining their approval and proper corporate action (3 Comp. Laws 1929, § 11922).

5. SAME—LOANS TO DIRECTORS—STATUTES.

   The law demands the fullest disclosure and fair dealing by a director or officer in his relations with a bank and the approval of two-thirds of the directors of a loan in excess of 10 per cent. of capital and surplus (3 Comp. Laws 1929, § 11922).

6. SAME—LOAN TO OFFICER IN EXCESS OF STATUTORY LIMIT—FRAUD —EVIDENCE.

In bank receiver's action against former president, who owned 65 per cent. of its stock, and his wife for fraudulent concealment that loan obtained on wife's note was for benefit of husband who had already borrowed from the bank in excess of amount allowed by statute, record showing that wife did not testify but presenting evidence that loan was obtained for benefit of a private bank, owned and operated by defendants as partners, and husband, called for cross-examination under the statute, gave testimony leading to such an inference, was unable to show that any of loan was taken for individual use of wife, and records of private bank reveal no trace it was so used, property owned by husband or him and his wife jointly was conveyed to plaintiff's bank as collateral for this and other loans and that only a portion of collateral for this loan was individual property of wife, and showing a substantial loss by reason of the loan having been made *held*, to justify finding that husband fraudulently obtained funds from bank (3 Comp. Laws 1929, §§ 11922, 14220).

7. SAME—FRAUD—EVIDENCE—ACTION AGAINST PRESIDENT'S WIFE.

In bank receiver's action against former bank president and his wife, plaintiff *held*, to have failed to sustain burden of showing wife guilty of fraud in connection with loan to husband in excess of amount permitted by statute to be loaned to bank officer; the wife having no fiduciary duty to the bank (3 Comp. Laws 1929, § 11922).

8. FRAUD—LOAN TO BANK OFFICER'S WIFE—EVIDENCE.

Where trial judge made no finding of fraud on part of wife of bank president as a matter of fact but only as a matter of law in denying new trial in action for conspiracy to defraud bank brought by receiver against former president and his wife and there is no showing wife had knowledge husband had exceeded statutory limit of loan from his bank, her liability is confined to judgment in assumpsit, no tort being shown to have been committed by her (3 Comp. Laws 1929, § 11922).

9. HUSBAND AND WIFE—RAISING MONEY.

A woman has a right to raise money in a legal manner to help her husband.

10. BANKS AND BANKING — CONSPIRACY — FRAUD — LOAN TO PRESIDENT'S WIFE.

In bank receiver's action against former president and his wife for conspiracy to defraud bank by obtaining loans in excess of husband's power to borrow without complying with statutory requirements, plaintiff who had burden of showing fraud on part of wife as she owed no fiduciary duty to bank *held*, not to have sustained such burden (3 Comp. Laws 1929, § 11922).

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted October 15, 1937. (Docket No. 134, Calendar No. 39,522.) Decided January 19, 1938.

Case by Everett W. Barber, receiver of State Bank of America, against George J. Kolowich, Irene G. Kolowich and John C. Finan to recover amount of loans alleged to have been procured fraudulently. James E. Atkinson, successor receiver, substituted as plaintiff. From judgment for plaintiff against defendants Kolowich only, they appeal. Affirmed as to George J. Kolowich. Reversed as to Irene G. Kolowich.

Neill E. Graham and *Cook, Smith, Jacobs & Beake* (*O. L. Smith* and *George D. Hatie,* of counsel), for plaintiff.

Savery, McKenzie & Hamilton (*John A. Hamilton,* of counsel), for defendants.

BUTZEL, J. Plaintiff, receiver of the State Bank of America, in an action based upon alleged fraud in securing a loan of $24,000 from the bank, had judgment against the defendants Kolowich for $18,842.78, this being the unsatisfied portion of said loan. The defendants have appealed.

While defendants admit plaintiff was entitled to a judgment in assumpsit for the above amount against

defendant Irene G. Kolowich, they assert on this appeal that there was error on the part of the trial judge, who tried the case without a jury, in finding a judgment against both defendants on the ground of the alleged fraud.

George J. Kolowich was the president of the State Bank of America and owned approximately 65 per cent. of its stock. He and his wife, Irene G. Kolowich, for years had been in a partnership business known as Kolowich & Company which conducted the Merchants & Mechanics Bank of Hamtramck, Michigan. No question is raised as to the legal status of the so-called partnership between a husband and wife. On October 4, 1929, Mrs. Kolowich borrowed $24,000 from the State Bank of America. She executed a collateral form promissory note which was secured by 7,906 shares of Detroit Housing preferred stock and 7,906 shares of Detroit Housing common stock. She gave a renewal note of like character on May 29, 1930. In this renewal note it was recited that the total value of the above mentioned collateral was $103,987, though there is some testimony that this was stated as "book" value. On the date of the original loan Mrs. Kolowich received a cashier's check from the State Bank of America for $24,000, and on this same day the check was deposited in the American State Bank to the account of the Merchants & Mechanics Bank. Later (October 24, 1929) the board of directors approved a line of credit to Mrs. Kolowich in the amount of $25,000. Previous to making the $24,000 loan she had borrowed from and repaid to the bank large sums. At the time Mrs. Kolowich obtained this loan, Mr. Kolowich had already borrowed from the State Bank of America, of which he was president, in excess of the amount limited by statute. Act No. 66, § 25, Pub. Acts 1929,

being 3 Comp. Laws 1929, § 11922. It is plaintiff's theory that this $24,000 loan was secured by Irene G. Kolowich at the behest and for the benefit of her husband, George J. Kolowich, who could not legally secure a further loan for himself from the State Bank of America, and that either Mr. Kolowich or the partnership made up of Mr. Kolowich and Mrs. Kolowich actually received the proceeds of the loan. The loan was not paid at maturity and later the deposited collateral was sold for $9,626. This amount was credited on the note. Plaintiff alleges that the defendants herein concealed the actual nature of the transaction from the directors of the State Bank of America, and that by thus obtaining a loan for the benefit of Mr. Kolowich or for the partnership of which he was a member in excess of the amount he could lawfully borrow from the bank a fraud was perpetrated on it.

In their brief appellants state:

"We are willing to concede that if the copartnership of George J. Kolowich and Irene G. Kolowich, doing business as the Merchants & Mechanics Bank, had borrowed $24,000 from the State Bank of America, that such a loan would have been illegal and a fraud on the part of the partners, because the partnership note would be charged against Mr. Kolowich's line of credit. * * * And it is not disputed that George J. Kolowich, on October 4, 1929, had exceeded his line of credit with the bank. It is our contention, however, that the loan of $24,000 to Irene G. Kolowich, was not a loan to the partnership, but was a loan to Irene G. Kolowich personally."

If this $24,000 loan was merely a loan in the name of Irene G. Kolowich, but in fact was a loan to Mr. Kolowich or the partnership composed of himself

and his wife, it was made in violation of the statutory limitation; and appellants concede its consummation in that event was a fraud upon the bank and its unpaid creditors. There is no testimony that the loan was approved by a two-thirds vote of the bank's directors, as is required in a loan of this character by the above cited statute. So the controlling issue to be determined is whether this loan was in fact a loan to Irene G. Kolowich personally; or was it a loan to George J. Kolowich or the partnership Kolowich & Company, obtained through a subterfuge whereby the loan on its face appeared to be to Irene G. Kolowich.

In support of their claim that this was an individual loan to Mrs. Kolowich, appellants point out that there was nothing on the face of the note which in any way indicated it was a loan to or for the benefit of either Mr. Kolowich or the partnership, that the note was signed by Irene G. Kolowich personally, that the name of George J. Kolowich nowhere appears on the note, and that approximately 5,000 shares of the stock deposited as collateral security was the individual property of Mrs. Kolowich; and other inferences from the testimony of like character are stressed by appellants. On the other hand, appellee contends that the following facts and circumstances appearing in the record sustain his contention that in truth this loan through subterfuge and deceit was unlawfully obtained for the benefit of the Merchants & Mechanics Bank, owned and operated by the partnership, Kolowich & Company. Immediately upon securing the cashier's check for $24,000 this item was deposited in the American State Bank for the benefit of and to the account of the Merchants & Mechanics Bank. Mrs. Kolowich did not appear as a witness; and Mr. Kolowich, who was called as a

witness by plaintiff under the statute (3 Comp. Laws 1929, § 14220) and who seemed to be the person who had most knowledge of the details of this transaction, was unable to state what, if any, of the claimed loan to the Merchants & Mechanics Bank was taken by Mrs. Kolowich. A rather searching investigation of the records of the Merchants & Mechanics Bank reveal no trace of such a transaction. Instead the funds obtained from the State Bank of America on the note signed by Irene G. Kolowich were immediately turned over for the use and benefit of the Merchants & Mechanics Bank, no part of the loan appearing to have been used by Mrs. Kolowich for her individual benefit. Further, 2,906 units of the stock deposited as collateral to the $24,000 loan were owned jointly by Mr. and Mrs. Kolowich. In addition to this George J. Kolowich conveyed to the bank his interest in certain real property which he owned either individually or jointly with Mrs. Kolowich as collateral security for this and other loans. Mr. Kolowich gave the following testimony:

"*Q.* Now does that refresh your recollection as to your testimony over there, that it was your claim there that your wife made a loan, made this particular loan of $24,000 for the purpose of loaning it to the M. & M. bank, isn't that it?

"*A.* I take it that way, yes, sir. * * *

"*Q.* What were you having your wife borrow the $24,000 then for, if you did not need it?

"*A.* I could not say. It may have been used for investment. It may have been used for assisting some other corporation that we were interested in. It may have been borrowed to assist the banking company. But I do know *we* borrowed money and we put up good collateral at that time."

If a borrower, after obtaining a bank loan amounting to the maximum permitted by law, secures an additional loan through an irresponsible "dummy," he would be guilty of fraud. If a loan is made by the borrower's wife, after he has obtained the legal limit from the bank, it casts suspicion on the transaction. It is contended that he would not be guilty of fraud if the intermediary were a responsible person who deposited adequate collateral to secure the loan. Even though Mrs. Kolowich may have been responsible, and even though the collateral deposited may have been satisfactory, a further obligation rested on Kolowich. He was dealing with his own bank, of which he was president, director and owner of over 60 per cent. of the stock. Without question the proceeds of the loan were for Kolowich's benefit. Furthermore, he had an interest in part of the collateral.

The legislature has seen fit to permit directors and officers of a bank to borrow from that bank. 3 Comp. Laws 1929, § 11922. However, the directors and officers of any corporation stand in a fiduciary position and may deal with the corporation only in good faith, with all material facts made known to the other directors. *Baker* v. *Hellner Realty Co.*, 265 Mich. 625. The director has the burden of proving the fairness and honesty of his dealings with the corporation. *Veeser* v. *Robinson Hotel Co.*, 275 Mich. 133. These rules should be applied even more stringently to an officer and director of a bank who should be concerned with the welfare of depositors as well as that of customers and stockholders.

As an officer and director, Kolowich could not deal with the bank, either directly or indirectly, by having Mrs. Kolowich obtain a loan for his benefit, without disclosing all of the facts to the other di-

rectors and appropriate officers and first obtaining their approval and proper corporate action. The law demands the fullest disclosure and fair dealing by a director or officer in his relations with a bank. It further requires an approval by a two-thirds vote of the directors of a loan in excess of 10 per cent. of the capital and surplus. Although he was in a position to know all of the facts and circumstances, Kolowich's testimony was evasive. He did not disclose the manner in which the loan was handled by the bank. He did not tell whether or not the other officers and directors knew of the intended loan before it was made and had an opportunity to pass on its wisdom. The formal approval of the directors was not obtained until after the loan had been made. There is no showing that an approval by two-thirds of the directors was ever obtained. The conduct of Kolowich in obtaining the funds of the bank falls far short of that required of an officer and director of a bank. From all the circumstances we must conclude that Kolowich fraudulently obtained the funds of the bank and therefore is obliged to repay them; that his unpaid liabilities thus exceeded the statutory limit; and that the tort judgment against him was proper.

The case against Mrs. Kolowich, however, fails for lack of proof. The burden of showing fraud was on plaintiff, but it was not sustained. The loan to Mrs. Kolowich was made October 4, 1929. It was secured by 7,906 shares of preferred and an equal number of shares of common stock of the Detroit Housing Corporation. According to the report of certified public accountants filed with the bank, the book value of the pledged stock on June 30, 1929, was $96,265. No evidence was introduced to show that the book value was not the actual value. The

stock was sold in units of one share of preferred and one share of common stock. Mr. Kolowich testified that he paid as low as $6 per unit and as high as $12.50 for the stock. At the lower price the stock would be worth $47,436 and at the higher one $98,825. The stock was sold by the receiver of the bank on February 20, 1931, for $9,626. This sale took place almost 17 months after the beginning of the depression. Mr. Riopelle, a former director of the State Bank of America, testified that Mrs. Kolowich had made and repaid previous loans from the bank and when the $24,000 credit was extended to her, he felt that the bank was amply protected by the collateral offered and the responsibility of Mrs. Kolowich. The fact that the proceeds of the loan were used to bolster up the credit of a private bank in which Mrs. Kolowich was a partner does not prove any fraud. She had a right to raise money in a legal manner to help her husband. Her credit being good and the security being adequate, Mrs. Kolowich would be liable for conspiracy to defraud only upon a showing that she knew Mr. Kolowich had reached his limit, that he was obtaining these additional funds by improper means, and that she intended to assist him in the fraudulent scheme. The burden was on plaintiff to prove fraud on her part, since she had no fiduciary duty to the bank, but no evidence of Mrs. Kolowich's knowledge or intentions was introduced. We do not believe that on this record, defendant Mrs. Kolowich should be held liable in tort. The judge made no finding of fraud as a matter of fact, but in denying the motion for a new trial, he stated that he found defendants guilty of fraud as a matter of law. The judgment against Mrs. Kolowich in tort should be reversed. Her attorneys concede that her sole liability would

be in assumpsit, but a judgment in assumpsit cannot be rendered in the present action.

The declaration is rather crudely drawn and seeks a judgment against John C. Finan, Irene G. Kolowich and George J. Kolowich, by reason of conspiracy, concealment and unlawful acts of each of them. It makes the direct charge that George J. Kolowich, a director and president of the bank, borrowed $24,000 and other sums in excess of the maximum amount that he could legally borrow under Act No. 66, § 25, Pub. Acts 1929 (3 Comp. Laws 1929, § 11922), by inducing his wife to obtain a loan from the bank. It also charges Mrs. Kolowich with conspiring with her husband to defraud the bank. While the liability of Kolowich for fraud has been established, the charge of conspiracy to defraud against Mrs. Kolowich has not. The case was dismissed as to defendant Finan.

The judgment against Mr. Kolowich is affirmed, that against Mrs. Kolowich is reversed, and the case remanded to the trial court to enter a judgment of not guilty against Mrs. Kolowich. Plaintiff will recover his costs from Mr. Kolowich and Mrs. Kolowich will be entitled to costs from plaintiff.

WIEST, C. J., and BUSHNELL, SHARPE, POTTER, CHANDLER, and NORTH, JJ., concurred. FEAD, J., took no part in this decision.

PEOPLE *v.* PETTIJOHN.

1. CRIMINAL LAW — CONSPIRACY — GREAT WEIGHT OF EVIDENCE — CREDIBILITY OF WITNESSES.

   Conviction of defendants charged with conspiracy to murder mayor of a village *held*, not against great weight of evidence, notwithstanding testimony of several witnesses linking defendants with alleged conspiracy was that of felons, it being jury's province to determine credibility of the witnesses.

2. SAME—CONSPIRACY—VENUE—OVERT ACTS.

   Court having jurisdiction of place where an overt act in connection with conspiracy to murder took place has jurisdiction to try defendants charged with such conspiracy especially where both defendants were present with other conspirators on such occasion.

3. SAME—RECORDER'S COURT OF DETROIT—JURISDICTION.

   Verdict of jury that recorder's court of Detroit, whose jurisdiction as to crimes was limited to those committed within such city, had jurisdiction of prosecution of defendants for conspiracy to commit murder *held*, borne out by testimony.

4. SAME—CONSPIRACY—ORDER OF PROOF.

   Admission of acts and statements of conspirators before proof was offered of defendant's complicity is not in itself ground for reversal.

5. SAME—CONSPIRACY—ASSENT—INFERENCES.

   The existence of the assent of minds which is involved in a conspiracy may be, and, from the secrecy of the crime, usually must be, inferred by the jury from proof of facts and circumstances which, taken together, apparently indicate that they are merely parts of some complete whole.

6. SAME—INSTRUCTIONS—REQUESTS TO CHARGE.

   Instruction given jury that they might disregard testimony of witnesses who testified falsely in any material fact and take into consideration the fact that four witnesses for the prosecu-

tion had been convicted of crime and give such weight to good character of defendants as jury thought defendants were entitled in prosecution for conspiracy to commit a murder *held,* fair and to have covered substantially defendants' proper requests to charge even though parts were not given with such emphasis as defendants may have preferred.

Appeal from Recorder's Court of Detroit; Maher (John J.), J. Submitted October 14, 1937. (Docket No. 126, Calendar No. 39,616.) Decided January 19, 1938.

Jesse Pettijohn and Lawrence Madden were convicted of conspiracy to murder. Affirmed.

John J. O'Hara and *Daniel J. O'Hara,* for appellants.

Raymond W. Starr, Attorney General, *Duncan C. McCrea,* Prosecuting Attorney, and *William L. Brunner* and *William E. Dowling,* Assistant Prosecuting Attorneys, for the people.

BUTZEL, J. Jesse Pettijohn and Lawrence Madden were found guilty on a charge of entering into a conspiracy to kill and murder William Voisine on the 1st day of January, 1936, and divers other days and dates up to and including the 1st day of May, 1936, in the city of Detroit. Voisine at that time was mayor of the village of Ecorse, in which city both defendants resided. It was the claim of plaintiff, as borne out by the testimony, that defendants with one John Bannerman, Dayton Dean, Ervin Lee and Frederick Gulley, and others, were members of a secret society called the Black Legion; that the society would perpetrate murder for a consideration or some other reason at the request of its members; that Voisine was violently disliked by both defend-

ants, who desired and plotted with the other conspirators to bring about his death. The entire story sounds so barbaric that it almost seems incredible unless regarded as a scheme devised by psychopaths. On the other hand, positive testimony links defendants with active participation in a conspiracy to murder Voisine and had it not been the latter's good fortune to be absent at certain times and places, defendants might have been charged with murder instead of conspiracy to commit murder.

In the presentation of its case, the prosecution first showed that Harvey Davis met Dayton Dean in the restroom of the Findlater Temple of Detroit and asked him whether he wanted to make some easy money, from $100 to $200, by killing Voisine. Neither Pettijohn nor Madden was present at this meeting nor is there any testimony to connect them with it. Shortly thereafter, however, both respondents met with Dean, Lee and Davis, and others, at a beer garden in Ecorse. The testimony shows that Davis, Dean and Pettijohn went to the basement where Pettijohn was first assured by Davis that Dean could be relied on and was to do the job; that upon inquiry being made by Davis if he had located Voisine, Pettijohn stated that they had been unsuccessful all evening in the attempt to locate him, but they would keep on trying. Dean then stated to Pettijohn that he did not come there to "fool," that he had orders to kill Voisine, that Pettijohn was the man who wanted him killed and it was up to Pettijohn to find him and the others would do the job. Pettijohn stated that he would like to do the job himself, but could not do it. It was not shown that Madden or Pettijohn offered Dean any money.

Another meeting took place at the same beer garden where Dean, Lee and Davis found Madden. Dean testified that he told Madden that he had a gun

to get Voisine that night and wanted Madden to find Pettijohn because he would know where to find Voisine. The four thereupon went to a hall in Ecorse where a political meeting was in progress, but Pettijohn had not arrived there. After making a further search for him they returned to the hall and talked over their plans. The testimony shows that at this time, Madden told Dean that his wife had been working as a nurse for Voisine and that he was the "stool pigeon" between Voisine and Pettijohn. Sometime later, Pettijohn appeared. He was informed that Dean was armed. However, they were unable to find Voisine that evening.

Dean resided on 23rd street in the city of Detroit. The record shows that sometime in March or April, 1936, Madden, Pettijohn and Davis drove to Dean's home and that Madden alighted from the car and went to the house to summon Dean and inform him that Pettijohn and Davis were out in the car and wanted to speak to him. When Dean came out, a conversation took place in which Pettijohn stated that there was to be a budget meeting of the village council that night in Ecorse and it would be a good time to find Voisine. Dean was to meet Pettijohn at his store at 7 o'clock that evening to learn whether the budget meeting would be held. That evening Dean and one Claimount drove to Pettijohn's store in Ecorse and Pettijohn told Dean that the budget meeting would not take place. Dean thereupon told Pettijohn that he had been delegated to kill Voisine and it was up to Pettijohn to locate him. Dean and two others drove to the home of Voisine in Ecorse and Dean with one Henderson, with drawn revolvers, knocked at the door of Voisine's home but no one answered. Dean thereupon walked around the house and looked through the windows, but no one was there. Dean and his associates thereupon returned

to Detroit. It is unnecessary to recite further details of the conspiracy. If the testimony of the prosecution's witnesses is true, there can be no question but that Pettijohn and Madden were parties to the conspiracy.

The motive for getting rid of Voisine was testified to by Dean as follows:

"*Q.* Did they tell you, either one of them, why they wanted to get rid of Mr. Voisine?
"*A.* Why, yes.
"*Q.* Who told you?
"*A.* Pettijohn.
"*Q.* What did he say?
"*A.* Well, he said that Voisine was in their way out there, and on account of him being a Catholic, and him being—bothering them. Well, I don't know, they seemed to have a political fight out there, the way he explained it. * * *
"*A.* Then he was a menace to the organization out there.
"*Q.* Pettijohn said this?
"*A.* Yes."

The motive for Madden's participation was an intense dislike for Voisine and his association with Pettijohn. The testimony of Dean is corroborated by that of John Bannerman, Ervin Lee and Fred Gulley. Dean, Bannerman and Lee are serving life sentences for two other murders. Gulley also was serving a term in the penitentiary for "false imprisonment" at the time of the trial. One other witness testified that Madden had remarked to him that Voisine had better watch his step or somebody would be taking him for a ride. Madden testified that he did not recall making this remark, but that, if he did, he only referred to the enmity Voisine might have incurred from gamblers.

Pettijohn and Madden each testified in his own behalf and categorically denied attending any of the

meetings or doing any of the acts showing conspiracy and denied participation in the preparation, planning, or having any desire to murder Voisine, as testified to by other witnesses. Pettijohn denied ever meeting Dean, Lee or Bannerman prior to his arrest, or that he belonged to the Black Legion, and testified that he only knew Gulley through his trading at Pettijohn's grocery store in Ecorse. Both Pettijohn and Madden denied belonging to the Black Legion. Madden also denied meeting Dean, Bannerman or Lee until after his arrest, and stated that he had no dislike for Voisine until some time after the alleged conspiracy occurred. Both defendants testified that they had never been previously arrested and they, as well as others, testified to their good reputation.

It is claimed on appeal that the verdict of the jury was against the great weight of the testimony, that both defendants were men of good reputation and character, and that they had been convicted entirely on the testimony of felons. The record has been examined with care. The jury had an opportunity both to hear and see all of the witnesses, four of whom testified that defendants were participants in the conspiracy. It was for the jury to determine their credibility. We cannot say that the verdict is against the great weight of the testimony.

Appellants further contend that the conspiracy, according to the testimony, took place in the village of Ecorse in Wayne county, and outside of the jurisdiction of the recorder's court for the city of Detroit, which is limited to offenses committed in Detroit, and therefore, they should have been tried in the Wayne circuit court where jurors from the entire county and possibly from the vicinage of Ecorse might have been selected. The testimony shows that an important meeting, at which further plans were made for the murder, was held in front

of Dean's home on 23rd street in the city of Detroit. There were present both defendants and Dean and Davis and arrangements were made to murder Voisine that night. An overt act in connection with the conspiracy thus took place in Detroit and defendants could have been tried by either the recorder's court for the city of Detroit or the Wayne circuit court. In *People* v. *Arnold,* 46 Mich. 268, 275, we said:

"It is also objected that the defendant was informed against and tried in the county of St. Joseph while the conspiracy is alleged to have been formed in Calhoun; so that the defendant has been deprived of his right to a trial by a jury of the vicinage. But the overt act was committed in St. Joseph; and according to the common-law precedents the misdemeanor may be tried wherever an overt act in pursuance of the conspiracy takes place. If a man at one end of the State conspires with others to defraud a person at the other extreme, and the fraud is actually committed, the question of hardship as between him and the prosecutor in requiring the trial for the conspiracy to be had at the place of residence of the one rather than at that of the other, presents considerations which obviously are not at all in favor of the accused. But the rule is clear and no doubt has been wisely settled. *King* v. *Brisac,* 4 East, 164 (102 Eng. Rep. 792)."

The judge further instructed the jury that the jurisdiction of the recorder's court in the city of Detroit was limited to crimes committed in the city of Detroit, and that it was a question of fact for the jury to determine whether any part of the plan to kill Voisine took place in Detroit, in which event the recorder's court would have jurisdiction, but if no part of it took place in Detroit and it all took place in Ecorse, then the court would have no jurisdiction

and it would be the duty of the jury to acquit. The record shows that the verdict of the jury as to venue was borne out by the testimony.

Appellants further claim that error was committed in admitting testimony in regard to the conversation between Dean and Davis prior to any showing that either defendant had anything to do with the conspiracy. The testimony was conditionally received by the court with the understanding that it would be stricken if defendants were not connected with it. In *People* v. *Knoll,* 258 Mich. 89, 94, we quoted with approval the following excerpts from *People* v. *Saunders,* 25 Mich. 119, 120:

"But it often happens that the existence of the conspiracy is only made out by inference from the acts and declarations of the several parties thereto; and to exclude evidence of these until the conspiracy is established in some other way would, in many cases, give the guilty parties immunity."

We also said, (258 Mich. 89, 95):

"The existence of the assent of minds which is involved in a conspiracy may be, and, from the secrecy of the crime, usually must be, inferred by the jury from proof of facts and circumstances which, taken together, apparently indicate that they are merely parts of some complete whole. * * * The safest rule is to satisfy the jury by a *prima facie* case that a conspiracy existed and then to offer evidence of the declaration of any conspirator. However, * * * the declarations are often received before there is any proof of a conspiracy, and then, if the conspiracy be not shown, the jury is instructed to disregard the declaration."

Further complaint is made that the judge did not follow the requests to charge offered by the attorneys for the defendants. He substantially adopted

them. He instructed the jury that they might disregard the testimony of any witnesses who testified falsely in any material fact; that, in weighing the testimony, they had a right to take into consideration the fact that four witnesses for the prosecution had been convicted of crime, that they might give such weight to good character of defendants as they thought they were entitled to. Reading the charge as a whole, we believe that it was fair and that it substantially covered the proper requests to charge even though parts of it were not given with such emphasis and exactitude as counsel for defendants would have preferred.

We find that defendants had a fair trial. There was no miscarriage of justice and, not finding any error, we affirm the judgment of conviction.

WIEST, C. J., and BUSHNELL, SHARPE, POTTER, CHANDLER, and NORTH, JJ., concurred. FEAD, J., took no part in this decision.

KING *v.* EMMONS.

1. APPEAL AND ERROR—MOTION TO DISMISS—STATEMENTS OF FACT IN BILL TAKEN AS TRUE.

   On a motion to dismiss a bill of complaint, the statements of fact therein must be accepted as true.

2. WORDS AND PHRASES—STATUTES—GUARDIAN AD LITEM.
   A term, such as "guardian *ad litem,*" which has a very definite meaning in the law must be assumed to have been used in its proper sense when incorporated in a statute by the legislature (3 Comp. Laws 1929, § 15899).

3. COURTS—GUARDIAN AD LITEM—APPOINTMENT.
   The power of appointment of a guardian *ad litem* is incident to the power of every court to try a case and the power is then confined to the particular case at bar.

4. SAME—PROBATE COURTS—JURISDICTION—STATUTES.
   Jurisdiction of the probate court is derived entirely from statute, none of it from the common law.

5. SAME—GUARDIAN AD LITEM—APPOINTMENT—PROBATE COURTS—CIRCUIT COURTS.
   Statute authorizing the probate court, upon request of any person interested, to appoint a guardian *ad litem* for person unborn, unascertained or legally incompetent to act in his own behalf and who is not represented otherwise than by the trustee whose account or petition is before the court *held,* to contemplate only the appointment of such guardian by the judge of probate incident to a matter being prosecuted in the probate court and not to authorize appointment of guardian *ad litem* to institute and prosecute litigation in the circuit court, since such power is vested in circuit court itself (3 Comp. Laws 1929, §§ 14036, 15899).

6. SAME—NEXT FRIEND—APPOINTMENT—CIRCUIT COURTS.
   In the absence of a controlling statute to the contrary, the power to appoint a suitable person as next friend to prosecute a suit in the circuit court on behalf of unknown and unascertained minors would be in the circuit court, not the probate court.

7. DISMISSAL AND NONSUIT—PARTIES—INTERVENTION.
   Motion to dismiss bill of complaint because plaintiff who brought suit was not a proper party would not be granted where one who is unquestionably a proper party has intervened and could forthwith renew the suit by filing a like bill of complaint (3 Comp. Laws 1929, §§ 14018, 14021).

8. TRUSTS—PARTIES—CHARITABLE TRUST—SUIT FOR ACCOUNTING BY EXECUTOR-TRUSTEE.
   Nonprofit corporation, organized by executor who was also the testamentary trustee of residuum of donor's estate to take over

assets of trust for crippled children, *held*, a proper party defendant in suit against it and executor-trustee for accounting as to misappropriated assets where bill of complaint made it a party and under allegations of bill it was a necessary party, and, as such party defendant, entitled to have suit dismissed or prosecuted by a proper party plaintiff.

9. EQUITY—JURISDICTION—FRAUD — EXECUTORS — TRUSTEES — ACCOUNTING.

Allegations of fraud in bill of complaint in suit against executor of will of donor, who was also trustee under trust of residuum and non-profit corporation he organized for taking over assets of such trust, for accounting as to funds of estate alleged to have been fraudulently concealed from probate court *held*, sufficient to give court of chancery jurisdiction to inquire into claimed fraudulent transactions as orders of the probate court fraudulently obtained are not *res judicata*.

10. TRUSTS—PARTIES—CIRCUIT COURT—GUARDIAN AD LITEM—APPOINTMENT—ACCOUNTING BY EXECUTOR-TRUSTEE—PROSECUTING ATTORNEY.

Guardian *ad litem*, appointed by probate court, for "persons unborn, unascertained, or legally incompetent to act in their own behalf, and of any minors, societies, corporations, institutions or other possible or contingent beneficiary" under trusts created by will of donor of large sum for crippled children after executor had filed a supplemental account, *held*, to have no standing as party plaintiff in equity proceeding in circuit court against such executor and corporation which, as testamentary trustee, he had caused to be organized to take over assets of the trust, for accounting as to funds alleged to have been misappropriated; such suit being continued by prosecuting attorney who had intervened as party plaintiff and corporation has sought relief from codefendant by way of cross-bill (3 Comp. Laws 1929, §§ 13513, 15899).

11. SAME—PARTIES—PROSECUTING ATTORNEY—UNCERTAIN AND INDEFINITE BENEFICIARIES.

Statute providing that prosecuting attorney shall represent beneficiaries in all cases where they are uncertain or indefinite *held*, applicable to case where accounting is sought as to funds by executor and corporation which he, as testamentary trustee, had caused to be organized to take over assets under trust set up "for the care, maintenance and education of crippled chil-

dren, who otherwise are destitute of the proper and necessary means for their care, medical attendance and education'' since such children are the uncertain and indefinite beneficiaries of the trust, not the corporation organized to administer the fund (3 Comp. Laws 1929, § 13513).

12. SAME—PARTIES—RECEIVERS—PREMATURE APPOINTMENT.

Appointment of receiver on petition of guardian *ad litem,* designated by probate court, but who was not a proper party plaintiff to proceeding in chancery for accounting as to alleged misappropriations by executor who was also testamentary trustee *held,* premature where made before hearing upon merits and questioned by nonprofit corporation executor had caused to be organized to administer trust assets but vacation of order making such appointment and granting injunctive relief as to assets is made without prejudice as to right of any proper party to make further application in circuit court for such relief where it does not appear the estate will suffer loss pending disposition of case on merits if possession and management be left with such corporation.

13. APPEAL AND ERROR—EQUITY—DISMISSAL OF BILL BECAUSE PLAINTIFF WAS AN IMPROPER PARTY OPERATIVE IN FAVOR OF NON-APPEALING DEFENDANT.

In suit against executor who was also testamentary trustee and who caused to be organized defendant nonprofit corporation to take over and administer trust assets, where bill is dismissed on appeal of corporation because plaintiff who initiated proceedings was not a proper party, it is operative in favor of executor-trustee as well notwithstanding he did not appeal.

Appeal from Wayne; Nicol (Henry G.), J. Submitted October 15, 1937. (Docket No. 9, Calendar No. 39,274.) Decided February 24, 1938.

Bill by Paul H. King, guardian *ad litem,* against Harold H. Emmons and George H. Cummings Foundation for an accounting, appointment of a receiver and other relief. Wayne County Prosecuting Attorney intervened as party plaintiff. Cross-bill by defendant George H. Cummings Foundation

against defendant Emmons for an accounting and other relief. Separate motions to dismiss by defendants. Motions to dismiss denied. Defendant George H. Cummings Foundation appeals. Remanded.

E. Cyril Bevan, for plaintiff.

Fred G. Dewey (*Thomas L. Poindexter,* of counsel), for defendant George H. Cummings Foundation.

NORTH, J. The bill of complaint herein was filed in behalf of and for the purpose of protecting the interests of beneficiaries of a trust created by the will of George H. Cummings, deceased. Each of the defendants filed a motion in the circuit court for the dismissal of the bill of complaint. The motions were denied. Leave having first been obtained, the defendant George H. Cummings Foundation has appealed. As hereinafter noted, an appeal has also been taken by this defendant from the order of the circuit court appointing a temporary receiver.

The first question commanding consideration is whether Paul H. King, as guardian *ad litem* appointed in the probate court, is a proper party plaintiff. On the motion to dismiss the statements of facts in the bill of complaint must be accepted as true.

George H. Cummings died on June 7, 1920, leaving a will which, among other provisions disposing of his estate, contained the following:

"Seven: All the rest, residue and remainder of my estate, either as it shall exist at the time of my death, or with accruals or additions thereto, as hereinabove provided, I give, devise and bequeath to Nellie G. Rockafellow and Harold H. Emmons, to be

held by them in trust for the following purposes, namely:

"They shall devote the income from the said residuum and so much of the principal as in their best judgment shall seem wise, to the establishment and maintenance of a home for the care, maintenance and education of crippled children, who otherwise are destitute of the proper and necessary means for their care, medical attendance and education, and I hereby instruct and empower my said trustees, either to establish such institution as a new enterprise, or to take over and control an established institution for similar purposes, and to expand and establish it on a proper basis and in a proper manner. I further empower my said trustees at their discretion to transfer such institution and such fund to a corporation which may with their permission be formed to take over and carry on such institution for crippled children, the same to be organized, however, in a manner which shall be satisfactory to them."

Defendant Harold H. Emmons and Nellie G. Rockafellow were appointed executors of the estate in July, 1920. An account of these executors was filed and allowed in December, 1924. Nellie G. Rockafellow died the following month. Thereafter defendant Harold H. Emmons continued to administer the Cummings estate as the sole surviving executor. The total assets were in excess of a million dollars; and with the exception of a few provisions involving comparatively small amounts, the testator provided that his estate should pass to the trustees under the provision hereinbefore quoted. The bill of complaint alleges maladministration of the estate and charges that defendant Emmons has misappropriated large sums of money belonging to the estate and by fraudulent concealment from and

misrepresentation to the probate court has obtained the approval and allowance of his accounts in fraud of the trust created in the Cummings' will for the benefit of crippled children. In the main the relief sought is that the orders of the probate court approving the accounts of defendant Emmons as executor or trustee be set aside on the ground that they were procured by fraud and for an accounting as to alleged misappropriated assets of the estate.

On the 19th day of June, 1928, the probate court entered an order purporting to approve and allow "the final account of Harold H. Emmons, sole surviving executor." It was recited in the order that the portion of the estate with which we are here concerned should be assigned to Emmons as surviving trustee; and a bond in the sum of $100,000 was required. Such a bond was not given and letters of trusteeship were not issued until April, 1935, at which time the bond was reduced to $100. On or about August 9, 1930, defendant Emmons caused to be organized and incorporated a Michigan nonprofit corporation under the name of the George H. Cummings Corporation, but this name was later changed to George H. Cummings Foundation. This corporation was formed in contemplation of transferring to it the assets of the Cummings' trust for crippled children. However, the George H. Cummings Foundation remained inactive and no assets of the estate were transferred to it until August, 1935. In June, 1935, Emmons filed a final account as "sole surviving executor and trustee." The order on this petition was entered August 7, 1935, and recited that the final account of Emmons was allowed and he was "discharged as such executor and trustee." The order further approved Emmons' designation of the George H. Cummings Foundation as the recipient

of the fund provided in the will for the benefit of crippled children and of the transfer of such assets to said foundation and such assets were so assigned; and further provision was made in the probate court order for compensation to Emmons as sole surviving executor and trustee and also for legal services performed for the benefit of the estate.

At the request of the probate judge, the executor on February 11, 1936, filed a so-called supplemental account which disclosed more in detail the various transactions of the executor. In connection with this phase of the proceedings plaintiff Paul H. King was appointed by the probate court "guardian *ad litem* for any person or persons unborn, unascertained, or legally incompetent to act in their own behalf, and of any minors, societies, corporations, institutions or other possible or contingent beneficiary under the trusts created by the last will and testament of George H. Cummings, deceased." Further the probate court on the 20th of May, 1936, ordered and directed the plaintiff herein to file a bill of complaint demanding an accounting from Harold H. Emmons. The bill of complaint was filed in this cause on the same date.

As before indicated the first question for consideration on this appeal is whether this suit in the circuit court in chancery, under the circumstances above outlined, is one properly brought by and which can be properly prosecuted by Paul H. King, guardian *ad litem* appointed in the probate court proceedings. It is the contention of appellant that Mr. King as a guardian *ad litem* appointed in the probate court can have no standing or authority to prosecute this suit in the circuit court. This contention leads to a consideration of the powers of the probate court in this particular.

Appellee asserts that he is a proper party plaintiff under the following statutory and rule provisions:

"When, upon filing or hearing of an account of a trustee in a probate court, or any petition allowed by this chapter to be filed in such court, it appears to the court that the interest of a person unborn, unascertained or legally incompetent to act in his own behalf is not represented otherwise than by the trustee, the court may, and upon the request of any person interested shall, appoint some competent and disinterested person to act as guardian *ad litem* for such person and to represent his interests in the matter. The person so appointed shall make oath to perform his duty faithfully and impartially and shall be entitled to such reasonable compensation for his services as the court may allow." 3 Comp. Laws 1929, § 15899.

"The (probate) court may, when it shall be deemed necessary, appoint a guardian *ad litem* or a next friend to appear for any minor or other person under legal disability, to represent him in any matter pending before the court, or to prosecute any matter or proceeding in his behalf, with or without notice, as the court may direct." Michigan Probate Rule No. 12 (1933).

It must be borne in mind that the instant suit is not an appeal from the probate court, but instead is a separate independent suit originally instituted in the circuit court in chancery. Further the unknown and unascertained beneficiaries are in the position of parties plaintiff, not defendants. The above quoted statute provides only for the appointment of a "guardian *ad litem* for such person and to represent his interests in the matter." The designation "guardian *ad litem*" has a very definite meaning in the law and it must be assumed the legislature used

it in its proper sense. If the quoted section of the statute is so construed the conclusion must be reached that it contains no authority whatever for appointing a person in the specified representative capacity to institute and prosecute litigation in the circuit court. In Bouvier's Law Dictionary (Baldwin's 1934 Ed.), the term guardian *ad litem* is defined as follows:

"A guardian appointed to represent the ward in legal proceedings to which he is a party defendant.

"The appointment of such is incident to the power of every court to try a case; (*Bullard* v. *Spoor*) 2 Cow. (N. Y.) 430; and the power is then confined to the particular case at bar."

In a recent decision we have said:

"The probate court derives none of its jurisdiction or power from the common law, *Grady* v. *Hughes*, 64 Mich. 540, but must find the warrant for all its doings in the statute." *In re Estate of Meredith*, 275 Mich. 278 (104 A. L. R. 348).

Further, we think it clear that the rule provision above quoted contemplated only the appointment of a guardian *ad litem* or a next friend by the judge of probate incident to a matter being prosecuted in the probate court. We are not here concerned with the authority of such an appointee to follow the prosecution or defense of the case on appeal from the probate court; but we are satisfied it was not intended by this rule to attempt to vest the probate court with authority to appoint a next friend for the purpose of instituting litigation in the circuit court. That power is vested by statute in the circuit court itself. 3 Comp. Laws 1929, § 14036. The statute makes the next friend so appointed for the infant plaintiff responsible for costs of suit. The real par-

ties in interest as plaintiffs in the instant suit are unknown and unascertained minors—"crippled children." If a suit were to be instituted in the circuit court in behalf of such plaintiffs, in the absence of a controlling statutory provision to the contrary, the power to appoint a suitable person as next friend to prosecute the suit would be in the circuit court, not in the probate court.

However, both parties to this appeal agree that there is a statutory provision in this state in consequence of which the prosecuting attorney of the county wherein the suit originated is a proper party plaintiff to represent unascertained beneficiaries.

"The prosecuting attorney of the county in which the court of chancery shall have jurisdiction and control shall represent the beneficiaries in all cases where they are uncertain or indefinite, and it shall be his duty to enforce such trusts by proper proceedings in the court, but he shall not be required to perform any duties in connection with such trusts in any court outside of this State." 3 Comp. Laws 1929, § 13513.

The prosecuting attorney of Wayne county filed a petition in the circuit court in chancery asking leave to intervene as a party plaintiff in this suit. Prior to denial of appellant's motion to dismiss the circuit judge allowed such intervention. There has been no appeal from such holding; and further we think it was entirely proper. As a result there is now a proper party plaintiff in this case. It would be an idle ceremony, resulting in delay and unnecessary expense, for this court to grant appellant's motion to dismiss the bill of complaint after the intervention of a proper party plaintiff who in event of dismissal, could forthwith renew the suit by filing a like bill of complaint. See 3 Comp. Laws 1929,

§§ 14018, 14021; and *Windoes* v. *Colwell*, 247 Mich. 372.

As bearing upon appellant's right to insist upon its motion to dismiss, appellee asserts in his brief that the George H. Cummings Foundation "has no status in this court." Various reasons are urged in support of this contention. But it is sufficient to note plaintiff made the George H. Cummings Foundation a party defendant; and under the allegations of the bill this foundation was a necessary party defendant. As such party it was and is in a position to raise the questions which are now before the court. As a defendant it has the right to have this suit dismissed or prosecuted by a proper party plaintiff.

Notwithstanding appellant's contention to the contrary, we are satisfied from this record that the allegations of fraud contained in the bill of complaint are sufficient to give the circuit court in chancery jurisdiction to inquire into the claimed fraudulent transactions. Further, orders of the probate court fraudulently obtained are not *res judicata*. *Raseman* v. *Raseman*, 234 Mich. 237; *In re Estate of Rahn*, 241 Mich. 29.

It must be held that the plaintiff, Paul H. King, as a guardian *ad litem* appointed in the probate court, has no standing in this proceeding in equity, and is therefore not a proper party plaintiff. The prosecuting attorney who is now joined as a plaintiff in this suit, is a proper party plaintiff. It follows that as to plaintiff Paul H. King, the suit must be dismissed. However, because of the character of the subject matter of the litigation, the suit should be and is continued with the prosecuting attorney as the party plaintiff. Especially is this proper procedure herein since, as hereinafter noted, a cross-

bill has been filed by the George H. Cummings Foundation seeking affirmative relief against defendant Emmons.

In holding that the suit should not be dismissed, we are not unmindful of appellant's contention that this case is not one in which the beneficiaries are "uncertain or indefinite." Appellant urges that since the George H. Cummings Foundation has been incorporated, and is to be the immediate recipient of the assets of this trust, it cannot be said "the beneficiaries * * * are uncertain or indefinite." But obviously while the George H. Cummings Foundation may be lawfully entitled to the possession of the assets of this trust, by no stretch of imagination can it be said that the George H. Cummings Foundation is the ultimate beneficiary. Instead the testator designed this trust "for the care, maintenance and education of crippled children, who otherwise are destitute of the proper and necessary means for their care, medical attendance and education." Clearly such children are the "uncertain and indefinite" beneficiaries of this trust. The statute (3 Comp. Laws 1929, § 13513) providing that the prosecuting attorney shall represent the beneficiaries in all cases where they are uncertain or indefinite, is applicable to the instant case.

Appellant also challenges the appointment of a receiver prior to a hearing on the merits. The pleadings, including attached exhibits, cover 120 pages of the printed record. The sworn bill of complaint had been answered under oath by the respective defendants prior to the appointment of the receiver. The George H. Cummings Foundation had also filed a cross-bill in which to a certain extent it sought relief against defendant Emmons of the same character prayed for in plaintiff's bill of com-

plaint. On the 12th day of October, 1936, the circuit court, having previously heard the parties, appointed a receiver and issued an injunctive order which in general restrained defendants from selling, assigning, incumbering or in any other manner dealing or attempting to deal with any part of the assets of the Cummings' trust for the benefit of crippled children. As hereinbefore noted the trust assets had been assigned to the George H. Cummings Foundation prior to the filing of the bill of complaint herein. Plaintiff challenges the right of the George H. Cummings Foundation to possession of the trust property. This contention is based largely upon its claim that the George H. Cummings Foundation was not organized in accordance with the terms of the will and that the order of the probate court by which the foundation was designated as the recipient of the trust property and had the same assigned to it was illegal in that it was prematurely made and was obtained through fraud perpetrated upon the probate court. It is further asserted by plaintiff that the officers and directors of the foundation are more or less dominated by defendant Emmons. These are questions which clearly go to the merits of the case. The charges made have been denied under oath. The trust estate, composed of both real and personal property, is large in amount, and its management will of necessity require much time, care and ability. No convincing showing is made that the estate will suffer loss pending disposition of this case on its merits if the possession and management of the property in the meantime is left with the George H. Cummings Foundation. Further, in view of our decision hereinbefore indicated, it now appears that the receiver was appointed on the petition of a plaintiff

whom we are constrained to hold had no interest in the subject matter of this litigation and was not a proper party to institute this suit. As the record now stands there is no way of ascertaining whether the prosecuting attorney of Wayne county as a proper party plaintiff does or does not desire a receivership *pendente lite,* which will of necessity subject the trust estate to additional expense and complications. In view of these rather unusual circumstances we are of the opinion that the order appointing the receiver and granting injunctive relief should be vacated, but without prejudice to the right of any proper party to make further application in the circuit court for such relief of this character as may seem fit and proper in this case. This holding is in accord with *Woodmansee* v. *Ann Arbor Brick Co.*, 164 Mich. 688, citing numerous cases, and *Central Holding Co.* v. *Bushman*, 238 Mich. 261.

Notwithstanding defendant Emmons did not appeal from the circuit court's denial of his motion to dismiss, since it has now been determined that Mr. King is not a proper party plaintiff in this suit, the order of dismissal should be operative in favor of both defendants. An interlocutory order or decree may be taken in this court in accordance with this opinion and the case will be remanded to the circuit court of Wayne county in chancery for further proceedings therein. Appellant will have costs of this appeal.

WIEST, C. J., and BUSHNELL, SHARPE, POTTER, and CHANDLER, JJ., concurred. BUTZEL, J., did not sit. FEAD, J., took no part in this decision.

TETRO *v.* COUNTY OF WAYNE.

1. PLEADING—ALLEGATIONS OF ANSWER NOT TRAVERSED STAND AS ADMISSIONS.

   Affirmative allegation in answer to relator's petition which is not traversed by relator stands admitted.

2. MANDAMUS—COUNTIES—DEPUTY SHERIFFS — SALARY — BOARD OF SUPERVISORS—STATUTES.

   In mandamus proceeding to compel payment of additional salary to deputy sheriff, allegation in defendants' answer that resolution of board of supervisors setting salary of relator did not receive approval of majority of supervisors-elect as required by statute *held,* admitted where not traversed by relator (1 Comp. Laws 1929, § 1122).

3. SAME—BOARD OF SUPERVISORS—RESOLUTIONS—STATUTES.

   Relator in mandamus proceeding to compel payment to him of additional salary for services as deputy sheriff *held,* not entitled to relief where resolution of board of supervisors in accordance with which relief is sought is admitted not to have been passed in accordance with statutory requirements (1 Comp. Laws 1929, § 1122).

4. COURTS—PREVIOUS DECISION—QUESTIONS REVIEWED.

   Claim that deputy sheriff is entitled to additional salary in accordance with resolution of board of supervisors because such resolution was assumed to have been valid in a previous case involving it *held,* untenable where question of validity of resolution involved was not presented in such previous case.

5. COSTS—PUBLIC QUESTION.

   In mandamus proceeding to compel payment of claim for salary alleged to be due a deputy sheriff, no costs are allowed, a public question being involved.

Mandamus by Fred Tetro against the County of Wayne, Edward H. Williams and others, members of the Board of Auditors of Wayne County, Benjamin B. Pelham, Clerk of the Wayne County Board

of Auditors, and Jacob P. Sumeracki, Treasurer of Wayne County, to compel the payment of additional salary for term of office. Submitted December 14, 1937. (Calendar No. 39,826.) Writ denied February 24, 1938. Rehearing denied April 4, 1938.

Munro & Donovan, for plaintiff.

Duncan C. McCrea, Prosecuting Attorney, *Garfield A. Nichols* and *William L. Brunner*, Assistant Prosecuting Attorneys, for the defendants.

NORTH, J. Relator herein, formerly a deputy sheriff for Wayne county, has instituted mandamus proceedings in this court. He served in his official capacity from May 1, 1935, to November 30, 1936; and during a part of this period he received pay at the rate of $1,800 per year and during the remaining portion at the rate of $1,980 per year. Relator asserts that he was lawfully entitled to payment at a greater rate of salary and he asks that defendants be mandamused to pay him the additional amount.

In seeking the above relief relator relies solely upon the action taken by the board of supervisors of Wayne county in October, 1934, whereby he contends that the salary for the office held by him was fixed by resolution of the board at the rate of $2,070 per year. In the answer defendants deny that relator's salary was fixed by the board of supervisors as he asserts. They contend that the attempted action of the board of supervisors did not comply with statutory requirements in that the salary resolution was not adopted by the requisite vote and, therefore, was ineffective. In this particular, defendants rely upon the following statute:

"A majority of the supervisors of any county shall constitute a quorum for the transaction of the

ordinary business of the county, and all questions which shall arise at their meetings shall be determined by the votes of a majority of the supervisors present, except upon the final passage or adoption of any measure or resolution, or the allowance of any claim against the county, *in which case a majority of all the members-elect shall be necessary.*'' 1 Comp. Laws 1929, § 1122.

It is affirmatively alleged in defendants' answer ''that said resolution did not pass under the statutory requirements, which require a majority vote of the supervisors-elect in making such a final determination.'' This affirmative allegation in the answer is not traversed by relator and therefore stands admitted. Because this resolution upon which relator relies was not passed by the requisite vote of the board of supervisors it is ineffective and relator cannot be granted relief thereunder.

Relator asserts that he is entitled to the claimed additional salary under our decision in *Atlas* v. *Wayne County Board of Auditors,* 281 Mich. 596, wherein it was assumed that the same resolution of the board of supervisors here involved was valid and effective. In this connection it should be noted that the question on which decision turns in the instant case was not presented to this court in the *Atlas Case* and, therefore, it was assumed that the October, 1934, resolution of the board of supervisors relating to salaries was adopted in compliance with statutory requirements. The contrary appears in the instant case and is controlling.

The writ is denied. The question being one of public concern, no costs are awarded.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, and CHANDLER, JJ., concurred. FEAD, J., took no part in this decision.

THOMAS *v.* CURRIER LUMBER CO.

1. AUTOMOBILES—TEST TO DETERMINE WHETHER PASSENGER IS GUEST.

   Test to be applied in determining whether a passenger is a guest in defendant motorist's car within meaning of guest act is whether or not the transportation is furnished gratuitously (1 Comp. Laws 1929, § 4648).

2. SAME—GUEST PASSENGERS—PAYMENT FOR TRANSPORTATION.

   It is unnecessary to show that plaintiff made a cash payment for his transportation in order not to hold him a guest passenger of defendant motorist, within meaning of the guest passenger act, it being sufficient if a benefit accrued to defendant by reason of such transportation (1 Comp. Laws 1929, § 4648).

3. SAME—GUEST PASSENGERS—BUILDING CONTRACTORS—PROSPECTIVE CUSTOMERS—LUMBER COMPANY—SALESMAN.

   Plaintiff, a building contractor who had conducted negotiations with defendant salesman, a salaried employee of defendant lumber company, with respect to materials for a proposed house and a factory alteration job to a point where it was necessary to interview lumber company's president who ordered defendant salesman to transport plaintiff to president's office *held*, a nongratuitous passenger in salesman's car when injured while being transported to president's office, since prospect for sale of materials for either job was a benefit to both defendants (1 Comp. Laws 1929, § 4648).

4. SAME—NEGLIGENCE—PROXIMATE CAUSE—PROSPECTIVE CUSTOMERS.

   Proof of ordinary negligence on part of defendant salesman for defendant lumber company *held*, sufficient to entitle plaintiff to recover from both defendants for injuries proximately caused thereby, which he sustained while he, as prospective purchaser of materials, was being transported by the salesman to office of company's president at latter's request.

5. SAME—SPEED—STATUTES—NEGLIGENCE PER SE.

Operation of car at speed in excess of that defined by statute as *prima facie* lawful *held,* negligence *per se* in action for injuries by passenger in such car (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933).

6. SAME—NEGLIGENCE—QUESTION FOR JURY—SPEED—WRONG SIDE OF STREET.

Question of whether motorist was negligent in operating car at time plaintiff, a passenger therein, was injured *held,* properly left to jury notwithstanding showing made that excessive speed was not the proximate cause where there was testimony, though contradicted, that left wheels of car were at left of center of street (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933).

7. APPEAL AND ERROR—AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—PASSENGER'S FAILURE TO OBJECT TO EXCESSIVE SPEED AND IMPROPER OPERATION OF CAR.

Contention that plaintiff, a prospective customer of defendant salesman and his employer, also a defendant, had assumed hazards of transportation by salesman to employer's office by failing to object to excessive speed and improper operation of car and was, therefore, guilty of contributory negligence *held,* without merit on appeal, where such matter was submitted to jury and resolved in favor of plaintiff.

Appeal from Wayne; Sprague (Victor D.), J., presiding. Submitted January 5, 1938. (Docket No. 22, Calendar No. 39,756.) Decided February 24, 1938.

Case by John M. Thomas against Currier Lumber Company, a Michigan corporation, and Ernest J. Wells for personal injuries sustained while a passenger in automobile owned and operated by defendant Wells. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

Daniel W. Ross and *Walter M. Nelson,* for plaintiff.

Kerr, Lacey & Scroggie (*Harry S. Toy* and *William J. Eggenberger,* of counsel), for defendant Currier Lumber Company.

CHANDLER, J. Plaintiff had verdict and judgment. Motions for judgment *non obstante veredicto* and a new trial were denied. Defendants appeal.

The principal question involved in this appeal is whether plaintiff, while riding in the motor vehicle at the time he sustained his injuries, was a "guest without payment for such transportation" within the meaning of 1 Comp. Laws 1929, § 4648. By stipulation of counsel this question was withdrawn from the consideration of the jury and the trial court found as a matter of law that plaintiff was not a gratuitous guest passenger.

Plaintiff is a building contractor conducting his business in the city of Detroit. Defendant Currier Lumber Company is engaged in the business of selling lumber and other building supplies and employed the defendant Wells as its salesman.

Plaintiff owned a lot in the city of Detroit which was located in close proximity to another lot on which the annual builders' show house was being constructed. He proposed to gain publicity for himself by erecting a house upon his lot and exhibiting the same during the time the builders' show house was being displayed, later intending to sell it. It was also contemplated that the various concerns who supplied material for the house, if constructed, would receive their share of publicity. Plaintiff was also about to undertake the alteration of a small factory for one of his customers, the plans and specifications for which called for two large doors which he intended to have constructed. He had discussed the proposition of the purchase of materials for the

house and the doors for the factory with Wells as salesman for the Currier Lumber Company. A question as to terms of payment for said materials and the price to be charged for the doors had arisen which Wells stated was beyond his authority as salesman to decide and that it would be necessary for plaintiff to make further negotiations with Mr. Currier, president of the lumber company.

Wells had discussed the prospective business with Mr. Currier and the latter had requested Wells to bring plaintiff to his (Currier's) office for an interview. An appointment was arranged and on the morning of November 12, 1934, Wells called plaintiff and they agreed to meet at plaintiff's office and from there go to the office of Mr. Currier. Wells advised plaintiff that he was in a hurry, stating that after taking plaintiff to Mr. Currier it was necessary for him to return to the neighborhood on other business. Plaintiff wanted to drive his car but Wells advised that Mr. Currier had sent him to convey plaintiff to his office, and he so testified. While being thus transported by Wells in a Plymouth car owned and operated by him, an accident occurred resulting in plaintiff's injuries.

The appellant, Currier Lumber Company, urges six reasons in support of the claim that plaintiff was a gratuitous guest passenger as a matter of law and therefore cannot recover, there being no proof of gross negligence or wilful and wanton misconduct on the part of its salesman Wells. Briefly, they are: that Wells, on other business, would have made the same trip on the morning of the accident whether plaintiff accompanied him or not; that plaintiff would have gone anyway had he not gone with Wells; that plaintiff had entered into no contract of any description either with Wells or the lumber

company prior to the accident; that further negotiations concerning the prospective business with Wells was of no avail as Wells had no authority as salesman to proceed; that Wells received no payment for transporting plaintiff; and finally, that Wells would receive nothing if the business was satisfactorily terminated and a sale made as he was paid on a salary rather than a commission basis and received only gas, oil and minor repairs for the use of his car.

We are unimpressed by the argument of appellant. We have previously held, in considering the statute in question, that the test to be applied is, "Was the transportation furnished gratuitously?" *McGuire* v. *Armstrong,* 268 Mich. 152 (36 N. C. C. A. 252). It would not be necessary, in holding that plaintiff was not a gratuitous guest passenger, to find that a cash payment was made by him for his transportation. It is sufficient if a benefit accrued by reason of such transportation. That both defendants were benefited in the instant case cannot be reasonably denied. The negotiations relative to the sale of the building materials and construction of the doors for the factory could proceed no further without consultation with Mr. Currier. In the absence of an interview with him no possibility of entering into a contract of sale existed. The lumber company would be desirous of consummating the contract not only because of the prospect of the profit to be derived immediately but because of the publicity it would receive from the construction of the proposed house to be displayed to the public by plaintiff. Either of these prospects, which could not possibly materialize in the absence of an interview with Mr. Currier, were benefits sufficient to characterize plaintiff as a nongratuitous passenger.

The same factors are applicable to the case of defendant Wells, who, as a salesman, would be interested in producing a volume of business. Although reimbursed for his services on a salary basis, it is safe to assume that he could not hope to continue in the employ of the lumber company or aspire to promotion unless productive of business. It was therefore of benefit to him to convey plaintiff to the office of the lumber company and thus, if possible, complete the sale. Numerous cases on this question generally are collected in *McGuire* v. *Armstrong, supra.* See, also, *Cardinal* v. *Reinecke,* 280 Mich. 15; *Beer* v. *Beer,* 52 Ohio App. 276 (3 N. E. [2d] 702); *Streeter* v. *Locke,* — Mass. — (4 N. E. [2d] 297); annotations, 82 A. L. R. 1365; 95 A. L. R. 1180.

On the foregoing facts, proof of ordinary negligence on behalf of Wells was sufficient to entitle plaintiff to recover if such negligence was the proximate cause of the accident.

Plaintiff's office was located in the northwest section of the city and the office of the lumber company in the northeast section. Wells, accompanied by plaintiff, left the latter's office and, enroute to their destination, drove east on Fenkell avenue. At the intersection of Fenkell avenue and Lesure, they collided with a Hupmobile car, which, prior to the accident, was being driven west on Fenkell, and which, at the moment of impact, was apparently making a left turn onto Lesure. Plaintiff did not see the Hupmobile until the instant of the crash and Wells claimed that it turned into the path of his car from the rear of a large truck; that he was about 30 feet distant when the car started to turn out, but that he did not have sufficient time to apply his brakes to avoid the collision.

It is conceded that Wells was operating his car at a rate of speed in excess of that defined as *prima facie* lawful by the statute (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933 [Comp. Laws Supp. 1935, § 4697]), and in violation of the ordinances of the city of Detroit. Violation of the statute in this regard was negligence *per se*. *Bade* v. *Nies,* 239 Mich. 37; *Smith* v. *Ormiston,* 242 Mich. 600.

Appellants elaborately attempt to demonstrate by brief that it was mathematically impossible for the negligence arising from driving at an excessive rate of speed to have been the proximate cause of the accident, claiming that the same could not have been avoided even had Wells been complying with the law as to speed. However, there is testimony, though contradicted, that Wells was also driving with the left wheels of his car to the north of the center line. The testimony on this point is conflicting and confusing. It is clear that Wells was in haste and that in passing cars had driven to the north of the center line. Upon review of the testimony, we believe that the question as to whether his negligence was the proximate cause of the accident was properly left to the determination of the jury.

Lastly, it is urged that plaintiff was aware of the excessive speed and improper operation of the car and that, failing to object, must be held to have assumed the hazards and guilty of contributory negligence. This question was submitted to the jury and resolved in favor of plaintiff. The point is without merit.

Judgment affirmed, with costs to plaintiff.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, NORTH, and MCALLISTER, JJ., concurred.

ROUNDTREE *v.* FORD MOTOR CO.

1. WORKMEN'S COMPENSATION—FINDING OF DEPARTMENT—DISABILITY—FOOT INJURY—EVIDENCE.

   Finding of fact by department of labor and industry, in proceeding for further compensation for injury to foot, that plaintiff had failed to establish disability as result of injury received a year and nine months previous to filing instant petition *held,* supported by testimony in the record.

2. SAME—FINDING OF FACT BY DEPARTMENT BINDING ON SUPREME COURT.

   Supreme Court is bound by finding of fact of department of labor and industry which is supported by evidence.

3. SAME — AGREEMENT SUSPENDING COMPENSATION — EMPLOYEE'S BURDEN OF PROOF AS TO DISABILITY.

   An agreement of employee and employer suspending payment of compensation, entered into after former had reentered service of employer, and approved by the department of labor and industry still leaves employee with burden of showing, upon subsequent application for further compensation, that he is under disability resulting from the accident in consequence of which the original award was made.

Appeal from Department of Labor and Industry. Submitted January 5, 1938. (Docket No. 38, Calendar No. 39,739.) Decided February 24, 1938.

Clarence Roundtree presented his claim for compensation against Ford Motor Company, employer, for injuries suffered in defendant's employ. On petition for further compensation. Award denied Affirmed.

Eugene P. Berry, for plaintiff.

E. C. Starkey and *W. J. Jones,* for defendant.

NORTH, J. This is an appeal from an award of the department of labor and industry where upon review of plaintiff's petition for further compensation the award of $5 per week made by the deputy commissioner was reversed and compensation denied. Plaintiff has appealed.

While working in the plant of the defendant company plaintiff sustained an injury in the following manner. A billet or bar of steel eight inches square, approximately 10 feet in length and weighing about 1,800 pounds, rolled or fell against plaintiff's right foot and injured it at a point between the ankle and the heel. An agreement for compensation was entered into and approved by the department. Compensation at the rate of $18 per week was paid for a short period. Thereupon compensation was suspended by a supplemental agreement which was filed with the department March 12, 1935, and approved by it two days later. Plaintiff had previously returned to his employment with defendant company. He was given light work for about a month and thereafter, at least during a portion of the time that he remained in defendant's employ, resumed the same work at which he had been employed prior to his injury. He continued in defendant's employ until June 23, 1935, when he was laid off. He filed his present petition for further compensation October 13, 1936.

The general character of plaintiff's claimed injury and the conclusions reached from the testimony by the department are indicated by the following quoted portion of its opinion:

"The X-rays, entered by plaintiff, are really the important witness in this case. The claimed piece of detached bone is underneath the os calcis or heel bone in the notch of this bone. The os calcis toward the back is formed much in the shape of the heel of a shoe, only that the contour is softened by curved lines and the detached bone (?) is just forward of this heel. But was this detached bone, if it is bone, dislodged by the blow from the billet? Dubitation arises with respect to a causal relationship here because, *prima facie,* a blow on the side of the heel would not chip off a piece of bone underneath the heel.

"The words 'if it is bone' are used because valid doubt is allowable as to whether the small detached body is bone at all. * * *

"The plaintiff's doctors simply assume the separated fragment to be bone and they stress it as being the cause of plaintiff's claimed inability to remain on his feet over a stretch of hours. They do not discuss and refute that the fragment might not be bone or that such detached fragments are quite frequently present in feet without causing discomfort. * * *

"The one doctor sworn by the defense, Dr. William E. Johnston, does not go on record as to whether the detached body—spur he calls it—is bone or other substance. He attaches no importance to it, however. His testimony is as follows:

"'*Q.* Do you attach any importance to this detached spur or whatever it is?

"'*A.* These spurs develop sometimes on the os calcis independent of injury; one often finds them present without the patient realizing their being present. * * *

"'*Q.* After having examined this man do you feel that he has any disability?

"'*A.* In my opinion this man has no disability. * * *

"'*Q.* Do you see any reason why this employee could not stand eight hours a day and work?

"'*A.* No, I think this man is quite able to work.'"

While it is not embodied in the department's opinion, Dr. Johnston further testified:

"There is no swelling and both ankles measure exactly the same and there is no limitation of movement of his foot. * * *

"*Q.* Is there any indication that this man is favoring this foot?

"*A.* I tried to find that out from muscle atrophy, and which nature itself will do, if he is favoring the foot; and there is no evidence of it.

"*Q.* If this man had been favoring this foot from the time he was injured in January, 1935, up to October, 1936, as to whether or not you would expect to find some evidence of the favoring at this time?

"*A.* I would expect to find it, yes."

The department found that plaintiff had failed to establish disability as a result of the injury he received in January, 1935. Appellant's contention that this determination was not based upon testimony contained in the record, but instead upon matters "wholly outside of the record," cannot be sustained. There was testimony to support the finding of fact and we are bound by the department's determination.

Without having raised the question in any way at the time of review before the department of labor and industry, appellant urges in his brief on appeal to this court that because of our decision in *Miller* v. *City Ice & Fuel Co.*, 279 Mich. 592, the agreement between the parties suspending compensation should be considered a nullity; and that the original agreement for compensation made by the parties and approved by the department should be considered in full force and effect, and the department should issue to plaintiff a certificate entitling him to judgment

and execution on the basis of the original award for compensation. In this connection it should be noted that our decisions in the *Miller Case* and in the companion case, *DeTroyer* v. *Ernst Kern Co.,* 282 Mich. 689, have been interpreted, if not modified, by the opinion rendered on rehearing of the *DeTroyer Case.*

In accordance with the holding on the rehearing of the *DeTroyer Case,* the agreement for suspension of compensation entered into between these parties and approved by the department placed plaintiff in the instant case in this position: If he sought further compensation the burden was upon him to show that he was still under disability resulting from the accident in consequence of which the original award was made. This was the identical issue of fact determined by the department on its review. As hereinbefore noted, based on testimony in the record, it was adjudicated that plaintiff was not suffering any such disability. Because of this fact his petition for further compensation was denied. This was an adjudication of the controlling issue; and was in accord with proper practice contemplated in the *DeTroyer Case, supra.* It was determinative of plaintiff's alleged rights as presented to the department by his petition herein. Under the circumstances it would be improper to remand the case to the department for further consideration.

The award is affirmed, with costs to appellee.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and MCALLISTER, JJ., concurred.

CITY OF MENOMINEE *v.* COUNTY OF MENOMINEE.

1. STATUTES—CONSTRUCTION—RELATED ACTS.

   In controversy between city and county in which such city was located respecting apportionment of funds for highway purposes derived from taxes on gasoline and motor vehicles, not only provisions of statutes under which such taxes are imposed and distributed are considered but also related statute which provides for transition of control of township roads from township to county highway authority and supply of funds therefor (Act No. 130, Pub. Acts 1931; Act No. 7, § 34, subd. [4], Pub. Acts 1934 [1st Ex. Sess.], amending 1 Comp. Laws 1929, § 4651; Act No. 8, § 19, subd. [d(4)], Pub. Acts 1934 [1st Ex. Sess.], amending 1 Comp. Laws 1929, § 3594).

2. TAXATION—MOTOR VEHICLE WEIGHT AND GASOLINE TAXES—DISTRIBUTION—LEGISLATIVE INTENT.

   Under statutes providing for distribution of so-called motor vehicle weight and gasoline tax funds the legislature is *held*, to have intended to specify the particular purposes with designated priorities for which a portion of such funds might be used in the respective counties except as in a limited measure the power of appropriation was delegated to boards of supervisors (Act No. 7, § 34, Pub. Acts 1934 [1st Ex. Sess.], amending 1 Comp Laws 1929, § 4651; Act No. 8, § 19, Pub. Acts 1934 [1st Ex. Sess.], amending 1 Comp. Laws 1929, § 3594).

3. EVIDENCE — JUDICIAL NOTICE — TRANSFER OF MAINTENANCE OF TOWNSHIP HIGHWAYS TO COUNTIES.

   It is a matter of common knowledge that as a result of Act No. 130, Pub. Acts 1931, annually during a transition period the maintenance of thousands of miles of what had theretofore been township highways was transferred from the townships to the respective counties.

4. TAXATION—COUNTIES—CONSTRUCTION OF STATUTES—ADDITIONAL MILEAGE OF TOWNSHIP ROADS.

   Specification in statutes that a designated portion of funds derived from motor vehicle weight and gasoline taxes should "be used for the maintenance of additional mileage of township roads in any county selected and determined upon in

accordance with the provisions'' of an act setting forth method of accomplishing transition of control of 20 per cent. of the township highway mileage annually from township to county highway agencies, providing funds for latter agencies, and gradually reducing maximum rate of taxation by townships for highway purposes *held*, to provide such county agencies with additional funds for the additional burden even after all the roads had been taken over by the county agencies, especially in view of the fact that amendments enacted subsequent to the completed transfer of authority continued to embody such provision and added authority of boards of supervisors to appropriate for the maintenance of city and village streets, hence resolution of board of supervisors making appropriation for ''roads heretofore selected, determined upon and taken over into the county road system'' under the act providing for transition of control was within power of board to pass (1 Comp. Laws 1929, § 3594, as amended by Act No. 41, Pub. Acts 1932 [1st Ex. Sess.], Act No. 8, Pub. Acts 1934 [1st Ex. Sess.], and Act No. 340, Pub. Acts 1937; § 4651, as amended by Act No. 7, Pub. Acts 1934 [1st Ex. Sess.], and Act No. 320, Pub. Acts 1937; and Act No. 130, Pub. Acts 1931).

5. STATUTES—CONSTRUCTION—HIGHWAYS—AUTOMOBILES.

Sense in which legislature uses language in a statute relative to funds for highways must be determined in the light of known facts concerning the development of highways in this State as accentuated, if not necessitated, by the public's use of the motor vehicle (1 Comp. Laws 1929, §§ 3594, 4651, as amended; Act No. 130, Pub. Acts 1931).

6. COSTS—PUBLIC QUESTION.

No costs are allowed in proceeding between plaintiff city, located in defendant county, and such county to determine construction of statutes relative to distribution of motor vehicle weight and gasoline tax moneys, a public question being involved (1 Comp. Laws 1929, §§ 3594, 4651, as amended; Act No. 130, Pub. Acts 1931).

Appeal from Menominee; Bell (Frank A.), J. Submitted January 14, 1938. (Docket No. 95, Calendar No. 39,772.) Decided February 24, 1938.

Petition for declaratory judgment by City of Menominee, a municipal corporation, against County of Menominee, Board of Supervisors and others to

determine the power of the Board of Supervisors to appropriate certain highway moneys, for the construction of statutes and other relief. Judgment for plaintiff. Defendants appeal. Reversed and remanded for entry of judgment in accordance herewith.

Kenneth O. Doyle, for plaintiff.

F. Earl Lanthier and *George Barstow,* for defendants.

Miller, Canfield, Paddock & Stone (*Louis H. Fead,* of counsel), *C. W. Coates, John Walsh, H. Reade Smith* and *Lynn B. Mason, amici curiæ.*

NORTH, J. At a meeting of the board of supervisors of Menominee county in August, 1937, it adopted a resolution which in part reads:

"Resolved, in view * * * of the need of the McNitt road(s) of additional funds; that of one-half of the moneys heretofore paid and hereafter to be paid by the State of Michigan to the county of Menominee under the so-called * * * (weight tax act [Act No. 7, Pub. Acts 1934 (1st Ex. Sess.)]) and the gas tax act (Act No. 8, Pub. Acts 1934 [1st Ex. Sess.]) for the year 1937, there be apportioned (after deducting from said half the township road bonds payable therefrom during the year 1937) 50 per cent. thereof for the maintenance of roads heretofore selected, determined upon and taken over into the county road system under the McNitt-Holbeck-Smith act, all in accordance with the power and authority granted to the board of supervisors by the said * * * (weight tax act) and gas tax act."

The city of Menominee filed in the circuit court of Menominee county a petition for a declaratory judgment as to the power of the board of supervisors of Menominee county to appropriate to the county's

use, in the manner provided in the quoted resolution, money received from the State for highway purposes. The county and its proper officials were made defendants. They answered, admitting the facts as alleged in plaintiff's petition, and made a motion to dismiss on the ground that petitioner was wrong in its conclusion and contention that the board of supervisors did not have the power to make the appropriation. The circuit judge entered a declaratory judgment sustaining plaintiff's contention as to the law, and defendants have appealed.

The controversy is one of statutory construction. It involves Act No. 7, § 34, subd. (4), Pub. Acts 1934 (1st Ex. Sess.), so-called weight tax act (Comp. Laws Supp. 1935, § 4651), and Act No. 8, § 19, subd. (d[4]), Pub. Acts 1934 (1st Ex. Sess.), so-called gasoline tax act (Comp. Laws Supp. 1935, § 3594). Except for the catchline which prefaces Act No. 7, § 34, subd. (4), the two portions of the statutes noted above are identical. We quote from Act No. 7:

"(4) Maintenance of township highways taken over by counties. Not to exceed fifty per cent. of any funds remaining after the application of moneys for the foregoing purposes may be used for the maintenance of *additional mileage of township roads* in any county selected and determined upon in accordance with the provisions of act number one hundred thirty of the public acts of nineteen hundred thirty-one, known as the McNitt-Holbeck-Smith act, if and when so ordered by a three-fifths vote of the board of supervisors of such county."

Because of the identity of the two statutory provisions we refer herein only to the one quoted, unless otherwise indicated. The controversy in the instant case centers upon the meaning or construction to be given to the italicized words in the above quoted

subdivision (4). Plaintiff asserts, for reasons hereinafter noted, that under the proper construction of subdivision (4) the board of supervisors is without power to appropriate for highway use by the county road commissioners any portion of the highway fund to which this subdivision is applicable; but that instead all of such moneys should pass to the incorporated cities and villages of Menominee county and to the county itself under the provisions of subdivision (5) of the act. If plaintiff is right in its contention it would receive a larger amount of funds to be used for its street and highway purposes than it would in event the county's contention is sustained. And, of course, the county would receive a correspondingly smaller amount.

It is essential to a proper conception of this controversy that consideration be given to the development and purpose not only of the acts involved but of other legislative acts related thereto. Act No. 7, Pub. Acts 1934 (1st Ex. Sess.) (amendatory of Act No. 302, Pub. Acts 1915) is a part of our motor vehicle law which, among other things, provides for levying specific taxes upon motor vehicles and for the "disposition" of resulting funds. Section 7 of the act (Comp. Laws Supp. 1935, § 4638) provides for what is commonly known as the weight tax. Section 34 of this amendatory act (Comp. Laws Supp. 1935, § 4651) specifies the disposition to be made of the fund which results from this tax. It provides one-half of it is to be "returned to the county treasurers" by the secretary of State, "to be used for highway purposes under the jurisdiction of the county road commissioners subject to the approval of the county board of supervisors." It also provides the other half of the fund resulting from the weight tax is to be returned by the secretary of State

to the various county treasurers "in the same manner and proportion as the 50 per cent. first allocated in this section." But as to the second half of the weight tax fund the legislature in this section 34 of Act No. 7 has made specific provision as to the manner in which the same should be used or expended. In so providing the legislature specified five purposes and their order of priority, as follows: (1) Relief of assessments under Covert act (1 Comp. Laws 1929, § 4314 *et seq.*); (2) reduction of taxes on county at large for road and bridge bonds; (3) reduction of taxes for general highway township bonds; (4) maintenance of township highways taken over by counties; and (5) apportionment of balance of the weight tax between incorporated cities and villages of each county and the county, with specified purposes and priorities. The most casual reading of the pertinent portion of Act No. 7 convincingly discloses that the legislature definitely intended to specify the particular purposes with designated priorities for which one-half of the weight tax fund might be used in the respective counties, except as in a limited measure the power of appropriation was delegated to boards of supervisors. In the instant suit we are not concerned with the first three purposes designated by the legislature. Instead, as above noted, this controversy centers on what is the proper construction of subdivision (4) already quoted.

Section 34, subdivision (4) of Act No. 7 authorizes the board of supervisors by a three-fifths vote to use not to exceed 50 per cent. of the funds to which this section is applicable "for the maintenance of additional mileage of township roads in any county selected and determined upon in accordance with the provisions of Act No. 130, Pub. Acts 1931, known as

the McNitt-Holbeck-Smith act (Comp. Laws Supp. 1935, § 4018–1 *et seq.*)." This 1931 act marks the beginning of the complete transition of township roads from township control to county control as a part of our county road systems. (See title to act.) To accomplish this a definite, detailed and orderly method was adopted by the legislature and embodied in the statutory law of the State by this so-called McNitt-Holbeck-Smith act. Roughly the act may be outlined in part as providing for ascertaining the total mileage of township highways exclusive of streets and alleys in recorded plats as of January 1, 1931; and that on or before April 1, 1932, each county (acting through its road commission) shall "take over and incorporate into the county road system, twenty per cent. of the total township highway mileage * * * (and yearly thereafter shall) take over and incorporate into their county road system, an additional twenty per cent. of such township highway mileage until the entire township highway mileage * * * has been taken over and made a part of the county highway systems. * * * In the year next following the taking over of all such highways, all dedicated streets and alleys in recorded plats and outside of incorporated cities and villages shall be taken over and become county roads." Act No. 130, § 2, Pub. Acts 1931.

It is a matter of common knowledge that, as a result of the above statutory provisions, annually during the transition period the maintenance of thousands of miles of what had theretofore been township highways was transferred from the townships to the respective counties. The resulting financial burden assumed by the counties is obvious. To care for this situation section 5 of the McNitt-Holbeck-Smith act provided:

"The several counties of the State shall receive from the State highway department funds the following amounts in the proportion and according to the methods of distribution set forth in section six hereof: Two million dollars for the calendar year ending December thirty-one, nineteen hundred thirty-two; two million five hundred thousand dollars for the calendar year ending December thirty-one, nineteen hundred thirty-three; three million dollars for the calendar year ending December thirty-one, nineteen hundred thirty-four; three million five hundred thousand dollars for the calendar year ending December thirty-one, nineteen hundred thirty-five; four million dollars for the calendar year ending December thirty-one, nineteen hundred thirty-six; and four million dollars for each calendar year thereafter."

As bearing upon the issue in the instant case, it is worthy of note that as a part of the transition plan the legislature in the McNitt-Holbeck-Smith act provided for an annual increase of funds payable to the counties as the mileage of township roads taken over and added to the county road systems annually increased.

Act No. 7, § 34, subd. (4), hereinbefore quoted, and the corresponding provision in Act No. 8 are taken almost literally from Act No. 41, § 19-a, subd. (4), Pub. Acts 1932 (1st Ex. Sess.). In this last cited subdivision (4) of section 19-a there appears for the first time in this phase of our statutory law the expression the construction of which gives rise to the instant suit, that is the expression "for the maintenance of additional mileage of township roads in any county selected and determined upon in accordance with the provisions of" the McNitt-Holbeck-Smith act. Act No. 41 was given immediate effect on May 17, 1932. It is interesting and quite persuasive to note that this legislative action was taken almost

immediately after the counties under the McNitt-Holbeck-Smith act had taken over the first 20 per cent. of the township highway mileage on April 1, 1932. When the legislature passed and gave immediate effect to this Act No. 41 it obviously was mindful that the counties had but recently taken over 20 per cent. of the burden of maintaining township highways and annually thereafter an additional 20 per cent. would be taken over until the county systems had finally taken over the total burden of maintaining the township highway mileage. It is also apparent from section 8 of the McNitt-Holbeck-Smith act the legislature foresaw that the specific appropriations therein made would be inadequate to meet the total of highway needs; and so in the McNitt-Holbeck-Smith act it continued to provide that the townships might levy a property tax for township highway purposes. But by section 11 of the act it was provided that the township's power to levy such tax should be reduced during each year of the first three years of the transition period until (except for the purpose of meeting highway obligations) it was reduced to three mills on each dollar's taxation valuation. Surely it is a reasonable conclusion that in Act No. 41, Pub. Acts 1932 (1st Ex. Sess.), the legislature sought to provide additional funds for the use of the highway agencies which were to become responsible for the maintenance of what up to that time had been township highway mileage. The counties (under the McNitt-Holbeck-Smith act) had been designated as such agencies.

The acts under consideration are outgrowths or developments of the 1932 act; and it is difficult to resist the conclusion that when the legislature in these acts provided a county, by a three-fifths vote of the board of supervisors, might use a limited por-

tion of the available highway funds "for the maintenance of additional mileage of township roads in any county selected and determined upon in accordance with" the McNitt-Holbeck-Smith act, it was not pursuing its general policy of providing the various highway agencies (*i. e.,* the counties acting through their road commissioners) additional funds with which to meet the additional burden.

The construction of the statute for which appellee contends is that since the transition of township roads to the various county road systems has been fully completed (*i. e.,* all township roads have been taken over) there is no longer "additional mileage of township roads" to be "selected" and taken over by the counties, and therefore the boards of supervisors no longer have the power to appropriate any portion of the highway funds available under Act No. 7, § 34, subd. (4), Pub. Acts 1934 (1st Ex. Sess.), and the corresponding provision in Act No. 8, Pub. Acts 1934 (1st Ex. Sess.), for use by their county road commissioners. Appellee's contention is stated in its brief as follows:

"Plaintiff asserts that the legislature intended that such money (after proper application to priorities not affected by the instant case) shall not be used for the maintenance of such *former* township mileage, but that they shall be used only for the maintenance of township mileage selected and designated in any one year *additional* to the 20 per cent. of township mileage which it was mandatory (under the McNitt-Holbeck-Smith act) for the county road commission to take over annually and if the commission did not *take over more* than such 20 per cent. annually, the board of supervisors had no authority to apportion any of the remaining funds otherwise than between the county and the incorporated cities and villages within the county pursuant to subdivi-

sion (5) of both acts, and that at all events when the calendar year 1936 ended, the authority of the board of supervisors to apportion any of such moneys for the maintenance of township roads or for 'additional mileage' of township roads ceased."

We cannot accept the quoted contention based upon the assumption that the legislature in passing the McNitt-Holbeck-Smith act contemplated that more than 20 per cent. of the township highway mileage might be taken over in a given year. Instead the act specifies that beginning in 1932 the counties annually shall take over 20 per cent. of the township highway mileage, neither more nor less, although it may be assumed that slight deviation from the exact amount would be considered substantial compliance. Be that as it may, there is no obvious reason for any substantial deviation from the exact provisions of the statute, and hence there is no apparent reason for assuming that the legislature went out of its way to provide a separate fund for which there could be no use except in the event of violation of the statute by the highway authorities.

Further appellee's contention just above quoted that "when the calendar year 1936 ended, the authority of the board of supervisors * * * ceased" is, we think, wholly derogatory of the purpose of the legislation. Appellee's contention would lead to this result. Immediately upon the total burden of maintenance of township roads being transferred to the county, its power under subdivision (4) to appropriate to any highway agency any portion of the highway funds to be used in the maintenance of these roads ceased, *i. e.*, the statutory provision became inoperative in 1936. The provision, so construed, to say the least is somewhat incongruous. Further, the

fact that the legislature re-embodied these provisions in acts passed by it in 1937 (see Acts No. 320 and No. 340, Pub. Acts 1937) militates much against appellee's contention that the authority of the board of supervisors to act under subdivision (4) ended in 1936.

Nor can we accede to appellee's alternative contention that the right of the board of supervisors to appropriate highway funds under Act No. 7, § 34, subd. (4), Pub. Acts 1934 (1st Ex. Sess.), and the corresponding provision of Act No. 8 was intended by the legislature to apply only to township highway mileage which the county road commission had "selected and designated" to be taken into the county road system, but which had *not yet been taken over by the county.* Appellee, assuming such to be the proper construction, concludes:

"Such mileage was not entitled to maintenance from McNitt-Holbeck-Smith money until taken over. Yet it was contiguous to the county road system. It ought to be maintained in reasonable condition for county roads before it could be taken over. Hence the legislature authorized the board of supervisors to maintain it as 'additional mileage selected and determined upon' in accordance with the McNitt-Holbeck-Smith act."

We do not find in the statute any justification for appellee's deduction.

In the companion case of *City of Iron Mountain* v. *Dickinson County Road Commissioners, post,* 213, an *amicus curiæ* brief, which is also considered in this case, has been filed in support of appellee's contention. This *amicus curiæ* brief asserts as a proper construction of the controverted statutory expres-

sion a construction which differs somewhat from any of those hereinbefore noted. We quote:

"It is our contention that the words 'additional mileage of township roads' in subdivision 4 of Acts No. 7 and No. 8 of the (first) extra session of 1934 means the remaining mileage other than the 20 per cent. of the township highways taken over annually by the county road commissions."

Not only is this suggested construction not justified by the context of the respective acts, but we think it is in direct conflict with the acts. In order that this interpretation of the *amicus curiæ* might be accepted as correct the statutory provisions would have to be changed by including the word below inclosed in parentheses and by so doing the pertinent parts of Acts No. 7 and No. 8 would be changed to read:

"For the maintenance of additional mileage of township roads in any county (*not*) selected and determined upon."

Such a distortion of legislative language is not consonant with any sound rule of statutory construction.

The sense in which the legislature used the controverted expression "additional mileage of township roads" must be determined in the light of known facts concerning the development of highways in this State as accentuated, if not necessitated, by the public's use of the motor vehicle. Not so many years ago all rural highways were township roads. They were laid out, constructed and maintained by the townships. The extent and character of roads was almost wholly a matter of local concern. Responsibility was therefore lodged in the townships. But with the advent of the motor vehicle the question of

highways ceased to be one principally of local concern. Highway construction and maintenance became one of general public importance; and then, naturally if not necessarily, rapidly followed a transition of the responsibility for highways to the larger governmental units—to the counties and to the State at large. Today we have no township roads.

In part the method of transition was charted by the McNitt-Holbeck-Smith act. By a fixed plan extending over a period of years this act provided for complete termination of township highway control. Gradually and systematically the township road mileage was diminished. The mileage taken from the townships was embodied in the county road systems as "additional mileage of township roads." This we think clearly fixed the meaning of the qualifying word "additional" as used in the statutory expression "additional mileage of township roads."

It is fair and reasonable to assume that some proper purpose prompted the legislature in continuing to designate the township highways as such even after they were taken over into the county road systems. County road systems already existed (1 Comp. Laws 1929, § 3976 *et seq.*). They comprised the more generally traveled highways of the counties. The legislature evidently saw sufficient reason for keeping in a class by themselves the "additional mileage of township roads" when these lesser used roads were transferred from the townships to the county systems. By so doing the legislature could and did require the counties (notwithstanding its own system of county roads) to expend certain highway funds (if used at all by the county under subdivision [4]) in the maintenance of "additional mileage of township roads" which had become a part of the county systems. This (or possibly some more perti-

nent reason), we think, fairly accounts for the use of the quoted expression, and tends to sustain appellants' contention. It also seems to answer fairly well the following portion of appellee's argument:

"From an examination of (Act No. 7, § 34, subd. 5 (e-2), Pub. Acts 1934 (1st Ex. Sess.), which provides for the maintenance of additional mileage of township roads selected and determined upon in accordance with the McNitt-Holbeck-Smith act and for the widening, improvement and construction of county roads, it is inconceivable that the legislature would have used such phraseology when it was only necessary to insert the word 'maintenance' before the word 'widening' if it intended the funds for maintenance of county roads.

"When the township roads were entirely taken over under the McNitt-Holbeck-Smith act they became for all purposes county roads and there could be no purpose in making such distinction between such township roads (taken over under the McNitt-Holbeck-Smith act) and county roads as the legislature made in subsection (5)."

We are in accord with the following quoted from the *amicus curiæ* brief filed in support of appellants' position:

"The (controverted) provisions (of Acts No. 7 and No. 8) present no difficulty if read fairly. They were intended to give the board of supervisors a voice in ear-marking the funds for each of the three purposes set out; and particularly to conform to the general trend of the legislation to impose upon the board of supervisors the responsibility and to give it the power to do what was necessary to maintain the converted township mileage."

And it may be noted that the amendments to Acts No. 7 and No. 8 embodied in Acts No. 320 and No. 340, Pub. Acts 1937, broaden the power of boards of

supervisors by extending to them the right to appropriate highway funds under section 34, subdivision (4) of Act No. 320 and the corresponding provision in Act No. 340 so that it now includes the additional power to appropriate "for the maintenance of city and village streets."

We are advised by appellee's brief that a substantial majority of the counties have construed the controverted statutory provisions in accordance with its contention; and we understand that opinions issued from the attorney general's office have agreed such is the correct construction. While we have given these circumstances due consideration, we have not been able to find that such construction accords with either the context or the purpose of the legislative act.

Our consideration of the detailed and somewhat involved pertinent provisions of the related statutes, as well as the particular statutory provisions directly involved in this suit, brings this conclusion. When the legislature by the McNitt-Holbeck-Smith act adopted the plan for all township highway mileage being transferred to and made a part of the respective county road systems, it (for some reason or reasons that it deemed sufficient) also provided for a separate classification of this township mileage as a distinct "integral part of the county highway system." (See section 4 of McNitt-Holbeck-Smith act.) These township roads so taken over have come to be designated as the "McNitt roads." Continuing to designate and consider this "additional mileage of township roads" as a classification within the county system of which it has become a part, enabled the legislature to make specific provisions for such township roads which it otherwise could not have made. And it is only by so construing the statutory provi-

sions out of which this suit arises that various inconsistencies and absurd consequences can be avoided. Such a construction is necessitated by the context and purpose of these statutes. It sustains appellants' contention.

The Menominee county board of supervisors in passing the quoted resolution acted within its statutory powers. Judgment to the contrary in the circuit court is reversed. The case is remanded for the purpose of entering a declaratory judgment in accordance herewith. The question being one of public concern, no costs are awarded.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and MCALLISTER, JJ., concurred.

NAGY *v.* CONTINENTAL DIE CASTING CORP.

WORKMEN'S COMPENSATION—HERNIA—ACCIDENT—EVIDENCE.

Employee engaged in tipping second barrel of scrap on contents of first barrelful which had been dumped on floor and who claims to have suffered a sharp pain that was followed by a right indirect inguinal hernia *held*, not entitled to compensation where evidence shows he had been engaged for some time in lifting boxes weighing about 60 pounds, no claim is made of slipping or of any unusual circumstances except weight of the barrel and that he continued working over two months thereafter.

Appeal from the Department of Labor and Industry. Submitted January 4, 1938. (Docket No. 11, Calendar No. 39,645.) Decided February 24, 1938.

Julius Nagy presented his claim against Continental Die Casting Corporation, employer, and Zurich General Accident & Liability Insurance Company, insurer, for compensation for injuries suffered in defendant's employ. Award to plaintiff. Defendants appeal. Award vacated.

Marcus & Marcus, for plaintiff.

Kerr, Lacey & Scroggie, for defendants.

WIEST, C. J. Plaintiff was a common laborer in the employ of the Continental Die Casting Corporation and claims that, on the 28th day of February, 1936, while engaged, with a fellow worker, in emptying an iron barrel of zinc scrap metal, he suffered a "right indirect inguinal hernia." A previous barrel of scrap had been emptied upon the floor and it was while emptying the second barrel upon the pile from the first that he claims he felt a sharp pain and the hernia followed. He kept at work thereafter until discharged in May, 1936, and at times was engaged in lifting boxes weighing about 60 pounds. The barrel was tipped over with the top resting upon the pile of scrap from the previous barrel and then the bottom tilted up to spill the contents. This had been a part of his work for some time but, he claims, that the barrel was heavier than usual.

No claim is made of slipping or of any unusual circumstances except the weight of this barrel.

The department, after criticizing our holdings, stated:

"The commission of labor and industry is justified in grasping at a straw to make industry absorb, as a cost of production, its human wreckage or rather the rehabilitation and compensation of same, and in so doing it is merely following a clearly defined public demand, based upon a re-awakened public conscience, as evidenced in the unemployment insurance act already enacted and the occupational disease act and other social legislation under consideration by the legislature, including, incidentally, compensation for hernia even though unaccidental."

Of course, we shall limit consideration, as the department should have done, to applicable law.

The opinion of the department is only helpful in vacating the award.

Our previous holdings on the issue here presented clearly dispose of the case, and we cannot help observing that the department departed therefrom with the fillip that they were "justified in grasping at a straw."

There was no accidental injury.

The instant case is ruled by *Perkins* v. *Jackson Cushion Spring Co.*, 206 Mich. 98; *Sinkiewicz* v. *Lee & Cady*, 254 Mich. 218; *Marlowe* v. *Huron Mountain Club*, 271 Mich. 107; *Williams* v. *National Cash Register Co.*, 272 Mich. 553; *Allen* v. *Wolverine Express, Inc.*, 279 Mich. 621; *Waites* v. *Briggs Manfg. Co.*, 280 Mich. 185.

The award is vacated, with costs to defendants.

BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

AUTEN *v.* UNION CENTRAL LIFE INS. CO.

MORTGAGES—MORATORIUM RELIEF—EQUITY—INCREASE OF MONTHLY PAYMENT.

Extension of moratorium relief on condition that mortgagors pay a monthly amount in rent equal to about one-half the accumulation of interest aside from insurance and unpaid taxes *held*, so insufficient as to require payment of double such amount monthly in order to permit continuance of moratorium.

Appeal from Washtenaw; Sample (George W.), J. Submitted January 5, 1938. (Docket No. 40, Calendar No. 39,800.) Decided February 24, 1938.

Bill by Clayton M. Auten and wife against Union Central Life Insurance Company, an Ohio corporation, for moratorium relief from foreclosure of a mortgage. Order for plaintiffs. Defendant appeals. Modified.

John P. Kirk, for plaintiffs.

Wood & Williams, for defendant.

WIEST, C. J. October 1, 1929, plaintiffs mortgaged their 140-acre farm in Washtenaw county to defendant. In May, 1935, the mortgage was foreclosed by advertisement and, at the sale, defendant purchased the property for $10,532.71, that being the amount then due. In May, 1936, just before expiration of the period of redemption, plaintiffs applied for and were granted a moratorium, or extension of the period

within which to redeem, until March 1, 1937, upon condition that they pay defendant $29.18 per month, and make repairs to the amount of $50.

The legislature, by Act No. 1, Pub. Acts 1937, effective February 18, 1937, permitted extension of moratorium relief until November 1, 1938.

February 25, 1937, plaintiff filed the bill herein to obtain a moratorium until November 1, 1938, and such relief was granted on condition that they pay monthly, to the clerk of the court, the sum of $29.16, to be used to pay necessary insurance premiums, unpaid taxes and any balance thereof on the principal and interest.

Upon appeal defendant mortgagee claims that the terms mentioned are wholly inadequate and unreasonable.

The mortgage carried six per cent. interest. The assessed value of the farm was considerably less than the amount bid by defendant at the foreclosure sale. The real value of the farm at the time of the moratorium order was problematical. The highest possible value it might have in the future was stated by witnesses for plaintiff that, if times improved, it might bring $14,000, or $100 per acre, if terms were made of 25 per cent. of the purchase price down, and 10 years' time given for the balance.

Plaintiffs' application to the Federal Land Bank for a loan was unsuccessful.

The rental value of the farm was set by witnesses at $2.50 per acre, and that was the amount fixed by the court to be paid by plaintiffs in monthly instalments. That amount represented about one-half of the annual accumulation of interest on the mortgage obligation, exclusive of insurance and unpaid taxes.

It is quite evident that the mortgage as it now stands equals the present value of the farm and, un-

less there comes a decided increase in farm values between now and November 1, 1938, the moratorium granted will mulct defendant.

No showing was made of present value above the mortgage debt due or any possibility of redemption, except by a sale at a price not now obtainable and in the future wholly uncertain.

Under the terms of the granted moratorium the debt is increasing and there is no equity in requiring defendant to let the debt mount, to its loss, without assurance that the security will also increase in market value.

Under the circumstances we think the circuit judge failed to apply controlling principles of equity and, this being a chancery case, the order in the circuit court is vacated and an order will be entered in this court, at the election of plaintiffs, if filed in writing with the clerk of this court within 10 days after the filing of this opinion, extending the period of redemption to November 1, 1938, upon condition that plaintiffs pay to defendant, or to the clerk of the Washtenaw circuit court for defendant, the sum of $58.33, each month in advance, commencing March 1, 1938. If no such election is filed then the order appealed from is vacated.

In either event, defendant will recover costs.

BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

WELLS *v.* OLIVER.

1. APPEAL AND ERROR—DIRECTED VERDICT.

On appeal from judgment on directed verdict for defendant at close of plaintiffs' proofs, plaintiffs' evidence is accorded the most favorable consideration.

2. AUTOMOBILES—CONTRIBUTORY NEGLIGENCE AS MATTER OF LAW—INTERSECTIONS—SECOND LOOK.

Motorist whose view at midnight at intersection was limited to 200 feet to right when he was 30 feet from intersection curb *held*, guilty of negligence as a matter of law where he failed to take another look before proceeding to center of intersection beyond which his car was struck by defendant's car.

3. NEGLIGENCE—SUBSEQUENT NEGLIGENCE—LAST CLEAR CHANCE.

Doctrines of subsequent negligence or last clear chance of defendant in actions for negligent injuries require confession of negligence on part of plaintiffs and discovery thereof by a defendant in time and with ability to avoid injury and failure to do so.

4. AUTOMOBILES—SUBSEQUENT NEGLIGENCE—LAST CLEAR CHANCE—EVIDENCE.

In actions for injuries sustained in collision of automobiles at an intersection of city streets at midnight, the doctrines of subsequent negligence or last clear chance *held*, inapplicable under showing that plaintiffs' driver, who looked and had vision of 200 feet to right when 30 feet from intersection curb, entered intersection at 17 miles per hour and failed to look to right again until at middle of intersection when he saw defendant's car approaching at a high rate of speed and which skidded 41 feet before the collision.

Appeal from Saginaw; O'Neill (James E.), J. Submitted January 11, 1938. (Docket Nos. 102, 103,

Calendar Nos. 39,849, 39,850.) Decided February 24, 1938.

Separate actions of case by Bruce Wells and Louise Wells against George M. Oliver, Jr., for damages for personal injuries sustained in an automobile collision at an intersection. Cases consolidated for trial and appeal. Directed verdicts for defendant. Plaintiffs appeal. Affirmed.

O'Keefe & O'Keefe and *Nash & Nash,* for plaintiffs.

Picard & Heilman, for defendant.

WIEST, C. J. At the midnight hour of a July night in 1935, in the city of Saginaw, plaintiff Bruce Wells, accompanied by his wife, Louise Wells, while driving his automobile east on Johnson street, across the intersection of Second avenue, was, together with Mrs. Wells, injured when his car was struck by the automobile of defendant which approached from the south on Second avenue. The above suits were brought to recover damages for personal injuries and, for the purposes of trial, consolidated. The court, at the close of plaintiffs' proofs, directed verdicts for defendant on the ground of the contributory negligence of Mr. Wells as a matter of law and, under the rule of imputed negligence, that barred the action of Mrs. Wells.

Upon review plaintiffs contend that the issue of contributory negligence was for the jury.

Johnson street runs east and west, and Second avenue north and south. As Mr. Wells approached the intersection from the west on Johnson street he slowed his car, when about 30 feet from the intersection curb, and looked to the right, or south on Second

avenue, and testified that he saw no car approaching within the distance of 200 feet, that being the limit of his vision from that point and, after looking to the left, entered the intersection at a speed of about 17 miles per hour and, when at the middle of the intersection, looked again to his right and saw defendant's car approaching within 80 feet, at a high rate of speed, and it struck his car.

Upon this review we accord plaintiffs' evidence the most favorable consideration. If, as plaintiffs claim, their view to the right, from the point before entering the intersection, was restricted then Mr. Wells was guilty of negligence in not taking another look to his right when the view was enlarged and before proceeding to the center of the intersection. He was bound to observe and pay heed, while crossing, to traffic approaching the intersection from his right, and the fact that defendant's car was traveling at a high rate of speed and skidded about 41 feet before the collision had no bearing upon plaintiffs' failure to look to the right while crossing the intersection. When plaintiffs' car was at the point of entering the intersection the view on Second avenue was open so that, had a look been then taken, defendant's car could have been seen and the collision avoided, as Mr. Wells testified that he could have stopped his car within three or four feet.

The court was not in error in holding Mr. Wells guilty of contributory negligence.

The rule of law applicable to the case has been stated in *Halzle* v. *Hargreaves,* 233 Mich. 234; *Richardson* v. *Williams,* 249 Mich. 350; *Kerr* v. *Hayes,* 250 Mich. 19; *McKelvey* v. *Hill,* 259 Mich. 16; *Brodie* v. *City of Detroit,* 275 Mich. 626; *Young* v. *Martinich,* 279 Mich. 267; *DeCoopman* v. *Hammond,* 279 Mich. 619.

Peculiar and distracting circumstances set forth in *Scurlock* v. *Peglow,* 263 Mich. 658, distinguish that case.

Counsel for plaintiffs also contend that, regardless of plaintiffs' negligence, they had a right to go to the jury under the doctrine of subsequent negligence of defendant or last clear chance.

That doctrine requires confession of negligence on the part of a plaintiff and discovery thereof by a defendant in time and with ability to avoid injury and failure to do so. Plaintiffs have not, by their testimony, disclosed any such case.

The judgments are affirmed, with costs to defendant.

BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

PEOPLE *v.* ROCK.

1. RAPE—QUESTION FOR JURY—EVIDENCE.

In prosecution for rape where testimony of woman was of rape accomplished, trial court was not in error in leaving issue thereon to jury.

2. SAME—ASSAULT WITH INTENT TO COMMIT CRIME OF RAPE—CONVICTION OF LESSER CRIME ACQUITS DEFENDANT OF CHARGE OF GREATER CRIME.

In prosecution for rape, verdict of jury finding defendant guilty of assault with intent to commit the crime of rape acquitted him of rape.

3. SAME—EVIDENCE—ORIGINAL COMPLAINT BY WOMAN.

Testimony of original complaint of woman involved in prosecution for rape, made after she had escaped from automobile in which crime was alleged to have been committed and had gone into the woods to the house of an acquaintance *held*, admissible.

4. SAME—REPETITION OF COMPLAINT ON MORNING AFTER INADMISSIBLE.

Admission, over objection of defendant in prosecution for rape, of repetition by adult woman of her complaint of attack on morning after night of its alleged occurrence *held*, reversible error since there was time intervening sufficient to make it a studied utterance and cumulative.

5. CRIMINAL LAW—NEW TRIAL—ASSAULT WITH INTENT TO COMMIT CRIME OF RAPE.

Upon reversal of conviction of assault with intent to commit the crime of rape for error committed in admission of testimony, new trial is granted but is restricted to charge of assault with intent to commit the crime of rape.

Appeal from Delta; Bell (Frank A.), J. Submitted January 13, 1938. (Docket No. 111, Calendar No. 39,640.) Decided February 24, 1938.

Gordon Rock was convicted of assault with intent to commit the crime of rape. Reversed with new trial.

George W. Carr, for appellant.

Raymond W. Starr, Attorney General, *Edmund E. Shepherd*, Assistant Attorney General, and *William J. Miller*, Prosecuting Attorney, for the people.

WIEST, C. J. Gordon Rock, 22 years of age, was charged with the crime of rape upon Gerville Raiche, 21 years of age. At the first trial the jury disagreed. At the second trial the jury returned a verdict of guilty of assault, with intent to commit the crime of rape, and sentence followed.

Upon review by defendant it is claimed that, under the evidence, the charge of rape, consummated, should not have been submitted to the jury.

The testimony of the woman was of rape accomplished, and the court was not in error in leaving the issue thereon to the jury. The verdict acquitted defendant of the crime of rape and that left the included charges of major and minor assaults.

The offense was alleged to have been committed the night of May 12, 1936, on the front seat of a Chevrolet four-door sedan, while parked at the side of the roadbed of a highway in Delta county. The automobile had carried three persons to that point; prosecutrix, defendant, and a young man named Palmer, but prosecutrix claims that Palmer left before the assault was made.

Mr. Palmer was a witness, called by the people, and he testified that he was present all the time and no assault occurred.

The jury evidently discounted the claim of rape under the awkward surroundings and the resistance of the female, but found the attempt, with intent to commit the crime.

After the alleged rape the woman ran into the woods at the side of the road and went to the house of an acquaintance, where she appeared with her hair all mussed, her face swollen, her neck scratched, with red marks on it, her coat and dress torn and with a scratch on one limb above the knee. She

wanted to tell what had happened, but was told to wait until morning, and was put to bed. She did say, however, that "she went out with two boys and she thought they were all right," and that she had been attacked.

No objection was made to this testimony and, being the original complaint, it was admissible.

The next morning she was taken home and her mother testified that "She started to cry right away." She was asked by the prosecuting attorney:

"*Q.* Did she tell you what happened?"

The witness answered:

"She didn't tell me all right then."

Thereupon counsel for defendant objected.

The court ruled:

"You can answer whether or not she told, not what she told you."

The witness replied: "Yes, she started to tell us," and was asked "Did she give you the name of the person?" and answered, " Why sure," and then she was asked "Who was it?" and made answer, "Gordon."

Counsel for defendant contends that this testimony of repetition of the claim of attack was error.

We are constrained so to hold. The sense of outrage, immediately following such an assault, would be concomitant therewith and instinctively lead to complaint and, being so connected in cause, it would be removed from the danger of calculation, but evidence of repetition, with time intervening sufficient to be a studied utterance and cumulative, was wholly inadmissible. *People* v. *Corder,* 244 Mich. 274; *People* v. *Baker,* 251 Mich. 322.

Defendant denied making any assault and in this was supported by his male companion who claims he was present at all times on the trip, but whom the woman claims left just before the assault.

All parties had been drinking, and defendant's male companion testified that the woman was intoxicated, wanted to go back to a place where they had had liquor, "she kept on saying she wanted to go back and scratched and kicked around," and when the car was stopped she stepped outside and ran into the woods.

Other alleged errors are without merit.

For the error pointed out the conviction is reversed and a new trial granted on the charge of assault with intent to commit the crime of rape.

BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

CAMPBELL v. OSTERLAND.

1. AUTOMOBILES—THROUGH HIGHWAYS—RIGHT OF WAY—STOPPING.
   Right of way accorded driver on a through highway is more than mere privilege of going through an intersection in advance of a car which reaches it at the same time, as driver on through highway is entitled to assume that those approaching it from a stop street will obey the law and stop.

2. SAME—THROUGH HIGHWAYS—RIGHT OF WAY—DUE CARE.
   Motorist on through highway has right of way but must make such a lookout ahead and to the sides and down intersecting highways as a reasonably prudent person would do in order to avoid possible danger.

3. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Question of contributory negligence of motorist on through highway whose car was struck at an intersection *held*, for jury where evidence shows plaintiff was traveling 40 to 50 miles an hour on paved through highway and while 100 to 150 feet from intersection observed defendant had stopped at left of pavement and, without again looking in that direction, proceeded across the intersection where defendant's car struck plaintiff's.

4. JURY—VOIR DIRE — AUTOMOBILES — INSURANCE — AFFIDAVITS — WAIVER—PEREMPTORY CHALLENGES.

Refusal of trial judge to accord plaintiff's counsel in automobile accident case right to make examination of entire jury on *voir dire* to ascertain who, if any, were officers, employees or stockholders of the insurance company in which defendant was insured or members of any mutual insurance company *held*, error notwithstanding defendant's counsel had filed an affidavit prior to *voir dire* that five members of jury impanelled were at the time insured or had been previously insured in a mutual company in which defendant held a policy and plaintiff after such refusal did not waive right to claim error by not exhausting his peremptory challenges.

5. APPEAL AND ERROR—QUESTIONS REVIEWABLE—PLEADINGS—EVIDENCE—EMPLOYEE'S RIGHT TO SUE TORTFEASOR.

In action by employee who was injured in an automobile collision with defendant's car, where it is questionable whether issue as to whether he received compensation was properly raised by pleadings and no showing made that he did receive compensation, effect on employee's right to sue is not discussed (2 Comp. Laws 1929, § 8454).

Appeal from St. Clair; George (Fred W.), J. Submitted January 4, 1938. (Docket No. 12, Calendar No. 39,763.) Decided February 24, 1938.

Case by Robert Campbell against Otto Osterland for personal injuries sustained in an automobile collision at an intersection. Verdict and judgment for defendant. Plaintiff appeals. Reversed and new trial granted.

Echlin & Lendzion and *Don R. Carrigan,* for plaintiff.

Walsh, Walsh & O'Sullivan, for defendant.

BUTZEL, J. In an automobile collision on November 15, 1935, at the intersection of the Marine City highway, a paved road 16 feet in width, and a gravel road, 30 feet in width, known as the Indian Trail, in St. Clair county, plaintiff received serious injuries. He was approaching the intersection at a speed of from 40 to 50 miles per hour on the through highway. At a distance of from 100 to 150 feet from the intersection, he observed that defendant had stopped on the Indian Trail at the left side of the main highway. He then looked to the right and, without altering his speed, proceeded across the intersection, where he was struck by defendant who had driven on to the middle of the through road. Upon trial the jury found for defendant and plaintiff appeals. Defendant denies that there was any prejudicial error and contends that a verdict should have been directed in his favor because of contributory negligence on the part of plaintiff.

The law applicable to the situation, as stated in *Arnold v. Krug,* 279 Mich. 702, is that the right of way accorded to a driver upon a trunkline highway is something more than the privilege of going through an intersection in advance of a car which reaches it at the same time, and that the driver is entitled to assume that those approaching a through highway from an inferior street will obey the law and stop. We also stated that, on the other hand, the driver on the through highway must keep such a lookout ahead and to the sides and down intersecting highways as a reasonably prudent person would

do in order to avoid possible danger. He must act carefully under the existing conditions. The record of the trial in the instant case shows that there was an issue of fact for the jury.

The question of insurance was injected into the case, but by defendant and not plaintiff. Five members of the jury impanelled were at the time insured or had been previously insured in a mutual company in which defendant held a policy. An affidavit to that effect, executed by the file supervisor of the insurance company, was presented prior to the *voir dire* examination of the jury. Plaintiff, not satisfied with this *ex parte* showing, demanded the right to examine the entire jury on *voir dire* to ascertain who, if any, were officers, employees or stockholders of the insurance company or members of any mutual insurance company. Plaintiff was denied this right, although the five members named in the affidavit were excused by agreement of counsel.

In *Harker* v. *Bushouse,* 254 Mich. 187, and *Holloway* v. *Nassar,* 276 Mich. 212, we referred to the right to examine jurymen to ascertain their connection with insurance companies and discussed a proper manner in which prospective members of the jury might be interrogated on *voir dire* to ascertain their interest, if any, in the insurance companies which might be involved. In the instant case, plaintiff was not bound to accept defendant's statement as to which members of the panel were members of the insurance company. *Gammill* v. *Culverhouse,* 217 Ala. 65 (114 South. 800). It was an *ex parte* statement and a wholly inadequate substitute for the right to examine on *voir dire.* Plaintiff, thus denied necessary information, did not waive his right to claim error by not exhausting his peremptory challenges. The judge's refusal to accord plaintiff the right to make this examination of the jury was error.

A question that may arise on a new trial is whether plaintiff was not awarded compensation under the workmen's compensation law on account of the accident. Defendant contends that if plaintiff received compensation under the statute, he would be precluded from bringing the present action, and the claim should have been made by the employer under the compensation law, 2 Comp. Laws 1929, § 8454. As it is questionable whether the issue was properly raised by the pleadings, and there is no showing that plaintiff received compensation, we decline to discuss the question. Notice of such defense, if it exists, can be given by proper pleading before the new trial. Other errors complained of will not likely arise on a new trial.

The judgment for defendant is reversed, with costs to plaintiff, and a new trial granted.

WIEST, C. J., and BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

MELVINDALE STATE BANK *v.* ECKFELD.

1. APPEAL AND ERROR—CROSS-APPEAL—ASSUMPSIT—SET-OFF.

In action of assumpsit in which defendant claimed set-off, question of set-off is unimportant where trial judge, in holding in defendant's favor, denied judgment thereon in excess of amount claimed by plaintiff and defendant claims no cross-appeal.

2. BANKS AND BANKING—POWERS OF PRESIDENT—PRESUMPTIONS.
The president of a bank, as executive head, is presumed to have power to act for the bank in its ordinary contracts and agreements and his act pertaining to the general business will, in the absence of proof to the contrary, be presumed to have been properly authorized.

3. PLEDGES—DUTY OF PLEDGEE—NEGLIGENCE.
A pledgee has a duty to use at least ordinary care in the preservation of the security pledged and in the protection of the pledgor's interest therein.

4. BANKS AND BANKING—PLEDGES—SALE OF COLLATERAL UPON BORROWER'S DEMAND—NEGLIGENCE.
Failure of bank, as pledgee of stock, given it as collateral security for defendant's note, to sell such stock upon latter's request at a time when it would have more than satisfied his entire liability on note secured thereby and falsely representing such sale had been accomplished *held,* such negligence as to render bank liable for loss arising from depreciation in the value of the stock pledged.

5. BILLS AND NOTES—PURCHASER AFTER MATURITY.
Purchaser of note after maturity is in no better position than its assignor.

Appeal from Oakland; Gillespie (Glenn C.), J. Submitted January 19, 1938. (Docket No. 56, Calendar No. 37,362.) Decided February 24, 1938.

Assumpsit by Melvindale State Bank against Henry F. Eckfeld on a promissory note. Plea of setoff by defendant. Judgment for defendant. Plaintiff appeals. Affirmed.

R. S. Woodliff (*M. M. Larmonth,* of counsel), for plaintiff.

Pelton & McGee, for defendant.

BUTZEL, J. In 1930, defendant, who had been a branch manager of the American State Bank of De-

troit, in which he held 15 shares of stock, was asked by Robert Allan to take a position with and become a member of the board of directors of the Peoples State Trust & Savings Bank of Pontiac, Michigan. Allan was president of the American State Bank of Detroit and chairman of the board of the Peoples State Trust & Savings Bank. Defendant was also asked to purchase stock in the Pontiac bank and, in order to do so, he borrowed sufficient funds from the American State Bank and gave it as security his 15 shares properly indorsed. Mr. Allan was also president of the State Savings Bank of Melvindale, with whom he discounted defendant's note.

During the summer and fall of 1930, there was some discussion in reference to the sale of defendant's collateral, although, on November 5, 1930, defendant gave the American State Bank a renewal note for $875, payable within 90 days. He testified, however, that although he had had previous conversations with Mr. Allan in reference to selling his collateral so as to get out of debt, at the time of the renewal he demanded that the collateral be sold, and that Allan agreed to sell it at once. At that time the market value of the collateral was in excess of defendant's loan and not only did Mr. Allan tell him that he would sell the stock, but later assured him that the matter had been taken care of. The State Savings Bank of Melvindale in some manner was affiliated with the American State Bank, and defendant's note obviously was turned over to the Melvindale bank because the American State Bank could not make loans with its own stock as collateral. Both banks encountered difficulties, the American State Bank being taken over by another bank and the Melvindale bank being succeeded by plaintiff, which became the owner of the note. An interrelationship

between the two banks is indicated by the facts that they had the same person as president and that defendant's note was sent by the Melvindale State Savings Bank to the American State Bank for collection.

Suit was brought by plaintiff as assignee of defendant's note. Defendant in his answer set forth the entire transaction and also claimed set-off. The latter question becomes unimportant as the trial judge, although holding in defendant's favor, denied him judgment in excess of the amount of the note. Defendant claims no cross-appeal.

Plaintiff contends that the president's powers in a corporation are limited to those stated in the by-laws, which, in this particular instance, provided that the president was to be the presiding officer of the bank, sign all certificates of stock and execute and acknowledge all instruments, under seal or otherwise, which were necessary for the bank to execute. Plaintiff's contention does not conform with the modern view of the duties of a president of a bank. For a full discussion of the subject, see 4 Michie, Banks and Banking (Perm. Ed.), chap. 8, § 7, p. 90, *et seq.*, reference being made to *Wales* v. *Bank of Michigan,* Harr. Ch. (Mich.) 308. Under modern usage and customs the president of a bank, as executive head, is presumed to have the power to act for the bank in its ordinary contracts and agreements and any act of the president, pertaining to the general business, will, in the absence of proof to the contrary, be presumed to have been properly authorized. Many cases supporting this view are set forth in 1 A. L. R. 693, and 67 A. L. R. 970.

The other question raised is whether if a bank agrees to sell the collateral at a time when the price available is in excess of the loan and if the borrower is assured that it has been done, can the borrower later be held on his note in the event of the bank's

failure to carry out the agreement, the collateral having become valueless? There is a positive showing by uncontradicted testimony that the president did agree to sell the stock and that he assured defendant that the agreement had been carried out. Showing was also made that, although the disposition of the collateral had been discussed prior to the time of the last renewal of the note, defendant at that time insisted upon sale of the collateral, which, if sold, would have brought more than the amount of the loan plus interest to the date of maturity.

The claim of plaintiff that breach of the agreement to sell is not a bar to recovery on the note, because the agreement was without consideration, is beside the point. The liability of the pledgee may be founded on negligence as well as on breach of an express contract. A pledgee has a duty to use at least ordinary care in the preservation of the security pledged and in the protection of the pledgor's interest therein. *Frey* v. *Farmers & Mechanics Bank,* 273 Mich. 284; *W. F. Sheetz & Co.* v. *Commonwealth Commercial State Bank,* 282 Mich. 96; *First National Bank of Blakely* v. *Hattaway,* 172 Ga. 731 (158 S. E. 565, 77 A. L. R. 375); *C. H. Larkin Co.* v. *Dawson,* 37 Tex. Civ. App. 345 (83 S. W. 882); *Amick* v. *Empire Trust Co.,* 317 Mo. 157 (296 S. W. 798, 53 A. L. R. 1064); *Semple & Birge Manfg. Co.* v. *Detwiler,* 30 Kan. 386 (2 Pac. 511); *Johnson* v. *First Nat'l Bank of Shellman,* 53 Ga. App. 56 (184 S. E. 915). The failure of the pledgee to sell the stock upon request may not necessarily be a breach of his duty. *Allen* v. *Hook,* 198 Mich. 122 (L. R. A. 1918A, 441). However, the facts of this case are quite different from those relied upon in *Allen* v. *Hook, supra.* Not only did the pledgee agree to sell the stock, but he also informed the pledgor that the stock had been sold according to agreement. Such repre-

sentations would tend to lull the pledgor into a false sense of security and prevent him from taking other possible steps to protect his interest in the pledge. The failure of the bank to carry out its agreement cannot under these circumstances be considered an exercise of even ordinary care and such negligence will render the bank liable for the loss arising from the depreciation in the value of the stock pledged. *Johnson* v. *First National Bank of Shellman, supra.*

Plaintiff bought the note after maturity and, therefore, is in no better position than its assignor. Having breached its duty to defendant, the bank is liable for its default and cannot recover on the note. The trial court so found.

Judgment for defendant is affirmed, with costs.

WIEST, C. J., and BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

SPEAKER *v.* SPEAKER.

1. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—CONTRACT FOR CONTINUATION OF SON'S SERVICES—WIFE OF PLAINTIFF.

   In suit by plaintiff against his brother for portion of property given defendant by their father alleged to have been promised plaintiff by father when he was 21 if he would stay at home and help his parents, testimony of plaintiff's wife *held,* properly excluded as equally within knowledge of deceased father, where both real and personal property was sought to be recovered (3 Comp. Laws 1929, § 14219).

2. EQUITY—REHEARING—DISCRETION OF COURT—EVIDENCE.
Denial of motion for rehearing in son's suit for specific performance of alleged oral contract of father to convey real and personal estate if son would stay home and help his folks *held*, not an abuse of discretion where plaintiff's motion therefor stated he was seeking only one-half of personal property and no realty, where there was no renunciation of any interest in realty and testimony, other than that of plaintiff's wife, amounted to but an expression of testamentary intent (3 Comp. Laws 1929, § 14219).

3. APPEAL AND ERROR—SEPARATE RECORD—WITNESSES.
In suit by son for specific performance of alleged contract by deceased father to give plaintiff certain property in return for continuation of services, trial court's refusal to permit plaintiff to make a separate record of the testimony of his wife *held*, not error, since her testimony was inadmissible under statute as to testimony concerning matters equally within knowledge of deceased (3 Comp. Laws 1929, § 14219).

Appeal from Midland; Hart (Ray), J. Submitted January 11, 1938. (Docket No. 86, Calendar No. 39,815). Decided February 24, 1938.

Bill by William Speaker against John A. Speaker and others to enforce a parol contract for the conveyance of land and personalty, an injunction and other relief. Bill dismissed. Plaintiff appeals. Affirmed.

Riley L. Crane, for plaintiff.

James R. Rood, for defendants.

BUTZEL, J. William Speaker, plaintiff, and John A. Speaker, one of defendants, are the sons of Charles Speaker, now deceased. Plaintiff claims that when he was about 18 years of age, his father promised him that if he would remain on the old farm in Midland county, Michigan, until he was 21 years of age, the parents would give him a 40-acre farm in

the vicinity. Plaintiff claims that when he became of age his father failed to keep his promise, but told him that if he would remain at home and help his parents, he would receive the farm when he married and also half of the estate of his parents when they died. Plaintiff remained at home until he was 26 years of age, when he married. The father bought a 40-acre farm in January, 1914, but took title in his own name. Plaintiff and his wife, however, went into possession and finally in 1931, after considerable difficulty, obtained a deed on payment of $75. There had been considerable ill feeling between plaintiff and his father, fostered, according to plaintiff, by his brother John. It subsequently developed that the father, during his lifetime, turned over all his property, real and personal, to John.

In his bill, plaintiff asks that defendants be required to perform specifically the contract made between himself and his parents; to convey to plaintiff one-half of all property received from the parents, including one-half of an 80-acre farm, without the buildings; to pay plaintiff for the labor the latter performed for his parents; and to render a general accounting.

Plaintiff attempted to prove the alleged oral contract by the testimony of his wife, but the court excluded her testimony on the ground that she was an interested party and incompetent to testify as to matters equally within the knowledge of the deceased father. 3 Comp. Laws 1929, § 14219. The court relied on *Laird* v. *Laird,* 115 Mich. 352, wherein we held that such testimony by the wife of the claimant was not admissible because of the dower or homestead rights she would acquire if her husband were successful in his action to recover real property. Plaintiff claims that *Laird* v. *Laird, supra,*

applies only to a suit involving an interest in real estate and that the court should have applied the rule in *Dunn* v. *Dunn's Estate,* 127 Mich. 385, where testimony of claimant's wife was admitted because only personal property was sought. While the opinion in *Laird* v. *Laird, supra,* only intimates that personal property was also involved, the subsequent case of *Schulz* v. *Steffey,* 275 Mich. 409, not referred to by counsel, is definite in holding that a wife is barred from testifying at all as to matters equally within the knowledge of deceased when both real and personal property are sought to be recovered. On motion for a rehearing, plaintiff stated that he was seeking only one-half of the personal property and no realty. There was no renunciation of any interest in the real estate. The amended bill of complaint sought a one-half interest in both real and personal property. The judge did not abuse his discretion in denying the motion for a rehearing.

Without the wife's testimony, which was properly excluded, there was no showing of the alleged agreement. The testimony of other witnesses as to statements of the deceased were vague and indefinite and at most amounted to an expression of testamentary intent.

Error is claimed because of the trial judge's refusal to permit plaintiff to make a separate record of the testimony by plaintiff's wife. What she might have testified to would not be of any avail to plaintiff, as her testimony was barred by the statute.

Decree affirmed, with costs to defendants.

WIEST, C. J., and BUSHNELL, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred. SHARPE, J., did not sit.

SMITH *v.* NICKOLOFF.

1. COVENANTS—VIOLATIONS OF RESTRICTIONS—EQUITY.

Failure of property owners in the block to stop previous violations of restrictions in a subdivision does not prevent them from obtaining injunctive relief to prevent further violations where there has not been such a departure from the restrictions as to create an abandonment and equity will grant relief if the restriction can be shown of value to complainants.

2. SAME—SUBDIVISION RESTRICTIONS—ABANDONMENT—EQUITY.

Restrictions on lots of large and old subdivision that no dwelling worth less than $800 shall be erected or placed on them, which has been construed by residents to mean the property is to be used only for dwelling house purposes, may not be considered as waived or abandoned where there have been very few deviations and changes in neighborhood, due in part to use of nearby property outside of subdivision for other than residence purposes, do not leave restrictions without substantial benefit to plaintiffs.

3. SAME—INJUNCTION — RESIDENCE RESTRICTION—RESTAURANT—INTOXICATING LIQUOR—NUISANCE.

Plaintiffs, owners of lot adjacent to those owned by defendants, all in a subdivision subject to restriction of use to residence purposes only, *held*, entitled to injunction restraining defendants from moving onto their lots a building, not of sound-proof construction, in which restaurant had been operated on previous sites and liquor served therein and operation was accompanied with considerable disturbance, fighting and noise, both to enforce restriction shown to be of value to plaintiffs and to enjoin a nuisance.

Appeal from Oakland; Doty (Frank L.), J. Submitted January 12, 1938. (Docket No. 124, Calendar No. 39,637.) Decided February 24, 1938.

Bill by Sidney F. Smith and wife against Nick Nickoloff and wife to enjoin the operation of a restaurant and enforce restrictions on the use of land. Decree for plaintiffs. Defendants appeal. Affirmed.

Goodloe H. Rogers, for plaintiffs.

Charles S. Matthews, for defendants.

BUTZEL, J. Plaintiffs are the owners of lot 605 fronting on South Boulevard, Pontiac, Michigan, which abuts lots 606 and 607 on the northwest corner of South Boulevard and Going street. All of the lots are in a very large subdivision upon which the restrictions provide, as to the three lots and others, that no dwelling worth less than $800 shall be erected or placed on them. We deem it unnecessary to discuss defendants' contention that the deeds to lots 606 and 607 contain no restrictions against the sale of liquor, although the deed to lot 605 contains such a provision. The subdivision is an old one and the restrictions have been construed by the residents to mean the property is to be used only for dwelling house purposes and there have been very few deviations. The restrictions on lots 606 and 607, if still in force, must be interpreted to forbid a commercial use.

For two years defendants operated a restaurant on the north side of South Boulevard, about 125 feet west of lot 605. Plaintiffs objected to the restaurant. They then moved diagonally across the street to a lot about 500 feet from plaintiffs' lot, but subsequently when this property was purchased by the Baldwin Rubber Company, defendants proposed to move their restaurant to lots 606 and 607, which they are purchasing under a land contract. Before they

began business on the new location, plaintiffs sued to enjoin operation of the restaurant, which consists of a converted street car to which a shed containing an ice box, kitchen and toilet facilities is attached.

Plaintiffs show that the subdivision was designed for workingmen's homes and contend that defendants' use not only violates the restrictions but also is a nuisance. Defendants claim that the neighborhood has changed and that the restrictions in the titles to their property made no provision against the sale of liquor.

The Baldwin Rubber Company maintains a very large factory on the south side of South Boulevard across from plaintiffs' property, but in a different subdivision. Defendants also call attention to the fact that within the subdivision there is a two-story building 200 feet west of plaintiffs' property, the upper floor being used for living apartments and the ground floor for a restaurant where beer is sold by the bottle. They also show that a brewery was constructed some three blocks away. However, there has not been such a deviation from the restrictions so as to constitute a waiver or abandonment of them. The failure of property owners in the block to stop previous violations of restrictions in the same block does not prevent them from obtaining injunctive relief to prevent further violations where there has not been such a departure from the restrictions so as to create an abandonment. Equity will grant relief if the restriction can be shown of value to complainants. *DeGalan* v. *Barak*, 223 Mich. 378; *Woughter* v. *Van Marter*, 281 Mich. 408. The fact that the restrictions were generally observed with but a few deviations in this very large subdivision refutes any claim of abandonment.

While the conditions in the neighborhood have changed to a certain extent, the restrictions are still of substantial benefit to plaintiffs. Plaintiffs show that considerable disturbance accompanied the operation of defendants' restaurant on its previous sites. Defendant serves liquor and the restaurant is not of sound-proof construction. Witnesses testified that on occasions there were intoxicated persons about the premises, fighting and making considerable noise until as late as 2 o'clock in the morning; if the restrictions are not enforced, plaintiffs' home life will be disturbed; they will be unable to sleep at night, and the enjoyment they formerly derived from sitting on their front porch in the summer time will be seriously curtailed. Since plaintiffs have a substantial interest which can be protected, equity will enforce the restrictions, as well as restrain a nuisance.

Plaintiffs were entitled to the injunctive relief upholding the restrictions granted by the trial judge, and his decree is affirmed, with costs to plaintiffs.

WIEST, C. J., and BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

TYSON *v.* TYSON.

1. DIVORCE—AWARD IN LIEU OF DOWER—PERMANENT ALIMONY—DISCRETION OF COURT.

   Amount to be awarded in lieu of dower and for permanent alimony rests largely in the discretion of the trial court and only where there is a manifest abuse of that discretion will award be interfered with on appeal.

2. SAME—DIVISION OF PROPERTY—DISCRETION OF COURT.

   On appeal of plaintiff wife, 72 years of age, from provisions as to disposition of dower rights and denial of alimony, decree awarding 69-year old defendant husband property worth about $12,000, subject to $4,000 mortgage, upon which he was receiving about $180 a month rent, *held,* not a manifest abuse of discretion where during marriage, which was one of convenience and which had lasted less than six years, plaintiff's property, in which parties had lived, had been freed from $244 mortgage by defendant and had been bettered by improvements costing defendant about $500, and plaintiff had done nothing to help defendant acquire his property.

3. SAME—COSTS.

   No costs are allowed defendant husband, 69 years of age, successful appellee on appeal from provisions of decree as to disposition of property and denial of alimony to 72-year old wife.

Appeal from Jackson; Simpson (John), J. Submitted January 11, 1938. (Docket No. 108, Calendar No. 39,809). Decided February 24, 1938.

Bill by Vesta Tyson against Clarence T. Tyson for separate maintenance. Decree of absolute divorce for plaintiff. Plaintiff appeals. Affirmed.

Sagendorph, Dahlem, Vincent & Dahlem, for plaintiff.

Herbert N. Heuman (*Robert Crary,* of counsel), for defendant.

BUSHNELL, J. The parties, the one then a widow and the other a widower, were married on February 16, 1931. Mrs. Tyson filed her bill for separate maintenance on October 12, 1936, alleging that defendant was guilty of certain acts of extreme cruelty, subversive of the marriage relation. Defendant denied that plaintiff was entitled to any relief but the court, after the taking of testimony, decreed that the marriage should be dissolved, from which determination neither party appeals. Mrs. Tyson, however, complains of the court's disposition of her dower rights and its denial of alimony.

The circuit judge stated that defendant was 69 years of age and plaintiff was 72, and that their "marriage was one of convenience, so that they both might live in the plaintiff's house and get an income from the defendant's property." The court said:

"Before the marriage the defendant owned a home in the city of Grand Rapids. He converted this home into a filling station so that they might have an income from which to live. The defendant stated that the same was worth probably $12,000, but upon that there is a $4,000 mortgage. He has been receiving the sum of $180 a month for rent of the filling station. At the present time there is no written lease from the oil company to the defendant. According to the defendant the rent is paid into the bank which takes $100 from the same and after also deducting for a draft, he receives the balance. A new principal is figured every six months. According to the proof in the case, this is the only property the defendant

has. He paid off a mortgage of $244 on the plaintiff's property, and he claims that the money expended in improving the plaintiff's property was in the neighborhood of $500. So in all, she has had in the neighborhood of $744 from the defendant as an improvement on her property.

"The defendant is an old man and has no job or position. Since the divorce he has been required to rent a home and will be required to support himself from the balance that he gets from the rent of the filling station. The plaintiff did nothing to help the defendant acquire his property. Everything that he owns is property that he had before the marriage. This was not a marriage of young people, but of old people well along in years, and as heretofore stated entirely one of convenience.

"The court feels that the amount that the defendant has put into the plaintiff's home as improvements, together with the $244 that he paid to remove the mortgage on the plaintiff's home, is a sufficient award to release the balance of the defendant's estate from the plaintiff's inchoate right of dower, and feels that the case falls within the rule as stated in the case of *Born* v. *Born,* 237 Mich. 323; *Schlaf* v. *Schlaf,* 237 Mich. 543; *Streicher* v. *Streicher,* 202 Mich. 588; *Thompson* v. *Thompson,* 205 Mich. 124 (3 A. L. R. 990)."

The amount to be awarded in lieu of dower and for permanent alimony rests largely in the discretion of the trial court; and it is only where there is a manifest abuse of that discretion that its award will be interfered with on appeal. *Bialy* v. *Bialy,* 167 Mich. 559 (Ann. Cas. 1913A, 800).

The cited case contains a statement of some of the tests to be applied in determining such matters and the rule given has been applied to the facts disclosed in this record and we conclude that there was no

manifest abuse of discretion on the part of the trial judge. *Stevens* v. *Stevens,* 49 Mich. 504.

Because of the circumstances of the case, the age of the parties and the facts pertaining to the property situation, we will not allow costs in this court to Mr. Tyson.

The decree is affirmed, but without costs.

WIEST, C. J., and BUTZEL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

PEOPLE *v.* MONICK.

1. CRIMINAL LAW—JURISDICTION OF CIRCUIT COURT—RETURN OF EXAMINING MAGISTRATE.

   The jurisdiction of the circuit court is limited to the crimes included within the return of the examining magistrate.

2. SAME—SAFE ROBBERY—INTENT—RETURN OF EXAMINING MAGISTRATE.

   Since intent to commit the crime of larceny, included in statute as part of offense of robbing a safe or attempt to do so, is a separate and distinct crime from that of intent merely to do the physical acts prohibited, inclusion of allegation of such intent in return of the examining magistrate is necessary in order to bind accused over for trial in circuit court under such statute (Act No. 328, § 531, Pub. Acts 1931).

3. SAME—SAFE ROBBERY—INTENT TO COMMIT LARCENY — JURISDICTION OF CIRCUIT COURT—AMENDMENT OF INFORMATION.

Information charging defendant with attempt to break and destroy a safe containing valuables gave circuit court no jurisdiction over crime of attempt, with intent to commit crime of larceny, to break and destroy a safe containing valuables since the two crimes are different, hence conviction of latter crime on information amended to include allegations of intent to commit crime of larceny after prosecution had rested was error (Act No. 328, § 531, Pub. Acts 1931).

4. SAME—JURISDICTION OF CIRCUIT COURT—WAIVER.

Failure of defendant to request a continuance or re-examination and re-arraignment cannot be considered as a waiver of circuit court's lack of jurisdiction of crime alleged in information amended after prosecution had rested so as to charge crime different than that included in return of examining magistrate.

Appeal from Macomb; Spier (James E.), J. Submitted January 13, 1938. (Docket No. 114, Calendar No. 39,722.) Decided February 24, 1938.

Herman Monick was convicted of the crime of safe robbery. Reversed and defendant discharged.

Frank A. Ruddy and *Michael Fitzgerald,* for defendant.

Raymond W. Starr, Attorney General, *Vincent L. Fitzgerald,* Prosecuting Attorney, and *William H. Nunneley,* Assistant Prosecuting Attorney, for the people.

BUSHNELL, J. A written complaint was filed before a justice of the peace in Macomb county, alleging that Herman Monick, alias Joseph Caswell "did attempt to break and destroy a safe, to-wit, a depository of money and other valuables in a building of Charles Reindel on Main street in the village of Fraser, contrary to the form of the statute in such case made and provided."

The justice issued a warrant containing the identical language of the complaint. Monick was taken into custody, brought before the justice and an oral examination was had, the testimony not being reduced to writing. The justice held that the offense had been committed as charged and there was probable cause to suspect Monick of being guilty and he was held for trial in the circuit court. An information was then filed by the prosecuting attorney charging Monick with an "attempt to break and destroy a safe, to-wit, a depository of money or other valuables in a building of Charles Reindel on Main Street in the village of Fraser. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan."

At the trial in the circuit court before a jury, when the prosecution had rested, defendant moved the court to quash the information that he be discharged for the reason that it did not contain the language of the statute, namely, the words "intent to commit the crime of larceny," etc.

Section 531 of the Michigan penal code, same being Act No. 328, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 17115–531), reads as follows:

"Any person who, with intent to commit the crime of larceny, or any felony, shall confine, maim, injure or wound, or attempt, or threaten to confine, kill, maim, injure or wound, or shall put in fear of any person for the purpose of stealing from any building, bank, safe or other depository of money, bonds or other valuables, or shall by intimidation, fear or threats compel, or attempt to compel any person to disclose or surrender the means of opening any building, bank, safe, vault or other depository of money, bonds, or other valuables, or shall attempt to break, burn, blow up or otherwise injure or destroy

any safe, vault or other depository of money, bonds or other valuables in any building or place, shall, whether he succeeds or fails in the perpetration of such larceny or felony, be guilty of a felony, punishable by imprisonment in the State prison for life or any term of years."

The trial judge made the following observations:

" 'Any person who, with the intent to commit the crime of larceny or any felony, shall attempt to break, burn, blow, otherwise injure, destroy a safe, vault, or other depository of money * * * any person who, with the intent to commit the crime of larceny or any other felony.' It is the charge that Mr. Caswell, with intent to commit the crime of larceny, did attempt to break and enter. It is not alleged he did it with the intent to commit a crime of larceny. I presume possibly your information might be held defective for the failure to allege a crime of larceny. I will assume that is rather a technical objection that could be remedied by the amending of the information to include, to read that Herman Monick, late of the village of Fraser, on the 1st day of August, 1936, in the village of Fraser and county of Macomb, aforesaid, with the intent to commit the crime of larceny, did attempt to destroy and break a safe."

Defendant objected to any amendment; the court overruled the objection and permitted the prosecutor to amend the information by adding thereto the words, "with the intent to commit the crime of larceny." The jury was then returned to the court room, a witness was sworn on behalf of defendant, examined and cross-examined, and both sides rested. The jury brought in a verdict of guilty.

Defendant was granted leave to appeal and raises several questions, among which are that the circuit court did not acquire any jurisdiction, because the complaint, warrant and return of the examining

magistrate did not charge any offense known to the law; that the court was in error in permitting the information to be amended after the prosecution had rested; and that, even after amendment, the information was still defective in that the subject-matter of the larceny was not properly alleged. He claims, even though assuming that a crime was alleged in the original information, the court erred in amending such information to state a new crime, thereby compelling the defendant to proceed to trial without new arraignment and plea, he having stood mute. Defendant further urges that he was twice placed in jeopardy when the jury proceeded to try him under an amended information which alleged a higher offense.

All of the foregoing may be disposed of by determining the question of the jurisdiction of the circuit court to try the defendant on the information as amended.

This court held in *People* v. *Dochstader,* 274 Mich. 238, that the jurisdiction of the circuit court is limited to the crimes included within the return of the examining magistrate. See, also, *People* v. *Evans,* 72 Mich. 367; *Turner* v. *People,* 33 Mich. 363; and *People* v. *Wright,* 89 Mich. 70. Even though we should assume that the return stated an offense, the crime for which defendant was convicted under the amended information was not set forth in the return of the examining magistrate, either expressly or by reference to the complaint and warrant. At least where, as here, the intent which is included in the statute as a part of the offense is separate and distinct from an intent merely to do the physical acts prohibited, such intent must be included in the return because it is an essential ingredient of the offense, *People* v. *Stewart,* 44 Mich. 484, and the allegation of such intent sets up a different offense

from that which is stated without such an allegation. The amendment of the information in the circuit court to include an allegation of the larcenous intent with which the act was committed charged a different crime than that which the examining justice included in his return, namely, attempt to break and destroy a safe. The circuit court, therefore, had no jurisdiction over the crime stated in the amended information. *People* v. *Dochstader, supra,* and *People* v. *Hudson,* 35 Cal. App. 234 (169 Pac. 719).

People v. *Sims,* 257 Mich. 478, relied on by appellee, is distinguishable. The record in that case discloses that the jurisdiction of the circuit court to try the charge as amended was not challenged; this court held that, so far as 3 Comp. Laws 1929, § 17290, governing amendments, is concerned, an amendment is permissible if the information as originally drawn sufficiently apprised defendant of the charge as amended.

The holding in *People* v. *Spence,* 250 Mich. 573, is also consistent with our present conclusion. The amendment which was approved in that case did not change the offense from that stated in the return of the examining magistrate. It only made more specific the offense originally charged in the broad language of the statute under which the defendant was prosecuted. See, also, *People* v. *Farrell,* 263 Mich. 669.

The fact that defendant did not request a continuance or re-examination and re-arraignment cannot be considered as a waiver of the circuit court's lack of jurisdiction. *People* v. *Dochstader, supra,* and *People* v. *Gregory,* 30 Mich. 371.

The judgment of conviction is reversed and defendant discharged.

WIEST, C. J., and BUTZEL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

HARTLEY *v.* BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES.

1. TRADE UNIONS—RAILROAD BROTHERHOOD—MEMBERSHIP.

   Membership in railroad brotherhood, a voluntary unincorporated association organized to promote unity of action and the general welfare of the members, *held*, to create in such members, under the brotherhood's constitution, statutes and protective laws, no contractual rights guaranteeing individual members that no action will be taken or agreements made for the benefit of brotherhood as a whole if such action should operate to the detriment of an individual member.

2. SAME—SENIORITY RIGHTS—MODIFICATION BY AGREEMENT BETWEEN EMPLOYER AND BROTHERHOOD.

   In action by plaintiff, a married woman who had been employed by a railroad company for a number of years during which she had acquired seniority rights under an agreement between the company and defendant brotherhood, a voluntary unincorporated labor association, to recover damages for breach of alleged contract between plaintiff and defendant for loss of seniority rights, defendant *held*, to have the power to modify or destroy such rights in the interest of all the members by the same method as they were created, *i. e.*, an agreement with the employer.

3. SAME — SENIORITY RIGHTS — MODIFICATION — BAD FAITH — ARBITRARY ACTION—FRAUD.

   Seniority rights accorded members of a voluntary unincorporated labor association pursuant to its constitution and by-laws and agreement between association and employer may be modified in the general interest of all members of the association notwithstanding the effect thereof to an individual member providing such modification is not accomplished as a result of bad faith, arbitrary action, or fraud directed toward such member.

4. SAME—SENIORITY RIGHTS—MARRIED WOMEN—REDUCTION OF PERSONNEL—BREACH OF CONTRACT.

Agreement between employer and voluntary unincorporated labor association, executed when economic conditions necessitated a reduction in personnel, whereby married women were to be relieved from service unless extenuating circumstances were shown, *held,* not to have breached contractual rights forming basis for action against association by married woman who showed neither extenuating circumstances on her own part nor bad faith, arbitrary action or fraud directed at her by association.

5. SAME—SENIORITY RIGHTS—INTERFERENCE BY COURTS.

Action of brotherhood in denying within its organization relief to plaintiff, a married woman member who lost her seniority rights and employment with railroad company as result of agreement between brotherhood and company when latter had to reduce personnel, is not interfered with by courts where denial of such relief is not shown to have been accompanied with bad faith, arbitrary action or fraud on part of anyone participating in the disposition of her claim.

Appeal from Wayne; Moll (Lester S.), J. Submitted January 7, 1938. (Docket No. 79, Calendar No. 39,832.) Decided February 24, 1938. Rehearing denied June 14, 1938.

Action by Martha O. Hartley against Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, a voluntary unincorporated association, for damages for breach of contract and loss of seniority rights. Judgment for defendant. Plaintiff appeals. Affirmed.

Albert McClatchey and *Maurice Black* (*Thomas W. Payne,* of counsel), for plaintiff.

Wiley, Streeter & Ford and *Mulholland & Mulholland,* for defendant.

CHANDLER, J. Defendant, hereinafter called the brotherhood, is a voluntary unincorporated labor as-

sociation of which plaintiff has been a member for a number of years, the purposes of said organization being recited in the preamble to its constitution as follows:

"Unity guided by intelligence is a bulwark of strength that can withstand all attacks. Without intelligent organization we cannot acquire the discipline which enables us to act together, concentrate our strength and direct our efforts toward a common purpose.

"Therefore, for the purpose of promoting such unity of action, for our mutual protection and to promote the general welfare of our crafts, the organization known as the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees has been established."

In 1921 defendant entered into an agreement with the Grand Trunk Railway system, hereinafter called the railway. The agreement related to the working conditions of certain employees, according certain rights and privileges and in addition to other provisions, rules relative to seniority rights of various employees were promulgated:

"Promotion basis—Promotions to positions coming within the scope of this agreement shall be based on ability, merit and seniority, ability and merit being sufficient, seniority shall prevail, supervising officer to be the judge." (Rule 4, art. 3.)

"Reducing force—When force is reduced the senior employees on the seniority district, or subdistrict, capable of doing the work, will be retained, merit and ability to be given consideration in accordance with rule 4 of this article." (Rule 16, art. 3.)

"Exercising seniority—The exercise of seniority in reduction of force or displacing junior employees

provided for in this article is subject to the provisions of rule 4 of this article." (Rule 25, art. 3.)

"Date effective—Effective July 1, 1921, this agreement shall supersede and annul all existing agreements and practices or working conditions in conflict therewith, subject to 30 days' written notice given either party by the other of a desired change." (Rule 70, art. 12.)

In 1930, the railway commenced to receive protests from groups of its employees and individuals because married women were retained in its employ, while others, who had no other source of income were dismissed when a reduction of personnel became necessary. The situation became so acute that in December, 1931, the railway notified defendant that it would be necessary to modify the rules relative to a reduction of personnel. Negotiations between representatives of the defendant and the railway resulted in the following agreement, executed March 7, 1932, by Charles L. Brisley, local chairman of the brotherhood in the district in which plaintiff was employed:

"Effective March 16, 1932, all married women will be relieved from the service, irrespective of seniority, unless there are some extenuating circumstances to be presented to a representative of the management and the local chairman or other clerk, who will decide.

"Hereafter, any female employee getting married will immediately be relieved from the service.

"To the extent that the provisions hereof are inconsistent with or conflicting with the provisions of the agreement between the Grand Trunk Railway System (lines in the United States) and all that class of clerks and other office and station employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station

Employees, bearing the effective date of July 1, 1921, this agreement shall be deemed to supersede all of such inconsistent or conflicting provisions."

Plaintiff, a married woman, was employed by the railway from December 29, 1919, to March 18, 1932, during which period she had acquired seniority rights under the provisions of the agreement of 1921. Her employment with the railway was terminated in accordance with the agreement of March 7, 1932, no extenuating circumstances being found to exist in her particular case after full and complete investigation.

She appealed her case in the order provided by the protective laws of the brotherhood to its highest tribunal, her claim in each instance being denied. This suit is prosecuted to recover damages for breach of contract alleged to exist between plaintiff and the brotherhood on the theory that the brotherhood, having created her seniority rights by the agreement of 1921, could not subsequently enter into another agreement whereby such rights were altered or ceased to exist. The trial court entered a judgment of no cause of action from which this appeal is taken.

Plaintiff is somewhat vague as to what contractual rights existing between herself and the brotherhood have been breached, but states in her brief:

"The selection of the members to be employed is entirely with the employer, but after the selection is made and the members employed, both the employer and the members employed must comply with the provisions of the agreement made between the union and the employer.

"This, we contend, is the agreement between the union and its members. Any attempt by the union to designate which members shall be employed and

which members shall not be employed, is a violation of the agreement making the union liable to the member or members discriminated against for any damage they sustain through the violation of the contract by the union."

The purposes of the brotherhood, as stated in the preamble to the constitution, are to promote unity of action and the general welfare of the members thereof. These purposes are accomplished by the instrument of collective bargaining with the employer as to conditions of employment, etc. But by becoming a member of the brotherhood, no contractual rights arose out of the constitution, statutes and protective laws which guaranteed plaintiff that no action would be taken or agreements made for the benefit of the brotherhood as a whole if such action should operate to the detriment of plaintiff as an individual.

The seniority rights acquired by her did not arise by virtue of her contract of employment with her employer, but existed by reason of the agreement of 1921 between the railway and the brotherhood. *Ryan* v. *Railroad Co.*, 267 Mich. 202. This agreement was executed for the benefit of all the members of the brotherhood and not for the individual benefit of plaintiff. When, by reason of changed economic circumstances, it became apparent that the earlier agreement should be modified in the general interest of all members of the brotherhood it was within the power of the latter to do so, notwithstanding the result thereof to plaintiff. The brotherhood had the power by agreement with the railway to create the seniority rights of plaintiff, and it likewise by the same method had the power to modify or destroy these rights in the interest of all the members.

A different situation might be presented had the agreement of 1932 been accomplished as a result of bad faith, arbitrary action, or fraud directed at plaintiff on the part of those responsible for its execution. No claim or showing of such a nature is made in this case. The railway notified the officers of the brotherhood, in accordance with Rule 70, art. 12, *supra,* that the protests against the retention of married women in its employ were becoming so acute as to result in a serious impairment of personnel relations, and that it was imperative that the situation be corrected. Meetings were held and the majority vote of those in attendance favored the present agreement. By the execution of the agreement, no contractual rights of plaintiff were breached permitting her to maintain this action.

Furthermore, the laws of the brotherhood make provision for the determination of grievances of its members. Plaintiff presented her grievance and appealed her claim to the highest tribunal in the union. Here again, there is no intimation of bad faith, arbitrary action or fraud on the part of anyone participating in the disposition of her claim. In such instances, the courts will not interfere. *Ryan* v. *Railroad Co., supra,* and cases cited therein.

Judgment affirmed, with costs of this appeal to defendant.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, NORTH, and MCALLISTER, JJ., concurred.

ROLLIN *v.* VAN TINE.

1. AUTOMOBILES—SIDE COLLISION—VERDICTS AND FINDINGS—CONTRIBUTORY NEGLIGENCE—NEGLIGENCE.

In action for damages arising from collision of left rear end of plaintiff's car with left front end of defendant's car which occurred as the cars met and were about to pass each other on a wet pavement, finding of court sitting without a jury that there was "no evidence whatever of negligence on the part of plaintiff" and awarding him damages *held*, to necessitate conclusion that trial court found plaintiff free from contributory negligence and that the collision occurred by reason of negligence of defendant.

2. APPEAL AND ERROR—QUESTIONS OF FACT—EVIDENCE.

Supreme Court does not substitute its judgment on questions of fact for that of the trier of the facts unless the evidence clearly preponderates in the opposite direction.

3. AUTOMOBILES—NEGLIGENCE—EVIDENCE.

Evidence that defendant was negligent as he attempted to meet and pass plaintiff's car during a winter evening *held*, sufficient to sustain finding of negligence by trial court, sitting without a jury.

WIEST, C. J., and CHANDLER and NORTH, JJ., dissenting.

Appeal from Tuscola; Cramton (Louis C.), J. Submitted January 22, 1938. (Docket No. 140, Calendar No. 39,247.) Decided February 24, 1938.

Case by Harry Rollin against Thomas Van Tine for personal injuries and car damage sustained in an automobile collision. Judgment for plaintiff. Defendant appeals. Affirmed.

T. George Sternberg, for plaintiff.

Orr & Orr, for defendant.

SHARPE, J. I am not in accord with Mr. Justice WIEST's opinion. The record shows that there were three eyewitnesses to the accident who testified at the trial. All witnesses agree that immediately before the cars collided, each car was on its proper side of the highway. Plaintiff testified that at all times he was driving on the proper side of the highway and at least 18 inches from the center. Leo Walker, a witness riding in the front seat with plaintiff, testified that plaintiff was upon his proper side of the road; that the car did not swerve before the collision; and that plaintiff's car was a distance of from 12 to 20 inches from the center line of the highway.

Defendant testified that as the cars were passing each other, the rear end of plaintiff's car "slued or skidded" across the center line of the highway and caught the front fender of defendant's car. Defendant also testified that after the accident he traced the tracks of plaintiff's car through the slush and found that the marks were over the center of the highway. The evidence as to the marks in the slush was corroborated by the testimony of Miss Larsen who arrived upon the scene after the accident occurred. However, plaintiff's witness testified that the road was wet, but with no slush upon the highway as the snow melted as soon as it reached the pavement. The principal issue involved in this case presents a question of fact. The trial court had the privilege of seeing and hearing the witnesses testify. He found that there "was no evidence whatever of negligence on the part of the plaintiff" and awarded plaintiff damages.

The only conclusion that can be arrived at from the court's findings is that plaintiff was free from contributory negligence; and that the collision occurred by reason of the negligence of defendant. In *Leonard* v. *Hey,* 269 Mich. 491 (37 N. C. C. A. 111), we held that we do not substitute our judgment on questions of fact unless the evidence clearly preponderates in the opposite direction.

See, also, *Paton* v. *Stealy,* 272 Mich. 57; *Baumgartner* v. *St. Armour,* 276 Mich. 650.

To say that the alleged negligence of the defendant was not established does violence to the policy of this court as enunciated in *Leonard* v. *Hey, supra,* and to hold otherwise would be a substitution of our judgment for that of the trial judge.

The judgment is affirmed. Plaintiff may recover costs.

BUTZEL, BUSHNELL, POTTER, and MCALLISTER, JJ., concurred with SHARPE, J.

WIEST, C. J. (*dissenting*). The evening of January 4, 1936, plaintiff's and defendant's automobiles approached one another, each on its proper side of the center line of a paved highway but, in passing, there was a collision between the left front of defendant's car and the left rear side of plaintiff's.

Plaintiff claims that defendant's car, after passing the front of his car, turned to the left and caused the collision.

Defendant claims that, as he passed the front of plaintiff's car, the rear of that car slued into the pathway of his car, and that caused the collision.

The issues were tried before the court, and a finding made that defendant was guilty of negligence and there was "no evidence whatever of negligence on the part of plaintiff, and the contact not being

with the front of plaintiff's car, but with his rear, the court finds for the plaintiff."

Presumably the court thought the statute, 1 Comp. Laws 1929, § 4788, helpful in determining fault. That statute creates a *prima facie* presumption of negligence where one vehicle overtakes and strikes the rear end of another vehicle proceeding in the same direction.

In the instance at bar the vehicles were traveling in opposite directions and there was no rear-end collision and no presumption of negligence.

The finding of "no evidence whatever of negligence on the part of plaintiff" was not equivalent to an affirmative finding that plaintiff was free from contributory negligence, and leaves that finding subject to the criticism of counsel for defendant that the court entertained the view that the burden was on defendant to make a showing on that subject.

The plaintiff had the burden of establishing the alleged negligence of defendant and his own freedom from contributory negligence. This is too elementary to require citation of authority.

The pavement was narrow, but wide enough to afford clearance of the cars if on the proper sides of the center line.

Defendant claims that it was snowing and there was slush upon the pavement; while plaintiff claims the pavement was only wet from snow melting as it fell.

Each driver saw the approach of the other and agree that each one was on his proper side of the center line of the pavement when the fronts of the cars came opposite one another. From that point they disagreed, plaintiff claiming that his car continued its straight course, and defendant's car turned into collision with the rear side thereof; while de-

fendant claims that his car continued in its straight course but the rear of plaintiff's car slued across the center line of the pavement and into the pathway of his car and caused the collision. The claims of both parties have supporting evidence.

Avis Larsen, a school teacher, arrived at the scene of the accident right after the happening thereof and testified that marks in the slush showed that the rear wheels of plaintiff's car slued across the center line of the pavement.

The trial judge gave little weight to her testimony, because she was acquainted with defendant and, she "saw what she saw under the direction of the defendant," and her testimony "that there was slush on the pavement, and car tracks in the slush" was "directly denied not only by the plaintiff, but by Mr. Walker."

Miss Larsen's testimony, of course, was not controlling but had bearing upon the issue of the preponderance of the evidence.

Plaintiff, to have recovery, was required to show, by a preponderance of the evidence, that the collision was occasioned by the negligence of defendant and, upon review, where trial was without a jury, and the point is presented, we must determine whether the judgment is supported by a preponderance of the evidence.

In the case at bar the alleged negligence of defendant was not established by a preponderance of the evidence, and the judgment should be reversed, without a new trial, and with costs of both courts to defendant.

CHANDLER and NORTH, JJ., concurred with WIEST, C. J.

CITY OF IRON MOUNTAIN *v.* DICKINSON COUNTY ROAD COMMISSIONERS.

1. TAXATION—MOTOR VEHICLE WEIGHT AND GASOLINE TAXES—ALLOCATION TO DEDICATED STREETS AND ALLEYS IN PLATS OUTSIDE CITIES AND VILLAGES.

   Allocation by board of supervisors of portion of funds received by county from State motor vehicle weight and gasoline taxes for use on dedicated streets and alleys in recorded plats outside of incorporated cities and villages during year 1936–1937 *held*, proper, such thoroughfares being township roads by force of statute and taken over by county authorities pursuant to statute (1 Comp. Laws 1929, § 3594, as last amended by Act No. 8, Pub. Acts 1934 [1st Ex. Sess.]; §§ 3998, 4294; § 4651, as last amended by Act No. 7, Pub. Acts 1934 [1st Ex. Sess.]; Act No. 130, Pub. Acts 1931, as amended by Act No. 238, Pub. Acts 1937).

2. COSTS—PUBLIC QUESTION—ALLOCATION OF MOTOR VEHICLE WEIGHT AND GASOLINE TAXES.

   No costs are allowed in controversy between city and county road commissioners involving allocation of funds received by county from State motor vehicle weight and gasoline tax moneys for use on dedicated streets and alleys in recorded plats outside of incorporated cities and villages, a public question being involved (1 Comp. Laws 1929, § 3594, as last amended by Act No. 8, Pub. Acts 1934 [1st Ex. Sess.]; § 4651, as last amended by Act No. 7, Pub. Acts 1934 [1st Ex. Sess.]; Act No. 130, Pub. Acts 1931, as amended by Act No. 238, Pub. Acts 1937).

Appeal from Dickinson; Bell (Frank A.), J. Submitted January 14, 1938. (Docket No. 136, Calendar No. 39,771.) Decided February 24, 1938.

Assumpsit by City of Iron Mountain, a municipal corporation, against Dickinson County Road Commissioners, Dickinson County Board of Supervisors and Amelio Valenti, Treasurer, to recover sums al-

leged to be due under the allocation of road funds. Judgment for plaintiff. Defendants appeal. Reversed.

Ernest W. Brown, for plaintiff.

Edward J. Dundon, for defendants.

C. W. Coates, John Walsh, H. Reade Smith and *Lynn B. Mason, amici curiæ.*

BUTZEL, J. On October 12, 1936, the board of supervisors of Dickinson county allocated for the year 1936–1937, $10,000 "for streets and alleys in platted areas" out of the moneys to be received by the county from the State under Act No. 7, § 34, subd. (4), Pub. Acts 1934 (1st Ex. Sess.), and Act No. 8, § 19, subd. d (4), Pub. Acts 1934 (1st Ex. Sess.). The plaintiff city contends that no allocation could be made under the above sections after the year 1936 and that even if an allocation for the maintenance of township roads was proper, streets and alleys in recorded plats are not township roads within the meaning of the above sections.

The main question of construction in the instant case is ruled by the case of *City of Menominee* v. *County of Menominee, ante,* 146. The only question remaining is in regard to the status of streets and alleys in recorded plats under the McNitt-Holbeck-Smith act, Act No. 130, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 4018–1 *et seq.*).

Under 1 Comp. Laws 1929, § 4294, the township authorities were given jurisdiction over streets in recorded plats. By force of 1 Comp. Laws 1929, § 3998, all established and public roads in townships, except county roads are designated township roads. The 1937 amendment of the McNitt-Holbeck-Smith act, Act No. 238, Pub. Acts 1937 (Comp. Laws Supp.

1937, § 4018–1a) includes streets and alleys in recorded plats in the "total township highway mileage." In view of these statutes and for the additional reasons stated in the case of *City of Menominee* v. *County of Menominee, supra,* it was proper that the moneys received by the county from the State, under Act No. 7, § 34, subd. (4), Pub. Acts 1934 (1st Ex. Sess.), and of Act No. 8, § 19, subd. d (4), Pub. Acts 1934 (1st Ex. Sess.), be allocated for use on dedicated streets and alleys in recorded plats outside of incorporated cities and villages.

The judgment for plaintiff is reversed. As the question is a public one, no costs will be allowed.

WIEST, C. J., and BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

TAYLOR *v.* STATE HIGHWAY COMMISSIONER.

COVENANTS—RECIPROCAL NEGATIVE EASEMENTS—INTENT OF SUBDIVIDER—EVIDENCE.

Reciprocal negative easements restricting use of property in a subdivision, containing 32 lots, to residence purposes *held,* not established where evidence shows subdivider had sold or used 11 lots without restrictions, one lot purchaser had him thereafter insert such restriction in deed he had hitherto executed for avowed purpose of attempting to increase amount owner

expected to receive for taking it upon relocation of railroad right of way, some 7 lots were used for residence purposes including plaintiffs' in whose deed title was recited as "free from all incumbrances whatever except building restrictions of record," and subdivider deeded some lots and parts of others without restrictions to State for railroad purposes, there being no evidence of intention to create a servitude beneficial to the land retained by the subdivider.

Appeal from Oakland; Holland (H. Russel), J. Submitted January 5, 1938. (Docket No. 36, Calendar No. 39,805.) Decided February 24, 1938.

Bill by John S. Taylor and wife against Murray D. Van Wagoner, State Highway Commissioner, and another for a mandatory injunction to compel condemnation proceedings. Bill dismissed. Plaintiffs appeal. Affirmed.

Arthur E. Moore, for plaintiffs.

Raymond W. Starr, Attorney General, and *Charles P. Webster,* Assistant Attorney General, for defendant State Highway Commissioner.

H. V. Spike and *John J. Gafill,* for defendant Grand Trunk Western Railroad Company.

CHANDLER, J. In March, 1911, Robert Mageehan recorded the plat known as Mageehan's subdivision of outlots 1 and 2, Wilson Park subdivision, city of Royal Oak, Michigan. The subdivision as platted by him contained 32 lots.

Subsequent to the date of the plat and prior to October 25, 1928, Mageehan sold eight of the lots, all of which were conveyed without restrictions of any nature.

On May 24, 1919, he deeded lot No. 19 to James P. Hagerty and wife in pursuance of the terms of a

certain land contract executed in 1912. This deed likewise contained no restrictions of any nature. But on October 25, 1928, Mrs. Hagerty returned the deed to Mageehan and the following was at her request inserted in the body of the instrument:

"No building shall be erected on said lots which shall be of less than $2,000 in valuation and to be used for dwelling purposes only; only one dwelling shall be erected on each lot, except where it shall be otherwise provided."

Mageehan subscribed his name immediately following the foregoing addition and the deed was then re-recorded but no attempt was made at re-execution. Mrs. Hagerty testified that she requested the restriction be inserted as she had been told that if restrictions were attached to the lot she would receive more damages when the railroad was constructed.

In April, 1929, plaintiffs purchased lot No. 25 from Mageehan, the deed thereto reciting: "free from all incumbrances whatever except building restrictions of record."

By Act No. 340, Pub. Acts 1927 (1 Comp. Laws 1929, § 4454 *et seq.*), provision was made for the relocation of the Grand Trunk Western Railroad through the city of Royal Oak so that the right of way of said railroad extends through Mageehan's subdivision on the west side of Lafayette street. Plaintiff's property is located on the east side of Lafayette street. The railroad, as relocated, is constructed in such a manner that its embankment interferes with plaintiff's view, it being impossible for them to see to the west from their property beyond the railroad right of way.

The bill of complaint alleges that by virtue of the provision inserted in the Hagerty deed and that in

the deed to plaintiffs of lot No. 25, the lots in the subdivision, particularly those fronting on Lafayette street, became subject to reciprocal negative easements and that before proceeding with the construction of the railroad it was the duty of defendants to condemn the rights of plaintiffs acquired thereby. The bill seeks a mandatory injunction compelling defendants to institute condemnation proceedings to condemn the rights of plaintiffs claimed to exist by reason of the alleged easement. The trial court dismissed the bill of complaint and plaintiffs take this appeal.

Assuming, without comment thereon, the validity of the restriction inserted in the Hagerty deed in 1928 without the formalities of re-execution, we find that the writ should be denied on other grounds.

Plaintiffs' contention that reciprocal negative easements were created is founded upon the proposition that the facts exhibit a general plan to restrict the various lots in the subdivision, particularly those abutting Lafayette street, to residence purposes only. We fail to find that such a plan was contemplated or existed. Mr. Mageehan sold one lot, without restrictions, prior to the sale in the year 1912 of lot No. 19 on contract to the Hagertys. Subsequent to the platting and prior to 1928, eight lots were sold without restrictions. On October 25, 1928, Mrs. Hagerty returned their deed for the insertion of the restrictions hereinbefore quoted, and for the admitted purpose of attempting to increase the amount they expected to receive for the taking of said lot upon relocation of the railroad. The subdivider deeded some lots and parts of others, located on the West side of Lafayette street to the State for railroad purposes without restrictions. In brief, of all the lots conveyed by Mageehan, the deeds contained

no restrictions, except that inserted in the Hagerty deed in 1928 and the reference to building restrictions to be found in the deed of April 10, 1929, conveying lot No. 25 to plaintiffs.

Eighteen of the lots in the subdivision face Lafayette street. Prior to the relocation of the railroad, three on the west side of the street and four on the east side were residence properties. Lot No. 1 has been used for an oil station since 1922, which was constructed by Mageehan and later leased by him for this purpose. Lot No. 3 was leased by him for the erection of a signboard.

It is apparent from a recital of the foregoing facts that no plan whatsoever existed to restrict the subdivision to residence purposes. The insertion of the restriction in the one deed to Mr. and Mrs. Hagerty does not establish the existence of such a plan. No intention is thus shown to create a servitude beneficial to the land retained by Mageehan. The doctrine of reciprocal negative easements as set forth in *Sanborn* v. *McLean,* 233 Mich. 227 (60 A. L. R. 1212), and like cases, is inapplicable.

Decree affirmed, with costs to defendants.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, NORTH, and MCALLISTER, JJ., concurred.

SEAMAN *v.* IRONWOOD AMUSEMENT CORP.

1. CORPORATIONS — STOCKHOLDERS' MEETINGS — RESOLUTIONS — AMENDING ARTICLES—MAJORITY—VOTE BY PLEDGEE—ESTOPPEL.

   Resolution amending articles of incorporation at meeting of stockholders, which authorized sale to them of no par stock at $1 per share and giving such stock equal rights as to dividends, voting, and distribution upon liquidation with the outstanding stock which had a par value of $100 per share, book value of $112.43, and which had been purchased at public auction at $2.50, *held*, not invalid because some stock had been voted in favor thereof by pledgee where owner was present at the meeting, made no complaint thereat and sufficient stock to pass the resolution by a two-thirds majority had been voted in favor of passage of the resolution even though pledged stock had been voted against it.

2. SAME—STOCKHOLDERS' MEETINGS—RESOLUTIONS—AMENDING ARTICLES—VOTE BY RECEIVER.

   Vote by receiver of bank in favor of resolution amending articles of incorporation at meeting of stockholders, which authorized sale to them of no par stock at $1 per share and giving such stock equal rights as to dividends, voting, and distribution upon liquidation with the outstanding stock which had a par value of $100 per share, book value of $112.43, and which had been purchased at public auction at $2.50, *held*, proper in suit by a stockholder brought some time later, where fact that such voter, as receiver of the bank, was the owner of the stock was evidenced by stock record of the corporation and the record in the case and no challenge of his right to vote either was or could be made.

3. SAME—AMENDING ARTICLES—INCREASE OF STOCK—ISSUANCE OF SHARES WITHOUT PAR VALUE—FRAUD.

   In a stockholder's suit against corporation and certain other stockholders to require corporation to reimburse such stock-

holders as had purchased no par stock issued pursuant to resolution amending articles of incorporation, which had been passed by holders of a majority of upwards of two-thirds of the outstanding stock, whereby sale to stockholders of the no par stock was authorized at $1 per share and it was given equal rights as to dividends, voting, and distribution upon liquidation with the then outstanding stock which had a par value of $100 per share, book value of $112.43, and which had been purchased at public auction at $2.50, action of stockholders in so amending articles in order to raise capital for corporation in straitened financial circumstances *held*, without fraud, either actual or constructive under record presented.

4. SAME—STOCKHOLDERS' MEETING—AMENDMENT OF ARTICLES—SHARES WITHOUT PAR VALUE—MAJORITY—STATUTES.

Statutory requirement that holders of two-thirds of the total number of shares of each class of stock outstanding and entitled to vote on matter of issuance or subscription to shares without par value fix consideration at which such stock was to be issued *held*, inapplicable to resolution, passed at stockholders' meeting, to amend articles of incorporation so as to permit issuance of such stock, authority to amend articles without limitation so long as articles as amended would have been authorized by statute as original articles being conferred upon holders of a mere majority of shares entitled to vote (Act No. 327, §§ 19, 43, Pub. Acts 1931).

5. SAME—PROXIES—CONSTRUCTIVE NOTICE TO STOCKHOLDER.

A shareholder represented by proxy at a meeting is chargeable with knowledge of facts connected with the proceedings of that meeting, known to his proxy.

6. SAME—OFFER OF NEWLY-AUTHORIZED STOCK TO STOCKHOLDERS—ESTOPPEL—CHANGE OF OFFER—RECORD.

In stockholder's suit against corporation and certain other stockholders who purchased shares of newly-authorized stock without par value, plaintiff's claim that such stock should be surrendered to corporation which in turn should be required to reimburse purchasers the amount it had received therefor because offer of the corporation to its stockholders had been changed by action of the board of directors which amounted to a preferential offer *held*, untenable where plaintiff, through his brother as proxy, knew of action of stockholders and directors but disdained participation in efforts of others to reorganize and rebuild the corporation when it was facing

bankruptcy and record does not disclose any action was ever taken at a stockholders' or directors' meeting changing the offer by cancellation of balance due from stockholders on their original subscriptions to the newly-authorized stock.

7. SAME—NO PAR STOCK—PRE-EMPTION BY STOCKHOLDER—RECORD—LACHES—WAIVER—FRAUD.

Plaintiff, a stockholder in defendant corporation which was empowered by proper corporate and governmental authorities to issue to stockholders for $1 per share, stock without par value with equal rights as to dividends, voting, and distribution upon liquidation with the outstanding stock which had a par value of $100 per share, book value of $112.43, and which had been purchased at public auction at $2.50, *held,* by waiting for over two years thereafter, when corporation had emerged from financial straits, guilty of laches and to have waived his right to *pro rata* share of no par stock or to equitable relief where record shows he or his proxy had full opportunity to pre-empt shares, his proxy was present at trial but did not testify, no intentional wrong to plaintiff is claimed nor was there an act of fraud perpetrated by the corporation or any of its officers.

8. SAME—ACTION BY MINORITY STOCKHOLDER—FRAUD—ULTRA VIRES ACTS—LACHES AS DEFENSE.

Laches is a defense to the action of a minority stockholder to set aside corporate acts whether fraudulent or *ultra vires.*

Appeal from Gogebic; Driscoll (George O.), J. Submitted January 13, 1938. (Docket No. 43, Calendar No. 39,799.) Decided February 24, 1938.

Bill by Meyer J. Seaman against Ironwood Amusement Corporation, a Michigan corporation, and others to require the corporation defendant to reimburse other defendants for purchase price of stock, for cancellation of that stock, and for injunction. Bill dismissed. Plaintiff appeals. Affirmed.

Roscnburg & Painter and *Humphrey & Humphrey,* for plaintiff.

Edward W. Massie (*Raymond Turner* and *Miller, Canfield, Paddock & Stone,* of counsel), for defendants.

CHANDLER, J. The Ironwood Amusement Corporation was originally organized on the 21st day of November, 1918, under the laws of the State of Michigan for the purpose of operating theaters in the city of Ironwood. The original capital stock of this corporation was $10,000. Certain amendments were made to the articles of incorporation increasing the capital stock so, as of October, 1932, the corporation had an authorized capital stock of 1,500 shares of the par value of $100 per share, 1,400 shares of which were fully paid, issued and outstanding, the remaining 100 shares being retained in the treasury.

The plaintiff, Meyer J. Seaman, was the owner of 250 shares of this stock. A brother of the plaintiff was also the owner of stock in the corporation and resided at Ironwood. Mr. Charles Seaman, plaintiff, and A. L. Picker were the original incorporators of the corporation. The plaintiff lived at Ashland, Wisconsin, where he engaged in business, and his brother and Mr. Picker, residing in Ironwood, had charge of the affairs of the corporation. Charles Seaman continued as a member of the board of directors until the year 1934. The individuals here referred to were also the principal owners of stock in the Seaman Building Corporation, which owned property adjoining one of the theaters of the Ironwood Amusement Corporation, and the last-named corporation for a number of years rented a portion of the building owned by the Seaman Building Corporation for the purpose of a lobby for the theater. In 1931 and 1932 the Ironwood Amusement Corpo-

ration had felt the effects of the industrial depression and its receipts had decreased to the extent that the corporation was sustaining serious losses. For the year ending June 30, 1933, the corporation had sustained a net loss of upwards of $19,000, and had also sustained a loss for the fiscal year ending June 30, 1932. As of August 7, 1932, its balance sheet showed current assets of $113.91 and current liabilities of $47,850, consisting for the most part of indebtedness to banks, delinquent taxes, rent and interest. Its fixed liabilities consisted of a first mortgage of $74,000. The fixed assets, land, buildings, equipment and improvements, were carried on the books at $247,364.89.

This statement would indicate the book value of the stock to be $112 per share; however, the record shows that during the fall of the year 1932 certain shares of the stock were sold at public auction for approximately $2.50 per share.

Threats of bankruptcy faced the corporation and conferences were held by certain of the stockholders, including the brother of plaintiff, at which receivership proceedings were discussed and later committees were appointed to negotiate with the bondholders for an extension of time and to negotiate with the banks and other creditors for a compromise of the corporation's indebtedness. These negotiations finally resulted in an extension of time being granted by the bondholders, the banks waiving interest, and compromises with other creditors on the basis of 50 cents on the dollar.

Being confronted with these propositions, it can be readily seen that the prospects were far from bright. The stock had but little, if any, real value and the problems confronting the management were very involved. At a meeting of the board of di-

rectors held on July 21, 1932, the president advised the board of receipt of a notice to vacate dated July 13, 1932, which had been served upon him by the Seaman Building Corporation for nonpayment of lobby rental in the sum of $1,727.44. At this meeting, Mr. Charles Seaman, president of the Seaman Building Corporation, gave to the Ironwood Amusement Corporation an extension of time for the payment of the rent until August 25, 1932. At a special meeting of the stockholders of the Ironwood Amusement Corporation held August 29, 1932, at which plaintiff's brother, Charles Seaman, was present, ways and means of securing additional capital were discussed and it was suggested at this meeting that the capital stock be increased to make available stock for sale in order to obtain additional capital. "It was determined that it was for the best interests of the corporation the capital stock be increased in order to make available stock for sale." At a special meeting of the stockholders held September 8, 1932, another notice to quit for nonpayment of lobby rental, served by the Seaman Building Corporation on August 22, 1932, was brought to the attention of the stockholders, and the following appears with reference thereto in the minutes of this meeting:

"The matter demanding immediate attention, those present advanced sufficient moneys to pay the amount of rental in default."

At another special meeting of the stockholders held September 12, 1932, at which Charles Seaman was present, further discussion was had on the financial condition of the company; ways and means of securing additional capital to meet the current obligations were also discussed; and the matter of changing the capital stock from par value into no

par value stock, and to increase the number of shares of stock and selling part of the proposed increase to stockholders of record, were considered.

On October 3, 1932, a special meeting of the board of directors of the corporation was held pursuant to written notice duly given and it was then and there resolved, to call a special meeting of the stockholders and submit to them the proposition of changing the 1,500 shares common capital stock of the par value of $100 each into common stock without nominal or par value, and that the capital stock of the corporation be increased to 30,000 shares of common stock of no par value; that 10,000 shares of the newly-authorized capital of no par value be offered the stockholders of record for their subscription at a price of $1 per share, each such stockholder to be entitled to subscribe for an amount thereof equal to seven and one seventh shares for each share of stock then held by him, said subscriptions to be paid in cash for the amount subscribed as follows: 30 per cent. on or before November 17, 1932; 30 per cent. on or before December 17, 1932; 20 per cent. on or before January 17, 1933, and the balance on or before February 17, 1933. It was also resolved that in the event any stockholder of record should fail to subscribe for the whole or any part of his proportionate share on or before November 1, 1932, that the board of directors should have power and authority to dispose of the same to other stockholders for cash at a price to be determined by them but for not less than $1 per share; and, that each stockholder be given a reasonable opportunity to subscribe for his proportionate share. This resolution further provided that any unissued shares of capital stock without par value might be issued and sold by the company in such manner and for such consideration as

from time to time might be fixed by the board of directors at not less than $1 per share. A special meeting of the stockholders was called to be held on the 17th of October, 1932, for the purpose of submitting the proposed amendments, and the secretary was instructed to send out notices to the stockholders of said company pursuant to the resolution with a letter to all out-of-town stockholders explaining in greater detail the reasons and necessity for the proposed amendments. The plaintiff received this notice together with a letter explaining in detail the reasons and necessity for the increase of the capital stock.

Pursuant to this notice a meeting was held October 17, 1932, at which meeting all of the outstanding capital stock was represented either in person by the shareholders thereof or by proxy. Plaintiff was represented by his brother, Charles Seaman, who was present in person at this meeting. A resolution was offered changing the 1,500 shares of common capital stock of the par value of $100 each into common stock without nominal or par value, and this resolution received the affirmative vote of 1,075 shares and no contrary vote was recorded, the record showing that the stock owned by plaintiff and his brother, Charles Seaman, was present but not voted. A resolution was then presented providing that the capital stock of the company be increased to 30,000 shares of common stock of no par value which received the affirmative vote of 1,075 shares, the plaintiff being represented by his proxy, Charles Seaman, who was personally present, but the Seaman stock was not voted. A resolution was then presented providing for the offering for sale of 10,000 shares of the newly-authorized capital stock of no par value to stockholders of record as of 12

o'clock noon October 17, 1932, for subscription at a price of $1 per share, each such stockholder being entitled to subscribe at said price an amount thereof equal to seven and one-seventh shares for each share then held by him. This resolution was adopted by a similar vote. Another resolution, similarly adopted, authorized the sale of the stock by the company.

Later, on the 26th of October, 1932, the vice-president and secretary of the Ironwood Amusement Corporation filed with the secretary of State a certificate of amendment to the articles of incorporation of said company. The following was placed in the certificate subsequent to the stockholders' meeting at the time it was presented to the secretary of State for filing, the same being placed therein at the insistence of the latter for the purpose of ascertaining and determining the franchise fee payable to him under Act No. 85, §§ 3, 3a, Pub. Acts 1921, as amended (2 Comp. Laws 1929, §§ 10138, 10139), and for no other purpose:

"Consisting of 1,500 shares of Class A stock and 28,500 shares Class B stock. The book value of Class A stock is $112.43 per share and Class B stock, $1 per share."

On November 16, 1932, an order was entered by the Michigan securities commission approving of the amended articles and authorizing the sale of 10,000 shares of unissued no par stock at the price of $1 per share for sale to stockholders only under the provisions of 3 Comp. Laws 1929, § 9773(d).

A special meeting of stockholders was held November 26, 1932, at which meeting plaintiff's brother, Charles Seaman, was present, it being decided to pay in 30 per cent. of the subscriptions for $10,000 of the stock, and Charles Seaman, with two others, was appointed to make an appraisal of the build-

ings and equipment of the corporation for the purpose of writing down assets in order that a saving might be made in the capital stock tax. The resolutions adopted at this meeting were unanimously carried. A regular annual meeting of the stockholders was held January 9, 1933, there being present shareholders representing all of the stock, Charles Seaman being present in person and as proxy for plaintiff. At this meeting plaintiff's brother was re-elected as a director of the corporation. At a special meeting of the board of directors held January 13, 1933, at which plaintiff's brother was present, a resolution was adopted changing the time of payment of subscriptions for capital stock to the extent that the first payment should be made on or before February 1st in order to give those who were in default an opportunity to come in on a *pro rata* basis, and that subsequent payment of 70 per cent. be left to the discretion of the board of directors, but that in no case should the board of directors call for more than 30 per cent. at intervals of not less than 30 days. This resolution was unanimously adopted by the board of directors, and all stockholders were given notice of the same.

Another special meeting of the board of directors was held on the 15th of March, 1933, at which plaintiff's brother was present, and a notice to stockholders was authorized advising them that there were 942½ shares of the authorized increase available for subscription because four of the original stockholders had not subscribed for their share, and that stockholders in the corporation were entitled to subscribe for their *pro rata* share of this 942½ shares at $1 per share and had 10 days in which to do so, and that otherwise this stock might be then taken as a payment by the 10 stockholders of record who made a loan to the corporation in the sum of

$100 each. This notice was sent by registered mail to all of the stockholders, including plaintiff.

Plaintiff's proxy, Charles Seaman, was present at a meeting of the stockholders, November 26, 1932, when it was decided to pay in 30 per cent. of the subscriptions for $10,000 worth of stock. At that same meeting Charles Seaman supported a motion that stock certificates and revenue stamps be purchased for the issue of new certificates. He was also present at a meeting of the board of directors when a resolution was passed authorizing the secretary to call in the old stock and issue the new.

A directors' meeting was held on June 28, 1933, at which Charles Seaman was present, and at that time an adjustment of the assets of the company was made to comply with the values of the company as set up by its auditors. Between this date and June 13, 1934, no material progress had been made by the corporation and it was evidently deemed advisable by both the board of directors and the stockholders that some attempt should be made to put the business under experienced management. A proposition had been made by Mr. Martin D. Thomas, one of the defendants herein, that he would undertake the management of the company for a period of five years, the company to pay him $25 per week during said period, and if at the end of five years all the liabilities of the company, both current and fixed, had been paid from the operation of the business, he should receive, in addition to his salary, shares of stock in the corporation equal to one-fifteenth of the issued stock thereof.

A special meeting of the stockholders was held on June 13, 1934, pursuant to notice, including a notice to plaintiff, for the discussion and consideration of the proposed agreement with Mr. Thomas. At this

meeting the plaintiff's brother, Charles Seaman, was present in person and as proxy of the plaintiff, and upon motion of Charles Seaman the proposed contract with Mr. Thomas was unanimously adopted, the stock of plaintiff being voted in favor thereof.

On January 28, 1935, the annual meeting of the stockholders of the corporation was held, at which plaintiff was represented by his attorney, Charles Humphrey, who held his proxy. The business conducted at this meeting was the election of a board of directors. A meeting of the board of directors was held directly thereafter. The minutes of this meeting show that Mr. Humphrey, attorney for Mr. Charles Seaman and Meyer Seaman, was present, as was also Charles Seaman in person, and that an informal discussion was held in regard to stock and matters pertaining to the rental of the lobby from the Seaman Building Corporation. It appears that other meetings of the stockholders were held as late as December 3, 1935, at which Mr. Charles Seaman was present in person and plaintiff was represented by his attorney, Mr. Humphrey.

It may seem that the activities of plaintiff's brother, Charles Seaman, are given undue prominence in this opinion, but attention is called to these numerous meetings at which Charles Seaman was present, at which times he represented plaintiff, because of the relations between Charles and Meyer Seaman which we will now discuss.

It appears from the testimony of the plaintiff that he never personally attended any stockholders' meeting of the Ironwood Amusement Corporation or any meeting of the Seaman Building Corporation, and that because of his absence from the city of Ironwood, being engaged in business elsewhere, the matter of his holdings in these corporations was left

entirely to his brother, Charles Seaman. Plaintiff testified: "The theater business was left entirely in the hands of my brother, Charles, and A. L. Picker. I relied upon them to manage my affairs and look after my interest during that period, 1922 to 1928." During this time plaintiff resided in Ashland, Wisconsin. Later he went to Battle Creek. He testified:

"*Q.* When you were in Battle Creek the situation didn't change, Charles continued to look after your interests in the Ironwood Theatre?

"*A.* I didn't tell him to look after it; the thing just went on * * * Charlie looked after those things; I never attended one meeting of the stockholders or directors of the Seaman Building Corporation or Ironwood Amusement Corporation. I was merely represented by Charles or someone else * * * he took care of my theater stock in the business. I never appeared at a stockholders' meeting in its whole history, except by proxy. I let Charles vote my proxy."

All of the stockholders but four subscribed for their proportionate share of the 10,000 shares of stock authorized to be sold and paid 30 per cent. of the amount subscribed. No further sums were ever paid by them, and no call was made upon them for further payment by the board of directors. The record of the corporation does not disclose that any other or further action was taken either by the stockholders or the directors relative to the sale of other stock or the collection of unpaid subscriptions on the stock subscribed. The stock record at the time of the hearing of this case showed that between July 24, 1933, and February 4, 1936, upon the surrender of old certificates new stock certificates for a like number of shares were issued to all stockholders except-

ing plaintiff, his brother and one other who did not surrender his stock. This was called Class A stock on the stock record. All of the new certificates but seven bear date of July 24, 1933, one certificate bearing date August 11, 1933, two, February 10, 1934, one May 9, 1934, two November 15, 1935, and one February 4, 1936. What is termed the Class B stock record shows that 2,996½ shares of stock were issued between the dates of July 24, 1933, and May 9, 1934, inclusive.

At the time of the hearing of this cause in the court below it appeared that under the management of Mr. Thomas the bonded indebtedness of the corporation had been reduced to approximately $32,000 and the current liabilities to $2,200, and upon argument before this court it was stated by counsel for the appellees, and not contradicted by appellant, that all of the indebtedness of the corporation, both fixed and current, had been paid in full.

On June 2, 1936, plaintiff filed his bill of complaint charging that the action of the stockholders of the corporation in amending its articles of incorporation was illegal and fraudulent in that the financial condition of the corporation did not require the issuance and sale of further stock in said corporation; that plaintiff and other stockholders were deprived of their just proportion of the capital stock of the corporation by reason of plaintiff's inability to subscribe for and pay for his proportionate share thereof; that by the issuance of said stock the purchasers thereof had acquired rights and benefits from said stock out of proportion to the stockholders who were unable to subscribe and pay therefor; that the action of said corporation was illegal and void for the reason that in the vote taken for the amendment of the articles of incorporation

authorizing the sale it was not voted by the holders of record of two-thirds of the capital stock then outstanding, inasmuch as defendant Alex Rosemurgy voted 100 shares of stock which were then of record in the name of Charles Seaman, and Daniel Waite, as receiver of the Iron National Bank, voted 75 shares of stock which were then of record in the name of Charles Seaman and 50 shares of stock which were then of record in the name of A. L. Picker; and, that the issuance of the new certificates was illegal and fraudulent for the reason that the president and secretary of the corporation were not authorized by the stockholders or the board of directors to issue the same. Plaintiff by his bill asks that the corporation be required to reimburse the holders of the so-called Class B stock for the respective amounts paid by them upon receiving said certificates and that said holders of said stock be required to surrender their certificates to the corporation for cancellation. It is here to be noted that no rights of creditors are involved, and that this is a suit brought by a stockholder challenging the action taken by the directors and other stockholders in the name of the corporation.

The trial court found that plaintiff had presented no case for equitable relief and entered a decree dismissing his bill of complaint. From this decree plaintiff appeals and insists that said decree should be vacated and relief granted for the following reasons:

1–2. That the resolution passed by the stockholders authorizing the sale of 10,000 shares of no par value stock at $1 per share, giving such stock equal dividend rights, equal voting rights and rights of equal distribution upon liquidation with the outstanding stock which had a par value of $100 per

share and a book value of $112.43, and which had been purchased at public auction at $2.50 per share, was illegal, void and fraudulent. Also that it was void because not adopted by a two-thirds vote of the stockholders.

The records of the corporation show that at the time the vote was taken for amendment of the articles of incorporation, one Alex Rosemurgy had standing in his name on the books of the corporation 139 shares and "Alex Rosemurgy, pledgee, 100 shares." This stock was voted in favor of the resolution. If this 100 shares standing in the name of Rosemurgy, as pledgee, had not voted at all, or had voted in the negative, the resolution would still have had more than a two-thirds vote of all the stock outstanding. The record discloses that a portion of this stock standing in the name of Alex Rosemurgy, pledgee, had been pledged to him by Charles Seaman who was present at the meeting representing both himself and the plaintiff. No challenge to the vote of the stock in the name of Rosemurgy, as pledgee, was made and the legality of this vote was never questioned until the institution of this suit.

At the time of the vote on this resolution the records of the company show that Daniel Waite, receiver of the Iron National Bank, was the owner of 125 shares which were voted by Mr. Waite in the affirmative. No challenge was made at the time this stock was voted. No challenge could be properly made because the stock record of the corporation and the record in this case show that Mr. Waite, as receiver of the bank, was the owner of the stock in question and had a right to vote the same at a stockholders' meeting. We, therefore, find that the resolution providing for the amendment of the articles of incorporation which increased the capital stock

and fixed a price for the sale of such increase was adopted by a two-thirds vote of all of the outstanding stock of the corporation, and that there was no fraud, either actual or constructive, in the action of the stockholders in amending the articles of incorporation.

In support of his contention that a two-thirds vote for the amendment was necessary, plaintiff relies upon Act No. 327, § 19, Pub. Acts 1931, which reads as follows:

"Shares without par value may be issued or subscriptions therefor taken by corporations formed or existing under this act from time to time for such consideration as may be fixed from time to time by the board of directors, unless in the articles the power to fix such consideration shall have been reserved to the shareholders, in which event such power shall be exercised by the shareholders by consent in writing (a) without a meeting, or (b) by vote at a meeting, in each case by the holders of record of two-thirds of the total number of shares of each class of stock then outstanding and entitled to vote in respect thereto."

The foregoing provision pertains only to the fixing of the consideration at which the no par stock is to be issued, and would apply only after the resolution providing for issuance had been passed. The point is controlled by Act No. 327, § 43, Pub. Acts 1931, which reads, in part:

"Any corporation formed or existing under this act may at a meeting of the shareholders duly called and held amend its articles without limitation so long as the articles as amended would have been authorized by this act as original articles, by the vote of the holders of the majority of its shares entitled to vote."

It is undisputed that this amendment was adopted by the vote of a majority of the holders of shares entitled to vote. This section is discussed by Wilgus & Hamilton, Michigan Corporation Law, p. 292:

"Act No. 84, Pub. Acts 1921, required a two-thirds vote to amend the capital structure, although equally vital changes (such, for example, as of corporate objects) might be accomplished by a mere majority, the present act permits a majority to make its will effective as to all types of authorized amendments."

It would therefore appear that a majority of the stockholders may pass any amendment "so long as the articles as amended would have been authorized by this act as original articles."

3. Plaintiff contends that the offer of the corporation to its stockholders permitting them to subscribe for their proportionate part of the 10,000 shares and fixing the terms of payment has been changed by action of the board of directors which amounted to a preferential offer and as such was illegal, void and fraudulent, and that the stockholders who subscribed for the additional stock should be required to surrender the same for cancellation and the corporation required to pay to them the amount received therefor.

The record is conclusive that plaintiff's brother, Charles Seaman, had knowledge of every action taken at stockholders' and directors' meetings prior to 1934, and in view of the relations between him and plaintiff hereinbefore referred to and which will be later more fully discussed, we hold that the knowledge of Charles Seaman is chargeable to plaintiff.

"A shareholder represented by proxy at a meeting is chargeable with knowledge of facts connected with the proceedings of that meeting, known to his proxy." 7 R. C. L. p. 342.

"As a rule the stockholder is chargeable with notice of what takes place at a meeting at which he is represented by proxy, and of matters reported thereto." 5 Fletcher, Cyclopedia Corporations (Perm. Ed.), § 2061.

See, also, *Thames* v. *Central City Ins. Co.*, 49 Ala. 577; *Gray* v. *Aspironal Laboratories* (C. C. A.), 24 Fed. (2d) 97; *Rossing* v. *State Bank of Bode*, 181 Iowa, 1013 (165 N. W. 254); *In re Mathiason Manfg. Co.*, 122 Mo. App. 437 (99 S. W. 502).

4. Plaintiff contends that after stock was subscribed for by stockholders to be paid for in instalments, and after the first of such instalments was paid, that neither the stockholders nor directors could pass a resolution canceling the balance due upon such subscriptions without the consent of all of the stockholders. By this contention plaintiff assumes that such action was taken either at a stockholders' or directors' meeting. A diligent search of the record fails to disclose that any action was ever taken at a stockholders' or directors' meeting canceling the balance due from stockholders upon their original subscriptions to the newly-authorized capital stock.

5. Plaintiff insists that, having shown that there has been a preference made in the offer of subscription to other stockholders, he is entitled to demand his *pro rata* share of the increase of the capital stock on the same basis as other stockholders, and claims that he instituted this action immediately following the time such facts came to his knowledge.

We reiterate that the brother of plaintiff had full knowledge and information of all acts of the corporation from the time of the original incorporation up to the year 1934 when his term of office as a director was terminated, and his knowledge is chargeable to plaintiff. Testimony taken upon the hear-

ing, we think, discloses the real reason why neither plaintiff nor his brother, Charles Seaman, subscribed for their proportionate part of the newly-authorized stock. During the fall of 1932 and spring of 1933 when the corporation was reorganizing, attempting to find some way to prevent complete demoralization, Mr. Charles Seaman had said the stock "was not worth the paper that it was written on—that it was ready for the ash can." He made this statement on numerous occasions during the fall of 1932 and spring of 1933. There is testimony that Charles Seaman advised plaintiff not to put any money into the stock—"that the company was through." Testimony to this effect was given by Mr. P. J. O'Donnell, one of the defendants, who testified that he had a conversation with plaintiff in August, 1934, and that plaintiff asked him how the theater was coming. The witness related the following conversation:

"I said, 'Meyer, it begins to look as though we were working the thing out all right.' Then he said, 'That's what I understand. Pat, do you imagine there is any way that I could prevail upon the stockholders or board of directors at this time to pay in the required money and establish my position the same as the others that have paid their money in on the subscriptions?' and I said, 'Well, Meyer, I don't hardly see how that could be accomplished.

" 'In my opinion you showed you weren't interested and those boys have put their money in and saved the situation and it looks as though we are coming out whole and it seems unreasonable to make the request. I personally, feel they wouldn't agree to it.' That was all that was said there and he said, 'How much money would it have cost me to have taken my subscription?' I said, 'Well, as near as I can estimate, Meyer, it would be a matter of about $500 but when I get back to Ironwood I will send you the figure,' and then he said, 'My God, isn't that

terrible?' He said, 'Charles (meaning his brother) told me that you folks were all through and not to put a dollar into it.' ''

This testimony was contradicted by plaintiff. Mr. Charles Seaman, who although present during the trial, was not a witness. We find, therefore, that the only reasonable inference that can be drawn from the testimony and the circumstances disclosed by the record is that the plaintiff had the same knowledge of the facts relative to the actions of the stockholders, directors and officers as did his brother, Charles, and that he relied upon the latter's counsel and advice with reference to the advisability of going along with the other stockholders in the plan of reorganization and attempt to refinance and rebuild the corporation. Being charged with full knowledge of the facts and having failed to exercise his pre-emptive rights, plaintiff must be held to have waived the same.

''The stockholder * * * who brings his action against the corporation for damages for refusal to allow him to subscribe for the new stock, or for selling the stock to someone else, or for depriving him in any other way of it, must allege and prove that he demanded the stock and offered to subscribe and pay for it in the regular way within the time fixed for such subscriptions.'' (1 Cook on Corporations [8th Ed.], § 286.)

See *Hammond* v. *Edison Illuminating Company of Detroit,* 131 Mich. 79 (100 Am. St. Rep. 582); *Wilson* v. *Bank of Montgomery County,* 29 Pa. 537; *Hoyt* v. *Shenango Valley Steel Co.,* 207 Pa. 208 (56 Atl. 422); 7 R. C. L. p. 206.

The doctrines of waiver, estoppel and acquiescence are considered as of one family in the law, and another, closely akin to these, is the doctrine of laches.

In this case plaintiff was given an opportunity to exercise his right to subscribe for his proportionate share of the stock made available to stockholders of the corporation. He had at least constructive knowledge of all actions taken by the corporation and did not see fit to avail himself of his right to subscribe to the whole or any part of his proportionate share. A reasonable time was fixed within which each stockholder should avail himself of this right; the time for such subscription was extended; plaintiff had notice thereof and still did not see fit to avail himself of the opportunity. We must, therefore, hold that he intentionally relinquished his pre-emptive rights.

The record clearly shows that in the summer and fall of 1932 plaintiff had full knowledge of the distressed financial condition of the corporation; and had full knowledge of each and every act taken by it in attempting to improve the situation. He stood by and saw practically all of the other stockholders subscribe and pay for new stock. He knew the purpose to be an attempt to revive the corporation, and instead of acting with the other stockholders, it is apparent that he relied upon the advice of his brother, his "*alter ego*," that the company was "all through and not to put a dollar into it." Nearly two years thereafter, in August, 1934, he received information that it was beginning to appear as if those who had assumed the risk in attempting to revive the company "were working the thing out all right." Plaintiff then, evidently for the first time, realized that he had ignored an opportunity, and asked his informant, "do you imagine there is any way that I could prevail upon the stockholders or board of directors at this time to pay in the required money and establish my position the same as the others that have paid their money in on the subscriptions?"

It must be held that plaintiff, by his waiver of his stock subscription right and his subsequent conduct with the knowledge of the facts, acquiesced in the corporate acts of the corporation and the acts and conduct of its officers and board of directors, and that it would be manifestly unjust and inequitable to permit him to succeed in this suit and thus place himself on the same plane as those, who by investing their money saved the corporation from bankruptcy.

"Certainly, if the stockholder persistently, continuously, and steadfastly refuses to avail himself of the opportunity to subscribe for his *pro rata* share of treasury stock about to be offered for sale, meeting every demand with unequivocal refusal, being influenced by the financial difficulties of the corporation, he cannot later, after the stock has acquired great value, owing to a fortunate adjustment of its affairs, set aside a sale of the stock, or compel an accounting, for, though he is entitled to his opportunity to subscribe to the additional issue, he is compelled to exercise that right within a reasonable time, and here he not only fails, but manifests his intention of not profiting by the opportunity in the most unmistakable terms. *Conklin* v. *United Construction & Supply Co.*, 166 App. Div. 284 (151 N. Y. Supp. 624), affirmed without opinion, 219 N. Y. 555 (114 N. E. 1063), and reargument denied in 219 N. Y. 626 (114 N. E. 1063)." 52 A. L. R. 227.

There was no claim made that any action taken by the corporation, its officers or board of directors was not in good faith. Neither is there any claim that there was any intentional wrong done to plaintiff, nor any act of fraud perpetrated by the corporation or any of its officers. The record speaks to the contrary. In a letter written by Mr. Humphrey, one of the attorneys for plaintiff, to the president of the corporation on January 30, 1935, he stated,

"I have advised Charles Seaman and Meyer Seaman that this was a fraud upon their right as stockholders, and in saying this, I want you and the officers of the Ironwood Amusement Corporation to understand that, by using the word 'fraud,' I do not mean that any intentional wrong was done to Charles or Meyer Seaman but that what was done amounts to fraud in law."

It is clearly apparent from this letter that plaintiff nearly a year and a half before this suit was instituted was advised by his attorney that no intentional wrong had been consummated but that a constructive fraud had been perpetrated which entitled him to relief. Instead of acting promptly then, if he had not already lost his right to complain, he stood by, permitting the position of defendants to become more entrenched, when it was his duty if he had a grievance to act without delay and in an unequivocal manner. We must, therefore, hold that he was guilty of laches to the extent that he is precluded from obtaining equitable relief. The rule is broadly stated in *Baker* v. *Spokane Saving Bank* (C. C. A.), 71 Fed. (2d) 487, as follows:

"Laches is a defense to the action of a minority stockholder or shareholder to set aside corporate acts whether fraudulent or *ultra vires.*"

See, also, *Bonnet* v. *First National Bank of Eagle Pass,* 24 Tex. Civ. App. 613 (60 S. W. 325); 11 Fletcher, Cyclopedia Corporations (Perm. Ed.), § 5146; 10 R. C. L. p. 730.

The decree is affirmed, with costs to defendants.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, NORTH, and MCALLISTER, JJ., concurred.

TIGHE *v.* DAVIS.

1. DEEDS—EXECUTION—DELIVERY.
   Subsequent to execution of a deed that is absolute in form, nothing further need be done to render it effective than to deliver it to the grantee.

2. SAME—DELIVERY—INTENT.
   The act of delivery of a deed is not necessarily a transfer of the possession of the instrument to the grantee and an acceptance by him but it is that act of the grantor, indicated either by acts or words or both, which shows an intention on his part to perfect the transaction, by a surrender of the instrument to the grantee, or to some third person for his use and benefit.

3. SAME—DELIVERY—INTENT.
   The test of a conveyance is whether it can be said that delivery of the deed was such as to convey a present interest in the land.

4. SAME—PHYSICAL DELIVERY—PRESUMPTIONS.
   Physical delivery of a deed to the grantee raises a rebuttable presumption of delivery.

5. SAME—DELIVERY—BURDEN OF PROOF—EVIDENCE.
   The burden of proving a valid delivery of a deed ordinarily rests upon the party relying upon the instrument but in such cases testimony that the grantor entertained a secret and undisclosed intention that the deed was ineffectual to pass title is not permissible.

6. SAME—DELIVERY TO GRANTEE—SUBSEQUENT CONDUCT—EVIDENCE.
   In suit to set aside deed from plaintiff to defendant, delivery to defendant *held,* ineffective to pass title since there was no intention to pass title, where evidence of subsequent conduct shows, among other things, grantee did not consider himself owner when he gained physical possession of the deed and deed was thereafter returned to grantor's husband and not recorded

until grantee regained possession of it after death of the husband who handled his own and plaintiff's affairs without question by her.

7. SAME—DELIVERY—PHYSICAL POSSESSION.

Record, containing conflicting testimony in suit to set aside and declare void a deed, *held,* to present no reason for disturbing finding that delivery was not effective to pass title to defendant grantee, husband of plaintiff's step-daughter, after death of grantor's husband when grantee regained physical possession of the deed.

Appeal from Wayne; Campbell (Allan), J. Submitted January 6, 1938. (Docket No. 51, Calendar No. 39,681.) Decided February 24, 1938.

Bill by Blanche Tighe and Phillip H. Tighe against Webster Davis to set aside and declare void a deed, for a receiver and other relief. Cross-bill by defendant against plaintiffs to quiet title to land. Decree for plaintiffs. Defendant appeals. Affirmed.

John L. Crandell and *Perry W. Richwine,* for plaintiffs.

Hatfield & Hall (*Theron M. Hall,* of counsel), for defendant.

CHANDLER, J. Plaintiffs, Blanche Tighe and Phillip H. Tighe, are the widow and son, respectively, of Edward H. Tighe, deceased. Defendant is the husband of Mary Helen Tighe Davis, a daughter of Edward H. Tighe by a former marriage. Inasmuch as Phillip H. Tighe played no part of importance in the events to be herein related it will be understood that in speaking of the plaintiff we refer to Blanche Tighe.

This is a suit to set aside a deed from plaintiff to defendant and for an accounting of income from the property described in the deed in question.

Subsequent to her marriage plaintiff and her husband lived for a time in Plymouth and Detroit, but for some 15 years prior to the commencement of this suit they had resided in California, her husband returning to Detroit and Plymouth for two or three months during the summer to attend to his somewhat extensive real estate operations.

The property involved is situated in the city of Plymouth and was purchased by Edward H. Tighe on land contract dated July 15, 1914. He received a deed thereof in the following year. Subsequently he executed two mortgages covering the property and in August, 1926, conveyed the premises to defendant's wife, who, in the following month, conveyed it to plaintiff.

It fairly appears that Blanche Tighe is a woman of limited business experience; that her husband disposed of any transactions demanding attention and that he made many transfers of his property in which his wife joined, if necessary, upon his request and without inquiry as to the purpose.

On February 17, 1930, plaintiff executed the deed with which we are concerned and in which defendant was named as grantee. This deed was prepared and executed in the office of a notary public in Pasadena, California. Edward H. Tighe was present at the time. Plaintiff has no clear recollection of the transaction but assumes that subsequent to the execution the instrument was left on the desk of the notary public and from there removed by her husband. She claims not to have seen the deed again until after the death of her husband in November, 1934.

Defendant claims that in the latter part of February, 1930, he received the deed in an envelope bearing the post mark of Pasadena, California, and there is testimony by Louise Mulford, another daughter of Edward H. Tighe by his first marriage, that she was present at the time the deed arrived in the mail and that the envelope in which it was contained was addressed in the handwriting of plaintiff. Plaintiff has no recollection of mailing the deed to defendant but testified that she at various times mailed papers at the request of her husband, often addressing the envelopes, and without knowledge as to the contents.

After receiving the deed, defendant turned it over to his wife who placed it in a safety deposit box in Highland Park over which she had joint control with Louise Mulford. It was later taken to Plymouth and there placed in a deposit box under the sole control of Mrs. Mulford. She testified that in July, 1934, Edward H. Tighe, who was then in ill health, became apprehensive as to the safety of some of his papers and that to dispel his fears as to their whereabouts she drove him to the bank, obtained the deed and handed it to him. It was apparently placed by Mr. Tighe in his traveling bag along with other papers, where it remained until after his death when the papers were removed from the bag by plaintiff.

Two weeks after the death of Mr. Tighe, Louise Mulford requested that plaintiff bring the papers to her house for the inspection of herself, defendant and his wife. The testimony conflicts as to what transpired at this meeting. On behalf of defendant it is claimed that he picked the deed from the table, saying, "This deed belongs to me," and that plaintiff looked at the instrument and remarked, as she congratulated him: "You are right. That is your deed. * * * Take your deed. Collect your rent,

pay your taxes." It is further claimed that objections were then expressed by Mrs. Mulford and that plaintiff replied, "It doesn't matter whether you do or not. That is the way father wanted it. That is the way it is going to be."

Plaintiff's version of this meeting is that defendant picked up the deed, remarking, "Well, here is something with my name on it;" that he placed it in his pocket and from thenceforth refused to return it although requested to do so.

Thereafter, on November 19, 1934, defendant recorded the deed. Other facts will be hereinafter discussed.

The trial court entered a decree for plaintiff and defendant takes this appeal.

It will be readily perceived that the determining issue presented is whether at any time there was a valid delivery of the deed to defendant. The deed was absolute in form and subsequent to its execution nothing further remained to be done to render it effective other than delivery to the grantee.

That physical delivery to the grantee was accomplished cannot be denied as it was received by defendant from Pasadena in the mail. Mere physical delivery alone, however, is not sufficient to validate the deed.

"The act of delivery is not necessarily a transfer of the possession of the instrument to the grantee and an acceptance by him, but it is that act of the grantor, indicated either by acts or words or both, which shows an intention on his part to perfect the transaction, by a surrender of the instrument to the grantee, or to some third person for his use and benefit." *Thatcher* v. *Wardens & Vestrymen of St. Andrew's Church of Ann Arbor,* 37 Mich. 264.

"The test is whether it can be said that delivery of the deed was such as to convey a present interest in the land." *Pollock* v. *McCarty,* 198 Mich. 66.

See, also, *Gibson* v. *Dymon,* 281 Mich. 137.

But physical delivery to the grantee raises a presumption of delivery. *Collins* v. *Lamotte,* 244 Mich. 504; *Dawson* v. *Hall,* 2 Mich. 390; *Wilbur* v. *Grover,* 140 Mich. 187. This presumption, however, is not conclusive and may be rebutted by the evidence, the burden of proving a valid delivery ordinarily resting upon the party relying upon the instrument. *Barras* v. *Barras,* 192 Mich. 584. In such cases, testimony that the grantor entertained a secret and undisclosed intention that the deed was ineffectual to pass title is not permissible. *Wilbur* v. *Grover, supra.*

The present case is to be distinguished from those cases in which the deed has been delivered by the grantor absolutely with instructions that it should be later turned over to the grantee upon the happening of a future contingency. Here, subsequent to its execution, the deed came into the possession of Edward H. Tighe and it may be fairly inferred from the circumstances that its ultimate delivery to the grantee was dependent upon Tighe's will. He transacted all business for himself and plaintiff, many instruments being executed by her at his request but without her knowledge as to what they were or their significance. As to this particular transaction it is clear that the final disposition of the deed rested with Mr. Tighe. Plaintiff testified:

"*Q.* In California, when we took these depositions, you testified that you signed this deed, and that whatever your husband did with it was all right; is that correct?

"*A.* I trusted him to take care of all those things.

"*Q.* You completely forgot about the deed?
"*A.* Yes, that is the idea.
"*Q.* And didn't know any more about it until the night that it came up after your husband's death.
"*A.* That's right."

Although executed by plaintiff, whether the deed was delivered must be gathered from the significance of her husband in placing the deed in the hands of the grantee. That there was no intention to pass title is apparent, we believe, from the subsequent conduct of the parties, and this despite the presumption of delivery arising by virtue of possession of the deed by defendant. The subsequent conduct of the parties is inconsistent with any claim or understanding of ownership on the part of the grantee. Edward H. Tighe became involved in litigation about the year 1925 and thereafter several transfers of his property, including that involved in the instant case, were made between members of the family, and in each instance without consideration. He at all times prior to his death exercised proprietary control over the property; he collected the rents and a month or so before his death rented a portion of the premises to defendant and his wife and they paid rent to him. The actions of defendant in no way indicate that he considered himself as owner until after the death of Edward Tighe. Defendant did not record the deed when he received it but the same was given to his wife, then to Mrs. Mulford and finally returned to the possession of Mr. Tighe. In addition, Mrs. Mulford testified that the arrangement between herself and her father was such that she was to turn the deeds in her possession over to him at his request, her exact testimony in this regard being:

"*The Court:* You were under arrangement to turn over those deeds to him any time he wanted them for any purpose he wanted them for?

"*A.* Yes."

She also testified that this deed, together with another, while in her possession was contained in an envelope upon which a rather unexplainable statement was written:

"*Q.* Did you mark on it anything?

"*A.* Yes, in case of my death, it was to be given to Mr. Tighe or Mr. Davis, at my death."

The subsequent acts of the parties are not compatible with a finding that a valid delivery had been effected. See *Benneson* v. *Aiken,* 102 Ill. 284 (40 Am. Rep. 592); *Weigand* v. *Rutschke,* 253 Ill. 260 (97 N. E. 641).

We conclude, therefore, that the conveyance must fail for the neglect of Edward H. Tighe to complete delivery in his lifetime.

The meeting occurring subsequent to the death of Mr. Tighe at which time defendant regained possession of the deed presents a question of fact as to whether the facts relied upon by him to establish delivery at that time occurred. The testimony on this point was conflicting. The trial judge who had the opportunity of viewing the witnesses and hearing their testimony resolved the issue in favor of plaintiff. Based upon plaintiff's version of what transpired, no delivery was consummated at this time. We have examined the record and see no reason for disturbing this finding.

Decree affirmed, with costs to plaintiffs.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, NORTH, and MCALLISTER, JJ., concurred.

LAWSON-ERB LUMBER CO. *v.* GRAHAM-PAIGE CO. OF MICHIGAN.

1. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED CORPORATE OFFICER—SURVIVING OFFICERS—LANDLORD AND TENANT—ORAL AGREEMENT REDUCING RENT.

   In action of assumpsit to recover balance of rent, alleged to be due under written lease for five-year term, which after 20-½ months had been deferred in part by a supplemental written agreement reducing amount presently payable for ensuing six months, testimony by officers of corporate lessee that continuance of smaller payments beyond such six-month term and acceptance by lessor was in payment of rent in full and was pursuant to oral agreement with an officer of corporate lessor, since deceased, *held*, not barred by statute as to matters equally within knowledge of deceased officer, where testimony also shows a surviving officer of lessor was fully familiar with the arrangement (3 Comp. Laws 1929, § 14219).

2. LANDLORD AND TENANT—REDUCTION OF RENT—EXECUTED ORAL AGREEMENT.

   In action of assumpsit to collect balance of rent alleged to be due under lease for five-year term, evidence *held*, to show that corporate lessor entered into oral agreement reducing rent for an unexpired portion of term, which oral modification, having been completely executed, was binding on lessor although for a period of years (3 Comp. Laws 1929, § 13411).

3. FRAUDS, STATUTE OF—MODIFICATION OF WRITTEN LEASE BY ORAL AGREEMENT.

   An oral agreement between landlord and tenant reducing the rent payable by the terms of a written lease, while invalid and void so long as it remains executory, is valid and binding when followed by the regular payment and acceptance of the reduced amount in full (3 Comp. Laws 1929, § 13411).

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted January 12, 1938. (Docket No. 14, Calendar No. 39,748.) Decided February 24, 1938.

Assumpsit by Lawson-Erb Lumber Company, a Michigan corporation, against Graham-Paige Company of Michigan, a Michigan corporation, for sums due on a lease. Judgment for plaintiff. Defendant appeals. Reversed without a new trial.

Race, Haass & Allen, for plaintiff.

Crawford S. Reilley (*Hill, Hamblen, Essery & Lewis,* of counsel), for defendant.

NORTH, J. Plaintiff sues to recover the unpaid balance of rent alleged to be due on a five-year written lease entered into with defendant. From a judgment for plaintiff defendant appeals.

Plaintiff as lessor and defendant as lessee entered into a written lease of premises in the city of Birmingham, Michigan. Under the terms of this lease the lessor was to erect a building according to plans and specifications agreed upon, and to lease the building and premises to the lessee for a five-year period beginning February 15, 1929. The rent specified was $350 monthly for the first two years, $400 a month for the third year, and $450 per month for the fourth and fifth years. In the fall of 1930 negotiations were had for the temporary reduction of the rent, resulting in another written contract which provided for rental payments of $250 per month for a period of six months beginning November 1, 1930. This written contract further provided that the reduced payments amounting to $725 for this six-month period should be added to subsequently accruing monthly rentals. When this reduced rental

period had ended the lessee continued to tender and the lessor accepted and cashed monthly checks for $250 for the balance of the leasehold term, except that a check of $125 for the last half month's rent was retained by plaintiff but not cashed. Tendered return of this check at the trial was refused. Plaintiff's suit is for $7,075, this being the difference between the total rentals provided for in the lease and the amount paid by defendant.

There is no dispute between the parties over the terms of the written lease and the subsequent contract in writing modifying the same. The controversy centers in an alleged oral agreement for reduction of monthly rentals made subsequent to April 30, 1931 (the day when the written agreement for reduced rentals expired). A letter was produced at the trial written by the Graham-Paige Company to plaintiff on April 28, 1931, reading in part as follows:

"Last fall we made arrangements whereby part of the payments were deferred until 1932 with the expectation that conditions would improve in spring.

"We have operated in Birmingham at a loss ever since we started and it would not be good business for us to continue on the same rental basis. If we cannot secure a reduction in the rent it would be better that we sublet the entire building. We realize that we could not hope to get the amount as stipulated in the lease and do not care to establish a rental value that would be detrimental to you after the expiration of our present lease."

In answer to this letter the Lawson-Erb Lumber Company wrote defendant company a letter in which they acknowledged that conditions were bad; that they also were suffering under adverse conditions and had taken on the obligations necessary to build

on the leased land by direct request of defendant company; and that they would be pleased to help defendant company if it did not mean a hardship to plaintiff.

Defendant produced oral evidence showing that it continued negotiations for reduction of rent with John Lawson, who until his death on August 15, 1932, was actively in charge of the business of the Lawson-Erb Lumber Company. James M. O'Dea, who was president and general manager of Graham-Paige Company, testified:

"*Q.* Previous to May 1, 1931, did you have any negotiations with Mr. Lawson in reference to the continuation of the payment of $250 per month until the termination of the lease?

"*A.* Towards the end of April business instead of * * * being better, which we expected, was worse, so at that time Mr. Thoms had made the survey what they were paying in their show rooms in Birmingham and he and I went out and saw Mr. Lawson and told him very definitely we could not afford to pay $250 a month, if we had to pay $250 a month we would have to move out because the going rent at that time for similar show rooms was $75 to $100 a month. * * * After a great deal of discussion we compromised, we were to pay $250 a month for that show room and the service up until the expiration of the lease or at least until business got better but, of course, business hasn't got better."

There is testimony showing a subsequent effort in July, 1931, to have the monthly rental reduced below $250. Lansing W. Thoms, vice-president and sales manager of defendant company during the period of this lease, testified:

"I met Mr. Lawson at the show room in Birmingham and we went over several incidental matters

about the little things about the building and then I brought up the question of rent. As I remember the conversation, I says, 'Mr. Lawson, we cannot go on paying $250 a month, $250 a month is too much rent for this building. I don't know whether you know it or not, but there is a similar type of building which is leased anywhere from $50, $75 to $100 a month at the present time.' * * * I says, 'Mr. Lawson, why don't you make a further reduction of this rent?' And he replied, 'Well, I know that you are taking a loss on the rent and I also want you to know we are taking a loss on the rent also, it would be impossible to lower the rent below $250 a month.' I says, 'Well, we cannot continue on paying $250 at all times.' He says, 'Well, if you get really pushed where you cannot pay any more come around and see me again but I know you can pay $250, and regardless of whether the other buildings are paying less than that right now.' He says, 'If you really get into bad trouble on this rent come around and see me,' and the conversation was ended there."

Plaintiff objected to the foregoing testimony of O'Dea and Thoms as being inadmissible under 3 Comp. Laws 1929, § 14219:

"And when any suit or proceeding is prosecuted or defended by any corporation, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation, and not within the knowledge of any surviving officer or agent of the corporation."

Mr. Erb testified:

"I had no knowledge of any agreement other than the written amendment to the original agreement."

Notwithstanding this testimony on the part of Mr. Erb we are not in accord with the trial judge

who seems to have been of the opinion that the above-quoted testimony in behalf of defendant, being equally within the knowledge of Mr. Lawson, a deceased officer of plaintiff company, was barred by the statute. In his opinion the trial judge said:

"It is unfortunate that the court is deprived of the testimony of Mr. Lawson. However, I am satisfied from the proofs that no other officer (of plaintiff company) had the knowledge of the matters pertaining to this particular transaction that he possessed."

Under the circumstances set forth in this record we are unable to reach any other conclusion than that Mr. Erb, president of plaintiff company, was fully advised of the now controverted oral agreement. From April 30, 1931, the expiration date of the written agreement for the temporary reduction of rent, to the end of the leasehold term, plaintiff company received from its lessee each month (with the exception of the last payment of $125) a check in the amount of $250 bearing a notation plainly indicating that the check was in payment of the rent for the current month. There were 17 such payments made to plaintiff company after the death of Mr. Lawson during which time Mr. Erb was in charge of plaintiff's business. The following testimony of Mr. Erb is quite indicative of his knowledge of this whole transaction. He testified:

"*Q.* Now, then, did you know that after the 30th of April, 1931, that the lessee Graham-Paige paid $250 each and every month up to the time of the termination of this lease?

"*A.* I was aware of the rentals that were paid, the majority of the time. I did eventually know a long time before the termination of the lease that the lessee was paying $250 per month. I know of

the letter written by Graham-Paige under date of April 28, 1931. * * *

"*Q.* From May 1, 1931, up to the last payment you knew each and every month it would be $250 for the rent, did you know that?

"*A.* I believe that.

"*Q.* But you never made any protest to the Graham-Paige?

"*A.* No, I did not.

"*Q.* Because of those payments or any, took any action whatsoever?

"*A.* Not until the final payment.

"*Q.* Not until the final payment?

"*A.* Until the termination of the lease."

Quite in accord with the foregoing testimony of Mr. Erb is that of Mr. O'Dea to the effect that in a conversation which he had with Mr. Erb he called the latter's attention to the oral agreement which had been made with Mr. Lawson relative to the reduction of rent and Mr. Erb said, "I am fully familiar with the arrangement you had."

In view of the foregoing record it must be held that the statute (3 Comp. Laws 1929, § 14219) did not bar the oral testimony of O'Dea and Thoms, because it cannot be said the subject matter of such testimony was "not within the knowledge of any surviving officer or agent of the (plaintiff) corporation." Instead, we think Mr. Erb had full knowledge of the oral agreement for a reduction of rentals and hence the statutory bar is not applicable.

As bearing upon the admissibility of oral testimony, it should be noted that this litigation arises out of a contract that had been fully performed. For this reason the instant case is to be distinguished from *Claerhout* v. *Tromley,* 282 Mich. 649.

We are satisfied from the record that an oral agreement was entered into by plaintiff company,

acting through its representatives, whereby the rental for the unexpired portion of the term was reduced to $250 per month; and since the modified lease contract was completely executed by the respective parties, this oral modification was legally binding upon them. In arriving at this conclusion we are mindful that the modification was one of a written lease for a period of years by an oral agreement.* That such an oral agreement, after it has been fully executed by the respective parties, is binding is supported by abundant authority. *Eisenberg* v. *C. F. Battenfeld Oil Co.*, 251 Mich. 654, in which we quoted with approval the following:

" 'An oral agreement between landlord and tenant reducing the rent payable by the terms of a lease in writing under seal, while invalid and void so long as it remains executory, is valid and binding when followed by the regular payment and acceptance of the reduced amount in full. *Snow* v. *Griesheimer*, 220 Ill. 106 (77 N. E. 110).' L. R. A. 1915B, 66, note."

To the same effect, see *McKenzie* v. *Harrison*, 120 N. Y. 260 (24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638); *City Mortgage Co.* v. *Diller*, 180 Wash. 499 (40 Pac. [2d] 164); *C. S. Brackett Co.* v. *Lofgren*, 140 Minn. 52 (167 N. W. 274, L. R. A. 1918F, 998).

The judgment entered in the circuit court is reversed without a new trial. Defendant will have costs of both courts.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and MCALLISTER, JJ., concurred.

* See 3 Comp. Laws 1929, § 13411.—REPORTER.

WALL *v.* ZYNDA.

1. VENDOR AND PURCHASER—COVENANTS—LIMITATION OF ACTIONS—RECOVERY OF PAYMENTS.

   In purchaser's suit to rescind land contracts for purchase of lots in a subdivision in which contract vendor agreed to convey merchantable title, gravel streets and lay cement sidewalks, plaintiff's suit *held*, not founded on covenant so as not to be barred until lapse of 10 years, but one to recover payments made under contract, no fraud or mistake having been alleged (3 Comp. Laws 1929, § 13976).

2. CANCELLATION OF INSTRUMENTS — RESCISSION — RESTORATION OF STATUS QUO.

   Rescission not only involves a repudiation of a contract and the refusal of the moving party to be further bound by it but also a restoration of the *status quo*.

3. COVENANTS—SPECIFIC PERFORMANCE—DAMAGES.

   A suit founded on a covenant seeks affirmatively to enforce the terms of the covenant by way of specific performance or by recovery of damages for a breach of the covenant by one relying on it and asserting his rights thereunder.

4. CANCELLATION OF INSTRUMENTS — RESCISSION — PROMPT ACTION REQUIRED.

   The character of relief sought in suit for rescission is opposite to that of covenant and requires prompt action by one seeking rescission in order that *status quo* may be restored.

5. EQUITY—RESCISSION—PROMPT ACTION.

   Equity will not permit one possessed of a right of rescission to delay unduly in the exercise of that right and while so doing speculate on the outcome of the transaction at the risk of his adversary.

6. LIMITATION OF ACTIONS—PERIOD DETERMINED BY FORM OF ACTION INSTITUTED.

   If a plaintiff has a choice between two forms of action, the one brought by him determines the period of limitation applicable.

7. VENDOR AND PURCHASER—RESCISSION—LIMITATION OF ACTIONS.
Purchaser's bill for rescission of land contracts in suit started over seven years after payment of contract price in full *held*, properly dismissed, the suit being barred by the six-year statute of limitations (3 Comp. Laws 1929, § 13976).

8. APPEAL AND ERROR—QUESTIONS REVIEWABLE—LIMITATION OF ACTIONS—FORM OF ACTION.
Contention that executory land contracts are not "deeds" within meaning of statute of limitations as to actions on covenants is not passed upon where form of action instituted by plaintiff rendered such provisions of statute inapplicable (3 Comp. Laws 1929, §§ 13309, 13976).

9. EQUITY—RESCISSION—SPECIFIC PERFORMANCE—RELIEF GRANTED.
Under prayer for general relief in suit for rescission of land contracts brought by purchaser, plaintiff may not be granted relief by way of specific performance since such latter relief is wholly inconsistent with the former, might depend on wholly different facts and circumstances and disposition of suit can be made without prejudice to plaintiff's right, if any, to institute suit for specific performance.

Appeal from Macomb; Spier (James E.), J. Submitted January 5, 1938. (Docket No. 24, Calendar No. 39,785.) Decided February 24, 1938. Rehearing denied April 4, 1938.

Bill by James E. Wall against Anna Zynda and others to obtain rescission of land contracts and for a money decree. Motion to dismiss by defendants. Motion granted. Plaintiff appeals. Affirmed.

Stanley E. Beattie, for plaintiff.

Alton H. Noe and *Butler & Dougherty,* for defendants.

NORTH, J. Plaintiff filed a bill to obtain rescission of two land contracts and repayment of the purchase price. By these contracts plaintiff had agreed to purchase from John Zynda, Sr., trustee, certain

lots in a Macomb county subdivision. Defendants, claiming plaintiff's suit was barred by statutory limitations, moved to dismiss the bill of complaint. This motion was granted and plaintiff has appealed.

The land contracts were entered into April 12, 1926. The total purchase price was $3,450. Approximately one-half was paid prior to December 28, 1927, on which date John Zynda, Sr., died. He left an estate in excess of $350,000. The individual defendants are the legatees each of whom received upwards of $19,000 from the estate. Defendants Anna Zynda and Joseph Zynda were appointed executors and plaintiff paid to these executors the balance of the contract price. The final payment was made October 9, 1929. Plaintiff resided in Massachusetts. After payment in full of the contracts, from time to time he made inquiry and demand, by letter and other means, of the executors for performance of the vendor's obligations under the land contracts, and he was advised that performance could not be tendered for the reason, among others, that the Zynda estate was in process of administration and that title could not be made until some future date, but that ultimately the contract obligations of the vendor would be performed in full.

By the terms of these contracts, upon payment in full, the vendor was to convey by warranty deed a marketable title and provide vendee with an abstract for each lot. The vendor also agreed "to gravel streets and to lay cement sidewalks." In April, 1936, an abstract of title was tendered to plaintiff's counsel but it disclosed that the lots were incumbered. On or about September 15, 1936, plaintiff's counsel was notified that the incumbrance had been removed and that defendants would soon be able to deed the property. About this time plaintiff ascer-

tained that the streets had not been graveled and the cement walks had not been laid. He informed defendants that he would not accept conveyance of the lots until the agreed improvements were made. Defendants Joseph and John Zynda requested further delay until the return of the widow, Anna Zynda, from Germany. An adjustment not having been accomplished, plaintiff started suit March 10, 1937. Defendants have never conveyed title nor tendered conveyance thereof.

The reasons assigned by defendants in support of their motion to dismiss are that the plaintiff's cause of action is barred by the six-year statute of limitations (3 Comp. Laws 1929, § 13976) and by plaintiff's failure to file a claim against the estate of John Zynda, Sr., in accordance with statutory requirements. The trial judge sustained defendants' motion to dismiss on the ground that plaintiff's cause of action was barred by the six-year statute of limitations, and also on the further grounds that plaintiff did not present his claim against the Zynda estate within two years after the granting of letters testamentary (3 Comp. Laws 1929, § 13981) and that he did not file a contingent claim as provided by statute (3 Comp. Laws 1929, § 15708).

If the trial court was correct in holding that the six-year statute of limitations barred plaintiff's suit, his holding is decisive of this appeal. However, appellant asserts that the six-year limitation is not applicable because this suit is one "founded" upon covenant, and therefore comes within the statutory provision which in part reads:

"Actions founded upon covenants in deeds * * * may be brought at any time within 10 years from the time * * * when the cause of action accrued on such * * * covenant." 3 Comp. Laws 1929, § 13976.

We cannot agree with appellant that his suit is one which comes within the above quoted statutory limitation. His bill is one for *rescission* of the two contracts. Neither fraud nor mistake is alleged. Instead vendor's failure to fulfill the terms of the contracts is alleged as the ground for rescission. Such failure was known at all times to plaintiff, or at least would have been known to him had he exercised anything like reasonable diligence in ascertaining the facts. A bill for rescission of a contract, even though under seal, is not founded upon covenant in such contract, *i. e.*, it is not a bill asking affirmative relief based upon a covenant. Instead the rescission here sought is relief of directly the opposite character. The prayer in plaintiff's bill for rescission is that the entire contract be abrogated and moneys paid by him under the contract be decreed to be repaid.

"To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it. But this by itself would constitute no more than a breach of the contract or a refusal of performance, while the idea of rescission involves the additional and distinguishing element of a restoration of the *status quo*." 1 Black on Rescission and Cancellation (2d Ed.), § 1.

As contradistinguished from rescission, a suit founded on covenant seeks affirmatively to enforce the terms of the covenant by way of specific per-

formance or by recovery of damages for a breach of the covenant by one who relies upon the covenant and asserts his rights thereunder.

Not only is rescission the opposite of covenant in the character of the relief sought, but of necessity the results which follow the respective actions are opposite or at least distinctly different. Rescission wholly abrogates the contract and restores the parties to a *status quo;* but covenant perpetuates the contract and affords the moving litigant his rights thereunder. Because of this difference courts have uniformly required a plaintiff in rescission to assert his right to rescind without any unnecessary delay. Otherwise he will be denied the relief. In many cases the right to have rescission has been held to have been lost by laches within a much shorter period than the six-year statute of limitations. It is obvious that a prolonged period of time within which to bring an action for rescission would be quite incompatible with the character of the relief sought. A party asking restoration of the *status quo* for obvious reasons should be required to move promptly. Equity will not permit one possessed of a right of rescission to delay unduly in the exercise of that right and while so doing speculate on the outcome of the transaction at the risk of his adversary.

"The form of action fixes the bar rather than the cause of action. For instance, if plaintiff has a choice between two forms of action, the one brought by him determines the period of limitation applicable." 1 Green's Michigan Practice (Nichols' 3d Ed.), p. 165.

To the same effect, see *Christy* v. *Farlin,* 49 Mich. 319; *Avery, for the use of Aultman,* v. *Miller,* 81 Mich. 85; *Stringer* v. *Stevens' Estate,* 146 Mich. 181

(8 L. R. A. [N. S.] 393, 117 Am. St. Rep. 620, 10 Ann. Cas. 337).

Plaintiff's cause of action accrued when he paid in full the contract price in October, 1929. But he did not start his suit for rescission until March 10, 1937. The circuit judge was right in dismissing the bill of complaint on the ground that the suit was barred by the six-year statute of limitations.

It should be noted that we do not pass upon appellees' contention that executory land contracts are not "deeds" in the sense in which that word is used in 3 Comp. Laws 1929, § 13976, hereinbefore quoted. In part this contention is based upon 3 Comp. Laws 1929, § 13309, which provides that such executory contracts are not embraced in the term "conveyance" as used in chapter 260, 3 Comp. Laws 1929, under the title of "conveyances of real property." See 3 Comp. Laws 1929, § 13278 *et seq.*

We are not in accord with appellant's contention that notwithstanding rescission is sought in the instant case, plaintiff may (under his prayer for general relief) be granted specific performance. The latter is wholly inconsistent with the former and the right to such relief might depend upon wholly different facts and circumstances. Disposition of the instant case can be made without prejudice to plaintiff's right, if any, to institute suit for specific performance. 1 Black on Rescission and Cancellation (2d Ed.), § 12.

Dismissal by the circuit court of the bill of complaint is affirmed, with costs to appellees.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and MCALLISTER, JJ., concurred.

BAY CITY BANK *v.* WHITE.

1. MORTGAGES—PURPOSE OF HOME OWNERS' LOAN ACT—REDUCTION OF DEBT—AMORTIZATION.

   The purpose of the home owners' loan act is to save the small home owner from loss of the home by refinancing same up to 80 per cent. of its appraisal value and to enable him to amortize the mortgage by monthly payments on principal and interest by a reduction of the amount of the owner's debt with the consent of the mortgagee (48 Stat. at L. chap. 64).

2. CHATTEL MORTGAGES—VALIDITY—REPURCHASE OF HOME—USE OF HOME OWNERS' LOAN CORPORATION BONDS.

   In transaction which took place after expiration of period of redemption from foreclosure of plaintiff's mortgage on defendants' home, whereby latter effected a repurchase thereof by giving plaintiff Home Owners' Loan Corporation bonds and chattel mortgage in form of bill of sale of cottage and garage, owned by defendants on land in which they held a leasehold interest, securing note for difference between bonds and interest plaintiff had in the home, such chattel mortgage and note *held,* not void and unenforceable because contrary to mortgagee's consent to take bonds whereby it waived all claims against the property or applicant for loan from the Home Owners' Loan Corporation arising from such property since the chattel mortgage and note were in part payment for the repurchase of the home, pertained to other property than that covered by the bonds and not used in connection therewith and full details of entire transaction were disclosed to representatives of the Corporation (48 Stat. at L. chap. 64).

Appeal from Bay; McCormick (James L.), J. Submitted January 6, 1938. (Docket No. 66, Calendar No. 39,760.) Decided February 24, 1938.

Bill by Bay City Bank against W. Ernest White and Rosemary C. White to foreclose a chattel mortgage and for a deficiency decree. Suggestion of death of defendant W. Ernest White. Rosemary C. White, administratrix of the estate of W. Ernest White, substituted as party defendant. Decree for plaintiff. Defendant appeals. Affirmed.

Lloyd W. Bartlett, for plaintiff.

B. J. Tally, for defendant.

NORTH, J. Plaintiff filed a bill for foreclosure of a chattel mortgage and a deficiency decree. After the case was tried in the circuit court but before entry of decree, defendant W. Ernest White died and Rosemary C. White as administratrix was substituted in the place of deceased. The chattel mortgage in suit (in form of a bill of sale) covered a cottage and garage owned by defendants on land in which they held a leasehold interest, and was given to secure a promissory note, dated April 26, 1934, in the principal amount of $1,176.62. There was default and on foreclosure plaintiff purchased the property for $1,000, and had decree for deficiency of approximately $300. This appeal followed.

The defense is that the note and chattel mortgage are void and unenforceable being in violation of the home owners' loan act of 1933 (48 Stat. at L. chap. 64 [12 USCA, § 1461 *et seq.*]) and against public policy. This defense necessitates a review of the transaction leading up to the execution of the note and bill of sale.

Defendants owned a home in Bay City subject to a mortgage in favor of plaintiff bank. There was default in the mortgage payments, the mortgage

was foreclosed and a sheriff's deed for the premises was issued to plaintiff on August 13, 1932. Defendants failed to redeem the property and title became absolute in plaintiff. Plaintiff desired to give defendants a further opportunity to save their home and suggested that they make an application for a Home Owners' Loan Corporation loan. Plaintiff prepared the application, which was signed by defendants, and it was submitted to the Saginaw office of the Home Owners' Loan Corporation. After an appraisal of the property, an offer was submitted of $3,200 in Home Owners' Loan Corporation bonds for the bank's interest in the property. According to the policy of the Home Owners' Loan Corporation, before they purchased a mortgagee's interest in a homestead such mortgagee was required to sign a "mortgagee's consent to take bonds." This instrument, which was submitted to plaintiff, contained a paragraph reading as follows:

"The acceptance of this consent by the undersigned constitutes a waiver by you of any and all claims which you may have at this time against either the property involved or the applicant for a loan with the Home Owners' Loan Corporation named in this consent arising from this property."

At this time the bank had an interest of $4,376.62 in the property and was unwilling to release its claim for the amount offered by the Home Owners' Loan Corporation. However, after further negotiations defendants agreed to give the note in suit, in the sum of $1,176.62 (being the difference between plaintiff's claim and the amount of the Home Owners' Loan Corporation offer) secured by the bill of sale covering the cottage and garage owned by defendants. Before the transaction was consummated the whole arrangement was discussed between the

assistant cashier of the plaintiff bank and a representative of the Home Owners' Loan Corporation and received the latter's approval. Concerning the conversation at the Home Owners' Loan Corporation office, Mr. Bamford, assistant cashier of the plaintiff bank, gave the following uncontradicted testimony:

"Prior to the signing of exhibits 1 (the note), 2 (the bill of sale) and 3 (the mortgagee's consent to take bonds), I had several discussions with Mr. and Mrs. White. My bank received exhibits 1 and 2 and $3,200 in Home Owners' Loan Corporation bonds. I discussed this with the Home Owners' Loan Corporation, in their office. I talked to Mr. Lawler.

"*Q.* Did you at that time present to him the proposition which was carried through later here?

"*A.* Yes, I talked the whole proposition over with them thoroughly.

"*Q.* Advised them of the total amount?

"*A.* Advised them of the total amount, and asked them for their consent to handle the matter in that way, to take additional security—of the security it would take, a bill of sale on the cottage to apply on our mortgage, and afterwards sent an acceptance of the $3,200 in home owners' loan bonds for the balance of the loan.

"*Q.* The Mr. Lawler you talked to was in the Home Owners' Loan Corporation office?

"*A.* Yes, Saginaw branch of the Home Owners' Loan Corporation.

"*Q.* And did he object to that, or was he agreeable to it?

"*A.* He was agreeable to it. * * * Mr. Lawler told me he would consent to allow that separate transaction to go through between the bank and the Whites."

The transaction was completed on April 26, 1934, by the execution of the note and bill of sale by defendants, and the mortgagee's consent to take bonds

by plaintiff. Further, when the consent to take bonds was forwarded to the office of the Home Owners' Loan Corporation on May 3, 1934, the bank again reiterated the details of the arrangement finally entered into in a letter reading as follows:

"Home Owners' Loan Corporation,
"207 Goff Building,
"Saginaw, Michigan.
"Attention: Mr. Lawler.

"*Dear Sir:*

"We are inclosing herein mortgagee's consent to take bonds in the sum of $3,200 in settlement of our interest in the property of W. Ernest White, located at 2156 Fourth avenue, Bay City, Michigan.

"This matter has been held up for several days during which time arrangements were made for the balance of our claim. The bill of sale on the summer cottage regarding which the writer talked to you on his last visit to Saginaw has been completed and our mortgage now reduced to the above mentioned sum of $3,200."

As hereinbefore stated, the defense urged is that the part of the transaction which resulted in defendant's giving the note and chattel mortgage, being in violation of the spirit of the home owners' loan act, was contrary to public policy and therefore unenforceable. Cases involving legal questions of this character are of comparatively recent origin; and there is seeming conflict in the decisions. The purpose sought to be accomplished by the organization and the contemplated activities of the Home Owners' Loan Corporation is stated in one of the decisions as follows:

"To save homes from threatened or pending foreclosures, to save lifetime savings investments of home owners in distress, to save them from becoming paupers, and is the rehabilitating agency to

guard and protect the small home owner by judiciously refinancing his obligations with enough to pay all the incumbrances on his home, but limiting the new mortgage to 80 per cent. of its appraisal value for the property, so he can meet his amortized mortgage by monthly payments on principal with interest." *Jessewich* v. *Abbene,* 154 Misc. 768 (277 N. Y. Supp. 599).

In another case it is stated:

"It has been held that the courts should take judicial notice of the fact that the Home Owners' Loan Corporation is strictly a relief agency, organized to aid distressed home owners in saving their homes. The reduction in the amount of the home owner's debt (which, of course, can be accomplished only with the consent of his creditor) is the most effective aid, in most instances, which can be rendered to him. * * * The Home Owners' Loan Corporation is interested in the reduction of the indebtedness of the home owner who procures a loan." *Chaves County Building & Loan Ass'n* v. *Hodges,* 40 N. M. 326 (59 Pac. [2d] 671).

Other decisions bearing upon the phase of the law here involved will be found in the following cases: *First Citizens Bank & Trust Co. of Utica* v. *Speaker,* 159 Misc. 427 (287 N. Y. Supp. 831); *Cook* v. *Donner,* 145 Kan. 674 (66 Pac. [2d] 587, 110 A. L. R. 244); *Stager* v. *Junker,* 14 N. J. Misc. 913 (188 Atl. 440); *Ridge Investment Corp.* v. *Nicolosi,* 15 N. J. Misc. 569 (193 Atl. 710). In none of the cases above cited, except the last from New Jersey, was the party who stood in the position of plaintiff in the instant case permitted to recover. In the cases wherein the question is involved, the theory of the decision seems to be that since the Home Owners' Loan Corporation is a public agency, violation of

the mortgagee's agreement above quoted is a fraud upon the public and therefore unenforceable as a matter of public policy. It is somewhat difficult to reach the conclusion that such a transaction is a fraud upon the public when it is consummated, as in the instant case, with full knowledge and consent on the part of the representative of the Home Owners' Loan Corporation. For this reason we find ourselves unable to go as far as did the supreme court of Kansas in the case of *Cook* v. *Donner, supra,* wherein it is said:

"So such agreements would seem to be prohibited whether they be secret or not."

However, it is somewhat important to note that in this Kansas case the security taken by the mortgagee was against the identical property covered by the Home Owners' Loan Corporation loan, not security against separate property owned by the mortgagor, as in the instant case. In the earlier one of the two cases decided by the supreme court of New Jersey (*Stager* v. *Junker, supra*) it was held that a secret agreement between the mortgagor and the mortgagee whereby the former undertook to save the latter from loss in consequence of his having accepted Home Owners' Loan Corporation bonds, was unenforceable. The court said:

"By means of the secret agreement the plaintiff could not defeat the express terms of his own agreement to accept the bonds of the lending agency in full settlement of defendants' obligation."

But the same court in its later case reached the conclusion that an obligation of this character entered into by the mortgagee with the mortgagor, with the knowledge of the representative of the Home Owners' Loan Corporation, was valid and enforceable. It may be noted that this decision was

subsequent to each of the decisions hereinbefore cited. The New Jersey court said:

"We are unable to agree with the contention of the appellants that the agreements for payments over and above the amount of the Home Owners' Loan Corporation mortgage are entirely void and illegal. The most favorable view of the statute and the cases thereunder cited would be that fraudulent agreements, made in collusion to induce the granting of the mortgage loan by the corporation, are unenforceable. As stated, the factual finding here is that there was no fraud or collusion, and that the arrangement was openly made with the knowledge of all parties, including the representative of the corporation." *Ridge Investment Corp.* v. *Nicolosi, supra.*

We are of the opinion that there are several phases of the instant case which are of particular importance. First, that at the time the Home Owners' Loan Corporation loan was solicited the period of redemption after foreclosure had fully expired and the plaintiff was the absolute owner of the property upon which the Home Owners' Loan Corporation loan was sought. The real transaction was a purchase of the property by the defendants from the plaintiff. Further, the obligation which plaintiff now seeks to enforce in no way constituted a lien upon the property covered by the Home Owners' Loan Corporation mortgage. Instead it was a bill of sale or chattel mortgage covering personal property of defendants which was in no way related to nor used in connection with the real estate on which the Home Owners' Loan Corporation took security. The chattel mortgage obligation which defendants now seek to avoid was in fact accepted by plaintiff in part payment for the conveyance of the real estate to de-

fendants. The transaction did not minimize the security taken by the Home Owners' Loan Corporation incident to its mortgage. And still more important, the transaction on the part of the plaintiff in the instant case was in no way characterized by fraud, secrecy or collusion. On the contrary the details were fully revealed to the Home Owners' Loan Corporation representative pending the negotiation of the loan from the corporation. Under the circumstances we are unable to find any justification for holding that the obligation which plaintiff seeks to enforce is void on the ground of public policy.

The decree entered in the circuit court is affirmed, with costs to appellee.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and MCALLISTER, JJ., concurred.

In re EVANS' ESTATE.

LEVENSELLER *v.* SMITH.

1. WILLS—EXECUTION—EVIDENCE—QUESTION OF LAW.
   In will contest, evidence *held*, sufficient to justify holding of trial court as a matter of law that will was executed in accordance with legal requirements.

2. SAME—UNDUE INFLUENCE—PRESUMPTIONS—PRACTICAL NURSE—CONFIDENTIAL RELATION—POWER OF ATTORNEY.

Contention by cousins, residing in another State some distance from home of testatrix, that will, containing bequest of household furniture, car and one-third of the residuary estate to neighbor who had acted as practical nurse for testatrix and her late husband, is presumed to have been obtained through undue influence of such legatee who is alleged to have sustained a confidential relation with testatrix because he had a power of attorney *held*, untenable where power of attorney was not given to legatee until three months after will was executed.

3. SAME—UNDUE INFLUENCE—PRESUMPTIONS—INTERMITTENT INSANITY—INTIMATES—BUSINESS AGENTS.

Fact that a beneficiary under a will has for a considerable time been intimate with and attended to business transactions for a testator, notwithstanding latter was mentally afflicted to the extent of being intermittently insane, does not raise a presumption of undue influence.

4. SAME—INSTRUCTIONS—UNDUE INFLUENCE—OPPORTUNITY.

Record in will contest *held*, not to disclose error, either in lengthy and perhaps somewhat repetitious and irrelevant charge or failure to give appellants' proffered requests as to undue influence so prejudicial as to constitute reversible error, especially where testimony indicates no more than that person who is alleged to have exercised undue influence had an opportunity to do so.

5. SAME—UNDUE INFLUENCE—OPPORTUNITY—PRESUMPTIONS.

Fact that opportunity was present for undue influence of a testator in making a will will not raise an inference of it.

6. SAME—UNDUE INFLUENCE—FAILURE OF BENEFICIARY TO BE SWORN AS WITNESS—PRESUMPTIONS.

In contest of a will, alleged to have been the result of undue influence upon the part of a beneficiary, fact that such person was not called as a witness by proponent at trial in circuit court *held*, no basis for instruction to jury that presumption was raised that had he been called his testimony would have been adverse to proponent where such person was sworn as a witness by contestants in the probate court and was present in court throughout the trial in the circuit court notwithstanding argument as to permissible inference from failure to testify was made to the jury over proponent's objection.

7. SAME—MENTAL COMPETENCY—REQUESTS TO CHARGE—INSTRUCTIONS.

Determination of jury in will contest that testatrix was not shown mentally incompetent to execute will when it was executed *held,* proper where voluminous testimony was conflicting, full and detailed requests to charge were submitted by both proponents and contestants and charge as given on such question, though somewhat repetitious and prolix was not prejudicial.

8. EVIDENCE—HYPOTHETICAL QUESTIONS—ASSUMED FACTS—MENTAL COMPETENCY.

Objection to hypothetical question of considerable length relative to opinion of expert as to whether or not testatrix was suffering from senile dementia to such an extent as destroyed her testamentary capacity at time will was executed *held,* properly sustained where in certain material particulars the facts assumed in the hypothetical question were not supported by testimony.

9. WILLS—INSTRUCTIONS—INSANE DELUSIONS—EVIDENCE.

Charge to jury in will contest that only insane delusion with which testatrix is shown to have been afflicted had nothing to do with the disposition made of her property in the will and therefore jury could not find the will invalid on that ground *held,* justified under record presented.

10. APPEAL AND ERROR—WILLS—WEIGHT OF EVIDENCE—RECORD.

Contention that verdict of jury sustaining will proposed for probate was contrary to the weight of the evidence *held,* not sustained by record.

Appeal from Macomb; Reid (Neil E.), J. Submitted January 19, 1938. (Docket No. 138, Calendar No. 39,679.) Decided February 24, 1938.

In the matter of the estate of Annie S. Evans, deceased. A will was presented for probate. Louise Smith Trask and Fannie S. Northup objected thereto. Will admitted to probate. Contestants appealed to circuit court. Charles F. Smith joined as contestant in circuit court. Verdict and judgment sustaining will. Contestants appeal. Affirmed.

George W. and *Clifford A. John,* for proponent.

Lungerhausen, Weeks, Lungerhausen & French and *Neale & Hirt,* for contestants.

NORTH, J. This appeal involves a contest of the will of Mrs. Annie S. Evans, deceased. She died October 2, 1935, at the age of 77 years. The immediate cause of death was pneumonia, but she was then suffering from senile dementia. Her husband's death occurred on December 18, 1934. The will in suit bears date January 29, 1935; and it was proposed for probate by Aubrey Levenseller, one of the beneficiaries. It was sustained after contest in the probate court and upon appeal to the circuit court with trial by jury it was again upheld. It is contested on the grounds that it was not legally executed and that the testatrix was unduly influenced and mentally incompetent. Contestants have appealed from the judgment in the circuit court sustaining the will and from the denial of their motion for a new trial.

Mr. and Mrs. Evans had been married about 20 years at the time of his death. He left his property to Mrs. Evans who at the time of her death was possessed of a substantial estate. Mr. and Mrs. Evans had no children, and so far as is disclosed by the record she left no near relatives surviving her. Contestants are first cousins living in the State of New York. But the record discloses that this relationship had resulted in no particular friendliness or intimacy between testatrix and these cousins. It is not shown when, if ever, they had visited each other. They did not visit at the Evans' home during the final and somewhat prolonged illness of either Mr. Evans or Mrs. Evans nor were they pres-

ent at the funeral of either. They did not even appear and testify as witnesses at the trial of this case.

As noted above, the will was made by Mrs. Evans six weeks after the death of her husband. While the provisions of the will are somewhat numerous, each is of very simple character. It contains 11 separate bequests of sums of money ranging in amounts from $100 to $500 each. Two of these are to churches and the remaining nine are to designated individuals each of whom is referred to as "my friend." By another bequest the testatrix gave all of her household furniture and her automobile to Conrad Turrell who is also one of the three residuary legatees named in the will. The other two residuary legatees are designated in the will as "my second cousin, Frank Levenseller" and "my second cousin, Auburn Levenseller." Their relationship was in fact somewhat more distant than second cousins. Aubrey Levenseller at Mrs. Evans' request had visited her home for some considerable time prior to the death of her husband, and remained two weeks or more after the death of Mr. Evans. During his visit he assisted in the care of Mr. Evans and in other ways aided Mrs. Evans and afforded her companionship. Mr. Turrell, like Mr. and Mrs. Evans, was a resident of the village of Romeo. They lived about two blocks from each other. For several years he had served as village clerk. He was a practical nurse and had assisted in the Evans' home during the last illness of Mr. Evans. Subsequent to the latter's death Mr. Turrell kept in almost daily contact with Mrs. Evans and continued to render active friendly service without compensation. Mr. Homer L. Fitch, an attorney of upwards of 25 years' practice and then serving as president of the village of Romeo, had at the request of Mrs. Evans been appointed as

the administrator with the will annexed of Mr. Evans' estate, and he had served both Mr. and Mrs. Evans in a professional capacity. Just prior to the drafting of the will in suit Mr. Turrell at the request of Mrs. Evans informed attorney Fitch that she desired him to prepare her will. Mr. Fitch asked that Mrs. Evans make a written statement of the manner in which she wished to dispose of her property. Such a statement was prepared by Mrs. Evans in her own handwriting and through Mr. Turrell it was delivered in a sealed envelope to attorney Fitch. From this memorandum, together with some information supplied by Mr. Turrell, the attorney prepared the will, and by arrangements made through Mr. Turrell met with the witnesses to the will at the home of Mrs. Evans. They assembled in the latter part of the afternoon of January 29, 1935. At the time Mrs. Evans was in bed, although the testimony shows that her being in bed was not due to illness, but to her habit of retiring for rest on one or more occasions practically every day. Testimony offered by contestants disclosed that later in this same day Mrs. Evans without assistance came down from her bedroom on the second floor of the residence to the living quarters on the lower floor. The will was signed by the testatrix and the two witnesses whose presence she had requested through Mr. Turrell. One of these witnesses was the pastor of Mrs. Evans' church whom she had previously informed of her intention to make a will and asked him to act as a witness thereto. The other witness was her attending physician. Attorney Fitch testified that just prior to the execution of the will and in the absence of any other persons he read it to Mrs. Evans and gave it to her for her personal inspection, and that she expressed her approval of its provisions. How-

ever, there is considerable discrepancy in the record as to the details surrounding the execution of the will, particularly as to who took the instrument to Mrs. Evans in her upstairs bedroom, the length of time consumed in executing the will, and as to just what was done as to the will having been read to Mrs. Evans or as to her being advised of its contents. But we are satisfied that the testimony was ample to justify the refusal of the trial court to submit to the jury the question as to the will having been executed in accordance with legal requirements, and in holding as a matter of law that it was so executed.

Contestants rely very much upon their claim that prior to the execution of the will Mr. Turrell sustained a confidential relation to Mrs. Evans; and from this they urge that a presumption arises that the will wherein Mr. Turrell was a beneficiary was procured by undue influence. They assign error upon the trial court's refusal so to hold and charge. In support of their contention that there was a confidential relation, appellants stress the fact that Mrs. Evans gave Mr. Turrell a power of attorney (not printed in the record) in consequence of which he seemingly was authorized to transact her general business affairs. This contention is not tenable because no such relationship existed either at or prior to the time the will was made. Instead, the power of attorney was not given to Mr. Turrell until three months after the will was executed. We find nothing in the testimony which indicates that the relationship between Mrs. Evans and Mr. Turrell at or prior to the time of the will was other than hereinbefore indicated. He was a kindly, well-disposed neighbor who had rendered, without compensation so far as the record discloses, to both Mr. and Mrs. Evans, services in consequence of which the latter

might very naturally and justly have remembered him in her will. Especially is this true since Mrs. Evans was not survived by any near relatives who in consequence of relationship had any particular claim upon her bounty. We have repeatedly held that the fact that a beneficiary under a will has for a considerable time been intimate with and attended to business transactions for a testator, notwithstanding the latter was mentally afflicted to the extent of being intermittently insane, does not raise a presumption of undue influence. *In re Lacroix's Estate*, 265 Mich. 59; *Lamb* v. *Lippincott*, 115 Mich. 611; *In re Flood's Estate*, 270 Mich. 655; *In re Browne's Estate*, 217 Mich. 621; *Severance* v. *Severance*, 90 Mich. 417.

Very many of the other alleged errors stressed by appellants pertain to the court's charge to the jury, it being urged that there was error in numerous portions of the charge as given and also that there was error in the court's refusal to give requests preferred by appellants. Their complaint that the charge was unduly lengthy, that there was much repetition, and that certain portions of the charge related to questions not involved, or at best only remotely involved in this case, is not wholly without merit. However, a careful review of this record fails to disclose any error in the charge which would justify a holding that it was prejudicial to the extent of constituting reversible error.

Many of appellants' complaints as to the charge of the court or the refusal of the court to charge relate to undue influence. None of these could have been seriously prejudicial to appellants for the following reason: At the conclusion of all the proof the proponent made a motion for a directed verdict both as to the issue of undue influence and of mental incapacity. In the motion proponent urged upon the

court that there was no testimony tending to sustain contestants' claim of undue influence. The motion appears at length in the record. We quote but briefly:

"The fact that opportunity was present for undue influence will not raise an inference of it. *In re Allen's Estate,* 230 Mich. 584. See, also, *In re Spinner's Estate,* 248 Mich. 263; *In re Carlson's Estate,* 218 Mich. 262; *In re Bulthuis' Estate,* 232 Mich. 129."

Our review of this record satisfies us that at most the testimony indicates no more than that Mr. Turrell may have had an opportunity to exercise undue influence in the making of the will. He is the only person appellants claim exercised undue influence in procuring this will. While he was in Mrs. Evans' home at the time she signed her will, he was not in her presence when she executed it. Whatever he did relative to securing the presence of her attorney and the witnesses for Mrs. Evans, was seemingly done at her request, although direct testimony as to all details was not produced. As we have repeatedly held in the cases above cited, proof of mere opportunity is not sufficient. Because of this condition of the record the trial court on proponent's motion might well have entirely withdrawn from the consideration of the jury the contestants' claim of undue influence. Under the circumstances appellants should not secure a reversal on the ground that the court declined to give certain of their requests pertaining to undue influence nor on the ground that there was error in the charge as given on this phase of the case. In any event we think nothing appears in the court's charge relating to undue influence which constitutes prejudicial error.

We are not impressed with appellants' contention that because Mr. Turrell (who was present through-

out the trial of this case) was not called as a witness by proponent, therefore a presumption arises that had his testimony been given it would have been adverse to the proponent of the will. This is not a case wherein an interested litigant has suppressed testimony or by absenting himself from the court proceedings has deprived his adversary of the opportunity to place him upon the witness stand. In the contest of this will in the probate court Mr. Turrell was sworn as a witness by contestants. On this account it is obvious that they were fully advised of what would have been the character of Mr. Turrell's testimony if called as a witness in the circuit court. They not only had the advantage of knowing what his testimony was in the probate court, but also the opportunity of calling him as a witness at any time they saw fit during the trial in the circuit court. The burden of proof was on the contestants. They were permitted to argue to the jury the inference that might be drawn from Mr. Turrell's failure to testify. Over proponent's objection, the court, in the presence of the jury, so ruled. There is no justification for appellants' complaint that because proponent saw fit to submit the case without calling Mr. Turrell as a witness, contestants were entitled to have the court charge the jurors they should presume that Mr. Turrell's testimony, had it been given, would have been adverse to proponent.

In this case the actual question worthy of being litigated was whether testatrix at the time of making her will (January 29, 1935) had sufficient mentality to make this will. In the charge to the jury the circuit judge stated that the trial had been in progress "for several days." A rather large volume of testimony was taken in behalf of the respective litigants. If that produced in behalf of proponent were ac-

cepted as true, unquestionably the will was valid. If on the other hand the testimony for contestants were accepted as true then the will was clearly invalid because of mental incapacity. A broad range of testimony was admitted bearing upon the age of testatrix, the state of her health, whether she was weak or strong, ill-tempered, eccentric, forgetful, suffering from delusions, or afflicted with senile dementia, et cetera. There is testimony of one witness that about an hour after the will was executed Mrs. Evans said she did not know she had signed a will. All these and other phases of the record were before the jury on the issue of Mrs. Evans' mental competency at the time the will was made. Counsel for contestants submitted rather full and detailed requests to charge. Such requests to the extent of covering approximately two and a half pages of the printed record were given verbatim, and we think fully and clearly covered, from the standpoint of contestants, the law applicable to this phase of the case. In an obvious effort to cover thoroughly the question of alleged mental incompetency, the circuit judge also gave verbatim numerous requests submitted by proponent's counsel. As a natural consequence there was some repetition and prolixity. But we do not find prejudicial error resulting from erroneous statements of the law or, as appellants contend, because certain designated portions of the charge were "confusing, argumentative and repetitious." The determination of the jury under the charge of the court that Mrs. Evans was not shown to have been mentally incompetent at the time of making her will must be accepted.

Another error relied upon by appellants is the ruling of the trial court sustaining proponent's objection to the hypothetical question propounded by

them to Dr. Howard M. Freeman. An important issue in this case was whether Mrs. Evans at the time of making her will was suffering from senile dementia to such an extent as destroyed her testamentary capacity. Proponent concedes that during the summer of 1935 she became so afflicted. Contestants assert that she was in that condition prior to the date of making her will, January 29, 1935. The lengthy hypothetical question propounded, covering more than two pages of the printed record, was submitted for the purpose of obtaining Dr. Freeman's opinion as to whether Mrs. Evans was suffering from progressive senile dementia in November, 1934. The court sustained proponent's objection to the question on the ground that the assumed facts were not in accord with the record; but at the same time the court suggested to counsel that they "had better redraft" the question. It was not redrafted. The ruling of the court was correct because in certain material particulars the facts assumed in the hypothetical question were not supported by testimony. We note only the following: There is no testimony supporting the assumed fact that "in November of 1934, and on at least three different occasions in that month" Mr. Evans fell out of his bed and was allowed "to remain on the floor all night, and (Mrs. Evans) said, 'Let him lay there,' and objected to have a friend telephone for assistance to get her husband back in bed." At most the testimony shows that there was only one occasion when Mrs. Evans allowed her husband to remain on the floor all night, after he had fallen out of bed and those present in the household were not able to lift him back into bed; and on this occasion he was provided with a pillow and cover. Further there was only one occasion (not three) when Mrs. Evans sug-

gested that Mr. Evans be left upon the floor after having fallen from his bed. Another assumed fact embodied in the question and one which was of serious importance was that Mrs. Evans' "mental powers constantly decreased from March, 1934, down to the time of her death." There is no competent testimony in the record justifying this wrongfully assumed condition as being a fact.

Appellants complain because the circuit judge in his charge to the jury explained the law relative to insane delusions, and stated to the jury that the only insane delusion with which the testimony tended to show Mrs. Evans was afflicted, had nothing to do with the disposition of her property made by her will; and therefore the jury could not find the will invalid on the ground of an insane delusion. Appellants now say in their brief:

"We submit that there was no evidence in the cause nor attempt on the part of contestants to claim that the insane delusions of Mrs. Evans relative to her parents (entered) into the making of the will."

This portion of the charge was not subject to the criticism that it was "argumentative." And contestants cannot now complain that it was confusing in that it did not relate to an issue in the case. One of the grounds of appeal from the probate court is contestants' claim that the will was invalid because of testatrix's insane delusions; and contestants offered testimony tending to show that Mrs. Evans at times believed her parents, who had been dead for years, were in an upstairs room in her home. It developed that this delusion had no bearing whatever upon the testamentary disposition which Mrs. Evans made of her property. The trial court was fully justified in directing the jury's attention to

this condition of the record and instructing them as above noted.

Appellants' contention that the verdict of the jury is contrary to the weight of the evidence is not sustained by this record. We find no merit in other alleged errors. The judgment entered in the circuit court is affirmed, with costs to appellee. The case is remanded for certification of the judgment to the probate court.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and MCALLISTER, JJ., concurred.

CONTRACT & INVESTMENT CO. *v.* HOME INS. CO. OF NEW YORK.

1. INSURANCE—FIRE—CHANGE OF INTEREST, TITLE OR POSSESSION—NOTICE TO INSURER—COURSE OF PRACTICE—ESTOPPEL.

   Course of practice whereby owner of several hundred pieces of real estate notified agency of defendants, insurers under fire insurance policies, on first of month following month in which change of interest or possession occurred *held*, ineffective to work estoppel of insurers to deny liability for fire loss resulting from operation of an alcohol distillery installed after plaintiff had sold property on land contract and delivered possession, but before first of following month or notice to the agency had been given, where testimony shows that date of notice to insurer's agency and not date of change of interest or possession was the date of change indorsed on the policy in the course of practice involved.

2. SAME—FIRE—CHANGE OF INTEREST, TITLE OR POSSESSION—INDORSEMENT ON POLICY—SALE ON LAND CONTRACT.

Sale of property under land contract, accompanied by change of possession, *held*, such a material change of interest of insured as to require immediate notice thereof to insurer under fire insurance policy to hold it liable for fire loss occurring after such change where policy declares it would be void unless written indorsement of change of interest, title or possession were made.

Appeal from Wayne; Moll (Lester S.), J. Submitted January 5, 1938. (Docket No. 25,· Calendar No. 39,711.) Decided February 24, 1938.

Action by Contract & Investment Company, a Michigan corporation, against Home Insurance Company of New York, and Hudson Insurance Company, New York corporations, for sums due on a fire insurance policy. Judgment for defendants. Plaintiff appeals. Affirmed.

Yerkes, Goddard & McClintock (*William R. Rudell* and *Shirley T. Johnson,* of counsel), for plaintiff.

Walters & Head, for defendants.

MCALLISTER, J. Plaintiff realty company was the owner of several hundred pieces of real estate and carried numerous policies of fire insurance on its properties with defendant insurance companies. The Parker-Davis Insurance Agency was the agency through which plaintiff placed its policies.

On the 15th day of December, 1932, the agency issued a fire insurance policy effective for three years on a certain frame dwelling house owned by the plaintiff. The policy included the provision that it should be void "unless otherwise provided by agreement in writing added hereto * * * if any

change, other than by death of an insured, takes place in the interest (except increase of insured's interest), title or possession of the subject of insurance (except change of occupants without increase of hazard)."

On June 4, 1935, plaintiff sold the house, which was insured under this policy, on a land contract and the purchasers took immediate possession. Twenty days after the execution of the land contract, on June 24, 1935, a fire occurred in the insured premises caused by the operation of an alcohol distillery which had been installed after the change of possession. Neither defendant companies nor the agent were ever notified from the date of the execution of the land contract and change of possession of the premises to the date of the fire, of any such change of interest. Plaintiff filed proof of loss and defendant denied liability.

Plaintiff claimed that there had grown up a course of practice with defendant companies and their agent that whenever there was a change in interest and possession of its properties so insured, plaintiff would notify the insurance agency the first of the following month that such change in interest and possession had taken place the previous month; that because of such procedure, consented to over a long period of time by the agent company, and covering many different pieces of property in former transactions, a course of conduct had been followed which led the insured to believe that such policies would not be void for lack of immediate notice of change of interest; that because such indorsement and consent to change of possession had always been agreed to by defendants, and because of the nature of the authority given by defendants to their agent and the agent's knowledge of the circumstances, defendant

insurance companies are estopped from forfeiting the contract in this case.

On the trial the court held that there was no proof of such course of conduct entered upon or consented to by defendants' agent or by defendants that would result in a waiver of the conditions of the policy; that no principle of estoppel was applicable to the case, and that by the terms of the policy the insurance company was not liable because it had not been notified of the change in interest and possession and increase of hazard in the use of the premises; and accordingly entered a judgment of no cause of action.

The question before us is whether there was any course of conduct indulged in or consented to by defendants' agent which would lead plaintiff to believe that it was unnecessary to notify the agency of a change of interest or possession until the first of the month following such change. The plaintiff contends that if such facts are proved there would result a waiver of these provisions of the contract of insurance and that defendants would be estopped from insisting upon adherence to the terms of the policy. It therefore becomes necessary to examine the practice of plaintiff and defendants' insurance agent regarding notification of change of interest and consent of defendants to such change in their previous transactions.

On the trial, plaintiff's office manager testified that the procedure, which was followed in such cases, was that whenever plaintiff sold property or foreclosed or cancelled a vendee's interest, all of the accumulations of each month's sales and cancellations for that particular month were placed in a file and afterward given to an employee, who in turn notified the insurance agent to have the proper indorsement of change

of interest placed on the policies. He testified as follows:

"*Q.* To your knowledge, your office never called up the Parker-Davis Agency immediately upon the sale of a piece of property?

"*A.* No.

"*Q.* Always followed this procedure of notifying them the subsequent month?

"*A.* Yes."

Plaintiff's employee in charge of such notifications testified that plaintiff's bookkeeper at the beginning of the month would give her all changes for the month previous to this date. She testified that she would notify the insurance agency of what indorsements they wanted, and that the regular procedure was to notify the agency once a month. "Well, around the first of the month, she (plaintiff's bookkeeper) would give me these slips stating each individual new contract or cancellation. I would take care of it as soon as I could get to it."

An officer of the insurance agency was sworn by plaintiff and testified to the following as to the procedure followed in making such indorsements:

"From time to time the Title & Trust Company would write us a letter, usually about once a month, possibly twice a month, and in that letter they would set forth the various changes affecting the various policies that we had in force for them. * * * This letter would cover changes such as new contract purchasers on the properties, or satisfaction of interests of the Title & Trust Company where they would have sold property to more than one party and had no further interest in the property; would cover any changes of any nature affecting the title interest of the property; and this letter would usually cover the transaction. * * * We would proceed to issue the

indorsements effective as of the date of the letter, setting forth the changes as outlined in the letter. * * *

"*The Court:* What would you do upon receipt of the letter?

"*A.* An indorsement, making an indorsement effective as of the date of the letter, although that would not necessarily mean that was the date that the transaction was consummated. For example, we may receive a letter dated May 25th, asking us to indorse the additional interest of a contract purchaser on a property where, as a matter of fact, the contract purchaser's interest may have attached on the 5th day of that month, or 20 days prior, but all we would have to go by was the date of the letter, and we would issue an indorsement effective as of the date of the letter."

It therefore appears that whenever plaintiff received indorsements and consent of change of interest from the insurance agent, it had notice that such change of interest was agreed to only as of the date on which plaintiff had notified the agent. Because of the fact that defendants' agent invariably limited its indorsements consenting to change of interest and possession "*effective as of the date of the letter*" which notified it of such change, neither the insurance agent nor defendant companies can be said to have led plaintiff to believe that such change in the terms of the policy would be considered to be effective at any time prior to receiving such notifications. In this case the change of interest occurred on June 4, 1935. Twenty days later the fire causing the damage took place. Neither defendants' agent nor defendants were ever notified of any change of interest prior to the fire.

Appellant calls our attention to the case of *Zeitler* v. *Concordia Fire Insurance Co.,* 169 Mich. 555, in

which this Court held, under an insurance policy similar to the one before us, that a change of interest without the agreement of the insurer did not void the policy.

In that case the policy was issued to the estate of a deceased person on May 5, 1910, during probate proceedings. Before this policy was issued, and on May 2, 1910, the administrator obtained from the probate court a license to sell the property. On June 2, 1910, about a month after the policy was issued, the administrator entered into a contract for the sale of the property, giving a land contract in the usual form which was executed and delivered on the day stated, the plaintiff as administrator agreeing to sell to the purchaser for a certain down payment and other stipulated payments; the entire sum stipulated, to be paid on or before June 1, 1911. Possession of the premises was not to be given to the purchaser until December 1, 1910. The sale was confirmed by the probate court on June 13th and the fire which destroyed the insured property occurred October 9, 1910. Subsequent to the fire the purchaser made full payment on the contract and received deed from administrator on December 5, 1910. In discussing these circumstances the court said:

"The administrator did not own the property, and had no interest in it except to perform his official duty in that connection, as an agency of the probate court. Neither the actual owner of the property or creditors of the estate are named in the policy or were known to the insurers, so far as disclosed. The business was done with the administrator, necessarily known to be a temporary official in charge while the property was going through the probate court. * * * Although there is some conflict upon the question, the weight of authority recognizes the general rule that, where possession and control of

the property and an insurable interest are retained by the insured, an executory agreement for its sale does not so violate the spirit of such conditions as to render the policy void. * * * In fire insurance the moral hazard, as well as the physical, is recognized as an important factor. The legitimate object of and primary reason for, the restrictive clauses in a policy is the protection of the insurer against risks materially different from those undertaken at the time of issuing the policy. To that end the insurer is entitled to insist on a continuance of the personal vigilance, possession, supervision, control, care, and moral responsibility in relation to the property stipulated in the contract. In this case the insured was an estate, and the contract must be presumed to have been made with reference to the usual changing conditions of property in the hands of an administrator, passing through probate. At the time of the fire, it was yet in his hands, passing through probate, and the legal title was in the estate, which yet had an insurable interest in excess of the loss. The legal title, possession, care, custody and moral and physical hazard were unchanged."

The court held that because neither the moral or physical hazard of the risk was increased, the policy of insurance would not be forfeited. In the case before us there was a change of interest, including change of possession.

In *Excelsior Foundry Co.* v. *Western Assurance Co.*, 135 Mich. 467 (3 Ann. Cas. 707), the court had occasion to pass upon the question of whether a policy of insurance, containing terms regarding change of interest similar to that in the case before us, would be forfeited, because of a certain change of interest, without notice to the insurer. A fire insurance policy had been issued on factory buildings erected on land held by the insured under a part-paid contract from one Wheeler. Subsequently, the

insured contracted to sell the plant to Wheeler and reassign the contract. The contract was reassigned, half of the consideration paid to the insured and a bill of sale of the plant delivered to a third person, to be delivered to Wheeler upon full payment, it being agreed that title was not to pass until such payment. Before delivery of the bill of sale, a fire occurred. The court held because the contract for the premises upon which the insured buildings were located, had been reassigned to Wheeler by the insured after he had insured the buildings and because Wheeler had paid the insured $10,000 in cash, and had given a note for the balance of the purchase price, secured by a block of valuable stock, that a transaction of this nature constituted such a material change in the interest of the insured as to void the policy. The rule to be drawn from this case is that where there is material change in the interest of the insured, such a policy will be void.

In this case, defendants' agent did nothing by representation or conduct that would result in waiver of the conditions of the policy. There was a material change in interest and possession of the property insured without the written agreement or indorsement of defendants or its agent consenting thereto, as required by the contract of insurance. The policy, therefore, was void at the time the fire occurred. The determination of this question makes it unnecessary to discuss other matters raised on the appeal.

The judgment is affirmed, with costs to the defendant.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, and NORTH, JJ., concurred. CHANDLER, J., did not sit.

STUCKUM *v.* METROPOLITAN LIFE INS. CO.

1. EVIDENCE—CAUSE OF DEATH—PRESUMPTION AGAINST SUICIDE.
   Where death occurs in an unknown manner, the presumption of law is against suicide.

2. SAME—PRESUMPTION AGAINST SUICIDE—BURDEN OF PROOF.
   Presumption against suicide disappears when testimony is offered to rebut it and such presumption is not to be treated as evidence, but the ultimate burden of proof of showing suicide by a preponderance of evidence rests upon one asserting it.

3. SAME—JUDICIAL NOTICE—JACKS IN AUTOMOBILES.
   It is not unusual to carry jack handles and jacks in the rear of automobiles.

4. SAME—JUDICIAL NOTICE—POSSIBILITY OF ACCIDENTS—SHOTGUNS.
   It is common knowledge that accidents happen with shotguns and that it is not always necessary to pull the trigger in order to cause them to be discharged, there being a possibility of discharge through impacts, jars, or worn or defective mechanism.

5. INSURANCE—CAUSE OF DEATH—SUICIDE—EXPLANATION BY BENEFICIARY.
   In action by beneficiary under life insurance policy in which defense of suicide was interposed, plaintiff does not have burden of proving a reasonable explanation of the manner of death of deceased or to give any explanation whatever.

6. SAME—LIFE INSURANCE—SUICIDE—BURDEN OF PROOF—QUESTION FOR JURY.
   In action against insurer under life insurance policy where defense of suicide is interposed, unless evidence discloses that only reasonable hypothesis of death is that of suicide, the case must be submitted to a jury as the presumption is against suicide and insurer must show suicide by a preponderance of evidence.

7. SAME—SUICIDE—ACCIDENT—DISCHARGE OF SHOTGUN.

In action under life insurance policy in which insurer asserted death was by suicide, defendant *held*, not to have sustained burden of showing cause of death was inconsistent with any reasonable hypothesis other than suicide, there being circumstances sufficient to sustain jury's finding death was due to accidental discharge of shotgun.

8. SAME—CAUSE OF DEATH—SHOTGUN WOUNDS—EVIDENCE.

Question of whether death from shotgun wounds was result of suicide or accident *held*, properly submitted to jury under evidence presented and instructions given, where plaintiff's testimony tended to show deceased was engaged in shooting crows which had been bothering their cornfield, testimony as to whether deceased made remarks indicating that he was contemplating suicide was in dispute and finding of jack handle in rear of car could not be said to be conclusive proof that deceased committed suicide by using it to push the trigger.

Appeal from Van Buren; Warner (Glenn E.), J. Submitted January 5, 1938. (Docket No. 39, Calendar No. 39,810.) Decided February 24, 1938.

Assumpsit by Bertha Stuckum against Metropolitan Life Insurance Company on a life insurance policy. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Earl H. Burhans, for plaintiff.

Gore, Harvey & Fisher, for defendant.

MCALLISTER, J. Plaintiff's son was killed by a discharge of a shotgun and she sues defendant as the beneficiary of a life insurance policy, which was taken out by deceased. On trial before a jury plaintiff received verdict and judgment for the amount due according to the terms of the life insurance policy. On appeal defendant claims that the evidence

conclusively established that deceased came to his death by suicide; and, because it is claimed that the policy in question excluded liability in case of suicide, the court erred in refusing to direct a verdict of no cause of action.

Merle Stuckum, the deceased, a young man who lived with his family, was a truck driver and drove such vehicles usually during the nighttime. On Saturday night, September 5, 1936, he went out with a group of friends to a dance and beer garden. He had been drinking beer before he started on the party, and during the course of the evening, he continued to drink beer. While he was with his friends an altercation took place, resulting in the plaintiff's decedent trying to fight with one of his friends, because of an argument with regard to the latter's wife.

One witness states that deceased afterward wanted to go to another place to dance and became angry when the party refused to go; that he finally said he was tired of everything; that his family interfered with his affairs; and that he was going to end everything.

After leaving the group at 2 o'clock the following morning, deceased went home and asked his mother if she did not want to drive with him to Kalamazoo to see her daughter. He further asked her if on the following week she would wash his clothes which he had left in another village, and upon her agreeing to do so, he drove his car to the village and returned with his soiled clothes. He then had some conversation with his mother and discussed the crows which had been bothering them on the farm. He told his mother that he was going into the woods to shoot crows and at 5 o'clock in the morning left the house with his shotgun.

A few hours later, at 7:30 o'clock, he was found dead in his automobile, sitting upright behind the wheel, shot through the right side. The front right-hand window of the car was open and the shotgun was found lying on the ground about nine feet from the car. No one heard the shot or knew how he was killed. The coroner signed a certificate of accidental death.

Experiments later made by the police showed that the gun, if resting on a stump, upon being fired, would recoil through the air about seven feet. In the rear of the car, behind the front seat, there was found a jack handle and this circumstance has given rise to defendant's theory that deceased held the gun against his side, resting it through the open window and pushed the trigger with the jack handle. Plaintiff's theory is that the deceased was pushing the gun out through the window with the muzzle toward him when it accidentally "went off."

The trial court submitted the question of whether deceased had committed suicide to the jury for determination as a question of fact; and plaintiff was awarded verdict and judgment.

Defendant claims that as a matter of law the court should have directed the jury to return a judgment of no cause of action, for the reason that the evidence conclusively showed that the deceased had committed suicide.

Defendant's chief reliance is placed upon the testimony of Palma Randall, one of the members of the party at the tavern, who testified that deceased had told her on the evening before his death, that he was "tired of everything" and was "going to end everything." The testimony of this witness was flatly contradicted by others who were present at the time deceased is alleged to have made this statement.

The sister of deceased testified that she went with her husband to see Mrs. Randall about two weeks after the death of her brother and that at that time Mrs. Randall "said that she never was so surprised in all her life as when she heard of Merle's death. She also said at that time that she didn't believe he did it. * * * If he did do it, he never so much as ever mentioned it to her."

Much significance is attached by defendant to the finding of the jack handle in the back of the car, on the theory that it definitely proved how deceased killed himself. One of defendant's witnesses, the deputy sheriff, who went out to investigate the death, found that the jack handle was on the floor behind the front seat. He also thought that the jack itself was on the back seat cushion at that time. The woods near which deceased was found were about one-half mile from his home. Crows had been bothering the Stuckum family. When deceased was preparing to leave his mother's house with his shotgun, he secured the cartridges from the cupboard drawer in his home in the presence of his mother. Before leaving the house he went into the bedroom and asked Louis Stuckum if he would go with him to shoot crows.

Where death occurs in an unknown manner, the presumption of law is against suicide. *Burnham* v. *Interstate Casualty Co.,* 117 Mich. 142. And where testimony is offered to rebut this presumption it disappears and such presumption is not to be treated as evidence. *Watkins* v. *Prudential Insurance Co.,* 315 Pa. 497 (173 Atl. 644, 95 A. L. R. 869). But the ultimate burden of proof on the issue of suicide rests upon the defendant and it must meet this burden by a preponderance of the evidence.

In *Curth* v. *New York Life Ins. Co.*, 274 Mich. 513, 522, Mr. Justice BUTZEL, speaking for the Court said:

"We believe that on the question of suicide, the evidence in the instant case presented a question for the determination of the jury, that this was not a case where the evidence showed that the only reasonable hypothesis was that of suicide and was inconsistent with any other reasonable explanation."

In *Shiovitz* v. *New York Life Ins. Co.*, 281 Mich. 382, 388, this Court said:

"We find that defendant not only has not sustained the burden of proof, but has produced no testimony of sufficient evidentiary force so as to prove self destruction. Even though we may not be convinced that it was not a case of suicide, defendant did not meet the burden of proof."

In the case before us, it is disputed by witnesses whether deceased made any remarks indicating he was planning to take his own life. The finding of the jack handle could not be said to be conclusive proof that deceased committed suicide by using it to push the trigger. It is not unusual to carry jack handles and jacks in the rear of automobiles. It is common knowledge that accidents happen with shotguns, and that it is not always necessary to pull the trigger in order to cause them to be discharged. Careful men are cautious in handling such firearms for they realize that they are dangerous and that there is the possibility of being injured by their discharge, caused through impacts, jars, or worn or defective mechanism. Such happenings are within the realm of possibility. The request of the deceased to his mother shortly before his death to arrange to have his laundry washed the following week and his de-

sire expressed to his brother to go out with him on the occasion on which he met his death are circumstances inconsistent with an intention to commit suicide. But the burden of proof is not upon plaintiff to give a reasonable explanation of the manner of death of deceased or, for that matter, is she required to give any explanation whatever.

Unless the evidence shows that the only reasonable hypothesis is that of suicide, and that it is inconsistent with any other reasonable explanation, the case must be submitted to a jury. The presumption is against suicide and the burden of proof was upon defendant relying upon a defense of suicide to prove its cause by the preponderance of the evidence.

We do not believe that the evidence showed that the death of plaintiff's deceased was inconsistent with any reasonable hypothesis other than suicide. There were circumstances in this case that might indicate an accident. The question was for the determination of the jury and was submitted to them in accordance with proper instructions. The trial court was not in error in refusing to direct a verdict for defendant.

The judgment is affirmed, with costs to plaintiff.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and NORTH, JJ., concurred.

TAYLOR AVENUE IMPROVEMENT ASS'N *v.* DETROIT TRUST CO.

1. EQUITY—LACHES—COVENANTS—RESIDENCE AND BUILDING SETBACK RESTRICTIONS.

   Claim of laches on part of plaintiffs in bringing suit to enforce residence and building setback restrictions on subdivision, consisting of but 98 lots abutting one side or the other of a single street for distance of three blocks, against parties proposing to build a gasoline station *held,* without force where suit was started with reasonable promptness.

2. COVENANTS—BUILDING RESTRICTIONS—TEMPORARY STRUCTURES—PERMANENT COMMERCIAL BUILDINGS—WAIVER.

   Fact that owners of lots in a subdivision, restricted to use for residential purposes, have permitted erection of signboards which are relatively temporary *held,* insufficient to constitute waiver of right to prevent construction of permanent buildings devoted to commercial purposes.

3. JUDGMENT—RES JUDICATA—SUBJECT-MATTER—PARTIES.

   Dismissal, with prejudice, of former suit to enforce restrictions on lot in same subdivision across street from one involved in instant case and owned by same defendants cannot operate as bar to instant suit where several parties plaintiff herein were not parties of former suit.

4. COVENANTS—ENFORCEMENT OF RESTRICTIONS.

   Decisions in suits to enforce restrictions depend entirely upon the facts in each particular case.

5. SAME—CHANGE IN CHARACTER OF NEIGHBORHOOD—RELIEF FROM RESTRICTIONS.

   Relief from very onerous restrictions because of a change in the character of the neighborhood will be granted only if it can be done without causing any damage to others who have purchased their property in the restricted area in reliance on the restrictions, but restrictions will be modified where there has been such a change in a neighborhood that the modification will not damage owners of other lots in the subdivision.

6. SAME—ABANDONMENT OF RESTRICTIONS—EVIDENCE.
   Frequent violations of a restriction, unobjected to, are indicative of an abandonment of such restriction.

7. SAME—ABANDONMENT—OCCASIONAL AND REMOTE VIOLATION OF RESTRICTIONS.
   Occasional violation of a restriction in a more remote portion of a street in a restricted subdivision does not preclude one from complaining of a nearer violation and does not operate as a general abandonment of the restrictions.

8. SAME—RESTRICTION OF BENEFIT TO OBJECTOR—ESTOPPEL.
   Usually a restriction will be upheld wherever it remains of any substantial benefit to parties objecting to its violation provided they are not estopped by their conduct from making such objection.

9. SAME—MODIFICATION OF USE RESTRICTION—GASOLINE STATION ON PORTION OF END LOT OF SMALL RESIDENCE SUBDIVISION—SETBACK LINE.
   In suit by owners of lots in a subdivision three blocks long, containing but 98 lots all abutting one side or the other of one street, which lots were restricted to use for residence purposes and whereupon it was required that front line of house be set back 25 feet from front line of lot, against owners of 200-foot lot at end of subdivision to restrain use of 60 feet of lot at end of street, where it intersects with a main traffic artery, for gasoline station purposes, restriction is modified to permit erection of gasoline station on such portion of end lot otherwise surrounded by property used for non-residential purposes where nearest plaintiff is separated from 60-foot parcel by an alley and 140 feet of unoccupied land in balance of lot and plaintiffs do not show they are substantially affected by presence of the gasoline station set back 25 feet from street on land not remotely desirable for dwelling house purposes.

Appeal from Wayne; Toms (Robert M.), J. Submitted January 5, 1938. (Docket No. 30, Calendar No. 39,765.) Decided February 24, 1938.

Bill by Taylor Avenue Improvement Association, a voluntary unincorporated association, and others against Detroit Trust Company, trustee under will of DeWitt H. Taylor, and others for a mandatory

injunction to enforce building restrictions. Decree for plaintiffs. Defendants Detroit Trust Company, DeWitt E. Taylor, Charles E. Austin and Sunny Service Oil Company, Inc., appeal. Modified and affirmed.

Stanley E. Beattie, for plaintiffs.

Harold A. Sleeper, for defendants Detroit Trust Company and Taylor.

Anderson, Wilcox, Lacy & Lawson (*Harold A. Sleeper,* of counsel), for defendants Austin and Sunny Service Oil Company, Inc.

BUTZEL, J. DeWitt H. Taylor subdivision of lot 7 and the southerly part of lot 8, quarter section 45 of the 10,000-acre tract in Detroit, Michigan, runs the length of three blocks from Woodward avenue to Hamilton boulevard and consists of only 98 lots, all abutting either on the north or the south side of Taylor avenue. Lots 1 and 98 are situated respectively at the northwest and southwest corners of Taylor and Woodward avenues, each lot having a frontage of 200 feet on Taylor avenue. During his lifetime, DeWitt H. Taylor, the subdivider, executed and caused to be recorded an instrument, dated May 28, 1907, restricting all lots to residential purposes and providing that only a single dwelling house at least two stories in height and necessary outbuildings could be erected on the lots; that the front line of each house should be no less than 25 feet from the front line of the lot; that no other obstruction to the view except trees should be placed in front of the building line; that the grade from the sidewalk to the building line should be 6 inches to every 10 feet; and that no dwelling should be erected between

Woodward and Second avenues costing less than $5,000. It is conceded that both lots 1 and 98 were so restricted.

Defendants Detroit Trust Company, as trustee, and DeWitt E. Taylor, son and heir of the original subdivider, are owners of lots 1 and 98. On May 15, 1935, they leased a portion of lot 98, having a frontage of 90 feet on Woodward avenue and 60 feet on Taylor avenue to defendant Charles E. Austin, who sublet to the defendant Sunny Service Oil Company. Notwithstanding the restrictions, some of the defendants proceeded to erect an oil station fronting on Woodward avenue on lot 98 and plaintiffs, with a reasonable degree of promptness, brought suit to enforce the restrictions. There is no force to defendants' claim of laches. Plaintiffs petitioned for a mandatory injunction ordering the removal of the gasoline station and restraining further use of the premises for the business of servicing automobiles and selling gasoline or oils. The lower court granted a decree holding that the restrictions were still in force and ordering removal of the oil station.

Defendants contend that plaintiffs have waived their right to enforce the restrictions by permitting the maintenance of large illuminated signboards on lots 1 and 98 for a period of several years; that a former suit involving the restrictions on lot 1 was a former adjudication of the rights involved in this suit; and that, in any case, the conditions of the neighborhood on Woodward avenue, both in the immediate vicinity and for the entire distance of a mile south and at least a block north of the subdivision, have become so devoted to non-residential purposes as to make the restrictions obsolete, oppressive, of no value, and therefore unenforceable in equity.

Irrespective of whether the maintenance of the signboards was a breach of the restrictions, such structures are relatively temporary, and permitting them to remain will not be considered a waiver of the right to prevent the construction of permanent buildings, devoted to commercial purposes. *Sanders* v. *Campbell,* 231 Mich. 592; *Austin* v. *Van Horn,* 245 Mich. 344.

A former suit to enforce the restrictions on lot 1 was dismissed by the trial court with prejudice, but that adjudication cannot be a bar to this suit because several of the parties plaintiff herein involved were not parties to that former suit.

Defendants' main contention is that the neighborhood surrounding the corner lots has changed and become so devoted to non-residential purposes that an enforcement of the restrictions under the circumstances would be inequitable and destructive of the entire value of their property.

We are much impressed with the equities of the situation. As has been frequently stated, decisions in restriction cases depend entirely upon the facts in each particular case. The subdivision is only one street wide. Immediately to the north of lot 1, on Woodward and Clairmount avenues, are stores and other commercial structures. Immediately to the south of lot 98 on Woodward and Hazelwood avenues are a used-car lot, a gasoline station, a bank and an apartment house. The northwest corner of Woodward and Hazelwood was partly relieved of restrictions in *Putnam* v. *Ernst,* 232 Mich. 682. On the east side of Woodward avenue, opposite the end of Taylor avenue, are various non-residential structures. There is a double street car track on Woodward avenue and, with very few exceptions, its entire length to Clairmount avenue is given over to

non-residential buildings. Lots 1 and 98 in this narrow subdivision are flanked on both sides by Woodward avenue lots not similarly restricted, and the Woodward avenue frontage of both lots is not even remotely desirable for dwelling house purposes. If the restrictions are maintained, the lots will be of but little value to defendants.

Relief from very onerous restrictions because of a change in the character of the neighborhood will be granted only if it can be done without causing any damage to others who have purchased their property in the restricted area in reliance on the restrictions. We have neither the disposition nor the right to lift or modify restrictions at the expense of or to the damage of any other property holder in the subdivision. The query is, whether these restrictions can be modified in such a manner so that in this particular instance no damage is done to the residents of Taylor avenue.

In the case of *Boston-Edison Protective Ass'n* v. *Goodlove,* 248 Mich. 625, we refused to remove the restrictions and enjoined the construction of an office building fronting on Hamilton boulevard, notwithstanding that to a limited extent the character of Hamilton boulevard had changed in certain districts into a business street. It was shown, however, that the lot was situated in a subdivision which included five contiguous restricted blocks fronting on Hamilton boulevard and which had remained strictly a residential neighborhood, there always having been a compliance with the restrictions. In the present case, we have only a small subdivision, the lots of which all abut on Taylor avenue, the Woodward avenue frontage being surrounded on three sides by non-residential structures. In the case of *Polk Manor Co.* v. *Manton,* 274 Mich. 539, we

enforced a restriction because the property directly opposite the lot in question was improved with a large and very costly apartment house. It was shown that the presence of the gas station would substantially injure the value of the apartment house. The owners had a right to the enforcement of the restrictions. In *Wineman Realty Co.* v. *Pelavin,* 267 Mich. 594, it was shown that the encroachments of business had not reached the vicinity of that part of Dexter boulevard where plaintiff had erected an apartment house.

On the other hand, we have not refused to modify restrictions where there has been a change in a neighborhood to such an extent that the modification will not damage the owners of the other lots in the subdivision. *Windemere-Grand Improvement & Protective Ass'n* v. *American State Bank of Highland Park,* 205 Mich. 539; *Frigo* v. *Janek,* 237 Mich. 642; *Austin* v. *Van Horn,* 255 Mich. 117; *Golden* v. *Davis,* 266 Mich. 7.

The situation in the present case is peculiar. It is claimed that some of the plaintiffs are not damaged because, as stated in *Golden* v. *Davis, supra,* they reside such a distance from the lot in question that they could not suffer more than a nominal injury, if any. A lot improved with a residence, owned by one of the plaintiffs in the instant case, is separated from lot 98 only by an alley. There is no question but that at present the owners of the homes abutting or near lot 98 would be seriously damaged if any violation of the restrictions by a non-residential use of the property immediately across the alley would be permitted. The rear of such a non-conforming structure would be immediately opposite the conforming homes and the owners thereof would have much of their privacy destroyed thereby. From the side of their homes or even from diagonally across

the street, the outlook would be upon the unsightly rear of the non-conforming building. Owners nearby would be inconvenienced by the noise, dirt, and congestion of vehicular traffic along the side or in the rear of the non-conforming property. Also see *Polk Manor Co.* v. *Manton, supra.* We have held that frequent violations of a restriction, unobjected to, are indicative of an abandonment of such restrictions, but in *Voorheis* v. *Powell,* 261 Mich. 378 (85 A. L. R. 932), we again announced the principle that an occasional violation of a restriction in a more remote portion of a street in a restricted subdivision does not preclude one from complaining of a nearer violation and does not operate as a general abandonment of the restrictions. As a rule, we will uphold a restriction wherever it remains of any substantial benefit to the parties objecting to its violation, provided they are not estopped by their conduct from making such objection.

The use of the premises objected to by plaintiffs actually involves only the easterly 60 feet of lot 98 fronting on Woodward avenue. The gasoline station is separated from the nearest lot owned by one of the plaintiffs by an alley and 140 feet of unoccupied ground. The evidence makes it reasonably apparent that in spite of the noise and other disturbances possibly arising from the operation of the gasoline station, the inconvenience to plaintiffs will not be appreciably increased over that already caused by the street cars, traffic, school children, and the many businesses lawfully occupying Woodward avenue and the surrounding streets in the immediate vicinity. Plaintiffs do not show that they are substantially affected by the presence of the gasoline station or will be substantially benefited by its removal.

However there is no question but that these restrictions are still of some value to plaintiffs in preventing the approach of commercial operations to a point where the injury will be more than nominal. While the case of *Putnam* v. *Ernst, supra,* differs in its facts from the present case, the chancellor in balancing the equities held that because of the change in the character of the streets in the immediate vicinity of Hazelwood avenue, he would permit the use of the easterly 50 feet of the lot for business purposes, provided, however, that the lot line on Hazelwood avenue be preserved and no business be permitted to be done on or through the Hazelwood avenue frontage. It is true that no appeal was taken by the owners of the adjoining properties from this decision, but we deem it an essentially fair and equitable one. Equity can be done without damaging plaintiffs by relieving a part of lot 98 from onerous restrictions to a limited extent. It is only because of the fact that lots 1 and 98 are owned by the same parties defendant; because the subdivision is a small one with the frontage on Woodward avenue in the immediate vicinity being used for non-residential purposes; because this decision in no way affects the rear 140 feet of lot 98 or of lot 1 across the street, and because of the further fact that we expressly stipulate that the northerly 25 feet of lot 98 may not be built upon, that we come to our conclusion. The set-back line of 25 feet on Taylor avenue must be rigidly observed so that the owners of all the lots on Taylor avenue may continue to have their view unobstructed for the entire length of the street. The decree of the lower court will be so modified as to permit the building and operation of a gas station on lot 98 for a distance of not more than 60 feet west from the lot line on

Woodward avenue, but no buildings, pumps, appurtenances and signs shall be permitted to remain less than 25 feet south of the lot line on Taylor avenue. The present structure on lot 98 must be moved so as to conform with this opinion.

The decree of the lower court, as modified, is affirmed, with costs to plaintiffs.

WIEST, C. J., and BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

WILCOX *v.* WILCOX.

1. DEEDS—DELIVERY—INTENT—EVIDENCE.

Deeds from grantor, an elderly woman, to a third party and from such third party jointly to grantor and plaintiff, a girl whom grantor and her late husband had taken at an early age, reared and educated but not adopted, *held*, not delivered with intent to pass any present interest in the property where evidence shows the unrecorded deeds were placed by grantor in a safety deposit box to which plaintiff had joint right of access, removed by plaintiff without grantor's knowledge or consent, recorded and returned to box, grantor testified deed, rather than will, was executed to save probate expenses and that she had never delivered the deed.

2. SAME—INTENT TO CONVEY AN INTEREST—DELIVERY.

The intent of the grantor to convey an interest is an essential element of an effective delivery.

3. SAME—DELIVERY—TRANSFER OF POSSESSION OF DEED.
A grantor must intend that the transfer of possession of a deed shall make the deed effective as a conveyance.

4. SAME—DELIVERY TO JOINT TENANT—EFFECT—INTENT—EVIDENCE.
In suit by foster child to establish her interest in property alleged to have been conveyed to her by means of two deeds, one from her elderly foster mother to a third person and other from third person to foster mother and plaintiff jointly, which deeds were contemporaneously executed, hence, considered together, delivery of second deed to foster mother *held,* not to constitute a delivery to plaintiff where it is shown foster mother has never had intent at any time to have deeds presently operative to convey an interest to plaintiff.

Appeal from Livingston; Collins (Joseph H.), J. Submitted January 5, 1938. (Docket No. 42, Calendar No. 39,734.) Decided February 24, 1938.

Bill by Grace E. Wilcox against John E. Wilcox and Helen Willnow for an injunction, an accounting and other relief. Decree for defendants. Plaintiff appeals. Affirmed.

Don W. Van Winkle, for plaintiff.

Shields & Smith, for defendants.

BUTZEL, J. Defendant Julia E. Wilcox and her husband, now deceased, for a number of years lived on a farm near Blissfield, Michigan. They had no children of their own. They took plaintiff, Grace E. Wilcox, when four years of age and a younger brother into their home. The children assumed the name of Wilcox. Their foster parents never adopted them but gave them love, care, education and support. Plaintiff graduated from high school in Blissfield, taught country school, worked in offices, stores and factories, but always would return to the Wilcox

home where she was welcomed the same as if she were a daughter. She subsequently went to California and worked there for three years; in 1916 or 1917, she went to Howell, Michigan, where Mr. and Mrs. Wilcox had established their home. After a brief stay, plaintiff went to Detroit, but later returned to Howell where she secured employment in a store. It was at this time that defendant and her husband, as tenants by the entirety, acquired the Wilcox Apartment building in Howell, Michigan.

Plaintiff roomed and boarded with the Wilcox family and assisted with the work in the rooms of the Wilcox apartment. She paid no board or lodging, and received no wages, but was treated as a member of the family.

When Mr. Wilcox passed away in 1925, Mrs. Wilcox was about 70 years of age. In December, 1925, she went to the office of Willis L. Lyons, judge of probate, in Howell, who had been attorney for her husband and herself for many years. The testimony of both Mrs. Wilcox and Judge Lyons is to the effect that she came there to arrange her affairs. Judge Lyons testified that Mrs. Wilcox said something about making arrangements so that plaintiff might "receive" the apartment property after Mrs. Wilcox's decease. Mrs. Wilcox was inclined to give a deed of the property but reserve a life estate. Judge Lyons advised her that he preferred that the deed be made to Mrs. Wilcox and plaintiff as joint tenants so that the property would go to plaintiff without any legal proceedings in case of the prior death of Mrs. Wilcox. At the time, there was a discussion about making a provision in reference to the property in a will that Judge Lyons was preparing for Mrs. Wilcox but he advised the making of the deed. Deeds were prepared by a clerk in Judge Lyons' office, one conveying the property to a clerk, the

other reconveying it to plaintiff and Mrs. Wilcox, as joint tenants. At the same time, Mrs. Wilcox made a will of her other property to other relatives. There is some dispute as to just what happened thereafter. The deeds were taken home by Mrs. Wilcox and plaintiff claims that they were delivered to her. Mrs. Wilcox denies the delivery. They were not recorded but placed in a folder in a drawer, to which both parties had access. They remained there unrecorded until the spring of 1928, when Mrs. Wilcox placed them in a safety deposit box, which she rented in a bank at Howell. She also arranged that plaintiff should have access to the box. Plaintiff kept her own effects in one portion of the box and Mrs. Wilcox kept the deeds and other valuables in another portion.

Mrs. Wilcox, at about this time, took into her home a grandniece, Helen Willnow, codefendant, and a grandnephew. Difficulties arose between plaintiff and Helen Willnow and there was more or less quarreling between them. Plaintiff also quarreled with Mrs. Wilcox so that their relationship was no longer harmonious. Plaintiff, thereupon, in 1931, went to the safety deposit box, withdrew the two deeds, had them recorded, and then returned them to the safety deposit box. When the relationship between plaintiff and Mrs. Wilcox became increasingly unpleasant, Mrs. Wilcox went to the deposit box and discovered for the first time that the deeds had been recorded. Almost immediately thereafter, there was an open rupture between plaintiff and Mrs. Wilcox. Plaintiff claimed that the advent of Helen Willnow was the cause of all of the trouble and she filed a bill claiming an interest in the property and asking that an injunction be issued restraining Helen Willnow from either coming to the apartment building or occupying a portion thereof and from abusing and

threatening plaintiff or interfering with her. She also asked for an accounting for one-half of the net proceeds from the rentals from the property from the time she claims she became a joint owner. Mrs. Wilcox in her answer denied that plaintiff had any interest in the property, sought a decree declaring the deeds null and void, and that plaintiff be obliged to reconvey the property to Mrs. Wilcox, or that the decree, as recorded, operate as such deed.

The trial judge denied plaintiff any relief and set aside the deeds. In his opinion, he held that the transaction was testamentary in character, subject to revocation, and that the deed was never delivered with an intent to pass any present interest in the property. The trial judge was correct. Plaintiff testified that when Mrs. Wilcox first brought the deeds home, she stated that she did not want them recorded until after her death; that Mrs. Wilcox placed the deeds in the safety deposit box herself; and that plaintiff withheld the knowledge from Mrs. Wilcox that they had been recorded. The testimony of Judge Lyons leads to the conclusion that Mrs. Wilcox at the time simply wanted to see that the plaintiff would have the property in event of Mrs. Wilcox's death. Mrs. Wilcox testified that she only wanted to make a testamentary disposition and arrange to give plaintiff the property after her death and not before; that she executed the deed instead of a will in order to save probate expenses. She testified positively that she never gave plaintiff any idea she was to have the deed or that it was to be recorded prior to her death; that until that time she had reserved the right to do with the deed whatever she saw fit, and that there was never any delivery of the deed by her.

We believe that there is only one construction that can be placed on the entire testimony. Mrs. Wilcox

did not intend that during her lifetime plaintiff should have any interest in the property. She further intended to keep control of the disposition of the property. Unless the disputed transfer of possession of the deeds was accompanied with the intention of having it become presently operative, there was no delivery at all. The intent of the grantor to convey an interest is an essential element of an effective delivery. She must intend that the transfer of possession of the deed shall make the deed effective as a conveyance. *Schuffert* v. *Grote,* 88 Mich. 650 (26 Am. St. Rep. 316); *Phillips* v. *Farmers' Mutual Fire Ins. Co. of Kalamazoo County,* 208 Mich. 84 (7 A. L. R. 1606).

Plaintiff contends that she need not prove a delivery of the joint deed to herself by the defendant, because the transfer by the clerk in Judge Lyon's office to Mrs. Wilcox, as one of two joint tenants, constituted a delivery to plaintiff under the decision in *Mayhew* v. *Wilhelm,* 249 Mich. 640, which is based on entirely different facts. In the instant case, the clerk was a mere instrumentality, whose interposition was necessary only because of the technical requirement of unity of title in the creation of a joint tenancy. The two deeds were contemporaneously executed and must be considered together. The validity of the entire transaction was dependent upon the intent of Mrs. Wilcox and at no time, whether while in the office of Judge Lyons or thereafter, did she intend that the deeds should be presently operative to convey an interest to plaintiff.

We need not discuss other reasons presented by appellees for upholding the decree of the trial judge. It is affirmed, with costs to appellees.

WIEST, C. J., and BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

WOSINSKI *v.* RENIHAN.

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE—SUPREME COURT.
   Questions which the parties desire presented to Supreme Court should be raised in the court below for adjudication as questions may not be raised on appeal for the first time.

2. SAME—QUESTIONS REVIEWABLE—HOMESTEAD RIGHTS OF WIDOW.
   Widow's claim that deed of administrator with will annexed of her late husband's estate was void on ground that she was deprived of her homestead rights, first raised in Supreme Court, is not considered on appeal from decree dismissing bill in her suit to have deed declared void because property was sold for less than its real value, administrator was guilty of misrepresentations in connection therewith and court authorized sale prior to date set for hearing on petition for license to sell (Const. 1908, art. 14, §§ 2–4; 3 Comp. Laws 1929, §§ 14608, 15844–15847).

3. SAME—STATEMENT OF QUESTIONS INVOLVED—BRIEF.
   Widow's claim that property of an estate was sold by administrator with will annexed at less than its real value, not given in statement of questions involved, nor argued in her brief except by bare statement of sale at grossly inadequate price will not be considered (Court Rule No. 67, § 1 [1933]).

4. EXECUTORS AND ADMINISTRATORS—WAIVER OF NOTICE—CONSENT TO SALE OF REALTY.
   Waiver of notice and consent of widow to sale of real estate in her late husband's estate *held*, binding upon her, the record disclosing nothing to substantiate her claim that administrator with will annexed obtained same by means of fraudulent misrepresentations.

5. SAME—SALE OF REALTY—WIDOW'S CONSENT—NOTICE TO HEIRS AND PERSONS INTERESTED IN ESTATE.
   Sale of realty will not be set aside on complaint of widow of deceased testator because of failure to give notice to testator's legatees, sons by a former marriage who were left $10 each

and were not complaining, where widow's sworn consent to sale asserts she was ready and willing to pay such legacies and that such legatees and herself were all of testator's heirs at law and persons interested in the estate.

6. SAME—SALE OF REALTY PRIOR TO HEARING ON PETITION FOR LICENSE TO SELL—WIDOW'S CONSENT.

Order of probate court authorizing administrator with will annexed to sell real estate prior to day originally set by the court for hearing on his petition for license to sell *held,* not invalid where widow's consent authorized sale forthwith, estate is ample to pay other legatees who are not complaining and no one appeared on day set for hearing to object to sale anyway (3 Comp. Laws 1929, § 15805).

Appeal from Kent; Brown (William B.), J. Submitted January 14, 1938. (Docket No. 33, Calendar No. 39,798.) Decided February 24, 1938.

Bill by Veronica Wosinski against Joseph Renihan, administrator of the estate of Bert P. Wosinski, deceased, John S. Kaminski and wife to set aside deeds, restrain eviction proceedings and for other relief. Bill dismissed. Plaintiff appeals. Affirmed.

Carmody, Geib & Walsh, for plaintiff.

Norman A. Lilly, for defendant Renihan.

Harry L. Merdzinski (*Sigmund S. Zamierowski,* of counsel), for defendants Kaminski.

BUSHNELL, J. Plaintiff, Veronica Wosinski, is the widow of Bert P. Wosinski, who, by his last will and testament, gave the sum of $10 to each of his two sons by a former marriage and the remainder of his property to his wife, Veronica. Wosinski was the owner of a business block in the city of Grand Rapids, consisting of two stores, with living apartments on the second floor, one of which was used

as a residence by him prior to his death and has since been occupied as such by his widow.

Subsequent to his marriage to Veronica, he mortgaged this property to the Home Owners' Loan Corporation as security for a loan of $2,566.97. He did not make the required monthly payments and for some time no taxes were paid.

Although named as executrix in Wosinski's will, the widow declined to serve and, at her request, defendant Joseph Renihan, a lawyer of many years' standing in the community, was appointed administrator, with the will annexed.

Plaintiff's bill of complaint avers that the only other property in her husband's estate was a vacant lot, of doubtful value, in Ottawa county, and some household furniture. According to the testimony, the building, which was the principal asset of the estate, produced very little revenue and was badly in need of repairs. The mortgagee threatened foreclosure, which, however, was withheld upon the insistence of Mr. Renihan while he was attempting to secure a buyer. A real estate broker procured an offer from defendants Kaminski in the sum of $5,000, and the administrator petitioned the probate court for authority to sell the same for such sum, less incumbrances, for the purpose of paying the debts and expenses of the estate.

On August 12, 1936, an order of publication was entered and the hearing on the petition was set for September 8th. Although Mrs. Wosinski was without business experience, she had completed the 8th grade of school and a three-year commercial course. She testified that the administrator asked her to sign a waiver of notice and consent for the sale and that, although she could read and write English without any difficulty, she did not see the printed part of the paper that she signed and took the ad-

ministrator's word that it was only for the purpose of saving a $5 publication fee. She insists that the paper to which she affixed her signature was a blank printed form and did not contain any other writing. Defendant Renihan strongly contradicted plaintiff's statements and said that about two weeks elapsed before plaintiff complied with his request. The widow's waiver and consent was filed on August 24, 1936, upon which showing the probate court entered an order authorizing the administrator to sell the property at private sale at the highest price obtainable but for not less than $5,000. Two days later the administrator reported that he had sold the property to Kaminski and wife for $2,433.03, "that being the highest price obtainable therefor and not less than the value thereof as determined by said court." On the same day the probate court entered an order confirming the sale.

One of the buyers testified that he "assumed the balance of the Home Owners Loan Corporation mortgage of $2,488.73," after Renihan had paid the instalments on the mortgage and the taxes to date. There being some question about the title to the property, the buyer reserved $150 of the proceeds to guarantee clearing the title, making the total consideration $5,000. Renihan paid the delinquent mortgage payments amounting to $260, and $500 in back taxes, and paid a commission of $250 to the broker. After the payment of the debts of the estate and expenses of administration, it is stated there will be between $300 and $400 left for plaintiff.

The record indicates that Mrs. Wosinski was dissatisfied with the administrator's handling of the estate before the property was sold. On October 24th she wrote Renihan a letter "dismissing" him as administrator and stating that she would act in

that capacity thereafter. She made it clear to Renihan that she would refuse to sign a quitclaim deed which had been requested by the buyers' attorney. Renihan replied to this letter, explaining in detail the reasons for the poor financial condition of the estate, et cetera.

A few months later, plaintiff filed the bill of complaint in the cause now before us, in which she asked that the administrator be restrained from disbursing any moneys and the buyers from prosecuting any eviction proceedings against her and that the court declare the administrator's deed null and void, et cetera. She claimed the right to such relief because, among other reasons, the property was sold for less than its real value and Renihan was guilty of misrepresentations with respect to the "consent and waiver;" also because the probate court authorized the sale prior to the date set for the hearing upon the petition for license to sell.

The matter was fully considered by the chancellor and his observations are set forth at length in the record. The opinion describes the property in detail, its value and income, and the circumstances under which the sale was had. The court concluded that there was "no collusion or conspiracy or conduct of any improper kind on the part of the purchaser or the grantee in the deed," and fully exonerated the administrator from the charge of bad faith. A decree was entered dismissing plaintiff's bill of complaint, confirming title in the Kaminskis and dissolving the injunction theretofore issued.

Nothing is said in the bill of complaint regarding any dower or homestead rights claimed by plaintiff, nor is there anything in the testimony with respect to such claims and they are raised for the first time in this court on appeal.

Plaintiff argues that she was not advised by Renihan as to her homestead rights and that they were entirely ignored by the probate court. She urges this court to set aside the sale as being in violation of the rights guaranteed her under the Constitution and laws of this State. See Const. 1908, art. 14, §§ 2, 3 and 4, and 3 Comp. Laws 1929, §§ 14608, 15844–15847.

May the question of homestead rights of a widow be raised for the first time in this court?

In *Brown* v. *O'Donnell,* 123 Mich. 100, an ejectment case, there was a levy on certain lands to satisfy a judgment obtained by plaintiff against defendant and they were sold thereunder as one parcel. At the trial the jury found that a portion of the land thus sold was occupied by defendant as a homestead and judgment was rendered for her as to such portion. Defendant claimed on appeal that the entire sale was void because of the inclusion of homestead land. This court said:

"Counsel for plaintiff assert that this question was not raised in the court below, and therefore cannot be urged here. The case was submitted to the jury upon the stipulation made at the close of the proofs. Defendant's counsel preferred no request. If counsel desired to present the question in this court, he should have raised it in the court below for adjudication. It cannot be raised here for the first time. It is a fair inference from the record that no such issue was there made. The question is an interesting one, and has never before been presented to this court. We do not, however, feel called upon to determine it upon this record."

See, also, *Griffin* v. *Johnson,* 37 Mich. 87, in which we declined to consider homestead rights where there was evidence given in the trial court but no finding made on this question. See, also, the gen-

eral statement in 3 C. J. p. 716, § 612, where the *Brown Case, supra,* is cited. In view of the foregoing, we will not pass upon plaintiff's claim that the administrator's deed was void on the ground that she was deprived of her homestead rights.

Plaintiff's claim that the property was sold for less than its real value is not given in her "statement of questions involved," nor is it argued in her brief except by the bare statement that "the premises were sold at a grossly inadequate price." This claim will not be considered. See Court Rule No. 67, § 1 (1933), and *Sebastian* v. *Sherwood,* 270 Mich. 339.

Appellant charges that her signature to the "waiver of notice and consent" was obtained by the administrator by means of fraudulent misrepresentations. Passing the question of whether this would affect the title of a *bona fide* purchaser, we have examined the record with more than the usual care and have found nothing therein to substantiate this charge. We are therefore in accord with the trial judge's exoneration of Mr. Renihan, the administrator. Plaintiff's waiver and consent were binding upon her.

The sale of real estate belonging to an estate for the purpose of paying debts and expenses of administration is authorized by 3 Comp. Laws 1929, § 15800 *et seq.* The provisions of the statute were complied with, except that the order authorizing the sale was entered about 15 days prior to the date set for the hearing on the petition. Section 15805 provides that the probate judge, at the time and place appointed for the hearing, or its adjourned date, "upon proof of the due service or publication of a copy of the order, or upon filing the consent in writing to such sale of all the persons interested, shall proceed to the hearing of such petition."

Even if testator's adult sons by a former marriage, who were given legacies of $10 each, are interested persons, these sons are not complaining, and plaintiff's signed waiver of notice and consent to sale says:

"We, the undersigned (Veronica Wosinski, widow and sole residuary legatee under last will and testament of said deceased except a bequest of $10 each to Joseph and Edward Wosinski, which I am ready and willing to pay) being all of the heirs at law of said deceased, and all of the persons interested in said estate, do hereby acknowledge due notice of the hearing on the petition of (Joseph Renihan) for (sale of real estate lot 10 block 2 L. G. Mason's add. and block thereon known as 705 and 707 Eleventh street N. W.) filed in said court herewith and waive further notice thereof, and do hereby consent to the granting of said petition forthwith (and sale at $5,000 or more) and being first duly sworn we do each severally depose and say that the abovenamed persons are all of the heirs at law of said deceased and all of the persons interested in said estate."

There being ample funds in the estate to pay the two $10 legacies, the sale should not be set aside because such legatees were not notified, especially since they are not complaining.

Mrs. Wosinski claims, however, that the probate court had no power to enter an order authorizing the sale of real estate prior to the day originally set by the court for the hearing on the administrator's petition for license to sell. We do not agree that the setting of a day for hearing limits the statutory jurisdictional powers of a probate court. The court had the power to enter the order of August 24th even though a later day had been previously designated. The only jurisdictional question here in-

volved is whether due notice of the day on which the order was actually made was given to or waived by interested parties and, if not, whether such notice may be dispensed with for some reason. It may be that Mrs. Wosinski's waiver of notice of the hearing set for September 8th did not constitute a waiver of notice of the hearing held at the earlier date on which the order authorizing the sale was made. But Mrs. Wosinski did more; she consented to an order for sale being entered "forthwith." This was waiver of all notice, for the only purpose of giving notice is to afford knowledge of the opportunity to object to the authorization of the sale. Nor may Mrs. Wosinski take advantage of the lack of notice to the legatees, for the reasons previously stated.

We note the following testimony given by Mr. Renihan on cross-examination, which is uncontradicted:

"I said in my report of sale that it was necessary to have it confirmed immediately because I was trying to save time, to get through with it. The sale was confirmed forthwith. I was present in probate court on September 8th but there was nobody else but me there. At that time I already had the license, but the notice was filed and if there was anybody interested in that estate, they could get relief, if that is what was coming to them. The order was made and the sale was confirmed before the date of the hearing, but on the showing of that, there isn't any question in my mind but what either one of the judges probably would set aside that and allow the hearing of it or any objection that might be made. No one appeared. The notice went through the full limit of time; no one appeared there to object to it.

"It is my claim that the probate court can make an order before the date of hearing where the interested parties consent to it. There was no waiver filed by the two legatees under the will at any time,

but they told me everything was all right; they approved of everything I was doing."

The decree dismissing plaintiff's bill of complaint is affirmed, with costs to appellees.

WIEST, C. J., and BUTZEL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

KENT PROBATE JUDGE, *for use of* HEANEY, *v.* AMERICAN EMPLOYERS INS. CO.

1. JUDGMENT—RES JUDICATA—PRINCIPAL AND SURETY—BOND OF CO-ADMINISTRATOR.

   Liability of surety in action on its bond of coadministrator of the estate of a deceased person *held*, not dependent upon any application of the doctrine of *res judicata* where surety was not heard, not represented in, nor a party to final accounting proceedings wherein the liability of its principal was determined.

2. PRINCIPAL AND SURETY — COADMINISTRATOR'S BOND — FINAL ACCOUNT—PARTNERSHIPS—EVIDENCE.

   In action to determine liability of surety on bond of coadministrator of the estate of a deceased person, who was the son and partner of deceased, surety *held*, entitled to introduce evidence to show that final account of alleged assets of estate embraced partnership assets which statute requires to be administered by surviving partner, not administrator of deceased partner's estate (2 Comp. Laws 1929, § 9869 *et seq.*).

3. SAME — JUDGMENT AGAINST COADMINISTRATOR — PARTNERSHIPS — FINDING OF COURT—EVIDENCE OF PARTIAL LIABILITY.

Finding that surety was liable for net balance of but $404.10 of judgment of $1,759 against coadministrator of estate of deceased person, who was a son and partner of deceased in the operation of drug stores *held,* free from reversible error under evidence presented showing liability of coadministrator was based but in part upon his obligation to administer assets of the estate which was the sole obligation upon which surety was liable.

4. EXECUTORS AND ADMINISTRATORS—FINAL ACCOUNT—LIABILITY OF SURETY ON BOND OF COADMINISTRATOR—PARTNERSHIPS.

Validity of order of probate court allowing coadministrator's final account, filed after creditors of estate sought his removal, *held,* not material to determination of liability of surety on coadministrator's bond where, unknown to probate court, some assets included in the account and inventory were not assets of the estate, the surety being liable merely for fulfillment of coadministrator's failure to "administer according to law all the goods, chattels, rights, credits and estate" of deceased and surety's assertion that account as allowed was not a correct charge upon it was not a collateral attack upon the probate court order.

Appeal from Kent; Verdier (Leonard D.), J. Submitted January 11, 1938. (Docket No. 87, Calendar No. 39,847.) Decided February 24, 1938.

Assumpsit by Clark E. Higbee, Kent probate judge, for use of Robert C. C. Heaney, administrator of estate of John C. Dutmers, deceased, against American Employers Insurance Company and Cornelius J. Dutmers on an administrator's bond. From judgment for plaintiff in an alleged insufficient amount, he appeals. Affirmed.

McCobb & Heaney, for plaintiff.

Earl F. Phelps, for defendant Insurance Company.

BUSHNELL, J. After the death of John C. Dutmers in 1932 the probate court for the county of Kent ap-

pointed deceased's son, Cornelius J. Dutmers, and Robert C. C. Heaney, an attorney at law, as coadministrators of his estate. Defendant American Employers Insurance Company became surety on the bond of the administrators. The bond recites that the principals "shall administer according to law all the goods, chattels, rights, credits and estate of said deceased," and "shall perform all orders and decree of said court, by the said administrator, to be performed in the premises."

The inventory, filed on March 14, 1933, stated that the deceased's estate consisted of three parcels of real estate, cash, rent accounts receivable, some household goods, and the stock of goods, fixtures and accounts receivable of three drug stores. Two of the parcels of real estate were being purchased on land contracts and the stock and fixtures of two of the drug stores were incumbered by a chattel mortgage in one instance and a title-retaining contract in another.

In December, 1933, certain creditors filed a petition for the removal of coadministrator Dutmers, charging him with the misappropriation of funds of the estate. This petition was heard and Dutmers subsequently filed his resignation. He did not, however, render his final account and, in May, 1934, Heaney filed an individual account which was allowed "subject to any change in the liability of Cornelius J. Dutmers which he may establish upon the hearing on his final account." Dutmers later filed his final account covering the period from February 17, 1933, to June 8, 1934, and the probate court found that he was indebted to the estate in the net amount of $1,622.66. It appeared that Dutmers had collected some rentals and had used other funds of the estate amounting to $2,172.66, and the probate court allowed him a credit of $350 for his fee as coadminis-

trator and $200 as compensation for his services as a druggist in the operation of the business previously referred to. The amount due from Dutmers to the estate was not paid and the probate court directed Heaney, the surviving administrator, to institute a suit in the circuit court against Dutmers and his surety. Upon the trial of that cause it developed that, although the property located in the various drug stores and certain real estate being purchased on land contract were inventoried and accounted for as a part of the deceased's estate, they were, in fact, partnership assets, owned by the deceased and his son, Cornelius, the coadministrator. Inquiry being directed to this situation, Heaney stated, on cross-examination:

"The store on Giddings originally belonged to Henry Dutmers, one of John's sons, where John furnished the money to get Henry started, and after Henry's death the partnership of John and Cornelius Dutmers sort of took that in without any formal determination of ownership, and so at the time I first came into the estate, it was included in the inventory as being part of the assets of the deceased. It was so involved financially that in dividing the assets of the estate we show it as all belonging to the creditors. We put it in the estate of the deceased for the purpose of liquidation to turn the proceeds over to the creditors.

"My office drew up the inventory, which was sworn to by both Mr. Dutmers and myself."

Dutmers testified:

"Mr. Heaney told me I had no right in the store because it belonged to creditors. * * *

"When father died the partnership was in debt to a considerable extent. I cannot say definitely but it was around $15,000 or $16,000. At the time of his death I was paying those debts at the rate of about

$200 per month from partnership funds. Up to the time that Mr. Heaney took charge, I was putting the rents from the building into the partnership account, which was up until Mr. Brown did the bookkeeping. After that I turned them over to Mr. Brown who turned them over to Mr. Heaney. That continued up to December 2, 1933, after which I didn't turn them over to anyone."

During the administration of the estate, Dutmers filed a claim against the estate for moneys he said were advanced by him. In explanation thereof, he said in the circuit court:

"The building at 35 South Division was used as partnership property from April 29, 1922, until the business was discontinued June 9, 1934. During that entire time the funds from the building were put into the partnership, and the expenses were paid by the partnership. I included some of the things in the inventory on advice of Mr. Heaney, who was then acting as my legal advisor and as attorney for Annis and Heaney for the estate. I paid no funds directly to the Michigan Trust Company on the building. I put money into the partnership account as follows:

"March 10, 1928, $692.53, part of a deposit of $787.18 made on that date;

"December 29, 1928, $1,000, I borrowed from National Life Insurance Co.;

"August 29, 1930, $500, I borrowed from National Life Insurance Co.

"Those were the items referred to in my claim filed against the estate which Mr. Heaney brought out a little while ago. In filing my claim for $2,000 for the stock borrowed from my sister I acted under legal advice from Mr. Renihan. I did not know at that time whether the partnership assets belonged to the surviving partner or to the administrator of the estate of the deceased partner."

The record does not contain the answer filed by appellee insurance company to plaintiff's declaration and we can only assume the nature of its defense from that portion of the testimony shown in the record, the statements of fact contained in the court's opinion, and the arguments in the various briefs.

The circuit judge, sitting without a jury, filed a written opinion in September of 1935, in which he said:

"That the order of the probate court is binding upon the defendant Dutmers, but not upon his surety, and that plaintiff is not, therefore, entitled to recover the full amount of his claim in the present state of the proofs. In view of the fact that there is an apparent liability of both principal and surety and this conclusion decides merely a technical question as to the proof required, the ends of justice will be served by allowing costs to the defendant surety and by ordering the case reopened to permit plaintiff to offer further proof to establish liability."

An order was entered in conformity to this finding. Further proofs were then taken and a second opinion was filed on December 21, 1935, in which the trial judge held that certain changes should be made in the computation of the liability of Cornelius J. Dutmers, which resulted in the entry of a judgment against Dutmers individually in the sum of $1,759. The court held, however, that, because property had been included in the inventory of the estate that should have been treated as belonging to the partnership and administered by the surviving partner, the liability of the surety was in a lesser amount because, said the court:

"The bond signed by the surety limits its obligation to the 'goods, chattels, rights, credits and estate

of said deceased,' and cannot be stretched to include property that did not belong to deceased but was owned by a partnership of which deceased was a member.''

The surety's liability was fixed by the circuit court as $727.06, which, after an adjustment of the fees allowed to Dutmers by the probate court, left a net balance of $404.10, in which sum judgment was entered against it and paid.

Plaintiff Heaney is the only party appealing from this judgment. He claims that the order of the probate court, allowing the final account of Cornelius J. Dutmers, was *res judicata* of the surety's liability on Dutmer's bond; that the probate court files and records are conclusive proof of what the assets of the estate are and that the findings of that court cannot be attacked in a collateral proceeding by the surety.

Questions regarding the sufficiency of notice to the surety and publication of the final account are also raised but need not be decided because of our view of the controlling question in the case.

The liability of the surety is not dependent upon any application of the doctrine of *res judicata*. Defendant American Employers Insurance Company was not heard or represented in, nor was it a party to the final accounting proceedings wherein the liability of its principal was determined. The only question involved is: What is the contractual undertaking of the surety? See *Grady* v. *Hughes*, 80 Mich. 184; *Robbins, for use of Wood*, v. *Burridge*, 128 Mich. 25; *People, for use of Clinton*, v. *Laning*, 73 Mich. 284; *Holden* v. *Lathrop*, 65 Mich. 652; *Sauer* v. *Detroit Fidelity & Surety Co.*, 237 Mich. 697 (51 A. L. R. 1485).

It is true that defendant surety company obligated itself to secure performance by its principal,

Dutmers, of "all orders and decrees of said (probate) court * * * in the premises." However, it is important to emphasize that this provision is limited to "all orders," et cetera, *"in the premises;"* and the broad language of this obligation must be further construed in the light of the other condition of the bond quoted, *supra,* that Dutmers "shall administer *according to law all* the goods, chattels, rights, credits and estate *of said deceased,"* et cetera. It was permissible for the surety to introduce evidence to show that the order entered by the probate court did not come within the obligations of the bond; that, in part, the order was based upon Dutmers' mishandling of assets which were not, in fact, assets "of said deceased," but were, instead, assets of a partnership of which the deceased was a member, and, therefore, the order was not entirely confined to "the premises." See *Russell* v. *Wheeler,* 129 Mich. 41; *Webber* v. *Detroit Fidelity & Surety Co.,* 263 Mich. 144. Under the statute (2 Comp. Laws 1929, § 9869 *et seq.*), partnership assets are to be administered by the surviving partner and not by the probate court which exercises jurisdiction over the administration of the deceased partner's estate. *Merritt* v. *Dickey,* 38 Mich. 41, and *Heap* v. *Heap,* 258 Mich. 250.

Since, therefore, the liability adjudged by the order entered by the probate court did not come within the terms of the surety's contract, it was necessary for the circuit court to take testimony in order to determine the surety's liability on the general condition of its bond that its principal "shall administer according to law," et cetera. *Perkins* v. *Cheney,* 114 Mich. 567 (68 Am. St. Rep. 495). The findings of the circuit judge on this issue are in accord with our views and, in our opinion, are free from any reversible error.

It may be that the order entered in the probate court was valid in a jurisdictional sense, even though, unknown to the probate court, some assets included in the account and inventory were, in fact, not assets of the estate. *Peninsular Savings Bank* v. *Ward,* 118 Mich. 87, 94; but the fact that the order may be valid is not material in this instance in determining the surety's contractual liability.

Holden v. *Lathrop, supra,* is cited as authority to the contrary. In that case the surety questioned the *correctness* of a probate order allowing an executor's account in which the latter was charged with a defalcation. This court held in that case that: "The payment of the probate judgment is within the exact conditions of his bond." Here, the surety does not question the *correctness* of the probate order of which it did not have notice, but contends that the indebtedness of its principal includes matters not within the conditions of its bond. The defense is not a collateral attack upon the probate order but rather raises an issue as to defendant surety's responsibility for its performance. Similar distinctions may be drawn between the instant case and *Gill* v. *Backus,* 108 Mich. 417, and *Dudley* v. *Conely,* 125 Mich. 300.

The judgment entered in the circuit court is affirmed, with costs to appellee American Employers Insurance Company.

BUTZEL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred with BUSHNELL, J.

WIEST, C. J., concurred in the result.

BARD *v.* BAKER.

1. AUTOMOBILES—NEGLIGENCE—IMPUTATION TO ADULT GUEST PASSENGERS.

   In action by wife, not a minor, for injuries sustained while a passenger in car driven by her husband, his negligence in driving the car is imputable to her.

2. SAME—TRUCKS—NEGLIGENCE—EXCESS WIDTH OF LOAD.

   Defendants who operated truck on public highways with load in excess of 96 inches in width *held*, guilty of negligence in violating terms of statute prohibiting loads in excess of such width (1 Comp. Laws 1929, § 4759, as amended by Act No. 253, Pub. Acts 1933).

3. SAME—DANGERS TO GUARD AGAINST.

   Only danger against which motorist is bound to guard is what he, as a careful person, sees or should see.

4. SAME — NEGLIGENCE — QUESTION OF FACT — ASSURED CLEAR DISTANCE AHEAD.

   Statute providing 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" is construed as not requiring that a person be held guilty of contributory negligence as a matter of law in failing to see an object on the highway which was undiscernible to a person approaching the same in the exercise of ordinary care (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933).

5. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT—LIGHTS—OVERHANGING LOAD IN EXCESS OF STATUTORY WIDTH.

   Question of contributory negligence of deceased motorist *held*, for jury where record shows he had been traveling 25 miles an hour and had begun to slow down as he approached intersection where defendants' dump trucks, loaded with wooden road mats to a width in excess of that permitted by statute and

from which red flag hung so that lowest part of flag and mats was more than 42 inches from pavement, the height the direct rays of lights on deceased's car were permitted to shine, since deceased is only presumed to have seen that which statute requires an ordinarily careful person to have seen and if, assuming all other lights were out, lights on decedent's car would not have apprised him of the overhanging mats he would not be guilty of contributory negligence as a matter of law (1 Comp. Laws 1929, § 4738 [b], as amended by Act No. 59, Pub. Acts 1931, § 4759, as amended by Act No. 253, Pub. Acts 1933).

6. SAME—TRUCKS—NIGHTTIME—LOADING—PARKING.

While deceased motorist who approached parked truck at night should have observed it, he had right to assume it was loaded and parked in compliance with statutes (1 Comp. Laws 1929, § 4759, as amended by Act No. 253, Pub. Acts 1933).

WIEST, C. J., and BUTZEL and POTTER, JJ., dissenting.

Appeal from Gratiot; Searl (Kelly S.), J. Submitted October 13, 1937. (Docket No. 111, Calendar No. 39,646.) Decided February 25, 1938. Rehearing denied April 4, 1938.

Case by Jennie Bard against John Baker and Amos Baker, copartners doing business as Baker & Son, for personal injuries sustained while riding in a motor vehicle which collided with overhanging load on defendants' truck. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

Montigel & Knorr (*J. David Sullivan,* of counsel), for plaintiff.

Charles H. Goggin and *Robert H. Baker,* for defendants.

SHARPE, J. At about the hour of 6 p. m., on the evening of December 10, 1935, Byron Bard and wife, the plaintiff herein, were traveling south in a 1926 two-door Buick sedan on the westerly side of a gravelled highway known as 555. On the same day

John Baker, one of the defendants, took two truck drivers and a Dodge truck and went to Remus where they got another truck and brought back in the trucks two loads of six road mats for use on a highway construction job. The mats are made of two-inch elm planks, three-ply, put together crosswise to make them firm enough to hold heavy machinery that may have occasion to pass over them. The mats when constructed are six inches thick, four feet wide and 14 to 16 feet long. The trucks were one and one-half ton chassis, equipped with dump bodies, six feet wide and eight feet long; the top of the dump box was five feet from the ground. Two 14- and one 16-foot mats were loaded on top of each other crosswise of the dump bodies and just back of the cab of each truck. The trucks were loaded heavier on the right side and a red flag, one and one-half feet square, was fastened at the left front end of the lower mat on each truck. The lowest part of the mat and end of the flag were more than 42 inches from the pavement. The truck arrived at the place where the accident happened shortly before 6 p. m. Mr. Baker drove on ahead to the intersection. He parked his car about 15 feet west of 555 and in the center of M-46 facing the southeast. The Chevrolet truck next arrived and was backed off of highway 555 and stopped about 30 feet east of the east shoulder of 555 and on the south line of the right of way of M-46. It stood facing nearly west. The Dodge truck next arrived and stopped at the south line of the right of way of M-46, the right wheels being about eight inches from the east shoulder of 555. The lights on all of these vehicles were turned on. The Dodge truck was so located that the lights of the car and truck illuminated both sides of the truck. The Bards had been visiting at the home of

plaintiff's relatives who lived about one mile north of the intersection. They left there as it was growing dark, turned on their lights and eventually proceeded south on 555. They were traveling about 25 miles per hour and slowed up somewhat as they approached the intersection. They crossed the intersection, missed the dump body of the truck and crashed into the mats which extended about one and one-half feet into the westerly half of 555. The force of the impact slid the mats on the left side of the truck one and one-half feet toward the rear end of the dump body. The windshield and the entire top and body of the Bard car above the steering wheel was sheared off. Bard's body was found in the middle of the road about 100 feet south of the Dodge truck and the automobile came to a stop against a large stone 219 feet south of the truck. Mr. Bard was killed and plaintiff received serious scalp wounds and other injuries.

Plaintiff brought suit for injuries and at the close of her case, the defense moved the court to direct a verdict on the ground that the driver of the automobile, in which plaintiff was riding when she was injured, was guilty of contributory negligence. Decision on this motion was reserved under the statute and the cause submitted to the jury who thereupon found in favor of plaintiff. Defendants then made a motion for judgment *non obstante veredicto* and upon the denial of this motion, they appealed.

It is conceded by all parties that plaintiff is not a minor and that the negligence of her husband, the driver of the car, is imputed to her; that 1 Comp. Laws 1929, § 4759, as amended by Act No. 253, Pub. Acts 1933 (Comp. Laws Supp. 1935, § 4759), provides that the width of the load over all, with certain exceptions not applicable to this case, shall not ex-

ceed 96 inches; and that as a result of the defendants' failure to comply with the terms of this statute, they were guilty of negligence in violating this statute. See *Beckman* v. *Baraga Township School District,* 271 Mich. 195.

Defendants rely upon 1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933 (Comp. Laws Supp. 1935, § 4697), which provides 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" and cite the following cases to the effect that if a driver is blinded by glaring lights he must stop: *Ott* v. *Wilson,* 216 Mich. 499; *Spencer* v. *Taylor,* 219 Mich. 110; *Holsaple* v. *Superintendents of Poor of Menominee County,* 232 Mich. 603; *Ruth* v. *Vroom,* 245 Mich. 88 (62 A. L. R. 1528); *Bielecki* v. *United Trucking Service,* 247 Mich. 661; *Elrich* v. *Schwaderer,* 251 Mich. 33; *Thompson* v. *Southern Mich. Transportation Co.,* 261 Mich. 440; *Russell* v. *Szczawinski,* 268 Mich. 112.

We have frequently had the above mentioned statute under consideration. In *Martin* v. *J. A. Mercier Co.,* 255 Mich. 587 (78 A. L. R. 520), a motorist while it was misty and dark had been driving along a road open to traffic and drove into an excavation not marked with warning lights. We there said:

"The only danger against which he was bound to guard was what he saw or should have seen.

"The rule that a driver must see objects and be able to stop within the range of his lights, applied to things on the road, does not apply to holes in the road. A hole often melts into the road so it cannot be distinguished from the surface except at short range. Whether and when a hole or excavation would be noticed by a careful driver, especially on

a misty and dark morning, necessarily is so uncertain and dependent upon circumstances that, with possible exceptions, it is an issue of fact."

In *Marek* v. *City of Alpena,* 258 Mich. 637, a motorist ran into a bump in the highway. We there said:

"A violation of the rule that a driver must drive his car at such a speed that he can stop within the assured clear distance ahead does not preclude his recovery for injuries in a case where they are caused by running into a hole or bump on the road. The assured clear distance rule is applied when there is collision with trucks or other objects not a part of the road."

In *Garrison* v. *City of Detroit,* 270 Mich. 237, a motorist while driving on First street in the city of Detroit at a speed of 20 miles per hour or less struck an unlighted traffic signal post. The signal device consisted of a cement base, three feet in diameter and three feet high, supporting a six-inch steel post bearing guard lights five feet above the pavement and traffic lights nine feet high. In discussing the "rule of safety" as found in *Russell* v. *Szczawinski, supra,* and *Thompson* v. *Southern Michigan Transportation Co., supra,* we said:

"The cases dealt with large objects, such as other motor vehicles, easily seen, and on the open road. A driver must anticipate such objects, lighted or unlighted, carefully or negligently driven or parked, and guard against collision with them. He must see such obstruction as a careful person would have seen.

"It would convert a rule of safety into a rule of danger to hold that drivers in a city, subject to distraction caused by pedestrians and vehicles, must anticipate, at their peril, so unusual a thing as an unlighted traffic signal in the center of a street in-

tersection. When such a device is maintained, the cited rule of safety is not applicable but the question of the driver's negligence becomes an issue of fact under the circumstances."

Plaintiff has cited the following cases from other jurisdictions: *Whitworth* v. *Riley,* 132 Okla. 72 (269 Pac. 350, 59 A. L. R. 584); *Waynick* v. *Walrond,* 155 Va. 400 (154 S. E. 522, 70 A. L. R. 1014); *Crooks* v. *Rust,* 119 Wash. 154 (205 Pac. 419); *Dorris* v. *Bridgman & Co.,* 289 Pa. 533 (137 Atl. 609). And we have examined *Ross* v. *Hoffman* (Mo. App.), 269 S. W. 679; *Mechler* v. *McMahon,* 184 Minn. 476 (239 N. W. 605); *Whitlatch* v. *City of Iowa Falls,* 199 Iowa, 73 (201 N. W. 83); *Wicker* v. *North States Construction Co.,* 183 Minn. 79 (235 N. W. 630); *Kadlec* v. *Al. Johnson Construction Co.,* 217 Iowa, 299 (252 N. W. 103); *Baldwin* v. *City of Norwalk,* 96 Conn. 1 (112 Atl. 660).

In the cases cited from other jurisdictions the "rule of safety" is not statutory as in Michigan and these cases are not authority for the claims made by plaintiff, they merely show the tendency of courts of other jurisdictions to adopt a more liberal rule than is followed in Michigan. Our court in placing a reasonable construction upon this statute has held that a person should not be guilty of contributory negligence as a matter of law in failing to see an object which was undiscernible to a person approaching the same in the exercise of ordinary care.

In the case at bar, plaintiff's driver was killed and we do not know what he saw as he approached the truck. The record shows that he was traveling at the rate of 25 miles per hour and began to slow down as he crossed the intersection; that the lowest part of the mats and flag were more than 42 inches above the pavement, which is the height the "main

bright portion of the head lamp beams" of Bard's car were permitted by law to shine. 1 Comp. Laws 1929, § 4738 (b), as amended by Act No. 59, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 4738 [b]). In our opinion plaintiff's driver should have seen defendants' lighted truck parked on its proper side of the road, but he had a right to assume that it was loaded and parked in compliance with the laws of the State of Michigan; and whether or not plaintiff's driver failed to see the protruding mats or failed to see them in time to avoid a collision with them presents a jury question.

The judgment of the trial court is affirmed. Plaintiff may recover costs.

BUSHNELL, CHANDLER, and NORTH, JJ., concurred with SHARPE, J.

POTTER, J. (*dissenting*). Plaintiff and her husband, about 5:45 p. m., December 10, 1935, were traveling south in an automobile on the westerly side of highway No. 555, approaching what was to be new highway M-46 then under construction by defendants, a copartnership. Plaintiff was returning from the home of her mother and stepfather one-half mile north and west of the intersection of highway No. 555 with new M-46. Plaintiff and her husband had talked about the new road, saw automobiles of workmen parked on highway No. 555 on the way to her mother's home in the morning. Plaintiff's husband discussed the highway with Mr. LaVoy, a garage man at Riverdale, that morning. On the morning of December 10, 1935, John Baker arranged and managed the moving of six mats from Remus to the junction of new M-46 with No. 555. These mats, used for footings for excavating machinery working in soft ground, were made of plank two inches thick, three-ply, put crosswise, to hold

heavy machines so they would not sink in the muck. They were approximately six inches thick, four feet wide, and 14 and 16 feet long, and weighed between 1,500 and 2,000 pounds apiece. The trucks which carried them were 1½-ton trucks equipped with dump bodies about six feet wide and eight feet long. Two 14-foot mats and one 16-foot mat were loaded on top of each other crosswise of the dump bodies just back of the cab of each truck. About one and one-half feet more of these mats was overhanding on the right side than on the left. A red flag about one and one-half feet square was fastened at the left front end of the lower mat on each truck. Two trucks were used in moving them. One Marzolf drove a Dodge truck and one Daymon drove a Chevrolet truck. On the way from Remus, Baker drove ahead of the trucks and at Riverdale met two of his men, Viswat and Compson, whom he picked up and took along with him to the intersection of new M-46 and No. 555 to help unload the trucks. He came from the south, parked his automobile about 15 feet west of highway No. 555 in the center of the right of way of new M-46, facing the southeast. The Chevrolet truck arrived first, was backed off the highway and stopped about 30 feet east of the east shoulder of highway No. 555, on the south line of the right of way of new M-46 which runs substantially east and west, preparatory to unloading. This truck stood facing the northwest. While it was unloading, the Dodge truck stopped at the south line of the right of way of new M-46. The lights on all vehicles were turned on. The Dodge truck was so located that both sides were illuminated by the automobile on either side. The driver of the Dodge truck went to help unload the Chevrolet truck and about three minutes afterward plaintiff, riding with her husband

in his automobile coming from the north, drove across the intersection of highway No. 555 with new M-46 at about 25 miles an hour, missed the dump body of the Dodge truck, crashed into the mats on it with such force as to slide the mats on the left side of the truck one and one-half feet toward the rear end of the dump body. The windshield and top of the body of the automobile in which plaintiff was riding were sheared off and came to rest in the center of the road about 50 feet south of the Dodge truck. The body of plaintiff's husband was found in the middle of the road about 100 feet south of the Dodge truck. His automobile, after the impact, went up a five-foot grade and over a two-foot embankment and landed against a large stone in the fence 219 feet south of the Dodge truck. Plaintiff's husband was killed and plaintiff seriously injured. Plaintiff brought suit to recover for the injuries she suffered.

The lower part of the mats and the end of the red flag were more than 42 inches above the pavement. Plaintiff testified she was blinded by the lights from the truck, but there was no testimony as to what plaintiff's husband saw or did not see. Plaintiff and her husband were engaged in conversation in relation to some wood he had purchased from her stepfather until the moment of impact. Defendants, at the close of plaintiff's case, moved for a directed verdict upon the ground plaintiff's husband, driver of the automobile in which she was riding at the time of injury, was guilty of contributory negligence. The court reserved decision under the statute and submitted the case to the jury which found for plaintiff. A motion for judgment notwithstanding the verdict was made by defendants and denied

by the court, judgment entered, and defendants appeal.

Plaintiff relies on Act No. 253, Pub. Acts 1933 (Comp. Laws Supp. 1935, § 4759), to establish defendants' negligence. The act provides with certain exceptions not here material that "No motor vehicle * * * hereafter operated upon the public highways of this State shall have a gauge * * * more than ninety-six inches wide, over all including load." It is conceded the mats were 14 and 16 feet long and the load was wider than permitted by statute.

"The statute does not declare a rule of reasonable care in loading. It prescribes a mandatory condition of the use of the highway. It is incumbent on the driver, at his peril, to comply with the statute at all times." *Beckman* v. *Baraga Township School District,* 271 Mich. 195.

Defendants' negligence is established.

"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." 1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933 (Comp. Laws Supp. 1935, § 4697).

The negligence, if any, of the driver of the automobile in which plaintiff was riding is imputed to her. *Holsaple* v. *Superintendents of Poor of Menominee County,* 232 Mich. 603. Any want of due care or any failure as to a specific duty imposed by statute on the part of the plaintiff, if any, however slight, which contributed to the accident would bar recovery. *Gleason* v. *Lowe,* 232 Mich. 300.

"If there is negligence and contributory negligence then there is no remedy." *Bielecki* v. *United Trucking Service,* 247 Mich. 661.

In *Ruth* v. *Vroom,* 245 Mich. 88 (62 A. L. R. 1528), the court in passing upon the "assured clear distance" rule, said:

"The rule adopted by this court does not raise merely a rebuttable presumption of negligence. It is a rule of safety. * * * It is not enough that a driver be able to begin to stop within the range of his vision, or that he use diligence to stop after discerning an object. The rule makes no allowance for delay in action. He must, on peril of legal negligence, so drive that he can and will discover an object, perform the manual acts necessary to stop, and bring the car to a complete halt within such range."

See, also, *Cook* v. *City of Otsego,* 282 Mich. 248, and cases cited.

It is negligence as a matter of law to drive an automobile along a public highway in the dark at such speed that it cannot be stopped within the distance that objects can be seen ahead of it. *Spencer* v. *Taylor,* 219 Mich. 110; *Gleason* v. *Lowe, supra; Diederichs* v. *Duke,* 234 Mich. 136; *Lett* v. *Summerfield & Hecht,* 239 Mich. 699.

"We do not think the rule should be weakened by engrafting exceptions on it or modifying it. Its observance bespeaks the safety of human life and limb and of property. Had it been observed on the night in question, this unfortunate accident would not have happened." *Lett* v. *Summerfield & Hecht, supra.*

If the vision of the driver of the automobile in which plaintiff was riding was obscured by lights from oncoming cars, or if the lights on his own automobile did not illuminate the range of his vision so that he was deceived by appearances, then he was guilty of contributory negligence imputable to plain-

tiff. If the driver of the automobile in which plaintiff was riding saw the projecting mats and did not bring his automobile to a stop but ran into them, that would be contributory negligence as a matter of law.

Plaintiff contends the lower court properly denied defendants' motion, and cites *Minks* v. *Stenberg*, 217 Iowa, 119 (250 N. W. 883); *Whitworth* v. *Riley*, 132 Okla. 72 (269 Pac. 350, 59 A. L. R. 584); *Waynick* v. *Walrond*, 155 Va. 400 (154 S. E. 522, 70 A. L. R. 1014); *Crooks* v. *Rust*, 119 Wash. 154 (205 Pac. 419); *Dorris* v. *Bridgman & Co.*, 296 Pa. 198 (145 Atl. 827). In none of these cases was an "assured clear distance" statute involved. *Caudle* v. *Zenor*, 217 Iowa, 77 (251 N. W. 69), involved an "assured clear distance" statute, but exceptions have been engrafted on it.

Act No. 59, § 46 (b), Pub. Acts 1931 (Comp. Laws Supp. 1935, § 4738 [b]), is substantially the same as 1 Comp. Laws 1929, § 4738 (b), which is the same as Act No. 318, § 46 (b), Pub. Acts 1927. This provision in relation to lights on motor vehicles first appeared in Act No. 22, Pub. Acts 1921 (1st Ex. Sess.), and was probably repealed by Act No. 3, Pub. Acts 1921 (2d Ex. Sess.). Act No. 59, § 46 (b), Pub. Acts 1931 (Comp. Laws Supp. 1935, § 4738 [b]), provides:

"Head lamps and auxiliary driving lamps shall be so aimed and used upon approaching an oncoming vehicle that they do not project a glaring or dazzling light into the eyes of the approaching driver. Such lamps shall be deemed to comply with this provision prohibiting glaring and dazzling lights if substantially none of the main bright portion of the beam used in approaching an oncoming car is directed to the left of the vertical plane through the axis of the left head lamp and parallel to the longitudinal axis of the vehicle and above the

horizontal plane passing through the lamp centers parallel to the level road upon which the loaded vehicle stands, and in no case higher than forty-two inches, seventy-five feet ahead of the vehicle."

The 1927 act above referred to provides:

"Head lamps shall be deemed to comply with the foregoing provisions prohibiting glaring and dazzling lights if none of the main bright portion of the head lamp beams rises above a horizontal plane passing through the lamp centers parallel to the level road upon which the loaded vehicle stands and in no case higher than forty-two inches, seventy-five feet ahead of the vehicle."

Plaintiff argues that though her husband was negligent in violating the "assured clear distance" rule, this was not the proximate cause of the accident, because these mats were more than 42 inches above the level of the roadbed upon which the trucks were standing and because by statute the rays of light from the automobile of plaintiff's husband were not permitted to be more than 42 inches above the ground, 75 feet in front thereof. The statute provides "if substantially none of the main bright portion of the beam used in approaching an oncoming car" rises higher than 42 inches, at 75 feet in front of the automobile. The statute does not say no beam is to be above 42 inches, but that substantially none of the main bright portion should be. 1 Comp. Laws 1929, § 4738 (a), as amended by Act No. 59, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 4738), requires that automobile lights be so adjusted that when approaching an oncoming vehicle they will be sufficient to render clearly discernible a person 75 feet ahead. Both provisions of the statute should be permitted to stand and be construed

together. Section 4738 (b), as amended by Act No. 59, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 4738), does not mean that only three and one-half feet of a person need be clearly discernible while subsection (a) says the whole person shall be discernible. While one portion of the statute provides that substantially none of the main bright portion of the beam is to be above 42 inches, yet some of the rays of light from the automobile must necessarily be above 42 inches if subsection (a) of the statute is to mean anything. Had plaintiff's husband been watching and had he not been blinded by the glare of defendants' headlights, he would have been able to have seen the mats if the lights on his own automobile were in proper condition. We do not agree with the construction placed upon this statute by the trial court.

In *Sellon* v. *Tanner,* 252 Mich. 231, an automobile in which plaintiff was riding as a guest of the driver was proceeding north on the east side of the pavement on south Cedar street, in the city of Lansing, about 5:30 p. m., December 27, 1928, and at the intersection of Greenlawn street collided with a truck which had backed from Greenlawn street into the path of the northbound traffic on Cedar street and plaintiff was injured and brought suit against the owner. We held defendant was entitled to a directed verdict on the ground of contributory negligence on the part of plaintiff's driver. It was said:

"Defendant's truck backed into the intersection with the body of the truck and an overhanging timber reaching quite to the center of the pavement and directly across the path of the automobile in which plaintiff was riding. * * * Plaintiff did not see the truck because he was looking at approaching traffic on the opposite side of the pavement."

Defendant was negligent in backing his truck as shown in that case. It was said:

"It is negligence, as a matter of law, for the driver of a car to proceed over a highway without looking to see whether he can do so in safety. Lights on cars are intended to disclose the way ahead after dark, and, if they fail to do so for any reason, it is a warning to the driver not to proceed without having vision of the way."

The record in that case shows there were lights on the back of the cab of the truck seven and one-half feet above the ground, the platform upon which the timbers were riding was about three and one-half feet from the top of the cab, which would bring them at least 42 inches from the ground. As in this case, the automobile was demolished above the cowl and undamaged below by the impact of the collision. When this case was decided, Act No. 318, § 46 (b), Pub. Acts 1927, was in effect.

The rule in *Sellon* v. *Tanner, supra,* was approved in *Fraley* v. *J. Calvert's Sons,* 266 Mich. 460, and *Johnson* v. *Fremont Canning Co.,* 270 Mich. 524.

The trial court should have entered judgment for defendants.

Judgment should be reversed and cause remanded for entry of judgment notwithstanding the verdict, with costs to defendants.

WIEST, C. J., and BUTZEL, J., concurred with POTTER, J. FEAD, J., took no part in this decision.

MONDOU *v.* LINCOLN MUTUAL CASUALTY CO.

1. COURTS—JURISDICTION—CONSENT OF PARTIES.
   Jurisdiction cannot be thrust upon a court by consent of the parties when such jurisdiction does not exist under the law.

2. APPEAL AND ERROR—JURISDICTION OF SUPREME COURT—JUDGMENT —CLAIM OF APPEAL—BONDS—FILING.
   Supreme Court acquired jurisdiction to review judgment for plaintiff, entered in lower court in proceeding against garnishee defendant tried without a jury, notwithstanding term "decree" was used by appellant instead of "judgment" in its appeal, erroneously describing "decree" as having been entered when opinion ordering entry of judgment was dated, where claim of appeal was dated day before it and bond on appeal were filed and judgment appearing of record appears to have been "read, approved and signed" by trial judge on date claim of appeal and bond on appeal were filed though judgment was not entered until the following day.

3. INSURANCE—AUTOMOBILES—DRIVING CONTRARY TO LAW.
   Provision of automobile insurance policy that insurer shall not be liable thereunder when automobile is being driven contrary to law is valid.

4. SAME—AMBIGUITIES—CONSTRUCTION OF POLICY.
   Ambiguities in insurance policies prepared by insurer must be construed most strongly against the insurer.

5. SAME—CONSTRUCTION OF POLICY.
   While an insurance policy must be construed most strongly against the insurer, a court by an interlineation may not write a new clause into a policy.

6. SAME — AUTOMOBILES — CONSTRUCTION OF POLICY—EXCLUSION OF LIABILITY WHEN DRIVEN BY PERSON PROHIBITED BY LAW FROM DRIVING A CAR.
   Automobile insurance policy excluding liability of insurer when car was operated "(a) in any race or speed contest, or (b)

any person prohibited by law from driving the automobile'' *held,* to have a plain and certain meaning, although perhaps not grammatically correct and to provide that insurer has no liability when car is being driven by a person prohibited by law from driving an automobile.

7. SAME—CONSTRUCTION OF POLICY.

Worship of the literal should not overcome common sense or be used to bring about an absurdity if it can be avoided in construing an insurance policy.

8. SAME—CONSTRUCTION OF UNAMBIGUOUS POLICY.

No construction, in the usual sense of the word, is called for if the language of an insurance policy is not ambiguous.

9. CONTRACTS—CONSTRUCTION.

A contract will be construed so as to give effect to every word or phrase as far as practicable.

10. SAME—OMITTED WORDS—CONSTRUCTION.

Where the context of a written contract clearly implies or suggests that a certain word has been omitted, such word will be supplied by construction.

11. INSURANCE — AUTOMOBILES — EXCLUSION OF LIABILITY — UNLICENSED DRIVERS.

Insurer under automobile policy, excluding liability when car was operated by person prohibited by law from driving, *held,* not liable for damages to person injured while car was driven by an unlicensed driver.

12. SAME—CONSTRUCTION OF POLICY—INSERTION OF OMITTED WORD.

Trial court *held,* in error in refusing to insert word ''by'' after ''(b)'' in clause of automobile insurance policy relieving insurer from liability when car was operated ''(a) in any race or speed contest, or (b) any person prohibited by law from driving the automobile,'' and in holding such latter provision meaningless and of no effect.

SHARPE and POTTER, JJ., dissenting.

Appeal from Bay; McCormick (James L.), J. Submitted October 6, 1937. (Docket No. 31, Calendar No. 39,662.) Decided February 25, 1938.

Garnishment proceedings by Ruth Mondou against Rachel Rousse, principal defendant, and Lincoln Mutual Casualty Company, garnishee defendant, on an automobile insurance policy. Judgment for plaintiff. Garnishee defendant appeals. Reversed without a new trial.

Samuel G. Houghton, for plaintiff.

Stewart A. Ricard, for garnishee defendant.

BUTZEL, J. I am not in accord with the opinion of Mr. Justice POTTER, which for the first time raises the question of jurisdiction. It has not been raised by either party. Jurisdiction cannot be thrust upon a court by consent of the parties, when such jurisdiction does not exist under the law. It does exist in the instant case and jurisdiction was acquired to review the judgment of the lower court. It is true that the term "decree" instead of "judgment" was used by appellant in its appeal, but such an error, made in a case tried by a judge without a jury, is so patent that a correction should be considered as if made.

We are also mindful of the fact that when appellant filed claim of appeal and notice thereof on June 2, 1937, he described it as a "decree" entered on the 13th day of May, 1937. The mistake in date may be due to the fact that the office of the attorney for appellant is located in Detroit, while the case was tried in Bay county. The trial judge concluded his opinion with the statement that "judgment" might be entered in favor of plaintiff and against the garnishee defendant in the amount of $2,409.24 with interest. The opinion including this order is dated May 13, 1937. Appellant evidently was misled by the date of the order of judgment in the opinion. If appellant had been as careful as it was prompt, these slight procedural errors would have been avoided.

It was not until June 2, 1937, that appellant filed its claim of appeal, dated June 1, 1937. On June 4, 1937, it sent appellee's attorney the notice thereof. On June 2, 1937, appellant also filed a bond on appeal, of which it also notified appellee. The judgment as it appears in the record filed in this court was "read, approved and signed" by the trial judge on June 2, 1937, so that on the date the appeal and bond were filed, the judge had signed an order of judgment, though it was not entered until the following day.

When the notice of claim of appeal was sent to appellee, the judgment had been signed and entered on record. These procedural errors could have been corrected, or a new claim of appeal filed, or permission to file a delayed appeal been asked, had an objection promptly been made. Appellee has never questioned the regularity of the proceedings and apparently does not do so now. She has permitted the appellant to go to the expense of perfecting the appeal, printing the record and brief, and there is no showing that she has been prejudiced. At most, the errors were entirely procedural and not prejudicial. This is not a case where, through delay, the court lost jurisdiction or where the case comes to us without a judgment. The appeal was unquestionably from the judgment, as it appears on the record. It will be so regarded, notwithstanding the careless practice, which we condemn, but overlook in this case.

Plaintiff sued the principal defendant, Rousse, for damages alleged to have resulted from being hit by defendant Rousse's automobile. She recovered judgment.

The Lincoln Mutual Casualty Company carried insurance on defendant's automobile which, at the

time of the injury to plaintiff, was being driven by an unlicensed driver. The garnishee defendant, Lincoln Mutual Casualty Company, defended the principal case and denied liability on the ground it was not, under the terms of the policy, liable to plaintiff, the automobile of the principal defendant having been driven at the time of the injury by an unlicensed driver. Plaintiff claims the garnishee defendant is liable. The trial court so held and the defendant Lincoln Mutual Casualty Company appeals.

The insurance policy issued by the garnishee defendant to the principal defendant provided (paragraph 7):

"The company shall not be liable while any automobile herein covered is used, operated, manipulated or maintained: (a) in any race or speed contest, or (b) any person prohibited by law from driving the automobile, (c) while being used for the transportation of passengers for a consideration, actual or implied, or the transportation of explosives."

This provision of the policy does not include in it the word "by" before subdivision (b) of paragraph 7 thereof, but defendant contends this court should construe the policy as if the word "by" appeared before the word "any" in subdivision (b) of paragraph 7 of the policy. On the other hand, plaintiff contends the policy should be construed most strongly against the insurance company which prepared it; that the provision under consideration amounts to an exception to the general terms of the policy and must be clearly established and cannot be left to interpretation; that this court cannot make a contract for the parties, but must take the contract as it is and interpret it according to its express terms; and that when so interpreted, the exception

does not clearly appear, and hence the judgment of the trial court should be affirmed.

There is no question the provision of an insurance policy, providing the insurer shall not be liable thereunder when the automobile is being driven contrary to law, is good. *Zabonick* v. *Ralston,* 272 Mich. 247. And the insurer having prepared its policy, an ambiguity therein, if any exists, must be construed most strongly against the company. *Boesky Bros. Twelfth Street Corp.* v. *United States Fidelity & Guaranty Co.,* 267 Mich. 628; *Hallock* v. *Income Guaranty Co.,* 270 Mich. 448.

An insurance policy must be construed most strongly against the insurer. A court by an interlineation may not write a new clause into a policy. Neither of these two rules, however, is involved in the instant case. The words "or (b) any person prohibited by law from driving the automobile," as quoted in the excerpt from the policy, present no ambiguity nor question, nor are they susceptible of two interpretations. Their only meaning is that there is no liability when a car is being driven by a person prohibited by law from driving an automobile. While the expression in the policy may not be grammatically correct, its meaning is plain and certain. Worship of the literal should not overcome common sense or be used to bring about an absurdity if it can be avoided. A construction in accordance with these views violates neither the spirit nor the reason of the rules hereinbefore stated.

If the language of an insurance policy is not ambiguous, no construction, in the usual sense of the word, is called for. *Wertman* v. *Michigan Mutual Liability Co.,* 267 Mich. 508; *Indemnity Insurance Co. of North America* v. *Geist,* 270 Mich. 510. A contract will be construed so as to give effect to

every word or phrase as far as practicable. *Hapke* v. *Davidson,* 180 Mich. 138. This has always been the rule in this State. It was set forth by Mr. Justice CHRISTIANCY in *Washington County Bank* v. *Jerome,* 8 Mich. 490, in the following language:

"But it is said, the office of interpretation or construction is to ascertain the intention of the parties from the words which they have used; and that we are not at liberty to insert words which they have omitted, and which are not to be found in the instrument.

"This rule is correct when taken with its proper limitations. But it must be understood with this qualification, at least, that words the omission of which by way of ellipsis is sanctioned by usage, for the sake of brevity, and which are necessarily understood in order to give an intelligible meaning to the words used, or to complete the grammatical construction, must often be supplied, or, what is equivalent, understood as included in the words used."

Mr. Justice GRAVES in *Newton* v. *McKay,* 29 Mich. 1, stated:

"The whole writing is always to be considered, and the intent will not be defeated by false English or irregular arrangement, unless the defect is so serious as absolutely to preclude the ascertainment of the meaning of the parties through the means furnished by the whole document and such extrinsic aids as the law permits."

Had there been any doubtful meaning or ambiguity with the word omitted, there is no question but that the word could not have been supplied. *Kaifer* v. *Georgia Casualty Co.* (C. C. A.), 67 Fed. (2d) 309. But where the context of a written contract clearly implies or suggests that a certain word has been omitted, such word will be supplied by construction.

Hamilton v. *Wead,* 122 Neb. 854 (241 N. W. 556), citing *Goodrich* v. *Hubbard,* 51 Mich. 62.

In leases, the language is usually construed most strongly against the lessor in the same manner as an insurance policy is construed most strongly against the insurer. In *Dodd* v. *Mitchell,* 77 Ind. 388, a case involving a lease, the court stated:

"A word plainly omitted by inadvertence will always be supplied to accomplish justice by enforcing the intention of the parties. * * * Where a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless that word be introduced, such lease must be construed as if that word were inserted."

To like effect, see, *Irwin* v. *Nichols,* 87 Ark. 97 (112 S. W. 209); *Caldwell* v. *United States Fidelity & Guaranty Co.,* 205 Ala. 463 (88 South. 574).

The policy relieves defendant from liability in case of an accident when the car is being driven at the time by one not authorized by law to drive an automobile. It is admitted in the stipulation that the car was so driven. Therefore, there is no liability.

The trial court was in error in holding that the word "by" could not be inserted after the letter "(b)" in the fourth line of the paragraph hereinbefore quoted; that the exception stated in "(b)" was meaningless and of no effect; that therefore plaintiff could recover notwithstanding the fact that the car was being driven by a person prohibited by law from driving an automobile. He gave plaintiff a judgment for the full amount of her claim. The judgment is reversed, without a new trial and, with costs to appellant.

WIEST, C. J., and BUSHNELL, CHANDLER, and NORTH, JJ., concurred with BUTZEL, J.

POTTER, J. (*dissenting*). Plaintiff sued the principal defendant, Rousse, for damages alleged to have resulted from being hit by defendant Rousse's automobile. She recovered judgment.

The Lincoln Mutual Casualty Company carried insurance on defendant Rousse's automobile which, at the time of the injury to plaintiff, was being driven by an unlicensed driver. The garnishee defendant, Lincoln Mutual Casualty Company, defended the principal case and denied liability on the ground it was not, under the terms of the policy, liable to plaintiff, the automobile of the principal defendant having been driven at the time of the injury by an unlicensed driver.

Plaintiff claims the garnishee defendant is liable. The trial court so held, and the defendant Lincoln Mutual Casualty Company appeals.

The trial court filed an opinion herein dated May 13, 1937. Claim of appeal was filed, dated June 1, 1937, "from the decree entered on the 13th day of May, 1937." Judgment was entered June 3, 1937. There was no claim of appeal filed from the judgment, but only "from the decree entered on the 13th day of May, 1937." No decree was entered on that date, or on any other date. The only thing the record shows done May 13, 1937, was the dating of the trial court's opinion filed May 15, 1937. The claim of appeal was from something which preceded final judgment.

The rules of court refer to the method of review but do not restrict, enlarge or change the right or scope of review provided by law except as explicitly set out in the rules. Court Rule No. 55 (1933); *Jenkins* v. *Stewart,* 271 Mich. 522.

An appeal is perfected on filing a claim of appeal with the court, tribunal or officer whose action is to

be reviewed. When the appeal is so perfected, the Supreme Court shall have jurisdiction of the case. Court Rule No. 56, § 1, subds. (a) and (b) (1933); *Hoffman* v. *Security Trust Co. of Detroit,* 256 Mich. 383; *Weber* v. *Enoch C. Roberts Iron Ore Co.,* 270 Mich. 38.

The garnishee defendant having filed a claim of appeal as above mentioned, such appeal transferred jurisdiction to this court if it has jurisdiction of this case. The statement by the garnishee defendant that it "appeals from the judgment in favor of the plaintiff" in its reasons and grounds for appeal and bill of exceptions, settled under Court Rule No. 66 (1933), cannot operate to modify the claim of appeal or confer jurisdiction upon this court where it had none by the claim of appeal.

No appeal lies from an opinion of the trial court. Appeals at law are a substitute for the constitutional writ of error and, in the absence of express authorization, an appeal at law will lie only from a final judgment. *People, ex rel. Green,* v. *Eaton Probate Judge,* 40 Mich. 244; *Brady* v. *Railroad Co.,* 73 Mich. 457; *Steel* v. *Clinton Circuit Judge,* 133 Mich. 695; *Delaney* v. *Michigan Elm Hoop & Lumber Co.,* 144 Mich. 351; *Barribeau* v. *City of Detroit,* 146 Mich. 392; *In re Vetter's Estate,* 162 Mich. 109; *Bancroft* v. *Board of Regents of University of Michigan,* 192 Mich. 168; *Backus* v. *Trumbull Motor Car Co.,* 194 Mich. 199; *Lewis* v. *Bricker,* 232 Mich. 388; *Jirasek* v. *Wayne Circuit Judge,* 248 Mich. 676. The rights of the parties must be determined as of the date of the claim of appeal and by the claim of appeal filed by appellant. One may not file an appeal first and obtain judgment afterward. This is in accordance with the established rules of pleading. *Hovey* v. *Sebring,* 24 Mich. 232 (9 Am. Rep. 122); *Blackwood* v. *Brown,* 29 Mich. 483; *Moyer* v. *Scott,* 30 Mich. 345;

Carpenter v. *Harris,* 51 Mich. 223; *Schwier* v. *Atlas Assurance Co.,* 227 Mich. 104; *Waubun Beach Ass'n* v. *Wilson,* 274 Mich. 598 (103 A. L. R. 983); 1 C. J. p. 1149; 1 C. J. S. p. 1393; 1 R. C. L. p. 340. Where an appeal is taken from something not appealable, or is taken before the right of appeal accrues, it should be dismissed for want of jurisdiction. 4 C. J. S. pp. 936, 937.

It may be said the jurisdictional question is not raised by appellee. A court is a tribunal, not an arbitrator. Consent of the parties cannot confer jurisdiction on the court. Its acts without jurisdiction are not judicial acts. *Beach* v. *Botsford,* 1 Doug. (Mich.) 199 (40 Am. Dec. 45); *Clark* v. *Holmes,* 1 Doug. (Mich.) 390; *Spear* v. *Carter,* 1 Mich. 19 (48 Am. Dec. 688); *Wilson* v. *Davis,* 1 Mich. 156; *Farrand* v. *Bentley,* 6 Mich. 281; *Allen* v. *Carpenter,* 15 Mich. 25; *Moore* v. *Ellis,* 18 Mich. 77; *Youngblood* v. *Sexton,* 32 Mich. 406 (20 Am. Rep. 654); *Thompson* v. *Michigan Mutual Benefit Ass'n,* 52 Mich. 522; *Kirkwood* v. *Hoxie,* 95 Mich. 62 (35 Am. St. Rep. 549); *Peninsular Savings Bank* v. *Ward,* 118 Mich. 87; *Hull* v. *Hull,* 149 Mich. 500; *Bradfield* v. *Bradfield,* 154 Mich. 115 (129 Am. St. Rep. 468); *Maslen* v. *Anderson,* 163 Mich. 477; *People* v. *Meloche,* 186 Mich. 536; *Carpenter* v. *Dennison,* 208 Mich. 441. The question of jurisdiction of the subject-matter may be raised at any time. *Greenvault* v. *Farmers' & Mechanics' Bank of Michigan,* 2 Doug. (Mich.) 498; *Farrand* v. *Bentley, supra; Attorney General, ex rel. Lockwood,* v. *Moliter,* 26 Mich. 444; *Adams* v. *Hubbard,* 30 Mich. 104; *Woodruff* v. *Ives,* 34 Mich. 320; *Horton* v. *Howard,* 79 Mich. 642 (19 Am. St. Rep. 198); *Tromble* v. *Hoffman,* 130 Mich. 676; *Attorney General, ex rel. Wolverine Fish Co.,* v. *A. Booth & Co.,* 143 Mich. 89; 15 C. J. p. 847.

The objection that a court is without jurisdiction cannot be waived by the parties. 17 Am. & Eng. Enc. Law (2d Ed.), p. 1062. It is the duty of the court to raise the question of jurisdiction on its own motion.

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Mansfield C. & L. M. R. Co.* v. *Swan,* 111 U. S. 379, 382 (4 Sup. Ct. 510).

"If the record discloses a controversy of which the court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit." *Morris* v. *Gilmer,* 129 U. S. 315, 325 (9 Sup. Ct. 289).

"A court may of its own motion, even though the question is not raised by the pleadings or is not suggested by counsel, recognize the want of jurisdiction, and it is its duty to act accordingly by staying proceedings, dismissing the action, or otherwise noticing the defect, at any stage of the proceedings." 15 C. J. p. 852.

The claim of appeal here was "from the decree entered on the 13th day of May, 1937." Judgment was entered June 3, 1937. No claim of appeal was made from that judgment. There is nothing before this court to review. In principle, this case is governed by *Brown* v. *Adler,* 282 Mich. 264.

Appeal should be dismissed, with costs.

SHARPE, J., concurred with POTTER, J. FEAD, J., took no part in this decision.

MACK *v.* MACK.

1. DIVORCE—ALIMONY—MODIFICATION OF DECREE—STATUTES.
   Court's statutory power subsequently to modify provisions as to alimony in final decree in suit for divorce may not be exercised where no alimony was allowed in the original decree (3 Comp. Laws 1929, § 12748).

2. SAME—ALIMONY—RESERVATION OF RIGHT TO MODIFY DECREE.
   Trial court *held,* in error in amending final decree in suit for divorce which contained no provision for alimony and which made no reservation of right to do so, so as to provide for payment of alimony (3 Comp. Laws 1929, § 12748).

3. SAME—COURTS—STATUTES—EQUITY.
   Judicial power to decree divorce and all interlocutory proceedings, inclusive of temporary alimony, expense money, and counsel fees, is purely statutory, and the ordinary principles of equity jurisdiction do not obtain.

4. SAME—COUNSEL FEES—STATUTES—APPEAL—SUBSEQUENT PETITION TO MODIFY.
   Under statute providing counsel fees for wife in suit for divorce, such fees may be awarded not only during pendency of divorce proceedings and when an appeal is taken in good faith but also upon subsequent petition to modify decree as to alimony and children's support money and until the subject-matter of the suit is finally settled and determined (3 Comp. Laws 1929, § 12735).

5. SAME—COUNSEL FEES—APPEAL FROM AMENDATORY DECREE.
   Amendatory decree awarding plaintiff wife $100 for counsel fees for services to be rendered in connection with proposed appeal from a recently amended decree is vacated on appeal where no brief was filed for plaintiff as contemplated by order granting counsel fees although she would otherwise have been entitled to such expenses even though relief with respect to petition for increase for support of children was denied (3 Comp. Laws 1929, § 12735).

6. SAME—COSTS—HUSBAND'S APPEAL.

No costs are awarded husband, appellant in divorce suit, notwithstanding he is successful on appeal.

Appeal from Oakland; Doty (Frank L.), J. Submitted January 5, 1938. (Docket No. 34, Calendar No. 39,787.) Decided February 25, 1938.

Divorce proceedings by Maude Marion Mack against Thomas Henry Mack. On petition of plaintiff for additional alimony for the support of children, plaintiff and attorney's fees. From orders entered modifying decree, defendant appeals. Reversed.

Keeling, Bogue & Huthwaite, for appellant.

SHARPE, J. On January 6, 1936, plaintiff was granted a decree of divorce and among other things, the decree provided for the payment to Maude Mack of any sum paid by her on a $2,000 note upon which she was indorser and had pledged a portion of her separate estate as security. The decree also contained the usual statutory provisions barring dower and provided for the payment of five dollars per week for the support of each of four children until they attained the age of 16 years. On February 25, 1937, plaintiff filed a petition to modify the final divorce decree and prayed for an increase in the amount of alimony to be paid for the support of the children and for reimbursement to her for hospital and medical expenses incurred during their illness. When the above petition was filed, defendant was paying $15 per week for the support of three children, one of the children having attained the age of 16 years since the final decree was entered. After a hearing on the petition, the trial court entered a decree providing that defendant pay plaintiff $10

per week beginning March 15, 1937, for her support and maintenance in addition to what defendant was required to pay under the original decree. On April 6, 1937, the trial court entered another decree requiring defendant to pay $100 for plaintiff's counsel fee for services to be rendered on appeal of the amended decree to the Supreme Court.

Defendant appeals from the decree of March, 1937, amending the final decree of divorce and from the decree entered in April, 1937, allowing an attorney fee to plaintiff's attorney and contends that where a divorce decree does not award alimony for the support of the wife and the question is not reserved for further consideration, no alimony can thereafter be awarded; and that the trial court had no jurisdiction to award additional attorney fees to plaintiff after the final decree of divorce.

In speaking of the court's power to modify an award of alimony in a divorce decree, we said, in *Mayer* v. *Mayer,* 154 Mich. 386, 390 (19 L. R. A. [N. S.] 245, 129 Am. St. Rep. 477):

"It is contended in the brief of the defendant's counsel that this right exists in a court of equity independent of statute. We do not agree with this contention. * * * In most of the States the power to amend the decree as to alimony is reserved to the court by statute, but in the absence of such reservation of authority, or of a reservation in the decree itself, we think the determination should be treated as final."

In *Harner* v. *Harner,* 255 Mich. 515, we said:

"The statute, 3 Comp. Laws 1915, § 11417 (3 Comp. Laws 1929, § 12748), permits amendment of a decree for alimony, but 'to permit modification respecting alimony, allowance thereof must be in the original decree.' *Kutchai* v. *Kutchai,* 233 Mich. 569."

See, also, *Jordan* v. *Jordan,* 53 Mich. 550; *Moross* v. *Moross,* 129 Mich. 27.

In the case at bar the original decree did not provide for alimony to plaintiff, nor did it reserve the right to make such a provision, and under the authorities above cited it may not be done now. The trial court was in error in making such an amendment and the decree of March 15, 1937, is reversed.

The statute relative to attorney fees is 3 Comp. Laws 1929, § 12735, and reads as follows:

"In every suit brought, either for a divorce, or for a separation, the court may, in its discretion, require the husband to pay any sums necessary to enable the wife to carry on or defend the suit during its pendency; and it may decree costs against either party, and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver."

In *Hintz* v. *Wayne Circuit Judge,* 245 Mich. 306, we said:

"Judicial power to decree divorce and all interlocutory proceedings, inclusive of temporary alimony, expense money, and counsel fees, is purely statutory, and the ordinary principles of equity jurisdiction do not obtain."

There appears to be no question that under the above statute, the trial court may award counsel fees during the pendency of the divorce proceedings, *Rossman* v. *Rossman,* 62 Mich. 429, and when an appeal is taken in good faith, such fees may be awarded. *Reichert* v. *Reichert,* 124 Mich. 694.

In *Chambers* v. *Chambers,* 75 Neb. 850 (106 N. W. 993), the wife petitioned the court to modify a decree of divorce previously rendered in respect to alimony and custody of a child. The court there said:

"This proceeding is simply a continuation of the divorce suit and one of its incidents, and we think that under the authority of the court to allow counsel fees under the section of the statute last cited, (Comp. Stat. of Nebraska 1905, chap. 25, § 12, being the same as 3 Mich. Comp. Laws 1929, § 12735) continues until the subject matter of the divorce suit is finally settled and determined."

In *Helden* v. *Helden,* 11 Wis. 554, the husband objected to the allowance of counsel fees to his former wife on his motion to reduce alimony after the original decree of divorce. The Wisconsin statute (R. S. 1858, chap. 111, § 28), relative to revising and altering a decree for alimony, is analogous to our 3 Comp. Laws 1929, § 12748. The court said:

"It is objected that as the parties were already divorced, the court had no authority under the statute to make this allowance. But we think the power still remained. The proceedings taken by the husband to re-open the litigation, were taken by virtue of R. S. 1858, chap. 111, § 28, which authorizes the court, after the original decree, on the petition of either party, to revise the whole matter of alimony, and expressly gives the power to 'make any judgment respecting any of said matters which such court might have made in the original action.' There can be no question that under sections 15 and 16, the court in the original action, would have had power to compel the husband to pay reasonable sums for her expenses in conducting the litigation. And as section 28, notwithstanding a divorce, reserves the power for the parties still to litigate concerning the alimony, we think the intent was to reserve to court the same power to protect the wife in regard to the expenses of the litigation, which it had in the original action."

In the case at bar, plaintiff petitioned for an increase for support of the children, a matter over

which the court had jurisdiction; and upon proper showing of change of condition the court could have modified the decree. Plaintiff did not get the relief in the form asked for, but to deny her the expenses necessary to enable her to present the facts supporting her petition would be unfair to the court in determining a matter that indirectly affects public welfare. The trial court had jurisdiction to enter an order for these expenses, but in view of the fact that no brief has been filed for plaintiff as was contemplated by the order, the decree of April 6, 1937, is vacated. No costs will be awarded.

WIEST, C. J., and BUTZEL, BUSHNELL, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

STRAUSSER *v.* SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD.

1. JUDGMENT—POWER OF COURT TO OPEN, VACATE OR SET ASIDE.
   The judgment of a court, whether rightfully or wrongfully entered, is under its control so long as the court has jurisdiction, and the court may, on its own motion, open, vacate or set it aside for error in law.

2. SAME—SETTING ASIDE—ENTRY OF JUDGMENT NOTWITHSTANDING VERDICT.
   In action against insurer for death benefits, court *held,* not to have abused its discretion in vacating judgment on verdict for

plaintiff and entering one for defendant notwithstanding verdict, although motion for a directed verdict had been denied, where policy contained provision limiting time for bringing action thereunder to one year and more than that time had expired before plaintiff brought action.

3. FRATERNAL BENEFICIARY SOCIETIES — LIMITATION OF ACTIONS — WAIVER—AUTHORITY OF DISTRICT MANAGER.

Fraternal beneficiary society *held,* not to have waived provision of its life insurance policy limiting time within which action might be brought thereunder where it disclaimed liability thereunder and district manager with whom plaintiffs had negotiated is not shown to have had authority to waive it nor to admit liability.

4. SAME — LIMITATION OF ACTIONS — SUSPENSION FOR FAILURE TO MAKE MONTHLY PAYMENTS.

Death beneficiary under policy with a fraternal beneficiary society *held,* not entitled to recover where action was not brought within one year after death of insured as required by policy and insured was in arrears in making monthly payments and is not claimed to have not been suspended.

Appeal from Oakland; Rogers (Goodloe H.), J. Submitted January 12, 1938. (Docket No. 5, Calendar No. 39,586.) Decided February 25, 1938.

Assumpsit by Florence E. Strausser and Guy J. Harinton against Sovereign Camp of the Woodmen of the World, a Nebraska fraternal beneficiary society, for death benefits under an insurance policy. Verdict and judgment for plaintiffs. Judgment set aside and one entered for defendant *non obstante veredicto.* Plaintiffs appeal. Defendant cross-appeals. Affirmed.

LeRoy W. Belanger (*Nelson S. Shapero,* of counsel), for plaintiffs.

Joslyn, Joslyn & Joslyn, for defendant.

POTTER, J. Plaintiffs sued defendant to recover on an insurance policy for the death of the insured, Harry D. Harinton, deceased. There was verdict for plaintiffs which was set aside upon motion for judgment notwithstanding the verdict and judgment entered for defendant. Plaintiffs appeal. Appellee took a cross-appeal.

The judgment of the court, whether rightfully or wrongfully entered, was, so long as the trial court had jurisdiction, under its control, and it could on its own motion open, vacate or set aside the same for error in law. It does not here appear the trial court abused that discretion. Though the record shows the judgment was intentionally entered, it also shows the court at the conclusion of the testimony denied defendant's motion for a directed verdict in its favor, saying: "I will submit the case under the statute." After verdict was returned, judgment was entered thereon and, upon objection to defendant's renewal of its motion for judgment notwithstanding the verdict after judgment entered, the trial court set aside the judgment, holding the judgment previously entered had been entered by inadvertence. This, the trial court had a right to do. *Raridan* v. *Bick,* 259 Mich. 200; *Freedman* v. *Burton,* 281 Mich. 208. Having set aside the judgment entered upon the verdict, the trial court considered the motion for judgment notwithstanding the verdict and granted it. In so doing, there was no error.

The deceased died August 20, 1932, and suit was commenced February 23, 1934. The policy of insurance sued upon provides:

"No suit shall be brought upon this certificate unless said suit is commenced within one year from the date of death."

No suit was brought within the period fixed by the policy or certificate of insurance. It is claimed that after the death of the insured there were negotiations between plaintiffs and defendant and these negotiations for settlement amounted to a waiver of the provision of the policy above quoted. Though the defendant company in all cases responded to correspondence on behalf of plaintiffs, it at all times disclaimed liability upon the policy or certificate of insurance. There never were any negotiations upon the part of the defendant with plaintiffs, or their representatives, which indicated it in any way considered the question of admitting liability in whole or in part on the policy or certificate of insurance. Plaintiffs, and their representatives, also negotiated with one Engel, who appears to have been the district manager of defendant, but there is no testimony Engel ever had any authority to admit liability upon the part of the defendant or had any power or authority to waive the terms of the policy requiring suit to be instituted thereon within the period of one year provided therein. Passing without determination this question, it does appear from the undisputed evidence that the insured, during his lifetime and before his death, was suspended from the defendant order for nonpayment of premiums or assessments due upon his policy. This policy required monthly payments of $5.64. It is undisputed insured was in arrears at the time of his death, and there is no claim he was not suspended. Under the undisputed facts, plaintiff may not recover.

Judgment of the trial court affirmed, with costs.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

PITTELKOW *v.* JEFFERSON PARK LAND CO., LTD.

1. APPEAL AND ERROR—JUDGMENT NOTWITHSTANDING VERDICT—EVIDENCE.

   On appeal from judgment for defendants notwithstanding verdict for plaintiff, testimony must be considered in light most favorable to plaintiff.

2. BROKERS—COMMISSION—CONTRACTS—PERFORMANCE.

   Ordinarily where a real estate broker seeks to recover commission under an express written contract, he must show performance thereof.

3. SAME—LIABILITY OF OWNER FOR COMMISSIONS—SALE OF OTHER LANDS TO SAME PURCHASER.

   Liability of defendants in action by real estate broker to recover commission under written contract for sale of real estate would not be avoided merely because other lands were included in sale to purchaser with whom broker was negotiating.

4. SAME—COMMISSIONS—SERVICE—CONTRACTS.

   A real estate broker may be entitled to a commission even though he did not produce a purchaser ready, able and willing to acquire the property on terms satisfactory to the seller such as (1) where service only is contracted and performed, (2) where broker is employed to make a sale and procures a party with whom principal is satisfied and who actually contracts for the purchase of the property at a price acceptable to owner, and (3) where contract provides broker may be entitled to commission on sale made by owner without broker's cooperation.

5. SAME—LIABILITY OF OWNER FOR COMMISSIONS—TERMINATION OF AGENCY.

   Owners of realty, who had employed broker to sell it, may not avoid payment of commission merely by concluding their broker's agency and making sale themselves.

6. SAME—COMMISSIONS—PROCURING SALE.

Real estate broker seeking to recover commission because he was the procuring cause of the sale must show he was the procuring cause of the sale, that the purchaser learned of the property through him and that through his efforts the sale was made.

7. SAME—COMMISSIONS—CONTRACT—PERFORMANCE.

Real estate broker who had contract with owner to pay commission if broker procured a purchaser of the property for specified price and never produced a purchaser ready, able and willing to pay that price *held*, not entitled to commission as he did not perform contract in accordance with its terms.

Appeal from Wayne; Scallen (John P.), J., presiding. Submitted January 6, 1938. (Docket No. 49, Calendar No. 39,773.) Decided February 25, 1938.

Assumpsit by Arthur G. Pittelkow against Jefferson Park Land Company, Limited, a Michigan partnership association, limited, and others for commission for sale of real estate. Verdict for plaintiff. Judgment for defendants *non obstante veredicto*. Plaintiff appeals. Affirmed.

Prentis, Fitch & Hayes, for plaintiff.

Miller, Canfield, Paddock & Stone, for defendants.

POTTER, J. Plaintiff sued defendants to recover a commission upon the sale of real estate, had verdict of the jury, and the trial court on motion of defendants rendered judgment for defendants notwithstanding the verdict. Plaintiff appeals, and upon such appeal the testimony must be considered in the light most favorable to plaintiff.

There is no proof plaintiff was a licensed real estate broker, under 2 Comp. Laws 1929, § 9806 *et seq.*, but no question is raised about it.

The Federal housing commission desired to acquire lands in the city of Detroit for a Federal hous-

ing project. It would not employ and pay a broker to make the purchase. Defendants had lands to sell. The representative of the Federal housing commission knew of these lands. Plaintiff became interested in the acquisition of the property at the solicitation of citizens of Detroit. He opened negotiations with defendants and made a contract with them under date of August 22, 1935, the essential part of which is as follows:

"Upon your representations that this property is to be used for a building project, which is to be commenced in the very near future, and for which satisfactory assurances shall be given us, we will sell this property to your principals for a price of $285,000 cash. We shall pay out of this sum the regular realty broker's commission of five per cent. to the person or persons whom you may designate, which commission is to be paid only and when we receive the full purchase price."

Plaintiff, having accepted this contract, reported it to the persons who had induced him to negotiate with defendants and an offer of $75,000 was made for the property and reported by plaintiff to defendants and refused by them. Afterward the government representative who knew of the property negotiated directly with defendants and purchased the property covered by the letter of August 22, 1935, above quoted, and other property of a substantial amount, all for $170,000. Upon learning of this sale by defendants to the government, plaintiff brought suit; and the question is his right to recover.

Ordinarily, in order for a real estate broker to recover a commission where he has an express written contract, he must show performance thereof. Defendants contend plaintiff must have produced a purchaser ready, able and willing to purchase the

property on the terms of the contract; that plaintiff did not do so and, therefore, may not recover. If plaintiff was entitled to go to the jury, defendants could not avoid a liability by reason of including other lands in the sale to the purchaser with whom plaintiff was negotiating. *Ranson* v. *Weston,* 110 Mich. 240. And, under some circumstances, a real estate broker may be entitled to a commission even though he did not produce a purchaser ready, able and willing to acquire the property on terms satisfactory to the seller. If service only is contracted and performed, there is a consideration irrespective of the results acquired. *Gonte* v. *Rosenberg,* 221 Mich. 283. And where a broker is employed only for the purpose of making a sale, he becomes entitled to his commission when he procures for his principal a party with whom he is satisfied and who actually contracts for the purchase of the property at a price acceptable to the owner. *Fuday* v. *Gill,* 195 Mich. 613. And if it is so provided in the contract, a broker may be entitled to commission on a sale made by the owner without the broker's cooperation. *Axe* v. *Tolbert,* 179 Mich. 556; *Crawford* v. *Cicotte,* 186 Mich. 269. Knowing plaintiff was negotiating with the purchaser for a sale of the property, defendants could not avoid the payment of a commission merely by concluding his broker's agency and making the sale themselves. *Heaton* v. *Edwards,* 90 Mich. 500; *McGovern* v. *Bennett,* 146 Mich. 558; *Davis-Fisher Co.* v. *Hall,* 182 Mich. 574 (L. R. A. 1915A, 1224); *West* v. *Newton,* 229 Mich. 68.

Under the cases in which plaintiff has been permitted to recover because he was the procuring cause of the sale, plaintiff must show that he was the procuring cause of the sale, that the purchaser learned of the property through him, and that through his

efforts the sale was made. *Thuner* v. *Kanter,* 102 Mich. 59; *Douville* v. *Comstock,* 110 Mich. 693; *Brooks* v. *Leathers,* 112 Mich. 463; *Antisdel* v. *Canfield,* 119 Mich. 229; *Wood* v. *Smith,* 162 Mich. 334. But where, as in this case, plaintiff had a special contract whereby defendants were to pay a commission if he procured a purchaser of the property for $285,000, and where the plaintiff never produced a purchaser ready, able and willing to take the property at that price, he is not entitled to a commission because there was no performance upon his part of the contract in accordance with its terms.

In *McDonald* v. *Bœing,* 43 Mich. 394 (38 Am. Rep. 199), defendant agreed to pay a commission to plaintiff if he would sell certain real estate upon the basis of $8,500. Plaintiff did not make the sale upon that basis but sent another who was interested in the property to defendant who made a sale thereof for $7,000, and plaintiff brought suit. It was said:

"It is to be further observed that the sale was not made on the terms on which the defendant had empowered the plaintiff to make one. * * * The plaintiff was told in substance: 'You may go on and sell for $8,500, and when you do so I will pay you a commission.' But instead of making a sale, plaintiff interested himself in sending a purchaser to defendant, to whom the land was sold for $7,000. This service may have been valuable, but defendant had never contracted for it, and we have no reason to conclude as against him that he would ever have agreed to pay for it. He might have been willing to pay a liberal commission on a sale at the larger sum, and none at all on a sale such as was made. But speculation on the subject is useless: there was never any proposition to plaintiff that he should act generally in the sale of this land, and the proposition actually made to him, that he procure a purchaser

at a named price was never accepted and never acted upon. *Darrow* v. *Harlow,* 21 Wis. 302 (94 Am. Dec. 541); *Fraser* v. *Wyckoff,* 63 N. Y. 445; *McGavock* v. *Woodlief,* 20 How. (61 U. S.) 221."

We are unable to distinguish this case from *Gilmore* v. *Bolio,* 165 Mich. 633 (34 L. R. A. [N. S.] 1050), relied upon by the trial court.

In this case, plaintiff's right to recover depended upon his ability to obtain a purchaser ready, able and willing to take the property at the price of $285,000. He failed to produce such a person. The fact that the defendants sold the lands in question and other lands for more than $100,000 less than that sum to a person who had refused plaintiff's offer of $285,000 does not entitle plaintiff to compensation. The trial court reached a correct conclusion.

Judgment affirmed, with costs.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

HAINES *v.* HAINES.

1. APPEAL AND ERROR—TRIAL WITHOUT JURY—REVIEW OF EVIDENCE. On appeal from judgment in assumpsit for plaintiff, entered by trial court sitting without a jury, where reversal is sought because court's findings of fact are alleged to be against the clear preponderance of the evidence, the Supreme Court is called upon to review the evidence.

2. PARENT AND CHILD—FATHER'S AGREEMENT TO SUPPORT—QUESTION OF FACT.

In action of assumpsit to recover for charges and expenses of keeping defendant's infant son during and subsequent to his wife's fatal illness, evidence *held,* to present a question of fact as to whether defendant expressly agreed to pay for the child's care and maintenance to plaintiff who was the child's maternal aunt and who subsequently adopted the child.

3. APPEAL AND ERROR—FINDINGS OF COURT ON QUESTIONS OF FACT—PREPONDERANCE OF EVIDENCE.

Findings of trial court on questions of fact will be sustained on appeal unless contrary to the clear preponderance of evidence.

4. PARENT AND CHILD—FATHER'S AGREEMENT FOR SUPPORT—FINDING OF COURT.

Finding of trial court in action of assumpsit that defendant, father of child for whose care and maintenance plaintiff sought to recover, expressly agreed to pay for such charges and expenses *held,* not against the preponderance of the evidence.

5. APPEAL AND ERROR—TRIAL WITHOUT JURY—CREDIBILITY OF WITNESSES—WEIGHT OF EVIDENCE.

In law case tried without a jury brought to recover charges and expenses of keeping defendant's infant son, credibility of plaintiff's testimony and weight to be given it *held,* for determination of trial court.

Appeal from Washtenaw; Sample (George W.), J. Submitted January 11, 1938. (Docket No. 84, Calendar No. 39,842.) Decided February 25, 1938.

Assumpsit by Clara Haines against Paul S. Haines to recover sums due for the care of a minor child. Judgment for plaintiff. Defendant appeals. Affirmed.

Jacob F. Fahrner and *Andrew J. Sawyer,* for *plaintiff.*

Hooper & Hooper, for defendant.

MCALLISTER, J. Plaintiff brings this action against defendant to recover for charges and expenses incurred by her in connection with the care and maintenance of defendant's infant son, Richard. The case was tried before the court without a jury and, upon the trial, the court found that there was an express contract on the part of the defendant to pay plaintiff for the care and support of the child, and determined that the sum of $1,621.01, the amount claimed by plaintiff, was fair and reasonable, and accordingly entered judgment for her in that amount.

Defendant appeals, claiming that the court's findings are against the clear preponderance of the evidence and that the evidence clearly shows that defendant never expressly agreed to pay plaintiff for such care and maintenance. We are, therefore, called upon to review the evidence.

In September, 1925, defendant's wife, Irma, was dangerously ill. She had just undergone an operation for cancer. Their infant son was two and one-half years old and the mother was unable to take care of him. Plaintiff was the sister of defendant's wife. Plaintiff testified that when her sister came back from the hospital after the operation in September, 1925, she had a conversation with defendant.

She states, that defendant "asked me to care for Dick and he told me he would be willing to pay for him. * * *

"*Q.* He asked you to take care of the baby?
"*A.* Yes.
"*Q.* And said he would pay you for doing it?
"*A.* Certainly."

Bessie Stoutenburg, a sister of the plaintiff, testified that while the mother of the child was in the

hospital, Paul Haines, the defendant, came into plaintiff's kitchen and said: "Clara, will you take care of Dicky until I can make other arrangements and I will pay you."

Defendant claims that he never requested that plaintiff take the child; that she simply took him, without ever asking plaintiff's permission. There is no evidence that he ever made any objection. He testified that six months after his wife's operation, and when they all knew that she could not live much longer, his wife called him in and told him that she wanted it understood that plaintiff was to take the baby and bring him up, and that he acquiesced in his wife's wishes.

In his testimony defendant says that plaintiff and her husband understood that if the child needed anything he would furnish it, and that whenever they requested anything for the child defendant would send the money to them. On June 1, 1931, plaintiff wrote defendant stating that circumstances made it necessary to have a regular stipulated amount for the child's care; but defendant refused to enter into any such agreement, and told her that if plaintiff wanted him to start paying for the child's keep he would take him somewhere else. There had been some discussion between the parties that plaintiff and her husband would adopt the child, and finally on June 9, 1931, they petitioned the probate court for adoption, to which defendant consented.

The foregoing evidence and circumstances made the question of whether defendant expressly agreed to pay for the care and maintenance of his child a question of fact. In such cases the rule is that unless the findings of the court are contrary to the clear preponderance of evidence they will be sustained on appeal. In this case two witnesses testified that de-

fendant had expressly agreed to pay plaintiff for the care and maintenance of his infant child. There is nothing which is inherently improbable or incredible about such an agreement. On the contrary, it would be a natural thing for a father to agree to be responsible for his baby's maintenance during the fatal illness of his wife and after her death. Presumably, he could not take care of the infant himself. He might, of course, have arranged to place the child with some other members of his family without the necessity of paying for his maintenance; and he may have refused to agree to pay such expenses. But these are questions of fact. We do not think that the findings of the trial court are against the preponderance of the evidence. In reviewing law cases tried without a jury, we are not bound by the findings of fact made by the trial court, but consider the record as a whole. *Burchard* v. *Otis Elevator Co.*, 261 Mich. 142. Our review of the testimony satisfies us that it sustains the holding of the trial judge. *Jacoby* v. *Schafsnitz,* 270 Mich. 515.

Other questions raised by defendant only bear upon the credibility of plaintiff's testimony, or the weight to be given it, which was for the determination of the trial court. *Mayer* v. *Railway Co.*, 152 Mich. 276.

We find no error. Judgment affirmed, with costs to plaintiff.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and NORTH, JJ., concurred.

BURTON *v.* YELLOW & CHECKER CAB & TRANSFER CO.

1. AUTOMOBILES—NEGLIGENCE — SPEED — EVIDENCE — QUESTION FOR JURY.

   In action by pedestrian against defendants, owner and driver of a taxicab, question of defendants' negligence *held,* properly submitted to jury where admitted speed of taxicab was 20 miles per hour and there was testimony placing speed at 40 miles per hour, in violation of statute and ordinance (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933).

2. APPEAL AND ERROR—DIRECTED VERDICT—JUDGMENT NON OBSTANTE VEREDICTO—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

   On appeal from verdict and judgment for plaintiff pedestrian in case arising from injuries inflicted by taxicab, where defendants moved for directed verdict at close of plaintiff's proofs and again at close of all proof and moved for a judgment *non obstante veredicto,* testimony as to contributory negligence must be viewed most favorably to plaintiff.

3. AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—TAXICABS—SPEED — ASSUMPTIONS OF PEDESTRIANS.

   Pedestrian, crossing a 60-foot street between intersections, who saw taxicab some 250 or 300 feet away before reaching curb and 180 feet away when at street side of car parked at side of street he was leaving, *held,* to have a right to assume that taxicab driver would obey the law and not operate his car at an excessive and unlawful rate of speed (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933).

4. SAME—TAXICABS—PEDESTRIANS — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

   Whether or not pedestrian was negligent in proceeding across a street paved to width of 60 feet between intersections after having observed taxicab 250 or 300 feet distant before reaching curb and 180 feet distant when at street side of parked car on side of street he was leaving if he reasonably believed he could safely cross *held,* clearly a question for jury.

5. SAME—PEDESTRIANS—RUNNING—CONTRIBUTORY NEGLIGENCE.
Fact that pedestrian, crossing a 60-foot street between intersections, when near the middle thereof, started to run when he discovered taxicab 30 feet away approaching at a rapid speed *held,* not to amount to contributory negligence as a matter of law merely because he would not have been injured had he stood still, the question being one for the jury in such case.

6. NEGLIGENCE—SUDDEN PERIL.
One who suddenly finds himself in a perilous situation cannot be charged with negligence merely because it appears that had he acted differently the accident would have been avoided as his actions are not to be judged by what he should have done had he had the opportunity to deliberate.

Appeal from Genesee; Black (Edward D.), J. Submitted January 19, 1938. (Docket No. 137, Calendar No. 39,915.) Decided February 25, 1938.

Case by Charles C. Burton against Yellow & Checker Cab & Transfer Company, a Michigan corporation, and Cyril LaPort for personal injuries sustained when struck by defendants' automobile. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

McGregor & Hospers (*Richard C. Fruit,* of counsel), for plaintiff.

Millard & Roberts, for defendants.

CHANDLER, J. At twilight on May 17, 1935, plaintiff was injured while attempting to walk from the west to the east side of Saginaw street in the city of Flint, the place of accident being a business district in said city. Saginaw street is a main traveled thoroughfare, being 60 feet in width. It bears double street car tracks, the most westerly rail being approximately 20 feet east of the west curb line.

Plaintiff had stopped at a hardware store located on the west side of the street some 75 feet north of the north line of 12th street. He claims that as he came out of the store he crossed the sidewalk to the curb; that as he approached the curb he looked to the north for vehicles coming from that direction; that as he looked he saw defendants' taxicab proceeding south; that at that time the cab was in the next block north approximately 250 to 300 feet away; that after observing the cab he stepped from the curb at a point near a car which was parked on that side of the street; that he again made observation when he reached the east side of the parked automobile and noted that the cab had then reached a point just south of the south line of Wellington street about 180 feet away; that the cab did not appear to be traveling very fast and that he believed that he had time to cross the street; that he continued on his way and for the third time looked to the north as he reached the most westerly rail of the street car tracks; that as he looked he saw the cab but 30 feet away approaching at a rapid speed; and, that he became confused and started to run but was struck by the cab, resulting in his injuries.

As opposed to plaintiff's testimony the defendant, Cyril LaPort, driver of the cab, testified that he was driving south on Saginaw street at a speed of 20 miles per hour and that plaintiff stepped suddenly in front of his car from between two automobiles parked on the west side of the street; that he was then only six or eight feet from plaintiff; that he turned his cab to the left, applied the brakes, but was unable to avoid the accident.

At the close of plaintiff's proof and again at the close of all the proof, defendants moved for a directed verdict, decision thereon being reserved by

the court under the Empson act (3 Comp. Laws 1929, § 14531 *et seq.*). Upon verdict for plaintiff, defendants' motion for judgment *non obstante veredicto* was denied. Defendants appeal.

It is first claimed that there was no evidence of any negligence on the part of defendants. Although defendant LaPort testified that he was driving the cab at a speed of 20 miles per hour, there was other testimony placing the speed at 40 miles per hour in violation of the statute (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933 [Comp. Laws Supp. 1935, § 4697]), and the ordinances of the city of Flint. We believe the question of defendants' negligence was properly submitted to the jury.

The more important question pertains to the alleged contributory negligence of plaintiff. In considering this question we must adopt that view of the testimony most favorable to plaintiff. Defendants argue that plaintiff's actions between the time he first observed the cab and the moment he was injured constitute contributory negligence as a matter of law.

Plaintiff had a right to cross Saginaw street between intersections. His right to the use of the street as a pedestrian was reciprocal with the rights of defendants in that regard. In attempting to cross it was his duty to exercise reasonable care in view of all the attendant circumstances, including the duty to make reasonable observation for his own safety. That he did make such observation clearly appears as he first saw the taxicab before he had reached the curb when it was then some 250 to 300 feet to the north. He again made observation when the cab was 180 feet away, and believing he could proceed in safety continued on toward the opposite side of the

street. Having seen the cab first at a distance of 250 to 300 feet as he reached the curb and again at a distance of 180 feet from the east side of the parked automobile, he had a right to assume that the driver thereof would obey the law and not operate his car at an excessive and unlawful rate of speed. After making such observations as he did, if he reasonably believed he could cross the street in safety he had a right to proceed on his way and whether or not he was negligent in so doing was clearly a question for the jury. See *Petersen* v. *Lundin,* 236 Mich. 590; *Stobbelaar* v. *Berg,* 247 Mich. 121; *Walker* v. *McGraw,* 279 Mich. 97; *Moore* v. *Noorthoek,* 280 Mich. 431. See, also, *Orth* v. *Gregg,* 217 Iowa, 516 (250 N. W. 113); *LaRoche* v. *Singsen,* 281 Mass. 369 (183 N. E. 767).

Defendants cite *Brown* v. *Lilli,* 281 Mich. 170. Cases of this type are distinguishable from the instant case in that the plaintiff in the former failed to see that which was plainly visible had proper observation been made.

Defendants also urge that plaintiff's action in starting to run when he saw the cab for the last time when it was but 30 feet away amounts to contributory negligence as a matter of law and argue that had he stood still he would not have been injured. We do not so hold. Plaintiff suddenly found himself in a perilous situation and cannot be charged with negligence merely because it appears that had he acted differently the accident would have been avoided. His actions are not to be judged by what he should have done had he had the opportunity to deliberate. *Bacon* v. *McKay,* 227 Mich. 667; *Tregonning* v. *Castantini,* 243 Mich. 233. Here again, the question of his contributory negligence was for the jury.

Complaint is made of certain portions of the court's charge to the jury. We have examined the charge as a whole and find that the claims of defendants in connection therewith do not constitute error.

Judgment affirmed, with costs to plaintiff.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, NORTH, and MCALLISTER, JJ., concurred.

ALBERS *v.* POMMERENING.

1. LIMITATION OF ACTIONS—PART PAYMENT.

   Theory upon which part payment tolls running of statute of limitations is that it may be supposed to imply a new promise to pay the debt but such result will not follow where payment is accompanied by circumstances which preclude such inference (3 Comp. Laws 1929, §§ 13976, 13984, 13988).

2. SAME—INDORSEMENT OF PART PAYMENT BY PAYEE INSUFFICIENT TO TOLL RUNNING OF STATUTE.

   Indorsement of payments, written by or on behalf of party to whom payment is made, are insufficient proof of payment to toll running of statute of limitations, it being necessary to show part payment by debtor or his authorized agent (3 Comp. Laws 1929, §§ 13976, 13984, 13988).

3. SAME—PART PAYMENT—EVIDENCE.

   Proof of part payment, in order to toll running of statute of limitations, must be clear and decisive of payment (3 Comp. Laws 1929, §§ 13976, 13984, 13988).

4. EVIDENCE—BURDEN OF PROOF.

A plaintiff has the burden of showing his cause of action and every defendant is entitled to go clear unless made answerable by legal testimony.

5. LIMITATION OF ACTIONS—PRIMA FACIE EVIDENCE OF PART PAYMENT.

In action on a promissory note where plaintiff did not establish a *prima facie* case of part payment to toll running of statute of limitations, it was not incumbent upon defendant to offer proof denying payment had been made or authorized by him (3 Comp. Laws 1929, §§ 13976, 13984, 13988).

6. SAME—PART PAYMENT—EVIDENCE—CONJECTURE.

In action on promissory note proof of indorsement of part payment and deposit slip in handwriting of employees of bank tending to show part payment *held*, insufficient to toll running of statute of limitations where obligor was not connected with such payment other than by conjecture (3 Comp. Laws 1929, §§ 13976, 13984, 13988).

Appeal from Ottawa; Miles (Fred T.), J. Submitted January 7, 1938. (Docket No. 77, Calendar No. 39,839.) Decided February 25, 1938.

Assumpsit by George D. Albers against Ervin Pommerening and wife on a promissory note. From judgment against Ervin Pommerening, he appeals. Reversed without a new trial.

Gerrit W. Kooyers, for plaintiff.

Elbern Parsons, for defendant.

SHARPE, J. This is an action upon a promissory note. Defendants, who are husband and wife, executed the note July 28, 1928, in the sum of $500 payable one year after date. The last indorsement on the note was made by a bookkeeper of the First State Bank, Holland, Michigan. It purported to show payment on April 11, 1931, of five dollars to apply

on interest. The record shows that on April 9, 1931, the assistant cashier made a deposit slip in his own handwriting showing that the five dollars was to apply on interest on the note.

Suit was commenced April 7, 1937. Both defendants relied on the statute of limitations, 3 Comp. Laws 1929, § 13976, and the wife relied on Act No. 158, Pub. Acts 1917, and on coverture. The trial court held the wife not liable, basing decision on the failure of the note to contain the statutory statement, but held the husband liable upon the theory that he was presumed to have made the payment of April 9, 1931.

Defendant Ervin Pommerening appeals and contends that there was no evidence produced at the trial from which the court could find that he made the April, 1931, payment.

It is conceded that, since the statute of limitations was pleaded by defendants and unless it was tolled by the payment of April 9, 1931, recovery was barred by the statute.

The statutes applicable to the facts involved in the instant case are: 3 Comp. Laws 1929, § 13984, which provides:

"In actions founded upon contract express or implied, no acknowledgment or promise shall be evidence of a continuing contract, whereby to take a case out of the provisions of this chapter (limitation of actions), or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing, signed by the party to be charged thereby."

And 3 Comp. Laws 1929, § 13988, which provides:

"Nothing contained herein shall alter, take away, or lessen the effect of a voluntary payment of any principal or interest, made by any person; but no

indorsement or memorandum of any such payment written or made upon any promissory note, bill of exchange or other writing by or on behalf of the party to whom such payment shall be made, or purport to be made, shall be deemed sufficient proof of the payment, so as to take the case out of the operation of the provisions of this chapter."

In *Home Life Insurance Co.* v. *Elwell,* 111 Mich. 689, we said:

"The theory upon which part payment takes the case out of the provisions of the statute is that it may be supposed to imply a new promise to pay the debt; and the cases hold that this result will not follow where the payment is accompanied by circumstances which preclude such inference."

"The rule is well settled that part payment is but evidence of an admission of an indebtedness; but an admission of an indebtedness, to take the case out of the statute, must be such as reasonably leads to the inference that the debtor intended to renew his promise to pay, which it evidently cannot do if it is accompanied by circumstances which repel the idea of an intention to pay." *Lester* v. *Thompson,* 91 Mich. 245, 254.

In *Rogers* v. *Anderson,* 40 Mich. 290, with reference to 2 Comp. Laws 1871, § 7164, being 3 Comp. Laws 1929, § 13988, this court said:

"The statute is express and clear * * * that indorsements of payments, written by or on behalf of the party to whom payment is made shall not be deemed sufficient proof of payment to take the case out of the statute. 2 Comp. Laws 1871, §§ 7164, 7165.

"Unexplained indorsements of payments could not be received as evidence so as to take the case

out of the operation of the statute. *Michigan Ins. Co. of Detroit* v. *Brown,* 11 Mich. 265, 273."

See, also, *Judson* v. *Pratt,* 208 Mich. 286.

In *Johnson* v. *Meade's Estate,* 252 Mich. 357, claimant sought to show a payment on the debt to take it out of the statute of limitations. We held the following instructions to the jury proper:

" 'Now, it is necessary for the claimant to establish by the preponderance of the evidence, and the burden of proof is upon her to establish in respect to this payment or alleged payment the following facts:

" 'First, that the payment was actually made; that the sum of $200 was actually paid;

" 'Second, that it was paid upon a certain specific debt;

" 'Third, that such debt was the one involved in this case; and,

" 'Fourth, that this payment was applied by the deceased himself upon this debt as a part payment thereof and that he intended at the time that he made the payment that it should be applied generally upon the entire account between him and his sister from the beginning of the performance of the service.' "

And in *Sweet* v. *Ellis,* 109 Mich. 460, 465, the court said:

"Statutes of limitation are now generally considered to be statutes of repose, and any act or declaration which is to postpone their effect is closely scrutinized. 13 Am. & Eng. Enc. Law, 750; *Ten Eyck* v. *Wing,* 1 Mich. 40. * * * An acknowledgment, or a payment which is to operate as an acknowledgment, must be made by the debtor or his authorized agent. 13 Am. & Eng. Enc. Law, 760, and a large number of cases there cited."

See, also, *Gordon* v. *Heller,* 271 Mich. 240.

In *Hiscock* v. *Hiscock,* 257 Mich. 16, 20 (78 A. L. R. 953), we held:

"The evidence as a whole should be clear and decisive of payment. *Cowie* v. *Fisher,* 45 Mich. 629."

In the case at bar, neither of the defendants appeared as witnesses in their own behalf, nor were they called for cross-examination under the statute, 3 Comp. Laws 1929, § 14220. At the close of plaintiff's case the proof offered was that a payment had been made upon the note on April 9, 1931, received by the bank and credited to the account. It is important to note that there was no testimony tending to show that the payment had been made by defendant Ervin Pommerening or anyone authorized to act for him.

In *Lendberg* v. *Brotherton Iron Mining Co.,* 75 Mich. 84, 89, we said:

"A plaintiff has always the burden of showing his cause of action. Every defendant is entitled to go clear unless made answerable by legal testimony. There are no presumptions against him. If there is no testimony to be found, it is not admissible to make out a case without it. When plaintiff's case was closed, no cause of action had been made out."

And in *Blackman* v. *Andrews,* 150 Mich. 322, we said:

"Emphasis is laid upon the circumstance that Blackman, though present in court, and active in endeavoring to procure probate of the will, did not take the stand as a witness. This circumstance is utterly unimportant, unless contestant offered evidence tending to prove the impropriety of his conduct. The failure of a party to take the stand may

strengthen the inference to be drawn legitimately from testimony in the case, but it does not warrant an inference in no manner justified by that testimony. If it were otherwise, the plaintiff in any suit could submit his case without testimony and demand a verdict and judgment because the defendant remained silent."

See, also, *Benedict* v. *Rinna,* 257 Mich. 349; *Collar* v. *Maycroft,* 274 Mich. 376.

Until plaintiff established a *prima facie* case, it was not incumbent upon defendant Ervin Pommerening to offer any proof by denying that he made or authorized the payment of April 9, 1931. Under the evidence produced in this cause, it would be pure conjecture to say that defendant and appellant made or authorized the above payment. Because of plaintiff's failure to connect defendant Ervin Pommerening with such payment other than by conjecture the statute of limitations was not tolled.

Judgment reversed without a new trial. Appellant may recover costs.

WIEST, C. J., and BUTZEL, BUSHNELL, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

MADYCK *v.* SHELLEY.

1. EVIDENCE—REBUTTABLE PRESUMPTIONS.

A rebuttable or *prima facie* presumption has no weight as evidence but if challenged the presumption cannot be weighed against the evidence and supporting evidence must be introduced.

2. DEATH—CRASH OF AIRPLANE WITH EXPERIENCED FLYERS AT DUAL CONTROLS—EVIDENCE—PILOTS.

In action under survival act by special administratrix of estate of one experienced flyer against administrator of estate of another, killed in crash of airplane whose dual controls were found connected after the crash and in perfect working order, that defendant's decedent was in front cockpit, was a member of club which owned the plane and had sole right to fly it and was charged with the flying time and plaintiff's decedent was not a member of the club and without authority to fly the plane *held*, insufficient to establish fact that defendant's decedent was pilot of the plane and solely responsible for the fatal crash (3 Comp. Laws 1929, § 14040).

3. AVIATION—AIRPLANE CRASH—DUAL CONTROLS—BURDEN OF ESTABLISHING WHO WAS PILOT.

In action under survival act by special administratrix of estate of one experienced flyer against administrator of estate of another at controls of dually controllable airplane, plaintiff has burden of establishing fact that defendant's decedent had control of plane at time of fatal crash (3 Comp. Laws 1929, § 14040).

Appeal from Wayne; Merriam (DeWitt H.), J. Submitted January 14, 1938. (Docket No. 81, Calendar No. 39,844.) Decided February 25, 1938.

Irene Madyck, special administratrix of the estate of William Madyck, deceased, presented her claim against the estate of Leo F. Hickey, alias John O'Neill, deceased, for damages for personal injuries causing death of plaintiff's decedent as the result of an airplane crash. Claude D. Shelley, administrator of the defendant estate, objected thereto. From denial of claim in probate court, plaintiff appealed to circuit court. Judgment for plaintiff. Defendant appeals. Reversed without a new trial.

Samuel W. Patterson and *Elmer H. Groefsema,* for plaintiff.

Geo. J. Schneman (*John A. Hamilton,* of counsel), for defendant.

SHARPE, J. This is an action under the survival act, 3 Comp. Laws 1929, § 14040, growing out of the injury and death of plaintiff's decedent while in an airplane on the 26th day of April, 1936. A claim was presented to the commissioners on claims appointed by the probate judge of Wayne county in the estate of Leo F. Hickey, deceased. An appeal was taken to the circuit court from the determination of the commissioners, and upon a trial without a jury, plaintiff recovered judgment. Defendant appeals.

It appears from the record that the Michigan Aero Club, a corporation, located in Detroit, Michigan, was the owner of an airplane described as a Fleet biplane; that Leo F. Hickey held a private pilot's license, had been flying aircraft for approximately five years, and was a member of the Michigan Aero Club; and that William Madyck, plaintiff's decedent, owned a private plane which he kept at the city airport, held a mechanic's license, was em-

ployed as a skilled aircraft mechanic with the Central Airlines at the city airport, and was elected an honorary member of the Michigan Aero Club in 1933, although he was never known to fly any plane of the club after the year 1934.

A history of the airplane on the day in question shows that Arthur Torby, a licensed pilot and an officer of the club, made a flight in the plane at about 4 p. m. When he returned from the flight, the dual controls in the plane were not connected. After Torby used the plane, a flight was made by Hickey, after which a man by the name of Hardesty took the plane for a flight and returned to the airport. Hickey then made application for the use of the plane and he and Madyck took off. At the time the plane was released to Hickey there was sufficient gasoline to fly safely for two hours. After flying for some time the plane crashed. At the time the plane crashed, parachutes were found strapped to the backs of both Madyck and Hickey, the dual controls were connected, and a stick was present in the rear cockpit. The plane with the dual controls connected could be operated equally well from the front or rear cockpit although an experienced pilot would usually operate the plane from the front cockpit. After the plane crashed, Hickey was found in the front cockpit and Madyck was in the rear cockpit; the motor was torn loose from the fuselage, one of the wings was rolled up and the gasoline tank was torn completely out of the wing.

It is the claim of appellant that there was no definite proof as to who was piloting the plane at the time of the crash; that plaintiff's decedent assumed the risk and is therefore guilty of contributory negligence; and that there can be no recovery as the legal relationship between the two pilots was

one of joint venture. The plaintiff contends that the proofs show that Hickey was the pilot of the plane at the time of the crash; that the negligent manner in which the plane was flown was the proximate cause of the crash; and that plaintiff's decedent was presumed to have been in the exercise of due care.

The primary question involved in this cause is to determine who was the pilot of the plane at the time of the crash, as in any event plaintiff cannot recover unless it is established that Hickey was the pilot in control of the plane when the crash occurred. Plaintiff claims there is a presumption that Hickey was pilot which is based upon her contention that Hickey was part owner of the plane by reason of his membership in the club; that he had the sole right to fly the plane, was charged with the flying time, was an experienced pilot and occupied the front cockpit; and that Madyck, not being a member of the club, was without authority to fly the plane.

It is undisputed that there were no eyewitnesses to testify as to who was flying the machine at the time of the crash. Plaintiff depends in a large measure upon presumptions. The defendant was able to show that Madyck was an experienced flyer with an amateur license issued by the United States government; that after the crash the dual controls were connected and in perfect working order; and that while the plane was in the air, either or both pilots engaged in "stunt" flying.

The rule as to presumptions may be found in *Gillette* v. *Michigan United Traction Co.*, 205 Mich. 410:

"It is now quite generally held by the courts that a rebuttable or *prima facie* presumption has no weight as evidence. It serves to establish a *prima*

facie case, but if challenged by rebutting evidence, the presumption cannot be weighed against the evidence. Supporting evidence must be introduced, and it then becomes a question of weighing the actual evidence introduced, without giving any evidential force to the presumption itself."

See, also, *Hanna* v. *McClave,* 271 Mich. 133; *Patt* v. *Dilley,* 273 Mich. 601.

We think the facts established by defendant were sufficient to rebut the presumption relied upon by plaintiff. We have read the record carefully and fail to find sufficient proof therein to establish the fact that defendant's decedent was the pilot of the plane. The burden of proof to establish this fact was upon plaintiff. *Lendberg* v. *Brotherton Iron Mining Co.,* 75 Mich. 84. At most it is only conjecture to say that either pilot had control of the plane at the time of the accident. Judgments may not find a landing place in the field of conjecture alone. In view of our decision in this matter, it will not be necessary to discuss the other questions involved.

The judgment of the trial court is reversed, without a new trial. Defendant may recover costs.

WIEST, C. J., and BUTZEL, BUSHNELL, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

MICHIGAN AERO CLUB *v.* SHELLEY.

1. AVIATION—DEFINITION OF PASSENGER.
   "Passenger," as defined in provisions of penal code prohibiting low flight or dropping objects while over thickly inhabited areas or public gatherings, means any person not the pilot or member of the crew of any aircraft (Act No. 328, § 43, Pub. Acts 1931).

2. SAME—DEFINITION OF AERONAUT.
   "Aeronaut," as used in provisions of penal code prohibiting low flight or dropping objects while over thickly inhabited areas or public gatherings, includes aviator, pilot, balloonist, and every other person having any part in the operation of aircraft while in flight (Act No. 328, § 43, Pub. Acts 1931).

3. TRIAL—THEORY OF CASE.
   Recovery by a plaintiff must be had, if at all, on the theory on which it tried the case.

4. PLEADING—OBJECT OF DECLARATION.
   The chief object of a declaration is to apprize the opposite party of the cause of action and the claim of plaintiff.

5. SAME—CONTENTS OF DECLARATION.
   Though a declaration is not required to set up the evidence by which plaintiff's cause of action is to be proved, it must contain a specific and unequivocal statement of the essential facts constituting the cause of action.

6. AVIATION—AIRPLANE WITH DUAL CONTROLS—PRESUMPTIONS.
   In action for loss of airplane by nonprofit, nonstock corporate club owner against estate of club member who had taken plane equipped with dual controls out and was operating it with controls connected in violation of club, State and Federal rules, no presumption exists that plane was being operated by de-

fendant's decedent from front cockpit rather than by his passenger in rear cockpit nor that member was acting properly where neither he nor his passenger had transport pilot's licenses (Act No. 53, Pub. Acts 1931, as amended by Act No. 119, Pub. Acts 1935; Act No. 328, §§ 43–45, Pub. Acts 1931; 44 Stat. at L. p. 568 *et seq.*).

7. EVIDENCE—PRESUMPTIONS—DEFINITION.
Presumptions are merely *prima facie* precepts and are inferences from the existence or nonexistence of facts.

8. SAME—PRESUMPTIONS—INTRODUCTION OF EVIDENCE.
Presumptions disappear if, and when, evidence is introduced from which facts may be found and cannot be weighed against evidence.

9. NEGLIGENCE—PRESUMPTIONS—ACCIDENT.
Negligence is not presumed but must be proved and the mere happening of an accident raises no presumption of negligence.

10. EVIDENCE—AVIATION—PRESUMPTIONS.
Presumption, if any, that defendant's decedent, a member of plaintiff club, was operating airplane with dual controls at time plane crashed *held*, to have disappeared upon introduction of proof that his passenger in rear cockpit was a pilot and dual controls were connected immediately prior to flight in question (Act No. 53, Pub. Acts 1931, as amended by Act No. 119, Pub. Acts 1935; Act No. 328, §§ 43–45, Pub. Acts 1931; 44 Stat. at L. p. 568 *et seq.*)

11. TRIAL—SUFFICIENCY OF EVIDENCE.
If plaintiff, due to lack of proof, does not make out his case, the court should so hold.

12. EVIDENCE—CLAIM.
A mere claim cannot stand in place of evidence and operate as proof and things not made to appear must be taken as not existing.

13. SAME—GUESS.
A plaintiff's case must be established by the evidence and the court may not guess in default of evidence.

14. JUDGMENT—CONJECTURE.
A judgment cannot be based upon speculation or conjecture.

15. AVIATION—AIRPLANE WITH DUAL CONTROLS—NEGLIGENCE—EVIDENCE.

Airplane club, owner of plane taken out by defendant's decedent, a member who had obtained plane with dual controls and was using it contrary to club, State and Federal rules, *held*, to have failed to prove case for damages for destruction of plane by showing either that defendant's decedent was the pilot or that the plane was demolished solely because of his negligence and his violation of law and fundamental rules of flying, where passenger in rear cockpit was also a pilot, dual controls were connected and both men were killed in crash (Act No. 53, Pub. Acts 1931, as amended by Act No. 119, Pub. Acts 1935; Act No. 328, §§ 43–45, Pub. Acts 1931; 44 Stat. at L. p. 568 *et seq.*).

Appeal from Wayne; Merriam (DeWitt H.), J. Submitted January 14, 1938. (Docket No. 82, Calendar No. 39,845.) Decided February 25, 1938. Rehearing denied April 4, 1938.

Michigan Aero Club, a Michigan corporation, filed its claim for damages to an airplane against the estate of Leo F. Hickey, alias John O'Neill, deceased, in the probate court. Claude D. Shelley, administrator, objected thereto. From denial of claim by commissioners on claims, plaintiff appealed to circuit court. Judgment for plaintiff. Defendant appeals. Reversed without a new trial.

Cole & Lockwood (*Ralph W. Cole,* of counsel), for plaintiff.

Geo. J. Schmeman (*John A. Hamilton,* of counsel), for defendant.

POTTER, J. Plaintiff filed a claim against the estate of Leo F. Hickey, deceased, in the probate court of Wayne county. The claim was there disallowed and appeal taken to the circuit court where

the case was heard without a jury. Plaintiff recovered judgment for $2,200 and costs. From this judgment, the administrator of the estate appeals.

At about 6:30 p. m., April 26, 1936, an airplane, owned by plaintiff, a nonprofit, nonstock Michigan corporation, crashed in the city of Detroit near the southwest corner of State Fair and Waltham avenues, resulting in the death of Leo F. Hickey, a member of the corporation, and William Madyck, not a member. The airplane and its equipment were demolished. To recover for the value of this plane, the claim was presented.

Leo F. Hickey was approximately 32 years of age, held a private pilot's license and had been flying aircraft for about five years. Madyck held an amateur pilot's license, though but 18 years old. He owned a private plane, kept it at the Detroit city airport, held a mechanic's license, and was employed by the Central Airlines as a skilled aircraft mechanic. No witness saw the plane take off. After the crash, Hickey was found in the front cockpit, dead; and Madyck in the rear cockpit, fatally injured and unconscious.

Arthur Torby, a licensed pilot and an officer of the club, had made a flight in the plane at about 4 p. m. on the day of the crash and testified when he returned from his flight the dual controls in the plane were not connected. After Torby used the plane, a flight was made by Hickey, and upon his return one Hardesty took the plane for a flight and returned to the airport. Hickey and Madyck then took the plane. Between the flight of Torby and the time of the crash, someone connected the dual controls on the plane. After the crash, it was established the dual controls were connected at the time of the accident and a stick was present in the rear cockpit. The

plane, with the dual controls connected, could be operated equally well from the front and rear cockpits. Parachutes were found strapped to the backs of both Hickey and Madyck. On the day of the crash, Michael Them, holder of a United States department of commerce transport pilot's license, was flying instructor of the club. Hickey obtained custody of the plane from Them and permission to fly it in accordance with the usual practice. He did not inform Them that Madyck was going up in the plane. The rules of the club required him to do so.

There was testimony by those who saw the plane in the air that it was engaged in acrobatic or stunt flying. This was against the rules of the club and in violation of State and Federal laws which provide acrobatic and stunt flying must be completed at a height of not less than 1,500 feet. The testimony of those who saw the plane in action indicates the plane was under the altitude prescribed.

Subsection 2 (c) of section 72 of chapter 7 of the air traffic rules adopted and promulgated by the secretary of commerce of the United States * in pursuance of 49 Stat. at L. p. 570, as amended (49 USCA, § 173 [e]), provides that "any acrobatic maneuvers * * * shall be concluded at a height greater than 1,500 feet."

Act No. 53, Pub. Acts 1931, as amended by act No. 119, Pub. Acts 1935 (Comp. Laws Supp. 1935, § 4801 *et seq.*), provided for a board of aeronautics and authorized it to adopt the United States air commerce act of 1926 (44 Stat. at L. p. 568 *et seq.* [49 USCA, § 171 *et seq.*]), but provided it might add to or deviate from the Federal rules when deemed necessary for the public safety and for the safety of aircraft and airmen.

* Effective, as amended, January 1, 1934.

Section 6 (h) of the air traffic rules of Michigan is substantially the same as the above quoted subsection of the United States air commerce act.

The rules and regulations of the Michigan board of aeronautics, § 6 (o),* provide:

"DUAL CONTROLS—No airman, except a licensed transport pilot, shall pilot an aircraft within this State equipped with dual controls or part of such controls when carrying a passenger in the cockpit where such controls is (are) located, except by special permission from the State board of aeronautics."

No such permission was obtained by Hickey or Madyck.

"Passenger" means any person not the pilot or member of the crew of any aircraft. Act No. 328, § 43, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 17115–43).

"Aeronaut" includes aviator, pilot, balloonist, and every other person having any part in the operation of aircraft while in flight. Act No. 328, § 43, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 17115–43).

"*Any aeronaut or passenger* who, while in flight over a thickly inhabited area or over a public gathering, within this State, shall engage in trick or acrobatic flying, or in any acrobatic feat, or shall, except while in landing or taking off, fly at such a low level as to endanger the persons on the surface beneath, or drop any object except loose water or loose sand ballast, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than one year or by a fine of not more than five hundred

* See Rules and Regulations governing the Inspection of Aircraft and Parachutes; The Regulation of Exhibition Parachute Jumps and the Air Traffic Rules of Michigan. Effective, as amended, April 1, 1935.

dollars." Act No. 328, § 44, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 17115–44).

"Any person who shall operate any aircraft over open air assemblies of people at a height of less than fifteen hundred feet from the ground, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than one year or by fine of not more than five hundred dollars: *Provided,* That this section shall not apply to groups assembled for the purpose of witnessing aerial exhibitions and stunt flying, nor to groups assembled at a flying field." Act No. 328, § 45, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 17115–45).

There was testimony some of the acrobatic maneuvers of this plane were over congested areas of the city of Detroit in violation of both the State and Federal air traffic rules, though completed above the 1,500 feet limit as to altitude. U. S. Air Commerce Regulations, § 72 (2a); * Michigan Air Traffic Rules, § 6 (h).†

It is conceded the plane was airworthy when taken up on its last flight. There was testimony which might indicate the engine was faulty just before the crash, and other testimony it was functioning properly.

At the conclusion of plaintiff's testimony, defendant made a motion to dismiss for the reason no actionable negligence was shown on the part of Hickey; if negligence was shown, it was not the proximate cause of the accident; the death of Hickey terminated all liability to plaintiff; the by-laws of the corporation made no provision for such a suit; the testimony was just as consistent with the fact the dam-

* Effective, as amended, January 1, 1934.

† Rules and Regulations governing the Inspection of Aircraft and Parachutes; The Regulation of Exhibition Parachute Jumps and the Air Traffic Rules of Michigan. Effective, as amended, April 1, 1935.

age was caused by a forced landing as with the contention it was caused by a flight at low altitude; and the court, on the testimony, could only conjecture the cause of the crash. The trial court took this motion under advisement. Defendant proceeded to introduce testimony. The motion was renewed at the close of all the testimony.

Plaintiff claims it may recover damages from the estate of one of its members for the destruction of a plane owned by it and placed in its member's possession for the purposes of flight even when there is no direct proof whether the plane was being operated by the member or his passenger. Plaintiff alleged Hickey was the pilot, and the plane was completely demolished due solely to the negligence of Hickey and his violation of law and the fundamental rules of flying.

Plaintiff must recover, if at all, on the theory on which it tried the case. The trial court disposed of the case upon the theory that Hickey violated the bailment contract. No such theory was advanced by plaintiff in its claim against Hickey's estate, nor in the trial court.

The chief object of a declaration is to apprize plainly the opposite party of the cause of action and the claim of plaintiff. *Nugent* v. *Teachout*, 67 Mich. 571. Though a declaration is not required to set up the evidence by which plaintiff's cause of action is to be proved, yet it must contain a specific and unequivocal statement of the essential facts constituting the cause of action. *O'Neil* v. *Railway Co.*, 101 Mich. 437.

Plaintiff's declaration charges that Madyck was a mere passenger, and Hickey alone was responsible for the crash. The trial court said to hold otherwise than that Hickey was operating the plane in a negligent manner would mean the court would have to

guess or hold as a matter of conjecture there was in truth and in fact a forced landing. There is nothing except guessing and conjecture to indicate that Hickey, rather than Madyck, was negligently operating the plane.

There is no presumption the plane was being operated from the front cockpit. There is no presumption that Hickey was acting properly in face of the proof the plane was being operated in violation of the club, State and Federal rules. The club and State rules in relation to dual controls were violated because neither the pilot nor the passenger had a transport license. There is no proof even that Hickey knew the dual control stick was in the rear cockpit when he took off. Hickey was an experienced flyer, 14 years older than Madyck, was an average pilot, the club rules required members of the club obtain permission from the instructor before taking up passengers. It is just as consistent with what happened to claim that Madyck connected the dual controls, operated the plane from the rear cockpit, was engaged in stunt flying to demonstrate his skill and that Hickey permitted him to do so, and that, though Hickey may have thought Madyck's operation of the plane was dangerous, he preferred to take a chance with Madyck's operation rather than to attempt to control the plane from the front cockpit with the possibility both controls might become jammed and a crash rendered certain. This is mere conjecture, but it is not inconsistent with what happened. There is no presumption Madyck was not operating the plane. The dual controls were connected by someone, probably for some reason, and that enabled the person in the rear cockpit to control the plane. There is no presumption under the admitted facts that Hickey was operating the plane at the time of the crash.

Presumptions are frequently misapplied. They are merely *prima facie* precepts. Thayer's Evidence at Common Law (1st Ed.), p. 346. They are inferences from the existence or nonexistence of facts. *Thompson* v. *Southern Michigan Transportation Co.,* 261 Mich. 440. They disappear if, and when, evidence is introduced from which facts may be found (*Patt* v. *Dilley,* 273 Mich. 601), and cannot be weighed against evidence (*Essmeister* v. *Roadway Transit Co.,* 275 Mich. 387). Negligence is not presumed but must be proved. *Fleegar* v. *Consumers Power Co.,* 262 Mich. 537. The mere happening of an accident raises no presumption of negligence. *Brebner* v. *Sidney Hill Health System, Inc.,* 269 Mich. 541; *Collar* v. *Maycroft,* 274 Mich. 376.

If there was any presumption from the fact Hickey obtained the plane that he was operating it, that presumption disappeared in the face of the proof Madyck was in the rear cockpit, the dual controls connected, a stick present, Madyck a pilot, and that the dual controls were connected immediately prior to the flight in question. If plaintiff, due to lack of proof, does not make out his case, the court should so hold. *Lendberg* v. *Brotherton Iron Mining Co.,* 75 Mich. 84. A mere claim cannot stand in the place of evidence and operate as proof. *Stewart* v. *Ashley,* 34 Mich. 183. Things not made to appear must be taken as not existing. *Van Auken* v. *Monroe,* 38 Mich. 725. Plaintiff's case must be established by the evidence. The court may not guess in default of evidence. *Marquette County* v. *Ward,* 50 Mich. 174; *Baird* v. *Abbey,* 73 Mich. 347; *Swift & Co.* v. *McMullen,* 169 Mich. 1. The most that can be said is that it is a subject of conjecture whether Hickey was in control of the plane at the time of the crash or was actually operating it. Judgment cannot be based

upon conjecture. *Holgate* v. *Chrysler Corp.*, 279 Mich. 24.

In *Budgett* v. *Soo Sky Ways, Inc.*, 64 S. D. 243 (266 N. W. 253), one Hollister was demonstrating a Travelair OX5 open cockpit model plane equipped with two cockpits and dual controls. Budgett and Schmidt, both licensed airmen, occupied the front cockpit, while Hollister was in the rear cockpit. The controls were connected. The plane took off under the control of Hollister. It shortly stalled, took a nosedive and crashed to the ground. Schmidt and Budgett were killed. It was said:

"It is not necessary to determine which, if either, of the parties was negligent, because however negligent Schmidt and Budgett may have been in riding in the cockpit with the dual controls hooked up, it is not shown by any evidence in the record that such negligence contributed in any way or to any extent to the accident. It is possible that either Schmidt or Budgett may have taken hold of the stick and moved it in such a way as to have turned the nose of the ship toward the ground, and in that way caused the crash; but there is no evidence that either of them did anything of the kind.

"On the other hand, the pilot may have made a false move and pulled the stick the wrong way, or he may have made too short a turn or too steep a bank and lost flying speed of the ship, and for that reason it fell to the ground. * * *

"There is no more probability that the accident was caused by negligence on the part of the defendant than on the part of Budgett or Schmidt. In other words, plaintiff has failed to sustain the burden of proof and cannot recover."

In this case, the crash may have been caused by the negligence of Madyck operating the plane from the rear cockpit as in *Budgett* v. *Soo Sky Ways, Inc.*, *supra*. Or he may have taken hold of the stick and

moved it in such a way as to nose the ship toward the ground. He may have made a false move. He may have pulled the stick the wrong way. He may have made too short a turn. He may have made too steep a bank. He may have lost flying speed when the plane was nosed upward and according to some testimony dropped approximately 100 feet. Something may have happened to the motor and the plane gotten out of control. There is no more probability the accident was caused by the negligence of Hickey than there is it was caused by the negligence of Madyck.

A judgment may not be based upon speculation or conjecture. *Nashville, C. & St. L. R.* v. *Pollard,* 14 Tenn. App. 388. To prove a possibility only, or to leave the issue to surmise or conjecture, is never sufficient to sustain a judgment. *Columbus & G. R. Co.* v. *Coleman,* 172 Miss. 514 (160 South. 277). A verdict must stand upon evidence and not upon conjecture however plausible. *Deery* v. *Hall,* 96 Ind. App. 683 (175 N. E. 141); *McMaster* v. *Warner,* 44 Idaho, 544 (258 Pac. 547). A verdict cannot be permitted to stand which rests upon conjecture, surmise or speculation. *Wheelock* v. *Freiwald* (C. C. A.), 66 Fed. (2d) 694. Plaintiff must make out his case by proof or fail to recover. There was a failure of proof (*Murphy* v. *Railway Co.,* 71 N. J. Law, 5 [58 Atl. 1018]; *Dudley* v. *Duval,* 29 Wash. 528 [70 Pac. 68]; *Hauer* v. *Sampsell,* 153 Ill. App. 66; *Southern R. Co.* v. *Lee,* 167 Ala. 268 [52 South. 648]; *Rock Island Plow Co.* v. *Cut Bank Imp. Co.,* 101 Mont. 117 [53 Pac. (2d) 116]; *Kaplan* v. *Lanzner,* 193 N. Y. Supp. 2); and plaintiff may not recover.

Judgment reversed without new trial. Costs to defendant.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

SELMAN *v.* CITY OF DETROIT.

1. CARRIERS—PASSENGERS—STREET CARS—RAILROADS—SUDDEN INCREASE OR DECREASE OF SPEED.

   Rule respecting liability for injuries to passengers received from sudden increases or decreases of speed while passenger is alighting from street car differs from that where passenger alights from steam railroad.

2. SAME—SUDDEN JERKS OR JOLTS—PASSENGERS.

   Sudden jerks or jolts in the movement of railroad trains or street cars are among the usual incidents of travel which do not create liability for injuries to passengers received because thereof.

3. SAME—SUDDEN JERKS OR JOLTS—STREET CARS—PASSENGERS.

   Sudden jerks or jolts in stopping to let off and take on passengers and in starting, are among usual incidents of travel on street cars which every passenger must expect and mere fact that a passenger is injured thereby will not of itself make out a case of negligence which will render the carrier liable although carrier may be liable if the jerk or jolt is unnecessarily sudden or violent.

4. SAME — NEGLIGENCE — SUDDEN JERKS OR JOLTS — PASSENGERS — MAINTENANCE OF WAY AND EQUIPMENT — OPERATION OF CONVEYANCES.

   Unusually sharp jerks or violent jolting due to negligent operation of the car or negligent failure to maintain the track properly imposes liability on the carrier for resulting injuries to passengers but if there is maintenance of way and equipment in a serviceable condition and operation of conveyances in customary manner no liability attaches.

5. SAME—PASSENGER'S BAGGAGE ON FLOOR OF AISLE—DUTY OF COMPANY.

   It is not negligence as a matter of law for conductor of a street car with seats running lengthwise of the car on each side to

let the baggage of a passenger remain on the floor of the car in the aisle where it is not so placed as to obstruct free passage out of or into the car as the street car company is not bound to exercise toward a passenger the utmost diligence in providing against those injuries that can be averted by human foresight.

6. SAME—BAGGAGE IN AISLES—INJURIES TO PASSENGERS.
Where a passenger is injured by stumbling over baggage which another person has placed in the aisle of the vehicle, the carrier will not be liable for the injury unless it omitted to exercise reasonable care in keeping the aisle clear.

7. SAME—CARE REQUIRED AS TO SAFETY OF PASSENGERS.
A street railway company is not an insurer of the safety of those it undertakes to transport but is merely required to exercise that skill, diligence and foresight for the safety of its passengers consistent with the practical conduct of its business.

8. SAME — OBSTRUCTIONS IN AISLES — INJURIES TO PASSENGERS — KNOWLEDGE OF, OR NOTICE TO, EMPLOYEE.
Ordinarily a carrier is liable for injuries to a passenger resulting from obstructions in aisles of vehicles only where employee in charge of the car knew of the obstruction or it had existed for such a length of time that employee, in proper discharge of his duties, should know of its presence.

9. SAME—BAGGAGE IN AISLE—PRESUMPTIONS—NEGLIGENCE.
The mere fact baggage is in the aisle and a passenger stumbles over it does not raise a presumption of negligence on the part of the carrier.

10. NEGLIGENCE—EXERCISE OF FACULTIES BY NORMAL PERSONS.
The law requires normal persons, possessed of their faculties, to exercise them for their own protection.

11. CARRIERS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.
Plaintiff in action for injuries, alleged to have been sustained when she stumbled over another passenger's baggage which protruded into aisle of street car in which seats were placed lengthwise along side of car, had burden of showing she was free from contributory negligence and acted with due care.

12. APPEAL AND ERROR—DISAGREEMENT OF JURY—DIRECTED VERDICT —EVIDENCE.
On appeal from judgment for defendant on reserved motion for directed verdict, entered after disagreement of jury, testimony

and legitimate inferences to be drawn from established facts most favorable to the party against whom the verdict is sought to be directed must be accepted (3 Comp. Laws 1929, §§ 14531–14535).

13. CARRIERS—PASSENGERS—BAGGAGE IN AISLE—KNOWLEDGE OF, OR NOTICE TO, EMPLOYEE—CONTRIBUTORY NEGLIGENCE.

In passenger's action for injuries sustained when she stumbled over another person's baggage which stuck out in the aisle between the seats along the side of the car, testimony of plaintiff that she did not see suitcase over which she tripped until about to leave car established that it was not in aisle a sufficient length of time to charge carrier's employee with notice and her later testimony that she saw baggage protruding into the aisle when she boarded car and it was not moved during her 20-or-30-minute ride barred her recovery on ground of contributory negligence, where it was not shown conductor had knowledge of presence of the baggage before plaintiff fell.

Appeal from Wayne; Miles (Fred T.), J., presiding. Submitted January 5, 1938. (Docket No. 20, Calendar No. 39,712.) Decided February 25, 1938.

Case by Emily E. Selman against City of Detroit, a municipal corporation, for personal injuries sustained as a passenger on defendant's street car. After disagreement of jury, judgment was entered for defendant. Plaintiff appeals. Affirmed.

Walter M. Nelson, for plaintiff.

Rodney Baxter and *Leon H. Harman,* for defendant.

POTTER, J. Plaintiff brought suit against defendant to recover damages for an injury sustained while a passenger on one of defendant's street cars.

About 3:30 p. m., April 5, 1935, plaintiff boarded one of defendant's street cars at State and Griswold streets, in the city of Detroit, to go to her home on

Hillger avenue, near Jefferson. The street car traversed a route southbound on Griswold street to Jefferson and then eastbound on Jefferson. Plaintiff seated herself on the bench running lengthwise on the righthand side of the car, in the non-fare-paid section. The car was so arranged that passengers boarded at the front entrance and could either sit in the forward portion and pay fare upon going out, or pass by the center of the car and pay fare and sit in the rear portion. When plaintiff boarded the car, two ladies were sitting on the same bench. One was seated immediately next to the conductor and the other at her right. Plaintiff took the third place from the conductor. She claims both the ladies on the seat had suitcases, the one nearer the conductor had a larger suitcase than the other. Both suitcases were under the women's legs. Plaintiff testified the end of the larger suitcase, nearer the front end of the car, stuck out into the aisle; that she first noticed the larger suitcase was out a little in the aisle as she was nearing home. Later, she testified she saw the suitcases when she first boarded the car; that the larger one was on a slant out in the aisle then; and she insisted this testimony was correct. Plaintiff estimated the distance she rode on the car was about five miles and this occupied from 20 to 30 minutes. According to plaintiff's claim, the suitcase of the lady immediately next to her had nothing to do with the accident. She said both these ladies were on the street car when it reached St. Jean avenue, about five miles from where she boarded it. After the car started from a stop at St. Clair avenue, plaintiff signaled for a stop at Lillibridge avenue. As the car approached Lillibridge avenue, plaintiff says she arose from her seat, faced the side of the car on which she had been seated, took a strap in each

upstretched hand, and was moving slowly to her right, facing the two women with suitcases, on her way to the conductor's position to pay her fare and get out, when the street car jerked suddenly, pulled her hands loose from the straps and threw her toward the fare box; that in consequence she threw out her right foot, to brace herself, toward the back of the car; that it struck the larger suitcase, and she fell to the floor holding her right hand over her eyes to avoid hitting her head against the pipe railing around the conductor's seat. She claims the combination of the jerk of the street car and the striking of plaintiff's foot against the suitcase caused her to fall to the floor, with the resulting injuries. After her fall, plaintiff was assisted to her feet and took a standing position in front of the fare box. She tried to put her right foot down and found she could not stand upon it. She sat down, got her money out, hobbled across the aisle, paid her fare, and told the conductor she wanted to get off at St. Jean, as the car had passed Lillibridge. She testified she told the conductor she was injured and he asked her if she had fallen and she replied in the affirmative; the conductor said he did not see her fall, but he asked her if she had fallen over the suitcases. On direct examination, she said she replied "I must have." Later, she said she didn't use the word "must." She testified she then took the seat the lady with the larger suitcase had occupied next to the fare box as that lady had left the car with the suitcase soon after the accident. Plaintiff said she asked to be taken to her doctor, but was obliged to ride to the end of the line and back a mile or so to the car barns, as injured people, by the rules of the railway department, are to be taken home and not discharged or set down along the line. A police scout car was

waiting at the car barns and plaintiff was taken to her home a short distance away.

Neither of the ladies claimed to have had the suitcases was in court. Plaintiff made a written statement after the accident. In it, she said nothing about the suitcases. She made no statement about the suitcases to her doctor in describing the accident on the same day. In answer to a hypothetical question by plaintiff's counsel, her physician testified her injury could have been sustained in the manner she described. Plaintiff then rested.

Defendant made a motion for directed verdict on the ground plaintiff failed to establish freedom from contributory negligence or to establish actionable negligence on the part of defendant and that if, for the purpose of argument, such negligence on the part of defendant had been established, it was not shown to have been the proximate cause of plaintiff's injury. The court reserved decision on the motion. Defendant introduced testimony in defense, putting the conductor on the stand who testified he saw no suitcases on the trip when plaintiff was injured; plaintiff, in her conversation with him, did not mention the suitcases; he noticed no jerks of the car while she was riding; some people were standing in the car on that trip. Two men were sworn who claimed to have been riding on the car at the time plaintiff claims to have been injured and heard a commotion on the car "at or about St. Jean avenue." They did not recall anything unusual in the operation of the car. They claimed to have been riding back of the motorman and noticed no jerks, nor was their balance disturbed though they were standing. One could not recall whether other people were standing in the aisle of the car, but the other testified some were.

Plaintiff then took the stand and testified she had never seen the two men who testified they were standing on the front platform and that neither was on the street car talking to the motorman at the time she was hurt. Plaintiff then rested.

Defendant renewed its motion previously made. The court, reserving its decision on that motion under the Empson act (3 Comp. Laws 1929, § 14531 *et seq.*), submitted the case to the jury which deliberated for two days, then disagreed and was discharged. Thereupon, defendant moved the court to enter a judgment of no cause of action, as provided in 3 Comp. Laws 1929, § 14535. This motion was argued and granted, the trial court determining, in accordance with 3 Comp. Laws 1929, § 14535, the motion for a directed verdict should have been granted at the close of plaintiff's case. Judgment for defendant was entered.

Plaintiff appeals, claiming there was testimony tending to show defendant's negligence, that such negligence was the proximate cause of her injury; the court passed upon plaintiff's credibility as a witness, and that the credibility of plaintiff as a witness was a jury question, relying upon *Tuttle* v. *Railway Co.*, 193 Mich. 390.

There are cases relating to the operation of steam railroads which indicate that a negligent and sudden jerk of the train when the passenger is in the act of alighting may be ground for recovery. *Wood* v. *Railway Co.*, 49 Mich. 370 (4 Am. Neg. Cas. 35); *Smalley* v. *Railway Co.*, 131 Mich. 560. This court has held that sudden increases and decreases in the speed of street cars, whether a passenger is seated or standing, are subject to a different rule. *Schultz* v. *Railways Co.*, 158 Mich. 665 (27 L. R. A. [N. S.] 503); *Ottinger* v. *Railway*, 166 Mich. 106 (34 L. R. A.

[N. S.] 225, Ann. Cas. 1912D, 578, 3 N. C. C. A. 323); *Bogart* v. *City of Detroit,* 252 Mich. 534. Sudden jerks and jolts in the movement of railroad trains or street cars are generally accepted as among the usual incidents of travel which every passenger by experience has learned to expect to some extent. 10 Am. Jur. p. 213, § 1343. Sudden jerks or jolts in stopping to let off and take on passengers, and in starting, are among the usual incidents of travel on street cars which every passenger must expect, and the mere fact that a passenger is injured thereby will not of itself make out a case of negligence which will render the carrier liable. 4 R. C. L. p. 1210 *et seq.,* § 634. Though the carrier may be held liable if the jerk or jolt is unnecessarily sudden or violent. 4 R. C. L. p. 1210 *et seq.,* § 634. And unusually sharp jerks or violent jolting, due to the negligent operation of the car or the negligent failure to maintain the track properly, has been viewed as imposing liability on the carrier for resulting injuries to the passenger. 10 Am. Jur. p. 214, § 1343; 10 C. J. pp. 973, 974; 2 Moore on Carriers (2d Ed.), p. 1222; 1 Nellis on Street Railways (2d Ed.), p. 593. The rule is, that a street railway cannot be held liable for resulting injuries to passengers due to sudden jerks in starting, stopping or operating such conveyances if they are maintained in a serviceable condition and operated in the customary manner.

Plaintiff does not claim she is entitled to recover solely by reason of the jerking of the car, but relies upon that fact in connection with other circumstances. The other circumstance upon which plaintiff relies is the fact a suitcase was in the aisle of the street car. There is no testimony which would take this case out of the rule established by the authorities above so far as the sudden jerking of

defendant's car is concerned. Plaintiff contends she suffered no injury whatever from the fall occasioned by the jerk alone; that her injuries were caused by the twist of her right ankle striking the end of the suitcase just before her foot reached the floor to sustain the whole weight of her body as thrown by the jerk, her foot reaching the floor before the ankle could be straightened as the foot slid down the end of the suitcase to the floor. The thing that did the damage was a twist on the ankle like the twisting snap of a corn shucker or the torque of the drive shaft of a motor.

Plaintiff cites cases where there were suitcases and other impedimenta in aisles of carriers by steam railroad. These cases fall mainly into two classes, —those where the articles in the aisles were part of the equipment of the car itself, and those where they were not equipment but where the aisles were improperly lighted.

It is not negligence as a matter of law for the conductor of a street car of ordinary type with a seat running lengthwise of the car on each side to suffer the bag or satchel of a passenger to remain on the floor of the car in the aisle where it is not so placed as to obstruct free passage out of or into the car, for in such case the street car company is not bound to exercise toward a passenger the utmost diligence in providing against those injuries that can be averted by human foresight. *Pitcher* v. *Railway Co.*, 196 Mass. 69 (81 N. E. 876, 13 L. R. A. [N. S.] 481, 124 Am. St. Rep. 513, 12 Ann. Cas. 886).

Where a passenger is injured by stumbling over a basket or valise which another person has placed in the aisle of the vehicle, the carrier will not be liable for the injury unless it omitted to exercise reasonable care in keeping the aisle clear. 2 Hutchinson

on Carriers (3d Ed.), p. 1033; 1 Nellis on Street Railways (2d Ed.), p. 628; 2 Moore on Carriers (2d Ed.), p. 1200.

A street railway company is not an insurer of the safety of those it undertakes to transport. It fulfills the requirement of due care when it exercises that skill, diligence and foresight for the safety of its passengers consistent with the practical conduct of its business. 10 Am. Jur. p. 170, § 1247. The liability of a carrier for an injury to a passenger caused by obstruction of a car aisle or platform by property of another passenger arises only in case the carrier has been negligent in permitting the obstruction. Ordinarily, the carrier is liable only where one of its employees in charge of the car knows of the obstruction in time to have it removed before it can cause injury; or where the obstruction exists for such a length of time that an employee, in the proper discharge of his duties, should know of its presence. 10 Am. Jur. p. 197, § 1307; *Beiser* v. *Railway Co.*, 152 Ky. 522 (153 S. W. 742, 43 L. R. A. [N. S.] 1050); *Burns* v. *Railroad Co.*, 233 Pa. 304 (82 Atl. 246, Ann. Cas. 1913B, 811); *Kantner* v. *Railway Co.*, 236 Pa. 283 (84 Atl. 774); *Garner* v. *Railway Co.*, 211 Ill. App. 201; *Phinney* v. *Railway Co.*, 285 Mass. 207 (189 N. E. 52). In the last case, it is said:

"The carrying of hand bags by passengers in street cars and their deposit occasionally on the floor of the car are ordinary incidents of travel."

In *Costello* v. *Railway Co.*, 205 Iowa, 1077 (217 N. W. 434), plaintiff, a passenger on defendant's train, as she approached her station, got up and went down the aisle to leave the car. She saw some luggage which stuck out into the aisle about 14 inches. Other passengers went around it. Plaintiff saw it

just before she hit it. She testified, "I went to step out of the way, and just then the train gave a little jerk, and I lost my balance and hit it." It was held the trial court should have directed a verdict for defendant.

The mere fact baggage is in the aisle and a passenger stumbles over it does not raise a presumption of negligence on the part of the railroad company. *Dusenbury* v. *Railroad Co.,* 95 Misc. 241 (158 N. Y. Supp. 681).

In *Van Winkle* v. *Railroad Co.,* 46 Hun (53 N. Y. Sup. Ct.), 564, plaintiff sought to step over a basket and umbrella in the aisle and caught her foot, stumbled and was injured. The court said:

"The plaintiff, with full knowledge of the obstruction in her pathway, undertook to pass, unassisted, between the two men, over the basket and umbrella, and by that act plainly assumed all the dangers and risks of such a passage, and the disastrous results of such a hazardous undertaking cannot be charged against the defendant."

The law requires normal persons, possessed of their faculties, to exercise them for their own protection. *Evans* v. *Orttenburger,* 242 Mich. 57. The burden was upon plaintiff to show she was free from contributory negligence and acted with due care.

In denying a right to recover in *Carpenter* v. *Herpolsheimer's Co.,* 278 Mich. 697, it was said:

"The difficulty with plaintiff's case is that there was no evidence that the box which she claims was in the aisle and tripped her was a purse box; nor, if it was, that it had been piled negligently under the table; nor how it got into the aisle; nor that defendant had knowledge of its being there; nor that it was in the aisle long enough so defendant should have known of it."

On a motion for a directed verdict, testimony and legitimate inferences to be drawn from established facts most favorable to the party against whom the verdict is sought to be directed must be accepted. 1 Searl's Michigan Pleading & Practice, § 279.

Plaintiff first claimed she did not see the suitcase which she tripped over until nearing home and thereby established that the suitcase was not in the aisle a sufficient length of time to charge defendant with notice. *Carpenter* v. *Herpolsheimer's Co., supra.* She later claimed she saw the suitcases when she entered the car and the larger one stuck out in the aisle and was not moved throughout the trip; that she informed the conductor after the accident she had fallen and was hurt; that it sort of came to him the suitcases were there and he asked if she fell over them, and she replied that she had. There was no testimony tending to show the conductor knew of the presence of the suitcases in the aisle before plaintiff fell. If plaintiff saw the suitcases when she entered the car, one of them sticking out in the aisle, she barred herself from a right to recover upon the ground of contributory negligence. *Costello* v. *Railway Co., supra.* We think the trial court arrived at a correct conclusion.

Judgment affirmed, with costs.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

GLOESER *v.* MOORE.

1. EVIDENCE—FRAUD IN PROCUREMENT OF A CONTRACT.
   Fraudulent representations in a contract will void it and fact that subscription agreement contains provision that it was taken subject to approval or rejection of syndicate and that latter would not be bound by representations other than those printed therein did not prevent plaintiff subscriber from showing that procurement of the agreement was void by reason of false representations made by agent of syndicate.

2. JOINT STOCK COMPANIES—SUBSCRIPTION AGREEMENTS—FRAUD.
   Subscriber to syndicate certificates in an oil company is not bound by terms of written subscription agreement, if he was induced to execute such contract because of false and fraudulent representations by syndicate's agent.

3. PLEADING—FRAUD—RESCISSION—AFFIRMANCE OF CONTRACT.
   In a fraud action plaintiff can declare upon inconsistent counts of rescission and affirmance of the contract.

4. FRAUD — AFFIRMANCE OF CONTRACT — RESCISSION — MEASURE OF DAMAGES.
   If plaintiff in action of fraud on syndicate subscription agreement affirms the contract his measure of damages is the difference between what he has paid and the value of the stock he received at the time it was sold to him but where rescission is sought because of fraud, plaintiff is entitled to recovery of what he has paid.

5. SAME—RESCISSION—TENDER—DEMAND.
   Party suing to rescind contract of subscription for syndicate certificates because of fraud must seasonably assert such rescission, tender back what he has received and demand repayment of purchase price.

6. JUDGMENT—SUMMARY JUDGMENT—AFFIDAVITS—THEORY OF CASE —FRAUD—AFFIRMANCE OF CONTRACT.
   On appeal from summary judgment for plaintiff in action for fraud in obtaining subscription agreement for shares in syndi-

cate, plaintiff's cause of action *held,* to rest upon affirmance of contract and action for damages because of its breach by defendants, that being the theory of his motion for summary judgment and affidavit in support thereof.

7. SAME—MOTION FOR SUMMARY JUDGMENT—AFFIDAVITS—COMPETENCY OF AFFIANT.

Affidavit of railroad section hand and ditch digger in support of his motion for summary judgment in action to recover damages for breach of contract of defendants to deliver syndicate certificates in oil company *held,* insufficient to support summary judgment where affidavit did not affirmatively show that if sworn as a witness he could testify competently as to damages as required by court rule and presumably he would have no knowledge of what the value of the certificates was or difference in value between their represented and actual worth at time of sale to him (Court Rule No. 30 [1933]).

8. SAME—AFFIDAVITS OF MERITS—COMPETENCY OF AFFIANT.

Affidavits of merits, executed by defendants' attorneys, which are principally devoted to affiants' conclusions as to what occurred in transactions between plaintiff and defendants' agent relative to syndicate certificates in oil company, of which affiants obviously had no knowledge, *held,* insufficient under court rule requiring that affiant be competent to testify if sworn as a witness (Court Rule No. 30 [1933]).

9. SAME—AFFIDAVITS OF MERITS—MEASURE OF DAMAGES—FRAUD.

In action for fraud in sale of syndicate certificates in an oil company, averments in affidavits of merits opposing entry of summary judgment that defendant syndicate had several producing wells and that certificates of interest were of great value and had an intrinsic value equal to amount plaintiff had paid therefor *held,* to have no bearing upon question of value of properties at time fraud was alleged to have been perpetrated over two years prior to execution of such affidavits as the measure of damages, under the circumstances, is the difference between the represented and actual value of the certificates at time of purchase.

Appeal from Washtenaw; Sample (George W.), J. Submitted January 11, 1938. (Docket No. 101, Calendar No. 39,807.) Decided February 24, 1938.

Case by Joseph Gloeser against John Moore and others for damages caused by false and fraudulent misrepresentations. Summary judgment for plaintiff. Defendants Morris and Morris-Van Keuren Oil & Gas Syndicate No. 2 appeal. Reversed and new trial granted.

William M. Laird, for plaintiff.

Arthur C. Lehman and *Andrew J. Sawyer,* for defendants and appellants.

MCALLISTER, J. Plaintiff on May 11, 1937, filed a declaration against defendants alleging fraud in the sale of certain syndicate certificates in an oil company. Upon answer being filed, plaintiff moved for a summary judgment supported by an affidavit executed by himself. Defendants Charles Van Keuren, personally and as trustee, Arthur R. Morris, personally and as trustee, and the Morris-Van Keuren Oil & Gas Syndicate No. 2, caused affidavits of merits to be filed to prevent the taking of a summary judgment.

Plaintiff set forth in his affidavit that in the early part of January, 1935, one John Moore, agent of the Gas Syndicate, made certain representations to induce him to purchase interests in the syndicate, and as an inducement for plaintiff to buy, falsely and fraudulently represented that the syndicate had already paid monthly dividends to the owners of such interests in the past out of the profits, and would continue to pay regular dividends in the future from such profits; that the said agent further agreed that if plaintiff would invest $500 in the syndicate the said Moore would cause the trustees to execute to plaintiff a certificate in the syndicate, which interest would pay regular monthly dividends in the future;

that relying upon the promises and agreements made by the agent, plaintiff paid the syndicate the sum of $500 on January 15, 1935, and about a week later received a syndicate certificate representing such interest; that about the middle of March, 1935, the said Moore, in an effort to induce plaintiff to invest further funds, brought him a check in the amount of $15, being a three per cent. dividend on the $500 already invested; and thereupon made further false and fraudulent representations similar to those previously made, and induced plaintiff to pay an additional $500 for a further certificate which was delivered to him in June, 1935. Plaintiff further sets forth that he later discovered that dividends had not been paid monthly in the past by the syndicate on these certificates, and that such certificates were not of the kind which the agent promised to deliver; that the said Moore never delivered any such certificates upon which monthly dividends had been paid or which continued thereafter to pay monthly dividends out of profits; and that he thereby lost the sum of $1,000 which he had paid to the said Moore, with interest.

In the affidavits of merits filed on behalf of defendants, their attorneys, as affiants, denied that any such representations were ever authorized by the said defendants; that Moore never had any authority to promise the delivery of certificates which would continue in the future to pay dividends; that the receipt given to plaintiff by the said Moore recited on its face that the agent had no authority to make representations or promises other than those contained on the face of the receipt; and denied that the certificates were valueless inasmuch as the syndicate had several producing wells of oil and that the certificates were of great value and that plaintiff lost nothing through his purchase thereof.

On the hearing of the motion the circuit court held that the affidavits filed by the defendants did not set forth a valid defense to plaintiff's action, but that plaintiff's affidavit was sufficient to support judgment and thereupon entered summary judgment for plaintiff in the full amount of his claim.

On appeal by the defendants they urge that plaintiff is not entitled to a judgment for the reason that his claim is based upon an oral agreement which varies the terms of the written contract of subscription and defendants would not be bound by representations other than those contained in its subscription agreement. They further claim that plaintiff's affidavit was insufficient upon which to enter judgment; and that defendants' affidavits of merits in any event were sufficient to prevent the entry of such judgment.

The subscription agreement in this case is set forth in the following language: "This subscription is taken subject to the approval or rejection of the Morris-Van Keuren Oil & Gas Syndicate No. 2. The syndicate will not be bound by representations other than those printed herein." Plaintiff signed this agreement and defendants contend that any testimony which varied the terms of this contract was inadmissible and that plaintiff is bound by the terms thereof.

In *Plate* v. *Detroit Fidelity & Surety Co.*, 229 Mich. 482, 486, this Court had occasion to discuss a similar question. In that case the contract which was signed contained the provisions:

"This subscription is not subject to countermand and no conditions, agreements or representations either written or verbal, other than those printed herein, shall be binding on said company. * * * This subscription contains the entire contract between the subscriber and the company."

Of this we said:

"It is elementary that fraudulent representations inducing a contract will void it. Plaintiff does not seek to vary the terms of the contract, but claims the contract is void because she was induced to execute it by false and fraudulent representations made by Mr. Scott. It has long been settled that such provisions in a contract do not prevent showing the contract is void by reason of false and fraudulent representations in its procurement."

In *Delta Asbestos Co., Inc.*, v. *Sanders*, 259 Mich. 317, defendant signed an order for merchandise sold by plaintiff. Upon refusal to pay the purchase price, plaintiff sued and defendants set up as their defense that plaintiff's agent had fraudulently represented that it had on hand numerous orders to be filled within defendant's territory, and that if defendant purchased the material, plaintiff would immediately turn over to him all of the orders; that it would also forward to said defendant all of said orders which it had on hand from prospective purchasers. Plaintiff contended that evidence of fraudulent representations was inadmissible because it served to vary the terms of the contract. The trial court entered a judgment of no cause of action, finding that defendant was induced to sign the contract because of the false and fraudulent representations so made to him to induce him to purchase the merchandise. The judgment of the trial court was affirmed.

The rule, therefore, is clear that plaintiff is not bound by the terms of the written contract of subscription, if he was induced to execute such contract because of false and fraudulent representations by defendant's agent.

With regard to the sufficiency of the affidavits of merits and affidavit in support of the motion for

summary judgment, we turn to a discussion of plaintiff's claim and the statements in such affidavits.

Plaintiff's declaration, including several counts, does not clearly indicate whether he relies upon the theory of rescission of the contract or whether he affirms the contract and sues for damages resulting from its breach in an action for fraud.

In a fraud action plaintiff can declare upon inconsistent counts of rescission and affirmance of the contract. If he affirms the contract his measure of damages is the difference between what he has paid and the value of the stock he received at the time it was sold to him. In rescission he is entitled to the recovery of what he has paid. However, in rescission there are certain prerequisites to the bringing of such an action. Upon the discovery of the fraud he must seasonably assert such rescission, tender back what he has received, and demand repayment of the purchase price. *Glover* v. *Radford,* 120 Mich. 542; *Stowe* v. *Mather,* 234 Mich. 385; 3 Black on Rescission and Cancellation (2d Ed.), § 577; *Witte* v. *Hobolth,* 224 Mich. 286; *O'Neill* v. *Kunkle,* 244 Mich. 653; *Dorgan* v. *Birney,* 272 Mich. 145.

In the case before us, plaintiff's declaration sets forth that he "hereby tenders a return of said certificates to said defendants, and upon the trial of the cause, will present and deposit the same with the Court." He further says that because of the false representations, "this plaintiff has lost the amount of said investment; to-wit: the sum of $1,000, so turned over and paid by him to said defendants, all to the loss of the plaintiff in a large amount, to-wit: the sum of $1,500." Such allegations sound as though plaintiff were proceeding upon the theory of rescission, as there would be no requirement of tender in an action for breach of contract.

But there is no allegation of such tender before trial or of any acts of rescission on seasonable discovery of the fraud or return or offer to return, what plaintiff had received from defendant. Plaintiff's affidavit, however, clarifies this point when he says—"that this affidavit is accordingly made for the purpose of obtaining a judgment to cover the damages sustained by him by reason of the breach of contract on the part of the said defendants, * * * for their neglect and failure to furnish and deliver to deponent certificates of interests in the said Morris-Van Keuren Oil & Gas Syndicate No. 2, in accordance with the term of the contract and agreement made on behalf of said defendants by said John Moore."

In this proceeding, plaintiff's cause of action and claim for damages must rest upon his affidavit in support of his motion because it was upon this alone that the court entered summary judgment; and in this affidavit plaintiff conclusively rests his claim upon an affirmance of the contract and an action for damages because of its breach by defendants.

Because of this fact there arises the question in the case of whether plaintiff's affidavit is sufficient to enable the court to enter a summary judgment for damages. Court Rule No. 30 (1933) provides: "The affidavit verifying the plaintiff's cause of action shall be made on the personal knowledge of the affiant; shall set forth with particularity the facts upon which the plaintiff's cause of action is based; * * * shall not consist of conclusions but of such facts as would be admissible in evidence; and shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto."

Plaintiff was by occupation a section hand on the railroad and also a worker in digging ditches and sewers. The only evidence regarding value was that

contained in plaintiff's affidavit in which he claimed that such damages amounted to $1,000. No facts were set forth to show his source of knowledge or qualification as a witness. Presumably, he had no knowledge of what the value of the certificates was or what the difference in value was between what they were represented to be worth and what they actually were worth at the time the stock was sold to him. This was the measure of damages on affirmance of the contract. On the trial of the cause he would not have been a competent witness on such values. His affidavit did not affirmatively show that if sworn as a witness he could testify competently thereto, as required by rule of court. *La Prise* v. *Wayne Circuit Judge,* 234 Mich. 371. Plaintiff's affidavit was insufficient as proof of damages on motion for summary judgment.

The affidavits of merits filed by defendants were executed by attorneys for the defendants. They are principally devoted to such affiants' conclusions as to what occurred in transactions between plaintiff and defendants' agent, of which affiants obviously had no knowledge; and as such were insufficient according to the court rule to which reference has been made. Defendants' affidavits of merits further set forth on personal knowledge that defendant company had several producing oil wells and that the certificates of interest were of great value and had an intrinsic value equal to the sum of money paid by plaintiff and that plaintiff had lost nothing through his purchase. The fact that defendant syndicate was the owner of producing oil wells at the time the affidavits of merits were executed had no bearing upon the question of the value of defendant's properties at the time the fraud was alleged to have been perpetrated, more than two years prior thereto.

The measure of damages in such cases is the difference between the value of the stock as it was represented to be and what it was actually worth at the time of purchase. *Stowe* v. *Mather, supra.*

Because, however, of plaintiff's affirmance of the contract, as set forth in his affidavit, in which he stated the purpose thereof, proof of his damage was not sufficiently shown to the extent necessary and in the manner required to support the entry of a summary judgment, and the trial court was in error in entering such judgment upon plaintiff's motion.

Judgment reversed and new trial granted, with costs to defendants.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and NORTH, JJ., concurred.

SCHNACK *v.* APPLIED ARTS CORP.

1. CONTRACTS—RULE OF ACTION BETWEEN PARTIES.
   A contract becomes the rule of action between the parties to it and governs their rights and is enforceable if it is not contrary to law.

2. PATENTS—CONTRACTS—ROYALTIES.
   A contract to pay a royalty for leave to manufacture an unpatented invention is valid and enforceable.

3. SAME—LICENSES—ROYALTIES.
   A licensee of the right to use an invention or device under a patent cannot escape liability for royalties contracted to be paid though it turns out the device was not in fact patentable and not covered by the patent as the licensee is estopped from denying the validity of the royalty contract.

4. ESTOPPEL—CONTRACTS.
   A licensee cannot accept the benefits of a contract and, when called upon to perform its duties under it, repudiate it as made without right or as wanting in force if it is not actually a violation of law or wholly void.

5. SAME—AUTHORITY.
   The assignee or licensee of any right, accepted and acted under, may accordingly be estopped to deny the authority from which the right proceeds.

6. PATENTS—ESTOPPEL OF LICENSEE.
   A licensee who made and sold scooters under royalty contract cannot deny the title of its licensor and retain the profits to its own use.

7. SAME—INVALIDITY OF PATENT—LICENSES—ACCOUNTING.
   The fact that a patent is invalid does not render sales of the invention claimed to have been patented illegal so as to taint with illegality the obligation of the licensee to account for royalties.

8. SAME—ESTOPPEL—CO-OWNERSHIP BY LICENSOR.
   Licensee of right to make patent may not defeat licensor's right to recover royalties upon ground latter was only a co-owner in the invention or in the application for patent filed in the patent office.

9. SAME—LICENSES BY ONE OF SEVERAL CO-OWNERS.
   A license granted by one co-owner of a patent is valid as against the licensor and his co-owners, and the licensee is liable to the licensor for the agreed price, but he is not liable to the other co-owners, unless otherwise stipulated.

10. SAME—LICENSE BEFORE ISSUANCE OF PATENT.

A license may be given before issuance of a patent, and, if without restrictions, and if acted on as applying to the invention, will protect the licensee in its use after the patent is granted.

11. SAME—ROYALTY CONTRACT BEFORE ISSUANCE OF PATENT.

Royalty contract between inventor and manufacturer executed prior to issuance of patent was a valid contract in its inception.

12. SAME—LICENSE BY CO-OWNER—VALIDITY OF ROYALTY CONTRACT —FAILURE OF CONSIDERATION.

Royalty contract between co-owner of patent and defendant manufacturer, entered into before issuance of patent, *held*, not invalid for failure of consideration because co-owner represented he was the owner of the invention and of the application filed for letters patent since licensee was fully protected in its right to use the invention.

13. SAME—ACCOUNTING—ROYALTIES—PROSECUTION OF APPLICATION IN PATENT OFFICE—TERMINATION OF CONTRACT.

Failure of co-owner of invention and application for letters patent to prosecute application pending in patent office with due diligence *held*, no defense to suit for accounting for royalties accruing under agreement licensing defendant to manufacture scooters where licensee had failed to terminate agreement in accordance with provisions contained therein for that purpose.

Appeal from Kent; Perkins (Willis B.), J. Submitted January 6, 1938. (Docket No. 62, Calendar No. 39,768.) Decided February 25, 1938. Rehearing denied April 4, 1938.

Bill by Henry C. Schnack against Applied Arts Corporation, a Michigan corporation, for an accounting on a licensing contract and other relief. Decree for plaintiff. Defendant appeals. Affirmed.

Allaben & Wiarda, for plaintiff.

Glenwood C. Fuller, for defendant.

POTTER, J. August 18, 1934, defendant entered into a written contract with plaintiff, a copy of which is annexed hereto.* March 13, 1936, plaintiff filed a bill of complaint against defendant for an account-

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* CONTRACT

This agreement made and entered into this 18th day of August, A. D., 1934, between Henry C. Schnack, residing at Grandville, Michigan, hereinafter called the "licensor" and the Applied Arts Corporation, a corporation organized under the laws of the State of Michigan, having its principal office at Grand Rapids, Michigan, hereinafter called the "licensee," witnesseth:

Whereas, The licensor has invented a certain scooter for which the licensor has ordered prepared an application for letters patent in the United States patent office at Washington, D. C., which application has been executed and filed, the serial number of which is 642586.

Whereas, the said licensee is desirous of securing the exclusive right to manufacture and sell said scooter in and throughout the United States of America and its territories.

Now therefore, for and in consideration of the premises and the mutual considerations hereinafter set forth, the parties hereto have agreed and do hereby agree as follows:

I.

The licensor grants unto the licensee the exclusive right to make and sell in and throughout the United States of America and the territories thereof, scooters embodying said invention or any improvements on the same or modifications thereof from this date forth to the end of the life of any patent or patents that may be hereafter granted pursuant to application or to any subsequent applications upon improvements upon said scooter or modifications thereof.

II.

The licensee agrees:

(a) Either directly or through sub-licensees to engage in the manufacture and sale of said scooters and to use reasonable efforts to advertise, make known to the trade and supply the demand for said scooters.

(b) To pay the licensor a royalty of 5 per cent. of the net selling price on each scooter which shall be sold by said licensee and paid for by the person to whom it is sold, which shall be sold by or under the authority of the licensee during the life of this agreement.

(c) To keep full and true records of all sales of said scooters and to permit the licensor to have access to its books and records concerning sales of said scooters at all reasonable times hereafter during the life of this agreement.

ing, payment to him of the amount found due upon such accounting, and other relief. Defendant answered, admitting it had refused to pay royalties and sought to justify nonpayment, claiming the contract had been violated by plaintiff, it had been de-

(d) To pay the above stipulated royalty to licensor as follows: On or before the 15th day of each month licensee shall pay to licensor the royalty upon all scooters paid for during the preceding calendar month.

(e) To mark all scooters "patent applied for" until the patent shall have issued and thereafter to mark all scooters "patented" together with the number of the patent.

(f) To purchase and take over from the licensor under the terms and conditions hereinafter set forth the following:

70 pcs.	Foot board assembly
142 pcs.	Steering yoke
992 pcs.	Foot board
815 pcs.	Back roller bracket
1705 pcs.	Carriage bolt & nut
220 pcs.	Roller assembly
524 pcs.	Roller
460 pcs.	Roller pin
5600 pcs.	Cotter key
4425 pcs.	Roller clamp
4275 pcs.	Pin
120 pcs.	Steering post assembly
249 pcs.	Yoke for handle
1003 pcs.	Steering post
2700 pcs.	Steering post rivet
445 pcs.	King pin
720 pcs.	King pin cotter key
315 pcs.	Handle

One set of dies for manufacturing the following parts:

Steering yoke
Back roller bracket
Handle yoke
Front roller bracket
Roller clamp

All dies, tools and parts being of the estimated value of $775.

Licensee will pay to licensor upon the signing of this contract $75 approved H. C. Schnack; $150 to be paid 30 days after the date of signing and $550 to be paid 60 days after the date of signing of this contract.

III.

The licensor agrees to use reasonable diligence to obtain the issuance of the patent aforesaid and will at all times defend and keep harmless the licensee from the use of said invention and from any

ceived and defrauded into making it, and it was without consideration. Defendant asked, by way of cross-bill, that plaintiff be required to pay it the sum of $775, plus $23.60, with interest, and that it have a lien on the dies, tools and remaining or substituted parts which defendant contracted to purchase from

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claim made by other parties for infringement or damages of and for the use of said appliance.

The right is further granted to the licensee to stamp, designate and advertise said scooter under such name, design or appellation as licensee shall see fit.

In consideration of the exclusive license to it granted, licensee agrees that it shall be obligated for royalties in an amount not less than $500 a year.

IV.

In the event that the licensee shall not faithfully perform any and all the obligations by it to be performed under this agreement, the licensor shall have the right to terminate and cancel this agreement if the default shall continue for more than 30 days after written notice thereof to the licensee. The cancellation by the licensor shall not release the licensee from its obligation to pay the minimum royalties accrued prior to such cancellation.

The licensee shall have the right to terminate this agreement at any time hereafter on 90 days' written notice to the licensor, such written notice to be deemed sufficient if given to Henry C. Schnack or, in the event of his death, to Mabel B. Schnack by sending said notice through United States mails.

In the event of such termination by the licensee it shall have a reasonable time in which to dispose of such scooters as it shall have manufactured and have on hand at the time of such cancellation.

If within two years from the date of this contract no patent is issued, nor have any claims been allowed assuring the issuance of a patent, in that event this license shall be void and the licensee, having paid for the dies, tools and fixtures by that time may retain the same for its own use as it sees fit.

In Witness whereof the said Henry C. Schnack has executed the above and foregoing contract under his seal and Applied Arts Corporation has caused these presents to be executed by its president and attested by its secretary under the seal of said corporation, this 18th day of August, A. D. 1934.

HENRY C. SCHNACK,
(Seal)
APPLIED ARTS CORPORATION,
By R. F. DEBOER,
President.

Attest:
MARGARET GILLISSE,
Secretary.

plaintiff under the contract, and for other relief. From a decree for plaintiff substantially as prayed, defendant appeals.

Defendant contends plaintiff may not recover herein because, as shown by the records of the United States patent office, he was only a joint owner in the pending application for patent to cover his claimed invention. The contract between plaintiff and defendant recites the licensor has invented a certain scooter and has ordered prepared and filed an application for letters patent in the United States patent office, which application has been executed and filed.

Under the law, a contract becomes the rule of action between the parties to it and governs their rights and is enforceable if it is not contrary to law. A contract to pay a royalty for leave to manufacture an unpatented invention is valid and enforceable. *Hamilton* v. *Park & McKay Co.*, 112 Mich. 138; *Perfection Socket Co.* v. *American Forging & Socket Co.*, 222 Mich. 396; *Carter* v. *Marvel Carburetor Co.*, 263 Mich. 48. A licensee of the right to use an invention or device under a patent cannot escape liability for royalties contracted to be paid though it turns out the device was not in fact patentable and not covered by the patent (*Strong* v. *Carver Cotton Gin Co.*, 197 Mass. 53 [83 N. E. 328, 14 L. R. A. (N. S.) 274, 14 Ann. Cas. 1182]; *Bancroft* v. *Union Embossing Co.*, 72 N. H. 402 [57 Atl. 97, 64 L. R. A. 298]), because the licensee is estopped from denying the validity of the royalty contract. *Hall Manfg. Co. of Grand Rapids* v. *American Railway Supply Co.*, 48 Mich. 331; *Corncrook Manfg. Co.* v. *E. T. Barnum Wire & Iron Works*, 54 Mich. 552; *Eureka Co.* v. *Bailey Co.*, 11 Wall. (78 U. S.) 488.

A licensee cannot accept the benefits of a contract and, when called upon to perform its duties under it,

repudiate it as made without right or as wanting in force if it is not actually a violation of law or wholly void. The assignee or the licensee of any right, accepted and acted under, may accordingly be estopped to deny the authority from which the right proceeds. The licensee made and sold the scooters under its royalty contract with plaintiff. It can no more be allowed to deny the title of plaintiff, and retain the profits to its own use, than an agent who has collected a debt for his principal can insist on keeping the money upon an allegation that the debt was not justly due to the principal. The fact that a patent is invalid does not render the sales of the invention claimed to have been patented illegal so as to taint with illegality the obligation of the defendant to account. Bigelow on Estoppel (6th Ed.), pp. 597, 598. Defendant, as a licensee of the device in question, may not defeat plaintiff's right to recover upon the ground that plaintiff was only a co-owner in the invention or in the application for patent filed in the United States patent office. The authorities fully sustain the rule set forth in 48 C. J. p. 263, where it is said:

"A license granted by one co-owner of a patent is valid as against the licensor and his co-owners, and the licensee is liable to the licensor for the agreed price, but he is not liable to the other co-owners, unless otherwise stipulated. Nor can the co-owners recover such sum from the licensor, in the absence of an agreement to divide moneys received, although early decisions intimated that such recovery might be had."

The license may be given before issuance of a patent, and, if without restrictions, and if acted on as applying to the invention, will protect the licensee in its use after the patent is granted. 48 C. J. p. 264.

The contract was a valid contract in its inception. *Hamilton* v. *Park & McKay Co., supra;* 48 C. J. p. 264. The invalidity alleged by the defendant arises out of its contention that plaintiff represented he was the owner of the invention and of the application filed for letters patent when, in fact, he was but a co-owner. Notwithstanding defendant's claim, it was fully protected in its right to use the invention.

Defendant claims there was a failure of consideration for the contract. That cannot be sustained for the same reason, that is, the contract was valid and enforceable in its inception and fully protected defendant in its manufacture of the invention covered thereby.

Defendant claims it ought not to be compelled to respond in this proceeding to plaintiff for the reason that plaintiff himself violated the contract in that he did not prosecute the application pending in the United States patent office with due diligence. This is no defense to liability. The contract stipulates that the licensee shall have a right to terminate this agreement "at any time hereafter on 90 days' written notice to the licensor;" that in the event of termination of the contract, it shall have a reasonable time in which to dispose of such scooters as it shall have manufactured and have on hand at the time of such cancellation; that if within two years from the date of the contract, no patent is issued nor any claims allowed assuring the issuance of a patent, in that event, the license shall be void and the licensee, having paid for the dies, tools and fixtures by that time, may retain the same for its own use as it sees fit. Defendant did not exercise its right to terminate the agreement at any time. It permitted it to run. It manufactured and sold scooters there-

under. It is liable to account to plaintiff for the royalties accruing under the contract.

Decree of the trial court affirmed, with costs to plaintiff.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

GRIGG *v.* HANNA.

1. APPEAL AND ERROR—EQUITY—FINDINGS OF COURT—EVIDENCE.
   In suit by administratrix *de bonis non* with will annexed of estate of her deceased husband against administratrix of estate of deceased husband's partner, former executor of deceased husband's will and transferee of certain assets claimed by plaintiff and others, to set aside probate proceedings, for discovery, accounting and to impress a constructive trust, findings of fact by trial court *held,* sustained by the testimony.

2. JUDGMENT—COLLATERAL ATTACK.
   Suit to set aside proceedings in probate court is a direct, not a collateral, attack upon such probate proceedings.

3. COURTS—PROBATE JURISDICTION—ESTATES OF DECEDENTS.
   The probate court has exclusive jurisdiction of the administration and settlement of estates of deceased persons except where its remedies are inadequate or interposition of equity is necessary for some auxiliary purpose.

4. EXECUTORS AND ADMINISTRATORS—ACCOUNTS—PROBATE COURT ORDERS—RES JUDICATA.

An order of the probate court allowing the account of an executor or administrator is an adjudication to which the general principles of *res judicata* apply.

5. SAME—ALLOWANCE OF ACCOUNTS—ADJUDICATION.

A probate court order allowing the account of an executor or administrator does not adjudicate what is not before the court nor adjudicate what is not contained in it.

6. JUDGMENT—PROBATE COURT ORDERS—FRAUD.

Orders of the probate court may be attacked for fraud.

7. SAME—EQUITY—FRAUD.

Fraud which warrants equity in interfering with a judgment must be fraud in obtaining the judgment and must be positive and not merely constructive.

8. FRAUD—TRUSTS—EVIDENCE.

As against the living, proof of fraud must be clear and convincing but when charges of corrupt, fraudulent or criminal conduct are made against the dead who have occupied positions of trust, and whose acts have been authorized and confirmed by a court of competent jurisdiction, the proof must be so clear and convincing as to satisfy every reasonable mind.

9. TRIAL—PREPONDERANCE OF EVIDENCE.

In noncriminal cases the court cannot require a jury to disregard any preponderance of evidence which convinces them.

10. FRAUD—EVIDENCE.

Where the evidence of fraud is in writing, signed by the party to be charged, such writing, like any other testimonial document, may, in effect, be conclusive upon the party.

11. PARTNERSHIP—DEATH—WINDING UP—FIDUCIARIES.

Since copartners in business are co-owners of it and the partnership is dissolved by death of one of the partners, the surviving partner cannot continue the business but must wind it up and in so doing is liable as a fiduciary (2 Comp. Laws 1929, §§ 9846, 9861, 9871, 9877).

12. EXECUTORS AND ADMINISTRATORS—PARTNERSHIP.

The administrator of the estate of a deceased partner has nothing to do with his interest therein except to look after it so far as to see that no waste or fraud is committed in its manage-

ment, until the surviving partner has settled up the partnership, paid its debts and turned over to the administrator his share of what is left.

13. PARTNERSHIP—SURVIVOR AS TRUSTEE—CESTUI'S CONSENT TO PURCHASE ASSETS.

The surviving partner, as a fiduciary, is in effect the trustee of the assets of the deceased partner and as such trustee may not be interested directly or indirectly as a purchaser in his own behalf of the trust property without the consent of the *cestui que trust* (2 Comp. Laws 1929, §§ 9861, 9877).

14. TRUSTS—TRUSTEE WITH CONFLICTING INTEREST.

Trustee has no right to act when duty is opposed to interest, fidelity to cupidity, or honesty to desire for personal gain.

15. SAME—DUTY OF TRUSTEE.

To act as trustee for dead men carries with it the duty to exercise honesty, good faith, and active diligence; the duty to disclose to the beneficiaries and account for the estate.

16. PARTNERSHIP—JOINT ADVENTURES—SECRET ADVANTAGES.

One joint adventurer or copartner may not seek to reap a profit at the expense of the other, the relationship forbidding and negativing the existence of any secret advantage possessed by one over the other.

17. TRUSTS—EQUITY—JURISDICTION.

Equity will take jurisdiction where one occupying a fiduciary relationship violates his trust to the prejudice of persons otherwise beneficially interested.

18. PARTNERSHIP—ACCOUNTING BY SURVIVOR.

The use of property wrongfully appropriated by one copartner must be regarded as a continued use of the partnership assets never accounted for, and in a proper case the surviving copartner may properly be decreed to make it good.

19. EVIDENCE—FAILURE TO PRODUCE TESTIMONY.

Failure to produce testimony which is in control of the particular party justifies the presumption that the testimony, if produced, would be detrimental.

20. SAME—FIDUCIARY'S DISCLOSURE—FRAUD.

Failure of a fiduciary to disclose fully and fairly all facts to those to whom such duty of disclosure is owed may be regarded as evidence of fraud.

21. TRUSTS—CONSTRUCTIVE TRUST—FRAUD—STATUTE OF FRAUDS.
Party who obtains a conveyance under circumstances which court considers fraudulent or oppressive by instant or immediate consequence will be converted into a trustee in case that construction is needful for the purpose of administering adequate relief and statute of frauds will not hinder equity from affording relief in such manner (3 Comp. Laws 1929, §§ 13411, 13412).

22. EQUITY—JURISDICTION—FIDUCIARIES.
Equity takes cognizance of case where one holding confidential and fiduciary relations to another, and thereby morally and legally bound to communicate the facts, conceals them for his own benefit and profit and to the disadvantage of the other.

23. FRAUD—SUPPRESSION OF TRUTH—INTENT.
A fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood and courts will not hesitate to sustain recovery where the truth has been suppressed with intent to defraud.

24. TRUSTS—EQUITY—ADEQUACY OF REMEDY.
Courts of equity do not enforce or impose penalties or punish parties for their wrongs in the administration of trusts but only furnish the adequate means of redress when the law fails to do so.

25. EQUITY—NATURE OF RELIEF AFFORDED.
A court of equity may adapt its relief to the exigencies of the case and when nothing more is required, may order a sum of money paid to plaintiff or give him a personal judgment therefor, to be enforced by execution.

26. PARTNERSHIP—ACCOUNTING BY SURVIVING PARTNER.
Estate of surviving partner who sought to absorb all of the partnership assets by suppressing material facts which it was his duty to disclose *held,* accountable to administratrix of estate of partner first deceased.

27. EXECUTORS AND ADMINISTRATORS—NEGLIGENCE—RES JUDICATA—PARTNERSHIP—ACCOUNTING BY SURVIVING PARTNER.
In suit by administratrix *de bonis non* with will annexed of deceased partner's estate against trust company which had been executor of his will and surviving partner to set aside probate court orders allowing accounts and discharging executor and for discovery and accounting, record *held,* to sustain finding

of trial court that evidence was insufficient to establish liability on part of trust company for negligent administration of the estate, such probate court orders being *res judicata* of issues now sought to be readjudicated so far as executor is concerned although not as to surviving partner.

POTTER and CHANDLER, JJ., dissenting in part.

Appeal from Wayne; Miller (Guy A.), J. Submitted April 8, 1937. (Docket No. 20, Calendar No. 39,294.) Decided February 25, 1938.

Bill by Violet R. Grigg, administratrix *de bonis non* with will annexed of estate of W. Herbert Grigg, deceased, against Anna Hanna, administratrix of the estate of Bert Hanna, deceased, and others for an accounting and other relief. Bill dismissed as to Richard Charles Hanna, Frances Esther Haar, Detroit Trust Company and Grigg-Hanna Lumber & Box Company, Michigan corporations. Decree ordering accounting as to defendant administratrix. Defendant administratrix appeals. Plaintiff cross-appeals as to defendants Detroit Trust Company and Grigg-Hanna Lumber & Box Company. Affirmed.

William S. Peterson (*Kenneth M. Stevens,* of counsel), for plaintiff.

Lawhead & Kenney (*Donald P. Kipp,* of counsel), for defendants administratrix and Grigg-Hanna Lumber & Box Company.

Miller, Canfield, Paddock & Stone, for defendant Detroit Trust Company.

POTTER, J. (*dissenting in part*). Plaintiff, as administratrix *de bonis non* with the will annexed of

the estate of W. Herbert Grigg, deceased, filed a bill in equity against Anna Hanna, administratrix of the estate of Bert Hanna, deceased; the Detroit Trust Company, which had been appointed executor of the will of W. Herbert Grigg after his death; Richard Charles Hanna; Frances Esther Haar; and the Grigg-Hanna Box & Lumber Company, a corporation.

The bill of complaint charged that W. Herbert Grigg and Bert Hanna formed a partnership, known as the Grigg-Hanna Company, May 25, 1905, for a period of 10 years; the partnership affairs were not wound up at the expiration of the contract period, but continued until the death of W. Herbert Grigg; W. Herbert Grigg entered into a partnership with Charles W. Leech and Bert Hanna, in the Charles W. Leech Lumber Company, February 1, 1908, which partnership was to expire January 31, 1913, but this partnership continued until February 26, 1931, when a new partner was admitted to the partnership and new articles of association executed by the parties thereto; June 26, 1920, W. Herbert Grigg and wife bought the Tireman avenue property of Bert Hanna and wife for $125,000, with $12,000 paid down and the balance to be paid monthly; June 26, 1920, W. Herbert Grigg borrowed from Bert Hanna a considerable sum of money and gave him a quit-claim deed of the Michigan avenue property, taking back a land contract to purchase it for $100,000, $13,000 of which was paid down; April 19, 1931, W. Herbert Grigg died, his will was admitted to probate, and April 29, 1931, the Detroit Trust Company was appointed executor of his will, and acted as such until October 3, 1933; July 8, 1932, the Detroit Trust Company filed a petition in the probate court to sell the Michigan avenue property and the

Tireman avenue property, alleging the fee of the Michigan avenue property was worth $50,000, but, being subject to the contract of purchase above mentioned, the Grigg estate's interest therein was nothing; that the fee to the Tireman avenue property was worth $49,000, but, being subject to the land contract of purchase, the interest of the estate of W. Herbert Grigg therein was nothing, and that both properties were sold to Bert Hanna for a nominal consideration of $1 and deeded to him; September 2, 1932, the Detroit Trust Company, as executor, petitioned the probate court for an order authorizing it to sell the interest of the Grigg estate in the Grigg-Hanna Company, the one-half interest in the Grigg-Hanna Box Company, and the one-fourth interest of such estate in the Charles W. Leech Lumber Company, for $15,000, to Bert Hanna who agreed, in consideration of such sale, to release his claim against the Grigg estate which had been allowed by the commissioners in the probate court, and this was done. The bill of complaint charges that though the Detroit Trust Company had on hand appraisals and statements made by Bert Hanna showing the Michigan avenue property was worth $150,000 and the Tireman avenue property was worth $125,000, it did not disclose that fact to the probate court, but permitted false and fraudulent affidavits of freeholders to be presented to the probate court showing the values of $50,000 and $49,000 respectively above referred to; that Bert Hanna presented and had allowed against the estate of W. Herbert Grigg a fictitious claim of $200,000 which it knew was false, and was guilty of gross neglect of duty and constructive fraud in not opposing it and disclosing the facts within its knowledge to the commissioners on claims, and that Bert Hanna was

guilty of active fraud in presenting and procuring the allowance of such fictitious claim while occupying a fiduciary relation to the Grigg estate as surviving partner of W. Herbert Grigg; and that, in addition, the Detroit Trust Company was guilty of gross neglect of duty in not compelling Bert Hanna to account for the withdrawals of money from the Grigg-Hanna partnership after the death of W. Herbert Grigg and before the death of Bert Hanna who died March 20, 1934.

April 11, 1934, Anna Hanna was appointed administratrix of the estate of Bert Hanna, deceased, and April 16, 1935, the bill of complaint herein was filed to set aside the proceedings in the probate court for discovery, accounting, injunction, and to impress a constructive trust on the property of the Grigg-Hanna Box & Lumber Company, and for other relief.

Defendant Detroit Trust Company, by way of answer, denied all the charges of gross negligence and fraud, either actual or constructive, against it; alleged the regularity of the probate proceedings in the W. Herbert Grigg estate, that the proceedings in the probate court were regular and constituted former adjudication; that in the proceedings to remove the Detroit Trust Company and in passing upon its final account, the probate court passed upon and adjudicated the question of the propriety of the sales made by it and its conduct in relation thereto; and that all proceedings for the sale of the partnership interest in the Grigg estate property sold, and all proceedings in relation to the final account of the Detroit Trust Company, executor, were finally adjudicated against plaintiff and in favor of the Detroit Trust Company by the probate court of Wayne county, and may not be collaterally attacked.

In addition, it set up various special defenses tending to show the regularity of its conduct, again insisting the decisive questions were *res judicata.*

Anna Hanna, administratrix of the estate of Bert Hanna, deceased, and the Grigg-Hanna Lumber & Box Company (above mentioned as Grigg-Hanna Box & Lumber Company), a corporation, filed a joint and several answer denying the substantive charges of plaintiff on which she claimed relief, and asserting the probate proceedings were *res judicata.*

Plaintiff, by way of answer to the affirmative matter set up in defendants' answers, says if the accounting allowed in the probate court, obtained by fraud, is permitted to stand, the Grigg estate would be insolvent, but avers the figures in defendants' answers were fraudulent representations to the probate court and avers the Grigg estate was not insolvent; alleges it was solvent in fact and, but for the fraudulent accounting of defendants, would be shown to be so; and denies the probate proceedings are *res judicata.*

The trial court, after hearing the testimony, filed exhaustive findings of fact sustaining for the most part the claims made by plaintiff, but dismissing the bill as to Richard Charles Hanna and Frances Esther Haar, with costs against plaintiff; dismissing the bill of complaint against the Detroit Trust Company with prejudice to the right of plaintiff ever again to bring suit in law or in equity concerning any of the matters and things set forth in plaintiff's bill of complaint, but without costs; ordering an accounting and fixing the basis thereof; denying personal relief against the Grigg-Hanna Lumber & Box Company, but without prejudice to whatever legal lien may exist in favor of William Herbert Grigg, one of the partners of the Grigg-Hanna Com-

pany, a partnership, upon any partnership property which since the death of William Herbert Grigg had been taken over by the corporation; and referring the cause to a circuit court commissioner for the determination of the value of the estate's interest in the Charles W. Leech Lumber Company as of April 4, 1932, the total amount of cash withdrawals by Bert Hanna between April 19, 1931, and April 4, 1932, from both partnerships, the balance due and actually owing by Mr. Grigg to Bert Hanna upon the land contract covering the Michigan avenue property, the true amount of any other sums Bert Hanna actually paid under the terms of the settlement with the Detroit Trust Company and which amounted to legal claims against the Grigg estate, all of which information was to be reported back to the trial court, together with a full and complete list of all the property, both real and personal, transferred by Bert Hanna from the Grigg-Hanna Company, a partnership, to the Grigg-Hanna Lumber & Box Company and still in the latter's possession, and a full and complete list of all property, real and personal, that was withdrawn or received from the Charles W. Leech Lumber Company, a partnership, and now in possession of the defendants Anna Hanna, administratrix, or Grigg-Hanna Lumber & Box Company, a corporation. Plaintiff was given costs.

By this decree, basis of the accounting was established as follows: (a) that the claim of Bert Hanna upon the Tireman avenue land contract be and the same is decreed to have been discharged by the cancellation of the land contract thereon, and the claim allowed by the commissioners thereon satisfied and discharged; (b) the value of the W. Herbert Grigg estate's interest in the Grigg-Hanna Company is found to be and fixed at the sum of $125,000 and the estate of Bert Hanna charged therewith; (c) the

estate of Bert Hanna, deceased, should be given credit in such accounting for $15,000 which Bert Hanna paid upon the settlement. The bill of complaint was dismissed against the Grigg-Hanna Lumber & Box Company, a corporation, without costs, no personal relief being decreed against it, without prejudice to whatever legal lien might exist in favor of William Herbert Grigg, one of the partners of the Grigg-Hanna Company, as above mentioned.

From this decree, defendant Anna Hanna, administratrix of the estate of Bert Hanna, deceased, appeals. Plaintiff takes a cross-appeal from the decree of the court dismissing its bill of complaint as against the Detroit Trust Company and the Grigg-Hanna Lumber & Box Company.

Anna Hanna, administratrix, as appellant, contends the findings of the probate court of Wayne county and the claims allowed by the commissioners on claims; the petitions for licenses to sell real estate and personal property of the Grigg estate, and the orders of the probate court confirming those sales; the petition filed by the plaintiff to remove the Detroit Trust Company as executor of the estate of William Herbert Grigg, and the order made in pursuance thereof; and the final account of the Detroit Trust Company, as executor of the estate of William Herbert Grigg as allowed by the probate court, are *res judicata* as to the matters involved in this litigation and a bar to the plaintiff's right to to recover against Anna Hanna, administratrix of the estate of Bert Hanna, deceased; that Bert Hanna was not guilty of fraud in his dealings with the executor and heirs of the Grigg estate and no collateral inquiry into the proceedings of the probate court is permissible; that Bert Hanna, as surviving partner of himself and William Herbert Grigg, did not breach any duty he owed to the estate of William

Herbert Grigg, his deceased partner; that plaintiff did not show any damages, by the evidence introduced, suffered by reason of any of the conduct of Bert Hanna; the court was in error in ordering an accounting based upon a finding the value of the interest of the estate of William Herbert Grigg in the Grigg-Hanna Company was $125,000, that in reality Bert Hanna acquired the assets of the Grigg-Hanna Company and the Charles W. Leech Lumber Company at no cost to himself, the estate of Bert Hanna should be charged with one-half of the withdrawals from the two partnerships in question in the year following the death of William Herbert Grigg, and in finding the Tireman avenue land contract should not be considered in any accounting made.

Defendant and cross-appellee, the Detroit Trust Company, contends that, assuming the questions involved are not *res judicata,* the Detroit Trust Company was not guilty of culpable negligence in the respects charged in the bill of complaint during its administration as executor of the estate of William Herbert Grigg which caused loss or damage to that estate, and it was not guilty of fraud in the respects charged in the bill of complaint during its administration as executor of the estate of William Herbert Grigg which caused loss or damage to his estate; and the orders of the probate court of the county of Wayne during the administration of Grigg's estate are *res judicata* of the questions involved.

Plaintiff, in reply to the brief of Anna Hanna, administratrix, defendant and appellant, accepts the statements of the questions involved submitted by defendant and appellant Anna Hanna.

Plaintiff, in her cross-appeal against the Grigg-Hanna Lumber & Box Company and Detroit Trust

Company, contends she is entitled to a first lien for all sums found to be due, after the payment of partnership creditors, upon all real estate and personal property of the partnership involved that was transferred to the defendant Grigg-Hanna Lumber & Box Company, a corporation, and still held by it.

The Grigg-Hanna Lumber & Box Company contends the decree of the trial court against Anna Hanna, administratrix of the estate of Bert Hanna, deceased, does not entitle plaintiff to a first lien upon the assets which formerly belonged to the Grigg-Hanna Company, a partnership, which were purchased by Bert Hanna from the executor of the estate of William Herbert Grigg and subsequently transferred by Bert Hanna to the Grigg-Hanna Lumber & Box Company, a Michigan corporation.

An examination of the record is convincing the findings of fact of the trial court are sustained by the testimony.

This proceeding is not a collateral attack upon the proceedings of the probate court. It is a direct attack upon such probate proceedings. Van Fleet's Collateral Attack, § 2. The probate court has exclusive jurisdiction of the administration and settlement of the estates of deceased persons, except where its remedies are inadequate or the interposition of equity is necessary for some auxiliary purpose. *Nolan* v. *Garrison,* 156 Mich. 397; *Davis* v. *McCamman,* 165 Mich. 287; *Graham* v. *Graham,* 171 Mich. 307; *Brooks* v. *Hargrave,* 179 Mich. 136; *In re Rahn's Estate,* 241 Mich. 29; *Burgess* v. *Jackson Circuit Judge,* 249 Mich. 558.

An order of the probate court allowing the account of an executor or administrator is an adjudication. *In re Rahn's Estate, supra.* The general principles of *res judicata* apply to the orders of the

probate court on final accounts of executors and administrators. *Heap* v. *Heap,* 258 Mich. 250; *McDannel* v. *Black,* 270 Mich. 305. An order of a probate court allowing an account of an executor or administrator does not adjudicate what is not before the court. *Murphy Chair Co.* v. *American Radiator Co.,* 172 Mich. 14; *Creck* v. *Laski,* 248 Mich. 425 (65 A. L. R. 1113). Its allowance does not adjudicate what is not contained in it. *Morton* v. *Johnston,* 124 Mich. 561; *Porter* v. *Long,* 124 Mich. 584; *In re Ward's Estate,* 152 Mich. 218; *Powell* v. *Pennock,* 181 Mich. 588; *MacKenzie* v. *Union Guardian Trust Co.,* 262 Mich. 563.

The doctrine of former adjudication, its limitations and extent, is exhaustively discussed in *Bond* v. *Markstrum,* 102 Mich. 11; *MacKenzie* v. *Union Guardian Trust Co., supra; Rogers* v. *Detroit Automobile Inter-Insurance Exchange,* 275 Mich. 374.

The orders of the probate court may be attacked for fraud. 2 Pomeroy's Equity Jurisprudence (3d Ed.), § 919; 34 C. J. pp. 470, 471; *Adair* v. *Cummin,* 48 Mich. 375; *Ewing* v. *Lamphere,* 147 Mich. 659; *Babcock* v. *Babcock,* 150 Mich. 558; *In re Rahn's Estate, supra.* The fraud which warrants equity in interfering with a judgment must be fraud in obtaining the judgment. 2 Pomeroy's Equitable Remedies (2d Ed.), § 2077; *Columbia Casualty Co.* v. *Klettke,* 259 Mich. 564. The fraud must be positive and not merely constructive. 34 C. J. p. 471; *Ombrello* v. *Railway Co.,* 252 Mich. 396.

"As against the living, proof of fraud must be clear and convincing. But when charges of corrupt, fraudulent, and criminal conduct are made against the dead, who have occupied positions of trust, and whose acts have been authorized and confirmed by a court of competent jurisdiction, *the proof must be*

so clear and convincing as to satisfy every reasonable mind.'' *Egan* v. *Grece,* 79 Mich. 629, 639.

Though, as said in *Peoples* v. *Evening News Ass'n,* 51 Mich. 11:

''There are but two classes of cases recognized as requiring different rules of proof; *first,* criminal cases, and *second,* civil cases, or, to speak more accurately, cases not criminal. * * * In cases not criminal, and involving no criminal judgment and punishment, the court cannot require the jury to disregard any preponderance of evidence which convinces them.''

Where the evidence of fraud is in writing, signed by the party to be charged, such writing, like any other testimonial document, may, in effect, be conclusive upon the party.

Copartners in business are co-owners of the business. 2 Comp. Laws 1929, § 9846. The partnership is dissolved by the death of one of the partners. 2 Comp. Laws 1929, § 9871. The surviving partner under no disability must wind up the partnership. 2 Comp. Laws 1929, § 9877. In winding up the affairs of the partnership, the surviving partner is liable as a fiduciary. 2 Comp. Laws 1929, § 9861. He has no right to continue the business, *Swaine* v. *Hemphill,* 165 Mich. 561 (40 L. R. A. [N. S.] 201); *Marshall Field & Co.* v. *Himelstein,* 253 Mich. 355, it being the duty of the surviving partner to wind up the affairs of the copartnership.

The administrator of the estate of a deceased partner has nothing to do with his interest therein, except to look after it so far as to see that no waste or fraud is committed in its management, until the surviving partner has settled up the partnership, paid its debts and turned over to the administrator

his share of what is left. It is not until then the administrator is entitled to the possession of the estate's interest therein. *Loomis* v. *Armstrong,* 63 Mich. 355. The surviving partner, as a fiduciary, is in effect the trustee of the assets of the deceased partner. *MacKenzie* v. *Union Guardian Trust Co., supra.* As such trustee, he may not be interested directly or indirectly as a purchaser in his own behalf of the trust property without the consent of the *cestui que trust.* 1 Perry on Trusts & Trustees (6th Ed.), § 195.

"A trustee has no right to act when duty is opposed to interest, fidelity to cupidity, honesty to the desire for personal gain. To act as trustee for dead men carries with it the duty to exercise honesty, good faith, and active diligence; the duty to disclose to the beneficiaries and account for the estate, and, stringent as the law is in prohibiting trustees acting in violation of their trust, the rules of law should be more strict rather than be relaxed." *Kelsey* v. *Detroit Trust Co.,* 265 Mich. 358.

"There is little difference between the joint adventure and the partnership in this respect. One adventurer may not seek to reap a profit at the expense of the other. The very relationship forbids and negatives the existence of any secret advantage possessed by one over the other." *Latimer* v. *Piper,* 261 Mich. 123, 134.

Kelsey v. *Detroit Trust Co., supra,* above quoted, was approved in *Re Culhane's Estate,* 269 Mich. 68; and *McDannel* v. *Black, supra,* cited with approval in *MacKenzie* v. *Union Guardian Trust Co., supra.*

Equity will take jurisdiction where one occupying a fiduciary relationship violates his trust to the prejudice of persons otherwise beneficially interested. *Tompkins* v. *Hollister,* 60 Mich. 470; *Perrin* v. *Lepper,* 72 Mich. 454; *Graham* v. *Graham, supra.*

The use of property wrongfully appropriated by one copartner must be regarded as a continued use of the partnership assets never accounted for, and in a proper case the surviving copartner may properly be decreed to make it good. *Heath* v. *Waters,* 40 Mich. 457.

The failure to produce testimony which is in control of the particular party justifies the presumption that the testimony, if produced, would be detrimental. 1 Jones on Evidence (Horwitz Ed.), § 18; 1 Wigmore on Evidence (2d Ed.), § 291. The failure on the part of one occupying a fiduciary relation to disclose fully and fairly all of the facts to those to whom such duty of disclosure is owed may be regarded as evidence of fraud. *Heath* v. *Waters, supra.*

"It is the settled doctrine of the court that where a conveyance is obtained for ends which it regards as fraudulent or under circumstances it considers as fraudulent or oppressive by instant or immediate consequence, the party deriving title under it will be converted into a trustee, in case that construction is needful for the purpose of administering adequate relief; and the setting up the statute of frauds by the party guilty of the fraud or misconduct in order to bar the court from effective interference with his wrong-doing, will not hinder it from forcing on his conscience this character as a means to baffle his injustice or its effects. 2 Comp. Laws 1871, §§ 4692, 4693;* 1 Story Equity Jurisprudence, §§ 330, 333; 2 Story Equity Jurisprudence, §§ 1254, 1265; 1 Spence's Equitable Jurisdiction, 511; 2 Spence's Equitable Jurisdiction, 194, 294 *et seq.;* Hill on Trustees, 144; *Mestaer* v. *Gillespie,* 11 Ves. Jr. 621 (32 Eng. Rep. 1230); *Pickett* v. *Loggon,* 14 Ves. Jr. 215, 234 (33 Eng. Rep. 503); *Barnesly* v. *Powel,* 1 Ves.

* Same as 3 Comp. Laws 1929, §§ 13411, 13412.—REPORTER.

Sr. 284, 289 (27 Eng. Rep. 1034); *Young* v. *Peachy,* 2 Atk. 254, 257 (26 Eng. Rep. 557); *Brown* v. *Lynch,* 1 Paige Ch. (N. Y.) 147; *Hutchins* v. *Lee,* 1 Atk. 447 (26 Eng. Rep. 284); *Wolford* v. *Herrington,* 74 Pa. 311 (15 Am. Rep. 548); *Gregory* v. *Williams,* 3 Meriv. 582 (36 Eng. Rep. 224)." *Huxley* v. *Rice,* 40 Mich. 73.

Especially does equity take cognizance of a case where one holding confidential and fiduciary relations to another, and thereby morally and legally bound to communicate the facts, conceals them for his own benefit and profit and to the disadvantage of the other. *Tompkins* v. *Hollister, supra.* A fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud. *Tompkins* v. *Hollister, supra.*

See, also, *Darrah* v. *Boyce,* 62 Mich. 480; *Harper* v. *Corcoran,* 166 Mich. 474; *Graham* v. *Graham, supra.*

Courts of equity do not enforce or impose penalties or punish parties for their wrongs in the administration of trusts, but only furnish the adequate means of redress when the law fails to do so. *Perrin* v. *Lepper,* 72 Mich. 454.

"A court of equity may adapt its relief to the exigencies of the case, and, when nothing more is required, may order a sum of money to be paid to the plaintiff, or give him a personal judgment therefor, to be enforced by execution." *Baily* v. *Hornthal,* 154 N. Y. 648, 660 (49 N. E. 56, 61 Am. St. Rep. 645).

The record discloses that Bert Hanna, as surviving partner of himself and W. Herbert Grigg, sought, after the death of Grigg, to absorb all of the part-

nership assets, and to this end had the co-operation of the Detroit Trust Company. He suppressed material facts from the commissioners on claims which it was his duty to disclose, and the Detroit Trust Company, if it did not co-operate in the fraud in this particular, was negligent in the discovery of the facts which it ought to have discovered, in the presentation of them to the commissioners on claims, and in defending the estate against the Hanna claims. It was a fraud upon the probate court and upon the Grigg estate for the Detroit Trust Company, executor of the Grigg estate, not to disclose to the probate court, but to suppress from it, the appraisals of the Michigan avenue property and the Tireman avenue property of $150,000 and $125,000 respectively, which it had in its possession, signed by Bert Hanna, and to lead the probate court to act upon appraisals of the same property of $50,000 and $49,000 respectively. This $176,000 directly affected the rights of the Grigg estate and the action of the probate court. After Bert Hanna procured the allowance of his claim of $200,000 by suppressing the facts, and by the negligence of the Detroit Trust Company in not defending against it, and the Detroit Trust Company had obtained authority to sell the Michigan avenue property and the Tireman avenue property by the suppression from the probate court of the appraisals signed by Bert Hanna, its prospective purchaser, in its possession, it made a deal with Bert Hanna by which it swapped the real estate in question for his fictitious claim of $200,000, and $15,000 additional which he paid. And it is these transactions, and the confirmation thereof by the probate court, that defendants now say may not be called in question in this suit because *res judicata,* and because the Detroit Trust Company's final account was allowed.

It is an old saying "fraud vitiates everything." And whether there was collusion between the Detroit Trust Company and Bert Hanna in relation to the administration of the Grigg estate or not, there was negligence and improper handling of the estate upon the part of the Detroit Trust Company. There was failure on its part to disclose the appraisals of the Michigan avenue and Tireman avenue property which it was its duty to disclose, and this amounted to a fraud upon the Grigg estate and upon the probate court. There was a negligent failure to oppose the claims of Hanna presented against the Grigg estate. And there was failure to give notice of the sale of the Michigan avenue and Tireman avenue real estate to anyone in interest; and failure to notify the plaintiff of the claims which Bert Hanna presented against the estate. The probate proceedings under such circumstances do not constitute a bar to proceedings in equity and cannot be made the basis of any claim of *res judicata.* Similar questions have been repeatedly before the court. *Heath* v. *Waters, supra; Perrin* v. *Lepper,* 72 Mich. 454; *In re Rahn's Estate, supra; Heap* v. *Heap, supra.* The probate proceedings in the matter of the estate of William Herbert Grigg do not prevent a suit in equity if it is otherwise proper. *Perrin* v. *Lepper,* 49 Mich. 347. It was the duty of the Detroit Trust Company to file a true and correct inventory of the property of the estate, whether such property was owned by the estate individually, or as a tenant in common, or as an interest in partnership property. *Perrin* v. *Lepper,* 72 Mich. 454. And it was likewise the duty of the defendant Detroit Trust Company to defend the estate against all unjust claims. *Perrin* v. *Lepper,* 72 Mich. 454. The Detroit Trust Company failed to perform this duty. The trial court found the Detroit Trust Com-

pany was guilty of negligence and improper handling of the affairs of the estate of William Herbert Grigg, and we agree with these findings. The losses resulting to the Grigg estate arose largely from the negligent failure of the Detroit Trust Company to perform its duty. The bill of complaint not only charged fraud upon the part of the Detroit Trust Company, but gross negligence on its part in dealing with the affairs of the estate and fraudulent accounting in the probate court. The trial court said of the Detroit Trust Company:

"Its administration of the estate was faulty almost in the extreme. It was its duty as special administrator to file its accounts as such with inventory of property coming to its hands in that capacity as soon as the circumstances permitted. It filed no inventory and made no accounting until October of 1933, at least two years after the time when it should have accounted. It was its duty to file a true and accurate inventory, as executor, promptly after its appointment, and secure an appraisal of the assets of the estate with an equal degree of promptness. The inventory which was filed was not accurate. The Michigan avenue property was treated upon the books of the Grigg-Hanna Company as a partnership asset, and had been continuously so treated. Mr. Hanna advised the trust company in writing of this fact. The inventory, however, listed the vendee's interest in the land contract upon the Michigan avenue property as though the land were the individual holding of Mr. Hanna. As a matter of fact, the transaction was such that Mr. Hanna was an equitable mortgagee of the interest of Mr. Grigg in the Grigg-Hanna Company, and the inventory as filed should have reflected this fact, which was easily ascertainable. The Tireman avenue property was subject to an outstanding mortgage, upon which there was due and unpaid the sum

of $39,000. This mortgage was executed by Mr. Hanna. The inventory should have so stated. So far as an appraisal is concerned, there was none filed until the middle of 1932, after the agreement of settlement with Mr. Hanna had been entered into. The testimony would warrant the conclusion that the appraisal was made up to fit the agreement, and not the agreement in the light of a fair appraisal. It was the duty of the trust company to notify the heirs of the Hanna claim and to consult with them regarding the proposed settlement with Mr. Hanna before it was made. Neither of these things were done. It was the duty of the executor to account. It did not do so until twice cited to show cause by the probate court. It was the duty of the trust company to treat the heirs of the Grigg estate as the beneficiaries of any trust ought to be treated by the trustee. There was a conspicuous lack of sympathetic and fair-minded dealing in this regard. All of these matters indicate a negligence and improper handling of the affairs of the estate. The evidence, however, *does not show any personal profit to the trust company,* and therefore falls short of that clear and convincing showing of fraud which is necessary as a basis of recovery against it."

"The obligation immediately attaching upon the neglect of duty is an obligation to make compensation for the consequences." *Dornford* v. *Dornford,* 12 Ves. Jr. 127 (33 Eng. Rep. 49).

"A question was raised on the part of Lord Cadogan's executors, whether, as this was a mere personal default, productive of no benefit to his estate, his assets are liable to make compensation: but in *Scurfield* v. *Howes* (3 Bro. Ch. 90 [29 Eng. Rep. 425]) the trustee's estate had derived no benefit from the breach of trust; and in *Adair* v. *Shaw* (1 Sch. & Lef. [Irish Ch.] 243), Lord Redesdale says, 'It has been the constant habit of courts of equity to charge persons in the characters of trustees with the consequence of a breach of trust: and to charge

their representatives also; whether they derive benefit from the breach of trust, or not.'" *Montford* v. *Lord Cadogan,* 17 Ves. Jr. 485 (34 Eng. Rep. 188).

"The court does not inquire into the particular benefit that has been made; but fastens upon the party an obligation to make good the situation of the *cestui que trust.*" *Moons* v. *De Bernales,* 1 Russ. 301 (38 Eng. Rep. 117).

"The failure of an executor to perform his duty, which results in loss to the beneficiaries of the will of the testator, amounts to a *devastavit,* whether from fraud, conversion, negligence, or maladministration." *MacKenzie* v. *Union Guardian Trust Co., supra,* 588.

What is a *devastavit?* Bouvier defines it as "the mismanagement and waste by an executor, administrator, or other trustee, of the estate and effects trusted to him as such, by which a loss occurs." 1 Bouvier's Law Dictionary (Rawle's 3d Rev.), p. 860. And Corpus Juris defines it as "a failure to apply the funds as the law directs; a wasting of assets; a wasting of the estate—a misapplication of the assets." 18 C. J. p. 1031.

"Negligence on the part of an executor, administrator or trustee, may equally tend to the waste of the estate as the direct destruction or maladministration of the assets and render him guilty of a *devastavit.*" 1 Bouvier's Law Dictionary (Rawle's 3d Rev.), p. 860.

"The law requires from trustees good faith and due diligence, the want of which is punished by making them responsible for the losses which may be sustained by the property intrusted to them: when, therefore, a party has been guilty of a *devastavit,* he is required to make up the loss out of his own estate." 1 Bouvier's Law Dictionary (Rawle's 3d Rev.), p. 860.

"An executor, or other trustee, who mismanages, or puts the assets in jeopardy, by his insolvency, either existing or impending, should be prevented from further interfering with the estate." *Elmendorf* v. *Lansing,* 4 Johns. Ch. (N. Y.) 562.

"A trustee is liable for misconduct or breach of trust or negligence, as well as for money actually received. *Clarke* v. *Ormonde,* Jac. 108, 120 (37 Eng. Rep. 791). And if in these ways he injures the *cestui que trust,* he is liable, whether he himself gains by his misbehaviour or not. Lewin Trusts, 634; *Ex parte Shakeshaft in the matter of Kempson,* 3 Bro. Ch. 197, 198 (29 Eng. Rep. 487)." *Taylor* v. *Benham,* 5 How. (46 U. S.) 233, 275.

"A *devastavit* is a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the trust and confidence reposed in them, for which executors and administrators shall answer out of their own pockets, as far as they had, or might have had, assets of the deceased.

"Executors may be guilty of a *devastavit,* not only by a direct abuse by them, as by spending or consuming the effects of the deceased, but also by such acts of negligence and wrong administration as will disappoint creditors of their debts." 4 Bacon's Abridgment p. 100, title, "Executors and Administrators" (L).

Where an executor was negligent in his disregard of the duties imposed under the will, and he was negligent in his failure to take the usual and ordinary steps to protect the assets of the estate, the executor will be held liable. *Stong's Estate,* 160 Pa. 13 (28 Atl. 480).

The basis of liability of the Detroit Trust Company, as executor of the estate of W. Herbert Grigg, is not personal profit to it, but loss to the estate,—

not profit from fraud, but loss through negligence. We are constrained to hold the plaintiff established liability on the part of the Detroit Trust Company, and that part of the decree of the trial court dismissing the bill of complaint as to it will be reversed, with costs to plaintiff; and the case will be remanded for an accounting in accordance with the decree of the trial court, except that the amount of liability of the Detroit Trust Company will be determined upon such accounting in accordance with the opinion herein.

CHANDLER, J., concurred with POTTER, J.

NORTH, J. (*concurring in part*). Review of this record brings the conclusion that it does not establish fraud nor gross neglect of duty on the part of the Detroit Trust Company when acting as executor of the Grigg's estate, as is charged by plaintiff. This being true plaintiff cannot by her bill in equity go back of the probate orders which have disposed of the same issues that plaintiff now seeks to have readjudicated as to the Detroit Trust Company. Under such circumstances the orders of the probate court, so far as the trust company is concerned, are *res judicata* of the various controversies presented by plaintiff's bill of complaint.

"The orders of probate courts disposing of estates have the force and effect of judgments in courts of record, are *res judicata* of the matters therein disposed of, and therefore may not be collaterally attacked." *Chapin* v. *Chapin,* (syllabus) 229 Mich. 515.

In a comparatively recent case we had occasion to pass upon the finality of an order of the probate court approving the settlement of an infant's claim

against a tortfeasor. In that case, involving the rights of an infant, we held that since the probate court had jurisdiction of the matter its determination could not be challenged "except by appeal therefrom or by direct attack in equity for fraud, no other inquiry may be made into its sufficiency (citing cases)." *McMann* v. *General Accident Assurance Corp.*, 276 Mich. 108.

This record clearly discloses that the trial judge gave the controversy painstaking detailed consideration. His findings of fact and his interpretation of the law are in accord with the foregoing. I concur with Mr. Justice POTTER in so far as he writes for affirmance but not otherwise. On this record the decree entered in the circuit court should be affirmed.

WIEST, C. J., and BUTZEL, and BUSHNELL, JJ., concurred with NORTH, J.

BUSHNELL, J. (*concurring in part*). I concur in what Mr. Justice POTTER has said with respect to the liability of the defendants other than the Detroit Trust Company; but I cannot concur in his findings that plaintiff has established liability on the part of the trust company. He feels "constrained" to do so. I cannot reach the same conclusion without finding that the late Thomas T. Leete, former counsel for the executor of the estate of William H. Grigg, was guilty of "corrupt, fraudulent and criminal conduct." As stated in Mr. Justice POTTER's opinion in a quotation from *Egan* v. *Grece*, 79 Mich. 629, 639, when such charges—"are made against the dead, who have occupied positions of trust, and whose acts have been authorized and confirmed by a court of competent jurisdiction, the proof must be so clear

and convincing as to satisfy every reasonable mind."

We need not go outside the record for proof that Mr. Leete was a "very well known lawyer in the city of Detroit for a great many years and a member of one of the leading firms of the city, a lawyer of good repute, high standing and ability." The witness might have added that Mr. Leete's good reputation was also known to the bench and bar of the State, outside the community in which he lived.

The trust officer who testified stated that he had the advice of Mr. Leete; that the Hanna claim was discussed with him and that he acted upon Mr. Leete's advice in handling the affairs of the Grigg estate.

It is quite possible that, in 1932, during the darkest days of the depression, Mr. Leete realized that values had sunk to a very low depth and that the outlook was most discouraging; that what were formerly good assets had become serious liabilities; and that the release of the Grigg estate from its large obligations on the land contracts and the receipt of $15,000 in cash was most advantageous. We further note that the agreement with Hanna provided that the land contracts were to be returned to him. This may explain their disappearance.

Mr. Leete is not here to testify; he is dead and cannot defend his good name; but there is every reason for this court to be persuaded in its determination by the reputation that he built up over a lifetime. The trial judge might have been influenced in his findings by the justifiable presumption that Mr. Leete would not knowingly countenance a fraudulent act, and by the fact that he certainly was never known to have participated in one. Respect for the

administration of law demands that courts take notice of the good reputation of their officers, and justice cannot be had without insisting upon the preservation of the good name of our deceased attorneys and counselors unless proof to the contrary is "so clear and convincing as to satisfy every reasonable mind." *Egan* v. *Grece, supra.*

We said in *Baker* v. *Frischkorn,* 271 Mich. 485, 490:

"Fraud may not be lightly presumed. It must be clearly proved and established by satisfactory evidence and by facts which are inconsistent with an honest purpose. *Pierce* v. *Pierce,* 55 Mich. 629; *Graham* v. *Graham,* 184 Mich. 638; *Donnelly* v. *Lyons,* 173 Mich. 515."

I agree that the record "indicates a negligence and improper handling of the estate," and that the Detroit Trust Company's "administration of the estate was faulty almost in the extreme," but, as was said in *Sharrow* v. *McMichael,* 280 Mich. 114:

" 'Fraud cannot be lightly inferred and the burden of proof was upon plaintiffs. The circuit court was not convinced that plaintiffs established the fraud charged and our examination of the evidence leads us to the same conclusion. *Kirby* v. *Gibson Refrigerator Co.,* 274 Mich. 395, 401 (103 A. L. R. 1343).' "

I, therefore, concur in Mr. Justice POTTER's opinion, except in the finding of liability on the part of the Detroit Trust Company. The decree of the trial court should be affirmed, without modification.

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

FEAD, J., took no part in this decision.

DETROIT TRUST CO. *v.* STRUGGLES.

1. EQUITY — ADEQUACY OF REMEDY AT LAW — TROVER — REPLEVIN — CONSTRUCTIVE TRUST.

   Since neither the remedy of trover or replevin is available to recover new stock certificates for executor of estate of person who took stock certificates, indorsed them in blank and left them with broker as collateral for a third person's account and after death of plaintiff's testate broker caused new certificates to be issued in name of third person since plaintiff had no legal title thereto, suit was properly brought in equity for accounting of dividends and to determine ownership as equity has independent power to impose a constructive trust upon the traceable proceeds of converted property whenever it appears just and equitable to do so.

2. SAME — PLEDGES — CONVERSION — CONSTRUCTIVE TRUSTS — ACCOUNTING.

   If surrender of stock certificates by pledgee and causing new ones to be issued in name of third person, after death of party in whose name original certificates had been issued, constituted a conversion, the proceeds of such conversion were new stock certificates and not money, hence constructive trust and not an accounting is appropriate remedial device to grant relief to executor of estate of party who left original certificates with broker-pledgee.

3. EXECUTORS AND ADMINISTRATORS — CONVERTED STOCK CERTIFICATES — EQUITY.

   Executor of estate of owner of stock certificates, which were left with broker as collateral for a third person's account, should not be subjected to uncertainties of action for damages at law for conversion, effected by surrender of old certificates and causing new ones to be issued in name of third person, where new certificates of the allegedly converted property are within reach of equity.

4. EQUITY—CONCURRENT JURISDICTION—REMEDY AT LAW.

A court of equity has concurrent jurisdiction where a legal remedy is not available, the equitable remedy is more efficient or the procedure in equity affords advantages which are not attainable at law.

5. CORPORATIONS—OWNERSHIP OF PLEDGED STOCK.

In suit by executor of estate of owner of original shares of stock left with broker defendant as collateral for account of third person, also a defendant, if broker has a lien upon stock issued to third party upon surrender of original stock after death of its owner and with knowledge thereof, the court can still determine who is rightful owner as between plaintiff and such third party.

6. EQUITY—DECISIONS OF QUESTIONS OF FACT BY JURY.

Where jurisdiction of equity is clear there is no obligation to send questions of fact to jury and if it be thought expedient to do so, it should be by sending an issue to a jury, and not by dismissing the bill upon the hearing.

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted January 5, 1938. (Docket No. 32, Calendar No. 39,793.) Decided February 24, 1938.

Bill by Detroit Trust Company, a Michigan corporation, executor of the estate of John L. Liggett, deceased, against Thomas J. Struggles and E. A. Pierce Company, a copartnership, to determine title to stock, for an accounting, an injunction and other relief. Bill dismissed. Plaintiff appeals. Reversed and remanded.

Goodenough, Voorhies, Long & Ryan, for plaintiff.

John J. Sloan (*Charles P. Hornauer,* of counsel), for defendant Struggles.

Lewis & Watkins (*William F. Fratcher,* of counsel), for defendant E. A. Pierce Company.

BUSHNELL, J. According to the allegations of the bill of complaint of plaintiff, the executor of the estate of John L. Liggett, of Detroit, several months before his death, Liggett and his nephew, Thorpe J. Struggles, of Cleveland, brought to the Detroit office of defendant E. A. Pierce & Company, a certificate representing 500 shares of class A stock of Devoe & Reynolds Co., Inc., then standing on the books of the company in the name of Liggett. Struggles, a customer of E. A. Pierce & Company, had an account at their Detroit office, where he was purchasing stocks on margin. It is claimed that E. A. Pierce & Company required additional collateral of Struggles and the Devoe & Reynolds stock was loaned to him by Liggett for the purpose of protecting his account. The stock certificates were indorsed in blank by Liggett and delivered to E. A. Pierce & Company, with a letter signed by him, which read as follows:

"With respect to certificate No. 7905/9 representing 500 shares of Devoe & Reynolds A stock standing in my name and delivered to you through Mr. J. T. Struggles, I hereby authorize you to dispose of same or the proceeds thereof and any income therefrom in any manner he may direct, including a credit therefor to his personal account with you, and I hereby approve and confirm any accounting respecting same made to the said T. J. Struggles and accept the same to your full discharge."

Liggett continued to receive dividends on the Devoe & Reynolds stock until the time of his death, February 15, 1937, shortly after which date plaintiff claims that E. A. Pierce & Company, with the full knowledge of the death of Liggett, caused the certificates to be surrendered and new ones issued in lieu thereof in the name of defendant Struggles. Plaintiff charges that E. A. Pierce & Company's

right to retain the stock ceased upon the death of Liggett except in so far as it was then necessary to satisfy any debt owed by Struggles to E. A. Pierce & Company over and above other collateral held by them as the separate property of Struggles. Plaintiff says—"that at such time and at present the status of the account with Thorpe J. Struggles was such that said E. A. Pierce & Company had no lien thereon."

Learning that Struggles claimed to be the absolute owner of the stock and upon E. A. Pierce & Company's refusal to deliver the new certificates to plaintiff, it began action in the chancery court for the purpose of determining the rightful ownership thereof, for an accounting of the dividends paid, to restrain E. A. Pierce & Company from parting with the possession of the certificates until further order of the court, and, if the court should determine that plaintiff was either the owner or entitled to possession thereof, to compel an indorsement of the new certificates.

Defendants filed separate motions to dismiss but, upon similar grounds, namely that the bill of complaint upon its face did not state a cause of action cognizable in a court of equity and that plaintiff had an adequate remedy at law. Plaintiff appeals from an order dismissing its bill of complaint.

It is beside the point to discuss, as have the parties in their briefs, the adequacy of the remedies at law for the recovery of the new stock certificates issued in the name of Struggles. There could be no remedy at law, either in trover or replevin, for these certificates or their value, since plaintiff had no legal title thereto. Equity, however, possesses independent power to impose a constructive trust upon the traceable proceeds of converted property whenever it ap-

pears just and equitable to do so. *Warren* v. *Holbrook,* 95 Mich. 185 (35 Am. St. Rep. 554), and *Fur & Wool Trading Co., Ltd.,* v. *George I. Fox, Inc.,* 245 N. Y. 215 (156 N. E. 670, 58 A. L. R. 181). See, also, 35 Mich. Law Review, p. 798 (March, 1937).

In *Fur & Wool Trading Co., Ltd.,* v. *George I. Fox, Inc., supra,* it was alleged that goods belonging to plaintiff were taken from its possession by force and that the defendant received them, with knowledge of the facts, sold them at a large profit but at a price unknown to plaintiff, and has refused to account for the proceeds. The New York court, on appeal, reversed an order dismissing plaintiff's bill of complaint, quoting the following from *Lightfoot* v. *Davis,* 198 N. Y. 261 (91 N. E. 582, 29 L. R. A. [N. S.] 119, 139 Am. St. Rep. 817, 19 Ann. Cas. 747), where the action was with respect to bonds that were stolen and sold:

" 'The method by which equity proceeds in all these cases is to turn the wrongdoer into a trustee. If it may do so for the purpose of subjecting identified funds to the claim of the defrauded party, I do not see why it should not pursue the same method wherever it is necessary to protect the rights of the original owner. In the case of an actual trustee the *cestui que trust* may not only reclaim the trust property if he is able to trace it, but, failing to trace it, he is entitled to an accounting and personal judgment against the trustee.' "

We need not decide whether under the circumstances of the *Fur & Wool Trading Company Case, supra,* this court would grant relief by way of an accounting for the cash proceeds of the converted property. In the present case, assuming that the surrender and re-issue of the stock in the name of Struggles constituted a conversion, the proceeds of

such conversion were new stock certificates and not money and, therefore, a constructive trust and not an accounting is the appropriate remedial device to grant the relief prayed for in the bill of complaint.

Plaintiff should not be subjected to the uncertainties of an action for damages at law for the conversion of the old certificates (replevin being of no avail since it appears from the bill that the old certificates were surrendered and presumably cancelled and destroyed), where the new certificates, which are the proceeds of the allegedly converted property, are within the reach of equity.

In *Powers* v. *Fisher,* 279 Mich. 442, we said:

"Where a legal remedy is not available and the equitable remedy is more efficient, or where the procedure in equity affords advantages which are not attainable at law, the court of equity has concurrent jurisdiction. 13 Halsbury's Laws of England, p. 10.

"The fact that there is a legal remedy is not the criterion. That legal remedy, both in respect to its final relief and its modes of obtaining the relief, must be as effectual as the remedy which equity would confer under the circumstances or else the concurrent jurisdiction attaches."

Plaintiff's bill, while not one for discovery, nevertheless seeks relief in the nature of discovery. If the trial court should determine that Struggles is the rightful owner of the stock and entitled to possession thereof, that is the end of the inquiry. If E. A. Pierce & Company establishes a lien upon the stock, the court can still determine who is the rightful owner as between the estate and Struggles.

Defendants' argument regarding their right to trial by jury is answered by the following from *Chamberlain* v. *Eddy,* 154 Mich. 593, 604:

"Jurisdiction. It is contended that the bill should be dismissed, for the reason that there was an adequate remedy at law, and it is said that the case is one peculiarly adapted to trial by jury. We are of the opinion that equity has jurisdiction in this case, *first,* to declare that the property received was a trust fund, and to follow the fund and enforce payment against property purchased by it; *second,* to restrain by injunction the further disposition of the unexpended portion of the property. We are not impressed with the importance of a jury to decide any question in the case. A chancellor can do it as well. Where the jurisdiction of equity is clear, as in this case, there is no obligation to send questions of fact to the jury, and if it be thought expedient to do so, it should be by sending an issue to a jury, and not by dismissing the bill upon the hearing."

Under the circumstances of the case, the relief sought is peculiarly within the province of a court of equity. The order of the circuit court dismissing plaintiff's bill of complaint is therefore vacated and the cause remanded for further proceedings not inconsistent herewith. Costs to appellant.

WIEST, C. J., and BUTZEL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

BROUWERS *v.* ALLIED PAPER MILLS.

1. APPEAL AND ERROR—EQUITY—EVIDENCE.

On appeal from decree dismissing plaintiff's bill to cancel certificate of stock, to require reissue of half of the number of shares to her and for accounting for dividends paid defendant pledgee after he had caused stock owned by plaintiff and her late husband as tenants in common to be transferred to pledgee, plaintiff's apparent attitude as a witness and the contradiction in testimony given by her which was evidently discredited by judge *held,* to justify construction of her testimony in the light most unfavorable to her.

2. ESTOPPEL—INDORSEMENT ON CERTIFICATE OF STOCK—PLEDGES—EVIDENCE.

In suit to cancel certificate of stock and require reissue of half of the number of shares to plaintiff and for accounting for dividends paid pledgee of original stock, owned by plaintiff and her late husband as tenants in common and pledged by latter as security for his personal note which was never paid, evidence which showed that, notwithstanding plaintiff did not herself indorse original stock her name had been placed thereon beneath that of her husband's and that before original stock was caused to be transferred and reissued in name of pledgee, plaintiff knew the certificate purported to be indorsed by her and that pledgee was relying upon it as *bona fide* collateral over period of years after she had signed one of the renewal notes *held,* to estop her from asserting she was not bound by the indorsement.

Appeal from Kalamazoo; Weimer (George V.), J. Submitted January 13, 1938. (Docket No. 18, Calendar No. 39,780.) Decided April 4, 1938.

Bill by Dean Brouwers against Allied Paper Mills, a Michigan corporation, Holland State Bank and

William J. Westveer to cancel a stock certificate, for an injunction, accounting and other relief. Bill dismissed. Plaintiff appeals. Affirmed.

Annis & Cooper, for plaintiff.

Diekema, Cross & Ten Cate, for defendants Holland State Bank and Westveer.

NORTH, J. Plaintiff filed a bill of complaint asking that stock certificate No. 2,147 for 200 shares of the Allied Paper Mills, now in the name of William Westveer as one of the trustees for the segregated assets of the First State Bank of Holland, Michigan, be canceled and that a certificate for 100 shares of this stock be issued to her. She also asks for an accounting for dividends paid to the trustees. The defendant Holland State Bank has succeeded to and possesses some of the assets formerly held by the First State Bank of Holland. A decree was entered in the circuit court dismissing the bill of complaint, and plaintiff has appealed.

In August, 1926, the Wolverine Furniture Company was indebted on promissory notes to the First State Bank in the amount of $9,000. This indebtedness was canceled by the payment of $1,000 in cash and by each of the four indorsers on the furniture company notes giving to the bank his personal note for $2,000. Sikke Brouwers, one of the indorsers and husband of plaintiff, executed his note for $2,000 and delivered it to the bank September 14, 1926. March 8, 1927, $250 was paid on this note, and for the balance of the obligation a note for $1,750 was executed by plaintiff and her son-in-law, Mr. Eli Cross. Thereafter until August 26, 1930, renewal notes were signed every six months by Sikke Brouwers. Al-

though plaintiff at the trial denied remembering her part in the execution of the $1,750 note, still her testimony is not at all convincing. Portions of it indicate she knew all about the transaction. But in other portions she denies any knowledge concerning it. This note, presumably having been returned to either Mr. or Mrs. Brouwers, was not produced at the hearing.

When the $2,000 note was given to the bank by Sikke Brouwers he turned over as collateral a stock certificate issued January 6, 1922, to S. and D. Brouwers, representing 200 shares in the Allied Paper Mills. This stock was issued prior to the enactment of our present statutory provision governing the character of ownership of stock issued to a husband and wife (3 Comp. Laws 1929, § 13071); and counsel concede that plaintiff and her husband held this stock as tenants in common. When the certificate was delivered to the bank as collateral it bore the signature of Sikke Brouwers and under his signature appeared the name "D. Brouwer." The testimony does not show who placed "D. Brouwer" on the certificate. Plaintiff denies having signed it. So far as appears from the testimony the bank officers did not know who wrote the signature "D. Brouwer" upon the certificate. It came to the bank as collateral to Sikke Brouwers' note in the regular course of business and the genuineness of the indorsement was not questioned. Neither Mr. nor Mrs. Brouwers had previously done business with the bank and hence the signature "D. Brouwer" was not recognized at the bank as being or not being that of plaintiff. In passing upon this phase of the case the trial judge said:

"Plaintiff's denial of the indorsement of the certificate, exhibit A, supported as it is by other ex-

hibits containing her undoubted signatures, satisfies me that her apparent signature on exhibit A is not genuine. But that is not the whole story. She seeks equitable relief and must satisfy all the applicable maxims and rules. Is she estopped or otherwise precluded from receiving the relief sought?"

Mrs. Brouwers testified that she and her husband held stock jointly in the Wolverine Furniture Company and that her husband "looked after the interests" of himself and plaintiff "mostly." Previous to the transaction here in suit Mr. and Mrs. Brouwers had owned two other certificates of stock in the Allied Paper Mills, No. 670 for 126 shares and No. 668 for 200 shares. The first of these two certificates was sold to the son-in-law and was indorsed by both plaintiff and her husband; but plaintiff seems to have had no information concerning the ownership of the other certificate and she did not indorse it at the time it was sold.

The testimony is uncertain as to when plaintiff first learned about the pledge of the stock here in suit, but she sets the time as either in 1927 or 1928. She testified that she knew of it when the $250 was paid on the note in 1927. That was at the time that the first renewal note was executed by plaintiff and her son-in-law. However, plaintiff asserts that the first time she knew that her purported signature was on the certificate was when she went to the bank after her husband's death. This was in 1933 and she asked at the bank that she be permitted to see the certificate. She testified that she then told the bank officer, Mr. Wickers, that the indorsement on the certificate "D. Brouwer" was not her signature. Mr. Wickers testified that he had no recollection of plaintiff having so stated. In 1936 plaintiff first learned that the stock in question had been trans-

ferred to William Westveer. Notwithstanding plaintiff admits knowledge of the challenged indorsement in 1933, she took no action until this suit was started in January, 1937. In this connection she testified that she did not think the bank could sell this stock because "I didn't sign it."

The circuit judge in granting a decree dismissing plaintiff's bill of complaint planted decision on the ground that plaintiff was estopped from now asserting that she is not bound by the indorsement "D. Brouwer." Plaintiff's apparent attitude as a witness and the contradiction in testimony given by her seriously challenge her integrity. The trial judge evidently discredited her testimony. Under such circumstances this court on appeal is fully justified in construing her testimony in the light most unfavorable to her. With this in mind we quote a portion of plaintiff's testimony:

"*Q.* And you knew of his (plaintiff's husband) having stock ownership in the Wolverine Furniture Company of Zeeland, didn't you?

"*A.* I do.

"*Q.* Did you hold stock in there too?

"*A.* Yes. It was jointly, I guess, so far as I know.

"*Q.* But he handled these matters relating to his affairs and yours, all your interests or joint interests in that institution, didn't he?

"*A.* Well, I don't know what to say as to that.

* * *

"*Q.* You didn't have anything to do with the management of your interests or his in connection with that company, did you?

"*A.* Not at all.

"*Q.* You left that to him, didn't you?

"*A.* My husband and I always got along well together. I considered him honest. He always dealt fairly with me and other people.

"*Q.* You don't know of anything irregular or dishonest in the handling of his matters with the First State Bank, do you? * * *

"*A.* No, I don't. * * *

"*Q.* You knew at the time of the settlement that was made with the First State Bank when they took over Brouwers' note for $2,000 with this stock as collateral, didn't you?

"*A.* No, I didn't.

"*Q.* Didn't he ever tell you * * * about that note? * * *

"*A.* Not at the time. He did later during his lifetime.

"*Q.* He told you that he had left this certificate with the bank as collateral to that note, didn't he?

"*A.* I didn't never get that out of his mouth.

"*Q.* How did you learn that then?

"*A.* At the time that * * * Mr. Brouwers had $250 on deposit in the Zeeland State Bank, and * * * the directors of the Holland State Bank held a meeting on a Monday night, and they found out, I guess, that he had collateral in that bank in Zeeland, so they thought that they should have more security and then, of course, that came out.

"*Q.* And that was the first time that you knew that this certificate * * * was up as collateral with that note?

"*A.* Positively. * * *

"*Q.* And you knew that the reason why you didn't have this particular certificate in your possession was because that was up with the bank continuously as security, didn't you?

"*A.* Yes, sir.

"*Q.* And you never had any objection to that stock being at the bank as collateral, did you?

"*A.* No, I didn't because I knew it was my husband's doings. * * * I went (after my husband's death) to the bank and I had notice and I told them that I was very willing, but I was unable to pay. I knew at that time, that they would hold the collateral

there until the note was paid. I had no objection to that. If I had the money it would have been paid. I didn't have the money to pay it. * * *

"*Q.* And Mrs. Eli Cross (plaintiff's daughter) knew about this matter of this collateral being up with the bank at the time that her husband and you signed that renewal note that was dated February 28, 1927, didn't she?

"*A.* Yes."

We can arrive at no other conclusion than that at the time plaintiff and her son-in-law gave the bank their note of $1,750 in lieu of her husband's $2,000 note, on which the $250 was paid, she knew the stock was pledged as collateral to this note. Unless she was then bound by the pledge of this stock the $1,750 note given by herself and her son-in-law was evidently without proper collateral so far as either of them were concerned. It is a serious tax upon credulity to believe that any of the parties to the transaction had any other thought or intention at that time than that the whole 200 shares represented by this certificate was pledged to secure payment of plaintiff's $1,750 note. As before noted, the certificate purported to be indorsed by plaintiff. The bank certainly was justified in holding it as her collateral as well as that of her husband. The bank continued to carry the loan. Repeated renewals over a period of years followed without change in the collateral. It was still held by the bank at the time Mr. Brouwers died. Notwithstanding her testimony to the contrary, we think the record discloses that Mrs. Brouwers knew, at least from the time she signed the $1,750 note, that the bank was relying upon the indorsed certificate of stock as *bona fide* collateral during the period of years through which it carried this loan. We are in full accord with the finding of the circuit judge who said:

"It is too much to ask this court to find affirmatively on this record that plaintiff was not fully aware of the entire situation in 1926 or 1927, or that this stock was pledged by her husband without her knowledge."

The decree entered in the circuit court is affirmed, with costs to appellees.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and MCALLISTER, JJ., concurred.

In re RICHARDS' ESTATE.

RICHARDS *v.* STONE.

1. PERPETUITIES—STATUTE AGAINST SUSPENDING POWER OF ALIENATION RELATES SOLELY TO REAL PROPERTY.

   The statute forbidding suspension of power of alienation beyond two lives in being relates solely to real property (3 Comp. Laws 1929, § 12935).

2. TRUSTS—REALTY AND PERSONALTY.

   Testamentary trust making same disposition of realty and personalty is void in its entirety where void as to realty.

3. PERPETUITIES—PURPOSE OF RULE AGAINST PERPETUITIES AND STATUTES ON RESTRAINT OF ALIENATION.

   The rule against perpetuities and statutes prohibiting suspension of the absolute power of alienation for more than two lives in being at the creation of the estate are for the purpose of defeating testator's intention, not to determine it (3 Comp. Laws 1929, §§ 12934, 12935).

4. WILLS—INVALID TRUSTS—RESTRAINTS ON ALIENATION.
Testamentary trust which included realty as well as personalty, based upon a term of years rather than "during continuance of two lives in being" and which contained no provisions for termination of the trust prior to the time so fixed, contravenes statute prohibiting suspension of absolute power of alienation and must fail (3 Comp. Laws 1929, §§ 12934, 12935).

5. SAME—SUSPENSION OF POWER OF ALIENATION.
Power of testamentary trustees to sell and dispose of the property as testator himself could have done if living suspends, in law, the power of alienation (3 Comp. Laws 1929, §§ 12934, 12935).

6. SAME—SEPARATION OF VALID FROM INVALID PROVISIONS.
Bequest to person who was not an heir of testator which was entirely separate from disposition made to testator's three children *held*, valid, where it could be carried out entirely independent of the other provisions.

7. SAME—BEQUESTS TO TESTATOR'S CHILDREN—INVALIDATION OF BEQUESTS.
Under petition for construction of will containing outright bequest to testator's daughter of one-third of his property and setting up invalid trust as to remaining two-thirds for testator's sons, bequest to daughter *held*, invalid since it was testator's intention to give her one-third of his property only, not one-third plus a third of portion which must pass as intestate property.

8. SAME—COURT CANNOT MAKE NEW WILLS.
Courts cannot make new wills for testators who have failed to make valid wills for themselves, rather the property should pass by law.

9. SAME—INTENT.
It is the duty of courts to effectuate the intention of the testator as to the disposition of his property, in so far as it is legally possible.

10. COSTS—PARTIAL SUCCESS ON APPEAL.
No costs are awarded where appellants in equity prevail only in part on appeal.

Appeal from Hillsdale; Taylor (Mark D.), J. Submitted January 6, 1938. (Docket No. 52, Calendar No. 39,830.) Decided April 4, 1938.

In the matter of the estate of Norris E. Richards, deceased. On petition of Carleton N. Richards for construction of will and to have certain portions of will declared invalid. Order sustaining will. Petitioner appealed to circuit court. Judgment declaring will invalid. Executors of will of Norris E. Richards, deceased, appeal. Modified and affirmed.

Fildew & De Gree, for petitioner.

Merton Fitzpatrick and *Kenneth G. Prettie,* for executors.

NORTH, J. This is a petition for the construction of a will admitted to probate in the estate of Norris E. Richards, deceased, who died July 14, 1931, and left surviving him a daughter and two sons as his heirs at law. Petitioner contends that the trust provision in the will is void in that it violates the statute prohibiting restraints on alienation. The probate court held the will and trust valid, but on appeal to the circuit court the trust provision was held void on the ground above noted. It was also held that the invalid trust constituted an integral part of the will, that it could not be separated therefrom, and hence the entire will was void. The executors have appealed.

The pertinent provisions of the will are:

"3. I hereby give, devise and bequeath to Willard G. Stone the sum of $1,000.

"4. I hereby give, devise and bequeath to Myrtie B. Stone one-third of my estate absolutely.

"5. It is my desire that two-thirds of my property be placed in trust for the benefit of my two sons, and by this will I hereby create a trust of two-thirds of all my property, both real and personal of which I may die possessed.

"6. I hereby nominate and appoint Willard G. Stone and Myrtie B. Stone, or the survivor of the two, or their successors, trustees of two-thirds of my said estate, giving them and each of them full power to sell, assign, transfer, reinvest and otherwise hold and dispose of my property the same as I could do if living.

"7. I hereby give, devise and bequeath to Willard G. Stone and Myrtie B. Stone or the survivor of the two, or the successor, two-thirds of all my property, real, personal and mixed, to be by them disposed of as hereafter set forth.

"8. It is my will that said trustees shall use their own judgment and discretion in handling said trust estate.

"9. I further direct my said trustees shall pay one-half of the net income from two-thirds of my estate to each of my said sons, so long as my said sons shall live, and in no case shall any of the principal handled by my trustees be given to any of my sons.

"10. In case of death of one or more of my said sons, then that son's share shall go to his family, this paragraph relates solely to the net income of said estate, distributed between my sons.

"11. It is my will that said above trust created shall cease at the end of 20 years, and at that time two-thirds of my entire estate is hereby given to my sons' children, share and share alike, the children of any deceased child of my sons shall take the same share that the parent would have taken if living.

"12. I hereby appoint Willard G. Stone and Myrtie B. Stone, of Hillsdale, Michigan, executor and executrix of this, my last will and testament."

As disclosed by the inventory the estate consists of real property of the value of $800 and personal property of the value of $56,054. Norris C. Richards, a trust beneficiary under the will and a son of

the testator, died May 19, 1935. His son and an heir at law, Carlton N. Richards, filed the petition for the construction of the will, praying that the testamentary trust be declared invalid. The validity of the trust depends upon whether or not it violates the following statutory provisions:

"Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter; such power of alienation is suspended when there are no persons in being, by whom an absolute fee in possession can be conveyed.

"The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate, except in the single case mentioned in the next section." 3 Comp. Laws 1929, §§ 12934, 12935.

The exception just above referred to is not material to the case at bar. Although the above sections are applicable only to real property (*Michigan Trust Co.* v. *Baker,* 226 Mich. 72), they are vital to this trust because both realty and personalty are included in the trust estate. *Gardner* v. *City National Bank & Trust Co.,* 267 Mich. 270. Paragraph 11 of the will provides that the "trust created shall cease at the end of 20 years." There is no provision for termination of the trust prior to the time thus fixed. Consequently the trust is for a fixed term of years rather than for the period of two lives in being as required by the statute.

"The rule against perpetuities is not a rule of construction, but a peremptory demand of law. It is not a test to determine intention,—its object is to defeat intention (citing cases). The same may be said of the statutes, 3 Comp. Laws 1929, §§ 12934, 12935, prohibiting the suspension of the absolute

power of alienation for more than two lives in being at the creation of the estate." *Gardner* v. *City National Bank & Trust Co., supra,* 286.

The trust in question being based upon a term of years rather than "during the continuance of two lives in being" contravenes the statute and necessarily must fail. *Farrand* v. *Petit,* 84 Mich. 671; *State* v. *Holmes,* 115 Mich. 456; *Otis* v. *Arntz,* 198 Mich. 196; *Burke* v. *Central Trust Co.,* 258 Mich. 588.

Appellants contend that since the trustees have the power to sell and dispose of the property as the testator himself could have done if living, there is no restraint on alienation and, therefore, no violation of the statute. And appellants assert this power of sale amounted to an equitable conversion which would turn the realty into personalty and, therefore, the rule against perpetuities should be applied. Neither of these contentions can be sustained under our prior holdings. *Palms* v. *Palms,* 68 Mich. 355; *Grand Rapids Trust Co.* v. *Herbst,* 220 Mich. 321; *Allen* v. *Merrill,* 223 Mich. 467; *Burke* v. *Central Trust Co., supra; Gardner* v. *City National Bank & Trust Co., supra.*

It is also contended by appellants that since only $800 of the trust estate is realty and a much larger proportion is personalty, the two should be separated and the trust held good as to the latter since it does not violate the rule against perpetuities. The fifth clause of the will provides the trust is to consist of "both real and personal (property) of which I may die possessed." The testator made no attempt to discriminate between the two classes of property but instead expressed a definite intention to bulk them together and created a trust applicable to both. The trust expressed in the will cannot be enforced because it is in violation of law; and the

court has no right to establish a trust of a different character and by so doing dispose of testator's property in a manner contrary to his desire.

"If the residuary trust created by the will is void as to the real estate it is void in its entirety. The real estate of the testator as well as his personal property were placed in the residuary trust. It is all made subject to the same disposition. The testator made no distinction between the control and disposition of his real estate and the control and disposition of his personal property, so far as such trust is concerned." *Gardner* v. *City National Bank & Trust Co., supra,* 286.

See, also, *Palms* v. *Palms, supra; Burke* v. *Central Trust Co., supra.*

Section 3 of the will provides for a bequest to Willard G. Stone of $1,000, and section 4 devises and bequeaths to Myrtie B. Stone one-third of testator's estate. The trial judge held the entire will void. He based this conclusion upon the ground that the testamentary trust constituted such an integral part of the disposition made of the testator's estate that it could not be separated from the other provisions of the will without destroying the will in its entirety.

We are not in accord with that portion of the trial court's holding which invalidates the bequest to Willard G. Stone. This part of the will plainly expresses a definite intention of the testator and can be carried out entirely independent of the other provisions of the will. *Dean* v. *Mumford,* 102 Mich. 510; *Grand Rapids Trust Co.* v. *Herbst, supra.*

Notwithstanding the bequest to Willard G. Stone is sustained, that to Myrtie B. Stone must fail. The testator intended she should receive one-third of the estate after the bequest to Willard G. Stone was

paid. In *Gardner* v. *City National Bank & Trust Co., supra,* 293, we said:

"His (testator's) property ought not to be made to pass in a manner he never intended it should pass, by a will made by the court and not by him. Rather it should pass by law."

It is the duty of courts to effectuate the intention of the testator as to the disposition of his property, in so far as it is legally possible. In the instant case Myrtie B. Stone is one of testator's three children. If, except as hereinbefore indicated, the Richards' estate is distributed in the same manner as though it were an intestate estate, Myrtie B. Stone, one of the three children of deceased, will receive one-third of his estate. Such a division is clearly in accord with the intention of deceased, rather than that one-third of his property should pass to Myrtie B. Stone and also one-third of the property included in the invalid trust. For this reason the provision of section 4 of the will as to Myrtie B. Stone must fail with the trust.

The order of the trial court is modified in accordance with this opinion and the case remanded for further proceedings therein. Appellants having prevailed in part only, no costs are awarded.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and MCALLISTER, JJ., concurred.

WERONKA *v.* WERONKA.

1. DIVORCE—EXTREME CRUELTY—EVIDENCE.
   Evidence in husband's suit for divorce on ground of extreme cruelty *held*, sufficient to justify decree for plaintiff.

2. SAME—COSTS.
   No costs are awarded husband though wife is unsuccessful on her appeal from decree of divorce.

Appeal from Kent; Perkins (Willis B.), J. Submitted January 14, 1938. (Docket No. 74, Calendar No. 39,797.) Decided April 4, 1938.

Bill by Michael Weronka against Walentyna Weronka for an absolute divorce on grounds of extreme cruelty. Decree for plaintiff. Defendant appeals. Affirmed.

Abner Dilley, for plaintiff.

Sigmund S. Zamierowski, for defendant.

NORTH, J. In this suit for divorce brought by plaintiff against his wife, a decree from the bonds of matrimony was granted on the ground of extreme cruelty. The defendant has appealed. She asserts that the charges made against her were not established by the testimony and that plaintiff was not in court with clean hands. She asks that a decree be entered in this court dismissing the bill of complaint.

These parties were married in January, 1933. Their separation occurred shortly before the husband filed his bill of complaint in February, 1937. Plaintiff had been previously married and his for-

mer wife had died. Defendant had been married on three previous occasions. At least two of her marriages had resulted in divorce. She has two adult sons by her previous marriages, and plaintiff also has an adult son born of his former marriage. No children were born of this marriage. At the time of the trial plaintiff was 46 years of age and defendant 50.

In support of the charges made in the bill of complaint the husband and his witnesses gave testimony tending to show that defendant had a bad temper and was quarrelsome, that she called her husband opprobrious names, falsely accused him of drunkenness and of immoral relations with other women, that she assaulted him, told him and others that she did not care for him, and that after about six months following the marriage she refused to cohabit with plaintiff.

In behalf of defendant there was testimony tending to deny that offered by plaintiff and his witnesses and also tending to show that plaintiff at times became intoxicated and that he improperly consorted with another woman who was named in the case. Defendant denied the charge that she refused to cohabit with plaintiff except to the extent necessitated by impaired health and as advised by her physician.

Further details of the charges of the respective parties and the testimony offered by them would not be helpful. The circuit judge had the advantage of seeing and hearing the parties and their witnesses. The testimony in behalf of each party in a large measure is directly contradicted by testimony offered in behalf of the opposite party. After having reviewed the record carefully we are of the opinion that the decree of divorce granted by the circuit

judge, who necessarily had to pass upon the credibility of the witnesses, is justified by the testimony. The only relief asked in appellant's brief is "that the decree of the trial court be reversed and the bill of complaint dismissed." As just above indicated, we are unable to find that the record on this appeal is such as entitles defendant to a reversal of the decree entered in the circuit. The decree is affirmed, but without costs.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and MCALLISTER, JJ., concurred.

CONTINENTAL LIVE STOCK CO. *v.* KING.

1. BANKRUPTCY—DISCHARGE—CONVERSION—WILFUL AND MALICIOUS INJURIES.

A wilful and malicious injury, as that term is used in the bankruptcy act, does not follow as of course from every act of conversion as there may be an honest but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed and in such cases a discharge in bankruptcy will prevail as against a showing of conversion without aggravated features (42 Stat. at L. p. 354 [11 USCA, § 35]).

2. ANIMALS—BREEDING CONTRACTS—CONVERSION—INTENT—BANKRUPTCY.

In action tried without a jury by company engaged in business of placing hogs with farmers for breeding purposes under conditional sales agreements whereby seller was to obtain from the increase two hogs weighing at least 200 pounds for each hog placed, record *held,* to justify finding of circuit judge that after plaintiff had obtained 10 of the 20 hogs to which it was entitled conversion by defendant of other 10 was not wilful and malicious, for which he would be liable after discharge in bankruptcy, where remaining hogs became diseased, were sold in several lots over a period of a month and course of dealing indicates defendant acted in good faith although, due to other losses, he thereafter filed a voluntary petition in bankruptcy (42 Stat. at L. p. 354 [11 USCA, § 35]).

Appeal from Lenawee; Rathbun (George A.), J. Submitted January 12, 1938. (Docket No. 121, Calendar No. 39,776.) Decided April 4, 1938.

Action by Continental Live Stock Company, a copartnership, against Norman King for conversion of hogs. Judgment for defendant. Plaintiff appeals. Affirmed.

Alexander & Baldwin, for plaintiff.

Richard F. Roe, for defendant.

NORTH, J. Plaintiff sued to recover $250 for the conversion of 10 hogs. The defense set up was a discharge in bankruptcy. There was judgment for defendant and plaintiff appeals.

The Continental Live Stock Company was engaged in the business of placing hogs with farmers for breeding purposes. The farmer signed a conditional sales agreement under the terms of which he was required to feed and care for the hogs, and from the increase plaintiff company had the right to select

two hogs weighing at least 200 pounds for each hog placed with the farmer.

On December 13, 1933, defendant executed one of these conditional sales agreements and plaintiff delivered to him 10 sows. Defendant fed and cared for these sows and their increase, and a year later (December, 1934) plaintiff called for the hogs to which it was entitled under the contract. Only 10 were found to be the required 200 pounds in weight. Those 10 were accepted and defendant was to keep the rest until they reached the required weight. The following month defendant sold all of the hogs he had on hand.

Later defendant was evicted from the farm on which he was living, and he also lost practically all of his farm equipment through a chattel mortgage foreclosure. Thereafter he filed a voluntary petition in bankruptcy, in which the claim of plaintiff was scheduled; and in September, 1935, he was discharged in bankruptcy. This discharge was set up as a defense to the present action. Plaintiff however contends that the sale of the hogs without its knowledge and consent constituted a wilful and malicious injury within the following provision of the bankruptcy law:

"Debts not affected by a discharge. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * are liabilities for * * * wilful and malicious injuries to the person or property of another." 42 Stat. at L. p. 354 (11 USCA, § 35).

To substantiate its claim that defendant took its property intentionally, wilfully and maliciously the plaintiff calls attention to the following provision of the contract:

"The animal or animals * * * and the farrow, whether first, second or third farrow, shall remain the property of the first party (plaintiff) until said hog or hogs, as the case may be, are delivered to first party, and at the time of delivery the title to said animal or animals shall pass to second party and this contract shall be terminated."

That defendant knew of this contract provision is shown by the testimony of plaintiff's manager, Mr. Brackin, who visited defendant's farm on July 18th at which time he learned that defendant on March 1st had sold 15 pigs raised from sows furnished by plaintiff without first obtaining permission. At that time Mr. Brackin remonstrated with defendant. Later when vaccination reports were sent in to plaintiff company it was discovered that more pigs were missing and plaintiff wrote the following letter to Mr. King:

"We received your vaccination certificate for the pigs, but undoubtedly you have sold some pigs from the sows.

"Please do not sell any more of these pigs without communication with us."

Mr. King on cross-examination admitted he knew the pigs were the property of plaintiff and that he sold them without permission, except as hereinafter indicated. He gave testimony to the following circumstances which he claims justified him in selling the hogs and disproves plaintiff's charge of wilful and malicious misconduct. About three weeks after delivery of the first 10 hogs to plaintiff, Mr. Brackin called at defendant's farm to inspect the balance of the hogs. Mr. King testified as follows in regard to their conversation:

"The only thing he said to me at that time why he had not had the other 10 picked up was that they

were under weight, and that they were not calling for them at that time quite as fast as they had been. He wanted me to continue to keep them until they weighed around 200. * * * I said to him, 'If you don't pick these up before long how about my keeping them and breeding them?' He said, 'Use your own judgment.' "

A few weeks later the hogs became afflicted with some disease. King said he called the live stock company's office about the first of January so to advise Mr. Brackin but he was not in; that he (King) advised the woman answering the telephone as to the condition of the hogs and that he would have to sell them as they were no good for breeding, and was told to use his own judgment. Hearing nothing further from plaintiff company, defendant King sold the balance of the hogs. He did not sell them all at one time but on three or four different occasions he sold those in the worst condition. His reason for selling in separate lots was "because I wanted to keep them if I could, keep them to breed."

Defendant denied any intention to injure plaintiff wilfully or maliciously or to deprive it of its property, and gave the following testimony as indicating his motives in making the sale.

"*Q.* But you tell the court you had no thought or intention that you were going into bankruptcy at the time this sale of the hogs was made?

"*A.* No, I didn't have no intention.

"*Q.* In the past, in previous contracts with the Continental Live Stock Company, had there been accommodations and courtesies both ways, from you to them and them to you?

"*A.* Yes, sir. * * *

"*Q.* Now, when Mr. Knapp called at the farm in February, did you tell him at that time that you had sold the hogs and why you had sold them?

"*A.* Yes, sir. And he agreed with me they was no good for breeding purposes when that affliction comes onto them.

"*Q.* Did you have any intent or desire or purpose to defraud or deprive the Continental Live Stock Company of their property?

"*A.* No, sir.

"*Q.* And your thought was to make it good by delivering them 10 gilts the following year?

"*A.* Yes, sir.

"*Q.* And you would have done that had you been permitted to stay in business?

"*A.* Yes, sir."

By this record clearly a question of fact is presented as to whether defendant in selling the hogs intended to injure plaintiff "wilfully and maliciously." The trial judge, who had the opportunity both to hear and see the witnesses for the respective parties, passed upon this question and found in favor of defendant. We quote from the opinion filed by the trial judge:

"It is not, in my judgment, a case whether or not consent was actually given to make the sale. The question is whether or not there was any wilful or malicious act on the part of the person who claims bankruptcy as a defense. Here this man did not attempt to sell under cover of darkness. He did it in the usual course of business, and he didn't attempt to sell to try and get away with the money, although he probably did not happen to contact either Mr. Brackin or Miss Bonham at the time of the telephone conversation. I am satisfied in my own mind that he at least phoned the office, and that he at least waited a week afterwards within which to make his first sale which in and of itself entirely negatives any thought of concealment; and that is furthermore negatived by the fact that he didn't sell all these gilts at one time. He sold them in four separate

lots. All of which impresses me with the belief that he was acting in good faith and that unfortunately circumstances subsequently brought upon him, of which he then had no knowledge, resulted in his inability to fulfill his then intention."

Appellant in support of its contention that the sale of its property by defendant in the instant case constituted a wilful and malicious injury within the terms of the bankruptcy statute, cites and relies upon *Probst* v. *Jones,* 262 Mich. 678. However, it must be borne in mind that the court found in the cited case that "defendant did not act in good faith." The finding in the instant case is directly to the contrary, and in consequence thereof the law of the *Probst Case* is not here applicable. In our judgment this case is of the type passed upon in *Davis* v. *Ætna Acceptance Co.,* 293 U. S. 328, 332 (55 Sup. Ct. 151), wherein the court, speaking through Mr. Justice Cardozo, said:

"But a wilful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without wilfulness or malice. * * * There may be an honest, but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a wilful and malicious one. * * * The discharge (in bankruptcy) will prevail as against a showing of conversion without aggravated features."

We cited and quoted with approval the *Davis Case* in *Money Corporation* v. *Draggoo,* 274 Mich. 527.

In the instant case the circuit judge concluded that defendant's course of conduct was not prompted by maliciousness or wilfulness and that therefore his

discharge in bankruptcy constituted a bar to recovery. On this record we cannot say that the determination of the circuit judge was not justified by the evidence. It follows that the judgment must be affirmed. Costs to appellee.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and MCALLISTER, JJ., concurred.

DETROIT EDISON CO. *v.* OAKLAND CIRCUIT JUDGE.

1. JUDGMENT—ENTRY—FEES—STATUTES—COURT RULES.

There is no conflict between statute requiring payment of judgment fee before entry of final judgment in an action at law where trial has been had and court rule requiring that before taking proofs such fee be deposited with the clerk and its return to depositor attorney in case it should subsequently appear inappropriate to enter a judgment in the cause; and enforcement of the court rule would meet requirement of the statute but noncompliance with the court rule could not permit entry of judgment before receipt of the fee (3 Comp. Laws 1929, § 15421; Court Rule No. 37 [1933]).

2. MANDAMUS—ENTRY OF JUDGMENT—PAYMENT OF FEE.

In a petitioner's proceeding by mandamus to compel restoration of original judgment for defendant notwithstanding verdict for plaintiff on reserved motion, entered by clerk inadvertently before payment of judgment fee, order of court to reenter

judgment *nunc pro tunc,* as of date of payment of fee by defendant, *held,* proper, the court's power in the premises not being dependent upon plaintiff's right to move to vacate judgment nor limited by court rule relating to 20 days' time for perfecting an appeal to the Supreme Court, hence, although circuit court might have let judgment stand as originally entered after fee was paid, petitioner is not entitled to writ compelling same (3 Comp. Laws 1929, §§ 14531, 15421; Court Rules Nos. 37, § 13, 57 [1933]).

Mandamus by Detroit Edison Company, a New York corporation, against George B. Hartrick, Oakland Circuit Judge, to compel the restoration of a judgment. Submitted January 18, 1938. (Calendar No. 39,821.) Writ denied April 4, 1938.

Oxtoby, Robison & Hull, for plaintiff.

Clarence L. Smith and *G. Edson Hallock,* for defendant.

WIEST, C. J. August J. Cramer brought suit in the Oakland circuit against the city of Mt. Clemens and the Detroit Edison Company. On motion the suit against the city was dismissed. The suit against the Detroit Edison Company was tried by jury, with verdict of $20,000 for plaintiff. Under reserved power (3 Comp. Laws 1929, § 14531), the court directed entry of judgment for defendant and the clerk of the court, without first obtaining the judgment fee of $4, entered judgment. Thereupon plaintiff moved the court to vacate the judgment for nonpayment of the judgment fee, as required by 3 Comp. Laws 1929, § 15421. October 20, 1937, the same day that the motion was made, defendant's attorneys mailed to the clerk of the court their check for the judgment fee, disclaiming, however, any obligation to do so, under Court Rule No. 37, § 13 (1933). The court vacated the judgment, so entered without payment of the

judgment fee, and, in consideration of the mentioned payment by defendant, directed re-entry of the judgment, *nunc pro tunc,* as of October 20, 1937.

Defendant seeks our writ directing restoration of the first judgment entered, claiming that, under Court Rule No. 37, § 13 (1933), it was the duty of plaintiff to pay, and of the clerk to collect, the judgment fee before trial.

The court rule provides:

"No proofs shall be taken in the trial of a cause unless there has been deposited with the clerk of the court the amount of the lawful stenographer, jury and judgment fee. In case it shall subsequently appear inappropriate to enter a judgment in the cause, such judgment fee shall, under the direction of the judge, be returned to the attorney so depositing it."

In the instance at bar the plaintiff, before entry upon the trial, paid the stenographer and jury fees but did not pay the judgment fee. Whether payment was requested does not appear.

In answer to our order to show cause the circuit judge states that the first judgment entered was by error of the clerk, contrary to the mandate of 3 Comp. Laws 1929, § 15421; that the court rule in no way conflicts with the mandatory duty of the court in reference to obedience to the statute referred to and—

"The rule of the court must be subordinated in any event, to the provisions of the statute."

The invoked statute, 3 Comp. Laws 1929, § 15421, provides:

"Before the entry of any final judgment in a suit at law wherein trial has been had or where issue is joined by plea, or where a jury is called to render a

verdict upon default in pleading, there shall be paid to said clerk the sum of four dollars.''

There is no conflict between that statute and the court rule. Enforcement of the court rule would meet the requirements of the statute. Noncompliance with the court rule could not, and did not, permit entry of judgment before receipt of the fee.

Defendant contends that noncompliance with the mentioned court rule barred plaintiff from moving the court to vacate the judgment for nonpayment of the entry fee.

The power of the court to act in the premises did not rest on plaintiff's right to make the motion. The court probably could, upon the payment of the judgment fee by defendant, have let the original entry of the judgment stand, but we cannot hold that such was the only course.

Court Rule No. 57 (1933), relating to 20 days' time for perfecting an appeal to the Supreme Court did not limit the power of the circuit court in the premises.

The writ of mandamus is denied, with costs to respondent.

BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and McALLISTER, JJ., concurred. BUTZEL, J., did not sit.

BANKS *v.* BANKS.

AUTOMOBILES—GUEST PASSENGERS—GRATUITOUS AMBULANCE—WILFUL AND WANTON MISCONDUCT.

Defendant in whose car plaintiff, his brother, was a guest passenger, who had been previously injured to a then undetermined extent by falling from a ladder while painting a house and was being conveyed to a hospital, *held,* as a matter of law not guilty of wilful and wanton misconduct in running a second red light while operating his car as a gratuitous ambulance although clearly guilty of negligence.

Appeal from Calhoun; Hatch (Blaine W.), J. Submitted January 6, 1938. (Docket No. 55, Calendar No. 39,705.) Decided April 4, 1938.

Case by Charles Banks against D. D. Banks for personal injuries sustained while a passenger in defendant's automobile. Verdict for plaintiff. Judgment for defendant *non obstante veredicto.* Plaintiff appeals. Affirmed.

Russell W. Conroy and *Allen & North,* for plaintiff.

L. J. Carey and *George J. Cooper* (*Ronald M. Ryan,* of counsel), for defendant.

WIEST, C. J. Plaintiff and defendant are brothers. The afternoon of September 23, 1935, plaintiff, while painting a house, fell from a ladder and received

injuries to his head, the extent of which were somewhat difficult of observation because the paint bucket threw paint in his face. His brother, the defendant herein, was called, came with an automobile and, while taking plaintiff to a hospital, ran a red light and his auto was struck by another at a street intersection, plaintiff thrown therefrom and received added injuries.

Claiming that, in running the red light at the point of collision and also a red light at a previous street intersection, after being cautioned by plaintiff, defendant was guilty of gross negligence or wilful and wanton misconduct (1 Comp. Laws 1929, § 4648), rendering him liable to respond in damages to plaintiff as his guest, this suit was brought and, upon trial by jury, plaintiff had verdict for $2,500.

At the close of plaintiff's proofs defendant moved the court to direct a verdict of not guilty. The court reserved decision thereon, proofs were submitted on the part of defendant and at the close of all the proofs defendant again moved for a directed verdict and, after verdict, moved for judgment *non obstante veredicto,* and the court entered judgment in favor of defendant.

Plaintiff reviews by appeal and contends that, under the evidence, the question of the alleged negligence of defendant was one of fact for consideration by the jury, and the court failed to consider the evidence in the light most favorable to plaintiff.

The court found that at an intersection, before reaching the place of collision, defendant ran a red light in safety but, in running the red light at the place of collision he was guilty of negligence but not of gross negligence or wilful and wanton misconduct.

The collision was at the intersection of North avenue and Calhoun street. Defendant was driving

north on North avenue and was struck by an automobile traveling east on Calhoun street. Defendant was on a direct route to the Leila Y. Post Montgomery Hospital on North avenue, using his automobile as a gratuitous ambulance to get his brother where his injuries might be ascertained and treated. This gave him no right to disobey traffic signals but, at that time, the nature and extent of plaintiff's injuries had not been ascertained and brotherly concern and excitement, rather than wilful and wanton misconduct in running the red light, occasioned the accident.

Defendant was clearly guilty of negligence but, under the stress of excitement and brotherly solicitude, we do not think he acted with conscious indifference, or in reckless disregard of consequences.

The judgment is affirmed, with costs to defendant.

BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and MCALLISTER, JJ., concurred. NORTH, J., did not sit.

BOWEN *v.* KUNKEL.

1. CANCELLATION OF INSTRUMENTS—DEEDS—LACHES.
   In suit by aged parents of one of defendant grantees in deed sought to be set aside on ground of fraud and failure of consideration, claim that plaintiffs were guilty of laches in waiting over three years and seven months to set aside warranty deed to farm property in possession of which they have not been disturbed *held*, without merit.

2. EQUITY—CANCELLATION OF INSTRUMENTS—LIEN FOR PAYMENTS BY DEFENDANTS.
   Lien upon premises until payment of sums advanced by defendants to plaintiffs, aged parents of defendant wife, plus legal interest, *held*, sufficient protection to defendants who had received warranty deed without exception, reservation or consideration for 80-acre farm upon which grantors have continued in possession where deed was set aside.

Appeal from Montcalm; Hawley (Royal A.), J. Submitted January 12, 1938. (Docket No. 3, Calendar No. 39,667.) Decided April 4, 1938.

Bill by William T. Bowen and wife against Henry Kunkel and wife to set aside a deed and for other relief. Decree for plaintiffs. Defendants appeal. Affirmed.

Brake, Davis & Miel, for plaintiffs.

Charles E. Misner, for defendants.

BUSHNELL, J. Defendant Bessie Kunkel is the daughter of Nellie Bowen and the stepdaughter of

William T. Bowen, plaintiffs; defendant Henry Kunkel is her husband. Plaintiffs, aged 70 and 76, respectively, were the owners of an 80-acre farm in Montcalm county, on which there is a mortgage in the sum of $450. According to the testimony of the township supervisor, the property is assessed at $1,200. The holder of the mortgage was of the opinion that if someone wanted it for a home the farm might be worth $2,000 to $2,500, but that, if put up for auction at public sale, the premises would not bring more than $800 to $1,200.

Defendants had loaned plaintiffs small sums of money from time to time, with which to pay taxes and interest on the mortgage, but later, because of their inability to make further payments, plaintiffs became apprehensive of losing the farm. Just how the transaction was accomplished is disputed but, in any event, a deed was executed by plaintiffs conveying the premises to defendants. The deed was received in evidence but is not printed in the record, which is also silent as to the consideration paid therefor. Mrs. Bowen admitted that she wrote a letter to her daughter prior to the execution of the deed which read in part as follows:

"But we can't get money to pay our interest and taxes. Now if you want the place as Will told you last spring you could have it. You have the first chance. Now I don't want you to take it if you don't want it. We are going to let someone have it and you have the first chance."

Plaintiffs claim that it was well understood that they were to have a life lease on the premises and that defendants were to assume the unpaid mortgage indebtedness. Neither of these alleged agreements was carried out by defendants.

The conveyance in question was recorded but the plaintiffs have never been disturbed in their possession of the premises.

The bill of complaint in this cause, to set aside the conveyance of May 6, 1932, on the grounds of fraud and failure of consideration, was not filed until December 23, 1935, and then, according to defendants, only because there were some oil developments in the vicinity.

The trial judge filed a written opinion in which he found that:

"In the course of these conversations and discussions the defendants stated to the plaintiffs in substance that if they, the plaintiffs, would convey to them the farm in question they would pay off the mortgage and would also pay the taxes as they fell due and would give to them, the plaintiffs, a life lease of said premises. They also made certain other promises, none of which promises, however, have ever been fulfilled. It is quite probable, judging from the acts and conduct of the defendants that they did not intend to fulfill these promises when they made them. In such case the same would be fraudulent and would operate to avoid plaintiff's title. * * * Be that as it may it still remains a fact that the defendants, if plaintiffs' claims are true, procured a warranty deed of the premises in question without exception and reservation and without consideration."

The trial judge concluded: "that the allegations in the bill of complaint have been substantially sustained by the proofs and that the plaintiffs are entitled to a decree as prayed for in said bill, subject to the payment by plaintiffs to the defendants of the moneys paid or advanced by them as interest on the mortgage, and taxes on the land, with interest at the rate of 5 per cent. from the date of said several

payments. Such payment shall be made on or before 60 days after the entry of the decree herein and the aggregate of such payments and advancements will be fixed and determined at the time of the settlement of the decree and will remain a lien on said land until fully paid."

Defendants appeal from a decree entered in conformity to the foregoing findings.

Appellants do not question the power of a court of equity to cancel a conveyance under the circumstances of this case. Defendants urge that plaintiffs are guilty of laches. An examination of that claim in the light of the testimony shows it to be without merit. *Ford Heights Land Co.* v. *Schanert,* 279 Mich. 693.

Determination of the issues raised by the bill and answer depends upon the weight to be given to the conflicting testimony of the parties. The trial judge preferred to believe plaintiffs and there is sufficient testimony to support his conclusions. We see no reason to disturb the result reached.

Appellants urge that if the decree is not reversed, it should be modified so as to provide that, unless the payment is made within 60 days, the bill of complaint should be dismissed. We are not disposed to acquiesce in this suggestion. The provision for a lien upon the premises is sufficient protection to defendants.

The decree is affirmed, with costs to appellees.

WIEST, C. J., and BUTZEL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

In re HASKELL'S ESTATE.

BATTLE CREEK COLLEGE *v.* SACRE.

1. WILLS—COMPETENCY.
   In will contest, holding of trial court that testator was competent to make her will *held,* correct.

2. SAME—UNDUE INFLUENCE—BURDEN OF PROOF.
   One alleging procurement of will through undue influence must prove that improper influence was exerted and that it had the effect of overcoming the will of testatrix.

3. SAME—UNDUE INFLUENCE—FIDUCIARIES—ATTORNEYS—PRESUMPTIONS.
   Presumption that devise of property to one in such confidential and fiduciary relationship as an attorney was procured through undue influence is rebuttable and is rebutted where client, testatrix, receives independent legal advice.

4. SAME—UNDUE INFLUENCE—PRESUMPTIONS—REBUTTAL—BURDEN OF PROOF.
   Presumption of undue influence in making will in favor of testatrix's attorney having been rebutted by competent evidence that testatrix had the opportunity of receiving and did receive independent legal advice, contestants then had duty of producing evidence to substantiate their claim.

5. EVIDENCE—PRESUMPTIONS—REBUTTAL—SUPPORT—WEIGHING EVIDENCE.
   When evidence is introduced to rebut a rebuttable presumption and supporting evidence is also introduced, it then becomes a question of weighing the actual evidence introduced without giving any evidential force to the presumption.

6. WILLS—UNDUE INFLUENCE—PRESUMPTIONS—REBUTTAL—RECORD.
   In contest of will, leaving testatrix's property to attorney who had performed services for her over a period of years, where

record shows an absence of testimony to sustain claim of undue influence, raised by presumption against which competent rebuttal testimony had been introduced, judgment for proponent *non obstante veredicto* should be entered.

BUTZEL, BUSHNELL, and CHANDLER, JJ., dissenting.

Appeal from Sanilac; Boomhower (Xenophon A.), J. Submitted January 12, 1938. (Docket No. 19, Calendar No. 39,782.) Decided April 4, 1938. Rehearing denied June 14, 1938.

Veno E. Sacre presented for probate the last will and testament of Elizabeth A. Haskell, deceased. Battle Creek College, Isabelle Colgrove and Laura Baird objected thereto. From order denying probate of will, proponent appealed to circuit court. Judgment for contestants. Proponent appeals. Reversed.

Tilden M. Gallagher (*Veno E. Sacre,* of counsel), for proponent.

Ira A. Beck and *Charles W. Rigney,* for contestant Battle Creek College.

Robert W. McKenzie, for contestants Colgrove and Baird.

SHARPE, J. This is an appeal from the judgment of the circuit court for the contestants of the will of Elizabeth A. Haskell. The principal facts are not in dispute. The testatrix, an elderly unmarried woman, was survived by two brothers, a sister and others. On November 18, 1920, Miss Haskell entered into an agreement whereby she contributed $75,000 to what was known as the "Race Betterment Foundation" of Battle Creek to be used in founding a health college and received in return its annuity

bond which provided for the payment of eight per cent. interest to the donor during the balance of her life. This contribution was later increased to $90,000. In October, 1928, testatrix made a will naming the Battle Creek College residuary beneficiary. Between the years 1929 and 1933, the Battle Creek College defaulted on its bond to testatrix to the extent of about $12,000 interest. In June, 1933, she retained Veno E. Sacre, an attorney of Detroit, Michigan, to recover the money due her on the bond. Between September, 1933, and March 27, 1936, the sum of $8,720 was paid by the Battle Creek College to testatrix. Subsequent to the employment of Mr. Sacre for the purpose above mentioned, Miss Haskell consulted him upon other matters and in time began to rely more and more upon his judgment in legal and financial matters.

On May 8, 1935, testatrix executed another will naming Mr. Sacre sole beneficiary. This will was drawn by Mr. J. N. McNally, an attorney who occupied an office adjoining that of Mr. Sacre. Mr. Sacre and Mr. McNally were not associated in the practice of law, each had a private office, but they shared a common waiting room.

On May 8, 1935, Mr. Sacre drove Miss Haskell from Bad Axe to Detroit, took her to Mr. McNally's office, and after introducing her to Mr. McNally, went into his private office and remained there until Miss Haskell was ready to leave. Miss Haskell talked with Mr. McNally in his private office for 20 or 30 minutes, after which the will was drawn in her presence and duly executed by her.

Testatrix died April 11, 1936, leaving an estate appraised at $3,202.76. The will was offered for probate and disallowed by the probate court of Sanilac county. An appeal was taken to the circuit court of

Sanilac county. The trial court held that testatrix was mentally competent to make the will, but submitted the question of undue influence to the jury which found against the will. In our opinion the trial judge was correct in holding that testatrix was competent to make her will.

It is the contention of the contestants that whether the presumption of undue influence which arose because of the fiduciary relationship between testatrix and the sole beneficiary had been rebutted by the testimony of attorney McNally was a question for the jury.

"In order to establish undue influence contestants must prove that improper influence was exerted and that it had the effect of overcoming the will of testatrix. *In re Spinner's Estate,* 248 Mich. 263. While there is a presumption of undue influence where a person devises property to one in such a confidential and fiduciary relationship as a priest, *In re Bromley's Estate,* 113 Mich. 53, yet it is a rebuttable one." *In re Cotcher's Estate,* 274 Mich. 154.

And in *Re Bromley's Estate,* 113 Mich. 53, this court said:

"While a bequest in favor of an attorney who draws a will is a circumstance arousing suspicion, and raises a presumption more or less strong that undue influence has been exerted, yet, as was very properly charged at the request of the contestants themselves, the presumption of the invalidity of a will made by a client to her attorney may be rebutted by showing that she made her will after receiving independent legal advice."

See, also, *In re Browne's Estate,* 217 Mich. 621.

The record affirmatively shows that at the time the will was made, the testatrix had the opportunity of receiving and did receive independent legal advice.

The presumption of undue influence was rebutted by the testimony of Mr. McNally, the attorney who drew the will.

The presumption of undue influence being rebutted by competent evidence, it then became the duty of contestants to produce evidence to substantiate their claim.

In *Gillette* v. *Michigan United Traction Co.*, 205 Mich. 410, the court said:

"It is now quite generally held by the courts that a rebuttable or *prima facie* presumption has no weight as evidence. It serves to establish a *prima facie* case, but if challenged by rebutting evidence, the presumption cannot be weighed against the evidence. Supporting evidence must be introduced, and it then becomes a question of weighing the actual evidence introduced, without giving any evidential force to the presumption itself."

See, also, *In re Cochrane's Estate,* 211 Mich. 370; *In re Fay's Estate,* 197 Mich. 675.

The record shows an absence of testimony to sustain the claim of undue influence. The motion *non obstante veredicto* should have been granted.

The judgment of the trial court is reversed and a judgment will be entered there for the proponent of the will. Appellant may recover costs.

WIEST, C. J., and POTTER, NORTH, and MCALLISTER, JJ., concurred wtih SHARPE, J.

BUSHNELL, J. (*dissenting*). The judgment should be affirmed. At the time the will was drawn, testatrix was about 82 years of age. She evidently was wholly inexperienced in business matters, as is shown by her contract with proponent. She agreed to pay him a 50 per cent. contingent fee, in addition

to all expenses, for the collection of an account from the Battle Creek College, which in no way disputed the correctness of the account but merely asked for more time in which to pay it because of the financial conditions prevailing in 1932.

The confidential relationship of attorney and client existed between proponent and testatrix. A presumption of undue influence arises from the fact of this relationship, which presumption is founded on common experience. It is a presumption of fact, and its force and effect is for the jury, depending upon the circumstances of the particular case. *In re McMaster's Estate,* 163 Mich. 210. Notwithstanding this presumption, proponent did not see fit to take the witness stand. He claims, however, that the presumption was rebutted by a showing that testatrix obtained independent counsel.

While it is true that proponent did not draft the will, he took testatrix from Bad Axe, Michigan, to Detroit, a distance of over 100 miles, in order to have the will drawn by a lawyer who shared offices with proponent. This attorney and proponent had occupied joint offices for a period of seven years, having one outer door and two small offices, one for each of them. They used the same library and employed the same stenographer. Their names, a number of years ago, appeared in a State gazetteer as if they were partners, although the attorney testified that such publication was unknown to him and that he and proponent never were co-partners. No certificate of co-partnership was ever filed by them. This lawyer was unwilling to state that he had not previously discussed with proponent the drawing of a will for decedent. When the will was offered for probate in the probate court, he appeared as attorney for proponent and conducted the examination of wit-

nesses. Under these circumstances there was clearly a question for the jury and a verdict could not properly be directed for proponent. It cannot be said, as a matter of law, that there was a showing that independent legal advice was had. In the case of *In re Eldred's Estate,* 234 Mich. 131, the proponent, who was a physician of testatrix and held a power of attorney for her, recommended an attorney to draw the will, the attorney being a stranger to the testatrix. It was held that the presumption of undue influence was not rebutted and that proponent's motion for a directed verdict was properly denied by the trial court. In the case of *In re McMaster's Estate, supra,* the confidential agent recommended an attorney, procured the preparation of the will, was present when it was executed and acted as custodian until the death of testatrix. It was held that there was a question of undue influence for the jury. The fact that the draftsman was selected by proponent strengthens, instead of rebuts, the presumption of undue influence.

The cases cited by Mr. Justice SHARPE are distinguishable. In the case of *In re Cochrane's Estate,* 211 Mich. 370, the testator, not the proponent, selected the lawyer who drew the will. In *Re Bromley's Estate,* 113 Mich. 53, the question arose on the propriety of the charge to the jury and there was no question of directing a verdict for proponent. In *Re Fay's Estate,* 197 Mich. 675, no confidential relationship between the testator and proponent was involved. In *Re Browne's Estate,* 217 Mich. 621, the court held that when there was evidence of independent legal advice, it was not error to refuse to direct a verdict for contestant on the ground of presumption of undue influence. No question of directing a verdict for proponent was involved. In the

case of *In re Cotcher's Estate,* 274 Mich. 154, it was not shown that the proponent procured the execution of the will. The cases holding that a showing of independent legal advice rebuts the presumption of undue influence are distinguishable from the present fact situation in *Re Rosa's Estate,* 210 Mich. 628. In that case, the attorney who drew the will had previously been employed by proponent and was a stranger to the testatrix. It was held that the presumption was not rebutted and that there was a question for the jury.

Since the presumption of undue influence was not overcome by the testimony, the question became one for the jury to determine, and it was not error to refuse to direct a verdict for proponent.

Objection was made to the introduction in evidence of a letter written by testatrix. When undue influence is shown, statements of the deceased are admissible to show her state of mind. *In re Allen's Estate,* 230 Mich. 584.

The judgment should be affirmed, with costs to contestants.

BUTZEL and CHANDLER, JJ., concurred with BUSHNELL, J.

CESSANTE *v.* FORD MOTOR CO.

1. WORKMEN'S COMPENSATION—APPEAL AND ERROR—FINDING OF FACT—EVIDENCE.

   The findings as to facts by the department of labor and industry are conclusive upon Supreme Court if there is any competent evidence to sustain such findings (2 Comp. Laws 1929, § 8451).

2. WORDS AND PHRASES—HERNIA.

   A hernia is the peritoneum going through the inguinal ring, accompanied by the intestines or some other substance.

3. WORKMEN'S COMPENSATION—FINDING OF DEPARTMENT—POTENTIAL HERNIA.

   Finding of department of labor and industry that employee had merely a potential hernia or a condition of predisposition to hernia *held,* supported by evidence showing no protrusion through the internal inguinal ring.

Appeal from Department of Labor and Industry. Submitted January 6, 1938. (Docket No. 61, Calendar No. 39,618.) Decided April 4, 1938. Rehearing denied June 14, 1938.

Nunzio Cessante presented his claim against Ford Motor Company for compensation for injuries suffered in defendant's employ. Award denied. Plaintiff appeals. Affirmed.

Dann & Atlas, for plaintiff.

E. C. Starkey and *W. J. Jones,* for defendant.

SHARPE, J. May 20, 1936, plaintiff filed a notice and application for adjustment of claim for compen-

sation alleging that while in the employ of defendant company in April, 1931, he suffered a compensable accident. Defendant denied liability and the matter came on for hearing before a deputy labor commissioner who entered an award for plaintiff.

From this award plaintiff appealed and on March 23, 1937, the department reversed the award made by its deputy. Plaintiff appeals and contends that while exerting an unusual amount of effort in cranking an axle, he slipped on the oily floor, fell down and immediately felt a sharp pain in his left groin and reported the accident to his foreman who sent him to the first aid. At the hearing before the deputy commissioner, Dr. Grekin, a witness produced on behalf of the plaintiff, testified that he examined plaintiff a few days after the claimed accident. His testimony is as follows:

"*Q.* And what did you examine him for?
"*A.* He came to me complaining of pain in the left groin.
"*Q.* And did you make a diagnosis?
"*A.* Yes; I did.
"*Q.* And what was your diagnosis?
"*A.* Left indirect inguinal hernia.
"*Q.* Did you examine him again after that, doctor?
"*A.* Examined him again on June 29, 1936.
"*Q.* June 29, 1936?
"*A.* Yes.
"*Q.* And what was your diagnosis at that time?
"*A.* Left indirect inguinal hernia."

Dr. Klebba, a witness produced by the defendant company, testified that he examined plaintiff June 4, 1936. His testimony is as follows:

"*Q.* Any evidence of an enlarged ring in this patient?

"*A.* Yes, there is an enlarged ring on both sides more so on the left side than on the right side.

"*Q.* But, in your opinion, that condition on the left side doesn't meet the requirements of a hernia?

"*A.* It is my opinion that you could refer to that as a potential hernia, or, if somebody did refer to it as a hernia, it is just a question of one's personal opinion. In my opinion, nothing is a hernia unless you have a protrusion of the viscus outside of its natural cavity, and there is no protrusion of the viscus through these rings there, but there is a sharp mass by inserting your fingers in the rings and getting up on to the abdominal cavity. Some men call anything in there where there is a sharp mass, a hernia, and others don't call it a hernia until it has descended. In this case, it is my opinion that the viscus has not descended through the rings."

It is the claim of plaintiff that the evidence warrants a finding that an indirect inguinal hernia is the same as an oblique inguinal hernia; and that there is no evidence to sustain the finding of the department that plaintiff is suffering from a potential hernia. The problem in the case at bar is to determine whether or not there is competent evidence to sustain the finding of the department. In *Lyons* v. *City of Grand Rapids,* 274 Mich. 588, we said,

"The finding as to facts by the department of labor and industry is conclusive and binding upon this court if there is any competent evidence to sustain such finding."*

We have had occasion heretofore to discuss the subject of hernia in its relation to a compensable injury. In *Robbins* v. *Original Gas Engine Co.,* 191 Mich. 122, we said:

"All the experts seem to agree that the visible evidence of the hernia is the protrusion through the

* See 2 Comp. Laws 1929, § 8451.—REPORTER.

inguinal ring of the peritoneum and its contents: 'the hernia is the peritoneum going through, accompanied by the intestines or some other substance.' ''

In the case at bar there was no protrusion through the internal inguinal ring. The evidence sustains the finding of the department that plaintiff had a potential hernia or a condition of predisposition to hernia.

The order of the department denying compensation is affirmed, with costs to defendant.

WIEST, C. J., and BUTZEL, BUSHNELL, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

SLINGERLAND *v.* SNELL.

1. AUTOMOBILES—BURDEN OF PROOF—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

   In action by administratrix of estate of motorist, fatally injured in an automobile collision at a street intersection, plaintiff who showed defendant was guilty of negligence also has burden of proving her decedent was free from contributory negligence.

2. SAME—RIGHT OF WAY AT INTERSECTIONS NOT ABSOLUTE.

   Right of way of driver of automobile on right at street intersections under 1 Comp. Laws 1929, § 4712, is not an assurance of safety nor an absolute right in all conditions, both drivers being required to use due care, as driver on the right cannot continue to assume that the one on the left will accord him right of way when the circumstances would indicate the contrary to a reasonable person.

3. SAME—DRIVER HELD TO HAVE SEEN WHAT HE SHOULD HAVE SEEN. Plaintiff's decedent who drove car into intersection where he was hit by defendant's car which approached from decedent's left is chargeable with what he could have seen, that is, defendant's car approaching intersection without showing any indication of coming to a stop, hence, barred from recovery by his contributory negligence.

BUSHNELL and MCALLISTER, JJ., dissenting.

Appeal from Wayne; Miller (Guy A.), J. Submitted January 18, 1938. (Docket No. 123, Calendar No. 39,861.) Decided April 4, 1938.

Case by Ellen Z. Slingerland, administratrix of the estate of William Slingerland, deceased, against John Snell for fatal injuries received by plaintiff's decedent in a collision of automobiles at an intersection. Judgment for plaintiff. Defendant appeals. Reversed, without a new trial.

Hulett & Coash, for plaintiff.

Stewart A. Ricard, for defendant.

SHARPE, J. This case arises out of a collision between two automobiles at the intersection of Marquette and Stanton avenues in the city of Detroit. In circuit court before the trial judge, plaintiff had judgment and defendant appeals.

The collision occurred in the afternoon of December 24, 1936. Marquette avenue runs in an easterly and westerly direction and intersects Stanton avenue at right angles. Each street is paved for 26 feet in width. Neither street is superior to the other, there being no stop signs at this intersection. On the afternoon in question, plaintiff's decedent and one Edward Liphardt were each driving an automobile. When they reached Marquette avenue, they drove

westerly on this avenue at a speed of about 20 miles per hour for four blocks preceding the intersection where the collision occurred. The deceased maintained a distance of 50 to 60 feet in the rear of the car driven by Edward Liphardt. As they approached the intersection, Edward Liphardt proceeded across safely, but the car that plaintiff's decedent was driving collided with a car driven by defendant proceeding in a northerly direction on Stanton avenue; and as a result of this collision, plaintiff's decedent was injured and died December 27, 1936.

Subsequently, action was brought by the administratrix of the estate of William Slingerland. The cause came on for trial, and, at the close of plaintiff's testimony, the defendant made a motion for judgment of no cause of action which was denied. Later the trial court entered a judgment in favor of plaintiff. The principal question presented is the contributory negligence of plaintiff's decedent. From our examination of the record, we conclude that defendant was guilty of negligence, but plaintiff must also show that he was free from contributory negligence before a judgment may be entered in his favor. See *Faustman* v. *Hewitt,* 274 Mich. 458.

In addition to the facts heretofore noted the record shows that each driver approached the intersection on his proper side of the street and traveling at approximately 20 miles per hour; that the cars collided near the center of the intersection; that the left front end of plaintiff's car sustained greatest damage, while the damage to defendant's car was on its right side; that from measurements taken a person in a car parked 30 feet east of Stanton on Marquette, midway between the center of the street and the north curb, could see a distance of practically 143 feet south of Marquette on Stanton; that at the dis-

tance of 40 feet east of Stanton one could see about 100 feet south of Marquette on Stanton; and at a distance of 50 feet east of Stanton one could see a distance of 80 feet south on Stanton.

Assuming that plaintiff's decedent entered the intersection first, we think he was guilty of contributory negligence which bars recovery. It is apparent that when plaintiff's decedent entered the intersection, the defendant was at, or almost to, the intersection without showing any indication of coming to a stop.

In *Knight* v. *Merignac,* 281 Mich. 684, we said:

"The rule as to one who drives into an intersection without looking and is hit by another car over which he has the right of way was stated in *Kerr* v. *Hayes,* 250 Mich. 19, as follows:

" 'These cases, however, also point out that the statutory right of way* is not an assurance of safety, nor an absolute right in all conditions, but that both drivers must use due care. A driver cannot continue to assume that the one on the left will accord him right of way when the circumstances would indicate the contrary to a reasonable person.' "

In the case at bar we do not know what plaintiff's decedent saw, but he could have seen the defendant approaching from his left and is chargeable with what he could have seen.

In *Zuidema* v. *Bekkering,* 256 Mich. 327, we said:

"It will not do to say that plaintiff's husband looked down the Byron Center road to the left before attempting to cross the pavement and did not see the automobile of defendant approaching. He must be held to have seen what he should have seen, which there was nothing to prevent him from seeing, and if, as contended by plaintiff, he stopped his automobile, looked to the left, and did not see what was plainly to be seen, the approach of defendant's auto-

* See 1 Comp. Laws 1929, § 4712.—REPORTER.

mobile, he was guilty of contributory negligence which would bar plaintiff's recovery."

The judgment is reversed, without a new trial. Defendant may recover costs.

WIEST, C. J., and BUTZEL, POTTER, CHANDLER, and NORTH, JJ., concurred with SHARPE, J.

BUSHNELL, J. (*dissenting*). I cannot concur in Mr. Justice SHARPE's opinion because I believe his conclusions are contrary to our holding in *Thompson* v. *Michigan Cab Co.*, 279 Mich. 370. In that case the court was unanimous in its approval of the statement in *Railroad Co.* v. *Stout*, 84 U. S. 657, outlining the respective functions of the judge and jury in determining the question of contributory negligence. The court was also unanimous in its holding that the record presented a statement of facts upon which reasonable men might fairly arrive at different conclusions and that the trial court was not in error in holding that the question of plaintiff's driver's negligence was a matter for the jury.

It is only when but one reasonable conclusion can be reached from the proofs that plaintiff's contributory negligence is a question of law. *Halzle* v. *Hargreaves*, 233 Mich. 234, 237.

In the instant case the trial judge, sitting without a jury, held that plaintiff's decedent's negligence was a question of fact. We may differ with the conclusions of the trial judge but the record does not present such a clear case of want of ordinary care as to justify the holding, as a matter of law, that decedent was negligent.

The judgment should be affirmed, with costs to appellee.

MCALLISTER, J., concurred with BUSHNELL, J.

SAMBOR *v.* HOME OWNERS' LOAN CORP.

1. MORTGAGES—STATUTES—REPEALS BY IMPLICATION.
   Section of original mortgage foreclosure moratorium act limiting scope of legislation to mortgages executed prior to a specified date, which section was not expressly repealed, has continued to be such a limitation unless subsequently repealed by necessary implication (Act No. 98, § 8, Pub. Acts 1933).

2. STATUTES—REPEALS BY IMPLICATION NOT FAVORED.
   Repeals of statutes, or portions thereof, by implication are not favored.

3. SAME—AMENDMENT OF ONE SECTION NOT REPEAL BY IMPLICATION OF ANOTHER SECTION.
   Mere omission to re-enact a section of a statute at time of passing an amendment to certain other sections of same statute does not of itself give rise to an implication that section not re-enacted is thereby repealed, especially where sections amended are specifically designated by the amendatory act.

4. SAME—AMENDMENT OF CERTAIN SECTIONS.
   Unless the subject-matter of amendatory legislation is such as necessitates a contrary conclusion, it should be held not to have modified any other sections of the statutes than those expressly indicated in the amendatory act and it is unnecessary to re-enact and publish at length the remaining sections of the original act as they remain unaffected by the amendatory legislation (Const. 1908, art. 5, § 21).

5. MORTGAGES—APPLICATION OF MORATORIUM ACT.
   Section of original mortgage foreclosure moratorium act which limited application of act to mortgages executed prior to a specified date which section has remained unamended and unrepealed by subsequent acts which amended or added provisions to the act *held*, to render act inapplicable to mortgage executed after date specified (Act No. 98, § 8, Pub. Acts 1933).

Appeal from Wayne; Merriam (De Witt H.), J. Submitted March 16, 1938. (Docket No. 65, Calendar No. 39,835.) Decided April 4, 1938.

Bill by Leona M. Sambor against Home Owners' Loan Corporation, a United States corporation, for mortgage moratorium, an injunction, an accounting, and other relief. Bill dismissed. Plaintiff appeals. Affirmed.

Harry J. Lippman, for plaintiff.

Charles W. Horr, Jr., Melvin E. Fink and *R. F. Molyneaux,* for defendant.

NORTH, J. The sole question presented by this appeal is this: Does the 1937 mortgage moratorium law (Act No. 1, Pub. Acts 1937) provide for moratorium relief incident to the foreclosure of mortgages executed subsequent to February 14, 1933? The circuit judge held that the statute was not applicable to such foreclosures. Plaintiff, who is seeking moratorium relief, has appealed.

In this State mortgage moratorium legislation had its inception in Act No. 98, Pub. Acts 1933 (Comp. Laws Supp. 1933, § 14444–1 *et seq.*). Amendments followed in Act No. 20, Pub. Acts 1934 (1st Ex. Sess.), Acts Nos. 3, 158, Pub. Acts 1935, and the present statute, Act No. 1, Pub. Acts 1937. Section 4 of the act as last amended in part reads as follows:

"In any case of foreclosure of mortgage by advertisement pending on June two, nineteen hundred thirty-three or thereafter commenced, in which the sale has been held but the period within which the right of redemption might be exercised has not expired, the court, upon application of any person or persons liable upon said mortgage, or having any

other mortgage or lien on, or interest in any of the real estate covered by such mortgage, may make an order extending the time within which the right of redemption might be exercised until not later than November one, nineteen hundred thirty-eight."

The original moratorium act (Act No. 98, Pub. Acts 1933) contains the following (Comp. Laws Supp. 1935, § 14444–8):

"SEC. 8. This act shall not apply to any mortgage executed subsequent to February fourteen, nineteen hundred thirty-three."

Section 8, like a number of the other sections of the original act, is not re-enacted in any of the amendatory acts. For this reason appellant contends that the quoted section 8 is not a part of the present moratorium law. Appellant therefore asserts that the trial judge was in error in dismissing her petition for moratorium relief, such dismissal having been on the sole ground that the foreclosed mortgage, executed May 7, 1934, did not come within the terms of the present act because of the limitation contained in section 8 above quoted.

Appellant's contention is not tenable. There is no claim, nor could there be, that section 8 of the original moratorium act has been expressly repealed. Hence it has continued to be, as intended in the original act, a limitation upon the scope of the moratorium legislation in this State, unless because of subsequent amendments section 8 is repealed by necessary implication. As we have often stated, repeals by implication are not favored. *Attorney General, ex rel. Owen,* v. *Joyce,* 233 Mich. 619; *Saginaw City Council* v. *Saginaw Board of Estimates,* 256 Mich. 624; *Township of Port Huron* v. *Board of*

Auditors of St. Clair County, 269 Mich. 326; *Laidlaw* v. *City of Ludington,* 272 Mich. 11.

Mere omission to re-enact a section of a statute at the time of passing an amendment to certain other sections of the same statute, does not of itself give rise to an implication that the section not re-enacted is thereby repealed. Particularly is this true when, as in the legislative acts herein considered, the amendatory acts specifically designate the sections of the preceding act or acts which the legislature proposed to amend. Under such circumstances, unless the subject matter of the amendatory legislation is such as necessitates a contrary conclusion, it should be held not to have modified any other sections of the statute than those expressly indicated in the amendatory act. It is not necessary to re-enact and publish at length the remaining sections of the original act. They remain unaffected by the amendatory legislation. *Black* v. *Powell,* 248 Mich. 150. Such is the plain implication of our constitutional provision which reads:

"The act revised and the section or sections of the act altered or amended shall be re-enacted and published at length." Const. 1908, art. 5, § 21.

There is no constitutional requirement that the sections of a statute unaffected by amendatory legislation shall "be re-enacted and published at length." In none of the acts amendatory of the original moratorium act has the legislature expressly amended in any way the above quoted Act No. 98, § 8, Pub. Acts 1933. Instead, in each of the amendatory acts the legislature has indicated specifically that the amendments made pertain to other sections of the statute or were additions made thereto. In none of these subsequent amendatory acts do we find anything which is inconsistent with or repugnant to section 8

of the original moratorium act hereinbefore quoted, nor is there anything indicative of an intent on the part of the legislature to repeal the same.

The limitation upon the scope of moratorium relief contained in Act No. 98, § 8, Pub. Acts 1933, is still a part of the amended moratorium law of this State. It follows that the trial judge was correct in holding that the mortgage moratorium statute as amended does not apply to the mortgage in the instant case because this mortgage was executed subsequent to February 14, 1933. The dismissal of plaintiff's petition for moratorium relief is affirmed, with costs to appellee.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and MCALLISTER, JJ., concurred.

JUNE v. SCHOOL DISTRICT NO. 11, SOUTHFIELD TOWNSHIP, OAKLAND COUNTY.

1. OATHS—DEFINITION.

An oath is an external pledge or asseveration made in verification of statements made, or to be made, coupled with an appeal to a sacred or venerated object, in evidence of the serious and reverent state of mind of the party, or with an invocation to a supreme being to witness the words of the party, and to visit him with punishment if they be false.

2. AFFIDAVITS—DEFINITION.

An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath.

3. SAME—DIFFERENCE BETWEEN AFFIDAVIT AND OATH.

Difference between affidavit and oath is that former consists of a statement of fact which is sworn to as the truth while an oath is a pledge.

4. OATHS—ABSENCE OF JURAT—PRESUMPTIONS.

Absence of a jurat to an oath raises but a rebuttable presumption that the oath was not taken.

5. SAME—JURAT—EVIDENCE OF TAKING.

The actual taking of an oath in the nature of a pledge may be shown by evidence on the hearing where it does not appear by jurat that the oath was administered.

6. SCHOOLS AND SCHOOL DISTRICTS — TEACHERS' CONTRACTS — STATUTES—OATHS.

Statute requiring that teachers in public schools make and subscribe to oath to support Constitutions of State and nation at time of executing contract to teach must be given a reasonable construction and, so construed, *held*, not to require that oath be subscribed simultaneously with execution of the contract nor its inclusion as one of the contractual stipulations, since it is not an agreement made with the other contracting party (Act No. 19, § 22a, Pub. Acts 1931).

7. STATUTES—CONSTRUCTION.

The fundamental rule of construction of statutes is to ascertain and give effect to the intention of the legislature as expressed in the statute.

8. SAME—REASONABLE CONSTRUCTION.

When the words of a statute are not precise and clear, the construction which is most reasonable and best suited to accomplish the objects of the statute should be adopted, and a construction leading to an absurd consequence, hardship or injustice be disregarded if possible.

9. SCHOOLS AND SCHOOL DISTRICTS—TEACHERS' CONTRACTS—STATUTORY OATH—PURPOSE.

In requiring that teachers in public schools make and subscribe to oath that they would support the State and Federal Constitutions, at time of execution of contracts to teach, the legislature intended to make certain, and to exact a guaranty, that teachers in public schools should believe in and support the government, to prevent inculcation of subversive, disloyal and unpatriotic principles in the minds of school children and to require readily ascertainable proof in such a way that there could be no evasion (Act No. 19, § 22a, Pub. Acts 1931).

10. SAME—TEACHERS' CONTRACTS—OATH—JURATS.

Teacher's contract, signed by two officers of the district and teacher, which contained, beneath the signatures to the contract, written form of statutory oath required of teachers which was subscribed to by plaintiff teacher, *held*, not inadmissible in evidence in action for damages for breach of contract because oath was not embodied in contract, where it was administered by an officer of the school district at time contract was executed, although such officer failed to verify oath by his jurat (Act No. 19, § 22a, Pub. Acts 1931).

Appeal from Oakland; Holland (H. Russel), J. Submitted January 12, 1938. (Docket No. 122, Calendar No. 39,838.) Decided April 4, 1938.

Assumpsit by Helen E. June against School District No. 11, Southfield Township, Oakland County, Michigan, to recover money due under a written contract. Judgment for defendant. Plaintiff appeals. Reversed and new trial granted.

Preston Allen and *Percy G. Horler,* for plaintiff.

Pelton & McGee, for defendant.

MCALLISTER, J. Plaintiff, a school teacher, brought suit against defendant school district claiming damages resulting from breach of contract. On March 1, 1933, plaintiff entered into a contract with defendant whereby she agreed to teach during the years 1933 to 1936, inclusive, at the rate of $2,300 a year.

She taught from September, 1933, to January, 1935, when she was summarily discharged by the school board which, at that time, was in arrears in payment of her salary in the amount of $1,800.

Defendant claims that the contract is void because it does not comply with provisions of Act No. 19, § 22a, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 7381–1), requiring a teacher's oath to be included

in all such contracts. This statute provides as follows:

"At the time of signing of the said contract and any renewal thereof each teacher shall make and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm) that I will support the Constitution of the United States of America and the Constitution of the State of Michigan, and that I will faithfully discharge the duties of the office of teacher according to the best of my ability,' which shall be embodied in and made a part of said contract. Such contract with oath or affirmation shall be executed in duplicate. One copy thereof shall be filed with the board of education, and the other copy shall be retained by the teacher. The several members of the board of education, school trustees, school commissioners, and superintendents of schools are hereby authorized to administer said oath."

On the trial plaintiff testified that she had taken such oath at the time of signing the contract. The contract was introduced in evidence, subject to its admissibility being ruled upon later by the court. It was signed on the part of the school district by H. J. Kaufmann and C. Winifred Bingman, two officers of the district, and by plaintiff, as the other contracting party. Immediately following the signatures to the contract was the following written statement:

"In compliance with Act No. 19, Pub. Acts 1931, I hereby subscribe to the following oath: 'I do solemnly swear that I will support the Constitution of the United States of America, and the Constitution of the State of Michigan, and that I will faithfully discharge the duties of the office of teacher according to the best of my ability.' "

Directly beneath this statement plaintiff subscribed her name. The oath was administered by an officer of the school district.

The trial court reluctantly came to the conclusion that the contract was inadmissible for the reason that the jurat of the officer administering the oath, was lacking; and that the oath was not embodied in the contract. He accordingly entered judgment of no cause of action.

Plaintiff, on appeal, claims that she fulfilled all the requirements of the statute; that the oath was administered to her by a school officer as required by statute; that she subscribed the oath as set forth in the very words of the statute; and that the oath was embodied in and made a part of the contract in accordance with the requirements of the statute. Defendant, however, argues that the oath must be executed in the form of an affidavit, and that because of the absence of a jurat it is fatally defective.

This raises the question of whether the jurat of the officer administering the oath was necessary in this case. There is no specific requirement in the statute that the teacher execute an affidavit; and there is a difference between an oath and an affidavit.

An oath is defined in Black's Law Dictionary (2d Ed.):

"Oath. An external pledge or asseveration, made in verification of statements made, or to be made, coupled with an appeal to a sacred or venerated object, in evidence of the serious and reverent state of mind of the party, or with an invocation to a supreme being to witness the words of the party, and to visit him with punishment if they be false."

According to the same authority an affidavit is defined as follows:

"Affidavit. A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath."

The difference between an affidavit and an oath appears to be that an affidavit consists of statement of fact, which is sworn to as the truth, while an oath is a pledge.

In *Connell's Nomination,* 27 Pa. Co. Ct. 305, the court had occasion to pass upon the sufficiency of an oath which was not accompanied by the jurat or verification of the officer who administered it. The case arose upon a rule provided by a political party governing nominations to office. This rule provided:

"'Before entering upon the discharge of their duties the election officers shall subscribe to an oath or affirmation in the presence of each other in form as follows:

"'We, ———, do swear or affirm that we will, as officers at the ensuing election, impartially and faithfully perform our duties in accordance with the laws and Constitution of the commonwealth of Pennsylvania, and in accordance with the rules and regulations adopted by the Democratic party of Lackawanna county for the government of said primary elections, to the best of our judgment and ability.

"'The oath subscribed by the officers shall accompany their return made to the convention.'"

It appeared on the hearing that the election officers, in nearly every instance, signed their names as judge and inspectors to what is styled "Oath of primary election officers," which recites in print that:

"'We, ———, judge, and ———, inspectors, do solemnly swear that we will, as judge and inspectors,' perform the duties prescribed by and in the language of the rule stated."

The court said, p. 307:

"Aside from this signed statement in print, there is nothing to indicate that an oath or affirmation was

administered to the judge by one of the inspectors, nor by the then qualified judge to the inspectors, as required by the first section of the act of June 29, 1881, Pa. Laws, Act 148, p. 128, which also provides that the judge of election 'may administer the oath to any elector offering to vote as to his qualifications to vote at such election.' "

The court held that the absence of a jurat to such oath raised a presumption that the oath was not taken, but that such presumption could be rebutted by showing that the oath was actually administered, and in passing upon the question, said, p. 308:

"The law enjoins upon the election officers the duty of being severally sworn or affirmed in the presence of each other before entering upon the discharge of their duties, and where a duty is imposed by law and a penalty prescribed for non-observance, an act done in violation of that injunction is nugatory. It must appear affirmatively upon its face that the duty was performed, if the act is evidenced by a paper or by proofs at a hearing, if the act is questioned.

"The fact that the declaratory paper is signed by the judge and inspectors is no evidence that their whole duty was observed, because they act as magistrates when they qualify each other, and as election officers when they subscribe their names to the paper called an oath. They are required to take an oath or affirmation as well as to subscribe thereto, and the taking must appear or be shown as well as the subscribing. The taking of an oath is a magisterial act, while subscribing thereto, though required, is more of a ministerial function. * * *

"Both claimants offered the papers so executed in evidence, but neither questioned the witnesses respecting the administration of the required oath or affirmation. It was stated by counsel during the course of the hearing that there were present in

court election officers, or an election officer, from every election district in the county. The impression made during the whole course of the hearing points to the conclusion and warrants the finding that an oath or affirmation was administered in but few instances by the election officers to and in presence of each other.

"The act is mandatory, and its provision must be complied with strictly. * * *

"It is contended, however, that as the rule provides that the election officers shall subscribe only to an oath or affirmation that they will perform their duties faithfully, before entering upon their discharge, the presumption is that they took the oath or affirmation, and that the taking not being a necessary part of the credential, the holder of the latter is clothed with plenary authority to sit and participate in the convention.

"A certified oath, not required by law to be subscribed, is valid. But a subscribed oath with a presumption that it was taken is an anomaly, and may not be promotive of proper ends.

"The rule declares that not only 'the oath subscribed by the officers shall accompany their return made to the convention,' but also that they shall impartially perform their duties in accordance with the laws of the commonwealth, and the law requires the oath or affirmation to be taken and subscribed prior to the entry upon the discharge of their duties.

"The presumption must fall, because the rule itself requires more than the mere subscribing.

"The credential, with the return of the accompanying oath, taken and subscribed as required by law, and the rule thus read in conformity with law, is the passport which entitles the holder to a seat in the convention.

"The rule in *Contested Election of Owen Cusick,* 136 Pa. 459 (20 Atl. 574, 10 L. R. A. 228), is that the absence of a jurat raises a presumption that the

oath was not taken, which may, however, be rebutted by proof that it was actually administered."

In *State, ex rel. Dixon,* v. *Van Patten,* 26 Nev. 273 (66 Pac. 822), the supreme court of Nevada had occasion to pass upon a question similar to that before us, relating to an official oath which was not verified by jurat. In that case, a school trustee who was elected to such office took the official oath and subscribed his name thereto before an officer qualified to administer oaths. The officer administering the oath, however, did not affix his jurat to the oath which was subscribed by the school officer. It was claimed that a vacancy existed in the office for the reason that the oath of office had not been taken as required by law. The court, in holding that the school officer had complied with the law, said:

"It was shown that relator was regularly sworn, and took and subscribed to the official oath introduced in evidence in this case, before a duly-appointed and acting notary public of the county, but the jurat of the notary is not authenticated by his official seal. The seal of the officer would have been *prima facie* evidence that the oath had been taken, but was not the only evidence of the fact. It was competent for relator to have shown, as he did show by oral evidence, that the oath was in fact taken. In this connection it is urged that the oath was not indorsed upon the certificate of election. Section 1804, Comp. Laws 1900, requires that the oath shall be indorsed upon the certificate of election and signed by the officer. The substantial purpose of this requirement is the qualification of the officer, by taking and subscribing to the oath, and this was accomplished."

The rule is clear that the actual taking of such an oath in the nature of a pledge may be shown by evi-

dence on the hearing, where it does not appear by jurat that the oath was administered.

Defendant cites in its brief the case of *Scalf* v. *L'Anse Township Single School District,* 276 Mich. 662, in which this court held that the contract did not comply with the statute and was void *ab initio.* That case, however, can be distinguished from the one before us. In the *Scalf Case,* the statement signed by the teacher did not purport to be a sworn statement and did not follow in any particular the language required by the statute. On its face it was a mere certificate. Furthermore, it could not be said to be a part of the contract, as required by the statute; it was printed on an entirely separate sheet of paper and thereafter attached to the contract. Defendant also relies upon *Sauder* v. *District Board of School District No. 10, Township of Royal Oak, Oakland County,* 271 Mich. 413, in which this court held a teacher's contract was void *ab initio* because of its failure to comply with the statute. In the *Sauder Case* the oath was printed on a separate slip of paper. After being signed in duplicate by the teacher, one slip was retained by the school district and one by the teacher. The oath was not attached to the contract. Moreover, the oath was not signed at the time the contract was executed. This court held that it could not be said that such oath had complied with the statute for the reason that it did not follow the mandatory language providing that: "'At the time of the signing of said contract and any renewal thereof each teacher shall make and subscribe the following oath or affirmation: * * * which shall be embodied in and made a part of said contract.'"

With regard to whether this oath was "embodied in and made a part of said contract," we are obliged to give a reasonable meaning to the language of the

statute setting forth this requirement. It is urged that the contract to be valid must include this oath; that, presumably, according to such argument, between the beginning words of the contract and the signatures of the parties executing it, there must be an oath subscribed somewhere within the various stipulations of the parties. Subscribing such an oath *before* the execution, the contract would be subject to the same objection that is urged in this case—that of subscribing the oath *after* the execution of the contract. The oath cannot be subscribed simultaneously with the execution of the contract. It could not be included as one of the contractual stipulations of the contract, for it is not an agreement made with the other contracting party, but an oath in the nature of a pledge, required by the statute.

The fundamental rule of construction of statutes is to ascertain and give effect to the intention of the legislature as expressed in the statute. *Rapid Railway Co.* v. *Michigan Public Utilities Commission,* 225 Mich. 425 (P. U. R. 1924B, 585); *Gwitt* v. *Foss,* 230 Mich. 8. When the words of a statute are not precise and clear, the construction which is most reasonable and best suited to accomplish the objects of the statute, should be adopted, and a construction leading to an absurd consequence shall be disregarded. *Attorney General* v. *Railway,* 210 Mich. 227. If it can be avoided, the statute will not be given a construction which will create a hardship and injustice. *Attorney General, ex rel. Common Council of the City of Detroit,* v. *Marx,* 203 Mich. 331.

It is clear that the intent of the legislature was to make certain, and exact a guaranty, that teachers in public schools should believe in and support the government and the Constitutions of State and nation; and that the statute aimed to prevent the inculcation of subversive, disloyal and unpatriotic

principles in the minds of school children. With that purpose in mind, it required proof that no teachers in public schools should be employed unless they make a clear and unequivocal statement of their beliefs in this regard by pledging themselves to support the Constitution, and that in order to be certain that such objectives be carried out, the legislature required that the oath be taken at the time such contract with the teacher was entered into; that it be identified with the contract in such a way that there could be no evasion; and that at all times it would be readily ascertainable whether such provisions were carried out at the time the contract was entered into.

With this understanding of the intention of the legislature, and under the rules of statutory construction as set forth in the cases above cited, the oath in this case can be said to be embodied in, and made a part of the contract. Because of the fact that plaintiff took the required oath, which was administered to her by an officer qualified to administer such oaths; because she further subscribed the oath; because the said oath was administered to her on the occasion and at the time when the contract was executed, plaintiff did everything required of her. The oath in question complied with the requirements of the statute in form and substance. The ruling of the trial court, therefore, that the contract was inadmissible because the oath was not embodied therein, and was not verified by jurat of the officer administering the same, was error.

Judgment reversed and new trial granted, with costs to plaintiff.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and NORTH, JJ., concurred.

In re REZMER'S ESTATE.

1. EXECUTORS AND ADMINISTRATORS — CLAIMS AGAINST ESTATES — PROOF REQUIRED—CONTRACTS—PRESUMPTION ARISING FROM FAMILY RELATION.

   To recover for services rendered decedent against the decedent's estate, it is unnecessary to prove an express contract but there must be proof at least of an implied contract and in case claimant is a member of the family there must be enough in the record to overcome the presumption arising from the family relation.

2. SAME—SERVICES FOR PARENT—QUESTION FOR JURY.

   In son's proceeding against estate of decedent to recover money loaned and for services performed in operating latter's farm, evidence *held,* sufficient to present a question of fact for determination of the jury as to whether there was a contract between decedent and plaintiff.

3. LIMITATION OF ACTIONS—CONTRACTS FOR SERVICES FOR PARENT.

   In son's proceeding against estate of his late father to recover money loaned and for services performed where jury found contract between decedent and plaintiff and there was evidence that payment was not to have been made until the death of deceased, the statute of limitations would not begin to run until such decease (3 Comp. Laws 1929, § 13976).

4. PARENT AND CHILD—CONTRACTS FOR SERVICES—PRESUMPTIONS—MEMBERS OF SAME HOUSEHOLD.

   To enable a child to recover for services rendered a parent it is not essential that a formal contract be entered into but if the evidence rebuts presumption that performance of the work was gratuitous and authorizes inference that both parties acted under the understanding they were to be paid for, the parent is liable and the fact that the parent and child were not members of the same household weakens the presumption and may be regarded as giving support to other facts tending to establish an implied contract.

5. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE—EVIDENCE—QUESTION FOR JURY.

In son's proceeding against father's estate to recover for services performed in operation of latter's farm after latter sought to have plaintiff, a married man residing in a city, leave his work and conduct farm, evidence of statements by father to other children in presence of plaintiff that father would pay plaintiff in the end *held,* sufficient to present question of whether services were gratuitous as a question of fact for the jury.

Appeal from Bay; McCormick (James L.), J. Submitted January 19, 1938. (Docket No. 139, Calendar No. 39,902.) Decided April 4, 1938.

In the matter of the estate of Peter Rezmer, deceased. Chester Rezmer filed his claim for services. Claim allowed. Executor appealed to circuit court. Verdict and judgment for plaintiff. Executor appeals. Affirmed.

William L. Hellerman, for plaintiff.

Hubert J. Gaffney, for defendant.

MCALLISTER, J. On an appeal from probate to circuit court plaintiff had verdict and judgment of $1,732 for money loaned to, and services performed for, his deceased father. The executor of the estate of decedent appeals and asks for a reversal of the judgment on the ground that plaintiff's claim was barred by the statute of limitations (3 Comp. Laws 1929, § 13976); and that there was no evidence of a contract between plaintiff and decedent.

When plaintiff was 21 years old, in 1912, deceased suffered an accident causing injury to his spine. Plaintiff, his son, thereupon managed decedent's farm for approximately seven years until the time

when the other children of decedent had grown up. Plaintiff afterward went to Bay City where he secured a job.

In 1923, four years after plaintiff had left the farm, the deceased came to see him and induced him to leave his job and come back and manage the farm. He acceded to his father's request and worked on the farm during the following four years.

Plaintiff's father died November 12, 1935. Three days prior to that time he informed his daughter that he owed plaintiff money and that he wanted to pay him. Deceased expressed the fear that he himself might be obliged to go to the poor house, and he did not know how long he was going to live, but that "he was going to pay him in the end." Decedent also told two of his other sons in the presence of plaintiff during the month before he died, that he owed plaintiff money but that he couldn't pay him at that time because he might live for a long time. Three years before, in 1932, deceased told his son Edward that he was indebted to the plaintiff and stated:

"I want to pay Chester for the work and the money he let me take. Of course, I couldn't pay him now, because I might live 20 years or more, and I don't know when I will die."

On other occasions deceased told members of his family that as long as he lived he would "hang on to the money, but he said he wanted Chester to be paid."

In re Pierson's Estate, 282 Mich. 411, was a case in which this court reversed a judgment in favor of four claimants ranging in age from 7 to 16 years, against the estate of their uncle, for services performed. There was evidence that decedent had repeatedly expressed his gratitude and had mentioned that he would pay claimants some time for what they

had done. However, it was not shown that any such expressions of gratitude were known to any of the claimants. The court held that, under the circumstances and taking into consideration the age of the claimants and their relationship, the statements of decedent did not constitute evidence indicating that there was an understanding between the parties that claimants should be paid for their services.

In *Decker* v. *Kanous' Estate,* 129 Mich. 146, the court reversed a judgment in favor of a daughter who claimed that she was entitled to recover for services performed for her mother under an implied contract. There was some evidence that decedent had stated that her daughter ought to have pay for taking care of her, but the witness who testified to such statement did not understand at the time that the daughter had heard the conversation.

While it is not necessary to prove an express contract in terms, in claims for services against the estates of decedents, there must be proof at least of an implied contract, and in case of services performed by a member of the family, there must be enough in the record to overcome the presumption arising from the family relation. *Decker* v. *Kanous' Estate, supra.*

In *Pupaza* v. *Laity,* 268 Mich. 250, this court held that where a decedent had told various persons that she was indebted to claimant, and that he was to be paid after her death, such statements constituted sufficient evidence to present to the jury for their determination, as a question of fact, whether there was a contract between decedent and such claimant that he was to be paid for his services after her death.

Testimony and evidence presented a question of fact for the determination of the jury in the present

case. Under instructions from the trial court, the jury found that there was a contract between decedent and plaintiff. Because of the fact that there was evidence that payment was not to have been made until the death of deceased, the claim was not barred by the statute of limitations.

"There was some evidence from which the jury might find that the services were not to be paid for until the death of the decedent, and in such case the statute would not begin to run until such decease." *Pupaza* v. *Laity, supra.*

With regard to the presumption that services performed by a child for his parent are gratuitous, it was said in the case of *In re Abel's Estate,* 173 Mich. 93:

"It is not essential to a recovery by a child for services rendered to a parent, that a formal contract be established in relation thereto; but if the facts and circumstances attending the performance of the work and its acceptance are sufficient to rebut the presumption that the services were gratuitous and to authorize the inference that both parties acted under the understanding that they were to be paid for, the parent is liable."

In the case of *In re Hoffman's Estate,* 200 Mich. 464, 472, this court quoted with approval from *Wessinger* v. *Roberts* (syllabus), 67 S. C. 240 (45 S. E. 169), as follows:

"The presumption that services rendered to a mother by a daughter are gratuitous is not of itself destroyed by the fact that they were not members of the same household, yet this fact weakens the presumption, and it may be regarded as giving support to other facts tending to establish an implied contract."

At the time of performance of the services in this case, plaintiff was a married man and did not belong to his father's household. He returned from Bay City to the farm, in response to his father's request, at a time when the other children were leaving the farm. Statements of decedent acknowledging his obligation to his son and expressing an intention that he would pay claimant "in the end" for his services, were made to decedent's other children in the presence of the plaintiff.

There are no suspicious circumstances respecting the testimony of witnesses for the claimant. They were members of the same family and the establishment of plaintiff's claim would be to their disadvantage. Under the evidence, the question of whether the services which plaintiff performed for his father were gratuitous was a question of fact for the jury.

Judgment affirmed, with costs to plaintiff.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and NORTH, JJ., concurred.

NU-WAY SERVICE STATIONS, INC., *v.* VANDENBERG BROS. OIL CO.

1. LANDLORD AND TENANT — OPTION TO PURCHASE — COVENANT RUNNING WITH LAND.

   Option to purchase land in written lease for 10-year term if lessor desired to sell the property at end of term, which gave lessee first chance to buy property for period of 90 days after expiration of term by meeting terms of any other previous offer, *held*, valid and to constitute a covenant running with the land.

2. SAME—OPTION TO PURCHASE—CONDITIONS.

   Under option to purchase for period of 90 days at expiration of lease if lessor then desired to sell, lessee was limited as to time within which option might be exercised and also by the contingency of whether the lessor or those in privity with him desired to sell during that time and where undisputed evidence shows that vendee of party which purchased premises at mortgage foreclosure sale held prior to expiration of term did not desire to sell during such period the condition under which the option might be enforced did not exist.

3. CONTRACTS—ACCEPTANCE OF OPTION.

   Acceptance of an option must be in strict compliance with the terms proposed, both as to the exact thing offered and within the time specified; otherwise the right is lost.

4. SAME—OPTIONS—TIME.

   The power vested in an optionee to exercise a right at the end of a fixed period does not authorize him to exercise it prior to the time designated.

5. LANDLORD AND TENANT—OPTION TO PURCHASE.

   A court has no power to change the terms of an option to purchase land incorporated in a lease for the advantage of a party thereto.

6. SAME—OPTION TO PURCHASE—ADDITIONAL LAND—LESSOR'S PRIVIES.

Lessee under lease, containing option to purchase for period of 90 days after expiration of 10-year term if lessor then desired to sell, *held*, not entitled to enforce option as defendant in action of ejectment where lessor had lost premises, including those leased, through foreclosure of a mortgage on leased premises and a contiguous parcel, and land contract purchaser from purchaser at foreclosure sale was not desirous of selling leased premises at time limited by option, notwithstanding lessee's offer to purchase the additional land.

WIEST, C. J., and BUTZEL and BUSHNELL, JJ., dissenting.

Appeal from Ottawa; Sanford (Joseph F.), J., presiding. Submitted October 7, 1937. (Docket No. 61, Calendar No. 39,693.) Decided April 4, 1938.

Ejectment by Nu-Way Service Stations, Inc., a Michigan corporation, against Vandenberg Bros. Oil Company, a Michigan corporation, to obtain possession of certain premises. Judgment for plaintiff. Defendant appeals. Affirmed.

Arthur W. Penny, for plaintiff.

Diekema, Cross & Ten Cate, for defendant.

NORTH, J. I am in accord with the opinion by Mr. Justice WIEST in so far as it holds that the option in question is valid and that it constitutes a covenant running with the land. But I cannot agree with his statement that "defendant had a right to accept the terms of the option *when the sale was made to plaintiff.*" The contract sale to plaintiff was made October 27, 1936. The option held by defendant did not give it a right to purchase on that date. Instead the option was limited by its own terms to a period of 90 days beginning at the expir-

ation of defendant's lease, February 1, 1937. The option reads: "in case the said party of the first part desires to sell said property *at the end of the term of this lease,* * * * for a period of 90 days" defendant shall have "the first chance" to purchase on the most favorable terms. Obviously defendant had only a limited or conditional option, so-called. Its rights as an optionee were limited first by the period of 90 days beginning February 1, 1937, and also by the contingency of whether the optionor (or those in privity with him) desired to sell "at the end of the term of this lease." The undisputed testimony is that neither the optionor nor those standing in privity with him desired to sell the property at the expiration of the lease. The bank trustees did not have the power to sell at that time except subject to the contract rights of plaintiff. Plaintiff did not desire to sell. Therefore the condition under which the option might be enforced did not exist.

"Acceptance of an option must be in strict compliance with the terms proposed, both as to the exact thing offered and within the time specified; otherwise the right is lost." *Bailey* v. *Grover* (syllabus), 237 Mich. 548.

The option in the instant case differs from those in the cases cited and relied upon in my Brother's opinion. In those cases the option ran concurrently with the leasehold period. At any time during that period the optionee could have enforced his right to purchase. But in the instant case by its own terms the option was not enforceable until the expiration of the lease and during the next 90 days thereafter. The defendant company did not have an option which it could enforce prior to the expiration of its lease. Instead its lessor (optionor) and his grantees had

the right to continue ownership of the property and to enjoy the profit by way of rents and income therefrom. In other words, by its terms the option in no way limited the optionor's right to convey the title to someone other than the optionee during the leasehold period. With such a transaction the optionee had no concern. Instead, its only right was that in event the optionor or those who stood in privity with him desired to sell the property within the period of 90 days next after the expiration of the lease, the defendant was to have "the first chance to buy said property."

It developed that the property was not for sale during the period of the option and, therefore, defendant had no right to purchase under its terms. The situation would have been different if plaintiff had desired to sell the property during the option period. Then, and only then, would defendant under its option have possessed the right to purchase on the most favorable terms.

In *LaDow* v. *E. Bement & Sons,* 119 Mich. 685 (45 L. R. A. 479), this court was considering an option which provided for the repurchase of stock "at the end of two years." And we there said: "Clearly, plaintiff could not exercise the option until the complete expiration of the two years." The phrase "to sell said property at the end of the term" means exactly what it says.

"'At the expiration of three years' means, and was intended to mean, the day on which the period of three years expired. The meaning is as clear, we think, as it would be in the case of an ordinary promissory note for the payment of a sum of money at the expiration of three years from date." *Magoffin* v. *Holt,* 62 Ky. 95.

The power vested in an optionee to exercise a right at the end of a fixed period does not authorize him to exercise it prior to the time designated.

"He had no right to make this election (to retain or return stock) before the expiration of the time. The time for such election expired at midnight on November 30, 1892, and it could not have been made until the full expiration of the time." *Rogers* v. *Burr*, 97 Ga. 10 (25 S. E. 339).

The condition precedent to defendant's option being effective during the 90 days next after the termination of its lease did not exist. The owner of the property did not desire to sell it at that time. Hence defendant had no enforceable rights in the property under its conditional option. The court has no power to change for defendant's advantage the terms of its option.

Defendant's position is further complicated by the fact that the property which plaintiff purchased was not the identical property covered by defendant's option. Instead the property purchased by plaintiff was a substantially larger parcel of land which included that covered by defendant's option. From the record in this case it cannot be said that either defendant's optionor or the plaintiff in this case ever desired to sell (separate and apart from the contiguous land) the parcel covered by the option. In consequence the record does not disclose on what terms the optioned parcel was ever offered for sale, if at all. To obviate this difficulty, defendant now offers to purchase from plaintiff all of the land which plaintiff holds as a contract purchaser. Obviously defendant has no enforceable rights in the property not covered by its option; and further neither it nor the optioned property was for sale during the option period.

The judgment entered in the circuit court is affirmed, with costs to appellee.

SHARPE, POTTER, and CHANDLER, JJ., concurred with NORTH, J.

WIEST, C. J. (*dissenting*). This is an action of ejectment.

Defendant claims right to possession of the premises by virtue of acceptance of an option right to purchase.

January 8, 1927, Percy Ray, then the owner, leased the premises, in the city of Holland, to defendant for a term of 10 years. The lease provided:

"It is further agreed that in case the said party of the first part desires to sell said property at the end of the term of this lease, that said party of the second part shall have the first chance to buy said property for a period of 90 days, by meeting the terms of any other previous offer. * * *

"The covenants, conditions and agreements, made and entered into by the several parties hereto, are declared binding on their respective heirs, representatives and assigns."

After execution of the lease and entry by defendant, the lessor, on November 11, 1927, mortgaged the premises to the First State Bank of Holland and, on July 16, 1930, deeded the premises to his wife. The mortgage was foreclosed and, upon sale, a circuit court commissioner's deed was issued to Paul E. Cholette on August 10, 1934, who took title merely as agent for the bank. The wife of the mortgagor gave Mr. Cholette a quitclaim deed on September 16, 1935. September 17, 1935, Mr. Cholette and wife deeded the premises to the trustees of the segregated assets of the First State Bank, such trustees having been appointed by the circuit court for the county of

Ottawa on May 3, 1935. October 27, 1936, the trustees sold the premises on land contract to plaintiff. That contract stated:

"Vandenberg Brothers Oil Company, existing lease payable $75 a month, cannot be located but should such lease be located and found to be valid and in force, same is to be terminated not later than April 10, 1937."

And the lease was therein assigned to the vendee.

January 27, 1937, defendant gave the trustees notice of election to exercise the mentioned option to purchase by meeting the terms and conditions of contract sale to plaintiff and tendered a land contract to such effect, executed by defendant. This was rejected. On March 8, 1937, this suit was brought by the land contract vendee and, upon trial before the court, plaintiff had judgment of ouster. Defendant reviews by appeal.

Defendant contends: (1) that the option in the lease was valid and binding upon all persons chargeable with knowledge thereof; (2) that the option was a covenant running with the land; (3) that the option was not rendered unenforceable by sale under land contract before expiration of the lease.

The option in the lease was valid, constituted a covenant running with possession of the land, estopped the optionor from executing any defeative instrument and rendered possession by the lessee and optionee constructive notice to third parties of rights thereunder.

After notice of acceptance of the terms of the option and tender of performance defendant, in equity and law, being in possession, holds with rights superior to the optionor and others claiming rights under indentures subsequent to, and with actual or constructive notice of, the option covenant.

Notice was had by the mortgagee and the purchaser under land contract and defendant had a right to accept the terms of the option when the sale was made to plaintiff. Such an option in a lease is not uncommon and is of value, both to lessor and lessee. It induces a long-time rental under which improvements may be made by the tenant with assurance of ultimately obtaining the title and not having to make removal.

In support of what we have said, we cite and quote from the following cases:

"An option is not an actual or existing contract, but merely a right reserved in subsisting agreement. It is a continuing offer of a contract, and if the offeree decides to exercise his right to demand the conveyance, he must signify that fact to the offerer. The option is not a sale. It is not even an agreement for a sale. At best, it is but a right of election in the party securing the same to exercise a privilege, and only when that privilege has been exercised by acceptance does it become a contract to sell. It is a continuing offer to sell which may or may not, within the time specified at the election of the optionee, be accepted. The owner parts with the right to sell to another for such time and gives to the optionee the exclusive privilege to buy on the terms set forth in the option." 5 Thompson on Real Property, p. 390, § 4287g.

In *Garelik* v. *Rennard,* 116 Misc. 352 (190 N. Y. Supp. 371), a five-year lease provided:

"That in the event of said landlord at any time during the term hereby granted desiring to sell said premises she shall first offer the same to said tenant, who shall have the preference over other parties, provided said landlord and tenant can agree upon a price and terms of sale."

Held—

"The covenant for a pre-emption is one running with the land, and is not merely a personal covenant. * * * The contract to give tenant a preference, should the landlord desire to sell, if the price and terms could be agreed upon, is valid and enforceable." Citing cases.

"A covenant in a lease for an option to purchase relates to and runs with the land." *Chas. J. Smith Co., Inc.*, v. *Anderson* (syllabus), 84 N. J. Eq. 681 (95 Atl. 358).

In *Pearson* v. *Horne,* 139 Ga. 453 (77 S. E. 387), the option provided:

"I hereby agree if I should decide to sell my half interest in the property corner of Second and Cherry streets, Macon, Ga., to give him the option of purchasing same for his clients, at any price that may be offered for the property by other parties."

Held—A valid and enforceable option.

In James on Option Contracts (1st Ed.), p. 81 *et seq.*, § 211, it is said:

"An option recited that 'in consideration of $1,000 advanced to me by H, I hereby agree, if I should decide to sell my half interest in (certain lands), to give him the option of purchasing the same for his clients at any price that may be offered by other parties.' The optionor, without notice to the optionee, sold the property to a third person for a certain sum. The optionee thereupon brought suit to recover damages, alleging that the value of the option was the excess of the selling over the option price. It was urged as a defense that the price to be paid under the option was not stated and that the contract was, therefore, void, but the court ruled the contract must be construed as meaning that if any price was offered to the optionor for the property

which she would be willing to accept, it was her duty to give the optionee the privilege of purchasing at that price.''

The same author continues:

''The same conclusion was reached in a Nebraska case where a provision in a lease of land gave the lessee an option to purchase the property during the term 'at any price offered by a third party satisfactory to' the lessor; and in a Texas case where an option in a lease gave the lessee 'the preference right to purchase said land at any *bona fide* offer made and acceptable (to the lessor) by any responsible party;' and in an Illinois case where a provision in a lease reserved the right to the lessor to sell the land at any time but provided that no sale should be made by him 'without first having given said second party (lessee) the privilege of purchasing said land upon such terms and at the same price per acre, as any other person or purchaser might have offered therefor;' and in another case, from the same State, where, by the provisions of a lease the lessee was given 'the first opportunity to purchase said premises provided he will pay as much as any other person.' ''

In *Waters* v. *Wambach,* 140 Md. 253 (117 Atl. 751), it was said of an intervener:

''If she was not then actually aware of the option of purchase held by the plaintiff under the lease, it does not appear from any evidence in the case that she was without such information. At all events, she had knowledge of the plaintiff's possession, and as she could readily inform herself as to his rights and interests, it is proper that she should be chargeable with notice of their nature and extent. *Engler* v. *Garrett,* 100 Md. 387 (59 Atl. 648); 16 R. C. L. p. 538.''

In *Gates* v. *Shannon,* 200 Ky. 387 (255 S. W. 79), it was held, quoting syllabus:

"Notice of right of lessee under his lease to purchase the property will be imputed to a purchaser from the lessor by actual possession of the land by the lessee."

See, also, *Kerr* v. *Day,* 14 Pa. 112 (53 Am. Dec. 526); *Ohio River Junction R. Co.* v. *Pennsylvania Co.,* 222 Pa. 573 (72 Atl. 271).

Plaintiff has no more right to possession than its vendor, and its vendor's rights are subject to the option rights of the defendant.

The judgment should be reversed without a new trial, and, with costs to defendant.

BUTZEL and BUSHNELL, JJ., concurred with WIEST, C. J. FEAD, J., took no part in this decision.

ADOLPH *v.* COOKWARE COMPANY OF AMERICA.

1. APPEAL AND ERROR—DIRECTED VERDICT—EVIDENCE.
   On appeal from judgment upon directed verdict for defendant, plaintiff's testimony must be accorded favorable consideration.

2. MASTER AND SERVANT—CONTRACTS—CONSIDERATION—COMPENSATION.
   Contracts of employment do not require any consideration beyond rendition of services to make them valid and compensation may be made in any form agreeable to the parties.

3. CONTRACTS—STATUTE OF FRAUDS—PERFORMANCE WITHIN A YEAR.
In action to recover compensation under alleged contract of employment under plaintiff's testimony which indicated parties contemplated reducing contract to writing, unless such a writing was a condition precedent to the taking effect of alleged oral agreement, negotiations, if carried to point of mutual accord, could constitute a valid present contract especially where performance was entered upon and might not extend beyond a year (3 Comp. Laws 1929, § 13417).

4. FRAUDS, STATUTE OF—CONTRACTS PERFORMABLE WITHIN A YEAR.
Provision of statute of frauds voiding every unwritten agreement which by its terms is not to be performed within a year does not apply to contracts which by any possibility are capable of being completed within a year, although the parties may have intended and thought it probable that it would extend over a longer period and it does so extend (3 Comp. Laws 1929, § 13417).

5. MASTER AND SERVANT—CONTRACT OF PERMANENT EMPLOYMENT—TERMINATION.
Alleged contract of employment of plaintiff, an actively practicing chiropractor, to write a book and act as head of defendant manufacturer's health extension department *held,* a contract for permanent employment and, as such, for an indefinite period and, unless for a consideration other than promise of services, terminable at the will of either party.

6. CONTRACTS—CONSIDERATION.
Action of plaintiff, a chiropractor, actively engaged in practice in another State in giving up his practice *held,* but an incident necessary on his part to place himself in a position to accept and perform contract to write a book and act as head of defendant manufacturer's health extension department and not a price or consideration paid defendant for the contract of employment.

7. SAME—REDUCTION TO WRITING—QUESTION FOR JURY.
Whether alleged oral contract to employ plaintiff was fully agreed to and complete and the contemplated reduction to writing was to be but a memorial of the settled terms of the employment *held,* under plaintiff's testimony, a question of fact for the jury.

8. MASTER AND SERVANT — CONTRACT OF EMPLOYMENT — COMPENSATION.

Under alleged contract of employment whereby plaintiff wrote a book and agreed to act as head of defendant manufacturer's health extension department in return for 2 per cent. of gross sales, if contract were found to exist as claimed, plaintiff would be entitled to contract compensation during period he rendered services thereunder up to time of discharge.

Appeal from Berrien; Evans (Fremont), J. Submitted January 7, 1938. (Docket No. 69, Calendar No. 39,648.) Decided April 4, 1938.

Action by Herbert M. Adolph against Cookware Company of America, a Michigan corporation, for compensation for personal services. Directed verdict and judgment for defendant. Plaintiff appeals. Reversed with new trial.

Thomas N. Robinson and *Carl E. Schultz,* for plaintiff.

Gore, Harvey & Fisher, for defendant.

WIEST, C. J. Claiming an oral agreement with Dr. William A. Burnette, president of defendant company, for permanent employment by the company and to receive for his services two per cent. of the gross receipts from all sales made by the company, and alleging his unwarranted discharge, plaintiff brought this suit to recover such compensation to the time of his discharge and the present worth of prospective participation in the gross receipts from sales.

Defendant, by answer to plaintiff's declaration, denied every averment essential to plaintiff's right of action.

The issues came to trial before a jury and, at the close of plaintiff's proofs, on motion of defendant, the court directed a verdict for defendant.

The trial judge, in effect, held that an oral agreement, understood by the parties to be reduced to writing before becoming effective, was not a contract until so reduced to writing, and plaintiff could not recover under the alleged contract.

Plaintiff, in 1934, was a chiropractor in practice at Carrollton, Georgia, and had become interested in defendant's products. About January 1, 1935, at Chattanooga, Tennessee, plaintiff met William A. Burnette, president and general manager of defendant company, and claims that an oral agreement was made that he should write a book, to be published by the company, the writing to take two or three months and, when asked by Dr. Burnette: "How little do you suppose you could get along on until we get this thing going?" he said: "You really don't need to pay me anything at all."

However, it was arranged that plaintiff have $25 a week to defray his expenses, and was given a check for $25, which he said he would not use then and would wait until he started for Hartford, Michigan, the home town of the company.

We quote the following from plaintiff's testimony:

"After we had definitely settled the expense money, he (Dr. Burnette) said 'I think we ought to have something arranged.' And we both agreed we should have something arranged in writing on this. He asked me to write up a contract and send it to him, for his approval, and I told him that he being the president of the company, I thought it was up to him to write up the contract and send a copy to me, so I said, 'I would suggest that you write up your contract in two copies and send me one in conformity with what we have talked over, and if it is

satisfactory I will sign one and send it back.' Send both copies. I was to sign them both and send one back. And he agreed to do that, which would be very logical. That was the end of my contact with him at Chattanooga."

January 19, 1935, plaintiff wrote defendant's president a letter, stating that he had arranged his affairs and could leave for Hartford one week ahead of previously contemplated schedule, and—

"In case of an emergency I may wire you for $25 while en route. I will explain the reason when I see you, otherwise hold everything till I arrive in Hartford. * * *

"What I cherish mostly is the opportunity you have given me to build up to a station in life in keeping with my ability, training and desire for the special work I have followed.

"The remuneration for my services is I feel a secondary matter. Judging from the way you have compensated other men who have made good in your organization I feel perfectly willing as stated to you before to let the matter of compensation rest with your judgment, and I shall have no doubt about getting a fair and square deal at all times."

This letter does not indicate a completed contract for employment, but rather one having further negotiations in view.

On his way to Hartford, where the terms of his employment were to be considered and embodied in a written contract, he received a letter from the president of the company, dated January 15, 1935, in which it was stated:

"This will confirm our agreement that you are to come to the home office as soon as you find it convenient to do so—say within the next two or three weeks, and that you are to give your full time and attention to your work for the Company. As your

compensation, I agree to pay you $25 at the beginning. Any increase in pay will depend upon your worth to our organization.

"You are to work under my personal direction and if for any reason at any time you wish to terminate your connection with us you may do so by giving us two weeks' notice and if for any reason I wish to terminate your employment I may also do so by giving you a two weeks' notice.

"My idea is to make you the head of our health extension department. * * * I feel certain that we will get along splendidly if you are able to develop a practical business man's point of view regarding the development of this department."

When plaintiff reached Hartford on January 25, 1935, he was asked by Dr. Burnette if he had received that letter and stated that he had, and "that it was not in conformity with what we talked over and that we should have something definite in writing," and—"He (Dr. Burnette) said 'Well, you need not worry about anything, doctor, you are a valuable man to us and I don't want you to think for one minute you are not going to get a square deal. Just show us what you can produce.' He told me to go ahead with the preparation of this book, get that book started."

Plaintiff testified that the book was prepared by him and, on March 15, 1935, he said to Dr. Burnette:

"Now, Dr. Burnette you are going away to Europe and I want it definitely settled regarding my pay on a permanent basis as director of your health department. Now we have discussed matters pro and con from time to time up to this date. I have divulged to you practically all of my secret plans and ideas regarding this work, and the preliminary work including the writing of the book 'Healthward' and the establishment of the entire health service has

been set up all of which you have accepted as highly satisfactory, therefore I want it definitely settled how much my pay is going to be as a permanent employment (employee) here and as director of your health department.' * * * Then he said 'Your pay will be 2 per cent. of the gross sales of the corporation.' This was to be effective from March 15, 1935. * * * I asked him to put it in writing and he said that as he is going to Europe, he didn't have time, so many things coming up, and he requested that I just go along and not worry about anything, and when he got back from Europe, this matter would be put in writing and the $25 expense money that I was getting weekly for to cover my expenses would be deducted and applied on this condition, when he got back, and to go along on the $25 a week until he returned. * * * He wanted this conversation, this arrangement of 2 per cent. to be confidential because of personal reasons, and I respected his request in that regard and did not divulge that.''

Dr. Burnette left for Europe about March 19, 1935, and soon thereafter disputes took place between plaintiff and Mr. Olyneic, secretary and treasurer and office manager of the company, relative to the publication of the book, and culminated, on May 10, 1935, in plaintiff's discharge by Mr. Olyneic, and ratification thereof by Dr. Burnette.

Can it be said as a matter of law that plaintiff's testimony failed to show a valid contract? The verdict having been directed against plaintiff on his own testimony we must, in this review, accord such testimony favorable consideration.

If plaintiff was hired by defendant company the alleged contract did not require any consideration beyond his services to render it valid and his compensation could be made in any form agreeable to the parties. It is manifest, under plaintiff's testi-

mony, that the parties contemplated, at least, a written memorial of their agreement but, unless they intended such a writing to constitute a condition precedent to the taking effect of the alleged oral agreement, then their negotiations, if carried to the point of mutual accord, could constitute a valid present contract, and especially so when performance was entered upon and might not extend beyond a year.*

The uniform rule on this subject is well stated in the following decision:

"The mere fact that the contract may or may not be performed within the year does not bring it within the statute. The rule is that if, by any possibility, it is capable of being completed within a year, it is not within the statute, though the parties may have intended and thought it probable that it would extend over a longer period, and though it does so extend." *Smalley* v. *Mitchell,* 110 Mich. 650.

Plaintiff's proofs, taken as true, showed a contract for permanent employment. Such a contract is for an indefinite period and, unless for a consideration other than promise of services, the employment was terminable at the will of either party. *Lynas* v. *Maxwell Farms,* 279 Mich. 684, and cases there cited.

The action of plaintiff in giving up the practice of his profession was but an incident necessary on his part to place himself in a position to accept and perform the contract and not a price or consideration paid to defendant for the contract of employment. *Lynas* v. *Maxwell Farms, supra; Lord* v. *Goldberg,* 81 Cal. 596 (22 Pac. 1126, 15 Am. St. Rep. 82).

Plaintiff claims that the preliminary employment in preparing the book had ended and services under

* See 3 Comp. Laws 1929, § 13417.—REPORTER.

the alleged contract of permanent employment were thereafter commenced and rendered.

Whether the alleged oral contract was fully agreed to and was complete, and the subsequent writing was to be but a memorial of the settled terms of the employment, was, under plaintiff's testimony, a question of fact for the jury.

If found, as claimed by plaintiff, then, under such contract, he is entitled to the contract compensation during the period, if any, he rendered services thereunder, up to the time of his discharge on May 10, 1935.

The judgment is reversed and a new trial granted, with costs to plaintiff.

BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ. concurred.

DROLSHAGEN v. COUNTY OF WAYNE.

OFFICERS—PROBATE REGISTERS—REDUCTION OF SALARY DURING INCUMBENCY—EQUALLY DIVIDED COURT.

Judgment for plaintiff, administratrix of estate of deceased probate register who had been appointed under a statute providing that he should "hold such office during the term for which the judge of probate making the appointment shall have been elected, unless sooner removed by the judge of probate," against county in action to recover amount by which board of supervisors had reduced salary during term of office is affirmed by an equally divided court (Const. 1908, art. 16, § 3; 3 Comp. Laws 1929, § 13875).

Appeal from Wayne; Ferguson (Homer), J. Submitted January 6, 1938. (Docket No. 57, Calendar No. 39,833.) Decided April 4, 1938.

Bertha Drolshagen, administratrix of the estate of Joseph F. Drolshagen, deceased, filed her claim with the Wayne County Board of Auditors for alleged deficiency in salary paid plaintiff's decedent as probate register. From denial of claim, plaintiff appealed to the circuit court. Judgment for plaintiff. Defendant County of Wayne appeals. Affirmed by an equally divided court.

John J. Fish, for plaintiff.

Duncan C. McCrea, Prosecuting Attorney, *Garfield A. Nichols* and *Russell C. Duncan,* Assistant Prosecuting Attorneys, for the defendant.

SHARPE, J. I am not in accord with the opinion of Mr. Justice BUTZEL. His opinion is based upon the proposition that because the probate judge has the power to remove the register of probate at will, the term is indefinite and the board of supervisors had the right to decrease the salary.

The general rule is that if the term is indefinite, the officer's salary may be reduced or enlarged. In *Bodell* v. *City of Battle Creek,* 270 Mich. 445, we said, "The inhibition against the raising or lowering of salaries applies only to the definite, and not to the indefinite term of an official."

The real issue in the present case is to determine whether a register of probate is appointed for a definite term. The authority for such an appointment is found in 3 Comp. Laws 1929, § 13875, which reads as follows:

"In every county in this State the judge of probate may appoint a probate register, who shall hold

such office during the term for which the judge of probate making the appointment shall have been elected, unless sooner removed by the judge of probate; such register so appointed shall take and subscribe the oath of office prescribed by the Constitution, and give bond in the penal sum of $1,000 to be approved by the probate judge, and shall exercise the power of, and be competent to do all acts required of the judge of probate except judicial acts."

In support of the statement that if an officer is removable at will, he holds for an indefinite term, Mr. Justice BUTZEL cites: *Somers* v. *State,* 5 S. D. 321 (58 N. W. 804); 5 S. D. 584 (59 N. W. 962); *Buechele* v. *Petty,* 265 Ky. 321 (96 S. W. [2d] 1010); *Bayley* v. *Garrison,* 190 Cal. 690 (214 Pac. 871).

In the *Somers Case, supra,* the officer was appointed under a statute which provided that the superintendent was authorized "to appoint a deputy." There was no specification as to the term of the appointment. The court in that case said:

"Plaintiff had no 'term.' * * * The law fixed no time for the continuance of such appointment."

And on the rehearing, the court said:

"We still think that the word 'term,' when applied to an office means a definite time for its beginning and ending."

In the *Buechele Case, supra,* the court said: "If one holds office at the pleasure of the appointing power, he has no fixed right either to the office or the compensation attached thereto at the time of his appointment, but may be removed at any time." The report of this case does not show whether any term of office was mentioned, as in the case at bar. In *Bayley* v. *Garrison, supra,* it was held that the constitutional inhibition did not apply to the office

of a deputy county clerk because he had no term of office. The court there said: "We conclude * * * that the increase of compensation to a deputy who holds office at the pleasure of his principal is not a violation of * * * the Constitution."

In *Townsend* v. *Kurtz,* 83 Md. 331 (34 Atl. 1123), the State insurance commissioner, by statute, was to be appointed "for the term of four years * * * and shall hold his office during the term for which he is appointed, or until his successor is appointed, and qualified, unless sooner removed by the governor." The court said:

"When the statute has given the appointing power authority to remove the appointee, although originally appointed for a definite term of years, it can be exercised."

It was also said:

"It is contended on the part of the appellee that the tenure of this office is not for a fixed term, but its duration is uncertain and indefinite, and therefore the incumbent is removable at the will of the appointing power. It is well settled that where there is no limit fixed to the term (of) office, and the appointee holds merely at the will of the appointing power, he may be removed without notice and without charges being preferred or reasons assigned. But it would seem clear that under the very terms of the statute the tenure of this office is not for such an indefinite term as that. The statute says he shall be appointed 'for the term of four years,' and that he 'shall hold his office during the term for which he is appointed, or until his successor is appointed and qualified, unless sooner removed by the governor, treasurer, and comptroller.' We will have occasion to discuss later on the effect of this power of removal, but it cannot properly be said that the appointment is not originally for a definite term, al-

though subject to removal by the action of all of the officers above named. It is true he may not hold the office four years by reason of death, resignation, or his removal, if done in the way authorized by law, but that is the time designated by the statute for which he shall hold it, *subject to those contingencies.* It is therefore distinguished from that class of cases in which the appointing power is authorized to appoint officers without naming some fixed term."

From our examination of Michigan authorities, we find that this is a case of first impression, but in *Trainor* v. *Board of Auditors of Wayne,* 89 Mich. 162 (15 L. R. A. 95), we said: "It is the undoubted policy of our State, and best in accord with our system of government, that officers should hold for fixed terms, and not be subject to removal at the will or caprice of the appointing power." In construing the act under which the register of probate was appointed, the same must be construed to give effect to every portion of it, if possible. In *Rohde* v. *Wayne Circuit Judge,* 168 Mich. 683, on rehearing, it was said:

"It is a cardinal rule in the construction of statutes that effect is to be given, if possible, to every word, clause, and sentence. It is the duty of the court, so far as practicable, to reconcile the different provisions, so as to make them consistent and harmonious, and to give a sensible and intelligent effect to each."

In my opinion the proper construction of the statute is that the *register of probate holds his office for a definite term, but may be removed by the judge of probate at any time before his term would otherwise expire.* If the statute be construed in this way, some operation is given to all of its provisions, namely, the term of office of the register of probate is for a

definite term, and if there be no removals, his term would expire at a definite period. If we adopt the opinion of Mr. Justice BUTZEL, it would render full emphasis to the removal clause provided for in the act, but would emasculate that portion of the act providing for the period of appointment. This we may not do.

It may also be noted that in providing for the appointment of probation officers by the probate judge the legislature has expressly provided that "all probation officers shall hold office during the pleasure of the court." 3 Comp. Laws 1929, § 12838. It is a fair inference that had the legislature intended that probate registers should "hold office during the pleasure of the court" only, it would have so provided. On the contrary, as above noted, a probate register is appointed to serve during the fixed term for which the appointing judge has been elected, and when so appointed a probate register cannot be removed except for cause.

Possibly, as is rather convincingly set forth in my Brother's opinion, it would be better if a probate register was subject to removal at the will of the appointing probate judge; but the wisdom of the statutory provision is a matter solely of legislative concern.

Plaintiff has the right to recover the balance of the register's salary. *Ruell* v. *City of Alpena,* 108 Mich. 290.

See, also, *County Com'rs of Anne Arundel County* v. *Goodman,* 172 Md. 559 (192 Atl. 325); *Taylor* v. *City of Philadelphia,* 126 Pa. Super. Ct. 196 (190 Atl. 663).

The judgment of the lower court is affirmed, with costs to plaintiff.

POTTER, NORTH, and MCALLISTER, JJ., concurred with SHARPE, J.

BUTZEL, J. Plaintiff, administratrix of the estate of Joseph F. Drolshagen, deceased, prevailed in a suit brought against the county of Wayne on a claim for an alleged deficiency in the payment of the salary of decedent for the period from December 1, 1932, to May 1, 1934. Mr. Drolshagen was a competent register of probate of Wayne county. He was appointed to that office on May 16, 1929, by Judge Henry S. Hulbert, reappointed on January 2, 1931, and held the office until May 1, 1934, when it became vacant on account of his death. At the time of his reappointment the salary had been fixed by the board of supervisors at $9,000 per annum. At the session of the board of supervisors in October, 1932, the budget adopted for the fiscal year from December 1, 1932, to November 30, 1933, reduced the salary of the probate register from $9,000 to $7,600 per annum which amount was paid to Mr. Drolshagen until his death.

Plaintiff claims that under the State Constitution of 1908, art. 16, § 3, decedent's salary as a public officer could not be decreased during his term after appointment. *Gillespie* v. *Board of County Auditors of Oakland County,* 267 Mich. 483. However, if an officer is removable at will, the constitutional provision prohibiting reduction of his salary does not apply. *Somers* v. *State,* 5 S. D. 321 (58 N. W. 804), 5 S. D. 584 (59 N. W. 962); *Harrold* v. *Barnum,* 8 Cal. App. 21 (96 Pac. 104); *Board of Commissioners of Muskogee County* v. *Hart,* 29 Okla. 693 (119 Pac. 132, 37 L. R. A. [N. S.] 388); *State, ex rel. Matlack,* v. *Oklahoma City,* 38 Okla. 349 (134 Pac. 58); *Bayley* v. *Garrison,* 190 Cal. 690 (214 Pac. 871); *State, ex rel. Gilbert,* v. *Board of Commissioners of Sierra County,* 29 N. M. 209 (222 Pac. 654, 31 A. L. R. 1310); *Stone* v. *State, ex rel. Strain,* 18 Ala. App. 228 (89 South. 824); *Commonwealth* v. *Ewald Iron*

Co., 153 Ky. 116 (154 S. W. 931); *Jefferson County* v. *Cole,* 204 Ky. 27 (263 S. W. 1114); *State, ex rel. Kane,* v. *Johnson,* 123 Mo. 43 (27 S. W. 399); *Buechele* v. *Petty,* 265 Ky. 321 (96 S. W. [2d] 1010); *Stewart* v. *Kidd,* 262 Ky. 90 (89 S. W. [2d] 861). If an officer, removable at will, refuses to acquiesce in a reduction of salary, he may be summarily removed and another officer appointed to take his place. Under such circumstances, the constitutional prohibition cannot apply, for its purpose is to preserve the independence of a public officer. We said in *Bodell* v. *City of Battle Creek,* 270 Mich. 445:

"One of the reasons for the rule that an official's salary cannot be reduced during his definite term is to prevent the use of an indirect method to discharge an official during such term by the subterfuge of reducing his salary. This reason does not apply where, as in the instant case, plaintiff, from and after January 1, 1932, was subject to removal at any moment through the appointment of his successor."

Where it is shown that a public officer may be removed at the pleasure of the officer who appointed him and who must have complete control over his actions and conduct, there is no reason for prohibiting an alteration in his compensation. Since control may be exercised over his actions directly by removal, it cannot be complained that the indirect exercise of such power, by reduction in salary, is improper. If the officer is unwilling to accept a reduction, he may resign. If he is not willing to do either, he may be discharged for that reason alone. The question therefore arises as to whether the probate register is removable at will or only for cause.

Section 13875, 3 Comp. Laws 1929, provides that the judge of probate may appoint a probate register who shall hold office for the same term for which the judge of probate is elected, "*unless sooner removed*

by the judge of probate.'' It also provides for a salary of $3,000 in counties of 200,000 or more, with power in the board of supervisors, by a majority vote of the members elect, to name an additional salary. The statute does not expressly state whether the power of removal is at will or only for cause.

Plaintiff contends that upon the re-election of Judge Hulbert of the probate court and the reappointment of decedent as register of probate, the latter's term of office was definitely fixed as coextensive with that of the probate judge, and for that reason his salary could not be decreased. However, as hereinbefore stated, the true test by which the applicability of the constitutional limitation is determined, is whether or not the officer is removable at will. The mere fact that the officer is appointed to hold office for a specified period does not preclude a construction of the statute to the effect that he is removable at will and subject to having his salary altered. In *Commonwealth* v. *Ewald Iron Co., supra.* a statute, providing that an appointee was to hold office for the term of the appointing officer, ''unless sooner removed,'' was construed to allow removal at will and to permit an alteration in compensation. It has been repeatedly held that one holding office for a specified period, unless sooner removed, may be removed at will. *Townsend* v. *Kurtz,* 83 Md. 331 (34 Atl. 1123); *State, ex rel. Little,* v. *Mitchell,* 50 Kan. 289 (33 Pac. 104, 20 L. R. A. 306); *State, ex rel. Matlack,* v. *Oklahoma City, supra; State, ex rel. Holland,* v. *Ledwith,* 14 Fla. 220; *People, ex rel. Brundage,* v. *Hansen,* 234 Ill. App. 483; *State, ex rel. Sweeney,* v. *Stevens,* 46 N. J. Law, 344.

It cannot be said that a construction of the statute to allow removal at will nullifies the provision that the probate register is to hold office for the term of the probate judge. That clause is still effective to

fix a maximum period during which the register may hold office without reappointment. In the case of *State, ex rel. Rumbold,* v. *Gordon,* 238 Mo. 168 (142 S. W. 315, Ann. Cas. 1913A, 312), it was held that the legislature had power to alter the salary of the adjutant general, since the governor could remove that officer at will. The court said:

"This view of it does not make the words 'hold office during the term of the governor' perish by construction. Those words are still left as a legislative direction that in any and all events the military secretary of the governor shall step down and out with the governor himself. The governor is the commander in chief of the national guard by virtue of his office, and when he lays down his sword, his military secretary must lay down his official pen. The construction given but makes the whole law alive by giving some sensible office to all its words."

Removals at will are not favored and unless such power is expressly granted, it is presumed that an officer may be removed only for cause. *Hallgren* v. *Campbell,* 82 Mich. 255 (9 L. R. A. 408, 21 Am. St. Rep. 557). However, it was said in *Trainor* v. *Board of Auditors of Wayne,* 89 Mich. 162 (15 L. R. A. 95):

"And, although it is the undoubted policy of our State, and best in accord with our system of government, that officers should hold for fixed terms, and not be subject to removal at the will or caprice of the appointing power, yet there is no constitutional objection to the conferring of such power of removal in offices not elective, and the legislature has undoubted authority to do so."

Even though the power to remove at will was not expressly granted by the statute construed in the latter case, this court nevertheless held that such

power existed in the removing body. The question was clearly one of reasonable interpretation of the statutes involved and *Hallgren* v. *Campbell, supra,* was distinguished on that ground. The court said:

"In *Hallgren* v. *Campbell,* the power to remove certain officers at the pleasure of the council was expressly given in the same section of the charter, that mentioned the street commissioner as an officer. He was not included among those that might be so removed. But this last case recognizes, as do others in this State, the authority of the legislature to authorize the removal of appointed officers."

Even though the statute in the instant case does not expressly provide that the probate register is removable at will, a consideration of the nature of his duties leads to the conclusion that such was intended by the legislature.

When the nature of an office requires close cooperation between the person holding it and the person in whom the removal power lies, efficient administration may demand that the former be removable at the will of the latter. In *Townsend* v. *Kurtz, supra,* the court, in holding that an officer appointed for a specified period was removable at will, made the following statement which, although dictum, is peculiarly applicable to the instant case:

"The State reporter is appointed by the court of appeals, who 'shall hold his office for the term of four years unless sooner removed by said judges.' Although that question has never arisen, there would seem to be little doubt that this court could remove the reporter before the expiration of the four years without preferring charges. The nature of his duties requires him to come in close and frequent contact with the members of the court and it is important for the proper discharge of his duties that he and the judges work harmoniously together."

Although the probate register has no judicial powers, he is the right hand of the probate judge in the performance of his administrative duties. The judge must rely heavily upon the register and even though the latter may otherwise be competent, if he cannot work in harmony with the judge, he should be removable at will. On account of this very close relationship, the statute provides both for appointment and removal by the probate judge and we are of the opinion that the latter power is at will. Since expedience demands that the judge have complete control over the register, the register must be removable at the pleasure of the judge. *Smith* v. *Bryan*, 100 Va. 199 (40 S. E. 652).

In 1932, the country was rapidly approaching the worst period of the depression of which we have frequently taken judicial notice. It was a time when funds for the maintenance of government were difficult to obtain. Tax delinquency was very great, and it was necessary to economize in every proper manner. The reduction of Mr. Drolshagen's salary from $9,000 to $7,600 apparently met with his approval, for there is no showing of any objection or unwillingness on his part to accept a reduction. This claim was not presented until after his death. It seems quite obvious that had any complaint been made during the lifetime of decedent, the judge of probate could have exercised his power of removal under the statute. As the probate judge had the power to remove decedent at will, the board of supervisors had the right to decrease his salary.

The judgment of the lower court should be reversed without a new trial, but without costs to either party, since a public question is involved.

WIEST, C. J., and BUSHNELL and CHANDLER, JJ., concurred with BUTZEL, J.

CASE *v.* KLUTE.

1. WITNESSES — MATTER MUST BE SHOWN TO BE KNOWN BY DECEASED—INFERENCES.

   To exclude testimony of defendant on basis it related to fact equally within the knowledge of plaintiff's decedent for whose death damages were sought to be recovered, it must affirmatively appear from the testimony or circumstances that the facts sought to be shown were equally within the knowledge of the deceased as such facts cannot be inferred (3 Comp. Laws 1929, § 14219).

2. AUTOMOBILES—TESTIMONY AS TO COLLISION—KNOWLEDGE OF DECEASED GUEST PASSENGER.

   In action by administratrix of estate of deceased guest passenger of defendant motorist, admission of testimony of defendant as to facts relating to manner in which collision occurred *held*, not error, where testimony showed that deceased and defendant had been drinking beer earlier in the evening and that during the last two miles before the collision occurred there was no conversation between them although there had been during the preceding five miles, since it does not affirmatively appear that facts testified to by defendant were equally within the knowledge of the deceased (3 Comp. Laws 1929, § 14219).

3. TRIAL—OBJECTIONS TO EVIDENCE.

   When objections are made to the introduction of evidence during the course of a trial, such objections must be specific and the ground therefor should be stated with perspicuity and particularity in order that it may be understood by the court.

4. SAME—GENERAL OBJECTION TO EVIDENCE.

   A general objection to evidence is unavailable where any part of such evidence is not subject to the objection.

5. SAME—IMPROPER ADMISSION OF EVIDENCE—MOTION TO STRIKE.

   Party whose interests may be injuriously affected by improper admission of evidence may have it stricken out by applying to the court for that purpose but the ground upon which the mo-

tion is based should be stated and it is the duty of counsel to call to the attention of the court any conditions which may qualify its consideration by the jury.

6. SAME—ADMISSION OF EVIDENCE—QUALIFICATION—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED.

Failure of trial court to instruct jury at time of admission of testimony as to facts, claimed to be equally within knowledge of plaintiff's decedent, that such testimony was subject to consideration but with qualification that if they found that facts were equally within knowledge of deceased such testimony was to be disregarded *held,* not error in the absence of request so to charge on part of counsel (3 Comp. Laws 1929, § 14219).

7. AUTOMOBILES—ERROR OF JUDGMENT—GROSS NEGLIGENCE—GUEST PASSENGERS.

Mere error of judgment on part of motorist in so driving his car on four-lane highway as to crash into oncoming truck, which was the proximate cause of death of plaintiff's decedent, *held,* insufficient to constitute gross negligence within meaning of guest passenger act so as to entitle plaintiff to recovery (1 Comp. Laws 1929, § 4648).

Appeal from Berrien; Evans (Fremont), J. Submitted January 19, 1938. (Docket No. 70, Calendar No. 39,840.) Decided April 4, 1938.

Case by Clara F. Case, administratrix of the estate of Harry E. Case, deceased, against Louis Klute for damages sustained when plaintiff's decedent was killed in an automobile accident. Verdict for plaintiff. Judgment for defendant on special verdict. Plaintiff appeals. Affirmed.

White & White and *Theron D. Childs, Jr.,* for plaintiff.

Alexander, McCaslin & Cholette, for defendant.

MCALLISTER, J. About midnight of November 1, 1936, defendant was driving an automobile accom-

panied by plaintiff's decedent, who was riding in the front seat as a passenger. They were traveling on a so-called super-highway having four traffic lanes, at a speed of approximately 50 miles an hour. After having driven from the place of departure for about seven miles, they approached an oncoming truck, and when approximately 200 feet distant, defendant's car swerved to the left, across the highway and crashed into the truck. As a result of the collision, plaintiff's decedent was killed. The action brought against defendant was based upon gross negligence.

The case was tried before a jury, which returned a verdict for $2,666.66. The jury, however, answered a special question in which they found from the evidence that the cause of the collision was an error of judgment on the part of the defendant. The trial court entered judgment for defendant in compliance with the jury's answer to the special question submitted.

Plaintiff appeals and assigns error because of the admission of testimony of defendant driver, as to the occurrence of the collision and with regard to traffic just prior to the accident. Before the admission of such testimony, plaintiff's counsel made objection on the ground that it appeared that such facts were equally within the knowledge of the deceased.* The court overruled the objection. Plaintiff claims as error, that the court, in overruling such objection, neglected to instruct the jury at the time of his ruling that if the jury found that such facts were equally within the knowledge of the deceased, they should entirely disregard such testimony. No requests to instruct the jury on the point were submitted by plaintiff's counsel.

* See 3 Comp. Laws 1929, § 14219.—REPORTER.

In order to exclude such testimony in automobile accident cases, it must affirmatively appear from the testimony or circumstances that the facts sought to be shown, were equally within the knowledge of the deceased; such facts cannot be inferred. *Noonan* v. *Volek,* 246 Mich. 377.

The evidence showed that defendant and plaintiff's decedent had been distributing posters for an American Legion dance in another county and were returning home. They had been drinking beer earlier in the evening. During the time they were driving the last two miles before the collision, defendant testified that there was no conversation between him and plaintiff's decedent, although they had been talking during the preceding five miles. It did not affirmatively appear from the testimony or circumstances that the facts relating to the collision, as testified to by defendant, were equally within the knowledge of the deceased. There was no error in admitting such testimony. But plaintiff's counsel contend that where it does not affirmatively appear that the facts testified to were equally within the knowledge of the deceased, the evidence must be submitted to the jury with instructions to disregard such testimony if they find that it actually was within the knowledge of the deceased; and they claim that the trial court was in error in not instructing the jury to this effect. *In re Boyer's Estate,* 281 Mich. 618.

The trial court in its opinion denying a motion for a new trial, stated that there was nothing upon which the jury could have based a finding that the matter testified to was equally within the knowledge of the deceased; and that in any event, the failure of counsel to request such an instruction, either at the time the court admitted the testimony or previous to the court's charge to the jury, precluded them from raising the question on a motion for new trial.

When objections are made to the introduction of evidence during the course of a trial, such objections must be specific. *Detzur* v. *B. Stroh Brewing Co.*, 119 Mich. 282 (44 L. R. A. 500, 5 Am. Neg. Rep. 371). The ground of such objections should be stated with perspicuity and particularity, in order that it may be understood by the court. *Brown* v. *Weightman*, 62 Mich. 557. The proper practice in making objections is to state briefly the grounds thereof. *Abbott* v. *Chaffee*, 83 Mich. 256. A general objection to evidence is unavailable where any part of such evidence is not subject to the objection. *Timmerman* v. *Bidwell*, 62 Mich. 205.

Even in those cases where evidence has been improperly admitted, the party whose interests may be injuriously affected by it, may have it stricken out by applying to the court for that purpose, but the ground upon which the motion is based should be stated. *Runnells* v. *Village of Pentwater*, 109 Mich. 512.

Since it is necessary to move to strike out in such cases where evidence is improperly admitted, provided the grounds for such motion to strike are stated so that the court is informed of the question involved, it can be said with greater emphasis that where testimony is properly admissible, it is the duty of counsel to call to the attention of the court any conditions which may qualify its consideration by the jury; and counsel should follow such practice at the time of making such objection.

Defendant's testimony was clearly admissible. It would have been error to exclude it. The most that plaintiff now urges is that the court should have told the jury that it was to be considered subject to qualification. But plaintiff's objection went to its reception in evidence at all, which was clearly an insufficient objection. *Duflo* v. *Juif*, 63 Mich. 513.

Where such testimony is properly admissible, as in this case, failure of the trial court to instruct the jury at the time of its admission that it is subject to consideration only with qualifications is not error on the part of the trial court, in the absence of such a request on the part of counsel.

After the introduction of the testimony, plaintiff still had the opportunity to save such question for review by requesting that the court instruct the jury that they should give consideration to such testimony, subject to the qualifications that they could disregard it entirely if they found that it related to matters equally within the knowledge of the deceased. The court was not in error in failing to instruct the jury in the manner which plaintiff now insists was necessary in the absence of a request on the part of plaintiff. It is doubtful whether any of the facts testified to by defendant appeared affirmatively to have been equally within the knowledge of the deceased; but, in view of the foregoing, it is unnecessary to consider such question.

The jury found that the collision resulted from an error of judgment on the part of the defendant, and such finding removes from the case the question of defendant's gross negligence, which was the only ground upon which plaintiff could recover, the deceased having been a guest of defendant at the time of the collision.* We find no error in the action of the trial court in entering judgment for defendant.

Judgment affirmed, with costs to defendant.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, and NORTH, JJ., concurred.

* See 1 Comp. Laws 1929, § 4648.—REPORTER.

PAUL v. UNIVERSITY MOTOR SALES CO.

LINCOLN v. SAME.

1. PLEADING—AFFIRMATIVE DEFENSES—DISCHARGE.

   Discharge is an affirmative defense and the facts constituting such defense, as well as any other defense which by affirmative matter seeks to avoid the legal effect of, or defeat, the cause of action set forth in the declaration and any ground which if not raised on the pleading would be likely to take the opposite party by surprise, must be plainly set forth in the answer (Court Rule No. 23, § 3 [1933]).

2. SAME—ADMISSIBILITY OF EVIDENCE.

   Contract of sale of corporate automobile sales agency, referred to in plaintiffs' declaration in action against corporation to recover loans advanced to the company and for past due salaries accruing prior to such contract, *held*, admissible in evidence whether offered by plaintiffs or defendant notwithstanding defendant's answer was, in effect, a simple denial of each of plaintiffs' allegations upon which liability was predicated.

3. TRIAL—OBJECTION TO EVIDENCE.

   The particular reason for objection to the introduction of evidence must be reasonably apparent; the proper method being to state briefly the grounds thereof.

4. PLEADING—VARIANCE—SPECIFIC OBJECTION — SURPRISE — AMENDMENT.

   Variance between pleadings and proof which could have been cured by amendment and which, under the circumstances and in view of lack of specific objection, presumably did not occasion surprise to opposing counsel will be regarded on appeal as having been cured by amendment.

5. SAME—EVIDENCE—UNPLEADED DEFENSES—DISCHARGE.

In actions by two plaintiffs who had been officers and owners of controlling interest in defendant corporation to recover loans to corporation and past due salaries accruing prior to execution of contract of sale of their interests to individuals not defendants herein, admission in evidence of such contract and inventory of its assets referred to therein *held*, not error, where contract was referred to in plaintiffs' declarations, even though plaintiffs claimed contract and inventory were sought to be used in support of unpleaded defense of discharge.

6. EVIDENCE—BEST EVIDENCE—VARYING TERMS OF WRITTEN CONTRACT.

Exclusion of testimony, offered by plaintiffs in their action to recover loans made to defendant, a corporation, and unpaid salaries which accrued prior to the sale of their interests therein to individuals, not defendants, pursuant to a contract that referred to an inventory and appraisal which had been prepared by a certified public accountant, a copy of which was introduced by defendants that had omitted plaintiffs' claims as liabilities, that there was another and different inventory and appraisal on sheets of a different size which the same accountant had prepared and which included their claims *held*, proper, since witness could not testify as to contents of unambiguous written instrument, no subpœna was served upon alleged maker to bring in such claimed inventory in order to present best evidence and accountant testified exhibit introduced was the only one presented to parties as a basis for negotiating their deal and no questions were asked him concerning such claimed inventory.

7. SAME—PAROL EVIDENCE—UNAMBIGUOUS INSTRUMENT.

Parol evidence cannot be resorted to to add to, vary, contradict, or change the legal effect of the language of a written instrument unambiguous on its face.

8. SAME—PAROL EVIDENCE.

The contents of a written instrument cannot be proved by parol unless the instrument itself is produced or its absence accounted for.

9. SAME—BEST EVIDENCE.

It must be shown that it is impossible to produce the best and most direct testimony before other evidence is admissible.

10. SAME—SECONDARY EVIDENCE.
Secondary evidence is not admissible without proof that the original is lost or otherwise beyond the power of the party to produce it.

11. CORPORATIONS—OBSERVANCE OF CORPORATE FICTION.
A corporation will generally be looked upon as a legal entity until sufficient reason to the contrary appear but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, defend crime, or in support of an end subversive of the policy of the courts, the law will regard the corporation as an association of persons.

12. SAME—DISREGARD OF CORPORATE FICTION—CONTRACTS—INTENT—ESTOPPEL.
In order to carry out the intention of parties to a contract of purchase of corporate automobile sales agency, fiction that corporate existence of defendant company was distinct from that of its stockholders is disregarded where so-called "complete inventory and appraisal," referred to in contract and pursuant to which it was drawn, omitted reference to plaintiffs' claims for loans to the corporation and past due salary, hence plaintiffs are estopped to deny their claims against the corporation had been discharged where purchasers assumed only such corporate liabilities as were enumerated in the inventory and appraisal.

13. ESTOPPEL—CONTRACTS—FRAUD—MISTAKE.
If, in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands, in the absence of fraud or mistake.

14. CONTRACTS—ESTOPPEL TO DENY PREVIOUS ARRANGEMENTS.
Although a party to a contract had objections to it, yet having executed it, his mouth is closed against any denial that it superseded all previous arrangements.

Appeal from Wayne; Merriam (De Witt H.), J. Submitted January 7, 1938. (Docket Nos. 67, 68, Calendar Nos. 39,700, 39,701.) Decided April 4, 1938.

Separate actions by Riney F. Paul and Albert B. Lincoln against University Motor Sales Company, a

Michigan corporation, for sums due on promissory notes, for salary and on loans. Cases consolidated for trial and appeal. Disagreement of jury. Directed verdict and judgment for defendant. Plaintiffs appeal. Affirmed.

Charles A. Lorenzo, for plaintiffs.

Louis J. Colombo, for defendant.

MCALLISTER, J. On May 12, 1934, Riney F. Paul, Albert B. Lincoln and Walter Hammond incorporated the Paul-Hammond Company. Each of the incorporators owned one-third of the stock. In November, 1934, Hammond's stock interests in the corporation were purchased by plaintiffs and the name of the corporation was changed to the University Motor Sales Company. Plaintiffs Paul and Lincoln were the sole stockholders, officers and directors of the company. They managed and controlled the business of the corporation until March 7, 1935, having resigned about a week previous to this date as agency representatives of the Ford Motor Company.

During the latter part of 1934, William Heston mentioned to the officials of the Ford Motor Company that he would like to have such an agency if he could find a partner. Several months later he was called upon by a representative of the company and was shown the resignation of plaintiffs as dealers and was told that the agency was available. On this occasion he met for the first time Dawson, who also was interested in such an agency.

The University Motor Sales Company at this time was in serious financial straits. Heston and Dawson went over to the company's place of business and discussed the question of assets and liabilities. A representative of the Ford company, who was help-

ing along the negotiations, called in Ralph Genter, a certified public accountant, to audit the books of the company and to make a complete inventory and appraisal of all its assets and liabilities. In the examination of the affairs of the company, Mr. Genter ascertained that the plaintiffs had claims against the corporation for loans and past due salary.

The testimony is conflicting as to exactly what the conversation was between plaintiffs and Heston, Dawson and Genter with regard to these alleged liabilities. However, Genter prepared a statement showing the assets, liabilities and capital adjustments and presented copies of this statement, which were designated on the trial as a "complete inventory and appraisal," to both of the plaintiffs, and to Heston and Dawson as prospective purchasers. This statement, prepared by the auditor, included the assets and liabilities. All claims, however, of plaintiffs for loans advanced to the company and past due salaries were left out of the statement and did not appear as liabilities.

In the analysis of capital adjustment which was also submitted to the parties, it appeared that the accounts and loans payable as claimed by plaintiffs were omitted from the liabilities as set forth in the balance sheet. After they had examined the auditor's statement, a contract was prepared and executed by plaintiffs Paul and Lincoln, and Heston and Dawson, in which Heston and Dawson purchased all of the corporate stock of the company from plaintiffs, who were sole owners, and received an assignment of all of the assets of the University Motor Sales Company. The contract further set forth "first parties (Heston and Dawson) acknowledge receipt of a complete inventory and appraisal of the stock, fixtures, accounts receivable and payable,

tools, equipment, and other personal property of said company as of February 28, 1935, and that they have acquainted themselves with the transactions and business done by it from them to this date."

Heston and Dawson also acknowledged that the said business of University Motor Sales Company had sundry liabilities and obligations which they were to liquidate as successor stockholders and officers of the company, and they further assumed and agreed to discharge "such liabilities each and/or both of the parties of the second part (plaintiffs herein) is/are and/or may be subject to by reason of his/their having been stockholders and/or officers of said company whether such arise by statute or otherwise."

After the execution of the contract and the consummation of the sale, plaintiffs brought these actions to recover from the corporation the amount of the loans and past due salary accounts which had been omitted from the statement of liabilities prepared by the auditor prior to the sale. The defendant corporation claims that all of such salary accounts and loans were cancelled and discharged by plaintiffs at the time of their sale of the entire corporate stock and the sale of the entire assets of the company.

Separate actions were brought by Paul and Lincoln, which were consolidated for trial and appeal. On the trial a motion for directed verdict was made on behalf of defendant which was taken under advisement by the court in accordance with the Empson act (3 Comp. Laws 1929, § 14531 *et seq.*) and the case was submitted to the jury. Upon failure of the jury to agree upon a verdict, it was discharged and the court, under the right reserved on motion, entered judgments of no cause of action.

At the outset of their appeal, plaintiffs argue that the trial court erred in admitting in evidence the contract whereby plaintiffs sold their stock to Heston and Dawson, and the so-called inventory and appraisal, designated as exhibit 16, upon which defendant bases its claim that plaintiffs therein discharged the defendant from any liability on their loans and salary accounts.

Discharge is an affirmative defense and the facts constituting such defense, as well as any other defense which by affirmative matter seeks to avoid the legal effect of, or defeat, the cause of action set forth in the plaintiffs' declarations, and any ground which if not raised on the pleading would be likely to take the opposite party by surprise, must be plainly set forth in the defendant's answer. Court Rule No. 23, § 3 (1933).

In this case, defendant's answer was, in effect, a simple denial of each of the plaintiffs' allegations upon which liability was predicated. When defendant offered the contract in evidence, plaintiffs objected on the ground that it was "incompetent, irrelevant and immaterial, not set forth in the pleadings, no notice." Plaintiffs, themselves, however, set forth in their declarations the sale of all of their stock to Heston and Dawson, "who thereupon became the sole stockholders, directors, and officers of defendant company" on "to-wit: March 8, 1935." This allegation of the declarations obviously referred to the contract dated March 7, 1935. Such contract, under these circumstances and under the allegations in the declarations, would be admissible on the trial of the case, whether offered by plaintiff or defendant.

The inventory and appraisal, exhibit 16, was introduced on the theory that it was included by refer-

ence in the contract entered into between the parties. Plaintiffs' objection to the introduction of this instrument was that it was "irrelevant, incompetent and immaterial." Plaintiffs' real ground of objection to the admission of these instruments now appears to be that they constitute an affirmative defense, and that the defendant seeks to prove a discharge of plaintiffs' claims by setting up the terms of the contract in question and its legal effect; and that therefore there was a variance between defendant's pleadings and proofs permissible under them.

In objecting to the introduction of evidence, the particular reason for objection must be reasonably apparent, *Isaacs* v. *McLean,* 106 Mich. 79; and the proper method of objection is to state briefly the grounds thereof. *Welch* v. *Palmer,* 85 Mich. 310.

If the objection had been made, however, that defendant was relying, by virtue of these instruments, upon an affirmative defense, which had not been pleaded in conformity to the court rules, the trial court undoubtedly would have permitted an amendment to the plea in order to set forth such defense. The contract in question had been drafted by plaintiffs' counsel and presumably did not occasion surprise; but it was within the discretion of the court to continue the cause over, if plaintiffs were unprepared for such defense. No surprise was claimed, however, and no request for continuance made; and in view of plaintiffs' allegations and the lack of specific objection, any variance between defendant's pleadings and proof was one that could be cured by amendment; and it will now be regarded as amended in accordance with the rule laid down in *Hallock* v. *Income Guaranty Co.,* 270 Mich. 448, and *Scendar* v. *Winona Copper Co.,* 169 Mich. 665.

It is not apparent that there was any error, therefore, on the part of the trial court, in considering the

contract and inventory as properly a part of the evidence before it in the determination of the case.

It is the contention of plaintiffs that the so-called inventory and appraisal introduced in evidence on the trial and referred to in the contract of sale, is not the same inventory and appraisal as that relied upon by plaintiffs at the time of the execution of the contract. They claim that there was another and different inventory and appraisal consisting of a number of yellow sheets of paper which the auditor, Genter, prepared and that it is such latter inventory and appraisal to which the contract refers. Because of this claim they insist that they had a right to testify as to the inventory and appraisal upon which they relied; and which they claim was incorporated in the contract of sale; and that the trial court was in error in excluding such testimony. The decision of the trial judge was based upon the fact that such testimony varied the terms of a written contract and that because exhibit 16, the inventory and appraisal, was in writing and incorporated in the contract by reference, testimony of plaintiffs as to another inventory and appraisal, or facts set forth therein, was in violation of the parol evidence rule.

Defendant's counsel insists that if the inventory and appraisal introduced in evidence as exhibit 16 is a part of the contract, then plaintiffs have no claim, inasmuch as such statement omitted the claims of plaintiffs; and that in entering into such a sale of stock and assets based upon such statement, plaintiffs thereby cancelled and discharged their claims.

On the trial of the case the inventory and appraisal setting forth assets and liabilities was introduced in evidence by defendant's counsel. Heston and Dawson testified it was the only inventory and appraisal submitted to them or discussed by the parties. Plaintiff Lincoln testified that he did not dispute the

figures of the auditor at the time he presented the audit; that he acknowledged it; that they were trying to agree on some figures and plaintiffs had to take what was offered to them; that the prospective sale was not discussed until after the statement was made up; that they did not discuss the liabilities nor the assets to any great extent. He stated: "Each one of us was handed by the auditor a balance sheet showing exactly what all our assets were and what our liabilities were. And this statement included all the liabilities which Dawson and Mr. Heston agreed to assume. And those which we agreed to assume."

He further testified:

"*Q.* In other words, each one of you was presented with that balance sheet?

"*A.* Yes.

"*Q.* So you could see exactly what the corporation owed and what you possessed?

"*A.* We were presented with this. * * *

"*Q.* The point is were you shown and did you examine that sheet?

"*A.* Yes, I was shown that sheet.

"*Q.* This schedule which showed all the liabilities and assets of the corporation before this deal was consummated?

"*A.* Yes, sir, I was."

The schedule which the witness referred to in his testimony was later introduced in evidence as exhibit 16.

Plaintiff Paul, upon being shown exhibit 16, testified:

"Here is your balance sheet, the same figures, and an analysis of the capitalization, the same thing, it is exactly the same. This is the one I received. I did receive an exact copy of exhibit 16, an inventory and appraisal of stock and equipment. And notes

receivable and payable and so forth. I examined that inventory and appraisal before I signed this agreement. * * * This is the only inventory that I know of. That was in typewritten form, other than what they went around and checked on personally."

Subsequent to this testimony, during an interchange of comment between counsel, the trial judge attempted to clear up certain difficulties and said:

"*The Court:* Let's get at this question a little differently. When your clients signed that agreement, whether before supper or after supper that evening in question, didn't they sign that and accept that inventory? I am not asking you whether or not * * * they were forced to, but didn't they sign it?

"*Mr. Lorenzo* (counsel for plaintiffs): I think in this instance, they did.

"*The Court:* Then they are bound by it."

The court thereupon recessed and plaintiff Paul resumed the stand at the afternoon session. He then directly contradicted himself in his previous testimony. He testified:

"Exhibit 16, this group of papers, is not the inventory and appraisal. The appearance of that inventory and appraisal referred to by this exhibit was made out on yellow paper, similar to what you have there, somewhat longer. The auditor had it. Similar paper in color, but they were longer sheets, I believe. * * * We were not given a copy of that inventory and appraisal. We were not given an opportunity to examine it in detail. We could see from time to time as they were working on it that they were getting up a complete list of all stock, our parts and machinery, and tools, and also a complete list of all our book accounts. * * *

"*Q.* Did you see the inventory and appraisal which you speak of now sufficiently and generally enough to know whether or not there were accounts

receivable, accounts payable, and all liabilities of the corporation in detail?

"*Mr. Colombo:* I object to that question unless the inventory and appraisal itself is produced, and that is the best evidence of what it contains.

"*The Court:* I am going to sustain that objection."

Plaintiff Paul further testified:

"I am sufficiently acquainted with bookkeeping to know what an inventory is. There is nothing about this exhibit 16, the first sheet of which is designated as the balance sheet, assets, there is nothing about that that I can classify as being an inventory. They are just lump figures there. * * * There is nothing about that exhibit that could be designated as an appraisal."

In this testimony the witness contradicted practically all of his testimony of the morning. He further testified that this alleged statement, consisting of yellow sheets, was prepared for the purpose of the transaction and was left in possession of Mr. Genter, the auditor, whom he referred to as sitting right there in the court room.

Counsel for plaintiffs made vigorous efforts to elicit from the witness testimony that he referred to the so-called inventory of yellow sheets rather than exhibit 16 at the time of executing the contract of sale. But the court sustained objections to such testimony on the ground that he could not testify as to the contents of a written instrument; that plaintiffs should subpœna the person who made the inventory in order to have such papers brought before the court as the best evidence. Ralph Genter, the auditor, was sworn as a witness and testified that he was the party who had prepared the statement and that he had furnished no other inventory or appraisal

other than that of exhibit 16; that no inventory was presented to any of the parties except such exhibit, in which the loans and accounts claimed by plaintiffs to be due them, were eliminated.

It impresses us as significant that although plaintiffs referred to Genter as the auditor who had prepared the inventory which they claimed was different from exhibit 16, and which was alleged to be written on yellow sheets of paper, no request was made by counsel for defendant to have him produce such inventory, and no questions were asked of him regarding such alleged inventory or his preparation thereof. Genter's statement that exhibit 16 was the only inventory which he prepared and submitted to the parties was not challenged by plaintiffs' counsel during the course of his examination. Under these facts and circumstances, the court properly ruled that any testimony regarding such alleged inventory was in violation of the parol evidence rule, and varied the terms of the written contract executed by the parties which included by reference the inventory and appraisal designated as exhibit 16. "Parol evidence cannot be resorted to to add to, vary or contradict the language of a written instrument unambiguous on its face." *Gardner* v. *City National Bank & Trust Co.*, 267 Mich. 270. The legal effect of a written instrument complete in itself and unambiguous in its terms, cannot be changed by parol evidence. *Jones* v. *Phelps*, 5 Mich. 218; *Dunham* v. *W. Steele Packing & Provision Co.*, 100 Mich. 75.

If plaintiffs relied upon the alleged inventory which, they claim, consisted of yellow sheets of paper, they could have subpœnaed before the court the party in whose possession such inventory was last known to have been. The contents of a written instrument cannot be proved by parol unless the in-

strument itself is produced or its absence accounted for. It must be shown that it is impossible to produce the best and most direct testimony before other evidence is admissible. *Sullivan* v. *Godkin,* 172 Mich. 257. Secondary evidence is not admissible without proof that the original is lost or otherwise beyond the power of the party to produce it. *Gelder* v. *Welsh,* 169 Mich. 490.

Plaintiffs claim that they had served counsel for defendant with notice to produce such instrument; but it never appeared that the document was ever in the possession or control of defendant or its counsel. Heston and Dawson claim that no such inventory ever existed. According to plaintiffs' own claim, the witness who made the alleged inventory was the auditor, Genter. They claim that he was the party who first prepared it and was the last person seen in possession of it. No subpœna was ever served upon him requiring the production of such instrument. Although Genter was examined as a witness, he was not asked by plaintiffs' counsel to furnish the inventory, nor was he interrogated in any respect as to whether he had possession of it or had ever prepared it. Plaintiffs made no effort to have the alleged inventory produced in court; and because of their failure to do so, or give some reason for their inability to produce it, the court properly refused to allow them to testify to the terms of such written instrument. There was nothing therefore before the court bearing upon the agreement of the parties except the contract of sale and the inventory and appraisal to which the said contract referred, and which all parties agreed had been submitted to them. Such inventory omitted all of the loans and accounts which plaintiffs claim to be due them from the corporation prior to the sale.

But, it is urged by plaintiffs that although such contract and inventory and appraisal may show that plaintiffs' claims against the corporation were omitted from the list of liabilities, nevertheless, there is no proof of the discharge of these claims by the plaintiffs. In passing upon the question it is necessary to examine the contract and dealings of the parties. In purchasing the company, Heston and Dawson agreed upon, and assumed the existence of, the fact that the only liabilities of the company were set forth in the statement of liabilities as shown by the inventory and appraisal. Plaintiffs also assumed and agreed to this fact in signing the contract. They may have had objections to it; but they accepted this statement as the basis of the contract.

But, it is claimed that, although the contract be construed as a sale by plaintiffs to purchasers of the entire assets and corporate stock of the defendant corporation, based upon an understanding that plaintiffs' claims against the corporation were not to be considered as outstanding liabilities, nevertheless, plaintiffs sold the stock as individuals and the buyers purchased as individuals; and therefore in a suit against the corporation Heston and Dawson cannot claim that the corporation is not liable for such corporate debt. Such argument implies that, conceding Heston and Dawson agreed to pay the corporate debts, they would not be obliged to pay plaintiffs' claim because it was omitted from the statement of liabilities; but that inasmuch as plaintiffs' claim was a corporate indebtedness, it was never cancelled by plaintiffs, as against the corporation.

But if the corporation be liable, payment must eventually be made directly or indirectly by Heston and Dawson as they are the only stockholders, directors and officers of the company.

A corporation will be looked upon as a legal entity, as a general rule, and until sufficient reason to the contrary appear; but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. *United States* v. *Milwaukee Refrigerator Transit Co.*, 142 Fed. 247.

The fiction that the corporate existence and corporate functions are distinct from that of the stockholders is introduced for convenience and to subserve the ends of justice; but when invoked in support of an end subversive of its policy, it should be, and is, disregarded by the courts. *Southern Electric Securities Co.* v. *State*, 91 Miss. 195 (44 South. 785, 124 Am. St. Rep. 638).

"The statement that a corporation is an artificial person or entity apart from its members is merely a description in figurative language of a corporation viewed as a collective body; a corporation is really an association of persons and no judicial dictum or legislative enactment can alter this fact." 1 Morawetz, Private Corporations (2d Ed.), § 227.

Where a railroad company created a telegraph company and, owning all its stock, sold the property of the telegraph company and its stock to a third party and received the purchase price, the railroad company was held liable, in equity, to pay a judgment against the telegraph company due to a contract made by the telegraph company before the sale. *Baltimore & Ohio Telegraph Co.* v. *Interstate Telegraph Co.*, 4 C. C. A. 184 (54 Fed. 50).

The abstraction of the corporate entity should never be allowed to bar out and pervert the real and obvious truth, 14 C. J. p. 61. In order to carry out the intention of the parties to the contract in this

case, we disregard the fiction that the corporate existence of defendant company was distinct from that of plaintiff stockholders at the time the stock was sold.

"If, in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands, in the absence of fraud, * * * or mistake." 21 C. J. p. 1111.

Although a party to a contract had objections to it, yet having executed it, his mouth is closed against any denial that it superseded all previous arrangements. *Parish* v. *United States,* 8 Wall. (75 U. S.) 489.

Heston and Dawson were buying the company. They were purchasing the entire corporate stock and all of the company's assets from the sole owners of the corporation. Plaintiffs consented to the terms and executed the contract based upon the statement of assets and liabilities in which they approved the omission of their claims as accounts due them from the company. When they consented to the contract in which these accounts were omitted from consideration as owing to them by the company they contracted on the written understanding there were no liabilities due from the company to them. Plaintiffs' consent to such an agreement was, in effect, a consent to a discharge of their claims against the company. Under the circumstances, they are estopped from now setting up that there was no discharge of their claims. *Fourth National Bank of Grand Rapids* v. *Olney,* 63 Mich. 58.

Judgments affirmed, with costs to defendant.

WIEST, C. J., and BUTZEL, BUSHNELL, SHARPE, CHANDLER, and NORTH, JJ., concurred. POTTER, J., did not sit.

In re TROMBLEY'S ESTATE.

ZECHLIN *v.* KONEN.

1. EXECUTORS AND ADMINISTRATORS — ATTORNEY AND CLIENT — CONTINGENT FEE CONTRACT.

An administratrix of an estate is without power to make a contract for services of an attorney on a contingent fee basis.

2. SAME—RATIFICATION OF CONTINGENT FEE CONTRACT.

Probate judge *held,* not in error in refusing to ratify contract between attorney and administratrix *de bonis non* of estate of widow on contingent fee basis where court had not authorized employment of attorney on such basis to collect widow's allowance from estate of her late husband.

3. APPEAL AND ERROR—QUESTIONS REVIEWABLE—SUFFICIENCY OF ATTORNEY'S COMPENSATION IN PROBATE COURT PROCEEDING.

In proceeding by attorney to collect for services rendered estate of widow in obtaining widow's allowance from estate of widow's late husband where a legatee appealed to circuit court from allowance made by probate court and claimant took cross-appeal claiming full amount she would have been entitled to under alleged contingent fee basis and circuit court allowed entire claim, propriety of awarding sufficient compensation for time spent and beneficial results obtained *held,* before both probate and Supreme Courts where legatee presented such issue.

4. EXECUTORS AND ADMINISTRATORS—ATTORNEY FEES—EVIDENCE—CONTINGENT FEE CONTRACT.

Evidence in probate court *held,* to sustain finding as to value of services of attorney for an estate but not to constitute approval of contingent fee contract which had been entered into without previous approval of probate court.

5. SAME—AUTHORITY TO EMPLOY ATTORNEY—ADJUSTMENT OF COMPENSATION.

Granting of authority by probate court to administratrix of an estate to employ counsel does not authorize her to employ counsel on a contingent fee basis, adjustment of compensation being a matter for the probate court.

6. COSTS—APPEAL FROM PROBATE COURT.

No costs are allowed either party on appeal from circuit court which had changed relief granted in probate court from which both claimant and legatee had appealed where Supreme Court restored judgment as allowed by probate court.

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted January 14, 1938. (Docket No. 93, Calendar No. 39,699.) Decided April 4, 1938.

In the matter of the estate of Ernestine Trombley, deceased. Petition by Mila L. Zechlin for the allowance of attorney's fees. From partial allowance of claim for fees in probate court, Virginia Trombley Konen, legatee, appealed to circuit court. Mila L. Zechlin cross-appealed. Judgment for Mila L. Zechlin. Virginia Trombley Konen appeals. Reversed and judgment ordered entered affirming order of probate court.

Abraham Satovsky, for plaintiff.

Lloyd L. Axford, William E. Tarsney, Arthur Axford, and *Ray Cashen,* for defendant.

WIEST, C. J. The administratrix *de bonis non* of the estate of Ernestine Trombley, deceased, without authorization by the probate court to do so, employed plaintiff, an attorney at law, to render legal services in behalf of the estate on a contingency fee basis of one-third of recovery obtained. The deceased was the widow of August Trombley, and one part of plaintiff's employment was to procure for the estate unpaid sums from the August Trombley estate for widow's allowance. Through plaintiff's endeavors, the sum of $4,725 was so procured, and she claimed a fee of one-third thereof under the agreement. The administratrix paid her $1,000, and plaintiff peti-

tioned the probate court to allow the remainder, amounting to $575.

The probate court found the $1,000 sufficient compensation. Virginia Trombley Konen, a legatee, took an appeal to the circuit court from the allowance so made, and plaintiff took an appeal to the circuit court from the allowance refused.

In the circuit court plaintiff recovered, under the contract, the full sum she claimed; Mrs. Konen's appeal was dismissed, and she reviews such holdings by appeal.

Plaintiff did not ask the probate court to award her a reasonable fee for her services as an attorney, but sought payment under the contract with the administratrix.

The probate judge refused to validate the contingent fee contract but, considering that plaintiff had received $1,000 from the administratrix, adjudged that sum sufficient payment for services rendered.

The administratrix was without power to make the contingent fee contract and the probate judge was not in error in refusing to ratify it. The circuit court was in error in awarding plaintiff compensation under the contract.

Mrs. Konen contested the award, made to plaintiff in the probate and circuit courts, claiming that the contingency contract was a nullity, and that plaintiff did not establish, by evidence, the fee awarded her in the probate court.

The evidence on this subject was conflicting, and we are not inclined to disturb the award made in the probate court. That court, in fixing the fee, could consider not only the time spent by the attorney but as well the beneficial results obtained by her professional efforts. It is true that plaintiff insisted

upon recovery under the contract but, inasmuch as Mrs. Konen presented the issue of proper compensation, that matter was before the court and is here under the appeal.

The circuit judge was of opinion that the probate judge, in allowing the $1,000 to plaintiff, "inferentially approved the contingent agreement," and in denying the motion for a new trial, stated:

"I am still of the opinion, however, that there was no other basis before the probate court upon which to award the figure of $1,000, if it was not for this contingent contract, because there was no evidence of the value of the services, as I perceive it, from the transcript now in my hands. These fees were to be awarded either on the basis of the value of them as rendered to the administratrix, or on the basis of the contingent fee contract, and while the probate court specifically stated that he would not allow more than $1,000, it is apparent that the only basis for this allowance was upon the contract entered into between the administratrix and the attorney."

The mentioned transcript shows that the parties appeared in the probate court on the 17th day of December, 1935, and the court inquired:

"You have not any more testimony here?

"*Mr. Paul* (attorney for plaintiff): No testimony * * *.

"*Mr. Cashen* (attorney for Mrs. Konen):

"But the court has to decide for himself. If there is not a contingent contract there should be some testimony to give him an idea what the fee should be. In the event you don't agree that a contingent contract be binding, you should have some testimony to give you that idea. We have all of the testimony I think that gives you an idea what has been done in this matter by the attorney.

"*The Court:* I think Mrs. Zechlin might offer some more, but I think on what she has offered we have enough. * * *

"*Mr. Paul:* She recovers nothing for the work already done in the other matter. That situation serves to illustrate the benefit to the estate in entering into a contingent arrangement. I dare say that the work she has done would justify the fee in this matter as well as work in the other matters. I don't know. It may justify it.

"*The Court:* I cannot, and in view of the record of the court here, and in view of what she had to check over, I think this, that she could determine quite well just where she was headed for, but there is no doubt but what she was entitled to somewhat of a contingency, but in reference to her fee I feel that she has been amply paid, and I will so enter the order allowing her the fee she has been paid, but I wouldn't go any higher than that.

"*Mr. Cashen:* That is $1,000?

"*The Court:* Yes, but I will not go any higher than that."

We do not think that this constituted approval of the contingency fee contract.

The circuit judge was strongly of the opinion that the contract, in order to be valid, required approval of the probate court, but found such approval as before mentioned.

We do not find such approval, but rather express refusal to accept the terms thereof.

We find in the record a granted petition by the administratrix for leave to employ counsel, but that was not authority to enter into the contingency fee contract. Under that authority the administratrix could employ needed counsel, leaving compensation for legal services to be adjusted by the probate court.

The judgment in the circuit court is reversed, and the cause remanded to the circuit court with direction to enter judgment affirming the order of the probate court.

Neither party will recover costs.

BUTZEL, BUSHNELL, SHARPE, POTTER, NORTH, and MCALLISTER, JJ., concurred. CHANDLER, J., did not sit.

DOLBY *v.* STATE HIGHWAY COMMISSIONER.

1. APPEAL AND ERROR—RECORD.

In suit involving construction of a deed, a copy of which does not appear in the record, Supreme Court is confined to such quotations as appear in the record, the opinion of the trial judge and briefs of the parties.

2. DEEDS—FEE UPON CONDITION SUBSEQUENT.

Clause in deed of land 35 to 45 feet wide and 1,400 feet long providing that "said strip of land is to be used for railroad purposes only, and ceasing to be used for such purposes, shall revert to said parties of the first part, their heirs or assigns" *held*, to create a fee subject to divestment, a fee upon condition subsequent.

3. APPEAL AND ERROR—QUESTIONS REVIEWABLE.

A mere statement of a position without argument and citation of authority in support thereof is insufficient to present the matter for consideration of an appellate court (Court Rule No. 67 [1933]).

4. SAME—QUESTIONS REVIEWABLE—BRIEFS—EVIDENCE.

Effect of failure of grantee of fee upon condition subsequent to use land for purpose granted, which matter is not briefed, and claim of adverse possession, mentioned in plaintiffs' bill of complaint but not proved, are not considered on appeal in suit to establish title in plaintiffs (Court Rule No. 67 [1933]).

5. DEEDS—ASSIGNMENT OF RIGHT OF REVERTER BEFORE BREACH OF CONDITION SUBSEQUENT.

Attempt of grantor of fee upon condition subsequent to assign his right of reverter before breach of condition not only failed to effect assignment but extinguished the right.

6. COURTS—OVERRULING PREVIOUS DECISIONS.

Before a court overrules a decision deliberately made, it should be convinced not merely that the case was wrongly decided but also that less injury will result from overruling than from following it.

7. SAME—RULES OF PROPERTY.

A recognized rule of property ought not to be overturned without the very best of reasons.

8. APPEAL AND ERROR—QUESTIONS REVIEWABLE—ABANDONMENT.

Claim of mutual mistake in a deed, not raised nor referred to in original or amended bill of complaint, trial court's opinion nor briefs *held*, abandoned.

9. DEEDS—FEE UPON CONDITION SUBSEQUENT—EVIDENCE.

Record in plaintiffs' suit to establish title in them as to strip of land conveyed by deed vesting grantee with fee upon condition subsequent *held*, to show that subsequently executed mortgages merely recognized previous conveyance of fee from grantor to grantee.

WIEST, C. J., and SHARPE and POTTER, JJ., dissenting.

Appeal from Washtenaw; Moll (Lester S.), J., presiding. Submitted October 15, 1937. (Docket No. 52, Calendar No. 37,074.) Decided April 4, 1938.

Bill by Horace Dolby and wife against State Highway Commissioner and others for an accounting, an

injunction, and to determine title to real estate. Bill dismissed. Plaintiffs appeal. Affirmed.

Robert J. Peretto and *E. Samuel Taylor,* for plaintiffs.

Raymond W. Starr, Attorney General, and *Edmund E. Shepherd,* Assistant Attorney General, for defendants.

BUSHNELL, J. In 1912 plaintiffs Dolby and wife conveyed by warranty deed to F. W. Brooks, trustee, his successors and assigns, a strip of land 1,400 feet in length, more or less, varying in width from 35 to 45 feet, lying north of and adjacent to the fence of the north line of the highway and located in the east half of the southwest quarter of section one, in the township of Ypsilanti, Washtenaw county. This deed contained the following provision:

"Said strip of land shall be used for railroad purposes only and ceasing to be used for such purposes shall revert to said parties of the first part, their heirs or assigns."

In 1916, Dolby and wife, by warranty deed, conveyed to plaintiffs Parke and wife all of the east half of the southwest quarter of section 1, et cetera, excepting a parcel in the southwest corner thereof, containing about 16 rods, and excepting the strip of land deeded to Brooks. The Dolby-Parke deed contained the following provision:

"Said strip of land is to be used for railroad purposes only, and ceasing to be used for such purposes, shall revert to said second parties, their heirs and assigns."

We might state here that the record does not contain copies of the deeds in question and we are

confined to quotations in the record, the opinion of the trial judge and briefs of the parties, which are somewhat conflicting.

In 1926, Parke and wife conveyed certain lands to Dolby and wife which may or may not be the same as those conveyed in 1916, but the conveyance of 1926 does except a strip of land north of the fence on the north line of the highway—"extending across the entire front of the land of said parties of the first part on section one, said strip of land being 45 feet in width."

This deed contained the following provision:

"Said strip of land is to be used for railroad purposes only, and ceasing to be used for said purposes, shall revert to said second parties, their heirs and assigns."

In 1930, Brooks conveyed the strip of land in question to Grover C. Dillman, then State highway commissioner.

Plaintiffs Dolby and wife, by bill of complaint filed November 25, 1931, and amended bill filed May 7, 1932, claim that title reverted to themselves by reason of non-use of the strip for railroad purposes and by reason of the terms of the conveyance of 1930. They also claim title by adverse possession and charge that defendants State highway commissioner and Washtenaw county road commissioners and their contractor are interfering with their peaceful possession of the strip. They seek a decree establishing title in themselves, free of the claims of Brooks, his successors and assigns. Just how the remaining plaintiffs, whose names are printed on appellants' brief, come into the case we are not informed, but, whatever their interests may be, they have not joined in the prosecution of this appeal.

The trial court, by decree entered August 4, 1932, dissolved the temporary injunction previously issued and dismissed plaintiffs' bill of complaint.

While the language used in the various conveyances may differ somewhat, reverter clauses in deeds are generally susceptible of classification. Appellants apparently take the position that the provisions before us created a determinable fee or "conditional limitation." It would be more accurate to describe them as creating a fee subject to divestment by re-entry for breach of condition; in other words, a fee upon condition subsequent. *Weber* v. *Ford Motor Co.*, 245 Mich. 213; *Rhines* v. *Consumers Power Co.*, 259 Mich. 236; *Avery* v. *Consumers Power Co.*, 265 Mich. 696.

In ascertaining the rights of the parties, we will not determine whether Brooks' or his *cestui que trust's* failure to use the strip for railroad purposes between 1912 and 1916 constituted a breach of condition, inasmuch as this point, although presented in the amended bill of complaint and restated by appellants in their statement of questions involved, is not briefed. A mere statement of a position without argument and citation of authority in support thereof is insufficient to present the matter for the consideration of an appellate court. Court Rule No. 67 (1933), and *Johns* v. *Wisconsin Land & Lumber Co.*, 268 Mich. 675. The same observations apply to plaintiffs' claim of adverse possession which, although mentioned in the amended bill of complaint, is not supported by proof.

Plaintiffs' claim that no attempt was made in the deed of 1916 to assign the right of re-entry to Parke and wife would be correct if the language in this deed had gone no further than to except the strip previously conveyed to Brooks. See *Reynolds* v.

Gaertner, 117 Mich. 532. But grantors did more. They said: "said strip of land * * * ceasing to be used for said purposes, shall revert to said second parties, their heirs and assigns."

As the deed thus stands in this record, the language constituted an attempt to assign the right of re-entry; and not only did the assignment fail as to Parke and wife but the right was thereby extinguished. *Halpin* v. *Rural Agricultural School District,* 224 Mich. 308; *County of Oakland* v. *Mack,* 243 Mich. 279; *Fractional School District* v. *Beardslee,* 248 Mich. 112.

Plaintiffs contend that our holding in the *Halpin Case* is erroneous and the definition of executory limitation given therein is incorrect.

Notwithstanding attacks made upon the rule stated in *Halpin* v. *Rural Agricultural School District, supra,* it has been adhered to in *County of Oakland* v. *Mack, supra, Fractional School District* v. *Beardslee, supra,* and *Avery* v. *Consumers Power Co., supra.*

This court has not blindly adhered to the doctrine of *stare decisis.* See *Hilt* v. *Weber,* 252 Mich. 198, 223 (71 A. L. R. 1238). But the situations in the various "relicted land" cases there discussed were altogether different from those presented in the several "reverter" cases, *supra.*

In 1931, the legislature of this State abolished the "reverter" rule as to subsequent conveyances by the enactment of Act No. 219, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 12966–2), which reads:

"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."

This legislative enactment is an adequate solution of the "reverter" problem, and little argument can be advanced in support of a "judicial repeal" of the proviso of the quoted act by overruling the *Halpin Case*. Certainly far less damage will result from the operation of the proviso of the 1931 statute than from a determination that the *Halpin Case* was wrong in principle and should be overruled.

In *McEvoy* v. *City of Sault Ste. Marie,* 136 Mich. 172, 178, the court said:

"Before this court overrules a decision deliberately made, it should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it."

A recognized rule of property ought not to be overturned without the very best of reasons. *Lewis* v. *Sheldon,* 103 Mich. 102; *Pleasant Lake Hills Corp.* v. *Eppinger,* 235 Mich. 174.

Plaintiffs attempted to show that the use of the word "second" in this conveyance was an error; that the word should have been "first." The opinion of the trial judge omitted consideration of this claim of mutual mistake, and properly so, because it is neither raised nor referred to in the original or amended bill of complaint. Moreover, this claim is not pursued in the briefs and, therefore, must be held to have been abandoned.

Appellant urges that we construe the language of the deed of 1916 in connection with certain purchase money mortgages from Parke to Dolby, one of which mortgages was executed simultaneously with said deed. They argue that the express exclusion of the

strip from these mortgages shows that Dolby and wife never intended to assign their right of re-entry to Parke and wife. However, an examination of the record indicates that the exclusion of the strip from the mortgages is a recognition of the previous conveyance of the fee title in the same by Dolby to Brooks.

The decree dismissing plaintiffs' amended bill of complaint is affirmed, with costs to appellees.

BUTZEL, CHANDLER, and NORTH, JJ., concurred with BUSHNELL, J.

NORTH, J. (*concurring*). Since the question was first presented to this court it has been the law of this State that an attempt by the possessor of a conditional right of reverter to convey the same before breach of condition does not convey any interest in the realty to the grantee named, because the right before breach cannot be conveyed; and further such an attempt to convey extinguishes the right itself. This is a law of property and should not be changed by the court in the absence of compelling reasons. *Lewis* v. *Sheldon,* 103 Mich. 102. In this jurisdiction the rule was first announced in *Halpin* v. *Rural Agricultural School District,* 224 Mich. 308, and it has been reiterated in each of the following cases: *County of Oakland* v. *Mack,* 243 Mich. 279; *Fractional School District* v. *Beardslee,* 248 Mich. 112; *Avery* v. *Consumers Power Co.,* 265 Mich. 696.

I cannot assent to the conclusion that the rule as judicially adopted and consistently followed in this State is without support in respectable authorities or in reason. Regardless of the correctness or incorrectness of the statement that such a conditional or contingent right of reverter could not at common law be conveyed by the holder of the right, there can

be little doubt that such was and is the understanding of the common law by many of the courts of this country. In the opinion of Mr. Justice POTTER in this case he has quoted or cited several of the courts which have stated such was the common law. See *Cloyes* v. *Beebe,* 14 Ark. 489; *Moore* v. *Sharpe,* 91 Ark. 407 (121 S. W. 341, 23 L. R. A. [N. S.] 937); *Young* v. *Young,* 89 Va. 675 (17 S. E. 470, 23 L. R. A. 642); *Shell Petroleum Corp.* v. *Hollow* (C. C. A.), 70 Fed. (2d) 811. Even after the passage of the Statute of Henry 8 (32 Henry 8, chap. 34), the rule as above stated was adhered to in English courts. See *Warren* v. *Lee,* 2 Dyer, 126b (73 Eng. Rep. 276), wherein it is said:

"But when the condition is once annexed to a particular estate, and then by another deed the reversion is granted by the maker of the condition, there the condition is gone, *causa patet.*"

Further the rule as first above stated is by no means without respectable support in other jurisdictions, some of such decisions being of very recent date. *Dyer* v. *Siano,* — Mass. — (11 N. E. [2d] 451); *O'Connor* v. *City of Saratoga Springs* (1933), 146 Misc. 892 (262 N. Y. Supp. 809); *Underhill* v. *Railroad Co.,* 20 Barb. (N. Y.) 455; *Rice* v. *Railroad Corp.,* 12 Allen (94 Mass.), 141; *Craig* v. *Inhabitants of Franklin County,* 58 Me. 479; *Wagner* v. *Wallowa County,* 76 Ore. 453 (148 Pac. 1140, L. R. A. 1916 F, 303); *Board of Education of Humphreys County* v. *Baker,* 124 Tenn. 39 (134 S. W. 863); *Stevens* v. *Railway Co.* (Tex. Civ. App.), 169 S. W. 644. Text writers of repute have also stated the rule as prevailing law. Tiedeman, Real Property (4th Ed.), § 207; 2 Washburn, Real Property (6th Ed.), § 959; 2 Reeves, Real Property, p. 1018; 3 Thompson, Real

Property, § 2083; and 1 Tiffany, Real Property (1st Ed.), § 75, which we quote:

"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."

It cannot be said that none of the courts have expressed a reason justifying the adoption of the rule. Regardless of whether the reasons are satisfactory or convincing, it may be noted that in some jurisdictions the rule that the contingent right of reverter is extinguished by an attempt to convey before breach, is based upon a waiver of or an estoppel against the right to claim upon the happening of the contingency after the holder has sought to dispossess himself thereof. *Wagner* v. *Wallowa County, supra; Rice* v. *Railroad Corp., supra.* It has also been stated that the forfeiture of the right by the holder's attempt to convey before breach of condition is in the nature of a penalty imposed in consequence of the party's attempt to make a conveyance in violation of law. *Rice* v. *Railroad Corp., supra.* In Tennessee the court has said that the unlawful attempt to convey results in a relinquishment of the right of re-entry and is an election not to exercise the right. *Board of Education of Humphreys County* v. *Baker, supra.* Former consideration of the rule by this court has been accompanied by reasons assigned

in support thereof. We have approved of the above quotation from Tiffany on Real Property, and as further reasons in support of the rule have said:

"Conditions subsequent are not favored by the courts, nor by statute (3 Comp. Laws 1915, § 11564 [3 Comp. Laws 1929, § 12966]). Frequently the condition survives any substantial or actual benefit to the grantor and his heirs and becomes an onerous burden upon the grantee and his assigns, whose prayer for relief is appealing. This, in some degree, may account for the arbitrary rule that an attempt to convey destroys the right. And the author of a note in 38 A. L. R. 1112 states with ample citation of cases:

" 'It may also be noted in this connection that, wherever the point has directly arisen, it has been held that the effect of a subsequent conveyance by the grantor of the property, subject to the condition, is to destroy the condition.'

"In a note L. R. A. 1916 F, 311, 312, there is criticism of the rule, but the author says:

" 'All the American courts which have had occasion to pass upon the question have, practically without dissent, decided it in the same way.'

"The rule is settled in this jurisdiction. *Halpin* v. *Rural Agricultural School District, supra.*" *County of Oakland* v. *Mack, supra.*

Because the law as previously announced by this court is a rule of property and because it has ample support in other jurisdictions, it ought not to be set aside lightly. Especially is this true (even if it be conceded that the rule is not any too well grounded in reason), since comparatively recently the legislature has definitely established the law in this State, making such an interest in land transferable by deed or will. Act No. 219, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 12966–2). The importance of not changing the rule of property as judicially adopted in this State is readily revealed by the cir-

cumstances of the instant case. It is to be presumed that the defendant who purchased the parcel of land involved knew and relied upon the law as it had been plainly and repeatedly announced by this court. As hereinafter pointed out, if the previously judicially announced law is adhered to defendants will prevail in this case; but if we depart from the established law of this State, defendants will be defeated and the purchaser deprived of the acquired property rights.

Justice POTTER states that the conditional interest here in suit may lawfully be conveyed under 3 Comp. Laws 1929, § 12955. This, to say the least, is debatable. If, as some courts have held (*Wagner* v. *Wallowa County, supra*), a reversionary right contingent on a condition subsequent is nothing more than an unassignable chose in action and is not an interest in land (to the same effect, see Tiedeman, Real Property [4th Ed.], § 207), the plaintiffs in the instant case cannot benefit by 3 Comp. Laws 1929, § 12955, which provides for the conveyance of expectant estates. This is true because the statute is applicable only to expectant estates in real property. This statute is said to have been copied from a like statutory provision in the State of New York. See 1 N. Y. Rev. Stat. 1829, 725, § 35. The New York court has held that its statute is not applicable to a conditional right of reverter; and that notwithstanding the statute an attempt by the possessor to convey such right prior to the breach of condition extinguishes the right. *Underhill* v. *Railroad Co., supra.*

If we are to adhere to the rule as announced in the *Halpin Case* and other decisions of this jurisdiction in accord therewith, what then is the result to be reached in the instant suit? From a review of

the record it convincingly appears that Mr. and Mrs. Dolby in 1916 and before there was any breach of the condition which resulted in a reverter, attempted to convey their contingent reversionary rights. Thereby such rights were extinguished, and Brooks, trustee, became vested with an absolute and unconditional fee title to the parcel. By mesne conveyances this title was vested in defendant Dillman, as State highway commissioner. As against defendants, plaintiffs have established no rights under their bill to quiet title in themselves to the parcel in suit. Such was the effect of the holding in the circuit court. I concur with Mr. Justice BUSHNELL in affirmance, with costs to appellees.

POTTER, J. (*dissenting*). The trial court clearly and concisely stated the facts and the reason for the decree entered dismissing the bill of complaint. His language is adopted, as follows:

"This is a bill to restrain defendants from selling, assigning, transferring, incumbering, a certain strip of land along the north side of Michigan avenue, or from removing or damaging trees, shrubs, etc., located on said land, and also praying that the court may decree that F. W. Brooks, trustee, and his successors and assigns have no interest in said lands by reason of not having used same for the purpose for which they were granted, and that plaintiffs be decreed to be the owners thereof, freed from all rights of the said Brooks, trustee, his successors or assigns.

"Horace L. Dolby and Alice A. Dolby, his wife, were the owners of 80 acres of land in the township of Ypsilanti, Washtenaw county, described in paragraph 1 of the bill. This land had a frontage of some 1,400 feet on the north side of Michigan avenue. Dolby and wife by warranty deed, dated Oc-

tober 22, 1912, conveyed to F. W. Brooks, trustee, a strip of land lying next north of and adjacent to a fence on the north side of the highway known as Michigan avenue or Chicago road, and extending across the entire front of lands of said parties of the first part on section 1, Ypsilanti township, from the west (east?) line of land owned by Etta Dale on the west, said strip of land being 35 feet in width throughout 400 feet of its length, measured from the east line thereof, and 45 feet in width through the remaining portion of its length, the entire length of said strip being 1,400 feet more or less. Said strip of land shall be used for highway purposes only, and ceasing to be used for such purposes shall revert to said parties of the first part, their heirs or assigns. As a part and further consideration for this conveyance said second party shall erect a woven wire fence of good quality between the lands of said parties of the first part and the tracks of any railroad which may be constructed upon said right of way, together with suitable crossing and gate at the place designated by first parties.

"Said first parties reserve all buildings on said premises provided the same are removed within one year, at his own sole cost and expense, otherwise the same to be and to remain the property of said second party.

"On May 26, 1916, by warranty deed, Horace L. Dolby and Alice, his wife, conveyed to Archie B. Parke and Clara E. Parke, his wife, all the land described in paragraph 1 of the bill, excepting the strip of land theretofore deeded by Dolby and wife to Brooks, trustee, 'said strip of land is to be used for railroad purposes only, and ceasing to be used for such purposes shall revert to said second parties, their heirs and assigns, said premises conveyed containing 80 acres of land, more or less.'

"Thereafter and on July 21, 1925, Parke and wife deeded so-called parcel number two to Dolby and wife, and also all that parcel of land lying between

the north line of Michigan avenue and the south line of the Burbank two-acre parcel. Said last parcel is subject to the rights of F. W. Brooks, trustee, or his assigns in said strip of land.

"Later, on July 14, 1926, Parke and wife by warranty deed conveyed to Dolby and wife so-called parcel three, excepting a strip of land lying next north of and adjacent to the fence on the north side of the highway known as Michigan avenue, and extending across the entire front of the lands of said parties of the first part on section 1, the said strip of land being 45 feet in width. Said strip of land is to be used for railroad purposes only, and ceasing to be used for said purposes shall revert to said second party, their heirs and assigns, said premises being a part of the east half of the southwest quarter of section 1.

"It appears therefore that Dolby and wife and Parke and wife, together with one Lincoln, are claiming title to the entire strip extending the entire width of the original Dolby property on the south side thereof and adjoining Michigan avenue to the north. The defendants claim title by successive conveyances through F. W. Brooks, trustee.

"It is the claim of plaintiffs that the conveyance to Brooks conveyed a base fee subject to being divested on a contingency, and that such a contingency occurred when the property was subsequently deeded to the highway commissioner, which conveyance showed an ultimate abandonment of the strip in controversy for railroad purposes; also that the Dolbys had always excepted the strip in controversy in conveyances from themselves, and that the property reverts to Dolby. It is also claimed that Brooks, trustee, and his assigns did nothing to exercise the right of ownership, that there had been an abandonment of the strip by Brooks and his assigns, and that pursuant to right of ownership Mr. Dolby had paid the 1929 and 1930 taxes.

"The defendants contend that in the conveyance from the Dolbys to Parke and wife (warranty deed dated May 26, 1916), there was an attempt to convey the strip in controversy, which attempt extinguished any right of reverter in the Dolbys.

"An examination of this conveyance leads the court to a conclusion in accordance with this theory. While the language used excepted the strip of land lying next north of and adjacent to the fence on the north line of the highway known as Michigan avenue, the remaining language, namely:

" 'Said strip of land is to be used for highway (railroad?) purposes only, and ceasing to be used for such purposes shall revert to said second parties, their heirs and assigns, said premises conveyed containing 80 acres of land, more or less,' makes it appear that it was Dolby's intent to convey a reverter interest in the event of a breach of a condition subsequent, in other words 80 acres of land, more or less, together with a reverter was intended to be conveyed.

"The deed from Dolby and wife to F. W. Brooks, trustee, was a conveyance in fee of the entire strip, creating a condition subsequent. This conclusion, in the opinion of the court, brings the instant case within the holding of *Halpin* v. *Rural Agricultural School District,* 224 Mich. 308, where the distinction between condition subsequent and conditional limitation is discussed, and which case holds that an attempt on the part of the grantor (Dolbys) to convey a possibility of reverter before the condition is broken extinguishes the right of himself and heirs to re-enter after the condition is broken."

From a decree dismissing plaintiffs' bill and dissolving the injunction, plaintiffs appeal.

1. The rule, first announced in this State in *Halpin* v. *Rural Agricultural School District,* 224 Mich.

308, and subsequently followed, is relied upon as controlling this case.

The question recurs, whether the *Halpin Case* was erroneously or correctly decided.

2. It is contended that the rule of *Halpin* v. *Rural Agricultural School District* was the rule of the common law. The common law was brought to this country by the English colonists who settled at Jamestown in 1607. What was brought was not only the common customary law of England, but the law relating to land tenure as modified by English statutes of general operation up to that time, subject to some modifications not here important. *Penny* v. *Little,* 3 Scam. (4 Ill.) 301; *Crake* v. *Crake,* 18 Ind. 156; *Lavalle* v. *Strobel,* 89 Ill. 370; 1 Kent's Commentaries (14th Ed.), pp. 472, 473; 1 Select Essays in Anglo-American Legal History, pp. 367–430; 21 Am. Law Reg. (N. S.) 553.

(a) The ordinance of 1787, for the government of the territory northwest of the Ohio river, provided the inhabitants of the territory should always be entitled to judicial proceedings according to the course of the common law. This ordinance was the organic law of the Northwest Territory and of Michigan Territory. *Swan* v. *Williams,* 2 Mich. 427. It was, with some exceptions, afterward extended by Congress to Mississippi Territory. The common law there referred to was the common law of England. *State* v. *Cawood,* 2 Stew. (Ala.) 360; *Barlow* v. *Lambert,* 28 Ala. 704 (65 Am. Dec. 374). By act of July 14, 1795, the governor and judges of the Northwest Territory enacted that the common law of England and all statutes of the British parliament made in aid of the common law prior to the fourth year of King James 1 (that being the date of the English settlement at Jamestown), of a general

nature, and not local to the kingdom, should be adopted in that territory. After the surrender of the British posts in what is now Michigan by Great Britain to the United States, Michigan came under the ordinance of 1787 as a part of the Northwest Territory and later as a part of Indiana Territory.

(b) Michigan Territory was created and organized in 1805. The governor and judges of Michigan, by act of September 16, 1810, attempted to repeal all French and French-Canadian law in the territory (this had already been done by the ordinance of 1787), repeal all English statutes applicable to Michigan, though the governor and judges had no power of repeal, and their attempted action was ineffective so far as the English statutes included in the common law were adopted by the ordinance of 1787. The power of repeal granted to the governor and judges by the act of congress of May 8, 1792, to repeal (their laws made by them) was an implied exclusion of their right to repeal in cases not enumerated. As to the laws of the Northwest Territory and of Indiana Territory, it is probable the right of repeal existed under the act of congress of May 8, 1792. It was unnecessary to repeal the purported territorial laws enumerated for they had been declared unconstitutional. *McGarvin* v. *Wilson* (Mich. Terr. 1809), 36 Mich. Pion. & Hist. Soc. Coll. p. 363; *In re Colhoun,* 18 Mich. Law Rev. p. 21; *In re Hoffman's Will,* 18 Mich. Law Rev. p. 27. The common law, including the English statutes of general application, made the law of the territory by the ordinance of 1787, continued to be the law of Michigan notwithstanding any attempted repeal by any territorial legislative body. *Mercer* v. *Williams,* Walk. Ch. (Mich.) 85; *Stout* v. *Keyes,* 2 Doug. (Mich.) 184 (43 Am. Dec. 465); *May* v. *Rumney,* 1 Mich. 1; *Swan*

v. *Williams, supra; Lorman* v. *Benson,* 8 Mich. 18 (77 Am. Dec. 435); *Crane* v. *Reeder,* 21 Mich. 24 (4 Am. Rep. 430); *Coburn* v. *Harvey,* 18 Wis. 147; *Pollard* v. *Hagan,* 3 How. (44 U. S.) 212; *Board of Trustees for Vincennes University* v. *Indiana,* 14 How. (55 U. S.) 268. In *Re Lamphere,* 61 Mich. 105, attention was called to the enactment of the governor and judges on September 16, 1810, above mentioned. But this attempted legislation so far as it affected the common law, as modified by English statutes inherent in the term "common law" as used in the ordinance of 1787, was plainly invalid. The common law, as adopted by the ordinance of 1787 and made applicable to Michigan, consisted not only of the customary common law of England, but that law as modified by applicable statutes prior to our separation from Great Britain.

3. In *Halpin* v. *Rural Agricultural School District,* the rule announced is that a possibility of reverter is not assignable by the grantor except to the holder of the conditional fee. No grant of it may be legally made to another. It will not pass by any conveyance to any other person. Any attempt to alienate it to any one but the holder of the conditional fee is absolutely void and conveys nothing. Though the attempted grant of this possibility of reverter to a third person is void, it is in effect fully operative against the grantor in favor of the grantee of the conditional fee. It extinguishes the possibility of reverter and its effect is to convey an absolute fee to the holder of the conditional fee though no conveyance of it has been made to him by the grantor. In effect, the case holds the attempt to grant the possibility of reverter to a third person operates as a grant of the possibility of reverter to the holder of the conditional fee, merges such

possibility with the conditional fee, extinguishes the possibility of reverter, and converts the conditional fee to a title in fee simple absolute. Justice BIRD, in *Halpin* v. *Rural Agricultural School District,* was not impressed with the rule that an attempt to convey a reverter attached to a condition subsequent extinguishes it; and, in support of what seems to have been his opinion as to this rule, he quoted from a note to *Wagner* v. *Wallowa County,* 76 Ore. 453 (148 Pac. 1140), in L. R. A. 1916 F, 303, 311, where the editor says one "might wonder by what legerdemain a right, created by solemn compact between grantor and grantee, had been made to vanish into thin air. It would puzzle him to understand how an unsuccessful attempt to convey can have the effect of destroying the thing that is not conveyed. 'How is it,' he would say, 'that what does not pass does not remain?' His bewilderment would only be increased if he were informed that all the American courts which have had occasion to pass upon the question have, practically without dissent, decided it in the same way."

Clapp v. *Wilder,* 167 Mass. 332 (57 N. E. 692, 50 L. R. A. 120), holds the possibility of reverter, upon the death of the holder thereof, passes to his heirs or devisees, whereas *Vaughan* v. *Langford,* 81 S. C. 282 (62 S. E. 316, 128 Am. St. Rep. 912, 16 Ann. Cas. 91), holds such possibility of reverter does not pass by will because at the moment of death the possibility of reverter passes to the heirs of the grantor in the conditional deed,—which reason would prevent real estate, or any interest therein, from passing by devise under any circumstances. *Upington* v. *Corrigan,* 151 N. Y. 143 (45 N. E. 359, 37 L. R. A. 794), quotes from *Nicoll* v. *Railroad Co.,* 12 N. Y. 121, which held that 32 Henry 8, chap. 34,

which permitted the assignment of a right of entry in case of grants, or leases in fee, reserving rents, and of leases for lives or for years, says:

"There was a reason for the statutory change in the particular cases mentioned; for in them the grantor had an interest independent of the possibility of reverter. * * * But where a fee simple, without a reservation of rents, is granted upon a condition subsequent, as in this case, there is no estate remaining in the grantor. There is simply a *possibility of reverter,* but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone."

4. Gray draws a distinction between a right of entry for condition broken and a possibility of reverter. Gray, Rule Against Perpetuities (3d Ed.), § 31. Pollock & Maitland indicate the distinction between a reversion and a possibility of reverter is not well established. 2 Pollock & Maitland's History of English Law, p. 23. Act No. 219, Pub. Acts 1931 (Comp. Laws Supp. 1935, § 12966–2), which reversed as to future conveyances the rule of *Halpin* v. *Rural Agricultural School District,* speaks of a "reversionary interest."

(a) No reason has been advanced and none has been apparent to legal antiquarians, ancient or modern, for the existence of the rule declared in *Halpin* v. *Rural Agricultural School District,* that an attempt to alienate that which is inalienable has the effect claimed for it. No English statute declares such rule. No decision of any English court can be pointed to as the basis of any such conclusion. If we say the reason was that the attempt to alienate that which was inalienable was penalized by its forfeiture, we say that which has no support either in the statute or common law of England. Forfeitures

are not favored in law, and will not ordinarily be enforced in equity.

"No good reason is perceived why a right of entry for breach of condition should not be alienable nor why any distinction as to alienability should be drawn between it and the possibility of reverter." 3 Simes' Law of Future Interests, § 716.

(b) The only basis that has been pointed out for this assumed rule is the statement in 1 Sheppard's Touchstone (1648) (7th Ed.), p. 158, and reiterated in 5 Viner's Abridgment (1741), title Condition, p. 306. It is said:

"If one make a feoffment in fee of land upon condition, and after and before the condition broken he doth make an absolute feoffment, or levy a fine of all or part of the land to the feoffee, or any other; by this the condition is gone and discharged for ever, (except such fine is for further assurance)." 1 Sheppard's Touchstone (7th Ed.), p. 158.

No authority is cited to support this statement.

"When condition is once annexed to a particular estate, and after by *other deed* the reversion is granted by the maker of the condition, now the condition is gone." 5 Viner's Abridgment, p. 306, citting *Warren* v. *Lee,* 2 Dyer, 126b, 127a (73 Eng. Rep. 276).

In *Warren* v. *Lee, supra,* it is said:

"When the condition is once annexed to a particular estate, and then by another deed the reversion is granted by the maker of the condition, there the condition is gone, *causa patet.*"

It does not appear from this report whether this language was used by counsel, the court, or only by the reporter.

If there ever was any reason for the rule asserted in *Halpin* v. *Rural Agricultural School District,* such reason has ceased to exist; and when the reason for a common-law rule ceases to exist, the rule fails, for reason, as said by Lord Coke, is the basis of the common law.

5. Land holding, not land owning, was the characteristic of feudal land tenure. Plucknett's History of the Common Law, p. 311.

The central idea in the conveyance of land titles in the early English common law was seizin. Seizin was possession. 2 Pollock & Maitland's History of English Law, p. 29; Challis' Law of Real Property, p. 76. One could not deliver possession to another of what a third person possessed. A right of entry for condition broken could not be conveyed because there could be no livery of seizin. It was inalienable. Seizin was the basis of inheritance. The landowner who had not been in possession had no right which he could leave to his heirs. 3 Select Essays in Anglo-American Legal History, p. 596. One who conveyed real estate to a third person and delivered the possession or seizin thereof vested the grantee with a title good as against everyone except "those who have better because older title." 3 Select Essays in Anglo-American Legal History, p. 600. The termor or tenant could convey to another a right which he never had, seizin being no more nor less than possession. "The termor's tortious feoffment is no anomaly." 3 Select Essays in Anglo-American Legal History, p. 601.

"Our ancestors got into very odd notions on these subjects, and were induced by particular causes to make estates grow out of wrongful acts." *Goodright* v. *Forester,* 1 Taunt. 578, 613 (127 Eng. Rep. 958).

The theory recognized in *Halpin* v. *Rural Agricultural School District,* that there could be no conveyance of a mere possibility of reverter, is a survival of the common-law conception of seizin. There could be no valid conveyance because there could be no livery of seizin. Lord Mansfield says:

"*Seisin* is a technical term to denote the completion of that investiture, by which the tenant was admitted into the tenure; and without which, no freehold could be constituted or pass." *Taylor* v. *Horde* (1757), 1 Burr. 60, 108 (97 Eng. Rep. 190).

Legislation in England and America has "left us little but the names of *feoffment, seisin, tenure and freehold;* without any precise knowledge of the *thing originally signified,* by these sounds." *Taylor* v. *Horde, supra,* 108.

6. (a) If by the common law there could be no assignment of the right of re-entry for condition broken, and the ordinance of 1787 made the common law, as modified by English statutes prior to the settlement of America, the law in force in the Territory of Michigan, and the Constitution of 1835 continued the territorial laws in force not repealed by the Constitution, then by the early law of the State of Michigan there could be no valid conveyance of land by one not in the actual possession of the same. This was the established rule. *Bruckner* v. *Lawrence,* 1 Doug. (Mich.) 19; *Godfroy* v. *Disbrow,* Walk. Ch. (Mich.) 260; *Hubbard* v. *Smith,* 2 Mich. 207. This was changed by the Revised Statutes of 1846.

Section 13278, 3 Comp. Laws 1929, provides:

"Conveyances of lands, or of any estate *or interest therein,* may be made by deed, * * * without any other act or ceremony whatever."

Section 13283, 3 Comp. Laws 1929, provides:

"No grant or conveyance of lands *or interest therein,* shall be void for the reason that, at the time of the execution thereof such lands shall be in the actual possession of another claiming adversely."

(b) At the early English common law, anyone in the actual possession of lands could make livery of seizin to his grantee. An executor in possession of land belonging to the heirs of deceased could convey a fee. One could convey a larger estate than he actually had solely because he could make livery of seizin. Life tenants could convey a fee. This common-law rule was ended in Michigan by statute (3 Comp. Laws 1929, § 13280), which provides:

"A conveyance made by a tenant for life or years, purporting to grant a greater estate than he possessed or could lawfully convey, shall not work a forfeiture of his estate, but shall pass to the grantee all the estate which such tenant could lawfully convey."

7. It seems to be established by Glanville and Hale, Fleta and Blackstone, that one could not, at early common law, dispose of real estate by will. Beames' Glanville's De Tractibus (Beal's Ed.), pp. 115, 135, 136, and notes. Wills of real estate were authorized by 32 Henry 8, chap. 1, and 34 & 35 Henry 8, chap. 5. The only reason why the possibility of a right of re-entry or possibility of reverter could not be devised at early common law was that no interest in real estate could be devised at early common law.

8. It is conceded even in *Halpin* v. *Rural Agricultural School District,* that the possibility of reverter retained by the grantor of lands on condition

subsequent, or of the right of re-entry for breach of condition broken, was a right pertaining to real estate which descended from the grantor to his heirs, and, by 3 Comp. Laws 1929, § 13478, it is not necessary one be seized of an interest in real estate in order to devise the same. The statute here in force permits a testator who is "entitled to *any interest therein descendible to his heirs*" to devise and dispose of the same by will. The possibility of a right of re-entry for breach of condition subsequent under the law as it is now established is an interest in real estate which descends to the grantor's heirs. It is such an interest in real estate as may be devised, and, being an interest in real estate, it may, under 3 Comp. Laws 1929, §§ 13278, 13283, be conveyed.

9. "Possibilities not coupled with an interest,—*mere* possibilities or expectancies,—which are not embraced within these statutes, are, according to the general course of decision, assignable in equity for a valuable consideration; and equity will enforce the assignment when the possibility or expectancy has changed into a vested interest or possession. The explanation is sometimes given that the assignment operates as a contract by the assignor to convey the legal estate or interest when it vests in him, and that equity will specifically enforce such contract by decreeing a conveyance." 3 Pomeroy's Equity Jurisprudence (3d Ed.), § 1287, and cases cited.

The grantors herein had an exclusive right to be the beneficiaries of the right to re-enter in case of breach in the future of the condition subsequent in their deed by the grantee therein. This right was vested exclusively in the grantors, and like any other vested right was alienable by them, and their alienation, or attempted alienation, thereof did not

destroy it. It passed by their deed thereof. Assuming all that defendants claim, plaintiffs assigned for a valuable consideration a possibility. Equity will recognize and enforce it after a breach of condition subsequent by the conditional grantee.

By act of March 2, 1821, 1 Terr. Laws, p. 815, estates tail were abolished in the Territory of Michigan and the provisions of this statute were recognized and adopted by the Revised Statutes of 1846, chap. 62, § 3 (3 Comp. Laws 1929, § 12923). By act of February 26, 1821, 1 Terr. Laws, p. 796, entitled "An act to regulate the action of right and for other purposes," many changes in the common law were made, the more important of which were: abolishing the requirement of four knights girt with sword on the jury; establishing a jury of 16 men; abolition of trial by battle and of trial by grand assize, of fictitious summons and fictitious pledges of prosecution, of actual entry and of livery of seizin. The action lay to recover lands reverted and "in an action of right, the party recovering, shall recover on the merits, according to his, or their true right and title." Section 40, p. 805, of this act provided:

"*And be it further enacted,* That all right, benefit, remedy, relief and proceedings, and all injury, damage, wrong, loss or prejudice in favor of, or against any person or persons, by entry to recover *seizin* or claim in lieu of entry, or continual claim in lieu of entry, or continual claim; by bar from the right of entry being tolled, in consequence of a descent cast, or in consequence of peaceable possession for five years or for any other period of time, the period of sixty years excepted, or in consequence of not entering within twenty years or within any other period of time, after an entry by bar from not commencing an action within one year, or other period

of time after an entry; by bar from the right of entry being tolled in consequence of any alienation by any tenant; by bar from the right of entry being tolled in consequence of any alienation by any husband, seized in the right of his wife; by bar from the right of entry being tolled in consequence of any alienation on the part of any corporation sole; by any abatement on the part of any stranger, of the rightful possession, or of the freehold, or of the heir, or of the devisee, by any intrusion; by the intrusion on the part of any stranger after a particular estate of freehold is determined, before him, her or them in remainder or reversion; by entry to recover *seizin* in the case of the compulsive *disseizin* of a tenant and the substitution of another, with or without the consent, countenance or concurrence of the landlord or owner; by writ of entry *sur disseizin* in the *per,* or writ of entry *sur disscizin* in the *per* and *cui,* or writ of entry *sur disseizin* in the *post;* by writ of dower *unde nihil habet,* or writ of right of *dower,* or writ of admeasurement of *dower;* by writs of *dum fuit infra aetatem;* or of *dum fuit non compos mentis,* or of *cui invita,* or of *cui ante divortium,* or *ad communem legem;* or *in casu provisio;* or *in concilii casu;* or *ad terminum qui preteriit,* or *casu matrimonii prelocutii;* by writ of assize, or assize of *mort d'ancester,* or writ of *ayle,* or writ of *bisayle,* or writ of *tresayle,* or writ of *cosinage,* or writ of *nuper obiit,* or assize of *novel disseizin,* or writ of *redisseizin,* or writ of *post disseizin,* by action of *formedon,* or writ of *formedon* in the *discender* or writ of *formedon* in the remainder, or writ of *formedon* in the reverter; by bar from not commencing an action of *formedon* within twenty years, or within any other period of time; by writ of *quod ei deforceat,* or fine and concord *sur conizance de droit sur concessit,* or *sur done;* or common recovery on a writ of entry in the *post,* or default of the vouchee; by writ of *de rationabile parte;* by writ of *precipe*

quod dominus remisit curiam, or *precipe in capite,* or writ of right close, *secundam consuetudinem manerii,* or writ of *toll,* or writ of *pone,* or writ of *recordari facias;* by writ of *quare ejicit infra terminum;* by writ of assize of nuisance, or writ of *quod permiteat prosternere,* by writ of waste, or writ of *estrepement;* by writ *de consuetudinibus et observitiis,* or writ of *cessavit,* or writ of right *sur disclaimer,* or writ of *ne injuste vexes,* or writ of *mesne de medio,* or writ of *de secta,* and by writ of admeasurement of pasture, or writ of second surcharge, or assize of *novel disseizin sur* disturbance of common, or writ of *quod permittet* for deprivation of common, be and the same hereby are utterly abolished, abrogated and repealed, as to any future operation, in any degree whatsoever."

This section abolished a multitude of common-law remedies, but it may well be doubted whether its enactment was in accordance with the provisions of the ordinance of 1787 guaranteeing to the inhabitants of the territory judicial proceedings according to the course of the common law. Whether valid or invalid, it was substantially re-enacted by the Revised Statutes of 1838, pt. 3, title 3, chap. 1, which changed the law of 1821 in but two important particulars: first, by providing for a jury of 12, instead of 16, men; and, second, in the re-enactment of section 40 of the statute of 1821 as section 32 of pt. 3, title 3, chap. 1, of the Revised Statutes of 1838 which changed the statute of limitations from 60 to 25 years.

By the Revised Statutes of 1846, chap. 108, § 2, the action of right was abolished and the personal action of ejectment substituted therefor "in the same cases in which a writ of right may now be brought," and by 3 Comp. Laws 1929, § 14904, an

action of ejectment may now be brought in the same cases in which a writ of right might formerly be brought to recover lands, tenements, or hereditaments, and by any person claiming an estate therein, in fee, or for life. No other changes were made by these statutes in the common-law rule; and the Constitution of 1908 keeps in force "the common law and the statute laws now in force, not repugnant to this Constitution." Const. 1908, sched. § 1.

By 3 & 4 Will. 4, chap. 105, § 3, it is provided a widow may have dower when her husband shall have been entitled to a right of entry or action in any land, the same as if he had recovered possession. 8 & 9 Vict. chap. 106, § 6, provides for the conveyance by deed of a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England. By Will. 4 & 1 Vict. chap. 26, § 3, all interests in real estate to which deceased was entitled at the time of his death are devisable.

By the English statutes above mentioned, possibilities of reverter and possibilities of right of reentry for condition broken have been made fully alienable. Yet, in Michigan, where, since English and American occupation, the feudal system has been unknown, and knighthood never flowered, we have been, if the rule of *Halpin* v. *Rural Agricultural School District* was correct, helplessly "hogtied,"—in a land whose policy holds the free alienation of property to be one of its essential requisites,—while in England the senseless rule, real or pretended, has long since been discarded.

"In five States it has been held that, if an attempt is made to convey a right of entry for breach of condition which is unaccompanied by any reversion, the

interest of the conveyor is thereby forfeited. It is a little difficult to see why this should be so. If the interest is inalienable, why should the owner be penalized for an attempt at alienation which is a nullity? While a few statements are found supporting the position of these American cases in early English texts, there is no English decision to that effect. It is believed that the patent trend toward the alienability of future interests in recent years would probably lead a court in a jurisdiction where the question is still an open one to declare that an attempt at alienation of a right of entry for breach of condition does not forfeit the interest. Certainly, an attempt to alienate a possibility of reverter would not forfeit the interest even in jurisdictions where it is inalienable." 3 Simes' Law of Future Interests, § 717.

10. It is a long way from the medieval rule governing the transfer of folk land by feoffor to feoffee by livery of seizin, the basis of the rule of *Halpin* v. *Rural Agricultural School District,* to the rule enforcing contracts transferring possibilities of expectant estates; from physical delivery of the land, to transfer of title by conveyances in writing where the record is notice of prior defects in title. The theory that the attempt to assign a right worked a forfeiture, though inconsistent with equity which abhors forfeitures, is as logical, measured by modern conceptions of legal reasoning, as the rule that a life tenant might convey a fee,—a tortious act could be the foundation of a legal right,—that rights might have their foundation in wrong,—that one could convey that which he did not own,—convey a greater title than he himself possessed. In England, rights and interests in land were later recognized which did not depend on seizin, such as uses, for in *Wil-*

loughby v. *Willoughby,* 1 Term Rep. (Durn. & East's) 763, 765 (99 Eng. Rep. 1366), Lord Hardwicke said:

"Equity always considers who has the right in conscience to the land, and on that ground makes one man a trustee for another."

At early common law, title depended on seizin. There could be no dual title. Now, dual titles are recognized. The vendee in a modern land contract acquires possession, is the beneficial owner of the equitable title, though the legal title is held by the vendor as security for performance by the vendee. An equity of redemption on mortgage foreclosure was once based upon the discretion of the chancellor. It has become a right in property,—an estate which may be sold, assigned and conveyed. At common law, the trustee of real estate was the owner of the fee. The right to enforce the trust was a personal right. A trustee now holds nominal title only. He may resign, die, be removed or succeeded; or his duties may be performed by the court. The title to real estate conveyed by conditional fee is dual in character.

The fee here was conveyed for a particular use, and, never having been applied to that use, no absolute title in equity ever vested in the grantee. If we use the medieval conception of real estate titles, the fee vested in the grantee conditionally, subject to reversion for failure to use the land for the purposes for which it was conveyed. That part of the absolute fee not conveyed, the right to terminate the fee of the grantee for breach of condition subsequent, remained in the grantor.

The holder of a fee on condition subsequent,—a conditional fee,—is in some cases a holder in trust charged with the performance of the condition sub-

sequent. *Smith* v. *Atterby* (*Alterly*), 3 Chan. Rep. 93 (21 Eng. Rep. 739). This rule has been applied where lands are deeded on condition the grantee support the grantor or some other person. Such conditions are conditions subsequent. In such case —"the conveyance in question should be declared a trust to secure the performance of these obligations, and, in case of their nonperformance, this trust should end, and the property revert to complainant." *Cornell* v. *Whitney,* 132 Mich. 300; *Woolcott* v. *Woolcott,* 133 Mich. 643.

Courts of equity may grant or refuse relief on conditions peculiar to themselves, sometimes at variance with the common law. 3 Story's Equity Jurisprudence (14th Ed.), § 1724. Where a grantee obtained title for a nominal consideration for a specific use and the land was not so used and the grantee by his tortious act, in violation of the terms of his deed, conveys in form an absolute fee to his grantee, in violation of the interests of the grantors sought to be protected and subserved by the condition inserted in the deed, what reason is there to forfeit the rights of the grantors or their assigns reserved in the deed? Such forfeiture ought not to be enforced in equity. The grantee for a particular use ought not in equity to be held to have become vested, without conveyance to him and without consideration, with the right to destroy the beneficial interests of the grantors or their assigns sought to be protected by the condition in the deed.

The possibility of a reverter in *Halpin* v. *Rural Agricultural School District* was "to the said party of the first part, their heirs and assigns," and in the case at bar "to said parties of the first part, their heirs or assigns."

The statutes permitting the devise of any interest in property descendible, but for the will, to the heirs of the grantor; permitting conveyance of any interest in real estate by deed without any other act or ceremony whatever; abolishing the necessity of seizin; and prohibiting the tortious conveyance of interests in land not owned by the grantor, have been cited.

"Land has been held to include servitudes, easements, rents, and other incorporeal hereditaments, and all rights thereto and interests therein, equitable as well as legal; *Oskaloosa Water Co.* v. *Board of Equalization of City of Oskaloosa,* 84 Iowa, 407 (51 N. W. 18, 15 L. R. A. 296); *Butler* v. *Green,* 65 Hun (72 Sup. Ct.), 99 (19 N. Y. Supp. 890); and to be synonymous with the terms real estate and real property; *Black* v. *Elkhorn Min. Co.,* 49 Fed. 549; and to include leases for years, remainders, reversions, rentcharges, tithes, advowsons, and titles of honor; *In re Sir J. Rivett-Carnac's Will,* 30 Ch. Div. 136 (54 L. J. Ch. 1074, 33 W. R. 837)." 2 Bouvier's Law Dictionary (Rawle's 3d Rev.), p. 1827.

"The term 'conveyance,' * * * shall be construed to embrace every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged or assigned; or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands." 3 Comp. Laws 1929, § 13309.

In *McKissick* v. *Pickle,* 16 Pa. 140, 149, real estate was deeded for schoolhouse purposes with a provision that, if it ceased to be used for that purpose, it should revert to the party of the first part and *to his heirs and assigns.* It was contended the assigns of the grantor could not enter for breach of condition. It was said:

"That a grantor cannot reserve such a right, will hardly be contended, as in Pennsylvania there is no policy of law which forbids it. The law against maintenance has never been adopted in this State. The reason assigned why a condition in England could not be assigned, is, because no title could be made to land held by another adversely, as that was against the law, which forbid maintenance. And hence the rule, that none but the grantor, or his heirs, can enter for condition broken. This reason does not apply here, where the grantor expressly reserves the right: 55 Law Library, 2 Crabbe on Real Property, pp. 531, 550, §§ 2150, 2189, 2190, and the authorities there cited; *Martin* v. *McCord,* 5 Watts (Pa.), 493 (30 Am. Dec. 342); *Wright* v. *Linn,* 9 Barr (9 Pa.), 433; *Klinkener* v. *School Directors of M'Keesport,* 1 Jones (11 Pa.), 444; *Newkerk* v. *Newkerk,* 2 Caine (N. Y.), 345; *Hamilton* v. *Elliott,* 5 Ser. & R. (Pa.) 375, 385. In the last case, Chief Justice Gibson says, none but the feoffer or his heirs can enter; and the reason why a right of entry cannot be assigned is, that a contrary doctrine would favor maintenance and promote litigation. This is a fair case for the application of the maxim, *cessante ratione cessat ipse lex.*"

In *Cloyes* v. *Beebe,* and *Cloyes* v. *Newton,* 14 Ark. 489, it is said:

"It is true that, at common law, if a man had in him only the right of possession or property, he could not convey it to another, lest, in the language of the ancient law, 'pretended titles might be granted to great men, whereby justice might be trodden down and the weak oppressed.' But this was for the feudal reason that possession was an indispensable element of alienation, of which the law was so tenacious, even after the statute of uses, that a pretense title itself, would not prevent the seizin of the land from passing from the bargainor

to the bargainee by virtue of that statute, where he was actually seized, although his title was but pretended. At the same time reversions and vested remainders might be granted, because it was considered that the possession of the particular tenant was the possession of him in reversion or in remainder, and was not adverse. And upon the same principle the better and more recent authorities show that an equitable interest was always assignable; because after the sale, out of which an equitable interest grew, the vendor and those under him, would hold as trustees for the vendee and those under him, and therefore there could be no such adverse possession as to make the title pretended. But every vestige of this feudal doctrine, which thus restrained the alienation of real estate, has been swept off by our statute, which enacts that, 'Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same manner and with like effect as if he was in the actual possession thereof.' (Digest 1848, chap. 37, p. 265, § 6.) The next section (Digest 1848, chap. 37, p. 265, § 7), declares that 'The term *real estate,* as used in this act, shall be construed as co-extensive in meaning with "lands, tenements and hereditaments" and as embracing chattels real.' And Sir Edward Coke says, that of these three, 'hereditaments' is by far the largest and most comprehensive expression, because it included not only lands and tenements, but whatever may be inherited, be it corporeal or incorporeal, real, personal or mixed. And thus it appears that, although at common law, there were certain rights to and interests in real estate, that for want of possession, either actual or constructive, could not be alienated to a stranger, although they could be released or devised by will, or would pass to the heir or executor—as contingencies and mere possibilities—such is the comprehensiveness of our statute in embracing hereditaments in the term 'real es-

tate,' that that distinction is also annihilated, and therefore, in this State, *whatever interest in real estate may be inherited, may be bargained, sold and conveyed.*"

Nutter v. *Russell,* 3 Metc. (60 Ky.) 163, involved the question of reversion under a will. It was contended the court had no power to order a sale of a contingent interest and that the purchasers at such sale could not acquire a valid interest. The Kentucky statute provided:

"Any interest in, or claim to, real estate, may be disposed of by deed or will in writing. Any estate may be made to commence *in futuro,* by deed in like manner as by will, and any *estate* which would be good as an *executory devise* or bequest shall be good if created by deed."

The Kentucky statute was similar to 3 Comp. Laws 1929, § 13283, above quoted, in that it provided that any interest in real estate might be conveyed though it was in the possession of someone else. It was said:

"The effect of this enactment is to obviate at once all the difficulties growing out of the distinctions which had been established, by judicial construction, between such estates as were alienable and such as were not. It will not be doubted, we suppose, that under this statute every conceivable interest in, or claim to, real estate, whether present or future, vested or contingent, and however acquired, may be disposed of by deed or will."

In *Carrington* v. *Goddin,* 13 Gratt. (54 Va.) 587, 599, a similar statute was before the court and it was said:

"It is very clear that before the Code took effect, a bargainee of a party not in possession, actual or

constructive, at the time of the execution of the deed, could not maintain ejectment in his own name, at least against the party at that time in the adverse possession of the land. His disability to maintain the action proceeded, not from the act against conveying or taking pretensed titles, 1 Rev. Code 1819, chap. 103, p. 375, but from the common law, whose maxim it was that nothing in action or entry could be granted over. A feoffment was void without livery of seizin; and without possession there could be no livery of seizin. 4 Kent Commentaries, 448; 2 Lom. Dig. 8, 9. The statute of uses, 1 Rev. Code 1819, chap. 99, § 29, p. 370, did not remove the disability, because it only operated on a possession existing in the bargainor at the time of the execution of the deed, and transferred that possession to the use created or declared in favor of the bargainee. If no possession existed in the bargainor, of course none could be transferred to the bargainee. But the Code has changed the common-law rule by declaring that 'any interest in or claim to real estate may be disposed of by deed or will.' Rev. Code 1849, chap. 116, § 5, p. 500. That such a change was contemplated by the revisors, is manifest from their report, p. 602, § 5, and note ‡. They recommended the adoption of a section similar to 8 & 9 Vict. chap. 106, § 6; in which 'a right of entry' is expressly named. Instead of adopting that section, which is complicated in its details, the legislature enacted the provision before quoted. Their object was to use brief and plain terms, which would be at least as extensive in their meaning as the terms used in the statute of Victoria. They could not have used more comprehensive terms than they did. A right of entry is certainly 'an interest in or claim to real estate,' and may therefore 'be disposed of by deed or will.' If it may be so disposed of, the grantee or devisee may bring the action in his own name.''

In *Young* v. *Young,* 89 Va. 675 (17 S. E. 470, 23 L. R. A. 642), it is said:

"At common law, it is true, a *naked possibility,* such as this remainder, which was uncertain as to the person, could not be the subject of assignment or conveyance; but 'this matter,' as Mr. Minor expresses it, is assisted in Virginia by statute, which provides that any interest or claim to real estate may be disposed of by deed or will. 2 Minor's Inst. 362; Code of 1888, § 2418. 'The effect of this enactment,' as was said by the supreme court of Kentucky, in *Nutter* v. *Russell,* 3 Metc. (60 Ky.) 163, 'is to obviate at once all the difficulties growing out of the distinctions which had been established by judicial construction between such estates as were alienable and such as were not. It will not be doubted, we suppose, that under this statute every conceivable interest in or claim to real estate, whether present or future, vested or contingent, and however acquired may be disposed of by deed or will.' *Faulkner* v. *Davis,* 18 Gratt. (59 Va.) 651, 674 (98 Am. Dec. 698)."

In *Wilson* v. *Langhorne,* 102 Va. 631 (47 S. E. 871), the court quoted with approval the language of *Carrington* v. *Goddin,* above quoted, and said:

"The court in that case indulges in no refinement of construction. It is content to give to plain words their usual and everyday meaning, and the interpretation there placed upon the statute did away forever with the niceties by which the devolution of property had theretofore been embarrassed and hindered, and made capable of disposition by deed or will any interest in or claim to real estate."

A similar statute was before the court in *Moore* v. *Sharpe,* 91 Ark. 407, 418 (121 S. W. 341, 23 L. R. A. [N. S.] 937), where, after reviewing the authorities, it is said:

"We think it clear, both upon reason and authority, that where, as in this State, the common-law

doctrine of livery of seizin is abolished by a statute authorizing a conveyance of land, whether held in possession or not, a subsequent deed executed by an original grantor on condition is equivalent to re-entry, and is effectual for the purpose of declaring a forfeiture and vesting the title in the subsequent grantee."

In this case, it is said, p. 410:

"The doctrine of estates upon condition is of feudal origin, of which system the doctrine of title by livery of seizin formed an essential part, on account of the condition of real property at that time, and the only practical method of conveying it. This was then a doctrine of necessity, for in that day no system of registration of conveyances existed. Indeed, lands were not generally conveyed by writings, and the only practical method of giving notice of a change of title was either by actual delivery of possession or by symbolic delivery in sight of the land.

"At common law, the only method whereby a forfeiture could be effected for breach of condition was by re-entry upon the premises or by a public attempt to re-enter, with a declaration of forfeiture. This, too, grew out of the doctrine of livery of seizin, the reason being that the forfeiture for condition broken must be accomplished by acts of equal dignity and notoriety with those which created the condition, *viz.*, delivery, either actual or symbolic. 'As by the old common law a freehold could be created only by the ceremony of livery of seizin, the corresponding ceremony of re-entry was necessary in order to determine it, or, as Coke has it, "an estate of freehold cannot begin nor end without ceremony."' (1 Jones Law of Real Property in Conveyancing, § 715.) 'The entry, moreover, in the language of the Touchstone, should be "an open and notorious act, equivalent to investiture of land by livery of seizin, that notoriety might be given to the

change of title.'' It is not necessary, however, that the party entering should declare at the time for what purpose he enters. The act speaks for itself.' (1 Jones Law of Real Property in Conveyancing, § 716.)

''In his recent work on Real Property, Professor Minor (vol. 1, p. 532), says: 'It is an established rule of the common law that if the conditional estate be a freehold the mere occurrence of the event which constitutes the violation of the condition does not defeat the estate, because as a freehold can, at common law, only be created by livery of seizin, there is needed a corresponding notoriety in order to determine it. This corresponding notoriety is the re-entry of the grantor or his heirs. * * * No actual re-entry is necessary to determine an estate for years on condition, ''for, as a term of years may begin without ceremony, so it may end without ceremony.'' '

''It also must be conceded that at common law the right of re-entry for condition broken was not assignable, and could only be exercised by the grantor who created the condition, or by his privies in blood. It could not be exercised by one who was only the grantor's privy in estate. This under the maxim that, in order to discourage maintenance, 'nothing which lies in action, entry or re-entry can be granted.' The same rule prohibited the conveyance of lands held adversely, or any interest therein. This rule was created under the English statute (32 Henry 8, chap. 9) against selling pretended titles, and Sir Edward Coke states the reason therefor as follows: To prevent 'maintenance, suppression of right, and stirring up of suits; and therefore nothing in action, entry or re-entry can be granted over; for so under color thereof pretended titles might be granted to great men whereby right might be trodden down and the weak oppressed, which the common law forbiddeth.' Coke on Littleton, p. 214a.

"In many of the States of the American Union this English statute against the sale of pretended titles to lands not in possession has been re-enacted, and in a few States the doctrine has been recognized and enforced as a part of the common law. But this court in *Lytle* v. *State,* 17 Ark. 608, 674, held that 'the provisions of these statutes, upon which so much of the law of maintenance and champerty rests for support in the English law, so far from having been re-enacted in this State, have been met here by directly conflicting legislation in the several provisions touching the sale of real estate held in adverse possession; whereby the right of "alienation and purchase" of every interest, title and estate therein "has been enlarged almost to an unlimited extent." ' "

Kansas has a statute in all respects substantially like 3 Comp. Laws 1929, § 13278. This statute came before the court in *Miller* v. *Miller,* 91 Kan. 1, 4 (136 Pac. 953, L. R. A. 1915 A, 671, Ann. Cas. 1917 A, 918), where the validity of a freehold estate in remainder to commence in the future was in question. It was conceded that at common law such an estate could not be created without a grant of a precedent estate to support it. But it was held the common-law rule had been abrogated by statute. It was said:

"The words, 'conveyances of land,' mean, of course, the land itself in fee simple absolute. The words, 'any other estate or interest therein,' include estates of freehold and less than freehold, of inheritance and not of inheritance, absolute and limited, present and future, vested and contingent, and any other kind a grantor may choose to invent, consistent, of course, with public policy.

"The doctrine of the particular estate arose from the necessity under the feudal system of always

having a tenant to fulfill feudal duties, defend the estate, and represent it so that other claimants might maintain their rights. The only way to pass a freehold estate was by livery of seisin which operated immediately or not at all, and if the freehold became vacant the lord had an immediate right of entry and all limitations of the tenancy came to an end. The result was that in order to create a freehold estate, the enjoyment of which was to be postponed to a future time, it was necessary to support it by a precedent particular estate taken out of the inheritance, and to make livery of seisin to the particular tenant, which by fiction inured to the remainder man or remainder men."

In *Shell Petroleum Corp.* v. *Hollow* (C. C. A.), 70 Fed. (2d) 811, a question analogous to that here involved was before the court. Counsel discussed whether the instrument created a fee simple on condition subsequent with a possibility of reverter, or an estate in determinable fee. It was said:

"It is unnecessary to determine that question because the common-law rule that the possibility of reverter is neither an alienable, assignable, or descendible estate has been abrogated by statute in Kansas. * * *

"It is immaterial to a decision of this case whether the deed to the school district conveyed a fee simple estate on condition subsequent or an estate in determinable fee. A discussion of that question would be beside the decisive point. The rights of Ediger, in either event and whatever their nature, could be passed by deed."

11. In *Halpin* v. *Rural Agricultural School District,* plaintiff sought to enjoin defendant from selling school buildings on the land and recover the land because defendant had ceased to use it for

schoolhouse purposes. Defendant in its answer and in its brief in this court *disclaimed any interest in the real estate,* but claimed the schoolhouse erected on the land and its equipment belonged to the district and might be removed therefrom. Plaintiff contended there was a distinction between a condition subsequent and a conditional limitation and tried the case upon the theory the schoolhouse was real estate, attached to the soil, and reverted to him. In his brief in this court, plaintiff conceded *"that by the great weight of authority, a possibility of reverter is not under the common law alienable or diversable."* Appellee in its brief said:

"It is conceded by plaintiff's counsel in his brief that by the great weight of authority a possibility of reverter remaining after a conveyance upon a condition subsequent is not alienable or devisable."

Defendant contended the use of the land was for a specific purpose, for an indefinite period, and amounted merely to a lease of the land so long as used for school purposes and it had a right to remove the building and equipment therefrom at any time during the continuance of its occupation or within a reasonable time thereafter, relying upon the rule of *School District No. 5 of Delhi* v. *Everett,* 52 Mich. 314; *Osborn* v. *Potter,* 101 Mich. 300; *Hayward* v. *School District No. 9 of the Township of Hope,* 139 Mich. 539; *Higginbotham* v. *Phillips,* 192 Mich. 49; *Waverly Park Amusement Co.* v. *Michigan United Traction Co.,* 197 Mich. 92, to which may now be added the later case of *Cameron* v. *Oakland County Gas & Oil Co.,* 277 Mich. 442 (107 A. L. R. 1142).

Though plaintiff's concession related to the rule of the common law, counsel for defendant, and the

court, treated it as a concession as to the present law governing the question.

It will be seen (a) that in *Halpin* v. *Rural Agricultural School District,* there was apparently a concession of counsel as to the applicable rule and no real contentious litigation of the question; (b) that neither counsel for plaintiff or defendant called the attention of the court to the statutory provisions expressly making reversionary interests in real estate alienable; (c) the court's attention was not called to the provisions of 3 Comp. Laws 1929, § 13278, which expressly provides for the conveyance of lands, or of any estate or interest therein, by deed; (d) nor was it insisted that plaintiff's interest was an expectant estate made alienable by 3 Comp. Laws 1929, § 12955, when construed in connection with 3 Comp. Laws 1929, §§ 12929, 12932.

The foregoing is important only as showing the common-law rule, the background against which modern statutes relating to real estate must be construed, and as an alibi for error.

12. (a) The basis of the doctrine of *Halpin* v. *Rural Agricultural School District* was long ago cut away by statutes of the same kind that destroyed it in Pennsylvania, in Kentucky, in Virginia, in Arkansas, in Kansas, and in all other states where such statutes are in force. The statute formerly governing champerty and maintenance has been repealed, and the only statute in force is applicable only to attorneys and counselors. 3 Comp. Laws 1929, § 13593. 32 Henry 8, chap. 9, is not in force in this State at this time, nor was it in force when *Halpin* v. *Rural Agricultural School District* was decided.

(b) Chapter 62 of the Revised Statutes of 1846, entitled: "Of the nature and qualities of estates

in real property, and the alienation thereof." (3 Comp. Laws 1929, chap. 251, § 12921 *et seq.*), was adopted from 1 Rev. Stat. 1829 of New York, pt. 2, chap. 1, title 2, art. 1, entitled: "Of the nature and qualities of estates in real property, and the alienation thereof." So nearly does chapter 62 of the Rev. Stat. 1846, (3 Comp. Laws 1929, chap. 251, § 12921 *et seq.*) follow that part of the Revised Statutes of 1829 of New York above referred to, that in the particulars here involved they are identical in language and in the numbering of the sections.

Section 7, chap. 62 of the Revised Statutes of 1846 (3 Comp. Laws 1929, § 12927) provides:

"Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy."

Section 8 (3 Comp. Laws 1929, § 12928) provides:

"An estate in possession is where the owner has an immediate *right* to the possession of the land; an estate in expectancy is where the *right* to the possession is postponed to a future period."

Section 9 (3 Comp. Laws 1929, § 12929) provides:

"Estates in expectancy are divided into,

"First. Estates commencing at a future day, denominated future estates; and,

"Second. Reversions."

Section 12 (3 Comp. Laws 1929, § 12932) provides:

"A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised."

Section 35 (3 Comp. Laws 1929, § 12955) provides:

"Expectant estates are descendible, devisable and alienable, in the same manner as estates in possession."

The hair-splitting distinctions between a right of reverter, a naked right of reverter, a right of entry for condition broken, possibility of right of re-entry for condition broken, and mere naked possibility of right of re-entry for condition broken vanish before the plain language of the statutes classifying and defining estates in lands, first enacted by the Revised Statutes of 1829 of New York, and adopted verbatim by the Revised Statutes of 1846.

(c) Chapter 65 of the Revised Statutes of 1846 (3 Comp. Laws 1929, chap. 260, § 13278 *et seq.*) departed somewhat from 1 Rev. Stat. 1829 of New York, pt. 2, chap. 1, title 2, art. 4.

Section 136, art. 4, title 2, chap. 1, pt. 2, of the Rev. Stat. 1829 of New York, provides:

"The mode of conveying lands by feoffment with livery of seizin, is abolished."

Section 137 provides:

"Every grant in fee or of a freehold estate, shall be subscribed and sealed by the person from whom the estate or interest conveyed is intended to pass," etc.

Section 1, chap. 65 of the Revised Statutes of Michigan of 1846 (3 Comp. Laws 1929, § 13278), above quoted, provides for the conveyance of lands, or of any estate or interest therein, by deed *without any other act or ceremony whatever.* The abolition of all other acts and ceremonies except making, execution, acknowledgment and delivery of a deed is more sweeping than that of the Revised Statutes of 1829 of New York.

Section 147 of the same article, title, chapter, and part, of the Rev. Stat. 1829 of New York, above referred to, provides:

"Every grant of lands shall be absolutely void, if at the time of the delivery thereof, such lands shall

be in the actual possession of a person claiming under a title adverse to that of the grantor."

The language "at the time of the delivery thereof" relates to the delivery of the conveyance in writing,—the grant. See section 138 of the same article, title, chapter, and part, of the Revised Statutes of 1829 of New York.

Section 147 of part 2, chap. 1, title 2, art. 4 of the Revised Statutes of New York, above referred to, declared a rule in conformity with the common law as laid down in *Bruckner* v. *Lawrence, supra.*

The provisions of the original bill for revision introduced in the Michigan legislature of 1846 covering this subject are not known. When chapter 65 of the Revised Statutes of 1846 was under consideration in committee of the whole in the State Senate, March 27, 1846, sections 7 and 8 of chapter 65 of the proposed revision were stricken out and section 7 as subsequently enacted (3 Comp. Laws 1929, § 13283), above quoted, inserted in their place. Senate Journal on Revision, p. 46.

The statutes of 1829 of New York, so far as applicable, were adopted in Michigan with the modifications above noted, and the English statutes of 3 & 4 Will. 4, Will. 4 & 1 Vict. and 8 & 9 Vict. above cited were in effect re-enacted in Michigan, though the New York revision preceded the enactment of the English statutes above referred to in point of time.

(d) The statutes of this State above cited are so plain as to need no construction. It is established: *first,* that the grantors owned the premises in controversy in absolute fee simple; *second,* that they sold and conveyed a conditional fee therein; *third,* that interest which constituted the difference be-

tween the absolute fee which plaintiffs owned and the conditional fee which they conveyed reserved by grantors was a reversion,—that is, the residue of the estate left in the grantors after the conveyance of a conditional fee, commencing in possession on the determination of a particular estate granted or devised, an estate in possession being one where the owner has an immediate right to the possession; *fourth,* this reversion or reversionary right in the premises in question reserved by the grantors was descendible, devisable and alienable in the same manner as estates in possession; *fifth,* being alienable, by statute such reversion or reversionary interest could be conveyed by deed without any other act or ceremony whatever.

13. It is contended that to overrule *Halpin* v. *Rural Agricultural School District* will interfere with vested rights.

(a) In *Ex Parte Bollman* and *Ex Parte Swartwout,* 4 Cranch (8 U. S.), 75, 103 Mr. Justice Johnson said:

"I am far, very far, from denying the general authority of adjudications. * * * But I deny that a court is precluded from the right, or exempted from the necessity, of examining into the correctness or consistency of its own decisions, or those of any other tribunal. * * * Strange indeed would be the doctrine, that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error. A case that cannot be tested by principle is not *law,* and in a thousand instances have such cases been declared so by courts of justice."

In *Wood* v. *Brady,* 150 U. S. 18 (14 Sup. Ct. 6), it is said:

"If they (courts) were absolutely bound by their prior decisions, they would be without the power to correct their own errors."

"This court recognizes to its fullest extent the necessity for stability, consistency, and a firm adherence to the doctrine of *stare decisis* in passing upon and construing any provision of the organic law; but, if an error has been committed, and becomes plain and palpable, the court will not decline to correct it, even though it may have been re-asserted and acquiesced in for a long number of years." *Arnold* v. *Knoxville,* 115 Tenn. 195, 202 (90 S. W. 469, 3 L. R. A. [N. S.] 837, 5 Ann. Cas. 881).

"The doctrine of *stare decisis,* like almost every other legal rule, is not without its exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such cases it is the duty of courts to re-examine the question. Chancellor Kent, commenting upon the rule of *stare decisis,* said that more than a thousand cases could then be pointed out, in the English and American reports, which had been overruled, doubted or limited in their application. He added that 'it is probable that the records of many of the courts of this country are replete with hasty and crude decisions; and in such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.' (1 Kent's Commentaries (13th Ed.), 477; Broom's Legal Maxims, 153; *Gifford* v. *Livingston,* 2 Denio (N. Y.), 380, 392; *Morse* v. *Goold,* 11 N. Y. 281 (62 Am. Dec. 103); *Judson* v. *Gray,* 11 N. Y. 408.)" *Rumsey* v. *Railroad Co.,* 133 N. Y. 79, 85 (30 N. E. 654, 15 L. R. A. 618, 28 Am. St. Rep. 600).

"Because a judicial decision may apply to past as well as to future titles and conveyances, a change in a rule of property is to be avoided where fairly possible. But where it clearly appears that a decision, especially a recent one, was wrong and continuing injustice results from it, the duty of the court to correct the error is plain." *Hilt* v. *Weber*, 252 Mich. 198 (71 A. L. R. 1238).

(b) An examination of the briefs in *Halpin* v. *Rural Agricultural School District* shows the court treated the concessions of counsel as the law of the case.

"A mere concession of counsel in a former case cannot be regarded as a judicial establishment of the point conceded." 15 C. J. p. 940; *State, ex rel. Wine,* v. *Railroad Co.*, 99 Mo. 30 (12 S. W. 290, 6 L. R. A. 222).

14. The rule of *Halpin* v. *Rural Agricultural School District* should be overruled. It is unfounded in law.

(a) The opinion indicates that the writer thereof regarded the rule established and declared as unreasonable.

(b) The court, in deciding that case, overlooked the statutes which had been in force in this State since 1846 defining reversions or reversionary interest in lands, making them alienable, and providing such interests might be alienated by deed.

(c) Apparently, without any consideration of these statutes, the court adopted a rule of law based upon the medieval doctrine of seizin and the impossibility of livery of seizin when the possession of the property was held by someone other than the grantor, a doctrine which had been abrogated by statute in this State since 1846.

(d) The court overlooked its plain duty to follow the language of the applicable statutes.

"What a court is to do, * * * is to declare the law as written." 1 Cooley's Constitutional Limitations (8th Ed.), p. 124.

(e) Though the court, even if it had in mind the statutes above mentioned, had the power to ignore such statutes, it had no right to do so. Cardozo, The Nature of the Judicial Process, p. 129.

(f) "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." *Osborn* v. *Bank of United States,* 9 Wheat. (22 U. S.) 738, 866.

(g) No one has a vested right to rely upon an erroneous opinion in an analogous case (*Crigler* v. *Shepler,* 79 Kan. 834 [101 Pac. 619, 23 L. R. A. (N. S.) 500]), to be protected in claimed rights based upon palpable wrong, or to be relieved either in law or in equity from his own mistake in law. *Lyon* v. *Richmond,* 2 Johns. Ch. (N. Y.) 51.

(h) The lands in question were in 1910 owned by plaintiffs. October 22, 1912, plaintiffs conveyed a conditional fee therein by warranty deed upon condition subsequent to Brooks, trustee. The statutes provided plaintiffs could convey any interest in the premises by deed. They retained a reversionary interest in the lands so conveyed. That reversion, or reversionary interest, they could convey by deed. May 26, 1916, plaintiffs conveyed this reversionary interest to Parke and wife. Parke and wife had a

right to convey such interest acquired from plaintiffs, to whomsoever they saw fit and they did convey their interest therein by reconveying it to plaintiffs. Such interest is now revested in plaintiffs and plaintiffs' property rights based upon statutes which have been in force in this State for more than 90 years should be protected.

(i) If the rule of *Halpin* v. *Rural Agricultural School District* is adhered to, not only will plaintiffs' rights be forfeited, but the statutes applicable to the questions involved, in force in this State since 1846, will be disregarded and overridden and plaintiffs illegally deprived of their property. No one has a vested right to ignore a public statute enacted by the legislature in the exercise of its undoubted power, applicable to transactions into which he enters, which has been in force for more than 90 years.

(j) This court ought not to hesitate to pass upon the rights of one who, claiming to have acquired title in good faith to the property in question, obtained it by grant from those who never had the right to convey that which they did not own.

(k) In deciding the *Halpin Case,* the court did not consider, at least did not mention, that that decision, made in plain violation of the applicable statutes, imperiled the rights of thousands of people who had rights of property which, if the rule of that decision is good, were by it confiscated and destroyed. Upon a mere balancing of equities, the rule of *Halpin* v. *Rural Agricultural School District* should be overruled.

(l) This court ought not to disturb, or to deny, plaintiffs' rights in the property in question,—rights which were in force in 1912 when plaintiffs conveyed the conditional fee therein to Brooks, trustee,—rights which were lawfully conveyed by plaintiffs

to Parke and wife,—rights which vested in Parke and wife for a valuable consideration paid by them to plaintiffs for such rights,—rights which Parke and wife under the statute could reconvey to plaintiffs,—rights which were vested in plaintiffs at the time this suit was commenced,—rights which are still vested in plaintiffs, though it is now claimed such rights are divested by the rule in *Halpin* v. *Rural Agricultural School District* without notice, hearing, or an opportunity to be heard,—without due process of law.

(m) *Halpin* v. *Rural Agricultural School District* was decided October 1, 1923. This suit was commenced November 25, 1931, eight years, one month and 24 days afterward. The applicable statute of limitations (3 Comp. Laws 1929, § 13964, subd. [3]) is 15 years. August 27, 1930, the successors in title to the conditional fee in the strip of land in question conveyed by plaintiffs to Brooks, trustee, conveyed it by Union Guardian Trust Company and Eastern Michigan Properties Corporation to Grover C. Dillman, State highway commissioner. At that time, the right of reversion was vested in plaintiffs and their right of re-entry into the possession of the premises for the first time accrued against defendants. 3 Comp. Laws 1929, § 13966.

(n) The pretended rights of a rich and powerful State, based solely on tenderness for palpable error, ought not to be given preference over the admitted rights of its citizens, based upon the plain provisions of applicable statutes, in force when such rights accrued and in force now.

Plaintiffs should be entitled to a decree as prayed, with costs.

WIEST, C. J., and SHARPE, J., concurred in the result reached by dissenting opinion.

FEAD, J., took no part in this decision.

ANDRES *v.* NATIONAL LOAN & INVESTMENT CO.

1. BUILDING AND LOAN ASSOCIATIONS — ACCOUNTING — BURDEN OF PROOF OF PAYMENT.

   In suit for an accounting by mortgagors' assignee against mortgagee building and loan association, plaintiff's burden of proof as to payment of $437.50 *held,* sustained by entry in a pass book.

2. SAME—ACCOUNTING—RECORD.

   Record in suit for accounting against building and loan association *held,* so unsatisfactory as to cause Supreme Court to be unable to find mortgage debt satisfied and to decline to enter upon a general audit.

3. SAME—DIVIDENDS—EVIDENCE.

   In suit by mortgagors' assignee against mortgagee building and loan association, in which mortgagors had subscribed for stock of face value equivalent to amount of mortgage and made monthly payments thereon, record *held,* not to present evidence from which dividends in excess of fixed five per cent. rate could be adjudged.

4. SAME—ACCOUNTING—MORTGAGES—FORECLOSURE—REDEMPTION—CREDIT FOR PAYMENTS.

   In suit by mortgagors' assignee against mortgagee building and loan association for accounting, where plaintiff is found entitled to a sum together with interest from time payment thereof was made, credit upon redemption from foreclosure sale is allowed or cash payment from proceeds thereof if no redemption is had.

Appeal from Wayne; Ferguson (Homer), J. Submitted January 13, 1938. (Docket No. 105, Calendar No. 39,855.) Decided April 4, 1938. Rehearing denied June 14, 1938.

Bill by Marijan C. Andres against National Loan & Investment Company, a Michigan building and loan association, for an accounting, injunction restraining mortgage sale and moratorium. Decree for defendant. Modified and affirmed.

Fred H. Aldrich, for plaintiff.

Angell, Turner, Dyer & Meek, for defendant.

WIEST, C. J. The bill herein was filed to enjoin foreclosure, by advertisement, of a real estate mortgage and have an accounting, under claim that the amount defendant could exact had been satisfied. Upon hearing in the circuit the bill was dismissed, and plaintiff reviews by appeal.

In March, 1928, John and Mary Bytner, owners of the property, borrowed $2,500 from defendant National Loan & Investment Company and gave their note and mortgage. At the same time the borrowers became purchasers of 25 shares, "Class G" stock of the lender, of the par value of $2,500, upon which they were to make monthly payments. If such monthly payments and the monthly payments of interest on the mortgage were made then, at the expiration of 114 months, an arbitrary dividend added thereto would constitute payment, and the stock would be canceled and the mortgage satisfied. Payments made were entered in a pass book.

The Bytners conveyed the property, subject to the mortgage, to plaintiff in July, 1929. While negotiating for such purchase, plaintiff claims he was informed by defendant that the amount due on the mortgage was $1,639.37, and after purchase defendant's auditor, by letter, made confirmation thereof.

The record is unsatisfactory.

Plaintiff insists that the stated amount due when he purchased was approximately correct, considering a credit item of $437.50, appearing on the pass book, under date of October 3, 1928, but not found upon defendant's books.

Defendant disclaims all knowledge of the mentioned entry on the pass book and claims its auditor was mistaken when he stated in his letter the amount due.

By involved figuring, on assumptions we cannot adopt, plaintiff claims that $500 should be credited as of October 3, 1928. This would include the $437.50. If the $437.50 was paid, it was by the Bytners, and neither party called them as witnesses, nor was their absence explained. The burden was on plaintiff to show payment and this burden was met, as to the $437.50, by the pass book entry.

Plaintiff made no tender, claiming the mortgage debt satisfied.

We cannot find the mortgage debt satisfied and, therefore, decline, upon the unsatisfactory record herein, to enter upon a general audit.

We have not overlooked plaintiff's contention of right, as a shareholder, to be credited with dividends equal to his fair proportion of the profits instead of the fixed five per cent. dividend. We find no evidence from which dividends in excess of five per cent. can be adjudged.

After decree dismissing the bill plaintiff, by "amended or supplemental pleading," suggested that sale of the property under foreclosure, by advertisement, had been made and the property struck off to defendant for $2,217.68, and prayed:

"That if the said court or the Supreme Court should find that the said defendant is entitled to a

decree in the said cause for a lesser amount than the amount for which said premises were sold, that the said plaintiff may have an election, if the court shall deem best, to receive in cash the difference between the amount for which the said property was struck off and the amount which the said court shall find is due upon the said mortgage, or to have the said sale set aside as illegal."

We assume that the property was struck off to the mortgagee for the amount claimed to be due on the mortgage and included the mentioned $437.50.

The sale was not illegal.

We think plaintiff entitled to a credit of $437.50, as of October 3, 1928, together with interest thereon at the rate of five per cent. per annum, and, upon redemption, if any, that sum is to be deducted.

If plaintiff does not redeem from the foreclosure sale, then defendant, out of the proceeds of the same, must pay plaintiff such sum.

Plaintiff may take a decree to that effect, with costs of this appeal to be taxed.

BUTZEL, BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

AUSTIN *v.* OLDER.

1. MUNICIPAL CORPORATIONS — ZONING ORDINANCE — BUILDING PERMITS—LUBRITORIUM.

   Addition to gasoline station of structure 17' x 26' and one story high to be used as lubritorium and costing $3,000 *held,* within provision of zoning ordinance providing that no new building or alteration of existing building at cost of $100 be made until a building permit has been issued (Ypsilanti zoning ordinance, § 12).

2. SAME—ADDITIONS TO STRUCTURES USED FOR NONCONFORMING PURPOSES.

   Action of city engineer and zoning board of appeals in refusing building permit for lubritorium to owner of gasoline station which had been erected in residence zone prior to passage of zoning ordinance *held,* within spirit of and authorized by the ordinance although such addition would be artistic in appearance and was necessary to enable plaintiff to meet competition (Ypsilanti zoning ordinance, §§ 2, 4, 8, 10, 12).

3. SAME—ZONING ORDINANCE—DISCRETION OF BOARD OF APPEALS.

   Failure of zoning board of appeals to vary restrictions as to residence and educational zone so as to permit addition of lubritorium to gasoline station *held,* proper and not an abuse of its discretion to interpret provisions of the ordinance where practical difficulties or unnecessary hardship occur, where station was erected, prior to passage of ordinance, on one corner of an intersection, another corner of which had been created a nonresidential zone but State normal college was across street from plaintiff's property and proposed structure would be about 10 feet from residence on adjoining lot (Ypsilanti zoning ordinance, §§ 2, 4, 8, 10, 12).

4. CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—ORDINANCES.

   Every intendment is in favor of the constitutionality of the ordinance of a municipal corporation.

5. SAME—BURDEN OF SHOWING UNCONSTITUTIONALITY OF ORDINANCE.
One attacking the constitutionality of a municipal ordinance has the burden of showing that it has no real or substantial relation to public health, morals, safety or general welfare.

6. MUNICIPAL CORPORATIONS—ZONING ORDINANCES—POLICE POWER.
Zoning ordinances are constitutional in principle as a valid exercise of the police power.

7. SAME—POWER TO ZONE—STATUS QUO—FUTURE.
The power to zone is not limited to a protection of the *status quo* and a city may validly plan its future development.

8. SAME—GRADUAL ELIMINATION OF NONCONFORMING USES.
Gradual elimination of nonconforming businesses in residential zones of a city is within the police power.

9. CONSTITUTIONAL LAW—POLICE POWER—DEPRIVATION OF PROPERTY.
A zoning ordinance requiring an immediate cessation of a nonconforming use may be unconstitutional because it deprives one of property rights out of proportion to the public benefits obtained but an ordinance prohibiting enlargement of a nonconforming building is within the police power.

10. SAME—DUE PROCESS—POLICE POWER.
The due process clause does not prevent a valid exercise of the police power.

11. SAME — PROPERTY — POLICE POWER — PUBLIC HEALTH, MORALS, SAFETY AND WELFARE.
Property is held subject to right of government to regulate its use in the exercise of the police power so that it shall not be injurious to the rights of the community or so that it may promote its health, morals, safety and welfare.

12. SAME—REGULATIONS—PROPERTY.
Regulations may result to some extent practically in the taking of property, or the restriction of its use and yet not be deemed confiscatory or unreasonable.

13. MUNICIPAL CORPORATIONS—ZONING ORDINANCES—IMPROVEMENT OF RESIDENCE DISTRICTS—CONSTITUTIONAL LAW.
The improvement of residential districts by the exclusion of nonconforming businesses has a reasonable relationship to the public health, welfare and safety.

14. SAME — ZONING ORDINANCES — LIMITATION OF NONCONFORMING USES—GASOLINE STATIONS IN RESIDENCE ZONES—DEPRIVATION OF PROPERTY THROUGH OBSOLESCENCE OR COMPETITION.

Limiting further extension of nonconforming use by prohibiting alterations and additions to existing buildings such as addition of lubritorium to gasoline station *held,* a valid exercise of governmental power even though it may result in destruction of owner's business through obsolescence or inability to meet competition.

15. MANDAMUS—BUILDING PERMITS—ZONING BOARD OF APPEALS.

Mandamus to compel issuance of building permit *held,* properly refused where zoning board of appeals made constitutional exercise of discretion in refusing to issue permit to add a lubritorium to a gasoline station in a residence district (Ypsilanti zoning ordinance, § 10).

16. COSTS—MANDAMUS—DISCRETION OF BOARD OF APPEALS—PUBLIC QUESTION.

No costs are allowed in mandamus proceeding to compel issuance of building permit where construction of provisions of zoning ordinance as to discretion of board of appeals is sought, a question of public interest being involved.

Appeal from Washtenaw; Sample (George W.), J. Submitted January 18, 1938. (Calendar No. 39,825.) Decided April 4, 1938.

Mandamus by James Austin, doing business as J. Austin Oil Company, against T. Fred Older, City Engineer of Ypsilanti, Michigan, and the Board of Appeals under Ypsilanti zoning ordinance No. 111 to compel the issuance of a building permit. Mandamus denied. Plaintiff appeals. Defendants cross-appeal. Affirmed.

Reid & Young (*Hooper & Hooper,* of counsel), for plaintiff.

John P. Kirk (*Cleary & Weins,* of counsel), for defendants.

BUTZEL, J. After denial of certiorari by the circuit court (affirmed by this court, *Austin* v. *Older,* 278 Mich. 518), plaintiff sought mandamus in the circuit court of Washtenaw county to compel the issuance of a building permit. He appeals from an adverse decision.

On the eve of the passage of a zoning ordinance by the city of Ypsilanti (Ordinance No. 111), but before the day it became effective, plaintiff erected a building and appurtenances for a gasoline station on his property at the intersection of west Cross and Washtenaw avenues, in zone B, a residence district under the ordinance. Although this is a nonconforming use under the ordinance, which restricts the property of plaintiff and the surrounding area to residence purposes, the ordinance permits the continuation of such nonconforming uses as existed at the time of the effective date of the ordinance. Along each side of the one-story building erected by plaintiff, there is a pit used principally for the purpose of draining and lubricating automobiles. Over 10 years after the construction of the building and adoption of the ordinance, plaintiff filed an application with respondent engineer for a permit to remodel and thus modernize the gasoline station. His plans called for the filling in of the pit on one side and the extension of a bay window over the filled-in land. On the other side, an addition to the building was planned so as, approximately, to double its present size. The addition was to be used for what is commonly known as a "lubritorium." It appears from the architect's sketch that the addition would be artistic in appearance.

The city engineer refused to issue a permit and plaintiff appealed to the board of appeals, consist-

ing of five members appointed by the council, as provided in the ordinance. The appeal was unsuccessful. He claims that he is entitled to remodel and modernize the building provided there is no change in the actual use to which the building and premises are put and provided no more of the premises will be used than are now in use; also that the action of the zoning board of appeals in denying the permit was so arbitrary and unreasonable as to entitle him to a writ of mandamus to compel the issuance of the permit.

Plaintiff's property is in a zone B residence district under the zoning ordinance, section 4 of which restricts the use of buildings in zone B districts to residence, hotel, hospital, educational and similar purposes, which do not include that of selling gasoline and oil. Section 2 provides:

"Except as hereinafter provided, no building shall be erected or altered nor shall any building or premises be used for any purpose other than as permitted in the district in which such building or premises is located."

We also quote section 8:

"The lawful use of buildings and of premises at the time of the adoption of this ordinance may be continued although such use does not conform with the provisions hereof. If no structural alterations are made a nonconforming use may be changed to any use permitted in a district where such nonconforming use would be permitted.

"No nonconforming building which has been damaged by fire, explosion, act of God, or act of the public enemy to the extent of more than 80 per cent. of the assessed value shall be restored except in conformity with the regulations of this ordinance."

Section 10 provides that the board of appeals may, after public notice and hearings, authorize a variation in the application of the district regulations, in harmony with other general purposes and intent, where practical difficulties or unnecessary hardships occur.

The proposed improvement consists of a substantial structure, 17 feet by 26 feet, one story in height, costing $3,000, and whether regarded as an alteration in the existing building or a new structure, it is within section 12 of the ordinance, which provides that no new building or structure shall be erected, nor existing building altered at a cost of $100 or more until a permit has been issued. The case of *Paye* v. *City of Grosse Pointe,* 279 Mich. 254, is not at all applicable. In that case an erection of a new store front without any structural change was held not to be a violation of the ordinance, but we also stated that an alteration did exist when there was a change of form, character or size of a building. The change contemplated by plaintiff is one in the structural quality of the building and the requisite permit may not be issued unless the zoning regulations are complied with.

It is true that the continuation of such nonconforming uses as existed at the time of the adoption of the ordinance is permitted and plaintiff properly asserts that the building and premises may be used for a gasoline station, but he contends that, therefore, in order to meet competition, he should have the right to modernize the building by erecting a substantial addition. Unfortunately for plaintiff, this can only be done by making structural changes, and such alterations or additions for a nonconforming use are forbidden by section 2 of the ordinance.

Section 8 provides an exception to the blanket prohibition of section 12, but does not provide for the enlargement of a nonconforming use. The purpose of the ordinance is to keep residential, commercial and industrial uses within certain territorial confines, and to limit as far as is constitutionally permissible, the continuation of nonconforming uses. The effect of the zoning ordinance would be largely vitiated if a large mercantile establishment or factory would be permitted to supplant a small store or shop which existed at the time of the adoption of the ordinance. *State, ex rel. Carter,* v. *Harper,* 182 Wis. 148 (196 N. W. 451; 33 A. L. R. 269); *Piccolo* v. *Town of West Haven,* 120 Conn. 449 (181 Atl. 615); *Conaway* v. *Atlantic City,* 107 N. J. Law, 404 (154 Atl. 6). The action of the city engineer and the board of appeals in refusing the permit was within the spirit of the zoning ordinance and was authorized by its provisions.

We likewise dismiss the claim that the action of the city in refusing the permit was arbitrary or unreasonable. It was shown that the property of plaintiff, used for nonconforming purposes, abuts the lot upon which a residence is located. The contemplated new building, if erected, would not be much more than 10 feet from the side of the house on the adjoining lot. According to a map of the city, the State Normal College is across the street from the gasoline station. A nonresidential zone has been created on an opposite corner of the intersection. As the contemplated structure was not in accordance with the provisions of the zoning ordinance, the refusal was proper and there was no abuse of discretion by the board of appeals, notwithstanding its power to interpret the provisions of the ordi-

nance where practical difficulties or unnecessary hardship occur. A failure to vary the restrictions in this case cannot be considered an abuse of discretion.

Plaintiff contends, however, that under the decision of *Adams* v. *Kalamazoo Ice & Fuel Co.,* 245 Mich. 261, he cannot constitutionally be required to cease the nonconforming use to which he devoted his property before the enactment of the ordinance. This was not denied him. He claims, however, that the denial of his building permit will have this effect, and that unless he continues to modernize and make additions to his station to keep up with current trends, competition will eventually force him out of business. Assuming that there is merit in this claim, it must be determined whether or not the city may constitutionally prohibit a commercially necessary enlargement of a nonconforming business structure. Inasmuch as the question has not been squarely passed upon in this State, we quote extensively from other jurisdictions.

It is elementary that every intendment is in favor of the constitutionality of an ordinance and plaintiff has the burden of showing that it has no real or substantial relation to public health, morals, safety or general welfare. Zoning ordinances are constitutional in principle as a valid exercise of the police power. *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365 (47 Sup. Ct. 114, 54 A. L. R. 1016); *City of Lansing* v. *Dawley,* 247 Mich. 394; *City of Pleasant Ridge* v. *Cooper,* 267 Mich. 603. Furthermore, the power to zone is not limited to a protection of the *status quo,* and the city may validly plan its future development. In *Zahn* v. *Board of Public Works of Los Angeles,* 195 Cal. 497 (234 Pac. 388), affirmed in 274 U. S. 325 (47 Sup. Ct. 594), the court said:

"The power of the city council to zone is not limited in our opinion to the protection of established districts. So to hold would defeat in a large measure the very purpose of zoning which is to control the future development in the best interests of the city. Zoning in its best sense looks, not only backward to protect districts already established, but forward to aid in the development of new districts according to a comprehensive plan having as its basis the welfare of the city as a whole."

Certainly the maximum benefit of zoning ordinances cannot be obtained as long as nonconforming businesses remain within residential districts, and their gradual elimination is within the police power. *DeVito* v. *Pearsall,* 115 N. J. Law, 323 (180 Atl. 202); *Thayer* v. *Hartford Board of Appeals,* 114 Conn. 15 (157 Atl. 273); *Rehfeld* v. *City of San Francisco,* 218 Cal. 83 (21 Pac. [2d] 419). In *Thayer* v. *Hartford Board of Appeals, supra,* the court said:

"The ultimate purpose of zoning ordinances is to confine certain classes of buildings and uses to certain localities. The continued existence of those which are nonconforming is inconsistent with that object, and it is contemplated that conditions should be reduced to conformity as completely and speedily as possible with due regard to the special interest of those concerned, and where suppression is not feasible without working substantial injustice, that there shall be accomplished 'the greatest possible amelioration of the offending use which justice to that use permits.' 'The accepted method of accomplishing this result is as follows: The nonconformity is in no case allowed to increase. It is permitted to continue until some change in the premises is contemplated by the owner, when, in so far as expedient, the authorities take advantage of this fact to compel a lessening or complete suppression of the noncon-

formity.' Williams, Law of City Planning and Zoning (1st Ed.), pp. 202, 203."

An ordinance requiring an immediate cessation of a nonconforming use may be held to be unconstitutional because it brings about a deprivation of property rights out of proportion to the public benefit obtained, but an ordinance prohibiting the enlargement of a nonconforming building is not subject to the same infirmity. This more limited restriction on the owner's rights in the use of his property is within the police power and such ordinances have been held valid. *State, ex rel. Carter,* v. *Harper, supra; State, ex rel. City Ice & Fuel Co.,* v. *Stegner,* 120 Ohio St. 418 (166 N. E. 226, 64 A. L. R. 916); *Rehfeld* v. *City of San Francisco, supra; American Wood Products Co.* v. *City of Minneapolis,* 21 Fed. (2d) 440, affirmed in (C. C. A.) 35 Fed. (2d) 657. In the case of *Rehfeld* v. *City of San Francisco, supra,* the court upheld an ordinance forbidding enlargement of nonconforming buildings, saying:

"In enacting such (zoning) ordinances, however, municipal authorities have had in mind the injustice and doubtful constitutionality of compelling the immediate removal of the objectionable buildings already in the district and have usually made express provision that these nonconforming uses may be continued, without the right to rebuild or enlarge after destruction. The object of such provision is the gradual elimination of the nonconforming use by obsolescence or destruction by fire or the elements and it has been frequently upheld by the courts."

Even though, through normal business competition, the denial of the permit may eventually cause plaintiff's property to be of little or no value for the

sale of gasoline, he still may use it for purposes permitted by the zoning ordinance. It is true that he, as well as all others in the restricted zone, may be deprived of some property rights, but the due process clause does not prevent a valid exercise of the police power. In *State* v. *Hillman,* 110 Conn. 92 (147 Atl. 294), an ordinance was upheld which provided that a building devoted to a nonconforming use in a restricted area could not be rebuilt when destroyed by fire to more than 50 per cent. of its value. The court said:

"All property is held subject to the right of the government to regulate its use in the exercise of the police power so that it shall not be injurious to the rights of the community or so that it may promote its health, morals, safety and welfare. * * * Regulations may result to some extent practically in the taking of property, or the restriction of its use and yet not be deemed confiscatory or unreasonable. * * * Courts will not hold laws, ordinances, or regulations adopted under sanction of law to be unconstitutional unless they are clearly unreasonable, destructive, or confiscatory."

We can see but little difference between the application of the principles underlying the zoning law to the case of destruction of a business by fire or to a similar destruction by obsolescence or competition.

In a very few cases it has been held that a property owner has the right to make the necessary use of the entire premises which previously were devoted in part to a nonconforming use. *In re Gilfillan's Permit,* 291 Pa. 358 (140 Atl. 136); *Empire City Racing Ass'n* v. *City of Yonkers,* 132 Misc. 816 (230 N. Y. Supp. 457). Plaintiff calls our attention to the case of *Liberty Lumber Co.* v. *City of Tacoma,*

142 Wash. 377 (253 Pac. 122), which is distinguishable on its facts, the ordinance materially differing from the one in the instant case. While plaintiff has some support for his contention, the overwhelming weight of authority sustains the validity of the ordinance prohibiting the extension of a nonconforming use by alterations or additions to a building.

There can be but little doubt of the undesirability of a gasoline station in a residential neighborhood. The improvement of residential districts by the exclusion of nonconforming businesses has a reasonable relationship to the public health, welfare and safety. *Village of Euclid* v. *Ambler Realty Co., supra.* Limiting the further extension of a nonconforming use by prohibiting alterations and additions to existing buildings is a valid exercise of governmental power.

The trial judge properly refused mandamus and his order is affirmed. As the question is of public interest, no costs will be allowed.

BUSHNELL, SHARPE, CHANDLER, and MCALLISTER, JJ., concurred with BUTZEL, J. WIEST, C. J., and POTTER and NORTH, JJ., concurred in the result.

MEEK *v.* WILSON.

1. CONTRACTS—CONSIDERATION—ORAL AGREEMENT TO GIVE SECOND MORTGAGE AFTER HOME OWNERS' LOAN CORPORATION MORTGAGE—RELEASES.

   Agreement of land contract vendor to release purchasers thereunder and take bonds from the Home Owners' Loan Corporation, a third party, *held*, sufficient consideration for oral agreement of purchasers to give a note and second mortgage after mortgage was given to the corporation where release was merely intended to affect priority of obligations involved.

2. MORTGAGES—PURPOSE OF HOME OWNERS' LOAN ACT.

   Purpose of the home owners' loan act was not to assist holders of liens against property but to enable owners of homes to save their homes from foreclosure by advancing, on first mortgages, sums to be used to pay off liens and to lighten the burdens of the home owners, any benefit accruing to lien holders being incidental (48 Stat. at L. chap. 64).

3. SAME—AGREEMENTS BY LIEN HOLDERS CONTRARY TO HOME OWNERS' LOAN ACT.

   An agreement exacted by a lien holder which tends to counteract the relief of the home owner, sought by the home owners' loan act, is contrary to the purpose of the act and to the regulations adopted thereunder (48 Stat. at L. chap. 64).

4. SAME—JUNIOR LIENS—HOME OWNERS' LOAN CORPORATION REGULATIONS.

   Regulation of Home Owners' Loan Corporation barring second mortgages on property on which it held a first mortgage if the amount of the second mortgage exceeded difference between its appraisals and amount of its first mortgage *held*, within power of corporation to enact and binding upon junior lien holders of property upon which corporation has a first mortgage (48 Stat. at L. chap. 64).

5. SAME—SECOND MORTGAGES IN EXCESSIVE AMOUNT UNENFORCEABLE.

Note and second mortgage given by mortgagors on property on which first mortgage had been given to Home Owners' Loan Corporation in an amount in excess of difference between amount of latter's first mortgage and appraisal *held,* contrary to the home owners' loan act, contrary to public policy and unenforceable where exacted by vendor upon release of previously-existing land contract (48 Stat. at L. chap. 64).

6. CONTRACTS—PUBLIC POLICY.

Contracts which tend to bring about results which the law seeks to prevent are unenforceable.

7. APPEAL AND ERROR—QUESTIONS REVIEWABLE—CONTRACTS—PUBLIC POLICY.

Question of public policy arising upon foreclosure of a second mortgage on property in an amount in excess of that permitted by regulations authorized by home owners' loan act controlling mortgage indebtedness, argued by both parties in the briefs and oral arguments, is considered by Supreme Court where record is complete so that further testimony is not required for the determination of the question although question was raised only inferentially in trial court (48 Stat. at L. chap. 64).

8. MORTGAGES—FORECLOSURE OF VOID SECOND MORTGAGE—ACCOUNTING BY JUNIOR LIENOR.

In suit to foreclose second mortgage, given in contravention of public policy and hence unenforceable, mortgagee thereunder *held,* entitled to credit for payments made on first mortgage, taxes, repairs, insurance or any other lawful charges and subject to debit for payments made on second mortgage by mortgagors and with rents received, a lien on the property for any excess of credits over debits being impressed in his favor subject to first mortgage and adverse balance being required to be paid by him within a reasonable time.

9. COSTS—FAILURE TO RAISE DECISIVE QUESTION IN TRIAL COURT.

No costs are allowed defendant mortgagors on appeal from decree of foreclosure of second mortgage notwithstanding second mortgage is set aside as in contravention of public policy where defendants failed to raise such question properly in the trial court and thereby enable trial judge to have made his determination with that issue in mind and possibly have obviated necessity of an appeal.

Appeal from Wayne; Ferguson (Homer), J. Submitted January 14, 1938. (Docket No. 53, Calendar No. 39,828.) Decided April 4, 1938. Rehearing denied June 14, 1938.

Bill by Marcellus R. Meek, as assignee of Walter M. Meek, against Reginald Frank Wilson and Jessie Wilson to foreclose a second mortgage. Cross-bill by defendants against plaintiff to declare mortgage void, and for an injunction and other relief. Decree for plaintiff. Defendants appeal. Reversed and remanded.

Angell, Turner, Dyer & Meek, for plaintiff.

Ralph S. Moore, for defendants.

BUTZEL, J. Plaintiff brought suit to foreclose a second mortgage of $3,500 given by defendants to plaintiff's assignor on the 15th day of March, 1935. The mortgage covered property improved with a residence in Grosse Pointe Park, Wayne county, Michigan, which, in 1928, defendants had undertaken to purchase on land contract for the sum of $22,500 from the owner at that time. The contract was assigned to Walter Meek. In 1932, Meek and defendants entered into a new contract in place of the former one. Meek later assigned the new contract to plaintiff. The property was subject to a first mortgage running to the First National Bank of Detroit. Payments were made on the contract reducing the balance due to $17,888.50, but upon default being made in October, 1932, plaintiff began foreclosure proceedings in chancery. The case was dismissed because the defendants moved out of the premises and assigned the rents to the bank to apply on its first mortgage.

Subsequently, a first mortgage loan was sought from the Home Owners' Loan Corporation, organized and existing under the laws of the United States (home owners' loan act of 1933, approved June 13, 1933, 48 Stat. at L. chap. 64, p. 128, and amendments thereto; 12 USCA, § 1461 *et seq.*). The Home Owners' Loan Corporation for brevity is referred to herein as the H. O. L. C.

In March, 1935, the H. O. L. C. agreed to refinance the defendants' obligations but, prior thereto, there was considerable negotiation by defendants with plaintiff's assignor, and also with the H. O. L. C. The H. O. L. C. offered to loan to defendants on a first mortgage the sum of $9,105.07, of which $7,075 in bonds and a small amount in cash would be paid to the First National Bank to discharge its first mortgage, $475 in bonds and $25 in cash to plaintiff's assignor for his equity in the land contract, and the balance to be used to pay taxes and expenses. Plaintiff's assignor valued his equity in the property at approximately $7,700 and he notified defendants that he was unwilling to sacrifice that equity for $500, the amount offered by the H. O. L. C. On December 27, 1934, the H. O. L. C. gave notice to Mr. Meek that unless he called at the former's office within 48 hours, the application for the loan would be denied. Notice was sent to all parties on January 11, 1935, that the application had been denied. However, on January 16, 1935, defendants orally agreed to give plaintiff's assignor a second mortgage of $3,500 in addition to the $500 he was to receive from the H. O. L. C. Plaintiff's assignor thereupon signed and mailed to the H. O. L. C. a "vendor's consent to take bonds," in which he stated that he agreed "if said refunding can be consummated, to accept in full settlement of the claim of the undersigned the sum

of $500 net, face value of the bonds of the Home Owners' Loan Corporation, to be adjusted with not exceeding $25 cash and thereupon to release all the claim of the undersigned against said property." The consent was dated December 19, 1934, but was not mailed until after the agreement to give a second mortgage had been reached between plaintiff's assignor and defendants. The H. O. L. C. reopened the application for the loan. In performance of his agreement, plaintiff's assignor executed a warranty deed of the premises to defendants, but delivered it to the H. O. L. C. Defendants then gave a first mortgage to the H. O. L. C. and on March 15, 1935, gave the note and second mortgage to plaintiff's assignor in accordance with the previous negotiations. The H. O. L. C. was not a party to the negotiations and did not know that plaintiff's assignor was exacting a second mortgage of $3,500 for the deed and release. Plaintiff's assignor received the bonds and cash allotted to him by the H. O. L. C.

Upon default in the payments on the second mortgage, plaintiff brought suit to foreclose. In their answer, defendants admitted the execution of the note and mortgage, but defended on the grounds of no consideration, fraud and release. They also filed a cross-bill, asking that the note and mortgage be declared void and that plaintiff be ordered to refund payments made thereon. The trial court awarded a decree to plaintiff.

The agreement to give a second mortgage was a condition precedent that the plaintiff's assignor exacted from defendants before he would accept payment from the H. O. L. C. and give defendants a deed to the property. Defendants so understood it. There was no misunderstanding between plaintiff's assignor and defendants, nor were there any fraudu-

lent misrepresentations to defendants. The court properly found that plaintiff was not guilty of any fraud on them.

Defendants claim on appeal that there was no consideration for the note secured by the second mortgage, since the original obligation of defendants was released in full by plaintiff's assignor. However, it is undisputed that the agreement to give a note and mortgage was reached before the release was sent to the H. O. L. C. The agreement of plaintiff's assignor to release the contract obligation and to take bonds from the H. O. L. C., a third party, was sufficient consideration for the oral agreement of defendants to give a note and second mortgage. While the release which was thereafter given purported to be a release in full of all claims against the property, the manifest intent of the parties was that the release should affect only the contract obligation and not the new agreement to give a note and second mortgage. It was understood by defendants that they were to give the second mortgage in consideration of plaintiff's assignor's concessions to them which made it possible for them to refinance the debts against the property through the H. O. L. C.

The real difficulty in the case, if the question is properly before us, is whether the note and second mortgage are not void because against public policy. As stated in the title of the original home owners' loan act, as enacted by congress, the purpose of the act was "to provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize their debt elsewhere." (See original act, Public—No. 43—73d Congress [H. R. 5240]).

Its purpose was not to assist holders of liens against the property, but to enable owners of homes to save their homes from foreclosure by advancing on first mortgages, sums to be used to pay off liens and to lighten the burdens of the home owners. Any benefit that might accrue to lien holders would be incidental. The H. O. L. C., in refinancing a home owner's obligations, sought to readjust them in accordance with his ability to make payments. The salutary effect of such a readjustment would be nullified if a lien holder were permitted, without regulation, to defeat the purpose of the home owners' loan act. An agreement exacted by a lien holder which tends to counteract the relief of the home owner sought by the act is contrary to the purpose of the act and to the regulations adopted thereunder.

The home owners' loan act provides for amortization of the loans by monthly or other periodic payments so arranged as to conform "with the situation of the home owner." Section 4 of the act states that the board may make such by-laws and regulations not inconsistent with the provisions of the act as may be necessary for the proper conduct of the affairs of the corporation. The board did adopt regulations which provided that the corporation would not refund any indebtedness where the home owner was called upon to pay more than he owed, or agreed "to cover any assumed loss on account of the acceptance of the bonds of the corporation by the mortgagee." It also provided that where the full amount of the indebtedness against the property could not be refunded by the corporation, the mortgagee or other lien holder would be permitted to take a second mortgage if the amount of the second mortgage did not exceed the difference between the

corporation's appraisals and the amount of the corporation's first mortgage, but in no event should the second mortgage be in terms which would cause the mortgagor's payments to be a hardship or deprive him of a reasonable opportunity to pay such mortgage.

The settlement report of the H. O. L. C. on defendants' application was introduced in evidence to show that the H. O. L. C.'s appraisal of the property was $11,400. Adding $3,500, the amount of plaintiff's mortgage, to $9,105.07, the amount of the H. O. L. C. mortgage, would bring the total amount of the two mortgages to $12,605.07, which is over $1,200 in excess of the appraisal. This was distinctly forbidden by the regulations. Plaintiff asserts with some justification that it would have been very simple for the H. O. L. C. to exact a statement in the application or consent that the mortgagee was not receiving more than the H. O. L. C. payment. He further contends that it is not equitable to make him subject to rules and regulations not set forth in the act. While the rules and regulations are not widely publicized by the various governmental agencies, nevertheless the law does provide for such rules and regulations. In *Kay* v. *United States,* 303 U. S. 1 (58 Sup. Ct. 468) handed down by the United States Supreme Court January 31, 1938, the court said, in referring to another section of the home owners' loan act, that:

"The resolution adopted by the board of directors sets forth the nature of the ordinary charges that 'are authorized and required;' and the power of Congress to provide for such action by the board is not open to question."

In *Cook* v. *Donner,* 145 Kan. 674 (66 Pac. [2d] 587, 110 A. L. R. 244), where the facts were similar to

those of the instant case, the court said that the regulations of the H. O. L. C. were law and were to be followed by the court. There is no claim that the regulations were kept secret nor that they are unreasonable and not in conformity with the purpose or wording of the act. While plaintiff claims that the H. O. L. C. had knowledge that he was negotiating with defendants, there is no showing that the H. O. L. C. definitely knew that defendants proposed to give the second mortgage. Had the mortgage been given with the knowledge of the H. O. L. C. it could have insisted upon the provisions of the law being followed. The case differs entirely from *Bay City Bank* v. *White, ante,* 267.

Since the exacting of the second mortgage was contrary to the purpose of the act and to the regulations, it is contrary to public policy and unenforceable. *Cook* v. *Donner, supra; First Citizens Bank & Trust Co. of Utica* v. *Speaker,* 159 Misc. 427 (287 N. Y. Supp. 831), aff'd 250 App. Div. 824 (294 N. Y. Supp. 737); *Jessewich* v. *Abbene,* 154 Misc. 768 (277 N. Y. Supp. 599); *Chaves County Building & Loan Ass'n* v. *Hodges,* 40 N. M. 326 (59 Pac. [2d] 671). In *U. S.* v. *Kreidler,* 11 Fed. Supp. 402, the court stated that a creditor who signs a consent releasing all the indebtedness, while at the same time he is exacting an agreement to give a note and second mortgage for the difference between the market value and par value of the bonds to be received, is guilty of a violation of the act. While the facts in that case differ from those in the instant case, the same principles apply. Plaintiff did not attempt to mislead defendants in any way, nor affirmatively to conceal the transaction from the H. O. L. C., but the contract had a tendency to defeat the purpose of the act and is unenforceable on that account.

"The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate." *Richardson* v. *Crandall,* 48 N. Y. 348, 362.

Contracts which tend to bring about results which the law seeks to prevent are unenforceable. *Sage* v. *Hampe,* 235 U. S. 99 (35 Sup. Ct. 94).

Plaintiff contends strenuously that the question of public policy is not properly before this court because it was not raised in the court below, nor in the grounds of appeal in the record. Defendants' pleadings allege only that the mortgage was released, was without consideration, and was obtained by fraud, misrepresentations and for the purpose of defeating the rights of defendants. The question of public policy was only inferentially raised at the hearing before the trial court. The trial judge asked an attorney for the H. O. L. C., who appeared as a witness, whether he could point out anything in the transaction that was illegal. The latter stated that he had read the act several times and that it was not very definite. The question of public policy was raised, however, in the briefs in this court and in the oral argument. It is questioned whether, under previous decisions, a claim that a contract is void because it is against public policy can be raised for the first time in this court when it was raised neither in the pleadings nor at the hearing in the court below. In *Lee* v. *U. S. Graphite Co.,* 161 Mich. 157, we held that a party cannot claim for the first time in the Supreme Court that a contract is void because in restraint of trade. In *Boston Piano & Music Co.* v. *Pontiac Clothing Co.,* 199 Mich. 141, we held that the court exercises appellate jurisdiction, must dispose of cases submitted to it on the record as made, and cannot consider the question of the illegality of a

contract if not raised below. In *American Cedar & Lumber Co.* v. *Gustin,* 236 Mich. 351, a suit for an accounting and cross-bill to quiet title, we refused to consider the question of unenforceability of a land contract arising from the nonpayment of specific taxes, when not raised in the court below.

On the other hand, several cases have held that the defense of illegality need not be pleaded, since it is the duty of the court to take notice of illegality *sua sponte. Heffron* v. *Daly,* 133 Mich. 613; *Fisher* v. *Hampton Transportation Co.,* 136 Mich. 218 (112 Am. St. Rep. 358); *Swing* v. *Cameron,* 145 Mich. 175 (9 L. R. A. [N. S.] 417, 9 Ann. Cas. 332). In *Richardson* v. *Buhl,* 77 Mich. 632 (6 L. R. A. 457), it was held that it was not necessary that the parties should rely on the fact that the contract is one which it is against the policy of the law to enforce. The court will take notice of illegal contracts on its own motion and refuse to enforce them.

In the instant case, the record is complete so that the taking of further testimony is not required for the determination of the question of public policy. In *Auditor General* v. *Bolt,* 147 Mich. 283, where the record contained all of the facts necessary to the determination of a question raised by this court, it was considered though not raised or passed upon in the court below. Likewise in the more recent case of *Thomas* v. *Morton Salt Co.,* 258 Mich. 231, we held that the question of estoppel to deny the constitutionality of an act could be considered for the first time in this court although not formally pleaded; the question, however, being raised by this court to avoid conflict with previous decisions.

Section 13537, 3 Comp. Laws 1929, provides that after the argument of any case or when the same is submitted on briefs, if the court is of the opinion

that a certain point or legal proposition is involved which is material to the decision of the case, but which has not been raised by counsel, the case shall not be decided upon such point or proposition until both counsel have had an opportunity to argue the same before the court. The question of public policy arising in the instant case was argued by both parties in the briefs and oral arguments.

It would be anomalous, indeed, if this court were required to enforce a contract which the record discloses to be against public policy and in contravention of the purposes and provisions of a statute. The rule that a contract against public policy is unenforceable is for the protection of the public at large, and this protection should not be lost because of the lack of diligence of a party to the suit. Such is the rule in many jurisdictions. *Struthers* v. *Peckham,* 22 R. I. 8 (45 Atl. 742); *Crichfield* v. *Bermudez Asphalt Paving Co.,* 174 Ill. 466 (51 N. E. 552, 42 L. R. A. 347); *Claflin* v. *U. S. Credit System Co.,* 165 Mass. 501 (43 N. E. 293, 52 Am. St. Rep. 528); *Massachusetts National Bank* v. *Shinn,* 163 N. Y. 360 (57 N. E. 611); *Doucet* v. *Massachusetts Bonding & Ins. Co.,* 180 App. Div. 599 (167 N. Y. Supp. 892); *Ellis* v. *Frawley,* 165 Wis. 381 (161 N. W. 364); *Clark* v. *Utah Construction Co.,* 51 Idaho, 587 (8 Pac. [2d] 454); *Cullison* v. *Downing,* 42 Ore. 377 (71 Pac. 70); *Horsley* v. *Woodley,* 12 Ga. App. 456 (78 S. E. 260).

The second mortgage and note, having been given in contravention of public policy, should be set aside. Plaintiff, who has made payments on the first mortgage to the H. O. L. C. after defendants' default, should be credited with such payments and with any sums expended for taxes, repairs, insurance or any other lawful charges and should be debited with payments made on the second mortgage by defend-

ants and with any rents that he has received from the property. If the credits exceed the debits, he shall have a lien on the property, subject to the first mortgage, for any balance due him. If, however, he has received more than the amounts paid out by him, he shall pay the difference to defendants within a reasonable time.

As defendants failed to raise the question of public policy properly in the lower court, so that the trial judge could have made his determination with that issue in mind, and thus possibly have obviated the necessity of an appeal, no costs will be allowed to either party.

The case will be remanded to the lower court to ascertain the additional facts necessary for a decree and to enter one in accordance with this opinion.

BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred with BUTZEL, J.

WIEST, C. J. (*concurring*). Participation by plaintiff, enabling defendants to obtain the relief afforded by the H. O. L. C., disabled plaintiff from lessening the beneficial purposes thereof; not by the rule of estoppel between private parties, but by the inhibition of public policy.

FRIAR *v.* DAUSMAN.

1. ATTORNEY AND CLIENT—PURCHASE OF CLIENT'S PROPERTY BY ATTORNEY.

Action of defendant mortgagee's attorney in purchasing property from mortgagee after issuance of writ of restitution *held,* not unethical in mortgagor's proceeding to restore a moratorium, where attorney had made unsuccessful efforts to sell the property to others, defendant was desirous of getting his money out of the property as speedily as possible, attorney paid $500 down, agreed to pay balance at rate of $80 a month and made extensive repairs and defendant is not complaining.

2. MORTGAGES—MORATORIUM RELIEF—DISCRETION OF COURT.

Denial of extension of moratorium relief to mortgagor *held,* not an abuse of discretion where she had borrowed $3,200 from defendant mortgagee and, although she had received over $5,000 from the property in the last 5 or 6 years, had applied but a very small amount on the mortgage, permitted back taxes, insurance premiums and other charges to accumulate and the building to fall into disrepair and after dispossession lived opposite the premises and saw extensive repairs being made, but remained silent for six months.

3. SAME—MORATORIUM RELIEF—SUPREME COURT.

Supreme Court will not reverse the action of a trial judge in granting or refusing to grant a moratorium unless there has been an abuse of discretion.

Appeal from Kent; Perkins (Willis B.), J. Submitted January 7, 1938. (Docket No. 72, Calendar No. 39,836.) Decided April 4, 1938.

Bill by Elizabeth Friar against Samuel Dausman to restrain the issuance of a writ of restitution, and for moratorium relief on a mortgage foreclosure. From order denying petition to set aside writ of restitution, defendant appeals. Affirmed.

Fred P. Geib, for plaintiff.

Earl F. Phelps, for defendant.

BUTZEL, J. Plaintiff, a woman of 83 years of age, sought to have restored to her the benefit of a moratorium, which would give her the right to redeem the property involved until November 1, 1938, upon terms and conditions which the court might deem equitable. On September 24, 1928, the property, consisting of three frame stores with apartments above them on west Bridge street, Grand Rapids, Michigan, was mortgaged by plaintiff to defendant to secure a loan of $3,200. Defendant brought foreclosure proceedings and the property was bid in by him on March 2, 1935, for $3,488, approximately the amount due on the mortgage at that time. On February 26, 1936, but a few days before the expiration of the equity of redemption, plaintiff filed a petition for a moratorium, claiming that the property was of the value of $7,000; that two of the three stores had been vacant for the previous five years, and that the apartments on the second floor had only been rented occasionally during the period. Defendant's answer showed that in addition to the principal and interest due on the mortgage, $926.37 was due for taxes, and that with penalties and insurance premiums, the actual amount due was in the neighborhood of $5,000; that the property had become so run down, due to lack of repairs, that it would cost a considerable sum of money to restore it. On April 3, 1936, the court granted a moratorium until March 1, 1937, but stipulated that plaintiff was to pay to the clerk of the court on or before April 8, 1936, the sum of $60, and a like sum before the 8th day of each month thereafter, such sums to be paid to defendant, who was ordered to apply $40 of the sum paid each time upon past due taxes and repairs, and the balance of $20 upon the indebtedness. The court further ordered that upon default of plaintiff in making prompt payment, the clerk of the court, upon request of the defendant or

his attorneys, should file a certificate setting forth the default, in which event the moratorium should terminate and a writ of dispossession issue without the further order of the court.

Plaintiff made three payments of $60 to the clerk, but failed to make any payment on the due date of the 8th of July, 1936. The county clerk on July 22, 1936, filed a certificate as to the arrears, and two days later, a writ of restitution was signed by the circuit judge. About a month thereafter, the daughter of plaintiff filed a petition in her behalf to set aside the writ of restitution. She alleged that she had just taken over the business affairs of her aged mother, and that a mistake had been made; that she was not aware of the fact that the $60 payment due on July 8, 1936, was unpaid, and it was her belief that defendant had received a check from the clerk of the court for the July payment. She further stated that plaintiff had three offers for the property, one being for the sum of $6,200. Testimony of plaintiff's daughter was taken in open court. The trial judge refused to reinstate the moratorium. However, no formal order denying the petition was made or entered until March 5, 1937.

On February 27, 1937, plaintiff was granted leave to file a petition for a rehearing and the moratorium was extended until a hearing could be had on the merits of the petition, but without prejudice to the rights of any party. On the same date, by general order of the circuit court for Kent county, the moratorium was extended to November 1, 1938, in all cases where it was still in force, in accordance with the act of the legislature (Act No. 1, Pub. Acts 1937), but without prejudice to the rights of parties affected thereby. On March 12, 1937, plaintiff, by her daughter as attorney in fact, filed a petition to bring in additional parties-defendant, to set aside the writ of

restitution, and for the continuation of the moratorium. She alleged under oath that immediately after the issuance of the writ of restitution, she had sent a check for $60 to the county clerk who forwarded the amount to defendant; that defendant at the time was also in default because instead of applying $40 each month toward the payment of taxes and repairs, he had retained the entire amounts recovered during the three months, in which payment had been made, and thus violated the order of the court; that at the time of dispossession, tenants were paying plaintiff $75 per month; that shortly thereafter, Mr. Phelps, attorney for defendant, purchased the property, and made repairs, a part of which sum was borne by tenants; that the rents have been increased to $160 per month, and that she did not know of these facts when she presented her previous petition August 26, 1936. Defendant lived at Saranac, Michigan.

Mr. Phelps, on the other hand, in his own affidavit, stated that when default was made in the payment due July 8, 1936, he twice notified plaintiff's attorney before asking for the writ of restitution, which the trial judge signed in the presence of plaintiff's attorney. Defendant testified that when he received the $60 from the clerk of the court, he assumed that his attorney's efforts to declare the moratorium at an end had been unsuccessful, and that when he informed his attorney of the receipt of the $60, it was immediately returned in currency to the county clerk, who on September 23d returned it to plaintiff and she accepted it.

Defendant excuses his failure to apply the $120, being $40 from each of three payments made to him, on the ground that he resided some distance from Grand Rapids and was waiting until he would have a larger sum for taxes and repairs. It is true that he could have paid some of the back taxes in full with

the amount he had on hand. Defendant's attorney is assailed for having purchased the property because of his professional relations with defendant. He showed, however, that he had made unsuccessful efforts to sell the property to others, that defendant was desirous of getting his money out of the property as speedily as possible, that he not only paid $500 down, and agreed to pay the balance at $80 a month, but made extensive repairs so as to improve defendant's security. About $3,000 has been spent on repairs to date. There was nothing unethical about the actions of defendant's counsel. He was fair and aboveboard and the transaction met with the approval of his client and was in accordance with his wishes. Defendant makes no complaint, nor has he any reason to.

Although plaintiff has received over $5,000 from the property since 1932, she has applied but a very small amount on the mortgage indebtedness. She permitted back taxes, insurance premiums and other charges to accumulate and the building to fall into disrepair. After being dispossessed, she lived opposite the premises and saw the extensive repairs being made, but remained silent for six months. While her age must have been taken into consideration by the trial judge, he also saw that she was represented by an attorney and that her daughter was helping her. We have frequently stated that we will not reverse the action of a trial judge in granting or refusing to grant a moratorium, unless there has been an abuse of discretion. We find none in the instant case.

For this reason, the order is affirmed, with costs to defendant.

WIEST, C. J., and BUSHNELL, SHARPE, POTTER, CHANDLER, and NORTH, JJ., concurred. MCALLISTER, J., did not sit.

BATES *v.* ALFRED F. STEINER CO.

REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE—EVIDENCE.

In suit to reform settlement agreement, executed by driver of car on behalf of himself and corporate owner of car, to include the word "company" after name of principal stockholder so as to impose liability on part of company rather than such principal stockholder, who had not signed the agreement, finding of trial judge that agreement in its original form was the result of mutual mistake *held,* fully supported by evidence.

Appeal from Wayne; Jayne (Ira W.), J. Submitted January 11, 1938. (Docket No. 104, Calendar No. 39,854.) Decided April 4, 1938.

Bill by George M. Bates and Loretta M. Bates against Alfred F. Steiner Company, a Michigan corporation, and Wilfred A. Steiner to reform a written instrument. Decree for plaintiffs. Defendants appeal. Affirmed.

Cozadd & Shangle (*Earlmont H. Dill,* of counsel), for plaintiffs.

Wilfred A. Steiner, for defendants.

BUTZEL, J. The Alfred F. Steiner Company is a corporation in which two shares are owned by members of Alfred F. Steiner's family and the balance by Alfred F. Steiner. The Steiner company's car, while being driven by defendant Wilfred A. Steiner, was involved in an automobile accident in which plaintiff

Loretta Bates and her car were injured. She and George M. Bates made claims for damages on the Steiner company and, after some negotiations, the Steiner company agreed to pay to plaintiffs the sum of $400 within two years, and in the meantime to turn over to them all dividends, when and if paid by an insolvent insurance company in which the Steiner company had carried insurance. A written agreement was drawn, plaintiffs being represented by an attorney and the Steiner company by defendant Wilfred A. Steiner. We quote the latter part of the agreement:

"It is further understood that liquidating checks shall be made payable to Alfred F. Steiner Company and by them indorsed and turned over to Loretta M. and George M. Bates and in the event the sum of $400 has not been paid as aforesaid within two years from the date of this agreement, then Alfred F. Steiner will pay forthwith a sum of money equal to the sum of $400 less any sums of money theretofore paid as aforesaid.

"WILFRED A. STEINER,
"ALFRED F. STEINER COMPANY,
"WILFRED A. STEINER, Treas."

Wilfred A. Steiner acknowledged the instrument, both for himself and for the Alfred F. Steiner Company.

When the $400 was not paid at the expiration of the two years and it was discovered that the agreement contained no obligation on the part of the Alfred F. Steiner Company or Wilfred A. Steiner to pay the amount, but merely imposed an obligation upon Alfred F. Steiner, a third party, who had never signed the agreement, and that the word "company" obviously had been omitted after the name Alfred F. Steiner in the body of the agreement, suit was

brought to reform the instrument. The trial judge granted reformation. He stated that the written agreement in its original form was either the result of mutual mistake or technical fraud on the part of defendants' attorney in attempting to take advantage of a slip on the part of plaintiffs' attorney in the drafting of the agreement.

It would serve no useful purpose to discuss the evidence for it fully supports the finding of the trial judge of a mistake so palpable as to be almost self-evident.

The decree is affirmed, with costs to plaintiffs.

WIEST, C. J., and BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

PEOPLE *v.* FERRIS.

SAME *v.* HIMMELEIN.

1. EVIDENCE—OPINIONS—LAY WITNESSES.

Lay witnesses, in testifying to their opinions on technical subjects, in which men of professional training may be more expert, must have personally inspected and observed the subject-matter and they must detail the facts and circumstances upon which their opinions are based.

2. SAME—FOOD LAWS—COMPETENCY OF LAY WITNESSES' OPINIONS.

In prosecution for having possession of meat of calves less than four weeks old with intention of selling it, testimony of people's witnesses who had spent many years at farming and who detailed various facts by which they arrived at conclusion defendants had meat of calves under lawful age *held,* competent (1 Comp. Laws 1929, § 5469).

3. SAME—DEATH OF EXPERT WITNESS—READING TESTIMONY GIVEN AT JUSTICE COURT TRIAL.

In circuit court trial of defendants for possession of meat of calves less than four weeks old with intent to sell it, reading of testimony of witness, taken at justice court trial, who testified he was a special investigator for State department of agriculture *held,* not reversible error where such witness had died before trial in the circuit court, his qualifications or experience were not inquired into and record does not disclose objection made thereto because of lack of qualification to give expert testimony (1 Comp. Laws 1929, § 5469).

4. CRIMINAL LAW—EVIDENCE—FOOD LAWS—IMMATURE VEAL.

Admission of testimony that all of the 70 calves whose meat was in possession of defendants were under four weeks old *held,* not prejudicial error in prosecution for possession of such meat with intent to sell it, where witnesses testified they had examined all of the calves and people's expert witness, now deceased, had testified in justice court trial that meat of two selected and produced at trial represented average of entire group, as jury could take the testimony for what it was worth as against defendants' claim witnesses had not made a sufficient examination so as to be able to testify that all 70 calves were under four weeks old and it was unnecessary to show all were under that age (1 Comp. Laws 1929, § 5469).

5. APPEAL AND ERROR—WEIGHT OF EVIDENCE—VETERINARIANS—FARMERS—IMMATURE VEAL.

In prosecution for possession of meat of calves less than four weeks old with intent to sell it, claim that testimony of defendants' veterinarians should have outweighed that of the people's lay witnesses who were experienced farmers *held,* without merit (1 Comp. Laws 1929, § 5469).

6. CRIMINAL LAW—FOOD LAWS—CREDIBILITY OF EXPERT AND LAY WITNESSES—QUESTION FOR JURY—VERDICTS—EVIDENCE.

Credibility of witnesses, veterinarians for defendants and experienced farmers for people, in prosecution for possession of

meat of calves less than four weeks old with intent to sell it *held,* for jury, under evidence presented, and its conviction well supported by evidence (1 Comp. Laws 1929, § 5469).

7. SAME—FOOD LAWS—ACTION OF TWO DEFENDANTS.

In prosecution of two defendants for possession of meat of calves less than four weeks old with intent to sell it, evidence of actions of both defendants *held,* to justify finding of guilt (1 Comp. Laws 1929, § 5469).

Appeal from Allegan; Miles (Fred T.), J. Submitted January 13, 1938. (Docket Nos. 112, 113, Calendar Nos. 39,720, 39,721.) Decided April 4, 1938.

Harold Ferris and Donald Himmelein were convicted of having possession of meat of calves less than four weeks old with the intention of selling it. Defendant Himmelein waived a jury in circuit court and case decided on record of defendant Ferris. Cases consolidated for appeal. Affirmed.

Leo W. Hoffman, for appellants.

Raymond W. Starr, Attorney General, *George H. Heideman,* Assistant Attorney General, and *Welborne S. Luna,* Prosecuting Attorney, for the people.

BUTZEL, J. Respondents were found guilty in the justice court and, on appeal to the circuit court, were again convicted of having meat of several calves less than four weeks old in their possession with the intention of selling it, contrary to the provisions of 1 Comp. Laws 1929, § 5469. Respondent Himmelein waived a jury in the circuit court but stipulated that the case be heard upon proofs submitted in the case against respondent Ferris.

On appeal to this court respondents claim that certain lay witnesses were not properly qualified to give their opinion as to the age of all of the calves, and also that the verdict by the jury and the judgment by

the trial judge were against the great weight of the evidence.

Plaintiff produced lay witnesses to prove the age of the calves, and a number of veterinarians testified for respondents. One of the veterinarians stated that before coming from his home to the scene of the trial he "got out" the textbooks he had used in school and "looked them over," and that he also testified from experience through personal observations. The question is raised whether farmers, who have had years of practical experience in raising calves, cannot also acquire from observation sufficient knowledge of a subject that is not overly technical in nature. The veterinarians did approach the subject in a scientific manner and their judgment is entitled to much weight. We cannot say, however, that the testimony of the lay witnesses for the people should have been excluded. While we find no Michigan cases directly in point, in *Gilbert* v. *Kennedy,* 22 Mich. 117, we held that farmers, rangers and drovers, having knowledge and experience with cattle, may give an opinion as to the weight of cattle and their growth and increase under various feeding conditions. *Clague* v. *Hodgson,* 16 Minn. 329, upheld the admission of the testimony of a shepherd who stated that he could tell the age of sheep by observation.

Lay witnesses, in testifying to their opinions on technical subjects, in which men of professional training may be more expert, must have personally inspected and observed the subject-matter and they must detail the facts and circumstances upon which their opinions are based. *Dyer* v. *Rosenthal,* 45 Mich. 588; *Rice* v. *Rice,* 50 Mich. 448; *In re Lembrich's Estate,* 243 Mich. 39. Three of the witnesses for the people complied with this rule. One testified that he had spent most of his life on the farm and had had almost continuous experience in raising calves and

was able to tell by observation approximately the age of a calf. He testified that he had examined the calves and detailed the facts upon which he based his opinion as to their ages. Another witness, who was present at the slaughterhouse when defendants were arrested, testified on behalf of the people and stated that he had farmed all his life and that he could tell the age of a very young calf, that the navel string, which had not disappeared on one calf, showed that it was under 10 days of age; that another calf was undersized, not matured and not filled out as a normal calf should be at four weeks. He also testified that one of the calves was less than 10 days of age and another less than three weeks old. He told in detail how he reached his conclusions. Another witness testified that he had been a farmer for 15 years, and had had experience in raising stock, and was a meat inspector for the State and in his opinion the calves were all under four weeks of age. Because of the death of a fourth witness prior to the trial in the circuit court, his testimony, given at the justice court trial, was read to the jury. He had testified that he was employed by the agricultural department of the State of Michigan as a special investigator. His qualifications or experience were not inquired into. The record does not disclose objection made to his testimony on the ground that he was not sufficiently qualified to give expert testimony.

Two of the slaughtered calves had been preserved in a refrigerating plant and were produced as exhibits. The attention of the jury was called by one of the witnesses to certain physical conditions of one of the calves which indicated that the calf was less than 10 days old.

Respondents further complain that three of plaintiff's witnesses did not make a sufficient examination so as to be able to testify that all of the 70 calves

were under four weeks of age, and hence the admission of such testimony was prejudicial error. One of these witnesses stated that he had observed that all of the calves had been slaughtered; another that he examined all of the calves; and in the deposition of the deceased witness, heretofore referred to, he stated that the two calves he selected as exhibits represented an average of the entire group. The jury could take the testimony for what it was worth and it was for them to determine whether or not the statements that all of the calves were under four weeks of age were exaggerations. It was not necessary for the prosecution to show that all of the calves were under four weeks of age.

Respondents further claim that the verdict was against the great weight of the evidence and that the testimony of the veterinarians should have outweighed that of the lay witnesses. We do not believe there is merit to this claim. The credibility of the witnesses and the value of their testimony became a question for the jury and the verdict is well supported by the evidence. It is further claimed that there was no adequate proof that both defendants were in possession of the calves with the intention of selling them. The record has been read with care. Testimony as to the actions of both defendants fully justifies the finding of the jury. It would serve no useful purpose further to detail all the facts.

Judgment of conviction is affirmed.

WIEST, C. J., and BUSHNELL, SHARPE, POTTER, CHANDLER, NORTH, and MCALLISTER, JJ., concurred.

INDEX.

ABANDONMENT—See APPEAL AND ERROR (29); COVENANTS (1, 2, 9, 10).

ABUSE OF DISCRETION—See DIVORCE (1, 2).

ACCEPTANCE—See CONTRACTS (5); GIFTS (2); WORKMEN'S COMPENSATION (2–4).

ACCIDENT—See AUTOMOBILES (1); EVIDENCE (1, 14); INSURANCE (5, 6); JURY; NEGLIGENCE (3); WORKMEN'S COMPENSATION (3, 7, 8).

ACCOUNTING—See APPEAL AND ERROR (22, 23); BUILDING AND LOAN ASSOCIATIONS (1, 2, 4); EQUITY (1, 8, 9); ESTOPPEL (3); EXECUTORS AND ADMINISTRATORS (4–6, 8); JUDGMENT (2); MORTGAGES (9); PARTNERSHIP (4, 5); PATENTS (4, 10); TRUSTS (7–10, 12).

ACTION—See APPEAL AND ERROR (6, 10); CORPORATIONS (10); LIMITATION OF ACTIONS (2).

ADEQUACY OF REMEDY—See EQUITY (8, 10); TRUSTS (15).

ADHESIONS—See EVIDENCE (3).

ADMISSIONS—See PLEADING (1).

ADVERSE POSSESSION—See APPEAL AND ERROR (28).

AERONAUT—See AVIATION (3).

AFFIDAVITS.

1. An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath. *June* v. *School District No. 11, Southfield Township, Oakland County*, 533.
2. Difference between affidavit and oath is that former consists of a statement of fact which is sworn to as the truth while an oath is a pledge. *Id.* 534.

See JUDGMENT (6–9); JURY.

AGE—See DIVORCE (2, 3).

AGENCY—See PRINCIPAL AND AGENT.

AGREEMENT—See WORKMEN'S COMPENSATION (4).

AGRICULTURE, DEPARTMENT OF—See EVIDENCE (33).

AIRPLANES—See AVIATION (1, 4, 5); DEATH; EVIDENCE (19).

AISLE—See CARRIERS (5, 6, 8, 9, 11).

ALCOHOL DISTILLERY—See INSURANCE (1).

ALIMONY—See DIVORCE (3–6).

AMBIGUITIES—See EVIDENCE (26, 27); INSURANCE (8, 12).

AMBULANCES—See AUTOMOBILES (33).

AMENDMENT—See CORPORATIONS (3–6); CRIMINAL LAW (10, 11); DIVORCE (8); PLEADING (7); STATUTES (5, 6); TAXATION (9); WORKMEN'S COMPENSATION (2).

AMORTIZATION—See MORTGAGES (2).

ANGULATION OF LEGS—See DAMAGES; EVIDENCE (4).

ANIMALS.

In action tried without a jury by company engaged in business of placing hogs with farmers for breeding purposes under conditional sales agreements whereby seller was to obtain from the increase two hogs weighing at least 200 pounds for each hog placed, record *held*, to justify finding of circuit judge that after plaintiff had obtained 10 of the 20 hogs to which it was entitled conversion by defendant of other 10 was not wilful and malicious, for which he would be liable after discharge in bankruptcy, where remaining hogs became diseased, were sold in several lots over a period of a month and course of dealing indicates defendant acted in good faith although, due to other losses, he thereafter filed a voluntary petition in bankruptcy (42 Stat. at L. p. 354 [11 USCA, § 35]). *Continental Live Stock Co.* v. *King*, 496.

See EVIDENCE (32, 33).

APPEAL AND ERROR.

1. The amount of a verdict as fixed by a jury in an action for personal injuries ought not to be set aside unless it is such as to shock the conscience of the court. *Pearce* v. *Rodell*, 22.
2. On a motion to dismiss a bill of complaint, the statements of fact therein must be accepted as true. *King* v. *Emmons*, 116.
3. In suit against executor who was also testamentary trustee and who caused to be organized defendant nonprofit corporation to take over and administer trust assets, where bill is dismissed on appeal of corporation because plaintiff who initiated proceedings was not a proper party, it is operative in favor of executor-trustee as well notwithstanding he did not appeal. *Id.* 119.

APPEAL AND ERROR—Continued.

4. Contention that plaintiff, a prospective customer of defendant salesman and his employer, also a defendant, had assumed hazards of transportation by salesman to employer's office by failing to object to excessive speed and improper operation of car and was, therefore, guilty of contributory negligence *held*, without merit on appeal, where such matter was submitted to jury and resolved in favor of plaintiff. *Thomas* v. *Currier Lumber Co.*, 135.

5. On appeal from judgment on directed verdict for defendant at close of plaintiffs' proofs, plaintiffs' evidence is accorded the most favorable consideration. *Wells* v. *Oliver*, 168.

6. In action by employee who was injured in an automobile collision with defendant's car, where it is questionable whether issue as to whether he received compensation was properly raised by pleadings and no showing made that he did receive compensation, effect on employee's right to sue is not discussed (2 Comp. Laws 1929, § 8454). *Campbell* v. *Osterland*, 176.

7. In action of assumpsit in which defendant claimed set-off, question of set-off is unimportant where trial judge, in holding in defendant's favor, denied judgment thereon in excess of amount claimed by plaintiff and defendant claims no cross-appeal. *Melvindale State Bank* v. *Eckfeld*, 179.

8. In suit by son for specific performance of alleged contract by deceased father to give plaintiff certain property in return for continuation of services, trial court's refusal to permit plaintiff to make a separate record of the testimony of his wife *held*, not error, since her testimony was inadmissible under statute as to testimony concerning matters equally within knowledge of deceased (3 Comp. Laws 1929, § 14219). *Speaker* v. *Speaker*, 185.

9. Supreme Court does not substitute its judgment on questions of fact for that of the trier of the facts unless the evidence clearly preponderates in the opposite direction. *Rollin* v. *Van Tine*, 208.

10. Contention that executory land contracts are not "deeds" within meaning of statute of limitations as to actions on covenants is not passed upon where form of action instituted by plaintiff rendered such provisions of statute inapplicable (3 Comp. Laws 1929, §§ 13309, 13976). *Wall* v. *Zynda*, 261.

11. Contention that verdict of jury sustaining will proposed for probate was contrary to the weight of the evidence *held*, not sustained by record. *In re Evans' Estate*, 277.

12. Questions which the parties desire presented to Supreme Court should be raised in the court below for adjudication as questions may not be raised on appeal for the first time. *Wosinski* v. *Renihan*, 319.

13. Widow's claim that deed of administrator with will annexed of her late husband's estate was void on ground that she was deprived of her homestead rights, first raised in Supreme Court,

APPEAL AND ERROR—Continued.

is not considered on appeal from decree dismissing bill in her suit to have deed declared void because property was sold for less than its real value, administrator was guilty of misrepresentations in connection therewith and court authorized sale prior to date set for hearing on petition for license to sell (Const. 1908, art. 14, §§ 2–4; 3 Comp. Laws 1929, §§ 14608, 15844–15847). *Id.*

14. Widow's claim that property of an estate was sold by administrator with will annexed at less than its real value, not given in statement of questions involved, nor argued in her brief except by bare statement of sale at grossly inadequate price will not be considered (Court Rule No. 67, § 1 [1933]). *Id.*

15. Supreme Court acquired jurisdiction to review judgment for plaintiff, entered in lower court in proceeding against garnishee defendant tried without a jury, notwithstanding term "decree" was used by appellant instead of "judgment" in its appeal, erroneously describing "decree" as having been entered when opinion ordering entry of judgment was dated, where claim of appeal was dated day before it and bond on appeal were filed and judgment appearing of record appears to have been "read, approved and signed" by trial judge on date claim of appeal and bond on appeal were filed though judgment was not entered until the following day. *Mondou* v. *Lincoln Mutual Casualty Co.*, 353.

16. On appeal from judgment for defendants notwithstanding verdict for plaintiff, testimony must be considered in light most favorable to plaintiff. *Pittelkow* v. *Jefferson Park Land Co., Ltd.*, 374.

17. On appeal from judgment in assumpsit for plaintiff, entered by trial court sitting without a jury, where reversal is sought because court's findings of fact are alleged to be against the clear preponderance of the evidence, the Supreme Court is called upon to review the evidence. *Haines* v. *Haines*, 379.

18. Findings of trial court on questions of fact will be sustained on appeal unless contrary to the clear preponderance of evidence. *Id.* 380.

19. In law case tried without a jury brought to recover charges and expenses of keeping defendant's infant son, credibility of plaintiff's testimony and weight to be given it *held*, for determination of trial court. *Id.*

20. On appeal from verdict and judgment for plaintiff pedestrian in case arising from injuries inflicted by taxicab, where defendants moved for directed verdict at close of plaintiff's proofs and again at close of all proof and moved for a judgment *non obstante veredicto*, testimony as to contributory negligence must be viewed most favorably to plaintiff. *Burton* v. *Yellow & Checker Cab & Transfer Co.*, 384.

21. On appeal from judgment for defendant on reserved motion for directed verdict, entered after disagreement of jury, testimony and legitimate inferences to be drawn from established

APPEAL AND ERROR—Continued.

facts most favorable to the party against whom the verdict is sought to be directed must be accepted (3 Comp. Laws 1929, §§ 14531–14535). *Selman* v. *City of Detroit,* 414.

22. In suit by administratrix *de bonis non* with will annexed of estate of her deceased husband against administratrix of estate of deceased husband's partner, former executor of deceased husband's will and transferee of certain assets claimed by plaintiff and others, to set aside probate proceedings, for discovery, accounting and to impress a constructive trust, findings of fact by trial court *held,* sustained by the testimony. *Grigg* v. *Hanna,* 443.

23. On appeal from decree dismissing plaintiff's bill to cancel certificate of stock, to require reissue of half of the number of shares to her and for accounting for dividends paid defendant pledgee after he had caused stock owned by plaintiff and her late husband as tenants in common to be transferred to pledgee, plaintiff's apparent attitude as a witness and the contradiction in testimony given by her which was evidently discredited by judge *held,* to justify construction of her testimony in the light most unfavorable to her. *Brouwers* v. *Allied Paper Mills,* 478.

24. On appeal from judgment upon directed verdict for defendant, plaintiff's testimony must be accorded favorable consideration. *Adolph* v. *Cookware Company of America,* 561.

25. In proceeding by attorney to collect for services rendered estate of widow in obtaining widow's allowance from estate of widow's late husband where a legatee appealed to circuit court from allowance made by probate court and claimant took cross-appeal claiming full amount she would have been entitled to under alleged contingent fee basis and circuit court allowed entire claim, propriety of awarding sufficient compensation for time spent and beneficial results obtained *held,* before both probate and the Supreme Courts where legatee presented such issue. *In re Trombley's Estate,* 604.

26. In suit involving construction of a deed, a copy of which does not appear in the record, Supreme Court is confined to such quotations as appear in the record, the opinion of the trial judge and briefs of the parties. *Dolby* v. *State Highway Commissioner,* 609.

27. A mere statement of a position without argument and citation of authority in support thereof is insufficient to present the matter for consideration of an appellate court (Court Rule No. 67 [1933]). *Id.*

28. Effect of failure of grantee of fee upon condition subsequent to use land for purpose granted, which matter is not briefed, and claim of adverse possession, mentioned in plaintiffs' bill of complaint but not proved, are not considered on appeal in suit to establish title in plaintiffs (Court Rule No. 67 [1933]). *Id.* 610.

29. Claim of mutual mistake in a deed, not raised nor referred to in original or amended bill of complaint, trial court's opinion nor briefs *held,* abandoned. *Id.*

APPEAL AND ERROR—Continued.

30. Question of public policy arising upon foreclosure of a second mortgage on property in an amount in excess of that permitted by regulations authorized by home owners' loan act controlling mortgage indebtedness, argued by both parties in the briefs and oral arguments, is considered by Supreme Court where record is complete so that further testimony is not required for the determination of the question although question was raised only inferentially in trial court (48 Stat. at L. chap. 64). *Meek* v. *Wilson,* 680.

31. In prosecution for possession of meat of calves less than four weeks old with intent to sell it, claim that testimony of defendants' veterinarians should have outweighed that of the people's lay witnesses who were experienced farmers *held,* without merit (1 Comp. Laws 1929, § 5469). *People* v. *Ferris,* 700.

See COSTS (4, 5, 7); DIVORCE (1, 3, 7–9); MANDAMUS (2); WORKMEN'S COMPENSATION (9).

APPLICATIONS—See PATENTS (5, 9, 10).

APPOINTMENT—See COURTS (1, 3, 4); OFFICERS; TRUSTS (1, 3, 5, 8, 10).

APPRAISAL—See CORPORATIONS (13); EVIDENCE (26); MORTGAGES (7, 8).

APPROVAL—See BANKS AND BANKING (4, 5); WORKMEN'S COMPENSATION (3).

ARTICLES OF INCORPORATION—See CORPORATIONS (3–6).

ASPHYXIATION—See GAS (5).

ASSAULT—See CRIMINAL LAW (7); RAPE (2).

ASSENT—See CRIMINAL LAW (5).

ASSIGNMENT—See BILLS AND NOTES; BUILDING AND LOAN ASSOCIATIONS (1, 3, 4); DEEDS (13).

ASSOCIATIONS—See TRADE UNIONS.

ASSUMPSIT—See APPEAL AND ERROR (7); BANKS AND BANKING (2); FRAUD (1); LANDLORD AND TENANT (1); PARENT AND CHILD (1, 2).

ASSUMPTIONS—See AUTOMOBILES (18, 30, 35); EVIDENCE (10).

ASSURED CLEAR DISTANCE AHEAD—See AUTOMOBILES (2, 4, 26).

ATROPHY OF MUSCLES—See EVIDENCE (4).

ATTORNEY AND CLIENT.

Action of defendant mortgagee's attorney in purchasing property from mortgagee after issuance of writ of restitution *held,* not unethical in mortgagor's proceeding to restore a mora-

ATTORNEY AND CLIENT—Continued.

torium, where attorney had made unsuccessful efforts to sell the property to others, defendant was desirous of getting his money out of the property as speedily as possible, attorney paid $500 down, agreed to pay balance at rate of $80 a month and made extensive repairs and defendant is not complaining. *Friar* v. *Dausman,* 692.

See APPEAL AND ERROR (25); DIVORCE (6–8); EXECUTORS AND ADMINISTRATORS (13–16); JUDGMENT (8, 13); TRIAL (6); WILLS (19–21).

AUCTIONS—See CORPORATIONS (3–5, 9).

AUTHORITY—See BANKS AND BANKING (9); ESTOPPEL (2); EXECUTORS AND ADMINISTRATORS (16); FRATERNAL BENEFICIARY SOCIETIES (1); FRAUD (4); WORKMEN'S COMPENSATION (4).

AUTOMOBILES.

1. In pedestrian's action against motorist for injuries received at about 7:30 p. m. on October 13th, where testimony was in direct conflict as to whether plaintiff and companion were on the pavement or berm, admission of testimony of nearby resident as to location of automobile tracks as he observed them the next morning and showing that foot tracks were next to the ditch where automobile's tracks were deepest *held,* proper. *Pearce* v. *Rodell,* 19.
2. A motorist has no right to drive his automobile on the public highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead and it is *prima facie* unlawful for him to exceed such limitation of speed (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933). *Id.* 20.
3. A motorist is required to have his automobile equipped with headlights that would at all times, under normal atmospheric conditions, on a level road, produce a light sufficient to render clearly discernible a person 200 feet ahead (1 Comp. Laws 1929, § 4736, as amended by Act No. 64, Pub. Acts 1931, § 4738, as amended by Act No. 59, Pub. Acts 1931). *Id.*
4. Motorist whose car struck pedestrian *held,* guilty of negligence as a matter of law where he was driving car at such a speed as not to have it under sufficient control to bring it to a stop within the assured clear distance ahead even though his vision was obscured by glaring lights of an approaching automobile as it was then his duty to slacken his speed and have car under such control that he might stop it immediately if necessary (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933). *Id.* 21.
5. A pedestrian may walk on any part of a public highway and motorists must use reasonable and ordinary care not to run down pedestrians upon such highways. *Id.*

AUTOMOBILES—Continued.

6. A pedestrian has a right to rely upon the presumption that a motorist will exercise due care and is not, as a matter of law, required to look back for approaching vehicles. *Id.*

7. Whether or not pedestrian who was walking along highway at 7:30 p. m. on October 13th was guilty of contributory negligence when hit by righthand fender and headlight of defendant's car which approached from rear *held,* a question for jury. *Id.*

8. Instruction that if jury found pedestrian was walking on the berm and not on the paved portion of the highway then he was exercising ordinary care and not guilty of contributory negligence *held,* proper. *Id.*

9. Failure to give request to charge that if plaintiff pedestrian saw or could have seen defendant's car approaching from rear it was a circumstance to consider in determining whether plaintiff was guilty of contributory negligence *held,* not error where court fully charged jury as to matter of plaintiff's contributory negligence and charge as given was without error. *Id.*

10. Test to be applied in determining whether a passenger is a guest in defendant motorist's car within meaning of guest act is whether or not the transportation is furnished gratuitously (1 Comp. Laws 1929, § 4648). *Thomas* v. *Currier Lumber Co.,* 134.

11. It is unnecessary to show that plaintiff made a cash payment for his transportation in order not to hold him a guest passenger of defendant motorist, within meaning of the guest passenger act, it being sufficient if a benefit accrued to defendant by reason of such transportation (1 Comp. Laws 1929, § 4648). *Id.*

12. Plaintiff, a building contractor who had conducted negotiations with defendant salesman, a salaried employee of defendant lumber company, with respect to materials for a proposed house and a factory alteration job to a point where it was necessary to interview lumber company's president who ordered defendant salesman to transport plaintiff to president's office *held,* a nongratuitous passenger in salesman's car when injured while being transported to president's office, since prospect for sale of materials for either job was a benefit to both defendants (1 Comp. Laws 1929, § 4648). *Id.*

13. Proof of ordinary negligence on part of defendant salesman for defendant lumber company *held,* sufficient to entitle plaintiff to recover from both defendants for injuries proximately caused thereby, which he sustained while he, as prospective purchaser of materials, was being transported by the salesman to office of company's president at latter's request. *Id.*

14. Operation of car at speed in excess of that defined by statute as *prima facie* lawful *held,* negligence *per se* in action for injuries by passenger in such car (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933). *Id.* 135.

AUTOMOBILES—Continued.

15. Question of whether motorist was negligent in operating car at time plaintiff, a passenger therein, was injured *held*, properly left to jury notwithstanding showing made that excessive speed was not the proximate cause where there was testimony, though contradicted, that left wheels of car were at left of center of street (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933). *Id.*

16. Motorist whose view at midnight at intersection was limited to 200 feet to right when he was 30 feet from intersection curb *held*, guilty of negligence as a matter of law where he failed to take another look before proceeding to center of intersection beyond which his car was struck by defendant's car. *Wells* v. *Oliver*, 168.

17. In actions for injuries sustained in collision of automobiles at an intersection of city streets at midnight, the doctrines of subsequent negligence or last clear chance *held*, inapplicable under showing that plaintiffs' driver, who looked and had vision of 200 feet to right when 30 feet from intersection curb, entered intersection at 17 miles per hour and failed to look to right again until at middle of intersection when he saw defendant's car approaching at a high rate of speed and which skidded 41 feet before the collision. *Id.*

18. Right of way accorded driver on a through highway is more than mere privilege of going through an intersection in advance of a car which reaches it at the same time, as driver on through highway is entitled to assume that those approaching it from a stop street will obey the law and stop. *Campbell* v. *Osterland*, 175.

19. Motorist on through highway has right of way but must make such a lookout ahead and to the sides and down intersecting highways as a reasonably prudent person would do in order to avoid possible danger. *Id.*

20. Question of contributory negligence of motorist on through highway whose car was struck at an intersection *held*, for jury where evidence shows plaintiff was traveling 40 to 50 miles an hour on paved through highway and while 100 to 150 feet from intersection observed defendant had stopped at left of pavement and, without again looking in that direction, proceeded across the intersection where defendant's car struck plaintiff's. *Id.* 176.

21. In action for damages arising from collision of left rear end of plaintiff's car with left front end of defendant's car which occurred as the cars met and were about to pass each other on a wet pavement, finding of court sitting without a jury that there was "no evidence whatever of negligence on the part of plaintiff" and awarding him damages *held*, to necessitate conclusion that trial court found plaintiff free from contributory negligence and that the collision occurred by reason of negligence of defendant. *Rollin* v. *Van Time*, 208.

AUTOMOBILES—Continued.

22. Evidence that defendant was negligent as he attempted to meet and pass plaintiff's car during a winter evening *held*, sufficient to sustain finding of negligence by trial court, sitting without a jury. *Id.*

23. In action by wife, not a minor, for injuries sustained while a passenger in car driven by her husband, his negligence in driving the car is imputable to her. *Bard* v. *Baker*, 337.

24. Defendants who operated truck on public highways with load in excess of 96 inches in width *held*, guilty of negligence in violating terms of statute prohibiting loads in excess of such width (1 Comp. Laws 1929, § 4759, as amended by Act No. 253, Pub. Acts 1933). *Id.*

25. Only danger against which motorist is bound to guard is what he, as a careful person, sees or should see. *Id.*

26. Statute providing 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" is construed as not requiring that a person be held guilty of contributory negligence as a matter of law in failing to see an object on the highway which was undiscernible to a person approaching the same in the exercise of ordinary care (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933). *Id.*

27. Question of contributory negligence of deceased motorist *held*, for jury where record shows he had been traveling 25 miles an hour and had begun to slow down as he approached intersection where defendants' dump trucks, loaded with wooden road mats to a width in excess of that permitted by statute and from which red flag hung so that lowest part of flag and mats was more than 42 inches from pavement, the height the direct rays of lights on deceased's car were permitted to shine, since deceased is only presumed to have seen that which statute requires an ordinarily careful person to have seen and if, assuming all other lights were out, lights on decedent's car would not have apprised him of the overhanging mats he would not be guilty of contributory negligence as a matter of law (1 Comp. Laws 1929, § 4738[b], as amended by Act No. 59, Pub. Acts 1931, § 4759, as amended by Act No. 253, Pub. Acts 1933). *Id.*

28. While deceased motorist who approached parked truck at night should have observed it, he had right to assume it was loaded and parked in compliance with statutes (1 Comp. Laws 1929, § 4759, as amended by Act No. 253, Pub. Acts 1933). *Id.* 338.

29. In action by pedestrian against defendants, owner and driver of a taxicab, question of defendants' negligence *held*, properly submitted to jury where admitted speed of taxicab was 20 miles per hour and there was testimony placing speed at 40 miles per hour, in violation of statute and ordinance (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933). *Burton* v. *Yellow & Checker Cab & Transfer Co.*, 384.

AUTOMOBILES—Continued.

30. Pedestrian, crossing a 60-foot street between intersections, who saw taxicab some 250 or 300 feet away before reaching curb and 180 feet away when at street side of car parked at side of street he was leaving, *held*, to have a right to assume that taxicab driver would obey the law and not operate his car at an excessive and unlawful rate of speed (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933). *Id.*

31. Whether or not pedestrian was negligent in proceeding across a street paved to width of 60 feet between intersections after having observed taxicab 250 or 300 feet distant before reaching curb and 180 feet distant when at street side of parked car on side of street he was leaving if he reasonably believed he could safely cross *held*, clearly a question for jury. *Id.*

32. Fact that pedestrian, crossing a 60-foot street between intersections, when near the middle thereof, started to run when he discovered taxicab 30 feet away approaching at a rapid speed *held*, not to amount to contributory negligence as a matter of law merely because he would not have been injured had he stood still, the question being one for the jury in such case. *Id.* 385.

33. Defendant in whose car plaintiff, his brother, was a guest passenger, who had been previously injured to a then undetermined extent by falling from a ladder while painting a house and was being conveyed to a hospital, *held*, as a matter of law not guilty of wilful and wanton misconduct in running a second red light while operating his car as a gratuitous ambulance although clearly guilty of negligence. *Banks* v. *Banks*, 506.

34. In action by administratrix of estate of motorist, fatally injured in an automobile collision at a street intersection, plaintiff who showed defendant was guilty of negligence also has burden of proving her decedent was free from contributory negligence. *Slingerland* v. *Snell*, 524.

35. Right of way of driver of automobile on right at street intersections under 1 Comp. Laws 1929, § 4712, is not an assurance of safety nor an absolute right in all conditions, both drivers being required to use due care, as driver on the right cannot continue to assume that the one on the left will accord him right of way when the circumstances would indicate the contrary to a reasonable person. *Id.*

36. Plaintiff's decedent who drove car into intersection where he was hit by defendant's car which approached from decedent's left is chargeable with what he could have seen, that is, defendant's car approaching intersection without showing any indication of coming to a stop, hence, barred from recovery by his contributory negligence. *Id.* 525.

37. In action by administratrix of estate of deceased guest passenger of defendant motorist, admission of testimony of defendant as to facts relating to manner in which collision occurred *held*, not error, where testimony showed that deceased and defendant had been drinking beer earlier in the evening

AUTOMOBILES—Continued.

and that during the last two miles before the collision occurred there was no conversation between them although there had been during the preceding five miles, since it does not affirmatively appear that facts testified to by defendant were equally within the knowledge of the deceased (3 Comp. Laws 1929, § 14219). *Case* v. *Klute*, 581.

38. Mere error of judgment on part of motorist in so driving his car on four-lane highway as to crash into oncoming truck, which was the proximate cause of death of plaintiff's decedent, *held*, insufficient to constitute gross negligence within meaning of guest passenger act so as to entitle plaintiff to recovery (1 Comp. Laws 1929, § 4648). *Id.* 582.

See APPEAL AND ERROR (4); CORPORATIONS (13); COSTS (2, 3); EVIDENCE (13); INSURANCE (6, 7, 10, 13, 14); JURY; PLEADING (6); RAPE (3); REFORMATION OF INSTRUMENTS; STATUTES (2, 3); TAXATION (8–10); WILLS (4).

AVIATION.

1. In action under survival act by special administratrix of estate of one experienced flyer against administrator of estate of another at controls of dually controllable airplane, plaintiff has burden of establishing fact that defendant's decedent had control of plane at time of fatal crash (3 Comp. Laws 1929, § 14040). *Madyck* v. *Shelley*, 396.
2. "Passenger," as defined in provisions of penal code prohibiting low flight or dropping objects while over thickly inhabited areas or public gatherings, means any person not the pilot or member of the crew of any aircraft (Act No. 328, § 43, Pub. Acts 1931). *Michigan Aero Club* v. *Shelley*, 401.
3. "Aeronaut," as used in provisions of penal code prohibiting low flight or dropping objects while over thickly inhabited areas or public gatherings, includes aviator, pilot, balloonist, and every other person having any part in the operation of aircraft while in flight (Act No. 328, § 43, Pub. Acts 1931). *Id.*
4. In action for loss of airplane by nonprofit, nonstock corporate club owner against estate of club member who had taken plane equipped with dual controls out and was operating it with controls connected in violation of club, State and Federal rules, no presumption exists that plane was being operated by defendant's decedent from front cockpit rather than by his passenger in rear cockpit nor that member was acting properly where neither he nor his passenger had transport pilot's licenses (Act No. 53, Pub. Acts 1931, as amended by Act No. 119, Pub. Acts 1935; Act No. 328, §§ 43–45, Pub. Acts 1931; 44 Stat. at L. p. 568 *et seq.*). *Id.*
5. Airplane club, owner of plane taken out by defendant's decedent, a member who had obtained plane with dual controls and was using it contrary to club, State and Federal rules, *held*, to have failed to prove case for damages for destruction of plane by showing either that defendant's decedent was the

AVIATION—Continued.

pilot or that the plane was demolished solely because of his negligence and his violation of law and fundamental rules of flying, where passenger in rear cockpit was also a pilot, dual controls were connected and both men were killed in crash (Act No. 53, Pub. Acts 1931, as amended by Act No. 119, Pub. Acts 1935; Act No. 328, §§ 43–45, Pub. Acts 1931; 44 Stat. at L. p. 568 *et seq.*). *Id.* 403.

See DEATH; EVIDENCE (19).

BAD FAITH—See TRADE UNIONS (3–5).

BAGGAGE—See CARRIERS (5, 6, 9–11).

BALLOONIST—See AVIATION (3).

BANKRUPTCY.

A wilful and malicious injury, as that term is used in the bankruptcy act, does not follow as of course from every act of conversion as there may be an honest but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed and in such cases a discharge in bankruptcy will prevail as against a showing of conversion without aggravated features (42 Stat. at L. p. 354 [11 USCA, § 35]). *Continental Live Stock Co.* v. *King*, 495.

See ANIMALS; CORPORATIONS (8).

BANKS AND BANKING.

1. Every banking statute does not raise a public policy which wholly condemns a transaction. *Briggs Commercial & Development Co.* v. *Finley*, 1.

2. Liquidating trustees of trust company which had made extensive loans to realtor, had acted as his fiscal agent for many subdivisions he had developed and held his interest in subdivision involved as security for loans and advances made to him *held*, liable in action of assumpsit on its guaranty for full amount of notes issued by realtor, to plaintiff for sum borrowed to buy up outstanding prior lien where trust company obtained a direct enrichment from a single and isolated transaction in excess of amount involved in its agreement with plaintiff. *Id.*

3. President of bank, as borrower therefrom, who, after having obtained maximum loan permitted by law, obtains an additional loan through an irresponsible "dummy" would be guilty of fraud and where such borrower obtains the additional loan through his wife, even though she be financially responsible and collateral deposited was adequate, the transaction is regarded with suspicion (3 Comp. Laws 1929, § 11922). *Barber* v. *Kolowich*, 97.

4. An officer and director of a bank may not obtain a loan from it directly or indirectly without disclosing all facts to other directors and appropriate officers and first obtaining their ap-

BANKS AND BANKING—Continued.

proval and proper corporate action (3 Comp. Laws 1929, § 11922). *Id.*

5. The law demands the fullest disclosure and fair dealing by a director or officer in his relations with a bank and the approval of two-thirds of the directors of a loan in excess of 10 per cent. of capital and surplus (3 Comp. Laws 1929, § 11922). *Id.*

6. In bank receiver's action against former president, who owned 65 per cent. of its stock, and his wife for fraudulent concealment that loan obtained on wife's note was for benefit of husband who had already borrowed from the bank in excess of amount allowed by statute, record showing that wife did not testify but presenting evidence that loan was obtained for benefit of a private bank, owned and operated by defendants as partners, and husband, called for cross-examination under the statute, gave testimony leading to such an inference, was unable to show that any of loan was taken for individual use of wife, and records of private bank reveal no trace it was so used, property owned by husband or him and his wife jointly was conveyed to plaintiff's bank as collateral for this and other loans and that only a portion of collateral for this loan was individual property of wife, and showing a substantial loss by reason of the loan having been made *held*, to justify finding that husband fraudulently obtained funds from bank (3 Comp. Laws 1929, §§ 11922, 14220). *Id.* 98.

7. In bank receiver's action against former bank president and his wife, plaintiff *held*, to have failed to sustain burden of showing wife guilty of fraud in connection with loan to husband in excess of amount permitted by statute to be loaned to bank officer; the wife having no fiduciary duty to the bank (3 Comp. Laws 1929, § 11922). *Id.*

8. In bank receiver's action against former president and his wife for conspiracy to defraud bank by obtaining loans in excess of husband's power to borrow without complying with statutory requirements, plaintiff who had burden of showing fraud on part of wife as she owed no fiduciary duty to bank *held*, not to have sustained such burden (3 Comp. Laws 1929, § 11922). *Id.* 99.

9. The president of a bank, as executive head, is presumed to have power to act for the bank in its ordinary contracts and agreements and his act pertaining to the general business will, in the absence of proof to the contrary, be presumed to have been properly authorized. *Melvindale State Bank* v. *Eckfeld*, 180.

10. Failure of bank, as pledgee of stock, given it as collateral security for defendant's note, to sell such stock upon latter's request at a time when it would have more than satisfied his entire liability on note, secured thereby and falsely representing such sale had been accomplished *held*, such negligence as to render bank liable for loss arising from depreciation in the value of the stock pledged. *Id.*

See EVIDENCE (8); FRAUD (1).

BASE FEES—See APPEAL AND ERROR (28); DEEDS (12–14).

BEER—See AUTOMOBILES (37).

BENEFICIARIES—See COURTS (3); FRATERNAL BENEFICIARY SOCIETIES (2); INSURANCE (3); TRUSTS (8, 9, 12); WILLS (4, 8).

BEQUESTS—See WILLS (13, 14).

BERM—See AUTOMOBILES (1, 8).

BEST EVIDENCE—See EVIDENCE (26, 29).

BILL OF SALE—See CHATTEL MORTGAGES.

BILLS AND NOTES.

Purchaser of note after maturity is in no better position than its assignor. *Melvindale State Bank* v. *Eckfeld*, 180.

See BANKS AND BANKING (10); CHATTEL MORTGAGES; ESTOPPEL (3); LIMITATION OF ACTIONS (6, 7); TAXATION (2).

BINDING OVER FOR TRIAL—See CRIMINAL LAW (9).

BOARD OF APPEALS—See COSTS (6); MANDAMUS (3); MUNICIPAL CORPORATIONS (2, 3).

BONDS—See APPEAL AND ERROR (15); CHATTEL MORTGAGES; EXECUTORS AND ADMINISTRATORS (4); JUDGMENT (2); PRINCIPAL AND SURETY (1); TRUSTS (1, 2).

BOOKS—See CONTRACTS (8); MASTER AND SERVANT (2, 3).

BOOK VALUE—See CORPORATIONS (3–5, 9).

BRACES—See DAMAGES.

BREACH OF CONTRACT—See TRADE UNIONS (2, 4).

BREEDING CONTRACTS—See ANIMALS.

BRIEFS—See APPEAL AND ERROR (14, 26, 28–30); DIVORCE (8).

BROKERS.

1. Ordinarily where a real estate broker seeks to recover commission under an express written contract, he must show performance thereof. *Pittelkow* v. *Jefferson Park Land Co., Ltd.*, 374.
2. Liability of defendants in action by real estate broker to recover commission under written contract for sale of real estate would not be avoided merely because other lands were included in sale to purchaser with whom broker was negotiating. *Id.*
3. A real estate broker may be entitled to a commission even though he did not produce a purchaser ready, able and willing to acquire the property on terms satisfactory to the seller such as (1) where service only is contracted and performed, (2) where broker is employed to make a sale and procures a party with whom principal is satisfied and who actually contracts

BROKERS—Continued.

for the purchase of the property at a price acceptable to owner, and (3) where contract provides broker may be entitled to commission on sale made by owner without broker's cooperation. *Id.*

4. Owners of realty, who had employed broker to sell it, may not avoid payment of commission merely by concluding their broker's agency and making sale themselves. *Id.*

5. Real estate broker seeking to recover commission because he was the procuring cause of the sale must show he was the procuring cause of the sale, that the purchaser learned of the property through him and that through his efforts the sale was made. *Id.* 375.

6. Real estate broker who had contract with owner to pay commission if broker procured a purchaser of the property for specified price and never produced a purchaser ready, able and willing to pay that price *held,* not entitled to commission as he did not perform contract in accordance with its terms. *Id.*

See CORPORATIONS (11); EQUITY (8, 9).

BROTHERHOOD—See TRADE UNIONS.

BUILDING AND LOAN ASSOCIATIONS.

1. In suit for an accounting by mortgagors' assignee against mortgagee building and loan association, plaintiff's burden of proof as to payment of $437.50 *held,* sustained by entry in a pass book. *Andres* v. *National Loan & Investment Co.,* 663.

2. Record in suit for accounting against building and loan association *held,* so unsatisfactory as to cause Supreme Court to be unable to find mortgage debt satisfied and to decline to enter upon a general audit. *Id.*

3. In suit by mortgagors' assignee against mortgagee building and loan association, in which mortgagors had subscribed for stock of face value equivalent to amount of mortgage and made monthly payments thereon, record *held,* not to present evidence from which dividends in excess of fixed five per cent. rate could be adjudged. *Id.*

4. In suit by mortgagors' assignee against mortgagee building and loan association for accounting, where plaintiff is found entitled to a sum together with interest from time payment thereof was made, credit upon redemption from foreclosure sale is allowed or cash payment from proceeds thereof if no redemption is had. *Id.*

BUILDING CONTRACTORS—See AUTOMOBILES (12).

BUILDINGS—See CONSTITUTIONAL LAW (3); COSTS (6); COVENANTS (2–4, 6, 12); EQUITY (5); MANDAMUS (3); MORTGAGES (10); MUNICIPAL CORPORATIONS (1–3).

BURDEN OF PROOF—See AUTOMOBILES (34); AVIATION (1); BANKS AND BANKING (7); BUILDING AND LOAN ASSOCIATIONS (1); CARRIERS (10); CONSTITUTIONAL LAW (2); CORPORATIONS (2); DEEDS (5); EVIDENCE (12, 15); INSURANCE (4, 5); WILLS (18, 20); WORKMEN'S COMPENSATION (7).

CALVES—See CRIMINAL LAW (12–14).

CANCELLATION OF INSTRUMENTS.

1. Rescission not only involves a repudiation of a contract and the refusal of the moving party to be further bound by it but also a restoration of the *status quo*. *Wall* v. *Zynda*, 260.
2. The character of relief sought in suit for rescission is opposite to that of covenant and requires prompt action by one seeking rescission in order that *status quo* may be restored. *Id.*
3. In suit by aged parents of one of defendant grantees in deed sought to be set aside on ground of fraud and failure of consideration, claim that plaintiffs were guilty of laches in waiting over three years and seven months to set aside warranty deed to farm property in possession of which they have not been disturbed *held*, without merit. *Bowen* v. *Kunkel*, 509.

See APPEAL AND ERROR (23); EQUITY (12); ESTOPPEL (3).

CAPITAL—See CORPORATIONS (5).

CARRIERS.

1. Rule respecting liability for injuries to passengers received from sudden increases or decreases of speed while passenger is alighting from street car differs from that where passenger alights from steam railroad. *Selman* v. *City of Detroit*, 413.
2. Sudden jerks or jolts in the movement of railroad trains or street cars are among the usual incidents of travel which do not create liability for injuries to passengers received because thereof. *Id.*
3. Sudden jerks or jolts in stopping to let off and take on passengers and in starting, are among usual incidents of travel on street cars which every passenger must expect and mere fact that a passenger is injured thereby will not of itself make out a case of negligence which will render the carrier liable although carrier may be liable if the jerk or jolt is unnecessarily sudden or violent. *Id.*
4. Unusually sharp jerks or violent jolting due to negligent operation of the car or negligent failure to maintain the track properly imposes liability on the carrier for resulting injuries to passengers but if there is maintenance of way and equipment in a serviceable condition and operation of conveyances in customary manner no liability attaches. *Id.*
5. It is not negligence as a matter of law for conductor of a street car with seats running lengthwise of the car on each side to let the baggage of a passenger remain on the floor of the car in the aisle where it is not so placed as to obstruct free passage out of or into the car as the street car company

CARRIERS—Continued.

is not bound to exercise toward a passenger the utmost diligence in providing against those injuries that can be averted by human foresight. *Id.*

6. Where a passenger is injured by stumbling over baggage which another person has placed in the aisle of the vehicle, the carrier will not be liable for the injury unless it omitted to exercise reasonable care in keeping the aisle clear. *Id.* 414.
7. A street railway company is not an insurer of the safety of those it undertakes to transport but is merely required to exercise that skill, diligence and foresight for the safety of its passengers consistent with the practical conduct of its business. *Id.*
8. Ordinarily a carrier is liable for injuries to a passenger resulting from obstructions in aisles of vehicles only where employee in charge of the car knew of the obstruction or it had existed for such a length of time that employee, in proper discharge of his duties, should know of its presence. *Id.*
9. The mere fact baggage is in the aisle and a passenger stumbles over it does not raise a presumption of negligence on the part of the carrier. *Id.*
10. Plaintiff in action for injuries, alleged to have been sustained when she stumbled over another passenger's baggage which protruded into aisle of street car in which seats were placed lengthwise along side of car, had burden of showing she was free from contributory negligence and acted with due care. *Id.*
11. In passenger's action for injuries sustained when she stumbled over another person's baggage which stuck out in the aisle between the seats along the side of the car, testimony of plaintiff that she did not see suitcase over which she tripped until about to leave car established that it was not in aisle a sufficient length of time to charge carrier's employee with notice and her later testimony that she saw baggage protruding into the aisle when she boarded car and it was not moved during her 20-or-30-minute ride barred her recovery on ground of contributory negligence, where it was not shown conductor had knowledge of presence of the baggage before plaintiff fell. *Id.* 415.

CASH DISCOUNTS—See TAXATION (3).

CAUSE OF DEATH—See EVIDENCE (11); INSURANCE (3, 6).

CERTIFICATES—See APPEAL AND ERROR (23); EQUITY (8, 9); ESTOPPEL (3); EXECUTORS AND ADMINISTRATORS (9); FRAUD (3); JUDGMENT (8, 9).

CERTIFICATES OF DEPOSIT—See EVIDENCE (8); GIFTS (1, 4); WILLS (2); WITNESSES (3).

CERTIFIED PUBLIC ACCOUNTANT—See EVIDENCE (26).

CHALLENGES—See JURY.

CHANGE IN NEIGHBORHOOD—See COVENANTS (8).

CHANGE OF INTEREST—See INSURANCE (1, 2).

CHARITABLE TRUST—See TRUSTS (7).

CHATTEL MORTGAGES.

In transaction which took place after expiration of period of redemption from foreclosure of plaintiff's mortgage on defendants' home, whereby latter effected a repurchase thereof by giving plaintiff Home Owners' Loan Corporation bonds and chattel mortgage in form of bill of sale of cottage and garage, owned by defendants on land in which they held a leasehold interest, securing note for difference between bonds and interest plaintiff had in the home, such chattel mortgage and note *held*, not void and unenforceable because contrary to mortgagee's consent to take bonds whereby it waived all claims against the property or applicant for loan from the Home Owners' Loan Corporation arising from such property since the chattel mortgage and note were in part payment for the repurchase of the home, pertained to other property than that covered by the bonds and not used in connection therewith and full details of entire transaction were disclosed to representatives of the Corporation (48 Stat. at L. chap. 64). *Bay City Bank* v. *White*, 267.

CHIROPRACTOR—See CONTRACTS (8); MASTER AND SERVANT (2).

CIRCUIT COURTS—See APPEAL AND ERROR (25); COSTS (5); COURTS (3, 4); CRIMINAL LAW (8–11); EVIDENCE (33); TRUSTS (8, 10); WILLS (8).

CLAIM OF APPEAL—See APPEAL AND ERROR (15).

CLAIMS—See EVIDENCE (20).

CLAIMS AGAINST ESTATES—See EXECUTORS AND ADMINISTRATORS (10, 12).

CLERKS—See JUDGMENT (13); MANDAMUS (2).

COCKPIT—See DEATH.

COLLATERAL—See BANKS AND BANKING (3, 6, 10); CORPORATIONS (11).

COLLATERAL ATTACK—See EXECUTORS AND ADMINISTRATORS (4); JUDGMENT (10).

COLLEGES—See MUNICIPAL CORPORATIONS (3).

COMMISSIONS—See BROKERS.

COMMON LAW—See COURTS (2).

COMPENSATION—See APPEAL AND ERROR (25); COSTS (1); COUNTIES; COURTS (5); EXECUTORS AND ADMINISTRATORS (15, 16); MANDAMUS (1); MASTER AND SERVANT (1, 3); OFFICERS (2); WORKMEN'S COMPENSATION (3, 4, 7, 8).

COMPETITION—See MUNICIPAL CORPORATIONS (8).

CONDEMNATION PROCEEDINGS—See EMINENT DOMAIN (1, 3, 5).

CONDITIONAL SALES AGREEMENT—See ANIMALS.

CONDITIONS—See LANDLORD AND TENANT (3).

CONDUCTOR—See CARRIERS (5).

CONFLICTING INTERESTS—See TRUSTS (11).

CONJECTURE—See EVIDENCE (21); JUDGMENT (5); LIMITATION OF ACTIONS (7); MALPRACTICE (1).

CONSENT—See CHATTEL MORTGAGES; COURTS (6); DEEDS (8); EXECUTORS AND ADMINISTRATORS (1–3); PARTNERSHIP (2).

CONSIDERATION—See AUTOMOBILES (11); CANCELLATION OF INSTRUMENTS (3); CONTRACTS (8, 11); CORPORATIONS (6); MASTER AND SERVANT (1, 2); PATENTS (9).

CONSPIRACY—See BANKS AND BANKING (8); CRIMINAL LAW (1, 2, 4–6); FRAUD (1).

CONSTITUTIONAL LAW.

1. Every intendment is in favor of the constitutionality of the ordinance of a municipal corporation. *Austin* v. *Older*, 667.
2. One attacking the constitutionality of a municipal ordinance has the burden of showing that it has no real or substantial relation to public health, morals, safety or general welfare. *Id.* 668.
3. A zoning ordinance requiring an immediate cessation of a nonconforming use may be unconstitutional because it deprives one of property rights out of proportion to the public benefits obtained but an ordinance prohibiting enlargement of a nonconforming building is within the police power. *Id.* 668.
4. The due process clause does not prevent a valid exercise of the police power. *Id.*
5. Property is held subject to right of government to regulate its use in the exercise of the police power so that it shall not be injurious to the rights of the community or so that it may promote its health, morals, safety and welfare. *Id.*
6. Regulations may result to some extent practically in the taking of property, or the restriction of its use and yet not be deemed confiscatory or unreasonable. *Id.*

See APPEAL AND ERROR (13); MUNICIPAL CORPORATIONS (7); OFFICERS (2); SCHOOLS AND SCHOOL DISTRICTS (1, 2); STATUTES (6).

CONSTRUCTION OF CONTRACTS—See CONTRACTS (2, 3).

CONSTRUCTION OF ORDINANCE—See MUNICIPAL CORPORATIONS (3).

CONSTRUCTION OF POLICY—See INSURANCE (8–12, 14).

CONSTRUCTION OF STATUTES—See COSTS (2); STATUTES (1–3, 7, 8); TAXATION (9).

CONSTRUCTION OF WILL—See WILLS (14).

CONSTRUCTIVE NOTICE—See CORPORATIONS (7).

CONSTRUCTIVE TRUSTS—See APPEAL AND ERROR (22); EQUITY (8, 9); TRUSTS (14).

CONTINGENT FEES—See EXECUTORS AND ADMINISTRATORS (13–16).

CONTINUANCE—See CRIMINAL LAW (11).

CONTRACTS.

1. There is no public policy which permits persons or corporations to retain advantages and repudiate the obligations which produce them, except when the transaction is condemned as immoral or by positive statute and the only method of rendering the law effective is to leave the parties where they put themselves. *Briggs Commercial & Development Co.* v. *Finley*, 1.
2. A contract will be construed so as to give effect to every word or phrase as far as practicable. *Mondou* v. *Lincoln Mutual Casualty Co.*, 354.
3. Where the context of a written contract clearly implies or suggests that a certain word has been omitted, such word will be supplied by construction. *Id.*
4. A contract becomes the rule of action between the parties to it and governs their rights and is enforceable if it is not contrary to law. *Schnack* v. *Applied Arts Corp.*, 434.
5. Acceptance of an option must be in strict compliance with the terms proposed, both as to the exact thing offered and within the time specified; otherwise the right is lost. *Nu-Way Service Stations, Inc.*, v. *Vandenberg Bros. Oil Co.*, 551.
6. The power vested in an optionee to exercise a right at the end of a fixed period does not authorize him to exercise it prior to the time designated. *Id.*
7. In action to recover compensation under alleged contract of employment under plaintiff's testimony which indicated parties contemplated reducing contract to writing, unless such a writing was a condition precedent to the taking effect of alleged oral agreement, negotiations, if carried to point of mutual accord, could constitute a valid present contract especially where performance was entered upon and might not extend beyond a year (3 Comp. Laws 1929, § 13417). *Adolph* v. *Cookware Company of America*, 562.

CONTRACTS—Continued.

8. Action of plaintiff, a chiropractor, actively engaged in practice in another State in giving up his practice *held*, but an incident necessary on his part to place himself in a position to accept and perform contract to write a book and act as head of defendant manufacturer's health extension department and not a price or consideration paid defendant for the contract of employment. *Id.*

9. Whether alleged oral contract to employ plaintiff was fully agreed to and complete and the contemplated reduction to writing was to be but a memorial of the settled terms of the employment *held*, under plaintiff's testimony, a question of fact for the jury. *Id.*

10. Although a party to a contract had objections to it, yet having executed it, his mouth is closed against any denial that it superseded all previous arrangements. *Paul* v. *University Motor Sales Co.*, 589.

11. Agreement of land contract vendor to release purchasers thereunder and take bonds from the Home Owners' Loan Corporation, a third party, *held*, sufficient consideration for oral agreement of purchasers to give a note and second mortgage after mortgage was given to the corporation where release was merely intended to affect priority of obligations involved. *Meek* v. *Wilson*, 679.

12. Contracts which tend to bring about results which the law seeks to prevent are unenforceable. *Id.* 680.

See APPEAL AND ERROR (8, 30); BANKS AND BANKING (9); BROKERS (1–3, 6); CANCELLATION OF INSTRUMENTS (1); CORPORATIONS (13); EQUITY (2); ESTOPPEL (1, 4); EVIDENCE (22, 26); EXECUTORS AND ADMINISTRATORS (10, 11, 13–15); FRAUD (2, 3); FRAUDS, STATUTE OF; JOINT STOCK COMPANIES; JUDGMENT (6); LANDLORD AND TENANT (1); LIMITATION OF ACTIONS (8); MASTER AND SERVANT; PARENT AND CHILD (1, 3); PATENTS (1, 3, 8–10); PLEADING (4, 6, 8); SCHOOLS AND SCHOOL DISTRICTS; TRADE UNIONS (2, 4); VENDOR AND PURCHASER (1); WITNESSES (4).

CONTRIBUTORY NEGLIGENCE—See APPEAL AND ERROR (4, 20); AUTOMOBILES (7–9, 16, 20, 21, 26, 27, 30–32, 34, 36); CARRIERS (10, 11).

CONVERSION—See ANIMALS; BANKRUPTCY; EQUITY (9); EXECUTORS AND ADMINISTRATORS (9).

CONVICTION OF LESSER CRIME—See RAPE (2).

CO-OWNERS—See PATENTS (5, 6, 9, 10).

CORPORATIONS.

1. Directors and officers of a corporation stand in a fiduciary position and may deal with it only in good faith and with all material facts made known to the other directors. *Barber* v. *Kolowich*, 97.

CORPORATIONS—Continued.

2. A director has the burden of proving the fairness and honesty of his dealings with the corporation. *Id.*
3. Resolution amending articles of incorporation at meeting of stockholders, which authorized sale to them of no par stock at $1 per share and giving such stock equal rights as to dividends, voting, and distribution upon liquidation with the outstanding stock which had a par value of $100 per share, book value of $112.43, and which had been purchased at public auction at $2.50, *held*, not invalid because some stock had been voted in favor thereof by pledgee where owner was present at the meeting, made no complaint thereat and sufficient stock to pass the resolution by a two-thirds majority had been voted in favor of passage of the resolution even though pledged stock had been voted against it. *Seaman* v. *Ironwood Amusement Corp.*, 220.
4. Vote by receiver of bank in favor of resolution amending articles of incorporation at meeting of stockholders, which authorized sale to them of no par stock at $1 per share and giving such stock equal rights as to dividends, voting, and distribution upon liquidation with the outstanding stock which had a par value of $100 per share, book value of $112.43, and which had been purchased at public auction at $2.50, *held*, proper in suit by a stockholder brought some time later, where fact that such voter, as receiver of the bank, was the owner of the stock was evidenced by stock record of the corporation and the record in the case and no challenge of his right to vote either was or could be made. *Id.*
5. In a stockholder's suit against corporation and certain other stockholders to require corporation to reimburse such stockholders as had purchased no par stock issued pursuant to resolution amending articles of incorporation, which had been passed by holders of a majority of upwards of two-thirds of the outstanding stock, whereby sale to stockholders of the no par stock was authorized at $1 per share and it was given equal rights as to dividends, voting, and distribution upon liquidation with the then outstanding stock which had a par value of $100 per share, book value of $112.43, and which had been purchased at public auction at $2.50, action of stockholders in so amending articles in order to raise capital for corporation in straitened financial circumstances *held*, without fraud, either actual or constructive under record presented. *Id.*
6. Statutory requirement that holders of two-thirds of the total number of shares of each class of stock outstanding and entitled to vote on matter of issuance or subscription to shares without par value fix consideration at which such stock was to be issued *held*, inapplicable to resolution, passed at stockholders' meeting, to amend articles of incorporation so as to permit issuance of such stock, authority to amend articles without limitation so long as articles as amended would have been authorized by statute as original articles being conferred upon holders of a mere majority of shares entitled to vote (Act No. 327, §§ 19, 43, Pub. Acts 1931). *Id.* 221.

CORPORATIONS—Continued.

7. A shareholder represented by proxy at a meeting is chargeable with knowledge of facts connected with the proceedings of that meeting, known to his proxy. *Id.*

8. In stockholder's suit against corporation and certain other stockholders who purchased shares of newly-authorized stock without par value, plaintiff's claim that such stock should be surrendered to corporation which in turn should be required to reimburse purchasers the amount it had received therefor because offer of the corporation to its stockholders had been changed by action of the board of directors which amounted to a preferential offer *held*, untenable where plaintiff, through his brother as proxy, knew of action of stockholders and directors but disdained participation in efforts of others to reorganize and rebuild the corporation when it was facing bankruptcy and record does not disclose any action was ever taken at a stockholders' or directors' meeting changing the offer by cancellation of balance due from stockholders on their original subscriptions to the newly-authorized stock. *Id.*

9. Plaintiff, a stockholder in defendant corporation which was empowered by proper corporate and governmental authorities to issue to stockholders for $1 per share, stock without par value with equal rights as to dividends, voting, and distribution upon liquidation with the outstanding stock which had a par value of $100 per share, book value of $112.43, and which had been purchased at public auction at $2.50, *held*, by waiting for over two years thereafter, when corporation had emerged from financial straits, guilty of laches and to have waived his right to *pro rata* share of no par stock or to equitable relief where record shows he or his proxy had full opportunity to pre-empt shares, his proxy was present at trial but did not testify, no intentional wrong to plaintiff is claimed nor was there an act of fraud perpetrated by the corporation or any of its officers. *Id.* 222.

10. Laches is a defense to the action of a minority stockholder to set aside corporate acts whether fraudulent or *ultra vires*. *Id.*

11. In suit by executor of estate of owner of original shares of stock left with broker defendant as collateral for account of third person, also a defendant, if broker has a lien upon stock issued to third party upon surrender of original stock after death of its owner and with knowledge thereof, the court can still determine who is rightful owner as between plaintiff and such third party. *Detroit Trust Co.* v. *Struggles*, 472.

12. A corporation will generally be looked upon as a legal entity until sufficient reason to the contrary appear but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, defend crime, or in support of an end subversive of the policy of the courts, the law will regard the corporation as an association of persons. *Paul* v. *University Motor Sales Co.*, 589.

CORPORATIONS—Continued.

13. In order to carry out the intention of parties to a contract of purchase of corporate automobile sales agency, fiction that corporate existence of defendant company was distinct from that of its stockholders is disregarded where so-called "complete inventory and appraisal," referred to in contract and pursuant to which it was drawn, omitted reference to plaintiffs' claims for loans to the corporation and past due salary, hence plaintiffs are estopped to deny their claims against the corporation had been discharged where purchasers assumed only such corporate liabilities as were enumerated in the inventory and appraisal. *Id.*

See APPEAL AND ERROR (3, 23); AUTOMOBILES (12, 13); AVIATION (4); BANKS AND BANKING (4); CONTRACTS (1); EQUITY (1, 8, 9); ESTOPPEL (3); PLEADING (6, 8); REFORMATION OF INSTRUMENTS; TRUSTS (7–10); WITNESSES (5).

COSTS.

1. In mandamus proceeding to compel payment of claim for salary alleged to be due a deputy sheriff, no costs are allowed, a public question being involved. *Tetro* v. *County of Wayne,* 131.

2. No costs are allowed in proceeding between plaintiff city, located in defendant county, and such county to determine construction of statutes relative to distribution of motor vehicle weight and gasoline tax moneys, a public question being involved (1 Comp. Laws 1929, §§ 3594, 4651, as amended; Act No. 130, Pub. Acts 1931). *City of Menominee* v. *County of Menominee,* 147.

3. No costs are allowed in controversy between city and county road commissioners involving allocation of funds received by county from State motor vehicle weight and gasoline tax moneys for use on dedicated streets and alleys in recorded plats outside of incorporated cities and villages, a public question being involved (1 Comp. Laws 1929, § 3594, as last amended by Act No. 8, Pub. Acts 1934 [1st Ex. Sess.]; § 4651, as last amended by Act No. 7, Pub. Acts 1934 [1st Ex. Sess.]; Act No. 130, Pub. Acts 1931, as amended by Act No. 238, Pub. Acts 1937). *City of Iron Mountain* v. *Dickinson County Road Commissioners,* 213.

4. No costs are awarded where appellants in equity prevail only in part on appeal. *In re Richards' Estate,* 486.

5. No costs are allowed either party on appeal from circuit court which had changed relief granted in probate court from which both claimant and legatee had appealed where Supreme Court restored judgment as allowed by probate court. *In re Trombley's Estate,* 605.

6. No costs are allowed in mandamus proceeding to compel issuance of building permit where construction of provisions of zoning ordinance as to discretion of board of appeals is sought, a question of public interest being involved. *Austin* v. *Older,* 669.

COSTS—Continued.

7. No costs are allowed defendant mortgagors on appeal from decree of foreclosure of second mortgage notwithstanding second mortgage is set aside as in contravention of public policy where defendants failed to raise such question properly in the trial court and thereby enable trial judge to have made his determination with that issue in mind and possibly have obviated necessity of an appeal. *Meek* v. *Wilson,* 680.

See DIVORCE (3, 9, 11).

COTTAGES—See CHATTEL MORTGAGES.

COUNTIES.

Relator in mandamus proceeding to compel payment to him of additional salary for services as deputy sheriff *held,* not entitled to relief where resolution of board of supervisors in accordance with which relief is sought is admitted not to have been passed in accordance with statutory requirements (1 Comp. Laws 1929, § 1122). *Tetro* v. *County of Wayne,* 131.

See COSTS (2, 3); EVIDENCE (9); MANDAMUS (1); OFFICERS (2); STATUTES (2); TAXATION (8–10).

COURSE OF PRACTICE—See INSURANCE (1).

COURT RULES—See APPEAL AND ERROR (14, 27, 28); JUDGMENT (7, 8, 13); MANDAMUS (2); PLEADING (5).

COURTS.

1. The power of appointment of a guardian *ad litem* is incident to the power of every court to try a case and the power is then confined to the particular case at bar. *King* v. *Emmons,* 117.
2. Jurisdiction of the probate court is derived entirely from statute, none of it from the common law. *Id.*
3. Statute authorizing the probate court, upon request of any person interested, to appoint a guardian *ad litem* for person unborn, unascertained or legally incompetent to act in his own behalf and who is not represented otherwise than by the trustee whose account or petition is before the court *held,* to contemplate only the appointment of such guardian by the judge of probate incident to a matter being prosecuted in the probate court and not to authorize appointment of guardian *ad litem* to institute and prosecute litigation in the circuit court, since such power is vested in circuit court itself (3 Comp. Laws 1929, §§ 14036, 15899). *Id.*
4. In the absence of a controlling statute to the contrary, the power to appoint a suitable person as next friend to prosecute a suit in the circuit court on behalf of unknown and unascertained minors would be in the circuit court, not the probate court. *Id.*
5. Claim that deputy sheriff is entitled to additional salary in accordance with resolution of board of supervisors because such resolution was assumed to have been valid in a previous

COURTS—Continued.

case involving it *held*, untenable where question of validity of resolution involved was not presented in such previous case. *Tetro* v. *County of Wayne*, 131.

6. Jurisdiction cannot be thrust upon a court by consent of the parties when such jurisdiction does not exist under the law. *Mondou* v. *Lincoln Mutual Casualty Co.*, 353.

7. The probate court has exclusive jurisdiction of the administration and settlement of estates of deceased persons except where its remedies are inadequate or interposition of equity is necessary for some auxiliary purpose. *Grigg* v. *Hanna*, 443.

8. Before a court overrules a decision deliberately made, it should be convinced not merely that the case was wrongly decided but also that less injury will result from overruling than from following it. *Dolby* v. *State Highway Commissioner*, 610.

9. A recognized rule of property ought not to be overturned without the very best of reasons. *Id.*

See CORPORATIONS (12); DIVORCE (6); FRAUD (4); JUDGMENT (3); LANDLORD AND TENANT (4); OFFICERS (1); TRADE UNIONS (5); WILLS (8, 15, 16).

COUSINS—See WILLS (4).

COVENANTS.

1. Failure of property owners in the block to stop previous violations of restrictions in a subdivision does not prevent them from obtaining injunctive relief to prevent further violations where there has not been such a departure from the restrictions as to create an abandonment and equity will grant relief if the restriction can be shown of value to complainants. *Smith* v. *Nickoloff*, 188.

2. Restrictions on lots of large and old subdivision that no dwelling worth less than $800 shall be erected or placed on them, which has been construed by residents to mean the property is to be used only for dwelling house purposes, may not be considered as waived or abandoned where there have been very few deviations and changes in neighborhood, due in part to use of nearby property outside of subdivision for other than residence purposes, do not leave restrictions without substantial benefit to plaintiffs. *Id.*

3. Plaintiffs, owners of lot adjacent to those owned by defendants, all in a subdivision subject to restriction of use to residence purposes only, *held*, entitled to injunction restraining defendants from moving onto their lots a building, not of soundproof construction, in which restaurant had been operated on previous sites and liquor served therein and operation was accompanied with considerable disturbance, fighting and noise, both to enforce restriction shown to be of value to plaintiffs and to enjoin a nuisance. *Id.*

COVENANTS—Continued.

4. Reciprocal negative easements restricting use of property in a subdivision, containing 32 lots, to residence purposes *held*, not established where evidence shows subdivider had sold or used 11 lots without restrictions, one lot purchaser had him thereafter insert such restriction in deed he had hitherto executed for avowed purpose of attempting to increase amount owner expected to receive for taking it upon relocation of railroad right of way, some 7 lots were used for residence purposes including plaintiffs' in whose deed title was recited as "free from all incumbrances whatever except building restrictions of record," and subdivider deeded some lots and parts of others without restrictions to State for railroad purposes, there being no evidence of intention to create a servitude beneficial to the land retained by the subdivider. *Taylor* v. *State Highway Commissioner*, 215.
5. A suit founded on a covenant seeks affirmatively to enforce the terms of the covenant by way of specific performance or by recovery of damages for breach of the covenant by one relying on it and asserting his rights thereunder. *Wall* v. *Zynda*, 260.
6. Fact that owners of lots in a subdivision, restricted to use for residential purposes, have permitted erection of signboards which are relatively temporary *held*, insufficient to constitute waiver of right to prevent construction of permanent buildings devoted to commercial purposes. *Taylor Avenue Improvement Ass'n* v. *Detroit Trust Co.*, 304.
7. Decisions in suits to enforce restrictions depend entirely upon the facts in each particular case. *Id.*
8. Relief from very onerous restrictions because of a change in the character of the neighborhood will be granted only if it can be done without causing any damage to others who have purchased their property in the restricted area in reliance on the restrictions, but restrictions will be modified where there has been such a change in a neighborhood that the modification will not damage owners of other lots in the subdivision. *Id.*
9. Frequent violations of a restriction, unobjected to, are indicative of an abandonment of such restriction. *Id.* 305.
10. Occasional violation of a restriction in a more remote portion of a street in a restricted subdivision does not preclude one from complaining of a nearer violation and does not operate as a general abandonment of the restrictions. *Id.*
11. Usually a restriction will be upheld wherever it remains of any substantial benefit to parties objecting to its violation provided they are not estopped by their conduct from making such objection. *Id.*
12. In suit by owners of lots in a subdivision three blocks long, containing but 98 lots all abutting one side or the other of one street, which lots were restricted to use for residence purposes and whereupon it was required that front line of house be set back 25 feet from front line of lot, against owners of 200-foot

COVENANTS—Continued.

lot at end of subdivision to restrain use of 60 feet of lot at end of street, where it intersects with a main traffic artery, for gasoline station purposes, restriction is modified to permit erection of gasoline station on such portion of end lot otherwise surrounded by property used for non-residential purposes where nearest plaintiff is separated from 60-foot parcel by an alley and 140 feet of unoccupied land in balance of lot and plaintiffs do not show they are substantially affected by presence of the gasoline station set back 25 feet from street on land not remotely desirable for dwelling house purposes. *Id.*

See APPEAL AND ERROR (10); EQUITY (5); JUDGMENT (1); LANDLORD AND TENANT (2); VENDOR AND PURCHASER (1).

CREDIBILITY—See APPEAL AND ERROR (19); CRIMINAL LAW (1, 6, 13).

CREDITORS—See EXECUTORS AND ADMINISTRATORS (4).

CRIMINAL LAW.

1. Conviction of defendants charged with conspiracy to murder mayor of a village *held*, not against great weight of evidence, notwithstanding testimony of several witnesses linking defendants with alleged conspiracy was that of felons, it being jury's province to determine credibility of the witnesses. *People* v. *Pettijohn*, 108.
2. Court having jurisdiction of place where an overt act in connection with conspiracy to murder took place has jurisdiction to try defendants charged with such conspiracy especially where both defendants were present with other conspirators on such occasion. *Id.*
3. Verdict of jury that recorder's court of Detroit, whose jurisdiction as to crimes was limited to those committed within such city, had jurisdiction of prosecution of defendants for conspiracy to commit murder *held*, borne out by testimony. *Id.*
4. Admission of acts and statements of conspirators before proof was offered of defendant's complicity is not in itself ground for reversal. *Id.*
5. The existence of the assent of minds which is involved in a conspiracy may be, and, from the secrecy of the crime, usually must be, inferred by the jury from proof of facts and circumstances which, taken together, apparently indicate that they are merely parts of some complete whole. *Id.*
6. Instruction given jury that they might disregard testimony of witnesses who testified falsely in any material fact and take into consideration the fact that four witnesses for the prosecution had been convicted of crime and give such weight to good character of defendants as jury thought defendants were entitled in prosecution for conspiracy to commit a murder *held*, fair and to have covered substantially defendants' proper requests to charge even though parts were not given with such emphasis as defendants may have preferred. *Id.*

CRIMINAL LAW—Continued.

7. Upon reversal of conviction of assault with intent to commit the crime of rape for error committed in admission of testimony, new trial is granted but is restricted to charge of assault with intent to commit the crime of rape. *People* v. *Rock*, 172.

8. The jurisdiction of the circuit court is limited to the crimes included within the return of the examining magistrate. *People* v. *Monick*, 195.

9. Since intent to commit the crime of larceny, included in statute as part of offense of robbing a safe or attempt to do so, is a separate and distinct crime from that of intent merely to do the physical acts prohibited, inclusion of allegation of such intent in return of the examining magistrate is necessary in order to bind accused over for trial in circuit court under such statute (Act No. 328, § 531, Pub. Acts 1931). *Id.*

10. Information charging defendant with attempt to break and destroy a safe containing valuables gave circuit court no jurisdiction over crime of attempt, with intent to commit crime of larceny, to break and destroy a safe containing valuables since the two crimes are different, hence conviction of latter crime on information amended to include allegations of intent to commit crime of larceny after prosecution had rested was error (Act No. 328, § 531, Pub. Acts 1931). *Id.* 196.

11. Failure of defendant to request a continuance or re-examination and re-arraignment cannot be considered as a waiver of circuit court's lack of jurisdiction of crime alleged in information amended after prosecution had rested so as to charge crime different than that included in return of examining magistrate. *Id.*

12. Admission of testimony that all of the 70 calves whose meat was in possession of defendants were under four weeks old *held*, not prejudicial error in prosecution for possession of such meat with intent to sell it, where witnesses testified they had examined all of the calves and people's expert witness, now deceased, had testified in justice court trial that meat of two selected and produced at trial represented average of entire group, as jury could take the testimony for what it was worth as against defendants' claim witnesses had not made a sufficient examination so as to be able to testify that all 70 calves were under four weeks old and it was unnecessary to show all were under that age (1 Comp. Laws 1929, § 5469). *People* v. *Ferris*, 700.

13. Credibility of witnesses, veterinarians for defendants and experienced farmers for people, in prosecution for possession of meat of calves less than four weeks old with intent to sell it *held*, for jury, under evidence presented, and its conviction well supported by evidence (1 Comp. Laws 1929, § 5469). *Id.*

CRIMINAL LAW—Continued.

14. In prosecution of two defendants for possession of meat of calves less than four weeks old with intent to sell it, evidence of actions of both defendants *held,* to justify finding of guilt (1 Comp. Laws 1929, § 5469). *Id.* 701.

See CORPORATIONS (12).

CRIPPLED CHILDREN—See TRUSTS (7–9).

CROSS-APPEAL—See APPEAL AND ERROR (7).

CROSS-EXAMINATION—See BANKS AND BANKING (6).

CROWS—See INSURANCE (6).

CUSTOMS AND USAGES—See INSURANCE (1).

DAMAGES.

Verdict of $6,296.15 to 28-year old man who was receiving $65 a month and his board at time of injuries consisting of several comminuted fractures of leg bones and which required him to wear steel brace at time of trial, and which seriously angulated or bowed left leg, a condition that will in all probability prove permanent and disable him from doing work he had been doing *held,* not excessive. *Pearce* v. *Rodell,* 22.

See AUTOMOBILES (21); COVENANTS (5, 8, 11, 12); EMINENT DOMAIN (3–5); EXECUTORS AND ADMINISTRATORS (9); FRAUD (2); JUDGMENT (6, 7, 9); MASTER AND SERVANT (3); NEW TRIAL.

DEATH.

In action under survival act by special administratrix of estate of one experienced flyer against administrator of estate of another, killed in crash of airplane whose dual controls were found connected after the crash and in perfect working order, that defendant's decedent was in front cockpit, was a member of club which owned the plane and had sole right to fly it and was charged with the flying time and plaintiff's decedent was not a member of the club and without authority to fly the plane *held,* insufficient to establish fact that defendant's decedent was pilot of the plane and solely responsible for the fatal crash (3 Comp. Laws 1929, § 14040). *Madyck* v. *Shelley,* 396.

See AVIATION (5); DEEDS (6, 7); EQUITY (8); EVIDENCE (11, 33); FRATERNAL BENEFICIARY SOCIETIES (2); FRAUD (4); GIFTS (1); INSURANCE (3–6); JUDGMENT (4); LIMITATION OF ACTIONS (8); PARTNERSHIP (1); TRUSTS (12); WILLS (1, 2); WITNESSES (4).

DEATH ACT—See GAS (5).

DEBTOR AND CREDITOR—See BANKS AND BANKING (3–8); EVIDENCE (26); EXECUTORS AND ADMINISTRATORS (11); FRAUD (1); HUSBAND AND WIFE; PLEADING (8).

DECLARATION—See PLEADING (2, 3, 5, 6, 8).

DEEDS.

1. Subsequent to execution of a deed that is absolute in form, nothing further need be done to render it effective than to deliver it to the grantee. *Tighe* v. *Davis,* 244.
2. The act of delivery of a deed is not necessarily a transfer of the possession of the instrument to the grantee and an acceptance by him but it is that act of the grantor, indicated either by acts or words or both, which shows an intention on his part to perfect the transaction, by a surrender of the instrument to the grantee, or to some third person for his use and benefit. *Id.*
3. The test of a conveyance is whether it can be said that delivery of the deed was such as to convey a present interest in the land. *Id.*
4. Physical delivery of a deed to the grantee raises a rebuttable presumption of delivery. *Id.*
5. The burden of proving a valid delivery of a deed ordinarily rests upon the party relying upon the instrument but in such cases testimony that the grantor entertained a secret and undisclosed intention that the deed was ineffectual to pass title is not permissible. *Id.*
6. In suit to set aside deed from plaintiff to defendant, delivery to defendant *held,* ineffective to pass title since there was no intention to pass title, where evidence of subsequent conduct shows, among other things, grantee did not consider himself owner when he gained physical possession of the deed and deed was thereafter returned to grantor's husband and not recorded until grantee regained possession of it after death of the husband who handled his own and plaintiff's affairs without question by her. *Id.*
7. Record, containing conflicting testimony in suit to set aside and declare void a deed, *held,* to present no reason for disturbing finding that delivery was not effective to pass title to defendant grantee, husband of plaintiff's step-daughter, after death of grantor's husband when grantee regained physical possession of the deed. *Id.* 245.
8. Deeds from grantor, an elderly woman, to a third party and from such third party jointly to grantor and plaintiff, a girl whom grantor and her late husband had taken at an early age, reared and educated but not adopted, *held,* not delivered with intent to pass any present interest in the property where evidence shows the unrecorded deeds were placed by grantor in a safety deposit box to which plaintiff had joint right of access, removed by plaintiff without grantor's knowledge or consent, recorded and returned to box, grantor testified deed, rather than will, was executed to save probate expenses and that she had never delivered the deed. *Wilcox* v. *Wilcox,* 313.
9. The intent of the grantor to convey an interest is an essential element of an effective delivery. *Id.*
10. A grantor must intend that the transfer of possession of a deed shall make the deed effective as a conveyance. *Id.* 314.

DEEDS—Continued.

11. In suit by foster child to establish her interest in property alleged to have been conveyed to her by means of two deeds, one from her elderly foster mother to a third person and other from third person to foster mother and plaintiff jointly, which deeds were contemporaneously executed, hence, considered together, delivery of second deed to foster mother *held*, not to constitute a delivery to plaintiff where it is shown foster mother has never had intent at any time to have deeds presently operative to convey an interest to plaintiff. *Id.*

12. Clause in deed of land 35 to 45 feet wide and 1,400 feet long providing that "said strip of land is to be used for railroad purposes only, and ceasing to be used for such purposes, shall revert to said parties of the first part, their heirs or assigns" *held*, to create a fee subject to divestment, a fee upon condition subsequent. *Dolby* v. *State Highway Commissioner*, 609.

13. Attempt of grantor of fee upon condition subsequent to assign his right of reverter before breach of condition not only failed to effect assignment but extinguished the right. *Id.* 610.

14. Record in plaintiffs' suit to establish title in them as to strip of land conveyed by deed vesting grantee with fee upon condition subsequent *held*, to show that subsequently executed mortgages merely recognized previous conveyance of fee from grantor to grantee. *Id.*

See APPEAL AND ERROR (13, 26, 29); CANCELLATION OF INSTRUMENTS (3); COVENANTS (4); EQUITY (12).

DEFENSES—See CORPORATIONS (10); PLEADING (5, 8).

DELIVERY—See DEEDS (1–11); GIFTS; WITNESSES (3).

DELUSIONS—See WILLS (10).

DEMAND—See BANKS AND BANKING (10); FRAUD (3).

DENTISTS—See MALPRACTICE (1); NEW TRIAL; PHYSICIANS AND SURGEONS.

DEPUTY SHERIFFS—See COSTS (1); COUNTIES; COURTS (5); MANDAMUS (1).

DIRECTED VERDICT—See APPEAL AND ERROR (5, 20, 21, 24); AUTOMOBILES (16); JUDGMENT (4); TRUSTS (5, 6).

DIRECTORS—See BANKS AND BANKING (4, 5); CORPORATIONS (1, 2, 8).

DISABILITY—See WORKMEN'S COMPENSATION (5, 7).

DISAGREEMENT OF JURY—See APPEAL AND ERROR (21).

DISCHARGE—See BANKRUPTCY; MASTER AND SERVANT (3); PLEADING (5, 8).

DISCLOSURE—See BANKS AND BANKING (4); EVIDENCE (24).

DISCOUNTS—See TAXATION (2, 3).

DISCOVERY—See APPEAL AND ERROR (22); EXECUTORS AND ADMINISTRATORS (8).

DISCRETION OF COURT—See DIVORCE (1, 2); EQUITY (2); JUDGMENT (4); MANDAMUS (2); MORTGAGES (10).

DISMISSAL AND NONSUIT.

Motion to dismiss bill of complaint because plaintiff who brought suit was not a proper party would not be granted where one who is unquestionably a proper party has intervened and could forthwith renew the suit by filing a like bill of complaint (3 Comp. Laws 1929, §§ 14018, 14021). *King* v. *Emmons*, 117.

See APPEAL AND ERROR (2, 3); EQUITY (11).

DISTRICT MANAGER—See FRATERNAL BENEFICIARY SOCIETIES (1).

DITCH DIGGER—See JUDGMENT (7).

DIVIDENDS—See APPEAL AND ERROR (23); BUILDING AND LOAN ASSOCIATIONS (3); CORPORATIONS (3–5, 9); EQUITY (8); ESTOPPEL (3).

DIVISION OF PROPERTY—See DIVORCE (2, 3).

DIVORCE.

1. Amount to be awarded in lieu of dower and for permanent alimony rests largely in the discretion of the trial court and only where there is a manifest abuse of that discretion will award be interfered with on appeal. *Tyson* v. *Tyson*, 192.
2. On appeal of plaintiff wife, 72 years of age, from provisions as to disposition of dower rights and denial of alimony, decree awarding 69-year old defendant husband property worth about $12,000, subject to $4,000 mortgage, upon which he was receiving about $180 a month rent, *held*, not a manifest abuse of discretion where during marriage, which was one of convenience and which had lasted less than six years, plaintiff's property, in which parties had lived, had been freed from $244 mortgage by defendant and had been bettered by improvements costing defendant about $500, and plaintiff had done nothing to help defendant acquire his property. *Id.*
3. No costs are allowed defendant husband, 69 years of age, successful appellee on appeal from provisions of decree as to disposition of property and denial of alimony to 72-year old wife. *Id.*
4. Court's statutory power subsequently to modify provisions as to alimony in final decree in suit for divorce may not be exercised where no alimony was allowed in the original decree (3 Comp. Laws 1929, § 12748). *Mack* v. *Mack*, 365.

DIVORCE—Continued.

5. Trial court *held,* in error in amending final decree in suit for divorce which contained no provision for alimony and which made no reservation of right to do so, so as to provide for payment of alimony (3 Comp. Laws 1929, § 12748). *Id.*
6. Judicial power to decree divorce and all interlocutory proceedings, inclusive of temporary alimony, expense money, and counsel fees, is purely statutory, and the ordinary principles of equity jurisdiction do not obtain. *Id.*
7. Under statute providing counsel fees for wife in suit for divorce, such fees may be awarded not only during pendency of divorce proceedings and when an appeal is taken in good faith but also upon subsequent petition to modify decree as to alimony and children's support money and until the subject-matter of the suit is finally settled and determined (3 Comp. Laws 1929, § 12735). *Id.*
8. Amendatory decree awarding plaintiff wife $100 for counsel fees for services to be rendered in connection with proposed appeal from a recently amended decree is vacated on appeal where no brief was filed for plaintiff as contemplated by order granting counsel fees although she would otherwise have been entitled to such expenses even though relief with respect to petition for increase for support of children was denied (3 Comp. Laws 1929, § 12735). *Id.*
9. No costs are awarded husband, appellant in divorce suit, notwithstanding he is successful on appeal. *Id.* 366.
10. Evidence in husband's suit for divorce on ground of extreme cruelty *held,* sufficient to justify decree for plaintiff. *Weronka* v. *Weronka,* 493.
11. No costs are awarded husband though wife is unsuccessful on her appeal from decree of divorce. *Id.*

DOWER—See DIVORCE (1, 2).

DRUGGISTS—See PRINCIPAL AND SURETY (2).

DUAL CONTROLS—See AVIATION (1, 4, 5); DEATH.

DUE PROCESS—See CONSTITUTIONAL LAW (3, 4, 6).

DUSK—See AUTOMOBILES (7).

EARNING CAPACITY—See DAMAGES.

EASEMENTS—See COVENANTS (4).

EJECTMENT—See LANDLORD AND TENANT (5).

EMERGENCY—See AUTOMOBILES (32).

EMINENT DOMAIN.

1. Statute regulating proceedings for separation and reconstruction or alteration of existing separations of railroad and public highway grades *held*, not to require that grade separation proceedings be had prior to condemnation proceedings for widening of streets (1 Comp. Laws 1929, §§ 4481–4513; §§ 4514–4521, as amended by Act No. 335, Pub. Acts 1931). *In re Widening Michigan Avenue (Parcels 27, 32, 32A, 33)*, 55.
2. Under statute regulating proceedings for separation of railroad and public highway grades and the reconstruction or alteration of existing structures for increased highway or railroad facilities, the right of way and other property rights for the highway across the land and tracks of the railroad company, unless otherwise agreed upon, must be acquired in same manner as property is acquired for other highway purposes and may not be acquired under the grade separation statute (1 Comp. Laws 1929, § 4521, as amended by Act No. 335, Pub. Acts 1931). *Id.*
3. Grade separation damages may not be given in proceedings to condemn railroad rights of way for widening a street (1 Comp. Laws 1929, § 4521, as amended by Act No. 335, Pub. Acts 1931). *Id.*
4. Awards of six cents each to railroad companies for damages to portions of their rights of way taken by city for street widening purposes are affirmed where within range of testimony, and rights of litigants will not be affected by such affirmation since it does not preclude steps being taken to accomplish proposed reconstruction or alteration of existing grade separations (1 Comp. Laws 1929, §§ 4514–4521, as amended by Act No. 335, Pub. Acts 1931). *Id.*
5. Award of deduction of $2,280 to lessee from joint award of $4,263.23 as damages to land and $660 damages to frame warehouse, owned by railroad company, in proceedings to condemn land taken for street widening purposes *held*, not excessive but within fair range of testimony and facts which jury may have learned in examining property, the lease being a profitable one to lessee and entitling it to possession for 41½ months from the time of trial and its heavy machinery being located in portion taken. *Id.* 56.

ENGINEER—See MUNICIPAL CORPORATIONS (2).

ENTRY OF JUDGMENT—See JUDGMENT (13); MANDAMUS (2).

EQUALLY DIVIDED COURT—See OFFICERS (2).

EQUITY.

1. Allegations of fraud in bill of complaint in suit against executor of will of donor, who was also trustee under trust of residuum and non-profit corporation he organized for taking over assets of such trust, for accounting as to funds of estate alleged to have been fraudulently concealed from probate court,

EQUITY—Continued.

held, sufficient to give court of chancery jurisdiction to inquire into claimed fraudulent transactions as orders of the probate court fraudulently obtained are not *res judicata. King* v. *Emmons,* 118.

2. Denial of motion for rehearing in son's suit for specific performance of alleged oral contract of father to convey real and personal estate if son would stay home and help his folks *held,* not an abuse of discretion where plaintiff's motion therefor stated he was seeking only one-half of personal property and no realty, where there was no renunciation of any interest in realty and testimony, other than that of plaintiff's wife, amounted to but an expression of testamentary intent (3 Comp. Laws 1929, § 14219). *Speaker* v. *Speaker,* 185.

3. Equity will not permit one possessed of a right of rescission to delay unduly in the exercise of that right and while so doing speculate on the outcome of the transaction at the risk of his adversary. *Wall* v. *Zynda,* 260.

4. Under prayer for general relief in suit for rescission of land contracts brought by purchaser, plaintiff may not be granted relief by way of specific performance since such latter relief is wholly inconsistent with the former, might depend on wholly different facts and circumstances and disposition of suit can be made without prejudice to plaintiff's right, if any, to institute suit for specific performance. *Id.* 261.

5. Claim of laches on part of plaintiffs in bringing suit to enforce residence and building setback restrictions on subdivision, consisting of but 98 lots abutting one side or the other of a single street for distance of three blocks, against parties proposing to build a gasoline station *held,* without force where suit was started with reasonable promptness. *Taylor Avenue Improvement Ass'n* v. *Detroit Trust Co.,* 304.

6. Equity takes cognizance of case where one holding confidential and fiduciary relations to another, and thereby morally and legally bound to communicate the facts, conceals them for his own benefit and profit and to the disadvantage of the other. *Grigg* v. *Hanna,* 446.

7. A court of equity may adapt its relief to the exigencies of the case and when nothing more is required, may order a sum of money paid to plaintiff or give him a personal judgment therefor, to be enforced by execution. *Id.*

8. Since neither the remedy of trover or replevin is available to recover new stock certificates for executor of estate of person who took stock certificates, indorsed them in blank and left them with broker as collateral for a third person's account and after death of plaintiff's testate broker caused new certificates to be issued in name of third person since plaintiff had no legal title thereto, suit was properly brought in equity for accounting of dividends and to determine ownership as equity has independent power to impose a constructive trust upon the

EQUITY—Continued.

traceable proceeds of converted property whenever it appears just and equitable to do so. *Detroit Trust Co.* v. *Struggles,* 471.

9. If surrender of stock certificates by pledgee and causing new ones to be issued in name of third person, after death of party in whose name original certificates had been issued, constituted a conversion, the proceeds of such conversion were new stock certificates and not money, hence constructive trust and not an accounting is appropriate remedial device to grant relief to executor of estate of party who left original certificates with broker-pledgee. *Id.*

10. A court of equity has concurrent jurisdiction where a legal remedy is not available, the equitable remedy is more efficient or the procedure in equity affords advantages which are not attainable at law. *Id.* 472.

11. Where jurisdiction of equity is clear there is no obligation to send questions of fact to jury and if it be thought expedient to do so, it should be by sending an issue to a jury, and not by dismissing the bill upon the hearing. *Id.*

12. Lien upon premises until payment of sums advanced by defendants to plaintiffs, aged parents of defendant wife, plus legal interest, *held,* sufficient protection to defendants who had received warranty deed without exception, reservation or consideration for 80-acre farm upon which grantors have continued in possession where deed was set aside. *Bowen* v. *Kunkel,* 509.

See APPEAL AND ERROR (2, 3, 22, 23); COSTS (4); COURTS (7); COVENANTS (1, 2); DIVORCE (6); EXECUTORS AND ADMINISTRATORS (9); JUDGMENT (12); MORTGAGES (1); TRUSTS (8, 10, 13–15).

ESCAPE—See GAS (1).

ESTATES OF DECEDENTS—See APPEAL AND ERROR (22); COURTS (7); EXECUTORS AND ADMINISTRATORS (7, 8, 10, 11); GIFTS (1, 4); LIMITATION OF ACTIONS (8); PARTNERSHIP (2, 5).

ESTOPPEL.

1. A licensee cannot accept the benefits of a contract and, when called upon to perform its duties under it, repudiate it as made without right or as wanting in force if it is not actually a violation of law or wholly void. *Schnack* v. *Applied Arts Corp.,* 435.

2. The assignee or licensee of any right, accepted and acted under, may accordingly be estopped to deny the authority from which the right proceeds. *Id.*

3. In suit to cancel certificate of stock and require reissue of half of the number of shares to plaintiff and for accounting for dividends paid pledgee of original stock, owned by plaintiff and her late husband as tenants in common and pledged by latter as security for his personal note which was never paid,

ESTOPPEL—Continued.

evidence which showed that, notwithstanding plaintiff did not herself indorse original stock her name had been placed thereon beneath that of her husband's and that before original stock was caused to be transferred and reissued in name of pledgee, plaintiff knew the certificate purported to be indorsed by her and that pledgee was relying upon it as *bona fide* collateral over period of years after she had signed one of the renewal notes *held,* to estop her from asserting she was not bound by the indorsement. *Brouwers* v. *Allied Paper Mills,* 478.

4. If, in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands, in the absence of fraud or mistake. *Paul* v. *University Motor Sales Co.,* 589.

See CONTRACTS (10); CORPORATIONS (3, 8, 13); COVENANTS (11); INSURANCE (1); PATENTS (3, 5).

ETHICS—See ATTORNEY AND CLIENT.

EVIDENCE.

1. Admission of photographs taken some time after accident at the location thereof and showing plaintiff *held,* not error for purpose of showing general relative location of things at time pedestrian was injured. *Pearce* v. *Rodell,* 19.

2. While the answer of a properly qualified expert witness as to what might cause a given result, the ultimate fact to be proved, would not be inadmissible, admission of his answer as to what did cause it would be erroneous as an invasion of the province of the jury. *Id.*

3. Physician's testimony in pedestrian's action against motorist that pain, as to which plaintiff testified, was caused by adhesions which tended to limit function of limb, that is, fibrous unions between two tissues brought about as the result of inflammation, and that he would say such condition of the muscles and bones would be permanent and that the pain would continue *held,* not inadmissible as invading province of the jury where witness testified his answer was based upon his actual observations of the tendons, condition of the legs, knowledge and history of the patient. *Id.*

4. Testimony of physician who took X-rays of plaintiff's legs that his pain was due to atrophy of muscles, to shortening of both legs, to the angulation of the fragments and that change in the weight-bearing line existed because of the bowing and angulation of the lower left leg *held,* not inadmissible as an invasion of the province of the jury. *Id.* 20.

5. The test of the admissibility of testimony of experts is not whether the subject-matter is common or uncommon or whether many or few persons have knowledge of the matter but whether persons offered as experts have any peculiar knowledge or experience not common to the world, which renders their opinions

EVIDENCE—Continued.

founded on such knowledge or experience any aid to court or jury in determining questions at issue. *Id.*

6. A physician may testify as to the extent of certain injuries, whether the injury is permanent or not, the probability of recovery, or the probable results of the injury. *Id.*

7. The opinion of a medical man is admissible upon the condition of the human system, upon the probability of recovery from an injury, upon the question as to whether or not physical injuries are, or are not, of a permanent character and upon other questions peculiarly within his knowledge as such. *Id.*

8. Testimony of bank employee as to statement which deceased's nephew made relative to passage of title to certificates of deposit which had been purchased by deceased *held*, inadmissible as hearsay in administrator's suit to determine ownership of the certificates. *Geisel* v. *Burg*, 75.

9. It is a matter of common knowledge that as a result of Act No. 130, Pub. Acts 1931, annually during a transition period the maintenance of thousands of miles of what had theretofore been township highways was transferred from the townships to the respective counties. *City of Menominee* v. *County of Menominee*, 146.

10. Objection to hypothetical question of considerable length relative to opinion of expert as to whether or not testatrix was suffering from senile dementia to such an extent as destroyed her testamentary capacity at time will was executed *held*, properly sustained where in certain material particulars the facts assumed in the hypothetical question were not supported by testimony. *In re Evans' Estate*, 277.

11. Where death occurs in an unknown manner, the presumption of law is against suicide. *Stuckum* v. *Metropolitan Life Ins. Co.*, 297.

12. Presumption against suicide disappears when testimony is offered to rebut it and such presumption is not to be treated as evidence, but the ultimate burden of proof of showing suicide by a preponderance of evidence rests upon one asserting it. *Id.*

13. It is not unusual to carry jack handles and jacks in the rear of automobiles. *Id.*

14. It is common knowledge that accidents happen with shotguns and that it is not always necessary to pull the trigger in order to cause them to be discharged, there being a possibility of discharge through impacts, jars, or worn or defective mechanism. *Id.*

15. A plaintiff has the burden of showing his cause of action and every defendant is entitled to go clear unless made answerable by legal testimony. *Albers v. Pommerening*, 390.

16. A rebuttable or *prima facie* presumption has no weight as evidence but if challenged the presumption cannot be weighed against the evidence and supporting evidence must be introduced. *Madyck* v. *Shelley*, 396.

17. Presumptions are merely *prima facie* precepts and are in-

EVIDENCE—Continued.

ferences from the existence or nonexistence of facts. *Michigan Aero Club* v. *Shelley*, 402.

18. Presumptions disappear if, and when, evidence is introduced from which facts may be found and cannot be weighed against evidence. *Id.*

19. Presumption, if any, that defendant's decedent, a member of plaintiff club, was operating airplane with dual controls at time plane crashed *held*, to have disappeared upon introduction of proof that his passenger in rear cockpit was a pilot and dual controls were connected immediately prior to flight in question (Act No. 53, Pub. Acts 1931, as amended by Act No. 119, Pub. Acts 1935; Act No. 328, §§ 43–45, Pub. Acts 1931; 44 Stat. at L. p. 568 *et seq.*). *Id.*

20. A mere claim cannot stand in place of evidence and operate as proof and things not made to appear must be taken as not existing. *Id.*

21. A plaintiff's case must be established by the evidence and the court may not guess in default of evidence. *Id.*

22. *Fraudulent representations in a contract* will void it and fact that subscription agreement contains provision that it was taken subject to approval or rejection of syndicate and that latter would not be bound by representations other than those printed therein did not prevent plaintiff subscriber from showing that procurement of the agreement was void by reason of false representations made by agent of syndicate. *Gloeser* v. *Moore*, 425.

23. Failure to produce testimony which is in control of the particular party justifies the presumption that the testimony, if produced, would be detrimental. *Grigg* v. *Hanna*, 445.

24. Failure of a fiduciary to disclose fully and fairly all facts to those to whom such duty of disclosure is owed may be regarded as evidence of fraud. *Id.*

25. When evidence is introduced to rebut a rebuttable presumption and supporting evidence is also introduced, it then becomes a question of weighing the actual evidence introduced without giving any evidential force to the presumption. *In re Haskell's Estate*, 513.

26. Exclusion of testimony, offered by plaintiffs in their action to recover loans made to defendant, a corporation, and unpaid salaries which accrued prior to the sale of their interests therein to individuals, not defendants, pursuant to a contract that referred to an inventory and appraisal which had been prepared by a certified public accountant, a copy of which was introduced by defendants that had omitted plaintiffs' claims as liabilities, that there was another and different inventory and appraisal on sheets of a different size which the same accountant had prepared and which included their claims *held*, proper, since witness could not testify as to contents of unambiguous written instrument, no subpœna was served upon alleged maker to bring in such claimed inventory in order to

EVIDENCE—Continued.

present best evidence and accountant testified exhibit introduced was the only one presented to parties as a basis for negotiating their deal and no questions were asked him concerning such claimed inventory. *Paul* v. *University Motor Sales Co.*, 588.

27. Parol evidence cannot be resorted to to add to, vary, contradict, or change the legal effect of the language of a written instrument unambiguous on its face. *Id.*

28. The contents of a written instrument cannot be proved by parol unless the instrument itself is produced or its absence accounted for. *Id.*

29. It must be shown that it is impossible to produce the best and most direct testimony before other evidence is admissible. *Id.*

30. Secondary evidence is not admissible without proof that the original is lost or otherwise beyond the power of the party to produce it. *Id.* 589.

31. Lay witnesses, in testifying to their opinions on technical subjects, in which men of professional training may be more expert, must have personally inspected and observed the subject-matter and they must detail the facts and circumstances upon which their opinions are based. *People* v. *Ferris*, 699.

32. In prosecution for having possession of meat of calves less than four weeks old with intention of selling it, testimony of people's witnesses who had spent many years at farming and who detailed various facts by which they arrived at conclusion defendants had meat of calves under lawful age *held*, competent (1 Comp. Laws 1929, § 5469). *Id.* 700.

33. In circuit court trial of defendants for possession of meat of calves less than four weeks old with intent to sell it, reading of testimony of witness, taken at justice court trial, who testified he was a special investigator for State department of agriculture *held*, not reversible error where such witness had died before trial in the circuit court, his qualifications or experience were not inquired into and record does not disclose objection made thereto because of lack of qualification to give expert testimony (1 Comp. Laws 1929, § 5469). *Id.*

See APPEAL AND ERROR (5, 6, 8, 9, 11, 16–24, 28, 30); AUTOMOBILES (1, 15, 17, 22, 29, 37); AVIATION (5); BANKS AND BANKING (6, 7); BUILDING AND LOAN ASSOCIATIONS (3); CONTRACTS (9); COVENANTS (4, 9); CRIMINAL LAW (1, 3, 7, 12, 13); DEATH; DEEDS (5–8, 11, 14); DIVORCE (10); EMINENT DOMAIN (4, 5); EQUITY (2); ESTOPPEL (3); EXECUTORS AND ADMINISTRATORS (8, 12, 15); FRAUD (1, 4, 5); GAS (4, 5); GIFTS (4); INSURANCE (1, 4); LIMITATION OF ACTIONS (5–8); OATHS (3); PARENT AND CHILD (2, 3); PLEADING (3, 6–8); PRINCIPAL AND SURETY; RAPE (1, 3); REFORMATION OF INSTRUMENTS; SCHOOLS AND SCHOOL DISTRICTS (2, 3); TRIAL (2–8); WILLS (2, 3, 6, 8–10, 20, 21); WITNESSES (4–6); WORKMEN'S COMPENSATION (5, 6, 8, 9).

EXAMINING MAGISTRATE—See CRIMINAL LAW (8, 9, 11).

EXCESS WIDTH OF LOAD—See AUTOMOBILES (24).

EXECUTION—See DEEDS (1); EQUITY (7); WILLS (3, 4, 9).

EXECUTORS AND ADMINISTRATORS.

1. Waiver of notice and consent of widow to sale of real estate in her late husband's estate *held,* binding upon her, the record disclosing nothing to substantiate her claim that administrator with will annexed obtained same by means of fraudulent misrepresentations. *Wosinski* v. *Renihan,* 319.
2. Sale of realty will not be set aside on complaint of widow of deceased testator because of failure to give notice to testator's legatees, sons by a former marriage who were left $10 each and were not complaining, where widow's sworn consent to sale asserts she was ready and willing to pay such legacies and that such legatees and herself were all of testator's heirs at law and persons interested in the estate. *Id.*
3. Order of probate court authorizing administrator with will annexed to sell real estate prior to day originally set by the court for hearing on his petition for license to sell *held,* not invalid where widow's consent authorized sale forthwith, estate is ample to pay other legatees who are not complaining and no one appeared on day set for hearing to object to sale anyway (3 Comp. Laws 1929, § 15805). *Id.* 320.
4. Validity of order of probate court allowing coadministrator's final account, filed after creditors of estate sought his removal, *held,* not material to determination of liability of surety on coadministrator's bond where, unknown to probate court, some assets included in the account and inventory were not assets of the estate, the surety being liable merely for fulfillment of coadministrator's failure to "administer according to law all the goods, chattels, rights, credits and estate" of deceased and surety's assertion that account as allowed was not correct charge upon it was not a collateral attack upon the probate court order. *Kent Probate Judge, for use of Heaney,* v. *American Employers Ins. Co.,* 329.
5. An order of the probate court allowing the account of an executor or administrator is an adjudication to which the general principles of *res judicata* apply. *Grigg* v. *Hanna,* 444.
6. A probate court order allowing the account of an executor or administrator does not adjudicate what is not before the court nor adjudicate what is not contained in it. *Id.*
7. The administrator of the estate of a deceased partner has nothing to do with his interest therein except to look after it so far as to see that no waste or fraud is committed in its management, until the surviving partner has settled up the partnership, paid its debts and turned over to the administrator his share of what is left. *Id.*
8. In suit by administratrix *de bonis non* with will annexed of deceased partner's estate against trust company which had been executor of his will and surviving partner to set aside

EXECUTORS AND ADMINISTRATORS—Continued.

probate court orders allowing accounts and discharging executor and for discovery and accounting, record *held,* to sustain finding of trial court that evidence was insufficient to establish liability on part of trust company for negligent administration of the estate, such probate court orders being *res judicata* of issues now sought to be readjudicated so far as executor is concerned although not as to surviving partner. *Id.* 446.

9. Executor of estate of owner of stock certificates, which were left with broker as collateral for a third person's account, should not be subjected to uncertainties of action for damages at law for conversion, effected by surrender of old certificates and causing new ones to be issued in name of third person, where new certificates of the allegedly converted property are within reach of equity. *Detroit Trust Co.* v. *Struggles,* 471.

10. To recover for services rendered decedent against the decedent's estate, it is unnecessary to prove an express contract but there must be proof at least of an implied contract and in case claimant is a member of the family there must be enough in the record to overcome the presumption arising from the family relation. *In re Rezmer's Estate,* 545.

11. In son's proceeding against estate of decedent to recover money loaned and for services performed in operating latter's farm, evidence *held,* sufficient to present a question of fact for determination of the jury as to whether there was a contract between decedent and plaintiff. *Id.*

12. In son's proceeding against father's estate to recover for services performed in operation of latter's farm after latter sought to have plaintiff, a married man residing in a city, leave his work and conduct farm, evidence of statements by father to other children in presence of plaintiff that father would pay plaintiff in the end *held,* sufficient to present question of whether services were gratuitous as a question of fact for the jury. *Id.* 546.

13. An administratrix of an estate is without power to make a contract for services of an attorney on a contingent fee basis. *In re Trombley's Estate,* 604.

14. Probate judge *held,* not in error in refusing to ratify contract between attorney and administratrix *de bonis non* of estate of widow on contingent fee basis where court had not authorized employment of attorney on such basis to collect widow's allowance from estate of her late husband. *Id.*

15. Evidence in probate court *held,* to sustain finding as to value of services of attorney for an estate but not to constitute approval of contingent fee contract which had been entered into without previous approval of probate court. *Id.*

16. Granting of authority by probate court to administratrix of an estate to employ counsel does not authorize her to employ

EXECUTORS AND ADMINISTRATORS—Continued.

counsel on a contingent fee basis, adjustment of compensation being a matter for the probate court. *Id.*

See APPEAL AND ERROR (3, 13, 22); AUTOMOBILES (34, 37); AVIATION (1); CORPORATIONS (11); DEATH; EQUITY (1, 8, 9); EVIDENCE (8); GIFTS (4); JUDGMENT (2); LIMITATION OF ACTIONS (1); OFFICERS (2); PARTNERSHIP (5); PRINCIPAL AND SURETY; TRUSTS (1, 3, 4, 7–9); WILLS (2); WITNESSES (1–3).

EXECUTORY CONTRACTS—See APPEAL AND ERROR (10); FRAUDS, STATUTE OF (1).

EXPERTS—See APPEAL AND ERROR (31); CRIMINAL LAW (12, 13); EVIDENCE (2, 5, 33); MALPRACTICE (1).

EXTREME CRUELTY—See DIVORCE (10).

FACTORIES—See AUTOMOBILES (12).

FAILURE OF CONSIDERATION—See CANCELLATION OF INSTRUMENTS (3); PATENTS (9).

FAMILY RELATION—See EXECUTORS AND ADMINISTRATORS (10).

FARMERS—See APPEAL AND ERROR (31); CRIMINAL LAW (13); EVIDENCE (32).

FARMS—See CANCELLATION OF INSTRUMENTS (3); EQUITY (12); EXECUTORS AND ADMINISTRATORS (11, 12).

FEDERAL EXCISE TAX—See TAXATION (6).

FEES—See DIVORCE (6–8); EXECUTORS AND ADMINISTRATORS (13–16); JUDGMENT (13); MANDAMUS (2).

FEE UPON CONDITION SUBSEQUENT—See APPEAL AND ERROR (28); DEEDS (12–14).

FELONS—See CRIMINAL LAW (1).

FENDERS—See AUTOMOBILES (7).

FICTION—See CORPORATIONS (12, 13).

FIDUCIARIES—See BANKS AND BANKING (7, 8); CORPORATIONS (1); EQUITY (6); EVIDENCE (24); PARTNERSHIP (1, 2); TRUSTS (13); WILLS (4, 5, 19).

FIGHTING—See COVENANTS (3).

FILING—See APPEAL AND ERROR (15).

FINAL ACCOUNT—See EXECUTORS AND ADMINISTRATORS (4); JUDGMENT (2); PRINCIPAL AND SURETY (1); TRUSTS (1, 5, 6).

FIRE INSURANCE—See INSURANCE (1, 2).

FISCAL AGENT—See BANKS AND BANKING (2).

FOOD—See CRIMINAL LAW (12–14); EVIDENCE (32, 33).

FOOT INJURY—See WORKMEN'S COMPENSATION (5).

FORCEPS—See MALPRACTICE (1).

FORECLOSURE—See BUILDING AND LOAN ASSOCIATIONS (4); LANDLORD AND TENANT (3, 5); MORTGAGES (3, 4, 9).

FOSTER PARENTS—See DEEDS (8, 11).

FRACTURED BONES—See DAMAGES.

FRACTURED JAW—See MALPRACTICE (1); NEW TRIAL; PHYSICIANS AND SURGEONS (1).

FRATERNAL BENEFICIARY SOCIETIES.

1. Fraternal beneficiary society *held*, not to have waived provision of its life insurance policy limiting time within which action might be brought thereunder where it disclaimed liability thereunder and district manager with whom plaintiffs had negotiated is not shown to have had authority to waive it nor to admit liability. *Strausser* v. *Sovereign Camp of the Woodmen of the World*, 371.
2. Death beneficiary under policy with a fraternal beneficiary society *held*, not entitled to recover where action was not brought within one year after death of insured as required by policy and insured was in arrears in making monthly payments and is not claimed to have not been suspended. *Id.*

FRAUD.

1. Where trial judge made no finding of fraud on part of wife of bank president as a matter of fact but only as a matter of law in denying new trial in action for conspiracy to defraud bank brought by receiver against former president and his wife and there is no showing wife had knowledge husband had exceeded statutory limit of loan from his bank, her liability is confined to judgment in assumpsit, no tort being shown to have been committed by her (3 Comp. Laws 1929, § 11922). *Barber* v. *Kolowich*, 98.
2. If plaintiff in action of fraud on syndicate subscription agreement affirms the contract his measure of damages is the difference between what he has paid and the value of the stock he received at the time it was sold to him but where rescission is sought because of fraud, plaintiff is entitled to recovery of what he has paid. *Gloeser* v. *Moore*, 425.
3. Party suing to rescind contract of subscription for syndicate certificates because of fraud must seasonably assert such rescission, tender back what he has received and demand repayment of purchase price. *Id.*

FRAUD—Continued.

4. As against the living, proof of fraud must be clear and convincing but when charges of corrupt, fraudulent or criminal conduct are made against the dead who have occupied positions of trust, and whose acts have been authorized and confirmed by a court of competent jurisdiction, the proof must be so clear and convincing as to satisfy every reasonable mind. *Grigg* v. *Hanna*, 444.
5. Where the evidence of fraud is in writing, signed by the party to be charged, such writing, like any other testimonial document, may, in effect, be conclusive upon the party. *Id.*
6. A fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood and courts will not hesitate to sustain recovery where the truth has been suppressed with intent to defraud. *Id.* 446.

See BANKS AND BANKING (3, 6–8); CANCELLATION OF INSTRUMENTS (3); CORPORATIONS (5, 9, 10, 12); EQUITY (1); ESTOPPEL (4); EVIDENCE (22, 24); EXECUTORS AND ADMINISTRATORS (1); JOINT STOCK COMPANIES; JUDGMENT (6, 9, 11, 12); PLEADING (4); TRADE UNIONS (3–5); TRUSTS (8, 14); VENDOR AND PURCHASER (1).

FRAUDS, STATUTE OF.

1. An oral agreement between landlord and tenant reducing the rent payable by the terms of a written lease, while invalid and void so long as it remains executory, is valid and binding when followed by the regular payment and acceptance of the reduced amount in full (3 Comp. Laws 1929, § 13411). *Lawson-Erb Lumber Co.* v. *Graham-Paige Co. of Michigan*, 252.
2. Provision of statute of frauds voiding every unwritten agreement which by its terms is not to be performed within a year does not apply to contracts which by any possibility are capable of being completed within a year, although the parties may have intended and thought it probable that it would extend over a longer period and it does so extend (3 Comp. Laws 1929, § 13417). *Adolph* v. *Cookware Company of America*, 562.

See CONTRACTS (7); LANDLORD AND TENANT (1); TRUSTS (14).

FURNITURE—See WILLS (4).

GARAGE—See CHATTEL MORTGAGES.

GARNISHMENT—See APPEAL AND ERROR (15).

GAS.

1. In view of the dangerous character of gas for domestic use and its tendency to escape, gas company has duty to use a degree of care to prevent injury and damage commensurate with the danger which it has to avoid and it is liable for damage resulting from failure to exercise such degree of care. *Nephew* v. *Consumers Power Co.*, 12.

GAS—Continued.

2. Gas company may not escape liability because piping and shut-off valve on the premises were paid for by the owner of premises where plaintiff's decedent lived and died as it is not thereby excused from its failure to exercise necessary degree of care to avoid injury and damage commensurate with danger which it was its duty to avoid. *Id.* 13.
3. Regardless of ownership of service pipes and shut-off valve on private premises, a gas company is liable for negligent manner in which its employees sent to turn off the gas perform their duty. *Id.*
4. Although the failure of a gas company to shut off gas at the street is not negligence in and of itself, such failure may be considered by jury as bearing upon the exercise of due care by the gas company. *Id.*
5. In action under death act for asphyxiation of plaintiff's decedent, occupant of a house to which defendant gas company's employee had been called to turn off the gas, evidence tending to show he was negligent in shutting off and sealing the shut-off valve under the house *held*, sufficient to present question of negligence for jury (3 Comp. Laws 1929, §§ 14061, 14062). *Id.*

GASOLINE—See COSTS (2, 3); STATUTES (2); TAXATION (8–10).

GASOLINE STATION—See COVENANTS (12); EQUITY (5); MUNICIPAL CORPORATIONS (1–3, 8).

GIFTS.

1. Certificates of deposit found in shoe box under deceased payee's bed and which had been indorsed for payment to various relatives upon death of payee *held*, part of deceased payee's estate since there was no delivery. *Geisel* v. *Burg*, 73.
2. To constitute a valid gift *inter vivos* there must be a gratuitous and absolute transfer of property from donor to donee, taking effect immediately, and fully executed by a delivery of the property by donor and acceptance thereof by donee. *Id.*
3. To effectuate a gift *inter vivos*, there must be an unconditional delivery either to donee direct or to some one for him and the right of disposition must be wholly beyond the power of donor. *Id.*
4. In administrator's suit to determine ownership of certificate of deposit which was made payable to deceased purchaser or nephew, with whom it was left, where his testimony as to delivery to him was inadmissible as being equally within knowledge of deceased and there was no other evidence that it was a gift, certificate *held*, intestate property (3 Comp. Laws 1929, § 14219). *Id.* 74.
5. Certificates of deposit which had been purchased by deceased and made payable to various relatives and left with nephew subject to recall by deceased *held*, not to have been delivered so as to effect a gift *inter vivos*. Id.

GOOD FAITH—See ANIMALS; BANKS AND BANKING (5); CORPORATIONS (1, 2); DIVORCE (7); TRADE UNIONS (3–5).

GOVERNOR—See OFFICERS (1).

GRADE SEPARATIONS—See EMINENT DOMAIN (1–4).

GRATUITOUS AMBULANCE—See AUTOMOBILES (33).

GRATUITOUS SERVICES—See EXECUTORS AND ADMINISTRATORS (11, 12); PARENT AND CHILD (3).

GRATUITY—See AUTOMOBILES (10).

GREAT WEIGHT OF EVIDENCE—See CRIMINAL LAW (1).

GROSS NEGLIGENCE—See AUTOMOBILES (38).

GROSS PROCEEDS—See TAXATION (3, 4, 6).

GUARDIAN AD LITEM—See COURTS (1, 3, 4); TRUSTS (8, 10); WORDS AND PHRASES (1).

GUESS—See EVIDENCE (21).

GUESTS—See AUTOMOBILES (10–12, 23, 33, 37, 38).

HEALTH EXTENSION DEPARTMENT—See CONTRACTS (8); MASTER AND SERVANT (2, 3).

HEARING—See EXECUTORS AND ADMINISTRATORS (3); TRUSTS (10).

HEARSAY—See EVIDENCE (8).

HERNIA—See WORDS AND PHRASES (2); WORKMEN'S COMPENSATION (8, 10).

HIGHWAYS AND STREETS—See AUTOMOBILES (18–20, 30, 34, 38); COSTS (3); COVENANTS (12); EMINENT DOMAIN; EQUITY (5); EVIDENCE (9); STATUTES (2, 3); TAXATION (9, 10); VENDOR AND PURCHASER (1).

HOGS—See ANIMALS.

HOME OWNERS' LOAN CORPORATION—See APPEAL AND ERROR (30); CHATTEL MORTGAGES; CONTRACTS (11); MORTGAGES (2, 5–8).

HOMES—See CHATTEL MORTGAGES; MORTGAGES (2).

HOMESTEAD—See APPEAL AND ERROR (13).

HOSPITALS—See AUTOMOBILES (33).

HOUSES—See AUTOMOBILES (12).

HUSBAND AND WIFE.

A woman has a right to raise money in a legal manner to help her husband. *Barber* v. *Kolowich*, 98.

See AUTOMOBILES (23); BANKS AND BANKING (3, 6–8); DEEDS (6, 7); FRAUD (1); TRADE UNIONS (2, 4); WITNESSES (4).

HYPOTHETICAL QUESTIONS—See EVIDENCE (10).

IMPACTED WISDOM TOOTH—See MALPRACTICE (1); NEW TRIAL; PHYSICIANS AND SURGEONS.

IMPLIED CONTRACTS—See EXECUTORS AND ADMINISTRATORS (10).

IMPLIED POWERS—See WORKMEN'S COMPENSATION (2).

IMPROVEMENTS—See DIVORCE (2).

IMPUTED NEGLIGENCE—See AUTOMOBILES (23).

INDICTMENT AND INFORMATION—See CRIMINAL LAW (10, 11).

INDORSEMENT—See EQUITY (8); ESTOPPEL (3); GIFTS (1); INSURANCE (2); LIMITATION OF ACTIONS (4, 7).

INFERENCES—See BANKS AND BANKING (6); CRIMINAL LAW (5); EVIDENCE (17); LIMITATION OF ACTIONS (3); PARENT AND CHILD (3); WILLS (7, 8); WITNESSES (6).

INGUINAL RING—See WORDS AND PHRASES (2); WORKMEN'S COMPENSATION (10).

INJUNCTION—See COVENANTS (1, 3).

INSANE PERSONS—See EVIDENCE (10); WILLS (5, 10).

INSTRUCTIONS—See AUTOMOBILES (8); CRIMINAL LAW (6); INSURANCE (6); TRIAL (7); WILLS (6, 8–10).

INSURANCE.

1. Course of practice whereby owner of several hundred pieces of real estate notified agency of defendants, insurers under fire insurance policies, on first of month following month in which change of interest or possession occurred *held,* ineffective to work estoppel of insurers to deny liability for fire loss resulting from operation of an alcohol distillery installed after plaintiff had sold property on land contract and delivered possession, but before first of following month or notice to the agency had been given, where testimony shows that date of notice to insurer's agency and not date of change of interest or possession was the date of change indorsed on the policy in the course of practice involved. *Contract & Investment Co.* v. *Home Ins. Co. of New York,* 288.

INSURANCE—Continued.

2. Sale of property under land contract, accompanied by change of possession, *held*, such a material change of interest of insured as to require immediate notice thereof to insurer under fire insurance policy to hold it liable for fire loss occurring after such change where policy declares it would be void unless written indorsement of change of interest, title or possession were made. *Id.* 289.

3. In action by beneficiary under life insurance policy in which defense of suicide was interposed, plaintiff does not have burden of proving a reasonable explanation of the manner of death of deceased or to give any explanation whatever. *Stuckum* v. *Metropolitan Life Ins. Co.*, 297.

4. In action against insurer under life insurance policy where defense of suicide is interposed, unless evidence discloses that only reasonable hypothesis of death is that of suicide, the case must be submitted to a jury as the presumption is against suicide and insurer must show suicide by a preponderance of evidence. *Id.*

5. In action under life insurance policy in which insurer asserted death was by suicide, defendant *held*, not to have sustained burden of showing cause of death was inconsistent with any reasonable hypothesis other than suicide, there being circumstances sufficient to sustain jury's finding death was due to accidental discharge of shotgun. *Id.* 298.

6. Question of whether death from shotgun wounds was result of suicide or accident *held*, properly submitted to jury under evidence presented and instructions given, where plaintiff's testimony tended to show deceased was engaged in shooting crows which had been bothering their cornfield, testimony as to whether deceased made remarks indicating that he was contemplating suicide was in dispute and finding of jack handle in rear of car could not be said to be conclusive proof that deceased committed suicide by using it to push the trigger. *Id.*

7. Provision of automobile insurance policy that insurer shall not be liable thereunder when automobile is being driven contrary to law is valid. *Mondou* v. *Lincoln Mutual Casualty Co.*, 353.

8. Ambiguities in insurance policies prepared by insurer must be construed most strongly against the insurer. *Id.*

9. While an insurance policy must be construed most strongly against the insurer, a court by an interlineation may not write a new clause into a policy. *Id.*

10. Automobile insurance policy excluding liability of insurer when car was operated "(a) in any race or speed contest, or (b) any person prohibited by law from driving the automobile" *held*, to have a plain and certain meaning, although perhaps not grammatically correct and to provide that insurer has no liability when car is being driven by a person prohibited by law from driving an automobile. *Id.*

INSURANCE—Continued.

11. Worship of the literal should not overcome common sense or be used to bring about an absurdity if it can be avoided in construing an insurance policy. *Id.* 354.

12. No construction, in the usual sense of the word, is called for if the language of an insurance policy is not ambiguous. *Id.*

13. Insurer under automobile policy, excluding liability when car was operated by person prohibited by law from driving, *held*, not liable for damages to person injured while car was driven by an unlicensed driver. *Id.*

14. Trial court *held*, in error in refusing to insert word "by" after "(b)" in clause of automobile insurance policy relieving insurer from liability when car was operated "(a) in any race or speed contest, or (b) any person prohibited by law from driving the automobile," and in holding such latter provision meaningless and of no effect. *Id.*

See FRATERNAL BENEFICIARY SOCIETIES (1); JUDGMENT (4); JURY; MORTGAGES (1, 9, 10); WORKMEN'S COMPENSATION (2).

INTENT—See ANIMALS; CORPORATIONS (9, 13); COVENANTS (4); CRIMINAL LAW (7, 9, 10); DEEDS (2, 3, 5, 6, 8–11); EQUITY (2); FRAUD (6); FRAUDS, STATUTE OF (2); PERPETUITIES (2); RAPE (2); STATUTES (7); TAXATION (8); WILLS (2, 14, 16).

INTEREST—See BUILDING AND LOAN ASSOCIATIONS (4); EQUITY (12); MORTGAGES (2); TAXATION (7).

INTERFERENCE BY COURTS—See TRADE UNIONS (5).

INTERSECTIONS—See AUTOMOBILES (16–20, 27, 34–36); MUNICIPAL CORPORATIONS (3).

INTERVENTION—See DISMISSAL AND NONSUIT; TRUSTS (8).

INTER VIVOS—See GIFTS (2, 3, 5).

INTESTINES—See WORDS AND PHRASES (2).

INTOXICATING LIQUORS—See AUTOMOBILES (37); COVENANTS (3).

INVENTION—See PATENTS (1, 2, 4, 7–10).

INVENTORY—See CORPORATIONS (13); EVIDENCE (26); EXECUTORS AND ADMINISTRATORS (4); PLEADING (8).

JACKS—See EVIDENCE (13); INSURANCE (6).

JOINT ADVENTURES—See PARTNERSHIP (3).

JOINT STOCK COMPANIES.

Subscriber to syndicate certificates in an oil company is not bound by terms of written subscription agreement, if he was induced to execute such contract because of false and fraudulent representations by syndicate's agent. *Gloeser* v. *Moore*, 425.

See EVIDENCE (22); FRAUD (3); JUDGMENT (6, 7).

JOINT TENANCY—See DEEDS (8, 11).

JUDGMENT.

1. Dismissal, with prejudice, of former suit to enforce restrictions on lot in same subdivision across street from one involved in instant case and owned by same defendants cannot operate as bar to instant suit where several parties plaintiff herein were not parties of former suit. *Taylor Avenue Improvement Ass'n* v. *Detroit Trust Co.*, 304.
2. Liability of surety in action on its bond of coadministrator of the estate of a deceased person *held*, not dependent upon any application of the doctrine of *res judicata* where surety was not heard, not represented in, nor a party to final accounting proceedings wherein the liability of its principal was determined. *Kent Probate Judge, for use of Heaney*, v. *American Employers Ins: Co.*, 328.
3. The judgment of a court, whether rightfully or wrongfully entered, is under its control so long as the court has jurisdiction, and the court may, on its own motion, open, vacate or set it aside for error in law. *Strausser* v. *Sovereign Camp of the Woodmen of the World*, 370.
4. In action against insurer for death benefits, court *held*, not to have abused its discretion in vacating judgment on verdict for plaintiff and entering one for defendant notwithstanding verdict, although motion for a directed verdict had been denied, where policy contained provision limiting time for bringing action thereunder to one year and more than that time had expired before plaintiff brought action. *Id.*
5. A judgment cannot be based upon speculation or conjecture. *Michigan Aero Club* v. *Shelley*, 402.
6. On appeal from summary judgment for plaintiff in action for fraud in obtaining subscription agreement for shares in syndicate, plaintiff's cause of action *held*, to rest upon affirmance of contract and action for damages because of its breach by defendants, that being the theory of his motion for summary judgment and affidavit in support thereof. *Gloeser* v. *Moore*, 425.
7. Affidavit of railroad section hand and ditch digger in support of his motion for summary judgment in action to recover damages for breach of contract of defendants to deliver syndicate certificates in oil company *held*, insufficient to support summary judgment where affidavit did not affirmatively show that if sworn as a witness he could testify competently as to damages as required by court rule and presumably he would have

JUDGMENT—Continued.

no knowledge of what the value of the certificates was or difference in value between their represented and actual worth at time of sale to him (Court Rule No. 30 [1933]). *Id.* 426.

8. Affidavits of merits, executed by defendants' attorneys, which are principally devoted to affiants' conclusions as to what occurred in transactions between plaintiff and defendants' agent relative to syndicate certificates in oil company, of which affiants obviously had no knowledge, *held*, insufficient under court rule requiring that affiant be competent to testify if sworn as a witness (Court Rule No. 30 [1933]). *Id.*

9. In action for fraud in sale of syndicate certificates in an oil company, averments in affidavits of merits opposing entry of summary judgment that defendant syndicate had several producing wells and that certificates of interest were of great value and had an intrinsic value equal to amount plaintiff had paid therefor *held*, to have no bearing upon question of value of properties at time fraud was alleged to have been perpetrated over two years prior to execution of such affidavits as the measure of damages, under the circumstances, is the difference between the represented and actual value of the certificates at time of purchase. *Id.*

10. Suit to set aside proceedings in probate court is a direct, not a collateral, attack upon such probate proceedings. *Grigg* v. *Hanna*, 443.

11. Orders of the probate court may be attacked for fraud. *Id.* 444.

12. Fraud which warrants equity in interfering with a judgment must be fraud in obtaining the judgment and must be positive and not merely constructive. *Id.*

13. There is no conflict between statute requiring payment of judgment fee before entry of final judgment in an action at law where trial has been had and court rule requiring that before taking proofs such fee be deposited with the clerk and its return to depositor attorney in case it should subsequently appear inappropriate to enter a judgment in the cause; and enforcement of the court rule would meet requirement of the statute but noncompliance with the court rule could not permit entry of judgment before receipt of the fee (3 Comp. Laws 1929, § 15421; Court Rule No. 37 [1933]). *Detroit Edison Co.* v. *Oakland Circuit Judge*, 502.

See APPEAL AND ERROR (15, 16, 20); DIVORCE (4, 5, 8); EQUITY (1, 7); EXECUTORS AND ADMINISTRATORS (4–6); FRAUD (1); MANDAMUS (2); PRINCIPAL AND SURETY (2).

JUDICIAL NOTICE—See EVIDENCE (9, 13, 14).

JURAT—See OATHS (2, 3); SCHOOLS AND SCHOOL DISTRICTS (3).

JURISDICTION—See APPEAL AND ERROR (15); COURTS (2, 6, 7); CRIMINAL LAW (2, 3, 8, 10, 11); EQUITY (1, 6, 10); FRAUD (4); JUDGMENT (3); TRUSTS (13).

JURY.

Refusal of trial judge to accord plaintiff's counsel in automobile accident case right to make examination of entire jury on *voir dire* to ascertain who, if any, were officers, employees or stockholders of the insurance company in which defendant was insured or members of any mutual insurance company *held*, error notwithstanding defendant's counsel had filed an affidavit prior to *voir dire* that five members of jury impanelled were at the time insured or had been previously insured in a mutual company in which defendant held a policy and plaintiff after such refusal did not waive right to claim error by not exhausting his peremptory challenges. *Campbell* v. *Osterland*, 176.

See EQUITY (11); EVIDENCE (2–4).

JUSTICE COURT—See EVIDENCE (33).

LABOR AND INDUSTRY, DEPARTMENT OF—See WORKMEN'S COMPENSATION (1, 2, 4–7, 9, 10).

LACHES—See CANCELLATION OF INSTRUMENTS (3); CORPORATIONS (9, 10); EQUITY (5).

LADDERS—See AUTOMOBILES (33).

LAND CONTRACTS—See APPEAL AND ERROR (10); CONTRACTS (11); EQUITY (4); INSURANCE (1, 2); LANDLORD AND TENANT (5); MORTGAGES (8); VENDOR AND PURCHASER.

LANDLORD AND TENANT.

1. In action of assumpsit to collect balance of rent alleged to be due under lease for five-year term, evidence *held*, to show that corporate lessor entered into oral agreement reducing rent for an unexpired portion of term, which oral modification, having been completely executed, was binding on lessor although for a period of years (3 Comp. Laws 1929, § 13411). *Lawson-Erb Lumber Co.* v. *Graham-Paige Co. of Michigan*, 252.
2. Option to purchase land in written lease for 10-year term if lessor desired to sell the property at end of term, which gave lessee first chance to buy property for period of 90 days after expiration of term by meeting terms of any other previous offer, *held*, valid and to constitute a covenant running with the land. *Nu-Way Service Stations, Inc.*, v. *Vandenberg Bros. Oil Co.*, 551.
3. Under option to purchase for period of 90 days at expiration of lease if lessor then desired to sell, lessee was limited as to time within which option might be exercised and also by the contingency of whether the lessor or those in privity with him desired to sell during that time and where undisputed evidence shows that vendee of party which purchased premises at mortgage foreclosure sale held prior to expiration of term did not desire to sell during such period the condition under which the option might be enforced did not exist. *Id.*

LANDLORD AND TENANT—Continued.

4. A court has no power to change the terms of an option to purchase land incorporated in a lease for the advantage of a party thereto. *Id.*

5. Lessee under lease, containing option to purchase for period of 90 days after expiration of 10-year term if lessor then desired to sell, *held*, not entitled to enforce option as defendant in action of ejectment where lessor had lost premises, including those leased, through foreclosure of a mortgage on leased premises and a contiguous parcel, and land contract purchaser from purchaser at foreclosure sale was not desirous of selling leased premises at time limited by option, notwithstanding lessee's offer to purchase the additional land. *Id.* 552.

See EMINENT DOMAIN (5); FRAUDS, STATUTE OF (1); WITNESSES (5).

LARCENY—See CRIMINAL LAW (10).

LAST CLEAR CHANCE—See AUTOMOBILES (17); NEGLIGENCE (1).

LAY WITNESSES—See APPEAL AND ERROR (31); CRIMINAL LAW (13); EVIDENCE (31, 32).

LEASES—See EMINENT DOMAIN (5); LANDLORD AND TENANT.

LEGATEES—See APPEAL AND ERROR (25); EXECUTORS AND ADMINISTRATORS (2, 3); TRUSTS (5).

LEG INJURIES—See DAMAGES; EVIDENCE (3, 4).

LICENSES—See AVIATION (4); ESTOPPEL (1); EXECUTORS AND ADMINISTRATORS (3); INSURANCE (13); PATENTS (2–7, 9, 10).

LIENS—See CORPORATIONS (11); EQUITY (12); MORTGAGES (5, 6, 9).

LIFE INSURANCE—See FRATERNAL BENEFICIARY SOCIETIES (1); INSURANCE (3–5).

LIGHTS—See AUTOMOBILES (3, 4, 7, 27).

LIMITATION OF ACTIONS.

1. Generally an administrator cannot waive the statute of limitations. *Geisel* v. *Burg*, 73.

2. If a plaintiff has a choice between two forms of action, the one brought by him determines the period of limitation applicable. *Wall* v. *Zynda*, 260.

3. Theory upon which part payment tolls running of statute of limitations is that it may be supposed to imply a new promise to pay the debt but such result will not follow where payment is accompanied by circumstances which preclude such inference (3 Comp. Laws 1929, §§ 13976, 13984, 13988). *Albers* v. *Pommerening*, 389.

LIMITATION OF ACTIONS—Continued.

4. Indorsement of payments, written by or on behalf of party to whom payment is made, are insufficient proof of payment to toll running of statute of limitations, it being necessary to show part payment by debtor or his authorized agent (3 Comp. Laws 1929, §§ 13976, 13984, 13988). *Id.*
5. Proof of part payment, in order to toll running of statute of limitations, must be clear and decisive of payment (3 Comp. Laws 1929, §§ 13976, 13984, 13988). *Id.*
6. In action on a promissory note where plaintiff did not establish a *prima facie* case of part payment to toll running of statute of limitations, it was not incumbent upon defendant to offer proof denying payment had been made or authorized by him (3 Comp. Laws 1929, §§ 13976, 13984, 13988). *Id.* 390.
7. In action on promissory note proof of indorsement of part payment and deposit slip in handwriting of employees of bank tending to show part payment *held,* insufficient to toll running of statute of limitations where obligor was not connected with such payment other than by conjecture (3 Comp. Laws 1929, §§ 13976, 13984, 13988). *Id.*
8. In son's proceeding against estate of his late father to recover money loaned and for services performed where jury found contract between decedent and plaintiff and there was evidence that payment was not to have been made until the death of deceased, the statute of limitations would not begin to run until such decease (3 Comp. Laws 1929, § 13976). *In re Rezmer's Estate,* 545.

See APPEAL AND ERROR (10); FRATERNAL BENEFICIARY SOCIETIES; JUDGMENT (4); VENDOR AND PURCHASER.

LIQUIDATING TRUSTEES—See BANKS AND BANKING (2).

LIQUIDATION—See CORPORATIONS (3–5, 9).

LIST PRICE—See TAXATION (4).

LOADING—See AUTOMOBILES (24, 27, 28).

LUBRITORIUM—See MANDAMUS (3); MUNICIPAL CORPORATIONS (1–3, 8).

LUMBER COMPANY—See AUTOMOBILES (12, 13).

MACHINERY—See EMINENT DOMAIN (5).

MAINTENANCE OF WAY AND EQUIPMENT—See CARRIERS (4).

MAJORITY—See CORPORATIONS (3, 5, 6); MANDAMUS (1).

MALPRACTICE.

1. Expert testimony upon which plaintiff based his case in action for malpractice against dentist who fractured plaintiff's jaw in extracting an impacted wisdom tooth *held,* insufficient to establish negligence of defendant where opinion as to prac-

MALPRACTICE—Continued.

tice of taking X-rays, when difficulty was encountered, left matter conjectural that such procedure would have dictated a different method than the continued use of forceps after they had slipped off tooth several times. *Dunbar* v. *Adams*, 48.

2. Adjudged malpractice must rest upon negligence in commission or omission and, when charged upon omission, it must be made to appear that the negligence was the proximate cause of the injury. *Id.*

See NEW TRIAL.

MANDAMUS.

1. In mandamus proceeding to compel payment of additional salary to deputy sheriff, allegation in defendants' answer that resolution of board of supervisors setting salary of relator did not receive approval of majority of supervisors-elect as required by statute *held*, admitted where not traversed by relator (1 Comp. Laws 1929, § 1122). *Tetro* v. *County of Wayne*, 131.
2. In a petitioner's proceeding by mandamus to compel restoration of original judgment for defendant notwithstanding verdict for plaintiff on reserved motion, entered by clerk inadvertently before payment of judgment fee, order of court to reenter judgment *nunc pro tunc*, as of date of payment of fee by defendant, *held*, proper, the court's power in the premises not being dependent upon plaintiff's right to move to vacate judgment nor limited by court rule relating to 20 days' time for perfecting an appeal to the Supreme Court, hence, although circuit court might have let judgment stand as originally entered after fee was paid, petitioner is not entitled to writ compelling same (3 Comp. Laws 1929, §§ 14531, 15421; Court Rules Nos. 37, § 13, 57 [1933]). *Detroit Edison Co.* v. *Oakland Circuit Judge*, 502.
3. Mandamus to compel issuance of building permit *held*, properly refused where zoning board of appeals made constitutional exercise of discretion in refusing to issue permit to add a lubritorium to a gasoline station in a residence district (Ypsilanti zoning ordinance, § 10). *Austin* v. *Older*, 669.

See COSTS (1, 6); COUNTIES.

MARRIAGE—See DIVORCE (2).

MARRIED WOMEN—See TRADE UNIONS (2, 4, 5).

MASTER AND SERVANT.

1. Contracts of employment do not require any consideration beyond rendition of services to make them valid and compensation may be made in any form agreeable to the parties. *Adolph* v. *Cookware Company of America*, 561.
2. Alleged contract of employment of plaintiff, an actively practicing chiropractor, to write a book and act as head of defendant manufacturer's health extension department *held*, a con-

MASTER AND SERVANT—Continued.

tract for permanent employment and, as such, for an indefinite period and, unless for a consideration other than promise of services, terminable at the will of either party. *Id.* 562.

3. Under alleged contract of employment whereby plaintiff wrote a book and agreed to act as head of defendant manufacturer's health extension department in return for 2 per cent. of gross sales, if contract were found to exist as claimed, plaintiff would be entitled to contract compensation during period he rendered services thereunder up to time of discharge. *Id.* 563.

See CONTRACTS (7); WORKMEN'S COMPENSATION.

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—See APPEAL AND ERROR (8); AUTOMOBILES (37); EQUITY (2); GIFTS (4); TRIAL (7); WITNESSES.

MATURITY—See BILLS AND NOTES.

MAYORS—See CRIMINAL LAW (1).

MEAT—See CRIMINAL LAW (12–14).

MEETINGS—See CORPORATIONS (3, 4, 6–8).

MEMBERSHIP—See TRADE UNIONS (1).

MENTAL COMPETENCY—See EVIDENCE (10); WILLS (9, 17).

MISTAKE—See ESTOPPEL (4); VENDOR AND PURCHASER (1).

MODIFICATION AGREEMENT—See TRADE UNIONS (2, 3).

MODIFICATION OF DECREE—See DIVORCE (4, 5, 7).

MODIFICATION OF USE—See COVENANTS (12).

MORATORIUM—See ATTORNEY AND CLIENT; MORTGAGES (1, 3, 4, 10, 11).

MORTGAGES.

1. Extension of moratorium relief on condition that mortgagors pay a monthly amount in rent equal to about one-half the accumulation of interest aside from insurance and unpaid taxes *held*, so insufficient as to require payment of double such amount monthly in order to permit continuance of moratorium. *Auten* v. *Union Central Life Ins. Co.*, 165.

2. The purpose of the home owners' loan act is to save the small home owner from loss of the home by refinancing same up to 80 per cent. of its appraisal value and to enable him to amortize the mortgage by monthly payments on principal and interest by a reduction of the amount of the owner's debt with the consent of the mortgagee (48 Stat. at L. chap. 64). *Bay City Bank* v. *White*, 267.

MORTGAGES—Continued.

3. Section of original mortgage foreclosure moratorium act limiting scope of legislation to mortgages executed prior to a specified date, which section was not expressly repealed, has continued to be such a limitation unless subsequently repealed by necessary implication (Act No. 98, § 8, Pub. Acts 1933). *Sambor* v. *Home Owners' Loan Corp.*, 529.

4. Section of original mortgage foreclosure moratorium act which limited application of act to mortgages executed prior to a specified date which section has remained unamended and unrepealed by subsequent acts which amended or added provisions to the act *held*, to render act inapplicable to mortgage executed after date specified (Act No. 98, § 8, Pub. Acts 1933). *Id.*

5. Purpose of the home owners' loan act was not to assist holders of liens against property but to enable owners of homes to save their homes from foreclosure by advancing, on first mortgages, sums to be used to pay off liens and to lighten the burdens of the home owners, any benefit accruing to lien holders being incidental (48 Stat. at L. chap. 64). *Meek* v. *Wilson*, 679.

6. An agreement exacted by a lien holder which tends to counteract the relief of the home owner, sought by the home owners' loan act, is contrary to the purpose of the act and to the regulations adopted thereunder (48 Stat. at L. chap. 64). *Id.*

7. Regulation of Home Owners' Loan Corporation barring second mortgages on property on which it held a first mortgage if the amount of the second mortgage exceeded difference between its appraisals and amount of its first mortgage *held*, within power of corporation to enact and binding upon junior lien holders of property upon which corporation has a first mortgage (48 Stat. at L. chap. 64). *Id.*

8. Note and second mortgage given by mortgagors on property on which first mortgage had been given to Home Owners' Loan Corporation in an amount in excess of difference between amount of latter's first mortgage and appraisal *held*, contrary to the home owners' loan act, contrary to public policy and unenforceable where exacted by vendor upon release of previously-existing land contract (48 Stat. at L. chap. 64). *Id.* 680.

9. In suit to foreclose second mortgage, given in contravention of public policy and hence unenforceable, mortgagee thereunder *held*, entitled to credit for payments made on first mortgage, taxes, repairs, insurance or any other lawful charges and subject to debit for payments made on second mortgage by mortgagors and with rents received, a lien on the property for any excess of credits over debits being impressed in his favor subject to first mortgage and adverse balance being required to be paid by him within a reasonable time. *Id.* 680.

10. Denial of extension of moratorium relief to mortgagor *held*, not an abuse of discretion where she had borrowed $3,200 from

MORTGAGES—Continued.

defendant mortgagee and, although she had received over $5,000 from the property in the last 5 or 6 years, had applied but a very small amount on the mortgage, permitted back taxes, insurance premiums and other charges to accumulate and the building to fall into disrepair and after dispossession lived opposite the premises and saw extensive repairs being made, but remained silent for six months. *Friar* v. *Dausman*, 692.

11. Supreme Court will not reverse the action of a trial judge in granting or refusing to grant a moratorium unless there has been an abuse of discretion. *Id.*

See APPEAL AND ERROR (30); ATTORNEY AND CLIENT; BUILDING AND LOAN ASSOCIATIONS (1, 3, 4); CHATTEL MORTGAGES; CONTRACTS (11); COSTS (7); DEEDS (14); DIVORCE (2); LANDLORD AND TENANT (3, 5).

MOTIONS AND ORDERS—See EXECUTORS AND ADMINISTRATORS (5, 6); JUDGMENT (7, 11); TRIAL (6); TRUSTS (1).

MOTION TO DISMISS—See APPEAL AND ERROR (2); DISMISSAL AND NONSUIT.

MUNICIPAL CORPORATIONS.

1. Addition to gasoline station of structure 17' x 26' and one story high to be used as lubritorium and costing $3,000 *held*, within provision of zoning ordinance providing that no new building or alteration of existing building at cost of $100 be made until a building permit has been issued (Ypsilanti zoning ordinance, § 12). *Austin* v. *Older*, 667.
2. Action of city engineer and zoning board of appeals in refusing building permit for lubritorium to owner of gasoline station which had been erected in residence zone prior to passage of zoning ordinance *held*, within spirit of and authorized by the ordinance although such addition would be artistic in appearance and was necessary to enable plaintiff to meet competition (Ypsilanti zoning ordinance, §§ 2, 4, 8, 10, 12). *Id.*
3. Failure of zoning board of appeals to vary restrictions as to residence and educational zone so as to permit addition of lubritorium to gasoline station *held*, proper and not an abuse of its discretion to interpret provisions of the ordinance where practical difficulties or unnecessary hardship occur, where station was erected, prior to passage of ordinance, on one corner of an intersection, another corner of which had been created a nonresidential zone but State normal college was across street from plaintiff's property and proposed structure would be about 10 feet from residence on adjoining lot (Ypsilanti zoning ordinance, §§ 2, 4, 8, 10, 12). *Id.*
4. Zoning ordinances are constitutional in principle as a valid exercise of the police power. *Id.* 668.
5. The power to zone is not limited to a protection of the *status quo* and a city may validly plan its future development. *Id.*

MUNICIPAL CORPORATIONS—Continued.

6. Gradual elimination of nonconforming businesses in residential zones of a city is within the police power. *Id.*

7. The improvement of residential districts by the exclusion of nonconforming businesses has a reasonable relationship to the public health, welfare and safety. *Id.*

8. Limiting further extension of nonconforming use by prohibiting alterations and additions to existing buildings such as addition of lubritorium to gasoline station *held*, a valid exercise of governmental power even though it may result in destruction of owner's business through obsolescence or inability to meet competition. *Id.* 669.

See CONSTITUTIONAL LAW (1); COSTS (2, 3); STATUTES (2); TAXATION (9, 10).

MURDER—See CRIMINAL LAW (1, 2, 6).

MUTUAL INSURANCE COMPANY—See JURY.

MUTUAL MISTAKE—See APPEAL AND ERROR (29); REFORMATION OF INSTRUMENTS.

NEGLIGENCE.

1. Doctrines of subsequent negligence or last clear chance of defendant in actions for negligent injuries require confession of negligence on part of plaintiffs and discovery thereof by a defendant in time and with ability to avoid injury and failure to do so. *Wells* v. *Oliver*, 168.

2. One who suddenly finds himself in a perilous situation cannot be charged with negligence merely because it appears that had he acted differently the accident would have been avoided as his actions are not to be judged by what he should have done had he had the opportunity to deliberate. *Burton* v. *Yellow & Checker Cab & Transfer Co.*, 385.

3. Negligence is not presumed but must be proved and the mere happening of an accident raises no presumption of negligence. *Michigan Aero Club* v. *Shelley*, 402.

4. The law requires normal persons, possessed of their faculties, to exercise them for their own protection. *Selman* v. *City of Detroit*, 414.

See AUTOMOBILES (4, 13–16, 19, 21–24, 26, 29, 33, 34); AVIATION (5); BANKS AND BANKING (10); CARRIERS (3–7, 9); EXECUTORS AND ADMINISTRATORS (8); GAS; MALPRACTICE (2); NEW TRIAL; PHYSICIANS AND SURGEONS; PLEDGES.

NEIGHBORS—See WILLS (4).

NEPHEWS—See GIFTS (4, 5); WILLS (2); WITNESSES (3).

NEW TRIAL.

Denial of new trial to defendants, a dentist and his operator, in action for malpractice based on alleged negligence in fracturing plaintiff's jaw when extracting an impacted wisdom

NEW TRIAL—Continued.

tooth and for malpractice in post-operative treatment *held*, error, where evidence as to negligence in fracturing jaw was insufficient to take case to jury, there was evidence of malpractice as to post-operative treatment, and damages awarded for both alleged acts of malpractice were in one sum and cannot now be separated. *Dunbar* v. *Adams*, 48.

See CRIMINAL LAW (7).

NEXT FRIEND—See COURTS (4).

NIECE—See WITNESSES (3).

NIGHTTIME—See AUTOMOBILES (1, 3, 4, 7, 16, 17, 22, 28).

NOISE—See COVENANTS (3).

NO PAR STOCK—See CORPORATIONS (3–6, 8, 9).

NOTICE—See CARRIERS (8, 11); CORPORATIONS (7); EXECUTORS AND ADMINISTRATORS (1, 2); INSURANCE (1, 2).

NUISANCE—See COVENANTS (3).

NUNC PRO TUNC ORDER—See MANDAMUS (2).

OATHS.

1. An oath is an external pledge or asseveration made in verification of statements made, or to be made, coupled with an appeal to a sacred or venerated object, in evidence of the serious and reverent state of mind of the party, or with an invocation to a supreme being to witness the words of the party, and to visit him with punishment if they be false. *June* v. *School District No. 11, Southfield Township, Oakland County*, 533.
2. Absence of a jurat to an oath raises but a rebuttable presumption that the oath was not taken. *Id.* 534.
3. The actual taking of an oath in the nature of a pledge may be shown by evidence on the hearing where it does not appear by jurat that the oath was administered. *Id.*

See AFFIDAVITS; SCHOOLS AND SCHOOL DISTRICTS.

OBJECTIONS—See PLEADING (7); TRIAL (4, 5, 8).

OBSOLESCENCE—See MUNICIPAL CORPORATIONS (8).

OFFERS—See CORPORATIONS (8).

OFFICERS.

1. Statute providing that court probation officers be appointed and removed by the governor upon recommendation of respective courts and providing method of removal *held*, not in conflict with, but within exception of, statute defining and limiting term of office of officers and commissioners, appointed by the governor, in cases not otherwise defined and limited since statute relative to probation officers had effect of creating a

OFFICERS—Continued.

tenure of office during good conduct and not for a definite period and entitled appointee to hearing upon removal in accordance with statute pursuant to which he held office (Comp. Laws 1929, § 402, and §§ 17377 and 17380, as amended by Act No. 308, Pub. Acts 1931). *Lowrie* v. *Brennan*, 63.

2. Judgment for plaintiff, administratrix of estate of deceased probate register who had been appointed under a statute providing that he should "hold such office during the term for which the judge of probate making the appointment shall have been elected, unless sooner removed by the judge of probate," against county in action to recover amount by which board of supervisors had reduced salary during term of office is affirmed by an equally divided court (Const. 1908, art. 16, § 3; 3 Comp. Laws 1929, § 13875). *Drolshagen* v. *County of Wayne*, 569.

See AFFIDAVITS (1); BANKS AND BANKING (4, 6); CORPORATIONS (1, 9); FRAUD (1); PLEADING (8); TAXATION (1); WITNESSES (5).

OIL AND GAS—See JOINT STOCK COMPANIES; JUDGMENT (7–9).

OPINIONS—See APPEAL AND ERROR (15); EVIDENCE (31, 32).

OPPORTUNITY—See WILLS (6, 7).

OPPOSITE PARTIES—See WITNESSES (1).

OPTIONS—See CONTRACTS (5, 6); LANDLORD AND TENANT (2–5).

ORAL CONTRACTS—See CONTRACTS (11); EQUITY (2); FRAUDS, STATUTE OF (1); LANDLORD AND TENANT (1); WITNESSES (5).

ORDER OF PROOF—See CRIMINAL LAW (4).

ORDINANCES—See AUTOMOBILES (29); CONSTITUTIONAL LAW (1–3); COSTS (6); MANDAMUS (3); MUNICIPAL CORPORATIONS (1–4, 8).

ORIGINAL COMPLAINT—See RAPE (3).

OVERT ACTS—See CRIMINAL LAW (2).

PAIN AND SUFFERING—See EVIDENCE (3, 4).

PAINTING—See AUTOMOBILES (33).

PARENT AND CHILD.

1. In action of assumpsit to recover for charges and expenses of keeping defendant's infant son during and subsequent to his wife's fatal illness, evidence *held*, to present a question of fact as to whether defendant expressly agreed to pay for the child's care and maintenance to plaintiff who was the child's maternal aunt and who subsequently adopted the child. *Haines* v. *Haines*, 380.

PARENT AND CHILD—Continued.

2. Finding of trial court in action of assumpsit that defendant, father of child for whose care and maintenance plaintiff sought to recover, expressly agreed to pay for such charges and expenses *held*, not against the preponderance of the evidence. *Id.*
3. To enable a child to recover for services rendered a parent it is not essential that a formal contract be entered into but if the evidence rebuts presumption that performance of the work was gratuitous and authorizes inference that both parties acted under the understanding they were to be paid for, the parent is liable and the fact that the parent and child were not members of the same household weakens the presumption and may be regarded as giving support to other facts tending to establish an implied contract. *In re Rezmer's Estate*, 545.

See APPEAL AND ERROR (8); CANCELLATION OF INSTRUMENTS (3); DIVORCE (7, 8); EQUITY (2, 12); EXECUTORS AND ADMINISTRATORS (10–12); LIMITATION OF ACTIONS (8); PRINCIPAL AND SURETY; WILLS (13, 14); WITNESSES (4).

PARKING—See AUTOMOBILES (28).

PAROL EVIDENCE—See EVIDENCE (26–28).

PARTIAL REPUDIATION—See CONTRACTS (1).

PARTIES—See APPEAL AND ERROR (3); CONTRACTS (4); COURTS (6); DISMISSAL AND NONSUIT; FRAUD (5); JUDGMENT (1, 2); TRUSTS (7–10); WITNESSES (4).

PARTNERSHIP.

1. Since copartners in business are co-owners of it and the partnership is dissolved by death of one of the partners, the surviving partner cannot continue the business but must wind it up and in so doing is liable as a fiduciary (2 Comp. Laws 1929, §§ 9846, 9861, 9871, 9877). *Grigg* v. *Hanna*, 444.
2. The surviving partner, as a fiduciary, is in effect the trustee of the assets of the deceased partner and as such trustee may not be interested directly or indirectly as a purchaser in his own behalf of the trust property without the consent of the *cestui que trust* (2 Comp. 1929, §§ 9861, 9877). *Id.* 445.
3. One joint adventurer or copartner may not seek to reap a profit at the expense of the other, the relationship forbidding and negativing the existence of any secret advantage possessed by one over the other. *Id.*
4. The use of property wrongfully appropriated by one copartner must be regarded as a continued use of the partnership assets never accounted for, and in a proper case the surviving copartner may properly be decreed to make it good. *Id.*
5. Estate of surviving partner who sought to absorb all of the partnership assets by suppressing material facts which it was his duty to disclose *held*, accountable to administratrix of estate of partner first deceased. *Id.* 446.

See APPEAL AND ERROR (22); BANKS AND BANKING (6); EXECUTORS AND ADMINISTRATORS (4, 7, 8); PRINCIPAL AND SURETY.

PART PAYMENT—See LIMITATION OF ACTIONS (3–7).

PASS BOOK—See BUILDING AND LOAN ASSOCIATIONS (1).

PASSENGERS—See APPEAL AND ERROR (4); AUTOMOBILES (10–12, 14, 15, 23, 33, 37, 38); AVIATION (2, 4); CARRIERS.

PATENTS.

1. A contract to pay a royalty for leave to manufacture an unpatented invention is valid and enforceable. *Schnack* v. *Applied Arts Corp.*, 435.
2. A licensee of the right to use an invention or device under a patent cannot escape liability for royalties contracted to be paid though it turns out the device was not in fact patentable and not covered by the patent as the licensee is estopped from denying the validity of the royalty contract. *Id.*
3. A licensee who made and sold scooters under royalty contract cannot deny the title of its licensor and retain the profits to its own use. *Id.*
4. The fact that a patent is invalid does not render sales of the invention claimed to have been patented illegal so as to taint with illegality the obligations of the licensee to account for royalties. *Id.*
5. Licensee of right to make patent may not defeat licensor's right to recover royalties upon ground latter was only a co-owner in the invention or in the application for patent filed in the patent office. *Id.*
6. A license granted by one co-owner of a patent is valid as against the licensor and his co-owners, and the licensee is liable to the licensor for the agreed price, but he is not liable to the other co-owners, unless otherwise stipulated. *Id.*
7. A license may be given before issuance of a patent, and, if without restrictions, and if acted on as applying to the invention, will protect the licensee in its use after the patent is granted. *Id.* 436.
8. Royalty contract between inventor and manufacturer executed prior to issuance of patent was a valid contract in its inception. *Id.*
9. Royalty contract between co-owner of patent and defendant manufacturer, entered into before issuance of patent, *held*, not invalid for failure of consideration because co-owner represented he was the owner of the invention and of the application filed for letters patent since licensee was fully protected in its right to use the invention. *Id.*
10. Failure of co-owner of invention and application for letters patent to prosecute application pending in patent office with due diligence *held*, no defense to suit for accounting for royalties accruing under agreement licensing defendant to manufacture scooters where licensee had failed to terminate agreement in accordance with provisions contained therein for that purpose. *Id.*

PAVEMENT—See AUTOMOBILES (1, 8).

PAYMENT—See BUILDING AND LOAN ASSOCIATIONS (1, 4); CHATTEL MORTGAGES; EQUITY (12); FRATERNAL BENEFICIARY SOCIETIES (2); LIMITATION OF ACTIONS (8); MANDAMUS (2); MORTGAGES (1, 9); TAXATION (7); VENDOR AND PURCHASER (1); WORKMEN'S COMPENSATION (2, 3).

PEDESTRIANS—See APPEAL AND ERROR (20); AUTOMOBILES (1, 4–9, 29–32); EVIDENCE (1, 3).

PEREMPTORY CHALLENGES—See JURY.

PERFORMANCE—See BROKERS (1, 6); CONTRACTS (7); FRAUDS, STATUTE OF (2).

PERMANENT ALIMONY—See DIVORCE (1).

PERMANENT COMMERCIAL BUILDINGS—See COVENANTS (6).

PERMANENT INJURIES—See DAMAGES; EVIDENCE (3, 6, 7).

PERPETUITIES.

1. The statute forbidding suspension of power of alienation beyond two lives in being relates solely to real property (3 Comp. Laws 1929, § 12935). *In re Richards' Estate,* 485.
2. The rule against perpetuities and statutes prohibiting suspension of the absolute power of alienation for more than two lives in being at the creation of the estate are for the purpose of defeating testator's intention, not to determine it (3 Comp. Laws 1929, §§ 12934, 12935). *Id.*

PERSONAL INJURIES—See EVIDENCE (3).

PERSONAL PROPERTY—See TAXATION (5); TRUSTS (16); WILLS (11); WITNESSES (4).

PERSONNEL—See TRADE UNIONS (4).

PHOTOGRAPHS—See EVIDENCE (1).

PHYSICIANS AND SURGEONS.

1. Negligence of dentist in extracting an impacted wisdom tooth *held,* not established by sole fact that jaw was fractured in the course of the extraction since to do so would employ the doctrine of *res ipsa loquitur,* which is not permissible in this jurisdiction. *Dunbar* v. *Adams,* 48.
2. To establish actionable negligence on part of dentist who was engaged to extract an impacted wisdom tooth it is necessary to show he failed to follow the usual and ordinary practice of dentists of average ability practicing in same or similar localities and that the alleged negligence was the proximate cause of claimed injuries. *Id.*

See EVIDENCE (3, 4, 6, 7).

PILOTS—See AVIATION (1–4); DEATH.

PIPING—See GAS (2, 3).

PLATS—See COSTS (3); TAXATION (10).

PLEADING.

1. Affirmative allegation in answer to relator's petition which is not traversed by relator stands admitted. *Tetro* v. *County of Wayne*, 131.
2. The chief object of a declaration is to apprize the opposite party of the cause of action and the claim of plaintiff. *Michigan Aero Club* v. *Shelley*, 401.
3. Though a declaration is not required to set up the evidence by which plaintiff's cause of action is to be proved, it must contain a specific and unequivocal statement of the essential facts constituting the cause of action. *Id.*
4. In a fraud action plaintiff can declare upon inconsistent counts of rescission and affirmance of the contract. *Gloeser* v. *Moore*, 425.
5. Discharge is an affirmative defense and the facts constituting such defense, as well as any other defense which by affirmative matter seeks to avoid the legal effect of, or defeat, the cause of action set forth in the declaration and any ground which if not raised on the pleading would be likely to take the opposite party by surprise, must be plainly set forth in the answer (Court Rule No. 23, § 3 [1933]). *Paul* v. *University Motor Sales Co.*, 587.
6. Contract of sale of corporate automobile sales agency, referred to in plaintiffs' declaration in action against corporation to recover loans advanced to the company and for past due salaries accruing prior to such contract, *held*, admissible in evidence whether offered by plaintiffs or defendant notwithstanding defendant's answer was, in effect, a simple denial of each of plaintiffs' allegations upon which liability was predicated. *Id.*
7. Variance between pleadings and proof which could have been cured by amendment and which, under the circumstances and in view of lack of specific objection, presumably did not occasion surprise to opposing counsel will be regarded on appeal as having been cured by amendment. *Id.*
8. In actions by two plaintiffs who had been officers and owners of controlling interest in defendant corporation to recover loans to corporation and past due salaries accruing prior to execution of contract of sale of their interests to individuals not defendants herein, admission in evidence of such contract and inventory of its assets referred to therein *held*, not error, where contract was referred to in plaintiffs' declarations, even though plaintiffs claimed contract and inventory were sought to be used in support of unpleaded defense of discharge. *Id.* 588.

See APPEAL AND ERROR (2, 6).

PLEDGES.

A pledgee has a duty to use at least ordinary care in the preservation of the security pledged and in the protection of the pledgor's interest therein. *Melvindale State Bank* v. *Eckfeld*, 180.

See APPEAL AND ERROR (23); BANKS AND BANKING (10); CORPORATIONS (3, 11); EQUITY (8, 9); ESTOPPEL (3).

POLICE POWER—See CONSTITUTIONAL LAW (3–5); MUNICIPAL CORPORATIONS (4, 6).

POSSESSION—See CANCELLATION OF INSTRUMENTS (3); DEEDS (2, 6, 7, 10); EMINENT DOMAIN (5); EQUITY (12); INSURANCE (1, 2).

POST-OPERATIVE TREATMENT—See NEW TRIAL.

POTENTIAL HERNIA—See WORKMEN'S COMPENSATION (10).

POWER OF ATTORNEY—See WILLS (4).

PRACTICAL NURSE—See WILLS (4).

PRE-EMPTION RIGHTS—See CORPORATIONS (9).

PREPONDERANCE OF EVIDENCE—See APPEAL AND ERROR (17, 18); INSURANCE (4); PARENT AND CHILD (2); TRIAL (3).

PRESIDENT—See AUTOMOBILES (12, 13); BANKS AND BANKING (3, 7–9); FRAUD (1).

PRESUMPTIONS—See AUTOMOBILES (6); AVIATION (4); BANKS AND BANKING (9); CARRIERS (9); DEEDS (4); EVIDENCE (11, 12, 16–19, 23, 25); EXECUTORS AND ADMINISTRATORS (10); INSURANCE (4); JUDGMENT (7); NEGLIGENCE (3); OATHS (2); PARENT AND CHILD (3); WILLS (4, 5, 7, 8, 19–21).

PRINCIPAL AND AGENT—See BROKERS (4); JOINT STOCK COMPANIES; LIMITATION OF ACTIONS (4); PLEADING (6); WILLS (5); WITNESSES (3).

PRINCIPAL AND SURETY.

1. In action to determine liability of surety on bond of coadministrator of the estate of a deceased person, who was the son and partner of deceased, surety *held*, entitled to introduce evidence to show that final account of alleged assets of estate embraced partnership assets which statute requires to be administered by surviving partner, not administrator of deceased partner's estate (2 Comp. Laws 1929, § 9869 *et seq.*). *Kent Probate Judge, for use of Heaney*, v. *American Employers Ins. Co.*, 328.
2. Finding that surety was liable for net balance of but $404.10 of judgment of $1,759 against coadministrator of estate of deceased person, who was a son and partner of deceased in the

PRINCIPAL AND SURETY—Continued.

operation of drug stores *held*, free from reversible error under evidence presented showing liability of coadministrator was based but in part upon his obligation to administer assets of the estate which was the sole obligation upon which surety was liable. *Id.* 329.

See EXECUTORS AND ADMINISTRATORS (4); JUDGMENT (2).

PRIORITY—See CONTRACTS (11).

PRIVATE BANK—See BANKS AND BANKING (6).

PRIVITY—See LANDLORD AND TENANT (3, 5).

PROBATE COURT—See APPEAL AND ERROR (22, 25); COSTS (5); COURTS (2, 3, 7); EQUITY (1); EXECUTORS AND ADMINISTRATORS (3–6, 8, 14–16); JUDGMENT (11); TRUSTS (1, 8, 10); WILLS (8).

PROBATE REGISTERS—See OFFICERS (2).

PROBATION OFFICERS—See OFFICERS (1).

PROFITS—See PATENTS (3).

PROPERTY—See CONSTITUTIONAL LAW (5, 6).

PROSECUTING ATTORNEY—See TRUSTS (8, 9).

PROSPECTIVE CUSTOMERS—See APPEAL AND ERROR (4); AUTOMOBILES (12, 13).

PROTEST—See TAXATION (7).

PROXIES—See CORPORATIONS (7–9).

PROXIMATE CAUSE—See AUTOMOBILES (13, 15, 38); MALPRACTICE (2); PHYSICIANS AND SURGEONS (2); WORKMEN'S COMPENSATION (7).

PUBLIC HEALTH, SAFETY AND WELFARE—See CONSTITUTIONAL LAW (5); MUNICIPAL CORPORATIONS (7).

PUBLIC POLICY—See APPEAL AND ERROR (30); BANKS AND BANKING (1); CONTRACTS (1, 12); COSTS (7); MORTGAGES (8, 9).

PUBLIC QUESTION—See COSTS (1–3, 6).

PURCHASE OF CLIENT'S PROPERTY—See ATTORNEY AND CLIENT.

QUANTITY DISCOUNTS—See TAXATION (4).

QUESTION FOR TRIER OF THE FACTS—See APPEAL AND ERROR (4, 9, 18, 19); AUTOMOBILES (7, 15, 20, 26, 27, 29, 31); CONTRACTS (9); CRIMINAL LAW (13); EQUITY (11); EVIDENCE (2–4); EXECUTORS AND ADMINISTRATORS (11, 12); INSURANCE (4); PARENT AND CHILD (1); RAPE (1); TRIAL (6).

QUESTION OF LAW—See WILLS (3).

QUESTIONS REVIEWABLE—See APPEAL AND ERROR (6, 10, 12, 13, 25, 27–30); COURTS (5).

RACES—See INSURANCE (10).

RAILROADS—See CARRIERS (1, 2); COVENANTS (4); EMINENT DOMAIN (1, 2, 4); TRADE UNIONS (1, 5).

RAPE.

1. In prosecution for rape where testimony of woman was of rape accomplished, trial court was not in error in leaving issue thereon to jury. *People* v. *Rock*, 171.
2. In prosecution for rape, verdict of jury finding defendant guilty of assault with intent to commit the crime of rape acquitted him of rape. *Id.* 172.
3. Testimony of original complaint of woman involved in prosecution for rape, made after she had escaped from automobile in which crime was alleged to have been committed and had gone into the woods to the house of an acquaintance *held*, admissible. *Id.*
4. Admission, over objection of defendant in prosecution for rape, of repetition by adult woman of her complaint of attack on morning after night of its alleged occurrence *held*, reversible error since there was time intervening sufficient to make it a studied utterance and cumulative. *Id.*

See CRIMINAL LAW (7).

RATIFICATION—See EXECUTORS AND ADMINISTRATORS (14).

REAL PROPERTY—See BROKERS; PERPETUITIES (1); TRUSTS (16); WILLS (11); WITNESSES (4).

REALTORS—See BANKS AND BANKING (2).

REBUTTAL—See EVIDENCE (25); WILLS (20, 21).

RECALL—See GIFTS (5); WILLS (2).

RECEIVERS—See BANKS AND BANKING (6–8); CORPORATIONS (4); TRUSTS (10).

RECIPROCAL NEGATIVE EASEMENTS—See COVENANTS (4).

RECORD—See ANIMALS; APPEAL AND ERROR (8, 11, 26, 30); AUTOMOBILES (27); BANKS AND BANKING (6); BUILDING AND LOAN ASSOCIATIONS (2, 3); CORPORATIONS (4, 5, 8, 9); DEEDS (7, 14); EVIDENCE (33); EXECUTORS AND ADMINISTRATORS (1, 8, 10); WILLS (6, 10, 21); WORKMEN'S COMPENSATION (5).

RECORDER'S COURT OF DETROIT—See CRIMINAL LAW (3).

RECORDING—See COSTS (3); DEEDS (6, 8); TAXATION (10).

REDEMPTION—See BUILDING AND LOAN ASSOCIATIONS (4).

RED FLAGS—See AUTOMOBILES (27).

RED LIGHTS—See AUTOMOBILES (33).

REFORMATION OF INSTRUMENTS.

In suit to reform settlement agreement, executed by driver of car on behalf of himself and corporate owner of car, to include the word "company" after name of principal stockholder so as to impose liability on part of company rather than such principal stockholder, who had not signed the agreement, finding of trial judge that agreement in its original form was the result of mutual mistake *held*, fully supported by evidence. *Bates* v. *Alfred F. Steiner Co.*, 697.

REFUNDS—See TAXATION (4).

REHEARING—See EQUITY (2).

REIMBURSEMENT—See CORPORATIONS (8).

RELEASES—See CONTRACTS (11); MORTGAGES (8).

REMOVAL—See OFFICERS (1).

RENEWALS—See ESTOPPEL (3).

RENT—See DIVORCE (2); LANDLORD AND TENANT (1); MORTGAGES (1, 9); WITNESSES (5).

REORGANIZATION—See CORPORATIONS (8).

REPAIRS—See ATTORNEY AND CLIENT; MORTGAGES (9).

REPEALS—See MORTGAGES (3, 4); STATUTES (4, 5).

REPETITION OF COMPLAINT—See RAPE (4).

REPLEVIN—See EQUITY (8).

REQUESTS TO CHARGE—See AUTOMOBILES (9); CRIMINAL LAW (6); TRIAL (7); WILLS (6, 9).

RESCISSION—See CANCELLATION OF INSTRUMENTS (1, 2); EQUITY (3, 4); FRAUD (2, 3); PLEADING (4); VENDOR AND PURCHASER.

RESIDENCES—See COVENANTS (2–4, 6, 12); EQUITY (5); MANDAMUS (3); MUNICIPAL CORPORATIONS (2, 3, 6–8).

RESIDUARY LEGATEES—See TRUSTS (5).

RES IPSA LOQUITUR—See PHYSICIANS AND SURGEONS (1).

RES JUDICATA—See EQUITY (1); EXECUTORS AND ADMINISTRATORS (5, 8); JUDGMENT (1, 2).

RESOLUTIONS—See CORPORATIONS (3–5); COUNTIES; COURTS (5); MANDAMUS (1); TAXATION (9).

RESTAURANT—See COVENANTS (3).

RESTORATION—See CANCELLATION OF INSTRUMENTS (1, 2).

RESTRAINTS OF ALIENATION—See PERPETUITIES; WILLS (11, 12).

RESTRICTIONS—See COVENANTS (1–4, 6–12); EQUITY (5); JUDGMENT (1).

RETURNS—See CRIMINAL LAW (8, 9, 11).

REVOCATION—See WORKMEN'S COMPENSATION (2–4).

RIGHT OF REVERTER—See DEEDS (13).

RIGHT OF WAY—See AUTOMOBILES (18, 19, 35); COVENANTS (4); EMINENT DOMAIN (2–4).

ROAD MATS—See AUTOMOBILES (27).

ROBBERY—See CRIMINAL LAW (9, 10).

ROYALTIES—See PATENTS (1–3, 5, 8–10).

RULES AND REGULATIONS—See APPEAL AND ERROR (30); CONSTITUTIONAL LAW (6); MORTGAGES (7).

RULES OF PROPERTY—See COURTS (9).

SAFE ROBBERY—See CRIMINAL LAW (9, 10).

SAFETY DEPOSIT BOXES—See DEEDS (8).

SALARIES—See COSTS (1); COUNTIES; COURTS (5); EVIDENCE (26); MANDAMUS (1); OFFICERS (2); PLEADING (6, 8).

SALE OF REALTY—See APPEAL AND ERROR (13); EXECUTORS AND ADMINISTRATORS (1–3).

SALES—See BANKS AND BANKING (10); BROKERS (3, 5); CORPORATIONS (3–5, 9); LANDLORD AND TENANT (3); PATENTS (4); TAXATION (2–6).

SALESMAN—See APPEAL AND ERROR (4); AUTOMOBILES (12, 13).

SCHOOLS AND SCHOOL DISTRICTS.

1. Statute requiring that teachers in public schools make and subscribe to oath to support Constitutions of State and nation at time of executing contract to teach must be given a reasonable construction and, so construed, *held*, not to require that oath be subscribed simultaneously with execution of the contract nor its inclusion as one of the contractual stipulations, since it is not an agreement made with the other contracting party (Act No. 19, § 22a, Pub. Acts 1931). *June* v. *School District No. 11, Southfield Township, Oakland County*, 534.

2. In requiring that teachers in public schools make and subscribe to oath that they would support the State and Federal Constitutions, at time of execution of contracts to teach, the legislature intended to make certain, and to exact a guaranty,

SCHOOLS AND SCHOOL DISTRICTS—Continued.

that teachers in public schools should believe in and support the government, to prevent inculcation of subversive, disloyal and unpatriotic principles in the minds of school children and to require readily ascertainable proof in such a way that there could be no evasion (Act No. 19, § 22a, Pub. Acts 1931). *Id.*

3. Teacher's contract, signed by two officers of the district and teacher, which contained, beneath the signatures to the contract, written form of statutory oath required of teachers which was subscribed to by plaintiff teacher, *held,* not inadmissible in evidence in action for damages for breach of contract because oath was not embodied in contract, where it was administered by an officer of the school district at time contract was executed, although such officer failed to verify oath by his jurat (Act No. 19, § 22a, Pub. Acts 1931). *Id.* 535.

SCOOTERS—See PATENTS (3, 10).

SCRAP—See WORKMEN'S COMPENSATION (8).

SECONDARY EVIDENCE—See EVIDENCE (30).

SECOND BOOK—See AUTOMOBILES (16, 17).

SECOND MORTGAGE—See APPEAL AND ERROR (30); CONTRACTS (11); COSTS (7); MORTGAGES (7–9).

SECRET ADVANTAGES—See PARTNERSHIP (3).

SECTION HAND—See JUDGMENT (7).

SECURITY—See BANKS AND BANKING (3, 6).

SENILE DEMENTIA—See EVIDENCE (10).

SENIORITY RIGHTS—See TRADE UNIONS (2–5).

SEPARATE RECORD—See APPEAL AND ERROR (8).

SETBACK LINE—See COVENANTS (12); EQUITY (5).

SET-OFF AND RECOUPMENT—See APPEAL AND ERROR (7).

SHERIFFS AND CONSTABLES—See COSTS (1); COUNTIES; COURTS (5); MANDAMUS (1).

SHOE BOX—See GIFTS (1); WILLS (2).

SHOTGUNS—See EVIDENCE (14); INSURANCE (5, 6).

SHUT-OFF VALVE—See GAS (2–5).

SIDE COLLISION—See AUTOMOBILES (21).

SIDEWALKS—See VENDOR AND PURCHASER (1).

SIGNATURES—See ESTOPPEL (3).

SIGNBOARDS—See COVENANTS (6).

SPECIFIC PERFORMANCE—See APPEAL AND ERROR (8); COVENANTS (5); EQUITY (2, 4).

SPEED—See APPEAL AND ERROR (4); AUTOMOBILES (2, 4, 14, 15, 17, 29, 30, 32); CARRIERS (1).

STARE DECISIS—See COURTS (8).

STATEMENT OF QUESTIONS INVOLVED—See APPEAL AND ERROR (14).

STATUS QUO—See CANCELLATION OF INSTRUMENTS (1, 2).

STATUTES.

1. Generally tax laws are to be construed liberally in favor of the taxpayer, they are not to be extended beyond the clear import of their language and doubts therein are construed most strongly against the government. *Standard Oil Co.* v. *State of Michigan,* 85.
2. In controversy between city and county in which such city was located respecting apportionment of funds for highway purposes derived from taxes on gasoline and motor vehicles, not only provisions of statutes under which such taxes are imposed and distributed are considered but also related statute which provides for transition of control of township roads from township to county highway authority and supply of funds therefor (Act No. 130, Pub. Acts 1931; Act No. 7, § 34, subd. [4], Pub. Acts 1934 [1st Ex. Sess.], amending 1 Comp. Laws 1929, § 4651; Act No. 8, § 19, subd. [d(4)], Pub. Acts 1934 [1st Ex. Sess.], amending 1 Comp. Laws 1929, § 3594). *City of Menominee* v. *County of Menominee,* 146.
3. Sense in which legislature uses language in a statute relative to funds for highways must be determined in the light of known facts concerning the development of highways in this State as accentuated, if not necessitated, by the public's use of the motor vehicle (1 Comp. Laws 1929, §§ 3594, 4651, as amended; Act No. 130, Pub. Acts 1931). *Id.* 147.
4. Repeals of statutes, or portions thereof, by implication are not favored. *Sambor* v. *Home Owners' Loan Corp.,* 529.
5. Mere omission to re-enact a section of a statute at time of passing an amendment to certain other sections of same statute does not of itself give rise to an implication that section not re-enacted is thereby repealed, especially where sections amended are specifically designated by the amendatory act. *Id.*
6. Unless the subject-matter of amendatory legislation is such as necessitates a contrary conclusion, it should be held not to have modified any other sections of the statutes than those expressly indicated in the amendatory act and it is unnecessary to re-enact and publish at length the remaining sections of the original act as they remain unaffected by the amendatory legislation (Const. 1908, art. 5, § 21). *Id.*

STATUTES—Continued.

7. The fundamental rule of construction of statutes is to ascertain and give effect to the intention of the legislature as expressed in the statute. *June* v. *School District No. 11, Southfield Township, Oakland County,* 534.

8. When the words of a statute are not precise and clear, the construction which is most reasonable and best suited to accomplish the objects of the statute should be adopted, and a construction leading to an absurd consequence, hardship or injustice be disregarded if possible. *Id.*

See ANIMALS; APPEAL AND ERROR (8, 10, 13, 21, 30, 31); AUTOMOBILES (2–4, 10–12, 14, 24, 26–30, 35, 37); AVIATION; BANKRUPTCY; BANKS AND BANKING (1, 3–8); CHATTEL MORTGAGES; CONTRACTS (1, 7); CORPORATIONS (6); COSTS (2, 3); COUNTIES; COURTS (2, 3); CRIMINAL LAW (9, 10, 12–14); DEATH; DISMISSAL AND NONSUIT; DIVORCE (4–8); EMINENT DOMAIN (1–4); EQUITY (2); EVIDENCE (9, 19, 32, 33); FRAUD (1); FRAUDS, STATUTE OF; GAS (5); GIFTS (4); JUDGMENT (13); LANDLORD AND TENANT (1); LIMITATION OF ACTIONS (1, 3–8); MANDAMUS (1, 2); MORTGAGES (2–8); OFFICERS; PARTNERSHIP (1, 2); PERPETUITIES; PRINCIPAL AND SURETY (1); SCHOOLS AND SCHOOL DISTRICTS; TAXATION; TRIAL (7); TRUSTS (1–3, 8, 9, 14); VENDOR AND PURCHASER; WILLS (1, 11, 12); WITNESSES; WORDS AND PHRASES (1); WORKMEN'S COMPENSATION.

STOCK AND STOCKHOLDERS—See APPEAL AND ERROR (23); BUILDING AND LOAN ASSOCIATIONS (3); CORPORATIONS (3–11, 13); EQUITY (8, 9); ESTOPPEL (3); EXECUTORS AND ADMINISTRATORS (9); FRAUD (2); REFORMATION OF INSTRUMENTS.

STOPPING—See AUTOMOBILES (4, 18).

STREET CARS—See CARRIERS (1–3).

STRUCTURAL CHANGES—See MUNICIPAL CORPORATIONS (1–3).

SUBDIVISION—See COVENANTS (1–4, 6, 8, 12); EQUITY (5); JUDGMENT (1); VENDOR AND PURCHASER (1).

SUBPŒNA—See EVIDENCE (26).

SUBSCRIPTIONS—See CORPORATIONS (6); EVIDENCE (22); FRAUD (2, 3); JOINT STOCK COMPANIES; JUDGMENT (6).

SUBSEQUENT CONDUCT—See DEEDS (6).

SUBSEQUENT NEGLIGENCE—See AUTOMOBILES (17); NEGLIGENCE (1).

SUDDEN JERKS OR JOLTS—See CARRIERS (2–4).

SUDDEN PERIL—See AUTOMOBILES (32); NEGLIGENCE (2).

SUICIDE—See EVIDENCE (11, 12); INSURANCE (3–6).

SUMMARY JUDGMENT—See JUDGMENT (6–9).

SUPERVISORS, BOARD OF—See COUNTIES; COURTS (5); MANDAMUS (1); OFFICERS (2); TAXATION (8–10).

SUPPRESSION OF TRUTH—See FRAUD (6).

SUPREME COURT—See APPEAL AND ERROR (9, 12, 13, 15, 17, 25, 26, 30); BUILDING AND LOAN ASSOCIATIONS (2); COSTS (5); MANDAMUS (2); MORTGAGES (11); WORKMEN'S COMPENSATION (6, 9).

SURETY—See PRINCIPAL AND SURETY.

SURPRISE—See PLEADING (5, 7).

SURRENDER—See CORPORATIONS (11); EQUITY (9); EXECUTORS AND ADMINISTRATORS (9).

SURVIVAL ACT—See AVIATION (1); DEATH.

SUSPENDING COMPENSATION—See WORKMEN'S COMPENSATION (7).

SUSPENSION—See FRATERNAL BENEFICIARY SOCIETIES (2).

SYNDICATES—See EVIDENCE (22); FRAUD (2, 3); JUDGMENT (6–9).

TAXATION.

1. Tax collecting officers must be able to point to express statutory authority for making tax exactions. *Standard Oil Co.* v. *State of Michigan*, 85.
2. "Discounts," as that term is employed in section 1 of the general sales tax act, refers to discounts paid by the vendor to a bank or other discounting agency to have bills of exchange or promissory notes and other negotiable paper paid before maturity (Act No. 167, § 1, Pub. Acts 1933). *Id.*
3. Cash discounts, if taken by a customer, *held*, no part of gross proceeds of sale at retail under definition of "gross proceeds" contained in general sales tax act, hence are not taxable (Act No. 167, § 1, Pub. Acts 1933). *Id.*
4. Trade or quantity discounts, based on agreements between retailer and customer entered into in advance of sale, which are off list price and vary according to quantity of merchandise purchased and customers do not contemplate refunds on purchase price, are no part of gross proceeds of sale at retail as those terms are defined in general sales tax act, hence are not taxable thereunder (Act No. 167, § 1, Pub. Acts 1933). *Id.*
5. The State sales tax is a privilege tax, exacted for privilege of engaging in business of selling tangible personal property at retail within the State (Act No. 167, Pub. Acts 1933). *Id.*
6. Both the Federal excise tax upon sale of gasoline and lubricating oils and State sales tax attach the instant a sale thereof is made to the consumer, hence neither is a part of the sale price,

TAXATION—Continued.

the Federal tax being a fund payable by the manufacturer to the Federal government when collected but which never does become a part of manufacturer's gross proceeds of the sale subject to State sales tax (47 Stat. at L. p. 259, 48 Stat. at L. pp. 206, 764; Act No. 167, § 1, Pub. Acts 1933). *Id.* 86.

7. Interest on sales tax paid under protest of taxpayer *held*, allowable where taxpayer is permitted to recover tax exacted (Act No. 167, Pub. Acts 1933). *Id.*

8. Under statutes providing for distribution of so-called motor vehicle weight and gasoline tax funds the legislature is *held*, to have intended to specify the particular purposes with designated priorities for which a portion of such funds might be used in the respective counties except as in a limited measure the power of appropriation was delegated to boards of supervisors (Act No. 7, § 34, Pub. Acts 1934 [1st Ex. Sess.], amending 1 Comp. Laws 1929, § 4651; Act No. 8, § 19, Pub. Acts 1934 [1st Ex. Sess.], amending 1 Comp. Laws 1929, § 3594). *City of Menominee* v. *County of Menominee*, 146.

9. Specification in statutes that a designated portion of funds derived from motor vehicle weight and gasoline taxes should "be used for the maintenance of additional mileage of township roads in any county selected and determined upon in accordance with the provisions" of an act setting forth method of accomplishing transition of control of 20 per cent. of the township highway mileage annually from township to county highway agencies, providing funds for latter agencies, and gradually reducing maximum rate of taxation by townships for highway purposes *held*, to provide such county agencies with additional funds for the additional burden even after all the roads had been taken over by the county agencies, especially in view of the fact that amendments enacted subsequent to the completed transfer of authority continued to embody such provision and added authority of boards of supervisors to appropriate for the maintenance of city and village streets, hence resolution of board of supervisors making appropriation for "roads heretofore selected, determined upon and taken over into the county road system" under the act providing for transition of control was within power of board to pass (1 Comp. Laws 1929, § 3594, as amended by Act No. 41, Pub. Acts 1932 [1st Ex. Sess.], Act No. 8, Pub. Acts 1934 [1st Ex. Sess.], and Act No. 340, Pub. Acts 1937; § 4651, as amended by Act No. 7, Pub. Acts 1934 [1st Ex. Sess.], and Act No. 320, Pub. Acts 1937; and Act No. 130, Pub. Acts 1931). *Id.*

10. Allocation by board of supervisors of portion of funds received by county from State motor vehicle weight and gasoline taxes for use on dedicated streets and alleys in recorded plats outside of incorporated cities and villages during year 1936–1937 *held*, proper, such thoroughfares being township roads by force of statute and taken over by county authorities pursuant to statute (1 Comp. Laws 1929, § 3594, as last amended

TAXATION—Continued.

by Act No. 8, Pub. Acts 1934 [1st Ex. Sess.]; §§ 3998, 4294; § 4651, as last amended by Act No. 7, Pub. Acts 1934 [1st Ex. Sess.]; Act No. 130, Pub. Acts 1931, as amended by Act No. 238, Pub. Acts 1937). *City of Iron Mountain* v. *Dickinson County Road Commissioners*, 213.

See COSTS (2, 3); MORTGAGES (1, 9, 10); STATUTES (1, 2).

TAXICABS—See AUTOMOBILES (29–32).

TEACHERS—See SCHOOLS AND SCHOOL DISTRICTS.

TEMPORARY STRUCTURES—See COVENANTS (6).

TENANCY IN COMMON—See ESTOPPEL (3).

TENDER—See FRAUD (3).

TERM OF OFFICE—See OFFICERS (1).

TESTAMENTARY TRUSTEES—See TRUSTS (1–6).

THEORY OF CASE—See JUDGMENT (6); TRIAL (1).

THROUGH HIGHWAYS—See AUTOMOBILES (18–20).

TIME—See CONTRACTS (6).

TITLE—See APPEAL AND ERROR (28); CORPORATIONS (11); DEEDS (3, 5, 6); EQUITY (8); EVIDENCE (8); INSURANCE (1, 2); PATENTS (3); VENDOR AND PURCHASER (1).

TOOTH—See MALPRACTICE (1); NEW TRIAL; PHYSICIANS AND SURGEONS.

TOWNSHIPS—See EVIDENCE (9); STATUTES (2); TAXATION (9, 10).

TRACKS—See AUTOMOBILES (1).

TRADE DISCOUNTS—See TAXATION (4).

TRADE UNIONS.

1. Membership in railroad brotherhood, a voluntary unincorporated labor association organized to promote unity of action and the general welfare of the members, *held*, to create in such members, under the brotherhood's constitution, statutes and protective laws, no contractual rights guaranteeing individual members that no action will be taken or agreements made for the benefit of brotherhood as a whole if such action should operate to the detriment of an individual member. *Hartley* v. *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees*, 201.
2. In action by plaintiff, a married woman who had been employed by a railroad company for a number of years during which she had acquired seniority rights under an agreement

TRADE UNIONS—Continued.

between the company and defendant brotherhood, a voluntary unincorporated labor association, to recover damages for breach of alleged contract between plaintiff and defendant for loss of seniority rights, defendant *held*, to have the power to modify or destroy such rights in the interest of all the members by the same method as they were created, *i. e.*, an agreement with the employer. *Id.*

3. Seniority rights accorded members of a voluntary unincorporated labor association pursuant to its constitution and by-laws and agreement between association and employer may be modified in the general interest of all members of the association notwithstanding the effect thereof to an individual member providing such modification is not accomplished as a result of bad faith, arbitrary action, or fraud directed toward such member. *Id.*
4. Agreement between employer and voluntary unincorporated labor association, executed when economic conditions necessitated a reduction in personnel, whereby married women were to be relieved from service unless extenuating circumstances were shown, *held*, not to have breached contractual rights forming basis for action against association by married woman who showed neither extenuating circumstances on her own part nor bad faith, arbitrary action or fraud directed at her by association. *Id.* 202.
5. Action of brotherhood in denying within its organization relief to plaintiff, a married woman member who lost her seniority rights and employment with railroad company as result of agreement between brotherhood and company when latter had to reduce personnel, is not interfered with by courts where denial of such relief is not shown to have been accompanied with bad faith, arbitrary action or fraud on part of anyone participating in the disposition of her claim. *Id.*

TRAFFIC SIGNALS—See AUTOMOBILES (33).

TRIAL.

1. Recovery by a plaintiff must be had, if at all, on the theory on which it tried the case. *Michigan Aero Club* v. *Shelley*, 401.
2. If plaintiff, due to lack of proof, does not make out his case, the court should so hold. *Id.* 402.
3. In noncriminal cases the court cannot require a jury to disregard any preponderance of evidence which convinces them. *Grigg* v. *Hanna*, 444.
4. When objections are made to the introduction of evidence during the course of a trial, such objections must be specific and the ground therefor should be stated with perspicuity and particularity in order that it may be understood by the court. *Case* v. *Klute*, 581.
5. A general objection to evidence is unavailable where any part of such evidence is not subject to the objection. *Id.*

TRIAL—Continued.

6. Party whose interests may be injuriously affected by improper admission of evidence may have it stricken out by applying to the court for that purpose but the ground upon which the motion is based should be stated and it is the duty of counsel to call to the attention of the court any conditions which may qualify its consideration by the jury. *Id.*
7. Failure of trial court to instruct jury at time of admission of testimony as to facts, claimed to be equally within knowledge of plaintiff's decedent, that such testimony was subject to consideration but with qualification that if they found that facts were equally within knowledge of deceased such testimony was to be disregarded *held*, not error in the absence of request so to charge on part of counsel (3 Comp. Laws 1929, § 14219). *Id.* 582.
8. The particular reason for objection to the introduction of evidence must be reasonably apparent; the proper method being to state briefly the grounds thereof. *Paul* v. *University Motor Sales Co.*, 587.

See APPEAL AND ERROR (17, 19); JUDGMENT (13).

TRIGGERS—See EVIDENCE (14); INSURANCE (6).

TROVER—See EQUITY (8).

TRUCKS—See AUTOMOBILES (24, 27, 28, 38).

TRUSTEES—See APPEAL AND ERROR (3); EQUITY (1); TRUSTS (1, 3–9).

TRUSTS.

1. Order of probate court reciting that due to oversight testator's nominee for executor and trustee was not appointed as trustee when filing account as executor, that no trustee was hitherto appointed and ordering that such nominee be appointed and give bond *held*, not to serve as letters of trusteeship, *nunc pro tunc*, as of date of filing final account as executor, but a present appointment, inoperative without compliance with statutory provisions as to trustees (3 Comp. Laws 1929, §§ 15865, 15866, 15902, 15903). *In re Oliff's Estate*, 43.
2. Statutory requirement that a testamentary trustee give bond before entering upon duties of his office is mandatory (3 Comp. Laws 1929, § 15865). *Id.* 44.
3. Under will nominating same person as executor and trustee, acts of such person after appointment as executor and before issuance of letters of trusteeship are, in law, acts as executor and not as trustee even though performed in honest belief of power to act in latter capacity (3 Comp. Laws 1929, §§ 15865, 15866, 15902, 15903). *Id.*
4. Offices of executor and testamentary trustee are distinct, and fact that same person is nominated in a will to fill both does not and cannot bring relation of his acts in one capacity with those in the other. *Id.*

TRUSTS—Continued.

5. Motion for directed verdict for allowance of testamentary trustee's account from time of his appointment as such because during such period there was no contest should have been granted on contest of residuary legatee to testamentary trustee's final account where derelictions complained of occurred during his term as executor when he assumed to act as trustee before his appointment as such. *Id.*

6. Since entry of judgment on verdict allowing testamentary trustee's final account in amount which should have been directed on such trustee's motion, because of no contest for actual period of trusteeship, accomplished same result as directed verdict, the judgment is affirmed. *Id.*

7. Nonprofit corporation, organized by executor who was also the testamentary trustee of residuum of donor's estate to take over assets of trust for crippled children, *held,* a proper party defendant in suit against it and executor-trustee for accounting as to misappropriated assets where bill of complaint made it a party and under allegations of bill it was a necessary party, and, as such party defendant, entitled to have suit dismissed or prosecuted by a proper party plaintiff. *King* v. *Emmons,* 117.

8. Guardian *ad litem,* appointed by probate court, for "persons unborn, unascertained, or legally incompetent to act in their own behalf, and of any minors, societies, corporations, institutions or other possible or contingent beneficiary" under trusts created by will of donor of large sum for crippled children after executor had filed a supplemental account *held,* to have no standing as party plaintiff in equity proceeding in circuit court against such executor and corporation which, as testamentary trustee, he had caused to be organized to take over assets of the trust, for accounting as to funds alleged to have been misappropriated; such suit being continued by prosecuting attorney who had intervened as party plaintiff and corporation has sought relief from codefendant by way of cross-bill (3 Comp. Laws 1929, §§ 13513, 15899). *Id.* 118.

9. Statute providing that prosecuting attorney shall represent beneficiaries in all cases where they are uncertain or indefinite *held,* applicable to case where accounting is sought as to funds by executor and corporation which he, as testamentary trustee, had caused to be organized to take over assets under trust set up "for the care, maintenance and education of crippled children, who otherwise are destitute of the proper and necessary means for their care, medical attendance and education" since such children are the uncertain and indefinite beneficiaries of the trust, not the corporation organized to administer the fund (3 Comp. Laws 1929, § 13513). *Id.*

10. Appointment of receiver on petition of guardian *ad litem,* designated by probate court, but who was not a proper party plaintiff to proceeding in chancery for accounting as to alleged misappropriations by executor who was also testamentary trustee *held,* premature where made before hearing upon merits

TRUSTS—Continued.

and questioned by nonprofit corporation executor had caused to be organized to administer trust assets but vacation of order making such appointment and granting injunctive relief as to assets is made without prejudice as to right of any proper party to make further application in circuit court for such relief where it does not appear the estate will suffer loss pending disposition of case on merits if possession and management be left with such corporation. *Id.* 119.

11. Trustee has no right to act when duty is opposed to interest, fidelity to cupidity, or honesty to desire for personal gain. *Grigg* v. *Hanna*, 445.

12. To act as trustee for dead men carries with it the duty to exercise honesty, good faith, and active diligence; the duty to disclose to the beneficiaries and account for the estate. *Id.*

13. Equity will take jurisdiction where one occupying a fiduciary relationship violates his trust to the prejudice of persons otherwise beneficially interested. *Id.*

14. Party who obtains a conveyance under circumstances which court considers fraudulent or oppressive by instant or immediate consequence will be converted into a trustee in case that construction is needful for the purpose of administering adequate relief and statute of frauds will not hinder equity from affording relief in such manner (3 Comp. Laws 1929, §§ 13411, 13412). *Id.* 446.

15. Courts of equity do not enforce or impose penalties or punish parties for their wrongs in the administration of trusts but only furnish the adequate means of redress when the law fails to do so. *Id.*

16. Testamentary trust making same disposition of realty and personalty is void in its entirety where void as to realty. *In re Richards' Estate*, 485.

See EQUITY (8); EXECUTORS AND ADMINISTRATORS (8); FRAUD (4); PARTNERSHIP (2); WILLS (11, 12, 14).

ULTRA VIRES—See CORPORATIONS (10).

UNDUE INFLUENCE—See WILLS (4–8, 18–21).

UNJUST ENRICHMENT—See BANKS AND BANKING (2).

VARIANCE—See PLEADING (7).

VARYING TERMS OF WRITTEN CONTRACT—See EVIDENCE (26).

VEAL—See APPEAL AND ERROR (31); CRIMINAL LAW (12–14); EVIDENCE (32, 33).

VENDOR AND PURCHASER.

1. In purchaser's suit to rescind land contracts for purchase of lots in a subdivision in which contract vendor agreed to convey merchantable title, gravel streets and lay cement sidewalks,

VENDOR AND PURCHASER—Continued.

plaintiff's suit *held*, not founded on covenant so as not to be barred until lapse of 10 years, but one to recover payments made under contract, no fraud or mistake having been alleged (3 Comp. Laws 1929, § 13976). *Wall* v. *Zynda*, 260.

2. Purchaser's bill for rescission of land contracts in suit started over seven years after payment of contract price in full *held*, properly dismissed, the suit being barred by the six-year statute of limitations (3 Comp. Laws 1929, § 13976). *Id.* 261.

See CONTRACTS (11); LANDLORD AND TENANT (2–5); MORTGAGES (8).

VENUE—See CRIMINAL LAW (2, 3).

VERDICTS AND FINDINGS—See ANIMALS; APPEAL AND ERROR (1, 16–18, 22); AUTOMOBILES (21, 22); BANKS AND BANKING (6); CRIMINAL LAW (13, 14); DEEDS (7); EXECUTORS AND ADMINISTRATORS (8, 15); FRAUD (1); JUDGMENT (4); PARENT AND CHILD (2); PRINCIPAL AND SURETY (2); REFORMATION OF INSTRUMENTS; WILLS (17); WORKMEN'S COMPENSATION (5, 6, 9, 10).

VETERINARIANS—See APPEAL AND ERROR (31); CRIMINAL LAW (13).

VOIR DIRE—See JURY.

VOTES—See CORPORATIONS (3–5, 9).

WAIVER—See CORPORATIONS (9); COVENANTS (2, 6); CRIMINAL LAW (11); EXECUTORS AND ADMINISTRATORS (1); FRATERNAL BENEFICIARY SOCIETIES (1); JURY; LIMITATION OF ACTIONS (1); WITNESSES (1, 2).

WAREHOUSE—See EMINENT DOMAIN (5).

WARNINGS—See AUTOMOBILES (27).

WASTE—See EXECUTORS AND ADMINISTRATORS (7).

WEIGHT-BEARING LINES—See EVIDENCE (4).

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (11, 19, 31); CRIMINAL LAW (1, 12).

WEIGHT TAX—See TAXATION (8, 10).

WIDOW—See APPEAL AND ERROR (13, 14); EXECUTORS AND ADMINISTRATORS (1–3).

WIDOW'S ALLOWANCE—See APPEAL AND ERROR (25); EXECUTORS AND ADMINISTRATORS (14).

WILFUL AND MALICIOUS INJURIES—See BANKRUPTCY.

WILFUL AND WANTON MISCONDUCT—See AUTOMOBILES (33).

WILLS.

1. In determining whether an instrument is a will or not, its form is of little consequence for if statutory formalities are complied with and instrument is to operate only after death of maker it is a will. *Geisel* v. *Burg*, 74.
2. In suit by administrator to determine ownership of various certificates of deposit which were made payable to deceased or certain relatives in the event of her death and were found in a shoe box underneath deceased's bed or which had been left with a nephew subject to her recall, evidence *held*, insufficient to establish intent of deceased to make a will as to any certificate in favor of any one. *Id.* 75.
3. In will contest, evidence *held*, sufficient to justify holding of trial court as a matter of law that will was executed in accordance with legal requirements. *In re Evans' Estate*, 275.
4. Contention by cousins, residing in another State some distance from home of testatrix, that will, containing bequest of household furniture, car and one-third of the residuary estate to neighbor who had acted as practical nurse for testatrix and her late husband, is presumed to have been obtained through undue influence of such legatee who is alleged to have sustained a confidential relation with testatrix because he had a power of attorney *held*, untenable where power of attorney was not given to legatee until three months after will was executed. *Id.* 276.
5. Fact that a beneficiary under a will has for a considerable time been intimate with and attended to business transactions for a testator, notwithstanding latter was mentally afflicted to the extent of being intermittently insane, does not raise a presumption of undue influence. *Id.*
6. Record in will contest *held*, not to disclose error, either in lengthy and perhaps somewhat repetitious and irrelevant charge or failure to give appellants' proffered requests as to undue influence so prejudicial as to constitute reversible error, especially where testimony indicates no more than that person who is alleged to have exercised undue influence had an opportunity to do so. *Id.*
7. Fact that opportunity was present for undue influence of a testator in making a will will not raise an inference of it. *Id.*
8. In contest of a will, alleged to have been the result of undue influence upon the part of a beneficiary, fact that such person was not called as a witness by proponent at trial in circuit court *held*, no basis for instruction to jury that presumption was raised that had he been called his testimony would have been adverse to proponent where such person was sworn as a witness by contestants in the probate court and was present in court throughout the trial in the circuit court notwithstanding argument as to permissible inference from failure to testify was made to the jury over proponent's objection. *Id.*
9. Determination of jury in will contest that testatrix was not shown mentally incompetent to execute will when it was executed *held*, proper where voluminous testimony was conflicting,

WILLS—Continued.

full and detailed requests to charge were submitted by both proponents and contestants and charge as given on such question, though somewhat repetitious and prolix was not prejudicial. *Id.* 277.

10. Charge to jury in will contest that only insane delusion with which testatrix is shown to have been afflicted had nothing to do with the disposition made of her property in the will and therefore jury could not find the will invalid on that ground *held,* justified under record presented. *Id.*

11. Testamentary trust which included realty as well as personalty, based upon a term of years rather than "during continuance of two lives in being" and which contained no provisions for termination of the trust prior to the time so fixed, contravenes statute prohibiting suspension of absolute power of alienation and must fail (3 Comp. Laws 1929, §§ 12934, 12935). *In re Richards' Estate,* 486.

12. Power of testamentary trustees to sell and dispose of the property as testator himself could have done if living suspends, in law, the power of alienation (3 Comp. Laws 1929, §§ 12934, 12935). *Id.*

13. Bequest to person who was not an heir of testator which was entirely separate from disposition made to testator's three children *held,* valid, where it could be carried out entirely independent of the other provisions. *Id.*

14. Under petition for construction of will containing outright bequest to testator's daughter of one-third of his property and setting up invalid trust as to remaining two-thirds for testator's sons, bequest to daughter *held,* invalid since it was testator's intention to give her one-third of his property only, not one-third plus a third of portion which must pass as intestate property. *Id.*

15. Courts cannot make new wills for testators who have failed to make valid wills for themselves, rather the property should pass by law. *Id.*

16. It is the duty of courts to effectuate the intention of the testator as to the disposition of his property, in so far as it is legally possible. *Id.*

17. In will contest, holding of trial court that testator was competent to make her will *held,* correct. *In re Haskell's Estate,* 513.

18. One alleging procurement of will through undue influence must prove that improper influence was exerted and that it had the effect of overcoming the will of testatrix. *Id.*

19. Presumption that devise of property to one in such confidential and fiduciary relationship as an attorney was procured through undue influence is rebuttable and is rebutted where client, testatrix, receives independent legal advice. *Id.*

20. Presumption of undue influence in making will in favor of testatrix's attorney having been rebutted by competent evi-

WILLS—Continued.

dence that testatrix had the opportunity of receiving and did receive independent legal advice, contestants then had duty of producing evidence to substantiate their claim. *Id.*

21. In contest of will, leaving testatrix's property to attorney who had performed services for her over a period of years, where record shows an absence of testimony to sustain claim of undue influence, raised by presumption against which competent rebuttal testimony had been introduced, judgment for proponent *non obstante veredicto* should be entered. *Id.*

See APPEAL AND ERROR (11, 22); EXECUTORS AND ADMINISTRATORS (8).

WINDING UP—See PARTNERSHIP (1).

WINTER—See AUTOMOBILES (22).

WISDOM TOOTH—See MALPRACTICE (1); NEW TRIAL; PHYSICIANS AND SURGEONS.

WITNESSES.

1. An administrator may not waive provisions of statute prohibiting a claimant against estate from testifying to facts, tending to support his claim, which were equally within knowledge of deceased except where administrator examines or calls the opposite party to testify as to matters equally within knowledge of deceased (3 Comp. Laws 1929, § 14219). *Geisel* v. *Burg*, 74.

2. Failure of an administrator to object to testimony of a witness who testifies as to matters equally within knowledge of deceased *held*, not a waiver of benefit of such statute (3 Comp. Laws 1929, § 14219). *Id.*

3. In administrator's suit to determine ownership of various certificates of deposit which had been purchased by deceased and were made payable to her or designated nephews and niece, testimony as to delivery by nephew with whom they were deposited and who had acted as deceased's agent *held*, inadmissible as to certificate in which he was designated as alternate payee but admissible as to certificates made payable to deceased and brothers and sister of witness as alternate payees (3 Comp. Laws 1929, § 14219). *Id.*

4. In suit by plaintiff against his brother for portion of property given defendant by their father alleged to have been promised plaintiff by father when he was 21 if he would stay at home and help his parents, testimony of plaintiff's wife *held*, properly excluded as equally within knowledge of deceased father, where both real and personal property was sought to be recovered (3 Comp. Laws 1929, § 14219). *Speaker* v. *Speaker*, 184.

5. In action of assumpsit to recover balance of rent, alleged to be due under written lease for five-year term, which after 20-½ months had been deferred in part by a supplemental written agreement reducing amount presently payable for ensuing six

WITNESSES—Continued.

months, testimony by officers of corporate lessee that continuance of smaller payments beyond such six-month term and acceptance by lessor was in payment of rent in full and was pursuant to oral agreement with an officer of corporate lessor, since deceased, *held*, not barred by statute as to matters equally within knowledge of deceased officer, where testimony also shows a surviving officer of lessor was fully familiar with the arrangement (3 Comp. Laws 1929, § 14219). *Lawson-Erb Lumber Co.* v. *Graham-Paige Co. of Michigan*, 252.

6. To exclude testimony of defendant on basis it related to fact equally within the knowledge of plaintiff's decedent for whose death damages were sought to be recovered, it must affirmatively appear from the testimony or circumstances that the facts sought to be shown were equally within the knowledge of the deceased as such facts cannot be inferred (3 Comp. Laws 1929, § 14219). *Case* v. *Klute*, 581.

See APPEAL AND ERROR (8, 19, 23, 31); CRIMINAL LAW (1, 6, 12); EQUITY (2); EVIDENCE (26, 31–33); JUDGMENT (7, 8); WILLS (8).

WORDS AND PHRASES.

1. A term, such as "guardian *ad litem*," which has a very definite meaning in the law must be assumed to have been used in its proper sense when incorporated in a statute by the legislature (3 Comp. Laws 1929, § 15899). *King* v. *Emmons*, 117.
2. A hernia is the peritoneum going through the inguinal ring, accompanied by the intestines or some other substance. *Cessante* v. *Ford Motor Co.*, 521.

See AFFIDAVITS (1); AVIATION (2, 3); OATHS (1).

WORKMEN'S COMPENSATION.

1. The department of labor and industry has those powers expressly conferred upon it by the workmen's compensation act and those necessarily implied therefrom (2 Comp. Laws 1929, § 8407 *et seq.*). *Shiekick* v. *Varkle Iron & Metal Co.*, 38.
2. The department of labor and industry had the implied power to revoke an acceptance of the workmen's compensation act by an employer upon latter's failure to provide an acceptable certificate of insurance to guarantee payment of compensation prior to amendment expressly conferring such power (2 Comp. Laws 1915, § 5428, as amended by Act No. 64, Pub. Acts 1919, and Act No. 113, Pub. Acts 1929 [2 Comp. Laws 1929, § 8412]). *Id.* 39.
3. In proceeding to recover compensation under workmen's compensation act by way of petition for vacation of order revoking employer's acceptance of the workmen's compensation act, payments made under an unapproved agreement for compensation for accidental injury which had been suffered while employer's acceptance of the act stood revoked *held*, not binding upon employer and insurer (2 Comp. Laws 1929, § 8407 *et seq.*). *Id.*

WORKMEN'S COMPENSATION—Continued.

4. Since the department of labor and industry has no authority to make an award of compensation for an injury occurring while acceptance of the workmen's compensation act stands revoked and prior to time second acceptance is filed and an approval of an agreement for workmen's compensation is the equivalent of an award by the department, it has no authority to approve an agreement for such injuries. *Id.*
5. Finding of fact by department of labor and industry, in proceeding for further compensation for injury to foot, that plaintiff had failed to establish disability as result of injury received a year and nine months previous to filing instant petition *held,* supported by testimony in the record. *Roundtree* v. *Ford Motor Co.,* 141.
6. Supreme Court is bound by finding of fact of department of labor and industry which is supported by evidence. *Id.*
7. An agreement of employee and employer suspending payment of compensation, entered into after former had reentered service of employer, and approved by the department of labor and industry still leaves employee with burden of showing, upon subsequent application for further compensation, that he is under disability resulting from the accident in consequence of which the original award was made. *Id.*
8. Employee engaged in tipping second barrel of scrap on contents of first barrelful which had been dumped on floor and who claims to have suffered a sharp pain that was followed by a right indirect inguinal hernia *held,* not entitled to compensation where evidence shows he had been engaged for some time in lifting boxes weighing about 60 pounds, no claim is made of slipping or of any unusual circumstances except weight of the barrel and that he continued working over two months thereafter. *Nagy* v. *Continental Die Casting Corp.,* 162.
9. The findings as to facts by the department of labor and industry are conclusive upon Supreme Court if there is any competent evidence to sustain such findings (2 Comp. Laws 1929, § 8451). *Cessante* v. *Ford Motor Co.,* 521.
10. Finding of department of labor and industry that employee had merely a potential hernia or a condition of predisposition to hernia *held,* supported by evidence showing no protrusion through the internal inguinal ring. *Id.*

WRIT OF RESTITUTION—See ATTORNEY AND CLIENT.

WRONG SIDE OF STREET—See AUTOMOBILES (15).

X-RAYS—See MALPRACTICE (1).

YPSILANTI—See MANDAMUS (3); MUNICIPAL CORPORATIONS (1–3).

ZONING ORDINANCES—See CONSTITUTIONAL LAW (3); COSTS (6); MANDAMUS (3); MUNICIPAL CORPORATIONS (1–5, 7, 8).