MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

MAY 17 to OCTOBER 11, 1944

HIRAM C. BOND
STATE REPORTER

VOL. 309
FIRST EDITION

CHICAGO
CALLAGHAN AND COMPANY
1945

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SUPREME COURT.

Chief Justice.

	Term expires
WALTER H. NORTH, Battle Creek, . . .	Dec. 31, 1945

Associate Justices.

RAYMOND W. STARR, Grand Rapids, . .	Dec. 31, 1945
HOWARD WIEST, Lansing, ...	Dec. 31, 1947
HENRY M. BUTZEL, Detroit, ...	Dec. 31, 1947
GEORGE E. BUSHNELL, Detroit, . . .	Dec. 31, 1949
EDWARD M. SHARPE, Bay City, . . .	Dec. 31, 1949
EMERSON R. BOYLES, Charlotte, . . .	Dec. 31, 1951
NEIL E. REID, Mount Clemens, . . .	Dec. 31, 1951

Clerk—JAY MERTZ, Lansing.

Crier—DON M. CHILDS, Lansing.

Attorney General—HERBERT J. RUSHTON, Escanaba.

Solicitor General—EDMUND E. SHEPHERD, East Lansing.

594614

CIRCUIT JUDGES.

1.	CHARLES O. ARCH,	HILLSDALE.
2.	FREMONT EVANS,	ST. JOSEPH.
3.	JOHN V. BRENNAN,[1]	DETROIT.
	VINCENT M. BRENNAN,	
	SHERMAN D. CALLENDER,	
	JAMES E. CHENOT,	
	WILLIAM FRIEDMAN,	
	IRA W. JAYNE,	
	ADOLPH F. MARSCHNER,	
	DEWITT H. MERRIAM,	
	GUY A. MILLER,	
	LESTER S. MOLL,[2]	GROSSE POINTE.
	JOSEPH A. MOYNIHAN, GEORGE B. MURPHY, THOMAS J. MURPHY,	DETROIT.
	LILA M. NEUENFELT,	DEARBORN.
	CHESTER P. O'HARA,	GROSSE POINTE.
	THEODORE J. RICHTER,	GROSSE POINTE PARK.
	ROBERT M. TOMS, ARTHUR WEBSTER, CLYDE I. WEBSTER,	DETROIT.
4.	BENJAMIN WILLIAMS, JOHN SIMPSON,	JACKSON.
5.	ARCHIE D. McDONALD,	HASTINGS.
6.	FRANK L. DOTY,	PONTIAC.
	GEORGE B. HARTRICK,	ROYAL OAK.
	H. RUSSEL HOLLAND,	PONTIAC.
7.	CLIFFORD A. BISHOP, PHILIP ELLIOTT, PAUL V. GADOLA,	FLINT.
8.	MORRIS K. DAVIS,	STANTON.
9.	GEORGE V. WEIMER,	KALAMAZOO.
10.	ROBERT T. HOLLAND, JAMES E. O'NEILL,	SAGINAW.
11.	HERBERT W. RUNNELS,	SAULT STE. MARIE.
12.	BARNEY H. T. BURRITT,	HANCOCK.
13.	PARM C. GILBERT,	TRAVERSE CITY.
14.	JOSEPH F. SANFORD,	MUSKEGON.
15.	THEO T. JACOBS,	STURGIS.
16.	ALTON H. NOE, JAMES E. SPIER,	MOUNT CLEMENS.

1 Appointed September 11, 1944; qualified September 14, 1944.
2 Resigned September 11, 1944.

17.	WILLIAM B. BROWN, DALE SOUTER, LEONARD D. VERDIER,	GRAND RAPIDS.
18.	CARL H. SMITH,	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.	PAUL R. CASH,	ALMA.
30.	LELAND W. CARR, CHARLES H. HAYDEN,	LANSING.
31.	FRED W. GEORGE, SHIRLEY STEWART,	PORT HURON.
32.	THOMAS J. LANDERS,	IRONWOOD.
33.	WARD I. WALLER,	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.	GEORGE W. DESJARDINS,	LAPEER.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT.

JOHN V. BRENNAN, [1]
THOMAS M. COTTER, [2]
JOSEPH A. GILLIS,
ARTHUR E. GORDON,
GERALD W. GROAT, [3]
PAUL E. KRAUSE, [4]
JOHN J. MAHER,
GEORGE MURPHY,
JOHN P. SCALLEN,
W. McKAY SKILLMAN,
CHRISTOPHER E. STEIN,
DONALD VAN ZILE.

THOMAS F. MAHER,
GEORGE T. MURPHY,
TRAFFIC AND ORDINANCE DIVISION.

SUPERIOR COURT OF GRAND RAPIDS, THADDEUS B. TAYLOR.

1 Resigned September 15, 1944.
2 Died October 16, 1944.
3 Appointed September 11, 1944; qualified September 14, 1944.
4 Appointed December 8, 1944; qualified December 18, 1944.

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

COUNTIES.	CIRCUITS.
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
Alexander *v.* Everton	376
Allen Park Village Clerk, Council of the Village of Allen Park *v.*	361
Aller *v.* Detroit Police Department Trial Board	382
Auto Parts, Inc., *v.* Jack Smith Beverages, Inc.	735
A. W. Kutsche & Co., City of Detroit *v.*	700
Baker, Lelek *v.*	210
Balogh, Pavela *v.*	368
Barclay *v.* General Motors Corp.	534
Battle Creek (City of), Loose *v.*	1
Becker *v.* Partridge	46
Bennett's Claim	65
Berkley (City of), Township of Royal Oak *v.*	572
Bice *v.* Holmes	110
Blumlo *v.* Hampton Township Board	452
Bommarito, People *v.*	139
Brewer *v.* Stoddard	119
Brewster, Goff *v.*	89
Broderick (D. F.), Inc., *v.* Continental Credit Corp.	546
Brown *v.* Standard Oil Co.	101
Burroughs *v.* Teitelbaum	251
Campbell *v.* Homer Ore Co.	693
Carrothers *v.* French	340
City of Battle Creek, Loose *v.*	1

PAGE
City of Berkley, Township of Royal Oak *v*..... 572
——— Dearborn, Lawlor *v*..... 168
———, Waller *v*..... 168
——— Detroit *v*. A. W. Kutsche & Co..... 700
——— Ferndale, Township of Royal Oak *v*..... 458
——— Highland Park *v*. Royal Oak No. 7 Storm Sewer Drain District..... 646
——— St. Johns *v*. Hudson-Howe, Inc..... 240
Claim of Bennett..... 65
Clinton Township, Macomb Building Co. *v*.... 236
Coenis, Vollmer *v*..... 319
Commissioner of Insurance, Washington Agency, Inc., *v*. 683
Conservation Department, Gableman *v*..... 416
Continental Credit Corp., D. F. Broderick, Inc., *v*. 546
Cordell, People *v*..... 585
Council of the Village of Allen Park *v*. Allen Park Village Clerk..... 361
Czeizler *v*. Radke..... 349

Daniel, Yeager *v*..... 371
Dearborn (City of), Lawlor *v*..... 168
———, Waller *v*..... 168
Dearborn Universal Underwriters Credit Corp., Universal Credit Co. *v*..... 608
Department of Conservation, Gableman *v*..... 416
Derse, Liebert *v*..... 495
Detroit (City of) *v*. A. W. Kutsche & Co..... 700
Detroit Athletic Club *v*. Liquor Control Commission 721
Detroit Club *v*. State of Michigan..... 721
Detroit Police Department Trial Board, Aller *v*. 382
Detroit Trust Co. *v*. Mason..... 281
D. F. Broderick, Inc., *v*. Continental Credit Corp. 546

PAGE
DiMatteo *v.* Smith..... 640
Dodge *v.* Schantz..... 245
Drinski *v.* Drinski..... 479

Equitable Trust Co. *v.* Karos..... 565
Estate of Griffin, *In re*..... 376
——— Olney, *In re*..... 65
——— Thayer, *In re*..... 473
Evans *v.* Ross..... 149
Everton, Alexander *v*..... 376

Farrell *v.* Paulus..... 441
Ferndale (City of), Township of Royal Oak *v*... 458
Fidelity & Casualty Co. of New York *v.* King.. 488
——— *v.* Vantaggi..... 633
F. M. Sibley Lumber Co. *v.* Schultz..... 193
Fredenhagen, Miles *v*..... 674
French, Carrothers *v*..... 340
Frohnapel *v.* Frohnapel..... 215

Gableman *v.* Department of Conservation..... 416
Galusz, Himelson *v*..... 512
General Motors Corp., Barclay *v*..... 534
Globe Construction Co., Norwich Union Fire Insurance Society, Ltd., *v*..... 655
Goff *v.* Brewster..... 89
Gratiot Lumber & Coal Co. *v.* Lubinski..... 662
Gray, *In re*..... 145
Griffin's Estate, *In re*..... 376
Grooms *v.* Union Guardian Trust Co..... 437

Hampton Township Board, Blumlo *v*..... 452
Hasson *v.* Mutual Benefit Health & Accident Ass'n, Omaha..... 331
Hayes, Teal *v*..... 221

PAGE

Highland Park (City of) *v.* Royal Oak No. 7 Storm Sewer Drain District..... 646
Highland Park State Bank, Smith *v*..... 226
Himelson *v.* Galusz..... 512
Holmes, Bice *v*..... 110
Homer Ore Co., Campbell *v*..... 693
Hudson-Howe, Inc., City of St. Johns *v*..... 240
Hutchinson *v.* Tambasco..... 597

In re Gray..... 145
——— Griffin's Estate..... 376
——— Kemmerer..... 313
——— Olney's Estate..... 65
——— Thayer's Estate..... 473

Jack Smith Beverages, Inc., Auto Parts, Inc., *v*..... 735
Janks *v.* Ulen Contracting Corp..... 712
Jaynes *v.* Petoskey..... 32

Kallas *v.* Lincoln Mutual Casualty Co..... 626
Karos, Equitable Trust Co. *v*..... 565
Kathan *v.* Williams..... 219
Kemmerer, *In re*..... 313
King, Fidelity & Casualty Co. of New York *v*... 488
Knuth, Schafer *v*..... 133
Kutsche (A. W.) & Co., City of Detroit *v*..... 700

Lawlor *v.* City of Dearborn..... 168
Lelek *v.* Baker..... 210
Leve, People *v*..... 557
Levene, Webb *v*..... 38
Liebert *v.* Derse..... 495
Lincoln Mutual Casualty Co., Kallas *v*..... 626
Liquor Control Commission, Detroit Athletic Club *v*..... 721

PAGE

Lithuanian Sons & Daughters Aid Society, Morris *v*. 621
Local No. 575 of the American Federation of Labor, Silkworth *v*. 746
Loose *v*. City of Battle Creek. 1
Lowenstein, People *v*. 94
Lubinski, Gratiot Lumber & Coal Co. *v*. 662

Macomb Building Co. *v*. Clinton Township. . . . 236
Maedel *v*. Wies. 424
Mason, Detroit Trust Co. *v*. 281
Menominee Lumber & Cedar Co. *v*. Thomson. . 263
Michigan (State of), Detroit Club *v*. 721
Michigan Unemployment Compensation Commission, O'Brian *v*. 18
———, Roxborough *v*. 505
Miles *v*. Fredenhagen. 674
Mitchell *v*. Stroh Brewery Co. 231
Morris *v*. Lithuanian Sons & Daughters Aid Society 621
Mount Clemens Savings Bank *v*. State Land Office Board. 153
Musgrave, Wiseman *v*. 523
Mutual Benefit Health & Accident Ass'n, Omaha, Hasson *v*. 331

Norwich Union Fire Insurance Society, Ltd., *v*. Globe Construction Co. 655

O'Brian *v*. Michigan Unemployment Compensation Commission. 18
Olney's Estate, *In re*. 65

Parmelee, People *v*. 431
Partridge, Becker *v*. 46
Patterson *v*. Stevens. 473

PAGE

Paulus, Farrell *v*..... 441
Pavela *v*. Balogh..... 368
People *v*. Bommarito..... 139
——— *v*. Cordell..... 585
——— *v*. Leve..... 557
——— *v*. Lowenstein..... 94
——— *v*. Parmelee..... 431
——— *v*. Schneider..... 158
——— *v*. Vester..... 409
——— *v*. Woodson..... 391
——— *v*. Zesk..... 129
Petoskey, Jaynes *v*..... 32
Powers *v*. Secretary of State..... 530
Pringle *v*. Shevnock..... 179

Radke, Czeizler *v*..... 349
Richardson *v*. Richardson..... 336
Ross, Evans *v*..... 149
Roxborough *v*. Michigan Unemployment Compensation Commission..... 505
Royal Oak No. 7 Storm Sewer Drain District, City of Highland Park *v*..... 646
Royal Oak Township *v*. City of Berkley..... 572
——— *v*. City of Ferndale..... 458
Ruehs *v*. Schantz..... 245

St. Johns (City of) *v*. Hudson-Howe, Inc..... 240
Sauer Cooperage Co., Uhrstadt *v*..... 201
Schafer *v*. Knuth..... 133
Schantz, Dodge *v*..... 245
———, Ruehs *v*..... 245
Schneider, People *v*..... 158
Schultz, F. M. Sibley Lumber Co. *v*..... 193
Secretary of State, Powers *v*..... 530
———, Surtman *v*..... 270
Shevnock, Pringle *v*..... 179

PAGE

Sibley (F. M.) Lumber Co. *v.* Schultz..... 193
Silanpa *v.* Thomson..... 326
Silkworth *v.* Local No. 575 of the American Federation of Labor..... 746
Smith *v.* Highland Park State Bank..... 226
——— *v.* Withey..... 364
———, DiMatteo *v.*..... 640
Smith (Jack) Beverages, Inc., Auto Parts, Inc., *v.*..... 735
Sowell, Speicher *v.*..... 54
Speicher *v.* Sowell..... 54
Standard Oil Co., Brown *v.*..... 101
State Department of Conservation, Gableman *v.* 416
State Land Office Board, Mount Clemens Savings Bank *v.*..... 153
State Liquor Control Commission, Detroit Athletic Club *v.*..... 721
State of Michigan, Detroit Club *v.*..... 721
Stevens, Patterson *v.*..... 473
Stoddard, Brewer *v.*..... 119
Stroh Brewery Co., Mitchell *v.*..... 231
Surtman *v.* Secretary of State..... 270

Tambasco, Hutchinson *v.*..... 597
Teal *v.* Hayes..... 221
Teitelbaum, Burroughs *v.*..... 251
Thayer's Estate, *In re*..... 473
Thomson, Menominee Lumber & Cedar Co. *v.*.. 263
———, Silanpa *v.*..... 326
Township of Royal Oak *v.* City of Berkley.... 572
——— *v.* City of Ferndale..... 458

Uhrstadt *v.* Sauer Cooperage Co..... 201
Ulen Contracting Corp., Janks *v.*..... 712
Unemployment Compensation Commission (Michigan), O'Brian *v.*..... 18
———, Roxborough *v.*..... 505

PAGE
Union Guardian Trust Co., Grooms *v*..... 437
Universal Credit Co. *v.* Dearborn Universal Underwriters Credit Corp..... 608

Vantaggi, Fidelity & Casualty Company of New York *v*..... 633
Vester, People *v*..... 409
Vollmer *v.* Coenis..... 319

Waller *v.* City of Dearborn..... 168
Washington Agency, Inc., *v.* Commissioner of Insurance 683
Webb *v.* Levene..... 38
Wies, Maedel *v*..... 424
Williams, Kathan *v*..... 219
Wiseman *v.* Musgrave..... 523
Withey, Smith *v*..... 364
Woodson, People *v*..... 391

Yeager *v.* Daniel.....371

Zesk, People *v*..... 129

TABLE OF CASES CITED.

PAGE

Acme Messenger Service Co. *v.* Unemployment Compensation Commission, 306 Mich. 704.....22, 23
Adair *v.* Bonninghausen, 305 Mich. 137..... 421
Adams *v.* Canfield, 263 Mich. 666..... 345
———, *In re,* 214 Mich. 199..... 502
Alfred J. Brown Seed Co. *v.* Brown, 240 Mich. 569..... 527
Alpena Lumber Co. *v.* Fletcher, 48 Mich. 555..... 703
American Federation of Labor *v.* Swing, 312 U. S. 321. 754, 755, 757
American State Trust Co. *v.* Rosenthal, 255 Mich. 157..... 445
American Steel Foundries *v.* Tri-City Central Trades Council, 257 U. S. 184..... 756
Annis *v.* Reiser & Co., 209 Mich. 512..... 669
Appeal of Collins, 306 Mich. 638..... 426
Archer *v.* City of Grand Rapids, 255 Mich. 485..... 422
Arkansas Fuel Oil Co. *v.* Scaletta, 200 Ark. 645..... 107
Arnell *v.* Gordon, 234 Mich. 140..... 105
Arner *v.* Riser, 305 Mich. 619..... 157
Arnold *v.* Krug, 279 Mich. 702..... 346
Ash *v.* Ash, 280 Mich. 198..... 445
Ashbaugh *v.* Sauer, 268 Mich. 467..... 448
Attorney General, *ex rel.* Director of Conservation, *v.* Taggart, 306 Mich. 432..... 423
Attorney General (People, *ex rel.*) *v.* Michigan Bell Telephone Co., 246 Mich. 198..... 689
——— *v.* Railroad Co., 145 Mich. 140..... 731
Auditor General *v.* Fisher, 84 Mich. 128..... 239
——— *v.* Woodward, 191 Mich. 496..... 239
Axtell *v.* Gibbs, 52 Mich. 639..... 360

Bakery & Pastry Drivers & Helpers Local 802 of the International Brotherhood of Teamsters *v.* Wohl, 315 U. S. 769..754, 755
Bard *v.* Baker, 283 Mich. 337..... 659
Barlum *v.* Berger, 125 Mich. 504.....744, 745
Barney (State, *ex rel.*) *v.* Hawkins, 79 Mont. 506..... 564
Barnum (E. T.) Wire & Iron Works *v.* Wayne Circuit Judge, 59 Mich. 272..... 138
Barry *v.* Briggs Manfg. Co., 296 Mich. 137..... 541
Bateman *v.* Railroad Co., 96 Mich. 441..... 138
Bates *v.* Sylvester, 205 Mo. 493..... 80
Bay County *v.* Northeastern Michigan Fair Assn., 296 Mich. 634. 745
Beaubien *v.* Poupard, Harr. Ch. (Mich.) 206..... 367
Beauvais *v.* Springfield Institute for Savings, 303 Mass. 136.... 78
Beavers' Administratrix *v.* Putnam's Curator, 110 Va. 713..... 80
Beiersdorfer's Estate, *In re,* 297 Mich. 592.....74, 83
Bentley *v.* Caille, 289 Mich. 74..... 450
Berg *v.* Hemlock River Mining Co., 287 Mich. 697..... 605
Bilansky *v.* Hogan, 190 Mich. 463..... 359

PAGE

Bird *v.* Bird, 308 Mich. 230 500
Black *v.* Spears, 209 Mich. 1 339
Blake *v.* Farmers' Mutual Lightning Protected Fire Ins. Co. of Michigan, 194 Mich. 589 494
Blanchard *v.* Railroad Co., 31 Mich. 43 357
Blickley *v.* Luce's Estate, 148 Mich. 233 440
Board of Education of the Union School District of the City of Owosso *v.* Goodrich, 208 Mich. 646 386
Bolden *v.* Grand Rapids Operating Corp., 239 Mich. 318 440
Bolger *v.* Detroit Common Council, 153 Mich. 540 390
Book Tower Garage, Inc., *v.* Local No. 415, International Union, U. A. W. A. (C. I. O.), 295 Mich. 580 ..... 62, 754
Bowerman *v.* Detroit Free Press, 287 Mich. 443 205
——— *v.* Sheehan, 242 Mich. 95 13
Bowles *v.* Willingham, 321 U. S. 503 ..... 61, 62, 64
Bowmaster *v.* William H. DePree Co., 252 Mich. 505 661
Bradford *v.* Goldman, 290 Mich. 338 420
Brear *v.* Baumgartner, 249 Mich. 633 358
Breker *v.* Rosema, 301 Mich. 685 347
Briggs *v.* City of Grand Rapids, 261 Mich. 11 422
Brod *v.* Detroit Life Insurance Co., 253 Mich. 545 334
Brookdale Homes, Inc., *v.* Johnson, 123 N. J. Law, 602 190
Brooks *v.* Railway Co., 211 Mass. 277 79
Brown (Alfred J.) Seed Co. *v.* Brown, 240 Mich. 569 527
Budnick *v.* Peterson, 215 Mich. 678 661
Bunker *v.* Reid, 255 Mich. 536 346
Burke *v.* Michigan Stamping Co., 223 Mich. 495 607
Burnham *v.* Kelley, 299 Mich. 452 472
Burton *v.* Roberson, 139 Tex. 562 205
Buwalda *v.* County of Ottawa, 270 Mich. 477 348

Cady *v.* City of Detroit, 289 Mich. 499 ..... 7, 16, 17
Cafeteria Employees Union, Local 302, *v.* Angelos, 320 U. S. 293 757
Callahan *v.* City of Berkley, 307 Mich. 701 363
Calvert *v.* City of Pontiac, 288 Mich. 401 390
Cameron *v.* United States, 231 U. S. 710 406
Campbell *v.* City of Detroit, 259 Mich. 297 240
——— *v.* Osterland, 283 Mich. 175 346
Carlson *v.* California, 310 U. S. 106 754
Carpenters & Joiners Union of America, Local No. 213, *v.* Ritter's Cafe, 315 U. S. 722 754
Carrigan *v.* Cole, 35 R. I. 162 80
Caswell *v.* Stearns, 257 Mich. 461 380
Catholic Bishop of Chicago *v.* Kingery, 371 Ill. 257 191
Cecil *v.* Clark, 47 W. Va. 402 698
Chamberlain's Estate, *In re*, 298 Mich. 278 ..... 83, 511
Chatham-Trenary Land Co. *v.* Swigart, 220 Mich. 137 359
Chevlin *v.* Tarner, 274 Mich. 249 503
City of Detroit *v.* Township of Redford, 253 Mich. 453 ..... 468, 580
——— Gladstone *v.* Throop, 18 C. C. A. 61 652
——— Highland Park *v.* Oakland County Drain Commissioner, 300 Mich. 501 ..... 648–651, 653
——— New Baltimore *v.* Chesterfield Township, 292 Mich. 522. 580

PAGE

City of North Muskegon *v.* Miller, 249 Mich. 52.....188, 189
——— Pleasant Ridge *v.* Cooper, 267 Mich. 603.....189, 191
——— Saginaw *v.* Consumers Power Co., 304 Mich. 491..... 729
Clark *v.* Goodwin, 170 Cal. 527..... 80
Clifton *v.* Chrysler Corporation, 287 Mich. 87..... 606
Clinton *v.* Spencer, 250 Mich. 135..... 653
Cobleigh *v.* State Land Office Board, 305 Mich. 434..... 157
Colborne *v.* Railway, 177 Mich. 139..... 651
Cole (G. W.) Co. *v.* American Cement & Oil Co., 65 C. C. A. 105 619
Collins *v.* Township of Grand Rapids, 108 Mich. 675..... 239
Collins' Appeal, 306 Mich. 638..... 426
Common Council of Detroit *v.* Schmid, 128 Mich. 379..... 277
Commonwealth *v.* Kimball, 21 Pick. (38 Mass.) 373..... 733
County of Norfolk *v.* City of Portsmouth, 124 Va. 639..... 468

Davies Warehouse Co. *v.* Price Administrator, 321 U. S. 144.... 60
DeGrasse *v.* Verona Mining Co., 185 Mich. 514..... 697
Derham *v.* Hovey, 195 Mich. 243..... 116
Detroit Athletic Club *v.* Liquor Control Commission, 303 Mich. 444 .....723, 729
Detroit (City of) *v.* Township of Redford, 253 Mich. 453..468, 580
Detroit Fire & Marine Ins. Co. *v.* County of Oakland, 284 Mich. 130 651
Detroit Free Press *v.* Miller, 217 Mich. 118..... 745
Detroit Trust Co. *v.* Detroit City Service Co., 262 Mich. 14..... 651
——— *v.* Manilow, 272 Mich. 211..... 138
Director of Conservation (Attorney General, *ex rel.*) *v.* Taggart, 306 Mich. 432..... 423
Dodge *v.* Blood, 299 Mich. 364..... 36
Dollar S. S. Lines, Inc., *v.* Merz (C. C. A.), 68 Fed. (2d) 594.. 207
Dolsen *v.* Phoenix Preferred Accident Insurance Company, 151 Mich. 228..... 334
Dolson *v.* Railway Co., 128 Mich. 444.....72, 74
Dorchy *v.* Kansas, 272 U. S. 306..... 757
Dowsey *v.* Village of Kensington, 257 N. Y. 221..... 190
Draft *v.* Hesselsweet, 194 Mich. 604..... 230
Drake (People, *ex rel.*) *v.* Mahaney, 13 Mich. 481..... 277
Dramis *v.* Dunbar, 280 Mich. 300..... 347
Droste *v.* City of Highland Park, 258 Mich. 1..... 472

Eberly *v.* Sanders Lumber Co., 282 Mich. 315..... 107
Edgerton *v.* Lynch, 255 Mich. 456..... 77
Edward J. Jeffries Home Housing Project (Appeal of Collins), *In re*, 306 Mich. 638..... 426
Ehrke *v.* Danek, 288 Mich. 498..... 93
Elrich *v.* Schwaderer, 251 Mich. 33..... 661
Employers' Liability Assurance Co. (School District of the City of Ionia, *for use and benefit of*) *v.* Dadd, 308 Mich. 220..... 235
E. T. Barnum Wire & Iron Works *v.* Wayne Circuit Judge, 59 Mich. 272..... 138
Evans *v.* 2168 Broadway Corp., 281 N. Y. 34..... 308

Faraci *v.* Fassulo, 212 Mich. 216.....742, 744
Fashioncraft, Inc., *v.* Halpern, 313 Mass. 385..... 757
F. B. Holmes & Co. *v.* City of Detroit, 158 Mich. 137..... 268

PAGE

Federal Communications Commission *v.* Pottsville Broadcasting Co., 309 U. S. 134 387
Federal Union Ins. Co. (State, *ex rel.*) *v.* Warner, 128 Ohio St. 261 692
Ferguson's Estate, *In re*, 239 Mich. 616 477
Fidelity & Casualty Company of New York *v.* Vantaggi, 300 Mich. 528 ..... 635, 636, 638
Finley *v.* Union Joint Stock Land Bank of Detroit, 281 Mich. 214 689
Fiquet *v.* Allison, 12 Mich. 328 697
First National Bank of Utica *v.* Ramm, 256 Mich. 573 324
F. M. Sibley Lumber Co. *v.* Schultz, 297 Mich. 206 195
Ford *v.* Maney's Estate, 251 Mich. 461 ..... 73, 81, 83
Forsyth (People, *ex rel.*) *v.* Court of Sessions, 141 N. Y. 288 ... 595
Fort Pitt Malleable Iron Co. *v.* Detroit Steel Products Co., 260 Mich. 683 307
Franklin (Henry), *In re*, 77 Mich. 615 99
Frantz *v.* Railway, 147 Mich. 199 260
Fraternal Order of Police *v.* Lansing Board of Police & Fire Com'rs, 306 Mich. 68 389

Gallagher *v.* Walter, 299 Mich. 69 348
Gantz (M. M.) Co. *v.* Alexander, 258 Mich. 695 668
General Necessities Corp. *v.* Wayne Circuit Judge, 214 Mich. 138. 204
Gladstone (City of) *v.* Throop, 18 C. C. A. 61 652
Gledhill *v.* Fisher & Co., 272 Mich. 353 689
Gleichman *v.* Famous Players-Lasky Corp., 241 Mich. 266 129
Glidden *v.* Beaverton Power Co., 223 Mich. 383 116
Gloeser *v.* Moore, 284 Mich. 106 ..... 230, 231
Godsol *v.* Unemployment Compensation Commission, 302 Mich. 652 23
Goldinger, *In re*, 207 Mich. 99 ..... 501, 503
Goodpastor *v.* Southern Insurance Agency, Inc., 293 Ky. 420 691
Gorton *v.* Harmon, 152 Mich. 473 ..... 84, 86
Gould, *In re*, 174 Mich. 663 500
Grant *v.* Fletcher, 283 Fed. 243 699
——— *v.* National Manufacturer & Plating Co., 258 Mich. 453 ..... 668, 672
Greenman *v.* Gillerman's Estate, 188 Mich. 74 500
Gregory *v.* Bush, 64 Mich. 37 250
Guernsey *v.* Cook, 120 Mass. 501 127
Gumtow *v.* Kalamazoo Motor Express, 266 Mich. 16 605
Gunn *v.* Gunn, 205 Mich. 198 ..... 260, 261
G. W. Cole Co. *v.* American Cement & Oil Co., 65 C. C. A. 105 .. 619

Hamilton *v.* Jones, 125 Ind. 176 80
Hammond *v.* Paxton, 58 Mich. 393 429
Hampton *v.* Van Nest's Estate, 196 Mich. 404 381
Haney *v.* Troost, 242 Mich. 693 661
Hangen *v.* Hadfield, 135 Ohio St. 281 718
Hanna *v.* Hurley, 162 Mich. 601 448
Hanslovsky *v.* Township of Leland, 281 Mich. 652 652
Hanson *v.* Economical Cunningham Drug Stores, Inc., 299 Mich. 434 529

PAGE

Harner *v.* Harner, 255 Mich. 515 218
Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 62 367
Hathaway *v.* Porter Royalty Pool, Inc., 296 Mich. 90 675
Hawkeye Casualty Co. *v.* Holcomb, 302 Mich. 591 493
Hazen *v.* Rockefeller, 303 Mich. 536 529
Heckler *v.* Laing, 300 Mich. 139 348
Hegel *v.* George, 218 Wis. 327 80
Hennes *v.* Charles Hebard & Sons, 169 Mich. 670 698
Henry *v.* Sinclair, 218 Mich. 296 422
Henry Franklin, *In re*, 77 Mich. 615 99
Hickerson, *In re*, 301 Mich. 278 ..... 395, 396, 405
Hickey *v.* O'Brien, 123 Mich. 611 267
Highland Park (City of) *v.* Oakland County Drain Commissioner, 300 Mich. 501 ..... 648-651, 653
Hoffman *v.* Willits, 194 Mich. 276 745
Holloway *v.* Nassar, 276 Mich. 212 107
Holmes (F. B.) & Co. *v.* City of Detroit, 158 Mich. 137 268
Holsaple *v.* Superintendents of Poor of Menominee County, 232 Mich. 603 661
Home Owners' Loan Corp. *v.* City of Detroit, 292 Mich. 511 339
Home Savings Bank *v.* Young, 295 Mich. 725 261
Hudson *v.* Gulf Oil Co., 215 N. C. 422 107
Hughes *v.* Wayne Circuit Judge, 239 Mich. 110 429
Hume's Petition, *In re*, 260 Mich. 555 555
Huntington *v.* Parkhurst, 87 Mich. 38 745
Hupp Farm Corp. *v.* Neef, 294 Mich. 160 697
Hyatt *v.* Adams, 16 Mich. 180 72

In re Adams, 214 Mich. 199 502
——— Beiersdorfer's Estate, 297 Mich. 592 ..... 74, 83
——— Chamberlain's Estate, 298 Mich. 278 ..... 83, 511
——— Edward J. Jeffries Home Housing Project (Appeal of Collins), 306 Mich. 638 426
——— Ferguson's Estate, 239 Mich. 616 477
——— Franklin (Henry), 77 Mich. 615 99
——— Goldinger, 207 Mich. 99 ..... 501, 503
——— Gould, 174 Mich. 663 500
——— Henry Franklin, 77 Mich. 615 99
——— Hickerson, 301 Mich. 278 ..... 395, 396, 405
——— Hume's Petition, 260 Mich. 555 555
——— Johnson's Estate, 308 Mich. 366 477
——— Lacroix's Estate, 265 Mich. 59 477
——— Mueller's Estate, 280 Mich. 203 79
——— Petition of Hume, 260 Mich. 555 555
——— Rogers, 308 Mich. 392 148
——— Rowling's Estate, 291 Mich. 218 478
——— St. Louis Institute of Christian Science, 27 Mo. App. 633 310
——— Tinholt, 223 Mich. 483 596
——— Venneman's Estate, 286 Mich. 368 ..... 76, 77
——— Watertown Paper Co., 94 C. C. A. 528 690
——— Wyrick, 301 Mich. 273 ..... 395, 396, 405, 408
International Typographical Union *v.* County of Macomb, 306 Mich. 562 651

PAGE

Jackson *v.* Evans, 44 Mich. 510 324
Jacobson *v.* Carlson, 302 Mich. 448 278
James A. Welch Co., Inc., *v.* State Land Office Board, 295 Mich. 85 156
Jeffries (Edward J.) Home Housing Project (Appeal of Collins), *In re*, 306 Mich. 638 426
Jenks *v.* Daniel, 304 Mich. 239 ..... 372, 374, 375
Johnson *v.* Farmer, 89 Tex. 610 80
——— *v.* Fremont Canning Co., 270 Mich. 524 669
——— *v.* Ironside, 249 Mich. 35 675
Johnson & Higgins Co. (State, *ex rel.*) *v.* Safford, 117 Ohio St. 576 ..... 691, 692
Johnson's Estate, *In re*, 308 Mich. 366 477
Johnston *v.* Manhattan Fire & Marine Ins. Co., 294 Mich. 550 494
Jones *v.* Railroad Co., 303 Mich. 114 330
——— *v.* Williams, 139 Mo. 1 127

Kaminski *v.* Wayne County Board of Auditors, 287 Mich. 62 472
Kathan *v.* Stevenson, 307 Mich. 485 ..... 219, 220, 421
Katz *v.* Kowalsky, 296 Mich. 164 449
Kelley *v.* Brown, 262 Mich. 356 109
Kerns *v.* Lewis, 246 Mich. 423 345
Kinner *v.* Spencer, 257 Mich. 142 650
Knight *v.* Merignac, 281 Mich. 684 348
Kobic *v.* Reed, 242 Mich. 594 449
Kolbas *v.* American Boston Mining Co., 275 Mich. 616 607
Konstantine *v.* City of Dearborn, 280 Mich. 310 672
Kutschmar *v.* Briggs Manfg. Co., 197 Mich. 146 ..... 539, 541

Lacroix's Estate, *In re*, 265 Mich. 59 477
Lafayette Dramatic Productions, Inc., *v.* Ferentz, 305 Mich. 193 ..... 753, 757
Lake Township *v.* Millar, 257 Mich. 135 650
Lange *v.* Burke, 69 Ark. 85 690
Lansing *v.* Perry, 216 Mich. 23 422
Lau *v.* Pontiac Commercial & Savings Bank, 260 Mich. 73 672
Laughran *v.* Smith, 75 N. Y. 205 744
Lebovics *v.* Howie, 307 Mich. 326 105
Leland *v.* Ford, 245 Mich. 599 127
——— *v.* ———, 252 Mich. 547 127
Leonard *v.* Hey, 269 Mich. 491 43
Letherer *v.* United States Health & Accident Insurance Co., 145 Mich. 310 334
Lett *v.* Summerfield & Hecht, 239 Mich. 699 661
Lincoln *v.* Railway Co., 179 Mich. 189 74
Litchfield *v.* Ballou, 114 U. S. 190 ..... 652, 653
Littauer *v.* Houck, 92 Mich. 162 449
Littleton *v.* Railway Co., 276 Mich. 41 605
Lockerty *v.* Phillips, 319 U. S. 182 63–65
Lohrman *v.* Haven-Busch Co., 293 Mich. 143 541
Loucks *v.* Fox, 261 Mich. 338 89
Louisville & N. R. Co. *v.* Carter, 226 Ky. 561 691
Love *v.* Railroad Co., 170 Mich. 1 ..... 73, 83
Lumbermen's Mutual Casualty Co. *v.* Bissell, 220 Mich. 352 638

PAGE

MacGlashan *v.* Harper, 299 Mich. 662 358
Maclam *v.* Hallam, 165 Mich. 686 440
MacLean *v.* Wayne Circuit Judge, 52 Mich. 257 137
Maday *v.* Roth, 160 Mich. 289 697
Maki *v.* S. J. Groves & Sons, 279 Mich. 644 605
Mallory *v.* Pitcairn, 307 Mich. 40 ..... 374, 529
Manion *v.* State Highway Commissioner, 303 Mich. 1 726
Mapley *v.* City of Pontiac, 288 Mich. 396 ..... 387, 389
Markell *v.* Hilpert, 140 Fla. 842 691
Marks *v.* Corliss' Estate, 256 Mich. 460 ..... 743, 744
Martin *v.* Benzie Circuit Judge, 200 Mich. 549 500
——— *v.* J. A. Mercier Co., 255 Mich. 587 659
Martinelli *v.* Burke, 298 Mass. 390 ..... 79, 80, 82
May *v.* Meade, 236 Mich. 109 152
McCarthy *v.* Industrial Commission of Wisconsin, 194 Wis. 198. 542
McCormick *v.* Sears, Roebuck & Co., 254 Mich. 221 30
McCullough *v.* Clinch-Mitchell Construction Co. (C. C. A) 71 Fed. (2d) 17 705
McCurdy *v.* County of Shiawassee, 134 Mich. 550 653
McKey *v.* Swenson, 232 Mich. 505 ..... 527, 528
McNair *v.* State Highway Department, 305 Mich. 181 729
McPherson *v.* Secretary of State, 92 Mich. 377 62
M'Curdy *v.* Daniell, 135 Mich. 55 711
Mead *v.* Michigan Public Service Commission, 303 Mich. 168 729
——— *v.* Rehm, 256 Mich. 488 ..... 35, 37
Metal Craft Co. *v.* Metalcraft Heater Corp., 255 Mich. 642 .. 611, 616
Meyering Land Co. *v.* Spencer, 273 Mich. 703 650
Miller *v.* City of Detroit, 244 Mich. 38 240
——— *v.* Zahn, 264 Mich. 306 250
Miner *v.* Belle Isle Ice Co., 93 Mich. 97 527
Mitchell *v.* Reolds Farms Co., 268 Mich. 301 583
Mitton *v.* Jewell, 279 Mich. 9 468
M. M. Gantz Co. *v.* Alexander, 258 Mich. 695 668
Moe *v.* Smiley, 125 Pa. 136 80
Mooney *v.* Holohan, 294 U. S. 103 754
Moreland *v.* Armstrong, 297 Mich. 32 189
——— *v.* Durocher, 121 Mich. 398 206
Motyka *v.* Railway Co., 256 Mich. 417 330
Mowat *v.* Walsh, 236 Mich. 391 358
Mueller's Estate, *In re*, 280 Mich. 203 79
Muirhead *v.* Freimann, 270 Mich. 181 359
Mumma's Estate, 2 Pa. Dist. 592 310
Murray *v.* Keeley Institute of Western Michigan, 190 Mich. 295. 129
Muskegon Trust Co. *v.* Bousma, 247 Mich. 98 421

Nagy *v.* Solvay Process Co., 201 Mich. 158 539
Nahikian *v.* Mattingly, 265 Mich. 128 528
National Amusement Co. *v.* Johnson, 270 Mich. 613 .... 7, 9, 13, 16
National Bank of Detroit *v.* State Land Office Board, 300 Mich. 240 157
National Regulator Co. (People, for use of) *v.* Rosewarne, 247 Mich. 22 672
Naudzius *v.* Lahr, 253 Mich. 216 279
Neal *v.* M. E. Smith & Co., 54 C. C. A. 226 44

PAGE

Negaunee Iron Co. *v.* Iron Cliffs Co., 134 Mich. 264..... 116
New Baltimore (City) *v.* Chesterfield Township, 292 Mich. 522.. 580
Nichols *v.* Tallmadge, 260 Mich. 576..... 239
Noey *v.* City of Saginaw, 271 Mich. 595..... 16
Norfolk (County of) *v.* City of Portsmouth, 124 Va. 639..... 468
Norris *v.* Kent Circuit Judge, 100 Mich. 256.....73, 81, 83
North Muskegon (City of) *v.* Miller, 249 Mich. 52.....188, 189

Oak Park (Village of) *v.* Van Wagoner, 271 Mich. 450.650, 651, 653
Okulich *v.* Goldman, 239 Mich. 569..... 668
Opera on Tour, Inc., *v.* Weber, 285 N. Y. 348..... 757

Paperno *v.* Michigan Railway Engineering Co., 202 Mich. 257.. 74
Paridee *v.* Great Atlantic & Pacific Tea Co., 278 Mich. 191.... 541
Parsons (People, *ex rel.*) *v.* Wayne Circuit Judge, 37 Mich. 287. 731
Partch *v.* Baird, 227 Mich. 660, 230 Mich. 615..... 500
Peacock *v.* Stinchcomb, 189 Mich. 301..... 250
Pennsylvania Railroad Co. *v.* Jones, 155 U. S. 333..... 207
People *v.* Allen, 252 Mich. 553..... 99
——— *v.* Bashaw, 295 Mich. 503.....755, 757
——— *v.* Brown, 54 Mich. 15..... 594
——— *v.* Chapman, 301 Mich. 584..... 317
——— *v.* Connors, 251 Mich. 99..... 131
——— *v.* Covelesky, 217 Mich. 90..... 563
——— *v.* Droste, 160 Mich. 66..... 651
——— *v.* Dumas, 161 Mich. 45..... 133
——— *v.* Ferguson, 48 Mich. 41 412
——— *v.* Freedland, 308 Mich. 449..... 564
——— *v.* Goldberg, 248 Mich. 553..... 131
——— *v.* Hammond, 132 Mich. 422..... 166
——— *v.* Harter, 244 Mich. 346..... 144
——— *v.* Hopper, 274 Mich. 418..... 145
——— *v.* Jagosz, 253 Mich. 290..... 594
——— *v.* Keller, 227 Mich. 520..... 97
——— *v.* Kennedy, 58 Mich. 372..... 592
——— *v.* Kolowich, 262 Mich. 137..... 100
——— *v.* Korn, 217 Mich. 170..... 131
——— *v.* Lauder, 82 Mich. 109..... 409
——— *v.* Lowell, 250 Mich. 349.....730, 732
——— *v.* Marks, 255 Mich. 271..... 143
——— *v.* McCrea, 303 Mich. 213..... 133
——— *v.* McGraw, 184 Mich. 233.....9, 280
——— *v.* Meservey, 76 Mich. 223..... 593
——— *v.* Morris, 80 Mich. 634..... 100
——— *v.* O'Hara, 278 Mich. 281..... 165
——— *v.* Parker, 67 Mich. 222..... 434
——— *v.* Pizzura, 211 Mich. 71..... 152
——— *v.* Podsiad, 295 Mich. 541.....100, 101
——— *v.* Powers, 272 Mich. 303..... 99
——— *v.* Raider, 256 Mich. 131..... 164
——— *v.* Reilly, 53 Mich. 260..... 592
——— *v.* Robinson, 241 Mich. 497..... 386
——— *v.* Rohrer, 100 Mich. 126..... 143
——— *v.* Roxborough, 307 Mich. 575.....384, 394, 400, 408

PAGE

People *v.* Ryan, 307 Mich. 610 384
——— *v.* Sanford, 252 Mich. 240 99
——— *v.* Shuler, 136 Mich. 161 276
——— *v.* Slack, 15 Mich. 193 152
——— *v.* Stickle, 156 Mich. 557 595
——— *v.* Stimer, 248 Mich. 272 277
——— *v.* Sturgeon, 272 Mich. 319 457
——— *v.* Swift, 172 Mich. 473 164
——— *v.* Thompson, 259 Mich. 109 ..... 279, 280
——— *v.* Van Den Dreissche, 233 Mich. 38 99
——— *v.* Vasquez, 303 Mich. 340 411
——— *v.* Warner, 201 Mich. 547 143
———, *ex rel.* Attorney General, *v.* Michigan Bell Telephone Co., 246 Mich. 198 689
———, ——— ———, *v.* Railroad Co., 145 Mich. 140 731
———, ——— Drake, *v.* Mahaney, 13 Mich. 481 277
———, ——— Forsyth, *v.* Court of Sessions, 141 N. Y. 288 595
———, ——— Parsons, *v.* Wayne Circuit Judge, 37 Mich. 287 .. 731
———, ——— Roach, *v.* Carter, 297 Mich. 577 409
———, for use of National Regulator Co., *v.* Rosewarne, 247 Mich. 22 672
Peoples Wayne County Bank *v.* Wolverine Box Co., 250 Mich. 273 279
Pere Marquette R. Co. *v.* Muskegon Township Board, 298 Mich. 31 189
Perry *v.* Hogarth, 261 Mich. 526 731
Perry Mount Park Cemetery Ass'n *v.* Netzel, 274 Mich. 97 421
Petition of Hume, *In re*, 260 Mich. 555 555
Phillips *v.* Inter-City Trucking Service, Inc., 280 Mich. 30 .. 717, 718
Pleasant Ridge (City of) *v.* Cooper, 267 Mich. 603 ..... 189, 191
Price *v.* National Union Fire Ins. Co., 294 Mich. 289 522
Provident Mutual Life Ins. Co. *v.* Vinton Co., 282 Mich. 84 429
Purdy *v.* City of Sault Ste. Marie, 188 Mich. 573 607

Racho *v.* City of Detroit, 90 Mich. 92 81
Reynolds *v.* Skelly Oil Co., 227 Iowa, 163 107
Rhoades *v.* Finn, 288 Mich. 262 346
Rice *v.* Atkinson, Deacon, Elliott Co., 215 Mich. 371 ..... 743, 745
Richards *v.* City of Pontiac, 305 Mich. 666 ..... 6, 7, 16, 17
——— *v.* White, 44 Mich. 622 359
Richmond & I. Const. Co. *v.* Richmond, N. I. & B. R. Co., 15 C. C. A. 289 691
Rife *v.* Colestock, 297 Mich. 194 346
Riley *v.* Berry Brothers Paint Co., 293 Mich. 500 ..... 538, 540
Ritter *v.* City of Pontiac, 276 Mich. 416 457
Roach (People, *ex rel.*) *v.* Carter, 297 Mich. 577 409
Robb *v.* Connolly, 111 U. S. 624 754
Robbins *v.* Original Gas Engine Co., 191 Mich. 122 538
Robertson *v.* United Fuel & Supply Co., 218 Mich. 271 83
Robinson *v.* Railroad Co., 135 Mich. 254 207
——— *v.* Rice, 3 Mich. 235 63
Rogers *v.* Windoes, 48 Mich. 628 ..... 73, 83
———, *In re*, 308 Mich. 392 148
Rood *v.* McDonald, 303 Mich. 634 ..... 259, 260
Rosenblum *v.* Griffin, 89 N. H. 314 280

PAGE

Rottenberg *v.* United States, 321 U. S. 414.....61, 62, 64, 65
Rouse *v.* Michigan United Railways Co., 164 Mich. 475..... 81
Rowling's Estate, *In re*, 291 Mich. 218..... 478
Rupert *v.* Van Buren County Clerk, 290 Mich. 180..... 178
Ruth *v.* Vroom, 245 Mich. 88..... 661
Ryan *v.* Wilson, 9 Mich. 262..... 116

Saginaw (City of) *v.* Consumers Power Co., 304 Mich. 491.... 720
St. Joseph Stockyards Co. *v.* United States, 298 U. S. 38..... 533
St. Louis Institute of Christian Science, *In re*, 27 Mo. App. 633 310
Salisbury *v.* City of Detroit, 264 Mich. 250..... 533
Scavenger Service Corp. *v.* Courtney (C. C. A.), 85 Fed. (2d) 825 757
Schneider *v.* Lord, 62 Mich. 141..... 745
Schneiderman *v.* Sesanstein, 121 Ohio St. 80..... 10
School District of the City of Ionia, *for use and benefit of* Employers' Liability Assurance Co., *v.* Dadd, 308 Mich. 220.... 235
Scott *v.* Beecher, 91 Mich. 590..... 744
Scripps *v.* Sweeney, 160 Mich. 148..... 127
Senefsky *v.* City of Huntington Woods, 307 Mich .728..... 190
Senn *v.* Tile Layers Protective Union, 301 U. S. 468.....755, 757
Sherman *v.* Atwood, 274 Mich. 621..... 533
Sibley (F. M.) Lumber Co. *v.* Schultz, 297 Mich. 206..... 195
Siegel *v.* Wayne Circuit Judge, 155 Mich. 459..... 422
Sieweck *v.* F. Joseph Lamb Co., 257 Mich. 670..... 708
Silver King Coalition Mines Company of Nevada *v.* Silver King Consolidated Mining Company of Utah, 122 C. C. A. 402..698, 699
Sjoholm *v.* Hercules Powder Co., 227 Mich. 610..... 539
Slingerland *v.* Snell, 283 Mich. 524..... 348
Smith *v.* City of Ann Arbor, 303 Mich. 476..... 421
——— *v.* Kiel, 150 Mich. 417..... 504
——— *v.* Stewart, 245 Mich. 452..... 359
Solo *v.* City of Detroit, 303 Mich. 672..... 178
Spencer *v.* Taylor, 219 Mich. 110..... 661
Springwells Township *v.* Wayne County Treasurer, 58 Mich. 240.. 580
State *v.* Brittain, 89 N. C. 574..... 9
——— *v.* Gorman, 171 Ind. 58..... 310
——— *v.* Lehman, 182 Mo. 424..... 166
———, *ex rel.* Barney, *v.* Hawkins, 79 Mont. 506..... 564
———, ——— Federal Union Ins. Co., *v.* Warner, 128 Ohio St. 261 692
———, ——— Johnson & Higgins Co., *v.* Safford, 117 Ohio St. 576 .....691, 692
Stebbins *v.* State Board of Pharmacy, 297 Mich. 676..... 728
——— *v.* Walker, 46 Mich. 5.....43, 45
Stecker *v.* Silverman, 294 Mich. 422..... 358
Stephens *v.* Koprowski, 295 Mich. 213..... 644
Stewart *v.* Young, 247 Mich. 451..... 679
Stott *v.* Stott, 258 Mich. 547..... 127
Strickler *v.* International Harvester Co. (Tex. Civ. App.), 141 S. W. (2d) 989..... 207
Strong *v.* Kittenger, 300 Mich. 126..... 644
Stuart *v.* Home Telephone Company of Detroit, 161 Mich. 123.. 268

PAGE

Stuck *v.* Tice, 291 Mich. 486 644
Swainston *v.* Kennedy, 253 Mich. 518 346
Swayze's Lessee *v.* Burke, 12 Pet. (37 U. S.) 11 367
Sweeney *v.* Neely, 53 Mich. 421 584
Sweetland *v.* Railway Co., 117 Mich. 329 74

Taylor *v.* Lake Shore & Mich. Southern Railroad Co., 45 Mich. 74 440
Terminal Barber Shops, Inc., *v.* Zoberg (C. C. A.), 28 Fed. (2d) 807 619
Thomas *v.* Jewell, 300 Mich. 556 116
Thompson *v.* Southern Michigan Transportation Co., 261 Mich. 440 660
Thornhill *v.* Alabama, 310 U. S. 88 755–757
Tincknell *v.* Ward, 285 Mich. 47 359
Tinholt, *In re*, 223 Mich. 483 596
Toan *v.* McGinn, 271 Mich. 28 ..... 178, 179
Tousey *v.* Moore, 79 Mich. 564 583
Township of Lake *v.* Millar, 257 Mich. 135 650
——— Springwells *v.* Wayne County Treasurer, 58 Mich. 240 .. 580

Venneman's Estate, *In re*, 286 Mich. 368 ..... 76, 77
Vestal *v.* Thorminsul Corp., 291 Mich. 64 605
Village of Oak Park *v.* Van Wagoner, 271 Mich. 450 .... 650, 651, 653
Vinton *v.* Peck, 14 Mich. 287 434

Wade *v.* Farrell, 270 Mich. 562 ..... 727, 728
Waller *v.* Lieberman, 214 Mich. 428 358
Walsh *v.* Colby, 153 Mich. 602 256
Ward *v.* Carp River Iron Co., 47 Mich. 65 698
Watertown Paper Co., *In re*, 94 C. C. A. 528 690
Watkins *v.* Angus, 241 Mich. 690 449
Weaver *v.* People, 33 Mich. 296 590–592
Weco Products Co. *v.* Sam's Cut Rate, Inc., 296 Mich. 190 278
Welch (James A.) Co., Inc., *v.* State Land Office Board, 295 Mich. 85 156
Wellman *v.* Board of Metropolitan Police of the City of Detroit, 84 Mich. 558 390
West *v.* Camden, 135 U. S. 507 126–128
Westinghouse Electric & Manfg. Co. *v.* Hubert, 175 Mich. 568 .. 44
Westlawn Cemetery Ass'n *v.* Wayne Circuit Judge, 238 Mich. 119 260
Weston *v.* Livezey, 45 Col. 142 324
Wheeling Creek Gas, Coal & Coke Co. *v.* Elder, 170 Fed. 215 428
White *v.* Forbes, Walker's Ch. (Mich.) 112 248
Whitmore *v.* Detroit United Railway, 185 Mich. 46 235
Wies *v.* Brandt, 294 Mich. 240 ..... 425, 427
Wilbur *v.* Stoepel, 82 Mich. 344 125
Wilds *v.* Fidelity & Deposit Co., 239 Mich. 396 494
Willard *v.* Mohn, 24 N. D. 390 80
Williams *v.* Sealander, 288 Mich. 617 109
Willis *v.* Board of Commissioners of Wyandotte County, Kansas, 30 C. C. A. 445 652
Wingfield *v.* Neall, 60 W. Va. 106 428

PAGE

Wolverine Packing Co. *v.* Hawley, 251 Mich. 215..... 359
Wyrick, *In re,* 301 Mich. 273.....395, 396, 405, 408

Yakus *v.* United States, 321 U. S. 414.....61, 62, 64, 65
Yerex *v.* Eineder, 86 Mich. 24..... 250
Young & Chaffee Furniture Co. *v.* Chaffee Brothers Furniture Co., 204 Mich. 293..... 617
Youngs *v.* Read, 246 Mich. 219..... 679

Zoltowski *v.* Ternes Coal & Lumber Co., 214 Mich. 231..... 106
Zuidema *v.* Bekkering, 256 Mich. 327..... 348

LAWS CITED AND CONSTRUED.

CONSTITUTION OF THE UNITED STATES.

	PAGE
Art. 6, § 2	62, 65
1st Amendment	754
6th Amendment	62
14th Amendment	279, 754–756
———, § 1	533, 684

UNITED STATES STATUTES.

	PAGE
Emergency price control act (1942), title 1, § 1 (a)	57
———, ———, § 2	56, 57
———, ———, § 2 (a)	56
———, ———, § 2 (d)	57
———, title 2, § 204 (d)	57, 59, 62
———, ———, § 206	58
4 F. C. A. p. 6	125
11 F. C. A., title 50, apx. 25, § 1 *et seq.*	61
———, ———, apx. 43, § 1 *et seq.*	61
Rev. Stat. § 860	406
47 Stat. at L. 70, chap. 90	753
56 Stat. at L. 23	55, 60
——— 23, chap. 26	61
——— 765, chap. 578	61
——— 767	55, 60
57 Stat. at L. 566	55, 60
59 Stat. at L. 626	509
12 USCA, § 24	125
——— § 92	684, 687, 688
29 USCA, § 101 *et seq.*	753
42 USCA, § 501 *et seq.*	509
50 USCA, § 901 *et seq.*	55, 60, 337
———, apx., Supp. 2, § 901 *et seq.*	61
———, ———, ———, § 961 *et seq.*	61

UNITED STATES REGULATIONS.

	PAGE
CCH War Law Service, par. 49,129	212
7 F. R. 4072, 4075	338
8 F. R. 7322, 7326	212
O. P. A., Rent Regulation for Housing, § 1388.1181, subsection 6 (a) (6)	212

MICHIGAN CONSTITUTION 1908.

	PAGE
Art. 2, § 1	279
———, § 16	279, 402

MICHIGAN CONSTITUTION 1908—Continued.

PAGE
Art. 4, § 2 533
Art. 5, § 21 ..... 276, 533, 725
Art. 8, §§ 20, 21 15
———, § 28 ..... 12, 280

REVISED STATUTES 1838.

PAGE
Part 3, title 2, chap. 3, § 7 72

REVISED STATUTES 1846.

PAGE
Chap. 84, § 34 151

COMPILED LAWS 1871.

PAGE
§ 7997 591

COMPILED LAWS 1915.

PAGE
§§ 12350 669
12383 73
13955 501

COMPILED LAWS 1929.

PAGE
§§ 1788 362
2250 ..... 468, 579, 580
2386 238
2487 *et seq.* 8, 13
2633 ..... 188, 190
4658–4670 531
4671 ..... 531, 532
4672–4676 531
4697 ..... 661, 720
4697, subd. (a) 713, 717
4713 (c) 345
4713 (e) 347
4722 279
4927 652
5538 171
5540 172
8407 109
8407 *et seq.* 106, 539
8431 601
8434 607
8438 636
9238 *et seq.* 583
9443 36
9454 199
9545 *et seq.* 444
9766 454
9825 *et seq.* 42
§§ 9868 451
12339 ..... 684, 687
12344 687
12690 151
12704 151–153
12724 152
12753 150–152
12767 369
13069 445
13132 *et seq.* 242
13392 *et seq.* 450
13393 ..... 50, 53
13394 50
13395 ..... 50, 450
13396 50
13398 450
13413 679
13417 34–37
13434 449
13434 *et seq.* 444
13972 339
13492 ..... 338, 744
13593 430
13976 ..... 49, 260
14023 206
14040 ..... 72, 73, 75, 77, 81
14040 *et seq.* 80, 81

COMPILED LAWS 1929—Continued.

	PAGE
§§ 14061	73, 74
14061 *et seq.*	80, 81
14062	74
14144	668
14149	323
14200	484
14219	485
14377	256
14400	428
14517	206
14975	338, 737
14986	740
15394	703
§§ 15514	257
16723	148
17149	144
17217 *et seq.*	395
17220	394, 396, 402
17318	435
17320	145
17328	412
17329	590
17338 *et seq.*	101
17342	146
17354	399
17371 *et seq.*	590

COMPILED LAWS SUPPLEMENT 1935.

	PAGE
§§ 2486–22 *et seq.*	467
4697	720
4697 (a)	713

COMPILED LAWS SUPPLEMENT 1940.

	PAGE
§§ 1098–21 *et seq.*	4, 192
1098–21–1098–38	15
2250	468, 579, 580
2486–91 *et seq.*	654
2487 *et seq.*	8, 13
2488 (1)	13
3723–1 *et seq.*	155
4658–4676	531
4685–51–4685–69	274
4697	661
4713 (c)	345
4713 (e)	347
4722	280
6991–1 *et seq.*	315
8407 *et seq.*	106
8438	636
8485–1 *et seq.*	539, 543, 605
8485–2	540, 545
8485–8	607
8485–14	541
8485–41 *et seq.*	20
8485–75	507
8485–80	31
8485–82	23
8628–1 *et seq.*	753
9209–16 *et seq.*	723
9209–31	723
9766	454
9769–1 *et seq.*	617
§§ 9825 *et seq.*	42
10135–5	617
10135–6	611, 618
12339	684
12344	687
13492	338, 744
13862–1 *et seq.*	724
13976	260
14061	74
14061 *et seq.*	72, 80
14062, 14062–1	74
16289–3 (6)	500
16289–9 (27)	366
16289–10 (5)	499
17115–85	411
17115–118	160, 167, 561, 563, 564
17115–125	565
17115–158	99
17115–248, 17115–249	432, 435
17115–301–17115–306	141
17115–309	141
17115–335	314
17115–340	99
17115–372	141
17115–422	393
17115–520	411
17149	144

COMPILED LAWS SUPPLEMENT 1942.

PAGE

§§ 13862–1 *et seq*..... 724
13862–11a 724

COMPILED LAWS SUPPLEMENT 1943.

PAGE

§§ 1098–21 15
1098–21 *et seq*..... 192
1098–22 .....12, 15
1098–23–1098–38 15
2386 239
2486–53 470
2486–91 *et seq*..... 654
2487 *et seq*..... 8
3723–5a 290
4658–4670 531
4671 .....531, 532
4672–4676 531
4685–53, 4685–53a 273
8485–1 540

PAGE

§§ 8485–1 *et seq*..... 540
8485–41 *et seq*..... 20
8485–78 26
8485–82 23
9209–16 *et seq*..... 723
9846 445
13433–1 *et seq*..... 307
13862–11a 725
13976 49
14497a 207
14497a *et seq*..... 205
14497b 632
15394 703
17543–44 415

MICHIGAN STATUTES ANNOTATED.

PAGE

§§ 5.1536 362
5.2093 .....468, 579, 580
5.2412 238
5.2731 *et seq*..... 467
5.2771 *et seq*.....8, 13
5.2931 188
9.1471–9.1491 531
9.1541, 9.1542 274
9.1543 .....273, 274
9.1543 (1) 273
9.1544–9.1557 274
9.1565 720
9.1565 (a) 713
11.91 652
12.1076 171
12.1077 172
17.141 109
17.141 *et seq*.....106, 539
17.165 601
17.168 607
17.172 636
18.971 *et seq*..... 723
19.4 *et seq*..... 583
19.244 36
19.255 199
19.361 *et seq*..... 444
19.731 454
19.781 *et seq*..... 617
19.821 *et seq*..... 42
20.28 451

PAGE

§§ 21.5 617
21.6 .....611, 618
25.1 151
25.21 151–153
25.82 152
25.110 .....151, 152
25.132 369
26.201 445
26.321 *et seq*..... 242
26.881 *et seq*..... 450
26.882 .....50, 53
26.883 50
26.884 .....50, 450
26.885 50
26.887 450
26.908 679
26.922 34–36
26.971 449
26.971 *et seq*..... 444
26.1104 .....338, 744
27.87 430
27.601 339
27.667 206
27.684 72
27.684 *et seq*..... 81
27.711 *et seq*.....80, 81
27.838 668
27.843 323
27.914 485
27.915 484

MICHIGAN STATUTES ANNOTATED—Continued.

	PAGE		PAGE
§§ 27.1145	256	§§ 28.604	141
27.1184	428	28.664	393
27.1443	206	28.788	411
27.1986	338, 737	28.874	144
27.1997	740	28.943 *et seq.*	395
28.280	411	28.946	394, 402
28.313	160, 167, 561, 563, 564	28.967 (1) *et seq.*	315
28.320	565	28.1048	435
28.355	99	28.1050	145
28.445, 28.446	432, 435	28.1058	412
28.533–28.538	141	28.1072	590
28.541	141	28.1082 *et seq.*	101
28.567	314	28.1096	399
28.572	99	28.1131 *et seq.*	590

MICHIGAN STATUTES ANNOTATED 1943 REVISION.

	PAGE
§§ 24.133	684
24.138	687
27.2483	703
27.2614	257
27.3178 (206)	500
27.3178 (487)	366
27.3178 (545)	499

MICHIGAN STATUTES ANNOTATED 1938 CUMULATIVE SUPPLEMENT.

	PAGE
§ 17.141 *et seq.*	106

MICHIGAN STATUTES ANNOTATED 1940 CUMULATIVE SUPPLEMENT.

	PAGE
§§ 5.2771 *et seq.*	13
7.951 *et seq.*	155
17.220 *et seq.*	605
17.230 (3)	541
17.537	507
27.605	260

MICHIGAN STATUTES ANNOTATED 1942 CUMULATIVE SUPPLEMENT.

	PAGE
§§ 5.2771 *et seq.*	8
17.220 *et seq.*	539, 543
17.221	540, 545
17.545	23
27.3548 (1) *et seq.*	724
27.3548 (11½)	724

MICHIGAN STATUTES ANNOTATED 1943 CUMULATIVE SUPPLEMENT.

	PAGE
§§ 5.278 (1) *et seq.*	4, 15, 192
5.278 (2)	12, 15
5.278 (3)–5.278 (18)	15

MICHIGAN STATUTES ANNOTATED 1943 CUMULATIVE SUPPLEMENT—Continued.

PAGE

§§ 5.2412 239
5.2762 470
5.2767 (1) *et seq.* 654
5.2772 (1) 13
7.955 (1) 290
9.1471–9.1481 531
9.1482 ..... 531, 532
9.1483–9.1491 531
9.1565 661
9.1581 (c) 345
9.1581 (e) 347
9.1590 280
17.220 540
17.220 *et seq.* 540
17.227 607
17.454 (1) *et seq.* 753
17.501 *et seq.* 20
17.540 26
17.542 31
17.545 23
18.971 *et seq.* 723
18.987 723
19.821 *et seq.* 42
20.6 445
26.978 (1) *et seq.* 307
27.605 49
27.711 *et seq.* 72, 80
27.711–27.713 74
27.1683 (1) 207
27.1683 (1) *et seq.* 205
27.1683 (2) 632
27.3548 (11½) 725
28.2104 415

SESSION LAWS.

PAGE

1848, Act 38 ..... 71, 73–75
——, ——, § 1 74
——, ——, §§ 2, 3 75
——, Act 150 151
1885, Act 113 72
1907, Act 144 594
1909, Act 278, § 26, subd. (e) 362
1912 (1st Ex. Sess.), Act 10. 539
——, ——, pt. 7 539
——, ——, ——, § 2 538
——, ——, ——, ——, subd. 22 605
——, ——, ——, ——, subd. 28 ..... 535, 545

PAGE

1912 (1st Ex. Sess.), Act 10, pt. 7, § 8 607
——, ——, ——, § 10 606
1915, Act 314, chap. 12, § 32 75
1917, Act 72, § 6 445
——, Act 167 ..... 8, 13
——, Act 338 730
1919, Act 181 277
1921, Act 46 531
——, Act 352 ..... 151, 152
1923, Act 96 345
——, Act 316 648
1927, Act 175, chap. 11 ... 590
——, Act 318 ..... 279, 345

SESSION LAWS—Continued.

PAGE

1927, Act 318, § 30 ....279, 281
1929, Act 114 .....730, 733
1931, Act 163 .....684, 687
——, Act 233 ....468, 579, 580
——, Act 272 42
——, Act 274 42
——, Act 327, § 5 617
——, ——, § 6 .....611, 618
——, Act 328 432
——, ——, § 85 .....411, 412
——, ——, § 118 .....
.....160, 560, 561, 563, 564
——, ——, § 125 565
——, ——, § 158 99
——, ——, §§ 248, 249 ... 435
——, ——, §§ 301–306 141
——, ——, § 309 141
——, ——, § 335 314
——, ——, § 340 99
——, ——, § 372 141
——, ——, § 422 393
——, ——, § 520 411
1933, Act 94 467
——, ——, § 32 470
——, Act 119 .....713, 720
——, Act 203 273
——, ——, § 3 ...273, 274, 276
——, ——, § 3a 274–276
1933 (Ex. Sess.), Act 8 ... 723
——, ——, § 16 723
1935, Act 13 617
——, Act 34 454
——, Act 66 467
——, Act 84 144
——, Act 145 .....338, 744
——, Act 148 636
——, Act 250 274
1936 (Ex. Sess.), Act 1 ... 20
——, ——, § 10 .....508, 511
——, ——, § 11 ..508, 509, 511
——, ——, § 26 508
——, ——, § 35 ..507, 509, 511
——, ——, § 38 26
——, ——, § 40 31
——, ——, § 42, subd. (1) . 23
——, ——, ——, subd. (6), (7) 23
1937, Act 61 .....
..535, 539, 543, 545, 605, 607
——, ——, § 1, par. (c) .. 540
——, ——, § 2, item 28 ... 540
——, Act 155 155

PAGE

1937, Act 155, § 5a 290
——, ——, § 7 156
——, Act 193 260
——, Act 228 274
——, Act 255, chap. 3, § 4 . 415
——, Act 264 541
——, Act 281 723
——, Act 347 .....20, 507, 508
1939, Act 104 42
——, Act 135 .....723, 724
——, ——, § 11a .724, 727–729
——, Act 143 ..3, 4, 15, 16, 192
——, ——, § 2 12
——, ——, § 18 8
——, Act 165 .....315, 317
——, ——, § 7 318
——, Act 176 753
——, Act 216 274
——, Act 288, chap. 3, § 6.
.....500, 501
——, ——, chap. 9, § 27 .. 366
——, ——, chap. 10, § 5 .. 499
——, Act 297 .....72, 74, 80
——, ——, § 1 81
——, Act 303 13
——, Act 318 ....345, 347, 661
——, Act 324 .....20, 23, 508
——, Act 342 654
1941, Act 72 49
——, Act 137 ....724, 728, 730
——, ——, § 11a 725, 726
——, Act 173 415
——, Act 182 703
——, Act 201 .....238, 239
——, Act 210 470
——, Act 238 307
——, ——, § 1 307
——, Act 255 ...4, 8, 12, 15, 16
——, Act 272 445
——, Act 303 .....204, 207
——, ——, § 2 632
——, Act 353 654
——, Act 363 290
——, Act 364 .....20, 26
1942 (2d Ex. Sess.), Act 18.
.....20, 23
1943, Act 151 532
——, Act 237 ....725, 728, 730
——, ——, § 24 727
——, Act 245 540
——, Act 246 .....20, 23
——, Act 248 273

IDAHO.

PAGE
Code Annotated, § 30–708 63

KENTUCKY.

PAGE
§ 298.190 KRS 691

CHARTERS.

PAGE
1929, Dearborn, chap. 6 170–173
——, ——, ——, § 34 (1935) 170
1943, Dearborn, chap. 9, § 9.8 174
——, ——, ——, § 9.9 ..... 174, 175
Detroit, title 4, chap. 21, § 16 ..... 384, 385, 389
——, ——, ——, § 17 384

ORDINANCES.

PAGE
Battle Creek Trailer Ordinance 3–17
Bessemer, No. 26 328
Detroit, Compiled Ordinances, chap. 197, § 1 438
——, ——, chap. 201, § 11 (Ordinance 249–B) 438
Hampton Township Junk Yard Licensing Ordinance 454–456
Port Huron Zoning Ordinance 182, 185–188, 191, 192

JOINT RULES OF THE SENATE AND HOUSE OF REPRESENTATIVES.

PAGE
1943 Joint Rule 15 275

MICHIGAN COURT RULES (1931).

PAGE
No. 30 380
No. 56, § 1 257

MICHIGAN COURT RULES (1933).

PAGE
No. 4 135–137
No. 19, § 4 668
No. 47 204
No. 51 218
No. 68 681
No. 72 ..... 323, 380
——, § 1 (g) 631

CIRCUIT COURT RULES.

PAGE
No. 18 260
No. 19 260
——, § 1 260

TEXTS CITED.

	PAGE
2 Am. Jur. p. 679	310
—— p. 845	428
8 Am. Jur. p. 890	166
16 Am. Jur. p. 600, § 287	116
29 Am. Jur. p. 612, § 808	494
46 Am. Jur. p. 232	45
49 Am. Jur. pp. 35, 36, § 22	358
—— p. 47, § 34	359
American Law Institute, Model Code of Evidence, Rule 232, p. 171	407
10 A. L. R. 415	428
65 A. L. R. 124	325
66 A. L. R. 972	616
143 A. L. R. 7	205
Black on Interpretation of Laws, p. 36	733
Canon 12, Professional Ethics, Michigan Bar	138
43 C. J. p. 215	9
45 C. J. p. 661	83
58 C. J. p. 1078, § 336	359
59 C. J. pp. 172, 173, § 286	510
—— p. 173, § 287	511
3 C. J. S. p. 1048	310
26 C. J. S. pp. 429, 430, § 128	116
24 Cyc. p. 298	164
—— pp. 1031–1033	742
26 Cyc. p. 1546	106
Detroit Law Review (Nov. 1933), vol. 4, p. 13	540
1 Gillespie, Michigan Criminal Law & Procedure, § 379	132
2 Gillespie, Michigan Criminal Law & Procedure, § 1244	435
3 Joyce on the Law of Insurance (2d Ed.), p. 3243, § 1973	494
L. R. A. 1915 E, 1119, note	74
L. R. A. 1916 C, 973 note	74
1 Lewis' Sutherland Statutory Construction (2d Ed.), § 237	732
20 Michigan Law Review, pp. 340–344	745
18 Michigan State Bar Journal, p. 116	77
1 Nellis on Street Railways (2d Ed.), p. 619, § 308	235
2 Page & Jones on Taxation by Assessment, § 1512	652
1 Restatement, Agency (1933), § 153	36
1 Restatement, Trusts, § 170	306
——, ——, § 187, p. 482	306
8 R. C. L. pp. 1047, 1048, § 101	116
25 R. C. L. p. 907	732
5 Tiffany on Real Property (3d Ed.), p. 85, § 1296	428
1 Underhill on Landlord and Tenant, p. 157	743

APRIL TERM, 1944.*

LOOSE *v.* CITY OF BATTLE CREEK.

1. MUNICIPAL CORPORATIONS—ORDINANCES—PARKING OF TRAILER COACHES—STATUTES.

   City ordinance regulating parking of trailer coaches within city limits not specifically licensed as a trailer coach park and restricting occupancy to six weeks during a year where trailer is parked on premises also occupied for dwelling purposes did not conflict with State statute regulating trailer parks upon which three or more trailer coaches are parked notwithstanding the statute permits occupancy the year round since the ordinance occupies only the field of legislation left unoccupied by the statute (Act No. 143, §§ 2, 3, Pub. Acts 1939, as amended by Act No. 255, Pub. Acts 1941; Battle Creek Trailer Ordinance).

2. SAME—CONSTRUCTION OF ORDINANCES.

   As between two possible interpretations of ordinance, by one of which it would be unconstitutional, and by the other valid, it is the duty of the court to adopt that which will save the ordinance.

3. SAME—CONSTRUCTION OF ORDINANCES—STATUTES.

   The rule that what the legislature permits, the city cannot suppress, does not apply in construing an ordinance which does not enter into a field already occupied by a State statute.

4. SAME—ORDINANCES—STATUTES—TRAILER COACHES.

   City ordinance regulating parking of trailer coaches within city limits does not conflict with State housing law, especially where the State law excepts trailers under certain circumstances and the ordinance is a reasonable exercise of control

* Continued from Vol. 308.

by the municipality over use and occupancy of trailers within the exception (1 Comp. Laws 1929, § 2487 *et seq.*, as amended by Act No. 303, Pub. Acts 1939; Battle Creek Trailer Ordinance).

5. CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—ORDINANCES—DISCRIMINATION.

A city ordinance which applies to all citizens alike cannot be held to be discriminatory.

6. MUNICIPAL CORPORATIONS—TRAILER COACH ORDINANCE—OCCUPANCY ON DWELLING PREMISES.

City ordinance regulating the use of trailer coaches and limiting occupancy to six weeks during a year where occupied on premises used for dwelling purposes does not prevent the parking of trailer coaches on dwelling premises when not used for residence purposes (Battle Creek Trailer Ordinance, § 4).

7. SAME—TRAILER COACH ORDINANCE—LIMITATION OF OCCUPANCY FOR DWELLING PURPOSES.

Since the length of time that a trailer coach may be used as a dwelling is a matter for the local law-making body to determine, and limitation of occupancy to six weeks during course of a year is not an unreasonable exercise of municipality's police power, city ordinance containing such limitation is a reasonable exercise of the police power in the promotion of health, morals, safety and general welfare (Battle Creek Trailer Ordinance).

REID, J., dissenting in part.

WIEST and BOYLES, JJ., dissenting.

Appeal from Calhoun; Hatch (Blaine W.), J. Submitted January 11, 1944. (Docket No. 9, Calendar No. 42,515.) Decided May 17, 1944.

Bill by Claude Loose and another against City of Battle Creek to enjoin the enforcement of an ordinance regulating use of trailers. Decree for defendant. Plaintiffs appeal. Affirmed.

Howard W. Cavanagh, for plaintiffs.

Howard E. Wilder, for defendant.

REID, J. (*dissenting in part*). The bill of complaint in this case was filed by owners of two house trailers situated on different lots to enjoin the city of Battle Creek from ousting them from their trailer coaches pursuant to a city ordinance. The trial judge held the ordinance constitutional and dismissed the bill. Plaintiffs appeal.

No objection is raised to the joinder of two separate owners in this suit.

Aaron Jones and his wife live in their separately-owned trailer coach which they had placed on a lot belonging to Merle Puff, for the use of which lot they pay him rent. Puff occupies a residence situated on the same lot. Plaintiff Claude Loose owns the lot on which his one-room trailer coach is situated. He lives in it most of the year and is lessor of an occupied residence on the same lot. In each case the occupants of the trailer coaches have use of the toilet facilities in the respective residences and have water and electrical current supplied.

In paragraphs 5 and 6 of the bill, both admitted by the defendant, plaintiffs claim that "they resided in said trailers; and that it is the only dwelling they have in the city of Battle Creek; that there is no other place at the present time they can occupy * * * that to comply with * * * said ordinance would * * * compel them to move out of the city of Battle Creek." Plaintiff Loose has used his trailer coach at the same place more than five years and has not moved it nor changed its location in the last two years. Plaintiff Jones established the use of his trailer at the present location in August, 1941, and in July, 1942, he traded trailers and substituted a slightly larger trailer at the same location and with the same connections.

Plaintiffs claim that the entire ordinance is unconstitutional and in conflict with Act No. 143, Pub.

Acts 1939, as amended by Act No. 255, Pub. Acts 1941 (Comp. Laws Supp. 1940, 1943, § 1098–21 *et seq.*, Stat. Ann. 1943 Cum. Supp. § 5.278 [1] *et seq.*). The most serious objection urged by plaintiffs is to the portion of the ordinance which limits the occupancy of a trailer coach for residential purposes to a period of six weeks in any one year. They compare that section with the statute which permits trailer coaches in trailer parks to be occupied the year round. The ordinance forbids a single trailer coach being occupied for more than six weeks in the year, though it be so used and occupied as not to violate sanitary regulations or offend public morals.

The pertinent sections of the ordinance, adopted June 15, 1942, are as follows:

"SEC. 2. *Prohibited parking and use.*

"(a) No person shall park or cause to be parked any trailer coach over night on any street, alley, highway, or other public place.

"(b) No trailer coach shall at any time be parked between the established set back line and the curb line on any lot.

"(c) No trailer coach shall be used or occupied unless there is a clear unoccupied space of at least ten feet on all sides thereof.

"(d) No person shall park or permit the parking of any occupied trailer coach or use or occupy or permit the use or occupancy of any trailer coach on any site, lot, field, or tract of land not specifically licensed as a trailer coach park, except only as provided in this ordinance.

"SEC. 3. *Parking on dwelling premises.*

"Not more than one trailer coach may be parked, used and occupied on the premises of any dwelling as hereinafter limited, provided the occupants of the trailer coach have free access to and the unlimited use of the sanitary facilities of the dwelling of said premises and the operator of such trailer coach secures a permit as provided in this ordinance.

"SEC. 4. *Permits.*

"Application for a permit to park, use and occupy a trailer coach on the premises of a dwelling shall be made to the health officer of the city and shall state the address of the dwelling, the name of the owner or occupant in control thereof, the name and address of the owner or operator and license number of such trailer coach. The consent in writing of the owner or of the occupant in control of the dwelling premises to such parking, use and occupancy and to the use of the sanitary facilities as herein provided shall accompany the application or be indorsed thereon. Upon the filing of such application, the health officer shall cause an inspection to be made of such dwelling premises and trailer coach and if he finds that adequate facilities are afforded on the premises for the disposal of waste and excreta and it appears that the parking, use and occupancy of such trailer coach complies with the statutes of the State of Michigan and ordinances of the city, he shall approve such application. Upon the filing thereof with the city clerk and payment of a fee of $2 the clerk shall issue a permit, which permit shall limit the time of such parking, use or occupancy to a period not longer than six weeks from the date of the application therefor. Not more than one permit shall be issued for any one trailer coach or to any one trailer coach operator or occupant in any one 12-months' period. Every permit shall be displayed in or on the trailer coach for which it is issued on the side nearest to a public street in such manner as to be readily noticeable at all times.

"SEC. 5. *Waste water.*

"No person shall spill or drain any waste water or liquid waste of any kind upon the ground or upon any paved areas.

"SEC. 6. *Removal of wheels or tires—Occupancy limit.*

"No person shall remove or cause to be removed the wheels or tires from any trailer coach except for the purpose of repair, nor shall any person elevate,

block or stabilize any trailer coach other than with jacks designed, provided and intended for that purpose. No parked trailer coach shall be occupied for sleeping purposes by a greater number of persons than said vehicle is designed and arranged to accommodate.

"SEC. 7. *Inspection.*

"The health officer or his authorized representative or any member of the police department of the city shall have the authority to enter and inspect at any reasonable time any premises upon which a trailer coach is parked, used or occupied for the purpose of ascertaining that the owner, operator or occupant thereof is complying with all statutes, ordinances and rules and regulations governing the same.

"SEC. 8. *Penalty.*

"Any person violating any of the provisions of the ordinance shall on conviction thereof be punished by a fine not exceeding $100 or by imprisonment in the Calhoun county jail for a term not exceeding 90 days or by both such fine and imprisonment in the discretion of the court.

"Each and every day during which a violation of this ordinance is permitted to continue shall be deemed a separate, distinct and independent offense.

"SEC. 9. *Effect of ordinance.*

"The conditions of this ordinance are declared to be severable, and if any clause, sentence, paragraph, section or subscription [subsection?] is declared void or inoperative for any reason by a court of competent jurisdiction, it shall not affect any other part or portion thereof."

Plaintiffs cite the decision of this Court in the case of *Richards* v. *City of Pontiac,* 305 Mich. 666, in which case the 90-day clause in the ordinance conflicted with the State trailer coach park act above referred to. This Court upheld the statute and declared the ordinance void, reciting the conflict of the ordinance with the statute.

Defendant cites *Cady* v. *City of Detroit,* 289 Mich. 499. The ordinance in that case was sustained though it prohibited the use of a trailer coach park for more than 90 days. Defendant further claims that as the trailer coach park act did not mention what should or should not be done with one or two trailer coaches on any one lot, by any specific direction, that such use of one or two trailer coaches was a subject matter left open entirely to the discretion of the local municipal authorities. This Court in the *Richards Case, supra,* comments on the adoption of the trailer coach park act since the decision in the *Cady Case, supra.* Since the *Cady Case* this Court has decided in the *Richards Case* (p. 675) that the operation of a trailer coach park is not a nuisance *per se,* by which latter decision the rule as to things not evil *per se* (*National Amusement Co.* v. *Johnson,* 270 Mich. 613) must necessarily be considered. As a matter of common sense, if the use of several trailers in a trailer coach park is not a nuisance *per se,* then neither is the use of one trailer on a lot a nuisance *per se.* The necessity for use of trailer coaches has been enhanced since the decision in the *Cady Case, supra,* and before adoption of the ordinance in question, by the war situation and consequent greater need for portable habitations.

The law of this State as to trailer coaches has been changed by statute and subsequent decision of this Court since the *Cady Case.* That decision should not now be considered as authority to sustain validity of the ordinance in question.

At the hearing there was a written stipulation between the plaintiffs and defendant as follows:

"Plaintiff, Claude Loose, owns and occupies a trailer on property which he owns and he has the unlimited use of the water, toilet, and other sanitary facilities of a dwelling located on the premises.

Plaintiff, Aaron Jones, owns and occupied a trailer on land which he rents from Merle and Margaret Puff and he has the unlimited use of the water, toilet, and other sanitary facilities of the Puff dwelling on the lot adjacent to the premises rented. Neither trailer in itself conforms to the requirements of the State housing law, Act No. 167, Pub. Acts 1917, as amended (1 Comp. Laws 1929, § 2487 *et seq.* [see Comp. Laws Supp. 1940, 1943, § 2487 *et seq.*, Stat. Ann. and Stat. Ann. 1942 Cum. Supp. § 5.2771 *et seq.*]), and neither has applied for nor received an occupancy permit under said act or under the zoning ordinance of the city. Neither trailer is directly connected to the sewer or with city water, both of which are in the street in front of the property, but both dwellings providing the sanitary facilities for the trailer occupants are connected with running water and with the sewer.

"The defendant admits that both trailers are better equipped, better suited and more desirable as living quarters than the average trailer and the defendant further does not deny that the occupants have to the best of their ability kept the trailers and the premises on which they are located clean and that no complaints have been made to the effect that the trailers or premises were not at all times kept in a neat and tidy condition."

Trailers are recognized as not being subject to the housing act. The trailer park act recited the need for the use of trailer coaches, saying, "The trailer coach had become a necessity." (Section 18 of the act as added by Act No. 255, Pub. Acts 1941.) It is not within the power of a city to forbid the use of that which has been determined by statute to be a necessity. The court is not driven to a doubtful determination of the existence of this necessity in considering the validity of the ordinance in question and may take judicial notice of the necessity as a

matter of common experience without the recital of the statute. But as long as the trailer coach act remains a statute the courts must take notice of the necessity for the use of trailer coaches as habitations.

The trailer park act regulates the use of three or more trailer coaches on one tract of land for residential purposes so as to prevent danger to the public health because of insanitary conditions. A trailer park occupied by three or more trailer coaches is likely to be more objectionable than the well-regulated use of a single house trailer. It will readily be observed that the legislature did not consider one or two trailer coaches on a lot as constituting a menace that needed regulation by the State; otherwise no doubt the regulation would have been provided. This does not leave open the subject of forbidding the use of one or two trailer coaches on a lot for 46 weeks of the year to any municipality.

The statute is law in the city of Battle Creek and the ordinance, if permitted to be given the full scope and effect the city contends for, would be inconsistent with the quoted recital of the statute as to necessity for the trailer coach. Under these circumstances the statute will be given its full force and effect and so far as the ordinance is contrary thereto it is invalid.

Plaintiffs also appropriately cite *National Amusement Co.* v. *Johnson, supra,* p. 616:

"It is the rule that, in the absence of specific statutory or charter power in the municipality, the provisions of an ordinance which contravene a State law are void. *People* v. *McGraw,* 184 Mich. 233; 43 C. J. p. 215. What the legislature permits, the city cannot suppress, without express authority therefor. *State* v. *Brittain,* 89 N. C. 574. * * * Where an amusement, which has been lawful and

unregulated, is not evil *per se* but may be conducted in a good or bad manner, is the subject of legislation, regulatory, not prohibitory, it would seem clear that the legislature intended to permit continuance of the amusement, subject to statutory conditions. The statute makes it unlawful to conduct a walkathon only in violation of certain conditions. This is merely a common legislative manner of saying that it is lawful to conduct it if the regulations are observed. *Schneiderman* v. *Sesanstein*, 121 Ohio St. 80 (167 N. E. 158, 64 A. L. R. 981). Assuming the city may add to the conditions, nevertheless the ordinance attempts to prohibit what the statute permits. Both statute and ordinance cannot stand. Therefore, the ordinance is void."

Section 2, excepting subsection (d), of the ordinance in question is upheld. Such regulations are proper in the city's discretion for adoption and enforcement. Section 3 and the following portion of section 4, "which permit shall limit the time of such parking, use or occupancy to a period not longer than six weeks from the date of the application therefor. Not more than one permit shall be issued for any one trailer coach or to any one trailer coach operator or occupant in any one 12-months' period," for the foregoing reasons are held invalid. Section 6 is obviously intended to cause temporary use only and is similarly invalid.

The ordinance in question does not point out the more objectionable features of the use of a trailer coach as a habitation which the city would desire to obviate. Defendant in its brief claims that the ordinance in its judgment will subserve the purposes of public morals, health and welfare and very appropriately says, "The commission of the city of Battle Creek is presumed to have a greater knowledge of local problems and local affairs." There-

fore as far as consistent with statute and common experience the city's ordinances should be sustained.

There may be many valid regulations not forbidding the habitation that could be thought of as being in the minds of the city commission, but the ordinance in question applies to trailer coaches lawfully placed in the situation where they now are, still lawful under the recital of the statute cited, and then forbids them to be occupied for 46 weeks of the year. This is such a broad and sweeping destruction of the rights of the plaintiffs that such portions of the ordinance are invalid.

The city has a right reasonably to regulate the use of one or two trailer coaches on any lot or tract but not to prohibit their use and any regulation aimed at prohibiting would be invalid.

Section 3 is obscure. It may be construed as expressing the intent to forbid the parking, use, or occupancy of more than one trailer coach on any site, lot, field or tract of land except on the premises of a dwelling, and then only if occupants of the trailer coach have free access and unlimited use of the sanitary facilities of the dwelling, and obtain a permit.

The ordinance is invalid wherein by necessary inference it forbids parking on a vacant site, lot or tract by either one or two trailer coaches and by more than one trailer coach on the premises of a dwelling. The provisions concerning a permit are not severable from the invalid portions of the ordinance.

Sections 2(d), 3, 4, 6 and 7 are invalid. The city will be enjoined by the decree of this Court from enforcing the same, the decree appealed from being to that extent reversed. The provisions of section 2(a), (b), and (c) are severable and are within the

proper exercise of the police powers of the city to enact and to enforce. As to section 2(a), see Constitution (1908), art. 8, § 28. The decree appealed from is to that extent affirmed. No costs are awarded, this being a matter of public interest.

SHARPE, J. The ordinance in question does not contravene the general law of the State regulating trailer parks. The State law regulating trailer parks defines a trailer park as any site upon which three or more occupied trailer coaches are parked. Act No. 143, § 2, Pub. Acts 1939, as amended by Act No. 255, Pub. Acts 1941 (Comp. Laws Supp. 1943, § 1098–22, Stat. Ann. 1943 Cum. Supp. § 5.278[2]). The State has not enacted legislation governing "trailer parks" where less than three trailer coaches are parked. The Battle Creek ordinance does not purport to regulate parks as such, but applies to the parking of trailers in numbers less than three. An examination of the ordinance justifies this conclusion. Section 2 of the ordinance prohibits the parking or use of a trailer anywhere within the city "not specifically licensed as a trailer coach park, except only as provided in this ordinance."

Section 3 of the ordinance reads as follows:

"*Parking on dwelling premises.*

"Not more than one trailer coach may be parked, used and occupied on the premises of any dwelling as hereinafter limited, provided the occupants of the trailer coach have free access to and the unlimited use of the sanitary facilities of the dwelling of said premises and the operator of such trailer coach secures a permit as provided in this ordinance."

The above section of the ordinance speaks in terms of parking one trailer coach and provides that the operator secure a permit as distinguished from a

license referred to in the State law. Moreover, the ordinance provides that "not more than one trailer coach may be parked, used and occupied on the premises of any dwelling."

In *Bowerman* v. *Sheehan,* 242 Mich. 95 (61 A. L. R. 859), the following rule is stated:

"'The rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.'"

In my opinion the ordinance occupies only the field left unoccupied by the State trailer coach park act and cannot be held invalid because of conflict with that act. The rule that what the legislature permits, the city cannot suppress, as stated in *National Amusement Co.* v. *Johnson,* 270 Mich. 613, has no application to the facts in the instant case as the city has not entered into a field already occupied by the State trailer act.

Nor is there any conflict between the ordinance and the State housing law, Act No. 167, Pub. Acts 1917, being 1 Comp. Laws 1929, § 2487 *et seq.,* as last amended by Act No. 303, Pub. Acts 1939 (Comp. Laws Supp. 1940, § 2487 *et seq.,* Stat. Ann. and Stat. Ann. 1940 Cum. Supp. § 5.2771 *et seq.*). The housing law includes trailers within the definition of a dwelling (Comp. Laws Supp. 1940, § 2488 [1], Stat. Ann. 1943 Cum. Supp. § 5.2772 [1]), but excepts them from operation of the housing law under certain circumstances. This exception shows that the State is not attempting to occupy the whole field of regulating the use of trailers as dwellings under all circumstances. This section reads in part as follows:

"A house trailer or other vehicle, when occupied or used as a dwelling, shall be subject to all the provisions of this act, except that house trailers or other

vehicles, duly licensed as vehicles, may be occupied or used as a dwelling for reasonable periods or lengths of time, without being otherwise subject to the provisions of this act for dwellings, when located in a park or place designated or licensed for the purpose by the corporate community within which they are located: Provided, That such parking sites are equipped with adequate safety and sanitary facilities."

The ordinance in question covers the same subject matter as the State housing law which specifically makes an exception of trailers "when located in a park or place designated or licensed for the purpose by the corporate community within which they are located," leaving a municipality the right to exercise reasonable control over the use and occupancy of trailers by licensing or designating the places for parking.

Plaintiffs urge that because section 4 of the ordinance permits the use of a trailer coach on dwelling premises for not more than six weeks during each 12 months, the ordinance is unreasonable and discriminatory. In view of the fact that the ordinance applies to all citizens, it cannot be held to be discriminatory. The six-weeks' use of a trailer coach as defined in the ordinance does not prevent the parking of trailer coaches on dwelling premises when not used for residence purposes. The length of time that a trailer coach may be used as a dwelling is a matter for the local law-making body to determine. I am not prepared to say that the limitation of time so determined is an unreasonable exercise of the police power. In my opinion the ordinance is a reasonable exercise of the police power in the promotion of health, morals, safety and general welfare.

The decree of the trial court is affirmed, but without costs as a public question is involved.

NORTH, C. J., and STARR, BUTZEL, and BUSHNELL, JJ., concurred with SHARPE, J.

BOYLES, J. (*dissenting*). The ordinance is void in its entirety because it contravenes the general law of the State regulating trailer parks. The constitutional limitation on the power of the city to pass laws and ordinances relating to its municipal concerns is that such power is subject to the Constitution and the general laws of the State. Const. (1908), art. 8, §§ 20, 21. The State has enacted a comprehensive law licensing and regulating the establishing or maintaining of trailer coach parks on any site, lot, field or tract of land upon which three or more occupied trailer coaches are harbored. Act No. 143, Pub. Acts 1939, as amended by Act No. 255, Pub. Acts 1941 (Comp. Laws Supp. 1940, 1943, §§ 1098–21—1098–38, Stat. Ann. 1943 Cum. Supp. §§ 5.278 [1]–5.278 [18], inclusive).

If the ordinance in question were limited in its operation and effect to less than three occupied trailer coaches harbored on any one site, lot, field, or tract of land, it would not invade the field covered by the general State law. It is not so limited, either in express terms or in operation and effect. Section 3 of the ordinance indicates that an unlimited number of trailer coaches may be parked and occupied on the premises of any dwelling, provided the occupants have free access and unlimited use of the sanitary facilities of the dwelling and the operator (occupant) has secured the local permit required of each occupant by section 4.

The ordinance differs from the State law in imposing different regulations and restrictions on the use

and occupancy of premises within the city by trailer coaches, requires a local permit issued by the city clerk to use and occupy trailer coaches (without limit as to number), sets up requirements for sanitation different than provided for by the general law. The provisions of an ordinance which contravene a State law are void. *National Amusement Co.* v. *Johnson,* 270 Mich. 613; *Noey* v. *City of Saginaw,* 271 Mich. 595.

The ordinance in express terms purports to limit the time of the use or occupancy of the premises to a period of not longer than six weeks. This is contrary to the provisions of the general State law which merely requires an annual license without limiting the period of occupancy. The city of Pontiac by ordinance sought to limit the period of occupancy by a trailer coach to three months in any one year. The Pontiac ordinance was held to be void as contravening State law for that reason, in *Richards* v. *City of Pontiac,* 305 Mich. 666, 673, where the court said:

"Defendants urge that the 90-day clause in the ordinance is a valid exercise of legislative power by the city of Pontiac and cite *Cady* v. *City of Detroit,* 289 Mich. 499, as authority for such claim. It is to be noted that the above case was tried and reviewed before Act No. 143, Pub. Acts 1939, as amended by Act No. 255, Pub. Acts 1941, was enacted. At the time of the *Cady Case,* the ordinance before the court, insofar as the 90-day clause was concerned, was not contrary to any State law. In the case at bar, the State by the enactment of appropriate legislation permits unlimited parking of trailers. The ordinance, however, fixes a time limit for the parking of trailers. In that respect it conflicts with State regulations and is therefore void."

In the case at bar the city relies on the *Cady Case, supra.* The *Cady Case* does not apply. The distinc-

tion between the *Cady Case* and the *Richards Case, supra,* pointed out above, applies equally to the case at bar.

The ordinance in question also requires a separate local permit from the city clerk before an occupied trailer coach is allowed to use premises for parking within the city limits. The ordinance requires payment of a fee for the permit. The Pontiac ordinance, considered in the *Richards Case, supra,* contained a similar requirement and was held void for that reason. The court said, p. 673:

"The ordinance also provides for a license from the city commission and requires an annual fee of $10 for each unit capacity of the tourist camp. The State law provides for license fees and their allocation to various governmental units. The State having entered the field of licensing tourist camps, any provision for additional fees, imposed by an ordinance for such licensing, is void."

In the case at bar the circuit judge held the ordinance valid, relying on our opinion in the *Cady Case.* Since then the *Richards Case* has been decided in this court, pointing out why the *Cady Case* does not apply. The *Richards Case* is controlling and the ordinance is void. A decree should be entered to that effect enjoining the city from further attempt at enforcement, with costs to plaintiffs.

WIEST, J., concurred with BOYLES, J

O'BRIAN *v.* MICHIGAN UNEMPLOYMENT COMPENSATION COMMISSION.

1. UNEMPLOYMENT COMPENSATION—ROOFING AND SIDING APPLICATORS—TEST OF EMPLOYMENT—STATUTES.

   In determining whether or not plaintiff who has been assessed for contributions under the unemployment compensation act was an employer of persons who applied roofing and siding, the test of employment applied is that furnished by the unemployment compensation act rather than one supplied by common-law principles (Act No. 1, § 42, subds. [1] [6], Pub. Acts 1936 [Ex. Sess.], as last amended by Act No. 18, Pub. Acts 1942 [2d Ex. Sess.]).

2. SAME—TEST OF EMPLOYMENT.

   Under the unemployment compensation act where service is performed for remuneration, there is an employment unless it is shown that the individual performing the service is free from control or direction over the performance of the service both under the contract and in fact, that the service is either outside the usual course of business for which the service is performed or is performed outside of all the places of business of the enterprise for which performed and that the individual is customarily engaged in an independently established trade, occupation, profession or business (Act No. 1, § 42, subd. 6 [a, b, c], Pub. Acts 1936 [Ex. Sess.], as amended by Act No. 18, Pub. Acts 1942 [2d Ex. Sess.]).

3. SAME—CONSTRUCTION OF STATUTES.

   The unemployment compensation act should be liberally construed to accomplish its purpose (Act No. 1, Pub. Acts 1936 [Ex. Sess.], as amended).

4. SAME—GREAT WEIGHT OF EVIDENCE—ROOFING AND SIDING APPLICATORS—INSPECTION.

   On certiorari in suit to determine liability for contributions under the unemployment compensation act, holding of circuit judge that parties who contracted with plaintiff to apply

roofing and siding materials were his employees was not against the great weight of the evidence where it appears applicators were not free from control by plaintiff, contracts with property owner were with plaintiff who was liable to the former for defective workmanship or material, contributions for some 77 individuals as applicators were involved, so-called master contract with schedule of payments did not create any contractual relation between plaintiff and applicators, work sheets embodying data as to a particular job were not always executed as a formal contract, tools and equipment were sometimes loaned applicators and work was inspected by plaintiff's inspectors, notwithstanding it also appeared that in so-called master contract applicators were designated as contractors and they were given the right to employ and control men used on the jobs and contractors carried on other jobs at same time they worked for plaintiff (Act No. 1, Pub. Acts 1936 [Ex. Sess.], as amended).

Appeal from Ingham; Carr (Leland W.), J. Submitted April 12, 1944. (Docket No. 23, Calendar No. 42,632.) Decided May 17, 1944.

Petition by George N. O'Brian, doing business as Mineralite Products Company, for writ of certiorari to review order of Michigan Unemployment Compensation Commission determining liability of plaintiff for contributions. Order affirmed in part and reversed in part. Plaintiff appeals. Defendant cross-appeals. Affirmed.

Cummins & Cummins, for plaintiff.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, *Frank Day Smith, Florence Clement Booth, Daniel J. O'Hara,* and *Victor H. Meier,* Assistants Attorney General, for defendant.

NORTH, C. J. In April, 1942, plaintiff filed an application for determination of his liability for contributions or assessments under the Michigan unem-

ployment compensation act. Act No. 1, Pub. Acts 1936 (Ex. Sess.), as amended.* Upon being advised that he was liable for contributions he appealed to a referee, and from the decision of the referee to the appeal board. Thereafter from a decision adverse to plaintiff an appeal in the nature of certiorari was taken to the circuit court of Ingham county. The final determination held plaintiff liable for contributions in so far as certain men designated as "applicators" were engaged in rendering services in the performance of specific contracts incident to plaintiff's business. From the decision of the circuit court this appeal in the nature of certiorari has been taken by plaintiff.

Plaintiff is doing business in the city of Lansing as Mineralite Products Company, and he designates himself as "a merchandiser and jobber of composition roofing and siding materials." In connection with his business plaintiff enters into contracts for furnishing the material and labor for roofing or siding buildings. Such contracts in some instances are obtained with the property owners by solicitors whose relations to the transactions are not involved in this appeal, and in some instances such initial contracts are obtained by the parties who apply the roofing or siding. When such contracts are presented to plaintiff, they are accepted by him if found satisfactory. For brevity we herein refer to George N. O'Brian as plaintiff; to the men who undertake to perform the labor in applying the roofing or siding as application contractors or subcontractors; and to the persons whom such subcontractors employ to perform labor as employees.

* This act had been amended prior to April, 1942, by Act No. 347, Pub. Acts 1937, Act No. 324, Pub. Acts 1939, Act No. 364, Pub. Acts 1941, and Act No. 18, Pub. Acts 1942 (2d Ex. Sess.). It has since been amended by Act No. 246, Pub. Acts 1943 (see Comp. Laws Supp. 1940, 1943, §§ 8485–41 *et seq.*, Stat. Ann. 1943 Cum. Supp. § 17.501 *et seq.*).—REPORTER.

From time to time as the contracts for the performance of such jobs are available through plaintiff's office any one of numerous so-called application contractors, men who are carpenters or skilled in construction and roofing business, enter into agreements with plaintiff to perform the necessary labor in applying the roofing or siding on designated jobs. Such relationship is established with plaintiff by means of two instruments, one of which is referred to as the master contract and the other as a separate job sheet. The former is a continuing agreement without any fixed period of duration. It sets forth the terms, including the "price per square" of footage at which the work will be done, and establishes the relation which, without reference to any particular job, would generally be applicable between plaintiff and the "applicator." The job sheet embodies the details of the particular job to be performed. The plan results in plaintiff furnishing the material with which the job is to be done at his price per square or lineal foot, while the application contractor performs the service of applying the roofing or siding at a price agreed upon between him and plaintiff.

Aside from infrequent instances the application contractor in doing the work uses his own tools and ladders. He may perform the actual labor in person or engage employees to do the work. He is not under the control of plaintiff as to whom he will employ or at what rate of pay or as to hours of labor or the time or manner in which the work will be done except that the completed job is to be done in a good and workmanlike manner in accord with the contract for the particular job. Except as he receives pay under the terms of his agreement as performed, the application contractor receives no compensation for services from plaintiff; and the

application contractor bears his own loss, if any, or benefits from the profits, if any, derived from a particular job. In exceptional circumstances plaintiff has paid wages to the application contractor's employees; but such is not the rule and, when done, the amount so paid is charged against what would otherwise be due the application contractor on the particular job. The question for determination is whether under such circumstances the application contractors are to be considered as plaintiff's employees and plaintiff required on that basis to make contributions to the unemployment compensation fund under the Michigan act, or whether on the other hand the applicators are independent contractors, as claimed by plaintiff.

Decision must be made in the light of the Michigan unemployment compensation act, which furnishes its own test, rather than by common-law principles which normally determine the distinction between an employee and an independent contractor. *Acme Messenger Service Co.* v. *Unemployment Compensation Commission,* 306 Mich. 704. As to what constitutes "employment" within the act the following provisions control:

"(1) Subject to the other provisions of this section 'employment' means service, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied. * * *

"(6) Services performed by an individual for remuneration shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commission that:

"(a) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and

"(b) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

"(c) Such individual is customarily engaged in an independently established trade, occupation, profession or business." (Act No. 1, § 42, subd. (1), (6), Pub. Acts 1936 (Ex. Sess.), as amended by Act No. 324, Pub. Acts 1939, and Act No. 18, Pub. Acts 1942 (2d Ex. Sess.) (Comp. Laws Supp. 1940, § 8485–82, Stat. Ann. 1942 Cum. Supp. § 17.545).

Subdivision 7 of section 42 enumerates various exceptions to the above-quoted subdivision 6 of section 42, but such exceptions in no way affect decision in the instant case. Nor is decision herein affected by the fact that subdivision 6 above quoted was omitted from section 42 as amended by Act No. 246, Pub. Acts 1943 (Comp. Laws Supp. 1943, § 8485–82, Stat. Ann. 1943 Cum. Supp. § 17.545).

In a former case we have held that paragraphs (a), (b), (c), above quoted, which limit the preceding words of subdivision 6 of section 42, are to be construed conjunctively. *Acme Messenger Service Co.* v. *Unemployment Compensation Commission, supra,* 710. We have also held that the unemployment compensation act should be liberally construed in accomplishing its purpose. *Godsol* v. *Unemployment Compensation Commission,* 302 Mich. 652 (142 A. L. R. 910).

The so-called master contract or "agreement" is of such length that we refrain from quoting it in full. It contains in the paragraphs indicated the following provisions:

"First: Contractor agrees that he will accept any job for applying, laying and/or repairing roofs, siding and general repair work on buildings within the

State of Michigan, which may be tendered to him by the company (plaintiff), and that he will apply, lay and/or repair the roofs, siding or do general repair work on those jobs which he accepts in a neat, workman like manner, and in accordance with the instructions furnished to him by the company.

"Second: Contractor agrees that he will not do any extra work on said jobs not specified in such instructions above mentioned without express written authority from the company. * * *

"Fifth: Contractor guarantees that all roofs or siding applied, laid and/or repaired or general work performed by him under and by virtue of this contract shall be free and clear from any defect in workmanship for a reasonable length of time. * * * Contractor agrees to remedy said defects without delay and without cost to the company. * * *

"Sixth: Contractor agrees to indemnify, protect and hold the company free and harmless from any and all claims, and demands whatsoever, and all suits in law or in equity, and any and all expenses (including court costs and attorney fees) incurred by the company in and about defending against and settling such claims. * * *

"Seventh: Contractor shall employ and discharge at his own expense and have complete control and supervision over all men used in or about any of said jobs.* * *

"Ninth: Company agrees to pay contractor, and contractor agrees to accept from the company as full payment for work done by the contractor on any job tendered by the company to the contractor and accepted by the contractor hereunder * * * compensation in accordance with schedule marked exhibit 'A', signed by the parties hereto and attached to this contract and hereby made a part hereof."

Other provisions in the so-called master contract are that the contractor upon the completion of a job will return to the company all ladders, scaffolding

and other equipment loaned to him; that he will deliver to plaintiff waivers of lien signed by the contractor and "each laborer employed by him," and a statement signed by the property owner that the job has been done in a manner satisfactory to him; that materials delivered to the job but not used thereon will be returned to plaintiff's place of business; and that the contractor will pay all charges of any kind for unemployment insurance or old age pension for men employed by him on jobs taken from plaintiff.

Because of the character of the record on this appeal we should note in part the statutory provisions governing such appeals to the circuit court and from the circuit court to the Supreme Court.

"*Review of questions of fact and law by court.* The findings of fact made by the appeal board acting within its powers if supported by the great weight of the evidence, shall, in the absence of fraud, be conclusive, but the circuit court of the county, in which the claimant resides or in which the employer's principal place of business in Michigan is located, if no claimant is a party to the case, or the circuit court for the county of Ingham shall have power to review questions of fact and law on the record made before the referee and the appeal board involved in any such final decision, but said court may reverse such decision of said appeal board upon a question of fact only if it finds that said decision of the appeal board is contrary to the great weight of the evidence: Provided, That application is made within 15 days after delivery of a copy of such decision, by certiorari or by any other method permissible under the rules and practices of the circuit courts of this State, and to make such further orders in respect thereto as justice may require. The commission shall be deemed to be a party to any judicial action involving any such decision. An appeal may be had from the decision of said circuit court in the same

manner as provided by the laws of this State with respect to appeals from circuit courts." Act No. 1, § 38, Pub. Acts 1936 (Ex. Sess.), as amended by Act No. 364, Pub. Acts 1941 (Comp. Laws Supp. 1943, § 8485–78, Stat. Ann. 1943 Cum. Supp. § 17.540).

Our review of the record discloses phases of the relation between plaintiff and the applicators which tend to sustain plaintiff's contention that these applicators are in fact and in law independent contractors; but on the other hand much in the record supports defendant's contention that the applicators under the provisions of the controlling statute are employees of the plaintiff. Decision of this controlling question must be made from an over-all consideration of the record. We deem it unnecessary to attempt to review every detail of the record but note the following.

As tending to establish the relation of an independent contractor rather than that of an employee plaintiff notes and urges the following.

(a) The applicator renders services under an agreement in which he is designated as a "contractor." While worthy of consideration, this circumstance is not conclusive, and particularly so since the statute above quoted provides that the one rendering the service is an employee "until it is shown to the satisfaction of the commission" that such person is free from control or direction "both under his contract of service *and in fact.*"

(b) The so-called master contract provides: "Contractor shall employ and discharge at his own expense and have complete control and supervision over all men used in or about any of said jobs." Admittedly the quoted provision is indicative of full control and of an independent contractor status, but its persuasiveness must be viewed in the light of other portions of the record. It appears by plaintiff's own testimony that the applicators were paid

by plaintiff for work done "at the end of each week, according to footage." Further, that in some instances plaintiff paid wages direct to the men who assisted the applicators, and that plaintiff kept book accounts in which entry of payments to applicators was under the heading "labor."

(c) The testimony discloses that the applicators fixed the amount of the compensation to be paid to their helpers, and this, plaintiff urges, is in keeping with his claim that the applicators were independent contractors. However it may be noted as a matter of common knowledge that men employed as foremen frequently have the power to "hire and fire" employees and to fix the compensation for which they will work; but such authority on the part of the foremen does not render him an independent contractor. And so in the instant case the circumstance just noted is not conclusive.

(d) Another circumstance urged in support of plaintiff's contention is that the application contractors carried on other jobs during the same period they were performing services for plaintiff. Here again the circumstance noted tends to sustain plaintiff's claim; but it must be considered in the light of the fact that the ordinary employee may and often does render services to parties other than his employer and during the period of his employment. This, however, does not change his status of an employee to that of a contractor.

In support of defendant's contention that the applicators are employees of plaintiff rather than independent contractors, the following among other phases of the record are stressed.

(a) It plainly appears from the record that the contract with the property owner for the roofing or siding is between the owner and the plaintiff. The job is plaintiff's job, and he merely employs the services of the applicators in performing the con-

tract. If either the material used or the workmanship proves defective the property owner would look to plaintiff for correction; but in this connection the record shows that the cost of correcting defective workmanship is charged back by plaintiff against the applicator, as would be done in the case of a subcontractor.

(b) The testimony discloses that there is great uncertainty both in plaintiff's mind and in his records as to who rendered services for him as alleged contractors and who were persons otherwise employed to assist in the work. The decision rendered by the appeal board states: "The employment status of the services of 77 individuals designated as 'application contractors' * * * is up before us for consideration." To say the least, this is seemingly a large number of persons to be considered "independent contractors" rather than employees.

(c) The so-called master contract (including the attached schedule) solely in and of itself did not create any contractual relation between plaintiff and the applicators. This is true because this instrument does not identify any work or job to be done. By itself it created no obligation on the part of plaintiff or the subscribing applicator. If any legally enforceable contract relation arose, it was only brought into being by the so-called "work sheet," which embodied data pertinent to a particular job.

(d) The record discloses that the "work sheet" memorandum was sometimes signed by the applicator who took the job, but in other instances seemingly it was not executed at all as a formal contract. And the record fails to show whether such work sheets were or were not signed by plaintiff.

(e) Further, the so-called master contract provides: "Company agrees to loan contractor,

wherever company shall have available, any necessary ladders, scaffolding and other equipment required by contractor in and about * * * jobs undertaken by contractor hereunder;" but it is further provided in the master contract that the contractor "assumes any and all liability arising or growing out of the use thereof," and further (as hereinbefore noted), the loaning of such tools or equipment by plaintiff to an applicator occurred rather infrequently. Furnishing tools to a workman is more commonly indicative of his status as an employee, rather than an independent contractor.

(f) It also appears from plaintiff's own testimony that he employed one or more inspectors who check on the jobs being done. Plaintiff testified: "I have one man in my employ who makes the rounds, goes around and just looks at the job. * * * We cannot tell a man (an applicator) what to do, if he is staying within the frame of the contract. If a man is not staying within the frame of the contract, we can break the contract with him."

The trial judge, in holding that the applicators were plaintiff's employees, seemingly relied much on the provision for inspection just above quoted and the provision in the first paragraph of the master agreement hereinbefore quoted wherein the contractor "agrees that he will accept any job * * * which may be tendered to him by the company" and that he will do the work "in a neat, workmanlike manner, *and in accordance with the instructions furnished to him by the company.*" Plaintiff contends that the word "instructions" above quoted should be held to mean *specifications* as contained in the so-called work sheet. But the circuit judge did not so construe this provision in the agreement, nor does it so read. And it cannot be overlooked that this provision goes to the very heart of the

instant case, because if plaintiff has the right to give "instructions" to the applicator, the latter is not free from control. Herein lies the distinction between the instant case and our decision in *McCormick* v. *Sears, Roebuck & Co.*, 254 Mich. 221. Concerning the phrase "and in accordance with the instructions furnished to him by the company" the circuit judge said:

"It seems to me that the language quoted is especially significant with reference to the matter of supervision and control. It will be noted that the contract does not undertake to limit the instructions as to character, detail, or time of furnishing. Doubtless the parties in making such agreement have in mind that the job to be performed is, after all, plaintiff's undertaking with the owner and that in consequence responsibility for proper performance rests with plaintiff. It is, I believe, a fair interpretation of the language used that the parties contemplated that instructions with reference to the doing of the work might be given in advance, or from time to time as the work progresses, or a combination of such methods. The right to give such instructions logically involves the incidental rights of inspection. The duty to follow instructions given at plaintiff's election indicates that the actual control and direction of the work rests with him. The fact that he employs in the carrying out of his contracts men of experience who do not require specific directions does not change the rights and duties of the parties as created by their agreement, nor does it alter the status of those engaged in the performance of the work. * * *

"I am brought to the conclusion that the holding of the appeal board with reference to the status of the so-called application contractors is not repugnant to the great weight of the evidence."

The above determination is controlling of the status of the other men who worked with the applicators

in applying the roofing and siding. The following portion of the act is pertinent to this phase of the case.

"Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this act, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of the work." Act No. 1, § 40, Pub. Acts 1936 (Ex. Sess.) (Comp. Laws Supp. 1940, § 8485–80, Stat. Ann. 1943 Cum. Supp. § 17.542).

The conclusion that all men engaged in applying plaintiff's roofing and siding materials were his employees obviates need for comment concerning plaintiff's contention that the Michigan unemployment compensation act would be unconstitutional, if construed to require him to make contributions on the basis of men who were rendering service but were not plaintiff's employees.

From the record as a whole the circuit judge found that the applicator in performing services for plaintiff did not "continue to be free from control or direction over the performance of such services" as provided in the statute, and therefore plaintiff was not exempt from liability for contributions under the Michigan unemployment compensation act. On this appeal by certiorari under the statutory provisions it cannot be said that the circuit judge's determination was "contrary to the great weight of the evidence." The judgment entered in the circuit court is affirmed. Costs to appellee.

STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

JAYNES *v.* PETOSKEY.

1. BROKERS—COMMISSIONS—SALE OF REALTY—STATUTE OF FRAUDS.
   It is essential to validity of a realty broker's commission agreement under the statute of frauds that the writing show an agreement or promise; the signature of the party to be charged, or his agent; and an indication that it relates to payment of a commission for the sale of an interest in real estate (3 Comp. Laws 1929, § 13417).

2. SAME—RIGHT TO RECOVER COMMISSION ON QUANTUM MERUIT.
   Oral agreement to pay commission on sale of land being void under statute, no recovery on *quantum meruit* may be had, even though service is rendered and accepted (3 Comp. Laws 1929, § 13417).

3. FRAUDS, STATUTE OF—PRINCIPAL AND AGENT.
   Rule that agent need not have written authorization to bind his principal applies only to statute of frauds pertaining to personal property, not statute relating to realty (Comp. Laws 1929, §§ 9443, 13417).

4. BROKERS—COMMISSIONS—SALE OF REALTY—STATUTE OF FRAUDS—EVIDENCE.
   In realty broker's suit to recover commission for sale of land pursuant to oral agreement with owners' son who was then handling his parents' affairs, written memorandum with reference to such commission made in accounting by son with the guardian of the estate of his parents which was not signed by the estate or its representative and did not show that defendant son had assumed the liability was not sufficient to establish liability under the pertinent statute of frauds (3 Comp. Laws 1929, § 13417).

5. SAME—COMMISSIONS—SALE OF REALTY—STATUTE OF FRAUDS—BREACH OF IMPLIED WARRANTY.
   Where written memorandum relating to commission to plaintiff broker for sale of real estate was insufficient to satisfy the

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Sufficiency of written memorandum, see 1 Restatement, Agency, § 153; 1 Restatement, Contracts, §§ 207, 208, 210, 211, 212.

statute of frauds as to defendant estate of owners or as to their son who had made oral agreement as to commission with plaintiff, latter may not impose personal liability upon son on theory of breach of implied warranty of authority to enter into the agreement (3 Comp. Laws 1929, § 13417).

Appeal from Wayne; Brown (William B.), J., presiding. Submitted April 4, 1944. (Docket No. 10, Calendar No. 42,593.) Decided May 17, 1944.

Bill by Clinton C. Jaynes against August Petoskey and John D. Pheney, administrator of the estate of Hulda Petoskey, deceased, for a money decree and injunction. Bill dismissed. Plaintiff appeals. Affirmed.

Bloom & Bloom, for plaintiff.

William C. O'Reilly (*Echlin & Lendzion,* of counsel), for defendant Petoskey.

John D. Pheney, administrator, *in pro per.*

SHARPE, J. Plaintiff appeals from a decree dismissing his bill of complaint in which he sought to recover a commission upon the sale of a 55-acre tract of land. The material facts are not in dispute. Rudolph and Hulda Petoskey, the father and mother of August Petoskey, were the owners of the land in question. Rudolph died in 1939, and Hulda in 1942. For some years prior to their death August Petoskey, by verbal agreement, managed their property. In October, 1935, August Petoskey entered into a verbal agreement with plaintiff, by virtue of which plaintiff was to receive a commission of $1,500 if he found a purchaser for the 55-acre tract. On May 7, 1936, the property was sold for $20,000, upon which a down payment of $8,000 was made, and the balance

to be paid in subsequent instalments. Subsequent to the death of his parents August Petoskey continued to act, without legal authority, as their agent. John D. Pheney was appointed guardian of the persons of Rudolph and Hulda Petoskey, and later appointed administrator of their estates. After his appointment as guardian he called upon August Petoskey for an accounting of his transactions in behalf of his parents. August Petoskey submitted to John D. Pheney, as guardian, an accounting in which he listed as a credit the amount of commission claimed to be due plaintiff. The account in question was listed as follows:

"Services of C. C. Jaynes in securing buyer for 55 acres, $1,500."

Later, August Petoskey submitted a further accounting and credited himself with the said amount in the following manner:

"May 7, 1936, C. C. Jaynes, Services on sale of 55 acres, $1,500."

In March, 1942, plaintiff filed a bill of complaint in the chancery court of Wayne county asking for a decree for the sum of $1,500 and certain injunctive relief pending the collection of the above sum.

Each of the defendants filed an answer to the bill of complaint and asked for dismissal of the same, alleging that the so-called agreement is void under the statute of frauds (3 Comp. Laws 1929, § 13417 [Stat. Ann. § 26.922]). The trial court held that there was no personal liability against August Petoskey and that the so-called agreement was void as being contrary to the statute of frauds, and dismissed plaintiff's bill of complaint. Plaintiff appeals.

The principal question in this case relates to the statute of frauds, 3 Comp. Laws 1929, § 13417 (Stat. Ann. § 26.922), and reads as follows:

"In the following cases specified in this section, every agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized, that is to say: * * *

"5. Every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate."

The statute provides that the following items must appear in the writing in order that it be valid: (1) a memorandum of an agreement or promise; (2) signature of the party to be charged, or his authorized agent; and, (3) an indication that it relates to payment of a commission for the sale of an interest in real estate.

In *Mead* v. *Rehm,* 256 Mich. 488, plaintiff, a real estate broker, brought suit against George H. Rehm, John Rehm and Grace Rehm for a commission growing out of the following agreement:

"I hereby agree to pay R. T. Mead a commission of five per cent. on the sale price of the Putnam resort property. Signed, George H. Rehm, Putnam, Sand Lake, Michigan."

John and Grace Rehm did not sign the agreement and denied authorizing George H. Rehm to make the agreement sued upon. We there said:

"While the statute does not expressly state that one assuming to execute the contract for another must have written authority to do so, yet it does state that he must be lawfully authorized to sign

the name of another. This agreement was not signed by John and Grace Rehm, neither did George Rehm sign their names thereto. If John Rehm may be held liable under the claimed verbal authority, then the evil the statute was intended to prevent will be present, and one who cannot be held liable on a verbal promise to pay a commission would be worse off than before the statute, for his liability would depend upon the promise of one asserting verbal authorization. A verbal agreement to pay the commission is rendered absolutely void by the statute, and there can be no recovery on *quantum meruit,* even though the service was rendered and accepted."

In *Dodge* v. *Blood,* 299 Mich. 364 (138 A. L. R. 322), we held that the agent need not have written authorization in order to bind his principal, and adopted the American Law Institute rule as promulgated in 1 Restatement, Agency (1933), § 153:

"For the purpose of satisfying the provisions of a statute requiring a note or memorandum to be signed by the party to be charged or by his agent, a memorandum signed by a *properly authorized* agent with or without indication of the existence or identity of the principal is sufficient to charge the principal."

In the *Dodge Case, supra,* the pertinent part of the section reads: "or his agent in that behalf" (2 Comp. Laws 1929, § 9443 [Stat. Ann. § 19.244]), while in the case at bar the pertinent part of the section reads: "or by some person by him thereunto lawfully authorized" (2 Comp. Laws 1929, § 13417 [Stat. Ann. § 26.922]).

The rule adopted in the *Dodge Case, supra,* relates to a statute different than the statute under consideration in the case at bar and must necessarily be limited to that statute.

The purpose of the statute (3 Comp. Laws 1929, § 13417), is to require an admission in writing that the person signing it, either himself or his lawful attorney or agent, is making a specific promise to pay. In the case at bar the writings are not signed by the estate or its representative. Moreover, there is no written authorization from Rudolph Petoskey and Hulda Petoskey conferring upon August Petoskey authority to make the agreement.

The writings are signed by a party whose interests in this particular instance are adverse to the interests of the estate, and do not show that August Petoskey assumed the liability of the promise.

Plaintiff's theory that August Petoskey's personal liability arises from his breach of implied warranty of authority to enter into the agreement would, if recognized, nullify the effect of the ruling in the *Mead Case,* and the evil which the statute intended to prevent would still be present.

The writings cannot be regarded as a promise to pay the debt or obligation of another, as the two papers taken as a whole sought to charge the estate with the debt, nor is there anything in them to show any promise on the part of August Petoskey to stand as guarantor if the estate did not pay. In our opinion the writings are insufficient to take the case out of the statute of frauds as they fail to show a promise or agreement of the parties to be charged. Our decision in this matter applies to the estate of Rudolph Petoskey and Hulda Petoskey as well as to the personal liability of August Petoskey.

The decree of the trial court is affirmed, with costs to defendants.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, BOYLES, and REID, JJ., concurred.

WEBB *v.* LEVENE.

1. SALES—ESTOPPEL—ORAL NOTICE OF SALE OF BUSINESS—QUESTION FOR TRIER OF FACTS—EVIDENCE.

   In nonjury action by seller of coal against corporate owner and former owner of laundry who had conducted the business under an assumed name similar to that of the corporation, organized after the sale, for balance due on account, the question of whether or not plaintiff had been given oral notice of the sale to the corporation was a question of fact and finding for plaintiff thereupon by trial court is accepted where there is competent evidence to sustain it (2 Comp. Laws 1929, § 9825 *et seq.*, as last amended by Act No. 104, Pub. Acts 1939).

2. APPEAL AND ERROR—NONJURY CASES—QUESTIONS FOR TRIER OF FACTS—EVIDENCE.

   The Supreme Court does not substitute its judgment on questions of fact for that of the trial court in nonjury actions at law unless the evidence clearly preponderates in the opposite direction.

3. PARTNERSHIP—RETIREMENT OF A PARTNER—NOTICE.

   A retiring partner has an affirmative duty of notifying all persons with whom the firm has had dealings of his retirement from the partnership in order to absolve himself from liability for credit subsequently extended.

4. NAMES—RETIREMENT OF PERSON FROM A FIRM—NOTICE.

   Where a firm name remains unchanged after the retirement of a person therefrom, the burden is upon such person to give notice of the retirement to all who have had dealings with the firm in order to absolve himself from liability for credit subsequently extended the firm.

5. ESTOPPEL—PARTIES—APPARENT OWNERSHIP.

   A person who permits another, who is in fact the owner and operator of a business, to conduct such business in such a way as to create the appearance of ownership in the first

party may be estopped to deny such relationship to or connection with the business as will cause him to be liable for breach of contract to a third party whose dealings with the business were based upon the first party's apparent ownership thereof.

6. SAME—LAUNDRY—NOTICE OF CHANGE IN OWNERSHIP—NAMES.
Appellant who operated a laundry under an assumed name and bought coal from plaintiff is estopped from denying liability for coal purchased after assets of the business became property of defendant corporation with the same or a similar name as long as credit was extended to him as owner where he failed to notify plaintiff of any change in personnel of the ownership of the laundry (2 Comp. Laws 1929, § 9825 *et seq.*, as amended by Act No. 104, Pub. Acts 1939).

Appeal from Kalamazoo; Weimer (George V.), J. Submitted April 6, 1944. (Docket No. 41, Calendar No. 42,633.) Decided May 17, 1944.

Assumpsit by Hugh S. Webb and Blanche Webb, doing business as Webb Coal Company, against Andrew H. Levene, doing business as Ideal Laundry Company, and another. Judgment for plaintiff against defendant Levene. Defendant appeals. Affirmed.

Mason & Stratton, for plaintiff.

Joseph S. Folz, for defendant.

SHARPE, J. This is a law action on an account for coal sold and delivered to defendant Andrew H. Levene, doing business as "Ideal Laundry Company." It appears that prior to 1942 defendant Andrew H. Levene was operating three hotels in Kalamazoo and purchased coal for these hotels from plaintiffs. Separate bills were rendered for each of the hotels and the bills were generally paid monthly as per invoice. One of the hotels was known as the "Midway Hotel." In May, 1942, defendant

Levene opened a laundry in the building in which the Midway Hotel was located. On May 29, 1942, he filed in the office of the clerk of Kalamazoo county an assumed name certificate, to the effect that he was operating the laundry under the name "Ideal Launderers and Cleaners." The laundry occupied quarters separate and apart from the hotel and had a separate coal bin and coal chute. After the establishment of the laundry defendant purchased coal from plaintiffs for the laundry. Until September 4, 1942, coal furnished the laundry was billed as part of the Midway Hotel account, but after that date plaintiffs kept a separate record of coal delivered to the laundry, which account was kept in the name of "Ideal Laundry Company."

On November 21, 1942, defendant Andrew H. Levene sold and delivered possession of the laundry assets to Royce Y. Pitchuer and James L. Simmons. After that date the laundry was operated by Pitchuer and Simmons until completion of incorporation of a company they had agreed to form. Articles of incorporation were executed on December 10, 1942. The certificate of incorporation was issued on December 14, 1942, and filed in the office of the Kalamazoo county clerk on December 16, 1942. A chattel mortgage from the purchasers to defendant Levene was executed on December 9, 1942. Some time after the laundry had been sold, defendant Levene, by registered mail, notified all of his laundry creditors of the sale, except plaintiffs, and as to plaintiffs the claim is made that one Shaw, plaintiffs' manager, was so notified by a personal conversation over the telephone.

After November 21, 1942, plaintiffs continued to deliver coal at the laundry premises. Bills for the coal were sent to Ideal Laundry, but none of these bills was paid, and are in issue in the present con-

troversy. When the corporation was formed, under the name "Ideal Launderers and Cleaners, Incorporated," defendant Levene was made vice-president and a member of the board of directors, but took no active part in the management of the corporation's business. A dissolution notice of doing business under an assumed name was filed December 31, 1942, by Ideal Laundry Company. The manager of plaintiffs' company stated that he was not informed of the change of ownership until sometime in March, 1943.

Plaintiffs' declaration states a claim for coal delivered between September 4, 1942, and March 17, 1943, inclusive, in the sum of $624.48. Defendant Levene filed an answer to the declaration, claiming that he paid for all coal furnished between the dates of September 4, 1942, and November 18, 1942, and that after the date of November 18, 1942, he did not authorize plaintiffs to sell or deliver coal to the Ideal Laundry Company. The trial court entered a judgment in favor of plaintiffs in the sum of $624.48, and in an opinion stated:

"Defendant's denial of liability is necessarily based upon an affirmative defense. He caused deliveries of coal to be charged to him personally, doing business under an assumed name. He is liable for all deliveries so made until such time as he established by a preponderance of the evidence that he notified plaintiff not to charge further deliveries to his account.

"I am not satisfied by a preponderance of the evidence that defendant definitely or sufficiently advised plaintiff, or his duly authorized agent, to desist from charging subsequent deliveries of coal to his account so as to relieve him of liability therefor. I realize there is a conflict in the testimony, but on the whole record it appears that defendant has not met the burden of proof."

Defendant Levene appeals and urges that he did in fact notify plaintiffs on or about December 1, 1942, that he had sold the laundry prior to that date; that as a matter of law he was under no duty to notify plaintiffs of the sale of his laundry; and that recovery should be limited to $10.56, representing the unpaid balance for coal delivered to and including November 18, 1942.

It is the claim of plaintiffs that they were entitled to actual notice of the change in ownership at the time said defendant sold his business, and that plaintiffs had a right to be apprised of the fact that they would have to look to others for payment of coal delivered.

There is no claim made that the filing of the dissolution under the assumed-name statute * on December 31, 1942, or the filing of the articles of incorporation on December 16, 1942, constituted notice to plaintiffs of a change in ownership. Defendant Levene urges that on or about December 1, 1942, he had a telephone conversation with Donald B. Shaw, manager of plaintiff company, notifying Shaw that he wanted a statement of his account as he had sold the business as of November 21, 1942. Mr. Shaw testified that the first knowledge he had that said defendant was no longer connected with the laundry was sometime in March, 1943.

In view of the testimony in this case the matter of oral notice becomes a question of fact. There is competent evidence to sustain the finding of the trial court. In such cases we do not substitute our judgment on questions of fact unless the evidence clearly preponderates in the opposite direction. See

* 2 Comp. Laws 1929, § 9825 *et seq.*, as amended by Acts Nos. 272, 274, Pub. Acts 1931, and Act No. 104, Pub. Acts 1939 (Comp. Laws Supp. 1940, § 9825 *et seq.*, Stat. Ann. and Stat. Ann. 1943 Cum. Supp. § 19.821 *et seq.*).—REPORTER.

Leonard v. *Hey,* 269 Mich. 491 (37 N. C. C. A. 111). We therefore accept the finding of fact by the trial court upon this issue.

The remaining question of whether defendant had a duty to notify plaintiffs of the sale of his laundry in order to absolve himself from any liability for coal furnished is a legal question. In partnership cases a retiring partner has an affirmative duty of notifying creditors of his retirement from the partnership.

In *Stebbins* v. *Walker,* 46 Mich. 5, plaintiff was a dealer in grain, and defendants were commission brokers. As such brokers they had bought and sold for plaintiff previous to June 30, 1879. On August 14, 1879, plaintiff made a conditional sale of his business to his brother, Osmyn G. Stebbins. The conditions of this sale were not performed by the brother, and at the end of a week plaintiff resumed his business and took possession of his property. On August 14, 1879, plaintiff, by letter, notified defendant that he was retiring from business, but that the business would be conducted by his brother. From August 14 to November 5, 1879, defendant had been dealing with the said Osmyn G. Stebbins in the belief that he was the principal in the business. When Osmyn G. Stebbins left the employment of his brother no notice was given to defendants, and to all appearances the business was conducted as before. On November 26, 1879, defendant learned for the first time that plaintiff had resumed business and that all the wheat dealings previous to November 15th had been conducted by Osmyn G. Stebbins as agent and not as principal. As a result of these dealings Osmyn G. Stebbins became indebted to defendants. Defendants attempted to apply certain credits due plaintiff as part payment on a loan of

$700 to Osmyn G. Stebbins. The trial court applied the credits against the loan. On appeal the court said:

"The same person who had sent wheat to them, and who they supposed and had a right to suppose was the principal, requested of them an advance, and they made it. * * *

"The case in judgment is a plain case of estoppel. There has been negligence from which one of two parties must suffer, and the responsibility for this negligence justly and exclusively lies at the door of the plaintiff. If he were now to collect of defendants the sum they advanced to his brother while he was acting ostensibly as principal, they would be defrauded, and the plaintiff's negligence would have furnished the opportunity, and the agent. The loss must therefore fall upon the plaintiff, though his intentions may have been entirely honest. * * *

"The defendants were therefore at liberty to stand upon their rights as they existed at the time they first learned that the business carried on with them by Osmyn in the name of O. G. Stebbins was really the business of the plaintiff."

The same principle is involved in *Westinghouse Electric & Manfg. Co.* v. *Hubert,* 175 Mich. 568 (Ann. Cas. 1915A, 1099). We there quoted with approval from *Neal* v. *M. E. Smith & Co.,* 54 C. C. A. 226 (116 Fed. 20):

"When a person retires from a firm with which he has been connected, it is his duty to advise all persons with whom the firm has previously had dealings that he has so withdrawn, if he would absolve himself from liability for credit subsequently extended by such persons to the firm from which he has retired. The law casts this burden on the retiring member; and, where the firm name remains unchanged, it does not compel those who have previously dealt with it to ascertain, each time that

credit is extended, whether the membership thereof remains the same as before. In the absence of a notice to the contrary, they may assume that it does. This doctrine is elementary."

In 46 Am. Jur. p. 232, it is said:

"A person who permits another, who is in fact the owner and operator of a business, to conduct such business in such a way as to create the appearance of ownership in the first party may be estopped to deny such relationship to or connection with the business as will cause him to be liable for breach of contract to a third party whose dealings with the business were based upon the first party's apparent ownership thereof. Thus, the owner of a department store has been held liable for the price of goods sold to the lessee or licensee of a department in such store."

In the *Stebbins Case, supra,* credit was advanced on the past business relations and under the belief that Osmyn G. Stebbins was the principal. In the case at bar plaintiffs advanced credit to the laundry in the belief that defendant Levene was the owner. Plaintiffs relied upon past business relations with said defendant in continuing to give him credit. Said defendant had a duty to notify plaintiffs of any change in the personnel of the ownership of the laundry if he would absolve himself from liability. He is now estopped from denying liability on the credit extended to himself as owner of the laundry.

The judgment of the trial court is affirmed, with costs to plaintiffs.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, BOYLES, and REID, JJ., concurred.

BECKER *v.* PARTRIDGE.

1. EQUITY — BANKRUPTCY — FRAUDULENT CONVEYANCES — SETTING ASIDE CONVEYANCES—BILL IN AID OF EXECUTION.

   Trial court properly denied motion to dismiss bill to set aside conveyances of real estate as a bill in aid of execution where plaintiff, as trustee of bankrupt's estate, stands in the place of a judgment creditor who had caused a writ of *fieri facias* to be issued and levied on the bankrupt's real estate previous to plaintiff's appointment.

2. FRAUDULENT CONVEYANCES—NOMINAL TITLE HOLDERS—STATUTE OF LIMITATIONS—EQUITY.

   Transferees' motion to dismiss bill by trustee in bankruptcy to set aside transfers of real estate to bankrupt and his wife was properly denied as to certain parcels where wife acquired her interest within six years previous to suit and holders of title were merely nominal title holders, as equity will look through the subterfuge of deeding the property to others in order to reach the real parties in interest and statutes of limitation, applied by analogy in equity, do not strictly control the question as to whether an action is barred in chancery by laches or estoppel (3 Comp. Laws 1929, § 13976, as amended by Act No. 72, Pub. Acts 1941).

3. BANKRUPTCY — FRAUDULENT CONVEYANCES — EQUITY — JURISDICTION.

   Since a bankrupt's interest in property passes to the trustee in bankruptcy, the chancery court has jurisdiction in the trustee's suit to set aside transfers of property by the bankrupt to determine the validity of such transfers.

4. SAME—FRAUDULENT CONVEYANCES—INSOLVENCY—INTENT TO DEFRAUD CREDITORS.

   Conveyances for which consideration was furnished by bankrupt which resulted in title being placed in bankrupt and his wife while he was insolvent, as disclosed by evidence,

including financial statements presented to receiver of bank to which he was greatly indebted, *held*, to have been made with intent to hinder, delay and defraud his creditors (3 Comp. Laws 1929, §§ 13393–13396).

Appeal from Oakland; Toms (Robert M.), J., presiding. Submitted January 5, 1944. (Docket No. 28, Calendar No. 42,462.) Decided May 17, 1944.

Bill by Ralph Becker, trustee in the matter of Edward M. Stout, a bankrupt, against Ward Partridge and others to set aside transfers of real estate and for an accounting and an injunction. Decree for plaintiff. Defendants Stout appeal. Affirmed.

Benjamin D. Jaffe and *Carleton H. McIntyre* (*Aaron Weiswasser,* of counsel), for plaintiff.

Glenn C. Gillespie, for defendant Grace Stout.

Walter J. McAloon, for defendant Edward M. Stout.

BOYLES, J. On March 31, 1941, a petition in bankruptcy was filed against Edward M. Stout; on September 25, 1941, he was adjudged a bankrupt; and on October 31, 1941, Ralph Becker, plaintiff and appellee, was appointed as the trustee in bankruptcy. On April 1, 1942, the trustee filed the present suit in chancery to set aside certain conveyances of real estate to the defendants herein on the ground that Edward M. Stout was insolvent at the time they were executed and delivered and that they were executed and delivered with intent to hinder, delay and defraud his creditors. The bill of complaint also asked for an accounting, and an injunction to restrain the defendants from encumbering or disposing of the real estate in question. The bill of

complaint was taken as confessed by defendants Ward and Allene Partridge who did not appear or answer. The case was heard in open court as against defendants Edward M. Stout and his wife, Grace Stout. The court filed an opinion finding that Stout was insolvent at the time the conveyances were executed and delivered, that the conveyances were made with intent to hinder, delay and defraud the creditors of Edward M. Stout within the meaning of the fraudulent conveyance act, and were null and void. From a decree entered in accordance with the opinion, defendants Edward M. Stout and Grace Stout appeal.

Two questions secondary to the main issues are raised by appellants:

(1) Should the bill of complaint be dismissed as a bill in aid of execution? The suit has a secondary aspect as a bill in aid of execution in that the trustee claims to be a judgment creditor of Stout. One of the creditors represented by the trustee in bankruptcy is Hugh A. McPherson, receiver of the Pontiac Commercial & Savings Bank. The receiver had obtained a deficiency decree against Stout in a mortgage foreclosure suit in chancery, the decree being entered in favor of the Reconstruction Finance Corporation which at that time held an assignment of the assets of the bank as security for a loan. Subsequently, and before plaintiff was appointed trustee, the bank paid off the Reconstruction Finance Corporation loan and obtained reassignment of all its remaining assets, including the deficiency decree. The deficiency was not paid by Stout and the receiver caused a writ of *fieri facias* to be issued and levied on Stout's real estate. McPherson, as receiver, succeeded to all the rights of the Reconstruction Finance Corporation. Plaintiff, as trustee in bankruptcy, stands in place of the receiver who was

the real party in interest in the attempt to collect the deficiency from Stout. Defendants' motion to dismiss the bill of complaint as a bill in aid of execution was properly denied. The chancery court, having jurisdiction over the main issues in the case, may grant the incidental relief essential to an effective disposition of the entire matter.

(2) Appellants claim that the suit is barred by the statute of limitations * as to three certain parcels of real estate involved. The Partridges paid no consideration for two of these parcels deeded to them by Mr. Stout in 1935, and in 1937 conveyed them to Grace Stout, wife of Edward M. Stout. Ward and Allene Partridge did not contest this suit, and Ward, testifying, admitted that he was merely a nominee in the transaction "through some arrangement between Mr. and Mrs. Stout,"—also "Well, I knew I was acting—we were acting simply as nominee and that they were to be reconveyed to Mrs. Stout as it was my understanding." Grace Stout testified that when Mr. Stout deeded these parcels to Partridge she "wasn't quite satisfied with the property * * * at the time Mr. Partridge took this property over for me I wasn't quite satisfied." All four of these parties are before the court. Grace Stout acquired the title within the six-year period during which the cause of action is not barred. Equity will look through the subterfuge of deeding the property to the Partridges to reach the real parties in interest. A somewhat similar situation arose as to parcel 68—a vacant lot, in which title was apparently taken by the Partridges in 1935 and paid for with $50 furnished by Mr. Stout. The deed from the grantors to the Partridges was not acknowledged or recorded,

* See 3 Comp. Laws 1929, § 13976, as last amended by Act No. 72, Pub. Acts 1941 (Comp. Laws Supp. 1943, § 13976, Stat. Ann. 1943 Cum. Supp. § 27.605).—REPORTER.

and later the Partridges gave a deed of the parcel to the Stouts. Defendants' motion to dismiss as to these parcels on the ground that the suit was barred by the statute of limitations was denied. We are in accord. Whatever interest Edward M. Stout had (if any) in these parcels passed to the trustee in bankruptcy, and the court has jurisdiction in chancery to determine the validity of the transfers. While statutes of limitation by analogy apply in equity, they do not strictly control the question as to whether an action is barred in chancery by laches or equitable estoppel.

The controlling issues in this case are (1) whether Edward M. Stout was insolvent within the meaning of the fraudulent conveyance act (3 Comp. Laws 1929, §§ 13393–13396 [Stat. Ann. §§ 26.882–26.885]) when the conveyances in question were made during the years from 1935 to 1938; and (2) were they made with intent to hinder, delay and defraud his creditors? The first is a question of fact, and the second is a conclusion to be drawn from the facts.

Stout had been a resident of the city of Pontiac for many years, married defendant Grace Stout in 1898, was in the business of buying and selling real estate during the period of the rapid growth and expansion of Pontiac as an industrial center. He acquired title and interests in a large number of parcels of real estate, both in his own name and in the names of business associates and partners. Prior to the closing of the Pontiac Commercial & Savings Bank and the appointment of Hugh A. McPherson as receiver in 1931, Stout was an extensive borrower of this bank in his own name, and in conjunction with business associates. Such borrowings were evidenced by indirect liabilities, where Stout discounted notes to the bank on his indorse-

ment, by direct liabilities evidenced by his note as maker, and by mortgage loans evidenced by notes secured by mortgages.

Beginning in 1926 Stout maintained a bank account with the Pontiac Commercial & Savings Bank in the name of Edward M. Stout and Grace Stout, his wife. This was the only account Edward Stout as an individual, or Edward Stout and Grace Stout jointly, had at any time and was used as a depository of funds derived from Stout's individual business dealings as well as for all funds derived by Edward M. Stout and Grace Stout in their alleged joint dealings. Between 1927 and 1931 this account received the proceeds of bank loans made to Edward M. Stout individually in the sum of $99,690.78. In addition, numerous proceeds of indirect loans to Edward M. Stout were deposited in the bank account during the same period. Prior to 1931 Edward M. Stout acquired interest in many parcels of property and few parcels, if any, were acquired in the name of Grace Stout or Edward M. Stout and Grace Stout by entireties. No separate books and records or bank account was kept on the few parcels which were in the names of Stout and his wife. Mr. Stout had the management of these properties and bank account, with full authority to act therein. Mrs. Stout testified that she at no time ever had a separate estate, contributed nothing to the real estate venture through her own efforts, acquired nothing by inheritance, and knew little or nothing of the details of her husband's business. She never had any moneys in a separate bank account prior to 1931, and in 1931 did not know how much money, if any, she had in the joint account, nor did she know her net worth individually or jointly at that time. Any interest she later acquired in property owned by her husband was without consideration from her. She was the

housewife, not the business woman. On June 13, 1931, when Hugh A. McPherson was appointed receiver for the Pontiac Commercial & Savings Bank, Stout's indebtedness to the bank amounted to $149,096.58. This indebtedness did not include indebtedness on mortgage loans held by the mortgage department of the bank.

After 1931 Edward M. Stout did not acquire or take title to any property *in his own individual name.* Certain partnership or joint business associations were dissolved subsequent to 1931 and the title to the interests of his associates was transferred to the names of Edward M. Stout and Grace Stout, his wife, by entireties, Grace Stout individually, or to Ward Partridge and/or Allene Partridge, son-in-law and daughter of Edward M. Stout, notwithstanding that at such time large borrowings of such partnership or joint business association and individual borrowings of Stout remained outstanding and unpaid to the Pontiac Commercial & Savings Bank.

The indebtedness of Edward M. Stout to the Pontiac Commercial & Savings Bank increased from $149,096.58 in June, 1931, to $169,634.80 in November, 1934. After 1931 all newly-acquired titles or interests in properties were taken in the names of Edward M. Stout and Grace Stout by entireties, Grace Stout, or in the names of Ward Partridge and/or Allene Partridge, his wife.

Edward M. Stout in 1931 was in default on many of his individual obligations. The mortgage liability or encumbrances covering Edward M. Stout's properties in 1931 amounted to $130,491.56. This indebtedness continually increased after 1931 and ultimately resulted in a loss of the properties through foreclosure. He was in default in taxes in 1931 in the sum of $33,480.12. This default increased to $56,082.56 in 1934. Ultimately many of

such properties were lost to the State of Michigan by tax sale, in November, 1939. The entire liability of Edward M. Stout in 1931, as determined, was approximately $313,048.08, composed of his bank liability, mortgage liability, tax delinquency. The title to a large number of parcels of property was transferred to Grace Stout between 1931 and 1934. After the petition in bankruptcy was filed in 1941 the properties listed by Stout in his bankruptcy schedules amounted only to about $16,000. On May 6, 1936, Edward M. Stout filed a sworn financial statement with the first National Bank of Pontiac wherein he showed that he was insolvent. This statement showed his properties at an estimated value of $119,680 and his liabilities at $181,534.04. On April 4, 1938, Edward M. Stout gave a sworn financial statement to the Pontiac Commercial & Savings Bank which again reflected complete insolvency. This statement disclosed properties of an estimated value of $18,650 and liabilities of $121,336.37.

Approximately 700 record pages of testimony were taken to show whether Mr. Stout was insolvent. No satisfactory objective can be accomplished by any lengthy statement of the many financial transactions indulged in by Mr. Stout, or the varying estimates as to the values of his property and the extent of his indebtedness. Accepting his own sworn financial statements filed with the two bank creditors in 1936 and 1938, he was admittedly insolvent. His counsel now seek to convince that these were false statements.

"A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." 3 Comp. Laws 1929, § 13393 (Stat. Ann. § 26.882).

The circuit judge in a lengthy opinion tabulated and reviewed the testimony and reached the conclusion that Stout was insolvent. In so doing, the trial court did not include as a part of Stout's assets the property that had been hidden in the name of Partridge and wife. The conclusion of the trial court that Stout was insolvent when the conveyances in question were executed is fully supported by the testimony. The conduct of Mr. Stout in financial matters was not consistent with the conduct of one who believes himself solvent. The record is convincing that the conveyances in question were made with intent to hinder, delay and defraud his creditors.

The decree is affirmed, with costs to appellee.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, and REID, JJ., concurred.

SPEICHER *v.* SOWELL.

1. JUDICIAL SALES—PRICE CONTROL—EQUALLY DIVIDED COURT.
Order confirming sale by receiver of assets of a partnership engaged in manufacturing at which goods were sold above amount permitted by regulation of the office of price administration is affirmed by an equally divided court (56 Stat. at L. 23, as amended by 56 Stat. at L. 767 and 57 Stat. at L. 566).

2. COSTS—PUBLIC QUESTION—PRICE CONTROL—JUDICIAL SALES.
No costs are allowed in suit to determine whether or not war emergency price control regulations applied to judicial sales, a public question being involved (56 Stat. at L. 23, as amended by 56 Stat. at L. 767 and 57 Stat. at L. 566).

Appeal from Wayne; Miller (Guy A.), J. Submitted January 13, 1944. (Docket No. 53, Calendar No. 42,607.) Decided May 17, 1944. Rehearing denied June 30, 1944.

Bill by Walter D. Speicher against Nina Sowell and another to dissolve a partnership. On order to show cause why sale of assets by receiver should not be confirmed. Administrator of Office of Price Administration intervened. Sale confirmed. Administrator of Office of Price Administration appeals. Affirmed by an equally divided court.

Arnold F. Zeleznik, for receiver.

Thomas I. Emerson, Fleming James, Jr., David London, Morton Abrahams, James C. Gruener, A. D. Ruegsegger, Abram Sapiro, and *Albert E. Smith,* for intervener.

REID, J. (*for affirmance*). This is an appeal from the order and decree of the chancery court confirming report of receiver Ona Dunlop of sale of assets in the winding up of the affairs of a partnership which had engaged in manufacture. We quote from the opinion of the trial judge:

"The exact question involved is this: Does the act of congress creating the office of price administration* give to that office power to fix maximum or

* See 56 Stat. at L. 23, as amended by 56 Stat. at L. 767 and 57 Stat. at L. 566 (50 USCA, § 901 *et seq.*).—REPORTER.

ceiling prices which may be realized upon liquidation sales in State courts which are carried out in every particular lawfully under State laws?

"The carrying on of a continuing business by a receiver appointed by a State court is not involved here. Nor does this case require the examination of the rules and regulations adopted by the price administrator. Those regulations can rise no higher than their source. The act of congress is that source. Congress may by its acts, within its delegated powers, create administrative bodies. It may delegate the power to those bodies to adopt administrative rules and regulations, but those rules and regulations must be within bounds and rules laid down by congress in its enabling acts. To allow such bureaus and administrative bodies to go beyond the carrying out of the orders of congress would be to permit the former to legislate and the latter to delegate the power to legislate. * * *

"This court takes judicial notice of acts of congress, treaties, and presidential proclamations. These are the law of the land. It does not take notice of administrative rules and regulations. They are not the law of the land. They are merely administrative acts. The thing to be examined in order to find out the applicability of the price ceilings in question is, therefore, the act of congress. It is to be examined to learn the intention of congress as to what sales it meant to interfere with. Did it mean to hinder State courts in proceedings such as these, where sales are made once only, not in the course of business, in the carrying out of functions of winding up businesses and getting creditors paid? If it did so intend, that meaning must be gotten by construction, because it did not say so directly.

"Title 1, § 2, deals with the powers of the price administrator. The opening sentence of that section is as follows:

"'SEC. 2 (a). Whenever, in the judgment of the price administrator, the price or prices of a com-

modity or commodities have risen or threaten to rise to any extent or in a manner inconsistent with the purposes of this act, he may, by regulation or order, establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this act.'

"Section 1 (a) of the act discloses that its purposes are, among other things, to prevent speculative and abnormal increases in prices and rents, 'to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices, resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency;' to protect persons from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to governmental agencies, which would result from abnormal increases in prices; to secure adequate production; to prevent collapse of values; to stabilize agricultural prices; and 'to permit voluntary cooperation between the government and producers, processors, and others to accomplish the aforesaid purposes.'

"This statement of purposes clearly indicates that the act is intended to apply to regularly conducted businesses. * * *

"In section 2 (d) the idea of control over continuing operations is still further emphasized in that the administrator is given power to regulate or prohibit speculative or manipulative *practices* or *hoarding.*"

Section 204 (d) of the emergency price control act of 1942 is as follows:

"The emergency court of appeals, and the supreme court upon review of judgments and orders of the emergency court of appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any

price schedule effective in accordance with the provisions of section 206 and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order or price schedule, or to restrain or enjoin the enforcement of any such provision."

The point involved is simply thus stated: Does the act forbid review by a State court of an attempted regulation which is beyond and outside the scope and provisions of the act?

As indicated by the trial judge in his opinion, the act is very evidently aimed at controlling prices at which goods are as a practice and customarily to be sold to the public in the ordinary course of business. That is the real intent and purpose of the act and it is further a matter of common knowledge that judicial sales are distress sales in which the price obtained is for the most part far less than the true value of the property offered for sale. It could scarcely be imagined that from these distress sales the market could by any means become inflated. It is a matter of common knowledge and observation that the contrary is the effect and the occasion of any article in a judicial sale selling at a price exceeding the price fixed by the office of price administration would be a rarity. It is inconceivable that congress really intended to take away from the State courts the right to control their own receivers in a field of activity where deflation instead of inflation is practically the universal rule.

It is not to be presumed that congress intended that each and every official under the guise of the authority of the office of price administration could do as he pleased in the whole field of price fixing and be immune from all accountability save only to one court for the whole United States as a court of review of his actions in the first instance. The very fact that only one court is provided of itself would tend to indicate a contrary intention. The section quoted does not in any explicit terms so provide. A careful review and analysis of section 204 (d) shows that only regulations that are issued *under the act* are protected against review by any tribunal other than the emergency court of appeals and Federal supreme court on appeal from that tribunal. The words "such regulations" thrice recurring in the section can only refer to the regulations and orders preceding in the same section and those are under the act. Regulations issued not under the act are not so protected. In other words, an officer or authority who does some act not authorized by the emergency price control act is not protected therein. He may not do an unauthorized act and receive immunity. Acts *ultra vires* are not placed in the jurisdiction of the emergency court of appeals and it is *ultra vires* for the office of price administration to fix maximum prices at which goods may be sold at judicial sales.

It appears from statements contained in the answer of the intervening defendant that of the items shown by the report of sale by the receiver, all but 12 are either exempted from price control or the prices bid were below the applicable ceiling price and that of these 12 items the amount of the excess bid above the regulation is $2,605.25. The parties stipulate the accuracy of these statements contained in the answer of the intervener. The decree ap-

pealed from approves such sales at such prices.

The intervening defendant claims that the regulations and orders of the office of price administration were all published in the Federal register and therefore entitled to judicial notice. However, it seems they were admitted in evidence at the hearing on the order to show cause why the sale should not be confirmed. It is unnecessary to rule on the question whether we should take judicial notice of these regulations. They are in the record.

For the reasons hereinbefore set forth in this opinion, the decretal order appealed from is affirmed. It is to be expected that the receiver's expenses incident to this appeal will be an item in his account. No costs are allowed. The price administrator was an active party defendant and his intervention was caused by public interest.

NORTH, C. J., concurred with REID, J.

BOYLES, J. (*for affirmance*). I concur in the result reached by Justice REID. His viewpoint receives support in *Davies Warehouse Co.* v. *Price Administrator,* 321 U. S. 144, 151, 154 (64 Sup. Ct. 474, 88 L. Ed. 635). The question decided was whether a public warehouse was exempt from the United States emergency price control act of 1942 (56 Stat. at L. 23, as amended by 56 Stat. at L. 767 and 57 Stat. at L. 566 [50 USCA, § 901 *et seq.*]). In so holding, the court said:

"But as matter of policy congress may well have desired to avoid conflict or occasions for conflict between Federal agencies and State authority which are detrimental to good administration and to public acceptance of an emergency system of price control that might founder if friction with public authorities be added to the difficulties of bringing private self-

interest under control. Where congress has not clearly indicated a purpose to precipitate conflict, we should be reluctant to do so by decision. * * * Congress has given no indication that it would draw all such State authority into the vortex of the war power. Nor should we rush the trend to centralization where congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the court that 'the extension of Federal control into these traditional local domains is a "delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions." ' "

NORTH, C. J., and WIEST, J., concurred with BOYLES, J.

BUSHNELL, J. (*for reversal*). I am unable to concur in the affirmance of the order of the trial court.

The record contains supplementary order No. 10 of the office of price administration issued July 15, 1942, and the amendment thereto issued December 11, 1942. These orders expressly exclude judicial sales from the operation of price schedules except when "machinery products" are involved such as in the instant case.

The precise question involved here was not in issue in *Yakus* v. *United States* (*Rottenberg* v. *United States*), 321 U. S. 414 (64 Sup. Ct. 660, 88 L. Ed. 834 [decided March 27, 1944]), but the emergency price control act of January 30, 1942, 56 Stat. at L. 23, chap. 26 (50 USCA, apx., Supp. 2, § 901 *et seq.*, 11 F. C. A., title 50, apx. 25, § 1 *et seq.*), as amended by the inflation control act of October 2, 1942, 56 Stat. at L. 765, chap. 578 (50 USCA, apx., Supp. 2, § 961 *et seq.*, 11 F. C. A., title 50, apx. 43, § 1 *et seq.*), was fully discussed. See, also, *Bowles* v. *Willingham*,

321 U. S. 503 (64 Sup. Ct. 641, 88 L. Ed. 892), decided the same day.

Among other matters decided in the *Yakus* and *Rottenberg Cases* was the proposition whether the act "if construed to preclude consideration of the validity of the regulation as a defense to a prosecution for violating it, contravenes the Sixth Amendment or works an unconstitutional legislative interference with the judicial power." This question is at least analogous to the one determined by the trial judge in the instant case.

The opinion of the court in the *Yakus* and *Rottenberg Cases* directed attention to section 204 (d) of the act which gives the emergency court of appeals "exclusive jurisdiction to determine the validity of any regulation or order issued," et cetera, and the prohibition therein that:

"Except as provided in this section, no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order," et cetera.

Our court has recently said in *Book Tower Garage, Inc.*, v. *Local No. 415, International Union, U. A. W. A. (C. I. O.)*, 295 Mich. 580, 587, that:

"Controlling interpretation of Federal law rests with the supreme court of the United States,"

citing Michigan authorities and that:

"It is the duty of the State courts as well as the courts of the nation to guard and enforce every right secured by the Federal Constitution,"

citing authorities. We are "bound thereby" because of the requirement of article 6, § 2, of the Constitution of the United States.

We said in *McPherson* v. *Secretary of State*, 92 Mich. 377, 393 (16 L. R. A. 475, 31 Am. St. Rep. 587):

"There is no doubt of the rule that where a law of a State conflicts with a law of Congress in a matter in reference to which Congress has the right to legislate the State law must give way to the extent of such conflict. *Robinson* v. *Rice,* 3 Mich. 235, 242."

The district court of the eleventh judicial district of the State of Idaho, in and for the county of Twin Falls, in the unreported case of *Twin Falls County* v. *Hulbert,* decided March 13, 1944, in reply to the argument that the emergency price control act does not by its terms apply to a State, its political subdivisions and agencies, said:

"The cases where State statutes have come in conflict with Federal enactments have been numerous and the courts have uniformly held that under such circumstances the State statute must be construed as either void, modified or amended as the circumstances require. The mere fact that the emergency price control act and the regulations promulgated thereunder are in conflict with the State statute, I. C. A. § 30–708, requiring the county commissioners to sell to the highest bidder does not make that part of the act unconstitutional. The Federal enactment is paramount and has the effect of modifying the State statute. The sale must be made to the highest bidder as provided by the State statutes but not for a price in excess of the ceiling price fixed under the emergency price control act. In case of several bids at the ceiling price the county commissioners have the right to determine the bid to be accepted and the fairest way to make such determination would appear to be by lot. The county commissioners and this court are just as much bound by the Federal enactment as by a State statute and in case of conflict must recognize that the Federal enactment is paramount."

In *Lockerty* v. *Phillips,* 319 U. S. 182 (63 Sup. Ct. 1019, 87 L. Ed. 1339), the court held that Congress

has the power to provide that equity jurisdiction to restrain enforcement of the emergency price control act, so far as Federal courts are concerned, is restricted to the emergency court of appeals, but it did not pass upon the prohibition in the act against the exercise of jurisdiction by State courts in the premises, that question not being in issue. In *Bowles* v. *Willingham, supra,* it met the State question and held such jurisdiction could be withheld in controversies arising "under the Constitution and the laws of the United States."

In the *Yakus* and *Rottenberg Cases* the rule in the *Lockerty Case* was followed and applied. The minority, like the trial judge in the instant case, made much of the threat of suspension of judicial duty "to guard whatever liberties will not imperil the paramount national interest." (See dissent of Mr. Justice Rutledge and Mr. Justice Murphy.)

I cannot conceive that the foundation stones of constitutional liberty are in danger merely because the creditors of a partnership in the process of dissolution are denied the benefit of an excessive price on the receiver's sale of used machinery when all other sellers, because of the exigencies of war, may not obtain a like benefit. Nor can I believe that the integrity of the judicial power of sovereign States is threatened by compliance with a temporary wartime act of congress and the rules and regulations of the Federal agency charged under that act with the duty and responsibility of maintaining "in the interest of the national defense and security and necessary to the effective prosecution of the present war," those price controls which are designed to prevent inflation.

We have long been accustomed to the doctrine of comity between State and Federal courts and that of comity between sovereign States and the Federal

government. No fundamental liberties will be endangered by the judicial application of this doctrine to problems affecting the national economic good.

The order of the trial judge in the instant case is in direct conflict with the reasoning and intendment of the court in the *Lockerty, Yakus* and *Rottenberg Cases, supra,* and being in contravention of the "supreme law of the land," Constitution of the United States, art. 6, § 2, should be vacated and the cause remanded for further proceedings in conformity to this opinion.

It should be so ordered, but without costs.

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

In re OLNEY'S ESTATE.
CLAIM OF BENNETT.

1. AUTOMOBILES — EVIDENCE — NEGLIGENCE — PROXIMATE CAUSE — DAMAGES.

In action by plaintiff, a motorist, against estate of deceased motorist whose oncoming car was driven onto plaintiff's side of road, evidence sustained finding of trial judge that deceased motorist was guilty of negligence proximately causing accident and justified awarding judgment of $2,540.03 for personal injuries and property damages.

Per NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, and BOYLES, JJ.

REID, J., dissenting.

Contributory negligence as a finding of fact by the trial judge sitting without jury, see 2 Restatement, Torts, § 284, comment a, § 434, comments b, c.

Negligent conduct of defendant, see 2 Restatement, Torts, § 284; function of court in determining contributory negligence, see § 476; causal relation to accident sufficient to bar recovery, see § 467.

2. ABATEMENT AND REVIVAL—SURVIVAL ACT—DEATH ACT.

The survival act is inconsistent with only that part of the statute amending the death act requiring that all actions for wrongful death or injuries resulting in death be thereafter brought only under the death act; otherwise the survival act continues in force (3 Comp. Laws 1929, § 14040; § 14061 *et seq.*, as amended by Act No. 297, Pub. Acts 1939).

3. SAME—SURVIVAL ACT—DEATH OF INJURED PARTY OR TORTFEASOR.

Under the survival act there is survival of a cause of action regardless of whether the death is that of the injured party or the tortfeasor (3 Comp. Laws 1929, § 14040).

4. DEATH—STATUTES—AMENDMENT OF DEATH ACT.

The purpose of the amendment to the death act was to enable a person to bring his action thereunder regardless of whether there was instantaneous death or survival of the injured person and to provide to what person or persons the damages recovered should be distributed (3 Comp. Laws 1929, § 14061 *et seq.*, as amended by Act No. 297, Pub. Acts 1939).

5. ABATEMENT AND REVIVAL—EXECUTORS AND ADMINISTRATORS—RIGHT TO SUE.

When the law declares that a cause of action shall survive, it is equivalent to saying that an executor may sue upon it, and that the estate of the deceased tortfeasor may be sued upon it.

6. DEATH—DAMAGES.

Under the death act as amended, damages are recoverable for (1) pecuniary injury resulting from the death to those persons who are entitled to such damages, (2) reasonable medical, hospital, funeral and burial expenses, and (3) reasonable compensation for the pain and suffering undergone by deceased (3 Comp. Laws 1929, § 14061 *et seq.*, as amended by Act No. 297, Pub. Acts 1939).

7. SAME—DAMAGES—LOSS OF WIFE—PECUNIARY INJURY TO HUSBAND.

In husband's action under the death act as amended for damages arising because of death of wife, while he has no legally enforceable claim to support or maintenance by deceased he was entitled to the value of her services less the reasonable cost of her maintenance (3 Comp. Laws 1929, § 14061 *et seq.*, as amended by Act No. 297, Pub. Acts 1939).

8. SAME—DAMAGES—MEDICAL AND FUNERAL EXPENSES.

While a surviving husband is legally liable for the payment of his wife's reasonable medical, hospital, funeral, and burial expenses, where he has recovered therefor in action brought in his own right he may not recover for them in action

brought as administrator of his wife's estate under the death act as amended (3 Comp. Laws 1929, § 14061 *et seq.*, as amended by Act No. 297, Pub. Acts 1939).

9. DAMAGES—DEATH OF WIFE—REMITTITUR—EARNING CAPACITY—PERSONAL INJURIES.

On appeal from judgment for $5,000 in nonjury action by plaintiff husband as administrator of his wife's estate, remittitur of that in excess of $3,000 is ordered where it appears husband and wife each had an expectancy of about eight years and she had general charge of summer resort hotel and cottages which they operated, her services being stated as worth $100 a month, and that she was dazed during first part of six days that she survived the accident in which she received injuries to her head, face, chest, abdomen and left leg; medical, hospital, funeral and burial expenses having been recovered by husband in action in his own right.

10. AUTOMOBILES—HEAD-ON COLLISION—CONTRIBUTORY NEGLIGENCE—QUESTION FOR TRIER OF FACTS.

In action by motorist, individually and as administrator of his wife's estate, for damages sustained in collision resulting fatally to motorist and his wife in other car as well as plaintiff's wife, question of whether plaintiff husband was guilty of contributory negligence was for trier of facts under the evidence which sustained finding for plaintiff.

11. COSTS—FAILURE OF EITHER PARTY TO SUSTAIN POSITION ON APPEAL.

No costs are awarded to either party on appeal in nonjury actions to recover damages, where neither has fully sustained the position asserted in the Supreme Court.

Per NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, and BOYLES, JJ.

SHARPE and REID, JJ., dissenting.

Appeal from Kent; Brown (William B.), J. Submitted January 6, 1944. (Docket No. 43, Calendar No. 42,522.) Decided May 18, 1944. Rehearing denied June 30, 1944.

In the matter of the estate of John B. Olney, deceased. Separate claims by Edwin E. Bennett, individually and as administrator of estate of Margaret B. Bennett, for damages sustained in an automobile accident. Cross action by Viola Olney Christian, administratrix of the estate of John B.

Olney, deceased, for damages sustained in the same accident. Claims of Edwin E. Bennett allowed. Defendant appeals. Judgment for plaintiff. Defendant appeals. Affirmed.

Herbert Hertzler and *Searl, Messinger & White,* for plaintiffs.

Allaben & Wiarda, for defendant.

SHARPE, J. (*dissenting in part*). At the hour of about 4:30 p. m., on October 14, 1941, John B. Olney, a resident of Grand Rapids, was driving his automobile in a northerly direction on US-23 near Alpena. His wife was riding with him. At the same time, Edwin E. Bennett was driving his automobile on the same highway in a southerly direction. His wife was riding in the front seat with him and one Eunice Hawkins was riding in the back seat. The highway where the automobiles collided is of concrete structure and 22 feet wide. The two automobiles collided near the center of the highway and as a result of the collision, Mr. and Mrs. Olney were severely injured and Mr. Olney died within 24 hours after the collision. Mrs. Bennett was also severely injured and died six days after the accident.

Plaintiff, Edwin E. Bennett, filed a claim in the probate court of Kent county for the following damages and expenses:

"Alpena General Hospital for Margaret B. Bennett	$ 82.71
Spens Pharmacy, gangrene serum	3.97
Funeral expenses of Margaret B. Bennett	433.00
Alma Kunz, R.N. for Margaret B. and Edwin E. Bennett	40.00
H. G. Purdy, R.N. for Margaret B. and Edwin E. Bennett	40.00

Madeline B. Martinson, R.N. for Margaret B. and Edwin E. Bennett	41.00
Alpena General Hospital for Edwin E. Bennett	103.35
Wm. F. Carle, ambulance to Alpena	15.00
Frank Doane, wrecker service	12.00
Loss of 1938 4-door Oldsmobile Sedan	600.00
Loss of use of such automobile	100.00
Personal injuries, pain and suffering, disfigurement, permanent injuries, loss of time from business and earning ability of Edwin E. Bennett	5,000.00
Total	$6,471.03"

Plaintiff, Edwin E. Bennett as administrator of the estate of Margaret B. Bennett, filed a claim in the probate court of Kent county for $5,000 for loss of prospective earnings and $5,000 for pain and suffering.

Defendant, administratrix of the estate of John B. Olney, deceased, filed an answer and cross action.

The probate court allowed the claims of plaintiff. Defendant appealed to the circuit court of Kent county. The cases were tried without a jury and a judgment was rendered for plaintiff Edwin E. Bennett, individually, in the amount of $2,540.03 and for plaintiff Edwin E. Bennett, as administrator of his deceased wife's estate, in the amount of $5,000.

Motion for a new trial was denied and defendant appeals. Defendant contends that plaintiff was guilty of contributory negligence as a matter of law; that the judgments are contrary to the great weight of the evidence and are excessive; that the court erred in failing to grant the estate of John B. Olney a judgment on its cross declaration against Edwin E. Bennett; and that under the present death act, the estate of Margaret B. Bennett, deceased, plaintiff, is not entitled to a judgment.

In considering this appeal, we shall first direct our attention to plaintiff's individual claim. The trial court found:

"The evidence conclusively establishes that the accident occurred on the west side of the highway; that claimant, Bennett, was driving on his right (west) side of the road; that the decedent Olney had been previously driving upon his right (east) side of the road and when about 35 feet from the point of impact had commenced to veer to the left, that when about 17 feet from the point of impact the left side of the Olney car crossed the center line of the highway and continued upon that side (the west side) of the road until the collision took place. * * *

"There is no evidence which explains or excuses the violation of the law and the rules of the road by Mr. Olney. The accident was the result of his driving upon his left side, the wrong side, of the highway. * * *

"The claimant, Mr. Bennett, was free from contributory negligence. He was driving upon his own right side of the road where he had the right and duty to be."

In determining the amount of damages to be allowed upon the claim of Edwin E. Bennett, individually, the trial court said:

"(1) Edwin E. Bennett, claimant as an individual, suffered a concussion, contusions on the head and shoulders, lacerations, was in the hospital approximately three weeks and suffered considerable pain during that period and for sometime thereafter and his injuries resulted in a double vision for a period of some two months.

"His bills for doctors, nurses and hospital for himself were $213.32. The bills for doctors, hospital, nurses and funeral expenses for Mrs. Bennett were $721.71. The damage to Mr. Bennett's car was $405,

making a total financial loss to Mr. Bennett of $1,340.03.

"The law affords no rule by which damages for pain and suffering may be computed. The determination is not based upon how some person other than the injured person would feel or would suffer. It is determined by the extent of the suffering of the injured person, and where death occurs the injured person is not a witness. A nervous, unduly imaginative, despondent person may suffer more from a slight injury than would a composed, sensible person suffer who has serious injury, is not unduly apprehensive, and who commands a hopeful outlook. Without minimizing the fact of suffering, and having in mind the outcome of certain adjudicated cases, it would appear that the allowance of the sum of $1,200 would be a reasonable sum to be awarded to Mr. Bennett for his item of pain and suffering. This added to $1,340.03, his financial damages, would be $2,540.03, the total amount to be recovered by Mr. Bennett, individually."

A recital of the claims of the parties as to how the collision occurred would add nothing to the value of this opinion nor be of any particular interest to the profession. We have examined the record and in our opinion there is competent evidence to sustain the finding of fact by the trial judge that: "Mr. Olney must be held to have been guilty of negligence which was the proximate cause of the accident." Nor do we find any error in awarding plaintiff a judgment of $2,540.03 for his individual claim and the same is affirmed.

We now consider the issues involved in the claim of the estate of Mrs. Bennett. Decedent Olney died about 12 hours after the accident, while Mrs. Bennett died some five days later.

Defendant contends that under the present death act, so-called (Act No. 38, Pub. Acts 1848, as

amended by Act No. 297, Pub. Acts 1939 [Comp. Laws Supp. 1940, § 14061 *et seq.*, Stat. Ann 1943 Cum. Supp. § 27.711 *et seq.*]), the alleged tortfeasor Olney having predeceased Margaret B. Bennett, no cause of action for her death existed against any "person" at the time of her death; that there can be no cause of action against a corpse; and that no cause of action having existed, none could survive.

Plaintiff contends that a cause of action "for injuries resulting in death" to Mrs. Bennett exists against the estate of the wrongdoer Olney; that under the law of Michigan prior to the 1939 amendment to the death act, a cause of action existed for damages occasioned by a death caused by the wrongdoing of another against the estate of the wrongdoer; that it was not the intent of the legislature by amending the death act to take from families of persons killed by wrongful act of another a cause of action against the estate of the wrongdoer; that the purpose of the amendment was to abolish the distinction between instantaneous death and death following injury; and that there was no intent to change the liability of the tortfeasor.

At common law there was no civil cause of action for the death of a human being caused by the wrongful act or negligence of another, or for damages suffered by any person in consequence of such death. *Hyatt* v. *Adams,* 16 Mich. 180. Nor did the common law permit the survival of actions for personal injuries. *Dolson* v. *Railway Co.,* 128 Mich. 444.

As early as 1838, the legislature provided that in addition to actions which survive by common law, certain others shall also survive. Rev. Stat. 1838, p. 428, pt. 3, title 2, chap. 3, § 7. By Act No. 113, Pub. Acts 1885, an action for "negligent injuries to the person" was included among those actions expressly surviving. This provision now exists in 3 Comp. Laws 1929, § 14040 (Stat. Ann. § 27.684).

In 1848, the "death act," a typical "Lord Campbell's Act" (Act No. 38, Pub. Acts 1848), was passed and has remained unchanged until amended in 1939. Prior to this amendment, section 1 thereof (3 Comp. Laws 1929, § 14061) provided:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured."

The interpretation of these acts became well established and is summarized in *Ford* v. *Maney's Estate,* 251 Mich. 461 (70 A. L. R. 1315), where the court said:

"Our survival statute, 3 Comp. Laws 1915, § 12383 (3 Comp. Laws 1929, § 14040), reads in part:

" 'In addition to the actions which survive by the common law the following shall also survive, that is to say, actions * * * for negligent injuries to persons.'

"The survival is not confined to actions commenced, but applies as well to rights and causes of action. A cause of action for negligent injuries, which accrues in the lifetime of a party, whether person injured or tortfeasor, survives his death. *Rogers* v. *Windoes,* 48 Mich. 628; *Norris* v. *Kent Circuit Judge,* 100 Mich. 256; *Love* v. *Railroad Co.,* 170 Mich. 1.

" 'When the law declares that a cause of action shall survive, it is equivalent to saying an executor may sue upon it.' *Rogers* v. *Windoes, supra.*

"It is also equivalent to saying that the estate of the deceased tortfeasor may be sued upon it. * * *

"The courts are in conflict upon the respective scope and operation of the death act and survival statute. L. R. A. 1915E, 1119, note; L. R. A. 1916C, 973, note. In this State it is held that the death act created a cause of action unknown to the common law, not by way of survival of a right accruing to the deceased which before had abated at this [his?] death, but as a new and special remedy accruing to those who suffered loss by the death; and that the legislature did not intend to give two remedies for death by negligent act, but that the death act and the survival act is each exclusive within its sphere. The line of cleavage between them is whether the death is instantaneous. The legal test of instantaneous death was devised in order to afford a practical working of the statutes, death being seldom instantaneous in fact. The test was established, not in an attempt to bring the acts into harmony with common-law principles but by way of judicial interpretation of legislative intention in the construction of statutes which change the common law and have points of conflict. *Sweetland* v. *Railway Co.,* 117 Mich. 329 (43 L. R. A. 568); *Dolson* v. *Railway Co.,* 128 Mich. 444; *Lincoln* v. *Railway Co.,* 179 Mich. 189 (51 L. R. A. [N. S.] 710); *Paperno* v. *Michigan Railway Engineering Co.,* 202 Mich. 257."

See, also, *In re Beiersdorfer's Estate,* 297 Mich. 592.

In 1939, the legislature passed Act No. 297, Pub. Acts 1939, which amended Act No. 38, Pub. Acts 1848, being 3 Comp. Laws 1929, §§ 14061, 14062 (Comp. Laws Supp. 1940, §§ 14061, 14062, 14062–1, Stat. Ann. 1943 Cum. Supp. §§ 27.711–27.713), which reads as follows:

"SECTION 1. * * * Whenever the death of a person or injuries resulting in death, shall be caused by wrongful act, neglect or default, and the act,

neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. All actions for such death, or injuries resulting in death, shall hereafter be brought only under this act.

"SEC. 2. Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and in every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered and also damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death: * * *

"SEC. 3. Insofar as the provisions thereof are inconsistent with the provisions of act number 38 of the public acts of 1848 as amended by this act, section 32 of chapter 12 of act number 314 of the public acts of 1915, being section 14040 of the compiled laws of 1929 is hereby repealed."

There is no doubt that prior to this amendment plaintiff in the case at bar would have had a cause of action against defendant estate. However, it would have been the cause of action which vested in Mrs. Bennett during her lifetime and prior to the death of Olney and which under the survival act would have survived in her personal representative and against the personal representative of Olney.

The facts in the case at bar necessitate a determination of the nature of the cause of action created by the amended act; and whether, under the present statute, it ever vested in plaintiff.

In construing the act before us it must be presumed that the legislature knew the construction which this court had given to both the death and survival acts; that the death act, prior to amendment, created a cause of action unknown to the common law in certain beneficiaries and was premised upon the wrongful act and death; and that this cause of action for death was different in kind from that which was permitted to survive under the survival act.

The amended act expressly provides that "all actions for such death or injuries resulting in death, shall hereafter be brought only under this act." An examination of the amended act in the light of the former law clearly reveals that the legislature intended to wipe out the fiction of instantaneous death and create *one* cause of action where death results, either "instantaneously" or from injuries wrongfully inflicted; and that this cause of action is a *new* statutory action. This intent is found not only in section 1 of the amendment, but also in the title which reads in part, "An act requiring compensation for causing death and injuries resulting in death by wrongful act;" and from an examination of the liability created as indicated by a comparison of the damages recoverable under the death and survival acts prior to this amendment and under section 2 of the amendment.

The situation prior to the 1939 amendment was that where the action was brought under the death act, recovery was limited by the act to actual pecuniary loss suffered by one entitled to or receiving support from the deceased (see *In re Venneman's*

Estate, 286 Mich. 368) and funeral expenses (*Edgerton* v. *Lynch,* 255 Mich. 456). And where action was brought under the survival act (where the injured party survived even though only a short time), recovery was permitted of such damages as the deceased could have recovered had he lived to bring an action, such as conscious pain and suffering, loss of earnings sustained by deceased from the time of the accident until death and prospective loss from the date of death throughout the life expectancy of the deceased. See 18 Michigan State Bar Journal, p. 116.

The amendment makes no provision for recovery of the loss of earnings of the deceased either prior to his death or afterwards. It does provide for the "reasonable medical, hospital, funeral and burial expenses for which the *estate* is liable and reasonable compensation for pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death." It also provides damages with reference to the pecuniary injury resulting from such death to those persons who may be entitled to such damages.

As further indication of its intent to create a new statutory cause of action in cases of death from injuries, the legislature provided in section 3 that insofar as the provisions of the survival act (3 Comp. Laws 1929, § 14040) are inconsistent with the provisions of the amended act, they are repealed.

We conclude that the amendment to the death act excludes the cause of action for injuries which the deceased party had during his lifetime from the operation of the survival act, when the injured party dies prior to the bringing of an action; that the amendment does not join in a single cause of action two separate causes of action for injuries and death

(see *Beauvais* v. *Springfield Institute for Savings*, 303 Mass. 136 [20 N. E. (2d) 957, 124 A. L. R. 611 and annotation]) but creates an entirely new statutory cause of action applicable to all cases where death results from wrongful act, whether occurring "instantaneously" or as the result of injuries. The legislature has made not only the wrongful act, neglect or default of the wrongdoer a necessary element in the cause of action, but also the *death* of the injured party is a necessary fact to the right of his representative to maintain an action under this amendment. Death is a part of the substance or essence of the right.

It inevitably follows that the cause of action for injuries resulting in death created by this statute does not arise or come into being until the death occurs. The cause of action which the injured party has for his injuries now abates upon his death, at which time the new cause of action in his personal representative created by the statute arises. The legislature has given a new right of recovery in substitution for the right which the injured party had during his lifetime, the basis of which is the same wrongful act, but which does not come into being until his death.

Was this action lost because tortfeasor Olney predeceased Mrs. Bennett? The statute provides that "the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured."

Plaintiff argues that the legislature did not repeal the survival act insofar as it permitted recovery against the estate of a tortfeasor; and that the legislature did not provide that an action for injuries resulting in death could not be brought against the *estate* of the wrongdoer. Defendant contends that

no cause of action existed against any *person* at the time of Mrs. Bennett's death; and that there can be no cause of action against a corpse.

The question is not whether an accrued cause of action abates because of the death of tortfeasor before an action is brought, as referred to in the dissenting opinion in *Re Mueller's Estate,* 280 Mich. 203, or whether it survives, but whether the statute imposes liability directly upon the administrator of the tortfeasor's estate.

In *Martinelli* v. *Burke,* 298 Mass. 390 (10 N. E. [2d] 113, 112 A. L. R. 341), defendant died before plaintiffs. The court had before it for construction a statute containing language similar to our own. It said:

"The wording of the statute is, 'a person who by his negligence or by his wilful, wanton or reckless act * * * causes the death of a person * * * shall be liable.' It has been stated repeatedly that no cause of action arises until the actual occurrence of the death for which recovery is sought. * * * When that event took place in each of the cases at bar the 'person' who, in the language of the statute, would 'be liable' was himself dead. 'It is axiomatic that a corpse is not a person.' *Brooks* v. *Railway Co.,* 211 Mass. 277, 278 (97 N. E. 760). A dead person cannot 'be liable,' nor can a cause of action arise against a person who does not exist. * * * There are no words in the statute which can be construed as creating a new cause of action against the administrator of the wrongdoer after his appointment. The actor himself and not his administrator is named as the 'person' who is to 'be liable.' The administrator of the person killed is in a different position. The statute is explicit in granting him the right to prosecute in behalf of the specified beneficiaries the cause of action which arose upon the death of his intestate. * * *

"The conclusion is inescapable that none of the actions can be maintained. That result has been reached in the only cases which we have seen dealing with the precise question and is supported by the reasoning in cognate cases. *Beavers' Administratrix* v. *Putnam's Curator,* 110 Va. 713 (67 S. E. 353); *Hegel* v. *George,* 218 Wis. 327 (259 N. W. 862, 261 N. W. 14): *Willard* v. *Mohn,* 24 N. D. 390 (139 N. W. 979); *Clark* v. *Goodwin,* 170 Cal. 527 (150 Pac. 357, L. R. A. 1916A, 1142): *Hamilton* v. *Jones,* 125 Ind. 176 (25 N. E. 192); *Bates* v. *Sylvester,* 205 Mo. 493 (104 S. W. 73, 11 L. R. A. [N. S.] 1157, 120 Am. St. Rep. 761, 12 Ann. Cas. 457); *Moe* v. *Smiley,* 125 Pa. 136 (17 Atl. 228, 3 L. R. A. 341); *Carrigan* v. *Cole,* 35 R. I. 162 (85 Atl. 934); *Johnson* v. *Farmer,* 89 Tex. 610 (35 S. W. 1062)."

For the reasons given in *Martinelli* v. *Burke, supra,* the amended death act does not impose liability upon the administrator of the tortfeasor's estate.

The claim of plaintiff Edwin E. Bennett as administrator of the estate of Margaret B. Bennett should be reversed, without a new trial and without costs as to either party.

NORTH, C. J. I concur with Mr. Justice SHARPE in affirming the judgment in favor of Edwin E. Bennett, but I am not in accord with my Brother's holding that there can be no recovery in the suit brought by Edwin E. Bennett as administrator of the estate of Margaret B. Bennett, deceased.

Act No. 297, Pub. Acts 1939 (Comp. Laws Supp. 1940, § 14061 *et seq.,* Stat. Ann. 1943 Cum. Supp. § 27.711 *et seq.*), does not repeal, but instead only amends, our so-called death act. 3 Comp. Laws 1929, § 14061 *et seq.* (Stat. Ann. § 27.711 *et seq.*). Nor does the 1939 act repeal our so-called survival statute (3

Comp. Laws 1929, § 14040 *et seq.* [Stat. Ann. § 27.684 *et seq.*]), except in so far as section 14040 is "inconsistent" with the 1939 act. And we do not find section 14040 at all inconsistent with any provision in the 1939 act, except that section 1 of the latter act provides: "All actions for such death, or injuries resulting in death, shall hereafter be brought only under this act." Section 14040 is still part of our statutory law, and this section reads:

"In addition to the actions which survive by the common law the following shall also survive, that is to say, actions of replevin, actions for the conversion of property, for deceit, for assault and battery, for false imprisonment, for negligent injuries to persons, for damages done to real and personal estate, and actions to recover real estate, or any interest therein, where persons have been induced to part with the same through fraudulent representations and deceit."

It follows that our statutory provisions for survival of actions still continues in force. And there is survival regardless of whether the death is that of the injured party, in which event the action may be brought by the representative of the estate of the deceased (*Racho* v. *City of Detroit,* 90 Mich. 92; *Rouse* v. *Michigan United Railways Co.,* 164 Mich. 475); or whether the death is that of the tortfeasor (*Norris* v. *Kent Circuit Judge,* 100 Mich. 256; *Ford* v. *Maney's Estate,* 251 Mich. 461 [70 A. L. R. 1315]).

Above we have stated that the 1939 act does not repeal the death act (3 Comp. Laws 1929, § 14061 *et seq.,* Stat. Ann. § 27.711 *et seq.*). Instead, section 14061, which provided the statutory right of action in death cases, was literally reenacted, with the modifications about to be noted, in section 1 of Act No. 297, Pub. Acts 1939, which reads:

"Be it enacted by the senate and house of representatives of the State of Michigan, whenever the death of a person *or injuries resulting in death,* shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. *All actions for such death, or injuries resulting in death, shall hereafter be brought only under this act.*"

The italicized words in the above section disclose the only changes made by the 1939 re-enactment. Surely the right to bring an action in a death case was not repealed by this re-enactment in identical words of the former statute. Instead the obvious purpose of the 1939 act was to enable a person to bring his action under this statute regardless of whether there was instantaneous death or survival of the injured person, and to provide to what person or persons the damages recovered should be "distributed."

Martinelli v. *Burke,* 298 Mass. 390 (10 N. E. [2d] 113, 112 A. L. R. 341), cited and quoted in my Brother's opinion, is not in accord with the law of this State. The Massachusetts statutory provision on which decision turned was: "A person who by his negligence or by his wilful, wanton, or reckless act * * * causes the death of a person * * * shall be liable." In substance the Massachusetts court held that because the statute gave the right of action only against the "person," as distinguished from his estate, death of the tortfeasor

terminated the right of action. The Michigan statute both before and since its re-enactment in 1939, like the Massachusetts statute, provides a right of action against "the person who, or corporation which" commits the tort for which suit is brought. But in *Ford* v. *Maney's Estate, supra,* we passed squarely upon and rejected the contention "that the right of action abated" upon the death of the tortfeasor. We there said:

"A cause of action for negligent injuries, which accrues in the lifetime of a party, whether person injured or tortfeasor, survives his death. *Rogers* v. *Windoes,* 48 Mich. 628; *Norris* v. *Kent Circuit Judge,* 100 Mich. 256; *Love* v. *Railroad Co.,* 170 Mich. 1.

"'When the law declares that a cause of action shall survive, it is equivalent to saying an executor may sue upon it.' *Rogers* v. *Windoes, supra.*

"It is also equivalent to saying that the estate of the deceased tortfeasor may be sued upon it. * * *

"The cause of action consisted of the duty of care owed by Mr. Maney to plaintiff, its breach, and the consequent injury to plaintiff. 45 C. J. p. 661; *Robertson* v. *United Fuel & Supply Co.,* 218 Mich. 271. All elements were complete during the lifetime of Mr. Maney and, therefore, a cause of action vested in plaintiff, and, under our statute, survived."

See, also, *In re Beierdorfer's Estate,* 297 Mich. 592; and *In re Chamberlain's Estate,* 298 Mich. 278.

Our conclusion being that the administrator's cause of action survives, consideration must be given to appellant's claim that damages adjudged in the amount of $5,000 were excessive. In this connection the question arises as to what elements of damages may be recovered under the 1939 act. This act specifically divides the damages recoverable into three classes. These classes are damages (1) "with

reference to the pecuniary injury resulting * * *;" (2) "for the reasonable medical, hospital, funeral and burial expenses * * *;" (3) "for the pain and suffering."

1. The surviving husband had no legally enforceable claim to support or maintenance by deceased, nor does this record disclose such claim as to any other person. But the surviving husband lost the services of Mrs. Bennett, and the value thereof less reasonable cost of her maintenance may be recovered in this action. *Gorton* v. *Harmon,* 152 Mich. 473 (15 Ann. Cas. 461). It should be noted that recovery in the cited case was under the provision of the death act that there could be recovery "for pecuniary loss," and that the same provision is embodied in the 1939 act. This element of damages is recoverable in the instant case.

2. The surviving husband was legally liable for the payment of his wife's "reasonable medical, hospital, funeral and burial expenses;" but since he has recovered for these items in the suit brought in his own right, there can be no recovery for them in this action.

3. There seems to be no room for doubt that under (3) above quoted there can be recovery in this action "for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his (her) death." This action is statutory and the elements of damage are fixed therein; and under the circumstances of the instant case the only recoverable damages are for loss of the wife's services and for pain and suffering. On this appeal the question is presented as to whether the judgment for $5,000 damages for these elements was excessive.

As to loss of services the following are among the pertinent facts. At the time of the accident Mr. and Mrs. Bennett were respectively 71 and 70 years old, and the expectancy of each was substantially eight years. Each was in good health. They occupied as their home and together operated a hotel at Hubbard Lake in Alcona county. It was a summer resort hotel, having 14 bedrooms, and located 12 miles from a railroad station. There were four or five tourist cottages in connection with the hotel. Mr. Bennett did the clerical work and the buying. Mrs. Bennett had supervision of employees and took general charge of carrying on the business. She was a good cook. Without indicating whether he meant during the whole year or only during the season of activity, Mr. Bennett testified Mrs. Bennett's services were worth $100 per month.

As to pain and suffering, the record discloses that Mrs. Bennett lived six days after the accident. The physician who attended her at the hospital testified:

"I found her in shock; she had extensive laceration of the head and face, her left ear was severed almost from the head; injuries to chest and fracture of the left leg and injury to her spine. She had an abdominal injury. She died from these injuries. * * * She had a compound fracture of the left leg. * * * She had two blood transfusions. She was conscious following the injuries all the time while she was in the hospital. Her injuries were certainly painful and she complained of pain. They required a narcotic. * * * Concerning her internal injuries, there was no operation performed, but she was troubled with great distention of gas and abdominal distress. * * * The left side of her face and her whole forehead were badly lacerated and the ear almost severed. At first she was dazed, which lasted until the next day."

By our review of the record we are constrained to hold that damages adjudged in the amount of $5,000 were excessive. Without reviewing all the pertinent phases of the record we note the following. The period during which plaintiff might hope to benefit by the services of his wife was limited by both his and by her expectancy of approximately eight years. It must be considered that Mrs. Bennett was 70 years of age at the time of the accident and it is fair to presume that her ability to render services of the character noted quite probably would not continue at her advanced age for the full remainder of her life. Also that the trial judge in reaching his determination made no allowance or deduction for the cost of the wife's maintenance during such period as the services might be rendered. See *Gorton* v. *Harmon, supra.* As to the amount to be awarded for pain and suffering we cannot overlook the fact that Mrs. Bennett survived the accident only six days and that during the first of this period she was in a "dazed" condition. Under this record the maximum amount of damages should not have exceeded $3,000.

Mr. Justice REID has written for reversal in each of these two cases, placing decision on the ground that plaintiff was guilty of contributory negligence as a matter of law. Our review of the record satisfies us that on this issue a question of fact was presented. The circuit judge, hearing the case without a jury, decided the issue in favor of plaintiff. The record sustains that finding. Neither case should be reversed on that issue.

Judgment entered in the case of Edwin E. Bennett in his individual right should be affirmed. In the case wherein Edwin E. Bennett as administrator of the estate of Margaret B. Bennett, deceased, is plaintiff, the judgment will be reversed and a new

trial ordered unless within 15 days after our decision herein a remittitur of damages in the amount of $2,000 is filed by the plaintiff, in which event judgment for the remaining amount of $3,000 will be affirmed.

No costs should be awarded on this appeal to either party for the reason that neither has fully sustained the position asserted in this Court.

STARR, WIEST, BUTZEL, BUSHNELL, and BOYLES, JJ., concurred with NORTH, C. J.

REID, J. (*dissenting*). It is apparent that plaintiff Bennett, driving in a southerly direction, was not watching the road ahead of him. He testified he knew nothing of the accident that had occurred. He even inquired, after the accident, of witness Squires what had happened. He observed the Hanna house at his right just before the accident, said the women were talking about it, and that he took a look at it. His negligence is established by his own testimony.

Both of the occupants of the Olney car were killed by the accident. Mrs. Bennett was also killed, leaving at the time of trial Bennett and his nephew's wife the only survivors of the occupants of the two cars.

The only disinterested witness to the accident was Leo L. Squires who was working on the last rows of shingles on the very front end of the north side of the front gable of the Hanna house. His attention was called to the accident by the brakes squeaking or some other thing of which he was not sure and he noticed the two cars when they collided. They came together about 60 or 75 feet south of the driveway leading toward this house. It appeared from where he was looking as if both cars were in the

center of the pavement. The witness was high up, there was nothing to interfere with his view, and it looked as if the front end of both cars sort of jumped into the air, the car on the *easterly* side of the pavement turning completely around so that it faced southeast.

The testimony of this entirely disinterested and apparently credible witness is not contradicted by any witness except the impeached witness, Eunice Hawkins Cornelius, who had worked as waitress for plaintiff six years in his hotel, is married to his nephew and was riding with plaintiff in his car. She stated to State trooper Froberg within 15 minutes after the accident that she had her head down at the time of the collision, was reaching for a basket of grapes on the floor of the car and didn't recall how the accident happened. At the trial she undertook to relate in her testimony that Bennett's car was entirely on the westerly half of the pavement at all times and described the Olney car as leaning toward the Bennett car and that the collision took place on the west half of the road.

Mr. Olney, driving northerly on his right hand side of the road, must have noticed a jeopardizing change in the direction of the Bennett car as it began to cross over onto the easterly side of the road. Nothing else would have caused him to apply his brakes so that there were skid marks for 33 feet before the point of collision, *beginning* when his car was entirely on *his side* of the road and ending with his left wheel 2 ½ feet west of the median line.

It, therefore, becomes a reasonable conclusion from the undisputed nature of Olney's skid marks that the Bennett car did begin to go over onto the east and wrong side of the highway. Evidently the Bennett car must have swerved again to the right so that the two cars came in contact practically in the middle of the highway. The confusion of Olney

was caused by the preceding negligence of Bennett. In any event, the collision having been shown to have occurred in the center of the road, plaintiff is clearly guilty of negligence and cannot recover. *Loucks* v. *Fox*, 261 Mich. 338.

The evidence as to plaintiff's negligence clearly preponderates in favor of the defendant. The verdicts for plaintiffs are contrary to the great weight of the evidence, and judgments and verdicts should be set aside. A judgment should be entered for defendant in both cases.

GOFF *v.* BREWSTER.

AUTOMOBILES—INTERSECTIONS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SPEED.

On plaintiff's appeal from judgment for defendant *non obstante veredicto* in action arising from collision at intersection of country roads at 10 a.m. on a bright sunshiny day in June, evidence showing that notwithstanding some obstruction to view plaintiff's driver in westbound car when at least 25 feet from intersection and proceeding at not more than 15 miles per hour could see defendant's southbound truck approaching at speed of 50 to 60 miles an hour some 75 to 100 feet to the north and, instead of stopping, "stepped on the gas" and tried to cross in front of the truck, established as a matter of law contributory negligence of plaintiff's driver which, being imputed to plaintiff, an adult, barred her recovery

Appeal from Sanilac; Boomhower (Xenophon A.), J. Submitted April 5, 1944. (Docket No. 26, Calendar No. 42,580.) Decided June 5, 1944. Rehearing denied September 5, 1944.

Contributory negligence of plaintiff sufficient to bar recovery, see 2 Restatement, Torts, § 476, also, § 475, comment a; causal relation between harm and negligence, § 465; contributory negligence defined, see § 463.

Case by Katherine P. Goff against Milford Brewster for personal injuries sustained in a collision between automobiles. Verdict for plaintiff. Judgment for defendant *non obstante veredicto*. Plaintiff appeals. Affirmed.

Paterson & Paterson, for plaintiff.

Otto, Holland & Otto, and *Atkins & Stommel,* for defendant.

BOYLES, J. Plaintiff, an adult person, brought suit to recover damages for personal injuries arising out of an automobile accident. At the close of the proofs before a jury, defendant moved for a directed verdict on the ground that the testimony showed that the driver of the automobile in which plaintiff was a guest passenger was guilty of contributory negligence as a matter of law. The court reserved decision on the motion, submitted the case, and the jury returned a verdict for the plaintiff. Defendant's motion for judgment *non obstante veredicto* on the same ground was granted and plaintiff appeals from the judgment entered on the motion. The only question on appeal is whether plaintiff's driver was guilty of contributory negligence as a matter of law. If so, his negligence would be imputed to plaintiff and bar recovery.

The collision occurred at the intersection of Galbraith Line road and Black River road in Sanilac county, about 10 o'clock in the forenoon of June 18, 1940, on a bright sunshiny day. Galbraith Line road runs east and west and Black River road runs north and south. Both are graveled roads about 20 feet in width on the traveled portion, with about 60 feet between fences on each road. The roads are of equal importance and intersect at right angles.

The automobile in which plaintiff was a guest passenger was proceeding west on Galbraith Line road and defendant's milk truck was traveling south on Black River road. The automobile and the truck collided at about the center of the intersection.

As plaintiff's driver approached the intersection from the east on Galbraith Line road the road sloped upward to the intersection. Steep banks on both sides of the road prevented a clear view of the Black River road north and south until the driver reached a point opposite a big tree variously estimated at from 10 to 25 feet east of the east line fence on Black River road. At this tree plaintiff's driver could see to the north on Black River road about 100 feet. He looked north and saw no car approaching. Plaintiff's driver says that at this tree or between the tree and the intersection he changed into second gear, that he was traveling about 15 miles an hour, and that he could stop within 20 feet. When he reached the fence line on the east line of Black River road he was 25 to 30 feet from the center of the intersection. At the fence line he saw defendant's milk truck approaching rapidly from the north but thought he had time to go through. He "stepped on the gas" and the collision occurred at the center of the intersection.

The plaintiff herself testified:

"*Q.* About how far to the north could you see when you were in this position opposite this big tree?

"*A.* We could see 75 or 100 feet. * * *

"*Q.* Was there any vehicles in sight at this point?

"*A.* No.

"*Q.* What did Mr. Martin (the driver) then do?

"*A.* Mr. Martin went into second gear and proceeded up into the intersection.

"*Q.* Where were you when you were first able to see the defendant's truck?

"*A.* We were just about up to the line of the fence. * * *

"*Q.* Then you were able to see this truck when it came in sight at the time you were at the fence line and it was up at about the barn?

"*A.* Yes.

"*Q.* And then you observed that truck as it came down upon you?

"*A.* Yes. * * *

"*Q.* And state whether or not you were able to decide whether the speed of the truck—speed of the approaching truck?

"*A.* Well, he was going at least 60 miles an hour. * * *

"*Q.* How far across the intersection did your car get before it struck?

"*A.* We were almost through the intersection.

"*Q.* What part of the Black River road was he traveling on when he hit your car?

"*A.* He was coming from the north to the south.

"*Q.* On the east or west half of the road?

"*A.* He was on his own side of the road."

When the automobile in which plaintiff was riding was at the fence, it was at least 25 feet from the center of the intersection. It was proceeding in second gear at not more than 15 miles per hour. The driver testified he could stop in 20 feet, which would be before he reached the center of the intersection. He "stepped on the gas" and the collision occurred at about the center, while his automobile, in part at least, was in the west half of Black River road. Accepting plaintiff's version as to how the accident occurred, defendant's negligence was established by the proofs, but the same proofs established that plaintiff's driver was guilty of contributory negligence as a matter of law. When he was

at the fence he observed defendant's truck 75 to 100 feet north on Black River road approaching the intersection at 50 to 60 miles per hour. He had ample time to stop short of the center of the intersection. Had he done so it would have left the defendant's truck an opportunity to continue on through the intersection on its own side of Black River road without an accident. Instead, plaintiff's driver thought he could get across and stepped on the gas. As a matter of law, a reasonably prudent driver, exercising the care and caution required under the circumstances, would not "step on the gas" and try to cross in front of the rapidly approaching truck. If plaintiff's driver was confronted with a sudden emergency it was of his own making. The truck was approaching the intersection from the right of plaintiff's driver and the high bank obstructing his view called for more care and caution on his part than would be required if his view were unobstructed.

Plaintiff's driver was guilty of contributory negligence as a matter of law; his negligence is imputed to plaintiff and bars recovery. See *Ehrke* v. *Danek,* 288 Mich. 498.

Judgment affirmed.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, and REID, JJ., concurred.

PEOPLE *v.* LOWENSTEIN.

1. CRIMINAL LAW—SODOMY—DEBAUCHERY OF BOY—EVIDENCE.
   In prosecution for sodomy and for debauchery of a boy under the age of 15 years, testimony of boy, an epileptic, and others was sufficient to convince a jury of defendant's guilt under both counts beyond a reasonable doubt (Act No. 328, §§ 158, 340, Pub. Acts 1931).

2. SAME—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.
   In prosecution for sodomy and for debauchery of a boy under the age of 15 years, credibility of witnesses was for the jury (Act No. 328, §§ 158, 340, Pub. Acts 1931).

3. APPEAL AND ERROR—JUDICIAL NOTICE OF FILES—LEAVE TO APPEAL.
   The Supreme Court takes judicial notice of the contents of its files on application for leave to appeal by defendant in a prosecution for crime and his showing in support thereof resulting in the granting of leave to appeal.

4. NEW TRIAL—RECANTING WITNESS—HEARING ON MOTION.
   Where new trial is sought in a prosecution on the ground that the complaining witness had recanted, it is proper to have such witness testify at the hearing on the motion for new trial.

5. SAME—DISCRETION OF COURT.
   The granting or denying of a motion for a new trial rests in the sound discretion of the court.

6. CRIMINAL LAW—NEW TRIAL—SODOMY—DEBAUCHERY OF BOY—RECANTING WITNESS—DISCRETION OF COURT.
   In prosecution for sodomy and for debauchery of a boy under the age of 15 years, where new trial was sought after it was claimed the 14-year-old complaining witness had recanted, denial of new trial was not an abuse of discretion where

it appears such witness and his mother related circumstances under which the alleged repudiation had been procured (Act No. 328, §§ 158, 340, Pub. Acts 1931).

7. SAME—CONCURRENTLY RUNNING SENTENCE ON TWO COUNTS. Sentence of defendant on two counts, based on the same act and to run concurrently, was not error, as, in effect, it is but a single sentence.

8. SAME—HABITUAL CRIMINAL ACT—CONCURRENT SENTENCES. Conviction under two counts based on the same act and for which two sentences were imposed to run concurrently does not result in the conviction of defendant so as to subject him to additional punishment for two felonies under the habitual criminal act (3 Comp. Laws 1929, § 17338 *et seq.*).

Appeal from Recorder's Court for the City of Detroit; Stein (Christopher E.), J. Submitted April 13, 1944. (Docket No. 68, Calendar No. 42,538.) Decided June 5, 1944.

Max Lowenstein was convicted of sodomy and of debauching the morals of a boy. Affirmed.

Frank G. Schemanske, for appellant.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, *William E. Dowling,* Prosecuting Attorney, and *Frank J. Wendt* and *Henrietta E. Rosenthal,* Assistant Prosecuting Attorneys, for the people.

BOYLES, J. Defendant appeals from a conviction and sentence on an information charging him in the first count with the crime of sodomy, and in a second count with having debauched the morals of a boy under the age of 15 years. Two errors are relied on for reversal: (1) That the court erred in denying defendant's motion for a new trial based

on a claimed repudiation by George Kusulin, the 14-year-old boy, of his testimony as the principal witness for the people; and (2) that the verdict of the jury finding the defendant guilty on both counts was faulty, erroneous and void.

A detailed recital of the repulsive testimony is not necessary to decision. George Kusulin, the 14-year-old boy who was the subject of the crime, is an epileptic, attending special school since the age of seven. He was working for the defendant at defendant's gasoline filling station, doing odd jobs, changing tires, et cetera. His testimony before the jury, while inconsistent in many details, was sufficient to convince a jury of defendant's guilt beyond a reasonable doubt. It was corroborated to some extent by other witnesses—the clerk and another employee of the hotel where defendant had a room and where the offense is claimed to have been committed. The defendant testified in his own behalf and denied committing the offense. He admitted having been convicted and sentenced in New York for a felony, and having been sentenced to a term of 3½ to 4 years in Michigan for larceny. At the time of the present trial he was serving a 90-day sentence in the county jail for another offense. Several witnesses for the defendant testified regarding certain inconsistencies in the people's testimony. Credibility of witnesses was for the jury. The testimony is important only as it bears on the denial of defendant's motion for a new trial.

After conviction and before sentence the defendant moved for a new trial. The ground then urged which is now before us for consideration was that the 14-year-old boy had testified falsely and that he had subsequently repudiated his testimony. Neither the court's opinion nor order denying the motion for new trial is in the printed record, although the

motion obviously was denied as the court later imposed sentence and mittimus was issued. However, we take judicial notice of the files of this court on defendant's application for leave to appeal and his showing in support thereof, on which showing leave to appeal was granted. The proceedings on the motion, omitted from the printed record, are in the files of this court.

Affidavits in support of the motion for new trial were filed, showing that George Kusulin, the 14-year-old boy, had signed an unsworn written statement before witnesses that he had testified falsely. His counsel stated he would ask the court to direct police officers to produce this boy before the court. In defendant's statement of facts filed in this court with his application for leave to appeal, signed by defendant's present counsel and certified to this court by the trial judge, it appears that the 14-year-old boy was called and did testify before the court on the hearing on defendant's motion for new trial. Such procedure was approved by this court in *People* v. *Keller,* 227 Mich. 520, where a motion for new trial was granted in this court after the complaining witness had recanted her former testimony. There the court said:

"We think it unfortunate that the court did not require Leah to be produced as a witness on the hearing of this motion. The unreliability of affidavits as evidence has long been recognized. Had Leah been brought before the court and examined, the judge would have been enabled to form an opinion of the weight which should be given to her conflicting sworn statements, which we would be loath to disturb."

From defendant's statement of facts, certified by the trial judge, we quote what occurred in court on defendant's motion for a new trial:

"At the hearing on the motion for new trial, George Kusulin testified that after defendant's convictions, his brother, Dave, a taxi driver, picked up George Kusulin on the street at 10 p.m. on Saturday, February 20th, threatened him for having framed his brother, saying he could kill him and then promised him that he would pay the family rent and that nobody in the family would have to work if George would go to defendant's attorney and tell him that the charge against defendant and a similar charge against one Rubin, were false and had been framed by the Canfield police. Dave did not permit the boy to go home, but kept him with him until the following Tuesday morning, during which time Dave wrote up an alleged confession, showing that the story was a frame-up and had the boy sign it in the presence of some taxi drivers and a passenger. During the same time, the boy was taken to the office of defendant's attorney to tell his story, but made no written statement. When he returned home on Tuesday, February 23d, his mother had already called the juvenile officers, reporting his absence. Since he was on probation, the officers took him back to juvenile court where he told them what had happened and repeated that his original story was true. Defendant filed a motion for a new trial after conviction, alleging the testimony of George Kusulin was false and attaching a copy of the alleged confession. At the hearing of the motion, George was sworn as a witness, and admitted that he had made these statements to defendant's attorney, but stated that they were not true and that he had only told this and answered the questions because Dave had told him to. He related that Dave kept him with him in the cab all night during the two nights he was away from home, and that when he was not in the cab, he was kept in Dave's home on Blaine avenue, sleeping on the floor. George's mother was also sworn, and testified as to his absence and that she had informed the juvenile authorities. Defense counsel asked time

to file additional affidavits in support of the motion. The motion for a new trial was denied after an adjournment."

The granting or denying of a motion for a new trial rests in the sound discretion of the court. We find no abuse of discretion of the trial court in denying defendant's motion. *People* v. *Van Den Dreissche,* 233 Mich. 38; *People* v. *Sanford,* 252 Mich. 240.

The first count in the information charged defendant with having committed the abominable and detestable crime against nature with George Kusulin (sodomy). The punishment for this crime is imprisonment in the State prison for not more than 15 years. Act No. 328, § 158, Pub. Acts 1931 (Michigan penal code) (Comp. Laws Supp. 1940, § 17115–158, Stat. Ann. § 28.355). The second count charged defendant with having debauched and depraved the morals of George Kusulin, a boy under 15 years of age, by enticing and soliciting him to commit the abominable and detestable crime against nature. The punishment for this crime is imprisonment in the State prison not more than five years. Act No. 328, § 340, Pub. Acts 1931 (Michigan penal code) (Comp. Laws Supp. 1940, § 17115–340, Stat. Ann. § 28.572). The jury returned a verdict of guilty of both offenses. The court sentenced defendant to State prison for 10 to 15 years on the first count, and to State prison for 4 to 5 years on the second count, both sentences to begin on the same date and run concurrently. In effect, this was a sentence of 10 to 15 years on the first count. The two counts did not charge inconsistent offenses. Both arose out of the same transaction, both were provable by the same testimony, only one time, place and subject being involved. Defendant relies on *In re Henry Franklin,* 77 Mich. 615; *People* v. *Allen,* 252 Mich. 553; and *People* v. *Powers,* 272 Mich. 303,

wherein this court set aside general verdicts of guilty on different counts, one charging larceny and the other receiving stolen property. Inasmuch as one cannot be convicted of being a thief and at the same time for receiving the same stolen goods, the two different statutes were held to set up separate and distinct offenses. Such is not the case now before us.

"Where there are two counts charging different grades of the same offense, under a conviction or plea of guilty, it has been the general practice in England and in this country to pass judgment according to the count charging the highest grade of the offense." *People* v. *Morris,* 80 Mich. 634, 636 (8 L. R. A. 685).

"It would seem that, even assuming there is some merit to defendant's contentions, he was not injured by the alleged error in joinder, inasmuch as a verdict of guilty was returned on all three counts and identical sentences imposed for each count, to run concurrently." *People* v. *Kolowich,* 262 Mich. 137, 148.

"With regard to the claimed error in sentencing defendant on two counts, based upon the same act, we find no error. Although she was sentenced on each count, the sentences were for the same period of imprisonment and were to run concurrently. It is held that when a defendant is convicted on several indictments tried at the same time and is sentenced on each to run concurrently, the judgment will not be reversed because the evidence was insufficient to support one indictment, since the sentence is, in fact, but a single sentence and is supported by the conviction on the other indictments." *People* v. *Podsiad,* 295 Mich. 541

Nor does the fact that defendant was convicted and sentenced on both counts result in conviction for

two felonies such as to subject the defendant to additional punishment under the habitual criminal act.* *People* v. *Podsiad, supra,* p. 546. The defendant was not harmed by the sentence under the second count, to run concurrently with the sentence 10 to 15 years under the first count.

Affirmed

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, and REID, JJ., concurred.

BROWN *v.* STANDARD OIL CO.

1. APPEAL AND ERROR—DIRECTED VERDICT—EVIDENCE.
   In considering an appeal from judgment entered on a directed verdict for defendant, the Supreme Court views the testimony in the light most favorable to plaintiff.

2. MASTER AND SERVANT—INDEPENDENT CONTRACTOR—DEFINITION.
   An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work.

3. SAME—INDEPENDENT CONTRACTOR—EVIDENCE.
   Generally the circumstances showing one to be an independent contractor are the independent nature of his business, the existence of a contract for the performance of a specified

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* See 3 Comp. Laws 1929, § 17338 *et seq.* (Stat. Ann. § 28.1082 *et seq.*).—REPORTER.

Definition of independent contractor, see 1 Restatement, Agency, § 2 (3).

piece of work, the agreement to pay a fixed price therefor, the employment of assistants by the employee who are under his control, the furnishing by him of the necessary materials, and his right to control the work while it is in progress except as to results.

4. SAME—GASOLINE FILLING STATION—DEATH OF LESSEE'S EMPLOYEE—LIABILITY OF LESSOR.

In common-law action by administrator of estate of alleged employee of lessee of oil company's gasoline filling station under lease expressly negativing reservation of any control by lessor over the business or operations conducted thereon or power of lessee to employ any persons for or on behalf of the lessor against lessor and lessee, where lessee conducted the station buriness as an independent contractor, lessor was not, as a matter of law, liable for death of employee who died from injuries received while repairing a tire.

5. SAME—GASOLINE FILLING STATIONS—DEATH—INDEPENDENT CONTRACTORS—QUESTION FOR JURY.

In action by administrator of estate of 19-year-old boy who received fatal injuries while repairing a truck tire against lessee of gasoline filling station, question as to whether or not decedent was an employee of the lessee or was an independent contractor *held,* for jury under evidence presented.

6. SAME—DEFENSES UNAVAILABLE TO ONE NOT SUBJECT TO WORKMEN'S COMPENSATION ACT—NEGLIGENCE.

While a lessee of a gasoline filling station who has not elected to become subject to the workmen's compensation act is deprived of the defenses of contributory negligence, assumed risks and negligence of fellow employees, one bringing an action against such lessee for injuries sustained by person claimed to have been an employee must show actionable negligence on the part of defendant lessee (2 Comp. Laws 1929, § 8407 *et seq.*).

7. SAME—REPAIR OF DUAL WHEEL TRUCK TIRE—PROPER TOOLS—NEGLIGENCE—QUESTION FOR JURY.

In action by administrator of the estate of a 19-year-old boy who was fatally injured while repairing a tire on inner wheel of truck dual wheel at gasoline filling station leased by defendant lessor to defendant lessee, question of whether or not lessee was negligent in failing to provide decedent with the proper tool or tools to do the work was for jury.

Appeal from Wayne; Murphy (George B.), J. Submitted April 5, 1944. (Docket No. 15, Calendar No. 42,475.) Decided June 5, 1944.

Case by Isaac Brown, individually and as administrator of the estate of William Brown, against Standard Oil Company, a corporation, and Al Jones for damages arising out of death of decedent. Directed verdict and judgment for defendants. Plaintiff appeals. Affirmed as to Standard Oil Company. Reversed and new trial granted as to defendant Jones.

Ralph J. Osborne (*Roxborough & Taliaferro,* of counsel), for plaintiffs.

Kerr, Lacey & Scroggie (*Wilfrid C. Dilworth* and *Benedict H. Lee,* of counsel), for defendant Standard Oil Company.

STARR, J. On October 11, 1938, while working at a gasoline service station in Detroit, William Brown, about 19 years old, sustained injuries which resulted in his death a few days later. His administrator began the present law action for damages against the Standard Oil Company, which owned the station, and defendant Al Jones, who leased and operated it.

Jones had operated said station for several years prior to May 5, 1937. On that date defendant company leased the station and the machinery, equipment, appliances, and fixtures connected therewith, to him for a 12-month period. The lease provided for successive renewal periods of six months each and for a monthly rental of $19.50, plus one-half cent per gallon on all gasoline delivered to said station. Jones, as lessee, was required to pay all ex-

penses in connection with the operation of the station and to keep it in good repair. The lease further provided:

"That none of the provisions of this lease shall be construed as reserving to the lessor any right to exercise any control over the business or operations of the lessee conducted upon the leased premises or to direct in any respects the manner in which any such business and operations shall be conducted, it being understood and agreed that so long as the lessee shall use said premises in a lawful manner as herein provided, the entire control and direction of such activities shall be and remain with the lessee.

"It is further understood and agreed that lessee shall have no authority to employ any persons as agents or employees for or on behalf of the lessor for any purpose, and that neither the lessee nor any other persons performing any duties or engaging in any work at the request of the lessee upon the leased premises shall be deemed to be employees or agents of the lessor."

The lease was renewed and defendant Jones was in possession of the station at the time plaintiff's decedent was injured. There was a sign across the front of the building reading, "Al Jones Super Service * * * Standard Oil Products." The station also sold automobile supplies and accessories and furnished services such as washing and greasing cars and changing and repairing tires. Plaintiff's decedent had worked at the station from about February, 1937, until he was injured. He washed cars, filled gasoline tanks, changed tires, sold merchandise, and did miscellaneous work.

On October 11, 1938, a customer of the station brought in a Ford truck with dual rear wheels, the tires on which carried a pressure of about 80 pounds. The tire on one inside wheel was flat. While working at the station, plaintiff's decedent had previously

repaired tires on this truck. The customer testified that he told defendant Jones, "I have got a flat tire," and that Jones replied, "All right, I will take care of it." It appears that to repair a tire on an inside dual wheel, the customary practice was to remove both wheels and to repair and inflate the tire on the inner wheel while it was so removed. The testimony indicates that on this occasion plaintiff's decedent removed the outer wheel but was unable to take off the inside wheel because he did not have the proper tool or wrench to remove the lugs or nuts. He attempted to do the tire-repair job without removing the inner wheel. He took off the tire, repaired the inner tube, and replaced the tire on the wheel. The casing of the tire was held in place by a steel rim. Apparently he did not replace or adjust the rim properly, because when he inflated the tire, the rim sprung loose and struck him on the head, causing fatal injury.

There was testimony indicating that the safest method would have been for decedent to take off the inner wheel, remove, repair, and replace the tire, affix the steel rim, and then inflate the tire while the wheel was lying on the ground with the rim side underneath. By such method, if the steel rim had sprung loose, it would not have struck him.

At the conclusion of plaintiff's proofs, each defendant moved for a directed verdict. The trial court granted both motions and entered judgment for defendants, from which plaintiff appeals. In considering an appeal from judgment entered on a directed verdict for defendant, we view the testimony in the light most favorable to plaintiff. *Lebovics* v. *Howie,* 307 Mich. 326; *Arnell* v. *Gordon,* 234 Mich. 140.

Defendant Standard Company based its motion for a directed verdict on the ground that plaintiff's decedent was not its employee; that the station was

leased to and operated by defendant Jones as an independent contractor; that if decedent was determined to be its employee, plaintiff could not recover in this law action because it had elected to come under the provisions of the workmen's compensation law (2 Comp. Laws 1929, § 8407 *et seq.*, as amended [Comp. Laws Supp. 1940, § 8407 *et seq.*, Stat. Ann. and Stat. Ann. 1938 Cum. Supp. § 17.141 *et seq.*]); that decedent had not given notice that he elected not to be subject to the provisions of said law; and that plaintiff's remedy, if any, was by proceedings before the department of labor and industry. Plaintiff contended that both decedent and defendant Jones were employees of the Standard Oil Company; that the company exercised complete control and supervision of the operation of the station; that the purported lease to Jones was merely a subterfuge by Standard Oil Company to escape liability as an employer; and that both defendants are liable in damages for their negligence in failing to furnish his decedent with proper tools.

The evidence shows that the station was under lease to and was occupied and conducted by defendant Jones at the time of decedent's injury. It shows that Jones hired and paid station employees, paid the expense in connection with the operation of the station, and generally conducted it as his own business without consultation with or interference by the Standard Oil Company. In *Zoltowski* v. *Ternes Coal & Lumber Co.*, 214 Mich. 231, we quoted with approval 26 Cyc. p. 1546, stating as follows:

"An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work. Generally the cir-

cumstances which go to show one to be an independent contractor, while separately they may not be conclusive, are the independent nature of his business, the existence of a contract for the performance of a specified piece of work, the agreement to pay a fixed price for the work, the employment of assistants by the employee who are under his control, the furnishing by him of the necessary materials, and his right to control the work while it is in progress except as to results."

See, also, *Eberly* v. *Sanders Lumber Co.*, 282 Mich. 315; *Holloway* v. *Nassar*, 276 Mich. 212; *Arkansas Fuel Oil Co.* v. *Scaletta*, 200 Ark. 645 (140 S. W. [2d] 684); *Reynolds* v. *Skelly Oil Co.*, 227 Iowa, 163 (287 N. W. 823); *Hudson* v. *Gulf Oil Co.*, 215 N. C. 422 (2 S. E. [2d] 26).

It clearly appears that defendant Jones as lessee conducted the station business as an independent contractor. Viewed in the light most favorable to plaintiff, the testimony does not show, nor could it be inferred, that plaintiff's decedent was an employee of the Standard Oil Company. The evidence presented no question of fact for jury determination as to whether or not decedent was an employee of the company, and in view of such conclusion, other questions relative to its liability do not require consideration. We find no error in the admission or exclusion of testimony relative to the liability of the company. We conclude the trial court did not err in granting defendant company's motion for a directed verdict.

Defendant Jones based his motion for a directed verdict on the ground that there was no proof of negligence on his part; and that plaintiff's decedent was guilty of contributory negligence. He also claimed that plaintiff's decedent was not his employee; that he did not pay him wages; but that he

permitted him to work around the station, doing odd jobs, as an independent contractor. Plaintiff contended in substance that his decedent was employed by Jones, and in his declaration alleged that "the relation of master and servant existed" between Jones and his decedent. He also contended in substance that Jones paid decedent weekly wages, controlled and directed his work at the station, and instructed him to make the truck-tire repairs which resulted in his fatal injury. He further claimed that defendant Jones was negligent in failing to provide his decedent with a safe place to work and with proper tools with which to do the tire-repair work in question.

There is conflict in the testimony as to the arrangement or agreement with defendant Jones under which decedent was working. His brother, who was present when decedent and Jones discussed the matter of employment, testified in part:

"Willie Brown (decedent) asked Mr. Jones whether or not he needed anyone to work. Mr. Jones replied, 'Yes, I needs a man around here, * * * certain minor things to be done,' and asked him what could he do. He (decedent) told him he used to pump gas, and knows how to handle oil and gas, grease cars, that's all, and Mr. Jones told him, 'Come back tomorrow and I will put you to work.'

"*Q.* Now, did * * * Willie Brown go to work there?

"*A.* Yes. He went back next day and went to work. * * *

"*Q.* Did you ever see how much he got?

"*A.* I have seen Mr. Al (Jones) pay him $10 a week and more. I have seen him pay as high as $13, but he paid him $10 a week regular. I have been there many Sunday mornings and seen Mr. Al pay him."

Defendant Jones denied that decedent was his employee. He testified in part:

"*Q.* Did this young man (decedent) work for you?

"*A.* He worked for himself. He washed cars; would go over to police pound No. 1 and repair brakes; he done various jobs, worked for himself. In return, kind of helped me and assist me in the station, because he appreciated it, that I let him stay around there."

The above-quoted and other testimony clearly presented a question of fact for jury determination as to whether plaintiff's decedent was an employee of Jones or was merely permitted to work at the station as an independent contractor. It is admitted that Jones had not elected to come under the workmen's compensation law. Therefore, if plaintiff's decedent was his employee, Jones was deprived of the defenses of contributory negligence, assumed risks, and negligence of fellow employees (2 Comp. Laws 1929, § 8407 [Stat. Ann. § 17.141]). However, it was necessary for plaintiff to prove actionable negligence on the part of Jones. *Williams* v. *Sealander,* 288 Mich. 617; *Kelley* v. *Brown,* 262 Mich. 356.

The testimony is conflicting and confusing as to whether or not Jones was negligent in failing to furnish plaintiff's decedent with the proper tools with which to remove the inner wheel from the truck. There was testimony indicating that, being unable to remove the wheel because not supplied with the necessary tools, decedent followed the more dangerous method of repairing and inflating the tire while the wheel was on the truck.

Assuming that plaintiff's decedent was an employee of Jones, we believe that the conflicting testi-

mony presented a question of fact for jury determination as to whether or not Jones was negligent in failing to provide decedent with the proper tool or tools to do the work in which he was engaged at the time of his injury. As the defenses of contributory negligence and assumed risk are barred, we are convinced that, viewing the testimony in the light most favorable to plaintiff, a question of fact was presented for jury determination. The trial court erred in granting defendant Jones' motion for a directed verdict.

The judgment for defendant Standard Oil Company is affirmed. The judgment for defendant Jones is reversed and a new trial granted.

Plaintiff shall recover costs from defendant Jones. Standard Oil Company shall recover costs from plaintiff.

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

BICE *v.* HOLMES.

1. APPEAL AND ERROR—CHANCERY CASES—REVIEW DE NOVO—QUIETING TITLE—CONSTRUCTION OF INSTRUMENTS.

   Suit to quiet title to mineral rights in certain lands, to construe a certain conveyance and to determine the rights of the several defendants in the lands, being a chancery case, is considered *de novo* by the Supreme Court and where certain defendants appeal, only the rights of plaintiff and such defendants could be determined on appeal.

2. DEEDS—CONSTRUCTION—INTENT.
   A deed should be construed so as to give effect to the intention of the parties, such intention to be ascertained, if possible, by considering all provisions of the deed.

3. SAME—CONSTRUCTION—UNCERTAINTY—INTENT—PAROL EVIDENCE.
   In construing a deed where there is some uncertainty as to the meaning of certain terms, the court may also properly consider the surrounding facts and circumstances in determining the parties' intention.

4. SAME—RESERVATIONS—INTENT—DOUBT—PAROL EVIDENCE.
   In interpreting a reservation clause in a deed, the purpose is to discern the intention of the grantor from the words employed; the subject matter and attending circumstances to be considered where the words have a doubtful meaning.

5. SAME—CONSTRUCTION—RESERVATION OF MINERALS.
   Provision of deed conveying undivided fractional interests in several parcels of land, a part of which grantor had inherited from his father, who had died intestate in 1887, and a part of which grantor had acquired by direct conveyance from others, made after death of father's widow and excepting and reserving all ores and minerals therein and thereafter expressing intent to convey to grantee the entire remainder of the interests of grantor's father excepted mineral rights of all lands in question whether received by grantor from his father or otherwise.

6. TAXATION—SURFACE OWNERS—MINERAL RIGHTS—ASSESSMENT—CONTRIBUTION.
   Claim for contribution of taxes, made by surface owners against owners of mineral rights, is without foundation where lands do not appear to have been assessed for their mineral value.

Appeal from Iron; Landers (Thomas J.), J., presiding. Submitted April 12, 1944. (Docket No. 57, Calendar No. 42,642.) Decided June 5, 1944.

Bill by Edward S. Bice, administrator with will annexed, and Roscoe W. Baldwin, testamentary trustee of estate of Charlotte G. Breitung, deceased, against Herman Holmes and others to quiet title to mineral rights, to construe deeds and to determine rights of parties. Cross bill by defendants Holmes

and Burridge against plaintiffs to quiet title to land. Decree for plaintiffs. Defendants Holmes and Burridge appeal. Affirmed.

Eldredge & Eldredge, for plaintiffs.

August J. Waffen, for defendants Holmes and Burridge.

STARR, J. In January, 1942, plaintiffs, as representatives of the estate of Charlotte G. Breitung, deceased, filed bill of complaint to quiet title to mineral rights in certain lands in Iron county, to construe a certain instrument of conveyance, and to determine the rights of the several defendants in said lands. Defendants Herman Holmes and wife Christina Holmes and Louis Burridge and wife Edith Burridge filed answer and cross bill denying plaintiffs' right to the relief sought and asserting claim to the mineral rights in a part of the lands. They appeal from a decree dismissing their cross bill and granting plaintiffs substantially the relief sought. The rights of other defendants were determined by said decree, but they have not appealed. Therefore, we are here concerned only with the issues presented as between plaintiffs and appellants. This being a chancery case, we consider the same *de novo.*

It appears that one Edward Breitung, who owned considerable real estate and mineral interests in the upper peninsula, died intestate in 1887. He left surviving, his widow Mary Breitung, also referred to as Mary Kaufman, and his son Edward N. Breitung. His real estate descended to his said son Edward N., subject to the dower rights of his widow Mary, which rights were extinguished by her death August 29, 1923. On September 20, 1923, said

Edward N. Breitung and wife Charlotte conveyed by deed to Sam Luke undivided fractional interests in several described parcels of land in Iron county, a part of which interest said Edward N. Breitung had inherited from his father, and a part of which he had acquired by direct conveyance from others. Following the description of said lands, the deed provided in part:

"*Excepting and reserving also from the above-described interests in the several tracts of land described herein unto the said parties of the first part and to their heirs and assigns, forever, all ores and minerals situated in, upon or under said lands, or any part or parts thereof,* and the right at all times to enter upon said lands, or any parts thereof and there to explore, search, dig and mine for ores and minerals, and freely carry on the business of mining removing ores and minerals, and for such purpose or purposes to take, use and occupy so much and such parts of said land and for such term of time as said first parties their heirs or assigns shall deem expedient, without any let, hindrance or interference by the second party, or the heirs or assigns of the second party, provided that if the said first parties or their heirs or assigns shall require the surface of said land, or any part thereof, for permanent occupancy for the purposes aforesaid, or shall damage any part of the surface of said lands, or the improvements thereon, said first parties or their heirs or assigns so occupying or so damaging shall pay to the said second party, or to his heirs or assigns, for the said occupancy or for the damages so caused, but not exceeding in amount the actual prior market or salable value of the part or parts of said lands so occupied or damaged, together with the actual salable value of buildings, structures or fences or other improvements that shall then be on the part or parts of said land so occupied and belonging to the said second party or to his heirs or assigns, conveying

hereby any and all rights of dower which accrued to Mary Kaufman, formerly known as Mary Breitung, the widow of Edward Breitung, late of the city of Marquette, Michigan, deceased, the said Mary Kaufman having departed this life on August 29, 1923, whether the undivided interest above specified are correctly stated or not, *it being the express purpose of this instrument to convey to said second party, his heirs and assigns, the entire remainder of the interests of the heirs at law of the said Edward Breitung, deceased, in and to the lands described herein other than any interests that may have been heretofore conveyed, so that the entire remaining interest in said lands of the late Edward Breitung, deceased, may be by this instrument conveyed to the second party, his heirs or assigns.*"

The above-mentioned deed of September 20, 1923, to Sam Luke is referred to in the record and briefs as the "crucial deed," and we shall so designate it in this opinion. The construction of the above-quoted provisions of the deed presents the principal issue in controversy in this suit. The grantors and grantee having died prior to the trial, we do not have the benefit of their testimony.

By two deeds acknowledged October 5, 1923, Sam Luke and wife conveyed to defendant Herman Holmes the fractional interests in Iron county lands (except one parcel) which Luke had acquired by the above-mentioned crucial deed from Edward N. Breitung and wife. Both of said deeds to Holmes expressly excepted and reserved all minerals, and further stated that it was intended to convey all right, title, and interest which Luke had acquired "by virtue of a certain deed (crucial deed) from Edward N. Breitung and wife." It appears from the record that defendant Louis Burridge acquired from defendant Holmes one-half of his interest in the lands in question.

In November and December, 1923, Edward N. Breitung conveyed whatever interest he had in said lands to his wife Charlotte Breitung. She died in July, 1936, and the representatives of her estate are plaintiffs in the present suit.

Plaintiffs contend that the crucial deed excepted and reserved to the grantors, Edward N. Breitung and wife Charlotte, the mineral rights in all lands therein described; and that such mineral rights are now owned by the estate of said Charlotte Breitung, deceased. Appellants contend that the crucial deed did not except and reserve mineral rights in that part of the lands which Edward N. Breitung had inherited from his father, but excepted and reserved mineral rights only in that part which he had acquired by direct conveyance from other persons. That is, appellants claim that, as to the lands which Edward N. Breitung had inherited from his father, the crucial deed conveyed to Sam Luke (who subsequently conveyed to defendant Herman Holmes) both the land and the minerals, without exception or reservation.

The parties stipulated as to which of the parcels in question said Edward N. Breitung had inherited from his father and which parcels he had acquired by direct conveyance from others. For the purpose of this opinion it is unnecessary to set forth detailed descriptions of the interests in lands conveyed by the crucial deed and involved in this suit.

The crucial deed should be construed so as to give effect to the intention of the parties, and such intention shall, if possible, be ascertained by viewing the deed from its four corners and considering all its provisions. There being some uncertainty as to the meaning of certain terms of the deed, we may also properly consider the surrounding facts and circumstances in determining the parties' intention. In

Thomas v. *Jewell,* 300 Mich. 556, 558 (139 A. L. R. 1335), we said:

"It is a general rule that in interpreting deeds and other written instruments, the primary object is to determine the intention of the parties from the instrument itself. If the instrument indicates an ambiguity, then resort may be had to extraneous matters."

In the case of *Derham* v. *Hovey,* 195 Mich. 243, 247 (21 A. L. R. 999), we said:

"In interpreting devises and reservations in deeds, the purpose is to discern the intention of the testator, or grantor, from the words employed; the subject matter and attending circumstances to be considered where the words have a doubtful meaning."

See *Glidden* v. *Beaverton Power Co.,* 223 Mich. 383; *Negaunee Iron Co.* v. *Iron Cliffs Co.,* 134 Mich. 264; *Ryan* v. *Wilson,* 9 Mich. 262; 8 R. C. L. pp. 1047, 1048, § 101; 16 Am. Jur. p. 600, § 287; 26 C. J. S. pp. 429, 430, § 128.

Following the granting clause and the express exception and reservation of minerals, the crucial deed provided:

"It being the express purpose of this instrument to convey to said second party, his heirs and assigns, the entire remainder of the interests of the heirs at law of the said Edward Breitung, deceased, in and to the lands described herein other than any interests that may have been heretofore conveyed, so that the entire remaining interest in said lands of the late Edward Breitung, deceased, may be by this instrument conveyed to the second party, his heirs or assigns."

It is clear that the parties did not intend the above-quoted explanatory provision of the crucial

deed to nullify, limit or restrict the preceding granting clause and the express exception and reservation of minerals. Such provision merely indicated their intention to include all interests in said lands (except minerals) which grantor Edward N. Breitung had inherited from his father.

That the grantors in the crucial deed intended to except and reserve minerals in all of the lands included in such deed is indicated by the fact that within a few months thereafter they gave to the Oliver Iron Mining Company an option covering mineral rights in seven of the described parcels. It should also be noted that the mineral rights in all the lands in question were included in the inventory of the estate of Charlotte Breitung.

The record also shows other facts and circumstances which are indicative of the intention and understanding of the parties to the crucial deed, and of defendant Holmes as a subsequent grantee from Sam Luke. When Luke and wife conveyed to Holmes, they expressly excepted and reserved all minerals, and stated in substance that they intended to convey all right, title, and interest which Luke had acquired by the crucial deed from Breitung and wife. That defendant Holmes understood he had acquired no mineral rights from Luke is indicated by the fact that when he conveyed his interest in one of the parcels to the Oliver Iron Mining Company in 1929, he provided in his deed, "subject, however, to the mineral exceptions and reservations contained or referred to in the deed to said premises (from Sam Luke) through which the parties of the first part (Holmes) derived title thereto." We also note that in an instrument conveying certain rights to the city of Crystal Falls for a water pipe line over two of the parcels in question (which parcels Edward N. Breitung had inherited from his father), defendants

Holmes and Burridge described themselves as the owners of "an undivided one-half interest in the surface." It appears that prior to the crucial deed, Edward N. Breitung and wife had conveyed other fractional interests in the lands in question to defendant Herman Holmes, and that in such deeds they had expressly excepted and reserved all minerals. The record indicates that defendants Holmes and Burridge did not question the exception and reservation of minerals in the crucial deed for many years after the deed was given, and that such exception and reservation was first questioned about 1940 by an attorney for the Oliver Iron Mining Company in connection with the above-mentioned option on minerals given by Breitung and wife.

Careful consideration of all provisions of the crucial deed and of the surrounding facts and circumstances as shown by the record convinces us that such deed excepted and reserved to the grantors Edward N. Breitung and wife the minerals in all the lands in question, regardless of whether said lands were inherited by Breitung from his father or acquired by conveyance from others. We agree with the trial court's opinion which states in part:

"It was clearly the intent of the grantors (in the crucial deed) to convey an estate in fee simple, and it was equally clear that the grantors, by apt and explicit words, excepted therefrom, and carved out of the operation of the deed, the mineral right, and that intent is beyond the range of all doubt."

Under the facts shown by the record, defendants Holmes and Burridge acquired no title to the excepted and reserved minerals by adverse possession. Their claim for contribution of taxes is without foundation, as the testimony indicates that the lands in question were never assessed for their

mineral value. The trial court did not abuse its discretion in denying their motions to reopen the case for the taking of further proofs. Other questions presented do not require consideration.

We conclude that the trial court's decree properly and equitably determined the rights of the parties. The decree, in so far as it relates to the issues between plaintiffs and appellants, is affirmed. Plaintiffs shall recover costs of both courts from appellants.

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

BREWER *v.* STODDARD.

1. BANKS AND BANKING—NATIONAL BANKS—DIRECTORS—OFFICERS.
   Under the national banking act the stockholders of a bank elect the directors who, in turn, appoint the officers and usually fix the latter's salaries (12 USCA, § 24).

2. CONTRACTS—CONTROL OF BANKS—SALARIES—PUBLIC POLICY.
   Contract to secure control of banks and share equally in salaries received as officers thereof, not made for the purpose of benefiting the stockholders, is against public policy and unenforceable.

3. CORPORATIONS—FIDUCIARY RELATION BETWEEN SHAREHOLDERS.
   Shareholders in a corporation occupy a fiduciary relationship to other shareholders.

Bargain by official of corporation for a consideration to exercise his powers in a certain way is illegal, see 2 Restatement, Contracts, § 569.

4. SAME—CONTRACT FOR SALE OF OFFICE—PUBLIC POLICY.
   An agreement by one of the stockholders of a corporation for the sale, directly or indirectly, of an office or a permanent position therein is against public policy even though the contracting stockholder had shares sufficient to give him control in the election of officers since by such agreement he might be required to act contrary to the duty he owed the company and other stockholders.

5. BANKS AND BANKING—CONTRACT TO CONTROL BANK AND SHARE SALARY—STOCKHOLDERS—PUBLIC POLICY.
   A contract by a stockholder and another to manage and control a bank and share equally in the salaries and compensation received by them was more than a voting trust and was illegal since it was not in the interest of the stockholders and the public but solely for the profit and interest of the contracting parties.

6. JOINT ADVENTURES—CONTRACTS—ILLEGAL ENTERPRISE.
   A contract setting forth the rights of parties to a joint enterprise will not be enforced where it is for the purpose of engaging in an illegal venture.

7. CONTRACTS—OPTION TO PURCHASE STOCK.
   A contract giving plaintiff an option to purchase stock in a bank will not be enforced where the option was never exercised.

8. SAME—PERSONAL SERVICES—DEATH.
   A contract calling for personal services by one of the parties is terminated by the death of such party.

9. JOINT ADVENTURES—PERSONAL SERVICES—CONTRACTS—PARTNERSHIP.
   To the extent that a contract calls for personal services under a joint venture the rights and liabilities of the parties should be governed by the rules which govern partnerships.

10. PARTNERSHIP—DEATH—DISSOLUTION OF FIRM.
    The death of a partner dissolves a partnership.

11. ACCOUNTING—CONTRACTS—PUBLIC POLICY—MOTION TO DISMISS.
    Motion to dismiss suit for accounting under agreement, attached to the bill of complaint, was properly granted where agreement was contrary to public policy and unenforceable.

Appeal from Eaton; McDonald (Archie D.), J. Submitted April 6, 1944. (Docket No. 38, Calendar No. 42,680.) Decided June 5, 1944.

Bill by Joseph Hillyer Brewer, executor of the estate of Joseph H. Brewer, deceased, against Howard J. Stoddard for an accounting. Bill dismissed. Plaintiff appeals. Affirmed.

McPherson, Harrington, Waer & Cary, for plaintiff.

Shields, Ballard, Jennings & Taber, for defendant.

BUTZEL, J. On January 2, 1940, Charles B. Bohn of Grosse Pointe Park, Michigan, as seller, entered into a written contract with Howard J. Stoddard, of Lansing, Michigan, defendant herein, as buyer, for the sale of large blocks of stock in the First National Bank of Port Huron, First National Bank of Battle Creek, First National Bank & Trust Company of Grand Rapids, Lansing National Bank and Saginaw State Bank, for the sum of $231,858.77, to be paid with interest on or before three years from the date of the contract and for which amount Stoddard gave his note to Bohn and pledged the stock as security. The contract superseded a previous one entered into on April 13, 1937.

On June 10, 1940, Stoddard entered into an agreement with Joseph H. Brewer, now deceased, of whose estate plaintiff is executor. It recited that previous to the contract of January 2, 1940, between Bohn and Stoddard, Joseph H. Brewer, plaintiff's decedent, had an agreement with Stoddard under the terms of which decedent, at his election up to January 2, 1944, might join in the purchase of the bank stocks being acquired from Charles B. Bohn by furnishing one-half of the funds necessary to purchase the stock, that the decedent and Stoddard would share and share alike in the joint venture of acquiring bank stocks, and in the operation and development of the banks, whether they be operated

as separate units or be consolidated, and that the profits and losses of such joint venture and the compensation of the parties for services in connection therewith should be divided equally. It further recited that it was the intention that the rights of decedent should not be modified or affected by this agreement of January 2, 1940, between Bohn and Stoddard, and that it was mutually agreed as follows:

"1

"First party agrees that his rights under said contract between himself and said Charles B. Bohn, dated January 2, 1940, are held by him subject to his agreement with second party that second party shall have the right at his option up to January 2, 1944, to acquire one-half of the shares of bank stocks that may be acquired by first party under said contract between him and Charles B. Bohn dated January 2, 1940, by payment of one-half of the net investment of first party in said stocks plus interest at the rate of three per cent per annum to January 2, 1944, upon any payments made by first party under said contract prior to that date, the acquisition by the party of the second part to be on the proportionate basis which the five above-mentioned stocks bear to each other.

2

"It is agreed between the parties hereto that whether said banks shall be operated as separate units or shall be merged or consolidated into one or more units, the parties hereto shall share equally in the control of said bank or banks to the extent that they, or either of them, shall be able to control and manage said bank or banks, and they shall share equally in the compensation or salaries received by them, or either of them, as officers or as an officer of said bank or banks, until said stocks to be acquired under said contract dated January 2, 1940, shall be fully paid for and equally divided between the parties hereto.

3

"It is agreed that the parties hereto shall share equally in the profits or losses resulting from any transactions involving the acquisition of any other bank or banks or the disposition of any stocks representing the ownership of the above banks, whether merged or not, and the disposition of the stocks of any bank or banks acquired subsequent to this date.

4

"It is further agreed between the parties hereto that all or any portion of the above listed stocks, if offered for sale, be first offered to each other or Charles B. Bohn."

Joseph H. Brewer died February 9, 1943, and plaintiff was appointed executor. Neither plaintiff nor his decedent paid any sums whatsoever to Stoddard. On March 12, 1943, Stoddard advised plaintiff that he disclaimed all obligations under the contract and that the contract, therefore, would not be an asset of the Brewer estate.

In December, 1940, the banks, in which stocks had been purchased by Mr. Stoddard from Bohn, were consolidated and defendant received 17,749 shares of stock of the Michigan National Bank in exchange for the shares of stock he had purchased from Bohn. Plaintiff in his bill of complaint alleges that the stock of the Michigan National Bank issued for the stocks purchased from Bohn had a market value of $381,603.50. This would indicate an approximate profit of $150,000 if the stock were sold at such price. Plaintiff further alleges on information and belief that other transactions involving the purchase of bank stocks occurred subsequent to June 10, 1940, and that these transactions, of which he has no record, would also come under the contract; that there has been no accounting between Stoddard and either decedent or himself. He asks that Stoddard be

ordered to make a full disclosure of all transactions, that a complete accounting be made, and that Stoddard be compelled to pay plaintiff the full amount of the damage to the estate of Joseph H. Brewer caused by the repudiation by Stoddard on March 12, 1943, of his obligations under the contract, the material parts of which have been heretofore set forth.

Defendant claims that any contract that preceded that of June 10, 1940, was in parol, void as against public policy, and without consideration. He also contends that the contract of June 10, 1940, was not supported by any consideration and was void because it was against public policy. He further alleges that neither plaintiff nor his decedent ever paid, or offered to pay, any part of the purchase price of the stocks. He, therefore, asked that the bill be dismissed. The parties regarded the pleadings as a motion to dismiss, and the trial judge entered an order of dismissal.

Plaintiff on appeal presents only two questions. The main one is whether the contract is against public policy and, therefore, unenforceable. Defendant reframes this question and asks whether an option agreement is against public policy and void for the reason that it couples with the sale of the stock in a banking corporation an agreement by the parties to share equally in the control of the bank to the extent that either of them shall be able to control and manage said bank, and also share equally in the compensation and salaries received by them or either of them as such officers of the bank until such time as the bank stocks are fully paid for. The question resolves itself around paragraph 2 of the agreement, where it is provided in part:

"It is agreed * * * the parties hereto shall share equally in the control of said bank or banks,

* * * and they shall share equally in the * * * salaries received by them, * * * as officers * * * of said bank or banks, until said stocks * * * shall be fully paid for and equally divided between the parties hereto."

Under the national banking act, 12 USCA, § 24 (4 F. C. A. p. 6), stockholders of the bank elect the directors who in turn appoint the officers. The directors, as a rule, fix the salaries of the officers. This is not a voting trust agreement entered into by the stockholders, but an agreement by the parties to secure control of the banks and share equally in the salaries received by them as officers of the banks. It was not made for the purpose of benefiting the stockholders of the bank but for securing control of the banking corporations and dividing salaries. We believe the contract was against public policy. Such a contract will not be enforced. Shareholders in a corporation occupy a fiduciary relationship to other shareholders. In *Wilbur* v. *Stoepel,* 82 Mich. 344 (21 Am. St. Rep. 568), an agreement was made by two of three stockholders that the vendee of stock would be employed by the corporation for two years and if at the end of that time he desired to retire from the corporation, the stock would be repurchased at a stated price. Objection was made by the third stockholder, and in holding that the agreement was against public policy, we said:

"This alleged agreement between the defendants, who owned a majority of the stock, and the plaintiff, is contrary to public policy, and void as against those not consenting to it. The defendants were directors, and, in the management of the corporate affairs, cannot but be unduly influenced by such an agreement. Their natural desire and inclination would be to continue the plaintiff as manager, although it were against the interest of the stock-

holders, and would be against their own as stockholders, but for the agreement which might render them liable for the payment of a large sum if they failed to retain him. Nor is such contract made valid by the good faith of the parties to it. Its effect upon stockholders who are not parties to it, or do not consent to it, is the same in the one case as in the other. The law therefore wisely condemns and prohibits all such contracts. The supreme court of the United States has so decided in a recent case, under facts very similar to the case at bar. *West* v. *Camden,* 135 U. S. 507 (10 Sup. Ct. 838, 34 L. Ed. 254), and authorities there cited."

In *West* v. *Camden,* 135 U. S. 507 (10 Sup. Ct. 838, 34 L. Ed. 254), where again the question of permanently retaining a stockholder as vice-president at a fixed salary in consideration of the sale to the company of a competing company, the court held that it was against public policy, and stated, p. 520:

"The agreement alleged to have been made was one on the part of the defendant whereby he might be required to act contrary to the duty, which, as an officer of the Baltimore United Oil Company, he owed to that company and to the stockholders other than the plaintiff. The same rule which is applicable to the case of a public office applies to the present case, although it does not appear that the defendant was to receive direct, personal, pecuniary compensation or gain for what he was to do. The plaintiff on his own showing dealt with the defendant in reference to the fiduciary relation which the latter bore to the stockholders, both of the Standard Oil Company and of the Baltimore United Oil Company. The agreement alleged was an agreement which bound the defendant as to his future action as a director of the Baltimore United Oil Company and an agreement to keep the plaintiff permanently in the position of vice-president of that company irrespective of its interests. It amounted to a situa-

tion on the part of the defendant that no contingency should happen which would require a change of management and a reduction of expenses."

In *Scripps* v. *Sweeney,* 160 Mich. 148, the same question was discussed and it was stated, quoting from *Jones* v. *Williams,* 139 Mo. 1, 32 (39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436):

"But it is said that the contract is against public policy and void for the reason that it couples with the sale of stock in the corporation an agreement to give to the purchaser a position for five years at a large salary, and in addition the position of director and president of the corporation.

"Counsel cite many cases in support of their position. It is undoubtedly true that an agreement by one of the stockholders for the sale, directly or indirectly, of an office in a corporation or of a permanent position therein would be against public policy and void, though the contracting stockholder had shares sufficient in amount to give him control in the election of officers. By such agreement he might be required to act contrary to the duty he owed the company and other stockholders. *West* v. *Camden,* 135 U. S. 507 (10 Sup. Ct. 838, 34 L. Ed. 254).

"Each shareholder in the corporation has a right to rely upon the judgment of all the others in the election of directors and officers, and any such agreement which puts it out of its power to exercise such judgment is against public policy."

A leading case to like effect is that of *Guernsey* v. *Cook,* 120 Mass. 501. We have always adhered to this rule. For further cases see *Leland* v. *Ford,* 245 Mich. 599, and *Leland* v. *Ford,* 252 Mich. 547; *Stott* v. *Stott,* 258 Mich. 547. In the latter case, we stated:

"The stockholders of a corporation have a community of interest in the property owned by it. They can perform valid acts only when lawfully assembled in their representative capacity. When so acting,

every stockholder has the right to assume that every other stockholder is exercising an independent and honest judgment on the questions presented, and that none of them has been influenced by a consideration paid to him for voting in a particular manner. As was said in *West* v. *Camden,* 135 U. S. 507, 521 (10 Sup. Ct. 838, 34 L. Ed. 254), it was the right of the other stockholders 'to have the defendant's judgment, as an officer of the company, exercised with a sole regard to the interests of the company.' A number of stockholders, before a meeting, may agree to combine together to favor any particular policy or lawful action to be considered thereat, and, if they own a majority of the stock, the minority may not, ordinarily, question their right to do so."

Plaintiff attempts to differentiate the instant case so as not to come under the general rule, but the same principle prevails in all of them. The contract providing that the parties manage and control a bank to the extent of their ability, and share equally in the salaries and compensation received by them, was more than a voting trust agreement. It was an illegal contract to manage and control banks not in the interest of the stockholders and the public but for the purpose of using the banks so as to make profits, draw and share salaries and compensation solely in the interest of the parties to the contract. It was against public policy and will not be enforced.

Plaintiff claims, however, that this was a joint enterprise. If it is one for the purpose of engaging in an illegal venture, the contract will not be enforced. Even assuming that the contract merely gave plaintiff or his decedent an option to purchase the stock, the option was never exercised. The contract called for personal services on the part of Mr. Brewer and death would terminate such contract. To the extent that it called for personal services under the joint venture, rights and liabilities of

the parties should be governed by the rules which govern partnerships, *Gleichman* v. *Famous Players-Lasky Corp.*, 241 Mich. 266. The death of a partner dissolves a partnership. *Murray* v. *Keeley Institute of Western Michigan*, 190 Mich. 295, 312. The joint venture had no assets. It covered an illegal agreement which will not be enforced by the courts.

The agreement between Brewer and Stoddard is attached to and made part of the bill of complaint. It thus appears on the face of the bill that it is based on an agreement that was contrary to public policy and unenforceable. Therefore the trial judge was justified in dismissing plaintiff's cause of action.

Order granting motion to dismiss is affirmed, with costs to defendant.

NORTH, C. J., and STARR, WIEST, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

PEOPLE *v.* ZESK.

I. CRIMINAL LAW—MURDER—ARGUMENT OF PROSECUTING ATTORNEY—OBJECTIONS—QUESTIONS REVIEWABLE.

Remarks of acting prosecuting attorney in opening and closing addresses to jury at trial of defendant for murder in the first degree, alleged to have been so highly inflammatory and prejudicial that defendant did not have a fair trial, *held*, not to call for any exception to general rule that objections to argument not made at the trial will not be considered when made for the first time on appeal.

2. SAME—MURDER—STATEMENTS BY ACCOMPLICES.

Defendant, charged with murder in the first degree, may not complain as to the introduction of statements made by other participants in the crime where his own attorney introduced them, notwithstanding the statements undoubtedly had a very damaging effect.

3. SAME—ACCOMPLICE—CREDIBILITY—UNCORROBORATED TESTIMONY.

The credibility of an accomplice, like that of any other witness, is exclusively a question for the jury and a jury may convict on the uncorroborated testimony of an accomplice.

4. SAME—MURDER—WEIGHT OF ACCOMPLICE'S TESTIMONY—REQUEST TO CHARGE.

On trial for murder in the first degree wherein an accomplice who had pleaded guilty was the sole witness against defendant, it was not error for trial judge not to charge jury it must carefully consider the weight of the accomplice's testimony in the absence of a request so to do.

Appeal from Shiawassee; Collins (Joseph H.), J. Submitted April 13, 1944. (Docket No. 63, Calendar No. 42,341.) Decided June 5, 1944.

Frank Raymond Zesk was convicted of murder. Affirmed.

Frederick P. Alexander, for appellant.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, and *James A. Quayle,* Prosecuting Attorney, for the people.

BUTZEL, J. Defendant was convicted of murder in the first degree. It was shown that he and one Tony Kozakiewiecz robbed a gasoline station in Owosso, Michigan, on the night of July 20, 1943; that while defendant kept watch outside, Kozakiewiecz entered the station and shot George Shaw, the attendant, who died a few days later. Kozakiewiecz and defendant divided the proceeds of the robbery, ap-

proximately $30. It is unnecessary to set forth the many other details of the robbery in view of the questions involved as propounded by appellant and to which we limit our opinion.

It is claimed that the acting prosecutor, both in the opening and closing addresses to the jury, indulged in such highly inflammatory and prejudicial remarks that defendant did not have a fair trial, and that objections on the part of defendant's counsel would not have eradicated the harm done. Defendant's counsel at the time of the trial made no objections to the remarks.

We have carefully examined the remarks. We find that they were not so prejudicial or improper as to call for reversal, particularly in view of the fact that no objections were made. They did not call for any exception to the general rule that objections to argument not made at the trial but made for the first time on appeal will not be considered. *People* v. *Goldberg,* 248 Mich. 553; *People* v. *Connors,* 251 Mich. 99; *People* v. *Korn,* 217 Mich. 170.

Counsel for defendant claims that there was error in the introduction of certain sworn statements made and signed by Kozakiewiecz and two other parties by the names of Jolly and Losey. Kozakiewiecz made a number of statements that contain inconsistencies. His first one did not implicate defendant. He excuses the omission on the ground that he was fearful of bodily harm from defendant. His other two statements not only show that he and defendant perpetrated the robbery in question but others as well. Two statements of Donald Jolly also contain glaring inconsistencies but they do set forth many other crimes in which he said defendant was an active participant. Losey also made a written statement to the effect that he and defendant committed a number of larcenies. These statements un-

doubtedly had a very damaging effect. They were introduced not by the prosecution but by the attorney for defendant. He asked that the entire statements be introduced. No error can be complained of under the circumstances.

The sole witness against defendant was Kozakiewiecz. He pleaded guilty to the crime. He described the minute details in connection with the robbery and murder, and defendant's active participation in it. Notwithstanding any inconsistencies in his previous statements, he was positive in his testimony. Defendant took the witness stand and denied participation in any of the robberies and the murder. He stated that at the time of the perpetration of the crime charged, he was in Detroit where he and his family had been living for some time prior to the day of the robbery. Notwithstanding that he gave a defective notice of an alibi, the court admitted the testimony of nine witnesses corroborating defendant's testimony that at the time of the murder he was at his home in Detroit and could not have been in Owosso, Michigan. The jury, however, believed the testimony of Kozakiewiecz. Evidently the jury decided that the alibi witnesses were either mistaken as to time or else that they did not tell the truth. Defendant claims that the trial judge in his charge should have directed the jury to look with suspicion on the testimony of a self-confessed murderer and perjurer. The correct rule is well stated in 1 Gillespie on Michigan Criminal Law & Procedure, § 379:

"The credibility of an accomplice, like that of any other witness, is exclusively a question for the jury, and it is well settled that a jury may convict on such testimony alone, and it is not error for the court to refuse to charge that it is not safe to convict a defendant, on the uncorroborated testimony of an accomplice."

Many cases are cited, including *People* v. *Dumas,* 161 Mich. 45, which has many features resembling those in the instant case. Also, see *People* v. *McCrea,* 303 Mich. 213. The trial judge probably would have charged the jury to carefully consider the weight of the accomplice's testimony had defendant's counsel made the request. There was no error.

Judgment is affirmed.

NORTH, C. J., and STARR, WIEST, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

SCHAFER *v.* KNUTH.

1. COURTS—JURISDICTION—FUND PAID INTO COURT—DISPUTE BETWEEN ATTORNEY AND CLIENT.

   In dispute between attorney and client over amount allowable for former's services with reference to litigation wherein a fund had been paid into circuit court in chancery by opposing litigants, such court had jurisdiction of the fund and the attorney for the party to whom the sum was awarded (Court Rule No. 4 [1933]).

2. SAME—JURISDICTION—COORDINATE COURTS.

   When a court of competent jurisdiction becomes possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of and no court of coordinate authority is at liberty to interfere with its action, in order to prevent unseemly, expensive and dangerous conflicts of jurisdiction and of process.

3. SAME—JURISDICTION—IDENTITY OF TWO PROCEEDINGS.

Rule that once a court of competent jurisdiction obtains jurisdiction of a case it retains authority over the case until the matter is finally disposed of applies so as to prevent a court of coordinate jurisdiction from obtaining jurisdiction where the two proceedings have identity of parties, subject matter involved, nature of remedies and character of relief sought.

4. SAME—JURISDICTION—ATTORNEY FEES.

The circuit court in chancery has jurisdiction in case before it to inquire into the matter of services rendered by attorney for plaintiffs and to fix the fee (Court Rule No. 4 [1933]).

5. ATTORNEY AND CLIENT—FEES FOR SERVICES.

In determining the amount of an attorney fee it is proper to consider the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite properly to conduct the cause, the customary charges of the bar for similar services, the amount involved in the controversy and benefits resulting to the client from the services, and the contingency or certainty of the compensation.

6. SAME—FEE FOR SERVICES RENDERED.

In controversy between attorney and client, where attorney, faced with a difficult and delicate problem, had spent about 43 days in bitterly contested and involved proceedings to quiet title to oil-producing farm of great value for client, charged with misconduct and fraud, but who settled the proceeding without the attorney's consent and behind his back, attorney is awarded $2,150 together with expenses.

Appeal from Allegan; Miles (Fred T.), J. Submitted April 6, 1944. (Docket No. 21, Calendar No. 42,634.) Decided June 5, 1944.

Bill by Amos Schafer and wife against Milton W. Knuth and others to quiet title to real estate. On petition of plaintiffs against Glenwood C. Fuller, their attorney, for relief under Court Rule No. 4 (1933). Defendant Fuller appeals. Modified and affirmed.

Harry Pell, for plaintiffs.

Leon W. Harrington, for defendant Fuller.

BUSHNELL, J. This is an appeal by defendant, former circuit judge Glenwood C. Fuller, now an attorney at law in Grand Rapids, from a decree entered in the Allegan circuit upon a petition and complaint filed under Court Rule No. 4 (1933), by Fuller's clients, Amos Schafer and Eliese, his wife, residents of Allegan county.

Fuller was retained by Amos Schafer in 1941 in connection with difficulties concerning the lien of a certain mortgage on a farm in Hopkins township. Schafer purchased the farm in 1920 and at that time he assumed and agreed to pay a mortgage of $8,000, held thereon by his cousin Menno Schafer. After Menno Schafer's death in 1939, Amos Schafer was appointed successively special administrator and administrator of his estate and, while acting as special administrator, Amos Schafer had his deed to the farm recorded and discharged the mortgage. Heirs of Menno Schafer who had a two-thirds interest in his estate took the position that the mortgage had been improperly discharged and claimed that there was an unpaid balance of $4,000 due the estate from Amos Schafer, together with about $2,500 of accrued interest. Certain proceedings followed in the probate court for Allegan county in which Fuller represented Schafer. The opposing heirs took an appeal to the circuit court of Allegan county from the probate order ratifying and confirming the discharge of the mortgage, which appeal was later dismissed upon motion of the attorney for the contesting heirs. Subsequently, Amos Schafer and his wife, represented by Fuller, filed a bill in chancery to clear title and it is in this proceeding that this appeal arises.

About a month after Fuller had been retained Schafer paid him $100, and on July 6, 1942, Schafer

gave Fuller an assignment or order on the clerk of the Allegan court for $2,500 out of impounded funds which were to be paid into court on account of royalties for oil taken from the farm. On July 7th, a consent order was entered in the chancery cause directing the oil company to pay the funds which it had impounded to the clerk of the court, and directing the clerk to turn over all funds so paid in excess of the amount of $6,000 to Amos Schafer and his wife, and to retain the $6,000 to protect the heirs on the claimed mortgage. This order was never carried out because on July 7, 1942, Fuller was informed over the telephone, by former opposing counsel, that a settlement was going to be made between opposing counsel and the Schafers directly, and on July 13th a petition for settlement was noticed by the opposing counsel. Fuller did not appear at the hearing on the proposed settlement but a decree was entered on July 20th, in his absence, which provided, among other things:

"6. That the clerk of the court retain $2,500 in her possession to protect the firm of Fuller, Sherk & Dilley on its claim for attorney fees until the further order of the court."

As between Fuller and Schafer nothing further was done until December 18, 1942, when Fuller brought an action in the superior court of Grand Rapids against both Amos Schafer and his wife. He secured an order for service of process on Sunday and the Schafers were served on April 18, 1943. Two motions challenging the jurisdiction of the superior court were made and denied. On May 29, 1943, a petition for relief under Court Rule No. 4 was filed by the Schafers in the Allegan chancery proceedings and the order to show cause issued.

Fuller made a motion to dismiss the petition under Court Rule No. 4 on jurisdictional grounds,

which was denied, and an answer was filed and proofs taken. The circuit judge did not treat the petition as an original proceeding under Court Rule No. 4 but rather as a request to the court to investigate and make a further order under the jurisdiction reserved in paragraph 6 of its decree. After hearing the proofs the trial judge held that Fuller was entitled to $600 for his legal services which he had performed, allowed him a balance of $1.92 on his expenses, cancelled the assignment of the impounded funds and ordered the balance of $1,898.08 paid over to Amos Schafer.

Fuller now contends that the superior court acquired full jurisdiction and that the circuit court cannot oust that jurisdiction in a proceeding under Court Rule No. 4. The circuit court did, however, have prior jurisdiction. It had and retained jurisdiction of the fund under its prior decree, and it had jurisdiction of Fuller, the attorney for the plaintiff in the chancery proceeding, under Court Rule No. 4.

"It is a familiar principle that when a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of; and no court of co-ordinate authority is at liberty to interfere with its action. The principle is essential to the proper and orderly administration of the laws; and while its observance might be required on the grounds of judicial comity and courtesy, it does not rest upon such considerations exclusively, but is enforced to prevent unseemly, expensive and dangerous conflicts of jurisdiction and of process." *MacLean* v. *Wayne Circuit Judge,* 52 Mich. 257.

In the *MacLean Case* this court pointed out that:

"The matter is not one which, under the circumstances, can come under his (the circuit judge

against whom mandamus was sought) cognizance; other courts have control of the controversy with all its incidents, and have ample competency to do in respect to it whatever may remain to be done."

See, also, *E. T. Barnum Wire & Iron Works* v. *Wayne Circuit Judge,* 59 Mich. 272, and *Bateman* v. *Railroad Co.,* 96 Mich. 441.

As stated in *Detroit Trust Co.* v. *Manilow,* 272 Mich. 211:

"This rule is subject to the limitation that the two proceedings must be in all respects identical, as to the identity of the parties, the subject matter involved, the nature of the remedies and the character of the relief sought."

See, also, authorities there cited.

The circuit court had full jurisdiction to and did properly inquire into the matter and fix the fee.

Canon 12 of Professional Ethics adopted for the Michigan bar provides: "In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; * * * (3) the customary charges of the bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or certainty of the compensation."

In undertaking these proceedings Fuller, as attorney for Schafer, was faced with a difficult and delicate problem. His problem was primarily to clear title to an oil-producing farm of great value in bitterly contested and involved proceedings, and he was faced with difficulty in proving his position because of the rule barring the testimony of his client. His client was faced with charges of misconduct and fraud. Fuller spent approximately 43 days in the

litigation. That the results obtained were meager was primarily due to the settlement of the proceedings by his client without his consent and behind his back. This being a chancery appeal, we hear it *de novo* and we feel that a proper fee for Fuller would be the sum of $2,150, together with his expenses.

The cause is remanded for the entry of an order allowing Fuller the sum of $2,150 as fees, plus the $1.92, unpaid balance of his costs and expenses, from the fund in the hands of the clerk of the court, and directing that the balance of the fund be paid over to Amos Schafer. As so modified, the decree will be affirmed. It is so ordered, with costs to the appellant.

NORTH, C. J., and WIEST, BUTZEL, SHARPE, BOYLES, and REID, JJ., concurred. STARR, J., did not sit.

PEOPLE *v.* BOMMARITO.

1. CRIMINAL LAW—SEPARATE AND DISTINCT OFFENSES.
   A person should not be subjected to trial for two separate and distinct offenses at one time.
2. SAME—ELECTION OF COUNTS—EVIDENCE.
   The people cannot be required to elect between counts where the offenses charged arose out of the same acts at the same time and the same testimony must be relied on for conviction.
3. INDICTMENT AND INFORMATION—DUPLICITY—MISJOINDER—GAMING—CONSPIRACY.
   Information containing 14 counts was not duplicitous nor was there misjoinder of counts because the various sections of

the penal code pertaining to gambling under which the information is laid may cover separate offenses where each count contained a charge of conspiracy to violate each designated section of the penal code (Act No. 328, §§ 301–306, 309, 372, Pub. Acts 1931).

4. ARREST—WITHOUT WARRANT.

A peace officer may arrest without a warrant when he has reasonable cause to believe that a felony has been committed and that person to be arrested has committed it (3 Comp. Laws 1929, § 17149, as amended by Act No. 84, Pub. Acts 1935).

5. SAME—WITHOUT WARRANT—GAMBLING PARAPHERNALIA.

Policeman's arrest without a warrant of persons in whose presence or on whose persons he found gambling paraphernalia while they were upon or near premises upon which all of them had been present under suspicious circumstances and to which he had gained peaceable access while entertaining a reasonable and honest belief that a felony had been committed by them under the circumstances was not an illegal arrest and seizure of their illegal property was proper (3 Comp. Laws 1929, § 17149, as amended by Act No. 84, Pub. Acts 1935; Act No. 328, §§ 301–306, 309, 372, Pub. Acts 1931).

6. CONSPIRACY—EVIDENCE.

In prosecution for conspiracy to violate the gaming laws where seizure of illegal property in possession of some of the conspirators was properly made it was admissible against all of the conspirators (3 Comp. Laws 1929, § 17149, as amended by Act No. 84, Pub. Acts 1935; Act No. 328, §§ 301–306, 309, 372, Pub. Acts 1931).

7. CRIMINAL LAW—PRIOR CONVICTIONS—EVIDENCE—INTENT.

In prosecution of four defendants, evidence as to prior convictions of three of them was inadmissible to establish guilt of defendants charged with conspiracy to violate the gaming laws but it is admissible to establish intent (3 Comp. Laws 1929, § 17320).

8. SAME—PRIOR CONVICTIONS—EXHIBITS—INTENT.

In prosecution for conspiracy to violate the gaming laws it was not error to use exhibits used in previous convictions of three of the four defendants for the purpose of showing intent (3 Comp. Laws 1929, § 17320).

9. CONSPIRACY—VIOLATION OF GAMING LAWS—EVIDENCE.

In prosecution for conspiracy to violate the gaming laws where there was testimony tending to establish connection between

company whose store was entered by policeman who made the arrest and another company not a party defendant nor owned or controlled by any of the defendants, testimony regarding activities of latter company was properly received (Act No. 328, §§ 301–306, 309, 372, Pub. Acts 1931).

10. SAME—SUFFICIENCY OF EVIDENCE.

In prosecution for conspiracy to violate the gaming laws, evidence *held*, sufficient to sustain verdict of guilty on all 14 counts (Act No. 328, §§ 301–306, 309, 372, Pub. Acts 1931).

Appeal from Recorder's Court of the City of Detroit; Van Zile (Donald), J. Submitted April 13, 1944. (Docket No. 65, Calendar No. 42,385.) Decided June 5, 1944. Rehearing denied June 30, 1944. Certiorari denied by Supreme Court of the United States November 20, 1944.

Joe Bommarito, Ed Carlton Lacy, Saul Kohn, and Edward Godderman Weisberg were convicted of conspiracy to violate the gaming law. Affirmed.

P. J. M. Hally, for appellants.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, *William E. Dowling,* Prosecuting Attorney, and *Raymond J. DeRyck* and *Henrietta E. Rosenthal,* Assistant Prosecuting Attorneys, for the people.

BUSHNELL, J. Defendants Bommarito, Lacy, Kohn and Weisberg were granted leave to appeal from sentences following their conviction under an information containing 14 counts, based upon conspiracy to violate the gaming law, Act No. 328, §§ 301–306, 309, 372, Pub. Acts 1931 (Comp. Laws Supp. 1940, §§ 17115–301—17115–306, 17115–309, 17115–372, Stat. Ann. §§ 28.533–28.538, 28.541, 28.604).

All of the defendants were apprehended in or near the premises located at 1431 Broadway in the city of Detroit, which was a store where phonograph records were sold by the "Swingland Record Com-

pany." Sergeant O'Brien of the Detroit police department had been observing the premises and had seen Weisberg and Kohn enter the place "carrying a leather zipper bag and a dirty cloth bag like a money bag they use in banks" and had "watched them go directly into the store, through the store and into the back room at the rear of the store" and later leave the place, carrying nothing. Several evenings afterwards he saw these same defendants come out of the premises. He then left and later that evening returned with other officers and at about 10:40 p. m., he saw Bommarito and Lacy drive up in a car out of which they took a leather bag, through the store and into the back room. He entered the open store and knocked on the door of the back room. When asked who was there, he mumbled "It is Eddie." The door was opened and he saw Bommarito emptying the contents of the bag upon a table where he observed a quantity of money and various gambling paraphernalia which he knew, from his experience as a police officer, was used in the policy, numbers and mutuel business. He placed Bommarito and Lacy under arrest and confiscated the money and gambling property. As he was leaving the premises with Bommarito and Lacy, he saw Kohn and Weisberg standing in front of the store, arrested them for investigation of conspiracy to violate the gambling law and, upon search, found other gambling paraphernalia in their possession. In the back room of the premises were two locked safes. Sergeant O'Brien obtained a search warrant for them and, upon opening the safes, they were found to contain gambling paraphernalia and over $7,000 in money.

Before the jury was sworn defendants filed a motion to quash all counts in the information except

one on the grounds of duplicity and misjoinder of counts, and to suppress the evidence claimed to have been unlawfully seized, both of which motions were denied. The jury found each of the defendants guilty on all of the 14 counts in the information.

Reversal is sought because of the court's failure to quash all but one count in the information, failure to suppress the evidence, error in the admission of prior convictions of Bommarito, Weisberg and Kohn, error in the admission of evidence of the activities of the so-called "Michigan Mutual Distributing Company," not a party defendant and not controlled or operated by any of the defendants, and because the evidence does not support a general verdict of guilty on all 14 counts.

In support of the claim of misjoinder in the information, appellants cite authorities which have to do generally with joinder of distinct and separate offenses where the elements of proof are not the same. There is no question but that the doctrine is well settled that a person should not be subjected to trial for two separate and distinct offenses at one time. *People* v. *Rohrer,* 100 Mich. 126. But it is also well settled that the people cannot be required to elect between counts where the offenses charged arose out of the same acts at the same time and the same testimony must be relied upon for conviction. *People* v. *Warner,* 201 Mich. 547. See, also, *People* v. *Marks,* 255 Mich. 271. The various sections of the penal code pertaining to gambling, under which the information is laid, may cover separate offenses, but we are not here concerned with separate offenses, as such, but rather with the identical charge in each count that defendants conspired and agreed together to violate each designated section of the penal code. By detailing each of the conspiracies separately,

conviction might properly follow on any one or all of the counts and yet result only in the conviction of the crime of conspiracy.

It is contended that evidence seized on the premises at the time of the arrests and that taken from the person of Kohn and from Weisberg's car at the time of their arrests should be suppressed on the ground that the arrests were illegal. It is true that the arrests were made without a warrant but any peace officer may arrest without a warrant "when he has reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person has committed it." 3 Comp. Laws 1929, § 17149, as amended by Act No. 84, Pub. Acts 1935 (Comp. Laws Supp. 1940, § 17149, Stat. Ann. § 28.874). The officer entered the open store and was admitted peaceably to the back room. There he saw gambling paraphernalia in the illegal possession of Bommarito and Lacy. This created a reasonable and honest belief that a felony had been committed, viz., a conspiracy to violate the gambling law. Their arrest without a warrant was justified and the seizure of the illegal property was proper and, as such, was admissible against all of the conspirators. *People* v. *Harter,* 244 Mich. 346. The same reasoning applies to the illegal property found on the person of Kohn and in the car of Weisberg after their arrest, because their presence on the premises at another time under suspicious circumstances and their presence nearby at the time of arrest of Bommarito and Lacy justified the arresting officer in suspecting them of connection with the conspiracy.

Appellants also urge that the court erred in admitting evidence as to prior convictions. The general rule is that such testimony is inadmissible to establish the guilt of defendants as to other distinct

and independent crimes, but such testimony is admissible to establish intent. 3 Comp. Laws 1929, § 17320 (Stat. Ann. § 28.1050), and authorities cited in *People* v. *Hopper,* 274 Mich. 418. Nor was the admission of exhibits used in previous convictions erroneous as showing intent.

There was testimony tending to establish connection between the "Swingland Record Company" and the Michigan Mutual Distributing Company and, therefore, testimony regarding the activities of the latter was properly received.

The record contains sufficient evidence to sustain a verdict of guilty on all 14 counts.

The several judgments are affirmed.

NORTH, C. J., and STARR, WIEST, BUTZEL, SHARPE, BOYLES, and REID, JJ., concurred.

In re GRAY.

1. CRIMINAL LAW—COURT JOURNAL—COMMITMENT PAPERS—CORRECTION OF MINISTERIAL ERRORS.

   Ministerial errors in court journal and commitment papers may be corrected pursuant to direction of the Supreme Court under its constitutional power and, by order *nunc pro tunc,* the record made to speak the judicial determination relative to the conviction and grounds for sentence imposed.

2. SAME—CORRECTION OF COURT JOURNAL AND COMMITMENT PAPERS.

   Where record in habeas corpus proceeding and ancillary writ of certiorari shows that, under information, charge of the

court and verdict of the jury, petitioner was convicted of the offense of "assault with intent to commit robbery while armed with a dangerous weapon" but journal entry of sentence and warrant for removal to prison recite he had been convicted of "attempted robbery armed," record is remanded to circuit court for proper correction of journal and issuance of supplemental commitment (3 Comp. Laws 1929, §§ 16723, 17342).

Habeas corpus proceeding by Charles Gray with accompanying certiorari to Genesee circuit judge to inquire into his detention by Warden of State Prison of Southern Michigan. Submitted April 27, 1944. (Calendar No. 42,676.) Release denied June 5, 1944.

Charles Gray, in pro. per.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, *Daniel J. O'Hara,* Assistant Attorney General, *John L. Roach,* Prosecuting Attorney, and *Leon A. S. Seidel,* Assistant Prosecuting Attorney, for the people.

SHARPE, J. Petitioner, Charles Gray, is confined in the State prison at Jackson, and seeks release by habeas corpus upon the theory that he was found guilty of "attempted robbery armed," which crime is punishable by imprisonment in the State prison "not more than five years, or in the county jail not more than one year," as was provided by 3 Comp. Laws 1929, § 17342; that he was illegally sentenced to serve a term of not less than 20 years, nor more than 35 years; and that the sentence which could have been legally imposed expired on November 21, 1935.

We issued the writ to inquire into the matter, and also an ancillary writ of certiorari to bring before us

the record of his conviction and sentence in the circuit court.

The information in the circuit court charged petitioner and one Guy Dennis, "on or about the 29th day of September, 1930, at the city of Flint, in said Genesee county, being then and there armed with a certain dangerous weapon, to wit: a revolver, in and upon one Joseph Henderson, in the peace of the people of the State of Michigan, then and there being, feloniously did make an assault, with intent the moneys, goods and chattels of the said Joseph Henderson, from the person and against the will of the said Joseph Henderson, then and there feloniously and violently to rob, steal, take and carry away."

On November 3, 1930, petitioner and Guy Dennis pleaded not guilty to the information. The cause came on for trial and at the completion of all testimony the trial court charged the jury as follows:

"Charles Gray, the defendant here, is charged as follows: On or about the 29th day of September, in the year 1930, at the city of Flint, in said Genesee county, being then and there armed with a certain dangerous weapon, to wit a revolver, in and upon one Joseph Henderson, in the peace of the people of the State of Michigan, then and there being, feloniously did make an assault with intent the moneys, goods and chattels of the said Joseph Henderson, from the person and against the will of the said Joseph Henderson, then and there feloniously and violently to rob, steal, take and carry away."

The jury returned a verdict of guilty as charged in the information, and on November 21, 1930, the trial judge pronounced sentence of 20 to 35 years, without recommendation. However, the journal entry of judgment or sentence and the warrant for

removal of the petitioner to State prison recite that Charles Gray, impleaded with Guy Dennis, has lately been "duly convicted of the crime of *attempted robbery armed.*"

The record does not sustain the claim of petitioner that he was found guilty of "attempted robbery armed." The information, charge of the court, and verdict of the jury clearly show that petitioner was convicted of the offense of "assault with intent to commit robbery while armed with a dangerous weapon." At the time petitioner was sentenced he could have been punished by imprisonment in the State prison for life or any number of years, by virtue of 3 Comp. Laws 1929, § 16723.

In *Re Rogers,* 308 Mich. 392, defendant pleaded guilty to the charge of breaking and entering in the nighttime designated premises, and stealing personal property. The journal entry of the court recorded him guilty of "grand larceny," but sentence was pronounced upon the charge laid in the information. We there said:

"The writ of certiorari has brought before us the proceedings in the circuit court and under our constitutional power, it being apparent that the errors in the court journal and the commitment of sentence are ministerial, the record is remanded to the circuit court with direction to make the same, *nunc pro tunc,* speak the judicial determination relative to the conviction and the grounds for the sentence imposed and a supplemental commitment issued and forwarded to the warden of the State prison at Jackson."

In the case at bar the entry in the court journal and the commitment do not conform to the true facts, and under the authority of *In re Rogers, supra,* the

record is remanded to the circuit court for proper correction of the journal. A supplemental commitment should be issued and forwarded to the warden of the State prison at Jackson.

Petitioner's application for release is denied.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, BOYLES, and REID, JJ., concurred.

EVANS *v.* ROSS.

1. MARRIAGE—ANNULMENT—STATUTES.

Prior to enactment of statute declaring void any marriage of female under the full age of 16 years except when performed by the probate judge, the marriage of a minor under the age of consent was voidable but the action for annulment could be instituted only by the minor (3 Comp. Laws 1929, §§ 12690, 12724, 12753).

2. STATUTES—CONSTRUCTION—PRESUMPTIONS—DECISIONS OF SUPREME COURT.

In construing various statutes pertaining to the same subject matter, it must be presumed that the legislature, in enacting the later statute, had in mind the decisions of the Supreme Court upon previous acts.

3. MARRIAGE—STATUTES—REPEAL BY IMPLICATION.

The statute making void the marriage of a female under the full age of 16 years repealed by implication previous statute making the marriage of minors under the age of legal consent voidable (3 Comp. Laws 1929, §§ 12704, 12753).

4. SAME—AGE OF LEGAL CONSENT—SUIT TO ANNUL—DETERMINATION OF AGE.

In 27-year-old husband's suit to annul a marriage that had been performed in 1943, brought against 15-year-old wife, there was nothing to annul since the marriage was void, the plaintiff being entitled merely to an adjudication as to the date of defendant's birth so that in case defendant were under the age of consent an order determining marriage to be void could be entered (3 Comp. Laws 1929, § 12704).

5. COSTS—CONSTRUCTION OF STATUTES.

No costs are allowed in husband's suit to annul a marriage where construction of a statute is involved (3 Comp. Laws 1929, §§ 12704, 12753).

Appeal from Jackson; Williams (Benjamin), J. Submitted April 5, 1944. (Docket No. 25, Calendar No. 42,661.) Decided June 5, 1944.

Bill by Gilbert H. Evans against Betty Jane Ross to annul a marriage because defendant was under age. Decree for defendant. Plaintiff appeals. Reversed and remanded for further proceedings.

John J. Gallagher, for plaintiff.

SHARPE, J. Plaintiff filed a bill of complaint to have his marriage to defendant declared void. The facts are not in dispute. A marriage ceremony between Gilbert H. Evans and Betty Jane Ross was performed on April 16, 1943, at Jackson, Michigan. The application for a license stated that Gilbert H. Evans was 27 years of age and that Betty Jane Ross was 19 years of age. As a matter of fact Betty Jane Ross was 15 years of age at the time of the marriage. The parties separated prior to her 16th birthday and have not cohabited together since. The bill of complaint was filed prior to defendant's 16th birthday. When the cause came on for trial, and after the taking of some testimony, the trial judge dismissed the bill of complaint by virtue of 3 Comp.

Laws 1929, § 12753 (Stat. Ann. § 25.110), which reads as follows:

"A bill to annul a marriage on the ground that one of the parties was under the age of legal consent, may be exhibited by the parent or guardian entitled to the custody of such minor; or by the next friend of such minor; but in no case shall such marriage be annulled on the application of a party who was of the age of legal consent at the time of the marriage, nor when it shall appear that the parties, after they had attained the age of consent, had freely cohabited as man and wife."

Plaintiff appeals and urges that 3 Comp. Laws 1929, § 12704 (Stat. Ann. § 25.21), repeals by implication 3 Comp. Laws 1929, § 12753* (Stat. Ann. § 25.110), and that under the later statute a man of full age may bring an action to have a marriage to a girl under 16 years of age declared void.

Prior to the enactment of Act No. 352, Pub. Acts 1921 (3 Comp. Laws 1929, § 12704 [Stat. Ann. § 25.21]), the law as to the age of consent read as follows:

"Every male who shall have attained the full age of eighteen years, and every female who shall have attained the full age of sixteen years, shall be capable in law of contracting marriage, if otherwise competent." 3 Comp. Laws 1929, § 12690 (Stat. Ann. § 25.1).

The effect of a marriage solemnized between parties under legal age was as follows:

"In case of a marriage solemnized when either of the parties was under the age of legal consent, if they shall separate during such nonage, and not cohabit together afterwards, or in case the consent of one of the parties was obtained by force or fraud,

* 3 Comp. Laws 1929, § 12753, is Rev. Stat. 1846, chap. 84, § 34, and was last amended by Act No. 150, Pub. Acts 1848.—REPORTER.

and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be deemed void without any decree of divorce or other legal process." 3 Comp. Laws 1929, § 12724 (Stat. Ann. § 25.82).

The law limiting the rights of the applicant for annulment of marriage was as stated in 3 Comp. Laws 1929, § 12753 (Stat. Ann. § 25.110).

Under the above act the marriage was voidable. The minor was the only person in whose behalf an action could be commenced.

In *May* v. *Meade,* 236 Mich. 109, the validity of a marriage consummated prior to the effective date of Act No. 352, Pub. Acts 1921, was questioned in a workmen's compensation case. The husband and wife cohabited together after the minor attained the age of consent. We there held that by reason of cohabitation of the parties after the minor became of marriageable age the marriage became valid *ab initio* and the husband could not assert its invalidity.

See, also, *People* v. *Slack,* 15 Mich. 193; *People* v. *Pizzura,* 211 Mich. 71 (10 A. L. R. 405).

The following is the pertinent part of Act No. 352, Pub. Acts 1921 (3 Comp. Laws 1929, § 12704 [Stat. Ann. § 25.21]):

"No marriage, common law or ceremonial, in this State shall be contracted where the female is under the full age of 16 years, and any such marriage, if entered into, shall be void."

It must be presumed that the legislature in enacting the above act had in mind the decisions of our court upon the previous acts referred to. The language used strongly indicates that it was the intention of the legislature to make such marriages void, except marriages performed by the judge of probate.

It follows that 3 Comp. Laws 1929, § 12753 (Stat. Ann. § 25.110), being in conflict with 3 Comp. Laws

1929, § 12704 (Stat. Ann. 25.21), the latter repeals the former by implication.

The marriage being void, there was nothing to annul, but plaintiff had a right to an adjudication as to the date of the birth of Betty Jane Ross. If Betty Jane Ross was under the age of consent at the time the marriage ceremony was entered into, then an order should be entered determining said marriage to be void.

The cause is remanded to the trial court for further proceedings in harmony with this opinion. No costs are allowed as the construction of a statute is involved.

NORTH, C. J., and STARR, BUTZEL, BUSHNELL, BOYLES, and REID, JJ., concurred with SHARPE, J. WIEST, J., concurred in the result.

MOUNT CLEMENS SAVINGS BANK *v.* STATE LAND OFFICE BOARD.

1. TAXATION—SCAVENGER SALE—NATURE OF RIGHT OF FORMER OWNER TO MATCH BID.

The right of a former owner to meet the highest bid made at a so-called scavenger sale is not a condition upon which the State acquired title absolute to lands which had been deeded to the State by the auditor general because of tax delinquency but is merely a contingent right which does not become a vested right until a sale has been made by the State to the highest bidder (Act No. 155, § 7, Pub. Acts 1937, as amended).

2. SAME—WITHHOLDING OF STATE-OWNED LANDS FROM PUBLIC SALE.
Parcels of land to which the State has acquired title because of nonpayment of taxes may be omitted from public sale without giving monetary consideration to the former owner of the land (Act No. 155, § 5, Pub. Acts 1937, as amended).

3. SAME—SCAVENGER SALE—MATCHING THE HIGHEST BID.
The privilege of matching the highest bid at a so-called scavenger sale applies only to such land as the State may have on the date of sale (Act No. 155, § 7, Pub. Acts 1937, as amended).

4. SAME—TITLE OF TAX-DELINQUENT LANDS—FORMER OWNER—CONDEMNATION BY FEDERAL GOVERNMENT—PARTICIPATION IN AWARD.
The former owner of lands to which the State had acquired title because of nonpayment of taxes and which were condemned by the Federal government before so-called scavenger sale thereof was held by the State had no interest in the land, merely a privilege of matching the bid if and when a sale was made, hence such former owner was not entitled to participate in the award made on condemnation proceedings (Act No. 155, §§ 5, 7, Pub. Acts 1937, as amended).

5. COSTS—PUBLIC QUESTION—TAX-DELINQUENT LANDS—CONDEMNATION BEFORE SCAVENGER SALE.
No costs are allowed in suit to determine former owner's right to participate in award made when Federal government condemned lands to which the State had title absolute and before lands were sold at so-called scavenger sale, a public question being involved (Act No. 155, Pub. Acts 1937, as amended).

Appeal from Macomb; Des Jardins (George W.), J., presiding. Submitted April 7, 1944. (Docket No. 55, Calendar No. 42,706.) Decided June 5, 1944.

Petition by Mount Clemens Savings Bank against State Land Office Board for declaration settling the rights of parties in a fund paid upon condemnation of land. Judgment for plaintiff. Defendant appeals. Reversed.

Nunneley & Nunneley, for plaintiff.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Elbern Parsons,* Assistant Attorney General, for defendant.

SHARPE, J. Petitioner filed a petition in the circuit court of Macomb county for a declaration of rights as to who is entitled to condemnation moneys paid by the Federal government. The facts are not in dispute. The petitioner, Mount Clemens Savings Bank, acquired the lots in question in 1932. Because of unpaid taxes the lots in question were bid to the State of Michigan at the 1939 tax sale, and on November 29, 1940, the property was deeded to the State by the auditor general. The property was due to be put up for sale at public auction by the State land office board under the provisions of Act No. 155, Pub. Acts 1937, as amended (Comp. Laws Supp. 1940, § 3723–1 *et seq.,* Stat. Ann. 1940 Cum. Supp. § 7.951 *et seq.*), at the regular public auction sale conducted by said board which began February 2, 1941. No sale of the lots was conducted on that date owing to the fact that the United States seized the title of the property by condemnation petition with declaration of taking. The award on condemnation which has been tendered by the United States is approximately $3,000. The amount of delinquent taxes cancelled by vesting title in the State was substantially the full amount of the award.

Petitioner, claiming that if the condemnation had not intervened it would have acquired the property at the State land office board sale for $760, and that it had been deprived of that right by the action of the United States in seizing the title before such a sale was made, filed a motion in the United States district court for the eastern district of Michigan asking for a distribution of the award of approximately $3,000 as follows: $760 to the State

land office board, and the balance to petitioner, as owner of the property prior to vesting of title in the State. The petition in the district court is being held in abeyance until the ownership of this fund is established in the State court. The trial court, after hearing the cause, entered a declaratory judgment in favor of petitioner in which it was determined that the State of Michigan was entitled to $760, and petitioner entitled to the balance, in the distribution of the condemnation award in question. The State land office board appeals and urges that the State, as absolute fee title owner of the lands in question on the date of seizure by the United States, was entitled to the entire award.

Petitioner urges that it had a granted, special right to acquire title to this property at a mandatory public sale; that this right is private property within the meaning of the constitutional provisions, and having been taken for public use must be compensated for to the extent of its value.

In *James A. Welch Co., Inc.,* v. *State Land Office Board,* 295 Mich. 85, 93, the State land office board, at the request of the city of Flint, withheld from sale certain lands formerly owned by plaintiff. Later, plaintiff filed a petition for a writ of mandamus to require the State land office board to proceed with the sale of said lands. We there said:

"On November 3, 1939, plaintiff ceased to have any more interest in the title to the lands described in its petition than any stranger to that title. The State, however, granted to it a right or privilege for a 30-day period after the sale of the land at the so-called scavenger sale, to acquire title by meeting the highest bid. Act No. 155, § 7, Pub. Acts 1937, as amended. The purchaser at this sale makes his bid subject to the statutory privilege or right of the former party in interest to meet the highest bid. The right of plaintiff to meet the highest bid is not

a condition upon which the State acquired title absolute to the lands in question. This privilege could not under any circumstances accrue to plaintiff or become a vested right in it until a sale has been made by the State to the highest bidder. It is only upon the acceptance by the State of the highest bid that the statutory right of the former owner to meet such highest bid becomes operative and permits the former owner to acquire the title in the manner provided by the statute. Until such sale, it is not a present vested right or a present interest; it is a mere contingent right which may or may not happen."

In *Arner* v. *Riser,* 305 Mich. 619, we said:

"The State sold its own property and the only right plaintiff had was to bid at the sale like anyone else and the privilege to match any higher bid within a specified time."

See, also, *National Bank of Detroit* v. *State Land Office Board,* 300 Mich. 240; *Cobleigh* v. *State Land Office Board,* 305 Mich. 434.

Under section 5 of the act parcels of land may be omitted from public sale without giving monetary consideration to the former owner of the land. It must be assumed that the State intended that the privilege of matching the bid applies only to such land as it might have on the date of sale. The owner has no interest in the land. He only has a privilege of matching the bid if and when a sale is made. The trial court was in error in holding that plaintiff was entitled to any part of the award.

The judgment is reversed and a judgment will be entered in favor of defendant. No costs are allowed as a public question is involved.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, and BOYLES, JJ., concurred. REID, J., did not sit.

PEOPLE *v.* SCHNEIDER.

1. CRIMINAL LAW—CHANGE OF VENUE—MISTRIAL—NEW TRIAL—LOCAL PREJUDICE.

   Generally a change of venue, a mistrial or a new trial will be granted in a criminal case when a community is so aroused that a fair and impartial trial cannot be had.

2. JURY—NEWSPAPER REPORTS—OPINIONS—PREJUDICE.

   Newspaper reports are ordinarily regarded as too unreliable to influence a fair-minded man when called to act as a juror and although he may have formed an opinion from reading such reports, he is competent if he states he is without prejudice and can try the case impartially according to the evidence and the court is satisfied that he will do so.

3. CRIMINAL LAW—CONTINUANCE WITHIN DISCRETION OF COURT.

   The continuance of a criminal case is within the sound discretion of the trial court.

4. CONTINUANCE—BURDEN OF PROOF.

   A party claiming an abuse of discretion in the denial of a motion for a continuance has the burden of proving it.

5. CRIMINAL LAW—CONTINUANCE—DISCRETION OF COURT—PREJUDICE.

   To warrant finding an abuse of discretion in the denial of a motion for continuance by a defendant in a criminal case, prejudice to him must be apparent or proved to have been at least probable.

6. SAME—CONTINUANCE—DISCRETION OF COURT—NEWSPAPER REPORTS—PREJUDICE.

   The denial of a motion for continuance in a criminal case did not constitute an abuse of discretion where defendant's counsel announced that he was satisfied with the jurors selected after they had been questioned concerning their fitness to sit as jurors in trial of a county auditor on charge of accepting a bribe and trial took place shortly after the

appearance of newspaper reports pertaining to corruption among the local county officers (Act No. 328, § 118, Pub. Acts 1931).

7. BRIBERY—EVIDENCE—COUNTY AUDITOR—CAMPAIGN EXPENSES.
In prosecution of county auditor for accepting a bribe where insurance agent had testified that he had an agreement with defendant to contribute a portion of his commission to defendant's campaign fund in return for county business, the admission of signed and verified statements of campaign expenses of defendant for his office and of the treasurer of his campaign committee was harmless error where the statements failed to show the agent had made a contribution since the gist of the offense is the acceptance of a bribe, not the use to which the bribe money was put (Act No. 328, § 118, Pub. Acts 1931).

8. CRIMINAL LAW—IRREGULARITIES—FAIR AND IMPARTIAL TRIAL.
On appeal from judgment of conviction of crime, the test is not whether there were some irregularities in the trial but whether defendants had a fair and impartial trial.

9. BRIBERY—SOLICITATION OF A BRIBE.
The soliciting of a bribe is a complete common-law offense.

10. SAME—PERFORMANCE OF AGREEMENT INVOLVING BRIBERY.
The fact that an agreement involving bribery is not carried out does not make it any the less bribery for when the agreement is consummated the offense is complete.

11. SAME—ACCEPTANCE OF BRIBE—REQUEST TO CHARGE.
In prosecution of a member of the board of county auditors for accepting a bribe from an insurance agent, it was not error for trial court to refuse to give requested instruction that it was necessary to show the proper official records of the board to establish what action was taken by it in the matter of awarding business to insurance agent before jury could find defendant corruptly exercised or agreed to exercise his vote in a particular manner in the matter (Act No. 328, § 118, Pub. Acts 1931).

12. SAME—ACCEPTANCE OF BRIBE—SUFFICIENCY OF EVIDENCE.
In prosecution of one of the county auditors for accepting a bribe, competent evidence *held*, sufficient to permit jury to find defendant guilty (Act No. 328, § 118, Pub. Acts 1931).

Appeal from Recorder's Court for the City of Detroit; Maher (John J.), J. Submitted April 13,

1944. (Docket No. 66, Calendar No. 42,471.) Decided June 5, 1944.

Ray D. Schneider was convicted of accepting a bribe. Affirmed.

Frank G. Schemánske, for appellant.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, *William E. Dowling,* Prosecuting Attorney, and *John W. Gilmore* and *Henrietta E. Rosenthal,* Assistant Prosecuting Attorneys, for the people.

SHARPE, J. Defendant, one of the county auditors of Wayne county, was arrested, charged and convicted of the crime of accepting a bribe, contrary to the provisions of section 118 of the penal code, Act No. 328, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 17115–118, Stat. Ann. § 28.313). The information charged defendant with receiving money from Edgar M. Robbins in pursuance of an unlawful agreement and understanding that his vote, opinion, judgment or influence would favor the awarding of contracts of insurance to the said Edgar M. Robbins. The cause was set for trial for September 16, 1942, but a mistrial was declared on September 21, 1942, by reason of the following article appearing in the Detroit Free Press, a newspaper published in the city of Detroit:

"GOOD MONEY AFTER BAD

"Ray D. Schneider, ousted Wayne county auditor charged with accepting bribes, has been brought to trial. A great deal of public money has been spent to establish that evidence against him warrants presentation of the case to the jury. A further substantial sum must go out of the tax-supported coffers to determine his guilt or innocence.

"Nor is there ground to hope that should the present jury convict Schneider it would terminate this outlay. If he chooses, the ex-auditor can protract the processes of justice indefinitely—as witness former Prosecutor Duncan C. McCrea, and former Sheriff Thomas C. Wilcox. Long since convicted of betraying the public's trust, they still are free men by reason of appeal processes.

"Other Wayne county officials and appointees—among them another former auditor, Edward H. Williams—accepted jury findings without taking recourse to further court fights and are now in prison. Having cheated Wayne county's taxpayers out of scores of thousands of dollars by their malfeasances, having put the State and county to the cost of trying them, they are now being supported by the State as inmates of institutions.

"Altogether, Michigan's taxpayers have taken a thorough financial drubbing from corrupt officials in this county. With the opportunities for pilfering Wayne's present governmental form offers, it is inevitable that sooner or later another gang of rogues will take it over. Then the whole costly, shameful process will have to be gone through again—with every taxpayer in Michigan as the ultimate sucker."

On October 4, 1942, a day before the trial of defendant was to commence, the Detroit News, a newspaper published in the city of Detroit, published the following editorial:

"MICHIGAN VOTERS ARE ASKED TO HELP WAYNE'S PROGRAM

"Once again we appeal to all decent, law-respecting out-State voters for their support of Proposal No. 2, the amendment to give Wayne county a chance to reform its government.

"Voters like you often have been disgusted by political goings-on in Wayne.

"Rest assured you have not been alone in that feeling, which is shared here in Wayne county by good citizens like yourselves. Long ago the decent citizens of Wayne recognized the need for reform, as well as the kind of reform needed. Two attempts have been made to get a more responsible form of government, both wrecked by political shysters aided, as it developed, by your indifference out-State.

"With the present attempt, we in Wayne county feel it is now or never. The Judge Ferguson grand jury just has finished turning up evidence of county graft that is a stench in the nostrils of all Michigan. Two auditors, a sheriff and a prosecutor have been convicted, as well as a number of lesser officials and former officials.

"We in Wayne county feel that if this will not arouse the out-State voter to come to our assistance, nothing will. Here is the clinching evidence that our big industrial county, with its more than 2,000,000 population, simply can not have proper government with the present governmental forms.

"Maybe the present form gives reasonable satisfaction in YOUR county. It doesn't here. Here it means a board of supervisors bigger than most State legislatures. It means a dozen 'executives' to be voted on, whom not one voter in a thousand can name, let alone keep track of. Here in Wayne this is a set-up for corrupt machine government, and that is what we get.

"The amendment we ask you to support as proposal No. 2 provides for a simplified government, with only one county executive and a small legislative body. It calls for nonpartisan voting and the hiring of county employees under civil service restrictions. It provides, in short, for the kind of government Wayne can hope to hold responsible. * * *

"People are going to tell you, perhaps in the last days of the campaign, that this is all right but why

not leave it to the legislature. We've tried that and failed, because machine politicians were strong enough to sabotage the legislation. People are going to tell you that, even if an amendment is necessary, voting on it is Wayne's problem, not yours.

"Ask those people why, then, they are so eager to beat Wayne's amendment!

"The truth is, this is your problem. Only your votes, plus ours, can put the amendment over, against the combined opposition of the machine out-State and the county machine here. It is your problem because Wayne is a part of Michigan and what dirties Wayne politics dirties politics the State over.

"The decent citizens of Wayne county are counting on you in this, their greatest and final effort to clean up Wayne county. Will you help?"

On October 5, 1942, counsel for defendant moved for an adjournment because of the proximity of the date of the trial to the date of the Detroit Free Press article and the Detroit News editorial. At the request of the trial court all members of the jury were questioned in their *voir dire* examination with regard to the above articles, and all denied any prejudice as a result of reading or hearing about the articles. The motion for adjournment was denied and the cause proceeded to trial, resulting in conviction of defendant. Defendant appeals and complains that he was not accorded a fair trial by reason of the trial having taken place so soon after the publication of the above articles; that it was error to offer and receive in evidence certain exhibits which were expense accounts of defendant as a candidate for county auditor; and for failure to give an instruction, later referred to.

It is to be noted that before a jury was selected the trial judge made the following statement:

"The court will not proceed with the trial if we cannot find a jury of twelve people who are fair and impartial, but first I want to find out whether we can or whether we can't."

The record shows that there was no challenge to the array, no motion for change of venue, nor did defendant's counsel exhaust his peremptory challenges.

The general rule in Michigan is that a change of venue, a mistrial or a new trial will be granted when a community is so aroused that a fair and impartial trial cannot be had.

In *People* v. *Swift,* 172 Mich. 473, we quoted with approval from 24 Cyc. p. 298, where the rule is announced:

"Newspaper reports are ordinarily regarded as too unreliable to influence a fair-minded man when called upon to pass upon the merits of a case in the light of evidence given under oath; and it is now a well-settled rule that a juror, although he may have formed an opinion from reading such reports, is competent if he states that he is without prejudice and can try the case impartially according to the evidence, and the court is satisfied that he will do so."

In *People* v. *Raider,* 256 Mich. 131, counsel had requested a continuance after the three leading newspapers of the city of Detroit had carried articles of the arrest of some of the witnesses charged with perjury and had mentioned that defendant was to have an early trial. We there said:

"Continuance was within the sound discretion of the court. The burden is on the party claiming abuse of discretion to show it. Prejudice to defendant must be apparent or proved to have been at least probable."

In the case at bar, defendant's counsel having announced that he was satisfied with the jurors selected, after the jurors had been questioned concerning their fitness to sit as jurors in this particular case, we find no abuse of discretion on the part of the trial court in denying the motion for a continuance.

It is also urged that the admission of exhibits 20, 21 and 22 was reversible error. The exhibits referred to were the signed and verified statements of campaign expenses of defendant, Ray D. Schneider, for the office of county auditor of Wayne county, and of the treasurer of defendant's campaign committee, and were introduced by the prosecution after the people's witness, E. M. Robbins, testified that he had an agreement with defendant to contribute a portion of his commission to defendant's campaign fund in return for county business. The exhibits failed to show that E. M. Robbins made any contribution to the campaign expenses of Ray D. Schneider, defendant, as a candidate for the office of county auditor.

Under the foregoing section of the penal code, the gist of the offense is the acceptance of a bribe. The purpose for which bribe money is used has no bearing upon the guilt or innocence of one so charged.

The admission of these exhibits in evidence was at most a harmless error.

In *People* v. *O'Hara,* 278 Mich. 281, 306, we said:

"The test is not whether there were some irregularities, but instead did the defendants have a fair and impartial trial."

It is also urged that the trial court was in error in failing to give the following requested charge:

"I charge you further that before you can find that the defendant corruptly exercised or agreed to exercise his vote in a particular manner on the ques-

tion of awarding contracts for insurance to Edgar M. Robbins, doing business as Robbins Insurance Agency, it is incumbent upon the State to show the proper official records of the board of Wayne county auditors to establish what action was taken by such board in the matter."

In *People* v. *Hammond,* 132 Mich. 422, we held that the soliciting of a bribe is a complete common-law offense, though the person solicited refused to cooperate.

In 8 Am. Jur. p. 890, the rule is stated to be:

"The fact that an agreement involving bribery is not carried out does not make it any the less bribery. The agreement is the essence of the offense; when that is consummated, the offense is complete. Failure of an executive officer to abide by his agreement upon a money consideration not to take official action in a certain case does not relieve his agreement not to do so from the character of bribery."

In *State* v. *Lehman,* 182 Mo. 424 (81 S. W. 1118, 66 L. R. A. 490, 103 Am. St. Rep. 670), it is said:

"It is not necessary, in order to constitute bribery, that the vote of the public official bribed should be on a measure that could be enforced. The crucial test may thus be stated: 'Is a matter pending before the officer in his official capacity, or one that may be brought before him in such capacity?' It is not a question as to the force and vitality of the ordinance pending; it was a subject that the municipal assembly had the right to legislate upon; the ordinance was pending before it; defendant was a member of that assembly; he was not only authorized to vote upon it, but it was his duty to do so, and any corrupt agreement or promise, which had for its purpose an improper influence upon his action in respect to said measure, has all the elements of bribery under the statute, and it makes no difference whether the measure is a valid one or not."

Section 118 of the penal code (Comp. Laws Supp. 1940, § 17115–118, Stat. Ann. § 28.313) reads as follows:

"Any executive, legislative or judicial officer who shall corruptly accept any gift or gratuity, or any promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with an understanding that his vote, opinion or judgment shall be given in any particular manner, or upon a particular side of any question, cause or proceeding, which is or may be by law brought before him in his official capacity, or that in such capacity, he shall make any particular nomination or appointment, shall forfeit his office, and be forever disqualified to hold any public office, trust or appointment under the Constitution or laws of this State, and shall be guilty of a felony, punishable by imprisonment in the State prison not more than ten years, or by fine of not more than five thousand dollars.

Under the above section of the penal code the action taken by the board of auditors of Wayne county is not an element of the offense charged. The trial court was right in refusing to give the requested instruction.

It is also urged that the verdict is against the great weight of the evidence. We have examined the record carefully and conclude that there was competent evidence upon which a jury could find the defendant guilty of the crime charged.

The judgment is affirmed.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, BOYLES, and REID, JJ., concurred.

LAWLOR *v.* CITY OF DEARBORN.

WALLER *v.* SAME.

1. MUNICIPAL CORPORATIONS—SEALERS OF WEIGHTS AND MEASURES—STATUTES.

   The authority to enact an ordinance creating the office of city sealer of weights and measures is conferred upon cities by statute (1 Comp. Laws 1929, § 5538).

2. SAME—SEALERS OF WEIGHTS AND MEASURES—SPECIAL POLICEMEN—POLICE DEPARTMENT—CIVIL SERVICE.

   The mere fact that the statute authorizing cities to create the office of city sealer of weights and measures provides that the enforcing officers are to be "special policemen" does not make appointees of a city members of its police department so as to exempt them from classified civil service under city charter (1 Comp. Laws 1929, § 5540; Dearborn Charter of 1929, amendment of 1935, §§ 5, 15).

3. SAME—CHARTERS—CIVIL SERVICE—CERTIFIED EMPLOYEES.

   Under new city charter provisions pertaining to retention of employees under the classified civil service where it was required that persons holding positions in such service would be retained without preliminary or performance tests, in case they had been certified by the prior civil service commission, recently appointed employees who had not been so certified were not entitled to benefits of such provision of new charter (Dearborn Charter of 1943, chap. 9, § 9.9).

4. SAME—CHARTERS—CIVIL SERVICE—UNCERTIFIED EMPLOYEES.

   Under provisions of new city charter pertaining to civil service where employees had not been certified by previously existing civil service commission as regular or permanent employees, they were subject to new charter provisions and the rules adopted thereunder (Dearborn Charter of 1943, chap. 9, § 9.9).

5. SAME—ASSISTANT SUPERINTENDENTS OF WEIGHTS AND MEASURES —CIVIL SERVICE—INCUMBENTS.

The opinion of corporation counsel, that incumbents of positions as assistant superintendents of weights and measures, appointed pursuant to previous city charter but not certified by then-existing civil service commission and who were first continued as temporary employees under new charter operating with similar rules as to civil service employees, were entitled to the positions and salaries thereof as against plaintiffs who had highest ratings on promotional employment list, was no justification for certification of incumbents for permanent employment contrary to plain mandate of charter (Dearborn Charter of 1943, chap. 9, § 9.9).

6. SAME—CIVIL SERVICE—CERTIFICATION AS TO PERMANENT EMPLOYMENT—DISCRETION OF COMMISSION.

A municipal civil service commission which certified incumbents for permanent employment as assistant superintendents of weights and measures after adoption of new charter exceeded its authority where incumbents did not receive the highest ratings in the promotional list and, since they had not been certified by previous civil service commission, were not entitled to permanent employment without examination and charter required certification of plaintiffs as the persons highest on such list, the commission having no discretion to exercise in case presented (Dearborn Charter of 1943, chap. 9, §§ 9.6, 9.9).

7. SAME—CIVIL SERVICE—PROMOTIONAL EMPLOYMENT LIST—CERTIFICATION—INSTALLATION IN EMPLOYMENT.

Plaintiffs who ranked highest on promotional employment list for office of assistant superintendents of weights and measures were entitled to certification by civil service commission and installation in such positions by the superintendent under mandatory city charter provisions (Dearborn Charter of 1943, chap. 9, §§ 9.6, 9.9).

8. COSTS—PUBLIC QUESTION—CIVIL SERVICE APPOINTMENTS.

No costs are allowed in suits to compel certification of plaintiffs as assistant superintendents of weights and measures pursuant to civil service provisions of city charter, a public question being involved (Dearborn Charter of 1943, chap. 9, §§ 9.6, 9.9).

Appeal from Wayne; Friedman (William), J. Submitted May 17, 1944. (Calendar No. 42,639.) Decided June 5, 1944.

Separate petitions by James Lawlor and Charles H. Waller for writ of mandamus to compel the City of Dearborn and certain of its officers to install plaintiffs in position of assistant superintendents of weights and measures. Defendants review issuance of writs by appeal in nature of certiorari. Affirmed.

Floyd T. Schermerhorn, for plaintiffs.

Dale H. Fillmore, Corporation Counsel, and *Richard A. Hicks,* Assistant Corporation Counsel, for defendants.

BOYLES, J. These consolidated cases involve the construction of an amendment to the city charter of Dearborn adopted in 1935, providing for a civil service commission; a new city charter effective January 6, 1943, re-creating the civil service commission and defining the status of officers and employees holding positions when this charter took effect; and the action of the defendants in refusing plaintiffs employment by the city. The circuit court for Wayne county granted writs of mandamus directing defendants to install plaintiffs in the position of assistant superintendents of weights and measures for the defendant city. Upon leave granted, defendants prosecute appeal in the nature of certiorari from the orders of the circuit court granting the writs. The facts are not in dispute.

In 1935 the city of Dearborn amended section 34 of chapter 6 of its then-existing charter to provide for a civil service commission to govern and control

the appointment of employees of the city of Dearborn. This charter remained in full force and effect until a new charter covering civil service, among other things, became effective January 6, 1943. On December 29, 1942, the city council adopted ordinance 216, creating a department of licenses, weights and measures, and two positions of assistant superintendents of weights and measures. Statutory authority for this ordinance is found in 1 Comp. Laws 1929, § 5538 (Stat. Ann. § 12.1076), which provides in part:

"Any incorporated city in this State may in its discretion appoint a city sealer of weights and measures under this act. He shall be appointed by the mayor, by and with the advice and consent of the common council."

On December 30, 1942, the mayor of the city of Dearborn appointed one Karmann and one Neary as assistant superintendents of weights and measures. On the same day, the appointments were approved at a meeting of the common council, and Messrs. Karmann and Neary both took the oath of office and thereupon began to discharge the duties of the office.

The city charter (1929) in effect at that time had a chapter inserted by amendment in 1935 providing for classified civil service for city employees, to be administered by a civil service commission. Section 5 provided:

"*Classified City Service* * * *

"The commission shall classify all positions and employment in the city of Dearborn to which appointments are made by any person or persons. The positions and employment so classified by the commission shall constitute the classified service of the city of Dearborn, and no appointment to any such

position or employment shall be made except under and according to the rules herein mentioned after the promulgation thereof."

The charter then in effect did not include the positions now under consideration among those exempt from civil service. Section 15 provided:

"*Exemption from Civil Service*

"The following officers and employees shall not be affected by the provisions of this chapter: officers elected by the people; officers and heads of departments appointed by the mayor; registrars, inspectors, supervisors, clerks and other assistants of elections; the mayor's secretary and other office assistants; officers and members of the fire department and of the police department; persons employed as experts under provisions of section 33 of chapter 6 of the charter of the city of Dearborn."

In that connection, defendants claim that the position of assistant superintendent of weights and measures is exempt from civil service under the above provision because the State law (1 Comp. Laws 1929, § 5540 [Stat. Ann. § 12.1077]) makes the deputy and the inspectors of the city superintendent of weights and measures "special policemen." The mere fact that they were made "special policemen" by the State act, obviously for the purpose of enforcing the act, did not make these appointees "members of the * * * police department" of the city so as to exempt them from classified service under other provisions of the city charter.

Pursuant to the mandate in section 5 of that charter, the then-existing civil service commission made orders and rules classifying positions and employment in civil service, as follows:

"Rule 1. * * *

"c. 'Position' means any office or place of employment in the classified service with duties and

responsibilities calling for the full time or part time employment of one person in the performance and exercise thereof.

"d. 'Permanent position' means any position in the classified service which has required or which is likely to require the services of an incumbent without interruption for a period of more than six months. * * *

"Rule 6.

"SEC. 7. (a) Jurisdictional Classification. The unclassified service shall be comprised of officers elected by the people, officers and heads of departments appointed by the mayor, registrars, inspectors, supervisors, clerks and other assistants of elections, the mayor's secretary and other office assistants. All such officers and employees shall be exempt from the provisions of these rules or any amendments thereto.

"SEC. 7. (b) Classified Service. The classified service shall be comprised of all positions, except those mentioned in section 7 (a), which are hereby declared subject to the provisions of these rules or any duly authorized amendments thereto."

We conclude from the foregoing charter provisions and the rules of the city civil service commission then in effect prior to the new charter, and in effect at the time that Messrs. Karmann and Neary were appointed to the position of assistant superintendents of the department of weights and measures, that this position was in the classified service.

On January 2, 1943, before the new charter went into effect, the city superintendent of the department of weights and measures requested the then-existing civil service commission to certify Karmann and Neary for the position of assistant superintendent in accordance with the terms and provisions of the original civil service law and the rules then in effect. Nothing was done on this request by the

civil service commission then in existence, but action was taken on January 8, 1943, by the new civil service commission provided for in the new charter. This will be considered later.

Chapter 9, § 9.8, of the new charter, effective January 6, 1943, defines unclassified and classified service as follows:

"The unclassified service shall comprise offices and positions held by:

"(a) Members of the city council and other elective city officers,

"(b) Corporation counsel and his chief assistant or deputy,

"(c) Elections inspectors,

"(d) Chief of the fire department,

"(e) Chief of police,

"(f) Directors and members of commissions and boards in charge of departments of the government of the city.

"The classified service shall include all other positions, now existing or hereafter created, and the provisions of this chapter shall apply thereto."

It is apparent from the foregoing that the position of assistant superintendent of weights and measures is within the classified service under the new charter. It then becomes necessary to determine whether Karmann and Neary, occupying those positions in the classified service under the former charter and rules of the civil service commission, were "blanketed" into the classified service under the new charter by any of its provisions, or by rules of the new civil service commission in pursuance thereof. Chapter 9, § 9.9, of the new charter defines the status of officers and employees holding positions when the charter took effect. It consists of three sentences, each covering a different situation, and they will be considered seriatim. The first situation covered is as follows:

"Except as provided in the preceding section, any person holding a position in the city classified service when this charter takes effect who shall have been properly certified by any civil service commission existing at the time of the adoption of this charter shall be retained without preliminary or performance tests and shall thereafter be subject in all respects to the provisions of this chapter."

As has been pointed out, Messrs. Karmann and Neary, although holding a position in the classified service when the new charter took effect, had not been certified by the then civil service commission and therefore were not entitled to be retained without preliminary or performance tests, under the above provision in section 9.9.

The second situation covered by section 9.9 is as follows:

"Except as otherwise provided in this charter, any persons who are serving in positions which positions were previously in the classified service as determined by any civil service commission existing at the time of the adoption of this charter, and who were not properly certified by such commission as regular or permanent employees, shall be subject to the provisions of this charter and the rules adopted thereunder."

Messrs. Karmann and Neary were serving in positions which *positions* were in the classified service under the old charter, as determined by the civil service commission existing at the adoption of the new charter. They had not been certified by that commission as regular or permanent employees, as we will shortly point out, and therefore they became subject to the provisions of the new charter and the rules adopted thereunder.

The third sentence of section 9.9 covers situations applying to "any *other* persons." Messrs. Karmann and Neary, being persons within the provisions

of the second situation, cannot be classed as "other persons" within the third or blanket provision. We find it necessary to conclude that Karmann and Neary were not "blanketed" into permanent positions by the new charter without examination and certification by the new civil service commission.

On January 8, 1943, the new civil service commission met and decided that the set of rules and regulations of the former civil service commission be adopted for the time being, pending revision and final adoption. At the same meeting, the civil service commission certified Messrs. Karmann and Neary to the temporary position of assistant superintendent of weights and measures, pending results of competitive promotional examination to be advertised and held as soon as possible in accordance with the rules.

On January 9th, the secretary of the civil service commission notified the department of weights and measures that Messrs. Karmann and Neary were certified for appointment to the position of assistant superintendent temporarily, for 60 days, pending examination. On the same day the superintendent of the department of weights and measures notified the civil service commission that Messrs. Karmann and Neary had been appointed temporarily. A civil service examination for the position was held on February 27, 1943, and plaintiffs herein were passed with the two highest grades on the promotional employment list. Karmann and Neary took the examination, Neary failed to qualify for the appointment while Karmann stood fourth.

On March 1st, the secretary-examiner of the civil service commission issued a certificate that the two highest candidates from the promotional employment list were Messrs. Waller and Lawlor, plaintiffs herein. They presented themselves, with their cre-

dentials, to the superintendent of the department of weights and measures to take up their duties but were not accepted and not permitted to assume their duties. The matter was left to the corporation counsel of the city of Dearborn for an opinion and the corporation counsel held that Karmann and Neary were in the classified service at the time the new charter became effective and were therefore each entitled to the position of assistant superintendent and to the wages for that position. The civil service commission met and agreed to accept the opinion and to be governed thereby. The civil service commission then certified Karmann and Neary to the department of weights and measures for *permanent* appointment to the position of assistant superintendent. Plaintiffs thereupon filed the instant mandamus proceedings in circuit court, claiming that it was the clear legal duty of defendants under the civil service provisions of the city charter to certify and install them in the positions to which they had been originally certified by the civil service commission. The circuit court agreed, after hearing, and issued the writs.

The question narrows down to whether the city authorities had a discretionary power to continue Karmann and Neary in their positions; or, to state the converse, was it their clear legal duty under mandatory civil service provisions of the old and new city charters to place plaintiffs in these two jobs? If the civil service commission had adhered to its original conclusion, to certify Karmann and Neary merely as temporary employees pending examination, and then had adhered to the subsequent certification of plaintiffs for the permanent employment following the examination, the issue between discretionary power and clear legal duty would not have arisen. The civil service commission, acting

on the advice of the corporation counsel, subsequently reversed its original stand and certified Karmann and Neary for the permanent employment. The opinion of the corporation counsel that Karmann and Neary were entitled to retain the positions of assistant superintendents was no justification for the civil service commission to certify them for the permanent employment. The commission is bound by the plain mandate of the charter. The charter does not confer on the commission the discretion it assumed to exercise in ultimately certifying Karmann and Neary for permanent employment without examination. That action on the part of the civil service commission was in contravention of the charter and of the rules of the civil service commission thereunder. Plaintiffs had received the highest standings on the examination and the charter required the civil service commission to certify them as the two candidates from the promotional and reemployment list. Under the provisions of the new charter it became mandatory that the petitioners be appointed to the position of assistant superintendents. There was no discretionary authority vested in either the civil service commission or the other city authorities to continue Messrs. Karmann and Neary for pcrmanent employment in these jobs.

This is not a case where there is any reasonable doubt as to the clear legal duty of the civil service commission whereby it might use its discretion in certifying Karmann and Neary to permanent employment. For that reason, decisions relied on by defendants do not control. See *Rupert* v. *Van Buren County Clerk,* 290 Mich. 180; *Solo* v. *City of Detroit,* 303 Mich. 672. Nor is this a case where decision of the civil service commission was based on a consideration of disputed facts requiring exercise of judgment or discretion. *Toan* v. *McGinn,* 271 Mich.

28. We agree with the circuit judge that it was the clear legal duty of the civil service commission to certify plaintiffs for the permanent employment. That being true, it must follow that the civil service commission was without any discretionary authority to subsequently certify Karmann and Neary for the permanent employment. Under the plain provisions of the city charter, the superintendent of the department of weights and measures was without any right or authority to continue Karmann and Neary as assistant superintendents. As between Karmann and Neary, and the plaintiffs herein, and under the circumstances presented to us on this record, it was the clear legal duty of defendants herein to install plaintiffs in these positions.

The action of the lower court is affirmed, but without costs, a public question being involved.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, and REID, JJ., concurred.

PRINGLE *v.* SHEVNOCK.

1. MUNICIPAL CORPORATIONS—ZONING ORDINANCE—SET-BACK LINES. Set-back restrictions, imposed by municipal zoning ordinance enacted after nonconforming dwellings had been erected, would not have to be observed by owner of property at end of block at end of street at edge of zoned area; although, in block where there were no established buildings, conformance with the set-back lines would have to be made.

2. SAME—ZONING—SET-BACK LINES—SIDE YARDS—FRONTAGE.
Owner of vacant property in block zoned as residential area in which residences had been erected previous to municipal zoning ordinance which did not conform to the set-back lines would nevertheless have to observe the requirements as to side yards and frontage as to such vacant property.

3. SAME—ZONING—RESIDENTIAL AREAS.
Desirability of property lying on outer fringe of most highly-restricted residential zone of city for use for residential purposes is to be measured more by adjacent surroundings than by conditions obtaining in the zone as a whole.

4. SAME—ZONING ORDINANCE—REASONABLENESS.
A zoning ordinance must be reasonable and its reasonableness becomes the test of its legality.

5. SAME—ZONING ORDINANCE—PUBLIC WELFARE.
In determining validity of municipal zoning ordinance as applied to particular parcel of property, the court must consider whether the zoning of such parcel advances the public health, safety, and general welfare of the people.

6. SAME—ZONING ORDINANCE—DETERMINATION OF REASONABLENESS.
Each zoning case, as a rule, stands by itself and its reasonableness must be judged by the circumstances in each particular case.

7. SAME—TEST OF VALIDITY OF ZONING ORDINANCES.
Zoning regulations, to be valid, must be made in accordance with plan to lessen traffic congestion, to promote public health, safety and welfare and with reasonable consideration to character of the district, its peculiar suitability for particular uses, conservation of property values and general trend and character of building and population development (1 Comp. Laws 1929, § 2633).

8. SAME—ZONING ORDINANCE—RESIDENTIAL AREA—PROPERTY ADJACENT TO TOURIST CAMP AND PUBLIC BATHING BEACH.
Zoning ordinance restricting to residence purposes the use of lots located adjacent to municipal tourist camp and public bathing beach *held,* unreasonable and confiscatory as to such lots, where it is shown as well as admitted by plaintiffs and intervening city that use of adjacent property made defendant's lots less desirable for residence property.

9. SAME—ZONING ORDINANCE—VALIDITY OF APPLICATION TO PARTICULAR PROPERTY.

In determining validity of municipal zoning ordinance as applied to particular property near outer fringe of zone the validity of the ordinance as applied to other property in the zone is not involved (1 Comp. Laws 1929, § 2633).

10. SAME—ZONING—RESIDENTIAL AREA—BATHING BEACH—TRAILER CAMP.

Use for trailer camp purposes of vacant city lots at edge of zone wherein property was restricted to high-class residential purposes is permitted notwithstanding objection by an adjoining owner and city where latter maintains a larger trailer camp than defendant started to establish before ordinance became effective and public bathing beach is adjacent to all properties involved, since zoning ordinance, as applied to defendant's property, is arbitrary and unreasonable.

11. AUTOMOBILES—TRAILER CAMPS—NUISANCES—STATUTES:

Properly-operated trailer camps are not to be classed as nuisances, and are under strict regulation by State statute (Act No. 143, Pub. Acts 1939, as amended).

Appeal from St. Clair; George (Fred W.), J. Submitted April 12, 1944. (Docket No. 42, Calendar No. 42,684.) Decided June 5, 1944.

Bill by Otis G. Pringle and wife against John M. Shevnock to enjoin the construction of a trailer camp. City of Port Huron intervened as a party plaintiff. Decree for plaintiffs. Defendant appeals. Remanded for entry of decree dismissing bill of complaint.

William O. Covington and *S. M. Touma,* for plaintiffs.

Rudolph J. Inman, for intervener.

Walsh, Walsh, O'Sullivan & Schlee, for defendant.

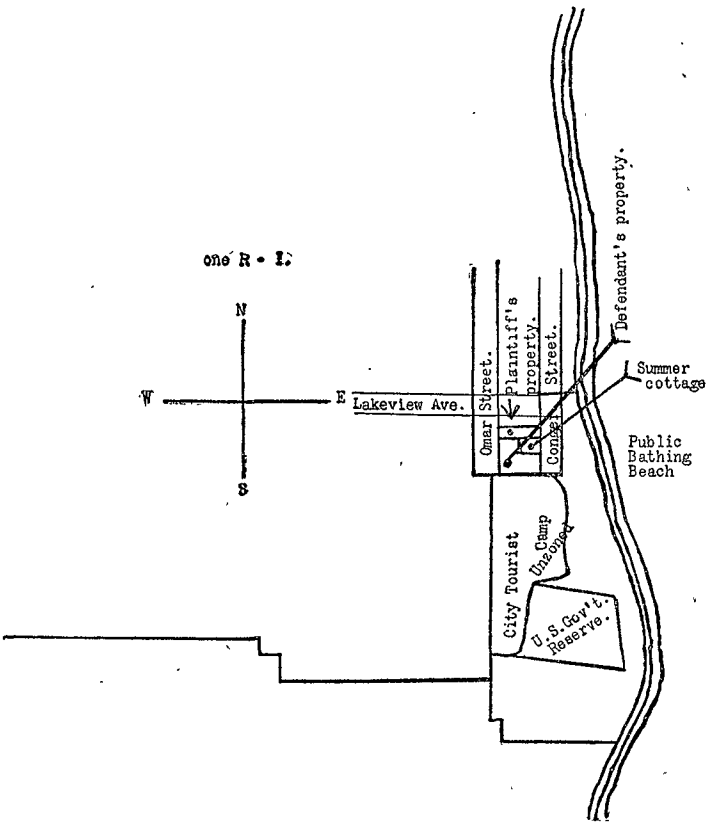
BOYLES, J. Defendant appeals from a decree of the circuit court for St. Clair county in chancery permanently enjoining him from constructing and maintaining a trailer camp on certain premises owned by him in the city of Port Huron on the ground that the trailer camp would be a violation of the city zoning ordinance.

On June 28, 1943, the city of Port Huron adopted a zoning ordinance, effective July 17, 1943, which would prevent the defendant herein from using certain lots owned by him in the city of Port Huron, near the shore of Lake Huron, as a trailer camp. The defendant had started to erect a service building and to construct a trailer camp on these lots. He claimed the ordinance was arbitrary, unreasonable and void as to his lots and declined to discontinue his plans. On July 24, 1943, plaintiffs, Otis G. Pringle and wife, owners of property adjacent to defendant's proposed trailer camp, filed a bill of complaint in the circuit court for St. Clair county in chancery to restrain defendant from constructing or maintaining a trailer camp on his said lots. A temporary injunction was issued. The city attorney filed a petition and obtained leave to intervene as party plaintiff on behalf of the city of Port Huron. Issue was joined, proofs taken in open court, and a decree was entered permanently enjoining the defendant from constructing or maintaining a service building or a trailer camp on the premises in question. On appeal defendant asks for a decree dismissing the bill of complaint.

Defendant claims (1) that the zoning ordinance is void because the city commission failed to give notice and hold a public hearing before its adoption; (2) that he had obtained a vested right to complete the construction of a trailer camp prior to the effective date of the ordinance; and (3) that the ordinance is

arbitrary, capricious and unreasonable in forbidding defendant's use of his property as a trailer camp, in view of its surroundings.

The locus and surroundings of the property owned by the parties are shown on the following drawing:



The respective properties of these parties front on Conger street, facing Lake Huron. They each have substantial residences on their property which they occupy as their homes. Plaintiffs acquired their property in 1935, defendant purchased his in 1939. The defendant's property consists of lots 5, 6, 7, 8, 9,

10, 11, 12, 13 and 15, block 5, subdivision of outlot 17, McNeil tract in the city of Port Huron. These lots all have a frontage of 25 feet and a depth of 100 feet. Lots 6, 8, 10 and 12 front on Conger street, and lots 5, 7, 9, 11, 13 and 15 front on Omar street. Lots 5 and 6 are abutted on the south by the so-called Lighthouse Reserve upon which the city of Port Huron operates a trailer camp. Lots 6, 8, 10 and 12 are abutted on the east by Conger street and immediately to the east of Conger street is a public bathing beach operated by the city of Port Huron and located on Lake Huron. The public bathing beach extends from the city trailer camp, on the south, north for approximately a city block to Lakeview avenue. Conger street along this block is a cinder drive which ends 50 feet north of the north line of the city trailer camp. The city trailer camp is used for house trailers, tents, and also contains tourist cabins, a service building, kitchen, laundry and caretaker's building. At the time of the trial of this case there were about 45 trailers in the city trailer camp. Prior to gas rationing the camp had at times as many as 125 trailers in it. This trailer camp is operated by the city from about the 1st of June until Labor Day. It had been established prior to the time the parties hereto acquired their respective properties in block 5.

The public bathing beach along Conger street and in front of block 5 was put into use as such in the summer of 1939 at about the same time that the defendant acquired his property. During the summer months the bathing beach is used in varying numbers, from approximately 25 to upwards of 300, depending upon the weather and the holidays. The bathers park their cars in front of the houses along Conger street and at times park their cars in front of the defendant's premises, sometimes using their

automobiles for dressing rooms. On a Sunday afternoon there have been parked at the foot of Lakeview avenue and along Conger street as many as 50 cars. The city has a "Stop" sign at the end of Conger street 50 feet north of the trailer camp, and at this place the cinder drive widens out and forms a turning basin for the beach traffic, using the property in front of defendant's house.

Plaintiffs Pringle and wife own lots 17 and 18 and the south half of lots 19 and 20, block 5, subdivision of outlot 17, McNeil tract, adjoining defendant's property on the north, and extending through from Conger street on the east to Omar street on the west, and having a frontage of 37½ feet on each street. Between the plaintiffs' home and the defendant's home there is a summer cottage. The defendant's home is located on Conger street, on the north side of his property, the south side of his house being 65 feet northerly from the north line of the city trailer camp.

Defendant's proposed trailer camp would occupy the southerly 55 feet of defendant's property on Conger street adjacent to the city trailer camp, and would occupy all of his rear lots fronting on Omar street. It would be an "L" shaped piece of property around the defendant's residence and would abut the westerly or rear part of plaintiffs' property. Along its entire southerly side of 200 feet, it would be abutted by the city trailer camp. It would accommodate 18 trailers if fully occupied. The city trailer camp is entirely within the view of defendant's premises, there being a fence of single strand wires strung on wooden posts.

The premises upon which defendant proposes to place his trailer camp are restricted by the Port Huron zoning ordinance as residential district of the highest class. For residential purposes the ordi-

nance would permit only the erection of single-family, two-family, group and multiple-family residences, and would not permit its use as a trailer camp. Every dwelling would have to be erected on a lot with not less than 5,000 square feet, with a frontage of not less than 50 feet, and with a front yard of not less than 25 feet. As to the lots in block 5 fronting on Conger street, because the dwellings already located there are nonconforming, the use of defendant's southerly lots would not have to observe the set-back line of 25 feet. However, he would have to observe the requirements as to side yards and frontage as to the vacant lots. As to his lots totaling 150 feet of frontage on Omar street, because there are no established buildings on that side of Omar street within block 5, the defendant's lots would have to be used in conformity with the restrictions of the zoning ordinance.

In April, 1943, the defendant decided to devote his vacant property to use as a trailer camp. He consulted the city engineer and an employee of the city engineer's office prepared the necessary sketches in his off time. Defendant was, however, informed by the city engineer that if the zoning ordinance was adopted in its present form a trailer camp would not be permitted on his property unless it was constructed before the ordinance went into effect. Various delays were encountered by the defendant throughout this period. In connection with application to the State health department for a permit to construct a trailer camp, the city clerk, on May 26, 1943, certified that there was no local ordinance prohibiting the establishment of a trailer-coach park on the location in question. On July 8th, the defendant went to Detroit to the War Production Board and on Saturday, July 10th, he received his priority number. On Monday morning,

July 12th, the defendant went to the city manager for the purpose of obtaining a building permit and was told to come back the next morning, July 13th, and finally, at 3 o'clock in the afternoon of that day, after the city manager had conferred with the city attorney and the city clerk, a building permit was issued to him for the construction of his service building on the trailer camp. On or about July 7, 1943, the defendant had a discussion with the city manager who told him that the zoning ordinance would be effective on July 17th. The defendant obtained blueprints, paid for leveling the ground, and upon receiving his building permit lumber costing $90.06 and crock pipe and fittings for sewer at the trailer camp, costing $69.86, were delivered to the premises. On Monday, July 19th, the defendant proceeded to build the forms necessary to pour concrete for the foundation of the service building, and purchased ready-mixed concrete which was poured into the forms. This work was completed on Saturday, July 24, 1943, and on that day the injunction, issued in this case, was served upon the defendant and the work ceased.

Defendant claims that the zoning ordinance is arbitrary and unreasonable as applied to his particular property. The ordinance covers the entire city, and district R-1 is designated as the most highly restricted residential zone. This zone comprises a considerable portion of the property within the city and there is no question but that, as a whole, it covers residential property most desirable for residential purposes. The defendant does not dispute plaintiffs' claim that this district as a whole is one of the most desirable districts in the city for residential purposes. However, defendant's property lies on the outer fringe of this district and its desirability for residential purposes is to be

measured more by its adjacent surroundings than by conditions obtaining in zone R-1 as a whole. Defendant's contention that the ordinance is arbitrary and unreasonable in its application to his property is partly substantiated by admissions of plaintiffs and the city authorities. Mr. Kiefer, a member of the city planning commission since it was first constituted, testified that the commission did not consider defendant's property individually, or as to its peculiar situation, and admitted that a piece of property abutting a tourist trailer camp is, generally speaking, not a proper, high-class piece of residential property. Plaintiff Otis G. Pringle admitted that defendant's property which abuts a trailer camp that has some 45 to 100 trailers in it would hardly be usable for high-class residence purposes. The evidence shows that the defendant's vacant property is not suitable for use solely for high-class residential purposes. This was substantially admitted by both the plaintiff and the chairman of the city planning commission.

The statute (1 Comp. Laws 1929, § 2633 [Stat. Ann. § 5.2931]) authorizing municipalities to pass zoning ordinances provides:

"Such regulations shall be made in accordance with a plan designed to lessen congestion on the public streets, to promote public health, safety and general welfare, and shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the general trend and character of building and population development."

A zoning ordinance must be reasonable and its reasonableness becomes the test of its legality. Each zoning case must be determined upon its own facts and circumstances. *City of North Muskegon* v.

Miller, 249 Mich. 52; *Pere Marquette R. Co.* v. *Muskegon Township Board,* 298 Mich. 31. In the latter case the court said:

"It is necessary that a zoning ordinance be reasonable and its reasonableness becomes the test of its legality. *City of North Muskegon* v. *Miller,* 249 Mich. 52. To classify this property for single residential purposes seems to us to work too great a hardship on the plaintiff and serves no useful purpose for the general welfare of the community. The parcel itself would be well adapted for residential use, being high, dry, level and sandy, with almost every modern convenience already established, were it not for its location. In the last analysis we must consider whether the zoning of this particular triangle advances the public health, safety and general welfare of the people. That is the general purpose of a zoning law and uniformity for this purpose is encouraged. Each zoning case, as a rule, stands by itself and its reasonableness must be judged by the circumstances in each particular case. *Moreland* v. *Armstrong,* 297 Mich. 32."

In *City of Pleasant Ridge* v. *Cooper,* 267 Mich. 603, the city of Pleasant Ridge zoned for residential purposes property located at the southwest corner of Woodward avenue and Ten Mile road in the city of Pleasant Ridge. It had a frontage of 312 feet on Ten Mile road and 125 feet on Woodward avenue. 712 feet west of the property in question was located the Detroit Zoological Park which was shown to have been visited during the summer on Sundays and holidays by many thousands of people. The three corners at the intersection opposite to the property in question were used for business purposes, as was the north side of Ten Mile road opposite the property in question. This court (syllabi) held:

"Zoning regulations, to be valid, must be made in accordance with plan to lessen traffic congestion, to promote public health, safety and welfare and with reasonable consideration to character of the district, its peculiar suitability for particular uses, conservation of property values and general trend and character of building and population development (1 Comp. Laws 1929, § 2633).

"Zoning ordinance restricting use of lot to residence purposes *held,* unreasonable and confiscatory where lot was on boundary of village, on corner of two busy thoroughfares with opposite sides devoted strictly to commercial purposes and nearby zoo attracts large crowds on Sundays and holidays making place less desirable for high-class residential purposes."

In New York, the appellate court in deciding a case somewhat similar to the instant situation as to facts, said:

"Certainly an ordinance is unreasonable which restricts property upon the boundary of the village to a use for which the property is not adapted, and thereby destroys the greater part of its value in order that the beauty of the village as a whole may be enhanced. In such case the owner of the property cannot be required to ask as a special privilege for a variation of the restriction. The restriction itself constitutes an invasion of his property rights." *Dowsey* v. *Village of Kensington,* 257 N. Y. 221, 231 (177 N. E. 427, 86 A. L. R. 642).

In *Senefsky* v. *City of Huntington Woods,* 307 Mich. 728, this court held the following statement from *Brookdale Homes, Inc.,* v. *Johnson* (syllabus), 123 N. J. Law, 602 (10 Atl. [2d] 477), to be an accurate statement of the law:

"While the legislature has given municipalities the right to pass ordinances to regulate and restrict

the height, number of stories and sizes of building, such ordinances to be valid must be designed to promote public health, safety, and general welfare, and do not carry with them the right arbitrarily or capriciously to deprive a person of the legitimate use of his property."

We are not called upon to decide whether the zoning ordinance now under consideration is arbitrary or unreasonable as applied to other property in zone R–1. The issue here is limited to the application of the ordinance to the property of this defendant. As was said in *City of Pleasant Ridge* v. *Cooper, supra,* at page 605:

"The appeal presents the sole question as to whether the ordinance, as it affects the use of appellant's property, is a constitutional, reasonable and nonconfiscatory exercise of police power under the provisions of the zoning statute. Our consideration of the ordinance in question is limited solely to its validity as applied to the particular property involved on this appeal."

In this case the defendant seeks to use his vacant lots for the very same purpose adopted by the municipality for its use of adjacent city-owned property. The city attempts by ordinance to prevent the defendant from using his property as a trailer camp, while at the same time the city continues to maintain a larger trailer camp on its adjacent unzoned property. In *Catholic Bishop of Chicago* v. *Kingery,* 371 Ill. 257 (20 N. E. [2d] 583), a zoning ordinance expressly permitted a public school to be maintained in a residential section but prohibited the existence of a private or parochial school in the same section. The court said:

"The ordinance before us bears no substantial relationship to the promotion of the public health,

safety, morals, or welfare. Such legislation amounts, in fact, to a capricious invasion of the property rights of the appellee, and as such cannot be sustained."

In view of the facts adduced, and the use made of unzoned property adjoining defendant's lots, we must conclude that the ordinance is arbitrary and unreasonable in restricting the use of defendant's property solely to high-class residential purposes. Properly-operated trailer camps are not to be classed as nuisances, and are under strict regulation by State statute. Act No. 143, Pub. Acts 1939, as amended (Comp. Laws Supp. 1940, 1943, § 1098–21 *et seq.*, Stat. Ann. 1943 Cum. Supp. § 5.278 [1] *et seq.*). In view of our conclusion, it is not necessary to pass upon the other questions raised by appellant.

The case is remanded for entry of a decree dismissing the bill of complaint, with costs to appellant.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, and REID, JJ., concurred.

F. M. SIBLEY LUMBER CO. *v.* SCHULTZ.

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE—EXPRESS WARRANTY.

   In action to recover balance due for lumber material furnished where question of express warranty had been eliminated in former opinion of Supreme Court and was negatived by the testimony on second trial it is not considered on second appeal.

2. SALES—IMPLIED WARRANTY—SPECIAL QUESTION.

   In action to recover balance due for plywood furnished to defendant where special question put to jury as to whether defendant's buyer specified the exact material he wanted and whether plaintiff's salesman procured the exact material he was ordered to was answered affirmatively, such finding determined that the sale was by description without implied warranty.

3. SAME—IMPLIED WARRANTY—SPECIAL QUESTION—INFORMATION BY CORPORATE AGENTS—FINDINGS OF JURY.

   In action to recover balance due for concrete form plywood special question proposed by defendant as to whether the particular purpose for which it was to be used was made known to corporate plaintiff by its salesman or secretary and treasurer would not constitute a reason for finding an implied warranty that it was suitable for such use as necessary elements are wanting.

4. SAME—IMPLIED WARRANTY—SPECIAL QUESTION—RELIANCE ON SKILL AND JUDGMENT OF SELLER.

   Special question as to whether defendant, in placing order for carload of concrete form plywood with plaintiff did "rely on the skill or judgment" of plaintiff was vague and failed to specify in what particular and to what extent defendant relied on the skill and judgment of plaintiff, hence jury's affirmative answer thereto could not be the basis for finding an implied warranty that it was suitable for use to which it was put.

5. SAME—IMPLIED WARRANTY—SPECIAL FINDING AS TO USABILITY OF PLYWOOD.

In action to recover balance due for concrete form plywood, it was not error for court to refuse to propound special question, proposed by defendant, to jury as to whether or not plywood furnished was reasonably fit for use to which it was to be put in the absence of a finding of implied warranty, where court did charge that if there was an implied warranty there was no question about its breach.

6. SAME—IMPLIED WARRANTY—PLYWOOD—INSTRUCTIONS.

Instructions to jury as to matter of whether or not an implied warranty arose because defendant purchaser of plywood had made known to the seller the particular purpose for which the plywood was to be used, because buyer relied on seller's skill and judgment, or because goods delivered were of merchantable quality *held*, sufficient and appropriate under the circumstances (2 Comp. Laws 1929, § 9454 [1] [2]).

7. SAME—IMPLIED WARRANTY—USAGE OF TRADE.

Where plywood was not being marked as to grade and its use to line forms to hold wet concrete was new to the trade and such usage of trade was neither pleaded nor proved, there was no implied warranty by usage of trade as to such particular use (2 Comp. Laws 1929, § 9454 [5]).

8. APPEAL AND ERROR—WEIGHT OF EVIDENCE—IMPLIED WARRANTY.

Verdict of jury against implied warranty in action to recover balance due for plywood sold defendant *held*, not against weight of evidence (2 Comp. Laws 1929, § 9454).

Appeal from Wayne; Miller (Guy A.), J. Submitted April 4, 1944. (Docket No. 13, Calendar No. 42,650.) Decided June 5, 1944. Rehearing denied September 5, 1944.

Assumpsit by F. M. Sibley Lumber Company, a corporation, against Robert J. Schultz, doing business as Builders Specialty Company, for plywood purchased. Defendant claimed set-off and recoupment. General verdict for defendant on set-off. Judgment for plaintiff on answers to special questions. Defendant appeals. Affirmed.

Fildew & DeGree, for plaintiff.

Clifford M. Toohy, for defendant.

REID, J. This action was before this Court on a former appeal, *F. M. Sibley Lumber Co.* v. *Schultz,* 297 Mich. 206, in which the claims of the parties appear. The question of implied warranty was properly submitted on the second trial. The jury allowed items of credit for plaintiff of $16,089.37, and damages to Schultz, defendant and cross plaintiff, of $7,797.11, leaving a balance of $8,292.26, with interest of $2,178.33, a total of $10,470.59 balance due plaintiff.

Defendant Schultz claims numerous errors, one being that the court did not submit to the jury his third requested question:

"Was plywood delivered to the site on May 6, 1937, reasonably fit to be used as liner for forms to hold wet concrete?"

The court considered an answer would not be conclusive and submitted the following five questions to the jury, questions 1 and 2 being prepared by defendant and questions 3, 4 and 5 by the court:

"1. Was the particular purpose for which the concrete form plywood, ordered March 15, 1937, and delivered May 6, 1937 by freight car, was to be used made known to the F. M. Sibley Lumber Company, a Michigan corporation, by information given to Ernest Edge, its salesman, or Harry H. Berger, its secretary and treasurer?" (Jury's answer yes.)

"2. In placing the order for the carload of concrete form plywood with the F. M. Sibley Lumber Company, did the purchaser Robert J. Schultz rely on the skill or judgment of the F. M. Sibley Lumber Company?" (Jury's answer yes.)

"3. Did Mr. Lightfoot specify to Mr. Edge the exact material he wanted, and did Mr. Edge merely procure the exact material he was ordered to?" (Jury's answer yes.)

"4. Did Mr. Lightfoot say in effect to Mr. Edge: We are figuring to get four uses from plywood as a concrete form lining, and we rely on your company to get us plywood that will give us four such uses?" (Jury's answer no.)

"5. Did the Sibley Lumber Company in effect undertake to furnish Mr. Schultz plywood as concrete form lining that would give four uses?" (Jury's answer no.)

The judge on motion for judgment *non obstante veredicto* considered the answers to the five questions taken together did not warrant any reduction from the full claim of the plaintiff and entered judgment for plaintiff for $20,312.82, evidently including interest.

The question of express warranty was eliminated in our former opinion, was negatived by the testimony on the second trial, and requires no further consideration.

We must consider the question of implied warranty, the manner of its submission to the jury, and the effect of the answers to the special questions, and determine the defendant's claims of error.

Defendant contended that he did not assert an implied warranty of four uses but of reasonable fitness. Following are excerpts from the testimony of defendant Schultz and his buyer Lightfoot, on whose testimony the claim of cross plaintiff of implied warranty must in effect depend:

(Lightfoot) "I called Mr. Edge (plaintiff's salesman). * * * I had literature (exhibit 17 quoted in cited decision, *supra*) that had been given

me by other salesmen on concrete form plywood and we talked about it. * * * We sat down side by side and read it because it was new to him and it was new to me. * * * Mr. Edge stated that the material would have at least four re-uses. * * * Mr. Edge said he was sure we would be able to get at least four re-uses out of it."

(Schultz) "Ernest Edge told me on the evening of March 13, 1937, that I would get four re-uses and some salvage value out of the concrete form plywood. * * * We anticipated using it four times."

This testimony was denied.

The answers of the jury to questions 4 and 5 find the above-quoted testimony incorrect.

Mr. Lightfoot further testified:

"The date on which Mr. Edge and I looked at page 9 of exhibit 17 was March 13, 1937. Mr. Edge at that time stated that that material was standard material used for concrete form lining and I asked him if it was the same material that was specified, that they referred to as specially fabricated and he said 'yes,' it was standard material furnished by all lumber companies. He said there was no question but what the F. M. Sibley Lumber Company could furnish the quality, but there was some question about the special 21-inch width size; and he stated it would be necessary for him to go back to the office and inquire as to whether it could be obtained from the mill they were dealing with, because of the special size.

"Next day he called me up and told me what the price was and that they could supply it. * * * Exhibit 5, our purchase order No. 152, was not requested by Mr. Edge. He had turned in a memorandum of the order to Mr. Berger (of the F. M. Sibley Lumber Company) and Mr. Berger called me and asked me to confirm. * * * I asked him

what he wanted me to call it and he said, 'Just call it plywood.' "

The answer by the jury to question 3 weighs such statements with opposing testimony and determines that the sale was by description without implied warranty.

The answer to question 1 in itself would not constitute a reason for finding an implied warranty. Necessary elements are wanting. Question 2 is vague and fails to specify in what particular and to what extent Schultz relied on the skill and judgment of plaintiff.

Defendant claims that the judgment and verdict are against the great weight of the evidence. It will be noted that his witness Lightfoot said this use of plywood was new to him and to Mr. Edge. It is hard to believe Lightfoot's further statements that Edge recommended the material for that new and therefore untried use.

Mr. Edge testified:

"*Q.* * * * What, if anything, did you say to Mr. Lightfoot when he informed you that the architect would not permit the use of masonite and that he would have to use concrete form plywood?

"*A.* I told him not to ask me about concrete form plywood, I didn't know anything about it.

"*Q.* And what further, if anything, did Mr. Lightfoot say?

"*A.* He told me I did not need to know that they knew what they wanted."

The jury could well have found that the manufacturer, West Coast Plywood Company, was informed by the F. M. Sibley Lumber Company's order, through intermediaries, of the intended use; that Lightfoot had received from agents of bidders other than Edge the manufacturer's literature (ex-

hibit 17) representing the suitability of their product for several uses; that defendant obtained through plaintiff a carload of that same manufacturer's product, the very thing that defendant had in mind when plaintiff was given the order; and that defendant without asking any questions (as it seems) accepted the latently deficient carload.

All the testimony is to the effect that the plywood furnished was not reasonably fit for the intended use, but with a finding of no implied warranty, it would be useless for the jury to answer the third question as proposed by defendant. He could gain nothing by the answer. In his charge the court said:

"It is conceded that none of the plywood that was delivered by the F. M. Sibley Lumber Company to Mr. Schultz gave more than two uses. So, if there was an implied warranty, there is no question about its breach."

Defendant complains that the court did not make a sufficiently detailed charge to the jury respecting the three phases of implied warranty set forth in subsections (1), (2) and (5) of 2 Comp. Laws 1929, § 9454 (Stat. Ann. § 19.255), relied upon by the defendant. Defense testimony in full was received on all these matters. Subsections (1) and (2) were read and properly explained to the jury. The jury were required to answer the questions of fact and were sufficiently and appropriately instructed as to their consideration of those facts.

It is clearly evident that the use of plywood to line forms to hold wet concrete was new to the trade in 1937. It was conceded that plywood was not then being marked as to grade. Evidently the jury could properly find that defendant Schultz took his chances with the use of plywood from a company

whose circular his agent Lightfoot had read, simply assuming that the product of that company would be suitable for the purpose intended but later experience has demonstrated how plywood requires to be prepared for that purpose, with what glue and of what particular consistency and with what pressure in the process of manufacture.

As to subsection (5), *supra,* there was no implied warranty by usage of trade as to this particular use of plywood in 1937. Such usage of trade was neither pleaded nor proved.

The jury was well within the bounds of the testimony in answering "yes" to question 3 and "no" to questions 4 and 5. Such answers are not against the weight of the evidence. The verdict being against implied warranty, it is unnecessary to consider claimed errors in rulings upon offered items under the cross declaration.

Judgment affirmed, with costs of both courts to plaintiff.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

UHRSTADT *v.* SAUER COOPERAGE CO.

1. NEW TRIAL—DISCRETION OF COURT—EXTENSION OF TIME.
   Granting a motion for a new trial was not error notwithstanding the motion was made more than 20 days after entry of judgment and without an extension of time having been granted since it was within the discretion of the trial court to grant an extension of time and where the motion was heard and disposed of on its merits it should be considered as having in effect extended the time for making the motion (Court Rule No. 47 [1933]).

2. SAME—MOTION SUA SPONTE.
   A court has power to grant a new trial on its own motion.

3. APPEAL AND ERROR—QUESTIONS REVIEWABLE—OBJECTION TO MOTION FOR NEW TRIAL.
   Objection that motion for new trial was belatedly made, not raised at time of hearing on the motion, comes too late when made for first time on appeal.

4. NEW TRIAL—DISCRETION OF COURT—JOINT TORTFEASORS.
   Order granting a new trial to only one of two defendant tortfeasors *held,* not to have constituted such an abuse of discretion under the circumstances as to justify setting the order aside.

5. SAME—JOINT TORTFEASORS—COMMON LAW—MODERN RULE.
   While at common law a new trial could not be granted as to one of several joint tortfeasors without granting a new trial as to other codefendants because the judgment was regarded as an entity to be affirmed or reversed as to all or none, the modern rule, adopted as a matter of case law, generally permits the granting of a new trial to one or more of several defendants and not a new trial as to the others where such action does not work obvious injustice.

6. JUDGMENT—JOINT TORTFEASORS—DISMISSAL.

In an action against several tortfeasors it is permissible to dismiss the action against one or more and enter judgment against the remainder (3 Comp. Laws 1929, §§ 14023, 14517).

7. NEW TRIAL—INTERRELATION OF JOINT TORTFEASORS—THREE-CAR COLLISION.

In action by passenger of automobile that collided with truck which had stopped on inside lane alongside car in outside lane of four-lane highway and was in turn crashed into by second tortfeasor's car, there was not such an interrelation between defendant tortfeasors as to require the granting of a new trial to both when granted to defendant truck owner.

8. SAME—JOINT TORTFEASORS—STATUTES—CONTRIBUTIONS.

The statute pertaining to contribution among tortfeasors has not changed the generally applicable rule that where two or more are defendants in the same action a new trial may be granted to one or more and denied to the remainder (Act No. 303, Pub. Acts 1941).

9. STATUTES—PRESUMPTIONS—JOINT TORTFEASORS—CONTRIBUTIONS—PRACTICE AS TO NEW TRIAL AS TO SOME DEFENDANTS.

In enacting statute relative to contributions among tortfeasors, it must be presumed that, had the legislature intended to change the well-established practice in the courts of this State relative to granting a new trial as to some tortfeasors and not all, it would have done so by appropriate enactment (Act No. 303, Pub. Acts 1941).

10. DAMAGES—FACIAL DISFIGUREMENT—HEADACHES—HEAD AND LEG INJURIES.

Verdict of $8,500 to 21-year-old woman with expectancy of 41.53 years *held,* not so excessive as to require disturbance on appeal where her face was considerably disfigured with scars, she still had severe headaches at time of trial some two years after the accident, had been hospitalized for three weeks and in bed at home thereafter and had suffered injuries to forehead, nose, head and left leg.

11. COSTS—NEW TRIAL—JOINT TORTFEASORS.

In action against two tortfeasors wherein one had been granted a new trial and other has appealed, costs are awarded to plaintiff and the defendant-appellee against defendant-appellant upon affirmance of the judgment against appellant and order granting new trial as to defendant-appellee.

Appeal from Wayne; Marschner (Adolph F.), J. Submitted April 4, 1944. (Docket No. 14, Calendar No. 42,621.) Decided June 5, 1944.

Case by Florence Cereski Uhrstadt against Sauer Cooperage Company, a foreign corporation, and Forest B. Hamilton for personal injuries sustained in an automobile accident. Verdict and judgment for plaintiff. New trial granted as to Sauer Cooperage Company. Defendant Hamilton appeals. Affirmed.

Elmer H. Groefsema, for plaintiff.

Leo J. Carrigan, for defendant Sauer Cooperage Company.

Alexander, McCaslin, Cholette & Buchanan, for defendant Hamilton.

NORTH, C. J. On January 25, 1941, plaintiff was riding as a passenger in an automobile proceeding southerly on Telegraph road, a four-lane highway, near Monroe, Michigan. Except as to the claim that the amount of damages adjudged was excessive, the questions presented on this appeal are procedural, and hence details of the accident need not be stated. It is sufficient to say that a truck belonging to defendant Sauer Cooperage Company was passing, or, as plaintiff claims, suddenly stopped along side of, an automobile parked in the outermost southbound traffic lane, and the car in which plaintiff was riding ran into the rear end of the truck. Almost simultaneously the automobile of defendant Hamilton crashed into the rear end of the car in which plaintiff was riding and plaintiff was injured.

Plaintiff brought this suit against the Sauer Cooperage Company and Hamilton as codefendants, plaintiff claiming they were joint tortfeasors. Upon trial by jury a verdict of $8,500 was rendered against the two defendants, and judgment entered thereon. Each of the defendants made a motion for a new trial. The motion of the Cooperage Company was granted, and the motion of defendant Hamilton was denied. The case is before us on the appeal of defendant Hamilton.

We first consider the claim that the trial judge in granting the Cooperage Company's motion for a new trial committed error for the reason that this motion was not made until more than 20 days after the entry of judgment and without an extension of time having been granted. See Court Rule No. 47 (1933). There is no merit to this contention. Clearly it was within the discretion of the trial court to grant an extension of time; and since the court heard and disposed of the motion on its merits, it should be considered that the court in effect extended the time for making the motion. The court had the power to grant a new trial of its own motion. *General Necessities Corp.* v. *Wayne Circuit Judge,* 214 Mich. 138. Neither plaintiff nor defendant Hamilton objected to the Cooperage Company's motion for a new trial at the time of its hearing on the ground that it was belatedly made. It is now too late to make such objection for the first time.

After this record on appeal was settled, plaintiff petitioned for leave to appeal from the circuit judge's order granting a new trial to the Cooperage Company, urging error in that particular on the ground above considered and also that under the circumstances of the instant case granting the motion was an abuse of discretion. We have considered the various reasons assigned by plaintiff,

but do not find in them justification for setting aside the order granting a new trial to the Cooperage Company.

A more important question presented by appellant is stated in his brief as follows:

"In the event of trial resulting in judgment against joint tortfeasors, may the court grant a new trial as to one tortfeasor permitting the judgment to stand against the other tortfeasor?"

Appellant asserts that because of the recent passage of the so-called contribution statute (Act No. 303, Pub. Acts 1941 [Comp. Laws Supp. 1943, § 14497a *et seq.*, Stat. Ann. 1943 Cum. Supp. § 27.1683 (1) *et seq.*]) hereinafter quoted in part, error was committed in granting a new trial to one of two joint tortfeasors and denying a new trial to the codefendant. At common law a new trial could not be granted to one of several joint tortfeasors without granting a new trial to other codefendants because the judgment was regarded as an entirety which must be affirmed or reversed as to all or none. *Burton* v. *Roberson,* 139 Tex. 562 (164 S. W. [2d] 524, 143 A. L. R. 1), and annotation 143 A. L. R. 7. But this rule has been changed and the modern rule generally followed, although not universally, is that a new trial in a tort action may be granted as to one of several defendants and not granted as to others; and a case may be dismissed as to one or more of such defendants and judgment entered against the remaining codefendants. In some jurisdictions this change in the rule of law has been accomplished by statutory enactments. In Michigan the modern rule has been adopted as a matter of case law. *Bowerman* v. *Detroit Free Press,* 287 Mich. 443 (120 A. L. R. 1230). However, it should be noted that in this jurisdiction there are pertinent statutory provisions.

"It shall be lawful for any plaintiff to include in one action as defendants, all or any of the parties who may be severally, or jointly and severally liable, and to proceed to judgment and execution according to the liability of the parties." 3 Comp. Laws 1929, § 14023 (Stat. Ann. § 27.667).

"In any action against two or more defendants, judgment may be rendered for the plaintiff against some one or more of the defendants." 3 Comp. Laws 1929, § 14517 (Stat. Ann. § 27.1443).

In *Moreland* v. *Durocher,* 121 Mich. 398, the plaintiff joined in a tort action two parties as principal defendants. After judgment each of these defendants moved for a new trial in his own behalf; and the trial court granted the motion as to one but denied it as to the other. On appeal this holding was affirmed, and incident thereto Justice MONTGOMERY said:

"The question of most importance arises out of the action of the court in granting a new trial as to a portion of the defendants, and allowing the judgment to stand as to the remainder. It is contended by the defendants that the effect of this order was to vacate the judgment as to all, and that upon the recovery of verdict and judgment against several defendants, whether in an action of tort or upon contract, a new trial cannot be granted as to a portion of the defendants only. Authorities are not wanting to sustain this contention, but the modern authorities sustain the ruling of the circuit judge. * * * In this case the plaintiff might have proceeded against the defendants as to whom the judgment now stands, or she might have discontinued the case as to their co-defendants at any stage of the proceedings. It is not easy to perceive, therefore, where the action is thus severable as well as joint, and where the right exists to proceed against a portion or all of the defendants, why the plaintiff should be compelled to lose her judgment against a

portion because it appears that the others are entitled to a new trial."

See, also, *Robinson* v. *Railroad Co.*, 135 Mich. 254 (15 Am. Neg. Rep. 341). While we deem the holdings just above noted applicable to and controlling of the instant case, it should be noted that because of peculiar circumstances touching the relation to each other of the respective tortfeasors, a case might arise in which the noted rule would not be applied because doing so would work obvious injustice. *Strickler* v. *International Harvester Co.* (Tex. Civ. App.), 141 S. W. (2d) 989. But we find no such interrelation or other controlling circumstances which render the general rule inapplicable to the instant case. In Federal practice a new trial may be granted to one defendant and denied to another unless there is a relation between the joint tortfeasors which would cause injustice to result from granting a new trial to one and denying it to another of the codefendants. *Dollar S.S. Lines, Inc.*, v. *Merz* (C. C. A.), 68 Fed. (2d) 594, citing *Pennsylvania Railroad Co.* v. *Jones*, 155 U. S. 333 (15 Sup. Ct. 136, 39 L. Ed. 176).

We are not in accord with the claim of defendant Hamilton that the recently enacted contribution statute, Act No. 303, Pub. Acts 1941 (Comp. Laws Supp. 1943, § 14497a, Stat. Ann. 1943 Cum. Supp. § 27.1683 [1]), changes the Michigan rule. The pertinent portion of this statute reads as follows:

"Whenever a money judgment has been recovered jointly against 2 or more defendants in an action for bodily injury or death resulting therefrom, or property damage, and such judgment *has been paid in part or in full by 1 or more of such defendants,* each defendant who has paid more than his own pro rata share shall be entitled to contribution with respect to the excess so paid over and above the pro rata

share of the defendant or defendants making such payment: Provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his pro rata share of the entire judgment."

It must be presumed that had the legislature intended to change the well-established practice in the courts of this State in the particular under consideration it would have done so by an appropriate enactment. Since such a change has not been accomplished, we adhere to the former rulings of this Court above noted.

The remaining issue on this appeal is presented by defendant Hamilton who claims that the verdict and judgment against him in the amount of $8,500 is excessive, and that in event a new trial is not granted on grounds hereinbefore considered, the judgment of $8,500 should be reduced or a new trial granted. The record discloses that the impact of the Hamilton car colliding with the rear of plaintiff's car caused her to be thrown against and through the windshield. Her face was badly cut, leaving disfiguring scars, which at least to some extent are permanent in character according to testimony given. At the trial, which occurred more than two years after the accident, the character and extent of the scars on plaintiff's face were pointed out and closely observed by the jury during the testimony of a doctor who on the eve of the trial had examined the condition of plaintiff's face. One of the scars, about a quarter of an inch in width and eight inches long, extended from plaintiff's forehead down through the eyebrow to the upper right eyelid and back to the temple region. Several other scars on plaintiff's face were pointed out to the jury while the doctor was testifying; and concerning one he said: "She has a scar through the right lower eyelid which

turns the inside of the eyelid outward. * * * It is permanent." A scar on the right side of plaintiff's nose "went right through the full thickness of the nose, and through part of septum." Plaintiff testified that she was unconscious as a result of this accident, that she was in the hospital for about three weeks and then went to the home of her people where she was in bed. She further testified:

"During the time I was in the hospital I suffered pain and suffering with my head. I had injuries on my forehead, nose, head and left leg. There was a hole in my left leg at that time. * * * The injury to my face took over 100 stitches. * * * I have severe headaches. They occur about once in two weeks, sometimes oftener. I still have difficulty that way. I am conscious of the scars on my face. * * *

"*Q.* Does it embarrass you some all the time?
"*A.* Yes."

Plaintiff's expectancy was shown to be 41.53 years at her age of 21. Obviously she must go through life with facial disfigurements of the character indicated. Her personal appearance before the jury was much more indicative than anything that can be included in a printed record of the amount of damages which would constitute just compensation. From the record as a whole we cannot say that the amount of the verdict and judgment was excessive to the extent that it should be disturbed on this appeal.

The orders of the circuit judge made incident to the motions for new trials and the judgment for plaintiff against defendant Hamilton are affirmed. Each of the other parties will have costs of this Court against appellant.

STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

LELEK *v.* BAKER.

1. LANDLORD AND TENANT—RENT REGULATIONS—GOOD FAITH—EVIDENCE.

In landlord's summary proceeding to obtain possession of a flat after office of price administration rent control regulations had become effective and rent was reduced from $60 to $52 a month, finding of trial judge who made a careful personal investigation of the premises involved that there was a lack of good faith on the part of plaintiff to recover possession of such flat for occupancy as a dwelling for himself was sustained under record presented and was not contrary to the great weight of evidence nor to the applicable law (8 F. R. 7322, 7326).

2. COSTS—BRIEFS ON APPEAL.

No costs are allowed on appeal upon affirmance of judgment where appellee did not file a brief.

Appeal from Wayne; Neuenfelt (Lila M.), J. Submitted April 11, 1944. (Docket No. 75, Calendar No. 42,734.) Decided June 5, 1944.

Summary proceedings by Vincent Lelek against James Baker before a justice of the peace to obtain possession of an apartment. Judgment for plaintiff. Defendant appealed to circuit court. Judgment for defendant. Plaintiff appeals. Affirmed.

Frank G. Schemanske, for plaintiff.

NORTH, C. J. This is an appeal in a summary proceedings in which plaintiff sought repossession of

premises occupied by defendant as tenant. Plaintiff is the owner of two flats, an upper and a lower, located at 7600 E. Morrow Circle, Dearborn, Michigan. Defendant has rented and occupied the lower flat for eight years. Plaintiff also owns and together with the members of his family occupies a dwelling at 7025 Hartwell avenue. Shortly after Office of Price Administration rent regulations became effective and thereby defendant's rent was reduced from $60 to $52 per month, plaintiff by summary proceedings sought to terminate defendant's tenancy. Judgment was entered against plaintiff. About a year later the present summary proceedings were instituted before a justice of the peace; and upon hearing plaintiff had judgment for possession of the Morrow Circle flat occupied by defendant. From the judgment entered defendant appealed to the circuit court of Wayne county where the case was heard without a jury. Judgment was entered in favor of defendant and plaintiff has appealed.

It appears from the record that except for the restrictions contained in the O. P. A. rent control regulation, plaintiff would have been entitled to terminate defendant's tenancy and to repossess the property. Incident to the present proceedings plaintiff, in an attempt to conform to the O. P. A. rent control regulations, served on defendant and on the O. P. A. a notice of eviction wherein he assigned as grounds for proceeding against defendant the following:

"1. My present quarters are overcrowded, since my married daughter and grown son live with me and my wife in a one-family dwelling.

"2. My wife's age and physical condition require that my wife have peace and all rooms on one floor, present quarters consisting of three rooms down and three up.

"3. My daughter, who to date is under the care of the University of Michigan Hospital, will live with me, because I no longer can afford to pay for her keep at said hospital, and because she needs a room all of her own.

"4. My present residence is absolutely unsuitable for quartering my daughter now at the U. of M. Hospital."

The pertinent portion of the O. P. A. rent control regulation is embodied in the Rent Regulation for Housing, section 1388.1181, subsection 6 (a) (6) (8 F. R. 7322, 7326 [CCH War Law Service, par. 49,-129]). It is therein provided in substance that under circumstances presented by the instant case a landlord may not dispossess a tenant unless the landlord "seeks in good faith to recover possession of such accommodations for immediate use and occupancy as a dwelling for himself." The circuit judge was of the opinion that plaintiff in seeking to dispossess defendant was not acting "in good faith" because of plaintiff's desire to occupy the premises, but instead that plaintiff in prosecuting the instant proceedings was motivated by ulterior reasons about to be noted.

There is testimony from which it may fairly be inferred that plaintiff determined to oust defendant from possession because under O. P. A. rent control regulations the rental was reduced from $60 to $52 per month. It also is a reasonable conclusion from the testimony that the primary purpose of plaintiff in seeking to dispossess defendant is that plaintiff wished to permit his married daughter and her husband and one of plaintiff's sons who was contemplating marriage to occupy plaintiff's property on Hartwell avenue, rather than plaintiff having any bona fide need of occupying the Morrow Circle flat. Further the testimony is quite decidedly against

plaintiff's statement in the notice of eviction that his wife's age and physical condition require and would be benefited by moving from plaintiff's present residence into the flat occupied by defendant. As to the condition of plaintiff's daughter who is afflicted with pulmonary tuberculosis the record discloses that her needs can be met as well and perhaps better in plaintiff's present place of residence rather than in the flat of which he seeks to dispossess defendant.

On the two phases of the case last above noted the trial judge took commendable pains in making a careful personal investigation. This was done by the circuit judge with consent of counsel in the case. It is therefore apparent that the judge was in a much more advantageous position to pass upon the merits of plaintiff's contentions than a reviewing Court having access to a printed record only. We quote the following from the opinion filed by the trial judge:

"It is the court's opinion that the plaintiff wants possession of the lower flat on Morrow Circle for the only purpose of providing space for his married daughter and son-in-law and for his son who expects to be married. It is obvious to the Court that if his son did not marry, that the place on Morrow Circle would not be large enough to accommodate plaintiff and his wife, his two sons and the daughter who is now at the University of Michigan Hospital. * * *

"The court is of the opinion that the plaintiff should not be allowed to do indirectly what he cannot do directly. In other words, that the court would not evict the defendants, in order to place the plaintiff's daughter and son-in-law in the flat; nor, should the court evict these tenants, in order to allow the daughter and her husband to live in the home on Hartwell.

"The court is, therefore, finding a lack of good faith on the part of the plaintiff and finding the defendant not guilty, with costs to the defendant."

The two contentions made by appellant are that (1) the trial court erred in holding that the evidence disclosed lack of good faith on the part of plaintiff, and (2) that the finding and judgment of the trial court was contrary to the great weight of evidence and contrary to the applicable law. Our conclusion from a careful review of the record is that neither of the above contentions on the part of appellant is well founded. The judgment entered in the circuit court is affirmed. Appellee not having filed a brief no costs will be allowed on this appeal.

STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

JUNE TERM, 1944.

FROHNAPEL *v.* FROHNAPEL.

1. DIVORCE—ALIMONY—PROPERTY SETTLEMENT—LUMP-SUM AWARD —CONTEMPT.

   Divorce decree may join award for alimony with award in lieu of dower, but if so awarded in lump sum, contempt for nonpayment thereof may not be adjudged.

2. SAME — SETTLEMENT AGREEMENT — ALIMONY — CONTEMPT — COURT RULES.

   Where property settlement agreement, incorporated in decree of divorce, provided for payment of a certain sum per month to wife in equal semimonthly payments and husband failed to make such payments, trial court was not in error in failing to find husband guilty of contempt for nonpayment of alimony where decree which complied with court rule awarded no alimony, permanent or temporary, to the wife (Court Rule No. 51 [1933, as amended in 1938]).

Appeal from Wayne; Toms (Robert M.), J. Submitted April 12, 1944. (Docket No. 12, Calendar No. 42,613.) Decided June 30, 1944.

Divorce proceedings by Alvah V. Frohnapel against Caroline K. Frohnapel. On order to show cause why plaintiff should not be punished for contempt of court. Order dismissed. Defendant appeals. Affirmed.

Hull, Brown & Fischer, for plaintiff.

G. Leslie Field, for defendant.

SHARPE, J. The parties to this appeal were formerly husband and wife. They were divorced August 28, 1941. About a month prior to the granting of the divorce, they entered into a property settlement whereby the husband assigned certain personal property to the wife, transferred the home to her subject to a mortgage, and assigned to her his interest in a $1,500 life insurance policy; and both parties agreed to the disposition of a summer cottage held by them as tenants by the entireties. The agreement also provided:

"6—It is agreed that until either the husband or the wife dies (and if the said husband and wife are hereafter divorced and the wife thereafter marries again, then until her remarriage) the husband will pay the wife the sum of $85 a month in equal semi-monthly instalments of $42.50 each on the 1st and 16th of each month. * * *

"9—The wife agrees that in the event the parties hereto are hereafter divorced, she will accept and does hereby, in such event, accept the above-described property and the terms hereof as a complete property settlement and for permanent and temporary alimony, attorney fees and other expenses in any divorce proceeding; and in lieu of her dower in the husband's property and in full satisfaction of all claims whatsoever which she may have in any property which the husband now or may hereafter own or in which he may now or hereafter have any interest. As further consideration for said property and for the making of this agreement by the husband, the wife hereby releases and forever discharges the husband from any and all further obligation or liability for her support, temporary and permanent alimony, dower, attorney fees and other expenses in any divorce proceeding, and from

any and all claims, rights and duties whatsoever by reason of or arising out of the marital relation between the said parties."

The divorce decree provided:

"PROPERTY SETTLEMENT

"It is further ordered, adjudged and decreed that the said agreement, copy of which is hereto attached, be and it hereby is approved and confirmed as a complete property settlement between the parties hereto, and that such settlement shall be in lieu of the defendant's dower in the plaintiff's lands and shall be in full satisfaction of all claims which the defendant may have in any property which the defendant owns or may hereafter own, or in which he has or may hereafter have any interest.

"ALIMONY

"And it is further ordered, adjudged and decreed, in view of the said property settlement made between the parties, that the defendant have from the plaintiff no alimony, permanent or temporary."

Sometime after the parties were divorced, the husband remarried, but continued to make payments of $85 per month for approximately two years. Later Alvah V. Frohnapel failed to make the required payments in accordance with the agreement and Caroline K. Frohnapel filed a petition to have Alvah V. Frohnapel adjudged in contempt of court for failure to pay alimony. An order to show cause was issued and Alvah V. Frohnapel filed an answer in which he contended that the divorce decree did not provide for permanent alimony.

The cause was heard by the trial court who found that neither the decree nor the property settlement provided for alimony; and he dismissed the order to show cause. Caroline K. Frohnapel appeals and

urges that paragraph 6 of the agreement provides for alimony; and that the agreement requires the husband to make semimonthly payments of a specified sum of money to the wife for a period terminable only by death or remarriage of the wife.

In *Harner* v. *Harner,* 255 Mich. 515, we held that a divorce decree may join an award for alimony with an award in lieu of dower, but if so awarded in a lump sum contempt for nonpayment thereof may not be adjudged.

It is to be noted that the decree provided, "the wife hereby releases and forever discharges the husband from any and all further obligation or liability for her support, temporary and permanent alimony, dower * * * and from any and all claims, rights and duties whatsoever by reason of or arising out of the marital relation between the said parties." Moreover, the decree provided:

"ALIMONY

"And it is further ordered, adjudged and decreed, in view of the said property settlement made between the parties, that the defendant have from the plaintiff no alimony, permanent or temporary."

The decree conforms to Court Rule No. 51 (1933, as amended in 1938). The provision for payment of $85 a month is a part of the property settlement and is in lieu of dower. It follows that contempt proceedings will not lie for its enforcement.

The order of the trial court is affirmed, with costs to plaintiff.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, BOYLES, and REID, JJ., concurred.

KATHAN *v.* WILLIAMS.

1. COVENANTS—RESTRICTIONS—COLORED PERSONS—COMMON PLAN OR AGREEMENT.

   Subdivision in which lots were marketed as high-class, residential property and subject to building restrictions but recorded restrictions silent as to use and occupancy by colored persons may not be restricted against use by such persons where there was no plan or agreement common to all home owners in the subdivision relative to such use.

2. COSTS—BRIEF.

   No costs are allowed appellees upon affirmance of decree where they filed no brief.

Appeal from Wayne; Richter (Theodore J.), J. Submitted January 4, 1944. (Docket No. 19, Calendar No. 42,481.) Decided June 30, 1944.

Bill by Dr. Albert O. Kathan and others against Alfred C. Williams and others to impress restrictions as to use and occupancy upon real estate and to enjoin use by defendants Williams. Decree for defendants. Plaintiffs appeal. Affirmed.

Frank C. Sibley and *Arthur E. Fixel,* for plaintiffs.

REID, J. This case was submitted upon the same testimony taken in the case of *Kathan* v. *Stevenson,* 307 Mich. 485. The relief sought is to enforce a claimed reciprocal negative easement respecting property adjoining the property involved in that case, barring use and occupancy by persons of Afri-

can descent. For reasons similar to those recited in the opinion of Mr. Justice WIEST, the trial judge found that there never had been any restrictions limiting the use and occupancy of these premises to persons of the Caucasian race either placed on record, in any deeds of conveyance, or adopted by general plan by or among the persons interested in properties on Arden Park that were binding upon owners and future purchasers without notice; and that there was no actual notice to defendants that these parcels could not be used and occupied by them as their residences. In accordance with that finding the trial judge by his decree dismissed the bill.

In *Kathan* v. *Stevenson, supra,* at p. 490 this Court said:

"There was no plan or agreement common to all home owners in the subdivision relative to racial use and occupancy of premises."

The finding by the trial judge is determined to be correct. The decree appealed from is affirmed. The appellees not having filed a brief, no costs are allowed.

NORTH, C. J., and STARR, WIEST, BUTZEL, SHARPE, and BOYLES, JJ., concurred. BUSHNELL, J., did not sit.

TEAL *v.* HAYES.

MORTGAGES—FORECLOSURE—LANDLORD AND TENANT—PURCHASE OF MORTGAGEE'S INTEREST—FRAUD—EVIDENCE.

In chancery suit to foreclose a mortgage wherein it appears that premises were leased from mortgagors by a family corporation owned by an attorney, his son and daughter, that four days before the period of redemption expired the son, on funds procured on his own credit, purchased the mortgagee's interest subject to the mortgagors' right to redeem, that there was no redemption, that the lease was terminated by the foreclosure before expiration of period for which rent had been paid, finding by trial court that attorney was not the mortgagors' attorney, that there was no fraud practiced by either the attorney or his son, that there was no breach of a fiduciary relation and that the mortgagors did not rely on redemption by the lessee as permitted but not required by the foreclosure decree and contract between lessee and mortgagor, was supported by record.

Appeal from Wayne; Jayne (Ira W.), J. Submitted April 5, 1944. (Docket No. 31, Calendar No. 42,666.) Decided June 30, 1944.

Foreclosure proceeding by Belle R. Teal, guardian of the estate of Frank G. Teal, Jr., a minor, against H. J. Hayes and others. On petition of defendants H. J. Hayes and wife for supplemental decree determining that petitioners are owners of an undivided fractional interest in the premises foreclosed. From decree denying petition, defendants Hayes appeal. Affirmed.

Adrian D. Rosen (*Carroll C. Grigsby*, of counsel), for defendants Hayes.

Harvey S. Durand, for defendant Moinet, Inc.

Henry C. L. Forler, for defendants Durand, Jr., and wife.

NORTH, C. J. Plaintiff filed a bill to foreclose a mortgage against the premises at 5167 Cass avenue, Detroit, Michigan. Prior to March 10, 1939, defendants and cross plaintiffs H. Jay Hayes and his wife lived in New York and owned this property in fee. In 1934, the defendant Moinet, Inc., a family corporation then consisting of H. S. Durand, Sr., H. S. Durand, Jr., and Marion Hanks, leased the property and successive leases were entered into between the parties. In May, 1940, a further agreement hereinafter noted covering rights of the parties was executed. On December 6, 1941, the lease then in effect was terminated by foreclosure of the plaintiff's mortgage, no redemption having been made. At the time of this termination, the rental was $75 per month. The lease ran until October 31, 1942, and rent was prepaid in the amount of $337.72.

In 1937, Hayes was in financial difficulty; State and county taxes were in arrears, and to redeem the property Hayes borrowed a sum of money from Moinet, Inc. This advancement served as a prepayment on rent. City taxes for 1930 to 1939 were unpaid and the city threatened foreclosure. Mr. Durand, Sr., is a practicing attorney in Detroit and undertook to obtain a postponement of foreclosure pending the obtaining of a mortgage on the property. To make possible this mortgage, Moinet, Inc., executed an instrument giving the mortgage priority over its lease but giving to Moinet, Inc., certain optional rights of redemption in event of default by the mortgagor. The mortgage was obtained from

the plaintiff and the borrowed funds were used to pay some tax liens. However, Hayes soon became in default and plaintiff commenced foreclosure a little over four months after execution of the mortgage.

The agreement of May, 1940, between Hayes and Moinet, Inc., provided that in the event of default, Moinet, Inc., could pay such default and to that extent acquire an interest in the premises. Moinet, Inc., was advised of the pending default but decided not to exercise its rights, and so notified both Hayes and the attorney for the mortgagee, whereupon foreclosure was commenced.

Mr. Durand, Sr., acting for Moinet, Inc., filed a cross bill asking the court to determine damages for the termination of the lease in the event no redemption was made by Hayes, and that the court permit Moinet, Inc., to redeem if it should wish to do so. The foreclosure decree provided that Moinet, Inc., could so redeem; and also that upon application of Moinet, Inc., if there was no redemption, damages would be determined by a supplemental decree as far as Moinet, Inc., was concerned. Considerable negotiation resulted in Mr. Durand, Sr., or Moinet, Inc., refusing to aid in the redemption.

Although Durand, Jr., had been an officer of Moinet, Inc., there is evidence that he ceased its actual management in 1938, moved away from Detroit, and devoted himself entirely to the management of the St. Clair Inn. In August, 1941, he resigned as president and director of Moinet, Inc. Just prior to the expiration of the period of redemption, Durand, Jr., on December 2, 1941, purchased the mortgagee's interest in the Detroit property but subject to Hayes' right to redeem. There was no redemption, but Hayes asserts that Durand, Jr.'s,

purchase should be held to be a redemption from the foreclosure, instead of vesting absolute title in Durand, Jr. On April 8, 1942, after securing leave, Hayes filed a petition for a supplemental decree and at this time Durand, Jr., and wife were made parties defendant. The matter came before a circuit court commissioner to determine whether Durand, Sr., had practiced fraud on Hayes; whether Durand, Sr., and Hayes stood in the relation of attorney and client; whether there was a legal duty on Durand, Sr., to prevent the acquisition of the property by Durand, Jr.; whether the purchase by Durand, Jr., was a fictitious purchase to circumvent the provisions of the decree and whether or not any future claim of Moinet, Inc., against Hayes should be barred.

The circuit court commissioner found that Durand, Sr., was not the attorney for Hayes, there was no fraud practiced by either Durand, Sr., or Durand, Jr., that Durand, Jr., obtained money to make the purchase on his own credit and that no claim for damages from Moinet, Inc., should be barred. Decree accordingly was entered in the circuit court.

The opinion given by the circuit court judge in confirming the commissioner's report states our own conclusions so well that we quote it in part as follows:

"After a perusal of the same, we conclude that the commissioner's findings of fact are comprehensive and correct, and they are made, by reference, a part of this opinion. We also approve his recommendations of the law generally, but two issues seem to call for particular comment.

"Defendants Hayes, in their brief, stress a fiduciary relationship between defendant Durand, Sr.,

and defendants Hayes, on which much of his legal argument is based. We agree with the commissioner that there is no testimony to support such a contention; in fact, just the opposite. When Durand and Hayes assumed the relation of tenant and landlord, Durand performed some legal services in clearing the tax records for their mutual benefit, and for which he properly charged Hayes. From the time the relationship of tenant and landlord began, their interests were generally opposed, and Hayes knew it.

"We conclude that Harvey S. Durand, Sr., who has a long and honorable record at this bar, did no act in violation of any fiduciary relationship. On the contrary, his conduct with the defendants Hayes was not only just, but generous; and it is our duty so to find.

"Defendants Hayes' other contention is based on the rather unusual paragraph in the original decree, permitting the defendant, Moinet, Inc., to redeem in case the property was foreclosed, to protect its own interests. * * *

"It will be noted that this language is permissive, and not mandatory. Moinet, Inc., was under no obligation to redeem, and did not redeem; and there is no evidence that Hayes expected that the corporation would, or that he relied on such redemption. In fact, under the law, he could have redeemed at any time during the statutory period, and the purchase of the plaintiff Teal's interests in no way cut him off.

"Defendants Hayes were deprived of no legal rights, and a reading of the record is convincing that the defendants Durand did much to help them preserve their equity."

We have read the record with care and although only a portion of the facts are stated herein, it is our conclusion that the record amply supports the confirmation of the commissioner's report. The

record is somewhat voluminous and to review here all of the testimony upon which we rely in arriving at our conclusion would be of no service. The decree entered in the circuit court is affirmed, with costs to appellees.

STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

SMITH *v.* HIGHLAND PARK STATE BANK.

1. APPEAL AND ERROR—JUDGMENT NON OBSTANTE VEREDICTO—EVIDENCE.

   In action against bank and real estate broker to recover amounts plaintiff had paid in taxes and on purchase price under land contract where jury gave verdict against bank but not against broker, testimony is viewed in light most favorable to plaintiff on her appeal from judgment *non obstante veredicto* for defendant bank.

2. VENDOR AND PURCHASER—BROKERS—MISREPRESENTATIONS—AGENT OF PURCHASER.

   Statements to purchaser by broker would not impose liability upon vendor for misrepresentations contained therein where broker acted as agent of the purchaser in the matter and vendor did nothing to ratify the broker's acts merely by accepting benefits of the sale.

3. SAME—RESCISSION—REPAIRS—LACHES—PADLOCKED PREMISES.

   Purchaser under land contract requiring her to make repairs upon premises, who failed to make them and who waited nearly a year and a half after purchase and a month after premises were padlocked for one year for illegal use before giving notice of rescission could not place vendor *in statu quo* and was not entitled to recover payments made under contract and for taxes.

Loss of power to rescind by failure to notify, see 2 Restatement, Contracts, § 483. Restoration as condition precedent of rescission, see 2 Restatement, Contracts, § 349, Restatement, Restitution, § 159 (1b); recovery of expenditures, see Restatement, Restitution, § 177, comment c.

4. SAME—RESCISSION—IN STATU QUO.

Placing the vendor *in statu quo* is requisite to rescission of a land contract.

Appeal from Wayne; Neuenfelt (Lila M.), J. Submitted June 6, 1944. (Docket No. 7, Calendar No. 42,418.) Decided June 30, 1944.

Action by Bonnie Osborne Smith against Highland Park State Bank and another to recover amounts paid on land contract. Verdict for plaintiff against defendant bank. Judgment for defendants *non obstante veredicto*. Plaintiff appeals. Affirmed.

Roxborough & Taliaferro, for plaintiff.

Miller, Canfield, Paddock & Stone, for defendant bank.

NORTH, C. J. On November 22, 1938, plaintiff entered into a contract with defendant bank to purchase the premises at 3477 Beaubien street in Detroit. On April 15, 1940, plaintiff gave defendant bank notice of rescission and on April 20th brought this action to recover the amounts paid on the purchase price and taxes, claiming fraudulent misrepresentation. Defendant McQueen was the broker through whom the land was purchased. Upon trial by jury, a verdict of $625.22 was given against the defendant bank but the jury found no cause of action against defendant McQueen. Upon timely motion, the trial court granted the bank's motion for judgment *non obstante veredicto*. Plaintiff appeals, claiming that the trial judge was in error in entering such judgment after the issues of fact were sub-

mitted to and passed upon by the jury. Plaintiff does not attack the verdict of no cause of action as to defendant McQueen. To ascertain the correctness of the trial judge's action, we view the testimony in the light most favorable to the plaintiff.

In view of the fact that the jury found no cause of action as to McQueen and in order to support a verdict against the bank, it is necessary to have testimony tending to show that the bank or its agents perpetrated the alleged fraud upon the purchaser. A review of the record does not disclose such testimony.

Plaintiff had known defendant McQueen for several years and had made previous purchases of real estate through him. Plaintiff advised McQueen that she wished to purchase a certain type of real estate, and accompanied McQueen on inspections of several properties. McQueen checked the assessor's records and found that the property here involved was owned by defendant bank. He called at the bank to ascertain the price of the property and obtained from the bank its form of preliminary agreement, apparently a type of an offer to purchase. The form was filled out, and McQueen was informed by the bank that the property would not be sold unless the form contained an undertaking by the purchaser to make repairs. On October 11, 1938, a $50 down payment and a final offer of purchase containing the provision "purchaser agrees to recondition house inside and outside and do all necessary repairs before March 1, 1939," was presented by plaintiff, acting through McQueen, to the bank. The receipt given by the bank to McQueen acknowledged the payment of $50 by him "as agent for B. Osborne Smith."

On October 17, 1938, the offer to purchase was

approved by the bank and plaintiff so notified. About a month later plaintiff was notified by the bank that her deposit would be forfeited if the transaction was not closed by November 22, 1938. On that date McQueen picked up the copies of the land contract which had been prepared by the bank and took them to the plaintiff for her signature. This contract contained a printed clause that purchaser agreed to accept the premises in their present condition, subject to all defects, known and unknown, and forthwith to make all repairs necessary to put the premises in first-class condition. The contract also included a typewritten provision in which the purchaser agreed on or before March 1, 1939, to recondition the exterior and interior and to do "all necessary repair work to put said building in good, safe, sound, secure and tenantable condition, all in a workmanlike manner and to the satisfaction of the bank." Plaintiff signed the contract November 22, 1938. McQueen then took the copies to the bank for execution by an officer and later returned plaintiff's copy to her.

Plaintiff testified that she inspected the property twice from the outside before deciding to buy it, and that each time she remained in a car near the property. Plaintiff's discussions concerning the property were wholly with McQueen. Plaintiff claims that fraud was perpetrated on her because McQueen told her the building was in good condition whereas the property was badly run down and needed very extensive repairs.

The uncontroverted testimony is that McQueen was at all times acting as the agent of the plaintiff and that there was no question of fact concerning this agency to be submitted to the jury. As McQueen was the plaintiff's agent, the statements

made by him to his own principal could not create a liability upon the defendant bank, which neither directly nor indirectly made any false representation. Even though McQueen did make misrepresentations to the plaintiff, which question is not here passed upon, in this case there is no ground upon which the bank could be held liable for those misrepresentations. Nor was there under the facts in this case subsequent ratification by the bank of McQueen's acts by accepting the benefits of the sale such as would create or imply the relation of agent and principal between the bank and McQueen.

As stated above, the jury found no cause of action against McQueen and the plaintiff failed to show a sufficient relation between McQueen and the bank to support a verdict against the bank. This alone is sufficient to affirm the case without a discussion of other defenses urged. However, in passing, we also note the fact that although the property was purchased November 22, 1938, no action for rescission was started by the plaintiff until April of 1940, which was about a month after the building had been padlocked because of unlawful use. During this period plaintiff or her agents knew of the condition of the building, and the trial judge could well have dismissed the case because of plaintiff's failure to take timely action. *Draft* v. *Hesselsweet,* 194 Mich. 604; *Gloeser* v. *Moore,* 284 Mich. 106.

It is also worthy of note that repairs were not made by the plaintiff in accordance with the contract of purchase. And further plaintiff could not put defendant bank *in statu quo* because in March, 1940, the building had been padlocked for one year, and thereby the bank would have been prevented from renting the padlocked portions of the building.

Placing *in statu quo* is requisite to rescission. *Gloeser* v. *Moore, supra.*

Affirmed, with costs to appellee.

STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

MITCHELL *v.* STROH BREWERY CO.

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.
   In an action against two alleged tortfeasors it is incumbent on plaintiff to establish that the negligence of one or both of defendants was the proximate cause of her injuries, and also that she was free from contributory negligence.
2. SAME—RES IPSA LOQUITUR.
   The mere fact that an accident happened does not establish negligence on the part of defendant as the doctrine of *res ipsa loquitur* is not followed in this State.
3. STREET RAILWAYS—ALIGHTING PASSENGERS—CONTRIBUTORY NEGLIGENCE.
   A passenger who alights from a streetcar with as good an opportunity as the streetcar operators to observe the conditions which confront him and to know as well as they whether such conditions are dangerous to him in an attempt to alight and is injured while alighting in such a dangerous position is guilty of contributory negligence precluding recovery.
4. SAME—BREWERY TRUCK—CONTRIBUTORY NEGLIGENCE OF ALIGHTING PASSENGER.
   Plaintiff, a stout and heavy woman 56 years of age who, while alighting from city streetcar, became confused by defendant brewery company's truck being parked about two feet from

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Contributory negligence as a matter of law, see 2 Restatement, Torts, §§ 432, 463, comment b, § 464, comment a, § 465, § 466, comment g; function of court and jury in determining contributory negligence as proximate cause of injuries sustained, see § 476; negligent conduct necessary, § 432; difference between negligence and contributory negligence, § 463, comment b; standard of conduct, § 464 (1); § 466, comment g; effect of joint tortfeasor, § 439, comment b.

side-exit door of streetcar on narrow street and fell when she attempted to get back into streetcar after having placed one foot on the ground, *held*, guilty of contributory negligence precluding recovery for injuries sustained, where it appears that neither the truck nor the streetcar moved.

Appeal from Wayne; Marschner (Adolph F.), J. Submitted June 8, 1944. (Docket No. 33, Calendar No. 42,605.) Decided June 30, 1944.

Case by Annie Mitchell against Stroh Brewery Company, a corporation, and City of Detroit, Department of Street Railways, for injuries sustained when alighting from a streetcar. Directed verdict and judgment for defendants. Plaintiff appeals. Affirmed.

Dann & Atlas and *Seymour Tilchin,* for plaintiff.

L. J. Carey and *Geo. J. Cooper,* for defendant Stroh Brewery Company.

A. Albert Bonczak, for defendant City of Detroit.

STARR, J. Plaintiff began the present suit to recover damages for personal injuries sustained when she fell while alighting from a street car owned and operated by defendant city. She alleged, in substance, that the city was negligent in that said street car was stopped at a place where it was unsafe for her to alight; that defendant brewery company was negligent in parking its truck so close to the street car tracks as to endanger her safety, and was also negligent in parking its truck in violation of a city ordinance. At the conclusion of plaintiff's proofs, each defendant moved for a directed verdict on the ground that she had failed to establish negligence on their part and that she was guilty of contributory

negligence as a matter of law. The trial court granted such motions, and plaintiff appeals from the judgment entered on directed verdict for defendants.

It appears that about noon on February 19, 1941, plaintiff, a "stout and heavy" woman 56 years old, was a passenger on a street car operated by defendant city on Sherman street. She wished to get off at the corner of Chene and Sherman, at which corner there was no established safety zone. She rang the signal bell, the car stopped, the conductor opened the side-exit door, and she started to alight. While she had one foot on the car step and one on the ground, she first saw defendant brewery company's truck, which was parked close beside the street-car exit. She became frightened, and while attempting to get back on the street car, fell to the pavement, sustaining the injuries for which she seeks to recover.

It was stipulated by counsel that Sherman street, at the place of the accident, was 26 feet wide; that the distance from the car track to the curb was 10 feet 7 inches; and that the brewery company's truck was 23 feet long, 9 feet high, and 7 feet 9 inches wide. There was testimony indicating that the truck was parked about a foot from the curb and that there was a distance of about 2 feet between the street car and the side of the truck. Plaintiff testified regarding her accident in part as follows:

"I was not the first passenger to get off. * * * The man in front of me got off first. * * * I couldn't see in front of this man. * * * I followed right close behind him. * * *

"When I got off I put this foot down on the ground, and the other foot up here (on the step). I was still holding to the rod. The truck was too close to me and it frightened me. * * *

"*The Court:* The street car didn't move?

"*A.* No.

"*The Court:* The truck did not move?

"*A.* No, neither one moved.

"I still had one foot on the step of the street car. I didn't get off and turn around and get on the right side because I didn't have room to turn around. That's why I was trying to reach behind me and catch the rod but I couldn't find it. * * * After I got frightened I tried to get back in the street car. * * * I knew that if the street car moved there would be trouble with me. I lifted my foot to get back in the street car. I fell on my back just by reaching back. * * *

"I saw the truck when I put my foot down on the street. * * *

"The center of the truck was even with the street car door where I was getting off. * * *

"I wasn't able to see the truck because I wasn't looking for nothing like that. * * * I just been getting off there so much I wasn't thinking about no truck. * * *

"*Q.* Now, did you have both of your feet off the street car before you fell?

"*A.* No. * * * I was right up against the truck and then I tried to reach back, catch hold of that rod. I couldn't catch hold of the rod. I lost my balance and fell. * * *

"I had my head down looking down there at the step below. I did not look out of the door. I never looked up until after I put my left foot on the ground. * * *

"When I did look up, the truck was standing there. I said that the truck was only one foot or perhaps two feet from the street car. * * * It was pretty close. * * *

"I never slipped, I just lost my balance, tried to reach back * * * to get the rod."

It was incumbent on plaintiff to establish that the negligence of one or both of defendants was the

proximate cause of her injuries, and also that she was free from contributory negligence. The mere fact that an accident happened does not establish negligence on the part of defendants, as the doctrine of *res ipsa loquitur* is not followed in this State. *School District of the City of Ionia, for use and benefit of Employers' Liability Assurance Co.*, v. *Dadd,* 308 Mich. 220. In the case of *Whitmore* v. *Detroit United Railway,* 185 Mich. 46, we quoted with approval the following rule, which is applicable to the situation in the present case:

"But where a passenger in alighting from a car has as good an opportunity as the company or its servants to observe the conditions which confront him, and to know as well as they whether such conditions are dangerous to him in an attempt to alight, he is held to be guilty of contributory negligence precluding a recovery in case he is injured. If the street at the place of discharging a passenger presents a dangerous condition to one alighting there, and such danger is obvious to the passenger, the carrier is not liable to him for injuries received from such defects." 1 Nellis on Street Railways (2d Ed.), p. 619, § 308.

Assuming for the purpose of this opinion that defendants were negligent, we are convinced, nevertheless, that viewing the testimony in the light most favorable to plaintiff, she was guilty of contributory negligence as a matter of law. Her testimony indicates that she failed to observe the brewery truck, which was clearly visible, until she had reached a position where she had one foot on the car step and the other on the ground. Neither the truck nor the street car moved, and there was no showing that she could not safely have alighted from the car and passed between it and the truck. She lost her balance and fell to the pavement because she became

frightened and confused while attempting to get back on the street car. It is clear that by the exercise of reasonable care and caution she could have avoided the accident.

The trial court did not err in granting defendants' motions for a directed verdict. The factual situations involved in the several cases cited by plaintiff distinguish them from the present case.

The judgment for defendants is affirmed, with costs.

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

MACOMB BUILDING CO. *v.* CLINTON TOWNSHIP.

1. TOWNSHIPS—PUBLIC IMPROVEMENTS IN PLATTED LANDS—INITIATORY PETITIONS—SIGNATURES—JURISDICTION OF BOARD.

   Under statute providing for special assessment district for public improvements in platted lands in townships, the signatures on the initiatory petition of the owners of the percentage of lands set forth in the statute is necessary in order to give the township board jurisdiction in the matter (1 Comp. Laws 1929, § 2386).

2. SAME—ACTION OF BOARD—INITIATORY PETITION FOR PUBLIC IMPROVEMENT.

   The action of a township board based on a petition for public improvements in platted lands is a nullity where initiatory

petition therefor was void because it lacked signatures of owners of sufficient amount of property (1 Comp. Laws 1929, § 2386).

3. SAME—PUBLIC IMPROVEMENT ON PLATTED LAND—INITIATORY PETITION—SIGNATURES—TITLE HOLDERS.

On a petition to initiate proceedings for public improvements in platted lands in townships, the signatures of persons who were not record owners of lands to which the State held record title under deed from auditor general because of nonpayment of taxes at time when petition was filed would not be counted so as to validate the petition even though later on the property was redeemed from the State for plaintiff's grantor (1 Comp. Laws 1929, § 2386).

4. SAME—SPECIAL ASSESSMENT DISTRICTS—JURISDICTION OF BOARD TO ESTABLISH—ESTOPPEL.

The doctrine of estoppel cannot be invoked to establish jurisdiction of a township board to set up a special assessment district for public improvement in platted land (1 Comp. Laws 1929, § 2386).

5. SAME—SPECIAL ASSESSMENT DISTRICTS—CORPORATIONS—ESTOPPEL.

The fact that plaintiff corporation's officers had knowledge of and obtained the benefits from water facilities installed in a special assessment district before corporation purchased lots would not estop latter from claiming levy of assessment was invalid on the ground that initiatory petition failed to give township board jurisdiction to establish the district (1 Comp. Laws 1929, § 2386).

Appeal from Macomb; Reid (Neil E.), J. Submitted April 15, 1944. (Docket No. 78, Calendar No. 42,564.) Decided June 30, 1944.

Bill by Macomb Building Company, a corporation, against Township of Clinton and others to have a levy of special assessments declared void and to restrain collection of the same. Decree for plaintiff. Defendant appeals. Affirmed.

Nunneley & Nunneley, for plaintiff.

John E. Merrill and *Hugh H. Neale,* for defendants.

BUTZEL, J. The Macomb Building Company, a Michigan corporation, brought suit to restrain the township of Clinton and its officers from enforcing the collection of a special assessment levied against plaintiff's property for the installation of water facilities. It alleges that the proceedings to install the water mains were so irregular and insufficient that they conferred no jurisdiction on defendants to make such improvements or levy the assessments. Defendants, while not conceding any irregularity, set forth in their brief only one question upon which they base their appeal: Whether plaintiff is not estopped from raising these objections because, as defendants claim, plaintiff's grantor had participated in the initiation of the proceedings and improvements and the present officers of plaintiff corporation had knowledge of the construction of the improvements and received and accepted their benefits.

Many irregularities are claimed by plaintiff but we shall discuss only one, lack of jurisdiction. While the petitions to install the water facilities were signed by the alleged owners of over 65 per cent. of the lots in the assessment district, as a matter of fact, the parties who signed as owners of 29 of these lots had no title to them, the record title being in the State of Michigan by virtue of deeds from the auditor general which had been duly recorded prior to the filing of the petitions to install the water facilities. The record owners of only 26 of the 72 lots in the assessment district signed the petition. This was approximately 36 per cent. instead of the 65 per cent. provided for by statute, 1 Comp. Laws 1929, § 2386 (Stat. Ann. § 5.2412). (The subsequent amendment in Act No. 201, Pub.

Acts 1941 [Comp. Laws Supp. 1943, § 2386, Stat. Ann. 1943 Cum. Supp. § 5.2412], made no change in the per centum required.) The signature of the owners of 65 per cent. of the property is jurisdictional. The board never acquired jurisdiction over the subject matter. Its action based upon a void petition is a nullity. *Auditor General* v. *Fisher,* 84 Mich. 128; *Collins* v. *Township of Grand Rapids,* 108 Mich. 675; *Nichols* v. *Tallmadge,* 260 Mich. 576.

The lots, whose record title was in the State, were not owned by the parties who signed the petition as record owners. The property was redeemed from the State by a trustee of plaintiff's grantor, the latter being the *cestui que trust,* and the State gave a quitclaim deed to him. This, however, occurred after the filing of the petition. Later, and some time after the proceedings to install the water facilities, plaintiff was incorporated and title to these lots was conveyed to it by warranty deed. There is reasonable ground to infer that, in arriving at the price paid for the lots, the unpaid water assessment against these lots must have been considered. Defendants claim that because plaintiff's officers had knowledge of and obtained the benefits from the assessment and because all dealings involving the lots in question were carried out with this knowledge in mind, plaintiff should be estopped from denying the validity of the tax.

While it might be claimed that some minor irregularities in the proceedings can be waived by the action of the parties, the doctrine of estoppel cannot be invoked to establish jurisdiction when none existed. In *Auditor General* v. *Woodward,* 191 Mich. 496, the facts upon which a claim of estoppel was based resemble those in the instant case. The grantor of the parties who claimed the assessment illegal had signed the petition for the improvement.

In holding that there could be no estoppel where there is a lack of jurisdiction, we quoted with approval from Hamilton's Law of Special Assessments to like effect. Also, see *Miller* v. *City of Detroit,* 244 Mich. 38; *Campbell* v. *City of Detroit,* 259 Mich. 297.

Decree for plaintiff affirmed, with costs.

NORTH, C. J., and STARR, WIEST, BUSHNELL, SHARPE, and BOYLES, JJ., concurred. REID, J., did not sit.

CITY OF ST. JOHNS *v.* HUDSON-HOWE, INC.

1. MUNICIPAL CORPORATIONS—CONSTRUCTION OF PUBLIC BUILDINGS—BONDS—SUBCONTRACTORS—NOTICE.

   A subcontractor who failed to file the proper notice under statutory bond of principal contractor for construction of a public building for a city may not recover under the bond (3 Comp. Laws 1929, § 13132 *et seq.*).

2. INTERPLEADER—EXHIBITS—EVIDENCE.

   In city's interpleader suit wherein record shows exhibit containing specifications for construction of a municipal building was introduced in evidence, finding of trial judge that specifications were never introduced was erroneous.

3. MUNICIPAL CORPORATIONS—INTERPLEADER—SURETY ON PUBLIC CONSTRUCTION BOND—ASSIGNMENTS—SUBCONTRACTOR.

   In city's interpleader suit to determine ownership of funds withheld by city under contract for construction of a municipal building as between surety on statutory bond and assignee of principal contractor on the one hand and an unpaid

subcontractor who had performed work on the other hand where specifications provided that city might withhold a sufficient amount to make proper payments to subcontractors and that assignments were to be made subject to prior lien for services rendered and materials supplied, subcontractor was entitled to the fund withheld by the city to the extent of his contract price (3 Comp. Laws 1929, § 13132 *et seq.*).

Appeal from Clinton; Cash (Paul R.), J. Submitted June 8, 1944. (Docket No. 41, Calendar No. 42,723.). Decided June 30, 1944.

Bill of interpleader by City of St. Johns against Hudson-Howe, Inc., and others to determine the ownership of money in plaintiff's possession. Cross bill by R. E. Leggette, doing business as Acoustical & Specialties Contracting Company, claiming the full amount. Cross bill by Michigan Surety Company claiming full amount. Decree for defendant Michigan Surety Company. Defendant Leggette appeals. Reversed and decree awarding sum to appellant to be entered.

Beaumont, Smith & Harris, for defendant Leggette.

Shields, Ballard, Jennings & Taber, for defendant Michigan Surety Company.

SHARPE, J. This is a bill of interpleader filed by the city of St. Johns to determine the ownership of the sum of $1,400 which represents the balance owing by the city for the construction of a municipal building.

It appears that on December 10, 1938, the city of St. Johns advertised for sealed bids for the construction of a municipal building, and for the plumbing, heating and electric wiring thereof. Hudson-

Howe, Inc., was the successful bidder and entered into a contract with the city for the construction of the building. The defendant R. E. Leggette, doing business as Acoustical & Specialties Contracting Company, entered into a contract as subcontractor for the performance of certain work and services in and about the construction of the building. The specifications for the building provided:

"24. Owner's right to withhold certain amounts and make application thereof. In addition to the payment to be retained by the owner under the preceding provisions of these general conditions the owner *may withhold* a sufficient amount of any payment otherwise due to the contractor to cover (a) payments that may be past due and payable for just claims for labor or materials furnished in and about the performance of the work on the project under this contract, (b) for defective work not remedied, and (c) for failure of the contractor to make proper payments to his subcontractor. The owner *shall disburse* and shall have the right to act as agent for the contractor in disbursing such funds as have been withheld pursuant to this paragraph to the party or parties who are entitled to payment therefrom. The owner shall render to the contractor a proper accounting of all such funds disbursed in behalf of the contractor."

The statutory labor and material bond * was executed in which Robert Hudson and J. H. Howe, doing business as Hudson and Howe, were principals, Michigan Surety Company was surety, and the people of the State of Michigan were obligees. The same principal and surety company also executed a performance bond.

R. E. Leggette entered into a written contract with Hudson-Howe to furnish and install certain acousti-

* See 3 Comp. Laws 1929, § 13132 *et seq.* (Stat. Ann. § 26.321 *et seq.*).—REPORTER.

celotex for the building, in accordance with the plans and specifications, for the sum of $1,400. The work required by this contract was completed on December 6, 1939, and there is no dispute as to the character of the work done.

After work had commenced on the building the principal contractor experienced difficulties in meeting its financial obligations, and Robert Hudson, one of the partners of Hudson-Howe, borrowed the sum of $10,000 from the Owosso Savings Bank, which loan was secured by a bond executed by the Michigan Surety Company. On October 23, 1939, Robert Hudson and J. H. Howe assigned all their right, title and interest in and to certain moneys to become due to them by virtue of the construction contracts to Robert Hudson and Michigan Surety Company. The contract for the construction of the building was completed. The surety company paid all of the laborers, materialmen and subcontractors on the various jobs covered by the assignment except R. E. Leggette. It is admitted that the amount due R. E. Leggette under his contract is the sum of $1,400.

The trial court found that the Michigan Surety Company and Robert Hudson undertook and did complete the principal contract and that the assignment constituted a novation, and entered an order directing that the money be paid to the surety company. R. E. Leggette appeals. The surety company did not file a cross appeal. It is admitted that R. E. Leggette did not file the proper notice under the statutory bond and therefore is not entitled to recover under the bond. Appellant contends that by virtue of article 27 of the specifications,—

"Assignment of contract. The contractor shall not assign this contract or any part hereof without the written consent of the owner. No assignment of this contract shall be valid unless it shall contain

a provision that the funds to be paid to the assignee under the assignment are subject to a prior lien for services rendered or materials supplied for the performance of the work called for in said contracts in favor of all persons, firms, or corporations rendering such services or supplying such materials."

and article 24, hereinbefore quoted, he is entitled to the unpaid money held by the city of St. Johns.

The Michigan Surety Company contends that appellant, as a subcontractor, can only look to the principal contractor, or the surety on its bond, for recovery of the amount earned on his contract. It is also urged by the surety company, and the trial court found as a fact, that the specifications, of which article 24 is a part, were never introduced in evidence. In view of the fact that the determination of whether the specifications were introduced in evidence is important to the rights of the claimants of the fund, we have carefully examined the record and find that the court admitted in evidence all exhibits from 1 to 11. Exhibit 2 was the specifications. The record is clear that the specifications were introduced in evidence.

An examination of article 24 discloses that the city reserved the right to withhold money otherwise due the contractor for the payment of labor and materials. Under its provisions the city had the right to withhold such funds and disburse the same to parties entitled to payment from the principal contractor. The provision was designed as additional protection to the subcontractor.

Under article 27, relating to assignment, it is to be noted that the funds to be paid to the assignee are subject to a prior lien for services rendered or materials supplied.

In our opinion defendant R. E. Leggette is entitled to the sum of $1,400 by virtue of articles 24

and 27. The trial court was in error in awarding the sum to Michigan Surety Company.

The decree is reversed, and a decree will be entered awarding said sum to R. E. Leggette. Appellant may recover costs against the Michigan Surety Company.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, BOYLES, and REID, JJ., concurred.

RUEHS *v.* SCHANTZ.
DODGE *v.* SAME.

1. EQUITY—PROTECTION OF PROPERTY—SUBSTANTIAL INJURY.
   Since every man has a right to the enjoyment of his property, equity will interfere to protect that right provided the injury to the owner's enjoyment be a substantial one.

2. INJUNCTION—TRESPASS—SUBSURFACE DRAINS.
   Where the installation of subsurface tile drains on defendants' lands casts upon plaintiffs' lands water in excess of the amount with which latter are burdened by nature and thereby confers a benefit upon defendants while imposing damage and trespass upon plaintiffs' lands, plaintiffs would be entitled to injunctive relief against such trespass.

3. DRAINS—ADJOINING LANDOWNERS—UNTILLABLE LAND.
   A landowner has no right, under any circumstances, to transfer his wet and untillable land to his neighbor by the installation of an artificial drainage system and carrying the water at once upon his neighbor's land so that it will not overflow and percolate his own soil, irrespective of whether or not it was good husbandry to do so.

Causing a thing to enter the land of another may constitute a trespass, see 1 Restatement, Torts, §§ 158, 159.

4. WATERS AND WATERCOURSES—ADJOINING LANDOWNERS—FLOODING LANDS.

The right to drain or dispose of surface water on land cannot be exercised by concentrating and pouring it, by means of an artificial ditch or drain, in unusual quantities and velocity greater than would be natural, upon adjacent property.

Appeal from Kent; Verdier (Leonard D.), J. Submitted June 8, 1944. (Docket Nos. 44, 45, Calendar Nos. 42,768, 42,769.) Decided June 30, 1944. Rehearing denied September 5, 1944.

Separate bills by Linda Ruehs and another and William Dodge, by Clinton B. Dodge, his guardian, against Theodore Schantz and another to restrain the construction of a drain and interference with natural drainage of water. Cases consolidated. Bills dismissed. Plaintiffs appeal. Reversed and decree entered enjoining defendants and remanding for enforcement of decree.

Fred P. Geib, for plaintiffs.

Linsey, Shivel, Phelps & Vander Wal, for defendants.

BOYLES, J. In these consolidated cases plaintiffs are owners of certain servient farm lands in Caledonia township, Kent county, which are burdened with the natural flow of surface water from the adjacent upper or dominant estates of the defendants. Plaintiffs filed similar bills of complaint in the chancery court to enjoin defendants from draining additional water upon the lands of plaintiffs by means of subsurface tile drains. The cases were consolidated for hearing, the circuit judge dismissed the suits, and plaintiffs appeal. The single question for review is the same in both cases:

"May an upper farm proprietor proceed to tile drain his farms and cast 'ground water' or subsurface water through such tile drains to and upon the lower adjoining farms without prescriptive right and without the consent of their owners?"

Defendants restate the issue to be whether the defendants' proposed tile drainage would "unreasonably" increase the amount of water that will naturally flow onto plaintiffs' premises from defendants' lands. In one of the earliest reported decisions of the court of chancery of this State the chancellor said:

"It is contended that the injury is too inconsiderable in itself for the court to take cognizance of this case. * * * The question presented is, whether or no the defendant shall be allowed to erect a dam on his own land, to such a height as to flow the land of complainant, lying on the river a short distance above defendant's mill. It is not denied, but on the contrary is admitted, that the old dam, before it was carried away by the freshet, caused the water to overflow more or less of complainant's land. The defendant does not place his defense on this ground, but upon another and different ground, viz: that the land so overflowed, and which will be again, if he is allowed to erect a new dam of the same height with the old one, is of little or no value, and the flowing of it not productive of any serious injury. The evidence on this point is conflicting. Some of the witnesses think it would do little or no injury, while others estimate the damages at from $300 to $500. The extent of the injury, provided there be a substantial injury done, is of no very great importance. Every man has a right to the enjoyment of his property undisturbed by another, and to be protected in that enjoyment; and, what one may consider of little value, another may esteem very highly. The court will not, in cases of this

kind, be governed by dollars and cents alone, but will inquire whether the injury is of such a nature, that it can reasonably be supposed to lessen materially the enjoyment of property by its owner." *White* v. *Forbes,* Walker's Ch. (Mich.) 112.

The facts are not seriously in dispute. It is conceded that plaintiffs' lands are burdened with the natural flow of surface water from the lands of the defendants, and that defendants have no right acquired by prescription or consent.

In the spring of 1943 defendants started to construct a 4-inch tile drain on part of their lands, to drain a wet spot on their land which at times was so saturated with water as to be untillable. The trench for this tile was from 18 inches to 2 feet deep and the tile was to discharge directly into a so-called "stone pit" on plaintiffs' lands from which plaintiffs carry off the water by a tile drain. A few days later defendants started another 4-inch tile drain at a different place to discharge water into an open ditch on their farm and thence onto plaintiffs' lands. Temporary injunctions were issued halting these projects. In addition, defendants already had in operation an 8-inch tile drain discharging water from defendants' lands onto the lands of plaintiffs, without any prescriptive right or consent. This drain discharged water onto plaintiffs' lands to the extent that the water caused a wet place in one of plaintiffs' fields, as a result of which a tractor drawing a wheat harvester had to be pulled out with another tractor.

The record fully establishes that defendants are increasing and preparing to further increase the flow of water from their lands onto plaintiffs' lands beyond the natural flow of water with which plaintiffs' lands are burdened as a matter of law. As a result, plaintiffs must either take care of this ad-

ditional water through plaintiffs' own tile drains or permit it to percolate the soil in plaintiffs' fields. Defendants do not claim any prescriptive right or consent to do so but insist that the increase is not unreasonable in extent.

An expert witness produced by defendants at the hearing testified that the prime purpose in putting in a system of tile drainage, on a fairly level farm, is to lower the water table, to remove ground water more quickly; that

"the general purpose of the tiling system on the ordinary farm is to remove that ground water from the soil and cast it on down to lower levels. The effect of tiling, for that purpose, is to increase the run-off from that land by the amount that this subsurface drainage takes out of that ground water. It increases the water, that run-off, or all that is cast on the property below by that amount, over and above the surface water that runs off in the course of nature."

There is no question but that the tile drain already installed and the drainage system started by defendants casts and is intended to cast additional water upon plaintiffs' premises in excess of the amount with which plaintiffs' lands are burdened by nature. This is accomplished by tiling the subsurface whereby the percolating or subsurface water on defendants' lands is drained onto plaintiffs' lands. The result has been and would continue to be that defendants, by this system of subsurface drainage, would be able to utilize more land for tillage and in wet seasons work fields and plant crops much earlier than if the drains were not installed. While this would result in benefit to defendants, the record fairly establishes that at certain times it would prevent plaintiffs from an earlier use of their fields. The additional water

thus discharged onto plaintiffs' farms is a damage and a trespass. Plaintiffs' right to injunctive relief against the trespass is clear.

Where a similar situation arose in an early case, this court said:

"The defendant, as said in *Gregory* v. *Bush,* 64 Mich. 37, 42 (8 Am. St. Rep. 797), could not, 'by artificial drains or ditches, collect the water of stagnant pools, sagholes, basins, or ponds upon his premises, and cast them in a body upon the proprietor below him, to his injury.' And he could not reclaim his land by transferring the overflow from his land to that of plaintiff. 'He cannot collect and concentrate such waters, and pour them through an artificial ditch, in unusual quantities upon his adjacent proprietor.' *Gregory* v. *Bush,* 64 Mich. 37, 44. *What the defendant did, by his own showing, was to transfer his wet and untillable land to his neighbor by the digging of an artificial ditch, and carrying the water at once upon plaintiff's land, so that it would not overflow or percolate his own soil.* This he had no right to do under any circumstances, and whether or not it was good husbandry upon his part to do so was entirely immaterial." *Yerex* v. *Eineder,* 86 Mich. 24 (24 Am. St. Rep. 113).

"While one has a right to drain and dispose of the surface water upon his land, yet he cannot lawfully concentrate such water, and pour it through an artificial ditch or drain, in unusual quantities and greater velocity, upon an adjacent proprietor." *Peacock* v. *Stinchcomb,* 189 Mich. 301, 307.

In *Miller* v. *Zahn,* 264 Mich. 306, defendant built two tile drains that emptied onto plaintiffs' farm, which increased the volume of water. Defendant's land consisted of marshy soil which defendant sought to condition by drainage to make it tillable for crops. This court enjoined the maintenance of the tile drains.

A decree may be entered in this court permanently enjoining defendants from constructing or maintaining artificial drainage which may discharge water onto plaintiffs' lands in excess of the natural flow of surface water, and remanding for enforcement thereof. Plaintiffs may have costs of both courts.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, and REID, JJ., concurred.

BURROUGHS *v.* TEITELBAUM.

1. APPEAL AND ERROR—EQUITY—MORTGAGE FORECLOSURE—ANSWERS.
   On appeal in chancery mortgage foreclosure proceedings where decree, amended decree and plaintiffs' reply to an answer including a prayer for affirmative relief would indicate that defendants had filed an answer which does not appear in the record and of which there is no calendar entry, the case will be disposed of as though an answer had been filed denying the equities of the bill or leaving plaintiffs to their proofs.

2. MORTGAGES—CHANCERY FORECLOSURE—SALE AS ONE PARCEL.
   Upon sale under chancery foreclosure of a mortgage covering several pieces of property, it is permissible to sell all in one parcel when no offers are received for any separate parcel (3 Comp. Laws 1929, § 14377).

3. APPEAL AND ERROR—ABANDONMENT OF APPEAL—CHANCERY FORECLOSURE OF MORTGAGE.
   Where it appears that defendants in chancery proceedings to foreclose a mortgage filed preliminary notice of appeal from

original decree entered on December 19, 1932, and a supplemental notice of appeal after entry of supplemental decree, but on February 28, 1935, and March 1, 1937, filed petitions for moratorium, such appeal will be considered as having been abandoned on appeal from order denying petition to set aside sale, especially where attorneys for both sides acted as though by stipulation the appeal had been dismissed or had otherwise been abandoned (Court Rule No. 56, § 1 [1931]).

4. MORTGAGES—FORECLOSURE—SALES—RETURN OF SERVICE ON SECOND MORTGAGEE.

Return of service on third alias summons upon second mortgagee of premises upon which first mortgage was foreclosed in chancery, showing service upon such defendant in 1932, is not disturbed on appeal of such defendant from order denying petition, filed in 1938, to set aside the sale had under decree where trial judge found that appellant had been informed of such foreclosure, of the sale, and that a moratorium had been obtained by his sons who were other defendants.

5. PROCESS—CHANCERY CASES—ALIAS SUMMONS—STATUTE OF LIMITATIONS.

An alias writ in a chancery case, issued in accordance with court rule then in effect, if not good as an alias, is good as an original summons where the statute of limitations has not run (3 Comp. Laws 1929, § 13976, as amended by Act No. 193, Pub. Acts 1937).

6. SAME—ALIAS SUMMONS—STATUTE OF LIMITATIONS.

Where a writ purporting to be an alias summons has no proper basis as an alias, the previous writ not having been seasonably returned, the second writ is not for that reason void, but, the statute of limitations not having run against the suit, it should, in case the first suit goes down, be treated as a new writ for a new suit and sustained accordingly (3 Comp. Laws 1929, § 13976, as amended by Act No. 193, Pub. Acts 1937).

7. MORTGAGES—CHANCERY FORECLOSURE—SECOND MORTGAGEE—PROCESS—ALIAS—STATUTE OF LIMITATIONS—RELEASE.

Second mortgagee of premises upon which first mortgage was foreclosed in chancery was properly treated by the trial court as subject to the jurisdiction of the court and bound by the proceedings where, notwithstanding the third alias summons, returned as having been served, may not have been valid as an alias, was valid as an original summons since the statute of limitations had not run, and he had released part of the prem-

ises after foreclosure suit was commenced (3 Comp. Laws 1929, § 13976, as amended by Act No. 193, Pub. Acts 1937).

8. SAME—SETTING ASIDE CHANCERY FORECLOSURE SALE—CLEAN HANDS—LACHES.

Second mortgagee of premises upon which first mortgage was foreclosed in chancery was not entitled to have sale under decree set aside where, notwithstanding he claimed no process had been served on him, and that the third alias summons, returned as served, was invalid for failure to preserve continuity of action, he was not before equity court with clean hands and was guilty of laches, the original trial judge, the original plaintiff, his attorney, and the process server all having died before appellant's petition for relief was filed.

Appeal from Genesee; Bishop (Clifford A.), J. Submitted April 12, 1944. (Docket No. 1, Calendar No. 42,299.) Decided June 30, 1944. Rehearing denied September 5, 1944.

Bill by George W. Hubbard against Herman Teitelbaum and others to foreclose a mortgage. Decree for plaintiff. On motions by defendants Chimovitz to set aside sale. J. Edington Burroughs and others, co-executors of estate of George W. Hubbard, deceased, substituted as parties plaintiff. Motions denied. Defendants Chimovitz appeal. Affirmed.

Cline & George (*Homer J. McBride,* of counsel), for plaintiffs.

Walter C. Jones and *Maurine L. Jones* (*Ivan Meisner,* of counsel), for defendants and appellants.

REID, J. The principal objective of this appeal is to set aside a sale of lands on foreclosure in chancery. The appeal is from an order entered November 17, 1941, denying defendants' motions to set aside the sale. The bill was filed October 16, 1931. All of the lands are situated in Genesee county.

There are several descriptions of land, some being store property in the city of Flint; one is a residence, the homestead of one of the defendants; and one parcel is acreage outside of the city of Flint. In November, 1931, all of the defendants except Morris Chimovitz appeared. On June 14, 1932, the third alias summons was returned served on Morris Chimovitz, the affidavit of service being sworn to by H. M. Koffman. On July 20, 1932, affidavit of non-appearance, affidavit of regularity and order *pro confesso* as to defendant Morris Chimovitz were filed.

Defendants complain of irregularity of proceedings because no answer had been filed. The six active defendants were in court August 5, 1932, represented by attorney Dean, also by Neithercut & Neithercut, and agreed in open court that the hearing of the case should proceed as to the foreclosure, participated in the hearing and examined witnesses on that day and on August 11, 1932. It would seem that plaintiff had received from defendants their answer which incorporated a prayer for affirmative relief. Plaintiff's reply to such answer by defendants is on file and appears in the record. The decree and the amended decree both recite that the hearing was on bill, answer and amended answer. Defendant's answer was before the court but it is not now found in the file and there is no calendar entry of it. The case will now be disposed of in the same manner as though an answer had been filed denying the equities of the bill or leaving plaintiff to his proofs.

On December 19, 1932, a decree of foreclosure sale was filed. On December 30, 1932, a preliminary notice of appeal to this Court from the order of foreclosure sale was filed in a paper in which the title of the court and cause was recited as well as

that the appeal was taken on behalf of "the appellants above named." Affidavit of service of notice of appeal was filed January 4, 1933, and on the same day an amended decree by Judge Parker of foreclosure sale was filed which recited:

"It having been *consented to in open court* by the attorneys for the plaintiff and the defendants, except Morris Chimovitz, that this court acquire jurisdiction of the rights of the defendant, city of Flint, a municipal corporation, to have this court determine the necessity of it acquiring certain portions of the mortgaged premises * * * to be used for public purposes."

The decree determined that a fair and reasonable value of the premises described in it, which were to be acquired by the city of Flint, was $1,500, one half of which was to be paid to plaintiff and one half to defendants other than Morris Chimovitz, and recited that the city of Flint was entitled to condemn descriptions 1 and 2 set forth in said amended decree of January 4, 1933. It further recited that the total amount due plaintiff on the mortgage principal and interest was $122,011.99, found defendants Louis and Nathan Chimovitz personally liable for the payment of it, ordered payment to be made by December 19, 1932, and provided for sale by the circuit court commissioner of the other property described in the mortgage. This decree apparently was intended to amend *nunc pro tunc* clerical errors in dates in the former decree for foreclosure sale. The defendants should have urged at that time, if not before, their claims as to usury and shown the true balance due on the mortgage.

On January 23, 1933, appearance of plaintiff on appeal was filed. On February 8, 1933, the commissioner's report of sale was filed and order *nisi* con-

firming it was filed February 10, 1933. On February 17, 1933, the two defendants Teitelbaum and the four defendants Chimovitz, except Morris, by Oscar Dean, their attorney, filed with the circuit court their objections to confirmation of such report. They alleged, among other things, a sale in one parcel and not in separate parcels, and the inclusion of a homestead, but did not mention in their objections the fact of an appeal, claim of usury, or that the amount found due in the foreclosure decree was excessive. They claimed that, contrary to the recital in the report, the sale was in fact in two parcels. Apparently these six defendants had abandoned their appeal and were making themselves heard in the circuit court as though no appeal were pending. Supplemental notice of appeal was filed June 29, 1933, by Oscar Dean, attorney for defendants (apparently the same six defendants for whom he had formerly appeared). On January 3, 1934, the answer of plaintiff to the defendants' objections to the report was filed. On January 11, 1934, the testimony was offered before the circuit court, and the circuit court commissioner was sworn as a witness. His testimony showed that the individual pieces of property were offered first, separately, and, on his receiving no bids, were sold as one parcel for $120,000. Louis Chimovitz, apparently sworn on his own behalf, also testified as to the procedure at the sale. The two parcels which the city was accorded the privilege of condemning were disposed of in the meantime by the city's payment of $1,500 and the city received conveyance.

A chancery sale in one parcel is permissible when no offers are received for any separate parcel.* *Walsh* v. *Colby,* 153 Mich. 602 (126 Am. St. Rep. 546).

* See 3 Comp. Laws 1929, § 14377 (Stat. Ann. § 27.1145).—REPORTER.

On January 16, 1934, the circuit judge's unconditional order confirming the sale was filed. Petitions in the circuit court for moratorium were filed by defendants February 28, 1935 and March 1, 1937. The moratorium file was offered in evidence on a hearing in the circuit court but the contents thereof are not set forth in the record before this Court. When the first petition for a moratorium was filed, more than 18 months had elapsed after both the preliminary notice of appeal (December 30, 1932) and the supplemental notice of appeal (June 29, 1933) had been filed. Appellants elected to use a "bill of exceptions" which was never prepared (3 Comp. Laws 1929, § 15514 [Stat. Ann. 1943 Rev. § 27.2614]). But see Court Rule No. 56, § 1 (1931). Time to settle the "bill of exceptions" was never extended in circuit court or this Court.

On November 17, 1942, the circuit court denied defendants' motions to set aside the sale after finding that they had waived any irregularities in the foreclosure by their proceedings in this matter.

The defendants must be considered by this Court to have abandoned their appeal as the record does not disclose what actually became of it. On both sides the original attorneys acted as though by stipulation the appeal had been dismissed or had otherwise been abandoned. An examination of the records and files of this Court discloses no entry concerning said appeal.

On October 22, 1938, by their present attorneys, the four Chimovitzes, not including Morris, filed a petition to set aside the sale for the following reasons:

"(a) because the said case was not at issue at the time of the filing of the decree.

"(b) because defendants were ordered and directed to pay sums decreed to be due on the day * * * the first decree was filed.

"(c) because the sale by the first decree was ordered before the decree was signed and filed.

"(d) because any sale under the first decree was void.

"(e) because the second and amended decree was filed which superseded the former decree and, any sale made, must be under the amended decree.

"(f) because not sufficient time was allowed for the notice of sale after the amended decree was filed, and sale was therefore void.

"(g) because the amended decree orders the defendants to pay the amount found to be due, 14 days before the decree was filed, and therefore the sale could not be held thereunder.

"(h) because the properties consist of several separate pieces and they were sold as a whole, thereby preventing the defendants from redeeming any separate piece or parcel.

"(i) because the orders of the circuit court were made after the claim of appeal was filed, and therefore without the jurisdiction of the court."

The order now appealed from denied this petition. On the same day, October 22, 1938, Morris Chimovitz filed his petition by the same attorneys who then appeared for the other defendants to set aside the decree and sale. The petition was supported by his own affidavit and that of his daughter, Pearl Tarnopol. By these affidavits it would appear that he was not served with process but that instead his son-in-law Tarnopol was served. Morris Chimovitz resided with his said daughter and her husband. The trial judge was correct in his conclusion that Morris Chimovitz, the owner of a second mortgage on these premises, had been informed that the first mortgage had been foreclosed and the premises sold and that a moratorium had been obtained by his own sons, defendants. Under all the circumstances, we conclude to let the return by Koffman stand as setting forth the actual fact in the case.

Morris Chimovitz further claimed that the issuance of the so-called third alias summons that was served upon him was void and without jurisdiction of the court to issue it. Defendants' claim as to irregularity is that the summons was filed with a return showing service upon all parties except Morris Chimovitz and no statement that he could not be found after diligent search; that an alias summons was issued without being based upon any return and that the first alias summons was filed five days after the return date without any return attached; the second alias summons was issued March 11, 1932, returnable April 11, 1932, and was filed May 20, 1932, without any return and the third alias summons was issued May 20, 1932, returnable June 20, 1932, and was filed June 19, 1932, with the return by H. M. Koffman, which was the disputed return.

Defendants cite the case of *Rood* v. *McDonald,* 303 Mich. 634, the factual background of which case renders that decision inapplicable to the instant case. The real substance of our decision in the *Rood Case, supra,* is that under the circumstances of that case there was no abuse of discretion in the trial court's denial of plaintiff's application to amend the return on the original summons and on alias summonses issued prior to the alias which was finally served on defendant. It does not fully appear from our opinion that in so ruling the trial court was motivated by the involvement of the statute of limitations, which is not involved in the instant case. In the *Rood* opinion we said, p. 636:

"At the hearing (of defendant's motion to quash service) defendant made the further claim that plaintiff's claims were barred by the statute of

limitations.* There was no prior notice of the defense of the statute of limitations given but both in the arguments and the briefs filed respective counsel argued the applicability of the statute."

Because the trial court in the *Rood Case* upon the hearing of defendant's motion to quash service found as a fact that prior to the service of the alias summons upon defendant, plaintiff's cause of action was barred by the statute of limitations, the trial court granted the motion to quash, and that holding was affirmed by this Court. In the respect just above noted as to the statute of limitations, the *Rood Case* must be distinguished from the instant case.

In the case of *Westlawn Cemetery Ass'n* v. *Wayne Circuit Judge,* 238 Mich. 119, 123, we said:

"It is next urged that the *alias* writ was not issued in accordance with Circuit Court Rule No. 18. But it should be noted that Rule 18 deals with writs on the law side and Rule 19 deals with chancery summons, section 1 of which rule provides in part: * * *

" 'And if process is not executed on or before the return day, further process may be taken out of course, as often as may be necessary.'

"But if the writ was not good as an *alias,* it was good as an original summons, the statute of limitations not having run. *Frantz* v. *Railway,* 147 Mich. 199; *Axtell* v. *Gibbs,* 52 Mich. 639; *Gunn* v. *Gunn,* 205 Mich. 198."

The necessity of complying with rule requirements in taking out alias or pluries summons in order to preserve continuity of action and thereby

* See 3 Comp. Laws 1929, § 13976, as amended by Act No. 193, Pub. Acts 1937 (Comp. Laws Supp. 1940, § 13976, Stat. Ann. 1940 Cum. Supp. § 27.605).—REPORTER.

avoid the bar of the statute of limitations was fully considered in *Home Savings Bank* v. *Young,* 295 Mich. 725. We therein held plaintiffs' suit was barred because of failure to preserve continuity of action, but we said: "If the statute of limitations had not run against plaintiffs' suit, a different conclusion might be necessitated." And in this connection we quoted the syllabus in *Gunn* v. *Gunn,* 205 Mich. 198, as follows:

"'Where a writ purporting to be an alias summons has no proper basis as an alias, the previous writ not having been seasonably returned, the second writ is not for that reason void, but, the statute of limitations not having run against the suit, it should, in case the first suit goes down, be treated as a new writ for a new suit and sustained accordingly.'"

There is no claim in the instant case that plaintiff's cause of action was barred by the statute of limitations at the time Morris Chimovitz was served with an alias summons, and therefore the irregularity in the issuance of such alias did not render its service ineffective.

Morris Chimovitz without appearing in the case made part release of the premises covered by the mortgage being foreclosed in this proceeding, subsequent to the order authorizing the city to take over the property thus released from the mortgage. The release was witnessed by Dean, attorney for all the other defendants in the case except the city. The plaintiff mortgagee, interested in the transaction for the part release, and his attorney, Stockton, both doubtless had knowledge of Morris Chimovitz's acts respecting the conveyance. It is fairly to be considered that Morris Chimovitz by indirectly taking his part of the consideration paid by the city

knowingly benefited by the order of the court to the extent of his receipt of part payment.

Morris Chimovitz was properly treated by the trial court as subject to the jurisdiction of the court and is bound by the proceedings in this case. In any event under and because of the facts herein noted relative to Morris Chimovitz, we hold that in asking the affirmative relief presently sought he is not before the equity court with clean hands, and, further, is guilty of laches in consequence of which the relief sought by him must be denied.

The bill was filed in the first instance by George W. Hubbard, who died March 6, 1937, and by order in open court on January 16, 1939, the above named coexecutors were substituted as plaintiffs.

Notwithstanding many irregularities about the proceedings to foreclose this mortgage, the fact still remains that the final amendatory decree had been made by Judge Parker in January, 1933, after hearing objections raised by defendants. Before the motions filed October 22, 1938, by defendants, the circuit judge before whom the foreclosure proceedings occurred, Mr. Hubbard, original plaintiff, Mr. Stockton, plaintiff's attorney, and Mr. H. M. Koffman, who made the affidavit of service, had died. As before noted, appellants are guilty of laches. They have no right to have their matter again litigated.

The order appealed from is affirmed, with costs of both courts to plaintiffs.

NORTH, C. J., and STARR, BUTZEL, BUSHNELL, SHARPE, and BOYLES, JJ., concurred. WIEST, J., did not sit.

MENOMINEE LUMBER & CEDAR CO. *v.* THOMSON.

CONTRACTS—SALE OF ICE—REQUIREMENTS—CONSTRUCTION—PAROL EVIDENCE—MERGER OF PREVIOUS NEGOTIATIONS.

In assumpsit on contract whereby defendant railroad company agreed "to buy such ice as may be required" at a certain city it was permissible to submit to jury previous correspondence between the parties to show the amount intended by the word "required," especially where letter transmitting such contract to plaintiff for signature indicated that defendant did not understand the contract merged into it all previous negotiations, and the previous correspondence showed that plaintiff had specifically requested an estimate of daily requirements in order to harvest sufficient ice to meet defendant's needs.

Appeal from Menominee; Bell (Frank A.), J. Submitted April 5, 1944. (Docket No. 28, Calendar No. 42,672.) Decided June 30, 1944.

Assumpsit by Menominee Lumber & Cedar Company, a corporation, against Charles M. Thomson, trustee of the property of Chicago & Northwestern Railway Company, to recover damages for failure to take ice under contract. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

George Barstow, for plaintiff.

Frost & Deo, for defendant.

REID, J. Plaintiff and appellee filed its declaration July 29, 1943, alleging that defendant and ap-

Merger of previous correspondence in a writing, see 2 Restatement, Contracts, § 447.

pellant, receiver of the railroad company, entered into a contract by which plaintiff agreed to sell and defendant agreed to buy of plaintiff approximately 7.7 tons of ice per day during the icing season of the year 1942, amounting to substantially 3,000 tons of ice for the year; that the defendant accepted delivery and paid for only 66 tons of ice and declined to receive delivery of over 2,500 tons of ice for which it had contracted. The declaration further sets out the preliminary correspondence between the parties, exhibits A, B, C, D, E, F and G, and contract prepared by the defendant, signed by both parties, dated January 30, 1943, exhibit H. Plaintiff further alleges that exhibit H contained the words, "such ice as may be required at Menominee," which the declaration alleges to be indefinite and ambiguous unless understood in the same sense as the word "require" was used in correspondence, including exhibit C, which is, "We will require approximately 7.7 tons per day." The declaration further alleges that in reliance upon the contract plaintiff harvested and stored for delivery to defendant large quantities of ice for which it would not have use except for the purpose of fulfilling the contract.

The answer alleged that exhibit H was a contract complete in itself, free from ambiguity, and constituted the entire and only arrangement between the parties to this litigation for the sale, purchase and delivery of ice between plaintiff and defendant at Menominee during the period provided in the contract, January 2, 1942, to December 31, 1942.

Exhibit A, dated November 24, 1941, was a request from defendant's general purchasing agent addressed to plaintiff requesting price quotation on ice at Menominee during the season of 1942.

Exhibit B was a letter from plaintiff to defendant dated November 27, 1941, answering exhibit A and containing the words,

"We would appreciate your advising us how many cars you would require filled with ice and the time of filling."

Exhibit C, in reply to exhibit B, was dated January 2, 1942:

"Referring to your letter November 27, file CJS, regarding the number of cars that will require icing and the time of day it will be required.

"We have just received advice from our operating department that we will require approximately 7.7 tons per day. Delivery of this ice will be made at 7 a. m. for train No. 210 and 9:30 a. m. for train No. 214; also between 2 p. m. and 3 p. m. daily for train No. 224. On Sundays, trains Nos. 220 and 244 will require ice around noon time.

"With this information will you kindly quote us price on our ice requirements for 1942."

Exhibit D, dated January 12, 1942, in reply to exhibit C, contained an offer of the prices, and further contained the words,

"The above quotation is for prompt acceptance, as the labor situation is becoming more acute here every week, and we will have to give the filling of our ice house immediate attention."

Exhibit E, from defendant to plaintiff, dated January 17, 1942, contained the words,

"See if you cannot give us a more favorable figure for our 1942 requirements * * * We are able to purchase this ice at a more favorable figure."

Exhibit F was dated January 21, 1942, from plaintiff to defendant:

"Replying to your letter of the 17th, File 2–60–18, and confirming our telephone conversation of today with you, we will be glad to furnish your ice requirements at Menominee, Michigan, at a reduction

of 50 cents per ton below our quotation dated January 12, 1942.

"This is for prompt acceptance, and we would appreciate it if you could wire us if accepted and contract could come along later, as we are filling now and prefer not to put up any more than our requirements on account of labor conditions at this time."

Exhibit G is dated January 23, 1942, from defendant to plaintiff:

"Referring to yours January 21st, file CJS, wish to advise that in the next day or two we will forward you our ice contract covering requirements for 1942."

Exhibit I, not attached to the declaration but received in evidence on the trial, is a letter dated January 28, 1942, from the defendant to the plaintiff, also signed as accepted by the defendant:

"Enclose for your signature, contract in duplicate, covering our ice requirements at Menominee, Michigan, during 1942. Kindly sign and return the original for my file. Inasmuch as insurance covering public liability will expire as of March 1, 1942, it is understood of course, that same will be renewed at that time, and will be pleased to receive certificate of insurance indicating the insurance is in force for the protection of the railway and agreeing to give 10 days notice of cancellation or modification of said protection."

The important part of exhibit H, apparently inclosed with exhibit I, is:

"Menominee Lumber & Cedar Company, Menominee, Michigan, hereinafter called 'contractor' agrees to sell, and the Chicago & Northwestern Railway Company, hereinafter called 'railway company' agrees to buy such ice as may be required at Menominee, Michigan, during the period January 2, 1942,

to December 31, 1942, under the following terms and conditions:

"Price:

Ice placed in bunkers of air conditioned cars $3.50 per ton.

Ice placed in box for general use, such as refrigerator cars, water coolers in coaches and road and switch crews, et cetera $2.50 per ton.

"Delivery:

To be as required by railway company.

"Payment:

Payment to be made by the 20th of each month for all ice delivered during the previous month."

The contract further contained provisions for indemnity from liability for acts in performance of the contract, nothing about insurance, but a waiver as to local, State or Federal laws and liability if the contract were terminated under such laws.

No explanation is offered by either party of the reason for the almost total failure of defendant to accept deliveries of ice. There is a hint on that subject in exhibit E that the defendant could buy ice cheaper elsewhere.

Both plaintiff and defendant cite *Hickey* v. *O'Brien,* 123 Mich. 611 (49 L. R. A. 594, 81 Am. St. Rep. 227), in which John F. Lucas & Company made a contract with Kreutzberger & Crabbe,

"To furnish second parties with all the ice that they may require to carry on their ice business in said city for the period of five years from and after March 1, 1895 at the rate of 75 cents per ton."

On p. 615 the Court said:

"Kreutzberger & Crabbe undertook to take ice of Lucas & Company for the period of five years; that the quantity which they agreed to take was to be measured by the necessities of their business, but

this presupposed that they would have a business for the time agreed."

In that case the contract was to furnish "all the ice that they may require to carry on their ice business in said city," and the Court did not hold such contract void for uncertainty.

Defendant further cites *F. B. Holmes & Co.* v. *City of Detroit,* 158 Mich. 137, and *Stuart* v. *Home Telephone Company of Detroit,* 161 Mich. 123.

In the instant case plaintiff required of defendant an estimate of the amount of ice to be used by defendant as a necessary step and part of their negotiation and received that estimate in exhibit C as 7.7 tons per day. All the steps that led to the signing of exhibit H were by correspondence and were before the court and jury, except the telephone conversation referred to in exhibit F, which is shown by exhibit F to refer only to a reduction of 50 cents per ton in the proposed price in view of the request of defendant in exhibit E. It cannot be assumed that any of the other matters were waived or progress of negotiations changed by this telephone conversation except to lower the price 50 cents per ton. Plaintiff did not show exhibit H to its attorney before signing it, but does not ask to be relieved from any of its terms and on the contrary brings suit upon it.

It appears from exhibit I, the letter by which exhibit H was submitted to the plaintiff for signature, that exhibit H did not contain all the terms of the contract between the parties because insurance was a further item that was required by defendant to be considered as a part of the contract. It is improbable that the plaintiff actually *intended* to waive the estimate as to the quantity of ice to be furnished. The necessity of harvesting and storage was im-

perative and known to defendant, who also knew that ice not requisitioned would be a total loss to plaintiff. The defendant, the party asserting the rule as to the presumption of merger of previous negotiations into a written instrument, is the very party whose letter submitting the contract for signature shows that he did not so understand the situation and invited the other party to take the same view.

The trial judge was justified in submitting to the jury the previous correspondence to show the amount intended by the word "required."

The charge to the jury gave abundant latitude as to permissible variations by defendant from the estimated requirements. Plaintiff does not complain on that subject and defendant has no cause to complain. Judgment affirmed, with costs to the plaintiff.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

SURTMAN *v.* SECRETARY OF STATE.

1. STATUTES—AMENDMENTS.

   The legislature, in amending an act, is not required to re-enact and publish the amended act in full (Const. 1908, art. 5, § 21).

2. SAME—AMENDMENT—PUBLICATION AT LENGTH.

   In so far as an amendatory act does alter or amend a previous act by express language and is published at length and in so far as the change or alteration is by implication merely, it does not offend the provision of the Constitution relative to re-enactment and publication at length (Const. 1908, art. 5, § 21).

3. SAME—USE OF SHORT TITLES DURING LEGISLATIVE PROCESS.

   Legislative procedure whereby title of bill, proposing amendment to an act which contains a so-called short title, contains such short title until bill is passed by house of legislature other than that of origin, title of bill is then amended to contain full title and amendment is then concurred in by both houses of the legislature does not violate provisions of Constitution that no law shall embrace more than one object which shall be expressed in its title and that no law shall be revised, altered or amended by reference to its title only but that 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; Act No. 203, Pub. Acts 1933, as amended by Act No. 248, Pub. Acts 1943).

4. AUTOMOBILES—STATUTES—TITLE OF FINANCIAL RESPONSIBILITY ACT—AMENDMENT—OBJECT OF ACT—REPORTS.

   The title of the motor vehicle financial responsibility act of 1933, in stating that the primary object of the act was to require financial responsibility on the part of owners and operators of motor vehicles, is sufficient to embrace the object of a section added by an amendatory act wherein the operator or owner of

a motor vehicle involved in an accident in which anyone is killed or injured is required to give to the secretary of State a written report containing the names and addresses of owners and operators of all cars involved, of all persons injured or killed, the date, time, and place of accident and name of insurance carrier of operator or owner, and providing for self-insurance, limited inspection of report, penalties and suspension of operator's license (Const. 1908, art. 5, § 21; Act No. 203, § 3a, Pub. Acts 1933, as added by Act No. 248, Pub. Acts 1943).

5. STATUTES—AMENDMENT.

Whatever might have been incorporated into a statute upon its original enactment may be added thereto by way of amendment under the most general title.

6. SAME—AMENDMENT—STATEMENT OF OBJECT IN TITLE OF ACT.

An amendatory act which fails to show any objects foreign to the statement in the title of the act being amended and which amendment contains matter to be expected within the body of an act bearing such title is not unconstitutional because contrary to provisions of Constitution setting forth requisites of titles to acts (Const. 1908, art. 5, § 21; Act No. 203, § 3a, Pub. Acts 1933, as added by Act No. 248, Pub. Acts 1943).

7. CONSTITUTIONAL LAW—DISCRIMINATION—CLASS LEGISLATION.

That a rule of law may in certain instances work a hardship does not violate the due-process clause of the Constitution, provided it operates without any discrimination and in like manner against all persons of a class.

8. SAME—MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAW—CLASSIFICATION—REPORTS.

The classification of act, amending the motor vehicle financial responsibility act, requiring owners and operators of motor vehicles, except operators of vehicles owned by the public, to file reports of certain accidents containing certain information and providing penalty and suspension of operator's license for failure to do so is neither arbitrary, capricious nor unreasonable (Act No. 203, § 3a, Pub. Acts 1933, as added by Act No. 248, Pub. Acts 1943).

9. AUTOMOBILES—FINANCIAL RESPONSIBILITY ACT—REPORTS OF ACCIDENTS—CONSTITUTIONAL LAW—EQUAL PROTECTION—DUE PROCESS—SELF-INCRIMINATION.

Act, amendatory of the motor vehicle financial responsibility act, which requires the filing with the secretary of State of reports of accidents in which persons are killed or injured and

containing certain information, does not violate the equal-protection and due-process clauses of the State and Federal Constitutions nor the constitutional guaranty against self-incrimination where report made is not open to general public inspection (U. S. Const. Am. 14; Mich. Const. 1908, art. 2, §§ 1, 16; Act No. 203, § 3a, Pub. Acts 1933, as added by Act No. 248, Pub. Acts 1943).

10. SAME—CONSTITUTIONAL LAW—MUNICIPAL CONTROL OF STREETS.
Act, amendatory of the motor vehicle financial responsibility act, which requires the filing with the secretary of State of reports of accidents in which persons are killed or injured and containing certain information, does not infringe upon the reasonable control of streets reserved to municipalities by the Constitution (Const. 1908, art. 8, § 28; Act No. 203, § 3a, Pub. Acts 1933, as added by Act No. 248, Pub. Acts 1943).

11. CONSTITUTIONAL LAW—REASONABLE CONTROL OF HIGHWAYS BY MUNICIPALITIES.
The reasonable control of highways reserved to municipalities by the Constitution is such control as cannot be said to be unreasonable and inconsistent with regulations which have been established, or may be established, by the State itself with reference thereto, thus permitting a municipality to recognize local and peculiar conditions and to pass ordinances regulating traffic on its streets not contravening State laws (Const. 1908, art. 8, § 28).

12. LICENSES—CONDITIONS IMPOSED UPON GRANT BY STATE.
In accepting a license from the State, one must also accept all reasonable conditions imposed by the State in granting it.

13. COSTS—PUBLIC QUESTION—CONSTITUTIONAL LAW—MOTOR VEHICLE FINANCIAL RESPONSIBILITY ACT AMENDMENT.
No costs are allowed in suit against secretary of State to enjoin enforcement of act, amending the motor vehicle financial responsibility act and requiring reports of certain accidents, where public question concerning constitutionality of the amendatory act is involved (Act No. 203, § 3a, Pub. Acts 1933, as added by Act No. 248, Pub. Acts 1943).

Appeal from Wayne; Marschner (Adolph F.), J. Submitted April 13, 1944. (Docket No. 50, Calendar No. 42,710). Decided June 30, 1944. Rehearing denied September 5, 1944. Application for certiorari to Supreme Court of Michigan filed in Su-

preme Court of the United States withdrawn December 4, 1944.

Bill by John Earl Surtman and others against Herman H. Dignan, Secretary of State, to restrain enforcement of Act No. 203, § 3a, Pub. Acts 1933, as added by Act No. 248, Pub. Acts 1943. Isaac B. Holley and others intervene as parties plaintiff to obtain the same relief. Decree for defendant. Plaintiffs and interveners appeal. Affirmed.

Edward N. Barnard, for plaintiffs.

Roxborough & Taliaferro, for intervening plaintiffs.

Herbert J. Rushton, Attorney General, *Foss O. Eldred,* Deputy Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara* and *Maurice M. Moule,* Assistants Attorney General, for defendant.

BUSHNELL, J. The validity and constitutionality of Act No. 248, Pub. Acts 1943 (Comp. Laws Supp. 1943, §§ 4685–53, 4685–53a, Stat. Ann. §§ 9.1543, 9.1543[1]), is challenged in this appeal. The title of the act is as follows:

"An act to amend section 3 of Act No. 203 of the Public Acts of 1933, entitled, 'An act to provide for the revocation and suspension of operators' and chauffeurs' licenses and registration certificates; to require proof of ability to respond in damages for injuries caused by the operation of motor vehicles; to prescribe the form of and conditions in insurance policies covering such risks; to subject such policies to the approval of the commissioner of insurance; to provide for the payment of judgments in instalments in certain cases so as to meet the requirements of this act; to provide for furnishing by the secretary of State of information relative to the operating records of any person; to authorize the secretary of

State to make rules for the administration of this act and to prescribe penalties for the violation of the provisions thereof,' as last amended by Act No. 216 of the Public Acts of 1939; and to add to said act a new section to stand as section 3a thereof."

Act No. 203, Pub. Acts 1933 (Comp. Laws Supp. 1940, §§ 4685–51—4685–69, Stat. Ann. §§ 9.1541–9.1557), is known as "the Michigan motor vehicle financial responsibility act of 1933." The only change which the 1943 act made in the 1933 act as amended, so far as section 3* is concerned, is to require satisfaction within 30 days of any judgment involving damages "in excess of $50" instead of "in excess of $300," as provided in the original act. No question is raised on this appeal as to the change in section 3.

Section 3a, which was added to the original act, is questioned on the following grounds, (a) that the legislature failed to observe constitutional provisions in the legislative process of its adoption of the added section, and (b) that the added section contravenes various provisions of both State and Federal Constitutions. Appellants argue that the 1943 enactment is void because the legislature (1) failed to publish at length or to re-enact the act revised, and (2) because the amendment embraces more than one object, which is not expressed in its title. Appellants also contend that the act is void because (1) it violates the equal-protection-of-the-laws clauses of both Constitutions, (2) the due-process-of-law clauses, (3) it is contrary to the provisions of the guaranties against self-incrimination, and (4) it infringes upon the right of municipalities to reasonable control of their streets.

* This section of the original act was amended by Act No. 250, Pub. Acts 1935; by Act No. 228, Pub. Acts 1937, wherein the maximum amount of judgment was reduced from $300 to $150; by Act No. 216, Pub. Acts 1939, wherein the maximum amount of judgment was further reduced to $75.—REPORTER.

Section 3a, in substance, requires every operator or owner of a motor vehicle involved in an accident in which any person is killed or injured, to report in writing to the secretary of State, giving the names and addresses of the owners and operators of all motor vehicles involved, of all persons injured or killed, the date, time and place of the accident, and the name of any insurance carrier whose policy of insurance was in force and applicable to the liability of the owner or operator. Failure to furnish such report within 10 days constitutes a misdemeanor and sufficient ground for the suspension or revocation of the operator's license and registration certificate, unless showing of financial responsibility is made. The suspension is to continue until such proof is furnished, unless the injury or death claims are satisfied. The section provides a method for releasing the security and for self-insurance permits to be issued to the owner or operator of 25 or more motor vehicles. It also provides that the report may be examined by any person named therein, or his attorney, and for otherwise withholding the same from public inspection. It states that the provisions of the section shall not be applicable to any motor vehicle, or driver thereof, owned by the State or any agency, municipality or political subdivision thereof.

Plaintiffs Surtman, Pfeiffer, and others, owners and operators of motor vehicles, filed a bill in equity to enjoin defendant Dignan, secretary of State, from enforcing the provisions of section 3a of the act. The trial judge entered a decree denying such relief and dismissed the bill of complaint and an intervening bill, which was filed in the cause. From this decree plaintiffs and interveners have appealed.

The 1943 session of the legislature adopted Joint Rule 15, generally known as the "short-title" rule. It provides, in substance, that, when considering an amendment to an act which had been given a short

title, such as the one here involved, the title of a proposed amendment during its passage through both houses is required to contain only the "short title" of the act proposed to be amended with the chapter, part numbers, and compiler's section numbers, if any, and the year of compilation. Following the passage of an amendment in the house other than the house of origin, the title is there amended by striking out the "short title" and inserting in lieu thereof the last full title of the amended act, together with such other corrections and amendments as may be necessary, so that the amended title may be agreed to by the house in which the bill originated.

Such procedure was followed in the enactment of the amendment to the act in question. Appellants say this is a violation of the Constitution of 1908, art. 5, § 21, which reads in part as follows:

"SEC. 21. No law shall embrace more than one object, which shall be expressed in its title. No law shall be revised, altered or amended by reference to its title only; but the act revised and the section or sections of the act altered or amended shall be re-enacted and published at length."

This constitutional provision expressly refers to the title of an act as enacted, rather than to the title of a bill during its various steps towards enactment. The act in question did not attempt to amend the original act by reference only to the title of that act, but made the change in the original act by re-enacting section 3 in its entirety, as amended, and adding a new section 3a in full.

The legislature was not required to re-enact and publish the amended act in full. *People* v. *Shuler*, 136 Mich. 161.

We need not repeat the discussion of this proposition as stated in *People* v. *Stimer,* 248 Mich. 272 (67 A. L. R. 552), where the court said:

"In so far as the act under consideration revises, alters, or amends Act No. 181, Pub. Acts 1919, it does so in express language, published at length; and in so far as the change or alteration is by implication merely, it does not offend the constitutional provision."

Under the doctrine of "reasonable construction" enunciated by Mr. Justice COOLEY in *People, ex rel. Drake,* v. *Mahaney,* 13 Mich. 481, 496, 497, the legislative procedure here involved cannot be said to violate this constitutional provision.

But, say the appellants, the amendment embraces more than one object, which is not expressed in its title. It should be noted that the legislature did not amend the title to the original act, and that title is sufficient to give notice to all concerned of the general object of the act and the interests likely to be affected. The act has but one primary object, *i. e.,* to require financial responsibility on the part of owners and operators of motor vehicles, and the general object of the added section is completely within the object of the original act and is identical therewith. As said in *Common Council of Detroit* v. *Schmid,* 128 Mich. 379, 388 (92 Am. St. Rep. 468):

"Whatever might have been incorporated into the original act under the title of such original act may be added by way of amendment under the most general title."

Consideration of the language of the added section does not show any objects which are foreign to the statement in the title of the original act, and the amendment contains matter which should be ex-

pected within the body of an act bearing the original title of this act. See *Weco Products Co.* v. *Sam's Cut Rate, Inc.,* 296 Mich. 190, 196, and authorities therein cited.

A still more recent discussion of this question may be found in *Jacobson* v. *Carlson,* 302 Mich. 448, where other authorities are also cited, and the amendment was held to be "equally germane, auxiliary and incidental" to the general purpose of the act there in question.

Although appellants concede that the legislature might, if it saw fit, provide for compulsory automobile insurance against personal injury or death claims, they nevertheless take the position that the "unreasonable" restrictions imposed upon the operation of motor vehicles on the highways of this State deprive plaintiffs of certain constitutional guaranties. In their argument appellants attempt to distinguish between those owners and operators casually involved in an accident without negligence or culpability and those otherwise involved. They deem this to be a violation of the equal-protection clauses of the Constitutions.

Certain owners and operators are required to file written reports, although the operators of vehicles owned by the public are not required to do so.

The test to be applied is one of "reasonableness." The restrictions imposed by the legislature are for the purpose of protecting the life and safety of the traveling public. As pointed out by the trial judge:

"Appalling misuse of the highways by irresponsible drivers has brought forward the urgent problem of insuring persons injured or the families of persons killed in automobile accidents that the person liable for such loss will be in a position to pay."

"The fact that a rule of law may in certain instances work a hardship does not violate the due-

process-of-law clause of the Constitution, provided it operates without any discrimination and in like manner against all persons of a class." *Peoples Wayne County Bank* v. *Wolverine Box Co.*, 250 Mich. 273, 281 (69 A. L. R. 1024).

We also agree with the following statement of the trial judge:

"Even though it may be said that the classification prescribed by the legislature in this amendment might be discriminatory, it cannot be held to be unconstitutional unless it is constructively unreasonable and held as arbitrary classification. The classification so fixed in this act is by no means capricious or without an adequate determining principle. It was the evident intent of the legislature in enacting this law to secure greater public safety."

The classification is neither arbitrary, capricious nor unreasonable. *Naudzius* v. *Lahr*, 253 Mich. 216 (74 A. L. R. 1189, 30 N. C. C. A. 179).

The act in question does not violate the equal-protection and due-process clauses of the State and Federal Constitutions.* Nor does it deprive the owner or operator of a motor vehicle of his constitutional guaranty (Const. 1908, art. 2, § 16) against self-incrimination by requiring the filing of a report when a vehicle is involved in an accident resulting in the death or injury of any person.

This same question was decided in *People* v. *Thompson*, 259 Mich. 109, and decision there is controlling here. The requirements of this act are similar to those found in the uniform motor vehicle act, Act No. 318, Pub. Acts 1927, as amended, and particularly section 30 thereof. 2 Comp. Laws 1929, § 4722, as amended by Act No. 318, Pub. Acts 1939

* See U. S. Const. Am. 14; Mich. Const. 1908, art. 2, §§ 1, 16.—REPORTER.

(Comp. Laws Supp. 1940, § 4722, Stat. Ann. 1943 Cum. Supp. § 9.1590).

Appellants charge that the act infringes upon the right of the various municipalities of the State to exercise reasonable control of their streets, as provided in the Constitution of 1908, art. 8, § 28.

The reasonable control of streets reserved to municipalities by the Constitution is not impaired by legislation which seeks to maintain safety upon the public highways any more than such reasonable control is infringed by requiring motor vehicles operating upon such streets to be licensed by the State. As said in *People* v. *McGraw,* 184 Mich. 233, 238:

"In other words, the municipality retains *reasonable control* of its highways, which is such control as cannot be said to be unreasonable and inconsistent with regulations which have been established, or may be established, by the State itself with reference thereto. This construction allows a municipality to recognize local and peculiar conditions and to pass ordinances regulating traffic on its streets, which do not contravene the State laws."

We have not referred to the various financial responsibility acts enacted by many States. It is sufficient to say that more than 30 of the States have passed such legislation. One nearly in line with the statute in question is that of New Hampshire. Its constitutionality was sustained in *Rosenblum* v. *Griffin,* 89 N. H. 314 (197 Atl. 701, 115 A. L. R. 1367). Decision in the *Rosenblum Case* reached the same result as was reached by this court in *People* v. *Thompson, supra,* 123, where the court said:

"In accepting the license from the State, one must also accept all reasonable conditions imposed by the State in granting the license. The State has seen fit to impose as such conditions the various pro-

visions embodied in section 30. These provisions are not only humanitarian, but obviously contribute to the mutual welfare and safety of all users of the highways."

The decree dismissing appellants' and interveners' bills is affirmed, but without costs, a public question being involved.

NORTH, C. J., and STARR, WIEST, BUTZEL, SHARPE, BOYLES, and REID, JJ., concurred.

DETROIT TRUST CO. *v.* MASON.

1. TAXATION—SCAVENGER SALE—MATCHING BID—DEEDS.

   The right to match any bid at a so-called scavenger sale of property to which the State had acquired title for nonpayment of taxes is transferable by assignment or deed (Act No. 155, § 5a, Pub. Acts 1937, as added by Act No. 363, Pub. Acts 1941).

2. TRUSTS—FORECLOSED TRUST MORTGAGE—CAPITALIZATION OF CORPORATION—CONSENT OF COURT.

   Organization of corporation without court's consent with capital of only $50,000 for purpose of owning and operating hotel which trustee had bid in at foreclosure sale with upwards of $3,000,000 deposited bonds and which hotel property had been sold for nonpayment of taxes was not erroneous on part of trustee which had advanced nearly $400,000 of its own funds, notwithstanding the original investment of the bondholders would have justified a larger capitalization, in view of all

the circumstances including constant and continuing losses of large amounts in the operation of the hotel, the trustee's various gratuitous efforts, large prior liens and the fees and taxes of a larger corporation, especially where it is apparent trustee recognized court's jurisdiction in the matter.

3. APPEAL AND ERROR—RECORD—PREJUDICE—QUESTIONS REVIEWABLE.

On petition by trustee under trust mortgage which had been foreclosed for approval and authorization for reorganization and disposition of hotel property, alleged agreement between trustee and proponent of one plan for disposition of the property is not considered on appeal where it was omitted from the record and no motion was made to amend the record but without prejudice to enforcement of certain rights thereunder.

4. SAME—CHANCERY CASE—MODIFICATION OF DECREE—DISPOSAL OF TRUST ESTATE—COURT APPROVAL OF PLAN—PARTIES.

On petition of trustee under trust mortgage for approval and authorization for reorganization and disposal of hotel property under which trustee appeared willing to forego collection of a substantial portion of its advancements, and plan as finally approved was not that which trustee had proposed, decree is modified so as to provide that purchaser shall indemnify trustee against all claims against it by lessors of land on which hotel stood where such lessors are not parties to the proceedings.

5. JUDGMENT—PARTIES—RES JUDICATA.

A decree involving disposition of real estate cannot bind or take away the rights of those not parties to the suit but who hold interests in such real estate.

6. LANDLORD AND TENANT—SALE OF TRUST ESTATE—NOTICE OF CLAIM TO PURCHASER—DEFENSE.

Purchaser of hotel property, or his assignee, sold by trustee under trust mortgage pursuant to direction of court upon trustee's petition for disposition, is entitled to notice of claim against trustee by lessors of land upon which hotel stood and full rights to direct the defense against these claims.

7. APPEAL AND ERROR—QUESTIONS REVIEWABLE—DISPOSAL OF TRUST ESTATE—PARTIES—RES JUDICATA.

Claim of individual, who had worked for corporation that had been organized by trustee to own and operate hotel upon which trust mortgage had been foreclosed, for part of capital stock thereof, is not determined by decree entered on trustee's petition for disposal of the property where claimant made no

formal presentation of his claim and failed to establish it, and, since claimant was not a party to the proceedings, any decree entered would not be *res judicata* as to such claim.

8. TRUSTS—DUTY OF TRUSTEE—LIQUIDATION OF ESTATE.

A trustee under a trust mortgage upon foreclosure becomes a liquidating trustee for the benefit of the bondholders and must administer the trust for them with great fidelity and solely in their interest.

9. SAME—DUTY OF TRUSTEE—THIRD PERSONS—BENEFICIARIES—SALES.

A trustee under a trust mortgage after foreclosure is under a duty to administer the trust for the beneficiaries and is not to be guided by the interests of any third persons, hence it would be improper for the trustee to sell the property to a third party for purpose of benefiting such third party rather than the estate.

10. CONTRACTS—CONSTRUCTION AGAINST MAKER OF AGREEMENT.

Language used in a proposal for the sale of property by a liquidating trustee must be most strictly construed against the person responsible for it.

11. MORTGAGES—TRUST MORTGAGES—FORGIVING PORTION OF CLAIM—CONSIDERATION—STATUTES.

Claim that written agreement by trustee under trust mortgage, made as part of its proposal to court for disposal of the property upon which the mortgage had been foreclosed, whereby trustee forgave a part of its individual claim for advancements, services and as holder of some of the bonds, was unenforceable because without consideration is not tenable in view of statute relative to agreements to change, modify or discharge contract, obligation, lease, mortgage or other security interest in real or personal property without consideration (Act No. 238, Pub. Acts 1941).

12. CONTRACTS—ACCEPTANCE BY COURT.

A commitment made in court is not subject to arbitrary withdrawal after the court had stated that it would accept it.

13. TRUSTS—EQUITY—OFFER OF TRUSTEE TO FORGIVE PORTION OF CLAIM AGAINST ESTATE—ACCEPTANCE BY COURT WITH MODIFICATION.

A trustee under a trust mortgage which had been foreclosed, also interested in the property as a creditor for advancements and services as well as being a bondholder in its individual ca-

pacity, which made an offer to forgive a substantial part of its claim in its proposal for disposal of the property submitted to the court for approval as made or as modified by the court was bound by such offer when court orally accepted same with a modification as the trustee was in a court of equity and was bound to do equity.

14. MORTGAGES — CHANCERY FORECLOSURE — WAIVER — EQUITY — COURTS.

Ordinarily a court cannot make a mortgagee in a chancery foreclosure suit waive part of its mortgage as the obligation to do equity does not extend to foregoing a legal claim.

15. TRUSTS—DISPOSAL OF ESTATE AFTER FORECLOSURE OF TRUST MORTGAGE—ACCEPTANCE OF TRUSTEE'S OFFER TO FORGIVE PART OF CLAIM AGAINST ESTATE.

After foreclosure of trust mortgage, where trustee, in petition for disposal of the property, had proposed to forgive a substantial part of its claim against the property for advancements and services and as bondholder in its individual capacity, court's acceptance of such offer was not inequitable where modification by court did not affect amount trustee agreed to accept but did result in raising amount realized by holders of certificates of deposit of bonds from 65 cents to about $12 per $100 unit.

16. SAME—EQUITY—TRUST MORTGAGE—CERTIFICATES OF DEPOSIT OF BONDS.

In the foreclosure of a trust mortgage and disposal of the property a court of equity has the right and duty to look after the interests of the holders of certificates of deposit of bonds issued under the mortgage.

17. SAME—PROTECTION OF INTEREST OF BONDHOLDERS AND SUCCESSORS—*APPOINTMENT OF FRIEND OF THE COURT.*

Since a trial judge may not solicit plans for disposal of property upon which trustee had foreclosed a trust mortgage in chancery, where it is reasonably apparent that the interests of the bondholders or their successors may be better protected, in the absence of timely objection, it was not improper for the court to appoint a friend of the court to perform certain labors and make examinations and provide for his payment, the court reserving to itself the exclusive right to make final determination after submission of recommendations by the friend of the court.

18. SAME—APPOINTMENT OF FRIEND OF THE COURT—OBJECTION BY TRUSTEE.

Trustee under trust mortgage, which foreclosed mortgage and then petitioned court for authority to dispose of the property, was foreclosed from making objection to appointment of the friend of the court for purpose of obtaining other plans and making recommendations after it became apparent to the trial court that the trustee and the attorney for the bondholders' committee declined to make further efforts to make an arrangement whereby the holders of certificates of deposit of bonds would realize more on their investment and where no objection was raised at the time of his appointment.

19. SAME—DISPOSAL OF TRUST ESTATE AFTER FORECLOSURE—COLLOQUY—ORDER OF COURT.

Claim that final order of trial court did not properly incorporate proposal or offer submitted by appellee for hotel property being disposed of by trustee after foreclosure of trust mortgage thereon was without merit in view of colloquy in open court removing all ambiguity in the matter.

20. SAME—JURISDICTION OF COURT—FORECLOSURE OF TRUST MORTGAGE—BONDHOLDERS' DEPOSIT AGREEMENT—DISPOSAL OF TRUST ESTATE.

A court having jurisdiction of proceedings to foreclose trust mortgage in chancery may properly provide for disposal of trust estate notwithstanding the opposition of the holders of certificates of deposit representing a minority of the bonds deposited as the certificate holders are bound by deposit agreement empowering bondholders' committee to protect their interests and which committee participated in proceedings for disposal of the trust estate.

21. SAME—PLAN FOR DISPOSAL OF TRUST PROPERTY—PROFITS.

Sale of trust estate consisting of hotel property to purchaser who presented plan whereby holders of certificates for deposited bonds would presently receive a larger amount than any other plan proposed was proper and within jurisdiction of court where 14 years had elapsed since bondholders or their successors in interest had realized anything from the trust and whether present profitable operation of hotel would continue after termination of war was speculative.

22. SAME—PLANS FOR DISPOSAL OF TRUST ESTATE—DISCRETION OF COURT.

Plan for disposal of trust estate, consisting of hotel property upon which trust mortgage had been foreclosed, whereby cash was to be paid by purchaser for outstanding stock of corpo-

ration which had been formed by trustee to own and operate hotel, conditioned upon trustee forgiving a substantial part of its claim against the estate as it had proposed in its own plan for disposal and under which the purchaser took his chances on obtaining concessions from lessors of land on which hotel stood, *held*, preferable, under the circumstances, to plan whereby corporation was to pay off trustee, other certificate holders were to share in trustee's individually-owned certificates of deposit of bonds, and corporation was to continue operation of the hotel.

23. CORPORATIONS—ASSUMPTION OF LIABILITY FOR RENT—SALE OF TRUST ESTATE.

Corporation, organized to own and operate hotel property upon which trustee had foreclosed trust mortgage, was not relieved of liability for rent to lessors of land on which hotel stood merely because purchaser under plan for disposal of trust estate became owner of capital stock of corporation, hence where purchaser and his assignees are required to assume any individual liability of the trustee to such lessors, the trustee may not object to acceptance of such purchaser's plan rather than its own because of its continuing individual liability.

24. TRUSTS—SALE OF ESTATE AFTER FORECLOSURE OF TRUST MORTGAGE—CONTINUING JURISDICTION OF COURT.

Upon approval of sale of hotel property which had come into trust estate through foreclosure of trust mortgage, trial court properly retained jurisdiction to settle further questions that may arise including the mechanics of carrying out its decree.

WIEST, J., dissenting in part.

Appeal from Wayne; Brennan (Vincent M.), J. Submitted April 11, 1944. (Docket No. 19, Calendar No. 42,660.) Decided June 30, 1944. Rehearing denied September 5, 1944.

Bill by Detroit Trust Company against Fred H. Mason and others to allow sale of Tuller Hotel property subject to making report of sale. On petition for approval of refinancing plan. Louis H. Schostak and others presented their plans. From decree adopting Schostak plan, plaintiff, bondholders' committee, Abraham Skaff, Morris and David Pollack, Shelden A. Wood and others, Frank

Holznagle, Sr., John A. Taffee, David Johnson and Gertrude A. Luce appeal. Modified and affirmed.

Butzel, Eaman, Long, Gust & Bills (*Thomas G. Long* and *A. Hilliard Williams,* of counsel), for plaintiff.

Henry Meyers, amicus curiae, in pro. per.

Frederick J. Ward, for Abraham Skaff.

Fischer & Fischer, for Morris and David Pollack.

Wiley, Streeter & Meyer (*Charles H. Watson* and *Peabody, Westbrook, Watson & Stephenson,* of counsel), for bondholders' committee.

Wiley, Streeter & Meyer (*Fildew & DeGree,* of counsel), for defendants Albert F. and Shelden A. Wood.

Shapero & Shapero (*Frank W. Donovan,* of counsel for Louis H. Schostak), for Louis H. Schostak and Alvin E. Bernstein.

BUTZEL, J. In order to present the issues more fully in the instant case, we find it necessary to refer to some of the pertinent facts. It is, however, impossible to set forth all the details as they appear in a voluminous record and are discussed in 12 briefs. In coming to our conclusions, we have carefully reviewed all of the facts. The answers to many of the questions raised will be found in our discussion of the facts.

On August 20, 1929, suit was brought to foreclose a mortgage for $3,500,000 given January 2, 1926, to the Detroit Trust Company, as trustee, on the Tuller Hotel which was built on slightly more than

eight and one-half lots centrally located in the city of Detroit, Michigan. All but 60 feet fronting on West Adams avenue were owned in fee by the mortgagor. The 60 feet, consisting of two half lots, were held by the mortgagor on 99-year leases. The present lessors are the Koch and Longyear estates, each owning 30 feet of the leased property. The Tuller Hotel fronts on West Adams, Park and Bagley avenues.

At the time of the foreclosure sale, there were still $3,300,500 of bonds outstanding. A bondholders' committee was formed and the property purchased for over $3,000,000 by the trust company as trustee for the bondholders who had deposited their bonds with the committee which, in turn, issued certificates of deposit to the depositors. The bonds, so deposited, were applied toward the payment of the purchase price at the foreclosure sale. The trust company advanced $42,719.32 to pay non-depositing bondholders, and by agreement was given a prior lien for this amount. The trust company also owned in its own right a large amount of bonds, which it deposited. The bondholders' committee consisted of Fred H. Mason and Harry L. Stanton and others. Defendants Mason and Stanton, only remaining members of the committee, were made defendants in all subsequent court proceedings. Mr. Stanton is an officer of the Detroit Trust Company.

Upon purchasing the hotel property the trust company issued a declaration of trust to which the bondholders' committee duly assented. It provided that all funds advanced by the trust company were to be a prior charge on the trust estate and superior to any rights or interests of the *cestuis*. Many bondholders sold their certificates. The claim was made at the hearing of the instant suit that some

of those who acquired certificates in recent years purchased them at two cents on the dollar.

On June 16, 1939, the trust company filed a bill of complaint making the bondholders' committee and the certificate owners defendants. It alleged that there was due it for advances the sum of $384,639.86, which included the amount it had paid to nondepositing bondholders at the time of the sale. It further alleged that the property held in fee had been sold and bid in by the city of Detroit for various taxes, aggregating $132,825.91, and that there were other unpaid taxes against both the property held in fee and the leasehold in the amount of $565,953.59; that notwithstanding the fact that the hotel was managed by one of plaintiff's employees, no part of his salary had been repaid to plaintiff; that during the many years plaintiff had charge of the trust it had not received any compensation for services rendered either in the operation of the hotel or in the management of the trust; that the revenue from the hotel had been insufficient to maintain all portions thereof in usable condition, so that sections of it had to be closed at various times; that the results of the operation of the hotel during approximately 10 years had made it apparent that the tax obligations could not be discharged or any of the advances made by plaintiff repaid except by sale of the property to a purchaser who could refinance the charges against the property as well as rehabilitate it. It further stated that the trust company was in imminent danger of losing the entire sum of $384,639.86, which it had advanced, unless afforded the aid and protection of a court of equity. It therefore prayed that it be given the right and authority to sell the property subject only to making a report of any proposed sale and obtaining the approval of the court in advance

of the closing thereof. A decree was filed October 31, 1940, granting plaintiff the relief prayed for but reserving jurisdiction in the court.

Some time thereafter the title to the property held in fee became vested in the State of Michigan on tax sale. For a time plaintiff leased the property from the State. The only remaining asset, with the exception of the personal property of the hotel, some accounts receivable, cash and the leaseholds, consisted of the preferential right to match any bid for the property when sold at the scavenger sale. This right was the main asset of the trust estate. The right could be transferred by assignment or deed. Act No. 155, § 5a, Pub. Acts 1937, as added by Act No. 363, Pub. Acts 1941 (Comp. Laws Supp. 1943, § 3723–5a, Stat. Ann. 1943 Cum. Supp. § 7.955 [1]). The sum of $351,962.25 was required to bid in the property. Plaintiff did not care to advance such amount to an unsuccessful and impoverished trust, nor to obligate itself personally for a very large amount on a land contract to repurchase the property from the State. Without asking or securing the consent of the court, but with the approval of the bondholders' committee, the Detroit Grand Park Corporation (hereafter called the Grand Park) was formed with a capital of 50,000 shares of common stock having a par value of $1 per share. Mr. Stanton, an officer of the plaintiff, and one of the two remaining members of the bondholders' committee, became president of the Grand Park. All of the stock was issued to the bondholders' committee, but immediately pledged to plaintiff as security for the amounts due it. The full and exclusive voting rights were also assigned to plaintiff. The personal property of the hotel and the right to match the highest bid at the scavenger sale were transferred to Grand Park. A chattel mortgage on the personal

property was given plaintiff. Grand Park purchased the property from the State on land contract. Ten per cent. of the amount of the bid was paid to the State and the balance was made payable over a period of 10 years. On March 1, 1943, the amount had been reduced by monthly payments to $284,135.60.

Plaintiff is criticized for not having sought the consent of the court and the certificate holders before transferring the right to bid to the $50,000 corporation. Plaintiff in filing its subsequent petition did not regard the court as being divested of the subject matter, although the outward form of the corpus of the trust had changed. Fault is also found because the certificate holders had no opportunity to be heard, and that possibly some method might have been devised other than turning the property over to a $50,000 corporation. It is contended that had a successor trustee been appointed or a corporation with a much larger capital been formed, and should the hotel thereafter be operated on a profitable basis, very serious income tax problems, including possibly that of payment of a very large amount for excess profit taxes, might have been avoided. On the other hand, the attorneys for the bondholders' committee now claim that the formation of Grand Park with the consent of the bondholders' committee ousted the court of all further jurisdiction. Plaintiff did not believe it did when it filed its subsequent petition in the chancery court, nor did the bondholders' committee when it answered the petition and asked that it be granted. We agree with plaintiff that the court retained jurisdiction. Nor can we criticize the plaintiff for forming a corporation with a capital of $50,000. The past history of the hotel, its almost constant and continuing losses of large amounts,

the considerable amount of money, time and effort plaintiff expended without any repayment, and the large prior liens against the property indicated beyond any question that there was some doubt whether any equity would be saved for the certificate holders, or whether plaintiff could recover the amounts it had advanced. With the large amount of fees and taxes that a corporation with a large capital would have had to pay on its organization and subsequent operation, plaintiff might have been subjected to criticism had the capital been larger, even though the original investment of the bondholders would have justified a larger capitalization.

On April 1, 1943, the Detroit Trust Company filed a petition for approval and authorization for the reorganization and disposition of Tuller Hotel property. It set forth the former court proceedings and the final decree of the court, and alleged that all the holders of certificates of deposit were and still are parties defendant in the case, and that the court had reserved jurisdiction to approve any sale or disposition of the property. It recited the assignment of the bidding right to Grand Park and stated that the hopeless insolvency of the trust prevented plaintiff from assuming any liability to the State on the land contracts for the purchase price of the property at the scavenger sale. It further stated that the Koch and Longyear leaseholds were being maintained on a rental basis of $14,000 a year plus taxes on these parcels; that the claims against the property consisted of a balance due the State of Michigan on land contracts as of March 1, 1943, amounting to $284,135.60, and the sums due the Detroit Trust Company for advances to the trust aggregating $384,639.86; that the Koch and Longyear estates' rentals, accruing under leaseholds over a period of years and in dispute, were the sum of

$94,909.39; and that also the sum of $9,000 was due the bondholders' committee, their counsel and the Chicago depositary. This made a total of $798,945.24. The petitioner further stated that during the past 10 years of its operation all revenues which might have been available for paying debts had been used for rehabilitation of the property; that in addition to not receiving any compensation for its services or responsibility incurred, it had not received any payment on account nor had interest been charged on the amounts advanced by it.

It further stated that all efforts to obtain new funds had been futile, that the trust company had been willing to subordinate its claims to any new loan and extend the time for payment for the period of the loan, that there was no possibility of creating an equity value for bondholders unless the enumerated claims were paid and new funds obtained for the purpose of rehabilitating the property. It further stated that the continued operation of the hotel under conditions that had previously prevailed and without refinancing to the extent necessary for payment of obligations and necessary for rehabilitation of the property would result only in the sale for the best price available which would be a sum substantially less than the total obligations. Petition was filed on April 1, 1943, when the hotel evidently was no longer losing money, probably due to war conditions, for at the end of the following month the financial statement indicated a profit of $130,245.38 from which it seems to be conceded that a 40 per cent. tax would have to be deducted. The petition further stated that until recently no one had offered to venture an investment of any amount in the property. The Jefferson Standard Life Insurance Company of North Carolina, hereinafter called Jefferson Standard, proposed to invest in the

hotel on the condition that the paramount claims against the property could be eliminated. The proposal had been developed so as to create a potential equity for the former bondholders. Plaintiff, on condition that the plan be approved, offered to accept $108,000 for its advances amounting to $384,639.86 and for its expenses, and to further waive interest and other compensation for services, and further to cancel certificates of the face value of $186,700 representing what it owned in its individual corporate capacity. The plan proposed by Jefferson Standard for the disposition and reorganization of the property was to furnish Grand Park with the sum of $500,000, $470,000 of which the Jefferson Standard would loan on a first mortgage payable in 15 years with 6 per cent. interest, small amounts to be payable on principal semiannually. The $30,000 additional would be paid into the corporation by Jefferson Standard in return for 60 per cent. of Grand Park's outstanding capital stock of $50,000, thus leaving 20,000 shares of the par value of $1 each for the certificate owners. Figuring the stock as worth par, this would be a return of approximately 65 cents for every $100 originally invested by the bondholders.

From the $500,000 thus realized, plaintiff would receive the sum of $108,000, and the State of Michigan would be paid the balance due it on the contracts arising out of the scavenger sale. The petition also stated that the Koch and Longyear estates would release their claims of approximately $94,909.39 in consideration of new leases being entered into for the term of 18 years at a rental of $18,000 per year plus an additional 12 years at a rental of $16,000 per year. There also would be sufficient left to pay the past-due taxes on the leasehold properties, as well as the sum of $9,000 to members

of the bondholders' committee, its attorneys and depositaries. It was further proposed to reorganize the Detroit Grand Park Corporation so as to provide for five directors, two of whom would represent the certificate holders, and also increase the number of shares of common stock to be issued on a 60–40 per cent. basis, so that after the cancellation of the certificates held by plaintiff, 31,138 shares would belong to certificate holders and 46,707 shares to the Jefferson Standard.

Plaintiff, as petitioner, further stated that it did not make any representations as to what had been accomplished or would be accomplished by the proposed plan, but it offered to accept $108,000 in full for the various items hereinbefore set forth in the firm belief that the total sums due it could not be obtained by sale of the property or otherwise and such reductions in the plan proposed afforded the only possible means of creating some equity or potential equity for certificate holders which would have a material value. Plaintiff stated that the plan proposed would leave the property encumbered only by the mortgage of $470,000. It stated that the continued operation of the hotel property under the present financial arrangement was bound to result in a sale of the property for a sum substantially less than the total obligations. Petitioner further alleged it had been unable to obtain or develop any other plan which afforded the certificate holders the opportunity of salvaging anything. The offer of plaintiff to reduce or waive part of its claim was conditioned upon the approval and consummation of the plan which petitioner recommended as being fair and reasonable in view of the circumstances and for the "best interest" of the certificate holders and other parties in interest. Petitioner therefore prayed that the court, in the exercise of the power

reserved in the former decree to modify and change the same or to make other or further decree, authorize the carrying out of the plan thus set forth in all "the particulars or as to this court shall seem expedient and for the best interests of all concerned." Order to show cause was issued.

One group of certificate holders opposed the granting of the petition; another certificate holder proposed a different plan. Messrs. Mason and Stanton, the remaining members of the bondholders' committee, filed an answer in which they did not claim the court was without power. They expressly stated that they had participated in the formation of the plan and that it offered the holders of certificates of deposit of bonds "the greatest possible interest in a solvent corporation that is obtainable." They further stated that unless they obtained such shares of stock in such a solvent corporation their interests, and consequently, the interests of holders of certificates of deposit, "are worthless."

The court after a hearing and the arguments of counsel filed a supplemental decree granting the petition to carry out the Jefferson Standard plan. Very shortly thereafter appellant Skaff, holding a large amount of certificates of deposit, which it is claimed he purchased at two cents on the dollar, filed a motion to set aside the supplemental decree and suggested that efforts be made to secure a mortgage from the R. F. C. Mortgage Corporation on a new application so as possibly to create a greater equity for the certificate holders. At the hearing of the motion, there was considerable difference of opinion as to whether such a loan could be obtained. The court thereupon appointed Henry Meyers, an attorney, as friend of the court to investigate the possibility of obtaining such a loan and to report his findings to the court. The order appointing the friend stated that the court was desirous of obtain-

ing the best possible solution and was particularly anxious about the interest of certificate holders, and that the court should have a report from an officer of the court. The court ordered all persons before it to cooperate with the friend of the court and furnish him all information necessary in connection with the presentation. Three days later, an order was entered extending the powers of the friend of the court and instructing him to solicit proposals in writing from all parties for the reorganization or sale of the property in a manner that would be more beneficial to the bondholders than the one theretofore approved, and that such offers be submitted to the court by the friend with his recommendations. The record shows no objections whatsoever were made to the order appointing a friend of the court, or his active participation thereafter in accordance with the order of the court. He notified parties whom he thought might be interested and as a result a number of other proposals were received, all predicated, however, upon plaintiff accepting the $108,000 as indicated in its proposal, in consideration of an absolute release of all claims and the cancellation of certificates of deposit. Proposals were solicited by the friend of the court and sealed bids were opened at a specified time. All of the proposals were submitted to the court with the recommendation of the friend of the court. We shall discuss the various proposals to the extent we believe necessary in connection with the appeals of the proponents of such offers.

The proposal of one Louis Schostak was deemed the best by the court and an order was made directing its consummation by plaintiff and the necessary defendants.

Early in the proceedings the Jefferson Standard made a new proposal and offered to give the certificate holders the option of taking either their pro

rata share of 40 per cent. of the stock of the Grand Park or the sum of $7 for each $100 face value of bonds deposited and represented by the certificates. Jefferson Standard further amended its original plan by offering a mortgage loan of $500,000 at 5 per cent. interest at maturity with serial payments to be made as in their first plan. They later offered to pay $300,000 for the entire 50,000 shares of Grand Park stock. After deducting $9,000 miscellaneous fees, there would remain for the 31,138 shares held by certificate holders who would share in the proceeds (the trust company's share being eliminated) about $9 per share. In addition the certificate holders were given the option to purchase one share of stock for every $100 of the face amount of their certificate at $6 per share. The attorney for the Detroit Trust Company stated that it would accept $108,000 if this latter plan were approved.

The final offer of Louis H. Schostak was to acquire all of the stock of Grand Park by purchasing the 31,138 shares outstanding at a price of $12.30 per share conditioned solely upon the acceptance of an additional $108,000 by the Detroit Trust Company in return for a waiver of all of its claims, including the cancellation of the $186,700 of certificates owned in its individual corporate capacity. This would enable Schostak to become the owner of the entire outstanding capital stock of Grand Park on purchasing the 31,138 shares. It seems to be conceded that this would net each certificate holder approximately $12 per share for every $100 of bonds represented by the certificate. A holder of $13,000 certificates of deposit, represented also by the attorney for Schostak, filed a separate petition asking for the approval of the Schostak offer. An order making Grand Park a defendant was entered. The court considered the various proposals, approved the

Schostak proposal and ordered the closing of the trust and disposal of the property and the corpus therewith. The Detroit Trust Company was ordered to accept $108,000 in accordance with its proposal and to perform the other details necessary to make the transfer effective.

On October 26, 1943, the day after the court orally stated that it approved the Schostak offer, plaintiff filed a withdrawal of its commitment to accept $108,000.

An important factor in the Schostak proposal is the fact that it was made on the understanding that Schostak and those whom he represented would be obliged to take their chances in making proper adjustment with the lessors of the two 99-year leases and the settlement of all claims thereunder. Unless some agreement already exists or can be reached, it might become necessary to divide the building and close off that part of the hotel on the leased lots, which part contains the elevators and other necessary apparatus of the hotel. If the building on the leasehold property is separated or is torn down and used as a parking lot, it is claimed the leasehold properties would not bring nearly as large an income as is provided for under the revised leases as contained in the original petition of plaintiff. There is some claim on the part of Schostak's attorney that the holders of the 99-year leasehold are legally bound to accept the new leases as set forth in plaintiff's petition. It is further claimed that the lessors, if they have not already bound themselves by agreement, might be influenced by other factors including the responsibility of the parties with whom they dealt.

Schostak, as appellee, claims that the Detroit Trust Company in its individual capacity is solely a creditor and when it disposes of its claim, its re-

sponsibility entirely ceases. Schostak attaches to his brief an agreement between the trust company, Grand Park and the lessors by which it is claimed that any liability as might have existed has become solely that of the Grand Park Corporation. This new agreement is not part of the record and attorneys for plaintiff asked that it not be considered notwithstanding an affidavit of the attorney for Schostak claiming that it was omitted from the record because of a misunderstanding between counsel. It is not part of the record. No motion was made to amend the record and it will not be considered but without prejudice to any rights that any purchaser or his assignee might be able to enforce as owner of all of the stock of Grand Park and to any additional rights the purchaser or his assignee might have upon being subrogated to plaintiff's rights upon payment of the $108,000. On the other hand, inasmuch as this case is being heard *de novo,* the decree should be modified so as to provide that the purchaser and his assignees shall indemnify and save harmless the Detroit Trust Company against all claims that might be made against it by the lessors under the 99-year leases if such claims exist. Neither the Koch nor Longyear estates are parties defendant in the instant proceeding. The decree cannot bind them or take away any rights they or the purchaser or his assignee may have. The original and amended propositions of the Jefferson Standard set forth the fact that satisfactory arrangements had been made with the lessors of the 99-year leases. The trust company on disposing of its claims should be protected against any possible claim or liability because of the leases. On the other hand, the purchaser and his assignee shall be given notice of any claim and shall have full rights to direct the defense against these claims.

It appears from the record that one Charles W. Morris makes some claim, indefinite in character and amount, for services in connection with the Jefferson Standard proposal. He was drawing the sum of $600 a month for services from the Detroit Grand Park Corporation for a number of years. It developed during the hearing, for the first time, that the Jefferson Standard, if its proposal was accepted, had agreed to transfer to Morris 9 per cent. of the capital stock of the Grand Park Corporation. Morris testified that he had a claim of some kind but made no formal presentation of it and from the testimony he failed to establish it. As he was not a party to the proceedings, any decree would not be *res judicata* as to such claim. It is, however, very significant that when the plaintiff filed its original petition for approval and authorization for the reorganization and disposition of the Tuller Hotel property, it set forth existing claims and made no mention whatsoever of any amounts due Morris, thus indicating that if Morris has any claim, it is against the Grand Park.

In the final decree the court reviewed the various propositions and declared that it had jurisdiction of the parties and subject matter at the time the Detroit Trust Company agreed to accept $108,000, that such proposal was subject to the approval of the court and that the proposal was made for the benefit of the certificate holders so that they might realize something on their certificates. The court further found that the Detroit Trust Company had agreed to accept $108,000 in accordance with the Jefferson Standard proposal, which would provide $9 a share to the holders of certificates, that the Schostak plan would enable the certificate owners to realize substantially more than $9, and that Schostak through his attorney in open court offered to complete the

proposed arrangements with the Koch and Longyear estates. It further stated that the trust company having come into court praying for relief, may, in turn, be required to do equity in the premises; that it recognized its obligation to the holders of the certificates of deposit when it filed its first petition for the acceptance of the so-called Jefferson Standard plan, and in which it agreed to accept less than the full amount due it, waived all sums in excess thereof and continued to do so in the various revisions of the plan, thus creating an equity for certificate holders. The court, on the petition of a bondholder, ordered that the Schostak plan, to pay $382,997.40 for 50,000 shares of stock of the Detroit Grand Park Corporation, and the further sum of $108,000 to the Detroit Trust Company for its claims, be accepted as the most advantageous to certificate holders, and that upon making these payments Schostak be subrogated to all the claims of the Detroit Trust Company for advances, et cetera. The order made further provision for the payment of fees of the attorneys for the bondholders' committee and the sum of $2,000 for Mr. Mason, a member of the bondholders' committee, Mr. Stanton, the other member of the committee, having made no claim for compensation. It also made provision for payment of the Chicago depositary. It further provided that if the Schostak proposal was not completed and consummated, the Detroit Trust Company be ordered to accept $108,000 out of the corporate funds for payment of its advances, fees for counsel, services, et cetera, and for certificates for bonds amounting to $186,700, which certificates should then be cancelled. It further provided that the fees of Henry Meyers, friend of the court, be determined after hearing and the same be paid from the moneys deposited with the clerk of the

court as a charge for the services rendered. It further provided that the friend of the court be appointed and directed to represent the bondholders' committee if an appeal should be prosecuted, but not exclusive of other legal representatives, and that the friend of the court should mail a letter to all certificate holders setting forth the history of the proceedings. The court reserved jurisdiction to make such further findings and further orders as might be necessary.

The Detroit Trust Company on appeal states that the main question is whether it, as a creditor of a trust of which it is also trustee, can be compelled by court order to accept $108,000 in full payment of the sum of $384,639.86 due under prior decree of the court and compensation for services for 12 years and for the cancellation of $186,700 of bonds, all without its consent or agreement to do so and against its objection and protest and without any legal or moral consideration for so doing.

The record shows that the hotel was run at a tremendous loss for many years. The friend of the court stated in the oral argument that he had no criticism to make in regard to the trust company's management. The testimony indicated that the hotel was now being run at a large profit, probably due to war conditions, but it is highly speculative as to whether or not this profit will continue after the war. It is shown that the profit at the present time amounts to possibly $150,000 a year or thereabouts, less, of course, income taxes which are estimated at 40 per cent. However, it is pointed out by the attorney for Schostak that no provision whatsoever is being made for excess profit taxes. The trust company is criticized for incorporation for only $50,000. It is plain that the low capitalization of the Grand Park Corporation might possibly make

the company liable for very large excess profit taxes which would leave a net profit of a comparatively small amount. The record does not show that the trust company took the question of excess profits into consideration. The income of the corporation was increasing, particularly during a period prior to the time when plaintiff continued to express its willingness to accept $108,000, if the amended Jefferson Standard plan was adopted. It is difficult to conceive that the Detroit Trust Company filed its petition with any donative intent. It stated very frankly that it was satisfied to accept $108,000 so as to create a potential equity for the bondholders, the value of which the attorney for the bondholders admitted was very problematical. Even if there was a gift, and we do not find that there was one, it was solely for the benefit of the bondholders for whom the trust company still was the trustee. The trust company distinctly asked for the approval of its petition or any modification the court might see fit to make. The trust company owed a duty to the bondholders; it stood in a fiduciary relationship; it came into a court of equity for the purpose of bringing the trust to an end and disposing of the property. The court made no modification of the trust company's proposal in regard to its individual claim. It modified it as to certificate holders in conformance with the prayer of the bill.

It is not for us to say whether or not it was good business for the trust company to accept $108,000. The money had been lost in an unsuccessful venture. A vice president of the trust company testified that he wanted the original Jefferson Standard plan consummated; that there was no other plan that he believed was as good and which would be possible to consummate; that he did not want to run the risk of losing the one he had; that he would not refuse to

reduce the indebtedness down to $108,000 for other plans just because these would not be the trust company's plan; that, if the Jefferson Standard plan went through, the trust company would get $108,000 and would have no further interest in the project; that he did not want to propose a plan that in his opinion would not be a feasible one, a workable one, a fair one which in some way made provision for the bondholders; and that he was trying to work out the trust company's problem and also to help the bondholders. He did state that he objected to the other plan because he wanted a plan to go through that would be feasible, and would put the enterprise in a sound position where it would have an opportunity to advance in a good sound financial condition and be able to weather the storms of the future. He claimed that only the Jefferson Standard plan accomplished this. He also stated that he thought the trust company could get $108,000 for its claim very quickly if it wanted to put no other conditions on it. He stated, however, that the trust company had two interests: a monetary interest of its own and a desire to do something for the bondholders. As appellant, however, the trust company claims that its action also constituted a gift to a third party, and that it had a legal right to make such gifts to such persons as it saw fit and it was under no legal obligation, nor could it be compelled, to make a gift to any one other than persons whom the donee or donees had selected. From a careful reading of the record and considering the staggering loss that had theretofore been incurred in the operation of the hotel, and considering also its present prosperity and future prospects, much depending upon income taxes and possible excess profit taxes, the question immediately arises whether plaintiff after its long and unfortunate past experience with the property

was not willing to accept a loss, get back $108,000 and reinvest it in a gainful manner. Unfortunately, plaintiff was in a somewhat dual position. As a creditor, it had its own corporate interest to protect, and at the same time, it acted as trustee for the bondholders. One of its officers was chairman of the bondholders' committee and the president of the Grand Park, and one of its employees was secretary to the Grand Park. Plaintiff had an absolute right to protect its investment, but it had also accepted a trust on becoming trustee of the bondholders. Even had there been a gift, and we find none, it would have been to the bondholders to whom the trust company owed a duty. It was a liquidating trustee for their benefit and was bound by law to carry out its duties toward them with great fidelity and administer the trust solely in the interest of the beneficiaries. 1 Restatement of Trusts, § 170. It was under a duty to the beneficiaries in administering a trust not to be guided by the interests of any third person, and it would be improper for the trustee to sell trust property to a third person for the purpose of benefiting this party instead of the estate. 1 Restatement of Trusts, § 187, p. 482. Plaintiff came into court stating that it had been unable to develop any other plan which afforded the certificate holders the opportunity to salvage anything; that the plan proposed was for the best interests of the certificate holders; that its offer to accept $108,000 was made with the firm belief that the total sums due it could not be obtained by sale of the property, or otherwise, and the reductions of the plan afforded the only possible means of creating some equity or potential equity for certificate holders which would have material value.

Plaintiff came into a court of equity with a sworn petition making the proposal. It called attention to

the decree wherein the court had reserved the power to make modifications or changes, and asked for the court's approval and authority to carry out the plan as set forth in all particulars "or as to this court shall seem expedient and for the best interests of all concerned." The proposal was in writing signed by the trust company. The language must be most strictly construed against the person responsible for it. *Fort Pitt Malleable Iron Co.* v. *Detroit Steel Products Co.*, 260 Mich. 683. Nor is the claim that this agreement was without consideration a tenable one under Act No. 238, Pub. Acts 1941 (Comp. Laws Supp. 1943, § 13433–1 *et seq.*, Stat. Ann. 1943 Cum. Supp. § 26.978 [1] *et seq.*):

"SECTION 1. An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration: Provided, That the agreement changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge."

Commitment having been made in the judicial proceeding, it is not subject to arbitrary withdrawal after the court had stated that it would accept it, as modified. We quote from a case where the facts are not even analogous, but wherein the correct principle is stated as follows:

"Obviously an offeror cannot play fast and loose in a case where judicial approval is required. If an offeror duly submits an offer for approval to a court, where such judicial approval is required, it would seem that such offer might not be withdrawn

pending approval proceedings, provided the latter were not unduly protracted." *Evans* v. *2168 Broadway Corp.*, 281 N. Y. 34, 40 (22 N. E. [2d] 152).

The trial court held that plaintiff had come into a court of equity and was bound to do equity. Plaintiff was correct in stating that the obligation to do equity does not extend to its foregoing a legal claim. Ordinarily a court could not make a mortgagee in a foreclosure suit waive part of its mortgage, but we have a different situation here. The trust company of its own volition presented a petition to the court agreeing to accept $108,000 in full for its interests. It frankly stated that on account of untoward conditions presented, it proposed to accept such amount in full settlement of its interests and thereby salvage something which appeared to be of doubtful value for the certificate holders. It asked the court's approval of the plan or any modifications the court might see fit to make. The court did not ask the trust company to take less than it had proposed. It, however, ordered the company to accept the amount it had offered to take but under a modified order that would net the certificate holders approximately $12 instead of only 65 cents for each $100 in bonds represented by the certificates. Having thus submitted itself to a court of equity, it was bound to do what the court should find equitable under the circumstances. With its equitable powers the court had the right and duty to look after the interest of the certificate holders and to that extent it was doing the very thing plaintiff indirectly had requested in its petition. The plaintiff did not withdraw its offer when the Jefferson Standard changed its plan and proposed to pay $9 per $100 to certificate holders coupled with the right to buy one share of stock for each bond represented by the cer-

tificate at $6 a share. In its original petition the plaintiff reserved for the court the right to modify its proposal as the court shall deem expedient and for the best interests of all concerned. The court found that it was to the best interests of all concerned to accept the Schostak plan which would give plaintiff the sum requested and return a larger amount to the bondholders than any other plan had offered.

Plaintiff on appeal further contends that the court had no right to appoint a friend of the court to attempt to obtain a loan from the R. F. C. Mortgage Corporation or, later, to solicit bids higher than the Jefferson Standard proposal in order to obtain more for the bondholders. A peculiar situation had arisen. The Jefferson Standard plan was the result of negotiations in which plaintiff, the bondholders' committee and Mr. Morris, employed by the Grand Park Corporation, had participated. Plaintiff urged the acceptance of the plan. The attorney for the bondholders' committee not only urged it but insisted upon it to the exclusion of any other possible plan. From the testimony offered, it was shown that a better plan was available which would give plaintiff the $108,000 it asked for and net more for the certificate holders. A very unfortunate colloquy took place wherein the attorney for the bondholders' committee plainly showed that he was interested only in the Jefferson Standard plan. The judge could not solicit other plans. He felt that, in fairness to the certificate holders, efforts should be made along this line and thereupon appointed Mr. Meyers friend of the court, not to make any decision for the court but to obtain other plans and make recommendations, the court reserving to itself the exclusive right to make the final determination. There is authority for the appointment and payment of a friend of the

court who aids in the performance of certain labors and examinations. See 3 C. J. S. p. 1048; 2 Am. Jur. p. 679; *In re St. Louis Institute of Christian Science,* 27 Mo. App. 633; *Mumma's Estate,* 2 Pa. Dist. 592; *State* v. *Gorman,* 171 Ind. 58 (85 N. E. 763). The question has not been frequently passed upon. We find no authority to the contrary. However we base our holding on the fact that no objection whatsoever was raised to the appointment of the friend of the court. In fact, the attorney for the bondholders' committee assisted in drafting the first order and appellants are foreclosed from making any objection at this time.

Some of the appellants claim that the final order of the trial court does not properly incorporate the proposal or offer submitted by Schostak. There might be some merit to this contention had not the question been settled in the discussion that took place in open court. This discussion left no doubt that Schostak proposed to pay $12.30 for each $100 unit represented by a certificate and based upon the total of 31,138 units remaining outstanding after those held by the trust company were excluded. On the payment of such amount, and $108,000 to the trust company, Schostak would become the beneficial owner of all of the capital stock held by the bondholders' committee and pledged to the trust company. The colloquy that took place removed all ambiguity. The court made the proper order.

Some of the appellants contend that the court could not make the order in view of the opposition of the holders of the certificates representing a large number but a minority of the deposited bonds. The holders of certificates representing a majority of such deposited bonds took no active interest in the proceedings. The certificate holders are bound by the deposit agreement and the original and the final

decrees of the court, each providing for the disposition of the property by the court.

We shall not discuss the comparative merits of other offers or plans presented by some of the appellants. We agree with the court that Schostak made the best offer and that under it certificate holders would presently receive a larger amount than under any other plan proposed. Over 14 years had elapsed since the bondholders, or their successors, the certificate holders, had realized anything whatsoever from the trust. It is true that the hotel is now showing a large profit, but it is speculative whether such condition will continue after the termination of the war. The foreclosure sale took place in 1932 after litigation that preceded it. The trust company wanted the trust wound up. The court had jurisdiction and properly exercised it.

Some of the appellants claim that because Grand Park is making an estimated profit of $150,000 a year (before Federal taxes) and because it has a large amount of cash on hand, the trust company in conformance with its petition should be paid $108,000 and the other fees should be liquidated in a similar manner by Grand Park. The stock thus freed from the trust company's claim should then be distributed to the certificate holders. This plan assumes that the owners of the leaseholds have made or are bound to make the same concessions. If they refuse, the amount of cash on hand would be seriously depleted. Under the Schostak plan, the purchaser must take his chances on the concessions being made, if they have not been made theretofore. If Grand Park must pay an excess profit tax, it will retain but a small proportion of its profits. It still remains highly speculative whether the hotel can be run at a profit after the war. The Schostak plan will net bondholders almost $12 for each $100 unit. We be-

lieve the trial judge was correct in ruling it was the best plan for bringing the trust to a close.

The trust company contends that it owes a duty to all creditors including the owners of the leased property. The decree does not relieve the Grand Park from any liability under the leases. If the trust company has any liability in its individual capacity, Schostak and his assignees must assume it, subject to their right to show that the trust company is not liable in its individual capacity. No part of any amount paid or to be paid because of such liability whether on the part of the Grand Park or the trust company can be deducted or paid out of the $12.30 per unit to be deposited by the purchaser. The decree can in no way affect the leases. The purchaser and his assignees by becoming owners of the capital stock of the Grand Park do not release the corporation from its liabilities.

We have endeavored to discuss such of the questions raised as have any merit. The length of this opinion precludes us from discussing any others.

The decree of the trial court is affirmed, subject to the slight modification in regard to the assumption by Schostak and his assignee of any individual liability the trust company may have to the owners of the leasehold properties or their representatives. The trial court properly has retained jurisdiction and the decree entered in this court will so provide so that any further questions that may arise including the mechanics of carrying out the decree may be determined by the trial court. Appellees will recover costs.

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

WIEST, J. (*dissenting in part*). The decree should be modified by elimination of the compensation

awarded the so-called friend of the court. The court had no power, *sua sponte,* to appoint an *amicus curiae* to actively participate in activities of the parties litigant.

In re KEMMERER.

1. HABEAS CORPUS—CERTIORARI—RECORD—COMMITMENT—CRIMINAL SEXUAL PSYCHOPATHIC PERSON—JURY TRIAL—WAIVER.

   Claims of petitioner for habeas corpus that there had been no examination in open court on petition for his commitment as a criminal sexual psychopathic person and that he had not waived a jury trial thereupon *held,* not sustained by record on ancillary writ of certiorari (Act No. 165, Pub. Acts 1939).

2. CRIMINAL LAW—CRIMINAL SEXUAL PSYCHOPATHIC PERSON—DURATION OF DETENTION.

   An individual, previously convicted of five sex offenses and upon arrest for indecent exposure, examined and committed to the care of the State hospital commission as a criminal sexual psychopathic person, is not punished for the crime charged but is detained until cured of habit of committing sex offenses, hence detention was not illegal although it has lasted longer than maximum sentence which could have been imposed for crime charged (Act No. 328, § 335, Pub. Acts 1931; Act No. 165, Pub. Acts 1939).

3. HABEAS CORPUS—CRIMINAL SEXUAL PSYCHOPATHIC PERSON—TREATMENT—UNUSUAL PUNISHMENT.

   Individual committed as a criminal sexual psychopathic person who fails to receive proper treatment for his condition and is suffering any unusual punishment has remedy of habeas corpus, preferably in circuit court of county wherein institution in which he is confined is located (Act No. 165, Pub. Acts 1939).

4. CRIMINAL LAW—CRIMINAL SEXUAL PSYCHOPATHIC PERSON—DISCHARGE—PETITION.

Denial of petition for discharge, filed by one committed as a criminal sexual psychopathic person, was proper where petition did not present a factual basis showing recovery entitling him to discharge (Act No. 165, § 7, Pub. Acts 1939).

Habeas corpus proceedings by William G. Kemmerer directed to Warden of the State Prison of Southern Michigan to obtain release from prison with accompanying certiorari to Thomas M. Cotter, Judge of Recorder's Court of Detroit. Submitted June 30, 1944. (Calendar No. 42,779.) Writs dismissed September 11, 1944.

William G. Kemmerer, in pro. per.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, *Perry A. Maynard,* Assistant Attorney General, *William E. Dowling,* Prosecuting Attorney, and *Henrietta E. Rosenthal,* Assistant Prosecuting Attorney, for the people.

BUTZEL, J. On presentation of the petition of William G. Kemmerer, we issued a writ of habeas corpus to the warden of the State prison at Jackson and an ancillary writ of certiorari to the recorder's court of the city of Detroit. Returns were duly made. The record shows that on January 21, 1941, a warrant was issued charging petitioner with indecent and obscene exposure in the presence of a young girl. Complaint was made under section 335, Michigan penal code, Act No. 328, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 17115–335, Stat. Ann. § 28.567), which defines such an offense as a misdemeanor punishable by imprisonment for not more than one year or by fine of not more than $500. On arraignment defendant stood mute. On examination he was bound over for trial. Prior to the trial, how-

ever, a petition was presented by the prosecuting attorney for the examination of the defendant by psychiatrists in accordance with the provisions of Act No. 165, Pub. Acts 1939 (Comp. Laws Supp. 1940, § 6991–1 *et seq.*, Stat. Ann. § 28.967 [1] *et seq.*). The petition alleged that defendant was suffering from a mental disorder but was not insane or feeble-minded; that this psychosis had existed for not less than one year; that it manifests itself in criminal tendencies and in the commission of sex offenses; and that Kemmerer was a criminal sexual psychopathic person. It was shown that he had been convicted of indecent exposure and similar offenses on November 20, 1929, July 20, 1932, September 27, 1932, October 7, 1936, when he was convicted of disturbing the peace (window peeping), and November 17, 1937. He has served sentences for all these offenses except one for which he was placed on one year's probation. The prosecutor's petition was granted on January 31, 1941, and a psychiatric commission was appointed to examine Kemmerer in accordance with Act No. 165, Pub. Acts 1939. The commission filed a written report on April 1, 1941, and a hearing was held in open court at which the two members of the commission testified in the presence of defendant and defendant's counsel. Petitioner claims that there was no examination in open court, but the return of the trial judge shows that petitioner was mistaken. The record further shows that defendant had previously in writing waived a jury trial notwithstanding his present statement to the contrary. It further shows that petitioner was represented by counsel who stated in open court that petitioner had been advised of his rights and that he had desired to waive a trial by jury. The trial judge adjudged him to be a criminal sexual psychopath within the meaning of Act No. 165, Pub. Acts 1939, and committed him to

the State hospital commission to be confined in an appropriate institution under the jurisdiction of the commission or of the State corrections commission until he shall have been fully and permanently recovered, or otherwise discharged in proper legal proceedings.

The prisoner was first sent to Ionia State hospital but later was transferred to Jackson prison in accordance with an agreement between the State hospital commission and the State corrections commission under which the corrections commission would accept for therapeutic observation, care and treatment such persons who had been legally committed to the care of the hospital commission as criminal sexual psychopathic persons, and who were turned over to its care by the hospital commission. The agreement further recited that No. 12 block of the State prison of southern Michigan, located in Jackson county, Michigan, would constitute and be recognized as the official clinic for the transfer, observation, care and treatment of such designated persons. The Michigan corrections commission agreed to send psychiatrists periodically to the designated clinic located in No. 12 block, State Prison, Jackson, Michigan, for psychiatric examination of the "visitors."

The return from the recorder's court of the city of Detroit further states that on April 30, 1943, petitioner was paroled from the State prison to Detroit, that on July 2, 1943, he was recommitted as a parole violator, the violation consisting of indecent exposure and bestial conduct in the presence of some young girls, and that petitioner had not acquired sufficient self-control to refrain from such criminal indecencies, particularly when under the influence of liquor from which he did not have sufficient self-restraint to abstain. Petitioner, evidently a man of superior intellect, has marked psychopathic

deviations. In his petition for habeas corpus, petitioner attacks Act No. 165, Pub. Acts 1939, on the same grounds as were considered in *People* v. *Chapman,* 301 Mich. 584. It would serve no useful purpose for us to repeat what was so well stated in the carefully prepared opinion in that case. Had petitioner been convicted of the charge of indecent exposure, the maximum sentence could only have been one year, which now would have expired. He finds himself a prisoner for an indefinite period, possibly for life, because of the commission of a misdemeanor. The record fully shows that he is not being punished for a crime but he has been placed in the care of the State hospital commission until he recovers from his uncontrollable habit of committing sex offenses.

Petitioner further alleges that he is confined to Jackson prison and the sole distinction between his status and that of an ordinary convict is that he is called a "visitor" in accordance with Act No. 165, Pub. Acts 1939, and that he is kept in a separate cellblock exclusively used for criminal sexual psychopathic persons. He claims that his "visit" has been prolonged and he is asking to have it curtailed. The record indicates that the petitioner is an unfortunate person and, until cured, is unfit to enter society, and that he should be institutionalized until it is safe for both him and society that he be released. He alleges that he is not receiving proper care although the prison psychiatrist evidently visits him. He is entitled to proper care such as his condition and the good of society demands. If he is not receiving it and is suffering any unusual punishment, he can always present a petition for habeas corpus preferably to the circuit court of Jackson county where proper and full inquiry can be made into the facts. It is not within our province to prescribe the treatment that should be accorded petitioner. It must be borne

in mind that he is not being punished, that he is an unfortunate psychopath, and that he is entitled to such treatment as his condition requires.

Subsequent to his commitment, petitioner filed a petition for discharge, requested a hearing thereon in the lower court and filed a demand for a jury trial. The return of the trial judge of the recorder's court shows that the petitioner presented no factual basis in this petition showing recovery as required by Act No. 165, § 7, Pub. Acts 1939, the act under which petitioner is committed. The act does provide for jury trial but a petition for discharge first must contain a factual showing which, if proven to be correct, would result in a discharge. We have examined the petition and find that there is no such factual showing therein. The judge was correct in denying it.

Under the circumstances, we therefore hold that the prisoner is not entitled to habeas corpus and he is properly committed, and that, therefore, the writs are dismissed.

NORTH, C. J., and STARR, WIEST, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

VOLLMER *v.* COENIS.

1. APPEAL AND ERROR—PLEADING—ADDITIONAL DEFENSES—PAYMENT.
   In second mortgagee's action on mortgage note under record showing that order, granting leave to file supplemental answer wherein defense of payment was pleaded, was approved as to form by plaintiff's attorney but not signed by trial judge, and that the case was tried as if the order had been made, Supreme Court will consider the case as though order had been made (Court Rule No. 72 [1933]).

2. MORTGAGES—MERGER WITH FEE.
   As a rule the merging of a mortgage and fee estate extinguishes the mortgage.

3. SAME—MERGER WITH FEE—EVIDENCE.
   Generally a person cannot remain a mortgagee of lands after acquiring the fee estate in the absence of a showing that the mortgage was to be kept alive to protect the rights thereunder against the claims of others.

4. SAME—MERGER WITH FEE—PAROL EVIDENCE.
   Parol testimony is admissible not only to show that a deed was given as a mortgage instead of to pass title immediately but also to show that a deed was intended for the purpose of passing title and not to have the effect of a mortgage.

5. APPEAL AND ERROR—NONJURY TRIAL—EVIDENCE—NEW TRIAL.
   Upon trial of case without a jury where trial judge excluded evidence which was admissible upon defense of payment of note sued upon, a new trial is granted since plaintiff may not have deemed it necessary to present further testimony in view of trial court's ruling.

Appeal from Saginaw; Sample (George W.), J., presiding. Submitted June 6, 1944. (Docket No. 10, Calendar No. 42,721.) Decided September 11, 1944.

Parol evidence rule—general treatment, see 1 Restatement, Contracts, §§ 237–244.

Assumpsit by Arthur Vollmer against John Coenis and wife on a promissory note. Judgment for plaintiff. Defendants appeal. Reversed and new trial granted.

Floyd T. Fuss, for plaintiff.

Arthur J. Slaggert (*Ryan, Doozan & Scorsone,* of counsel), for defendants.

BUTZEL, J. Defendant John Coenis purchased lot 3 of block 2, Warren's Addition, Bay City, Michigan, and received a deed therefor. He also purchased on land contract lots 1, 2, 4, 5 and 6 of block 2 of the same subdivision. This property is located just within the corporate limits of Bay City and fronts on a four-lane highway leading to Saginaw.

Plaintiff Vollmer was employed by Coenis to build a large brick restaurant on lot 3 and to make other improvements including the erection of a garage and the moving of a barbecue stand from Saginaw and placing it on one of the other lots, all for a consideration of $16,400, part of which was paid in cash on hand and part with the proceeds of a mortgage of $9,000 given to the Peoples' American State Bank. Defendants gave plaintiff a note and a mortgage on lot 3 heretofore described for $3,239, the balance unpaid. Defendants owed other amounts, including sums due for fixtures being purchased on title-retention contract. They also were indebted for lumber to the Bressler Lumber Company, of which plaintiff was president. A large sum was also due from them to an ice cream company. Because of their inability to keep up the payments, defendants as first parties on the 20th of November, 1934, entered into an agreement with plaintiff as second party and the ice cream company as third

party in which it is set forth that defendants are the owners of an interest in the six lots, that a building was erected on lot 3, that certain personal property was chattel-mortgaged to the ice cream company and to a soda fountain company, and that certain debts were owing to the various parties including the Bressler Lumber Company. It provided for monthly payments to be made by defendants to the various creditors including the mortgagee bank. Specific amounts were set for each month's payment to the various creditors. The agreement further provided that:

"To secure the faithful performance of the payments above specified, said first parties have this day drafted and executed to Arthur Vollmer a quitclaim deed of the property above described, which deed has been placed in escrow with Henry T. Robinson, and the said first parties hereby agree with the said Arthur Vollmer and other parties to this transaction that should they fail to make the monthly payments above specified, then the said Arthur Vollmer may make proof of such failure to the said Henry T. Robinson and the said Henry T. Robinson shall forthwith deliver said quitclaim deed to said Arthur Vollmer and the said Arthur Vollmer shall own said property free and clear of claims of said first parties, and said first parties expressly waive all benefit of any laws or statutes, and hereby acknowledge that the said Arthur Vollmer shall own said property free and clear of any claim on their part upon their default.

"In consideration of the posting of the deed and the payments to be made by first parties, said M & B Ice Cream Company, for itself and as agent for the Knight Soda Fountain Company, agrees to withhold foreclosure of its chattel mortgage. It is also understood and agreed that People's American State Bank, while not binding itself in any way or in any

way agreeing not to foreclose, will be satisfied with its payment.

"It is further agreed on the part of Arthur Vollmer that in consideration of the payments made to him, he will withhold foreclosure on his second mortgage, and will likewise withhold the foreclosing of the land contract held by the Bressler Lumber Company."

The agreement further provided that the creditors might audit defendants' books, and the latter agreed not to further incumber the property nor to execute a transfer without applying the full consideration therefrom to the debts. In the event the business should make larger sums than contemplated, the parties agreed to prorate the increase among the creditors. This agreement was to extend for a period of two years except on default of defendants. It further stated that failure to make payments constituted grounds for plaintiff to take over the property and receive delivery of the deed from the escrow agent, as stated in the quoted paragraph. A quitclaim deed running to plaintiff was duly executed and deposited with the escrow agent, Henry T. Robinson, who was an officer of the mortgagee bank. Defendants failed to keep up the payments and thereupon the deed to plaintiff was recorded and he took over the property. Plaintiff thus not only became the title owner to the property, on which he had a second mortgage, but the record discloses that he took possession of the property and rented it to others. While the record is not at all clear, it indicates that the bank foreclosed its mortgage and the parties having liens repossessed themselves of the personal property.

Plaintiff brought the instant suit on his second mortgage note. Defendants claim that the deed to plaintiff operated as a merger of the second mort-

gage with the fee estate and not only disposed of the second mortgage lien but also satisfied the mortgage debt in accordance with the understanding at the time the papers were executed.

Plaintiff complains of the fact that defendants did not clearly give notice in their first plea of the defense of payment by the giving of the deed. The supplemental answer, filed almost two years before the case was heard, undoubtedly supplied this deficiency. The order granting leave to file a supplemental answer was never signed by the circuit judge, because, it is claimed, of the judge's illness and his subsequent death. However, it was approved in form by the attorney for plaintiff. The case was tried as if this order had been made and we will so consider it (3 Comp. Laws 1929, § 14149 [Stat. Ann. § 27.843]; Court Rule No. 72 [1933]).

Plaintiff's testimony was hesitant and evasive. In some manner the deed to plaintiff, which was deposited with Mr. Robinson as escrow agent, was withdrawn from him, duly recorded, and at the time of the trial was in the possession of plaintiff's attorney. The return address to which the register of deeds mailed the instrument was written in pencil on the back of the deed and, significantly, designated plaintiff's office. It was shown that the handwriting resembled that of plaintiff's daughter who looked after his office. During another phase of the trial, plaintiff admitted that he had the keys to part of the premises though at first he denied it.

Strenuous objection was made to testimony that was offered by defendants to show that plaintiff agreed to release defendants from all further liability if he became the owner of defendants' equity in the premises. The trial judge upheld the objection to this testimony upon the grounds that the written agreement was complete and unambiguous

in its terms, and that parol evidence could not be received to show the prior negotiations between the parties. Because he found nothing in the contract itself that provided for the extinguishment of the debt upon the delivery of the deed by the escrow agent, he allowed recovery on the note. The deed, however, was absolute in form. According to the written agreement, upon default plaintiff was entitled to receive from the escrow agent the deed to the property free and clear of all claims of defendants including all benefits of any laws or statutes. Was the trial judge correct in allowing recovery on the note and in excluding parol evidence explaining the contemplated effect of the deed?

As a rule the merging of a mortgage and fee estate extinguishes the mortgage. *First National Bank of Utica* v. *Ramm,* 256 Mich. 573. There is no question but at the time the deed was executed, title remained in defendants. It, however, was placed in the hands of an escrow agent who was to deliver it to plaintiff in the event of defendants' default. Immediately thereupon absolute title would vest in plaintiff. Defendants thus denied themselves the right to a moratorium, a period of redemption, et cetera. A person generally cannot remain mortgagee of lands after acquiring the fee in the absence of any showing that the mortgage was to be kept alive to protect the rights thereunder against the claims of others. *Jackson* v. *Evans,* 44 Mich. 510. The case of *Weston* v. *Livezey,* 45 Col. 142 (100 Pac. 404), is very similar to the instant one. A mortgagor placed a deed of land in escrow to secure certain payments on the mortgage. After default on these payments, the escrow agent delivered the deed to the mortgagee. Suit was brought on the original note. The court said:

"Where the mortgagee acquires the fee in the land mortgaged by conveyance from the mortgagor, the mortgage debt, so far as the mortgagee is concerned, is extinguished, unless a contrary intention is manifest."

The case is more fully briefed in 65 A. L. R. 124. The trial judge was manifestly in error in not permitting parol testimony by defendants to show that it was the intention of the parties that the delivery of the deed should extinguish the mortgage debt. There is no question but that one could show by parol that a deed was given as a mortgage instead of to pass immediate title. The converse of the rule is equally true. One can always show that a deed was intended for the purpose of passing title and not to have the effect of a mortgage.

The judge acting without a jury rendered a judgment for the full amount against defendants. The judgment should be reversed. In view of the ruling of the lower court, the plaintiff may not have deemed it necessary to present any further testimony to support his case. Under the circumstances, we believe there should be a new trial.

Judgment reversed, with costs to defendants.

NORTH, C. J., and STARR, WIEST, BUSHNELL, SHARPE, BOYLES, and Reid, JJ., concurred.

SILANPA *v.* THOMSON.

1. RAILROADS — AUTOMOBILES — CONTRIBUTORY NEGLIGENCE — UNGUARDED HIGHWAY CROSSINGS.

In automobile passenger's action for personal injuries sustained near shut-down iron mine when car in which he was riding collided with first of three railroad flat cars being pushed across unguarded crossing of county highway without a flagman being present or audible warning being given as required by city ordinance where it appears there were various obstructions to view and there was similarity of coloration of cars and background on late November morning, question of whether plaintiff's driver was guilty of contributory negligence was a question for the jury.

2. SAME — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — UNGUARDED HIGHWAY CROSSINGS.

The failure of a railroad to have a flagman to warn traffic at an unguarded highway crossing pursuant to city ordinance and its rule and custom would not excuse conduct attributable to plaintiff amounting to contributory negligence *per se* but some reliance may be placed upon guards or flagmen at highway crossings by users of the highways.

3. DAMAGES—KNEE INJURY—LOSS OF EARNINGS.

Verdict of $6,000 in favor of miner whose knee was broken in three places in collision between automobile and railroad flat car *held,* not excessive where knee is stiff, plaintiff has lost $2,400 in wages, later worked at 84 cents a day less, had a hospital bill of $93.65, a doctor bill of $150, and had suffered pain and inconvenience.

Appeal from Gogebic; Landers (Thomas J.), J. Submitted June 15, 1944. (Docket No. 34, Calendar No. 42,590.) Decided September 11, 1944.

Case by Valentine Silanpa against Charles M. Thomson, trustee of the property of the Chicago & North Western Railway Company, for personal injuries sustained when automobile in which he was riding was struck by a train. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

William F. Pellow (*Solomon W. Patek,* of counsel), for plaintiff.

Frost & Deo, for defendant.

BUTZEL, J. Plaintiff recovered a judgment of $6,000 against defendant trustee of the property of the Chicago & North Western Railway Company, referred to herein as railroad, for personal injuries caused by a train running into an automobile in which plaintiff was riding on November 26, 1941. Plaintiff, a miner, lived in Bessemer, Michigan, and was unemployed. At the time he and a friend named Certano were driving in the latter's car to a mine for the purpose of obtaining employment. He had worked at the Penokee mine in Ironwood, situated near the crossing involved in the accident. The mine had been shut down for some time. They passed the crossing, going along the county road, and on their arrival at the Ironton office they were told that the foreman or captain was at the Penokee mine. They thereupon decided to drive there and see him. At this time, about 10:30 a. m., as they were driving in a westerly direction on the north side of the highway, defendant was moving a short train consisting of an engine and three flat cars northerly across the county road in Gogebic county. As the cars were being pushed across the road with the engine in the back, the col-

lision occurred. A stockpile, bus shanty, rockpile and other objects had interfered with Certano's vision and when he finally saw the train, it was too late to avert the accident. These obstructions leveled off a short distance east of the first railroad track. The wooden shanty was approximately 10 feet wide, 12 feet long and 12 feet high, and was situated about 50 feet east of the first track of the crossing, approximately 30 to 40 feet south of the south shoulder of the road. The testimony showed that it obstructed the vision to the left as one drove up to the crossing.

The old county road on which Certano was driving was a well-traveled highway. Defendant realized the danger and for the past 10 years the rule and custom was for trains to stop at this crossing and send a flagman out to warn the traffic. The switchman testified that there was danger of collision if they did not stop and warn oncoming traffic. Ordinance No. 26 of the city of Bessemer required the railroad companies running their tracks through the city to keep at each railroad crossing a properly constructed gate or a flagman, et cetera. There is some testimony to indicate that there was sufficient clear space so that had Certano been carefully watching he could have seen the train in time to avoid the collision. However, he testified that he was familiar with the crossing, having passed over it for 15 years, and that he knew that defendant usually had a flagman at the crossing in the event of an approaching train. He further testified that he looked on both sides of the road as he approached the crossing and when he reached a point about 50 feet from the crossing he looked and saw nothing. He did not see the train until he was 15 or 20 feet from the track. Thereupon he applied the brakes. When the automobile stopped, it was approximately

1½ feet east of the nearest rail of the track. When he first saw the train, it was 4 or 5 feet south of the crossing. No warning was given by whistle or bell. The train struck the front end of the automobile on the left side and pushed it one foot to the north or right side before the train was brought to a stop. The color of the leading flat car was the same as the color of the surrounding country. The hill beyond was the same color, dark and cloudy. Plaintiff himself testified largely to the same effect, that he did not see any smoke of the engine to his left, that the view of the tracks to the south cannot be had before reaching the bus station, and that a point 15 to 20 feet from the bus station has to be reached before the tracks can be seen. Also, at the time of the accident, his vision was cut off after the car reached a point 20 feet from the track. The automobile was not badly damaged.

Defendant claims that the driver of the automobile drove it into the flat car so that the front left side of the automobile was badly crumpled up. Plaintiff, on the other hand, claims that the flat car ran into the automobile's left front side. The automobile itself was only mute testimony to the fact that it was damaged. Neither the front bumper nor the tire, however, were injured. The left fender and lamp seem to have received the brunt of the collision. Even assuming that plaintiff and the driver did not exercise such caution as would be expected of them at an unguarded crossing, the crossing must be considered as one that is always guarded and we must further accept the testimony that no bells were rung or whistles blown, that no smoke issued from the locomotive, and that the train was being pushed very slowly so that it evidently made but little noise. The verdict of the jury conveyed such a conclusion. The facts are such that at least the minds of reason-

able men might differ as to whether the driver was guilty of contributory negligence or not. While the defendant failed to observe the city ordinance and its rule and custom of having a flagman warn traffic, it would not excuse conduct amounting to contributory negligence *per se*. It does, however, raise the question whether or not the plaintiff and his driver, under the circumstances where their view was obstructed and with the full knowledge of the practice of having a flagman, and not expecting a train near the mine which was shut down, did have a right to assume that they could proceed with safety. A jury question was presented.

Defendant insists that plaintiff and his driver saw or should have seen the train much further south of the intersection than admitted by them. While there is some force to this claim, nevertheless, it became a question whether under the circumstances of the instant case plaintiff could not largely rely upon defendant observing the law and its custom of protecting the crossing. Under the circumstances, plaintiff would not exercise the extreme care that would be necessary at an unguarded crossing. As stated in *Motyka* v. *Railway Co.*, 256 Mich. 417, on rehearing:

"If one may place no reliance on guards and flagman, why have them?"

It would serve no useful purpose to discuss the many cases with different factual situations referred to by both parties. However, in *Jones* v. *Railroad Co.*, 303 Mich. 114, we held that under somewhat like circumstances the question whether a driver was guilty of contributory negligence in failing to stop after reaching the point from which he had a clear vision down the track was one for the jury.

The claim is made that the verdict is excessive. Plaintiff was laid up an entire year, lost $2,400 that he might have earned during the year had he not been injured, and later worked at $5.96 instead of $6.80 per day. He was not able to perform the duties of a miner. He had not fully recovered from the effects of the accident at the time of the trial. The hospital bill was $93.65 and the doctor's bill amounted to $150. He now has a stiff knee which might be corrected by an operation costing $350. The knee was broken in three places. The doctor thought that if plaintiff was properly treated, he could fully recover from his injuries in a period of six months. Considering also the pain and suffering and inconvenience that plaintiff was put to, we do not find the verdict of $6,000 excessive.

Judgment is affirmed, with costs.

NORTH, C. J., and STARR, WIEST, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

HASSON v. MUTUAL BENEFIT HEALTH & ACCIDENT ASS'N, OMAHA.

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE—INSURANCE—CONTINUITY OF DISABILITY.

Question as to whether or not pleadings in action upon health and accident insurance policy raised issue as to continuity of plaintiff's disability may not be raised for the first time in Supreme Court.

2. INSURANCE—HEALTH AND ACCIDENT POLICY.

One suing under a health and accident policy has burden of showing himself entitled under the policy to the amount claimed.

3. SAME—ACCIDENT—CONTINUITY OF DISABILITY.

Insured who was totally incapacitated for several months after accident, signed a release, resumed work for eight or nine months, and sought compensation for period 28½ months thereafter was not entitled to recover therefor where policy provided for disability payments only when disability was continuous, since continuity ceased upon resumption of work.

4. APPEAL AND ERROR—MISTAKE—TENDER—AFFIRMANCE WITHOUT PREJUDICE.

Where it appears that through a miscalculation plaintiff was entitled to $50 more than he had received in consideration for release of claim against insurer under health and accident policy, which amount was tendered to him at the trial, affirmance of judgment for defendant is without prejudice to plaintiff's recovery of amount so tendered.

Appeal from Wayne; Chenot (James E.), J. Submitted June 8, 1944. (Docket No. 36, Calendar No. 42,766.) Decided September 11, 1944.

Assumpsit by Ollie Hasson, also known as Alle Hassin, against Mutual Benefit Health & Accident Association, Omaha, a Nebraska corporation, on a health and accident insurance policy. Directed verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Dann & Atlas and *Seymour Tilchin,* for plaintiff.

Clifford M. Toohy, for defendant.

BUTZEL, J. Defendant issued a health and accident insurance policy to Ollie Hasson in 1928. On July 25, 1939, while the policy was still in force, plaintiff met with an accident, was totally incapacitated and unable to do any work until January 2,

1940. He, however, did work after the latter date. Plaintiff's attorney claims that from January until September of 1940, Hasson worked only intermittently. Although it would require a rather strained interpretation of plaintiff's testimony to construe it this way, it would make no difference in our legal conclusion. Plaintiff did use a cane and wore a special shoe on his left foot which was injured at the time of the accident. He claims compensation for 28½ months from and after September 19, 1940.

Plaintiff is a Kurd, unable to read or write English. On January 6, 1940, he executed a full release of all claims. It appears that he had the assistance of a friend and the latter's attorney in making out the necessary papers. Whether or not the plaintiff signed the release blindly or ignorantly is immaterial since our decision is based upon the construction of the policy, part of which under the heading "Accident Indemnities" provides:

"If such injuries as described in the insurance clause shall wholly and continuously disable the insured for one day or more."

The court in directing a verdict stated that:

"I do not see how anyone can seriously contend that this plaintiff was continuously disabled within the meaning of this policy. It is just a plain matter of fact that he was not, under his own testimony. It has been testified to here by this plaintiff that he went back to work about Christmas time of 1939, and it has been stipulated by counsel on the record, both of them, that he worked until September 17, 1940, approximately nine months, he went back to work, and he did work, and he so testified himself, for nine months.

"Now this court is asked to do violence to the plain language of this policy and say that, instead of that, he was continuously disabled.

"No; that is not common sense. It abrogates this contract. It makes an entirely different contract. And I know of no law or no theory of law under which the court can change the contract, even though made by an insurance company, and having fully in mind and being fully aware of the rule that where there is a doubt, where there is ambiguity or uncertainty, the contract shall be construed against the insurer; but there is no ambiguity here, there is no room for construction of the contract."

The question was before us in *Letherer* v. *United States Health & Accident Insurance Co.*, 145 Mich. 310, and *Brod* v. *Detroit Life Insurance Co.*, 253 Mich. 545. In the latter case, the policy provided that there must be proof that the plaintiff had become totally and permanently disabled. We held that there was no ambiguity in the policy, that it was not a straight disability contract, and that the disability, to be compensable, must be total and permanent. In the instant case, the language is still stronger for it provides that the injuries shall wholly and continuously disable the injured. The element of time must be marked by continuity. The continuity ceased when the injured went back to work for nine months.

Defendant's answer relied entirely on the release signed by plaintiff. The trial in the circuit court resolved itself largely upon the fact that plaintiff did not show that he was continuously disabled. No question was raised in regard to the pleadings and it may not be raised for the first time in an appellate court.

A similar situation arose in *Dolsen* v. *Phoenix Preferred Accident Insurance Company*, 151 Mich. 228. The suit involved a policy of life insurance which contained a time limit for bringing suit. Although the period of time in which to bring suit had expired, this defense had been waived. The waiver

was not set up in the pleadings but evidence proving that it had been given was admitted without objection. The court held that, although plaintiff was limited in his proof to his pleadings, the evidence in question was not objected to and no error could be assigned on appeal. In the instant case, defendant never pleaded breach of condition, but there was no objection to its evidence proving it or to its raising the issue, and even if we were willing to consider the objection now for the first time, it still remained incumbent upon plaintiff to show that he was entitled to the amount claimed under the policy. In his testimony it appeared that he was not wholly and continuously disabled in accordance with the terms of the policy. It did appear that through a miscalculation, plaintiff was entitled to approximately $50 more than he had received in consideration for the release which amount was tendered to him at the trial. In affirming the judgment for defendant, it is without prejudice to plaintiff's recovering the amount so tendered.

Judgment affirmed, with costs to defendant.

NORTH, C. J., and STARR, WIEST, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

RICHARDSON *v.* RICHARDSON.

1. FORCIBLE ENTRY AND DETAINER—NOTICE TO QUIT—OCCUPANCY AFTER JUDGMENT OF RESTITUTION.

   In suit by tenant to restrain execution of writ of restitution issued by circuit court, plaintiff's contention that she was entitled to the statutory notice to quit because she occupied the premises some 11 weeks after entry of unappealed judgment of restitution before the writ was issued is not supported by record showing negotiations were then being had relative to an amicable settlement of the differences between the parties (3 Comp. Laws 1929, § 13492, as amended by Act No. 145, Pub. Acts 1935).

2. JUDGMENT—POSSESSORY PROCEEDINGS—APPEAL—COLLATERAL ATTACK.

   Procedural or statutory defects in possessory proceedings must be attacked by way of appeal from judgment given therein and are not open to collateral attack.

3. ACTION—CONDITIONS AT TIME OF COMMENCEMENT.

   Conditions existing at the time of the commencement of a legal action govern the rights of the parties thereto.

4. LANDLORD AND TENANT—RENT REGULATION—EVICTION PROCEEDINGS.

   Rent regulation of office of price administration which was not in effect at time of commencement of eviction proceedings nor when judgment of restitution therein was rendered by circuit court commissioner and which regulation by its terms did not affect actions commenced or judgments entered prior to its effective date was not applicable so as to prevent execution of writ of restitution issued after such regulation became effective (Maximum Rent Regulation No. 11, 7 F. R. 4072, 4075).

Appeal from Washtenaw; Sample (George W.), J. Submitted May 10, 1944. (Docket No. 74, Calendar No. 42,733.) Decided September 11, 1944. Rehearing denied December 1, 1944. Certiorari denied by Supreme Court of the United States April 2, 1945.

Bill by Lucille Richardson against Joseph H. Richardson and wife to restrain enforcement of writ of restitution. Decree for defendants. Plaintiff appeals. Affirmed.

Bledsoe & Simmons, for plaintiff.

Jacob F. Fahrner, for defendants.

BUSHNELL, J. Plaintiff Lucille Richardson, with her husband, Samuel A. Richardson, for some years occupied, as a residence and also for business purposes, premises in the city of Ypsilanti, owned by her father-in-law and mother-in-law, defendants Joseph H. Richardson and Harriet Richardson.

On June 23, 1941, defendants instituted an action before a circuit court commissioner to recover possession of the premises. A stipulation in the record states that the original judgment for restitution was entered by the circuit court commissioner on February 19, 1942, from which an appeal was taken, and a like judgment was entered in the circuit court for the county of Washtenaw on December 17, 1942, which judgment is still in full force and effect. On March 4, 1943, a writ of restitution was issued by the circuit court. On March 12, 1943, plaintiff filed a bill of complaint in which she sought to restrain the execution of the writ, on the ground that defendants had not complied with the regulations pertaining to the so-called rent control act,* promulgated by the office of price administration, which regulations became applicable to Washtenaw county on July 1, 1942. Plaintiff also claimed that no statutory notice to quit had been given prior to the issuance of the writ of restitution of March 4, 1943.

On appeal from an order denying an injunction, plaintiff argues that she was entitled to the statu-

* See 50 USCA, § 901 *et seq.*—REPORTER.

tory notice to quit because she became a tenant at will subsequent to the entry of the judgment of restitution when defendants tacitly consented to her continued tenancy, and that if she is not a tenant at will, she at least occupies the premises by sufferance and, in either event, she was entitled to such statutory notice prior to the issuance of the present writ of restitution. See 3 Comp. Laws 1929, § 13492, as amended by Act No. 145, Pub. Acts 1935 (Comp. Laws Supp. 1940, § 13492, Stat. Ann. § 26.1104), and 3 Comp. Laws 1929, § 14975 (Stat. Ann. § 27.1986).

The testimony does not support plaintiff's contention. On the contrary, it indicates that, during the period in which plaintiff claimed such tenancy, negotiations were being had relative to an amicable settlement of the differences between the parties. If, as it is now claimed, there were any procedural or statutory defects in the possessory proceedings, an appeal should have been taken from that judgment and it cannot now be attacked collaterally.

The O.P.A. rent regulation, designated as maximum rent regulation No. 11, became applicable to Washtenaw county on July 1, 1942. That regulation reads as follows:

"At the time of commencing any action to remove or evict a tenant (except an action based on nonpayment of a rent not in excess of the maximum rent) the landlord shall give written notice thereof to the area rent office stating the title and number of the case, the court in which it is filed, the name and address of the tenant and the grounds on which eviction is sought." (7 F. R. 4072, 4075.)

This regulation was not in effect in Washtenaw county at the time the action was begun before the circuit court commissioner; nor was it in effect when a judgment was entered by the commissioner on February 19, 1942, and it is not applicable to the

situation in the instant case, for the reason stated in *Home Owners' Loan Corp.* v. *City of Detroit,* 292 Mich. 511, where the court, in referring to an act which provided a lien for water furnished by municipalities, said:

"The act cannot be considered in our determination of the matters now in controversy, it having been enacted subsequent to the filing of plaintiff's bill of complaint."

It is a well-established rule that conditions existing at the time of the commencement of a legal action will govern. As said in *Black* v. *Spears,* 209 Mich. 1, in discussing section 9 of the statute of limitations of actions, which reads:

"'All actions and rights shall be governed and determined according to the law under which the right accrued, in respect to the limitations of such actions or right or entry.' 3 Comp. Laws 1929, § 13972 (Stat. Ann. § 27.601).

"This is a general provision and in our opinion affects *all actions* whether personal or involving real estate."

The O.P.A. rent regulation, by its very terms, does not affect actions commenced and judgments entered prior to its effective date.

The order of the circuit court is affirmed, with costs to appellees.

NORTH, C. J., and STARR, WIEST, BUTZEL, SHARPE, BOYLES, and REID, JJ., concurred.

CARROTHERS *v.* FRENCH.

1. AUTOMOBILES—THROUGH HIGHWAYS—OBSERVATION OF TRAFFIC ON INTERSECTING HIGHWAYS.

   Although a motorist may be on a through highway, the right of way accorded him does not relieve him from his duty to make proper observation of traffic approaching on intersecting highways and to use reasonable care and caution to avoid an accident (1 Comp. Laws 1929, § 4713 [c], as amended by Act No. 318, Pub. Acts 1939).

2. SAME—TRUNK LINE HIGHWAYS—RIGHT OF WAY—NEGLIGENCE.

   While the law accords the right of way to motorists on trunk line highways, it does not authorize one, in approaching a highway crossing, to assume that in all events he may proceed without looking, or, if unable to see, without exercising precaution commensurate with reasonable prudence (1 Comp. Laws 1929, § 4713 [c], as amended by Act No. 318, Pub. Acts 1939).

3. SAME—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—THROUGH HIGHWAYS.

   A motorist desiring to cross through highway must anticipate fast traffic on it, and when range of his vision is limited, he may not always assume that a single observation will disclose the whole situation, and proceed as though there were no cars within colliding distance; on the other hand, he may assume that a driver on the through highway, coming into the range of vision, will discover him seasonably and take ordinary care to avoid collision.

4. SAME—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—FAILURE TO OBSERVE—QUESTION OF FACT.

   Although defendant motorist on intersecting highway may have been negligent in attempting to cross through highway, testimony presented a question of fact as to whether or not plaintiff's driver, a motorist thereon, made proper observation at unobstructed corner and exercised reasonable care in failing

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Contributory negligence of plaintiff sufficient to bar recovery, see 2 Restatement, Torts, § 476, also § 475, comment a; causal relation between harm and negligence, §§ 465, 467; contributory negligence defined, § 463.

to sound horn, apply brakes or reduce speed after having seen defendant 50 or 60 feet to the south of the intersection while plaintiff's driver was some 300 to 400 feet west of the intersection, hence verdict of no cause for action was not against the great weight of the evidence (1 Comp. Laws 1929, § 4713 [e], as amended by Act No. 318, Pub. Acts 1939).

5. SAME—THROUGH HIGHWAYS—CONTRIBUTORY NEGLIGENCE—STOPPING—CROSSING IN FRONT OF ONCOMING TRAFFIC.

Where cross-defendant's driver, on through highway, may have been negligent in failing to make proper observation of cross plaintiff on intersecting road, latter, who had stopped at the through highway but attempted to cross in front of cross defendant's car although his unobstructed view permitted him to see in direction from which such car approached for 750 feet, was guilty of contributory negligence as a matter of law (1 Comp. Laws 1929, § 4713 [e], as amended by Act No. 318, Pub. Acts 1939).

6. SAME—THROUGH HIGHWAYS—STOPPING—FAILURE TO OBSERVE—CONTRIBUTORY NEGLIGENCE.

It is the duty of a motorist on an intersecting highway to stop before entering a through highway upon which there is traffic approaching the intersection and make proper observation before entering the intersection and if he fails to make such observation he is guilty of contributory negligence as a matter of law (1 Comp. Laws 1929, § 4713 [e], as amended by Act No. 318, Pub. Acts 1939).

7. APPEAL AND ERROR—QUESTIONS REVIEWABLE—APPEAL BY BOTH PARTIES.

On appeal from verdict and judgment of no cause of action in both plaintiff's action and defendant's cross action arising out of automobile collision, the fact that both parties appeal does not necessarily result in confining questions presented to questions of law only.

8. COSTS—APPEAL BY BOTH PARTIES.

In action and cross action arising out of automobile collision where both parties appeal and neither prevails, no costs are allowed.

Appeal from Wayne; Moll (Lester S.), J. Submitted June 13, 1944. (Docket No. 14, Calendar No. 42,651.) Decided September 11, 1944.

Case by Herbert M. Carrothers against W. W. French for damages to an automobile arising from an automobile accident. Cross action of case by defendant against plaintiff for damages to automobile and personal injuries. Verdict and judgment of no cause for action by either party. Plaintiff appeals. Defendant cross-appeals. Affirmed.

Warning & Platt (*Charles A. Bennett,* of counsel), for plaintiff.

Earl S. Demel (*Arthur C. Lumley* and *William J. Eggenberger,* of counsel), for defendant.

STARR, J. This case involves an automobile accident which occurred about 5 o'clock in the afternoon of September 16, 1942, at the intersection of through highway US-12 and Ann Arbor Trail road, near the city of Plymouth. Suit was begun and trial had in the common pleas court of Detroit, and on appeal by defendant to the circuit court for Wayne county was retried *de novo*. Plaintiff asserted claim for damages which he alleged resulted from defendant's negligence. Defendant filed cross declaration claiming damages which he alleged resulted from the negligence of the driver of plaintiff's car.

At the conclusion of all proofs plaintiff moved for a directed verdict against defendant on his cross declaration, on the ground that he was guilty of contributory negligence as a matter of law. The trial court reserved decision on such motion and submitted the case to the jury, which returned a verdict of no cause of action against each party. Judgment was entered on such verdict, plaintiff's motion for a new trial was denied, and he appeals. Defendant cross-appeals.

US-12 is a cement-paved, through highway, 24 feet wide, running east and west. Ann Arbor Trail road is tarvia surfaced to a width of 20 feet and runs in a southeasterly and northwesterly direction. The intersection of the two roads resembles an X with the greater or obtuse angles on the northeasterly and southwesterly segments of the intersection. Plaintiff's car, driven by his 21-year-old son, was proceeding east on US-12 and approached the intersection at a speed variously estimated at 45 to 60 miles an hour. Defendant, driving his Ford pick-up truck in a northwesterly direction on the Ann Arbor Trail road, approached the intersection at a speed of about 35 miles an hour, but stopped before entering the intersection. The day was clear, the roadways were dry, there was no interfering traffic, and the view of each driver was unobstructed.

After passing a car driven by witness Austin, at a point 600 feet or more west of the intersection, plaintiff's driver did not return to his right side of the road but proceeded toward the intersection straddling the center line. He testified that when he was 300 to 400 feet west of the intersection, he observed defendant's car 50 to 60 feet south of the intersection; that he did not see defendant's car stop, but admitted, "Perhaps he did. I didn't see him stop." Though his view was unobstructed, plaintiff's driver did not make further observation until about 50 feet from the intersection, when he saw defendant's car proceeding slowly across in front of him. He said that he swerved to the left onto the north (wrong) side of the highway to avoid a collision. He admitted that he was familiar with the highway and intersection; that he did not sound his horn, apply his brakes or reduce his speed. Witness Austin testified that plaintiff's car was

approximately 90 feet from the intersection when defendant started across.

Defendant testified that he stopped his car before entering the intersection; that he observed the highway to the left and right; that he saw the car of witness Austin about 750 feet distant approaching from the left (west) and the car of witness Stamper about 250 feet distant approaching from the right (east); that he made no further observation and proceeded across the intersection in low gear at a speed of 10 to 15 miles an hour; and that while crossing the intersection, he could have stopped his car within 3 or 4 feet. Defendant said that he did not see plaintiff's car until it was directly in front of him. He testified in part:

"*Q.* Did you see that car at any time except just before the impact took place?

"*A.* I did not. I never saw that car until it was right in front of me. * * *

"*Q.* * * * You came to the road and * * * stopped and looked?

"*A.* Looked up and down the road. I seen the traffic was clear and proceeded across the road. * * *

"*Q.* Did you look to your left again after you observed that car (witness Austin's car) coming out of the bend on the straightaway the first time?

"*A.* No."

The cars collided in the northeast portion of the intersection, at a point about three feet from the north line of US-12. The front of defendant's car struck the right side of plaintiff's car near the front wheel. Defendant's car remained on the highway near the place of impact, while plaintiff's car continued on out of control for 100 feet or more.

Assuming, for the purpose of this opinion, that defendant was negligent, the first question presented

is whether or not plaintiff's driver was guilty of contributory negligence barring recovery. Plaintiff contends in substance that because his car was on a through highway, his driver was free from contributory negligence as a matter of law. We cannot agree with such contention. Although he was driving on a through highway, it was the duty of plaintiff's driver to make proper observation of traffic approaching on intersecting highways and to use reasonable care and caution to avoid an accident. In the case of *Kerns* v. *Lewis,* 246 Mich. 423, Mr. Justice WIEST, writing for the court, said in part, pp. 426, 428:

"Plaintiff was driving east on a trunk line highway, and defendant's car was being driven north on an intersecting highway. * * *

"Plaintiff invoked the right of way accorded by law to users of a trunk line highway and the assurance of safety thereunder. While the law accords the right of way, it requires, as well, the exercise of at least 'horse sense.' The statute * does not authorize one, in approaching a highway crossing, to assume that in all events he may proceed without looking, or, if unable to see, without exercising precaution commensurate with reasonable prudence."

In the case of *Adams* v. *Canfield,* 263 Mich. 666, we said:

"A rate of speed on a through highway of 45 or more miles per hour is not illegal nor excessive nor uncommon. It is quite ordinary. A driver desiring

* The statute in effect when the cause of action arose in the case from which this quotation was taken was Act No. 96, Pub. Acts 1923. That statute was repealed by Act No. 318, Pub. Acts 1927. For present statutory law on the subject of right of way at type of intersection here involved, see 1 Comp. Laws 1929, § 4713 [c], as amended by Act No. 318, Pub. Acts 1939 (Comp. Laws Supp. 1940, § 4713 [c], Stat. Ann. 1943 Cum. Supp. § 9.1581[c]).—REPORTER.

to cross such road must anticipate fast traffic on it, and, when the range of his vision is limited, he cannot always assume that a single observation will disclose the situation and all of its probabilities and proceed as though there were no cars on the road within colliding distance. *On the other hand, he may assume that a driver on the through highway, coming into the range of vision, will discover him seasonably and take ordinary care to avoid collision.*"

In the case of *Rife* v. *Colestock,* 297 Mich. 194, 198, Mr. Justice BUTZEL said:

"There may be circumstances where a driver on a through street may be guilty of contributory negligence if he proceeds after he has seen that the driver from an inferior cross street has failed to stop in accordance with the stop sign. Plaintiff testified that the reason he did not look to the west again was because the intersection was clear 140 feet to the west when he looked, and that no one who came to a stop in accordance with the law could cross the intersection prior to plaintiff. Was this a reasonable surmise or not? Was a person guilty of contributory negligence in exercising such a belief? We hold that these questions are for the determination of a jury. See *Swainston* v. *Kennedy,* 253 Mich. 518; *Bunker* v. *Reid,* 255 Mich. 536; *Rhoades* v. *Finn,* 288 Mich. 262."

In *Campbell* v. *Osterland,* 283 Mich. 175, we said:

"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 trunk line 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.''

See, also, *Breker* v. *Rosema,* 301 Mich. 685 (141 A. L. R. 867); *Dramis* v. *Dunbar,* 280 Mich. 300.

The testimony clearly presented questions of fact as to whether or not plaintiff's driver made proper observation and whether or not he exercised reasonable care and caution to avoid the accident. There was evidence from which the jury could find, as they apparently did, that he was guilty of contributory negligence as a matter of fact. We cannot say that the verdict was against the great weight of the evidence.

Assuming, for the purpose of this opinion, that the driver for plaintiff, as cross-defendant, was negligent, the next question is whether or not defendant as cross-plaintiff was guilty of contributory negligence barring recovery under his cross-declaration. He stopped his car at the through highway, as required by law. 1 Comp. Laws 1929, § 4713 (e), as amended by Act No. 318, Pub. Acts 1939 (Comp. Laws Supp. 1940, § 4713 [e], Stat. Ann. 1943 Cum. Supp. § 9.1581 [e]). It was his duty to make proper observation for approaching traffic before entering the intersection. He had a clear and unobstructed view to the left (west) for a distance of more than 750 feet. He saw witness Austin's car approaching at a distance of about 750 feet and concluded that he could safely cross the highway. He proceeded into the intersection without making further observation and did not see plaintiff's car until it was directly in front of him. It is clear that, had he made proper observation, he would have seen or be presumed to have seen plaintiff's

car, which was plainly visible as it approached from the west. In *Heckler* v. *Laing,* 300 Mich. 139, 145, we said:

"It was not only the duty of plaintiff's decedent to stop at US-2, but it was also his duty, after stopping, to make proper observation for approaching traffic. If he, * * * having stopped, failed to make proper observation before entering the intersection, he was guilty of contributory negligence as a matter of law. *Gallagher* v. *Walter,* 299 Mich. 69; *Zuidema* v. *Bekkering,* 256 Mich. 327; *Buwalda* v. *County of Ottawa,* 270 Mich. 477.

"Plaintiff's decedent, in making the required observation on US-2, is presumed to have seen what a person in the exercise of ordinary care and caution would see; that is, what was plainly visible."

See, also, *Slingerland* v. *Snell,* 283 Mich. 524; *Knight* v. *Merignac,* 281 Mich. 684.

We conclude that under his own testimony defendant as cross plaintiff was guilty of contributory negligence as a matter of law. The trial court might properly have granted plaintiff's motion for a directed verdict against defendant as cross plaintiff. However, there was evidence from which the jury could find, as they apparently did, that defendant as cross plaintiff was guilty of contributory negligence as a matter of fact.

Plaintiff contends that the appeal by both parties is, in effect, a concession that only questions of law are presented for review. We find no basis or authority for such contention in this case.

The judgment is affirmed. Neither party having prevailed, no costs are allowed.

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

CZEIZLER *v.* RADKE.

1. APPEAL AND ERROR—CHANCERY CASE—DE NOVO REVIEW—SPECIFIC PERFORMANCE.
   A suit for specific performance of a land contract is reviewed *de novo* by the Supreme Court since it is a chancery case.

2. SPECIFIC PERFORMANCE—JURISDICTION.
   The jurisdiction of equity to decree specific performance presupposes that the parties have agreed between themselves upon every material matter and that the matters so agreed upon are of such a nature and the subjects of enforcement are such that the court can collect all elements in their proper relations and proceed intelligently and practically in carrying into execution the very things agreed on and standing to be performed.

3. SAME—ENFORCEMENT ACCORDING TO TERMS.
   Equity cannot make a new contract for the parties nor supply any material stipulation thereof but must specifically enforce the contract according to its terms or not at all.

4. SAME—PLAINTIFF'S COURSE OF CONDUCT.
   Equitable relief by way of specific performance should not be granted to plaintiff unless his course of conduct relative to the transaction has been one that warrants the approval of a court of equity.

5. SAME—REMEDY OF GRACE.
   Specific performance is a remedy of grace and not a matter of right and the test of whether or not it should be granted depends upon the peculiar circumstances of each case.

6. SAME—DISCRETION OF COURT.
   The granting of the remedy of specific performance lies within the discretion of the court.

7. SAME—MUTUALITY OF OBLIGATION AND REMEDY.
   Generally speaking, equity will decree the specific performance of a contract only in cases where there is a mutuality of obligation and of remedy.

Specific performance of land contract—mistake or sharp practice as grounds for refusing, see 2 Restatement, Contracts, § 367, comment c; uncertain terms, see § 370; remedy as affected by mutuality of remedy, see § 372.

8. SAME—LAND CONTRACT—CONSIDERATION.

In suit for specific performance of agreement to sell land, as evidenced by preliminary agreement, signed by plaintiff as purchaser and defendants as vendors, and which was accompanied by plaintiff's deposit of $100 that was turned over to and accepted by defendants, plaintiff was entitled to relief prayed for where the agreement was sufficiently clear, definite and complete to create a valid contract and a mutual right to specific performance.

9. VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—COMPETENCY TO EXECUTE LAND CONTRACT.

Vendor under contract to sell land who was ill, addicted to the use of liquor, and in a highly nervous state at time of accepting plaintiff's offer to purchase *held*, not shown to have been incompetent to do business at time contract was executed, hence plaintiff was entitled to specific performance thereof.

Appeal from Oakland; Doty (Frank L.), J. Submitted June 9, 1944. (Docket No. 53, Calendar No. 42,653.) Decided September 11, 1944.

Bill by David L. Czeizler against Julius Radke and wife for specific performance of an agreement to sell land. Decree for plaintiff. Defendants appeal. Affirmed.

A. Floyd Blakeslee, for plaintiff.

Verne C. Hampton, for defendants.

STARR, J. On November 23, 1942, plaintiff made an offer to purchase a dwelling-house property owned by defendants in the city of Pontiac, and on the same date defendants executed an acceptance of such offer, as follows:

"Preliminary Agreement

"Pontiac, Michigan. November 23, 1942.

"We hereby offer and agree to purchase through Leslie R. Tripp, realtor agent for the owner, the

following described property, situated in the city of Pontiac, in the county of Oakland, and State of Michigan, to-wit:

"Lot numbered 434 of Woodward Estates subdivision of the city of Pontiac, * * * subject to restrictions and easements of record; the same being improved with a dwelling known as No. 192 Bondale, including all electric, heating and plumbing fixtures, stoker, shades and curtain rods.

"And to pay therefor the sum of $5,000 upon the following terms and conditions: $100 upon the signing of this agreement, receipt of which is hereby acknowledged to apply on the purchase price, the same to be returned should proposition be rejected by owner, or prior sale, of said property; or should the title be found unmarketable, the balance to be paid as follows:

"Four hundred dollars upon execution of good and sufficient (land contract), * * * the balance to be paid in monthly instalments of not less than $50 per month, the first payment to be due one month from date of land contract;

"Said payments (to include) six per cent. interest. Deal to be closed within five days from date, abstract of title or policy of title insurance certified to date, showing marketable title has been delivered to purchaser for examination, other bills and insurance to be adjusted to date of transfer.

"Purchaser—DAVID L. CZEIZLER. * * *

"We hereby accept the above offer and agree to terms of same, and will furnish abstract of title or policy of title insurance certified to date, showing marketable title, and when conveying shall convey by:

"Abstract and Title Guaranty Company form of land contract calling for warranty deed upon completion; we further agree to pay all taxes, special and regular, in full, that are now a lien against the said property; all taxes and assessments that become due henceforth (including December, 1942 taxes, so-

called) to be paid by purchaser; possession to be given purchaser five days from date of closing deal. Upon closing deal the undersigned 'seller' hereby agrees to pay Leslie R. Tripp a real-estate commission of five per cent. of above sales price.

"JULIUS RADKE.
"ROSE RADKE."

Upon defendants' refusal to complete the sale, plaintiff began the present suit for specific performance. Defendants answered, alleging in substance that there was no consideration for their agreement to sell; that the acceptance was not the free act and deed of defendant Julius Radke because he was ill and under the influence of intoxicating liquor when he executed it; and that plaintiff was not entitled to the relief sought. The trial court decreed specific performance, and defendants appeal. This being a chancery case, we review the same *de novo*.

We shall give only a brief summary of the testimony, much of which is in conflict. Defendant Julius Radke had lived in the United States since 1910; had conducted a grocery store; owned other properties; and said that he had "done a lot of business in this country." Leslie Tripp, a real-estate agent, testified that defendant Radke telephoned him, stating that he wanted to sell his residence property, and requested Tripp to come to his home and discuss the matter; that he and his salesman, witness Voorheis, went to the Radke home; that Radke told them that his health was poor and that he was in a hurry to sell the property as he was leaving the city. Tripp further testified that Radke said, "I will sell it for five thousand with five hundred down." Tripp's testimony was corroborated by that of witness Voorheis.

Witness White, another salesman employed by Tripp, took plaintiff and his wife to the Radke home, introduced them to the Radkes, and they inspected

the property. Plaintiff then signed the above-quoted offer to purchase and gave White a check for $100 as a binder payment. White testified in part:

"I took him (plaintiff) * * * to see the property. Mr. and Mrs. Radke were there. * * * She said to show the property. Mr. Radke was there and I made him acquainted with the party (plaintiff). * * * We looked the property over. * * * Mr. Czeizler on the way back said, 'I am going to give you a deposit.' * * * I called up Mr. Tripp and asked him if he would make out the purchase agreements. * * * I picked him up at the office and we went over to Mr. Czeizler's and Mr. Czeizler and his wife signed them. * * * Mr. Czeizler had given me his check for $100. * * * I went back to the Radke's with Mr. Tripp. * * * I heard no talk that night about them not wanting to sell. When we went in, Mr. Tripp told them that we had an offer. * * * He * * * gave Mrs. Radke a copy (of plaintiff's offer) and Mr. Radke a copy and * * * read it over to them. They signed at that time. Mr. Tripp's check was given to them at that time. No complaint was made about the check. * * * I came into the office on Wednesday and there was a note saying the Radkes wanted to know if the purchaser would buy the coal and if they wanted the roomer to stay. * * * On Friday Mr. and Mrs. Radke got into a dispute. I could see at that time they didn't want to sell the property. Mr. Radke said, 'If we got the property that we wanted, it would have been O.K., but when we got there it was sold.'"

Witness Tripp further testified regarding defendants' acceptance of plaintiff's offer and their later refusal to complete the sale, in part as follows:

"Mr. White and I drove to Mr. Radke's and gave them my check for $100 and tendered the offer to him. He accepted it. He and Mrs. Radke signed the

agreement (acceptance of plaintiff's offer). * * * There was no quibbling about signing. They made no objection to taking my check. The next morning * * * Mr. Radke called me on the telephone stating that he was leaving the abstract (of title) at his daughter's grocery store, and asked me if I would object to going out there and picking it up, having it certified for him, which I did. * * * The abstract was examined and approved by Mr. Czeizler's attorney. * * * A few days after the abstract was approved, I met Mr. and Mrs. Radke at Mr. Hampton's office at which time I tendered them the balance of the purchase money, the down payment, in cash. Their attorney, Mr. Hampton said, 'We will acknowledge that you have made a tender of the down payment.' Then he suggested to Mr. Radke that he tender me my $100 check which he had received which he did and I declined to take it. * * * Mrs. Radke stated that they would like to get released from the agreement, and that if Mr. Czeizler would release them, that she would be glad to pay me my commission for making the sale.

"They gave as their grounds for refusing to go through with the deal that the contract they had contemplated buying was no longer available, and second, that * * * the house that they owned had been rented by their daughter to some of her employees and they couldn't move in that house, and then further reasons that the down payment wasn't sufficient."

Plaintiff Czeizler testified regarding his inspection of the property and his interview with the Radkes in part as follows:

"I went out to see the property with Mr. White, Mr. and Mrs. Radke were there. * * * I talked with Mr. Radke. He showed us through the property. * * *

"He told me * * * if I bought the place he could give me possession just as soon as I wanted it

and he also showed me the advantages of the place and he took me upstairs and showed me in the attic and showed me the furnace. * * *

"*Q.* At that time was anything said about the coal in the bin?

"*A.* Yes, he asked me what we would do about the coal. I said, you estimate about how many tons you have and I will pay you at the fair market price."

Defendants admitted signing the written acceptance of plaintiff's offer, and that Tripp's check for $100 was tendered to them, but said that they refused to accept the check because their name was not spelled properly. They stated they could not read English, and denied reading plaintiff's offer. It appears that defendant Julius Radke was afflicted with tuberculosis and had been in a sanitarium and undergone several operations. Defendants both testified in substance that, to relieve his pain and nervousness, he had developed the habit of drinking large quantities of intoxicating liquor and that he also took sedatives. Julius Radke claimed that when he signed the acceptance of plaintiff's offer, he was under the influence of liquor and sedatives and did not understand what he was doing. He testified in part:

"I was under a doctor's care in November, 1942. * * *

"He gave me some medicine to drink after meals and some pills. I tried everything and I couldn't get enough relief from my pains. * * * I started to use the liquor. * * *

"Started with a pint. Sometimes up to a quart. * * *

"About 8:30, Mr. Tripp came * * * with Mr. White and brought the papers to sign * * * and they said I should sign the papers so and so. I signed the papers. * * *

"He read the words and I looked the thing over, * * * I couldn't get much straight, so I said I don't know what it is except you will read it,— * * * so he did read it but what it was I don't know. * * *

"When the papers was signed, I was—got upset. * * *

"*Q.* You don't claim to have been drunk on that occasion * * * when you talked to Tripp the first time?

"*A.* I don't say I was drunk but that is what it was. * * *

"*Q.* Answer yes or not, Mr. Radke. Were you too drunk to know what you were doing?

"*A.* No."

Defendant Rose Radke testified, "Mr. Tripp told me the paper was an agreement on the place. I signed the paper and Mr. Radke signed the paper." A doctor who had attended defendant Julius Radke for several years testified in part:

"For years * * * he has had tuberculosis which we now feel is arrested. * * * Since his release from the sanitarium, I have seen him several times going back as far as 1940 and 1941 and then in November, 1942. The chief complaint seems to be extreme nervousness. * * *

"At various times * * * he was given sedatives * * * to help induce sleep because he complained he was unable to sleep and was extremely nervous. * * *

"I think both times when I saw him in November, 1942, he had been drinking rather heavy. * * *

"The impression that I got from his general attitude was that he was almost an early case of delirium tremens. That is to the extent he was very greatly agitated and he wouldn't sit and talk calmly. * * *

"I think even without a sedative that possibly his judgment— * * * certainly his reaction to situa-

tions was definitely altered by the use of alcohol. * * *

"*Q.* What dates did you see him in November, doctor? * * *

"*A.* Perhaps * * * around the 20th of November. * * *

"*Q.* So you wouldn't be able to testify as to what condition he was in on the 23d (the date he signed the acceptance)?

"*A.* No, not definitely on the 23d."

Witness Voorheis, the salesman who accompanied Tripp to the Radke home in the afternoon of November 23d, said that Julius Radke did not appear to be intoxicated. Witness Tripp further testified:

"I have known the defendants since 1928. I bought groceries at Mr. Radke's store. * * *

"*Q.* Did you observe at that time (November 23d) that Mr. Radke appeared to be intoxicated or under the influence of liquor?

"*A.* It never occurred to me that he might even have had a drink. He acted normal to me. * * *

"I wouldn't think that he had been drinking. Certainly not to a degree that would affect his judgment or his mental keenness."

Witness White, the salesman who showed plaintiff the property on November 23d, and who was present that evening when defendants signed the acceptance of plaintiff's offer, testified that "Mr. Radke did not appear to be intoxicated that night."

The question presented is whether or not the trial court erred in decreeing specific performance of the ageement to sell, as embodied in plaintiff's written offer to purchase and defendants' acceptance thereof. In the case of *Blanchard* v. *Railroad Co.*, 31 Mich. 43, 53 (18 Am. Rep. 142), we said:

"The jurisdiction of equity in specific performance proceeds on the supposition that the parties

have not only agreed, as between themselves, upon every material matter, but that the matters so agreed on are of such a nature, and the subjects of enforcement so delineated or indicated, either directly or by reference to something else, or so raised to view by legitimate implication, that the court can and may collect, and in their proper relations, all the essential elements, and proceed intelligently and practically in carrying into execution the very things agreed on and standing to be performed."

In 49 Am. Jur. pp. 35, 36, § 22, it is stated:

"Whenever it appears that material matters are not clear, certain and complete, but are left by the parties so obscure or undefined that the court cannot say whether or not the minds of the parties met upon all the essential particulars, or if they did, the court cannot say exactly upon what substantial terms they agreed, the case is not one for specific performance. Equity cannot make a new contract for the parties, but must enforce the contract according to its terms or not at all, the court will not make a contract for the parties or supply any material stipulation thereof."

In the case of *MacGlashan* v. *Harper,* 299 Mich. 662, 667, we said:

"Equitable relief by way of specific performance should not be granted to plaintiff unless his course of conduct relative to the transaction has been one that warrants the approval of a court of equity. *Brear* v. *Baumgartner,* 249 Mich. 633. Specific performance is a remedy of grace and not a matter of right, *Mowat* v. *Walsh,* 236 Mich. 391, and the test of whether or not it should be granted depends upon the peculiar circumstances of each case, *Waller* v. *Lieberman,* 214 Mich. 428. The granting of this equitable remedy lies within the discretion of the court. *Stecker* v. *Silverman,* 294 Mich. 422. See,

also, *Richards* v. *White,* 44 Mich. 622; *Smith* v. *Stewart,* 245 Mich. 452; and 58 C. J. p. 1078, § 336."

See, also, *Tincknell* v. *Ward,* 285 Mich. 47; *Wolverine Packing Co.* v. *Hawley,* 251 Mich. 215; *Chatham-Trenary Land Co.* v. *Swigart,* 220 Mich. 137; *Bilansky* v. *Hogan,* 190 Mich. 463.

"The test to be applied in such cases is, Are the sellers obligated to sell and the purchaser to buy?" *Muirhead* v. *Freimann,* 270 Mich. 181, 185.

"As the rule is generally stated, equity will decree the specific performance of a contract only in cases where there is a mutuality of obligation and of remedy." 49 Am. Jur. p. 47, § 34.

The situation presented in the instant case can be summarized briefly as follows: defendants wished to sell their property and, in effect, made Tripp their agent; Tripp's salesman, with defendants' approval, showed the property to plaintiff, who made a written offer of $5,000 and gave the salesman a check for $100 as a binder payment; defendants signed an acceptance of such offer, and Tripp gave them a check for the $100 which plaintiff had paid him. That defendants accepted such check is evidenced by the undisputed testimony that several days later, on the advice of their attorney, they tendered the check back to Tripp. Defendants recognized their agreement to sell when, on the day following their acceptance, they instructed Tripp to obtain the abstract of title from their daughter and have it brought down to date. They later changed their minds, refused plaintiff's tender of the balance of the down payment, and sought to avoid their agreement to sell.

We have carefully examined the agreement, consisting of plaintiff's offer and defendants' accept-

ance, hereinbefore quoted, and conclude that the essential provisions of such agreement were sufficiently clear, definite, and complete to create a valid contract and a mutual right to specific performance. Defendants' acceptance of the check for $100 constituted a valid and sufficient consideration for their agreement to sell.

Although, because of his illness and use of liquor, defendant Julius Radke was in a nervous state at the time he accepted plaintiff's offer, we are convinced that he knew and understood what he was doing. The trial court, who saw and heard the parties and their witnesses, was in a better position to judge their credibility and the weight to be accorded their testimony. After examining the record, we agree with the trial court who said in part:

"While the court is satisfied that Mr. Radke is in a highly nervous state, I cannot help but feel that he has plenty of mental capacity. He has made a success in life, much more so than the average individual. The fact he is afflicted with tuberculosis in my opinion does not make him incompetent to do business. I am also satisfied Mrs. Radke was competent to do business. * * * There was consideration. Mr. Tripp acted as the agent of the defendants in this case and the defendants had capacity to contract. * * * The agreement signed November 23, 1942, is a valid existing agreement capable of being enforced."

We conclude that plaintiff was entitled to specific performance of defendants' agreement to sell. The decree of the trial court is affirmed. Plaintiff shall recover costs of both courts.

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

COUNCIL OF THE VILLAGE OF ALLEN PARK *v.* ALLEN PARK VILLAGE CLERK.

1. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENT BONDS—ELECTIONS.

   Statute prohibiting a village from authorizing "any issue of bonds except special assessment bonds * * * unless approved by three-fifths of the electors voting thereon" excepts special assessment bonds from need of electoral authorization (1 Comp. Laws 1929, § 1788).

2. SAME—BONDS IN ANTICIPATION OF COLLECTION OF SPECIAL ASSESSMENTS—LIABILITY OF VILLAGE FOR PAYMENT.

   The right of a village to issue bonds in anticipation of collection of special assessments carries a liability to pay the bonds, such bonds being excepted from the amount of prohibited village indebtedness (1 Comp. Laws 1929, § 1788).

3. SAME—REFUNDING SPECIAL ASSESSMENT BONDS—ELECTIONS—COUNTER-SIGNATURE BY VILLAGE CLERK.

   A village clerk is under a mandatory duty to countersign refunding special assessment bonds pledging the full faith and credit of the village as authorized by the village council without vote of village electors where village charter requires his signature and statute authorizes issuance of special assessment bonds without such vote (1 Comp. Laws 1929, § 1788).

4. COURTS—OPINION AS PRECEDENT—BRIEF AMICUS CURIAE.

   Where point argued in brief *amicus curiae* was presented in appeal and rightly considered by the court, the opinion as to such point was a precedent and not merely dictum, although the point was not argued by counsel representing the parties.

5. COSTS — MUNICIPAL CORPORATIONS — MANDAMUS — ISSUANCE OF BONDS.

   No costs are allowed in mandamus proceeding to compel village clerk to countersign refunding special assessment bonds authorized by village council (1 Comp. Laws 1929, § 1788).

Petition by Etril L. Leinbach and others, as the council of the Village of Allen Park, Michigan, for a writ of mandamus to require Stanley H. Burbank, Village Clerk, to countersign refunding special as-

sessment bonds. Submitted June 22, 1944. (Calendar No. 42,808.) Writ granted September 11, 1944.

Claude H. Stevens, for plaintiff.

Harry Vellmure, for defendant.

Miller, Canfield, Paddock & Stone, amici curiae.

WIEST, J. The council of the village of Allen Park, by petition, seeks our writ of mandamus directing the village clerk to countersign refunding special assessment bonds, pledging the full faith and credit of the village as authorized by the council. The clerk refuses so to countersign, claiming such refunding special assessment bonds may not issue unless authorized by vote of the village electorate. The charter of the village requires that bonds be countersigned by the clerk. The original special assessment bonds, authorized by the village council, pledged the full faith and credit of the village, without vote of the village electors. The purpose of refunding, in part, is to reduce the rate of interest.

The question of law here involved is well stated as follows in petitioner's brief:

"Is an electoral vote necessary, under the provisions of Act No. 278, § 26, subd. (e), Pub. Acts 1909, as amended?"

The statute, 1 Comp. Laws 1929, § 1788 (Stat. Ann. § 5.1536), relating to prohibited bond issues, provides:

"(e) Or authorize any issue of bonds except special assessment bonds, * * * unless approved by three-fifths of the electors voting thereon at any general or special election."

Counsel for defendant concedes that no electoral vote was required by the village charter. The sole question turns upon the meaning of the term "special assessment bonds," as employed in the mentioned section of the village home rule act. The quoted subdivision excepts special assessment bonds from need of electoral authorization.

Counsel for defendant urges us to circumscribe the term "special assessment bonds" as employed in the statute to such as are payable solely from the assessments levied against districts and the collections thereof made. So to hold would render the village, maker of the bonds, a mere tax collector for the bondholders. The right of the village to issue bonds in anticipation of collection of special assessments carries a liability to pay the bonds. Such bonds are excepted from the amount of prohibited village indebtedness.

Counsel for plaintiff cite our opinion in *Callahan* v. *City of Berkley,* 307 Mich. 701. That case is in point. Counsel for defendant claims that, upon the pivotal point here involved, the opinion was dictum in that, while the point was presented in the appeal, it was not argued by counsel representing the parties. It was argued in the brief *amicus curiae,* rightly considered, and a motion for rehearing denied.

The village clerk is directed to countersign the refunding bonds, as issued by the village council. No costs.

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

SMITH *v.* WITHEY.

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE—APPOINTMENT OF FIDUCIARY—DEEDS.

   On appeal in suit by two children of decedent against their sister and her husband to set aside deed given by defendant sister, as administratrix, to a dummy transferee for consideration furnished by defendant husband, such transferee's deed to defendants and their deeds to others, validity of appointment of defendant sister as administratrix is not considered where deeds resulted from defendants' fraud and if such appointment were valid, statute rendered purchase of property by fiduciary void (Act No. 288, chap. 9, § 27, Pub. Acts 1939).

2. EXECUTORS AND ADMINISTRATORS—SELF-DEALING BY FIDUCIARY.

   Each suit to set aside a deed of property by a fiduciary for his own benefit must stand upon its own facts (Act No. 288, chap. 9, § 27, Pub. Acts 1939).

3. SAME—SELF-DEALING.

   An administratrix's sale of estate property for the benefit of herself is void and it makes no difference by what means the benefit is obtained (Act No. 288, chap. 9, § 27, Pub. Acts 1939).

4. SAME — SELF-DEALING — CLAIMS AGAINST ESTATES — EQUITY — FRAUD.

   Plaintiffs, two of decedent's three children to whom real estate had been devised in equal shares, were properly charged with two-thirds of claims filed, allowed and paid by estate upon being awarded two-thirds of the estate in suit to set aside deed by which administratrix, their sister, had sought to obtain entire estate for her own benefit by means of fraudulent scheme.

5. SAME—FRAUD.

   Scheme whereby defendant sister of plaintiffs had sought to obtain benefit of entire estate for herself in property that had

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Sale of trust property to fiduciary to self, see 1 Restatement, Trusts, §§ 170, 206.

been devised to the three of them in equal shares through handling the estate as administratrix was properly *held,* fraudulent, entitling plaintiffs to a two-thirds interest in the estate (Act No. 288, chap. 9, § 27, Pub. Acts 1939).

Appeal from Emmet; Gilbert (Parm C.), J., presiding. Submitted June 6, 1944. (Docket No. 9, Calendar No. 42,612.) Decided September 11, 1944.

Bill by Frances S. Smith and others against Clementine S. Withey and another to set aside a transfer of real estate for fraud. Decree for plaintiffs. Defendants Withey appeal. Affirmed.

Benjamin V. Halstead, for plaintiffs.

John Wendell Bird, for defendants.

WIEST, J. The bill herein was filed to set aside a deed. By will of their mother, duly admitted to probate, plaintiffs and defendant, Clementine S. Withey, were devised land in Emmet county having a considerable frontage on Walloon Lake. The will nominated plaintiff Frances S. Smith executrix, but she did not qualify. Sometime later defendant Clementine S. Withey, verbally, asked the probate judge to appoint her administratrix of the estate and she was appointed, without notice to any one interested, and gave bond. The estate was devised to the three children mentioned, share and share alike. After her appointment, Clementine S. Withey petitioned the probate court for leave to sell the premises at private sale and leave was granted.

Mrs. Withey deliberately planned a scheme by means of which the interests of the other devisees should inure to her benefit.

At the private sale Emma McWilliams of Chicago was selected as a dummy purchaser under an ar-

rangement by which she should bid $1,000 for the premises, the money to be paid by the defendant Grant R. Withey, husband of the administratrix, and Miss McWilliams should deed the property to defendants. The scheme was carried out and the administratrix gave Miss McWilliams a deed and Miss McWilliams deeded to the administratrix and her husband to hold by the entireties. The sale was reported to the probate court but nothing said about the transfer from Miss McWilliams to defendants. The sale, as reported, was confirmed by the court. Subsequently, defendants conveyed a small part of the lake frontage to another person and also a large part of the lake frontage to another purchaser, receiving about $100 for the small frontage and $2,500 for the large frontage. The sale so made by the administratrix, whether she was properly appointed or not, was void.

Act No. 288, chap. 9, § 27, Pub. Acts 1939 (Comp. Laws Supp. 1940, § 16289–9 [27], Stat. Ann. 1943 Rev. § 27.3178 [487]), relating to sales by administrators, provides:

"The fiduciary making the sale shall not directly or indirectly purchase, or be interested in the purchase of, any part of the property so sold, and all sales made contrary to the provisions of this section shall be void; but this section shall not prohibit any such purchase by a guardian for the benefit of his ward."

We do not deem it necessary to consider the question of whether the appointment of the administratrix was valid or not, for, if valid, the statute rendered the deed in this instance void.

The circuit judge who heard the proofs found defendants Withey guilty of fraud in carrying out the scheme to obtain the property and set the deed

aside. The deeds from the Witheys to subsequent purchasers conveyed, at least, the rights of Clementine S. Withey as a devisee of an undivided one-third of the premises. The circuit judge also found, and his finding is fully supported by the evidence, that the premises sold by the administratrix were worth, at the time of the sale, $5,000. The decree provided, in substance, that the subsequent purchasers be protected upon payment to plaintiffs of sufficient money to satisfy the value of their two-thirds interest in the premises and thereby have their deeds validated. The subsequent purchasers have not appealed.

In behalf of defendants Withey it is contended that this court, in at least three instances, has refused to void a sale by a fiduciary for his own benefit, but it is well stated that each case must stand upon its own facts. We let this case stand upon its facts and it clearly appears that the scheme of the administratrix, aided by her husband, was so clearly intended to deprive the plaintiffs of any right in the property that, as said by the chancellor in Harrington's Chancery Reports, in the case of *Beaubien* v. *Poupard*, Harr. Ch. (Mich.) 206, 218:

"It makes no difference by what means an administrator secures the benefit of a purchase at a sale made by himself; the rule is imperative that he cannot become a purchaser at all. *Swayze's Lessee* v. *Burke,* 12 Pet. (37 U. S.) 11, 25 (9 L. Ed. 980); *Hart* v. *Ten Eyck,* 2 Johns. Ch. (N. Y.) 62."

The court found the claims filed and allowed against the estate in the probate court amounted to $765; that defendants paid the same, and decreed that the interests of plaintiffs in said premises be charged with $510, two-thirds of said debts, in favor of defendants Withey. Plaintiffs appeal from that

part of the decree, contending that plaintiffs should not be required to pay any part of the debts mentioned. It was no more than fair in awarding plaintiffs two-thirds of the estate to require them to pay two-thirds of the debts and we approve of the adjudication made by the circuit judge.

The fraud accomplished cannot be countenanced by the court and the decree in the circuit court is affirmed, with costs against defendants Withey.

NORTH, C. J., and STARR, BÜTZEL, BUSHNELL, SHARPE, and REID, JJ., concurred with WIEST, J. BOYLES, J., concurred in the result.

PAVELA *v.* BALOGH.

1. LOST INSTRUMENTS—DEEDS—BURDEN OF PROOF.
   One claiming title to property under an alleged unrecorded deed subsequently lost or destroyed has the burden of establishing execution of such deed.

2. QUIETING TITLE—CLOUD ON TITLE—EVIDENCE.
   Warranty deed, solicited and procured from grantor by appellant-grantee and conveying property to himself and his former wife, after the grantor had previously given a warranty deed to the wife subsequent to her divorce from appellant, was, under evidence presented, properly found to have been a cloud upon title of parties holding under deed from wife and removed as such by trial court, where it appears appellant knew of previous unrecorded deed to wife, as appellant did not obtain his deed in good faith (3 Comp. Laws 1929, § 12767).

Appeal from Wayne; Ferguson (Homer), J. Submitted June 7, 1944. (Docket No. 20, Calendar No. 42,643.) Decided September 11, 1944.

Bill by Michael Pavela against Elsie Balogh and others to establish a lost or destroyed deed. Cross bill by defendants Otto Falklam and wife against plaintiff to quiet title to land. Decree for defendants and cross plaintiffs. Plaintiff appeals. Affirmed.

Younglove & Chockley (*Arthur J. Schuck,* of counsel), for plaintiff.

Lester J. Gardhouse, for defendants Falklam.

Nicholas Salowich, for defendants Kalman and Balogh.

WIEST, J. Plaintiff claims that a lost or destroyed unrecorded deed to himself and his wife, as tenants by the entirety, of certain premises in the city of Detroit, upon his wife subsequently obtaining a decree of divorce in the State of Texas without disposition of property rights thereunder, constituted him a tenant in common in ownership of the property under 3 Comp. Laws 1929, § 12767 (Stat. Ann. § 25.132). At the time of the Texas divorce the plaintiff's sister, Rose Szucs, was of record the sole owner of the premises here involved, and defendants Falklam claim title thereto by way of purchase under title of record.

By the bill filed by plaintiff he seeks adjudication establishing execution and delivery of the claimed deed to himself and wife, and that he be held thereunder an owner as tenant in common with defendants Falklam.

The burden was on plaintiff to establish execution of the claimed unrecorded deed. The trial court held the evidence failed to establish such claimed fact and dismissed the bill.

Defendants Falklam, March 4, 1941, by warranty deed, acquired the premises from Elsie Balogh. Defendant Mary Pavela acquired the premises by warranty deed from Rose Szucs, September 13, 1940, but did not record the deed until February 25, 1941. Before the deed was recorded Mary Pavela conveyed the premises to Elsie Balogh by quitclaim deed, dated September 13, 1940, and recorded October 9, 1940. January 23, 1941, before the deed from Szucs to Pavela was recorded, Rose Szucs, by warranty deed, conveyed the premises to "Michael Pavela, an unmarried man, and Mary Pavela, an unmarried woman." This deed was recorded January 29, 1941. That deed was executed at the demand of plaintiff who knew of the previous deed from Rose Szucs to defendant Pavela and evidently knowing it was not recorded solicited and obtained the deed last mentioned.

The circuit judge found that deed a cloud upon the title and by decree ordered its vacation. The record manifests the purpose of plaintiff in obtaining that deed. It was not obtained in good faith but simply as a trouble maker. The circuit judge was right in removing it as a cloud upon the title.

The record has been read with care, and we agree with the finding of the circuit judge and have no occasion to lumber this opinion with a recital of the testimony.

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

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

YEAGER *v.* DANIEL.

1. APPEAL AND ERROR—NONJURY CASE—FINDING OF COURT—EVIDENCE.

   The Supreme Court does not reverse the findings of fact made by a trial judge sitting without a jury, unless the evidence clearly preponderates in the opposite direction.

2. SAME—FINDINGS OF COURT—CONSTRUCTION CONTRACT—SUBCONTRACTOR—PREPONDERANCE OF EVIDENCE.

   In action by assignees of subcontractor against contractor for balance due for services and materials used in the reconstruction of a public sidewalk in front of a four-store building which defendant constructed for the owner, finding of trial judge that the subcontractor had done the work on a cost-plus basis for defendant, had not been paid in full, and that the owner had not ordered the work or been billed for it by the subcontractor is not disturbed under the evidence presented, since it does not clearly preponderate in the opposite direction.

3. JUDGMENT—RES JUDICATA—RECORD.

   In action by assignees of subcontractor against contractor for balance due for services and materials used in the reconstruction of a public sidewalk in front of a four-store building which defendant constructed for the owner, where record of case brought by the owner against the same defendant was not introduced in evidence in the instant case, the parties are not the same and the subject matter is different, the determination therein made with respect to the subcontractor's work is not herein determined, is not controlling and is not *res judicata* of the instant case.

Appeal from St. Clair; George (Fred W.), J. Submitted June 8, 1944. (Docket No. 39, Calendar No. 42,626.) Decided September 11, 1944.

Effect of judgment upon persons not parties, see Restatement, Judgments, § 93 *et seq.*

Assumpsit by Fred Yeager and Stephen A. Graham, trustees, doing business as F. Yeager Bridge & Culvert Works, against C. E. Daniel for services and materials rendered by plaintiff-assignor. Judgment for plaintiffs. Defendant appeals. Affirmed.

Walsh, Walsh, O'Sullivan & Schlee, for plaintiffs.

Frank J. Ortman, for defendant.

BUSHNELL, J. The trial judge sitting without a jury determined that plaintiffs, as assignees of Roy Travis, a cement subcontractor, were entitled to a judgment against defendant C. E. Daniel, a general contractor, in the amount of $488.14, for labor and material involved in the reconstruction of a sidewalk in front of a four-store building in the city of Port Huron, which Daniel constructed for Kate S. Jenks.

Controversies between the owner, Jenks, and the general contractor, Daniel, were determined in *Jenks* v. *Daniel,* 304 Mich. 239. The opinion in that case does not refer to Travis who, as a subcontractor, furnished labor and material for the cement work in the basement of one store in the Jenks building.

In the instant case the nature of the relations between Daniel and Travis with respect to the subsequent sidewalk reconstruction are in dispute. Travis testified that in the latter part of December, 1940, he entered into an oral contract with Daniel "to remove the old sidewalk and replace a new slab under the supervision of the city engineer of Port Huron." He said, "We decided at Mr. Daniel's suggestion that it should be a cost plus paid job." Difficulties were encountered in completing the work, and Travis stated:

"After removing the slab we found that the steel beam would not be substantial to carry the load called for according to the city specifications to bring it to the proper elevation. I called Mr. Daniel and told him I had a letter from the [city] engineer's office stipulating what I had to do in connection with it."

The steel for the sidewalk job was furnished by plaintiffs. Travis testified that the total cost for labor was $249.57 and the total cost for steel, $249.18, to which he added 10 per cent., making a total of $548.62, and that he received $100 from Daniel after the work was completed. Travis insisted that he had two separate contracts with Daniel, one for the basement floor of store No. 1 and one for the sidewalk; that he followed the instructions of the city engineer in the construction of the sidewalk, and that he never looked to Jenks for payment.

Daniel, on the other hand, insisted that, in addition to the contract for the basement floor, he also had a contract with Travis for the sidewalk, which he said "was to break up the sidewalk, remove the old sidewalk and replace with new concrete for a price of $100," and that he paid Travis all that was due him. Daniel testified that the structural steel used in the sidewalk was ordered by the owner and was not provided for in his contract with Jenks, and that Jenks was also responsible for additional concrete used to make the sidewalk thicker, which added about $70 to the cost. He compared the material and labor necessary for the sidewalk job which he said was to be completed at a cost of $100, with that required for the work done on the basement floor at an agreed cost of $80, to which $20 was added for extras, and pointed out that the area of the basement

floor was 2,232 square feet, while the sidewalk only had an area of 952 square feet. The trial judge resolved the factual disputes of the case in favor of plaintiffs.

We do not reverse the findings of fact made by a trial judge sitting without a jury, unless the evidence clearly preponderates in the opposite direction. *Mallory* v. *Pitcairn,* 307 Mich. 40, 47. An examination of the record does not justify the conclusion either that the subcontractor, Travis, had been paid in full or that this work was ordered by and billed to the owner.

The remaining question raised by Daniel on appeal is stated by him in this manner:

"May a trial court in one proceeding establish certain matters as facts and base a decree thereon, which findings and decree are affirmed in the Supreme Court, and in a subsequent proceeding ignore the facts so established and render a contradictory judgment?"

Daniel thus seeks to have us hold that our affirmation of the trial judge's determination in *Jenks* v. *Daniel, supra,* requires reversal of the same trial judge's finding in the instant case. In the *Jenks Case* the trial judge stated in part:

"I further find that defendant (Daniel) failed to follow the plans and specifications or failed to perform part of the work in a workmanlike manner in many instances."

Travis is not mentioned in the reported opinion, nor is his portion of the work specifically referred to. The dispute, which was resolved in that case in favor of the owner, had to do with Daniel's claimed

mechanic's lien, and the owner's claim of a right to an accounting. This court did not pass in any manner upon the nature or quality of the work done by Travis. Our statement in the *Jenks Case* (p. 252) was:

"The testimony clearly indicates that much of the building construction was done in a defective and unworkmanlike manner. The trial court saw and heard the witnesses and was better able to judge their credibility and the weight to be accorded their testimony. The testimony amply supported the trial court's finding."

Without recourse to the record in *Jenks* v. *Daniel,* which was not introduced in evidence in the instant case, we are unable to determine what finding the trial judge made with respect to the work of Travis. Nor do we deem this question of any consequence, or in any way controlling of the issue in the instant case. The parties are not the same, the subject matter is different, and *Jenks* v. *Daniel* cannot in any way be said to be *res judicata* of the issue in the instant case. Daniel insists that it involves "the same *res* and where the court by its previous decision has established certain facts in connection with the *res* it is difficult to conceive the theory upon which a subsequent judicial pronouncement can be based which completely ignores the facts so established and establishes a new contradictory set of facts."

He argues "that the court in a subsequent proceeding is bound by such determination."

The authorities cited in support of this proposition generally deal with the doctrine of *res judicata,* and we know of no authority for the proposition advanced by appellant.

The crux of the case is whether or not the conclusion reached by the trial judge should be set aside on the ground that the evidence clearly preponderates in the opposite direction. Such is not the situation and the judgment is affirmed, with costs to appellees.

NORTH, C. J., and STARR, WIEST, BUTZEL, SHARPE, BOYLES, and REID, JJ., concurred.

In re GRIFFIN'S ESTATE.
ALEXANDER *v.* EVERTON.

1. APPEAL AND ERROR—BRIEFS—RELIEF IN SUPREME COURT.
   Under the discretionary power of the Supreme Court to make any order which ought to have been made and grant such relief, whether mentioned in the notice of appeal or not, as a case may require, an order is granted permitting a legatee to file a brief in case appealed by administrator of a decedent's estate from judgment for claimant in circuit court where legatee's brief raises the only question of importance in the case, notwithstanding leave to file such brief had not been asked (Court Rule No. 72 [1933]).

2. ESTATES OF DECEDENTS—CLAIMS—EVIDENCE—FINDINGS.
   Claims against the estates of deceased persons must be proved by the claimants and judicially found.

3. SAME—CLAIMS—EVIDENCE—WAIVER.
   A claim against the estate of a deceased person, based upon a written agreement, alleged to have been signed by the decedent,

must be affirmatively proved by the claimant, it not being within the power of the administrator to waive such proof nor of the court to render such proof unnecessary.

4. COSTS—NEW TRIAL—OMISSION OF ESSENTIAL ISSUE.
No costs are allowed any one where judgment is reversed and new trial granted because court and counsel were all in error in leaving out the essential issue in the case.

Appeal from Wayne; Chenot (James E.), J. Submitted June 9, 1944. (Docket No. 54, Calendar No. 42,764.) Decided September 11, 1944.

In the matter of the estate of Frank Patrick Griffin, deceased. Nancy Everton presented her claim for money due her. Claim allowed. Frederick P. Alexander, administrator, appealed to circuit court. Judgment for claimant. The administrator appeals. Reversed and new trial granted.

William J. Eggenberger, for claimant.

Frederick P. Alexander, administrator, *in pro. per.*

M. Manuel Merzon, for the legatee.

WIEST, J. Nancy Everton, formerly Nancy Griffin, presented a claim, in the probate court, for $890 against the estate of her brother, Frank Patrick Griffin, who died testate in the city of Detroit, November 23, 1941. The probate court referees reported allowance of the claim. The administrator of the estate, with will annexed, objected to the allowance of the claim as reported by the referees, stating that the name of P. F. Griffin, which appears on the instrument upon which the claim is based, is not the genuine signature of the deceased,

and that the statute of limitations bars the claim. The probate court allowed the claim and the administrator took an appeal to the circuit court. The claim was based upon a written agreement, purporting to have been signed by the deceased on March 23, 1923, and acknowledged an indebtedness of $890 to claimant, and contained a promise to pay the same whenever he was financially able to do so.

Before impanelling the jury the circuit judge stated on the record:

"Now in this matter, Mr. Reporter, let the record show that both counsel and the court have been in conference on this matter for some time, and it is now, as I understand it, stipulated and agreed by the appellant here that the matter is to go to trial here on the objections to the allowance set up in paragraph 4 of the appellant's objections to the allowance of the claim of Nancy Everton by the referees. Paragraph 4 reads: 'Because if it was genuine the statute of limitations has long since run against the claim. According to the tenor of the instrument the claim was due and payable when the testator was financially able to pay it. A right of action accrued to the claimant then and the statute of limitations began to run against the claim.' The proofs here are to be limited to the question of when, if ever, was the testator financially able to pay the amount set up in the instrument during his lifetime, and, as I understand it, the appellant now stipulates and agrees that that is the issue here. Is that about right, Mr. Alexander?

"*Mr. Alexander:* That is just about the correct analysis, your Honor.

"*The Court:* So we will proceed in this matter, and the issue to be determined, as I have already tried to indicate, is when the testator here was financially able to pay the amount set forth in the

instrument. I will limit the proof to that question, and it will be for the jury to say when he was able to pay it, if he was ever able to pay it. Of course, the application as to when the statute of limitations started to run, if ever, will be for the court. Now have I got that right?

"*Mr. Alexander:* That is correct.

"*The Court:* That suits you, Mr. Eggenberger?

"*Mr. Eggenberger:* Yes, your Honor."

The agreement, if signed by the deceased, was evidently home-drawn and was styled "a Sacred Trust."

At the trial the circuit judge in his charge to the jury directed answers in writing to the following questions:

"No. 1. Did the deceased, Frank P. Griffin, become able to pay the obligation mentioned in the exhibit during his lifetime?

"Answer yes or no.

"No. 2. If the answer to No. 1 is yes, when did he become so able?

"Answer by fixing the date."

The jury answered question No. 1 by "Yes," and to question No. 2, answered that he became able to pay "April 4, 1936." Thereupon the court affirmed the probate court allowance of the claim.

The administrator appeals on the sole ground that the verdict of the jury was against the clear weight of the evidence. The sole legatee under the will of the deceased took no part in the trial and, in fact, did not appear in the case until April 12, 1943, or 45 days after the trial and judgment.

The legatee, in a brief, claims the administrator was without authority to comply with the issues as stated by the circuit judge and thereby waived a

"material legal right" of the legatee without the latter's knowledge or consent.

The attorney for claimant in his brief asks us to strike from the record the brief filed in behalf of the legatee, claiming that the legatee is a mere interloper. The point raised in the brief for the legatee is the only one of importance in the case and, had leave been asked, we would have granted the filing of the brief. We now exercise the power of this court under Court Rule No. 72 (1933), which states:

"The Supreme Court may, at any time, in addition to its general powers, in its discretion and on such terms as it deems just: * * *

"(g) Give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief, whether mentioned in the notice of appeal or not, as the case may require."

The claimed agreement did not prove itself and claimant was not entitled to verdict and judgment without proof of the signature of the deceased, and such proof could not be waived by the administrator or rendered unnecessary by the court.

In *Caswell* v. *Stearns,* 257 Mich. 461, we held that in probate proceedings like the instance at bar it was not necessary under Court Rule No. 30 (1931), or the statute, for the administrator to deny, under oath, the execution of the asserted agreement, and we stated the remedy was not intended to apply to a case where, by reason of the death of the real defendant, his representatives are prevented from making the required showing and his estate would be deprived of defense upon the merits.

"Claims against the estates of deceased persons must be proved by the claimants, and judicially

found. They cannot be established by concession of the decedent's representatives. * * * Neither the statute nor the rule was designed to operate as a practical repeal of the probate law requiring affirmative proof of claims against the estates of decedents."

In *Hampton* v. *Van Nest's Estate,* 196 Mich. 404, 413, the rule requiring denial on oath of execution of a promissory note was invoked against an estate and we there said:

"We doubt if it is applicable to cases appealed from the probate court. We think the burden was upon the claimant all the time to make his case and prove the execution of the instruments claimed to have been executed by the deceased."

The court and counsel for the parties were all in error in leaving out such essential issue, and for such error the judgment is reversed and a new trial granted, but without costs to any one.

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

ALLER *v.* DETROIT POLICE DEPARTMENT TRIAL BOARD.

1. STATUTES—CONSTRUCTION BY GOVERNMENTAL DEPARTMENTS.

   The construction placed upon statutory provisions by any particular department of government for a long period of time, although not binding upon the courts, should be given considerable weight.

2. MUNICIPAL CORPORATIONS—POLICEMEN—DISMISSAL—CHARTERS.

   The rights of members of city's police department were not prejudiced by reason of the fact that original hearing on petitions for their dismissal was had before trial board, consisting of commissioner of police, chief of detectives and superintendent of police, acting as chief inspector, instead of before the commissioner of police only, and charter provisions pursuant to which hearing was had were characterized by trial judge as "a masterpiece of ambiguity" (Detroit Charter, title 4, chap. 21, § 16).

3. SAME—CHARTERS—DISMISSAL OF POLICE OFFICERS—ADMINISTRATIVE INQUIRY.

   Purpose of charter provisions setting up trial procedure for dismissal of police officers is to check hasty and inconsiderate action, prevent autocratic tendencies, and publicize the proceeding, but the proceeding is in the nature of an administrative inquiry whose purpose is accomplished by a fair hearing upon specific charges supported by evidence.

4. CONSTITUTIONAL LAW—REVIEW OF ADMINISTRATIVE ACTION—CERTIORARI—JURISDICTION.

   The action of an adminstrative tribunal designed to afford a hearing on specific charges supported by evidence in the matter of dismissing, demoting, or disciplining police officers is open to public consideration but not to judicial review by appeal or certiorari except as it is made to appear as a matter of law the essentials of jurisdiction have not been followed.

5. APPEAL AND ERROR—FINDING OF ADMINISTRATIVE TRIBUNAL—EVIDENCE.

Under terms of charter providing for police trial board, its finding of fact in proceeding to dismiss police officer for conduct unbecoming to an officer is final where supported by evidence (Detroit Charter, title 4, chap. 21, §§ 16, 17).

6. ADMINISTRATIVE LAW—PROCEDURE—HEARING—JUDGMENT.

The differences in origin and function of courts and of administrative agencies preclude the wholesale transportation to administrative proceedings of the rules of procedure, trial and review which have evolved from the history and experience of courts, but interested parties before administrative agencies must be afforded an opportunity for a hearing before it and its judgment must express a reasoned conclusion.

7. MUNICIPAL CORPORATIONS—POLICE TRIAL BOARD—PROCEDURE—EVIDENCE.

Since law and order can only be maintained in the hands of police officers who are, in the opinion of their superiors, fit and proper persons to administer and enforce the law, the superiors' responsibility should not be curtailed or circumscribed by insistence upon application of technical rules as to the admissibility of proof by city police trial board, although the board's finding of fact must be supported by competent evidence.

8. OFFICERS—SURRENDER OF PRIVATE RIGHTS.

Those who serve the public, either as makers, interpreters or enforcers of the law, must necessarily surrender some of their presumed private rights while acting in such capacity.

9. MUNICIPAL CORPORATIONS—POLICE FORCE—RULES AND REGULATIONS.

A person appointed as a member of a police force of a city thereby subjects himself to the reasonable rules and regulations adopted by the city board having control of the police force.

10. COSTS—PUBLIC QUESTION—POLICE TRIAL BOARD'S ACTION.

No costs are allowed on appeal in consolidated certiorari cases in circuit court to review decisions of municipal police trial board in proceedings to review dismissals of members of police force, a public question being involved.

Appeal from Wayne; Moll (Lester S.), J. Submitted April 11, 1944. (Docket No. 48, Calendar No. 42,698.) Decided September 11, 1944. Rehearing denied December 1, 1944.

Separate petitions for writs of certiorari by Fred Aller and 22 other police officers of the city of Detroit against John H. Witherspoon and others to review dismissal by police trial board. Dismissals vacated on 21 of the petitions. Defendant trial board appeals. Petitioners cross-appeal. Cases consolidated. Orders reversed except on petitions by McKeon, Edom, Berry and Carbary.

Louis J. Colombo, Jr., Anthony A. Vermeulen (*Louis J. Colombo, Sr.,* of counsel), for plaintiffs.

Paul E. Krause, Corporation Counsel, and *Nathaniel H. Goldstick,* Assistant Corporation Counsel, for defendants.

BUSHNELL, J. Thirty-three police officers of the city of Detroit, who had been indicted by the so-called one-man grand jury conducted by Circuit Judge Homer Ferguson, were subsequently tried together with John Roxborough and Elmer Ryan. See *People* v. *Roxborough* 307 Mich 575, and *People* v. *Ryan,* 307 Mich. 610 They were either found not guilty or the information which had been filed against them was dismissed on motion. Immediately after the conclusion of the criminal trials, written charges were filed with the superintendent of police, charging each of them with conduct unbecoming an officer.

Under the provisions of title 4, chap. 21, §§ 16 and 17 of the charter of the city of Detroit, the trial board of the Detroit police department consists of the commissioner of police, or deputy commissioner of police, the chief of detectives, or such assistant as he may appoint, and the chief inspector of police. In these cases, John H. Witherspoon, commissioner of police, acted as chairman of the board, Paul H.

Wencel, chief of detectives, and Louis L. Berg, superintendent of police, acting in the capacity of chief inspector, sat with the commissioner as members.

Separate hearings were had before the trial board of the Detroit police department and five of the officers were found not guilty and ordered reinstated; 28 were found guilty and dismissed from the department. Twenty-three of the officers dismissed filed petitions for writs of certiorari in the circuit court for the county of Wayne, 21 of which petitions were granted.

Each petition was heard separately and separate orders were entered vacating the orders of the trial board dismissing the 21 petitioners from the Detroit police department. As to these petitioners the trial judge found that their "trials" were unfair, and the action of the trial board in dismissing them from the force was arbitrary and capricious. In each instance the trial board filed a claim of appeal and the officer concerned filed a claim of cross-appeal. By stipulation, the 21 cases were consolidated on appeal.

The trial court's conclusions were based principally upon the fact that the trial board permitted witnesses to be questioned by reading to them, not the entire transcript of the testimony they gave in the criminal cases, but only portions thereof, and asking them whether their answers were true; and in some instances by reading such transcript in the total absence of the witness who gave such testimony. The trial court held that this use of transcripts was without precedent in the law and that such testimony was pure hearsay and of no evidentiary value even though no objection was made by the officers concerned to the introduction of such transcripts before the trial board.

Title 4, chap. 21, § 16, of the charter of the city of Detroit reads in part as follows:

"No member of the police force shall be removed from the force except upon written charges preferred against him to the commissioner and after opportunity of being heard in his defense, but the commissioner may suspend any member of the force pending the hearing of the charges against him. Any member of the force deeming himself excessively penalized may demand a hearing."

Petitioners contended before the trial court and contend here that the trial board does not have original jurisdiction to hear and determine charges against a police officer, and that their rights under the charter were denied because they were not afforded an opportunity to be heard in their defense before the commissioner, nor were they penalized by him; and they contend, therefore, that the proceedings before the trial board were a nullity.

The trial judge did not agree with this interpretation of the charter although he characterized the section as "a masterpiece of ambiguity which practically defies judicial or other interpretation."

Appellants contend that the hearings were had in accordance with long-established practice and that, since no procedural objections were made at the hearing before the trial board, which took many weeks, the procedure followed should be approved under the theory of practical construction.

It is well settled that the construction placed upon statutory provisions by any particular department of government for a long period of time, although not binding upon the courts, should be given considerable weight. *Board of Education of the Union School District of the City of Owosso* v. *Goodrich,* 208 Mich. 646, 652, and *People* v. *Robinson,* 241 Mich. 497. It does not appear that appellees' and cross-appellants' rights were prejudiced by an original hearing before the trial board.

The controlling question is whether the trial judge was correct in applying to police trial boards the general rules of procedure and evidence as are applied in a trial at law. The court said in *Mapley* v. *City of Pontiac,* 288 Mich. 396, in discussing certain provisions of the charter of the city of Pontiac:

"Trial before the police and fire trial board supplanted the former method of power of dismissal of police and firemen without formal charges and a public hearing, but the purpose thereof in conception and operation is wholly administrative. The charter provision checks hasty and inconsiderate action, prevents autocratic tendencies and publicizes the proceedings. The hearing or trial before the board is not a trial at law but a proceeding in the nature of an administrative inquiry or inquisition and the purpose thereof is accomplished if there is a fair hearing upon specific charges supported by evidence. The action of the board is open to public consideration but not to judicial review in the sense of an appeal nor by certiorari, except it is made to appear as matter of law the essentials of jurisdiction have not been followed. The proceeding was administrative and, under the terms of the charter, the finding of the fact by the board is final if supported by evidence."

A similar view was expressed by the United States supreme court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134 (60 Sup. Ct. 437, 84 L. Ed. 656), as summed up in the headnote of the reported case in 84 L. Ed. as follows:

"The differences in origin and function of courts and of administrative agencies preclude the wholesale transportation to administrative proceedings of the rules of procedure, trial and review which have evolved from the history and experience of courts."

And the court said:

"To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion."

The record shows that in the proceedings before the trial board in the cases of appellees Aller, Blum, McManamon, Harrison, Lessnau, Vorpagel, Buckles, McKeon, Purdie, Kennedy, Kloka, McNinch, Ryckman, Welke, Finney, Slavin, Wilcox, and Bellm, witnesses appeared and either verified the testimony they had given in the criminal cases or gave additional testimony. In the cases of Berry, Carbary, and Edom, witnesses were not present at the trial board's hearing and their testimony in the criminal trials was read from the transcripts without objection. In the case of McKeon, although a witness appeared before the court, his testimony was weak and he did not expressly state that he had paid any money to McKeon, nor could he tell to whom he had paid money. At this hearing the testimony of this witness in the criminal trial was also received without objection.

Noting that the testimony given in the criminal trials of McKeon, Edom, Berry and Carbary was not authenticated by the court stenographer who prepared the transcripts, and that no witness had appeared in substantiation of this testimony, the trial judge determined that such testimony should be excluded and found as a result that, without it, there was no testimony or evidence before the trial board to justify its actions in these cases. In the other cases he concluded that he could not determine how much weight was given to the unauthenticated transcripts, and therefore such trials were unfair.

It is unnecessary to plant decision in these appeals upon the failure of the officers in question to object to the reception of such testimony, as we are mainly concerned with the proposition that, in the review of such matters by certiorari, "the finding of fact by the board is final if supported by evidence." *Mapley* v. *City of Pontiac, supra.*

When they adopted their charter the people of the city of Detroit committed to the trial board of their police department the responsibility of determining the propriety of the "acts, conduct or omissions" of the members of the police department (title 4, chap. 21, § 16) and the board is required to pass judgment when written charges are preferred, and if such charges are sustained, to remove the officer in question from the force or subject him "to such other penalty as the board may prescribe."

Law and order can only be maintained in the hands of police officers who are, in the opinion of their superiors, fit and proper persons to administer and enforce the law. Such responsibility should not be curtailed or circumscribed by insistence upon the application in each instance of technical rules as to admissibility of proof, even though the finding of fact by the board must be "supported by evidence." On the other hand, the police trial boards should be free to work out their own rules of procedure and pursue such methods of inquiry that will permit them to adequately discharge their responsibilities to the public. The rules of fair play in such instances are of far more importance to the public and the police officers concerned than is the application of strict legal procedure.

As said in *Fraternal Order of Police* v. *Lansing Board of Police & Fire Com'rs,* 306 Mich. 68, 79:

"Those who serve the public, either as the makers of the law, the interpreters of the law, or those who

enforce the law, must necessarily surrender, while acting in such capacity, some of their presumed private rights."

In that case the court was unanimous in stating that it cannot be denied "that when a person is appointed and becomes a member of the police department, he subjects himself to the reasonable rules and regulations adopted by the board."

Although, in our judgment, the police departments of the State should not be hampered by requiring them to retain an officer in the police force merely because his "acts, conduct or omissions" cannot be substantiated by strict legal evidence, there must be some competent evidence to sustain the action of the trial board. This court has held as follows:

"The board of police commissioners do not act as a court, and the formal and technical rules of pleading and practice do not apply to their investigations." *Wellman* v. *Board of Metropolitan Police of the City of Detroit,* 84 Mich. 558, 561.

"With the strength or weakness of the case against Mr. Bolger, we have nothing to do; our inquiry is limited to ascertaining whether there was any competent evidence, however weak, tending to sustain the findings of the common council. We agree with the circuit bench that there was such evidence and the judgment is affirmed." *Bolger* v. *Detroit Common Council,* 153 Mich. 540, 559.

"The instant case involves an employee policeman, whose character must be above reproach and whose truthfulness must be above suspicion. His veracity and integrity must be relied upon in the performance of his duties and the trial of criminal cases." *Calvert* v. *City of Pontiac,* 288 Mich. 401, 403.

An examination of the record requires the conclusion that each officer was afforded ample op-

portunity to meet the charges preferred against him, and that there was competent evidence presented in each of the cases, except those of McKeon, Edom, Berry and Carbary, to support the conclusion of the trial board that such officer should be dismissed from the force.

The order of the trial court in each instance, except McKeon, Edom, Berry and Carbary, is vacated and the several writs of certiorari are dismissed. In each of the cases of McKeon, Edom, Berry and Carbary the order of the trial court is affirmed without prejudice to further proceedings before the trial board as to these four petitioners. Because of the nature of the appeal, no costs will be allowed. It is so ordered.

NORTH, C. J., and STARR, WIEST, BUTZEL, SHARPE, BOYLES, and REID, JJ., concurred.

PEOPLE *v.* WOODSON.

1. WITNESSES—ONE-MAN GRAND JURY—SCOPE OF IMMUNITY.

   The statute providing for granting immunity to a witness before a so-called one-man grand jury expressly protects the witness against prosecution for any offense concerning which his answers may tend to incriminate him, but it does not protect him from an offense subsequently committed (3 Comp. Laws 1929, § 17220).

2. PERJURY—EVIDENCE—ONE-MAN GRAND-JURY WITNESS—IMMUNITY—STATUTES.

In prosecution for perjury, charged as having been committed at trial of a criminal case, testimony which had previously been given by alleged perjurer before so-called one-man grand jury was admissible to prove that in the later criminal case he had testified falsely, notwithstanding the statute providing for the granting of immunity may not have been complied with as to defendant herein when he testified before the so-called one-man grand jury (3 Comp. Laws 1929, § 17220; Act No. 328, § 422, Pub. Acts 1931).

3. CRIMINAL LAW—QUESTIONS REVIEWABLE ON APPEAL—PERJURY—ONE-MAN GRAND-JURY WITNESS—IMMUNITY.

On appeal from judgment of conviction of the crime of perjury for testifying falsely in a prosecution for crime, the question of whether or not the alleged perjurer was properly granted immunity on motion of an *amicus curiae* at preceding so-called one-man grand-jury proceeding is not before the Supreme Court (3 Comp. Laws 1929, § 17220; Act No. 328, § 422, Pub. Acts 1931).

4. PERJURY—SUFFICIENCY OF EVIDENCE.

In prosecution for perjury, evidence *held*, ample from which jury could find defendant guilty beyond a reasonable doubt (Act No. 328, § 422, Pub. Acts 1931).

5. CRIMINAL LAW—PERJURY—INSTRUCTIONS—REQUESTS TO CHARGE—MISCARRIAGE OF JUSTICE.

On appeal from conviction of charge of perjury no reversible error is found in court's charge to jury when considered as a whole where defendant presented no specific requests to charge and made no objection to charge when given and there does not appear to have been a miscarriage of justice (3 Comp. Laws 1929, § 17354; Act No. 328, § 422, Pub. Acts 1931).

Wiest, J., dissenting.

Appeal from Recorder's Court for the City of Detroit; Maher (John J.), J. Submitted April 13, 1944. (Docket No. 62, Calendar No. 42,340.) Decided September 11, 1944. Rehearing denied December 1, 1944. Certiorari denied by Supreme Court of the United States March 5, 1945.

Clinton Woodson was convicted of perjury. Affirmed.

Lewis, Rowlette & Brown (*George Stone,* of counsel), for appellant.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, *William E. Dowling,* Prosecuting Attorney, and *Frank S. Valenti* and *Henrietta E. Rosenthal,* Assistant Prosecuting Attorneys, for the people.

BUSHNELL, J. On jury trial defendant Clinton Woodson was convicted of the statutory offense of perjury (Act No. 328, § 422, Pub. Acts 1931 [penal code] [Comp. Laws Supp. 1940, § 17115-422, Stat. Ann. § 28.664]) and sentenced to prison for a term of 2 to 15 years. His motion for a new trial was denied and, having obtained leave, he appeals.

In December, 1939, defendant was called as a witness before Judge Homer Ferguson, sitting as a one-man grand jury engaged in the investigation of gambling and other offenses in Wayne county. Chester P. O'Hara (later appointed special prosecutor) was then acting as *amicus curiae* to said grand jury. After defendant was sworn, the following took place:

"*Q.* (By Mr. O'Hara) You have been engaged in operating a policy game in this town?

"*A.* I refuse to answer for fear it might incriminate myself. * * *

"*Mr. O'Hara:* I ask the court to grant this man immunity under the statute, and require him to answer the questions put to him, the same as though they were reduced to writing, pursuant to the statute, so that he will not be prosecuted for any answers that he gives on this record.

"*The Court:* The law provides that when you claim a privilege that way, the court can grant you immunity. Now according to the statute in this case

made and provided *the court does now grant you immunity the same as if each of these questions was in writing, and your answer in writing; now the court must require you, after granting you this immunity, that you answer the questions;* now when they ask you similar questions that might incriminate you, I will take it that you are claiming the same privilege, and I am now granting you immunity on all the questions and all the answers in this record. So now you must answer."

Following such purported grant of immunity, defendant was questioned and testified at considerable length regarding gambling and other offenses.

In October, 1941, defendant was called as a witness for the prosecution in the case of *People* v. *Roxborough,* then being tried in the circuit court for Wayne county (*People* v. *Roxborough,* 307 Mich. 575). He testified under oath relative to the same matters about which he had given testimony before the grand jury. Subsequently he was arrested and charged with having committed perjury in giving false testimony in the *Roxborough Case.* In proof of the perjury charge, the prosecution introduced in evidence, without objection by defendant, the court reporter's transcripts of defendant's testimony before the grand jury and in the *Roxborough Case,* and portions of such transcripts were read to the jury. It appeared that certain parts of his testimony in the *Roxborough Case* were contrary to and in conflict with his grand-jury testimony on the same subjects.

It is admitted that in granting defendant immunity against self-incrimination, the grand jury did not comply with the provisions of 3 Comp. Laws 1929, § 17220 (Stat. Ann. § 28.946), which provides:

"No person shall upon such inquiry be required to answer any questions the answers of which might

tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him."

As hereinbefore shown, defendant was granted immunity upon the oral motion of Mr. O'Hara, who was appearing as *amicus curiae* to the grand jury. The motion was not "in writing by the prosecuting attorney" as required by the above statute (*In re Wyrick,* 301 Mich. 273; *In re Hickerson,* 301 Mich. 278). The record does not show whether or not the questions and answers before the grand jury were "reduced to writing and entered upon the docket or journal" of the judge. However, it does appear that they were taken down by a court reporter and transcribed.

Defendant contends that the grant of immunity was illegal because not in compliance with the statute; that he was compelled to testify by the grand jury and, therefore, his testimony was not voluntary; and that such testimony could not be used against him in his subsequent trial for perjury. In support of his contention defendant cites *In re Wyrick, supra,* and *In re Hickerson, supra.* In each of those cases a justice of the peace of the Pontiac municipal court was conducting a judicial investigation, in pursuance of 3 Comp. Laws 1929, § 17217 *et seq.* (Stat. Ann. § 28.943 *et seq.*). He appointed an attorney to assist in the examination of witnesses and in the conduct of such investigation. The respective defendants were subpoenaed and asked certain questions, which they refused to answer on

the ground that their answers might incriminate them. The attorney appointed filed written motions to grant them immunity, and immunity was granted by the justice. They again refused to answer and were found guilty of contempt and sentenced. On review, the circuit court upheld the validity of the immunity granted. Both defendants then appealed, contending in substance that they were not required to answer the questions propounded, because their immunity was not granted upon motion of the prosecuting attorney, as required by the statute. In each case we held that the defendant was not guilty of contempt and should be released from custody. In the *Wyrick Case* we said:

"The right to grant immunity is found in the statute hereinbefore cited (3 Comp. Laws 1929, § 17220). An examination of this statute clearly leads to the conclusion that the making of a motion to grant immunity must be left to the discretion of the State's representative. The State has wisely provided that this power should lie in the discretion of the prosecuting attorney or the attorney general in certain cases. It follows that the trial court was in error in affirming the action of the justice of the peace in granting immunity upon the motion of one not a prosecuting attorney or attorney general or the duly authorized representative thereof."

In the *Hickerson Case* we said:

"The language of the statute, in providing that the motion shall be made by the prosecuting attorney, is mandatory in tone. * * *

"A power of such importance should be exercised only by those whose sworn duty it is, as public officers, in this case the prosecuting attorney or attorney general, to enforce the criminal laws."

It should be noted that in the above-discussed cases the witnesses, after being granted purported

immunity, refused to answer questions which might have incriminated them, while in the present case defendant, after being granted purported immunity, freely answered questions propounded to him. Under the above holdings, his refusal to answer would not have placed him in contempt. However, such decisions are not determinative of the question before us, as to whether or not defendant's testimony before the grand jury in December, 1939, was admissible in proof of his perjury in the *Roxborough Case* in October, 1941.

The immunity statute expressly protects a witness against prosecution for any offense concerning which his answers may tend to incriminate him, but it does not protect him from an offense subsequently committed. Defendant's answers before the grand jury did not relate to the offense of perjury, which he committed two years later and, therefore, his answers did not then tend to incriminate him as to such offense. As he apparently testified before the grand jury in reliance upon and without questioning the legality of the purported grant of immunity, it may reasonably be inferred that he testified the same and as truthfully as though immunity had been granted in conformity with the statute. Therefore, we conclude that his testimony, so given before the grand jury, was properly admissible as tending to prove that subsequently, in the trial of the *Roxborough Case,* he testified falsely. The authorities cited by defendant do not sustain his contention that such testimony was not admissible.

The question, whether or not the immunity granted defendant on the motion of an *amicus curiae* protected him from prosecution for any offense of which his answers may have tended to incriminate him, is not before us. Apparently he received the immunity which the statute intended,

as there is no showing that he was ever prosecuted as a result of incriminating answers.

Immediately after testifying in the *Roxborough Case,* defendant admitted to Mr. O'Hara, then acting as special prosecutor, and to other persons, that he had testified falsely. Mr. O'Hara, called as a prosecution witness, said in part:

"*Q.* Now, what was said by Mr. Woodson (defendant) in connection with the testimony which he had given before Judge Pugsley?

"*A.* Well, Woodson was asked * * * whether or not it was not a fact that he had testified falsely before Judge Pugsley, and he said that he had."

O'Hara's testimony as to defendant's admission of perjury was corroborated by that of an assistant prosecutor, an assistant attorney general, and a police officer. A partner and former business associate of defendant in the gambling business testified as to facts which indicated that he testified truthfully before the grand jury and falsely in the *Roxborough Case.* Defendant did not take the stand and offered no testimony in the present case. We are satisfied that there was material and ample evidence from which the jury, as judge of the facts, could find him guilty beyond a reasonable doubt of the crime charged.

Defendant further contends that the trial court erred in its charge to the jury. We have carefully examined such charge and conclude that, when considered in whole, it fully and fairly presented the questions of fact involved and the law properly applicable thereto. It should be noted that defendant presented no specific requests to charge and made no objection to the charge when given. The trial court did not err in denying defendant's motions for a directed verdict and for a new trial. Other questions raised and errors assigned do not merit con-

sideration. We are convinced that there was no miscarriage of justice (3 Comp. Laws 1929, § 17354 [Stat. Ann. § 28.1096]).

The conviction is affirmed.

NORTH, C. J., and STARR, BUTZEL, BOYLES, and REID, JJ., concurred with BUSHNELL, J.

WIEST, J. (*dissenting*). I do not join in the opinion.

Judge Ferguson was investigating the commission of crimes and defendant, as a suspect, was brought before him to be questioned, under oath, regarding violation of the criminal law against gambling and his connection therewith. The stenographic record of his examination, under oath, by an *amicus curiae* shows:

"*Q.* Where do you live, Mr. Woodson?
"*A.* 326 Frederick.
"*Q.* Got a telephone there?
"*A.* Temple 15626.
"*Q.* You work with Charles Mosley?
"*A.* Yes.
"*Q.* You have been engaged in operating a policy game in this town?
"*A.* I refuse to answer to (for) fear it might incriminate myself."

Thereupon Mr. O'Hara as *amicus curiae* stated:

"I ask the court to grant this man immunity under the statute, and require him to answer the questions put to him, the same as though they were reduced to writing, pursuant to the statute, so that he will not be prosecuted for any answers that he gives on this record."

The judge ruled:

"The law provides that when you claim a privilege that way, the court can grant you immunity. Now

according to the statute in this case made and provided the court does now grant you immunity the same as if each of these questions was in writing, and your answer in writing; now the court must require you, after granting you this immunity, that you answer the questions; now when they ask you similar questions that might incriminate you, I will take it that you are claiming the same privilege, and I am now granting you immunity on all the questions and all the answers in this record. So now you must answer. All right."

Thereupon, under questions and answers, defendant incriminated himself and testified to crimes, relative to gambling, committed by himself and associates. Later on, one John Roxborough was charged with crimes connected with gambling and obstruction of justice as set forth in *People* v. *Roxborough,* 307 Mich. 575, and was convicted and the conviction affirmed.

At the trial of Roxborough defendant was called as a witness by the prosecution and testified contrary to the testimony he gave before the one-man grand jury. He was tried for perjury in doing so, was convicted and his case is here by appeal.

The prosecution proceeded on the theory that defendant's testimony before the grand jury was true and he deliberately falsified in the testimony he gave at the trial of Roxborough. To sustain such claim the prosecution offered in evidence the stenographic report of defendant's testimony before Judge Ferguson and the assistant prosecuting attorney, who conducted the examination of defendant before Judge Ferguson was present at the trial of Roxborough, and the assistant attorney general and the assistant prosecuting attorney and one other person testified that after defendant testified in the *Roxborough Case* they had a conversation with him in which he stated that his testimony in the *Rox-*

borough Case was untrue and his testimony before Judge Ferguson was true.

The first question presented is whether defendant ever lost his constitutional privilege against self-incrimination. So far as the record shows Judge Ferguson granted the immunity upon the oral request of Mr. O'Hara as *amicus curiae.* The statute relative to granting immunity and requiring a witness to testify against himself is explicit in requiring the prosecuting attorney to make the motion relative to immunity in writing. This was not done and it is not a minor detail that can be overlooked. The statute requiring the request to be in writing has a purpose and that purpose is to have a permanent record of the same. The statute also requires that in case immunity is granted the questions to the witness shall be put in writing and also his answers, but since the time of court reporters and stenographic records it may well be said the testimony taken by a stenographer is equivalent to having the questions and answers in writing.

During the course of the examination before Judge Ferguson defendant again stated when a question was put to him: "Should I claim that it might incriminate me," and the court said, "I grant you the same privilege as I heretofore granted you under the statute, the same as if the question was in writing, and I now require you to make the answer. That will apply to all your questions, so you can go ahead and answer."

Under the record defendant never lost his constitutional privilege not to incriminate himself, and that privilege remained and was with him when he testified in the *Roxborough Case.* But it may be said that at the trial of defendant no objection was made to the introduction of his testimony before Judge Ferguson. Good practice required an ob-

jection and a ruling by the court, but we are here reviewing a constitutional privilege, personal to defendant, which may not be waived by mere inattention of his attorney. The point we are now discussing was presented to the trial court upon a motion to direct a verdict and later for a new trial and is before this court under the statement of questions involved. I think the right to consider the point is before the Court and we should review and maintain the constitutional privilege of the defendant in giving testimony before Judge Ferguson.

The Constitution of Michigan (1908), art. 2, § 16, provides:

"No person shall be compelled in any criminal case to be a witness against himself."

The statute, 3 Comp. Laws 1929, § 17220 (Stat. Ann. § 28.946), provides:

"No person shall upon such inquiry (grand jury) be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him."

In review of civil cases, except in chancery, heard *de novo,* we limit consideration to points of law reserved by presentation and rulings thereon, for such is a matter of procedure, but in the instant case where the record on its face clearly shows that a right guaranteed the defendant by the Constitution has been violated, we should consider the same.

The right of defendant in this instance rises above the failure of his attorney to object to introduction of the testimony taken before Judge Ferguson under an order, void on its face, and it is our duty to support defendant's constitutional right presented to the trial court upon the motion for a new trial. The right, guaranteed by the Constitution against self-incrimination, when duly invoked, is never lost or waived by forced compliance with a void court order and it remains void and is not validated by failure of counsel to object to it when offered by the prosecution.

This court will support the Constitution when the record affirmatively makes it appear that right thereunder has been denied, even though failure of counsel did not present the point until upon motion for directed verdict and for new trial. It is not a matter of mere grace on our part, but vindication of the right under the supreme law of the State which we may not pass unnoticed or invoke the statute that if defendant is guilty we may pass our duty in this instance.

At the close of the proofs, counsel for defendant moved for a directed verdict, one ground being that defendant was not granted legal immunity by Judge Ferguson, and called the court's attention to the statute relative to immunity and that it had not been complied with.

The trial court stated:

"The transcript (testimony of defendant before Judge Ferguson) read by Mr. Chamberlin (the stenographer) shows that from time to time during the testimony Judge Ferguson advised him that he had been granted immunity. He granted him immunity when O'Hara requested it at the outset and then during the course of remarks before the grand jury he was told on at least one occasion or maybe

two, that he was granted immunity and that he should go ahead and answer those questions just the same as if they had been submitted to him in writing in question form. So I am of the opinion that the people have made out a sufficient case to have the same go to the jury, and your motion for directed verdict is denied."

Counsel for defendant again directed the court's attention to the statute and quoted the provision:

" 'No person shall upon such inquiry'—that is relating to the inquiry of a one-man grand jury or an inquisitory body—'be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge,' " et cetera,

and claimed:

"Now that is the letter of the law and I claim it was not followed as strictly as it should have been and there never was any immunity granted in Judge Ferguson's court."

Thereupon the court stated:

"Maybe you are right, but let the Supreme Court decide that. I said in my remarks in denying your motion that Judge Ferguson granted him immunity. Whether it was in full compliance with the law or not, I don't know. Mr. Valenti says it doesn't make any difference. He says that he went there and there was an attempt, at least, to grant him immunity and he thought he had immunity and he went ahead and made certain statements and he says that when he reappeared in another proceeding that he made statements which are in conflict with what he said before Judge Ferguson. I don't think anything further need be said."

My Brother states that defendant was examined as a witness before Judge Ferguson by Chester P.

O'Hara as *amicus curiae,* and in this he is right. The examination of defendant as a witness before Judge Ferguson was in December, 1939, and Mr. O'Hara, in July, 1942, as a witness in the instant case, testified:

"I am an attorney at law; for the last seven or eight months I have been special prosecutor of Wayne county and prosecuted the case of the People *v.* John Roxborough, Reading and others; I was *amicus curiae* to the one-man grand jury and as such I took statement from Clinton Woodson, who appeared as a witness for the people and testified in the case of the People *v.* John Roxborough and others, before Judge Pugsley."

The court in *Re Wyrick,* 301 Mich. 273, in an opinion written by Mr. Justice SHARPE, expressly held that an *amicus curiae* could not even in writing move the court to grant immunity to a witness, and in *Re Hickerson,* 301 Mich. 278, the court again held that an *amicus curiae,* in a proceeding to investigate the commission of crime, could not move the court to grant a witness immunity, and emphasized the fact that:

"Aside from legislative intent, gleaned from statutory language, broad questions of public policy would seem to require that the use of such authority be limited. It can readily be seen that serious abuses could result if it were determined that any member of the bar while assisting at the inquiry could make a motion to grant immunity from criminal prosecution of any person who might be called as a witness. A power of such importance should be exercised only by those whose sworn duty it is, as public officers, in this case the prosecuting attorney or attorney general, to enforce the criminal laws."

Defendant when brought before Judge Ferguson as a witness claimed his constitutional privilege

against self-incrimination. Verbal motion of the *amicus curiae* to grant immunity and force defendant to testify was void and defendant never lost his constitutional privilege against self-incrimination. But, if it be said that defendant's privilege against self-incrimination was lost by the order of Judge Ferguson to grant him immunity, then the case at bar falls squarely within the holding in *Cameron* v. *United States,* 231 U. S. 710 (34 Sup. Ct. 244, 58 L. Ed. 448). We quote the syllabus:

"The use of testimony given by the bankrupt in a hearing before a commissioner to contradict his testimony given before the referee, in a trial on an indictment for perjury in giving the latter testimony, violates the immunity guaranteed under Rev. Stat., § 860, and the use thereof is reversible error."

There, as here (if we hold immunity was legally granted by Judge Ferguson), the prosecution introduced testimony of the accused to show that he told the truth under protection of immunity and, subsequently, wilfully committed perjury when questioned about the same matters. This cannot be done.

Without warrant of law defendant was deprived of his constitutional right against self-incrimination by Judge Ferguson and there was reversible error in using such self-incrimination at his trial for perjury. The motion for a directed verdict and new trial brought the error before the trial judge and there was reversible error in not granting a new trial under a holding, in effect, that such testimony before Judge Ferguson was proper upon the question of defendant's perjury at the trial of Roxborough.

The charge against Roxborough and his trial thereon involved the very subject matter of defendant's testimony before Judge Ferguson and, there-

fore, defendant's testimony forced by an unwarranted order was inadmissible upon the question of perjury.

Before Judge Ferguson defendant was compelled by a void order to be a witness against himself in a criminal case which, to say the least, was judicial coercion, and when prosecuted for perjury at the trial of Roxborough that testimony was employed to convict him. His testimony before Judge Ferguson and at the trial of Roxborough related to the same subject matter and thereafter he was prosecuted for perjury and his incriminating answers before Judge Ferguson employed to convict him of the charge of perjury. Such action was in violation of the Constitution and the statute.

Defendant never lost his constitutional right against self-incrimination and his testimony before Judge Ferguson was exacted in violation of his constitutional right and its use by the prosecution to show perjury on his part in testifying contrary thereto in the *Roxborough Case* was reversible error.

The rule applicable here is stated as follows in American Law Institute, Model Code of Evidence, Rule 232, page 171:

"Evidence of a statement or other disclosure made by a person is inadmissible against him if the judge finds that he had and claimed a privilege to refuse to make the disclosure but was nevertheless required to make it."

In commenting on this rule it is said:

"This rule states the existing law. It safeguards the privilege against destruction by its very violation. It is not in conflict with the settled common-law doctrine which refuses to exclude evidence merely because it has been procured by illegal means. A violation of a rule which has for its sole

purpose the prevention of compulsory disclosure may well be given a different effect from that given to the violation of a rule which has a different primary objective."

The conviction should be reversed and a new trial granted.

SHARPE, J. (*concurring in affirmance*). In October, 1941, defendant was called as a witness for the prosecution in the case of *People* v. *Roxborough,* 307 Mich. 575. He gave testimony there that was at variance with certain testimony given by him before a grand jury in December, 1939. The prosecution in the instant case is for perjury committed in the Roxborough trial.

The evidence relied upon to negative the testimony in the *Roxborough Case* was the testimony given by defendant before the grand jury and admissions made to Chester O'Hara, special prosecutor, Thomas Kenny, assistant attorney general, William Brusstar, assistant special prosecuting attorney, and Leo Mack, a police officer, and the testimony of Charles H. Mosley, a former partner of defendant, whose testimony corroborated the testimony given by defendant before the grand jury.

Defendant urges that it was error to admit any of his grand-jury testimony. It is to be noted that this testimony was received without objection. I am not in accord with the statement found in Mr. Justice WIEST's opinion—"The right, guaranteed by the Constitution against self-incrimination, when duly invoked, is never lost or waived by forced compliance with a void court order and it remains void and is not validated by failure of counsel to object to it when offered by the prosecution."

Under the authority of *In re Wyrick,* 301 Mich. 273, immunity may be granted only upon the motion

of the prosecuting attorney or attorney general. In the case at bar the so-called immunity granted defendant in the grand-jury proceedings was a nullity in so far as making him immune from prosecution for criminal acts testified to in such proceedings. Such testimony must be considered to have been given involuntarily and as such was inadmissible, but it does not follow that defendant could not waive the right to have this testimony rejected.

In *People* v. *Lauder,* 82 Mich. 109, 121, we said:

"A party may waive personal rights, although secured to him by law or by the Constitution. He may waive the right to a preliminary examination upon a criminal charge."

See, also, *People, ex rel. Roach,* v. *Carter,* 297 Mich. 577.

In my opinion defendant waived the right to have his grand-jury testimony excluded.

I concur in affirmance of the judgment.

PEOPLE *v.* VESTER.

CRIMINAL LAW—PLEA OF GUILTY—SENTENCE—WITHDRAWAL OF PLEA —NEW TRIAL.

Where plea of guilty to charge of rape and assault with intent to commit the crime of rape was voluntarily made and trial judge delayed two days before sentencing defendant to life

imprisonment, denial of motion to set aside and vacate the sentence and for a new trial is affirmed (3 Comp. Laws 1929, § 17328; Act No. 328, §§ 85, 520, Pub. Acts 1931).

BUTZEL, BUSHNELL, and REID, JJ., dissenting.

Appeal from Kent; Brown (William B.), J. Submitted January 13, 1944. (Docket No. 86, Calendar No. 42,568.) Decided September 11, 1944. Rehearing denied September 1, 1944.

Jesse Vester was convicted of rape and assault with intent to commit rape. Affirmed.

Thomas G. Roach, for appellant.

Herbert J. Rushton, Attorney General, *Menso R. Bolt,* Prosecuting Attorney, and *Adrian W. Verspoor,* Assistant Prosecuting Attorney, for the people.

SHARPE, J. On July 16, 1942, defendant was arrested under a warrant charging him with the crime of rape and assault with intent to commit the crime of rape. He was arraigned and entered a plea of guilty. On July 18, 1942, he was given a sentence of life imprisonment.

On November 18, 1942, defendant filed a motion to set aside and vacate the sentence and for a new trial. This motion is supported by and based upon two affidavits. The affidavit of defendant alleges that from the time of his arrest until the time of his arraignment he was kept in close confinement and had no opportunity to obtain legal counsel; that he had no knowledge of the legal elements of the crime with which he was charged; and that he understood that the charges were based upon illicit sexual relations. The affidavit of Pauline Vander Roest denies that defendant made an assault upon her. Affidavits in opposition to the motion were filed by

the prosecuting attorney. The trial court denied defendant's motion. Defendant appeals.

The record shows that the information filed against defendant contains two counts. The first count charges that defendant committed the crime of rape upon Pauline Vander Roest contrary to Act No. 328, § 520, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 17115–520, Stat. Ann. § 28.788), while the second count charges defendant with assault with intent to commit the crime of rape contrary to Act No. 328, § 85, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 17115–85, Stat. Ann. § 28.280). Defendant was arraigned on July 16, 1942, and pleaded guilty to the information.

Defendant urges that he be allowed to withdraw his plea of guilty to both counts in the information for the reasons stated in the affidavits attached to his motion. The rule as to withdrawal of a plea of guilty is stated in *People* v. *Vasquez,* 303 Mich. 340, where we said:

"But we have always adhered to the rule that after sentence has been imposed, the withdrawal of a plea of guilty rests in the sound discretion of the court."

The only question involved in this case is whether there was an abuse of discretion upon the part of the trial court in its refusal to allow defendant to withdraw his plea of guilty.

It appears in the record that the State department of corrections, bureau of probation, made an investigation of defendant. When interviewed, the defendant told the investigator:

"I had been keeping company with Pauline for about three months. This night we went for a ride and later parked. We necked a while and then she let me monkey around. Finally we got to fighting

and I hit her on the jaw three times. I did have my privates in her but only part way and only about a minute. She jumped out of the car and ran away."

We must assume that the trial court made a proper investigation of the nature of the case; and that the plea was freely made with full knowledge of the nature of the accusation and without undue influence as is required by 3 Comp. Laws 1929, § 17328 (Stat. Ann. § 28.1058).

The validity of a sentence pronounced upon a plea of guilty does not depend upon its appearing of record in what manner the judge may have proceeded to satisfy himself that the person acted freely in pleading guilty. *People* v. *Ferguson,* 48 Mich. 41.

Defendant urges as an additional reason for withdrawal of his plea of guilty that the trial court at the time defendant was sentenced stated as follows:

"Mr. Vester, you have pleaded guilty to the offense of rape as stated in Act No. 328, § 85, Pub. Acts 1931,—rather, the offense is charged under that section of the law. * * *

"The statute under which you have pleaded guilty carries a penalty of life."

The section referred to by the trial judge does not refer to the crime of rape, but does refer to the crime of assault with intent to commit the crime of rape. It is to be noted that the above statement made by the trial court was not made at the time defendant pleaded guilty, but was made at the time defendant was sentenced. Having been made subsequent to the acceptance of the plea of guilty, it has no bearing on the question involved in this case.

The trial court stated on the motion to vacate the sentence:

"I am thoroughly convinced that this man knew what he was talking about on the 16th of July when

I talked to him and I remanded him until the next Saturday morning so as not to act too hastily. Leaving this girl there in the woods in the dark, I commented upon the atrocity of it. I commented upon the perfect lack of motivating loyalty and patriotism when he was going into the army to get away from supporting his father and mother who had protected him and cared for him from his infancy, and the dastardliness of the purpose that he had in calling upon this girl that night solely for the purpose of having intercourse with her either with or without her consent. And after talking it over with him I put it over to the next Saturday morning so there wouldn't be any too hasty actions. And on the next Saturday morning he just as definitely admitted what he said two days before and so he was sentenced."

The record satisfactorily shows that defendant's plea was voluntarily made. There was no abuse of discretion in denying defendant's motion. The judgment is affirmed.

NORTH, C. J., and WIEST, and BOYLES, JJ., concurred with SHARPE, J. STARR, J., concurred in the result.

BUTZEL, J. (*dissenting*). Defendant, 20 years of age, charged with the crime of rape, was sentenced to life imprisonment on a plea of guilty. Subsequently, on motion for a new trial, a woman, older than defendant, signed an affidavit to the effect that she had given her consent to the sexual act; that, subsequently, there was a quarrel, and defendant struck her. At the time of his plea, defendant had no attorney to advise him as to the elements that make up the crime. He, however, was fully advised in advance that his plea of guilt might result in a sentence of life imprisonment. The statute makes the crime punishable by imprisonment for life or

any term of years. The judge had a right to impose life sentence. While some of us would have given defendant a new trial because of the affidavit of the alleged "victim" of the crime, and the fact that defendant had no counsel, nevertheless we find that there was not such an abuse of discretion so that we may properly interfere in the denial of a new trial. It is not within our province to decrease or increase the term of a sentence within the statutory limits. The undue severity of the sentence under the circumstances of the case, however, impels us to examine it more carefully. The State of Michigan has not adopted the suggestion made by leading penologists that the trial court simply determine guilt or innocence of the accused and then refer the length of time of imprisonment to a competent board which could parole the prisoner, but before doing so, would consider the adequacy of the punishment, the rehabilitation of the prisoner and his fitness to re-enter society. We do not know from the sentence what the trial judge intended. Instead of giving the defendant an indeterminate sentence with a minimum of a limited number of years and a maximum of life, the judge in sentencing the defendant, stated as follows:

"We have a system of penology in Michigan where a certain board called the board of paroles and pardons has some authority over the prisoners after they are committed to the prison. * * *

"It is my judgment that inasmuch as the statute has placed the matter of determining the length of sentence in the hands of the parole board to a large extent, that a matter of this kind should be placed as fully as possible with the parole board. The sentence of this court is that you be confined in the Southern Prison of Michigan in Jackson county for a period of your natural life, leaving it to the parole and pardon board to say at such time

and under what circumstances, if any, you shall be paroled."

Under chapter 3, § 4, of the law relating to probation (Act No. 255, Pub. Acts 1937), as amended by Act No. 173, Pub. Acts 1941 (Comp. Laws Supp. 1943, § 17543–44, Stat. Ann. 1943 Cum. Supp. § 28.2104), defendant could be released only by the bureau of pardons and paroles after he had served 10 calendar years of the sentence. It may be claimed that the judge intended thus to make the minimum term 10 calendar years and the maximum term life. The language used by the judge indicates that he wanted to leave to the pardon and parole bureau the right to parole defendant at such time as they might thereafter determine. If the trial judge concludes that it is proper that the defendant, who has served almost two years, be eligible to parole after a reasonably short minimum term, and that it be left to the bureau of pardons and paroles to determine when, if ever, he should be paroled, it should be so stated in resentencing the defendant.

Under the circumstances, I believe the sentence should be set aside and the prisoner remanded for resentencing.

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

GABLEMAN *v.* DEPARTMENT OF CONSERVATION.

1. APPEAL AND ERROR—CHANCERY CASES—DE NOVO REVIEW—QUESTIONS REVIEWABLE.

   On appeal in suit to enjoin use of lakefront lots as a public fishing site, question as to whether occupancy thereof was within meaning of the restriction is before Supreme Court on *de novo* review.

2. COVENANTS—OCCUPANCY.

   "Occupancy," as used in restrictive covenants running with the land, means "actual possession."

3. SAME—PUBLIC FISHING SITE—OCCUPANCY—RESTRICTION OF OCCUPANCY TO CAUCASIANS.

   In suit to enjoin the use of four lakefront lots as a public fishing site, the fact that those of the Negro race might have access to the lake for fishing purposes through the facilities thereby afforded by the State department which purchased the lots would not constitute occupancy or possession of such lands in violation of covenant restricting occupancy to persons belonging to the Caucasian race.

4. SAME—RESTRICTIONS MAY NOT BE ENFORCED AGAINST PARTY HAVING NEITHER ACTUAL NOR CONSTRUCTIVE NOTICE THEREOF.

   Restrictions which are not a matter of record and of which a party has neither actual nor constructive notice may not be enforced against such party.

5. SAME—PUBLIC FISHING SITE—RESIDENTIAL PLAN—BOAT LIVERY.

   Use of four contiguous lakefront lots as a public fishing site may not be enjoined by adjoining owner on ground that subdivision in which they are situated has been developed pursuant to plan restricting property to residential use only, where one lot therein has been used as a boat livery for 10 years, since the alleged plan has not been followed.

6. NUISANCE—ESTHETICS—PUBLIC FISHING SITE.

   Mere esthetics is beyond the power of the court to regulate in suit by adjacent lot owner to enjoin use in subdivision de-

voted largely to residences of four lakefront lots as a public fishing site because of destruction of the natural shore line, attendant noise from parking of cars, and establishment of nearby traffic hazard.

7. SAME—INJUNCTION—EQUITY—ANTICIPATED NUISANCE.
As rule, equity will not interfere in advance of creation of nuisance, where injury is doubtful or contingent, and anticipated merely from use to which property is to be put.

8. WATERS AND WATERCOURSES—PUBLIC FISHING SITE—CONDEMNATION—ADVERTISING STATE—PUBLIC PARKS.
The State should not be required to condemn property surrounding public fishing sites in order to make a lake available to the public in view of the fact that considerable public funds have been expended in advertising the State as a summer playground, and in the upkeep of public parks and playgrounds.

9. EVIDENCE—JUDICIAL NOTICE—ADVERTISING OF STATE.
Judicial notice is taken of the fact that public funds have been expended in advertising the State as a summer playground.

10. NUISANCE—PUBLIC FISHING SITE—INJUNCTION.
A public fishing site on four contiguous 50-foot lakefront lots at an inland lake which involves filling in the ground, grading it, building a boat ramp and parking lot and erecting signs cannot be said to constitute a nuisance, hence the establishment thereof will not be enjoined although the proper authorities may thereafter be required to regulate traffic and supervise its operation.

11. COSTS—PUBLIC FISHING SITE—INJUNCTION.
No costs are allowed in suit to enjoin the establishment of a public fishing site on four lakefront lots because of the nature of the case.

Appeal from Oakland; Holland (H. Russel), J. Submitted June 13, 1944. (Docket No. 11, Calendar No. 42,652.) Decided September 11, 1944.

Bill by Charles Gableman against the Department of Conservation of the State of Michigan to restrain violation of property and general plan restrictions. Decree for plaintiff. Defendant appeals. Reversed and bill dismissed.

Verne C. Hampton, for plaintiff.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, *Maurice M. Moule* and *Daniel J. O'Hara,* Assistants Attorney General, for defendant.

BUSHNELL, J. Plaintiff Charles Gableman is the owner of lot 9 in Sunrise Heights subdivision, Highland township, Oakland county, Michigan, fronting on White lake. He has occupied these premises for some 20 years and has invested upwards of $7,500 in a home thereon. In pursuance of its policy to make the waters of the State available to the public, defendant Department of Conservation purchased four contiguous 50-foot lots in this subdivision, *i. e.,* lots 10, 11, 12 and 13, which immediately adjoin plaintiff's property. The restrictions of record in this subdivision read substantially as follows:

"Said land is subject to the following restrictions which will run forever with the land to-wit: said lot shall not be sold, leased or occupied to or by any person whatsoever not belonging to the Caucasian race."

A deed executed in 1942 on lot 11 contains the following restriction:

"Said lot shall not be sold, leased or occupied to or by any person whatsoever not belonging to the Caucasian race."

After securing title to the lots the department filled in the shore line at a narrow point near the public roadway in order that fishing boats might be launched into the lake from the roadway, and to complete the project the department plans to do certain grading on top of this fill, sod the same, place guard posts running from the county highway

in a semicircle pattern to provide a roadway for cars to drive off the main road while launching boats, and to construct a timber boat ramp from the top of the fill to the water's edge, and to erect signs.

Before this work was completed, plaintiff filed a bill of complaint in the Oakland county circuit court in which he averred that a public fishing site is contrary to the restrictions upon the use of the premises and to the general plan in existence in the subdivision. He alleged that if defendant completed its project it would constitute a nuisance in that:

"(a) Excessive noise will come from the intended use.

"(b) Defendant by said construction will destroy the natural shore line, this preventing the plaintiff the full use and enjoyment of his property on said lake.

"(c) That plaintiff will be prevented free access to his property by said obstruction."

The circuit judge found that the character and complexion of the subdivision is strictly residential, and that of its 25 to 30 homes the cheapest one in the subdivision would be worth not less than $2,000, and that the presence of a public fishing site in the subdivision would—"definitely and perceptibly decrease the value of the homes in said subdivision and will especially decrease the value and be damaging to the property of the plaintiff whose house, of the value aforesaid, will be located only the width of a single drive from the lots to be used by the State for parking purposes for those utilizing said fishing site."

The circuit judge also said:

"The shore line of White lake opposite the four lots now owned by the State was, prior to the time that construction of the fishing site was commenced,

curving, the land gradually sloped from the roadway to the water's edge. The natural shore line has now been destroyed and will be further destroyed if the project is completed. The fill which is located in front of the four lots, which fill extends from the road into the lake, definitely destroys the natural beauty of the lake as viewed from plaintiff's property,—the pictures introduced in evidence not to the contrary. From the use to which the fishing site was put prior to the injunction, before the same was advertised or generally known to be a public site, it is apparent that said fishing site is and will continue to be a traffic hazard, located as it is on a curve of the road, which services the subdivision and adjacent communities. It was also apparent that there was and will be attending noise from the parking of cars and from people going to and from the lake. After viewing the property subsequent to the taking of the proof, the court finds that the natural shore line as well as the natural beauty has been changed and that such changes will be more apparent and more damaging if and when the State is permitted to complete its project which will entail the grading of the four lots to the level of the road in order to make them usable for parking purposes."

Defendant department has appealed from a decree permanently restraining it from—"violating the restriction of the subdivision known as "Sunrise Heights,' a subdivision located in Highland township, Oakland county, Michigan, and from carrying out or utilizing the property acquired, being lots 10, 11, 12 and 13, aforesaid, as a part of the public fishing site contemplated."

Although the trial judge held that the use of these lake lots by those of the Negro race would not constitute occupancy within the meaning of the language in the restriction, that question is before us on this hearing *de novo*. In the recent case of *Bradford* v. *Goldman*, 290 Mich. 338, this court followed the gen-

eral rule that occupancy means actual possession. See, also, *Adair* v. *Bonninghausen,* 305 Mich. 137.

Applying the reasoning of these authorities, those of the Negro race who might have access to White lake for fishing purposes through the facilities of the Department of Conservation would neither occupy nor possess these lands.

The court was of the opinion that a general plan existed in the subdivision; that the character and complexion of the neighborhood was residential; and that a public fishing site within the subdivision would be foreign to its development and should be restrained.

"Restrictions which are not a matter of record and of which a party has neither actual nor constructive notice cannot be enforced against such party. * * * Nor are the plaintiffs entitled to have the restrictions as such enforced." *Muskegon Trust Co.* v. *Bousma,* 247 Mich. 98, 101.

See, also, *Kathan* v. *Stevenson,* 307 Mich. 485.

The record shows that one of the lots in this subdivision has been occupied by a boat livery for approximately 10 years. If there ever was a so-called plan restricting the property to residential use only, that plan has not been followed and the department is not bound by it.

The use proposed by defendant department cannot be restrained on esthetic grounds. A similar argument was urged in *Smith* v. *City of Ann Arbor,* 303 Mich. 476, with respect to a city dump. The court said in that case:

"Plaintiffs claim that the dump is attractive to school children, that its effect is harmful, decreases the self-confidence of the pupils, causes an increased tendency to lie and disobey, and is bad for their morale. As said by Mr. Justice WIEST in *Perry Mount Park Cemetery Ass'n* v. *Netzel,* 274 Mich. 97,

a plant may be unsightly and detract somewhat from the beauty of the view, but mere esthetics is beyond the power of the court to regulate.

"Nor do we consider that the use of the dump should be enjoined because it occasions an increased use of the highways or because of increased traffic hazard conditions. To hold otherwise would lead to an absurdity."

The situation presented in the instant appeal is somewhat like that discussed in *Briggs* v. *City of Grand Rapids,* 261 Mich. 11, where the court said:

"Plaintiffs claim the use of the park for football exhibitions will constitute a nuisance to a large number of them living near the park. They also bring the suit as taxpayers in order to protect the city's rights. Without discussing whether the rule laid down in *Archer* v. *City of Grand Rapids,* 255 Mich. 485, is applicable in the instant case, there is no showing whatsoever that the purpose for which the park is to be used will be a nuisance *per se,* as plaintiffs fear. Equity, as a rule, will not interfere in advance of the creation of a nuisance where the injury is doubtful or contingent, and anticipated merely from the use to which the property is to be put. *Siegel* v. *Wayne Circuit Judge,* 155 Mich. 459; *Henry* v. *Sinclair,* 218 Mich. 296; *Lansing* v. *Perry,* 216 Mich. 23. The use of the property as an athletic field does not differ widely from that of a park and playground, and the fact that it may on a few occasions and for a limited time become a nuisance seems to be very problematical. Until there is a showing that the nuisance does exist, plaintiffs cannot complain."

The trial judge offered the following suggestion:

"Generally, it is the court's opinion that if the State of Michigan feels compelled to establish in connection with the four lots mentioned, a public fishing site, to the undeniable damage of the plain-

tiff's property, it should in all fairness proceed to condemn plaintiff's property to the end that he be reimbursed for the damages sustained."

We do not think it should be held that the State should be required to condemn surrounding property in order to make its natural resources available to the public. The court will take judicial notice of the fact that considerable public funds have been expended in advertising Michigan as a summer playground, and certainly it is the policy of this State to afford its citizens and its visitors free and comfortable use of the waters and scenic beauties of Michigan. See *Attorney General, ex rel. Director of Conservation,* v. *Taggart,* 306 Mich. 432. Large sums are spent annually in the upkeep of public parks and playgrounds. Generally speaking, these are well conducted and maintained. The policy of the department in this instance is to be commended and not condemned. We cannot anticipate that this small State park will be conducted differently from others. Should the occasion require, the property owners are free to take such steps as may be necessary to require the proper authorities to regulate traffic in the vicinity and supervise the conduct of those who visit White lake. It cannot be said that the proposed plan will constitute a nuisance.

The decree is vacated and one may be entered here dismissing plaintiff's bill of complaint. Because of the nature of the case, the appellant will not be allowed costs.

NORTH, C. J., and STARR, WIEST, BUTZEL, SHARPE, BOYLES, and REID, JJ., concurred.

MAEDEL *v.* WIES.

1. LIS PENDENS—EFFECT DURING APPEAL.

   Whether or not a *lis pendens* remains in effect and applies to a case during the period allowed for appeal is dependent upon whether or not the appeal is considered as a continuation of a suit.

2. SAME—DURATION.

   The effect of a notice *lis pendens* continues during the entire time of the pendency of a suit and ends when the suit is actually ended by a final decree (3 Comp. Laws 1929, § 14400).

3. APPEAL AND ERROR—JURISDICTION TRANSFERRED TO THE SUPREME COURT.

   An appeal taken in a chancery case transfers jurisdiction of the case to the Supreme Court.

4. LIS PENDENS—GRANTEE IN SUBSEQUENT DEED.

   Grantee of a deed, received after the filing notice of *lis pendens*, knows, or must be held to know, that the property was then in litigation and that his interest is subject to the effect of the final decree in the cause (3 Comp. Laws 1929, § 14400).

5. SAME—APPEAL—DECREE.

   The notice of *lis pendens*, once filed, continues in effect during the time allowed for appeal and during consideration by the Supreme Court of such appeal, and can be terminated only by a final decree (3 Comp. Laws 1929, § 14400).

6. SAME—IMPROVEMENTS BY GRANTEE IN DEED RECEIVED AFTER NOTICE FILED.

   Recourse, if any, of grantee under deed received after the filing of notice of *lis pendens* to reimbursement for improvements he made upon the property is against his grantor (3 Comp. Laws 1929, § 14400).

7. APPEAL AND ERROR—QUESTIONS REVIEWABLE—ALLEGED CHAMPERTY.

   Plaintiff's contention that a defendant's claim to the proceeds of a condemnation award was illegally purchased by another

defendant's attorney and that such purchase constitutes champerty is passed upon by Supreme Court notwithstanding matter was not mentioned in plaintiff's bill of complaint nor presented to trial court since it challenges the good faith of an officer of the Supreme Court.

8. CHAMPERTY AND MAINTENANCE—PURCHASE OF CLAIM ALREADY IN LITIGATION.

The inhibition of the champerty statute is confined to the purchase of a "thing in action, with the intent and for the purpose of bringing any suit thereon" and the purchase of a claim already in litigation is not barred (3 Comp. Laws 1929, § 13593).

Appeal from Wayne; Merriam (DeWitt H.), J. Submitted June 13, 1944. (Docket No. 12, Calendar No. 42,624.) Decided September 11, 1944.

Bill by Robert Maedel against Pauline E. Wies and August F. Brandt to determine ownership of real property and condemnation award thereon. Decree for defendant Wies. Plaintiff appeals. Affirmed.

Harry N. Grossman (*Meyer R. Rubin,* of counsel), for plaintiff.

Clarence T. Wilson (*George Stone,* of counsel), for defendant Wies.

BUSHNELL, J. Some of the factual background of this appeal may be found in *Wies* v. *Brandt,* 294 Mich. 240. In that case a trust deed executed by Pauline E. Wies (plaintiff there and defendant here) while under guardianship as a mentally incompetent person, and at the time presumably under the influence and domination of her guardian, Brandt (defendant there and defendant here), was declared to be void.

While that matter was pending on appeal and before its determination by this court, defendant Wies'

trustee, defendant August F. Brandt, on December 26, 1939, conveyed title to the property now in question to Frank J. McIntyre and Clara E. McIntyre, his wife, who on the same day conveyed to plaintiff Robert Maedel. The consideration paid Brandt by the McIntyres was $700 and that paid by Maedel to them was $850 in cash and the conveyance of a vacant lot which Maedel claims was valued at $1,500, with an assessed value of about $400.

Prior to the execution, delivery and recording of these deeds, defendant Wies had begun an accounting action against Brandt and in connection therewith had filed a *lis pendens* in the office of the register of deeds of Wayne county on May 22, 1939. After determination by this court of the appeal in that case, and while that matter was under remand to the circuit court, the city of Detroit on September 16, 1940, began condemnation proceedings for acquiring land for the Edward J. Jeffries Homes Housing Project. See *In re Edward J. Jeffries Home Housing Project (Appeal of Collins)*, 306 Mich. 638. The condemnation jury in that case returned a verdict of necessity and awarded, as compensation for the taking of the property now in question in this case, $2,000, payable jointly to plaintiff Maedel and defendant Wies. Maedel was unable to obtain payment of this award because the entire amount of the award was claimed by defendant Wies. He filed a bill of complaint seeking an equitable determination of the matter and a decree awarding him the condemnation proceeds in its entirety.

Prior to final determination in the original accounting proceeding, Brandt filed a bill against Wies and others seeking damages by reason of the original action. When the trial of that cause was begun, the instant case of *Maedel* v. *Wies* and Brandt had

been heard on its merits and was awaiting decision. A stipulation, which was filed in the matter now before us, was also filed in the two other cases. It recites the present litigation between the parties and effects a settlement of the two other cases, *i. e.*, *Wies* v. *Brandt* and others, and *Brandt* v. *Wies* and others. This stipulation states that the entire interest of defendant Wies in the instant matter shall be assigned by her to William F. Beyer in consideration of the payment by Brandt to Wies of $1,000.

The trial judge decided that Maedel had no valid claim to the proceeds of the condemnation award. He based this conclusion upon the fact that Maedel "had both constructive and actual notice and knowledge of the suit filed by Miss Wies on May 17, 1939, in which she asked that the trust deed of January 5, 1939, be set aside." The court said:

"The matter had not been finally determined at the time of Maedel's purchase. From all the facts it appears that Miss Wies has been as diligent as possible in the prosecution of her suit against Brandt and apparently the deed was void *ab initio*."

A decree was entered authorizing the payment of the entire condemnation award to defendant Wies, from which decree Maedel has appealed.

Some of the questions raised by the appellant were settled in the case of *Wies* v. *Brandt*, 294 Mich. 240.

Maedel contends that he is a bona fide purchaser and that the right of Brandt, as trustee, to convey the property in question continued after the entry of the original decree in the trial court dismissing the Wies bill of complaint, and that the notice of *lis pendens* did not terminate or annul Brandt's responsibility to preserve and protect the trust. He cites in support of the proposition authorities to the effect that one who, after a final decree and de-

termination of suit and before an appeal is obtained, purchases in good faith property which is the subject of litigation, such purchaser will be protected. See *Wheeling Creek Gas, Coal & Coke Co.* v. *Elder,* 170 Fed. 215, and *Wingfield* v. *Neall,* 60 W. Va. 106 (54 S. E. 47, 10 L. R. A. [N. S.] 443, 116 Am. St. Rep. 882, 9 Ann. Cas. 982).

The authorities are in agreement that whether or not a *lis pendens* remains in effect and applies to a case during the period allowed for appeal is dependent upon whether or not the appeal is considered as a continuation of the suit. See annotation on this point in 10 A. L. R. 415 and text to the same effect in 2 Am. Jur. p. 845. The following statement is found in 5 Tiffany on Real Property (3d Ed.), p. 85, § 1296:

"As to whether the doctrine of *lis pendens* is effective during the period between the entry of the judgment or decree and the disposition of an appeal or a writ of error, the decisions are conflicting, the doctrine being deemed effective during that period in those jurisdictions which hold that an appeal or writ of error is a continuation of the original suit."

3 Comp. Laws 1929, § 14400 (Stat. Ann. § 27.1184), reads:

"To render the filing of a bill constructive notice to a purchaser of any real estate, it shall be the duty of the plaintiff to file for record, with the register of deeds of the county in which the lands to be affected by such constructive notice are situated, a notice of the pendency of such suit in chancery, setting forth the title of the cause, and the general object thereof, together with a description of the lands to be affected thereby; and it shall thereupon become the duty of the register to record such notice, in a book

kept for that purpose, upon the payment of the same fees as is provided by law for recording deeds. A copy of such record, authenticated by the register, shall be evidence of such notice, and the filing of the same, in all courts and places."

This court held in *Hammond* v. *Paxton,* 58 Mich 393, 398:

"The effect of the suit, and the filing of the requisite notice under the statute upon purchaser or mortgagors *pendente lite,* continues through the entire time of its pendency, and ends when the suit is actually ended by a final decree."

The appeal taken by defendant Wies in her original action against Brandt transferred to this court jurisdiction of that case. *Hughes* v. *Wayne Circuit Judge,* 239 Mich. 110.

When Maedel acquired his interest in the property by deed from the McIntyres, that interest was subject to the outcome of the then pending litigation, and when he received his deed he knew, or must have known, by reason of the *lis pendens,* that he was buying an interest in property then in litigation, *Provident Mutual Life Ins. Co.* v. *Vinton Co.,* 282 Mich. 84, and that such interest was subject to the effect of the final decree in that cause.

The notice of *lis pendens,* once filed, continues in effect during the time allowed for appeal and during consideration by this court of such appeal, and can only be terminated by a final decree. The determination in the final decree was that the conveyance on which Maedel's title rested was invalid; and it must follow, therefore, that Maedel acquired no interest in, or title to, the property in question.

He contends, however, that being in equity he is entitled to reimbursement by defendants Wies and

Brandt for the improvements he has made upon the property. Maedel, however, was not a grantee of either Wies or Brandt but of the McIntyres, who are not parties hereto, and his recourse, if any, is against his grantors.

Appellant contends, also, that defendant Wies' claim to the proceeds of the condemnation award was illegally purchased by defendant Brandt's attorney and that this constitutes champerty. Notwithstanding the fact that this contention was not made in Maedel's bill of complaint nor presented to the trial court, we deem it proper to pass upon the matter because of the challenge to the good faith of an officer of this court.

It is sufficient to note that the inhibition of the champerty statute (3 Comp. Laws 1929, § 13593 [Stat. Ann. § 27.87]) is confined to the purchase of a "thing in action, with the intent and for the purpose of bringing any suit thereon." The claim was not purchased by William F. Beyer until the action was already in progress.

The decree of the trial court directing payment of the entire amount of the condemnation award to Wies "or her assigns" is affirmed, with costs to appellees.

NORTH, C. J., and STARR, WIEST, BUTZEL, SHARPE, BOYLES, and REID, JJ., concurred.

PEOPLE v. PARMELEE.

1. EVIDENCE—HANDWRITING.
   When questions of handwriting are involved, specimens of admitted or proven writings are admissible for the purpose of comparison regardless of whether or not the paper on which such writing appears is one in evidence or connected with the case.

2. FORGERY—COMPARISON OF SIGNATURES—EVIDENCE.
   In prosecution for forging and uttering a forged "accountable receipt," it was proper to admit check in evidence which bore the genuine signature of person whose signature is claimed to have been forged on the receipt (Act No. 328, §§ 248, 249, Pub. Acts 1931).

3. INDICTMENT AND INFORMATION—FORGERY.
   Information in prosecution for forging and uttering a forged accountable receipt *held*, sufficient to charge a violation of the statute making it a felony to falsely make, alter, forge and utter such a receipt (Act No. 328, §§ 248, 249, Pub. Acts 1931).

4. CRIMINAL LAW—FORGERY—ACCOUNTABLE RECEIPT—INCONSISTENT CLAIM—PREVIOUS ACTION.
   Defendant in prosecution for uttering a forged accountable receipt may not properly claim the instrument was not such a receipt where he had previously brought an action thereon in justice court (Act No. 328, §§ 248, 249, Pub. Acts 1931).

5. INDICTMENT AND INFORMATION—FORGERY—ACCOUNTABLE RECEIPT —VARIANCE.
   Asserted variance between recital of accountable receipt in information in prosecution for forging and uttering a forged accountable receipt and the language of the exhibit itself *held*, not sufficient to make the receipt inadmissible in the prosecution (Act No. 328, §§ 248, 249, Pub. Acts 1931).

6. FORGERY—INTENT—EVIDENCE.
   Proof of fraudulent intent in prosecution for forging and uttering a forged accountable receipt was sufficiently shown by action thereon by defendant against complaining witness (Act No. 328, §§ 248, 249, Pub. Acts 1931).

7. SAME—HANDWRITING LABORATORY EXAMINATION—ADDED INSTRUCTIONS.

In prosecution for forging and uttering a forged accountable receipt, claimed impropriety of examination of questioned instrument in a handwriting laboratory and of undue emphasis in court's charge by gratuitous mention of the crime of uttering when jury requested further instruction concerning venue of claimed forgery *held,* inconsequential, there being no impropriety in such examination and no undue emphasis in court's charge (Act No. 328, §§ 248, 249, Pub. Acts 1931).

Appeal from Saginaw; Martin (William H.), J. Submitted June 15, 1944. (Docket No. 59, Calendar No. 41,676.) Decided September 11, 1944. Rehearing denied December 1, 1944.

George Parmelee was convicted of uttering a forged accountable receipt. Affirmed.

Richard C. Fruit, for appellant.

Herbert J. Rushton, Attorney General, and *Emmanuel B. Reese,* Prosecuting Attorney, for the people.

BUSHNELL, J. Defendant George Parmelee, 62 years of age, lives on a farm near the Saginaw-Genesee county line, and has operated an oil and gasoline station for the last 8 or 10 years. He was convicted by a jury on a charge of forging and uttering an "accountable receipt," contrary to the provisions of sections 248 and 249 of the penal code, Act No. 328, Pub. Acts 1931 (Comp. Laws Supp. 1940, §§ 17115–248, 17115–249, Stat. Ann. §§ 28.445 and 28.446). Upon a motion for new trial the trial judge set aside the conviction of forgery, but permitted the conviction on the charge of uttering a forged "accountable receipt" to stand. Parmelee appeals from a sentence placing him on probation for three years and the imposition of a fine of $150 and costs in the amount of $100.

John Turnwald, the complaining witness, who has been a farmer all his life, owns a farm located partly

in Maple Grove, Saginaw county, and partly in Shiawassee county. He has had business dealings with Parmelee over a period of 15 years. On July 1, 1937, he sold 900 lbs. of beans at $6 per hundred to Parmelee, for which he received Parmelee's check for $54. On November 15th of that year Parmelee wrote Turnwald a letter in which he claimed that Turnwald was indebted to him in the sum of $34.65. On December 2d he wrote him another letter in which he asserted that this money was due because of the agreement that was made at the time the beans were purchased and the drop in their market price between July 1st and October 1st. In March of 1938 Parmelee brought suit against Turnwald in justice court on the claimed agreement. While the justice court suit was pending, he again wrote Turnwald on May 14, 1938, in an attempt to force a settlement. In this letter Parmelee mentioned for the first time a receipt for $54 which he claimed Turnwald had given him. Parmelee neither obtained a settlement nor a verdict and appealed the case to the circuit court, where Turnwald again prevailed. Later, Parmelee was arrested and charged with forging and uttering an "accountable receipt."

In the criminal trial the check was offered in evidence over Parmelee's objection that:

"There is no dispute over this paper and it has no bearing on the case. It is not a proper exhibit, as it has no connection with any dispute in this case."

The court overruled the objection on the ground that the check was part of the original transaction. The receipt which was received in evidence without objection reads:

"Date, July 1, 1937. Mr. John Turnwald received of George Parmelee $54 to apply on beans. Price to be what I get for bal. of my beans between now

and November 1. It is strictly understood there is to be no other agreements. 4# beans.

X JOHN TURNWALD
and GEO. PARMELEE."

Turnwald testified that the first time he saw the receipt was in the justice court; that he did not know where it came from; and that he never signed it. He identified the check and said he indorsed it when he cashed it. Leroy Smith, a member of the Michigan State police force, who has pursued the investigation of handwriting since about 1930, testified, from comparisons made at the State police laboratory in 1938 of Turnwald's indorsement on the check and the signature on the receipt, that, in his opinion, Turnwald's signature on the receipt was a tracing of his signature on the back of the check. He amplified his testimony with the statement that the signatures were identical and "a perfect match" which could happen only once in "1,000,910,000,000 times."

On appeal Parmelee charges error in the admission of the check "in evidence for the sole purpose of comparison of signature on another exhibit."

The rule established in *Vinton* v. *Peck,* 14 Mich. 287, was applied in *People* v. *Parker,* 67 Mich. 222 (11 Am. St. Rep. 578). In the *Parker Case* Mr. Justice MORSE, speaking for a unanimous court, said it was error to compare the signature on an alleged forged deed with a signature on papers belonging in a probate file, none of which "were at all material or relevant to the question at issue and could possibly throw no light upon the case." He stated the rule to be:

"Comparisons of this kind can only be made with such writings as are legally in evidence for some other purpose than that of being compared."

As said by Judge Gillespie in his Michigan Criminal Law & Procedure, § 1244, vol. 2:

"It was formerly the rule that when questions of handwriting were involved, writings claimed to have been made by the defendant must first be received in evidence for some other purpose than that of comparison, but it is now provided by statute, that whenever it shall be necessary to prove the signature of any person, any specimens of his handwriting or signature, admitted or proved to the satisfaction of the court to be genuine, may be introduced in evidence for the purpose of comparison, regardless of whether or not the paper on which such handwriting appears is one in evidence or connected with the case."

The statutory rule is stated in 3 Comp. Laws 1929, § 17318 (Stat. Ann. § 28.1048), as follows:

"Whenever in the trial of any criminal case it shall be necessary or proper to prove the signature of any person, it shall be competent to introduce in evidence for the purpose of comparison, any specimen or specimens of the handwriting or signature of such person, admitted or proved to the satisfaction of the court to be genuine, whether or not the paper on which such handwriting or signature appears is one in evidence or connected with the case or not."

The check in question was properly admitted in evidence.

The information sufficiently charges a violation of the statutes which make it a felony to falsely make, alter, forge, et cetera, and utter any "accountable receipt." Sections 248 and 249 of the penal code, Act No. 328, Pub. Acts 1931 (Comp. Laws Supp. 1940, §§ 17115–248, 17115–249, Stat. Ann. §§ 28.445 and 28.446).

Parmelee claims that the paper in question is not an "accountable receipt." It does not lie in his mouth to make this claim because he brought an action in the justice court upon the instrument, and cannot now deny its "accountable" nature.

The variance asserted in the recital of the receipt in the information and the language of the exhibit itself are not sufficient to make the receipt inadmissible in the criminal action.

The cited statutes require proof of fraudulent intent and appellant claims that no evidence of such intent was produced. If the receipt is a forged one, the intent to defraud by uttering it was sufficiently shown by the action which Parmelee brought on it against Turnwald in the justice court.

The question raised of the claimed impropriety of an examination of the questioned instrument in the handwriting laboratory and the question of undue emphasis in the court's charge by gratuitous mention of the crime of uttering when the jury requested further instruction concerning the venue of the claimed forgery are both inconsequential.

There was no impropriety in the laboratory examination of the claimed receipt and the trial judge's statement to the jury was correct and did not unduly emphasize the charge of uttering.

The sentence imposed is affirmed.

NORTH, C. J., and STARR, WIEST, BUTZEL, SHARPE, BOYLES, and REID, JJ., concurred.

GROOMS *v.* UNION GUARDIAN TRUST CO.

MUNICIPAL CORPORATIONS—SIDEWALKS—SNOW AND ICE REMOVAL ORDINANCE—PRIVATE RIGHT OF ACTION AGAINST OWNER.

Under ordinance requiring all persons to keep snow and ice removed from public sidewalks in the front, rear or side of their premises or keep them safe for purpose of walking thereon, a person injured by reason of the owner's failure to do so cannot bring private action against such owner (Detroit Compiled Ordinances, chap. 197, § 1; chap. 201, § 11).

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted June 13, 1944. (Docket No. 64, Calendar No. 42,611.) Decided September 11, 1944.

Case by Katherine Grooms against Union Guardian Trust Company, a Michigan corporation, for damages sustained when she slipped on an icy sidewalk. Verdict for plaintiff. Judgment for defendant *non obstante veredicto*. Plaintiff appeals. Affirmed.

Roxborough & Taliaferro, for plaintiff.

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

SHARPE, J. This is an action instituted by Katherine Grooms, plaintiff, against the Union Guardian Trust Company, as defendant, for the recovery of damages for an injury sustained by plaintiff on March 14, 1940.

The record shows that on the day in question plaintiff fell on a sidewalk adjacent to or near the vicinity of premises known as 8339 Oakland avenue, in the city of Detroit, as the result of an accumulation of snow and ice, and was severely injured. The record also shows that the ordinance in effect in the city of Detroit on the day in question, in so far as it is material in this action, reads as follows:

"Chapter 197, Compiled Ordinances:

"SECTION 1. No person, firm or corporation shall permit any snow or ice to remain on the sidewalks in the front, rear or sides of any house, premises, building or lot owned, occupied or controlled by him or it, longer than 24 hours after it has fallen or formed; and where either has fallen or formed on any such sidewalk, such owner, occupant or agent as above provided shall, within 24 hours after the same had fallen or formed, remove said snow or ice, or cause a sufficient quantity of salt, sand or ashes to be strewn thereon in such manner as to render the same safe for purposes of walking thereon.

"For the purpose of this ordinance, the phrase 'sidewalks in the front, rear or side of any house, premises, building or lots' shall be construed to mean that sidewalks or walks forming a part of the public highway. (Approved February, 1925, effective March 6, 1925.)

"Chapter 201, Compiled Ordinances:

(Effective September 3, 1926, Ordinance 249–B)

"SEC. 11. When ice and snow have accumulated on sidewalks and it is impossible to remove them by usual methods, sawdust, salt, sand, ashes or cinders may be sprinkled in sufficient quantities to make such sidewalks safe for traffic, et cetera.

"Fine: $100 or 30 days in Detroit House of Correction, or both such fine and imprisonment."

It also appears that from July 12, 1927, to November 15, 1939, the defendant acted as trustee under

an agreement with Frank S. Werneken in the management of certain property owned by him, including the property known as 8339 Oakland avenue. This agreement was terminated by the death of said Frank S. Werneken on November 15, 1939. Subsequently, and on January 15, 1940, an agreement was entered into between defendant and Frank E. Werneken, Helen S. Werneken, Marguerite E. Tilton and Maude W. Taylor, who acquired title to all property held under the agreement with said Frank S. Werneken at the time of his death, whereby said defendant was to continue to manage said property for the above-named persons.

On April 10, 1935, an application for tenancy was made to defendant trustee by Robert Boutry and Lula Boutry, his wife, and accepted by defendant, as agent of Frank S. Werneken, for the premises known as 8339 Oakland avenue, in the city of Detroit, which application for tenancy provided:

"2. Not to use the premises in contravention of any law or any police or sanitary regulation imposed by any government authority.

"3. To keep the premises in good repair during occupancy and at the expiration of occupancy to deliver premises in same condition as when taken, usual wear and tear excepted."

The same tenants occupied the premises on the day of the accident.

The cause came on for trial and at the close of plaintiff's proofs the defendant moved to direct a verdict of no cause of action upon the ground that the ordinance upon which plaintiff's cause of action is based imposes a public duty and confers no right upon an individual. The trial court took the motion under advisement and submitted the cause to a jury. The jury rendered a verdict in

favor of plaintiff. Subsequently, defendant made a motion for judgment notwithstanding the verdict on the ground that the pleadings and proofs did not create any liability on the part of defendant. The trial court granted the motion and held that the ordinance in question made only a public duty and that a personal or private action for a violation of the ordinance could not be maintained by an individual.

It is to be noted that plaintiff's claim for damages is based upon a violation of the ordinance by defendant.

In *Taylor* v. *Lake Shore & Mich. Southern Railroad Co.*, 45 Mich. 74 (40 Am. Rep. 457), plaintiff brought suit against the railway company for an injury suffered by her in consequence of slipping and falling upon ice which had formed on a sidewalk in front of premises occupied by defendant in the city of Monroe, which ice the defendant company failed to remove within 24 hours, as required by the ordinance. We there held that an ordinance requiring all persons to keep their sidewalks free from ice imposes a purely public duty, and persons injured by slipping on the ice cannot bring private actions against the owners of the premises.

See, also, *Blickley* v. *Luce's Estate,* 148 Mich. 233; *Maclam* v. *Hallam,* 165 Mich. 686; and *Bolden* v. *Grand Rapids Operating Corp.,* 239 Mich. 318 (53 A. L. R. 183).

The rule announced in the foregoing cases is determinate of the issue involved in the case at bar, and the judgment of the circuit court must stand affirmed, with costs.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, BOYLES, and REID, JJ., concurred.

FARRELL *v.* PAULUS.

1. HUSBAND AND WIFE—TENANTS BY ENTIRETY—JUDGMENT CREDITOR OF HUSBAND.

   In judgment creditor's suit to reach assets of judgment debtor, quitclaim deed by latter to his wife of his interest in property held by them as tenants by the entirety is not set aside while wife is yet living since plaintiff would not be aided thereby because neither the land nor the rents and profits therefrom would be subject to levy on execution for the sole debt of the husband.

2. FRAUDULENT CONVEYANCES—REAL PROPERTY—BULK SALES ACT.

   A conveyance of real estate is not within the provisions of the bulk sales act, such act applying to sales of stocks of merchandise (2 Comp. Laws 1929, § 9545 *et seq.*).

3. SAME—BULK SALES ACT—TRANSFER OF INTEREST IN PARTNERSHIP—PENDENCY OF ACTION.

   The status of plaintiff with whom one defendant had a contract to repurchase certain shares of stock in a brewing company which went bankrupt and from whom plaintiff had made demand for return of his money, as a creditor, is determined as of the date when plaintiff's cause of action arose, not the date when judgment was obtained or entered, hence debtor's transfers of interest in partnership which left him insolvent and which were made during pendency of action in which judgment was rendered against him are void as to creditors, notwithstanding an attempted compliance with the bulk sales act (2 Comp. Laws 1929, § 9545 *et seq.*).

4. SAME—BULK SALES ACT—PARTNERSHIP—NOTICE.

   Under the bulk sales act, the transfer of an interest, in whole or in part, in the assets of a copartnership consisting of a stock of merchandise, or merchandise and fixtures, otherwise than in ordinary course of trade and in the regular prosecution of the business, is void as to creditors unless the purchaser receives a list of creditors of the seller, under oath, and unless

the purchaser notifies every creditor stated in the list, or of which he has knowledge, of the proposed sale (2 Comp. Laws 1929, § 9545 *et seq.*).

5. SAME—BULK SALES ACT—KNOWLEDGE OF ATTORNEY OF DEBTOR AND TRANSFEREES—SUFFICIENCY OF NOTICE.

In judgment creditor's suit to reach assets of debtor, brought against debtor and transferees of partnership assets, who were his wife, son, partner and latter's wife, where transfers were arranged by debtor's attorney during pendency of action in which plaintiff obtained his judgment, the knowledge of the attorney of plaintiff's claim was sufficient notice to defendants thereof and, where the parties failed to comply with the bulk sales act, plaintiff has a right to follow the property in the hands of defendants (2 Comp. Laws 1929, § 9545 *et seq.*).

6. SAME—INTENT—CONSIDERATION.

Transfer by debtor of plaintiff of partnership interest to debtor's wife and "to the said partnership" with intent to hinder, delay and defraud plaintiff creditor who was then prosecuting action against such debtor was void as against such creditor, especially where it does not appear that the debtor's indebtedness, if any, to his wife or to the partnership was satisfied, cancelled or discharged (3 Comp. Laws 1929, §§ 13395, 13434).

7. SAME—INTENT—CONSIDERATION—INSOLVENCY.

The actual intent of one who transfers his assets to others without a fair consideration is unimportant where it leaves the transferor insolvent (3 Comp. Laws 1929, § 13395).

8. SAME—ACTUAL INTENT DERIVED FROM SURROUNDING CIRCUMSTANCES.

In a suit to set aside a conveyance alleged to have been made with actual intent to hinder, delay or defraud present or future creditors, the only method of determining actual intent is by a consideration of the circumstances surrounding the transaction (3 Comp. Laws 1929, § 13398).

9. SAME—ACTUAL INTENT—BADGES OF FRAUD.

Surrounding circumstances which usually accompany an actual intent to hinder, delay or defraud creditors and from which fraud may be inferred are called badges of fraud (3 Comp. Laws 1929, § 13392 *et seq.*).

10. SAME—INSOLVENCY OF GRANTOR.

When a questioned conveyance renders the grantor insolvent, fraudulent intent may be inferred (3 Comp. Laws 1929, § 13392 *et seq.*).

11. SAME—TRANSACTIONS BETWEEN MEMBERS OF A FAMILY CLOSELY SCRUTINIZED.

As a general rule transactions between members of a family must be closely scrutinized when the rights of creditors are involved and when such transactions are accompanied by other badges of fraud, a full explanation of the conveyance is required when it is challenged by an unsatisfied creditor (3 Comp. Laws 1929, § 13392 *et seq.*).

12. SAME—EQUITY—SUFFICIENCY OF CONVEYANCE SET ASIDE TO SATISFY PLAINTIFF'S CLAIM.

Transfer of one-fourth interest in partnership to debtor's son which left debtor insolvent and which was made without any consideration is only portion of transferred interest set aside where subjection of such portion or the income therefrom is sufficient to satisfy judgment creditor's claim and equity does not require that judgment debtor's wife be divested of her interest in the partnership for the benefit of plaintiff herein (Comp. Laws 1929, § 9868, § 13392 *et seq.*).

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted June 13, 1944. (Docket No. 37, Calendar No. 42,606.) Decided September 11, 1944.

Judgment creditor's bill by Leo M. Farrell against John Paulus and others to set aside conveyances and for a receiver. From decree setting aside only the conveyance of an automobile, plaintiff appeals. Affirmed as to setting aside conveyance of automobile and refusal to set aside deed to wife. Reversed as to interest in partnership and cause remanded.

Victor H. DeBaeke (*Harry Cohen* and *John Sklar,* of counsel), for plaintiff.

Frank G. Schemanske, for defendants Paulus and Club Chene-Trombly, Inc.

Thaddeus M. Machrowicz, for defendants Danielewski.

BOYLES, J. On May 26, 1939, plaintiff Leo M. Farrell recovered a judgment against defendant John Paulus for $5,312.50 and costs. His cause of action was based on an oral agreement whereby Paulus had agreed to repurchase certain shares of stock in a brewing company which went bankrupt. In September and again in December, 1937, plaintiff had demanded from Paulus the return of his money, started suit in May, 1938, and obtained judgment against Paulus in May, 1939. Paulus did not appeal and plaintiff took out execution which was returned wholly unsatisfied.

In January, 1940, plaintiff filed the instant suit in chancery, a judgment creditor's bill in aid of execution, to reach certain property held by the other defendants herein. Plaintiff claims that this property was transferred by Paulus to these defendants without compliance with the bulk sales act, 2 Comp. Laws 1929, § 9545 *ct seq.* (Stat. Ann. § 19.361 *et seq.*), and also that the transfers are void under the fraudulent conveyance act, 3 Comp. Laws 1929, § 13434 *et seq.* (Stat. Ann. § 26.971 *et seq.*)..

The lower court referred the case to a circuit court commissioner, and entered a decree confirming the report of the commissioner holding that plaintiff had failed to establish the allegations in his bill of complaint except as to an automobile. Plaintiff appeals.

The property in question consists of an automobile, a parcel of real estate, and Paulus' interest in a certain copartnership. As to the automobile, the lower court decreed the transfer to be void and defendants have not appealed, or cross-appealed, from the decree. For that reason no issue as to the automobile is involved in this appeal. As to the real estate, it satisfactorily appears from the record that this parcel of real estate had been held by John Paulus and his wife Elizabeth for many years as tenants by the entirety and Paulus merely quit-

claimed to his wife whatever interest he had therein. 3 Comp. Laws 1929, § 13069 (Stat. Ann. § 26.201); *Ash* v. *Ash,* 280 Mich. 198. The validity of the quitclaim deed is attacked by plaintiff, but if it were set aside the title would again be in the name of Paulus and wife as tenants by the entirety and plaintiff would not be aided thereby because neither the land nor the rents and profits therefrom would be subject to levy on execution for the sole debt of the husband. *American State Trust Co.* v. *Rosenthal,* 255 Mich. 157. A conveyance of real estate is not within the provisions of the bulk sales act which applies to sales of stocks of merchandise, or merchandise and fixtures. Under the circumstances of the case the quitclaim by Paulus to his wife of the lots 1 and 2 hereinafter referred to will not be set aside and it is of importance only as bearing on the entire issue of fact whether Paulus divested himself of all of his property with intent to hinder and defraud plaintiff as a creditor.

The more serious question concerns the transfer by John Paulus of his interest in a copartnership.

In 1929 defendants John Paulus and his wife Elizabeth and John Danielewski and wife Clara formed what they considered as a copartnership to own and operate a bowling-alley business. Apparently it was an indefinite arrangement, no partnership articles being signed. This was before the enactment of the statute permitting husband and wife to become copartners, Act No. 72, § 6, Pub. Acts 1917, as amended by Act No. 272, Pub. Acts 1941 (Comp. Laws Supp. 1943, § 9846, Stat. Ann. 1943 Cum. Supp. § 20.6). They contributed varying amounts, which ultimately seem to have been either confused with or considered as loans to the partnership or to Paulus. The business was established in 1928 or 1929 on four lots at Chene and Trombly streets in Detroit. Title to the two corner lots

1 and 2 hereinbefore referred to, was in the names of John and Elizabeth Paulus as tenants by the entirety. Title to the adjoining lots, 3 and 4, was taken in the name of Elizabeth Paulus. Mr. Paulus purchased the lots and Mrs. Paulus admits that the money did not come from her, that Mr. Paulus made the payments. The bowling alley building was put up on lots 3 and 4 out of money from the business. A beer garden or tavern was operated by these four defendants on lots 1 and 2. Paulus drew money from the partnership to invest in the brewery company, considered by defendants as a loan. Defendants also claim individual loans were made to Paulus. In 1939, after the brewery enterprise failed, and some time after plaintiff herein had demanded reimbursement from John Paulus, the latter executed the quitclaim deed to his wife of his interest in the tenancy by the entirety hereinbefore referred to. In March, 1939, when plaintiff's suit against Paulus was about to come up for trial in the circuit court for Wayne county, the defendant Paulus obtained a short adjournment and immediately thereafter Paulus divested himself of further ownership in the partnership. On March 28th Paulus executed an affidavit apparently intended to comply with the bulk sales act, reciting:

"That he is transferring and assigning all his interest in the said copartnership *to the partnership and to Elizabeth Paulus* as per a separate agreement to be entered into between John Paulus and the remaining partners."

This affidavit inventoried the partnership assets, and Paulus concluded with the statement:

"Deponent further states that at the present time he has no creditors and no outstanding indebtedness."

On April 4th an agreement was signed by Paulus and his wife and by Danielewski and his wife, reciting that they were copartners, and agreeing that "in consideration of the waiver by the said partnership and by Elizabeth Paulus of all claims against him by virtue of the amounts advanced to him, that the said John Paulus herewith quitclaims and releases *to the said partnership and to Elizabeth Paulus* any and all right, title and interest which he now has in the said partnership, or its assets."

On this same date, April 4th, these same four individuals (including John Paulus) executed bills of sale of the personal property of the partnership, as inventoried in the Paulus affidavit, to "Club Chene-Trombly, a Michigan corporation." Again on the same day, the capital stock of the Club Chene-Trombly, Inc., a Michigan corporation, consisting of 2,500 shares, was issued as follows: One fourth to Danielewski, one fourth to his wife Clara, one fourth to Elizabeth Paulus, and one fourth to Joseph Paulus, the 22-year-old son of John and Elizabeth Paulus, a student at Ann Arbor.

By these transactions, admittedly John Paulus divested himself of all of his property. Defendants Danielewski and wife continued to own one half of the partnership property through the medium of stock ownership in the corporation; the one-fourth interest of Elizabeth Paulus (assuming she had such an interest) continued as before, as one fourth of the stock of the corporation; and if we assume that John Paulus also had an equal one-fourth interest, it may be said to have become the property of his son through the same medium of stock ownership, although the son paid no consideration for the same.

These transactions were consummated April 4, 1939, during the adjournment of the suit of plaintiff herein against John Paulus. As hereinbefore stated, on May 26th plaintiff on jury trial recovered the

judgment against John Paulus for $5,312.50 and costs, on which his instant case as a judgment creditor is based.

The record is not conclusive as to whether John Paulus was indebted to his wife. Their business transactions were indefinite and inconclusive. She repeatedly testified that she still had her own money, that none of her own money went into the business, and at other times testified that she gave money to her husband. However, there is no such confusion as to the son. There is no claim that either John Paulus or the partnership was indebted to the son. There is also no question but that after these transactions John Paulus was insolvent.

While the affidavit of John Paulus on March 28, 1939, intended to comply with the bulk sales act, stated that he had no creditors, and might have been made in good faith, it cannot be said to be true, as a matter of law. His counsel urges that plaintiff herein was not a creditor of John Paulus at that time, nor until his claim was reduced to judgment, that a suit pending did not mean an indebtedness. That is not the law. The debt existed on, and before, March 28, 1939, although plaintiff did not become a *judgment* creditor until May 26th. The status of creditor is determined as of the date when plaintiff's cause of action arose, not the date when judgment was obtained or entered. *Hanna* v. *Hurley,* 162 Mich. 601; *Ashbaugh* v. *Sauer,* 268 Mich. 467.

Under the bulk sales act, the transfer of an interest, in whole or in part, in the assets of a copartnership consisting of a stock of merchandise, or merchandise and fixtures, otherwise than in ordinary course of trade and in the regular prosecution of the business, is void as to creditors unless the purchaser receives a list of creditors of the seller, under oath, and unless the purchaser notifies every creditor stated in the list, *or of which he has knowledge,* of

the proposed sale. *Watkins* v. *Angus,* 241 Mich. 690; *Kobic* v. *Reed,* 242 Mich. 594. The defendants claim that they had no knowledge that plaintiff herein was a creditor. Elizabeth Paulus testified she had knowledge of plaintiff's suit at the time it was started. The son, Joseph Paulus, also admitted he had knowledge of plaintiff's suit. The attorney for defendants, who counseled and carried out the transactions for defendants whereby John Paulus divested himself of his property, had full knowledge of plaintiff's suit and his claimed indebtedness against Paulus. Knowledge of defendants' attorney was sufficient notice to defendants of plaintiff's claim as a creditor. *Littauer* v. *Houck,* 92 Mich. 162 (31 Am. St. Rep. 572); *Katz* v. *Kowalsky,* 296 Mich. 164 (134 A. L. R. 179). The parties failed to comply with the bulk sales act and plaintiff has a right to follow the property in the hands of defendants.

We are convinced by the record that John Paulus transferred his interest in the partnership to his wife and "to the said partnership" with intent to hinder, delay and defraud plaintiff herein of his lawful demand and damages arising out of his suit against Paulus for recovery of his investment in the brewery company. The time and circumstances of the transfer lead directly to this conclusion.

Every assignment of an interest in goods or things in action made with the intent to hinder, delay or defraud creditors is void as against such creditors. 3 Comp. Laws 1929, § 13434 (Stat. Ann. § 26.971). In the absence of proof that the indebtedness, if any, of John Paulus to his wife or to the partnership was satisfied, cancelled and discharged, and in view of the doubt from the testimony of defendant Elizabeth Paulus as to whether John Paulus was actually indebted to her or to the partnership, and, if so, in what amount, plus the conceded fact that Paulus became insolvent as a consequence of the transfers, it

is a fair inference that this transfer was without a fair consideration, in which event the actual intent of the transferor has no importance. 3 Comp. Laws 1929, § 13395 (Stat. Ann. § 26.884). This court has held:

"In a suit to set aside a conveyance of land alleged to have been made with actual intent to hinder, delay or defraud present or future creditors, the only method of determining actual intent is by a consideration of the circumstances surrounding the transaction (3 Comp. Laws 1929, § 13398 [Stat. Ann. § 26.887]).

"Surrounding circumstances which usually accompany an actual intent to hinder, delay or defraud creditors and from which fraud may be inferred are called badges of fraud (3 Comp. Laws 1929, § 13392 *et seq.* [Stat. Ann. § 26.881 *et seq.*]).

"When a questioned conveyance renders the grantor insolvent, fraudulent intent may be inferred (3 Comp. Laws 1929, § 13392 *et seq.*).

"As a general rule transactions between members of a family must be closely scrutinized when the rights of creditors are involved and when such transactions are accompanied by other badges of fraud, a full explanation of the conveyance is required when it is challenged by an unsatisfied creditor (3 Comp. Laws 1929, § 13392 *et seq.*)." *Bentley* v. *Caille* (*syllabi*), 289 Mich. 74.

In the case at bar, the lower court found that the transfer of the automobile by Paulus to his wife was without consideration. Defendants did not appeal from such holding, and if that finding is correct the same rule should apply to the transfer to his wife of his interest in the partnership. He continues to use the automobile the same as before the transfer. He continues active in the business, where his presence and good will are admitted to be of value. The maneuvers of this debtor on the eve

of the trial and judgment obtained against him in plaintiff's suit, in practical effect resulting in the transfer of all of his property to his wife and his son, are contrary to equity and good conscience.

As stated, the record is confusing as to the extent, if any, of the amount of investment in the copartnership by Elizabeth Paulus. In any event, her investment, if any, therein cannot be considered a loan to John Paulus. Conceding that she could not become a partner with her husband at the time the partnership was carried on, yet as to her separate property she could still become a partner with defendant John Danielewski in the enterprise. Equity does not require that she be divested of rights in the partnership for the benefit of plaintiff herein. The circuit court commissioner found—and it is not disputed—that on April 4, 1939, the value of the assets of the partnership was $25,000. It is fair to infer that John Paulus' one-fourth interest therein, or the income therefrom, would be sufficient to pay plaintiff's judgment. The transfer of Paulus' one-fourth interest in the partnership to his wife and to the partnership, and thence to his son, Joseph Paulus, without any consideration, through the medium of issuing stock in the corporation, is set aside.

The decree is affirmed as to the transfer of the automobile and the conveyance by Paulus of his interest in real estate, and a decree may be entered in this court setting aside and holding for naught the transfer of John Paulus' one-fourth interest in the partnership. It may be subjected to the payment of plaintiff's judgment (2 Comp. Laws 1929, § 9868 [Stat. Ann. § 20.28]). The decree may provide for remanding the case to the circuit court for such further proceedings as may be necessary for

enforcement thereof. Appellant may have costs of this court.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, and REID, JJ., concurred.

BLUMLO *v.* HAMPTON TOWNSHIP BOARD.

1. TOWNSHIPS—LICENSES—AUTOMOBILE DISMANTLING LOT—JUNK YARD.

   An automobile dismantling lot is a "junk yard" as that term is used in township ordinance prohibiting operation of junk yards without a license (2 Comp. Laws 1929, § 9766, as amended by Act No. 34, Pub. Acts 1935; Hampton Township Junk Yard Licensing Ordinance, § 1).

2. SAME—DISCRETION OF BOARD—ORDINANCES—JUNK YARDS—RESIDENCES.

   Refusal of a township board to grant a license to operate a junk yard for dismantling automobiles at a place which was not restricted to residential use either by plat restrictions or zoning ordinance, for which restricted areas the ordinance barred issuance of a license, was not authorized by provision of ordinance permitting the township board "in its discretion, for just cause," to refuse to grant a license, as such provision, being without any standard as a basis of determination, is invalid (2 Comp. Laws 1929, § 9766, as amended by Act No. 34, Pub. Acts 1935; Hampton Township Junk Yard Licensing Ordinance, §§ 1, 4).

3. SAME—LICENSES—DISCRETION OF BOARD—STANDARDS.

   The failure to provide a standard in an ordinance conferring licensing power upon township board as to the business of

operating a junk yard for dismantling automobiles renders the discretionary provision of the ordinance invalid (2 Comp. Laws 1929, § 9766, as amended by Act No. 34, Pub. Acts 1935; Hampton Township Junk Yard Licensing Ordinance, §§ 1, 4).

4. SAME—JUNK YARD LICENSE—ORDINANCES—SEVERANCE CLAUSE—MANDAMUS.

Under township junk yard licensing ordinance which contains a severance clause, where township board refused issuance of a license pursuant to discretion attempted to be conferred under invalid provision, the remaining portion is held valid and applicant granted mandamus to compel issuance of license (2 Comp. Laws 1929, § 9766, as amended by Act No. 34, Pub. Acts 1935; Hampton Township Junk Yard Licensing Ordinance, §§ 1, 4, 15).

5. MANDAMUS—ORDINANCE INVALID IN PART.

While mandamus or other relief would not be obtainable under an ordinance invalid *in toto*, where invalid portion of ordinance is eliminated and plaintiff has asserted a clear legal right under the remaining portion which is declared to be valid, mandamus is the proper remedy for the enforcement thereof.

Appeal from Bay; McCormick (James L.), J. Submitted June 20, 1944. (Calendar No. 41,856.) Decided September 11, 1944.

Petition by Albert Blumlo for writ of mandamus to compel John De Wyse and others, clerk and members of Hampton Township Board, to issue a license authorizing petitioner to engage in the business of dismantling automobiles. Writ granted. Defendants appeal. Affirmed.

F. Norman Higgs and *Joseph J. Favazza,* for plaintiff.

Albert W. Black and *B. J. Tally,* for defendants.

NORTH, C. J. This is a mandamus proceeding by which plaintiff, Abraham Blumlo, seeks to compel Hampton township board to grant him a license to

engage in the business of dismantling, wrecking and disposing of automobiles and automobile parts, such business to be conducted on plaintiff's property hereinafter described. The relief sought by plaintiff was granted in the circuit court. The officers constituting the township board have appealed.

The statute under which townships are authorized to "adopt a resolution providing for the licensing of junk yards and places for dismantling, wrecking and disposing of * * * automobiles" reads in part as follows:

"The township board of any township may, at any regular meeting, adopt a resolution providing for the licensing of junk yards and places for the dismantling, wrecking and disposing of the junk and/or refuse material of automobiles; may prescribe the amount of an annual license fee which shall not exceed twenty-five dollars, and prescribe the form of an application for such license, and adopt rules, regulations and conditions for the operation thereof, which in the discretion of said board will best protect the public health, interests and general welfare of their township, * * * Provided, * * * The township board may in its discretion, for just cause, refuse to grant the license provided for in this act." 2 Comp. Laws 1929, § 9766, as amended by Act No. 34, Pub. Acts. 1935 (Comp. Laws Supp. 1940, § 9766, Stat. Ann. § 19.731).

Pursuant to the above statutory provisions and prior to plaintiff's application for a license, Hampton township enacted an ordinance from which we quote the following:

"SECTION 1. No person, corporation, copartnership or firm shall hereafter own or operate or use any junk yard within the township of Hampton, county of Bay, without having first obtained from the clerk of said township a license for the junk yard

or place for the dismantling, wrecking and disposing of automobiles. * * *

"SEC. 4. No license shall be issued for any premises which are restricted to private residence purposes, nor shall any license be issued for any premises restricted by any (zoning) resolution or regulation. * * *

"SEC. 15. Should provision of any section of this resolution be held unconstitutional or invalid, such holding shall not be construed as affecting the validity of any of the remaining (which) shall stand notwithstanding the invalidity of any provision or section."

Other provisions of the ordinance detail the manner of making the application for a license, referring the same to the township supervisor for making an investigation and recommendation to the township board "and if in the opinion of the township board the person making the application is a proper person and the place to be used is a proper place for such business, it may authorize the granting of a license upon the payment of the license fee (of $25), which said license shall be issued by the township clerk. The township board may in its discretion, for just cause, refuse to grant the license provided for in this resolution."

The reason in consequence of which the township board denied plaintiff's petition for a license is stipulated in the record as follows:

"Testimony at the trial showed further that the reason the township board refused to issue the license to the plaintiff was because the land intended to be used as a dismantling yard was in a vicinity primarily used for residential purposes."

Within the definition of the township ordinance an automobile dismantling lot is a junk yard. The property in the location affected is not subject to

plat restrictions or to a zoning ordinance. The general surroundings and plaintiff's asserted intended use of his property are clearly stated in the circuit judge's opinion from which we quote:

"The site upon which plaintiff proposes to operate his business is on the south side of Center avenue, a State highway, from a quarter to a half mile east of the eastern limits of the city of Bay City. The property opposite and on the north side of Center avenue is used largely for business purposes. The property on the south side east and west of the proposed site is occupied by a very limited number of residences, by a chicory plant between the site and eastern city limits, and by a store an eighth to a quarter of a mile to the east. The balance of the property is vacant or used for farming purposes. The site can hardly be said to be within a strictly residential district.

"In plaintiff's application for license he states that he proposes to erect a home on the northerly part of the site nearest to Center avenue, a building for the sale of used parts farther to the south, and to enclose a place at least 300 feet south from the highway for the dismantling and wrecking of automobiles. He further states at no time will there be an unsightly display of bodies of wrecked automobiles or parts thereof."

Since, as above noted, the proposed site is not within a restricted area, the refusal of the township board to grant the license was not authorized by any provision of the ordinance, except the portion of section 3 which reads: "The township board may in its discretion, for just cause, refuse to grant the license." Of necessity the township board must have assumed that the portion of the ordinance just above quoted authorized its action. But this portion of the ordinance is invalid because it contains no controlling

standard of action and attempts to vest the township board with power to act arbitrarily. In effect the quoted ordinance provision attempts to empower the township board to grant or deny a license for any cause which in the exercise of its discretion may be deemed just. This opens the door to captious action without any standard as a basis of determination, and renders the discretionary provision of the ordinance invalid. This phase of the law is so thoroughly and clearly stated in *People* v. *Sturgeon,* 272 Mich. 319, that it need not be repeated. See, also, *Ritter* v. *City of Pontiac,* 276 Mich. 416. But under the severance clause in the ordinance we hold the remaining portion of the ordinance valid; and that plaintiff is entitled to mandamus, as adjudged in the circuit court.

Appellants' contention that since plaintiff asserts the ordinance in part is invalid (as above held), he cannot obtain relief by mandamus, is not tenable. If the ordinance was adjudicated invalid *in toto,* it is obvious that relief under such invalid ordinance could not be obtained by mandamus or otherwise. But when, as in the instant case, the ordinance after eliminating an invalid provision is still held to be good, mandamus is a proper remedy by which an aggrieved party may enforce a clear legal right asserted under the valid portion of the ordinance.

The judgment entered in the circuit court granting mandamus is affirmed, with costs to appellee.

STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

TOWNSHIP OF ROYAL OAK *v.* CITY OF FERNDALE.

1. JUDGMENT—PARTIES—MUNICIPAL CORPORATIONS—ANNEXATION—WATER SYSTEM.

   In township's suit against home rule city to restrain latter from interfering with water system which had been supplying domestic and industrial users in territory of township annexed by city, the interests of holders of water-supply-system revenue bonds, issued after the annexation under township ordinance restricting them to system within unincorporated territory, are not adjudicated where bondholders are not parties nor directly represented except by an *amicus curiae* brief and portion of system within the annexed territory is but five per cent. of township's entire system and segregation of portion involved would not imperil bondholder's rights.

2. MUNICIPAL CORPORATIONS—TOWNSHIP WATER SUPPLY CONTRACT—ANNEXATION.

   Existence of provision in contract under which city in adjoining county supplied water for use in territory including some which had been annexed to defendant city from plaintiff township that if such township territory so supplied with water should become annexed to first-mentioned city during the life of the contract that all water mains would become the property of such city *held*, immaterial in suit by township against defendant city to restrain latter from interfering with water system in territory which had been annexed to defendant over 10 years before contract between plaintiff and other city was entered into.

3. SAME—TOWNSHIP WATER SUPPLY SYSTEM—INJUNCTION.

   A township's suit to enjoin defendant city from interfering with township water supply system, part of which lay within territory annexed to defendant from plaintiff, must be based upon all the material facts and circumstances applicable to the particular case.

4. SAME—NATURE OF RIGHT TO CONTROL WATER SYSTEM INSTALLED BY PROPERTY OWNERS—ANNEXATION.

   The right of control of a municipality to water mains laid in its streets, paid for with money obtained from property owners to whom the service was to be rendered, is not that of an absolute beneficial owner but that of a trustee, subject to the beneficial interest of the property owners to be served, and is a control which may pass with the territory to the annexing municipality if it can operate the system in the annexed territory without impairment of the rights of the property owners served, even though the municipality from which the territory is taken may be permissively allowed to continue the service.

5. SAME—WATER SYSTEM—BONDS—STATUTES.

   The right of a municipality to encumber its water system by issuing revenue bonds is derived purely from statute (Act No. 94, Pub. Acts 1933, as amended by Act No. 66, Pub. Acts 1935).

6. SAME—WATER MAINS—ANNEXATION—ADJUSTMENT OF PROPERTY RIGHTS.

   The right of a municipality in water mains, installed at the expense of the property owners to be served, is not such a property right as should be considered in adjusting, under the applicable statutes, property rights of the respective municipalities incident to annexations (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931).

7. SAME—ANNEXATION—ADJUSTMENT OF PERSONAL PROPERTY RIGHTS—STATUTES.

   A statute requiring the adjustment of rights of respective municipalities in personal property involved in annexation of territory is not applicable where annexation took place before the enactment of the statute (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931).

8. SAME—ANNEXATION—WATER MAINS—PUBLIC WELFARE.

   As a matter of public policy, in the absence of extraordinary circumstances requiring otherwise, the annexation of territory carries with it the right of the annexing municipality to take over water mains in the annexed territory that were installed at the expense of the property owners served thereby, in order that such municipality might protect the public health, welfare and safety of the inhabitants of the annexed territory where the annexing municipality can continue such service to the property owners beneficially interested therein.

9. SAME—ANNEXATION—CONTINUANCE OF WATER SERVICE—RIGHT TO CONTROL MAINS.

If an annexing municipality is unable to continue the service to property owners beneficially interested in the control and operation of water mains, the annexing municipality may not gain the right to their control and operation upon annexation.

10. SAME—ANNEXATION—UNIFIED WATER SYSTEM—BONDS.

In case territory annexed by a municipality is part of that served by a complete or unified water system, the value of which would be destroyed or greatly impaired by division, the annexing municipality would not necessarily gain control of the water mains by reason of the annexation and previously-issued bonds upon such a system would follow the territory severed from the jurisdiction of the borrower (Act No. 94, § 32, Pub. Acts 1933, as amended by Act No. 210, Pub. Acts 1941).

11. SAME—ANNEXATION—WATER MAINS—PUMPING STATION—GENERAL TAXATION.

The control of water mains serving territory severed from a municipality, which mains had been paid for by property owners serviced thereby but which municipality had an operating plant or pumping station erected from proceeds of general taxation or assessments levied over the municipality at large and whose value would be destroyed or greatly impaired by a division, would not necessarily pass to the annexing municipality.

12. INJUNCTION — MUNICIPAL CORPORATIONS — ANNEXATION — INTERFERENCE WITH WATER SYSTEM.

Impairments to operation of water system in balance of plaintiff township because of alteration by city of system within territory annexed to city from township *held*, insufficient to justify granting injunction against interference with city's operation of water mains within the annexed area, the interference not affecting the supply of water to the system from a source outside of the township.

13. MUNICIPAL CORPORATIONS—ANNEXATION—WATER MAINS—ESTOPPEL.

City to which territory was annexed from adjoining township was not estopped from interfering with the use of water mains in the annexed territory and which constituted a part of the township water supply service by reason of the fact that city failed to assert ownership for a period of approximately 14 years nor because of letter written by defendant's

city manager, at most only an administrative officer, to a second city supplying the water, where neither matter has worked to the disadvantage of the township.

14. ESTOPPEL—DISADVANTAGE TO ONE RAISING DEFENSE.
A fundamental requisite of estoppel is that conduct, whether action or inaction, on the part of the one against whom the estoppel is asserted has worked to the disadvantage of the party who urges this defense.

15. APPEAL AND ERROR—REMAND ON REVERSAL—DISPOSITION OF SEQUESTERED REVENUES.
In township's suit to enjoin city from interfering with water mains located within territory annexed to city from township where revenues had been collected during pendency of suit, upon reversal of decree for plaintiff, suit is remanded to jurisdiction of circuit court in chancery to make further orders relative to disposition of sequestered revenues.

Appeal from Oakland; Holland (H. Russel), J. Submitted June 7, 1944. (Docket No. 18, Calendar No. 42,735.) Decided September 11, 1944.

Bill by Township of Royal Oak against City of Ferndale to restrain interference with water supply system in territory annexed to defendant. Decree for plaintiff. Defendant appeals. Reversed and bill dismissed. Remanded for disposition of revenues collected.

Glenn C. Gillespie, Carl A. Braun and *Franklin E. Morris,* for plaintiff.

Orph C. Holmes (*Claude H. Stevens,* of counsel), for defendant.

Miller, Canfield, Paddock & Stone, amici curiae.

NORTH, C. J. Plaintiff township of Royal Oak (hereinafter referred to as the township) and defendant city of Ferndale (hereinafter referred to as

the city) are located in Oakland county. The defendant is a home rule city which adopted its charter in April, 1927. By elections held in February and June, 1928, the city annexed territory adjacent to its easterly boundary which prior to annexation was a part of plaintiff township. This annexed territory extends about two miles north and south, and in the southerly half its width east and west is three blocks of platted territory theretofore laid out in the township, and the northerly half of the annexed territory is about two-thirds as wide. With the exception of limited portions all of this territory was platted prior to its annexation. And prior to annexation suitable installations had been made for supplying water to a substantial portion of this annexed territory. The cost of installation, so far as it is involved in this suit, had been met by the owners of the property which it served, either by the lot owners (or the subdividers) paying $75 per lot or by special assessments which have been fully paid. Prior to the 1928 annexations and for approximately 11 years thereafter the water supply was furnished in the township (including the annexed territory) by the city of Detroit which adjoins the township on the south, and the charges for such service were collected from users by the city of Detroit. In 1938 the township by proper ordinance procedure created and thereafter began to operate its own water system, continuing however to take the supply from Detroit under a contract executed in April, 1939. Upon taking over the water system the township proceeded to make additions thereto. In this connection it first issued $160,000 of water-supply-system revenue bonds; and later issued an additional $40,000 of such bonds. In October, 1939, both of these bond issues were refunded by an issue of $200,000 water-supply-system revenue refunding

bonds. However, none of the proceeds of these bond issues were expended in extension or improvement of the water system within the annexed territory. Just prior to the time this litigation arose, the system as operated by the township had approximately 6,200 users. Of the total 95 miles of mains operated by the township, approximately 5 per cent. is in the annexed territory. Since the annexation no extensions or improvements, except ordinary repairs, have been made by the township to the water system in the annexed territory; but after the township established its water system it read the meters and collected the water charges until July, 1942. Since the annexation, the city has made some repairs to the water system in the annexed territory and has installed 25 hydrants. More recently it has constructed additional water mains through which connection with the city's supply system (which also comes from Detroit) has been made with a portion of the water pipes in the annexed territory. By so doing the city enabled itself to adequately furnish through township pipes water for domestic use and also for certain industrial plants located within the annexed territory whose use of water was much larger than that of ordinary domestic users. After this condition as to the city's water system came about, a controversy arose between the city and the township as to which had the right to and which should furnish the water service to the consumers in a limited portion of the annexed territory which could thus be reached and served by either the township or the city; and of course the revenue to be derived therefrom was involved.

The township insisted that it had a vested right in the established water system of the township notwithstanding the service was being rendered in and

the revenue collected in the territory which years before had been annexed to the city. On the other hand the city, asserting that at times the township water supply had been inadequate to meet the needs of industrial plants located in the disputed territory or to furnish adequate fire protection, contended that upon annexation the right to control the streets in which the water mains were laid became vested in the city, and that therefore it had the right to take over the operation of the water system and the revenue incident thereto. With this situation existing, the city, in July, 1942, closed the gates or valves in certain township supply mains through which the township water system had been supplying the portion of the system in the annexed territory which is in dispute in this suit. Thereupon the city began supplying water in the disputed area. The township protested such action on the part of the city as being an invasion of its rights and shortly filed the bill of complaint herein. The relief sought is that the city be enjoined from interfering in any manner with the township in operating and maintaining its water supply system and from interfering with the township in collecting accounts for water furnished in the annexed territory as the township had done in prior years. The suit was heard on the merits and a decree entered granting plaintiff the relief sought. Defendant has appealed.

For reasons hereinafter noted, we are of the opinion that the instant case can be and should be adjudicated on the basis of the rights of plaintiff township and defendant city resulting from the annexation of township territory, and without present consideration or determination of rights of other parties which under other circumstances would necessitate their consideration and which might be controlling of decision. For example considerable

space in the briefs is devoted to the rights of bondholders, the contention being made that a portion of the township water system cannot be segregated without unlawfully impairing the rights of bondholders. But the interests of bondholders, except possibly indirectly through the township, are not represented in this suit. They are not parties and final adjudication of their rights is not possible in this suit; notwithstanding an *amicus curiae* brief has been filed concerning rights of bondholders. Moreover, none of the bonds were issued until years after annexation; and the ordinance creating the water system on which the revenue bonds were issued contains the following: "and it is hereby determined to take over, operate and maintain the water supply system now existing within the *unincorporated portion* of said township now operated by the board of water commissioners of the city of Detroit and to replace and extend certain existing water mains and appurtenances in said system, in accordance with the maps, plans and specifications caused to be prepared." Obviously the expression limiting the system to that within the "unincorporated portion" of the township was wholly without meaning unless it excluded the portion of the water system within territory which had been annexed to the city years before. Further, the undisputed record discloses that the appraised value of the township water system is in excess of $750,000, and that the system in 8 months in 1942 produced, after deduction of operating cost, an income sufficient to pay bond retirement of nearly $11,000 and a further net income before depreciation of $28,701.25. Hence it appears that the segregation of only 5 per cent. of the township's water system would not imperil the rights of bondholders.

Nor are we persuaded that the outcome of the

instant case is materially affected by the existence of the 1939 contract between the plaintiff township and Detroit under which water is supplied for the township system, notwithstanding the contract among other things provided that in event township territory supplied with water should be annexed to Detroit during the life of the contract, all water mains, et cetera, supplied with water in such annexed territory would become the property of Detroit.

Other features of this record might be noted which clearly indicate that litigation of this character may arise under such a variety of circumstances that no hard and fast rule can be laid down which will furnish a guide for decision in each case. Instead each controversy of this character must be adjudicated in the light of all the material facts and the law applicable to the particular case. But as above noted we failed to find in the instant record facts or circumstances which prevent decision being based upon the rights and duties of the plaintiff township and defendant city respectively.

It is important to consider the character of ownership or of right of control that the township had in the water mains in suit at the time of annexation, and the character of such ownership or right of control, if any, that passed to the defendant city as the result of the annexation. We have already stated that the portion of the township water system in the annexed area was paid for with money obtained from property owners to whom the service was to be rendered. Under such circumstances we do not think it can be said with accuracy that the water system when installed became the property of the township in the sense that it was the absolute beneficial owner of the same. Nor would such absolute ownership pass to another municipality

incident to subsequent annexation of the territory served. In so stating we are mindful of the right of a municipality to encumber its water system by issuing revenue bonds, but such right is derived purely from statutory provisions. Act No. 94, Pub. Acts 1933, as amended by Act No. 66, Pub. Acts 1935 (Comp. Laws Supp. 1935, § 2486–22 *et seq.*, Stat. Ann. § 5.2731 *et seq.*). The apparent result is that the right of the municipality in whose streets water mains are laid at the expense of property owners to be served is that of a trustee which possesses and controls the system thus established subject to the beneficial interest of the property owners to be served. And in the absence of rights and circumstances other than those appearing in the instant record, if the area in which such a water system is installed passes by annexation to another municipality so circumstanced that it can operate the water system in the annexed territory without impairment of the rights of the property owners served, then the right and the duty to render such service passes to the annexing municipality; although, as has occurred in the instant case, the municipality from which the territory is taken may be permissively allowed to continue the service.

Counsel are quite in accord as to the character of a municipality's property right under the circumstances of the instant case being of the limited nature above stated. In appellee's brief it is stated as follows:

"It seems too clear for argument, that the township does not own the water supply system, in the sense that it is township property to be used or disposed of as the township authorities see fit. The title of the township is in the nature of that of a trustee, holding title to the property and assets of the water supply system in trust for water users

and the inhabitants of the township, and, it operates the same in more or less of a private capacity under the authority of the statute, for the use and benefit of its citizens whose money was used for its purchase."

Subsequent to the annexations there was an adjustment of property rights between the city and the township, but no claim of that character was presented relative to the existing water system in the annexed territory. Nor do we think that the rights of a municipality in a water system mstalled at the expense of the property owners to be served is such a property right, either real or personal, as should be considered in adjusting under the applicable statutes property rights of the respective municipalities incident to annexations. Counsel for the respective parties agree as to this phase of the law. See *County of Norfolk* v. *City of Portsmoutn,* 124 Va. 639, 659 (98 S. E. 755, 762). In passing it may be noted that the Michigan statute requiring adjustment of the rights of respective municipalities in *personal* property is not applicable in any event to the instant case because it was enacted subsequent to the annexation. *City of Detroit* v. *Township of Redford,* 253 Mich. 453. For statutory provisions just referred to, see 1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 2250, Stat. Ann. § 5.2093). We also note that our decision in *Mitton* v. *Jewell,* 279 Mich. 9, is not in point in the instant case. The cited decision is urged as authority by the township in support of its contention that the water mains installed by subdividers in a public street are personal property, the ownership or control of which the township asserts did not pass to the city incident to annexation. But as we have indicated the instant controversy is between two municipalities, neither

of which under the circumstances of the instant case has the absolute beneficial ownership of the water mains; whereas in the cited case the controversy was between private litigants, one of whom was found to be the actual owner of the water main involved.

There are numerous reasons for holding that, in the absence of extraordinary circumstances necessitating a contrary holding, annexation carries with it the right of the annexing municipality to take over water service of the character here involved. For example, after annexation in the instant case it obviously became the duty of defendant city to protect the public health, welfare and safety of the inhabitants of the annexed territory. This at once placed the annexing municipality in the field of sanitation, including water supply and sewage disposal as well as responsibility for the streets in which such facilities are located. It follows as a matter of public policy that in the absence of other circumstances or rights not present in the instant case, the right of control of water mains laid in the streets of the annexed territory passed to the annexing municipality.

Notwithstanding, as noted above, the control and operation of water mains installed under the circumstances of this case is a matter of the execution of a trust imposed upon and accepted by the municipality, a different result than that above indicated might necessarily follow if the annexing municipality was unable to continue the service to the property owners who are beneficially interested therein. The same might be true if prior to annexation bondholders had become vested with rights in a complete or unified water system which rights would be impaired by severance of a part of the system. However, in such case there is an appli-

cable statutory provision which in part reads: "The severance of any lands from the jurisdiction of the borrower subsequent to the issuance of bonds under this act, shall be subject to the obligations created by the issuance of such bonds." Act No. 94, § 32, Pub. Acts 1933, as amended by Act No. 210, Pub. Acts 1941 (Comp. Laws Supp. 1943, § 2486–53, Stat. Ann. 1943 Cum. Supp. § 5.2762). Likewise, decision in a case of this character might be controlled by the fact that a municipality from the proceeds of general taxation or assessments levied over the municipality at large had financed the construction of an operating plant, such as a pumping station, the value of which would be destroyed or greatly impaired by a division of the water system.

We are mindful plaintiff herein makes the contention that the township had established a so-called "unified" system and that the alteration in the water system in the instant case will impair to some extent the remaining portion of the township's system and to some extent increase the relative cost of operation. In this connection the township points out that the change which the city would make will create a limited number of "dead ends" in township mains, will impair circulation of water and reduce pressure. But it is important to note that the change in control and operation which the city seeks to bring about in no way interferes with the water supply to the remaining portion of the township from the Detroit water system. Under the facts of this case, we are of the opinion that the matters urged by plaintiff as impairments of the township's water system and its reasonable operation are rather inconsequential and not sufficient to justify granting the relief sought by plaintiff.

We are not in accord with the township's contention that it should be granted the injunctive relief sought on the ground that the defendant city is

estopped from taking over the water system in the annexed territory. The township urges estoppel, first, on the ground that following the 1928 annexations "the city of Ferndale made no claim of ownership of any part of the township water supply system" for a period of approximately 14 years during which the township was permitted to operate the portion of its water system located within the annexed area. And, secondly, the township urges estoppel by reason of the following. In November, 1938, when the township was contemplating making a new contract with the water department of Detroit, which contract was consummated in April, 1939, the city manager of Ferndale wrote to the Detroit board of water commissioners the following letter:

"Gentlemen: I understand that Royal Oak township is contemplating entering into a contract with your board whereby you will wholesale water to the township, and it will distribute the same through its own mains. Their distribution system will take in part of the east side of Ferndale. Due to our present lay-out of mains, it is impractical for us to take these small portions of our city into our system. It is agreeable to us that Royal Oak township supply those services in our section of the city that is now being served direct by the city of Detroit, provided rates are not increased."

Neither of the foregoing circumstances is of a character to justify holding that the defendant city is estopped from now taking over control of the portion of the water system in dispute. Under the facts disclosed in the instant case, nothing to the disadvantage of the township has resulted from its having been permitted to operate the water system previously constructed in the annexed territory and to collect the resulting revenues during the latter portion of the period intervening between the 1928 annexations and the time when the city decided to

take over a part of the system. Nor do we find anything in the above-quoted communication by the Ferndale city manager to the Detroit board of water commissioners (not addressed to the plaintiff township) which, without any present complaint on the part of the city of Detroit, would work an estoppel in favor of plaintiff. While not necessary to decision, it may well be doubted whether the communication from the Ferndale city manager, who under the Ferndale city charter was at most only an administrative officer, was binding upon or controlling of the rights of any of the parties concerned. *Droste* v. *City of Highland Park,* 258 Mich. 1. Concerning the above-noted letter the Ferndale city manager testified: "At that time it was satisfactory to the city of Ferndale for the township of Royal Oak to continue temporarily the operation of the system."

"A fundamental requisite of estoppel is that conduct, whether action or inaction, on the part of the one against whom the estoppel is asserted has worked to the disadvantage of the party who urges this defense." *Kaminski* v. *Wayne County Board of Auditors,* 287 Mich. 62, 66. See also, *Burnham* v. *Kelley,* 299 Mich. 452.

From the foregoing it follows that the decree entered in the circuit court must be reversed and one entered in this Court dismissing plaintiff's bill of complaint; continuing, however, jurisdiction in the circuit court in chancery to make such further orders as shall be deemed necessary relative to disposition of the revenues collected for water service pending this suit, which revenues were sequestered by order of the trial court pending litigation. Defendant will have costs of both courts.

STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

In re THAYER'S ESTATE.
PATTERSON *v.* STEVENS.

1. WILLS—MENTAL CAPACITY.
   Any person has the right to make a will and so long as such person has the mental capacity to understand the business in which he is engaged, to know the extent and value of his property, to know the natural objects of his bounty, and to keep these facts in mind long enough to dictate his will without prompting from others, such a person has capacity to make a valid will.

2. SAME—MENTAL CAPACITY—PHYSICAL AND MENTAL DISEASE.
   A testator may be suffering physical ills and some degree of mental disease and still execute a valid will, unless the provisions thereof are affected by the indisposition.

3. SAME—ECCENTRICITY OF BEHAVIOR.
   Mere eccentricity of behavior on the part of the testator will not cause an inference strong enough to invalidate a will if he is otherwise competent.

4. SAME—MENTAL CAPACITY—EVIDENCE.
   In will contest, while there was some testimony which might have created an inference of mental incapacity or undue influence, such testimony was controverted by positive testimony as to testatrix' capability of handling her own affairs, including testamentary disposition of property.

5. SAME—UNDUE INFLUENCE—ACTS OF KINDNESS—EVIDENCE.
   Undue influence of a testator may not be inferred from acts of kindness, but must be proved.

6. SAME—UNDUE INFLUENCE—OPPORTUNITY—EVIDENCE.
   Proof of opportunity to exercise undue influence upon a testator is not alone sufficient.

7. SAME—MENTAL CAPACITY—UNDUE INFLUENCE—EVIDENCE.
   Evidence in will contest *held*, insufficient to justify setting aside of will on the ground of mental incompetency or undue influence.

8. SAME—MENTAL CAPACITY—PRESUMPTIONS—BURDEN OF PROOF.

While a proponent cannot rest on the presumption of capacity when competent proof to the contrary is produced, yet the burden of proof at all times rests on the contestant to show that the testator did not have mental capacity to make the will.

Appeal from Wayne; Miller (Guy A.), J. Submitted July 8, 1944. (Docket No. 23, Calendar No. 42,402.) Decided September 11, 1944.

In the matter of the estate of Margaret Thayer, deceased. Harold Fred Patterson and others presented the last will of Margaret Thayer for probate. Helen R. Stevens and Mary E. Dohany objected thereto. Contest certified to circuit court. Judgment allowing will. Contestants appeal. Affirmed.

Victor H. Hampton, for proponent Patterson.

H. William Butler, for proponents Stevens.

Wallace C. Hall, for contestants.

NORTH, C. J. Contestants-appellants herein seek to set aside a will executed by one Mrs. Margaret Thayer on October 8, 1942, on the grounds of mental incompetency and of undue influence. If this is done, then seemingly a previous will executed on May 12, 1942, in which the contestants largely benefit, would be operative. The contestants, Mrs. Mary E. Dohany and Mrs. Helen R. Stevens, are two surviving sisters of Mrs. Thayer. The proponents are Arthur and Frieda Stevens, beneficiaries under the will, and Harold F. Patterson to whom the bulk of the estate was left. The contest was certified by the probate court to the circuit court where it was heard

without a jury. Contestants have appealed from a judgment sustaining the will.

Mrs. Thayer was an elderly lady and the possessor of an estate of approximately $30,000. After the death of her husband on March 2, 1942, Mrs. Thayer went to live with Mrs. Dohany, and while there paid the mortgage on the house and also purchased the equity in the property from Mrs. Dohany. A short time later Mrs. Thayer left the Dohany home and went to live with the other sister, Mrs. Helen Stevens. She continued to live with Mrs. Stevens until September 19, 1942, when she left with Mrs. Frieda Stevens, one of the proponents, who took her to a hotel where she lived until her death during the night of October 13, 1942.

The record is quite voluminous. It contains the testimony of 9 witnesses for the proponents and 19 witnesses for the contestants. A detailed review of all the testimony offered would serve no worthwhile purpose. There is ample testimony both from doctors and laymen to show that Mrs. Thayer had been in very poor health for a number of years, her physical well-being was rapidly deteriorating as a result of various ailments, she was mentally confused at times, she was exacting and impatient of contradiction, frequently lost the thread of conversation when being talked to and otherwise showed signs of advanced age.

For some years Mrs. Thayer and her husband had retained a Mr. Condon as their attorney in various affairs. About three weeks before her death, Mrs. Thayer discussed with Mr. Condon the proposition of selling the Dohany house to Arthur and Frieda Stevens at a modest price and with a small down payment. Attorney Condon advised against this because the price and down payment were, in his opinion, too low. However Mrs. Thayer persisted, and

the Stevens took her on October 7, 1942, to their attorney, Wilbur M. Brucker, a former governor of this State and a reputable member of his profession of long standing. Mr. Brucker testified that at the time of drawing up the land contract, Mrs. Thayer discussed in detail the terms of the contract and made decisions for herself concerning the contract terms.

Included in the exhibits is a letter purporting to be from Mrs. Thayer to proponent Harold F. Patterson, a friend living in Marion, Ohio. This letter requested him to come to Detroit in order to help her straighten out her affairs. Mr. Patterson came to Detroit and on October 8, 1942, arranged a meeting, for the purpose of drawing up a new will, between Mrs. Thayer and Mr. Paul Voorheis, a reputable attorney of 40 years' practice and formerly an attorney general of this State. Mr. Voorheis testified that a conference took place in Mrs. Thayer's room in her hotel and that during the conference Mr. Patterson was absent from the room. Further, he testified that during the conference Mrs. Thayer discussed her properties and her wishes for their disposal, referred from time to time to notes previously made, and otherwise gave Mr. Voorheis complete instructions for the preparation of the new will. The will in accord with the instructions was prepared the same day and about 4 o'clock that afternoon was read to Mrs. Thayer and executed by her, this being done in the absence of Mr. Patterson or any other beneficiary. While the will named some 13 beneficiaries, it contains no involved or complex provisions. The disposition of each item of property is made in simple, clear and direct terms, easy of understanding. It contains a bequest of $500 to each of the contestants.

One of the well-established rules of law in this

State is that any person has the right to make a will; and that so long as the person has the mental capacity to understand the business in which he is engaged, to know the extent and value of his property, to know the natural objects of his bounty and to keep these facts in mind long enough to dictate his will without prompting from others, such a person has capacity to make a valid will.

"A testator may be suffering physical ills and some degree of mental disease and still execute a valid will, unless the provisions thereof are affected thereby." *In re Ferguson's Estate,* 239 Mich. 616, 627.

Mere eccentricity of behavior on the part of the testator will not cause an inference strong enough to invalidate a will providing the above qualifying conditions are present. See *In re Johnson's Estate,* 308 Mich. 366, and cases cited therein. In view of the comprehensive discussion of the rule as to burden of proof in a will contest, and the general rules which determine the testator's capacity contained in *Re Johnson's Estate, supra,* we need not here further discuss the subject. While in the present case there is testimony which might create an inference of mental incapacity or undue influence, yet such testimony is controverted by positive testimony that Mrs. Thayer was capable of determining her own affairs, including a testamentary disposition of her property. And undue influence may not be inferred from acts of kindness. It must be proved. In *Re Lacroix's Estate,* 265 Mich. 59, we said, "proof of opportunity to exercise undue influence is not alone sufficient." On this record we cannot find that the judgment of the trial court was against the preponderance of the evidence. Instead we are in accord with the finding of the circuit judge that the will of

Margaret Thayer, under the evidence of this case, should not be set aside on the ground of mental incompetency or undue influence.

The contestants claim that the evidence of Mrs. Thayer's mental instability which they presented overcame the presumption of her competency to make a will and for that reason the burden of proof shifted to the proponents to prove competency. With this we cannot agree. While a proponent cannot rest on the presumption of capacity when competent proof to the contrary is produced, yet the burden of proof at all times rests on the contestant to show that the testator did not have mental capacity to make the will. See *In re Rowling's Estate*, 291 Mich. 218.

We have examined other questions presented by the contestants but find in them nothing which would alter decision herein. The judgment in the circuit court is affirmed, with costs, and the case remanded for further proceedings.

STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

DRINSKI *v.* DRINSKI.

1. DEEDS—MENTAL CAPACITY—EVIDENCE—CARE AND SUPPORT.
   In suit to set aside deeds and other instruments conveying property of mother to defendant daughter and latter's agreement to care for, maintain, and support her mother and make a payment of $500 after the mother's death to defendant's brother, holding of the circuit judge that at the time of the transfer the mother was mentally competent was fully supported by the preponderance of the proof.

2. SAME—CARE AND SUPPORT—EVIDENCE.
   Finding of trial judge that contention that defendant daughter had failed to perform her contract to support her mother for which the daughter had received deeds and other instruments from the mother conveying property valued at approximately $15,000 had not been proved by parties seeking to set aside the instruments by which the transaction was effected is sustained under record presented, especially where it is shown that upon termination of the daughter's home relation with her mother that latter struck the daughter and later stated she was going to kill the daughter and mother herself sought to set aside instruments solely on ground of fraud.

3. EQUITY—REHEARING—NEWLY-DISCOVERED EVIDENCE—COUNTER AFFIDAVITS.
   Two applications for rehearing of suit to set aside instruments whereby mother transferred property valued at approximately $15,000 to her daughter in consideration of latter's promise to care for, maintain and support the mother and pay $500 to brother after mother's death were properly denied in view of the fact that the alleged newly-discovered evidence was merely cumulative and the counter affidavits filed materially weakened the affidavits in support of the motions.

4. SAME—DECREE—RELIEF TO DEFENDANT.
   Provisions in decree for defendant in suit to set aside transfers of real and personal property to defendant daughter that the

conveyances were valid, and that the daughter had performed her agreement to support the mother, thereby practically quieting title in such defendant although she had prayed for no affirmative relief in her answer, were germane to issues presented in plaintiffs' amended bill and not error of which plaintiffs might complain.

Appeal from Cass; Warner (Glenn E.), J. Submitted June 8, 1944. (Docket No. 31, Calendar No. 42,494.) Decided September 11, 1944. Rehearing denied December 1, 1944.

Bill by Mary Dzieciniak against Joan Drinski and another to set aside a conveyance for fraud. Amended bill of complaint by Marjorie Drinski and John B. Hadden, administrator of estate of Mary Dzieciniak, deceased, to set aside the conveyance because of mental incompetency and failure of consideration. Decree for defendants. Plaintiffs appeal. Affirmed.

Asher L. Cornelius, for plaintiffs.

Burns & Hadsell, for defendant Joan Drinski.

NORTH, C. J. The original bill of complaint in this cause was filed April 23, 1942, by Mary Dzieciniak. Two of her three adult children, Joan Drinski and Ulick Drinski, were made defendants. The relief sought was cancellation of certain deeds and of the transfer of all of plaintiff's personal property, including money in the bank, to the daughter Joan Drinski, with the provision that within six years after plaintiff's death Joan would pay to plaintiff's son Ulick $500. Simultaneously with the property transfer a contract was entered into between Joan and her mother whereby the former agreed to "care for, maintain and support" her mother as long as she should live, pay all of her expenses both in ill-

ness and in health, pay the expenses of burial and the $500 above noted to Ulick. The ground upon which relief was sought was that plaintiff, a Polish woman whose knowledge of the English language was very limited, was fraudulently misled by her daughter to believe that the transfer of plaintiff's property was only testamentary in character—not an absolute transfer of title to Joan. The daughter answered denying the material allegations of the bill; but before the case was brought on for hearing the plaintiff died on July 8, 1942. On December 4, 1942, an amended bill of complaint was filed by decedent's other daughter, Marjorie Drinski, and John B. Hadden, administrator of the estate of Mary Dzieciniak, deceased. In this amended bill of complaint Joan Drinski and Ulick Drinski were made defendants. The same relief was asked as in the original bill of complaint, but primarily on the ground that at the time the mother transferred her property to Joan the former was mentally incompetent. This allegation is in the following words:

"That on said 23d day of December, A. D., 1941 (the date of the transfers to Joan Drinski), the said Mary Dzieciniak was mentally sick and disordered, and was mentally incapable of understanding or comprehending the nature of her acts, and was incapable of making a contract, or executing a deed, bill of sale or similar instrument, and was in fact *non compos mentis.*"

Plaintiffs also alleged that Joan failed to perform her contract to care for her mother. The case was brought to issue by the answer of Joan and the default for nonappearance of Ulick. After full hearing the circuit judge found as follows:

"The bill of complaint is dismissed because plaintiffs have not proved that Mary Dzieciniak was

mentally incompetent when she executed deed (deeds), bill of sale, and agreement, or that defendant Joan Drinski failed to carry out the terms of the contract for support."

From the decree dismissing the bill of complaint plaintiffs have appealed. We deem a complete and detailed recital of all the facts disclosed by the testimony unnecessary to decision herein, but we note the following.

At the time of the transfer of her property to the daughter Joan, Mary Dzieciniak was 55 years of age. She was a Polish woman with very limited knowledge of English, which she could neither read nor write. She lived in Cass county on a 50-acre farm which she operated, having been divorced from her former husband who was also living on a farm in the same vicinity. She was a frugal, hardworking woman, quite capable in business matters, and had become possessed of not only the farm and the usual personal property in connection therewith, but she also was the owner of a six-family flat in Gary, Indiana, and the possessor of bank deposits. While the testimony is not very definite, it is stated that the total value of all of her property was approximately $15,000. It was this property that the mother transferred to her daughter Joan on December 23, 1941.

At the time of the transfer the unmarried daughter, Joan, then 31 years of age, was living with her mother on the farm. Neither the son Ulick, who was 34 years of age, nor the other unmarried adult daughter Marjorie, resided with the mother. Joan had attended school until she finished the 7th or 8th grade, but when about 17 years of age she began working at Niles. For a time she drove back and forth with neighbors to her employment, but finally

stayed at Niles for about 5 years. Then in 1939 she returned to the farm and continued to reside there with her mother until some time after the conveyance of the property to her.

The circumstances immediately surrounding the transfer of the mother's property to Joan were as follows. On the date above noted, Mrs. Dzieciniak, in company with a neighbor, Frank Majieski, the daughter Joan and Walter Putek who described himself as Joan's boy friend, went to an attorney in Cassopolis who as scrivener prepared the instruments involved in this litigation. The attorney, who did not understand Polish, seems to have obtained his information as to what Mrs. Dzieciniak desired, at least in part, from those who accompanied her. However the attorney did testify that:

"I went further than I otherwise would, probably, in attempting to be sure that Mrs. Dzieciniak knew exactly what she was signing. Of course I don't remember what I said but I did tell her in effect this: That this was—that these were deeds and that she was disposing of her property—giving it away—so she would not have it any more. * * * She said that's what she wanted to do—give it to Joan. * * * These documents were interpreted by Mr. Majieski. I can't remember anything about what was said about her daughter Marjorie. I would say at the time, on the 23d day of December, 1941, that she was and had mental competency to make the instruments in question."

After the instruments of transfer had been completed, Mrs. Dzieciniak went to the probate court and obtained possession of a will which she had left there with the seeming purpose of destroying it.

Joan and her mother continued living at the farm home until about April 19 or 20, 1942; the exact day

is not definitely fixed. There is some testimony that notwithstanding the transfer of all her property to Joan, the mother transacted certain items of business in the same manner as though she were still owner of the property. About the date last above noted, a quarrel, and according to some testimony a physical encounter, occurred between the mother and Joan. This resulted in Joan leaving home and having practically all of the personal property removed from the farm, leaving only a very scanty amount of household furnishings and food for the mother. The latter shortly went to reside for a few days in the home of her former husband, but thereafter she resided with her daughter Marjorie in South Bend, Indiana, until about June 15, 1942. At this time the mother became violently insane. Thereafter until her death July 8, 1942, she was an institutional inmate and markedly insane.

The mother filed the original bill of complaint above noted promptly following the trouble between her and Joan. The record discloses that formerly there had been an unfriendly relation between Marjorie and her mother, and that prior to 1941 the mother instituted litigation against Marjorie to cancel a deed, and was "very angry" with Marjorie. There is also testimony that Mrs. Dzieciniak had said that her son Ulick had some shortcomings in that he spent "all money anyway for drinking," and "if she gave him more that he would spend it." Ulick, called by plaintiffs under the statute for cross-examination,* was one of the five witnesses who testified in behalf of plaintiffs.

A careful review of this record discloses that the testimony of something like 18 witnesses who testi-

* See 3 Comp. Laws 1929, § 14220 (Stat. Ann. § 27.915).—REPORTER.

fied in behalf of Joan quite conclusively shows that at the time of the execution of the challenged instruments Mary Dzieciniak was thoroughly competent to transact business and that the disposition that she made of her property to her daughter Joan was one that she had been contemplating for some time. For example the witness Frank Majieski who was a neighbor of Mrs. Dzieciniak and who accompanied her to Cassopolis at the time of the transaction in question testified:

"Well I was taking her a lot of times and she was telling me that she is going to sign up everything for Joan because the other daughter no good—she cheated her too much. That is what she told me."

The holding of the circuit judge that at the time of the transfer of the property to Joan her mother was mentally competent is fully supported by the preponderance of the proof. As noted above, it was some considerable time after the challenged transaction that Mrs. Dzieciniak filed in her own right the original bill of complaint herein.

Appellants also urge that cancellation should have been decreed on the ground that Joan failed to perform her contract to support her mother. The trial judge's finding that plaintiffs did not prove this contention is sustained by the record.

At the trial plaintiffs' counsel invoked the statute (3 Comp. Laws 1929, § 14219 [Stat. Ann. § 27.914]) which prohibited Joan from testifying to matters equally within the knowledge of her deceased mother, and in consequence thereof there is scanty competent testimony of the exact facts and circumstances under which the home relations between Joan and her mother were terminated. Some of such facts and circumstances which do appear in the record have been hereinbefore noted. But in ad-

dition the following seems quite pertinent to this phase of the case. Promptly after the difficulty which resulted in the separation, Mrs. Dzieciniak filed a bill of complaint wherein, among other relief, she sought a temporary injunction against Joan "from in any manner interfering with the sole and exclusive possession of the plaintiff in said premises." This suit was still pending when Mrs. Dzieciniak died. It is particularly worthy of note that in this suit the mother made no complaint that Joan had breached the contract for the mother's support. No relief was sought on that ground. Instead the bill was based wholly upon the mother's claim that she had been fraudulently led by Joan to believe that the transaction which occurred in Cassopolis was only a testamentary disposition of the mother's property. There is testimony to the effect that while the mother lived with Joan the latter provided the former with proper maintenance and support. There is also testimony from which the inference may be justly drawn that at the time of the separation Joan was assaulted by her mother; also that following the separation Joan's mother said "she was going to kill her daughter (Joan)."

From our review of the record as a whole, we are convinced that we would not be justified in reversing the circuit judge's holding that plaintiffs are not entitled to cancellation on the ground that Joan without just cause failed to carry out her contract for the support and maintenance of her mother. The circuit judge saw and heard the respective witnesses, and this afforded an unusual advantage in the instant case because of the highly conflicting character of the testimony of various witnesses and the quite obvious unreliability of certain portions of the testimony.

Appellants made two applications for rehearing. Each of these was denied. In these holdings we find no error for the reasons that counter affidavits were filed which met and materially weakened the affidavits in support of the motions, that for the most part the newly-discovered evidence was merely cumulative, and some of it of such character that with reasonable diligence it could have been and should have been produced at the hearing of the cause.

Appellants also assert error in the decree of the trial court on the ground it was adjudged therein:

"That the conveyances made by Mary Dzieciniak to Joan on December 23, 1941, were valid conveyances, and that Joan had performed her part of the agreement thereby practically quieting defendant's (Joan's) title to the property when the defendant, Joan Drinski, had prayed for no affirmative relief in her answer."

The provisions in the decree to the above effect were germane to the issues presented by plaintiffs' amended bill of complaint, and their inclusion in the decree was not error of which plaintiffs may complain.

The decree entered in the circuit court is affirmed, with costs to defendant Joan Drinski.

STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

FIDELITY & CASUALTY COMPANY OF NEW YORK *v.* KING.

1. INSURANCE—KNOWLEDGE OF GENERAL AGENTS.
   An insurance corporation is bound by the knowledge of its agents who are empowered to represent it generally in the issuance of its policies.

2. SAME—CANCELLATION OF PUBLIC LIABILITY POLICY—FALSE DECLARATIONS—KNOWLEDGE OF GENERAL AGENT.
   In suit by insurer under a public liability insurance policy to cancel the policy because it contained a false declaration that a similar policy had not been canceled by an insurance company within the last 12 months, so-called "special agent" whom local agent had requested to examine premises *held*, a general agent vested with such authority as made his knowledge of the circumstances under which other policy was canceled and of the rectification of the condition the knowledge of the company.

3. SAME—CANCELLATION OF POLICY—ESTOPPEL.
   Insurance company which issued a public liability policy on premises after cancellation of a like policy by another company and with knowledge of such cancellation is estopped from obtaining in a court of equity cancellation after an accrued liability under the policy.

4. SAME—IMPUTATION OF AGENT'S KNOWLEDGE TO PRINCIPAL.
   The general rule of insurance law is that the knowledge of, or notice to, an insurance agent as to a matter within the scope of his authority, and which is acquired while the agent is acting within the scope of his authority, is chargeable to the insurer.

5. SAME—KNOWLEDGE OF AGENT OF MATERIAL MISREPRESENTATION OR BREACH OF WARRANTY.
   An insurer will not be permitted to take advantage of a material misrepresentation or breach of warranty or condition or cause of forfeiture rendering an insurance policy unenforceable

at its inception where knowledge of insurance agent relates to such material misrepresentation or breach.

6. SAME—WAIVER OF CONDITIONS—AGENT—POLICY.
An insurer may be estopped or there may be waiver because of its agent's knowledge or acts, notwithstanding provisions in the policy as to the only manner in which conditions may be waived.

Appeal from Wayne; Friedman (William), J. Submitted June 9, 1944. (Docket No. 49, Calendar No. 42,770.) Decided September 11, 1944.

Bill by Fidelity & Casualty Company of New York against Joseph B. King to cancel a public liability insurance policy. Decree for defendant. Plaintiff appeals. Affirmed.

Leo J. Carrigan, for plaintiff.

William A. Rhodes, for defendant.

NORTH, C. J. This is a suit to cancel a public liability insurance policy issued by the plaintiff to the defendant and covering certain premises on Hastings street in Detroit. The reason urged for cancellation is a false statement or declaration in the policy as follows:

"9. The insured has not had any similar insurance canceled or declined by any insurance company within the last 12 months, except as follows: NO EXCEPTIONS."

The fact that the defendant had had similar insurance cancelled or declined within 12 months is not disputed. After hearing, a decree was entered dismissing the bill of complaint. Plaintiff has appealed.

Seymour J. Cohn was a duly licensed local agent for the plaintiff company. He was also agent for the New Amsterdam Casualty Company. Mr. Cohn, a witness for the defendant, testified that about two weeks prior to February 11, 1943, he learned that defendant was desirous of purchasing insurance on the Hastings street property, and in a preliminary discussion between defendant and Cohn the latter learned there had been a previous cancellation of insurance by the New Amsterdam Casualty Company. Cohn further testified he called the New Amsterdam Company, found out the reasons for the cancellation, learned that changes in the property previously recommended by the company had been made and requested the New Amsterdam Company to reinstate or rewrite the policy. The New Amsterdam Company said it would do so but only for the original agent (not Cohn). Cohn testified he then called the plaintiff company, explained the entire circumstances and requested a special agent of plaintiff company named Wood to inspect the property and also approve boiler insurance coverage thereon. This boiler insurance was later written but is not here involved.

The policy in suit was written February 19, 1943, as coverage from February 11, 1943. A few days after Cohn mailed the policy to defendant, he asked Cohn if an additional building at the rear of the Hastings street property was covered by the policy. Cohn said he called the plaintiff's Detroit office where the policy was written, found the additional building was not covered, and immediately he requested an indorsement extending the coverage to the additional building. That indorsement was issued as of February 25, 1943, and sent to the defendant. On cross-examination Cohn testified the policy

was actually written by plaintiff and that his only record was a copy called a "daily," and although he received his copy shortly after the policy was issued, the first time he examined it was just prior to March 17, 1943. His agency was terminated by plaintiff company April 21, 1943; and he testified such termination "was by reason of the controversy in this matter."

Defendant King's testimony regarding the purchase of the policy was similar to that of Cohn. In addition he testified that a man by the name of Mr. Wood who represented himself as being from the plaintiff company interviewed him, that Wood inquired as to whether the changes recommended by the New Amsterdam Company had been made and was informed that they had. The record contains no testimony challenging the truth of this latter statement. An accident within the insurance coverage occurred on the insured premises March 17, 1943. King reported the accident to Cohn. Later King received a letter from plaintiff dated April 12, 1943, purporting to cancel the policy. King testified he had never read his policy or the subsequently issued indorsement, although he said "I glanced it (the indorsement) through." Plaintiff sought to prove that defendant misrepresented a material fact in his oral application for the policy, and asserts that this misrepresentation constituted a fraud entitling plaintiff to cancellation. But defendant contends that no fraud was perpetrated because, while negotiations for the policy were pending, plaintiff through its agent Wood was apprised of the true facts; and although the recital first above quoted from the policy is admittedly untrue, plaintiff, in whose office that recital was written in the policy, by reason of its knowledge of the true facts waived its

right to relief and by its possession of full knowledge prior to the issuance of the policy is estopped from being decreed cancellation thereof.

It appears from the record that plaintiff maintained a general office in the city of Detroit through which its policies were issued. Being a corporation, plaintiff of necessity acts through its agents; and it is bound by the knowledge of such agents who are empowered to generally represent the corporation in the issuance of its policies. We think this record fairly discloses that Mr. Wood, notwithstanding he is referred to as a "special agent," was in truth a general representative of plaintiff company vested with such authority as makes knowledge possessed by Wood knowledge of the company. His initials appear at the foot of the policy issued in this case, and the record indicates that it was Wood who dictated this policy to the stenographer who prepared the same. Mr. Wood's initials also appear at the foot of the indorsement which was later issued. The witness Cohn in his testimony referred to Mr. Wood as the "inspector;" and according to undisputed testimony Wood acted in that capacity in the instant case prior to his having dictated and issued the policy. The undisputed testimony is to the effect that at the time Wood was making his inspection he was fully advised of the true facts material to this litigation. Thereafter, upon Cohn's application to plaintiff's Detroit office, the policy was issued and through Cohn delivered to plaintiff. Under such circumstances it must be held that plaintiff company is charged with the knowledge possessed by Wood, and having issued the policy with such knowledge plaintiff is estopped from obtaining in a court of equity cancellation after an accrued liability under the policy.

Notwithstanding Wood was present at the trial of this case, he did not take the stand as a witness. The circumstances from which it must be concluded Wood was a general agent of plaintiff company are not in dispute, and likewise the testimony as to Wood's knowledge is undisputed. The trial judge who saw and heard the witnesses believed their undisputed testimony and reached decision in accord therewith.

Plaintiff-appellant relies upon the clause in the policy which reads:

"Neither notice given to, nor the knowledge of, any agent or any other person, whether received or acquired before or after the date of this policy, shall be held to waive any of the agreements, provisions, or declarations of this policy, or to preclude the company from asserting any defense under said agreements, provisions, or declarations unless set forth in an indorsement added hereto and signed by one of the said officers."

Notwithstanding the quoted provision of the policy, plaintiff is not entitled to cancellation. A case strikingly similar in both its factual and legal aspects, particularly in that the policy included a clause of like effect to that above quoted, is reported in *Hawkeye Casualty Co.* v. *Holcomb,* 302 Mich. 591. We think our decision in that case, denying cancellation, is controlling of the instant case. We therein quoted with approval the following:

"The general rule of agency that the principal is chargeable with, and is bound by, the knowledge of or notice to his agent received while the agent is acting within the scope of his authority, and which is in reference to a matter over which his authority extends, is fully applicable to agents of insurance companies. The general rule of insurance law is that

the knowledge of, or notice to, an insurance agent as to a matter within the scope of his authority, and which is acquired while the agent is acting within the scope of his authority, is chargeable to the insurer. Where such knowledge of an insurance agent relates to a material misrepresentation or breach of warranty or condition which would otherwise render the policy unenforceable at its inception, the insurer issuing the policy will not be permitted to take advantage of such breach, or cause of forfeiture. (29 Am. Jur. p. 612, § 808). * * *

"Assurer may also be estopped or there may be a waiver by reason of its agent's knowledge or acts, notwithstanding provisions in the policy as to the only manner in which conditions may be waived by the agent. (3 Joyce on the Law of Insurance [2d Ed.], p. 3243, § 1973.)"

As authorities in the field of the instant case, see *Blake* v. *Farmers' Mutual Lightning Protected Fire Ins. Co. of Michigan,* 194 Mich. 589; *Wilds* v. *Fidelity & Deposit Co.,* 239 Mich. 396; and *Johnston* v. *Manhattan Fire & Marine Ins. Co.,* 294 Mich. 550.

The decree entered in the circuit court is affirmed. Costs of this Court to appellee.

STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

LIEBERT *v.* DERSE.

1. HABEAS CORPUS—MINOR CHILDREN—QUESTIONS REVIEWABLE.
   In reviewing habeas corpus proceedings involving the custody of a minor child, the Supreme Court examines the record to ascertain if the welfare and best interests of the child have been protected and the legal rights of the parties properly determined.

2. ADOPTION—RIGHTS OF PARENTS—STATUTES.
   The legal parent of an adopted child is entitled to all the rights of a parent under the probate code (Act No. 288, chap. 10, § 5, Pub. Acts 1939).

3. PARENT AND CHILD—SURVIVOR OF ADOPTING PARENTS—CUSTODY OF CHILD.
   In the absence of a showing that he is not a suitable person to have the custody of an adopted child, a widower, who with his wife had adopted a child, is, as her survivor, legally entitled to the child's custody under the probate code (Act No. 288, chap. 3, § 6, Pub. Acts 1939).

4. SAME—CUSTODY OF CHILD—BEST INTEREST OF CHILD.
   In determining who shall have custody of a minor child, the best interest of the child is of paramount importance and it is the judicial duty of a court to safeguard the child's welfare and care but the parent of the child may not be deprived of his custody except it be shown that the parent was an unsuitable person to have such custody (Act No. 288, chap. 3, § 6, Pub. Acts 1939).

5. SAME—CUSTODY OF ADOPTED CHILD—WISHES OF CHILD.
   The custody of a six-year-old boy who had been placed with the sister of plaintiff's first wife and her husband by the adopting father upon accidental death of his wife when child was about two years of age is awarded to plaintiff who has paid for child's keep and upon remarriage has established a suitable home and is not shown to be an unfit person to have

his custody, notwithstanding the child prefers to stay with foster-mother's sister, since the adopting father is legally entitled to the child's custody (Act No. 288, chap. 3, § 6, chap. 10, § 5, Pub. Acts 1939).

Appeal from Newaygo; Pugsley (Earl C.), J. Submitted June 20, 1944. (Calendar No. 42,736.) Decided September 11, 1944.

Petition by Gustave H. Liebert for writ of habeas corpus directed to Francis Derse and wife to determine right to custody of plaintiff's adopted minor child, Karl Francis Liebert. Petition dismissed. Petitioner appeals. Reversed and remanded for entry of order granting plaintiff's petition.

Allaben & Wiarda (*William J. Heyns,* of counsel), for plaintiff.

J. Donald Murphy, for defendants.

STARR, J. Upon plaintiff's petition filed February 5, 1944, the trial court issued writ of habeas corpus for the purpose of inquiring into defendants' alleged unlawful detention of plaintiff's legally-adopted six-year-old son, Karl Francis Liebert. Defendants answered denying plaintiff's right to the custody of said child. The matter was brought on for hearing, testimony was taken, and the trial court entered an order dismissing plaintiff's petition and granting defendants custody of the child. Having obtained leave, plaintiff appeals from such order. In reviewing habeas corpus proceedings involving the custody of a minor child, we examine the record to ascertain if the welfare and best interests of the child have been protected and the legal rights of the parties properly determined.

The boy, Karl Francis, was born June 14, 1937, and when about three months old was legally adopted by plaintiff and his former wife. The order confirming such adoption was entered in the probate court for Calhoun county September 21, 1937. Upon the accidental death of his wife in 1939, plaintiff placed the boy in defendants' care, but there was no agreement that they should have his custody permanently. Defendant Flossie Derse, a sister of plaintiff's deceased wife, testified in part:

"I realize Mr. Liebert (plaintiff) is the legal parent and guardian the same as a father. It wasn't our intention to keep him (Karl Francis) right from the first. * * *

"*Q.* * * * When did you decide that Karl should stay with you?

"*A.* When he showed a preference and objected to going."

It appears that at the same time plaintiff placed the boy Karl Francis in defendants' care, he also placed in their care his eight-year-old daughter by a previous marriage. He visited the children weekly and paid defendants $14 a week for their support and care. After his daughter returned to his home in June, 1943, he paid defendants $7 a week for the boy's care. In March, 1943, plaintiff remarried and established a home in Grand Rapids. He testified in part:

"My daughter * * * came to live with us on or about June 14th. At that time we had the intention of taking Karl but we were sort of talked into an idea of leaving Karl (with defendants) until school started. I wrote a letter asking that they have Karl ready to return with me on August 29 (1943), and when I went to get my boy I was refused him.

"I made full payment of the board up to August 29th. * * *

"I consider the boy to be my own child and plan to be a father to him in every respect. I feel that our family environment will be desirable for the child."

In his opinion the trial court said in part:

"There is a pleasant aspect to this case presented through the fact that I have observed no attempt on the part of the witnesses on either side to discolor or misrepresent the facts. * * *

"*On the part of the plaintiff it appears that he has a good home in Grand Rapids and there is nothing in the proof from which any unfavorable inference can be drawn against the plaintiff or his present wife. And the interest which he manifested at this time in the child which he adopted * * * is a commendable one.* * *

"It is quite possible that in time the child might react favorably to a change of custody. But as the matter stands at the present time, I do not feel that I would be justified in disturbing the wholesome and happy surroundings now existing.

"It is the order of this court that for the best interest of the child and *without any reflections upon the plaintiff, the petition should be denied.*"

The testimony indicates that plaintiff and his present wife are substantial and respectable people. He is 43 years old, is regularly employed, and says that he is able to provide for the boy adequately. He owns and maintains his home, equipped with modern conveniences and located near a city park. He showed his affection for and interest in the boy by visiting him regularly while he was in defendants' care and in paying for his support for several years. His wife said that they had redecorated a room in their home and made it into a boy's room for Karl.

The testimony likewise indicates that defendants are respectable people and that they gave plaintiff's

children good care. Defendant Francis Derse, who is 54 years old, has five grown children, all married. He was obliged to give up factory work because afflicted with arthritis. He and his wife, Flossie Derse, live in a four-room, unfinished house on a farm about a mile from White Cloud, where the boy Karl Francis attended school. Mrs. Derse said, "We do not have very many neighbors, but we have one colored family living across the road from us."

Defendants admit receiving payment from plaintiff for their support and care of both the children, and they base their refusal to surrender the boy on the ground that he prefers to remain with them. They make no showing whatever that plaintiff is not a proper and suitable person to have the boy's care and custody. Defendant Francis Derse said, "I have nothing that I feel about the character of Mr. Liebert (plaintiff) that isn't proper." A witness called by defendants said, "I do not have a thing to say against Mr. Liebert." Defendant Flossie Derse testified:

"I have no complaints to make about any person or place. Mr. Liebert was faithful in his payments until August 29, 1943. I have never told Karl that he must go. I have told him that his daddy would be good to him and that he would have a nice home and they like him very much and are very nice people."

The question presented on this appeal is whether or not the trial court erred in dismissing plaintiff's petition and in granting defendants custody of the child. As the legal parent of the adopted child, plaintiff is entitled to all the rights of a parent under the probate code, Act No. 288, chap. 10, § 5, Pub. Acts 1939 (Comp. Laws Supp. 1940, § 16289–10 [5], Stat. Ann. 1943 Rev. § 27.3178 [545]), which provides in part:

"*The person or persons so adopting such child shall thereupon stand in the place of a parent or parents to such child in law, and be liable to all the duties and entitled to all the rights of parents thereto,* and such child shall thereupon become and be an heir at law of such person or persons, the same as if he or she were in fact the child of such person or persons."

See *Greenman* v. *Gillerman's Estate,* 188 Mich. 74.

In the absence of a showing that he is not a suitable person to have the custody of the child, plaintiff, as the surviving parent, is legally entitled to his custody under the probate code, Act No. 288, chap. 3, § 6, Pub. Acts 1939 (Comp. Laws Supp. 1940, § 16289–3 [6], Stat. Ann. 1943 Rev. § 27.3178 [206]), which provides in part:

"The father or mother of the minor, and if 1 of them be deceased, *then the survivor thereof, being respectively competent to transact their own business, and otherwise suitable,* shall be entitled to the custody of the person of the minor and to the care of his education."

We recognize the long-established rule that the best interest of the child is of paramount importance, *Martin* v. *Benzie Circuit Judge,* 200 Mich. 549; *In re Gould,* 174 Mich. 663, and that it is our judicial duty to safeguard his welfare and care, *Bird* v. *Bird,* 308 Mich. 230. However, we never have interpreted such rule so as to deprive a parent of the custody of his or her child, unless it was shown that the parent was an unsuitable person to have such custody. It should be borne in mind that, in the present case, there was no showing that plaintiff was not a suitable and proper person to have the custody of his son.

In *Partch* v. *Baird,* 227 Mich. 660 (affirmed on rehearing in 230 Mich. 615), plaintiff's wife, before her

death, had expressed a wish that their infant son remain with defendant, her mother. Her wish was carried out, and plaintiff left the child with defendant. When the boy was about six years old, plaintiff, having remarried and established his own home, began habeas corpus proceedings to obtain his custody. The trial court determined that the boy should remain with the grandmother. In reversing the trial court and awarding the father custody, we said in part, pp. 665, 666:

"Plaintiff being now in a situation to take care of his boy, he wants him with him. Plaintiff's wife shares his desire and is willing that the boy should be brought to her home and is willing to mother him. * * *

"The testimony convinces us that the father is fond of his boy and is now in a position to take him into his own home, care for him and look after his education. During the years the boy lived with defendant the father visited him on an average of once in two weeks. * * *

"He (plaintiff) has paid defendant $2,557 for the care and attention which she has bestowed upon him. Defendant does not think plaintiff's home is as suitable as hers, but we think no objection can be urged against the father's home. * * *

"*If the father be a suitable person, the statute gives him the right to the custody of his minor son. 3 Comp. Laws 1915, § 13955* (substantially the same as chapter 3, § 6, of the probate code, hereinbefore quoted). *The showing made by defendant is not sufficient to establish the fact that plaintiff (father) is an unsuitable person, and the trial court did not find that he was unsuitable.*

"The judgment of the trial court must be reversed and one entered giving plaintiff the custody of his boy."

In the case of *In re Goldinger,* 207 Mich. 99, the plaintiff's wife had died and their infant child was

placed in the care of defendant, the deceased wife's mother. About three years later plaintiff, having remarried, began habeas corpus proceedings to obtain custody of the child. The trial court entered an order giving the grandmother custody. On appeal we reversed such order and, after recognizing the rule that our first consideration was the best interest of the child, we said, pp. 104, 106:

"We are unable to find, however, that this court has ever said, or interpreted the rule to mean, that a father would be deprived of the possession of his child where it clearly appears that he is a man of good habits, honest, and well able to provide for his child. * * * He never relinquished the right of the custody of his child, and it was only a short period after his second marriage that he requested its possession. It may be true that the respondent (grandmother) is as much attached to the child as the parent and that she is as suitable to have its custody and as able to provide and care for it, but nevertheless, *unless it clearly appears that the parent is for some reason unfit to have its possession, the rule is well established in our law that the parent is entitled to the possession of his child against all others.* * * *

*"The respondent having failed to show that the father * * * is not a fit person to have the care and custody of his son, it follows that the order made by the learned trial judge must be vacated and an order entered awarding the permanent custody of his child to the petitioner."*

In the case of *In re Adams,* 214 Mich. 199, the plaintiff father began habeas corpus proceedings *in this court* to obtain the custody of his infant daughter. We declined to assume original jurisdiction, as another proceeding involving the custody of the child was pending in circuit court. However, in

recognizing the father's right to the child, we said, p. 204:

"The law makes him her guardian by nature and for nurture, *prima facie entitled to her care and custody.* Bearing in mind also the child's best interests, the courts will primarily 'feel bound to restore the custody where the law places it, with the father, unless in a clear and strong case of unfitness on his part to have such custody.'"

In the case of *Chevlin* v. *Tarner,* 274 Mich. 249, plaintiff began habeas corpus proceedings against defendants, her father and mother, to obtain possession of her eight-year-old son. It appeared that she had been divorced and the child left in the care of defendants, who refused to surrender him. Plaintiff remarried and demanded possession of her child. In affirming an order awarding plaintiff custody, we said, p. 251:

"The mother seems now to be established in a suitable home and to be capable of taking and caring for her son. * * * She has never yielded her legal right to the custody of this child. * * *

"That the child has been well cared for in the home of the grandparents cannot be questioned. * * *. *Primarily the mother is legally entitled to the custody of her eight-year-old child.* * * * Relying much on the facts and reasoning in *Re Goldinger,* 207 Mich. 99, the circuit judge found that the mother was entitled to the custody of this child."

In the present case defendants base their refusal to give plaintiff custody of his son solely on the ground that he prefers to remain with them. They make no material charges or accusations against either plaintiff or his present wife. They make no showing whatever that plaintiff is not a suitable

and proper person to have his son's custody. When placed on the witness stand, the boy said, in substance, that he thought his father would be good to him but that he preferred to stay with defendants. Such preference was the natural desire of a small child to remain in the environment to which he had become accustomed. While his wishes are entitled to consideration, it is clear that a six-year-old child is hardly competent to determine what environment and whose custody are best for his present and future welfare. Furthermore, his present wish to remain with defendants cannot overrule the established legal right of his father to his custody. In *Smith* v. *Kiel,* 150 Mich. 417, the father began habeas corpus proceedings against the grandparents to obtain custody of his daughter, who was about nine years old. In affirming the trial court's award of custody to the father, we said in part:

"The child gave no testimony, but counsel for defendants requested the court to question her. *This the court declined to do, saying that her wishes could not be permitted to overrule legal rights.* From this and the language of the opinion which was filed, it is made clear that, having become convinced that both the father and the grandparents were suitable persons to have the care of the child, *decision was based upon the idea of the superior legal right of the parent.*"

We conclude that in the absence of a showing that plaintiff is not a suitable person to have the custody of his son, he is legally entitled to such custody. Furthermore, under all the facts and circumstances shown by the record, we believe it is for the boy's best interest that he be returned to his father.

The factual situations considered in the several authorities cited by defendants distinguish them from the present case. Other questions raised by defendants do not require consideration.

The order of the trial court dismissing plaintiff's petition is vacated and set aside. The case is remanded with direction to enter an order granting plaintiff's petition and awarding him custody of the child. Plaintiff shall recover costs.

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

ROXBOROUGH *v.* MICHIGAN UNEMPLOYMENT COMPENSATION COMMISSION.

1. OFFICERS—SALARIES—STATUTES.
   In fixing an appointee's salary, a governor can exercise only such authority as is delegated to him by legislative enactment.

2. SAME — CONTRACTS — AUTHORITY — STATUTES — CONSTITUTIONAL LAW.
   Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution.

3. STATES—AUTHORITY—IMPLIED CONTRACTS.
   A State is not bound by an implied contract made by a State officer where such officer had no authority to make an express contract.

4. UNEMPLOYMENT COMPENSATION—APPEAL BOARD—SALARIES—SOCIAL SECURITY BOARD REGULATIONS.
   By virtue of provisions of the unemployment compensation act the governor's authority to fix the salary of his appointed member of the appeal board is subject to the regulations of the Federal social security board, hence under regulations limiting the number of days' payments to such members from the administration fund, a fund 93 to 97 per cent. contributions by Federal government, to less than the maximum amount

provided for in the salary as fixed by the governor, his appointee may not recover for days worked in excess of the regulation's maximum where plaintiff accepted lesser payments made monthly and has made no showing he was requested or required to work the additional days (49 Stat. at L. 626; Act No. 1, §§ 10, 11, 35, Pub. Acts 1936 [Ex. Sess.], as amended by Act No. 347, Pub. Acts 1937).

5. OFFICERS—APPOINTMENT BY GOVERNOR—NOTICE OF LIMITATION ON SALARY.

A governor's appointee is chargeable with knowledge of a limitation on the governor's authority to bind the State to pay him a fixed annual salary (49 Stat. at L. 626; Act No. 1, §§ 10, 11, 35, Pub. Acts 1936 [Ex. Sess.], as amended by Act No. 347, Pub. Acts 1937).

6. STATES—OFFICERS—AUTHORITY—CONTRACTS.

The powers of State officers being fixed by law, all persons dealing with such officers are charged with knowledge of the extent of their authority or power to bind the State, and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred.

7. COSTS—SALARY OF MEMBERS OF UNEMPLOYMENT COMPENSATION COMMISSION APPEAL BOARD—PUBLIC QUESTION.

No costs are allowed in action by former member of appeal board of the unemployment compensation commission to recover salary for services rendered, a public question being involved in construction of statutory provisions relative to payment of salary (49 Stat. at L. 626; Act No. 1, §§ 10, 11, 35, Pub. Acts 1936 [Ex. Sess.], as amended by Act No. 347, Pub. Acts 1937).

Appeal from Court of Claims; Holland (H. Russel), J., presiding. Submitted June 6, 1944. (Docket No. 8, Calendar No. 42,467.) Decided September 11, 1944.

Claim by Charles A. Roxborough against Michigan Unemployment Compensation Commission for salary for services as member of appeal board of Michigan Unemployment Compensation Commission. Judgment for defendant. Plaintiff appeals. Affirmed.

Henry B. Taliaferro, for plaintiff.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Meredith H. Doyle, Frank Day Smith, Florence Clement Booth,* and *Daniel J. O'Hara,* Assistants Attorney General, for defendant.

STARR, J. On February 6, 1939, the governor appointed plaintiff a member of the appeal board of the unemployment compensation commission for the term ending March 31, 1940, and fixed his salary on a basis of "$25 per day, but not to exceed $4,500 a year." On March 27, 1940, he was reappointed a member of said appeal board for a six-year term, but served only to February 28, 1941. Such appointments were made in pursuance of Act No. 1, § 35, Pub. Acts 1936 (Ex. Sess.), as amended by Act No. 347, Pub. Acts 1937 (Comp. Laws Supp. 1940, § 8485–75, Stat. Ann. 1940 Cum. Supp. § 17.537), which provided:

"SEC. 35. * * * There is hereby created an appeal board of three members to be appointed by the governor, by and with the advice and consent of the senate, after April one, nineteen hundred thirty-eight, for terms of six years each, except that the terms of the members first appointed shall be for two, four and six years respectively, as designated by the governor at the time of appointment. * * * *Members of the appeal board shall receive such salary as the governor may prescribe, to be paid from the administration fund.*"

The salaries of plaintiff and other members of the appeal board were a part of the expense of administration of the unemployment compensation act and under said section 35 were to be paid from the

"administration fund." Such fund was created by section 10 * of the act, which provided:

"SEC. 10. * * * There is hereby created in the State treasury a special fund to be known and designated as the administration fund (Michigan unemployment compensation act). Any balances in this fund at the end of any fiscal year of the State shall be carried over as a part of said fund and shall at no time revert to the general fund of the State. All moneys deposited into said fund under the provisions of this act *are hereby appropriated to the commission to pay the expenses of the administration of this act.*

"Said fund shall be credited with all moneys appropriated thereto by the legislature, and all moneys received from the United States of America or any agency thereof for such purpose, including the social security board and the United States employment service, and all moneys received by the State for said fund from any other source."

It should be noted that the above-mentioned administration fund, created to pay the expenses of administration of the act, is separate and distinct from the unemployment compensation benefit fund created by section 26 of the act. The record shows that 93 to 97 per cent. of said administration fund was contributed by the Federal government and the balance by the State.

In disbursing the administration fund, the commission was required by section 11 of the act to comply with the regulations prescribed by the Federal social security board. Said section 11 † provided:

* This section is quoted as it was amended by Act No. 347, Pub. Acts 1937. It was also amended by Act No. 324, Pub. Acts 1939, in a manner not important to the decision of this case.

† This section is quoted in part as it was amended by Act No. 347, Pub. Acts 1937. It was also amended by Act No. 324, Pub Acts 1939, in a manner not important to the decision of this case.

"SEC. 11. * * * In the administration of this act, the commission shall cooperate with the social security board, created by the social security act, approved August fourteen, nineteen hundred thirty-five, as amended. * * * *The commission, subject to the provisions of this act, shall comply with the regulations prescribed by the social security board governing the expenditures of such sums* as may be allotted and paid to this State under title 3 of the social security act* for the purpose of assisting *in the administration of this act.*"

In summary, section 35 of the act gave the governor authority to appoint members of the appeal board and to fix their salaries, which were to be paid from the so-called administration fund; section 10 provided for the creation of said administration fund to pay the expenses of administering the act; and section 11 provided that in disbursing said fund the commission should comply with the regulations prescribed by the social security board.

Plaintiff's maximum annual salary, as fixed by the governor at $4,500, would cover 180 days at $25 a day, that is, an average of 15 days a month. However, at the time he began work as a member of the appeal board in 1939, he was informed that the disbursement of said administration fund was subject to the regulation of the social security board, and that such board, by budget regulation, had limited the amount which could be paid members of the appeal board (except chairman) to $250 per month, or $25 a day for 10 days. With notice of such limitation, plaintiff voluntarily performed services for 15 days a month in 1939, but he was paid for only 10 days. His vouchers for the additional days each month were not approved and were returned to him. Beginning January 1, 1940, the budget

* 49 Stat. at L. 626 (42 USCA, § 501 *et seq.*).

approved by the social security board provided for 13 1/3 days of work at $25 a day. Plaintiff continued to work for 15 days a month, but he was paid for only 13 1/3 days a month, and his vouchers for the additional days were returned to him. It should be noted that he accepted pay for the limited number of days each month, and that he made no showing that he was requested or required to work the additional days for which he now claims compensation.

When plaintiff ceased to be a member of the appeal board on February 28, 1941, there was an accumulation of 72 days of service for which he had not been paid and for which the commission refused to pay. On May 8, 1941, he filed petition in the court of claims, asking for a judgment of $1,800 for his services for said 72 days, together with interest. Defendant answered, denying that he was entitled to such additional compensation. The court denied his claim, entered judgment for defendant, and denied his motion for a new trial. He appeals from such judgment contending that his appointment created a binding contract on the part of the State to pay him a salary of $25 a day for services performed as a member of the appeal board, up to a maximum of $4,500 a year.

In fixing plaintiff's salary, the governor could exercise only such authority as was delegated to him by legislative enactment. The rule is stated in 59 C. J. pp. 172, 173, § 286, as follows:

"Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution. * * * Nor is a State bound by an implied contract made by a State officer where such officer had no authority to make an express one." (See cases cited.)

It is necessary that we determine the authority which the legislature delegated to the governor to fix salaries of members of the appeal board. To determine such authority, we must ascertain the legislative intention by interpreting the provisions of the unemployment compensation act. *In re Chamberlain's Estate,* 298 Mich. 278. From our examination of the above-quoted and other provisions of said act, it is clear the legislature intended that the governor's authority under section 35, to fix the salaries of members of the appeal board which were "to be paid from the administration fund" created by section 10, should be subject to the Federal social security board's regulation of the expenditure of said administration fund, as provided in section 11. Therefore, the governor's authority to fix plaintiff's salary was subject to such regulation.

At the time plaintiff accepted his appointment as a member of the appeal board, he was chargeable with knowledge of the limitation on the governor's authority to bind the State to pay him a fixed annual salary. In 59 C. J. p. 173, § 287, it is stated:

"The powers of State officers being fixed by law, all persons dealing with such officers are charged with knowledge of the extent of their authority or power to bind the State, and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred."

The social security board, through its budgetary regulation, limited the salary of plaintiff and other members of the appeal board (except chairman) to $25 a day for 10 days' work in each month in 1939 and for 13 1/3 days in each month thereafter. Although informed of such limitation and that he would be paid for only a limited and prescribed

number of days in each month, plaintiff voluntarily performed services for the additional 72 days for which he now claims compensation.

We conclude that plaintiff was paid in full for all days of service which he was authorized to perform. He does not have a valid claim for the additional 72 days of service, which he voluntarily performed in excess of the regulation prescribed by the social security board. Other contentions by plaintiff do not require consideration.

The judgment of the court of claims is affirmed. A public question being involved, no costs are allowed.

NORTH, C. J., and BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred. WIEST, J., concurred in the result.

HIMELSON *v.* GALUSZ.

1. APPEAL AND ERROR—CHANCERY CASES—DE NOVO REVIEW—SPECIFIC PERFORMANCE.

   Suit for specific performance of a land contract being a chancery case is reviewed *de novo* by Supreme Court.

2. SAME—FINDING AS TO VALUE—EVIDENCE.

   In suit for specific performance of land contract for conveyance of building, located in mixed business and residential neighborhood and which had been divided into six apartments, determination of trial judge that premises were worth $8,000, instead of $12,000 to $14,000 as claimed by defendants, is not disturbed under evidence presented.

3. VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—FRAUD—EVIDENCE—EXECUTION OF LAND CONTRACT.

In suit for specific performance of contract to sell vendees' interest in a land contract, finding of trial judge that defendants had failed to establish fraud on the part of plaintiff when contract was executed is not disturbed in view of the conflicting testimony and the fact that the trial judge saw and heard the parties.

4. SAME—FICTITIOUS SIGNATURES—EVIDENCE.

In suit for specific performance of contract to sell vendees' interest in a land contract, finding of trial court that name of one of the vendees therein named was purely fictitious so far as its use therein is concerned is not disturbed in view of his better position to judge the credibility of and weight to be accorded testimony of witnesses.

5. SAME—USE OF FICTITIOUS NAME BY PURCHASER.

Defendant who signed contract to sell vendees' interest in land contract who had signed the first contract with a fictitious name obligated herself as a vendee thereon.

6. SAME—EXECUTION—TENANTS IN COMMON—SUBSEQUENT MARRIAGE.

Man and woman who were not married at time they executed land contract as purchasers became owners of the vendees' interest as tenants in common where there was no change in the instrument although later they were married.

7. SPECIFIC PERFORMANCE—CONTRACT TO PURCHASE VENDEES' INTEREST IN LAND CONTRACT.

Contract for purchase of vendees' interest in land contract, which was obligatory on both parties and was sufficiently complete, definite and certain, gave mutual rights of specific performance.

Appeal from Wayne; McDonald (Archie D.), J., presiding. Submitted June 14, 1944. (Docket No. 68, Calendar No. 42,707.) Decided September 11, 1944.

Bill by Hilda Himelson against John Galusz and wife for specific performance of a contract for the sale of real estate. Decree for plaintiff. Defendants appeal. Affirmed.

Jos. B. Beckenstein, for plaintiff.

Harry J. Lippman (*Leslie D. Bloom,* of counsel), for defendant.

STARR, J. Defendants appeal from a decree granting plaintiff specific performance of a written contract by which defendants agreed to sell and plaintiff to purchase the apartment-house property located at 2628 Twelfth street in the city of Detroit, for a price of $8,000. This being a chancery case, we review the same *de novo.*

On November 12, 1936, the Detroit Fire & Marine Insurance Company executed a land contract whereby they agreed to sell the property in question to vendees designated as John Galusz (defendant) and Mary Zillis for a price of $8,000, payable $1,600 down and the balance in monthly instalments of $64 including interest. Defendant John Galusz signed the contract as vendee, and defendant Mary Galusz (who at that time was married to one Alec Zelasny) signed both the names "Mary Zillis" and "Mary Zelasny" on the contract. In February, 1937, said Mary Zelasny began divorce proceedings against Alec Zelasny, and in February, 1938, obtained a decree of divorce. A month later, in March, 1938, she married defendant John Galusz. The land contract was continued without change as to the name of Mary Zillis. Defendants John and Mary Galusz occupied one of the apartments, paid the monthly instalments on the contract, paid the premiums on fire insurance policies issued in their joint names, and generally managed the property as owners thereof. The property is located in a mixed business and residential neighborhood, and the building, which is 34 years old, is divided into six apartments of five small rooms. The apartments

are not modern, as much of the equipment is obsolete and the upper floors are heated with stoves. Testimony was presented by plaintiff indicating that the property was worth about $8,000 and by defendants that it was worth $12,000 to $14,000. After examination of such testimony we are inclined to agree with the trial court who determined that $8,000 was a reasonable price.

For some time prior to their execution of the agreement in question defendants had been endeavoring to sell or trade their equity in the property. Their agent, David Rabinovich, informed plaintiff that the property was for sale, and with defendants' consent, plaintiff and her husband inspected it. On the evening of August 26, 1942, plaintiff, her husband, and agent Rabinovich went to defendants' apartment, and they agreed on a price of $8,000, of which amount plaintiff would pay defendants their equity above the balance of about $3,700 due on the original land contract. The same evening, at defendants' suggestion, they went to the office of Joseph Smolenski, a notary public, and he prepared the agreement of sale. All parties signed the agreement in Smolenski's office, and plaintiff gave defendants a check for $100 as a binder payment, which check they cashed the next morning. The agreement, as embodied in plaintiff's offer and defendants' acceptance, was in the following form:

"ABSTRACT & TITLE GUARANTY COMPANY
"Detroit, Michigan

"Revised form of memorandum of sale

"The undersigned agrees to purchase the premises situated in the city of Detroit, Wayne county, Michigan, viz: as on the land contract made on November 12, 1936, between Detroit Fire & Marine Insurance Company, as sellers and John Galusz and Mary Zilis as the purchasers, being the

premises known as number 2628 on the east side of 12th street between Spruce and Henry and pay therefor the sum of $8,000, upon the following conditions.

"The sale to be consummated by: * * *

"2. Payment of the purchase money in cash or certified check less the amount owing upon an existing land contract now on the premises with accrued interest to date of consummation held by Detroit Fire & Marine Insurance Company upon which there is unpaid $3,771.06 with interest at 6 per cent. from August 12, 1942, which land contract becomes due on or about November 12, 1946, with an agreement by the grantee to assume and pay such land contract.

"If the seller's title to said land is evidenced by an existing land contract with unperformed terms and conditions substantially as above set forth and the cash payment to be made by the undersigned on consummation hereof will pay out the equity, an assignment and conveyance of the vendee's interest in the land and contract with an agreement by the undersigned to assume the balance owing thereon, will be accepted in lieu of the contract proposed in the preceding paragraph. * * *

"There shall be secured and delivered to the undersigned for examination as soon as may be, a complete abstract of title and tax history of said premises issued by the Abstract & Title Guaranty Company of Detroit, certified to a date later than the date of the acceptance hereof, or, if delivered on the day of such acceptance, certified to that date. * * *

"If a marketable title can be conveyed in the condition required by this offer, the sale shall be consummated within 30 days after delivery of such abstract or policy of title insurance. * * *

"The purchasers hereby agree to pay Dave Rabinovich sum of $150 for his services in connection of this sale; at the time of closing of this deal.

"It is also agreed upon between the parties hereto that the sellers have the right to occupy their flat free of charge for the period of 30 days after the closing of this deal.

"Authority is given Dave Rabinovich, real estate broker, to make this offer and pay a deposit of $100 on the purchase of said land to John Galusz and Mary Zilis.

"Dated August 26, 1942.

"HILDA HIMELSON, Purchaser. * * *

"Acceptance

"To the above-named purchaser:

"Your offer as stated above is accepted and receipt of the above-mentioned deposit money on account of the purchase price acknowledged and the undersigned agree to sell said lands on the terms stated and on consummation to pay a commission of $50 to Dave Rabinovich, broker.

"JOHN GALUS, L. S.

"MARY GALUS, L. S."

(Defendants John and Mary Galusz severally acknowledged their execution of the above agreement before Joseph M. Smolenski, a notary public).

On August 28, 1942, the insurance company, vendor in the land contract, delivered the abstract of title to plaintiff. She testified that on August 29th, three days after the offer and acceptance were executed, defendant Mary Galusz tendered back to her the binder payment of $100 and said that she was not going through with the sale because "her son did not want her to sell." Mary Galusz claimed she made such tender, which plaintiff refused, on August 27th. About September 19th defendants sent plaintiff a postal money order for $100, which money order she refused to accept and returned.

On September 25th plaintiff tendered defendants a certified check for $4,360 in payment for their equity in the property, and also tendered, for their

execution, a written assignment of their vendees' interest in the original land contract. Defendants refused to accept the certified check and to execute the assignment.

On September 29th plaintiff filed bill of complaint for specific performance of defendants' agreement to sell. Defendants answered, alleging that plaintiff fraudulently obtained such agreement by causing them to become so intoxicated that they did not understand what they were doing. They also alleged that their agreement to sell was not enforceable because not signed by Mary Zillis who, with defendant John Galusz, was named as a vendee in the original land contract; that said Mary Zillis and defendant John Galusz hold the vendees' interest in said contract as joint tenants and their interests are not severable. They further alleged that defendant Mary Galusz, who signed the present agreement to sell to plaintiff, has no interest in the property except her dower interest as the wife of defendant John Galusz. They also filed cross bill asking that their agreement to sell to plaintiff be declared void and unenforceable because obtained by fraud. In her reply to defendants' answer, plaintiff denied the charge of fraud and alleged in substance that the said Mary Zillis, who purported to have signed the original land contract as one of the vendees, was a fictitious person; that defendant Mary Galusz and said Mary Zillis were one and the same person; and that defendants John and Mary Galusz, who executed the agreement to sell to plaintiff, own the vendees' interest in the property. We note that in some instances the record refers to the defendants as "Galusz" and in some instances as "Galus" and as "Gillis"; that the former husband of defendant Mary Galusz is referred to as "Zelasny" and also as "Zelazny"; and that the purported vendee in the

land contract is sometimes referred to as "Zillis" and again as "Zilis" and "Zillias."

The trial court determined there was no fraud on the part of plaintiff; that defendant Mary Galusz (formerly Mary Zelasny) signed the original land contract in the fictitious name of Mary Zillis; and that defendants John and Mary Galusz, who were not married at the time they executed said contract, own the vendees' interest therein as tenants in common. A decree was entered dismissing defendants' cross bill and granting plaintiff specific performance. Defendants appeal from such decree.

In support of their contention that plaintiff obtained their agreement to sell by fraud, defendants testified that when their agent Rabinovich, with plaintiff and her husband, came to their apartment in the evening of August 26th, Rabinovich brought a quart of whisky; and that they became so drunk they did not understand what they were doing when they signed the agreement to sell to plaintiff. A daughter, Genevieve Zelasny, testified that her stepfather, defendant John Galusz, was drunk. Plaintiff, her husband, and defendants' agent Rabinovich denied that liquor was served in the Galusz apartment, and denied that defendants were drunk. The notary public, Smolenski, also denied that defendants were drunk when they executed the agreement to sell in his office. It would serve no purpose to discuss such conflicting testimony. The trial court, who saw and heard the parties, was best able to judge the credibility of and weight to be given their testimony, and we are not disposed to interfere with his finding that defendants failed to establish fraud on the part of plaintiff.

A more serious question arises regarding Mary Zillis. As hereinbefore explained, the land contract designated the vendees as John Galusz and Mary

Zillis. Defendant Mary Galusz (formerly Mary Zelasny) admitted that she signed the names Mary Zillis and Mary Zelasny on the contract. In explaining her signatures, she said that Mary Zillis, who lived in her home, could not read or write English and requested her to sign the contract. She testified that her husband, defendant John Galusz, and said Mary Zillis were cousins; and that each of them paid $800 of the down payment of $1,600 on the land contract. She further said in substance that in 1939 said Mary Zillis stated that she was going to Canada and was leaving her interest in the property in defendants' care. She also said that she had not seen Mary Zillis since 1939 and did not know her whereabouts.

However, the above testimony of defendant Mary Galusz is somewhat discredited by statements in her sworn answer to a cross bill filed by her former husband, Alec Zelasny, in their divorce proceedings, which cross bill and answer were properly admissible in evidence in the present case. In his cross bill Alec Zelasny alleged in part:

"That during the year of 1936, the plaintiff and cross defendant (Mary Zelasny, now Mary Galusz) took all the money, and informed the defendant and cross plaintiff (Alec Zelasny) that she was going to purchase a farm; * * * that instead of purchasing a farm, the * * * (plaintiff and cross defendant), with one John Galucz purchased an apartment house at 2628 Twelfth street, Detroit, Michigan, and that your defendant and cross plaintiff was not made a party to the purchase of this property, although most of his earnings were used to purchase this property."

In her sworn answer to such cross bill, said Mary Zelasny (now Mary Galusz) said in part:

"The plaintiff and cross defendant (Mary Zelasny) emphatically denies that the defendant and

cross plaintiff (Alec Zelasny) turned over any money to her * * * and * * * will show that a few months ago she did become a purchaser of the premises (2628 Twelfth street) * * * under land contract, wherein she purports to have an undivided one-half purchaser's interest, * * * and that the entire investment in and for the purchase thereof was $1,600, of which the co-purchaser (defendant John Galusz) invested $800, and loaned to the plaintiff and cross defendant (Mary Zelasny) the sum of $800, so she could invest her share, upon the express understanding that the loan of the $800 was to be repaid upon the resale of said premises."

Defendant John Galusz also testified that Mary Zillis was his cousin; that she paid half of the down payment on the property; and that he had not seen her for several years and did not know her whereabouts. However, examination of defendant Galusz' entire testimony creates doubt as to his credibility. Genevieve Zelasny corroborated the testimony of her mother and stepfather as to the existence of Mary Zillis.

There was considerable testimony tending to show that defendants had always treated the apartment property as their own and had made no mention of their present claim that said Mary Zillis had an interest therein. They used the income from the building to pay for repairs and maintenance and to make payments on the land contract, and whatever was left they used for their living expenses.

To quote from or discuss the voluminous and confusing testimony of defendants would not materially help to clarify the issue as to whether said Mary Zillis was a real or fictitious person. Although there may have been a person by the name of Mary Zillis, the testimony is not convincing that she acquired and owns one half the vendees' interest under the original land contract. Our study of the record leads us to believe that the name Mary Zillis

was used fictitiously by Mary Zelasny (now Mary Galusz) in executing such land contract. It should be noted that she also signed said contract in her own name, Mary Zelasny. The trial court, who saw and heard defendants and other witnesses, was in a better position to judge the credibility of and the weight to be accorded their testimony, and we agree with his finding that "Mary Zillis is purely a fictitious person, so far as the use of that name in the contract of purchase * * * is concerned."

We conclude that by signing the fictitious name, Mary Zillis, on said land contract, defendant Mary Galusz (formerly Mary Zelasny) obligated herself as a vendee thereon. As defendants John and Mary Galusz were not married at the time they executed such land contract, they became and are the owners of the vendees' interest as tenants in common. *Price* v. *National Union Fire Ins. Co.*, 294 Mich. 289.

Defendants failed to establish fraud on the part of plaintiff in obtaining their agreement to sell. The agreement was obligatory on both parties and was sufficiently complete, definite, and certain to give mutual rights of specific performance.

The decree of the trial court granting plaintiff specific performance and dismissing defendants' cross bill is affirmed. Plaintiff shall recover costs of both courts.

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

OCTOBER TERM, 1944.

WISEMAN *v.* MUSGRAVE.

1. CORPORATIONS—CONTRACTS WITH DIRECTORS.
   The burden is upon a director to show the fairness, reasonableness, and good faith of a bargain made by the corporation with himself.

2. SAME—DIRECTORS—CREDITORS—RESOLUTIONS—FINDINGS OF COURT.
   Finding of trial judge in nonjury action of assumpsit that defendants were creditors of corporation of which plaintiff was receiver for services rendered corporation while they were directors and in control thereof and that payment of $75 a month made after such relation had terminated was not a fraud upon other creditors of corporation is not disturbed under record showing a resolution authorizing such payments which had been passed before services were performed or payments made.

3. APPEAL AND ERROR—NONJURY CASE—EVIDENCE.
   In cases tried without a jury the trial judge is best able to judge the credibility of, and the weight to be accorded, testimony of witnesses he saw and heard and the Supreme Court will not reverse unless the evidence clearly preponderates in the opposite direction.

4. COSTS—BRIEFS ON APPEAL.
   No costs are allowed on appeal upon affirmance of judgment where appellees did not file a brief.

Appeal from Wayne; Toms (Robert M.), J. Submitted April 4, 1944. (Docket No. 8, Calendar No. 42,610.) Decided October 11, 1944.

Assumpsit by Walter G. Wiseman, receiver of Musgrave Tire Sales & Service, Inc., a Michigan corporation, against Robert R. Musgrave and another to recover money paid defendant as salary. Judgment for defendants. Plaintiff appeals. Affirmed.

John McNeil Burns (*Hugh V. Williams,* of counsel), for plaintiff.

BUSHNELL, J. Plaintiff Walter G. Wiseman, receiver of Musgrave Tire Sales & Service, Inc., a Michigan corporation, in voluntary dissolution, brought suit against defendant Robert R. Musgrave, the former president, treasurer, and controlling stockholder of the corporation, and defendant Howard L. Philippart, a stockholder, charging the unlawful withdrawal of corporate funds by Musgrave, with the assistance of Philippart while the corporation was insolvent.

Musgrave became connected with the corporation in 1923 or 1924, and in 1931 acquired all of its shares of stock, except two, one of which was held by his wife, Kathryn A. Musgrave, and the other by the company's attorney, defendant Howard L. Philippart. The company was in the business of selling and servicing automobile truck tires.

Prior to 1933 the corporate by-laws provided that each director should receive $75 per week as compensation. At that time, however, because of past due obligations to Kelly-Springfield Tire Company, the by-laws were amended to provide that no salary or compensation should be paid to any director or officer until the Kelly-Springfield obligation had been paid in full. The minutes show that in 1934 an adjustment had been made with Kelly-Springfield Tire Company and it was unanimously agreed that some of the duties relative to the operation of the

business be allotted to the vice-president, Kathryn A. Musgrave, without remuneration to her until a salary should be determined by the directors and stockholders. In 1935 compensation of $75 per month was authorized for additional services formerly performed by Philippart.

On July 27, 1940, the corporate records show the acceptance of the resignation of Musgrave and the transfer of his stock to G. P. Shelby, who was elected president and treasurer in his place. On the same date an agreement was made between the company and Manufacturers Trading Corporation of Cleveland, Ohio, for the sale to it of accounts receivable and the advancement by it of certain funds. On August 2, 1940, the company paid Musgrave $4,095.96 out of funds totaling $4,580.01, obtained from the Manufacturers Trading Corporation as the proceeds of pledged accounts and a mortgage. On May 17, 1940, the title to an automobile had been transferred to Musgrave. He testified that the automobile belonged to him although its value was charged to him on the company's books, and that the money he received from the company represented accrued unpaid salaries due him and his wife.

Prior to 1935 Musgrave received a salary of $150 a week. During 1935, 1936 and 1937 Mrs. Musgrave was allowed $75 a month for part-time work, consisting of handling collections, locating bad debtors, and securing the names and addresses of possible buyers of truck tires. When she became ill in 1937 and could no longer do this work, it was done by Musgrave after hours, with the understanding that he was to receive this additional compensation. Sometime thereafter Mrs. Musgrave died. The business continued to show a loss for five successive years, with the consequence that Musgrave did not regularly receive this $75 a month. He did receive, however, during this period the sum of $75 a week

for his regular services to the company. The dissolution proceedings were instituted in 1941.

The instant case was heard by the trial judge sitting without a jury, and the receiver has appealed from a judgment in favor of defendants. Appellant raises questions pertaining to the validity of the corporate resolution of 1935, which "purported" to authorize additional compensation of $75 a month, and the liability, if any, which accrued under such resolution; also, whether or not defendant Musgrave and his wife were creditors of the corporation and whether the subsequent payments to Musgrave were in fraud of creditors. The trial judge did not specifically pass upon the validity of the corporate resolution, but did hold that liability had accrued and that Musgrave was a creditor and the payments to him were not a fraud upon other creditors. This conclusion was based entirely upon the factual situation. The minutes of the corporation recite:

"That inasmuch as Howard L. Philippart, the secretary, will not be able to devote as much time as formerly to the company business, and that this will necessitate additional remuneration for such additional services to the corporation, the sum of $75 per month until changed by proper action on the part of the stockholders and directors of the company, and to be paid when possible and when the funds are available, or to accumulate and to be liquidated at the earliest possible time within the discretion of the officers and stockholders of the company."

The receiver argues that the above resolution is void because Musgrave at that time controlled the corporation and owned all but two shares of its corporate stock. Musgrave replies that he actually performed the extra services which were reasonably worth $75 per month to the company, and that the action of the corporation after he had disposed of

his stock and severed connection with it in paying him $4,095.96 was lawful and valid. To support his claim that a majority stockholder cannot legally vote himself an increase in salary as an officer or director of the corporation, plaintiff receiver relies on *Miner* v. *Belle Isle Ice Co.*, 93 Mich. 97, 111 (17 L. R. A. 412). In that case the court said:

"The contracts fixing salaries and rentals must therefore be held not only voidable, but absolutely void."

But this is qualified by what is said in the same paragraph immediately following the above sentence:

"In any case the burden is upon the director to show fairness, reasonableness, and good faith, and upon this record these transactions must not only be held to be constructively fraudulent, but fraudulent in fact."

Plaintiff also relies on *McKey* v. *Swenson,* 232 Mich. 505. In that case the court held that the action of the officers of the corporation in voting certain salaries to themselves and then approving such action as controlling stockholders was wholly void. It is obvious that this conclusion was reached because the officers failed to prove the reasonableness of the salaries. That opinion says (p. 514):

"These officers voted the salaries to themselves and then, as controlling stockholders, approved such action. Such action was wholly void, required refund thereof *or, at least, casts upon the officers the burden of showing the salaries were reasonable or to give the court information upon which reasonable compensation could be fixed.* Defendant officers offered no justification for the salaries."

Plaintiff also cites *Alfred J. Brown Seed Co.* v. *Brown,* 240 Mich. 569. There again the conclusion

hinged upon failure to prove the value of services. The opinion says:

"We are not persuaded that their services were worth the sum fixed by themselves. They should account for the money received as increased salaries. See *McKey* v. *Swenson,* 232 Mich. 505."

The *McKey Case* was again cited by this court in *Nahikian* v. *Mattingly,* 265 Mich. 128, where Mattingly was the general manager of the corporation and became the dominant factor in the company. The court said:

"In *McKey* v. *Swenson,* 232 Mich. 505, we held action in fixing salaries wholly void and cast the burden upon the officers to give the court information upon which reasonable compensation could be fixed. Such, however, is not the case at bar, for here we do not have wholly void action but only assertion of unreasonable compensation and the burden is on plaintiff to establish the charge."

From the foregoing it is apparent that the action of the stockholders of the corporation here involved, even though Musgrave owned practically all of the stock, would be void only in the absence of convincing proof that he actually rendered additional services worth $75 a month. On the record before us the testimony reasonably establishes that Musgrave earned the additional compensation, and that his extra services were worth $75 a month. This distinguishes the case at bar from those relied on by the receiver.

We have examined the testimony and are not disposed to disagree with the trial judge's findings which, in part, were:

"In the last analysis the issue narrows itself down to one of fact—that is, to a determination of whether or not honestly and fairly services worth $75 a month to the corporation were rendered by

claimant, Mr. Musgrave. The fact that this money was paid after he had severed his connection with the company and upon the vote of the successor stockholders and directors might raise a puzzling problem in the effort to hold Mr. Musgrave for official misconduct after he had ceased to be an official. This point becomes unnecessary to determine however. It must be assumed, reasonably, that this is not a trumped-up charge of $75 a month which was conceived on the eve of dissolution and then spread backward over the books to give it an air of legitimacy. It has its genesis in the minutes of the corporation several years before the dissolution and was carried as an item payable month by month over a long period of time. * * *

"It does not take much intelligent work to be worth $2.50 a day, and the court does not hesitate to find that the efforts contributed by Mr. and Mrs. Musgrave to this business were worth that amount of money. This is the controlling finding in the case and makes any other determination of solvency or insolvency or of any other of the issues unnecessary."

Furthermore, as said in *Mallory* v. *Pitcairn,* 307 Mich. 40, 47:

"We have repeatedly said that in cases tried without a jury the trial judge may give such weight to the testimony as in his opinion it is entitled to, and that in such cases we do not reverse unless the evidence clearly preponderates in the opposite direction. *Hazen* v. *Rockefeller,* 303 Mich. 536; *Hanson* v. *Economical Cunningham Drug Stores, Inc.,* 299 Mich. 434."

The judgment is affirmed but without costs, no brief having been filed by the appellees. It is so ordered.

NORTH, C. J., and STARR, WIEST, BUTZEL, SHARPE, BOYLES, and REID, JJ., concurred.

POWERS *v.* SECRETARY OF STATE.

1. MANDAMUS—OFFICERS—QUESTION OF FACT.
   Mandamus is not a writ of right but of grace and discretion and will not lie to compel a public officer to perform a duty dependent upon disputed and doubtful facts.

2. SAME—SECRETARY OF STATE—AUTOMOBILES—DEALER'S LICENSE—HEARING.
   Mandamus will not lie to compel the secretary of State to issue a motor vehicle dealer's license where plaintiff is permitted to continue his business pending the holding of statutory hearing before defendant relative to refusal to issue such license (1 Comp. Laws 1929, § 4671, as amended by Act No. 151, Pub. Acts 1943).

3. SAME—CONSTITUTIONAL LAW—QUESTIONS REVIEWABLE.
   The Supreme Court does not pass upon constitutional questions raised by applicant for mandamus to compel the secretary of State to issue a motor vehicle dealer's license where mandamus is denied without prejudice and a statutory administrative hearing is pending (1 Comp. Laws 1929, § 4671, as amended by Act No. 151, Pub. Acts 1943).

4. COSTS—MANDAMUS—AUTOMOBILES—DEALER'S LICENSE.
   No costs are allowed upon denial of mandamus to compel the secretary of State to issue a motor vehicle dealer's license where dealer is permitted to continue business until holding of statutory hearing upon issuance of such license (1 Comp. Laws 1929, § 4671, as amended by Act No. 151, Pub. Acts 1943).

Petition by James Powers, doing business as Powers Pontiac Sales Company, for writ of mandamus to require Herman H. Dignan, secretary of

State, to issue a license as an automobile dealer. Submitted July 25, 1944. (Calendar No. 42,738.) Writ denied without prejudice October 11, 1944.

Iverson & Allin, for plaintiff.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara* and *T. Carl Holbrook,* Assistants Attorney General, for the defendant.

BUSHNELL, J. Plaintiff James Powers, doing business as Powers Pontiac Sales Company, seeks a writ of mandamus directing defendant Herman H. Dignan, secretary of State, to forthwith issue a motor vehicle dealer's license as provided for in Act No. 46, Pub. Acts 1921, as amended, 1 Comp. Laws 1929, §§ 4658–4676 (Comp. Laws Supp. 1940, 1943, §§ 4658–4676, Stat. Ann. and Stat. Ann. 1943 Cum. Supp. §§ 9.1471–9.1491).

An order to show cause was issued and the secretary of State filed an answer and return in which he claims that Powers, as president of Powers Motor Sales, Inc., a Michigan corporation, has been "guilty of such fraudulent misconduct as a motor vehicle dealer as would, under the terms of the statute, bar him from receiving such a license." The allegations of fraud are that, while Powers was president of this corporation, he conducted its affairs in such a manner that it is still indebted to the State for sales taxes, and that the records of the corporation were kept so as to conceal such indebtedness in the amount of several thousand dollars, and the corporation, under Powers' direction, unfairly competed with others in the same line of business.

Defendant's return states that he "quite inadvertently and inadvisedly failed strictly to comply" with the provisions of section 14 of the act in question (1 Comp. Laws 1929, § 4671, as amended by Act No. 151, Pub. Acts 1943 [Comp. Laws Supp. 1943, § 4671, Stat. Ann. 1943 Cum. Supp. § 9.1482]), which reads in part as follows:

"The secretary of State shall be authorized, after a hearing, notice of which shall be given 10 days in advance, for good cause shown, to revoke the license of any motor vehicle dealer, or to refuse to issue a license, as provided in section 14f of this act."

He claims, however, that the matter is still open to lawful inquiry, and avers that he is "now ready and willing to accord plaintiff all of the rights guaranteed by the statute aforesaid, to prepare and serve upon him written charges of misconduct, to give due and timely notice of hearing, and to have present a competent stenographer in order that a complete record may be made available for judicial review in this or other appropriate proceedings."

Defendant further submits:

"(1) that neither justice nor the public interests would be served by the issuance of a peremptory writ of mandamus, at this time, requiring the secretary of State forthwith to grant to plaintiff the license demanded;

"(2) that, although plaintiff was inadvertently denied due process, and has not yet been accorded a proper hearing, he nevertheless, because of his acts of misconduct, does not stand in this court with clean hands, and he is not entitled to the issuance of the discretionary writ of mandamus;

"(3) that both justice and the public interests require, before the license be granted, or a writ of mandamus shall issue, that a proper and regular

hearing on such charges be held by this defendant to determine the truth thereof;

"(4) that both justice and the public interests would be served, and the rights of all parties protected, if this court should now order that the writ of mandamus be denied without prejudice; or if, holding matters in abeyance under the restraining order, the court should order this defendant to take the necessary and appropriate steps towards a hearing of the charges against the plaintiff, and await the outcome thereof until a transcript of the record of such hearing is made available for review."

Plaintiff insists that notwithstanding such answer and return he is entitled to a writ of mandamus as prayed and further contends that the act in question is unconstitutional because it violates the United States Constitution, Am. 14, § 1, and the Michigan Constitution (1908), art. 4, § 2, and art. 5, § 21.

Powers' petition for a writ of mandamus must be denied without prejudice, pending a formal administrative hearing on the charges of fraud, because mandamus is not a writ of right but of grace and discretion, and will not lie to compel a public officer to perform a duty dependent upon disputed and doubtful facts. *Salisbury* v. *City of Detroit,* 264 Mich. 250. See, also, *Sherman* v. *Atwood,* 274 Mich. 621, and *St. Joseph Stockyards Co.* v. *United States,* 298 U. S. 38 (56 S. C. 720, 80 L. Ed. 1033).

Because of denial of the writ of mandamus and the pendency of an administrative hearing, we do not pass upon the constitutional questions at this time.

Pending the outcome of the statutory hearing before the secretary of State, the *status quo* is being maintained under an order of this court so that the conduct of Powers' business is not being interrupted.

Plaintiff's petition for a writ of mandamus is denied, but without costs, and without prejudice.

NORTH, C. J., and STARR, WIEST, BUTZEL, SHARPE, BOYLES, and REID, JJ. concurred.

BARCLAY *v.* GENERAL MOTORS CORP.

WORKMEN'S COMPENSATION—HERNIA—FINDING OF DEPARTMENT—EVIDENCE.

Plaintiff was not entitled to compensation for hernia under the occupational disease amendment of the workmen's compensation act where there is evidence to support finding of the department of labor and industry that the hernia could not have been recent in origin notwithstanding the fact the condition was not previously disabling (Act No. 10, pt. 7, § 2, subd. 28, Pub. Acts 1912 [1st Ex. Sess.], as added by Act No. 61, Pub. Acts 1937).

STARR and BUSHNELL, JJ., dissenting.

Appeal from Department of Labor and Industry. Submitted June 8, 1944. (Docket No. 24, Calendar No. 42,596.) Decided October 11, 1944.

James Barclay presented his claim against General Motors Corporation (Pontiac Motor Division) for compensation for hernia. Award to defendant. Plaintiff appeals. Affirmed.

Maurice Sugar and *Benjamin Marcus,* for plaintiff.

Henry M. Hogan (*E. H. Reynolds,* of counsel), for defendant.

BUSHNELL, J. (*dissenting*). The sole question presented in this appeal, in the nature of certiorari from the department of labor and industry, is stated by plaintiff and appellant James Barclay as follows:

"Is the recent aggravation of a pre-existing non-disabling hernia, which aggravation causes total disability, compensable under the workmen's compensation law?"

Appellee and defendant Pontiac Motor Division, General Motors Corporation, prefers to state the question in this manner:

"Was plaintiff's hernia clearly recent in origin so as to be covered under paragraph 28 of section 2, part 7 of the workmen's compensation law?"

Barclay has been employed by defendant since 1935. In October of 1942, aided by a fellow employee, he picked up a breech case, weighing approximately 100 pounds, and placed it in a fixture for checking. As he did so, he felt something break in his left groin. He reported the incident to his foreman, who sent him to the first-aid station. The following day he returned to work, wearing a support, and was placed on a lighter job. About 15 days later the pain became so severe that Barclay was unable to continue his work. A physician who examined him the next day advised a herniotomy. This operation was performed in November and Barclay returned to work in January. He sought compensation for that period and for his medical and hospital expenses under the provisions

of part 7 of the workmen's compensation act, generally known as the "occupational disease amendment."

There is some indication that Barclay had a hernia in 1931, and there is no question about the fact that in 1936 he sustained a left inguinal hernia, which was repaired. Dr. Ethan B. Cudney, the industrial surgeon of defendant company, who examined Barclay on October 15, 1942, said that his examination revealed a hernia "so large that it practically obliterated the scrotum," and he stated that, in his opinion, the hernia "had been there for several years, four or five years, maybe longer." He testified in part as follows:

"I have never seen a hernia as large as Mr. Barclay has, that hadn't been present for a matter of, I would say, a matter of years. I don't think it is a matter of days or a matter of weeks; a hernia that large could not happen in a matter of two or three weeks and still have the man continue to be on his feet, and it would take a tremendous—it would be a tremendous amount of disability. In fact, it would be practically a fatal thing to have a hernia develop in a few weeks to the size Mr. Barclay's was when I examined him. In fact, most of the time hernias, or acute hernias, are very small, and we sometimes have to make several examinations to determine whether there is a hernia present or not."

Dr. Howard B. Barker, who testified in behalf of plaintiff, examined Barclay on October 20, 1942, and performed the herniotomy in November. He found "a large left inguinal hernia on the left side, with numerous adhesions between the various layers of the abdominal wall." He stated that a strain might have increased Barclay's disability, and that "usually a sudden pain on straining, in

the inguinal region, means the separation of muscle or the tearing of adhesions, if they are present." On cross-examination he testified that "the presence of adhesions and the thickness of the neck of of the sac would indicate that a hernia had been present for some time." He stated that from the history he obtained from Barclay he "judged that he had had something there, that his abdominal wall had not been intact since the disturbance four months after his second operation," and that "he had a hernia for some time, in other words, for several years." On redirect examination he said: "Accepting the history as given, I would say that he must have had some—some change in the condition of the inguinal canal as a result of the strain." On recross he answered that what he found would indicate that the swelling or lump had been present for some time; and, on redirect, replied to the inquiry as to whether or not the recurrence was old, that: "You can only make a relative statement. You can't tell how old nor you can't tell exactly how young."

The deputy commissioner then asked Dr. Barker about the adhesions, to which he replied:

"In the hernia, you have three layers, primarily; you have the peritoneum, which is the sac itself; you have the internal oblique muscle and you have the external oblique fascia, which [is] the media portion of the external oblique muscle. In doing an operation for hernia, you open the external oblique fascia, you divide or separate the fibers of the internal oblique muscle from the portion of Poupart's ligament, and you dissect out the peritoneal sac. You remove the peritoneal sac, close the neck, suture the internal oblique muscle to the shelving portion of the Poupart's ligament, by means of some type of suture material, either absorbable or non-absorbable, and you close the opening in the ex-

ternal oblique fascia. You can't do that in any hernia without leaving adhesions. That is, there are adhesions between the various layers after you do that operation, between the peritoneal layer and the internal oblique, between the internal oblique and the external oblique fascia, and of course each time that an operation is done, if you have two operations, you have more adhesions than you do with one operation, so that there are adhesions between the peritoneum and the internal oblique, and between the external oblique fascia and the internal oblique muscle."

The deputy commissioner concluded that the hernia was not of recent origin, and denied compensation. On review, the department considered that, although *Riley* v. *Berry Brothers Paint Co.*, 293 Mich. 500, involved the question of whether the claimant promptly reported a hernia, this authority was directly in point and, after quoting at length from the court's opinion, concluded that:

"Inasmuch as plaintiff had a left inguinal hernia prior to the incident of October 14, 1942, that condition could not have been recent in origin notwithstanding the fact the condition was not previously disabling."

The department held that:

"A recent aggravation of a pre-existing hernia which causes total disability is not compensable under section 2 of part 7 of the workmen's compensation act,"

and affirmed the award of the deputy commissioner, disallowing compensation.

Hernia was defined in *Robbins* v. *Original Gas Engine Co.*, 191 Mich. 122, as follows:

"All the experts seem to agree that the visible evidence of the hernia is the protrusion through the

inguinal ring of the peritoneum and its contents; 'the hernia is the peritoneum going through, accompanied by the intestines or some other substance.' "

The court further said:

"But the testimony for respondents is to the effect that the peritoneum is incapable of sudden, and is capable of very gradual, extension; that the sudden complete development of hernia in a pathological sense is impossible, but the hernia may be felt—the sudden projection of hernial contents into the preformed sac—for the first time during a straining effort. Various medical authorities to which the court is referred appear to sustain the proposition that hernia is of slow formation and can never arise from a single augmentation of intra-abdominal tension, however great it may be."

Under the workmen's compensation law (Act No. 10, Pub. Acts 1912 [1st Ex. Sess.], 2 Comp. Laws 1929, § 8407 *et seq.* [Stat. Ann. § 17.141 *et seq.*]), compensation for hernia could only be "allowed because of some unusual, fortuitous, or unexpected happening which caused the injury and which was in essence accidental in character." *Kutschmar* v. *Briggs Manfg. Co.*, 197 Mich. 146 (L. R. A. 1918 B, 1133). See, also, *Nagy* v. *Solvay Process Co.*, 201 Mich. 158, and *Sjoholm* v. *Hercules Powder Co.*, 227 Mich. 610.

The so-called occupational disease amendment (Act No. 61, Pub. Acts 1937 [Comp. Laws Supp. 1940, § 8485–1 *et seq.*, Stat. Ann. 1942 Cum. Supp. § 17.220 *et seq.*]) added a new part 7 to the workmen's compensation law and provided for compensation for disability arising from 31 specified "occupational diseases," among them being No. 28, Hernia, "clearly recent in origin and resulting from a strain, arising out of and in the course of employ-

ment, and promptly reported to the employer." *Riley* v. *Berry Brothers Paint Co., supra.*

By Act No. 245, Pub. Acts 1943 (Comp. Laws Supp. 1943, § 8485–1 *et seq.*, Stat. Ann. 1943 Cum. Supp. § 17.220 *et seq.*), part 7 was amended by striking therefrom the 31 specific diseases covered, and providing for compensation for any disease or disability "due to causes and conditions which are characteristic of and peculiar to the business of the employer, and which arises out of and in the course of the employment." To this was added the following:

"Ordinary diseases of life to which the public is generally exposed outside of the employment shall not be compensable: *Provided, however,* That a hernia to be compensable must be clearly recent in origin and result from a strain arising out of and in the course of the employment and promptly reported to the employer."

Thus the limitation on compensation as it existed at the time of Barclay's claimed hernia was retained in the law by the 1943 amendment, although in slightly different language.

Our problem is to determine whether the department correctly applied the 1937 limitation to the facts in Barclay's case.

A helpful discussion may be found in Detroit Law Review of November, 1933, vol. 4, p. 13, in an article entitled, "Hernia in Workmen's Compensation Cases."

In the solution of this problem we must first determine the intent and meaning of Act No. 61, § 2, item 28, Pub. Acts 1937 (Comp. Laws Supp. 1940, § 8485–2, Stat. Ann. 1942 Cum. Supp. § 17.221), which determination is also applicable to section 1, paragraph (c) of the same act, as amended by Act No. 245, Pub. Acts 1943 (Comp. Laws Supp. 1943, § 8485–1, Stat. Ann. 1943 Cum. Supp. § 17.220).

Neither the act of 1937 nor the act of 1943 precludes an award of compensation for hernia resulting from an accident or the intervention of an "unusual, fortuitous, or unexpected happening which caused the injury and which was in essence accidental in character." *Kutschmar* v. *Briggs Manfg. Co., supra,* 150. These amendments to the compensation law extend the right of compensation to those situations in which the accidental element is lacking and should be applied, in so far as legislative intent permits, to instances of aggravation of nondisabling hernias, such as that described in *Paridee* v. *Great Atlantic & Pacific Tea Co.,* 278 Mich. 191, where, prior to such amendments, compensation was not permissible. Any other holding would prevent those so situated from obtaining employment and performing gainful work. At the same time, it was undoubtedly the intent of the legislature, particularly in view of the new section added by Act No. 264, Pub. Acts 1937 (Comp. Laws Supp. 1940, § 8485–14, Stat. Ann. 1940 Cum. Supp. § 17.230 [3]), effective October 29, 1937, which provided for hernia waiver within 120 days from the effective date of this act, *Barry* v. *Briggs Manfg. Co.,* 296 Mich. 137, to avoid the burden of compensation for pre-existing hernias and to permit employment of those so situated. It is obvious, although the legislature did not say so, that common sense dictates that the employer would protect itself by proper physical examination of new employees. In short, the legislature sought, and we think effectively, to provide compensation for those employees who suffer a loss of earnings by reason of, not only a subsequent hernia, but also those whose pre-existing, nondisabling hernia becomes aggravated. *Lohrman* v. *Haven-Busch Co.,* 293 Mich. 143.

If the department in the instant case had arrived at its conclusion by reason of a finding that Barclay's hernia existed prior to the time of his disablement, there would be nothing left for us to say. However, the department did not do this. It concluded that "a recent aggravation of a pre-existing hernia which causes total disability is not compensable," and this solely because Barclay "had a left inguinal hernia prior to the incident of October 14, 1942." Such holding is legally erroneous in view of our construction of the statute. Nevertheless, we should not substitute our judgment on the factual aspects of the case for that of the department, but rather the department should pass upon the factual situation.

We have heretofore pointed out, by quotations from the testimony, the difficulties encountered in such determination. Our view in this respect has been frequently expressed, and in amplification of that view we adopt with approval the language of the supreme court of Wisconsin in *McCarthy* v. *Industrial Commission of Wisconsin,* 194 Wis. 198 (215 N. W. 824), as follows:

"It appears not only from the statement filed by the industrial commission in this case, but from an examination of the workmen's compensation reports, that the industrial commission is frequently called upon to deal with hernia cases, and that they are perhaps the most troublesome cases with which the commission comes in contact. This is due to the fact that inguinal hernia is rarely of traumatic origin, but that it has a gradual development, and its final culmination is frequently, if not generally, due to some strain which can be said to be incidental in its nature. The frequency of these cases has enabled the members of the industrial commission to become thoroughly familiar with the nature, development, and progress of the ailment, and they

bring to the consideration of such cases a knowledge and experience which enables them to pass most discriminatingly upon the evidence produced. It is scarcely too much to say that they are experts upon the subject. At any rate, none can deny that they are far better qualified to draw proper inferences from the physical facts than those who do not possess the peculiar knowledge of the subject which they have acquired by reason of their experience and contact with hundreds of such cases. * * * The convincing power of expert testimony depends somewhat upon the knowledge and experience of the one who is called upon to weigh such testimony. The untutored are likely to accept the opinion of an expert at its face value, while those possessing knowledge upon the subject concerning which he testifies may discount it or entirely disregard it as unsound."

The award of the department of labor and industry should be vacated and the matter remanded to the department for further consideration of the factual aspects of the case, in conformity with this opinion. It should be so ordered, with costs to appellant.

STARR, J., concurred with BUSHNELL, J.

WIEST, J. (*for affirmance*). I am of the opinion the holding of the department should be affirmed.

Plaintiff's right to an award, if any, is under the provisions of the statute as it stood in 1937 (Act No. 61, Pub. Acts 1937 [Comp. Laws Supp. 1940, § 8485–1 *et seq.*, Stat. Ann. 1942 Cum. Supp. § 17.220 *et seq.*]), and the act of 1943, cited by my Brother, has no bearing upon the issue in this case. Was the hernia of recent origin? A recurrent hernia is not a hernia of recent origin.

The department found that the disabling hernia suffered by plaintiff was a recurrence of a former hernia in 1936, and the evidence at the hearing, inclusive of plaintiff's own testimony, establishes beyond cavil such to be the fact. Plaintiff admits that he had a hernia in the same groin in 1936 and then had an operation at a hospital and by direction of his doctor wore a support for about nine months and at times, later, it pained and swelled to the size of a small egg. After the hernia in 1942, plaintiff went to the company doctor who examined his condition and took his history but did not perform an operation. The doctor testified:

"I have never seen a hernia as large as Mr. Barclay has, that hadn't been present for a matter of, I would say, a matter of years. I don't think it is a matter of days or a matter of weeks; a hernia that large could not happen in a matter of two or three weeks and still have the man continue to be on his feet, and it would take a tremendous—it would be a tremendous amount of disability. In fact, it would be practically a fatal thing to have a hernia develop in a few weeks to the size Mr. Barclay's was when I examined him. In fact, most of the time hernias, or acute hernias, are very small, and we sometimes have to make several examinations to determine whether there is a hernia present or not."

Dr. Howard B. Barker testified that he examined and operated on plaintiff; that October 20, 1942, plaintiff "had a left inguinal hernia, recurrent;" that plaintiff "had a large left inguinal hernia on the left side, with numerous adhesions between the various layers of the abdominal wall." At the time of the operation he found plaintiff "had a large sac with a large neck or opening, sac showed considerable peritoneal fat around it. There were adhesions between the muscle, the adjacent muscle and

the neck of the sac, and adhesions between the various layers of muscle, or external oblique fascia and the internal oblique muscles," which indicated "that there had been a previous disturbance of the muscles and, of course, in this case, we assumed that the previous disturbance was the previous operation," and the adhesions and a portion of the neck of the sac being thick would indicate that the hernia had existed for some time.

Plaintiff testified that following the operation in 1936, the hernia had been getting worse and started to bother him just a few months after he went back to work and has bothered him "on and off, all along;" that he first noticed the swelling more than a year "after I had taken the last injection," which "would be somewhere around * * * 1937 or 1938."

The denial of an award is affirmed, with costs to defendant.

NORTH, C. J. (*concurring in affirmance*). As to plaintiff's hernia the department found: "that condition could not have been recent in origin notwithstanding the fact the condition was not previously disabling." There was testimony to sustain this finding. It follows that plaintiff is not entitled to compensation because his hernia was not "clearly recent in origin" as required by the statute. Act No. 10, part 7, § 2, subd. 28, Pub. Acts 1912 (1st Ex. Sess.), as added by Act No. 61, Pub. Acts 1937 (Comp. Laws Supp. 1940, § 8485–2, Stat. Ann. 1942 Cum. Supp. § 17.221). For this reason I concur with Mr. Justice WIEST in affirmance, with costs to defendant.

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

D. F. BRODERICK, INC., *v.* CONTINENTAL CREDIT CORP.

1. CORPORATIONS—MERGER—OBLIGATIONS OF RESULTING CORPORATION.
   Upon the merger of two corporations, the obligations of the merging corporations become the obligation of the resulting corporation.

2. INSURANCE — CORPORATIONS — AUTOMOBILES — FINANCING — CONSTRUCTION OF POLICY—ACCOUNTING.
   Ambiguously worded insurance policy, issued to cover interest of defendant corporations which financed motor vehicles on both a wholesale and retail basis, which policy was designed to cover cars eligible for coverage and insured thereunder and which also permitted defendants to finance dealers with or without insurance, *held*, not to have provided total insurance, there being no provision for accounting as to all vehicles financed.

3. SAME—CONSTRUCTION OF POLICY—AMBIGUITY.
   An insurance policy or contract prepared by the insurer is construed against the insurer where the contract is ambiguous.

4. SAME—AUTOMOBILE FINANCE COMPANIES—ACCOUNTING—COVERAGE.
   Under insurance policy covering interest of defendant finance companies in only such cars retailed to purchasers by dealers as defendants chose to cover with insurance but which was not to attach to vehicles for which insurance was not applied for, defendant was under no duty to account to insurer or its agent for vehicles financed by it but not insured through plaintiffs.

5. APPEAL AND ERROR—QUESTIONS REVIEWABLE—STIPULATIONS.
   The Supreme Court does not concern itself with question of paid or unpaid premiums under insurance policies with defendant finance companies where parties have stipulated that the only question involved was that of the liability of the defendants under the policies.

Appeal from Wayne; Toms (Robert M.), J. Submitted June 6, 1944. (Docket No. 13, Calendar No. 42,442.) Decided October 11, 1944. Rehearing denied December 1, 1944.

Bill by D. F. Broderick, Incorporated, a Michigan corporation, and Home Insurance Company—New York, a New York corporation, against Continental Credit Corporation and Contract Purchase Corporation, Michigan corporations, for an accounting and to restrain an action at law. Decree for defendants. Plaintiffs appeal. Affirmed.

Wurzer, Higgins, Sweeney & Starrs (*John T. Higgins* and *John R. Starrs,* of counsel), for plaintiffs.

Fred Dye, for defendants.

SHARPE, J. Plaintiffs filed their bill of complaint against defendants to enjoin an action at law by defendant Contract Purchase Corporation against plaintiff D. F. Broderick, Inc.; for a determination of rights and liabilities of the respective parties under two automobile insurance policies; for an accounting for premiums due under said policies from April 14, 1939, to January 31, 1941; and a refund on return premiums and allowances under said policies. The trial court entered a decree dismissing the bill, from which plaintiffs have taken this appeal.

Plaintiff D. F. Broderick, Inc., operated as general agent of several insurance companies and is an associate agent of the Home Insurance Company. Defendant Continental Credit Corporation financed the purchase of automobiles by dealers at wholesale, and by individuals at retail, at their different offices throughout the State, and prior to

July 23, 1937, said defendant and its subsidiary sought a market for insurance on automobiles so financed by it. Plaintiff D. F. Broderick, Inc., procured a market for such insurance between the Home Insurance Company and said defendant, which company negotiated two so-called "master policies"—a "wholesale" policy which covered automobiles held in inventory by dealers and mortgaged by them to secure loans made to the dealers by the Continental Credit Corporation, and a "retail" policy which covered motor vehicles purchased by customers on deferred payment plans. Plaintiffs and defendant Continental Credit Corporation operated under said policies from the effective date thereof—July 23, 1937—until April 14, 1939, during which time the premiums paid to plaintiffs by said defendant averaged about $10,000 per month.

On April 14, 1939, an "agreement for merger" between defendants Continental Credit Corporation and Contract Purchase Corporation, with the Contract Purchase Corporation as the resulting corporation, was entered into, which merger provided, among other things, as follows:

"Contract Purchase Corporation shall, upon the execution, approval and filing of this agreement as provided by law, be possessed of all rights, privileges, powers, franchises, property, real, personal and mixed, debts, stock subscriptions, things in action, and all and every other interest of every kind and nature and shall be subject to all debts, liabilities, duties and obligations of whatsoever kind or nature, whether secured or unsecured, of Continental Credit Corporation, as provided by the statutes of the State of Michigan relating to merger of corporations, except as to subordinated obligations of Continental Credit Corporation, which are assumed in their subordinated position."

Prior to said merger defendant Contract Purchase Corporation conducted the business of financing the purchase of automobiles, with offices in Detroit. Subsequent to the merger it operated through its home office in Detroit and in the several offices taken over in the merger, with the exception of the Cleveland, Jackson and Flint offices which were sold shortly after the merger to other finance companies operating in those locations, and were doing business with the same dealers as defendant Continental Credit Corporation formerly did.

Plaintiffs claim that subsequent to the merger defendant Contract Purchase Corporation continued to operate the business formerly operated by defendant Continental Credit Corporation but failed to place insurance upon such business in accordance with the policies; refused to account to plaintiffs in relation to the number of motor vehicles financed by it in the course of operating the business formerly operated by Continental Credit Corporation subsequent to the merger of defendants, and since April 20, 1939, refused to make monthly reports to plaintiff as provided in the "wholesale" policy, and refused to make the daily reports to plaintiffs as provided in the "retail" policy, and that the Home Insurance Company has lost the benefit of the premiums, and D. F. Broderick, Inc., has lost the benefits of the commissions which would have been otherwise payable to them. Both policies were cancelled by plaintiffs in accordance with their terms, the effective date of termination being January 31, 1941.

Defendant Contract Purchase Corporation was not paid the moneys due it for refunds of premiums under the "retail" policy for the months of October and November, 1939, and on December 16, 1939, instituted suit in assumpsit in the common pleas court for the city of Detroit against plaintiff Broderick,

whereupon plaintiffs filed the bill of complaint in this cause and tendered the amount of the unpaid accruals for return premiums into court, to be held by the clerk of the court as a partial set-off against the amount due plaintiffs under an accounting as prayed for in the bill.

Defendant Contract Purchase Corporation claimed in its answer that both policies were terminated to all intents and purposes the day after the merger because of the fact that there were no placements of insurance for either of such contracts to become operative upon.

The trial court held that the master policies created no legally binding obligation on the part of defendants to place all their insurance business on automobiles financed by defendants with plaintiff Home Insurance Company, through plaintiff D. F. Broderick, Inc., and a decree was entered dismissing the bill and making such disposition of the moneys on deposit with the clerk of the court as was consistent with the court's opinion.

The principal question presented for review is the liability, if any, of defendant Contract Purchase Corporation to plaintiffs for premiums accruing under said policies from the effective date of the merger to the effective date of the termination of the policies by plaintiffs.

It is undisputed that if the policies issued by plaintiff to the Continental Credit Corporation created a legally binding obligation on the part of the Continental Credit Corporation that obligation followed the merger of the Continental Credit Corporation and the Contract Purchase Corporation and became an obligation of the resulting corporation. It thus becomes necessary to examine the two policies hereinbefore referred to.

Plaintiffs rely upon the following paragraphs of the wholesale policy in support of their claim of total insurance:

"1. Whereas the 'corporation' may or does finance on its wholesale plans the delivery of motor vehicles to 'dealers,' and the 'corporation' acquires an interest in such motor vehicles under the terms of trust receipts, storage warehouse consignment receipts, notes, accepted time drafts, chattel mortgages, conditional sales contracts and leases (hereinafter termed 'notes') and the 'corporation' desires to have all such motor vehicles in which it may have an interest insured (when said motor vehicles are not otherwise insured by the 'dealer' for the benefit of the 'corporation' and the 'dealer') against certain hazards, and; * * *

"5. As respects each motor vehicle financed on the 'corporation's' wholesale plans eligible for coverage and insured hereunder, the policy shall cover from the time of the preparation or execution of the 'notes' by the 'corporation' or the 'dealer' and shall cover continuously thereafter until the interest of all assureds in such 'notes' has been satisfied, or until the motor vehicles shall have been sold and delivered; (in such latter case, however, the interests of the 'assured' other than the 'dealer' shall be covered) or until this policy shall have been cancelled, as elsewhere provided herein. In the event of any 'note' being rejected by the 'corporation' when offered, this insurance will continue for a period of 30 days and no more, in so far as the interests of the 'dealer' are concerned (but as to the other assureds until their interests have been fully satisfied and liquidated) from the date the 'corporation' mails the notice of such rejection to the indorsers, drawers, makers and/or acceptors.

"6. It is intended that this policy will protect against the perils of fire, transportation, theft, rob-

bery and pilferage, as herein defined, any motor vehicle, including commercial and pleasure cars, trucks, tractors, trailers, buses, ambulances, funeral cars, hearses, taxicabs, and motorcycles or any part thereof or attached thereto financed on the wholesale floor plans of the 'corporation,' eligible for coverage and insured hereunder, and for which 'dealers' have executed 'notes' which are held or have been assigned to the 'corporation' while within the limits of the United States of America and Canada and while on the floor of the 'dealer' or any other place of storage, except as specifically excluded or limited by this policy, and including delivery by conveyance of any kind by land or water, or under their own power to warehouse or other place of storage, except as specifically excluded or limited by this policy, or to 'dealer' or 'bailee' from 'factory', 'warehouse' or 'railroad station' or other point of delivery and including also delivery by any form of conveyance by land or water or under their own power to a 'bailee' from the 'dealer' or other 'bailee'. * * *

"11. While this policy does not contemplate that the 'dealer' shall effect specific insurance on any of the motor vehicles covered hereunder at any location, it is expressly understood and agreed that the placing by the 'dealer' of such specific insurance at any location, without knowledge or consent of the 'corporation' or through inadvertence or misunderstanding, shall not invalidate the rights of the 'corporation' hereunder. It is understood and agreed that this insurance shall be considered as excess insurance when any other insurance exists in the name of the 'assured' on any of the property insured, or where other insurance has been taken out in the name of others for the benefit of the 'assured,' and this insurance shall not apply or contribute to the payment of any loss until all such other insurance shall have been exhausted, but this provision does not affect the right of the 'corporation' to recover

hereunder to the extent of its interest, if such other insurance shall have been placed without their knowledge or consent, and the 'company' through the 'general agent' shall make payment promptly upon receipt of proof of loss, it being understood, however, that in every case where the existence of other insurance comes to the attention of the 'corporation' at its home office, at Jackson, Michigan, notice of the existence of this insurance will be given promptly to the 'company' through the 'general agent,' and the 'company' will be subrogated to all rights of the other 'assured' in any recovery collected by virtue of the existence of other insurance, to the extent of the net loss paid by the 'company.'
* * *

"15. The omission or unintentional error on the part of the 'corporation' in the preparation of statement will be subject to rectification, provided same is communicated to the 'company' through the 'general agent' as soon as discovered and provided further that the omission or failure on the part of the 'corporation' to omit any transaction from statement sent to the 'company' coverable hereunder will not relieve the 'company' from its obligations hereunder, if it shall appear that the 'corporation' bona fide intended to bring such transaction under the operation of this policy and the 'assured' shall be liable for all agreed premiums thereon, it being agreed that this policy will, in accordance with its conditions, cover every motor vehicle which the books of the 'corporation' show to have been financed by it on its wholesale plans, and which motor vehicles are eligible for coverage and insured hereunder. All records, books, reports, statements of the 'corporation' relating to the transactions covered by this policy shall be open to inspection by the 'company' and/or the 'general agent' at any reasonable time."

Defendants urge that paragraphs 5, 6 and 15 are the only paragraphs in the policy which state what

cars are to be insured, and all paragraphs state that these are motor vehicles "eligible for coverage and insured hereunder." It is to be noted that the essential part of paragraph 6 reads as follows:

"It is intended that this policy will protect * * * any motor vehicle * * * financed on the wholesale floor plans of the 'corporation,' eligible for coverage *and insured hereunder,* and for which 'dealers' have executed 'notes' * * * except as specifically excluded or limited by this policy."

It is also to be noted that the following paragraph, in providing for an accounting, only requires the corporation to keep a record showing the amount of wholesale cost of the motor vehicle "eligible for coverage and insured hereunder":

"14. The 'corporation' agrees to keep an accurate record showing the amount of the wholesale cost to 'dealers' of the motor vehicles eligible for coverage and insured hereunder and to furnish the 'company' through the 'general agent' at the close of each month with a correct statement of average daily wholesale outstanding receivables covering motor vehicles (adjusted to the wholesale laid-down cost at the 'dealer's' place of business), outstanding during the preceding months. A rate of four and one-half cents per month shall be applied to each $100 of the average mean balance developed as per formulae attached hereto as exhibit 'A,' and the amount so obtained shall be the monthly premium for coverage provided under this policy which shall thereupon become due and payable to the 'company' through the 'general agent.'"

In our opinion the policy does not provide for total insurance. If it was intended that every motor vehicle financed by the corporation must be insured, it would have required an accounting on all vehicles

financed. Moreover, it is to be noted that this wholesale policy is ambiguous in its terms. Obviously, it is a contract prepared by the insurer, or its general agent, and therefore must be construed against the insurer. See *In re Petition of Hume,* 260 Mich. 555. Being so construed, it must be held that it does not provide for total insurance.

The retail policy covers retail sales of motor vehicles on the deferred payment plan. It covers such risks as fire, theft, transportation, robbery and pilferage. In order to ascertain what cars are covered by the policy it is necessary to refer to paragraph 17, which reads as follows:

"17. Application for acceptance and evidence of coverage. The 'named assured' shall send to the 'company' through the 'general agent' at the close of business each day an application in the form agreed setting forth each transaction to be covered hereunder and the standard information required by the 'company' in regard thereto and coverage shall not attach on any motor vehicle not so applied for. The acceptance of each risk and the particulars of coverage thereon, including the perils insured against, and the premium paid thereon, shall be evidenced by a subordinate policy, notice or certificate of participation issued hereunder and forming a part hereof by the 'company' through the 'general agent' hereunder and each subordinate policy, notice or certificate of participation is hereby made a part of this policy subject to its terms and to any special conditions indorsed on such individual subordinate policy, notice or certificate of participation which the 'general agent' will mail or cause to be mailed to the 'purchaser/assured.' "

Under the preceding paragraph it is provided that coverage shall not attach to any vehicle not applied

for. Such provision indicates that the Continental Credit Corporation would have some discretion in determining whether it would finance a vehicle "with insurance" or "without." Under the foregoing paragraph there need not be coverage unless the company finances on the "with insurance" plan. Under the "retail policy" the Continental Credit Corporation has the discretion of not insuring vehicles.

In view of the fact that the interested parties have stipulated that the only question is the liability of the defendants under the policies, we are not concerned with the paid or unpaid premiums, and are in accord with the finding of the trial judge,—"certainly, there is no provision in the policies which definitely, specifically and unequivocally imposes on the defendants the legal duty to place all their business with the plaintiffs."

The decree of the trial court is affirmed, with costs to defendants.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, BOYLES, and REID, JJ., concurred.

PEOPLE *v.* LEVE.

1. INDICTMENT AND INFORMATION—WORDING OF STATUTES.
   It is not imperative always to adopt the exact words of a statute in drafting an indictment or information provided other language of like import and certainty is used.

2. CRIMINAL LAW—BRIBERY—PUBLIC OFFICERS—USE OF INFLUENCE.
   The statute making it a felony for an executive, legislative or judicial officer to accept a bribe does not make it a crime to use influence (Act No. 328, § 118, Pub. Acts 1931).

3. SAME—INDICTMENT AND INFORMATION—BRIBERY—USE OF INFLUENCE.
   It was error to try defendant, charged with accepting a bribe contrary to section of penal code making it a felony for an executive, legislative or judicial officer to accept a bribe, under an information which not only did not conform to the language of the statute but was so broad that the jury could consider the use of influence by defendant, the use of influence not being an element of the crime as set forth in the statute (Act No. 328, § 118, Pub. Acts 1931).

4. OFFICERS—ESSENTIALS OF PUBLIC OFFICE.
   In order to make any position of public employment a public office of a civil nature, it is necessary to show the office was created by the Constitution or legislature or by a municipality pursuant to authority conferred upon it; there is delegated to it a portion of the sovereign power of government to be exercised for the benefit of the public; the powers conferred and duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority; the duties must be performed independently and without control of a superior power other than the law unless placed thereunder by the legislature; and that it have some permanency and continuity and not be only temporary or occasional.

5. CRIMINAL LAW—BRIBERY—PUBLIC OFFICER—DIRECTOR OF BUREAU OF INVESTIGATION OF BOARD OF COUNTY AUDITORS.

Director of bureau of investigation which had been created by board of county auditors to interview and investigate prospective indigent adult patients hospitalized at county expense, whose duties were to ascertain facts and make recommendations but who performed no duties independently and without the control of the board, who had no power to determine policies, enter into contracts, or vote upon any question, was not an executive officer as such term is used in section providing that acceptance of a bribe by an executive officer was a felony (Act No. 328, § 118, Pub. Acts 1931).

6. SAME—DIRECTOR OF BUREAU OF INVESTIGATION OF BOARD OF COUNTY AUDITORS—STATUTES—PUBLIC OFFICER.

Defendant, charged with accepting a bribe and described in information as a director of bureau of investigation of board of county auditors, should have been proceeded against and, if found guilty, sentenced under section of penal code imposing penalty of misdemeanor upon employees accepting bribes rather than under section imposing felony upon public officers since he was not a public officer (Act No. 328, §§ 118, 125, Pub. Acts 1931).

Appeal from Recorder's Court of the City of Detroit; Gordon (Arthur J.), J. Submitted June 15, 1944. (Docket No. 60, Calendar No. 42,221.) Decided October 11, 1944.

Samuel Leve was convicted of accepting a bribe. Reversed without prejudice.

Sidney L. Alexander, Gabriel N. Alexander and *Harry Cohen* (*MacMahan, Abbott & Roberts* and *Arthur J. Abbott,* of counsel), for appellant.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, *William E. Dowling,* Prosecuting Attorney, and *Joseph W. Louisell* and *Harold Helper,* Assistant Prosecuting Attorneys, for the people.

SHARPE, J. Defendant was arrested, charged and convicted of the crime of accepting a bribe under the following information:

"State of Michigan,
County of Wayne,
City of Detroit—ss.

"The recorders court of the city of Detroit.

"In the name of the people of the State of Michigan, William E. Dowling, prosecuting attorney in and for the said county of Wayne, who prosecutes for and on behalf of the people of said State in said court, comes now here in said court in the March term thereof, A.D., 1942, and gives the said court to understand and be informed that Samuel J. Leve, late of the said city of Detroit, in said county, heretofore, to wit, on or about the 24th day of August, A.D., 1938, at the said city of Detroit, in the county aforesaid, who was at the time a duly authorized public official, to wit: an executive officer, an employee of the county of Wayne, director of the bureau of investigation of the county of Wayne, and who was at the time duly appointed and qualified and acting as such, did corruptly accept a gift, gratuity or consideration, to wit: $50 to do an act under an agreement and with an understanding that his vote, opinion, judgment or influence shall be given in a particular manner, and upon a particular side of a question, cause or proceeding, in the city of Detroit, Wayne county, Michigan, which may be pending or may by law be brought before him in his official capacity as such public officer, *in that he would use his influence to send or cause to be sent afflicted indigent adults to the Knoedler Convalescent Home for care and treatment,* and in that he would in his official capacity as such public officer approve vouchers for payment by the county of Wayne for services rendered by the said Knoedler Convalescent Home, and that in consideration of said gift, gratuity or consideration of $50 he did use his influence to send or

cause to be sent afflicted indigent adults to the Knoedler Convalescent Home for care and treatment and he did in his official capacity as such public officer, approve vouchers for payment by the county of Wayne for services rendered by said Knoedler Convalescent Home; 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.

"Note—See Act No. 328, § 118, Pub. Acts 1931.

WILLIAM E. DOWLING,
Prosecuting Attorney."

It appears that in 1928 the board of Wayne county auditors created a bureau of investigation and assigned to it investigative and clerical duties concerning indigent adult patients hospitalized at county expense. On June 29, 1934, defendant was appointed *director* for an indefinite period. He did not file an oath or bond before entering upon his duties, nor was he required to. The functions of the bureau of investigation were interviewing and investigating prospective patients as to their financial status; the collection of money to reimburse the county; and checking and comparing claim vouchers with probate orders and records. The bureau of investigation had no authority to induct a patient into a hospital. Such authority was vested in the probate court, and later in the county welfare commission. As a matter of practice, when the bureau of investigation determined that a patient was eligible to hospitalization at county expense it would recommend the hospital or home where the patient could be sent. About 12,000 patients a year were investigated by the bureau of investigation.

Prior to the trial of the cause defendant filed a motion to quash the information for the reasons that defendant was not an executive officer as charged in

the information; that defendant was an employee or agent; that the information did not charge that defendant gave his vote, opinion or judgment as required by section 118 of the Michigan penal code (Act No. 328, Pub. Acts 1931 [Comp. Laws Supp. 1940, § 17115–118, Stat. Ann. § 28.313]); that the charging portion of the information charged a mere use of influence; and that the examining magistrate made no finding as to any particular crime that had been committed. Said motion to quash the information was denied by the trial court.

Defendant also made a motion for a continuance because of the publication of the following newspaper article prior to the trial of the case:

"GOOD MONEY AFTER BAD

"Ray D. Schneider, ousted Wayne county auditor charged with accepting bribes, has been brought to trial. A great deal of public money has been spent to establish that evidence against him warrants presentation of the case to the jury. A further substantial sum must go out of the tax-supported coffers to determine his guilt or innocence.

"Nor is there ground to hope that should the present jury convict Schneider it would terminate this outlay. If he chooses, the ex-auditor can protract the processes of justice indefinitely—as witness former prosecutor Duncan C. McCrea and former sheriff Thomas C. Wilcox. Long since convicted of betraying the public's trust, they still are free men by reason of appeal processes.

"Other Wayne county officials and appointees—among them another former auditor, Edward H. Williams—accepted jury findings without taking recourse to further court fights and are now in prison. Having cheated Wayne county's taxpayers out of scores of thousands of dollars by their malfeasances, having put the State and county to the cost of trying

them, they are now being supported by the State as inmates of institutions.

"Altogether, Michigan's taxpayers have taken a thorough financial drubbing from corrupt officials in this county. With the opportunities for pilfering Wayne's present governmental form offers, it is inevitable that sooner or later another gang of rogues will take it over. Then the whole costly, shameful process will have to be gone through again—with every taxpayer in Michigan as the ultimate sucker.

"When Wayne county asks that the voters of Michigan's other counties join with it next Nov. 3 in voting for a measure that will enable it to devise a modern, economical, graft-proof government, it isn't pleading for the acceptance of a theory. It is asking for something the distressing need for which can be read directly out of tomes of grand jury evidence, confessions and court records—something that will halt the outpouring of public moneys that can't be dammed so long as Wayne is governed by the ancient, creaking administrative machinery it now possesses."

There was also published in the newspaper another article of similar import.

The trial court denied the motion for a continuance and the cause proceeded to trial. A jury was selected, and one Celia Knoedler testified that she gave defendant $50 to "get business." The jury brought in a verdict of guilty. Thereafter defendant made a motion for a new trial. Among the reasons stated are that defendant was not an officer within the meaning of section 118, Michigan penal code; that he did not act in the capacity of an officer; and that the court erred in giving the jury conflicting and confusing instructions. The trial court denied the motion for a new trial, and upon leave being granted, defendant has appealed, and again renews the reasons stated in his motions to quash the information and for a new trial.

The information filed in this case was by virtue of section 118 of the penal code, Act No. 328, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 17115–118, Stat. Ann. § 28.313). This statute provides that any executive, legislative or judicial officer who shall corruptly accept any gift or gratuity, or any promise to make any gift, or do any act beneficial to such officer under an agreement, or with an understanding that his vote, opinion or judgment shall be given in any particular manner, shall be guilty of a felony. In the information filed in this cause there was added to his *"vote, opinion* or *judgment"* the words *"in that he would use his influence."* The trial court instructed the jury as follows:

"However, the statute under which this prosecution is brought, provides:

" 'Any executive, legislative or judicial officer, who shall corruptly accept any gift or gratuity, or any promise to make any gift, or to do an act under an agreement and with an understanding that his vote, opinion or judgment or influence shall be given in a particular manner, and upon a particular side of a question, cause or proceeding, which may be pending or may by law be brought before him in his official capacity.' "

The people urge that it is not imperative to always adopt the exact words of the statute, provided other language of like import and certainty is used, citing *People* v. *Covelesky,* 217 Mich. 90. We are in accord with the theory of the cited case, but in our opinion it has no application to the facts in the case at bar. In the instant case the statute provides for vote, opinion or judgment. It does not make it a crime to use influence.

The information is much broader than the statute. The facts indicate that defendant did use his influence to have patients assigned to the Knoedler Convalescent Home. The jury might well have con-

sidered the term "influence" in bringing about a conviction. It was error to try defendant on an information that not only did not conform to the statute but was so broad that a jury could consider facts which were not elements of the crime.

It is also urged that defendant was not a public officer within the meaning of section 118 of the penal code, Act No. 328, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 17115–118, Stat. Ann. § 28.313). In considering this question we have in mind that the bureau of investigation was created by the board of auditors as a servient organization dependent upon the auditors for its powers and duties and that defendant had no powers or duties which were not changeable at the will of the auditors.

In *People* v. *Freedland,* 308 Mich. 449, we quoted with approval from *State, ex rel. Barney,* v. *Hawkins,* 79 Mont. 506, 528, 529 (257 Pac. 411, 53 A. L. R. 583), as follows:

"After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional."

The duties of defendant were not performed independently and without control of the board of auditors. His duties were to ascertain facts and make recommendations. He had no power to determine policies, enter into contracts, or vote upon any question. He was not an executive within the meaning of the act under which he was convicted. He should have been proceeded against, and if found guilty, sentenced under section 125 of the penal code, Act No. 328, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 17115–125, Stat. Ann. § 28.320.)

The judgment is reversed, but without prejudice upon the part of the people to file a new information under section 125 of the Michigan penal code.

NORTH, C. J., and STARR, BUSHNELL, BOYLES, and REID, JJ., concurred with SHARPE, J. WIEST and BUTZEL, JJ., concurred in the result.

EQUITABLE TRUST CO. *v.* KAROS.

1. EQUITY—JURISDICTION—RECEIVERS—PARTNERSHIP—OWNERSHIP OF PROPERTY—ADEQUACY OF REMEDY AT LAW.

   Determination of ownership of valuable machinery, property in possession of partnership of which plaintiff was appointed receiver, was a matter within jurisdiction of court in suit to enjoin removal of such machinery by claimed owner-lessor thereof since the receiver had no adequate remedy at law to set aside the claimed lease on the ground of fraud or to prevent him from taking possession of the machines and disrupting the

business, ownership had to be determined as a necessary incident to the accounting of the copartnership, the appointment of the receiver, and control of the court and receiver over the firm's property, the parties were before the court and the subject matter was within its jurisdiction.

2. APPEAL AND ERROR—DE NOVO REVIEW—FRAUD—CONSPIRACY—ADMISSION OF EVIDENCE.

On *de novo* review of receiver's suit to enjoin alleged owner-lessor of valuable machinery from removing machinery used by firm of which plaintiff was receiver, Supreme Court finds no improper liberality in receiving testimony based on the claim of fraudulent conspiracy.

3. SAME—CHANCERY CASES—WEIGHT OF EVIDENCE—FINDING OF COURT.

The conclusion of the trial court in a chancery case that the evidence as a whole preponderates in favor of a party is not disturbed on appeal where the testimony is conflicting as the trial court was in a better position to judge the credibility of the witnesses and the weight to be given their testimony.

4. SAME—RECEIVERS—OWNERSHIP OF PROPERTY—FINDING OF COURT—EVIDENCE.

Where plaintiff receiver had been appointed incident to original chancery case in which the plaintiff therein sought to set aside agreement for dissolution of partnership on ground of fraud and a petition therein to lease machines from defendant herein was denied after hearing on the merits, where testimony as to ownership of such machines in instant case was in conflict, finding for plaintiff receiver that the machines belonged to the firm and not defendant is not disturbed.

Appeal from Wayne; Toms (Robert M.), J. Submitted June 7, 1944. (Docket No. 15, Calendar No. 42,637.) Decided October 11, 1944. Rehearing denied December 1, 1944.

Bill by Equitable Trust Company, successor receiver of Sam Karos, doing business as Karos Tool & Manufacturing Company, and of Karos Tool & Manufacturing Company, an alleged partnership, against Sam Karos, Frank T. Hinks, and John Silaides to determine the ownership of machinery

and for an injunction. Decree for plaintiff. Defendant Silaides appeals. Affirmed.

John P. O'Hara, Edgar M. Branigin, and *John F. Wagner,* for plaintiff.

Crawford S. Reilley and *Philip J. Williams,* for defendant.

BOYLES, J. In August, 1940, Ernest Sachs filed a bill of complaint in the circuit court for Wayne county against Sam Karos and others, doing business as copartners under the name of Karos Tool & Manufacturing Company, seeking to set aside an agreement for dissolution of the copartnership made without his knowledge, on the ground that it was fraudulent. Sachs asked for an accounting and other relief. In this opinion we refer to the above proceeding in chancery as the "original case," and for brevity we hereafter refer to the Karos Tool & Manufacturing Company as "the company." Various defendants in that case filed cross bills, seeking affirmative relief and asking for the appointment of a receiver. An extended hearing was held in that case before Hon. DeWitt H. Merriam, circuit judge for Wayne county, and on December 1, 1942, a decree was entered for the plaintiff, from which the defendants have appealed. That appeal is now pending in this court.

During the progress of the hearing in the original case Judge Merriam appointed the Equitable Trust Company, plaintiff in the instant case, as successor receiver for the company. On July 22, 1941, the first receiver had filed the bill of complaint in the instant case in the circuit court for Wayne county. In it the receiver alleges that there was situated in the shop of the company among other property two

machines worth $15,000 and upwards, of great value to the operation of the business, that Sam Karos had filed a petition in the original case asking for permission to enter into a lease or to purchase these two machines, that Judge Merriam had denied this petition after a hearing thereon, that these machines were purchased by the company pursuant to a priority order of the United States based on the fact that the company was engaged in war preparedness work, and that they were paid for with company funds. The bill further alleges that the receiver plaintiff had been served with a notice that the appellant herein, John Silaides, claimed he was cancelling a lease to Karos for these two machines, and that he was giving notice of an intention to remove and repossess the same from the company. The bill further alleges that this so-called lease was fraudulent, a mere device to obtain possession of the machines and to defraud the company; that their removal would cause irreparable damage to the business; and that a determination of the ownership of the machines was necessary before the receiver could carry out orders of the court in the receivership proceedings. Pursuant to the prayer of the bill the court issued a temporary injunction restraining the appellant herein from making any attempt to claim or remove the machines. Silaides moved to dismiss the bill of complaint and to dissolve the injunction, mainly on the ground that he was thereby prevented from seeking a determination of the ownership of the two machines by a jury trial in a law case. The motion to dismiss the bill of complaint and dissolve the injunction was denied, issue joined, and the instant case heard on pleadings and proofs taken in open court. Decree was entered adjudging that the two machines were the property of the company, that the receiver had the right to possession, and

that the purported lease from Silaides to Karos was a fraud and a nullity. Silaides appeals. During the hearing below the case was dismissed as to defendants Sam Karos and Frank T. Hinks and they are not parties in this appeal.

We find no merit in appellant's contention that the bill of complaint should have been dismissed on the ground that the court could not determine the ownership of the property as between the receiver and Silaides in this proceeding. The receiver had no adequate remedy at law to set aside the claimed lease from Silaides to Karos on the ground of fraud or to prevent Silaides from taking possession of the machines and thus disrupting the business of the company. As a necessary incident to the accounting of the copartnership, the appointment of a receiver, and the control of the court and the receiver over the property of the company, it became necessary to determine whether the machines belonged to the company. If they were company property the receiver was entitled to possession, and the machines should be included in the assets of the company for accounting. The parties were before the court and the subject matter was within its jurisdiction. Other grounds urged by appellant for dismissing the bill have no merit. Appellant now seeks reversal of the decree, claiming errors in receiving testimony. There was credible testimony from which an inference might properly be drawn of the existence of a conspiracy between Silaides, Karos, and others to defraud the company. Having in mind this is a chancery case heard by the court, which we hear *de novo,* we find no improper liberality in receiving testimony based on the claim of a fraudulent conspiracy.

In our review of the facts we have been greatly aided by the statements of facts by counsel in their

briefs. Their respective viewpoints of the testimony and inferences to be drawn therefrom have been fairly and comprehensively presented in the briefs. We find it unnecessary to repeat here the full details of this conflicting testimony. The machines in question were originally ordered by the company, and the priority order permitting purchase and delivery of the machines was obtained from the United States government by the company through another concern for which the company was manufacturing war material as a subcontractor. Silaides claims that the company did not have the money to pay for the machines and that it was arranged he was to purchase the machines and lease them to Karos, doing business as the company. He claims that he purchased the machines himself, that he became the owner, and that he had the right to lease them to Karos, doing business under the assumed name of Karos Tool & Manufacturing Company. He admits that Karos petitioned the court in the receivership for permission to lease the machines from him, that the petition was heard on the merits and denied by the court. Silaides admits he did not have the money to pay for the machines and claims to have borrowed it from Karos, Mrs. Karos, and others interested in the company. We need not decide whether the purchase money came from one of the numerous so-called "kitties" organized by Karos out of funds of the company, or of its copartners, to conceal the real financial setup of the company. The manipulations of financing fully justify the finding of the court below that the company, not Silaides, was the real purchaser of the machines in accordance with the priority order permitting delivery. In fact, Silaides executed an assignment of his ostensible interest in the machines without consideration, the name of the assignee being left blank. His ex-

planation of the entire transaction borders on the improbable. The circuit judge saw the witnesses and heard testimony of all of the people who might throw any light on the matter. The trial court was in a better position to judge the credibility of the witnesses and the weight to be given their testimony. The testimony is unquestionably in direct conflict, and we do not overrule the conclusion of the trial court that the evidence as a whole preponderates in favor of the plaintiff.

While the testimony is conflicting, the essential issue in the instant case is narrow and does not impinge upon the issues to be determined in the original case. The only real issue for determination here is, does the company own these machines as against the defendant Silaides? The financial manipulations and connivances between Karos and Silaides are apparent. The record fully convinces that Silaides had no right whatever to any interest in these machines or to any rental from the so-called lease which was declared a fraud by the court below. Silaides was a willing tool used in an attempt to perpetrate a fraud against the company.

The decree is affirmed, with costs of both courts to appellee.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, and REID, JJ., concurred.

TOWNSHIP OF ROYAL OAK *v.* CITY OF BERKLEY.

1. MUNICIPAL CORPORATIONS—ANNEXATION—PROPORTIONATE ASSUMPTION OF LIABILITIES.

   When territory from a township is annexed to a city the liabilities of the township are to be assumed by the city in the same proportion as the assessed valuation of the taxable property in the territory annexed bears to the assessed valuation of the taxable property in the entire township from which such territory is taken (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931).

2. SAME—INCORPORATION OUT OF TOWNSHIP TERRITORY—DIVISION OF PERSONAL PROPERTY.

   A city that was incorporated out of township territory after enactment of amendment of statute whereby personal property of the township from which the territory is taken is to be divided on the same proportion as the assessed valuation of the taxable property in territory annexed to a city bears to the assessed valuation of the taxable property in the entire township from which the territory is taken was entitled to division of the personal property on such basis (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931).

3. SAME—INCORPORATION OUT OF TOWNSHIP TERRITORY—PERSONAL PROPERTY—INTANGIBLES.

   The term "personal property," as used in statute pertaining to adjustment of assets and liabilities incident to incorporation of city out of township territory, connotes intangible as well as tangible personal property and must include choses in action such as accounts receivable (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931).

4. SAME—INCORPORATION OUT OF TOWNSHIP TERRITORY—UNCOLLECTED ADVANCEMENTS TO SPECIAL ASSESSMENT DISTRICTS.

   Where a city is incorporated out of territory of a township which had advanced township general funds to special assessment districts for which repayment had not been made, while

the city is entitled to insist on reassessment, it is entitled to its *pro rata* share of the money when and as collected and is not entitled to be paid in full if the township neglects to reassess (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931).

5. SAME—INCORPORATION OUT OF TOWNSHIP TERRITORY—DIVISION OF PERSONAL PROPERTY—WORTHLESS DEBTS.

In the division of personal property when a city is incorporated out of a township which had advanced its general funds for payment of special assessment district obligations, to the extent that such advancements are worthless items owing to the township, the township cannot be required to include the same as an item of cash but city is entitled to its share only if and when same are collected by the township (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931).

6. SAME—ACCOUNTS RECEIVABLE—INTEREST.

Collections from taxpayers in special assessment districts of townships after incorporation of city out of township territory may be used by township toward payment of its *pro rata* share of its accounts receivable to city although collected as interest (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931).

7. SAME—ADVANCEMENTS FROM TOWNSHIP GENERAL FUND TO SPECIAL ASSESSMENT DISTRICTS—REPAYMENT AFTER INCORPORATION OF CITY—INTEREST.

A township which had made advancements from its general fund to special assessment district funds before part of its territory was incorporated as a city must account to the city for its *pro rata* share of all money thereafter received from special assessments or reassessments if and when collected until its account is paid in full without interest (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931).

8. SAME—REPAYMENT TO TOWNSHIP OF ADVANCEMENTS TO SPECIAL ASSESSMENT DISTRICTS—STIPULATIONS.

The right of a city to participate in collections made by a township from special assessment districts to which it had made advancements from township general fund after city was incorporated in township territory would not be foreclosed by stipulation filed wherein it was expressly asserted that the parties were not in agreement as to the city's right to such participation (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931).

9. SAME—TOWNSHIPS—ACCOUNTING—INTEREST ON ACCOUNTS RECEIVABLE.

A township which receives no interest on its accounts receivable may not be required to account for interest thereon to city incorporated out of township territory (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931).

10. SAME—ACCOUNTING BY TOWNSHIP UPON INCORPORATION OF CITY—INTEREST ON ACCOUNTS RECEIVABLE.

Delinquent general taxes and accounts receivable from other cities incorporated out of plaintiff township territory prior to defendant city's incorporation out of territory in same township, which were listed in stipulation filed in accounting suit and charged against township for *pro rata* division, as assets, property on hand at time of defendant's incorporation, were not items upon which city was entitled to interest since they were not charged as deferred accounts receivable (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931).

11. SAME—ACCOUNTING BY TOWNSHIP—UNCOLLECTED TAXES—RESERVATION IN STIPULATION.

Under provision of stipulation filed in suit for accounting between township and city incorporated out of its territory whereby there was reserved to city the right to claim participation in certain uncollected taxes and money received from scavenger sales of real estate, the city would be entitled to participate in uncollected taxes from special assessments, reassessments and scavenger sales so reserved, if and when collected, while the right to other taxes would be foreclosed by such stipulation (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931).

12. SAME—INCORPORATION OF CITY OUT OF TOWNSHIP TERRITORY—INTEREST.

The statute governing the division of property between a township and a city upon latter's incorporation out of township territory does not provide for interest on an amount found owing (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931).

13. INTEREST—STATUTES.

With certain exceptions and in the absence of contract express or implied, the right to interest in this State is statutory (2 Comp. Laws 1929, § 9238 *et seq.*).

14. MUNICIPAL CORPORATIONS—INCORPORATION OF CITY OUT OF TOWNSHIP TERRITORY—DECREE—INTEREST.

Since the amount of a city's claim against township out of whose territory city was incorporated is unliquidated and unsettled until final decree where the parties have resorted to the courts for settlement of differences and stipulation filed does not provide for interest, city to whom township is found to have owed a substantial amount as of time of incorporation would not be entitled to interest from such time until entry of final decree but would be entitled to interest on the amount found due after date of entry of such decree (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931; 2 Comp. Laws 1929, § 9238 *et seq.*).

15. INTEREST—CONTRACTS—DAMAGES—UNLIQUIDATED CLAIM.

In the absence of agreement and except by way of damages for money withheld, interest does not run on an unliquidated claim.

16. APPEAL AND ERROR—REMAND OF CHANCERY CASE—STIPULATION—ALTERATION OF ISSUES.

Motion to remand case for taking additional testimony in suit for accounting between township and city incorporated out of township territory is denied where filed seven months after decree was entered in court below while appeal was pending in this court where case was tried below and decree entered on stipulation covering most of the matters involved and remand for such purpose would inject new issues or change the issues previously settled by the stipulation and the need for such action is not apparent.

17. COSTS—PUBLIC QUESTIONS—ACCOUNTING BETWEEN TOWNSHIP AND CITY.

No costs are awarded in suit for accounting between township and city incorporated out of township territory, where the questions involved are of a public nature (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931).

Appeal from Oakland; Holland (H. Russel), J. Submitted June 8, 1944. (Docket No. 27, Calendar No. 42,724.) Decided October 11, 1944.

Bill by Township of Royal Oak against City of Berkley for an accounting. Cross bill by defend-

ant against plaintiff for an accounting. Decree for plaintiff. Defendant appeals. Modified and affirmed.

Glenn C. Gillespie, Carl A. Braun and *Franklin E. Morris,* for plaintiff.

J. Harold Steffes and *Arthur E. Moore,* for defendant.

BOYLES, J. This is a bill in chancery filed by the township of Royal Oak against the city of Berkley for an accounting of their respective personal property rights arising from the incorporation of the city of Berkley out of an unincorporated part of the township. The city by answer denies any indebtedness and by cross bill also asks for an accounting. The case was heard on proofs regarding certain disputed issues, the facts being stipulated as to other issues, and decree was entered for a substantial amount in favor of the city. The city appeals, claiming the court erred as a matter of law in some of its computations and conclusions. After issue was joined most of the matters in controversy were settled by stipulation filed in the case as follows:

"It is hereby stipulated and agreed that on April 4, 1932, defendant, city of Berkley, was incorporated from a portion of the territory formerly included within plaintiff township, at which time the assessed valuation of the territory detached represented 17.72856 per cent. of the total assessed valuation of plaintiff township.

"It is further stipulated and agreed that the following statement of assets and liabilities of plaintiff township, prepared by defendant, sets forth the book value of the assets and liabilities of plaintiff township and is accepted by the parties hereto as the basis for a division of the assets and liabilities of plaintiff township, subject to such modifications as may be made thereto when the legal question hereinafter set forth shall have been decided by the court:

"Assets

"Cash on hand	$ 80,178.61
"Collections S. A. Rolls 1 to 3 inclusive and 21	826.96
"Accounts receivable county treasurer	38,366.97
"Tax collections (general fund)	156,150.26
"Accounts receivable—Ferndale	112,678.81
"Accounts receivable—Royal Oak	20,122.64
"Accounts receivable—Pleasant Ridge	9,138.44
"Physical assets	4,443.68
"Total assets	$421,906.37

"Liabilities

"Dog license account	$ 1,115.15
"School taxes collected by township	11,989.05
"State and county taxes	12,324.67

"Advances by county treasurer	$20,000.00		
"(All types of taxes)			
"Temporary loans	140,000.00		
"(Pledging all types of taxes and used in all different funds)			
"Total		$160,000.00	
"Cash expenditures over cash receipts special assessment districts	33,552.87		
"Cash expenditures over cash receipts fire and road district funds	94,312.58		
"Total		127,865.45	
"Net liability general fund only			32,134.55

"Total liabilities		$57,563.42
"Total assets	$421,906.37	
"Total liabilities	57,563.42	
"Net	$364,342.95	

"17.72856% of net—$64,592.75

"The parties hereto are not in agreement as to that portion of the foregoing statement as to 'liabilities,' included within the lines as above set forth, and it is mutually agreed that testimony thereon shall be presented by the respective parties and the court shall determine the questions presented as a matter of law.

"It is stipulated and agreed that testimony will be submitted by the respective parties concerning Berkley's right to participate in certain uncollected taxes and money received from the 'so-called' scavenger sales, together with testimony concerning the right of Berkley to receive interest on any amount which may be found to be owing to it.

"It is further stipulated and agreed that all questions concerning the liability of defendant, city of Berkley, on special assessment bonds issued by plaintiff township prior to the date of incorporation of said city, shall be reserved for further consideration of the court in another cause now pending, and, the decree to be entered herein shall provide that, if necessary, a supplemental decree shall be entered herein after the decision of said question."

The township produced testimony by a certified public accountant employed as its auditor continuously since 1935. The defendant produced the testimony of the accountant who had audited its books since 1932. Comprehensive audits were received as exhibits. Nothing of interest would be accomplished by including in this opinion the details of the extensive computations which appear in the record. The accounting was heard by the circuit judge on the proofs as narrowed down by the stipulation. The questions before us for decision concern the four items totaling $127,865.45 in that portion of the stipulation hereinbefore quoted appearing between the heavy lines. The accuracy of the other figures adduced is not in issue.

No serious question arises over the first two items in the disputed area of the stipulation. They represent money borrowed by the township and are a liability of the township for which the city must stand its proportionate share. The applicable part of the statute governing these items provides:

"The indebtedness and liabilities of every city, village and township, a part of which shall be annexed to a city shall be assumed by the city to which the same is annexed in the same proportion which the assessed valuation of the taxable property in the

territory annexed bears to the assessed valuation of the taxable property in the entire city, village or township from which such territory is taken." 1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 2250, Stat. Ann. § 5.2093).

The chief dispute arises over the last two items between the heavy lines of the stipulation covering claimed cash expenditures by the township over cash receipts from certain special assessment district funds. The computations in the stipulation were made by the city, and these two disputed items as they appear in the stipulation include money due to the township from the special assessment districts but which has never been received by the township because of the noncollection of special assessment taxes. The city's computation of these disputed items also includes money in bank in special assessment district accounts which has not been turned over to the township. The township claims that these items should not have been included in figuring the township property on hand, that they should not be included in computing the township's liability to the city unless and until they are collected. The court held with the township, that these moneys could not be charged against the township as cash on hand at the time the city was incorporated, because the township had not yet received them. The court further held—and the decree so provides—that the city should be entitled to its share of these moneys only if and when they were collected by the township. The city argues for reversal of this ruling.

While it is plain that these claims of the township against the special assessment districts are in a sense personal property of the township, the critical issue is whether the township must at this time be held to account for these items as cash, or may the

settlement be deferred until these items become cash instead of "accounts receivable." This involves a construction of the applicable part of the statute governing the question. It provides:

"Whenever a new city shall be incorporated, the *personal property* of the township from which it is taken shall be divided and its liabilities assumed between such city and the portion of the township remaining after such incorporation, in the same ratio as herein provided in case of the annexation of a part of a township to a city." 1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 2250, Stat. Ann. § 5.2093).

Prior to this 1931 amendment the statute provided only for a division of the real estate. *Township of Springwells* v. *Wayne County Treasurer,* 58 Mich. 240; *City of Detroit* v. *Township of Redford,* 253 Mich. 453; *City of New Baltimore* v. *Chesterfield Township,* 292 Mich. 522. Berkley having been incorporated as a city in 1932, the above amendment applies and the city is entitled to a division of the personal property of the township in accord therewith. "Personal property" connotes intangible as well as tangible personal property and must include choses in action. The debts which the special assessment districts owed to the township in 1932 were intangible personal property of the township at the time of the Berkley incorporation. These "accounts receivable" by the township must be included in the division with the city. The critical question is whether these items must be accounted for as cash, or merely as accounts receivable, the accounting to be deferred until collected. Defendant city claims they should be figured in as cash belonging to the township, in 1932, mainly on the contention that the township has had plenty of time since then to compel

a reassessment of the special assessment district taxes. The circuit judge held that these "accounts receivable" were chargeable against the township only when and if collected, at which time the township would be held to account for a division with the city.

It is conceded that the township had advanced funds to both the road repair and fire department special assessment districts before defendant city was incorporated. The city claims that the township was "obligated" to reassess this deficiency in the special assessment districts and to "apply the next money collected" to the repayment of the moneys thus advanced. As to that, the question of the duty to reassess is not an issue in this case. In fact, counsel for the township concede that the city would "undoubtedly * * * have a right to mandamus or any other available remedy to compel the township to act." Counsel for the city contend: "that the deficiency caused by the advancements of township general funds to road repair local improvement districts was required by law to be reassessed subsequent to 1932, and that therefore Berkley is entitled to insist on such reassessment and to be reimbursed out of such collections, *or to be paid in full therefor if the township neglects to reassess.*"

It is conceded that the city is entitled to insist on such reassessment, and we concur with the holding of the lower court that the city is entitled to its *pro rata* share of the money when and as collected. We do not agree that the city is now entitled "to be paid in full * * * if the township neglects to reassess."

According to the record, some of these special assessment districts are no longer in existence, and a portion of the taxable property in other such districts has become the property of the State for non-

payment of taxes. Any money to be derived from a reassessment of these delinquent special assessments cannot at the present time be classed as cash of the township on hand for *pro rata* accounting to the city. To the extent that these items are "bad debts," perhaps worthless items owing to the township, the township cannot be required to include the same in its present accounting. We agree with the trial court that the city is entitled to its share only if and when the same are collected by the township.

The appellant city claims it is entitled to interest on general tax collections, and on interest-bearing funds collectible by the township since the date of the city's incorporation. As we have said, the city is entitled to share *pro rata* in the collections, made by the township since the date of incorporation, from accounts receivable against the special assessment districts in the disputed area of the stipulation. Included in such money received by the township there doubtless will be interest or penalties collected by the assessment district from the taxpayers. This may be included as a part of the money received by the township as payment on its "account receivable," although collected by the district as interest. The township must be held to account to the city for its *pro rata* share of all the money received from special assessments or reassessments if and when collected until its account is paid in full. The right of the city to participate in the same, if and when collected, is not foreclosed by the stipulation. But this does not mean that the township receives *interest on its accounts receivable.* Nor does it mean that the township must account to the city for interest on its accounts receivable. If it receives none, it cannot be required to account for it. The city claims it is entitled to interest on accounts receivable by the township from delinquent general taxes, and from "ac-

counts receivable'' from Ferndale, Royal Oak and Pleasant Ridge. But these taxes and ''accounts receivable'' were listed in the stipulation and charged against the township for *pro rata* division, as assets, property on hand, in 1932. They are not charged as deferred accounts receivable and for that reason the city is not entitled to claim interest received by the township subsequent to 1932 on these items which are outside of the disputed area in the stipulation.

The stipulation reserves to the city the right to claim participation in certain uncollected taxes, money received from scavenger sales of real estate, and ''interest on any amount which may be found to be owing to it,'' as stated above. The right of the city to participate in uncollected taxes from special assessments or reassessments covered in the disputed area of the stipulation, but only if and when collected, is upheld. The right as to other taxes is foreclosed by the stipulation. The lower court held that the city could participate in moneys received by the township from scavenger sales for taxes due prior to its incorporation, and this should have been specifically provided for in the decree.

The city asks for interest on any amount which may be found to be owing to it. The statute referred to, *supra*, governing the rights of these parties as to division of property and assumption of liabilities, does not support the city's claim of interest on the amount found owing. With certain exceptions (see *Mitchell* v. *Reolds Farms Co.*, 268 Mich. 301) and in the absence of contract express or implied, the right to interest in this State is statutory.* *Tousey* v. *Moore*, 79 Mich. 564. The equities of the case do not require that the city be allowed interest from the date of its incorporation on the amount found owing

* See 2 Comp. Laws 1929, § 9238 *et seq.* (Stat. Ann. § 19.4 *et seq.*).—REPORTER.

to it by the decree. Both parties may have been remiss in that they failed to bring these matters to an earlier conclusion but the fact remains that the city's claim is unliquidated and unsettled until final decree. In the absence of agreement and except by way of damages for money withheld, interest does not run on an unliquidated claim. *Sweeney* v. *Neely*, 53 Mich. 421. The city is not entitled to interest from the date of its incorporation on the amount found due, either under the stipulation or by contract express or implied. The city is entitled to interest on the amount found due it by the decree, but only from the date of final adjudication of the amount and final entry of decree.

About seven months after decree was entered in the court below, and while the appeal was pending in this court, appellant filed a motion here to remand for further testimony. This motion was denied without prejudice to our ordering a remand for further testimony if we found the need to appear. This motion is now renewed in the record before us. The effect of ordering a remand for the taking of such testimony would in large part be to set aside the stipulation on which the case was heard and decree entered, and to inject new issues into the case. We see no need for further testimony on the issues in the case, or to change the issues which have been settled between the parties by the stipulation filed.

The decree is modified to incorporate a provision as to division of receipts from scavenger sales in accordance herewith; otherwise it is affirmed. No costs are awarded, the questions involved being of a public nature.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, and REID, JJ., concurred.

PEOPLE *v.* CORDELL.

1. CRIMINAL LAW — PROBATION — STATUTES — SUSPENSION OF SENTENCE.

   The probation provisions of the code of criminal procedure have no application to the question of whether a sentencing court, without complying with the probation statute and after suspending sentence at the request of the defendant for a period of 19 months, lost jurisdiction to impose sentence (3 Comp. Laws 1929, § 17371 *et seq.*).

2. SAME—SUSPENSION OF SENTENCE.

   The statute authorizing the judge of the sentencing court to pronounce judgment and pass sentence on persons convicted of crime does not in express terms declare when sentence must be pronounced (3 Comp. Laws 1929, § 17329).

3. SAME—SUSPENSION OF SENTENCE—SERVICE IN ARMED FORCES.

   Although sentences may be suspended for various purposes, where the prosecution is not abandoned and suspension is had upon defendant's request before commencement of execution of sentence until his discharge from the armed services and it was thereafter continued about a year until after the sentencing judge had had further investigation made through the probation department, the sentencing judge did not lose jurisdiction to resentence defendant for a minimum term that was less than the original term by the length of his service in the armed forces (3 Comp. Laws 1929, § 17329).

4. SAME—SUSPENSION OF SENTENCE—PARDONS.

   While the power to suspend sentence and the power to grant reprieves and pardons are distinct and different in origin and nature the power to suspend sentence has always been regarded as a judicial function.

5. SAME—SUSPENSION OF SENTENCE—STATUTES—COMMON LAW.
The fact that a statute is enacted which in terms authorizes courts to suspend sentence does not confer upon courts a new power since such power was, at common law, asserted to be a power inherent in the courts (3 Comp. Laws 1929, § 17329).

6. SAME—SUSPENSION OF SENTENCE—EFFECT.
The suspension of a sentence simply postpones the judgment of the court temporarily or indefinitely, but the conviction and liability following it, and all civil disabilities, remain and become operative when judgment is rendered.

7. PARDONS AND PAROLES—SCOPE OF PARDONS.
A pardon reaches both the punishment prescribed for the offense and the guilt of the offender as it releases the punishment and blots out of existence the guilt.

Appeal from Wayne; Pugsley (Earl C.), J., presiding. Submitted June 15, 1944. (Docket No. 63, Calendar No. 42,748.) Decided October 11, 1944. Rehearing denied December 1, 1944. Certiorari denied by Supreme Court of the United States January 29, 1945.

George Cordell was convicted of conspiracy to obstruct justice. Affirmed and remanded.

Edward N. Barnard, for appellant.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Daniel J. O'Hara,* Assistant Attorney General, for the people.

BOYLES, J. The only question of law in this case is whether the court had lost jurisdiction to sentence defendant by suspending sentence for about 19 months.

George Cordell, appellant, was informed against in Wayne circuit court, along with other defendants, charged with having conspired to obstruct justice. The case was tried before a jury with Hon. Earl C. Pugsley, judge of the Oceana circuit, presiding. On December 15, 1941, the jury returned a verdict of guilty as to 23 defendants including appellant. On

January 7, 1942, Judge Pugsley sentenced Cordell to not less than two nor more than five years in State prison. Cordell set about perfecting an appeal to this court which was dismissed by order of this court on stipulation of counsel August 18, 1942.

On August 19, 1942, Cordell presented a petition to Judge Pugsley, reciting the dismissal of the appeal, alleging that he had been inducted into the armed services and ordered to report for service August 22, 1942, that he desired to voluntarily enlist, and asking that the court set aside the sentence and hold any other sentence in abeyance until he had been released from the armed services. On the same day Judge Pugsley entered the following order:

"It is hereby ordered, adjudged and decreed that the sentence heretofore imposed upon the said George Cordell on the 7th day of January, A.D. 1942, be and the same is hereby set aside and held for naught.

"It is further ordered, adjudged and decreed that any subsequent sentence that may be entered by this honorable court will be held in abeyance until the said George Cordell has been discharged and/or returned from service in the armed forces of the United States."

Cordell served seven months and three days with the armed forces and was discharged because of a change in the age requirement. His service commenced August 22, 1942, and continued up to the month of March, 1943. He thereupon returned to this State. Defendant is in disagreement with the sentencing court as to what occurred thereafter. Judge Pugsley, in certifying the record to this court after leave to appeal was granted in the instant case, states:

"I further certify that during the spring of 1943 the said petitioner did appear before this court while sitting in chambers in the circuit court in the city of Detroit, Wayne county, Michigan, and did

then and there advise this court that he had been discharged from military services and that he had been further advised by military officials at the time of his discharge that his services should be more beneficial to the government in the conduct of the war industry in which he claimed to have been engaged immediately prior to the time he entered the military service of the United States. Whereupon this court took under advisement, without any promises or assurances to the petitioner, the further order and judgment of the court, and with the understanding that the said petitioner would later report to the court to abide the judgment and order of the court when and where he should be notified to do so.

"I further certify that I caused further investigation to be made in the premises through the probation department of the circuit court of Wayne county, Michigan, and upon my return to Detroit in March, 1944, the said petitioner was notified to appear before this court, whereupon the proceedings were had as more fully appears in the foregoing transcript of proceedings had on March 29, 1944, to which reference is hereby made.

"I further certify that suspension and deferment of the sentence in said cause was made upon the application of the petitioner represented by counsel and that the defendant was also present in court represented by counsel on the 29th day of March, 1944, as more fully appears herein, and that no objections were then and there made to the sentence of the court as then modified and rendered."

The transcript of the proceedings before the sentencing court on March 29, 1944, shows that defendant by request appeared before the court on that day in person and by counsel, and that the court stated:

"The record may show that in the case of People v. George Cordell, et al., No. 21,096, that the defendant was requested by the court to appear here this

morning to abide the order of the court relative to the sentence heretofore imposed by the court on the 7th day of January, 1942, at which time he was sentenced to serve a term of not less than 2 nor more than 5 years in the Southern Michigan prison at Jackson.

"Subsequently, and pending an appeal to the Supreme Court, this sentence was suspended on account of the fact that it appeared to the court that defendant had been taken into the service of the United States army, and his sentence was suspended until his return.

"He has since then returned and is not now in the United States army, and I am ready to consider at this time any reasons, if any there are, why the sentence originally imposed in this case should not become effective."

Following a statement by defendant's attorney as to his service in the forces of the United States, his discharge and subsequent work, the court announced:

"As a matter of fairness to Mr. Cordell, I am disposed to give him credit on the term of 2 years for which he was sentenced, for the time which he served in the United States army; in other words, reducing the minimum of his sentence by 7 months. * * * The sentence, as amended, will be for not less than 17 months nor more than 5 years from and after the 17th day of April. I am giving him until that time to arrange some matters which I understand he has to take care of."

On the same day a record of the sentence was entered on the journal of the circuit court, as follows:

"At a session of the circuit court for the county of Wayne in the court house in the city of Detroit, on the 29th day of March, A. D. 1944.

"Honorable Earl C. Pugsley, circuit judge.

"George Cordell, the defendant in this cause, having heretofore on January 7, 1942, been sentenced to State Prison of Southern Michigan for a period of not less than 2 years, nor more than 5 years, and said sentence having been suspended, until the defendant, George Cordell, shall have been discharged, it is ordered by the court now here that the sentence previously imposed be amended to one of not less than 17 months, nor more than 5 years, said sentence to begin April 17, 1944."

From this sentence leave to appeal was granted and execution of the sentence stayed by this court. The only question raised on the appeal is, whether under the foregoing circumstances the court was without jurisdiction to impose sentence on March 29, 1944. More precisely, the question of law is whether the sentencing court, after suspending sentence at the request of the defendant for a period of 19 months, lost jurisdiction to impose sentence.

It is plain that the probation provisions of the code of criminal procedure (Act No. 175, chap. 11, Pub. Acts 1927 [3 Comp. Laws 1929, § 17371 *et seq.* (Stat. Ann. § 28.1131 *et seq.*)]) have no application. While modern conceptions of penology recognize the desirability of suspending sentence on a convicted person for a period of probation during good behavior, this defendant was not put on probation in conformity with the probation statute.

The statute authorizing the judge of the sentencing court to pronounce judgment and pass sentence on persons convicted of crime does not provide the answer, except to the extent that it does not in express terms declare when sentence must be pronounced. 3 Comp. Laws 1929, § 17329 (Stat. Ann. § 28.1072). Several early decisions of this court, beginning with *Weaver* v. *People,* 33 Mich. 296, in 1876, have considered the question and are claimed by appellant to control decision in the instant case.

At the time these early cases were decided the statute above referred to, in so far as it applies to the instant question, was substantially the same as now (cf. 2 Comp. Laws 1871, § 7997).

In *Weaver* v. *People* (1876), *supra,* the defendant pleaded guilty, the circuit judge suspended sentence until the first day of the next term of court, and the defendant gave recognizance to appear at that time. He was not called in for sentence at the next term nor sentence further suspended. A year later another circuit judge, sitting temporarily in the court where conviction was had, imposed sentence of imprisonment. On review, this court said:

"Sentences may be suspended for various purposes. It may be for the purpose of allowing steps to be taken for a new trial, or other relief, or it may be with a view of letting the offender go without punishment. The release of a defendant on his own recognizance and without sureties, in a merely nominal amount, signifies usually the latter purpose. It at least is a plain assertion of the judge that he did not regard the offense as one that should receive a serious punishment. The failure to take steps during the October term of 1874 was a practical abandonment of the prosecution, and corroborates the opinion that such must have been understood as the object of the suspension, and as the record stands, it is fairly to be inferred it was intentional. To sentence a prisoner to the penitentiary under such circumstances, and when the trial judge has distinctly said he ought not to be so sentenced, is not supplying his omissions, but is overruling his decision. This we think not admissible, and the sentence was unauthorized, and the judgment must be reversed, and the prisoner discharged."

It is plain that the situation in the *Weaver Case, supra,* is distinguishable from the case at bar. In the instant case prosecution was not abandoned and

the contrary clearly appears in the action of the court in suspending sentence and expressly holding further action in abeyance until defendant was discharged from the armed forces.

In *People* v. *Reilly* (1884), 53 Mich. 260, defendant was convicted of crime on October 22, 1881, motion made for a new trial, defendant admitted to bail, and sentence was suspended indefinitely. The motion for new trial was denied and on November 28, 1882, about 13 months after conviction, the defendant was brought before the court and sentenced to imprisonment. Justice SHERWOOD wrote:

"Under the third assignment of error the respondent's counsel claim that the suspension of sentence was so long that the court lost jurisdiction to make the sentence he did. Under our practice courts may, for good cause, suspend sentence a reasonable length of time after trial and conviction. *Weaver* v. *People,* 33 Mich. 296. We find nothing in the record showing an abuse of the descretion vested in the judge."

Justice CHAMPLIN disagreed with Justice SHERWOOD on that point but with apparent inconsistence agreed that there were no errors calling for reversal of the judgment. Justice COOLEY concurred. To this extent the case is authority for the conclusion that at that early date the court did not consider that a suspension of sentence for 13 months deprived the court of further jurisdiction.

In *People* v. *Kennedy* (1885), 58 Mich. 372, the defendant was convicted of crime on November 28, 1883. By various court orders and for various reasons sentence was deferred until in March, 1885, when the defendant was sentenced to 10 days in the county jail. The court set aside the sentence on the ground that the maximum time for which de-

fendant might have been imprisoned (90 days) had expired before the last time sentence had been deferred. The court said:

"The principle in this case is the same as if the defendant had been in confinement, as he was under bonds and in the custody of the court; and the deferring of sentence was not asked by him or his counsel."

Neither of the two reasons for which the sentence was set aside in the above case is present in the case at bar.

In *People* v. *Meservey*, 76 Mich. 223, the trial court had sentenced the defendants to imprisonment in State prison, and the defendants had been remanded to the county jail to be transferred to the prison. The defendants then made an unsuccessful attempt to escape from the county jail, whereupon the court had the defendants again brought before him, set aside the sentences and resentenced them to longer terms in State prison. The court held that the original sentences had gone into effect, that the attempt to set them aside, together with the imposition of the second sentences, were void. The defendants were remanded to serve the terms of their first sentences. There is small consolation in that case for the defendant now before us. If we were to hold that the act of the court in the instant case setting aside the first sentence and later sentencing this defendant to a minimum of 17 months' imprisonment was void, and remand the defendant for carrying out the original sentence, defendant's minimum term would be two years instead of 17 months. But the difference in circumstances is apparent. In the case at bar the execution of the original sentence had not been started, and the setting aside of the sentence as well as deferring of

further action was in response to defendant's express request.

In *People* v. *Jagosz,* 253 Mich. 290, the trial court imposed sentence 63 days after conviction without any showing of the cause for delay, and the claim of error on that ground was dismissed by this court with the terse statement:

"There was no error in the delay."

Our review of the foregoing cases relied on by defendant is convincing that they are distinguishable by their circumstances from the case at bar. In this case the court granted the defendant's request that the sentence of two years' imprisonment be set aside, and his further request that the court "hold any other sentence in abeyance until the said defendant Cordell has been released from the armed forces of the United States government."

Defendant argues that the power to suspend sentence for an indefinite time is equivalent to the power to pardon, and that this power rests solely in the governor. Admittedly this theory was expounded in some of the early decisions of this court (*e. g., People* v. *Brown,* 54 Mich. 15). However, in considering a statute which expressly authorized the court to suspend sentence indefinitely of one convicted of desertion or abandonment of his wife or minor children (Act No. 144, Pub. Acts 1907) this court held it did not infringe on the pardoning power of the governor. The court said:

"The power to suspend sentence and the power to grant reprieves and pardons are distinct and different in origin and in nature. It has never been supposed that the power of courts to suspend sentence was other than a judicial function. It has been frequently and constantly exercised by courts of record before and since the adoption of the Constitution. * * * Assuming the power to be, as it

was at common law asserted to be, a power inherent in courts, no new power is conferred upon courts when the legislature in terms authorizes courts to suspend sentence. The distinction between the pardoning power and the power to suspend sentence is clearly pointed out in the opinion in *People, ex rel. Forsyth,* v. *Court of Sessions,* 141 N. Y. 288 (36 N. E. 386, 23 L. R. A. 856). It is said:

"'The suspension of the sentence simply postpones the judgment of the court temporarily or indefinitely, but the conviction and liability following it, and all civil disabilities remain and become operative when judgment is rendered. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense.'

"We do not find in the language employed in the act or in its probable effect if enforced any encroachment upon the exclusive power of the executive to grant pardons. * * *

"We cannot assume that interference with the judicial power was intended, or that the design was to confer any new power. The proviso must be read so as to sustain, and not destroy, the legislation if such reading is reasonably possible. No condition is imposed upon the exercise of the power of the court to impose sentence in conformity with the statute and a discretion judicially exercised. * * * It is said in argument that one found guilty of violating the statute may be subjected for an indefinite period to judicial espionage, and at the end of such period be sentenced. We have already indicated, and this is a complete answer to the objection, that the statute will not be construed as conferring upon the court *any new power.*" *People* v. *Stickle,* 156 Mich. 557, 563.

In the case at bar the defendant not only consented to setting aside the sentence first imposed,

and the deferring of further action, but actually requested it of the court. Defendant now argues that jurisdiction to impose the later sentence could not be conferred by consent, having once been lost. This argument is based on the false assumption that the court lost entire jurisdiction over the defendant by the lapse of time between the suspending of sentence and the final sentence, notwithstanding the fact that this was done at defendant's request. This court has adversely answered defendant's contention, in *Re Tinholt,* 223 Mich. 483, where the court said:

"On *habeas corpus* and accompanying certiorari, plaintiff Tinholt seeks to avoid the sentence imposed, contending that by indefinite and unreasonable postponement of sentence the court lost jurisdiction.

"On November 14, 1922, in the November term of the court, he was convicted of violating the prohibition law. On December 8th following, that being the general sentence day of the term, he appeared for sentence. It seems that the prosecuting attorney was hopeful of obtaining, by the aid of plaintiff, evidence of other violations and requested a postponement of sentence. Plaintiff consented to an indefinite postponement. No order was entered, but the court informed plaintiff 'that the sentence would be delayed and that he could appear later for sentence.' On April 18, 1923, he was notified to appear for sentence on April 20th following. He appeared and objected to sentence for the reasons stated. Sentence was then pronounced.

"By consenting, plaintiff has waived the right to complain of the indefinite postponement. Assuming that, though the agreed postponement was indefinite, the delay thereunder should not be unreasonable, we find, under the circumstances, no unreasonable delay."

Sentiment has no place in our discussion of the law of the case. Nor do we see any occasion to re-

sort to or discuss the decisions from other jurisdictions cited and argued by counsel, indicating a lack of uniformity in deciding the question. The conclusion which we now reach, that the court had jurisdiction to impose the sentence complained of, is in conformity with the previous decisions of this court.

The judgment is affirmed and the case remanded for execution of sentence.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, and REID, JJ., concurred.

HUTCHINSON *v.* TAMBASCO.

1. EVIDENCE—JUDICIAL NOTICE—AUTOMOBILES—CARBON MONOXIDE GAS.

   It is common knowledge among persons whose employment is closely connected with operations around automobiles in enclosed places such as garages that carbon monoxide gas is expelled through the exhaust of a running motor and that even small portions of the gas mixed with air are poisonous and may cause a person who inhales such gas to collapse.

2. WORKMEN'S COMPENSATION—ACCIDENTAL INJURY—KNOWLEDGE OF FOREMAN—NOTICE OF INJURY.

   Knowledge of foreman who had worked on same car as plaintiff on a cold day in November in an enclosed building for car washing that plaintiff had collapsed after having worked near exhaust pipe of preceding car whose motor had been kept running *held,* sufficient to charge employer with notice of injury from carbon monoxide poisoning (2 Comp. Laws 1929, § 8434; Act No. 10, pt. 7, § 7, Pub. Acts 1912 [1st Ex. Sess.], as added by Act No. 61, Pub. Acts 1937).

3. SAME—CLAIM FOR COMPENSATION—NOTICE OF INJURY—REPORTS.
Claim for workmen's compensation filed about eight months after injury was received was not barred where employer which had timely notice of the injury had not filed a report (2 Comp. Laws 1929, § 8434).

4. SAME—QUESTIONS REVIEWABLE—APPORTIONMENT OF AWARD UNDER OCCUPATIONAL DISEASE AMENDMENT.
Defendants' claim that, if plaintiff contracted an occupational disease as he had alleged, it was an aggravation of a pre-existing condition and the department should have proportioned the award under the occupational disease amendment of the workmen's compensation act, not having been raised before the department nor alleged in the claim of appeal, is not considered (Act No. 10, pt. 7, §§ 7, 8, Pub. Acts 1912 [1st Ex. Sess.], as added by Act No. 61, Pub. Acts 1937.

5. SAME—FINDING OF DEPARTMENT—CARBON MONOXIDE POISONING—EVIDENCE.
Finding of department of labor and industry that car washer's paralysis was caused by carbon monoxide gas to which he was exposed as a recurrent condition in his employment was supported by competent testimony (Act No. 10, pt. 7, § 2, Pub. Acts 1912 [1st Ex. Sess.], as added by Act No. 61, Pub. Acts 1937).

Appeal from Department of Labor and Industry. Submitted April 11, 1944. (Docket No. 73, Calendar No. 42,469.) Decided October 11, 1944.

Clarence Hutchinson presented his claim for compensation against S. Tambasco, doing business as Lafayette Auto Wash, employer, and State Accident Fund, insurer, for compensation for occupational disease. Award to plaintiff. Defendants appeal. Affirmed.

Dann & Atlas, for plaintiff.

Harry F. Briggs (*Henry A. Compeau* and *Rowland E. Giller,* of counsel), for defendants.

REID, J. This is an appeal in the nature of certiorari from an award of the department of labor and industry.

On November 14, 1941, plaintiff filed a notice and application for adjustment of claim with the department, alleging that an accident, the cause of his physical condition, happened on the — day of March, 1941 (not specifying on what day in March it occurred); that the accident happened as follows: plaintiff was overcome by excessive and unusual accumulation of carbon monoxide gas. The injury is carbon monoxide poisoning resulting in paralysis.

Defendants on November 25, 1941, filed their answer to the statement of claim, setting forth the following: first, that plaintiff suffered no injury in their employment; second, that he suffered no disability as a result of any accidental personal injury arising out of and in the course of their employment; third, that he did not make claim for compensation within the statutory period; fourth, that they had no notice or knowledge of an accidental personal injury arising out of and in the course of any employment within the statutory period.

The amended notice and application alleged the matter as "accident and occupational disease" and was filed January 14, 1942, to which an amended answer was filed January 17, 1942.

The finding of the deputy commissioner was that plaintiff's average weekly wage was $21, that plaintiff had not sustained an accident nor suffered an occupational disease and was not entitled to receive any compensation.

On review by the department, May 6, 1943, finding was made in accordance with plaintiff's claim that on March 14, 1941, while doing his regular work in the employment of defendant, plaintiff became dis-

abled as the result of occupational disease. They reversed the deputy's award and awarded plaintiff compensation for total disability, $18 per week beginning March 14, 1941.

In the instant case plaintiff's work was wiping off the windows and exteriors of the automobiles that were proceeding along the line. Other employees in preceding operations prepared the cars for plaintiff's finishing operation. The last car that plaintiff worked on was immediately behind a car, the motor of which was running, half racing, with smoke coming out of the exhaust pipe. The owner of that car didn't want the motor stopped during the washing process. As plaintiff cleaned off the whole side of the car down to the front, the smoke from the preceding car's exhaust continued to come out into his face. It was cold that day, the windows were closed and the doors were closed except when they let a car out. Plaintiff continued to work in such a position on the last car that his face was in front of the exhaust and in the path of the exhaust fumes for about five minutes. After that, as he testified, he felt "pretty dog-gone bad * * * awful funny about the head and everything * * * dizzy, dizzy." He went back to the barrel, wrung out his chamois, and there fell exhausted over the barrel. His foreman on the job, Charles McCray, and others came along and carried him out into the air and placed him on a bench in front of the building. After McCray finished up another car he told a customer to take plaintiff home but the man took plaintiff to Receiving hospital, where he remained 15 days. He was then taken to Marine hospital where he remained until August 31, 1941, when he was taken home. He has not been able to do any work since. It was 75 days after he returned home from the hospital that he filed his claim.

Plaintiff claims that knowledge on the part of the foreman of his condition is equal to notice and that he is excused from filing his claim during his illness in the hospital, that under 2 Comp. Laws 1929, § 8431 (Stat. Ann. § 17.165), the statute of limitations does not run against him until the report of the injury shall have been filed by the defendant with the department.

A controlling item is the knowledge of the foreman and the question whether such knowledge of the foreman constitutes notice to the company so that the employee need not give any other notice.

Charles McCray, the foreman, testified as follows:

"*Q.* You remember the day when he collapsed at work?

"*A.* Sure.

"*Q.* These cars move on a conveyor, don't they?

"*A.* No, they push them down; they come in and we give them only just a little push and they go down.

"*Q.* And as soon as it gets in there, some men start working on it right there?

"*A.* Yes.

"*Q.* And then they go a little bit farther and some other men work on them?

"*A.* Yes, men to do the body washes and men to chamois.

"*Q.* So that 10 men aren't working on a car at one time?

"*A.* Oh, no.

"*Q.* There is about 2 and 2?

"*A.* When one car gets done another car takes that place and then the body washers do that one then it gets to the chamoising and then they get started on that and it just keeps going and they chamois the body off and it keeps right on going.

"*Q.* These cars are close together?

"*A.* Yes, bumper to bumper.

"*Q.* So that the exhaust from one car in front would be right there at the front of the next car, it would be right there?

"*A.* Yes, it would be right next to the next one.

"*Q.* If you were bending over and wiping around the hood and fenders there you would get the exhaust right in your face?

"*A.* If you was wiping the back end by the exhaust pipe, I suppose you would get it.

"*Q.* You would if the exhaust of the car ahead is coming right at you, isn't it?

"*A.* Well, yes, if of course they are linked together; most naturally they would be that way.

"*Q.* Were you working with Hutchinson on a car before he got sick?

"*A.* Sure, working, I am on one side and he is on the other.

"*Q.* You do the wiping out there?

"*A.* Yes, I wipe this side and he wipes on that side.

"*Q.* Is that all you do on the job is wipe or do you go from car to car and supervise?

"*A.* I am from car and to car and help them.

"*Q.* So that you aren't always wiping a car?

"*A.* No, I chamois the car and collect the money."

Plaintiff also testified that the foreman worked on the other side of the car that plaintiff worked on, and the inference is fair that the foreman knew about the escaping of carbon monoxide gas from the exhaust of the car ahead as described by plaintiff. The foreman further testified:

"*Q.* McCray, as a matter of fact you didn't notice him until he collapsed on the barrel, isn't that right?

"*A.* No, I did not.

"*Q.* Isn't that when you first noticed him?

"*A.* When I first noticed him I had a tag and was walking in the place and hanging it up and

when I turned around this way he was laying on the barrel; I stepped back and seen him.

"*Q.* Had you watched him walk from the car he was working on to the barrel?

"*A.* I didn't see him; I didn't watch him walk away; I didn't know it; when I went there he was on there, because I was on this side.

"*Q.* And you helped carry him out?

"*A.* I did. * * *

"*Q.* Did you ask a customer to take him to the hospital?

"*A.* The customer offered; he said, 'I will take him home.' And I sent one of the boys with him; one of the boys working in the gang.

"*Q.* Didn't you want him taken to the hospital?

"*A.* No, he wanted to go home; and I said—this fellow says, 'I will take him home,' I offered to pay him; he says, 'Give me the wash,' I says, 'You can have it,' he says, 'I will take him.' When they get out, they claim he was too sick to take home and they took him to the hospital.

"*Q.* He was sick when he fell over the barrel?

"*A.* He must have been. * * *

"*Q.* * * * Hutchinson said he wanted to go home, did he say that he wasn't feeling good, that he wanted to go home, or what?

"*A.* He didn't tell me nothing; he just said he wanted to go home; there was a doctor there at the time, he said, 'This fellow is sick and he needs to go home or to the hospital.'

"*Q.* You said that there was a doctor there at the time; there was a doctor in there at the time?

"*A.* Yes.

"*Q.* And this doctor said that this man either had to go home or to the hospital?

"*A.* When we picked him up we saw he was sick. He examined him and he said, 'His heart is beating all right.' When we sat him on the bench his heart was beating all right. He said, 'This man needs to go home or to the hospital.' Although when they

got him out they took him to the hospital. I told him to take him home. They thought he was too sick and took him to the hospital. They found out he was too sick; just how sick he was I don't know, because I ain't a doctor. * * * The fellows said this fellow (plaintiff) is sick; I said, 'Sure he is sick.' He must have been sick. 'Pick him up and take him out.' "

Some cars were washed with the engine running, and some back-fired when they got wet.

Plaintiff also testified that the foreman ordered him taken home.

Plaintiff's witness, Dr. Owen, testified, reciting facts shown by testimony and his direct deductions therefrom:

"First, he had been well; second, he was in some heavy fumes, and in those fumes there (are) a lot of gases such as carbon monoxide and other incompletely combusted petroleum gases which make a person sick to their stomach, and which give people headaches. * * * If a person has carbon monoxide poisoning their blood is deficient in oxygen, because the carbon monoxide attaches itself to the hemoglobin, so that the oxidation is hindered very greatly, and with that process very frequently small blood vessels do rupture * * * so I believe there could be a relationship between an exposure to the fumes indoors and the resultant paralysis that he now has."

We take notice of the fact that it is common knowledge among persons whose employment is closely connected with operations around automobiles in enclosed places such as garages that carbon monoxide gas is expelled through the exhaust of a running motor and even small portions of the gas mixed with air are poisonous and may cause a person who inhales such gas to collapse.

Defendants cite *Gumtow* v. *Kalamazoo Motor Express,* 266 Mich. 16; *Littleton* v. *Railway Co.,* 276 Mich. 41; *Maki* v. *S. J. Groves & Sons,* 279 Mich. 644; *Berg* v. *Hemlock River Mining Co.,* 287 Mich. 697. Since the cause for claim occurred in each of those four cited cases, the occupational disease amendment to the workmen's compensation law was enacted, being Act No. 61, Pub. Acts 1937 (Comp. Laws Supp. 1940, § 8485–1 *et seq.,* Stat. Ann. 1940 Cum. Supp. § 17.220 *et seq.*), which took effect October 29, 1937. Part 7, § 2, subd. 22, then defined carbon monoxide poisoning as occupational disease. In the *Berg Case, supra,* the opinion stresses want of notice of an accident within the required period and the word accident is italicized in the opinion, which recites at p. 700:

"It is urged as a defense that defendant had no notice nor knowledge within the statutory limitation of plaintiff's having suffered an *accident.* There is ample testimony disclosing that plaintiff's sickness and his inability to continue his work were promptly called to the attention of defendant."

On p. 699 the opinion recites:

"Plaintiff claims that getting wet caused rheumatism, that he could not get out of bed the next day and he sent notice to the company's doctor who attended plaintiff * * * that a couple of weeks after the alleged accident his superintendent called on plaintiff and he told the superintendent about getting wet."

The *Berg Case* does not sustain the position of defendants as to sufficiency of notice in this occupational disease case.

The case of *Vestal* v. *Therminsul Corp.,* 291 Mich. 64, while not discussed in the briefs, should be considered on the question of notice. In that case a

light-colored gas was observed coming out of the cupola door, and two of defendant's employees, Sleeman and Webster, who had been putting coke and slag into the cupola, were overcome by gas to such an extent that immediate medical attention was necessary. Plaintiff's decedent assisted in attempts to resuscitate them. He went to his home nearby and got some whisky. A short time after that his wife found him in a stooped position by the sidewalk. He appeared to be faint. The doctor called about an hour afterwards and found him practically unconscious. While one doctor was working on the two other men defendant's superintendent received a report that Vestal "had also been taken sick and was at home." The superintendent immediately went to the Vestal home and was told by Vestal that he was "sick to his stomach." Defendant's night superintendent also testified as to the gassing of Sleeman and Webster and that Vestal told him the next morning that he had been taken ill the same night the other two were gassed and that he "had to have help to get home" because "he was taken ill on his way to the house." In that case the department, after citing *Clifton* v. *Chrysler Corporation,* 287 Mich. 87, held that the testimony "relative to notice or knowledge was not sufficient to sustain plaintiff's action." On appeal we held that "knowledge of Vestal's illness following so closely and so immediately connected with knowledge of the escaping carbon monoxide gas and its effect on others in the same room was sufficient 'notice or knowledge of the injury' to satisfy the requirement of the statute," and vacated the order of the department.

Section 10 of part 7, the occupational disease amendment, provides:

"The requirements as to notice as to occupational disease and death resulting therefrom and the requirements as to the bringing of proceedings for

compensation for disability or death resulting from such occupational disease shall be the same as required in section fifteen of part two of this act, except that the notice shall be given to the employer within one hundred twenty days after the disablement."

"Want of * * * notice shall not be a bar * * * if it be shown that the employer had notice or knowledge of the injury." 2 Comp. Laws 1929, § 8434 (Stat. Ann. § 17.168). *Purdy* v. *City of Sault Ste. Marie,* 188 Mich. 573 (Ann. Cas. 1917D, 881); *Burke* v. *Michigan Stamping Co.,* 223 Mich. 495.

The knowledge on the part of the foreman is sufficient under this section to charge the defendants with notice. The company not having filed a report to the department, the claim is not barred.

Defendants claim that if the plaintiff contracted an occupational disease as he alleges, it was an aggravation of a pre-existing condition and the department should have proportioned the award under Act No. 10, pt. 7, § 8, Pub. Acts 1912 (1st Ex. Sess.), as added by Act No. 61, Pub. Acts 1937 (Comp. Laws Supp. 1940, § 8485–8, Stat. Ann. 1943 Cum. Supp. § 17.227). This objection was not raised before the department nor alleged in the reasons and grounds for appeal to this Court, and will not now be considered. See *Kolbas* v. *American Boston Mining Co.,* 275 Mich. 616.

There was competent testimony to show plaintiff's paralysis was caused by the carbon monoxide gas to which he was exposed in his employment on the occasion in question, which was also a recurrent condition of his employment, and to furnish a basis for the department's finding. The award is affirmed, with costs to the plaintiff.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

UNIVERSAL CREDIT CO. *v.* DEARBORN UNIVERSAL UNDERWRITERS CREDIT CORP.

1. CORPORATIONS—CONFUSION OF NAMES.

   Whether names of corporations are so similar as to be confusing and deceptive depends upon application of principles to pertinent facts of each particular case (Act No. 327, § 6, Pub. Acts 1931).

2. SAME—CONFUSION OF NAMES—"UNIVERSAL"—INJUNCTION.

   Corporations doing automobile finance business under name of "Universal Credit Company" are entitled to injunction restraining defendants, who sought to engage in same field of business some 14 years later with offices in same building as plaintiffs, from using the word "universal" as part of corporate name and from using the abbreviation "U. C. C." which by use in plaintiffs' business had come to denote the full name (Act No. 327, § 6, Pub. Acts 1931).

3. SAME—CONFUSION OF NAMES—DOING BUSINESS.

   Fact that defendant corporation had not actually commenced doing business in same field of business in the same building would not preclude issuance of injunction against use of term in name that was the same as that which had been used theretofore by plaintiffs and their predecessors for about 14 years and which name had been used in extensive advertising programs, where the probability of confusion is apparent (Act No. 327, § 6, Pub. Acts 1931).

4. SAME—CONFUSION OF NAMES—INJUNCTION.

   Actual confusion in the use of names by corporations need not be shown to entitle one of them to an injunction, it being sufficient that confusion is probable or likely to occur (Act No. 327, § 6, Pub. Acts 1931).

5. SAME—NAMES—APPROVAL OF CORPORATION AND SECURITIES COMMISSION.

   While the fact that the State corporation and securities commission had "accepted, approved and filed" the articles of incor-

poration of defendant corporation whose name contained a term which was the dominant term in name under which plaintiff corporations had done business would be a matter for consideration in suit to enjoin the use of such term, it is not controlling, hence, judicial review is not barred (Act No. 327, §§ 5, 6, Pub. Acts 1931; Act No. 13, Pub. Acts 1935).

6. SAME—CONFUSION OF NAMES—"UNIVERSAL."

The use of the term "universal," which had been used for 14 years as the first word in the name of plaintiff corporations engaged in the business of automobile finance or automobile insurance and which had been an established and quite dominant part of such name, by defendant corporation as a part of its name is enjoined where such use would obviously lead to confusion as latter corporation was to engage in business in same field and have offices in same building as plaintiffs, whether or not it is a mere "geographical adjective" (Act No. 327, § 6, Pub. Acts 1931).

7. SAME—NAMES—FIRMS IN OTHER STATES.

The fact that corporations in five other States in the same field of business enterprise as plaintiffs have the word "universal" as a part of their corporate names would not preclude plaintiffs from having injunctive relief against defendant corporation using such term in its name where it proposes to do same kind of business as plaintiffs and have offices in same building as plaintiffs and it does not appear that such other corporations have ever done, or are licensed to do, business in this State (Act No. 327, § 6, Pub. Acts 1931).

8. SAME—CONFUSION OF NAMES—UNLIKE BUSINESSES—INJUNCTION.

The fact that other corporations in this State engaged in types of business wholly unlike that of plaintiff corporations yet had the word "universal" as a part of the firm or corporate name would not bar plaintiffs from injunctive relief against use of such term in name of defendant corporation proposing to engage in same type of business as plaintiffs with offices in the same building (Act No. 327, § 6, Pub. Acts 1931).

9. TRADE MARKS AND TRADE NAMES—INFRINGEMENT—UNFAIR COMPETITION.

Since unfair competition does not necessarily involve the question of the exclusive right of another to the use of a name, symbol, or device, it is distinguishable from the infringement of a trade mark.

10. SAME—INJUNCTION—PARTIES—CORPORATIONS.
Corporate incorporator and sole stockholder of recently-formed corporation which bore the term "universal" in its corporate name was a proper party defendant in plaintiff corporations' suit to enjoin the use of such term by another corporation engaged in the same type of business.

11. CORPORATIONS—CONFUSION OF NAMES—CONSTRUCTION OF DECREE.
In suit by "Universal Credit Company" and other affiliated foreign corporations using the term "universal" in their corporate name and engaged in conducting automobile finance business against domestic corporation entitled "Dearborn Universal Underwriters Credit Corporation," its corporate owner, and individual who controlled it, decree is construed as enjoining use of term "universal" in name of corporation engaged in either the automobile finance or automobile insurance business where insurance of type involved is a part of each transaction incident to financing automobile conditional sales contracts, but not the term "Dearborn" (Act No. 327, § 6, Pub. Acts 1931).

Appeal from Wayne; Murphy (George B.), J. Submitted June 13, 1944. (Docket No. 2, Calendar No. 42,547.) Decided October 11, 1944. Rehearing denied December 1, 1944.

Bill by Universal Credit Company, a Delaware corporation, and other corporations against Dearborn Universal Underwriters Credit Corporation, a Michigan corporation, and others to restrain the use of the corporate name or the use of the word "Universal" in the corporate name. Decree for plaintiff. Defendants appeal. Affirmed.

Butzel, Eaman, Long, Gust & Bills (*Frank D. Eaman* and *David A. Howell,* of counsel), for plaintiff.

Wurzer, Higgins, Sweeney & Starrs (*John T. Higgins* and *Robert E. Sweeney,* of counsel), for defendants.

NORTH, C. J. Plaintiffs by their bill of complaint seek to have defendants restrained, among other things, from using the corporate name "Dearborn Universal Underwriters Credit Corporation," and especially from using the word "Universal" as a part of a corporate name. Such relief is prayed on the ground that the quoted corporate name or the use by defendants of the word "Universal" in a corporate name would result in unfair competition by defendants with plaintiff companies. Also that it would be in violation of Act No. 327, § 6, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 10135–6, Stat. Ann. § 21.6), which forbids the use of a corporate name so similar to the name of another corporation existing or doing business in Michigan as to be likely to mislead the public or to result in confusion or deception. The suit was brought on for hearing on the merits, and at the conclusion of plaintiffs' testimony, the defendants made a motion to dismiss the bill of complaint. This motion was denied. Thereupon defendants rested without offering further proof, and the decree granting plaintiffs relief followed. Defendants have appealed.

Each case of this type must be decided in the light of the pertinent facts disclosed by the proofs in that case. *Metal Craft Co.* v. *Metalcraft Heater Corp.*, 255 Mich. 642. In the main such facts in the instant case may be outlined as follows.

Plaintiff "Universal Credit Corporation" was organized in 1928. It is a Delaware corporation authorized to do business in Michigan. It is a holding company and owns all of the stock in plaintiff "Universal Credit Company," which is also a Delaware corporation authorized to do business in Michigan, and it is qualified to do business in each of the other States of the United States, except Indiana, New

York, and California. The holding company also owns all the stock of three separate corporations named "Universal Credit Company," respectively organized under the laws of Indiana, New York, and California. Further, the holding company owns the stock of the plaintiff "Universal Dealers Company," a Delaware corporation authorized to do business in Michigan. Plaintiff Commercial Investment Trust Corporation, incorporated in Delaware in 1924, purchased from the Ford Motor Company in 1933 all the stock in the Universal Credit Corporation. The Commercial Investment Trust Corporation for some years carried on an automobile finance business through subsidiary corporations, each incorporated under the name "C. I. T. Corporation." But prior to this litigation and in September, 1942, these companies by change of corporate name respectively began to operate and continued to operate for some time as "Universal Credit Company." The corporate charters of these companies are still retained although the business formerly transacted has been transferred to the plaintiff Universal C. I. T. Credit Corporation. Each of the foregoing companies was incorporated and was doing business in Michigan prior to the incorporation of the defendant "Dearborn Universal Underwriters Credit Corporation," which was incorporated in Michigan in October, 1942.

It is sufficient to note as to the business in which they are engaged that the associated plaintiff corporations obtain and furnish capital to automobile dealers and to purchasers of automobiles, and discount commercial paper incident to such transactions. Their business, which is nation wide, requires on a large scale automobile insurance, both casualty and fire. For many years prior to the commencement of this suit defendant David F. Brod-

erick had been associated with plaintiffs' business, and particularly had charge of the insurance phase of their transactions covering loss by fire. For carrying on this business Broderick organized under Delaware law the "D. F. Broderick, Incorporated." Under the same name he caused to be organized a corporation in Michigan, one in California, and one in New York. The business of defendant Broderick and of his Michigan corporation was carried on through its central office located in an office building known as the United Artists Building, 154 Bagley avenue, Detroit. This was the same building in which the affiliated plaintiff corporations principally carried on their business. The relationship above noted between defendant Broderick and his corporations with the affiliated plaintiff companies continued from 1933, or earlier, until 1942. This relationship fully terminated June 30, 1942, although as to new business it ceased December 31, 1941.

The large volume of business transacted by plaintiff companies prior to the incorporation on October 13, 1942, of the defendant Dearborn Universal Underwriters Credit Corporation may be implied from the following. The aggregate balances to be paid on automobile paper purchased by plaintiff Universal Credit Corporation in the year 1941 for the entire United States was $233,000,000, and for the State of Michigan $21,000,000. And for the 5-year period of 1937 to 1941, inclusive, the average amount of such paper so purchased annually in the United States was in excess of $180,000,000, and for the State of Michigan in excess of $15,000,000. It is also to be noted that during this period of 1937 to 1941 the group of plaintiff companies which operated under the name "Universal Credit Company" annually spent approximately $25,000 for advertising. And there is testimony tending to show that from

1936 to 1941, inclusive, plaintiffs expended for advertising of various types nearly half a million dollars. In some of this advertising the abbreviation "U.C.C." was used to designate Universal Credit Company. The plaintiff companies operating as "Universal Credit Company" in their transactions with automobile dealers furnished forms to be used by purchasers of automobiles for applications for loans and forms for the conditional sales on contracts. Each individual purchaser of an automobile received a true copy of his purchase contract. On each of the forms of application for loans and on each of the conditional sales contracts there was conspicuously printed at the head thereof "Universal Credit Company," and in the body of each instrument the name "Universal Credit Company" was used. It was even provided that the place of making instalment payments on conditional sales contracts was "at the office of Universal Credit Company" and further that the "customer acknowledges notice of intended sale of this contract to the Universal Credit Company (hereinafter called holder)."

It is interesting and somewhat important to note the inception of the use of the quite dominating word "Universal" in the corporate names of the associated companies. We quote from appellants' brief:

"The Universal Credit Corporation, a Delaware corporation, was organized in 1928 as a wholly-owned subsidiary of Ford Motor Company. The several subsidiary Universal Credit Companies were organized at or subsequent to that time. The name 'Universal' was used because in 1928 the Ford car was known and advertised as the 'Universal Car.'

"Universal Credit Corporation, a Delaware corporation, was organized by Ford Motor Company to put it in competitive position as to finance plans for

dealers and customers with General Motors Corporation, * * * and with Chrysler Corporation (which had like financing facilities), * * * so as to afford finance plans to their respective dealers and customers."

In 1933, Ford's "Universal Credit Corporation," by purchase of its stock, was taken over by the plaintiff, Commercial Investment Trust Corporation; and thereafter, for quite obvious reasons, the word "Universal" was used as the initial word in the corporate name of each of the associated plaintiff companies, except the Commercial Investment Trust Corporation which had been organized in 1924 under the laws of Delaware. Plaintiff companies annually finance a large number of contract purchases of Ford automobiles.

Prior to the severance of his relations with the business of plaintiff corporations, defendant Broderick had been carrying on his business through corporations in the corporate names of which the word "Universal" was not used. But very shortly after relations were severed with plaintiff companies and on October 13, 1942, defendant Broderick organized under Michigan law the "Dearborn Universal Underwriters Credit Corporation." The stock in this corporation is held by the defendant D. F. Broderick, Incorporated (a Delaware corporation), of which latter company defendant David F. Broderick is in control and said to be the sole owner. The corporate powers of the defendant Dearborn Universal Underwriters Credit Corporation are amply broad enough to permit it to engage in the automobile finance business in competition with plaintiffs. The corporate name sought to be used by this defendant is the same as one of the plaintiffs with the addition of "Dearborn" and "Underwriters." This attempted adoption of a similar

corporate name, especially using the word "Universal" in connection with "Credit," is plainly indicative of a studied attempt on the part of defendants to indulge in unfair competition with plaintiffs and to appropriate the good will of their established business. As noted above, the business of defendants is carried on in the same office building in Detroit as that in which plaintiffs for years have had local business offices. The business of the defendant corporations is in the same field as that of plaintiff corporations. For years preceding the organization by Broderick of the Dearborn Universal Underwriters Credit Corporation he had been intimately associated with the business of plaintiff corporations in the same field in which Broderick proposes to carry on. Under the facts hereinbefore noted it is well established that plaintiffs are entitled to have defendants restrained from using the word "Universal" as part of a corporate name, and from using the abbreviation "U.C.C.," which by use in plaintiffs' business has come to denote "Universal Credit Company" or "Universal Credit Corporation." We arrive at this conclusion notwithstanding various reasons urged by appellants in opposition thereto, among which are the following.

Appellants urge that there is no showing of *actual* confusion or deception. However "Actual confusion need not be shown, but it is sufficient that confusion is probable or likely to occur. 66 A. L. R. 972." *Metal Craft Co.* v. *Metalcraft Heater Corp., supra.* Further such a showing was quite impossible because defendant Dearborn Universal Underwriters Credit Corporation never commenced doing business. It was not incorporated until October 13, 1942. Plaintiffs promptly protested. The bill of complaint herein was filed less than two months after the incorporation, and the hearing was con-

cluded February 19, 1943. But we are satisfied from this record that "the probability of confusion is apparent," as was said in the case last above cited.

Also appellants somewhat stress the fact that the Michigan corporation and securities commission in October, 1942, "accepted, approved and filed" the articles of incorporation* of the defendant Dearborn Universal Underwriters Credit Corporation. Such fact or circumstance is a matter for consideration in a case of this character, but it is by no means necessarily controlling. Otherwise judicial review would be barred. *Young & Chaffee Furniture Co.* v. *Chaffee Brothers Furniture Co.*, 204 Mich. 293.

In support of their claim that none of plaintiffs have proven "a special right in a 'secondary meaning' of the word 'Universal' " as part of a corporate name in the business of automobile finance or automobile insurance, appellants further urge that the word "Universal" is merely a "geographical adjective" and not capable of exclusive appropriation as a trade name. We cannot agree that as an established and quite dominant part of a corporate name its possessor is not entitled to enjoin its similar use by another when, as in the instant case, such use will obviously lead to confusion or deception. While not conclusive of plaintiff's right to injunctive relief in the instant case, it may be here noted that if, as appellants assert, the word "Universal" has no particular significance in the business of automobile financing but instead is only a "geographical adjective," surely appellants are not materially injured by the decree forbidding such use by appellants.

* See Act No. 327, § 5, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 10135–5, Stat. Ann. § 21.5); Act No. 13, Pub. Acts 1935 (Comp. Laws Supp. 1940, § 9769–1 *et seq.*, Stat. Ann. § 19.781 *et seq.*).—REPORTER.

As against plaintiffs' claim to injunctive relief, defendants point out that this record discloses there are in at least five other States corporations in the same field of enterprise each of which has the word "Universal" as a part of its corporate name. It is not clear in the record as to whether or not such corporate names were in use by these other companies prior to plaintiffs' similar use of the word "Universal." Nor does it appear what the relative legal rights to such use by the various parties would be determined to be if such rights were litigated. There is no claim that any of such other corporations have ever done business in Michigan or that they are licensed to do business in this State. The circumstances just above noted as to corporations in other States using "Universal" as a part of their corporate names is not controlling as to plaintiffs' right in the instant case to injunctive relief under the law of this State which provides:

"No corporation shall assume any name which is likely to mislead the public, or any name already in use by any other existing corporation of this State, or corporation lawfully carrying on business in this State, or so nearly similar thereto as to lead to confusion or deception." Act No. 327, § 6, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 10135–6, Stat. Ann. § 21.6).

Nor are plaintiffs barred of relief under the record in this case by reason of the fact that other companies in Michigan engaged in types of business wholly unlike that of plaintiffs' use "Universal" as a part of a firm or corporate name.

"Unfair competition is distinguishable from the infringement of a trade-mark in this: that it does not involve necessarily the question of the exclusive right of another to the use of the name, symbol, or

device." *G. W. Cole Co.* v. *American Cement & Oil Co.*, 65 C. C. A. 105 (130 Fed. 703).

Under the circumstances of this case, there is no merit to appellants' contention that D. F. Broderick, Incorporated, is not a necessary or proper party defendant. This company was the corporate incorporator of defendant Dearborn Universal Underwriters Credit Corporation and is its sole stockholder. See *Terminal Barber Shops, Inc.*, v. *Zoberg* (C. C. A.), 28 Fed. (2d) 807.

Appellants further urge that "the language of the decree in this case (is) so general in nature as to deprive defendants, or some of them, of a judicial determination by trial whether future unspecified acts are in fact likely to unlawfully divest plaintiffs of their alleged but unspecified legal rights." The portion of the decree which gives rise to this contention reads:

"Defendants * * * are * * * enjoined from using or causing to be used the name 'Dearborn Universal Underwriters Credit Corporation' or any counterpart thereof, (and) from using or causing to be used any name, designation, or abbreviation which employs or utilizes the word 'universal,' the letters 'UCC,' or any part, simulation, or imitation of the corporate names of plaintiffs herein in connection with the automobile finance business or the insurance of automobiles purchased or which have been purchased on the instalment plan."

Appellants assert the decree is too broad and indefinite in that it enjoins them from using the word "Universal" as a part of the corporate name or in the business of a company engaged in the *automobile insurance* business, whereas plaintiffs neither alleged nor offered testimony that any of them is engaged in that field of endeavor. We think the decree is not too broad in this respect because this record

fairly discloses that insurance of the type involved is almost of necessity a part of each transaction incident to financing automobile conditional sales contracts. Further no good reason appears for defendants' attempted use of the word "Universal," and the record fairly discloses that such use would lead to unlawful appropriation by defendants of good will which has been created by and belongs to the affiliated plaintiff companies.

Nor do we find that a fair reading of the decree enjoins defendants from using the word "Dearborn" in their business as part of a corporate name or otherwise. At the argument in this Court plaintiffs' counsel stated that no such claim is made by plaintiffs. At the opening of the trial in the circuit court plaintiffs' counsel stated: "There is quite a little in the answer and return about the name 'Dearborn.' We have no point about the name 'Dearborn.'" Under this record it cannot be contended that the decree entered enjoins defendants or any of them from using the word "Dearborn" in connection with their business.

From the foregoing it is apparent that appellants' motion to dismiss was properly denied by the circuit judge. Other contentions are presented in appellants' brief, but after carefully considering them we are of the opinion that they do not materially bear upon decision herein and are therefore not reviewed in this opinion. The decree entered in the circuit court is affirmed, with costs to appellees.

STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

MORRIS *v.* LITHUANIAN SONS & DAUGHTERS AID SOCIETY.

1. BENEFICIAL ASSOCIATIONS—DISCIPLINE OF MEMBERS—EVIDENCE—DAMAGES—HUMILIATION.

   In member's action against fraternal organization to recover damages for humiliation, shame, disgrace and loss of membership rights incident to administration of discipline pursuant to the society's bylaws, it was error for trial judge to prevent defendant from fully presenting its version of incident giving rise to the disciplinary action.

2. SAME—DISCIPLINE OF MEMBERS—PROCEDURE.

   Member of fraternal organization who actively participated in disciplinary action pursuant to bylaws of the society pertaining to transgressions by members is bound by procedure employed and may not thereafter claim beer-drinking incident which gave rise to the disciplinary action taken against him should have been presented to society pursuant to so-called society court procedure relating to claims against the society for benefits or more serious charges than those calling for mere disciplinary action.

Appeal from Kent; Brown (William B.), J. Submitted June 8, 1944. (Docket No. 35, Calendar No. 42,431.) Decided October 11, 1944.

Case by Walter Morris against Lithuanian Sons & Daughters Aid Society, a Michigan fraternal corporation, for damages arising because of his being barred for a period of one year from attending meetings and from voice and voting privileges. Judgment for plaintiff. Defendant appeals. Reversed without a new trial.

John J. Smolenski, for plaintiff.

Leo Henry, Maurice Sugar, N. L. Smokler and *Morton A. Eden,* for defendant.

WIEST, J. Defendant is a fraternal organization with a social gathering place in the city of Grand Rapids, where it maintains a bar under license to sell liquors. Saturday evening, June 20, 1942, plaintiff, a member, with a few friends, visited the place and were served with beer. About 1:30 o'clock, Sunday morning, they had some more beer and became boisterous and plaintiff claimed the right to be so served until 2 o'clock Sunday morning. This led to an altercation. Within a few days thereafter plaintiff presented written charges upon which he sought discipline of the president of the society and other named members for their interference with his claimed rights on the mentioned occasion. This brought forth countercharges of misconduct by plaintiff and members of his party on the occasion mentioned. The matter came before the trustees and executive officers on July 9, 1942, and the trustees recommended that plaintiff and the society members of his party be penalized according to the constitution, part 12, articles (b) (c). At the regular meeting of the membership of the society on July 14, 1942, the parties interested, including plaintiff, were heard at length upon the subject matter mentioned and, by vote of 66 to 50, plaintiff was disciplined by loss of his voice and vote and right to attend meetings for one year.

Plaintiff brought this action to recover damages for humiliation, shame, disgrace and loss of his membership rights, claiming that the discipline administered was contrary to the procedure estab-

lished by the laws of the society. Upon trial of the issues without a jury the circuit judge held the disciplinary procedure employed was void, awarded plaintiff $300 damages and denied defendant's motion for a new trial. Defendant reviews by appeal.

The written complaint, dated June 24, 1942, signed by plaintiff and three others, stated that Saturday evening, June 20, 1942:

"Our group was of 12 individuals—8 society members and 4 friends. We were enjoying the evening when just 1:30 (Sunday morning) the bartender and the society's president started to put out the lights. People started to be restless and nervous. It was seen that from an orderly evening signs of dissatisfaction became evident among the members. Then former president and now a member of trustees, Friend Stanley Phillips went to ask the bartender Warnas and President Lackus not to act as they have because the laws permit the sale of liquor until 2 a.m., then why make confusion here. But Lackus and A. Warnas did not listen to his suggestion, and instead started to put out more and more lights and told the people to get out. One of our group asked A. Warnas that he bring some drinks. A. Warnas brought the drinks, took the money and said that these are the last drinks. We said all right, and again the lights went out. Then Charles Jakems called Warnas and said 'You said that this was the last drink, then why do you put out the lights? When we drink these we will leave anyway.' Then A. Warnas said, 'If you don't go you will be thrown out.' And then President Lackus told the waitress to take the glasses away from us. Of course, the waitress took the glasses from our table, which were not empty and cost our member $1.30. Whereupon the police was called and also told Frank Zegunas not to let us into the hall. June 29th we came to the hall and we were stopped, could not get into the society hall,

"Honorable society members: This above-mentioned statement was that evening's action, which even the accused cannot deny. Therefore, we pray that all you members think about this incident and seriously consider society's member's rights. Such action of executives gravely endangers our society. * * *

"Therefore, we demand that those above-mentioned members be punished by the society and that they should return the $1.30 which was taken for the last drinks, and be punished for insulting our wives and our friends."

The counterversion of the affair, as appears in the testimony at the trial, was that plaintiff and his party were hilarious and very noisy and, upon being requested to quiet down and leave, threw beer bottles at the president and others and were so boisterous that some one called the police. Such version of the affair by the accused was placed before the society by letter. At the next regular meeting of the society the whole subject matter was taken up and plaintiff and others interested were fully heard and, as the ultimate authority in the premises, the members voted the mentioned discipline of plaintiff.

Plaintiff's complaint brought before the regular meeting of the society the whole subject matter of the beer-drinking incident, inclusive of his conduct and that of the accused, and it was open to the accused, without service of the countercharges, to present fully their version of the affair. The circuit judge was in error in holding otherwise. Plaintiff started the investigation which, necessarily, involved the whole affair and in a sense was "hoisted by his own petard." The disciplinary proceeding was carried out and actively participated in by plaintiff

under part 12 of the bylaws of the society which provide:

"Transgressions

"1. A member may be investigated and penalized for the following matters: * * *

"2. (b) By loss of voice and vote for not longer than one year.

"(c) By being forbidden to attend meetings for not longer than one year."

Plaintiff now contends that the procedure should have been under part 13, before a "society court." That part provides:

"Society Court

"There shall exist, for the purpose of hearing claims against the society by members, and charges against members of the society, a society court. The presiding officer of this court shall be the president of this society, and the judicial power shall be vested in the members of the society present at the convening of said court.

"1. A complaint may be made against a member or members by any member or officer, and must be made by a written report to the society officers. The secretary shall send to the member or members against whom a charge is made a copy of the charges, together with a notice that the charges will be read at the next ensuing meeting and a judgment made. * * *

"After both sides have been heard, the arguments have been made by the complaining member or officer, by the accused member, and by any other members of the society who may care to discuss the matter, a vote shall be taken as to whether or not the member is guilty of the charges, and as to whether or not he shall be suspended temporarily and permanently. The judgment thus made and rendered is final."

The provision for hearing claims against the society by members relates to benefits. The society court provision as to charges against members relates to suspension, temporarily or permanently, of members found guilty under charges more serious than calling for mere disciplinary action. In any event, plaintiff, by active participation in the procedure employed, is bound thereby.

The judgment is reversed, without a new trial and with costs of both courts to defendant.

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

KALLAS *v.* LINCOLN MUTUAL CASUALTY CO.

1. INSURANCE—AUTOMOBILES—LIABILITY POLICY—COVENANT NOT TO SUE.

   Under provisions of automobile public liability insurance policy as to liability and defense of suits and covenant not to sue insurer obtained from injured party, the insurer had an obligation to save the insured harmless to the extent therein mentioned.

2. RELEASE—COVENANT NOT TO SUE—REDUCTION OF JUDGMENT.

   A covenant not to sue an insurer of one liable for a tort may be used to reduce a judgment the injured party might obtain against the insured.

3. INSURANCE—COVENANT NOT TO SUE—REDUCTION OF JUDGMENT.

   An insurer under an automobile public liability policy who had obtained a covenant not to sue it from the injured party had

the duty of informing the court of the covenant and obtaining reduction from the judgment on the verdict by the amount expressed in the covenant, when a verdict was rendered for plaintiff in action against the insured.

4. SAME—TORTS—SETTLEMENT WITHOUT INSURED'S CONSENT.

An insurer of one of several parties liable jointly for a tort may recognize and settle its limited liability without consent of the insured and save the injured party's right of action, if any, against the insured or other person liable (Act No. 303, § 2, Pub. Acts 1941).

5. SAME—COVENANT NOT TO SUE—REDUCTION OF JUDGMENT NUNC PRO TUNC.

In action by insured tortfeasor against whom a judgment in the sum of $6,400 had been obtained after his insurer had obtained a covenant not to sue it from the plaintiff therein, which covenant recited a release of $2,500, the maximum amount for which insurer could be held liable, against his insurer for face amount of policy, interest and costs taxed in action by injured party, insurer which had not obtained reduction of judgment against insured by amount of its covenant is permitted a reasonable time within which to make it operative *nunc pro tunc* as of the date of the judgment against insured.

6. COSTS—INSURANCE—COVENANT NOT TO SUE.

Costs in action against insured tortfeasor are not allowed plaintiff in action against insurer where latter obtained, before injured party sued insured, a covenant not to sue insurer, coupled with agreement that payment thereunder might reduce judgment by the full extent of insurer's liability.

7. SAME—INSURANCE—COVENANT NOT TO SUE—REDUCTION OF JUDGMENT.

Costs on appeal are allowed insured tortfeasor in his action against insurer which had obtained an injured party's covenant not to sue it before action was brought by the injured party against insured but failed to obtain reduction of judgment in amount of covenant, whether or not condition of reversal of judgment for plaintiff herein is fulfilled.

Appeal from Wayne; Miles (Fred T.), J., presiding. Submitted June 13, 1944. (Docket No. 55, Calendar No. 42,775.) Decided October 11, 1944. Rehearing denied June 6, 1945.

Assumpsit by John Kallas against Lincoln Mutual Casualty Company, a Michigan corporation, on a casualty insurance policy. Verdict and judgment for plaintiff. Defendant appeals. Reversed conditionally.

Bernard E. Konopka, for plaintiff.

Stewart A. Ricard, for defendant.

WIEST, J. Plaintiff John Kallas owned an automobile and carried a public liability insurance policy, issued by defendant company to the amount of $2,500. He leased the automobile to one Wilson to be used as a taxicab and, February 5, 1939, the automobile, while being so used by Wilson and driven by his employee, ran a red light and struck and injured three young children of Stephen Brown, one of whom died from his injuries two days later. An adjuster of the insurance company investigated the matter and, being of the opinion that the company was liable, opened negotiations with Mr. Brown toward settlement of the company's liability. The negotiations resulted in payment of $2,250 in full satisfaction of any claims against the company, reserving, however, to Mr. Brown a right of action against Kallas for damages, if any. Mr. Brown, as administrator of the estate of his deceased son, brought action against Mr. Kallas and on October 18, 1940, recovered judgment for $6,400, upon which a body execution was issued against Mr. Kallas, and he was confined in the Wayne county jail for about two weeks. Later Mr. Kallas brought this suit for damages against the insurance company, claiming right to recover the amount of the insurance and have damages for his arrest and imprisonment, claiming he never consented to the adjustment between the insurance company and Mr. Brown and that the insur-

ance company did not defend him as provided in the policy. Upon trial, by jury, plaintiff was awarded the sum of $2,904.56, being the amount of the insurance, with interest and costs of $94, taxed in the Brown action.

In the adjustment with Mr. Brown the insurance company claims it sought to save plaintiff from suit, but Mr. Brown reserved the right to bring suit against plaintiff and the orders of the probate court authorized him to accept the offer of the insurance company.

Mr. Kallas did not appeal from the judgment against him in the action brought by Mr. Brown, nor was the public liability insurance amount deducted from the verdict and judgment thereon.

The insurance company, claiming errors in rulings, charge of the court, and denial of judgment *non obstante veredicto* and for a new trial, appeals.

In the adjustment between the insurance company and Mr. Brown it was considered that it would entail litigation of two years to adjudicate the liability of Mr. Kallas and the company and, therefore, the present worth of $2,500 for that period was fixed at the sum of $2,250.

The trial judge left to the jury the issue of fact as to whether Kallas consented to the adjustment with Mr. Brown and the jury found he did not.

Mr. Brown was appointed, by the probate court, guardian for his two injured daughters and administrator of the estate of his deceased son, and as such executed and delivered to defendant herein the following covenant, which was in accord with previous settlement agreements between defendant and Mr. Brown and in accord with probate court authorization.

"Covenant not to sue"

"For and in consideration of the payment of $1,950 to the estate of Raymond Brown, deceased, by

Stephen David Brown, administrator, and the sum of $100 to the estate of Virginia Brown by Stephen David Brown, guardian, and the sum of $200 to the estate of Luella Mae Brown by Stephen David Brown, guardian, receipt of which sums is hereby confessed and acknowledged by each of the said estates and by the administrator and guardian thereof, Stephen David Brown, each of the said estates by the said administrator and guardian, jointly and severally, hereby agree not to sue or attach in law or in equity the Lincoln Mutual Casualty Company, a Michigan corporation, by reason of a certain policy of insurance number 28061 pertaining to an automobile collision which occurred on or about the 5th day of February, A. D. 1939, at or near the intersection of Windemere avenue and Woodward avenue in the city of Highland Park, Michigan.

"It is a further condition that all the above said estates jointly and severally agree through the said administrator and guardian, Stephen David Brown, that should any litigation be instituted by them against the parties said to be responsible for the said collision, namely, John Kallas, Arthur Schram, and Charles Wilson, jointly or severally, and that thereafter if judgment be obtained against any or all of the last three mentioned, that then this instrument may be filed in any such suit or combination of such suits to operate as a satisfaction of judgment to the extent of $2,500, and to completely satisfy in full any further claims against said policy of insurance and the said Lincoln Mutual Casualty Company.

"Estate of Raymond Brown, deceased,
By (signed) STEPHEN DAVID BROWN,
Administrator.

"Estate of Virginia Brown, a minor
By (signed) STEPHEN DAVID BROWN,
Guardian.

"Estate of Luella Mae Brown, a minor
By (signed) STEPHEN DAVID BROWN,
Guardian.

"Dated: 3/23/39."

Defendant claims it was led to negotiate the settlement of its insurance liability because satisfied that Mr. Kallas had no defense and Mr. Brown was much in need of money. We notice, however, that the expressed pity for Mr. Brown did not prevent defendant from reducing its liability to the extent of $250.

The insurance policy required the company—"To investigate all accidents and to defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim, covered by this policy, whether groundless or not, for damages suffered or alleged to have been suffered on account of the bodily injuries or death or the damage to or the destruction of property. To pay all costs taxed against the assured in any legal procedure defended by the company in accordance with the foregoing agreement."

At the trial of the Brown case an attorney for the insurance company was present but just what activity he exercised is not apparent. Under the insurance contract it was the obligation of defendant, to save plaintiff harmless to the extent of $2,500, by virtue of Mr. Brown's covenant that the payment to him could be used to reduce any judgment he might obtain against Mr. Kallas.

When the verdict was rendered and before judgment was entered thereon it was the duty of defendant to inform the court of the provisions of the covenant and to ask reduction of $2,500 from the judgment on the verdict. This was not done and the judgment for $6,400 was entered and still stands against plaintiff, with interest on the full amount accumulating thereon.

Plaintiff has not paid any part of the $6,400 judgment and apparently no part thereof can be collected from him. It is simple justice that the amount of $2,500 be remitted from the $6,400 judgment if that can now be accomplished. Court Rule No. 72, § 1 (g)

(1933), enables this court, upon appeal, to "give any judgment and make any order which ought to have been given or made, and make such other and further orders and grant such relief, whether mentioned in the notice of appeal or not, as the case may require."

In the Brown case defendant failed to protect itself or the insured by introducing the covenant given by Mr. Brown and thereby reducing Mr. Brown's judgment against Mr. Kallas by $2,500. Before the covenant of Mr. Brown was executed defendant was jointly liable with plaintiff to the extent of $2,500. This joint but limited liability was by insurance contract and defendant could recognize and settle its liability without consent of plaintiff herein, saving, however, right of action by Mr. Brown, if any, against the other person liable. This is the rule, even as to joint tort-feasors. Act No. 303, § 2, Pub. Acts 1941 (Comp. Laws Supp. 1943, § 14497b, Stat. Ann. 1943 Cum. Supp. § 27.1683 [2]).

Under the peculiar situation here disclosed plaintiff is entitled to have the $6,400 judgment in the Brown case reduced by the sum of $2,500, and final decision in the instant case is held in abeyance to give defendant an opportunity by remittitur from, or by proceeding against Mr. Brown, to accomplish such result and operative *nunc pro tunc* as of the date of the Brown judgment. This matter of grace must be accomplished by defendant within a reasonable time and, if not so done, plaintiff may move the court for vacation of the leave and affirmance of the judgment in the circuit court, modified, however, by elimination of the item of $94, costs and interest thereon in the Brown case. If the mentioned remittitur or reduction is seasonably filed and certified to this court by the clerk of the circuit court,

the judgment will be reversed, but in any event with costs of this court to plaintiff.

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

FIDELITY & CASUALTY COMPANY OF NEW YORK *v.* VANTAGGI.

1 WORKMEN'S COMPENSATION—NOTICE TO FOREMAN OF ACCIDENTAL INJURY.

Notice to foreman of accidental injury sustained by an employee constituted notice thereof to his employer.

2. SAME—NOTICE OF ACCIDENT—INSURANCE—REFORMATION OF POLICY.

In action under workmen's compensation insurance policy by insurer against employer for failure to give notice as required by policy, the court may not reform the policy, hence the insurer, according to the terms of the policy, was entitled to prompt notice when the employer, through his foreman, learned of the accident.

3. SAME—FINDING OF DEPARTMENT—RES JUDICATA—REIMBURSEMENT.

Finding of department of labor and industry that employer had notice of injury on day that it occurred was *res judicata* of question of when employer received such notice in action by workmen's compensation insurer for reimbursement by employer whom insurer claimed had failed to give notice to it pursuant to policy provisions.

4. SAME—BREACH OF INSURANCE CONTRACT—LUMP-SUM SETTLEMENT.

The payment of workmen's compensation in a lump sum, pursuant to direction so to do by the department of labor and industry, would not bar insurer from recovering from the employer for breach of contract as to notice (2 Comp. Laws 1929, § 8438, as amended by Act No. 148, Pub. Acts 1935).

5. SAME—INSURANCE—NOTICE—WAIVER—DAMAGES—BREACH OF POLICY.

In action by insurer under a workmen's compensation policy against employer who had failed to give notice to insurer of injury to an employee as required by the policy, where there was no agreement in the policy whereby employer promises to reimburse the insurer, nor waiver by the latter, recovery must be had on the theory of damages suffered because of breach of the notice provision of the policy.

6. SAME—INSURANCE—HYDROCELE—FINDING OF DEPARTMENT—RES JUDICATA.

Finding of department of labor and industry that injured employee's hydrocele developed shortly after the accident was *res judicata* in action by insurer against employer to recover damages suffered because of breach of notice provision of the policy, hence where possible confusion in the minds of the jury in the instant case as to time when hydrocele developed was injected by plaintiff, and error worked to detriment of defendant, plaintiff may not complain of error thereon under the circumstances.

7. APPEAL AND ERROR—REJECTION OF TESTIMONY—ABANDONMENT OF INQUIRY.

Alleged error in claimed rejection of testimony tending to show that injury of which workmen's compensation insurer had not been given notice was only minor at first but was aggravated by working and lack of immediate proper care, which appears to have been abandoned by insurer in its action against the employer for breach of the notice provisions in policy, *held*, not reversible.

8. TRIAL—INSTRUCTIONS.

Charge of court in action by workmen's compensation insurer against employer for breach of notice provision of policy *held*, fair and to have squarely presented issue to jury.

Appeal from Iron; Bell (Frank A.), J. Submitted June 7, 1944. (Docket No. 21, Calendar No. 42,583.) Decided October 11, 1944.

Assumpsit by the Fidelity & Casualty Company of New York, a corporation, against Henry Vantaggi for damages resulting from failure to give notice of an accident as required by the terms of a workmen's compensation insurance policy. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Fred F. Murphy, for plaintiff.

M. S. McDonough, for defendant.

BUTZEL, J. For a statement of the facts leading up to the instant case, see *Fidelity & Casualty Company of New York* v. *Vantaggi,* 300 Mich. 528. Ray Laska, an employee of defendant, suffered a compensable injury which he reported to defendant's foreman. Defendant claimed that he was never informed of the injury until Laska filed his application for compensation with the department of labor and industry. Had the employer been informed by the foreman, it would have been a very simple matter for him to notify plaintiff and thereupon the employer's liability would have been assumed by plaintiff, the insurer. While it seems improbable that the employer would not have notified the plaintiff insurer of the accident, had the employer himself learned of it, nevertheless we hold that notice to the foreman was notice to the employer. The policy did not provide for the contingency of the insurer being still liable if the employer personally did not learn of the accident and, therefore, did not give the required notice. We cannot reform the policy and, according to its strict terms, the insurance company was entitled to notice when the employer through his foreman, his *alter ego,* learned of the accident. Plaintiff, as insurer, was entitled to prompt notice of the accident. After giving notice to defendant

that plaintiff would hold him responsible for any loss it suffered because of the failure to give prompt notice, plaintiff defended the Laska claim. The department held that Laska had given sufficient notice and he was awarded compensation. Thereupon, plaintiff insurer, in addition to making back payments, entered into an agreement to redeem liability by lump-sum settlement. The agreement was approved by the department and was satisfied by the payment of $1,600 to Laska. Plaintiff thereupon instituted suit against Vantaggi, the employer. On appeal, we held in 300 Mich. 528, that the finding of the department as to notice was *res judicata* of that question. The payment of the lump sum by the insurer would not bar it from recovering from the employer because of breach of contract as to notice. 2 Comp. Laws 1929, § 8438, as amended by Act No. 148, Pub. Acts 1935 (Comp. Laws Supp. 1940, § 8438, Stat. Ann. § 17.172). We held, however, that the carrier of workmen's compensation insurance, being a paid insurer, could only recover such damages as it actually suffered because of the failure to give prompt notice as required in the policy. A judgment, therefore, directed against plaintiff was vacated and the cause remanded for a new trial in accordance with the opinion. The case was retried and resulted in a verdict in defendant's favor. The case is here again on appeal.

In the opinion of the department on hearing on review, it is stated:

"Prior to the accident, plaintiff had no difficulty whatsoever with his back and was able to do any and all types of manual labor. Following the accident he has not only been constantly troubled with his back but has also been bothered with a hydrocele and an enlarged left testicle, both of which conditions developed shortly after the accident. To find that

there is no causal connection between the accident and these conditions which are disabling would be to ignore entirely the practical aspect of the situation and to ignore the medical testimony which in the main fairly discloses that the accident could have been the cause of plaintiff's disability."

Many questions are raised by plaintiff as appellant. The doctors who testified for plaintiff did not see Laska until several years after the accident. Much confusion arose as to just when the hydrocele developed. One doctor stated that not having seen plaintiff at the time of the accident, he could not tell when it developed, that it might have been congenital. However, the confusion was not brought about by defendant. Plaintiff's attorney, when questioning the doctor on direct examination, brought out the following testimony:

"*Q.* How long after in your opinion might a hydrocele develop?

"*A.* Well, as to the length of time that may be hard to say or to set a time definitely, but hydroceles may form in a matter of hours to probably days and weeks, as well as months and years. That would all depend upon the size of the hydrocele."

It can readily be seen that the doctors, in testifying, were giving their independent judgment on the question as to when the hydrocele developed. At the time they examined Laska, it had grown to the size of an orange.

Further confusion was thrown into the case by the showing that Laska was able to do part-time work for a period of over two years after the accident. Many of plaintiff's questions may be grouped under the single question as to whether the lower court erred in accepting the testimony of the doctors instead of the opinion of the department that the

hydrocele developed shortly after the accident. We believe that plaintiff was largely responsible for injecting the question into the case by the testimony hereinbefore quoted and, therefore, cannot complain of any error. The testimony in regard to back injuries was excluded correctly. The finding of the department was *res judicata* as between the insurer and the employer. *Fidelity & Casualty Company of New York* v. *Vantaggi, supra; Lumbermen's Mutual Casualty Co.* v. *Bissell,* 220 Mich. 352 (28 A. L. R. 874).

We do not believe that the errors complained of call for a new trial. Not only was plaintiff partly at fault, but the alleged errors operated against defendant, not against plaintiff. Had the hydrocele been congenital, and plaintiff was not notified immediately, plaintiff would have been the sufferer thereby. Had plaintiff had timely notice, it could have ascertained that the hydrocele was not caused by the accident. Having ascertained it, plaintiff could have readily defended Laska's claim before the department. The failure to give notice deprived the insurance company of the opportunity of ascertaining whether or not the cause of the hydrocele was congenital or brought about by causes other than the accident. For this reason it could not carry on a successful defense before the department and was, therefore, damaged to that extent. The error, if there was one, strengthened plaintiff's case. Moreover, the testimony was not entirely certain. It was shown without any question that had plaintiff learned of the hydrocele a simple operation could have cured Laska in a very few weeks. However, it is noted that the doctors testified in the main in a guarded manner as to what could have been done. When the insurance company, instead of offering

this so-called operation to Laska, after learning all of the facts, and thus curing him within a very short time at a minimum of expense, as they claimed they could have done, nevertheless proceeded to agree to a lump-sum settlement, uncertainty was created in the mind of the jury. The inference was proper and very convincing to a jury that the plaintiff would not have consented to a $1,600 lump-sum settlement had it in any way been convinced of the efficacy of an operation at a minimum of expense. The insurance company's action would tend to show that Laska's case was not one in which it was believed that the operation was advisable. It gave the jury a sound basis for coming to the conclusion that plaintiff was not entitled to recover.

Appellant further claims that the court erred in rejecting testimony to show that Laska worked four days after the injuries. Objection was made by the attorney for the defendant on the grounds that the record also showed that at a still later date Laska worked for a protracted period, and that this fact should also have been included in the question. The purpose of this line of questioning was to show that the injury, originally minor, was aggravated by working and by lack of immediate proper care. The court held that counsel for plaintiff should include all pertinent facts so as to enable the physician to come to his conclusion since he did not see Laska until over two years after the accident. The court did not exclude the question but required that a firm foundation be laid. Evidently the question was abandoned by plaintiff for his attorney did not pursue the subject any further. This was not reversible error.

The charge of the court was fair and the issue was squarely presented to the jury. No fault is found

with this charge. In the light of the above determination, the judgment of the lower court is affirmed, with costs to defendant.

STARR, WIEST, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred with BUTZEL, J.

NORTH, C. J. I concur. None of the rulings of which appellant complained were prejudicial.

DiMATTEO *v.* SMITH.

1. APPEAL AND ERROR—DIRECTED VERDICT—JUDGMENT NON OBSTANTE VEREDICTO—EVIDENCE.

   The testimony must be construed in a light most favorable to plaintiff upon an appeal wherein denial of motions for directed verdict and for judgment *non obstante veredicto* is claimed to have been error, even though testimony of witness upon whom plaintiff relies entirely was much discredited.

2. AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT—INTERSECTIONS—SPEED.

   Plaintiff's decedent, driving a pickup truck westerly across intersection of paved 40-foot highway at speed of half a mile per hour on a clear winter day when the pavement was covered with snow and ice and where there were no traffic or other obstructions to his view for many blocks of a rapidly-approaching southbound car and who appeared to have slowed down as he was crossing the westerly half of the intersection in which defendant's car struck the truck, was guilty of contributory negligence as a matter of law.

Contributory negligence of plaintiff sufficient to bar recovery, see 2 Restatement, Torts, § 476, also § 475, comment a; causal relation between harm and negligence, §§ 465, 467; contributory negligence defined, § 463.

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted June 13, 1944. (Docket No. 40, Calendar No. 42,708.) Decided October 11, 1944.

Case by Michael DiMatteo, administrator of the estate of Andrew DiMatteo, deceased, against Lester A. Smith for damages caused by death as result of an automobile collision. Verdict and judgment for plaintiff. Defendant appeals. Reversed without a new trial.

Martin J. Kilsdonk and *Walter M. Nelson,* for plaintiff.

Knight & Panzer, for defendant.

Butzel, J. On January 9, 1941, defendant was driving on Eight Mile road in the city of Detroit, Michigan, and, on reaching Meyers road, turned south. He collided with plaintiff's decedent at the intersection of St. Martins avenue and Meyers road. St. Martins runs east and west, parallel to and about 5 or 6 blocks south of Eight Mile road. Meyers road is a modern hard-surfaced highway; St. Martins, however, is an unimproved gravel road. Exhibits show that the east side of Meyers immediately north of St. Martins avenue is lined with bushes and trees, though it is claimed that a driver on Meyers road could look over the top of the growth and see a car coming from the east on St. Martins avenue. The bushes are fairly high. Defendant, as he approached St. Martins, was driving his car south on Meyers road at between 25 and 30 miles an hour. He was on the right side of Meyers road, closer to the center line than to the west curb. As he approached the St. Martins crossing, plaintiff's decedent drove his Ford pickup truck from the east on St. Martins

into Meyers road. Defendant applied his brake, his car skidded straight ahead and he threw out his arm in front of his wife to prevent her from going through the windshield. He made the statement at the time of the accident that he did not see the truck until just before he struck it. Defendant's car curved to the right or west just before the impact. It stopped at the intersection with the front end toward the west and the rear end out in Meyers road. At the time of the impact, decedent's truck was from 3 to 5 feet west of the center line of Meyers road. Decedent was very severely injured and as a result died 5 weeks later.

Plaintiff relies entirely upon the testimony of one Bart L. Del Duca despite the fact that his testimony was much discredited. However, on this appeal we must accept his testimony in the most favorable light. He testified that on the day in question the pavement on Meyers road was covered with ice or packed snow. Shortly after he turned into Meyers road from Eight Mile road and when he was only half a block south of Eight Mile road, the defendant's car passed him. From the latter intersection, St. Martins avenue is only a distance of 5 or 6 city blocks. The distance between St. Martins and the next cross road north and parallel to it is between 600 and 800 feet. Del Duca further testified that he was a block and a half north of St. Martins when the accident happened. He subsequently stated that he was a block away, that he saw decedent's pickup truck enter Meyers road, that it was jerking and traveling at no greater speed than one-half mile per hour. It slowed down and appeared to stop at the middle of the intersection and was struck by defendant's car. It was struck with such force as to drive it across the road and into a telephone pole. The left front fender of defendant's car struck dece-

dent's truck between the right front fender and the door. At the time of the collision, decedent's truck had passed the middle of the intersection and had reached the west lane of travel on Meyers road. Notwithstanding the fact that the testimony of Del Duca is unsatisfactory, we take it at full value in coming to our conclusion. He testified that it took him from 2 to 5 minutes to travel the block and a half between him and the scene of the accident, and that he saw it, removed his foot from the accelerator and slowed down. He further testified that when the pickup truck was just west of the center line of Meyers road, defendant's car was in the middle of the block on Meyers road between St. Martins and Pembroke, the street immediately to the north. He later testified that the distance was less than half a block. Defendant made a motion for a directed verdict and subsequently for a judgment *non obstante veredicto* after the jury returned a verdict of $5,000 in plaintiff's favor. Both motions were denied.

The physical facts are so strong that we must hold that plaintiff's decedent was guilty of contributory negligence. Plaintiff makes no claim of subsequent negligence. Accepting Del Duca's testimony as given and even assuming that defendant was guilty of negligence, we do not believe that reasonable minds can possibly differ as to the contributory negligence of plaintiff's decedent. Meyers road is an open road 40 feet in width and on a clear day, such as the day of the accident, one can see a distance of a great many blocks. There was no traffic or other obstructions to hinder vision. If DiMatteo had a defective car, he had no right to drive out into the roadway when he could plainly see a rapidly-approaching automobile nearing the intersection. Accepting Del Duca's testimony that decedent's truck was jerking, was traveling at no greater speed than

one-half mile an hour, slowed down as it crossed the intersection and appeared to stop, we find that decedent was guilty of contributory negligence in driving his car in this manner. If it were true that he was going one-half mile per hour as he entered the intersection, defendant's car would have been many hundreds of feet beyond the intersection before decedent could reach the west side of Meyers road. One cannot enter an intersection and see a rapidly-approaching car nearing him and then just slow down.

The judge denied a motion *non obstante veredicto* relying on *Stephens* v. *Koprowski,* 295 Mich. 213, and *Strong* v. *Kittenger,* 300 Mich. 126. In the first case cited, defendant changed the position of his vehicle after plaintiff made an observation and thought it was safe to proceed. In the second case cited, decedent's driver testified that, while he was about 50 to 75 feet away, defendant's car was about 150 to 200 feet from the intersection, and that he believed that defendant's car slowed down and was going to stop and give him the right of way. These cases do not resemble the instant one in any way. They are cases in which the minds of reasonable men might differ. In *Stuck* v. *Tice,* 291 Mich. 486, we said:

"Normally, under conditions such as these, when two cars collide on a bright clear day at the intersection of thoroughfares of equal importance, both drivers are to blame."

This is particularly applicable to the facts in the instant case. It would serve no good purpose to discuss the other cases referred to and distinguish them.

In the brief for plaintiff the question is asked:

"Would a reasonably prudent man have continued the 20 feet across Meyers when a light-

colored sedan was 600 to 800 feet away going at 25 to 30 miles per hour to his right under all the circumstances?''

Plaintiff claims that the jury found that this was a reasonable act. There however should be added to the question propounded ''Whether under these circumstances would a reasonably prudent man travel at the rate of half a mile per hour in crossing these 20 feet.'' At the rate he was going, he could have stopped his car or accelerated its speed and the accident would not have occurred. We hold that, proceeding at this rate of speed, decedent was guilty of contributory negligence as a matter of law and plaintiff cannot recover.

Judgment for plaintiff is reversed, with costs of both courts and without a new trial.

North, C. J., and Starr, Wiest, Bushnell, Boyles, and Reid, JJ., concurred with Butzel, J. Sharpe, J., concurred in the result.

CITY OF HIGHLAND PARK *v.* ROYAL OAK NO. 7 STORM SEWER DRAIN DISTRICT.

1. EQUITY—MOTION TO DISMISS—RES JUDICATA—REHEARING.
   While generally on a motion to dismiss allegations well pleaded must be assumed to be true, where attention is called to a previous case involving the same subject matter before the same court, the prior decision insofar as it governs the facts alleged is final as there cannot be a rehearing under the guise of a new bill of complaint.

2. TAXATION—SPECIAL ASSESSMENTS—TRUSTS—BONDS—STATUTES.
   Funds raised by special assessment are trust funds and must be applied to the payment of the improvement even if the statute under which the bonds are issued and the bonds are void.

3. COURTS—STARE DECISIS.
   The rule of *stare decisis* should be adhered to.

4. DRAINS—VOID DISTRICTS—COLLECTED SPECIAL ASSESSMENTS—DIVISION AMONG BONDHOLDERS.
   Funds which had been paid by property owners before drainage district was declared void and are not now recoverable by them are awarded to be divided *pro rata* among holders of outstanding bonds, the proceeds of which were used to pay for the public improvement (Act No. 316, Pub. Acts 1923, as amended).

5. APPEAL AND ERROR—QUESTIONS REVIEWABLE—PRESENTATION TO TRIAL COURT.
   Questions as to right to operate sewerage system on a revenue basis so as to raise funds for payment of bonds, right to salvage conduits laid in properties not belonging to plaintiff and whether or not bondholders were guilty of laches, not having been raised or passed upon by trial court, are not considered by Supreme Court on appeal in suit for equitable relief.

6. COSTS—MODIFICATION OF DECREE.
   No costs are awarded upon modification of decree in a substantial manner, since each party prevails in part.

Appeal from Oakland; Doty (Frank L.), J. Submitted June 9, 1944. (Docket No. 56, Calendar No. 42,777.) Decided October 11, 1944.

Bill by City of Highland Park, a municipal corporation, against Royal Oak No. 7 Storm Sewer Drain District and others to have drain district decreed to be indebted to bondholders and for mandatory injunction requiring levying of an assessment. Bill dismissed. Plaintiff and certain defendants appeal. Modified and affirmed.

Voorhies, Long, Ryan & McNair and *Joslyn, Joslyn & Joslyn* (*Miller, Canfield, Paddock & Stone,* of counsel), for plaintiff and defendant-appellants.

Harry J. Merritt, for defendant appellees.

Alex J. Groesbeck, Hugh Francis, Bernard F. Powell, John H. Yoe, and *Charles Retzlaff, amici curiae.*

BUTZEL, J. The City of Highland Park filed a bill of complaint against Royal Oak No. 7 storm sewer drain district (Oakland county), Oakland county, its drain commissioner, and its board of supervisors. Of the bonds issued by Royal Oak No. 7 storm sewer drain district, plaintiff owns $65,000 face value and certain defendants who have joined the plaintiff in this appeal own an additional $85,000 face value. The bill of complaint recites the history of the undertaking by means of which a sewer was built under the drain law. It sets forth the nature of the conduits that were built and the claim is made that no facts were disclosed in the record of the original proceedings indicating that the purpose of the structure was other than that of a drain as provided by

law. The bill further shows that the entire issue of bonds amounting to $191,000 was sold to a brokerage house and the moneys used exclusively for the building of the drain, acquisition of rights of way, engineering and other incidental expenses, and that the improvement remains in use at the present time and will for many years serve the district. The bonds were issued in 1928.

The bill of complaint refers to the case of *City of Highland Park* v. *Oakland County Drain Commissioner*, 300 Mich. 501, where it is stated that the proceedings to establish the drainage district in question were instituted on June 3, 1927, under Act No. 316, Pub. Acts 1923, as amended by subsequent acts but which only authorized the construction of drains. Forty-one thousand dollars of principal as well as some interest was paid on the drain bonds so that there remains $150,000 and interest outstanding and unpaid. Plaintiff admits in its bill that it is impossible for it and the defendant bondholders to sue upon their bonds but alleges that equitable grounds exist for recovery of the full amount of the unpaid bonds or some substantial part thereof from the drain district, or for other relief. Appellants claim fraud on the part of the drain commissioner and in the recitals in the bonds because it was concealed from all prospective purchasers that the project would primarily serve as a sanitary sewer. They allege that the improvement is of value to defendants. They ask that the drain commissioner be ordered by mandatory injunction to levy upon all lands in the drain district and against the village of Oak Park taxes of sufficient amount to enable the drainage district to discharge the indebtedness, or in lieu thereof, that an account be taken of the cost of such features and parts of the improvement so as to determine what it would have cost if the improvement

had been properly designed simply as a storm drain, and that each of the outstanding bonds be reformed to state such amount of principal as would properly represent 1/191st of such cost and a decree for such amount be binding upon defendant drain district. As an alternative it asks that the drain district be decreed to be trustee of the property known as the Royal Oak No. 7 storm sewer drain, its rights of way and all parts and equipment thereto, to be held in trust for plaintiff and the bondholder defendants, and that said trust be enforced either through transfer of the property to bondholders or through the imposition of an equitable lien in their favor for the sum of $150,000 and interest thereon at the rate of 5 per cent. per annum since May 1, 1940.

Defendant appellees appeared specially and moved to dismiss. They set forth that by adjudication of the court no such valid drain district exists (see *City of Highland Park* v. *Oakland County Drain Commissioner,* 300 Mich. 501, and cases therein referred to), and they further set forth that in the absence of a valid drain district, defendants Oakland county, its board of supervisors and drain commissioner have no jurisdiction or custody over any physical assets connected with the structure and, therefore, appellants are not entitled to the relief sought. They assert that as no valid drain district was created, no officers were guilty of fraud; that the duties of the drain commissioner were purely statutory and it was not the present incumbent of the office who practiced the alleged fraud complained of. Defendants claim that if the storm drain district does not exist, it cannot be sued, and the court is without jurisdiction. They further claim that the taxpayers, mortgagees and owners of land from whom plaintiff seeks payment are not before the court; that plaintiff is guilty of laches; that

the court is without power to establish a drain district and, if it had the power, the proper parties are not before the court; and that the bill of complaint does not state a cause of action against any of the defendants.

A motion to dismiss was granted without the taking of testimony. While, as a general rule, on a motion to dismiss allegations well pleaded must be assumed to be true, nevertheless when attention is called to *City of Highland Park* v. *Oakland County Drain Commissioner, supra,* involving the same subject matter before the same court, the decision in that case as far as it governs the facts alleged is final. There cannot be a rehearing under the guise of a new bill of complaint. The lower court stated:

"This court is forced to the conclusion that there is no such entity in existence as Royal Oak No. 7 Storm Sewer Drain District and without it there can be no liability against other defendants who, it follows as a matter of course, do not have custody, control or jurisdiction of the physical assets involved. This conclusion is based upon the many expressions of our Supreme Court, pointing to complete lack of jurisdiction from the beginning in the following cases:

"'An entire want of jurisdiction,' 'No jurisdiction,' 'The proceedings are void for want of jurisdiction.' (*Township of Lake* v. *Millar,* 257 Mich. 135.)

"'The petition as filed conferred no jurisdiction on the commissioner to take action,' 'All subsequent proceedings were without authority and void.' (*Kinner* v. *Spencer,* 257 Mich. 142.)

"'The acts of the drain commissioner were without warrant in law.' (*Village of Oak Park* v. *Van Wagoner,* 271 Mich. 450.)

"'We think the proceedings void,' 'The drain commissioner was without jurisdiction.' (*Meyering Land Co.* v. *Spencer,* 273 Mich. 703.)

"Null and void, wholly without authority, All proceedings thereunder are void. (*Detroit Fire & Marine Ins. Co.* v. *County of Oakland,* 284 Mich. 130.)

"The relief sought in paragraph 1 of plaintiff's prayer cannot be granted in view of the holding in *City of Highland Park* v. *Oakland County Drain Commissioner,* 300 Mich. 501, because if it were illegal and unconstitutional to levy a tax to pay the bonds, it would be just as illegal to levy taxes to pay a judgment such as sought here.

"The relief sought in paragraph 2 of the prayer cannot be granted because the parties defendant before the court do not have possession of, custody or control of the physical assets on which the lien is sought. The $23,000 does not belong to plaintiff and the taxpayers cannot recover it. It belongs to the county general fund.

"This court might well paraphrase the statement of the Supreme Court in *International Typographical Union* v. *County of Macomb,* 306 Mich. 562, by saying:

" 'Even if we were to hold that the lower court was in error in its reasons for the dismissal of the bill of complaint, which we do not, we would feel compelled to affirm the decree of dismissal by reason of the rule of *stare decisis.*' We call attention to the case of *City of Highland Park* v. *Oakland County Drain Commissioner,* 300 Mich. 501, where we said:

" 'We do not say that *Village of Oak Park* v. *Van Wagoner,* 271 Mich. 450, is *res judicata* of the rights of these relator bondholders; nor do we hold that they had their day in court through representation by the drain commissioner who was the defendant in that action. We do say, however, that the rule of *stare decisis* should be applied even though equitable considerations might prompt a different result. *Detroit Trust Co.* v. *Detroit City Service Co.,* 262 Mich. 14, 35. See, also, *People* v. *Droste,* 160 Mich. 66, 75, and *Colborne* v. *Railway,* 177 Mich. 139, 142. Since we held in 1935, that it was illegal to levy and

collect any tax assessed as a result of this project, under the doctrine of *stare decisis* we must hold now that it is illegal to levy and collect a tax to pay outstanding bonds issued incident to the same project.'

"Plaintiffs could not recover on express contract. They cannot recover on implied contract. *Hanslovsky* v. *Township of Leland,* 281 Mich. 652, 655, 656, and *Litchfield* v. *Ballou,* 114 U. S. 190 (5 Sup. Ct. 820, 29 L. Ed. 132)."

It will be noted that in the opinion of the court it is stated the sum of $23,000 has been collected by the county on assessment for the so-called drain from owners of property who made payments prior to the final adjudication that the entire proceedings were void. No testimony was taken in regard to the $23,000. It is evident from the opinion and the briefs that some owners of property paid the county expressly for the purpose of meeting the bond obligations prior to the entire proceedings being held void. No suit has been brought to recover these payments within the time limited by statute and those who paid the assessments have no further right of recovery. 1 Comp. Laws 1929, § 4927 (Stat. Ann. § 11.91). The rule is stated in 2 Page & Jones on Taxation by Assessment, § 1512, as follows:

"The funds raised by special assessment are trust funds, and the city must apply them to the payment of the improvement, even if the statute under which the bonds are issued and the bonds themselves are void."

The rule is upheld in *City of Gladstone* v. *Throop,* 18 C. C. A. 61 (71 Fed. 341), and *Willis* v. *Board of Commissioners of Wyandotte County, Kansas,* 30 C. C. A. 445 (86 Fed. 872). We believe, therefore, that an account should be taken of the amount so held by the county and approximating $23,000 and

that all the money be divided *pro rata* among the holders of the outstanding bonds.

Much has been said by the appellants in the series of briefs filed by them in regard to the equities. They again refer to *City of Highland Park* v. *Oakland County Drain Commissioner,* 300 Mich. 501, wherein we held that the rule of *stare decisis* should be upheld even though equity might prompt a different result. We referred to a number of cases including *Village of Oak Park* v. *Van Wagoner,* 271 Mich. 450, wherein the same project was under consideration. We must admit that some equitable considerations may arise in these cases but equities may frequently operate against the property owners. In *Clinton* v. *Spencer,* 250 Mich. 135, one of the first drain cases involving the same question came before this court. It will be recalled that had the assessment for sewer construction under drain proceedings been upheld and had we found that there was jurisdiction, the drain assessment alone for building the sewer would have been far in excess of the entire assessed value of the lands belonging to the plaintiffs. We should avoid the pitfall of making bad law in hard cases. The rule of *stare decisis* should be adhered to.

Situations like the present one have arisen before. See *McCurdy* v. *County of Shiawassee,* 134 Mich. 550. We believe the leading case is *Litchfield* v. *Ballou,* 114 U. S. 190 (5 Sup. Ct. 820, 29 L. Ed. 132), wherein the United States supreme court stated that there could not be any recovery. It is true in the latter case that general tax funds as well as the assessments raised through special taxes were used in the project. In the present case, conduits were buried in lands that plaintiff did not own or have any control over. These lands were publicly owned rights of way and they constitute an essential part

of the project. Part of the cost had been paid by other taxpayers who did pay their assessments and it is admitted in the briefs that a good part of the land became the property of the State and was sold at scavenger sales, free from taxes to the bidders at the sale.

In the final brief filed by appellants, they admit that the court has heretofore held the proceedings both for the construction of the drain and the issuing of the bonds to be illegal for want of jurisdiction for the drain commissioner to build a sewer. They now rely upon Act No. 342, Pub. Acts 1939, as amended by Act No. 353, Pub. Acts 1941 (Comp. Laws Supp. 1940, 1943, § 2486–91 *et seq.*, Stat. Ann. 1943 Cum. Supp. § 5.2767 [1] *et seq.*). They claim that Oakland county now has the right to own and operate a sewer and sewage system on a revenue basis and lands belonging to those who did not pay the assessments, but excepting those who purchased the property at scavenger sale, should be assessed and moneys collected on a revenue basis for the use of the conduit paid to the bondholders. We shall not even discuss these claims. They were not raised in the bill of complaint. So, many questions immediately arise including what rights, if any, the bondholders have at this late date in the conduits, what right they ever had after the conduits were buried in properties not belonging to them, and what would be the value of the property and the conduits if they were unearthed, whether the proper parties are before the court, and whether appellants are not guilty of laches. Many other questions may be raised. Inasmuch as this is a new question and the lower court had no opportunity to pass upon it, we decline even to consider it.

The query also arises whether, if a mere storm drain had been built, it would not have been paid for

by the $41,000 already paid to the bondholders plus the $23,000 which we decree belongs to the bondholders. On this record, we shall not pass upon whether the entire question is not *res judicata* under the circumstances.

The decree of the lower court is modified to the extent that the $23,000, or thereabouts, should be divided *pro rata* among the bondholders; otherwise, it is affirmed, but without costs, each party having prevailed partially.

NORTH, C. J., and STARR, WIEST, BUSHNELL, SHARPE, BOYLES, and REID, JJ., concurred.

NORWICH UNION FIRE INSURANCE SOCIETY., LTD., *v.* GLOBE CONSTRUCTION CO.

AUTOMOBILES—CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT FOR JURY—EXCAVATION IN HIGHWAY—WARNING FLARES.

Question of contributory negligence of driver of 30-foot tractor and semi-trailer loaded with about 15 tons of paper who had been travelling down hill at a reasonable rate of speed at night some 60 feet behind a preceding car which stopped suddenly and turned to the right immediately before reaching recently-excavated hole 38" deep and 67' long in highway and who turned left and passed through picket fence into excavation *held*, question of fact for jury, the testimony being conflicting as to whether there were flares at the near edge of the excavation.

NORTH, C. J., and SHARPE, J., dissenting.

Contributory negligence of plaintiff sufficient to bar recovery, see 2 Restatement, Torts, § 476, also § 475, comment a; causal relation between harm and negligence, §§ 465, 467; contributory negligence defined, § 463.

Appeal from Kalamazoo; Weimer (George V.), J. Submitted June 9, 1944. (Docket No. 57, Calendar No. 42,780.) Decided October 11, 1944.

Case by Norwich Union Fire Insurance Society, Limited, a foreign corporation, assignee and subrogee of McNamara Motor Express, Incorporated, a Michigan corporation, and McNamara Motor Express, Incorporated, against Globe Construction Company, a corporation, for damages sustained when plaintiff's truck was driven into an excavation. Verdict and judgment for plaintiffs. Defendant appeals. Affirmed.

Mason & Stratton, for plaintiff.

Dwight W. Fistler, for defendant.

BUSHNELL, J. Shortly before midnight on July 22, 1942, Harold Carter, an employee of plaintiff McNamara Motor Express, Inc., a common carrier of freight between Kalamazoo and Chicago, left the company's terminal in Kalamazoo with a 30-foot tractor and semi-trailer loaded with about 15 tons of paper. He had driven this route every other day for about 3 weeks, and had come from Chicago that morning. The road on which he traveled was being reconstructed and resurfaced from the junction of old US-12 and new US-12, and there was a sign west of the city of Kalamazoo at the junction of these two roads, reading, "Road under Construction." Beyond this junction is Snake hill, on which US-12 winds down grade from east to west, a distance of about two and one-half city blocks from top to bottom.

On this night there were no signs or lights at the top of Snake hill, but there were flares along both

sides of the highway. Carter, driving at a reasonable rate of speed, was following an automobile which had been in front of him for some time. He was about 60 feet behind this car and there was some dust in the air. As he reached the bottom of the hill the car in front of the truck suddenly stopped and made a quick turn to the right. Carter set his brakes and made a quick turn to the left in order to avoid striking this car. Just beyond this point, defendant Globe Construction Company had made an excavation in the highway 38 inches deep and 67 feet long. The testimony is conflicting as to whether or not there were any flares along the east edge of the excavation, but it is undisputed that there was a picket fence, similar to that used for snow fences, across the highway about 3 or 4 feet from the edge of the excavation. Carter was unable to stop his equipment before it went into the excavation, and turned over.

Suit was brought by plaintiff Norwich Union Fire Insurance Society, Ltd., as assignee and subrogee of McNamara Motor Express, Inc., resulting in a judgment in favor of the insurance company in the sum of $708.74 for damages to the cargo, and a judgment in favor of the express company in the sum of $852.50, for damage to its equipment.

Defendant's motions for a judgment notwithstanding the verdict and for a new trial were denied by the trial court and it appeals on the sole ground that plaintiff express company's driver was guilty of contributory negligence as a matter of law. In denying the several motions, the trial judge filed memoranda in which he said that the excavation in the pavement was not readily observable for a very great distance, and that the express company's driver did not turn out for the purpose of passing the vehicle ahead of him, but was confronted with

a sudden emergency; that he governed himself accordingly; attempted to avoid a collision with the vehicle that had stopped so suddenly ahead of him, and that, in pulling slightly to the left, was immediately confronted with the excavation without any earlier warning of it. Because of the weight of his vehicle and its momentum and his inability to turn to the right, he had no choice but to go ahead into the excavation.

The trial judge also commented upon the fact that because the flares had been there for some days and nights, Carter and others traveling the highway almost daily were familiar with the fact that it was under repair and might perhaps have assumed that the flares were there to mark the sides of the road, rather than to warn travelers of an "unexpected and suddenly created excavation of the entire pavement."

The trial judge concluded that Carter was not guilty of contributory negligence as a matter of law, but that his negligence, if any, was a question of fact for the jury. In passing upon the motion for a new trial, the trial judge concluded that:

"The jury apparently weighed the testimony of Harold Carter, driver of plaintiffs' truck, very carefully and, it seems to me, rendered the only just and true verdict possible on the whole record including his testimony. If I had been the trier of the facts I could not have found otherwise."

The trial judge also directed attention to the fact that, although Carter had made three or four round trips each week between Kalamazoo and Chicago during the progress of the road construction, the excavation had been made after he had passed over

that part of the highway on his return from Chicago. He stated that:

"This is not a case in which it satisfactorily appears that there was a proper barricade at a proper distance from the end of the excavation or other proper warning properly placed and readily discernible which a driver negligently failed to discover and to heed.

"It clearly appears from the testimony of Carter and other witnesses that the east end of the excavation at the foot of Snake hill was not reasonably discernible in the circumstances and conditions then present for sufficient distance to the east to afford travelers approaching it reasonable protection or to charge them with a want of due care if they failed to discover it in time to avoid driving into the excavation. The happening of this serious accident should surprise no one acquainted with the fact. In no respect am I able to find that Carter is subject to censure or failed to use reasonable care. As already stated, it cannot be said that he negligently failed to heed a warning of a danger that was clearly visible for a proper distance. It may more reasonably be said that he fell into a trap negligently placed by defendant's agents and employees."

Our examination of the testimony brings us to the same conclusion reached by the trial judge, *i.e.*, that Carter's negligence, if any, was a question of fact for the jury. *Martin* v. *J. A. Mercier Co.*, 255 Mich. 587 (78 A. L. R. 520), and *Bard* v. *Baker*, 283 Mich. 337.

The several judgments are affirmed, with costs to appellees.

STARR, WIEST, BUTZEL, BOYLES, and REID, JJ., concurred with BUSHNELL, J.

SHARPE, J. (*dissenting*). I am not in accord with the opinion of Mr. Justice BUSHNELL "that Carter's

negligence, if any, was a question of fact for the jury."

Carter, the driver of plaintiff's tractor and trailer, was familiar with the road. He knew the road was under construction and that the shoulders of the road were being graded. He was following an automobile down Snake hill at a distance of 65 to 75 feet; was 500 feet to the east of the excavation when he first saw the lights on each corner of it; was travelling at the rate of 35 miles per hour; and could stop his tractor in a distance of 60 feet. Carter testified: "When I was 100 feet east of the flares I was about 60 feet from the car ahead and gaining on him. He was then between me and the flares. When he was about 25 feet from the hole I started passing him. * * * It was pretty dusty, but not foggy that night. There was dust along there but I don't know how far I drove into the dust cloud before I hit the fence." When bright his lights would show "about 190 feet."

Clarence W. Leedy, a witness produced by plaintiffs, testified: "I was employed by the Globe Construction Company. * * * The fence was between 3 and 4 feet from the end of the excavation. The fence was a picket fence, painted red. * * * I helped Mr. Rendel place his flares. He placed three flares across the road. Two right at the corners of his fence, back something like 8 or 10 feet, and one in the neighborhood of 50 or 60 feet right in the middle of the road. * * * The fence was clear across the pavement east of the hole. Mr. Rendel, I believe, was about 75 feet in front of the light that was in the center of the pavement, with a red flag and a white handkerchief tied to the end of it."

In *Thompson* v. *Southern Michigan Transportation Co.*, 261 Mich. 440, we said:

"It is well settled that it is negligence as a matter of law to drive an automobile along a public highway in the dark at such speed it cannot be stopped within the distance that objects can be seen ahead. *Spencer* v. *Taylor,* 219 Mich. 110; *Holsaple* v. *Superintendents of Poor of Menominee County,* 232 Mich. 603; *Bowmaster* v. *William H. DePree Co.,* 252 Mich. 505.

" '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. * * *

"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. *Ruth* v. *Vroom,* 245 Mich. 88 (62 A. L. R. 1528); *Haney* v. *Troost,* 242 Mich. 693. Stress is placed upon the atmospheric conditions existing at the time of the accident. These conditions have been held not to change the rule. *Budnick* v. *Peterson,* 215 Mich. 678; *Haney* v. *Troost, supra; Lett* v. *Summerfield & Hecht,* 239 Mich. 699; *Elrich* v. *Schwaderer,* 251 Mich. 33."

In the case at bar plaintiffs' driver did not have such control of his truck and trailer as to stop within the assured clear distance ahead. (1 Comp. Laws 1929, § 4697, as amended by Act No. 318, Pub. Acts 1939 [Comp. Laws Supp. 1940, § 4697, Stat. Ann. 1943 Cum. Supp. § 9.1565].) He knew the highway was under repair, yet he drove to within 25 feet of the hole before putting on his brakes, knowing that he could not stop within a distance of 60 feet. If he had made proper observations he would have seen the flares and the fence, also the

flagman 50 feet east of the hole. His failure to see and heed what was plainly to be seen precludes recovery.

The judgment should be reversed without a new trial. Defendant should recover costs.

NORTH, C. J., concurred with SHARPE, J.

GRATIOT LUMBER & COAL CO. *v.* LUBINSKI.

1. FRAUD—SUFFICIENCY—EVIDENCE—DIRECTED VERDICT.

   In action of trespass on the case for alleged fraudulent conspiracy to obtain lumber and materials for modernizing a tavern, evidence *held,* insufficient to submit issue as to fraudulent conspiracy to jury.

2. PLEADING—AMENDMENT—CONSTRUCTION OF STATUTES.

   In furtherance of justice, trial courts should give the statute of amendments a liberal construction (3 Comp. Laws 1929, § 14144; Court Rule No. 19, § 4 [1933]).

3. SAME—AMENDMENT—DISCRETION OF COURT—ABUSE OF DISCRETION.

   Generally, permission to amend plea rests wholly within discretion of trial court, and unless discretion is abused, Supreme Court will not interfere, whether amendment is granted or refused (3 Comp. Laws 1929, § 14144; Court Rule No. 19, § 4 [1933]).

4. SAME—AMENDMENT—DISCRETION OF COURT—ABOLITION OF TECHNICAL ERRORS.

   The right to permit amendments to pleading, in accordance with the statute, is discretionary with the court and is aimed to abolish technical errors in proceedings and to have cases

disposed of as nearly as possible in accordance with the substantial rights of the parties (3 Comp. Laws 1929, § 14144; Court Rule No. 19, § 4 [1933]).

5. SAME—AMENDMENT—LESS STRINGENT REMEDY.

It was reversible error to deny plaintiff lumber company permission to amend declaration so as to state a cause of action in assumpsit in action of tort for fraudulent conspiracy to obtain lumber and materials for modernizing a tavern and brought against the owners of the tavern, the person who supervised the job and the latter's son, a salesman for plaintiff, where defendant owners' answer stated they were indebted to codefendant as a general and independent contractor but testimony at trial developed that owner claimed he owed money to plaintiff, since amendment at time of trial was first opportunity plaintiff had to meet new theory and remedy of assumpsit is less stringent (3 Comp. Laws 1929, § 14144; Court Rule No. 19, § 4 [1933]).

NORTH, C. J., and REID, J., dissenting.

Appeal from Wayne; Miller (Guy A.), J. Submitted June 8, 1944. (Docket No. 25, Calendar No. 42,683.) Decided October 11, 1944. Rehearing denied December 1, 1944.

Case by Gratiot Lumber & Coal Company, a Michigan corporation, against Anthony A. Lubinski and others for damages caused by conspiracy to defraud. Motion by plaintiff to amend declaration to set out cause of action in assumpsit. Motion denied. Directed verdict and judgment for defendants. Plaintiff appeals. Reversed.

Harry Z. Marx, for plaintiff.

Ralph Lane (*Herbert W. Lane,* of counsel), for defendants.

SHARPE, J. This is an appeal from a judgment for defendants upon their motion for a directed verdict.

Plaintiff, the Gratiot Lumber & Coal Company, is a Michigan corporation engaged in the retail lum-

ber and supply business in the city of Detroit. Defendants Anthony A. and Agnes Lubinski were engaged in modernizing a tavern. Defendant Andrew Musetti, Sr., supervised the modernizing of the tavern for Anthony A. and Agnes Lubinski. Defendant Andrew Musetti, Jr., son of Andrew Musetti, Sr., was employed as a salesman for plaintiff company.

During the months of April, May and June, 1941, Andrew Musetti, Jr., permitted the delivery to Anthony A. and Agnes Lubinski of approximately $900 worth of material contrary to the requirements of plaintiff company that credit may only be extended when there is a signed order passed upon favorably by its credit bureau. When this condition of affairs was called to the attention of the manager of plaintiff company a signed order was procured from Anthony A. and Agnes Lubinski, but before the credit report was examined and rejected more materials were delivered. At this time materials to the extent of $1,506.20 had been delivered, a part of which were taken from plaintiff's yard by defendant Anthony A. Lubinski personally.

Defendants Lubinski had engaged Andrew Musetti, Sr., to superintend the work of modernizing the tavern. Anthony A. Lubinski admitted owing the bill and signed the receipt for the materials. Shortly after the last material was delivered to defendants Lubinski a writ of garnishment had been served on them, as garnishee defendants, in an action against Andrew Musetti, Sr. A disclosure was filed by Anthony A. Lubinski in which he acknowledged owing Andrew Musetti, Sr., $1,405.70 on contract as a general contractor for labor, material and services. Between the time of the delivery of materials and the filing of the present suit the Lubinskis sold a piece of property located in

Detroit. The tavern where the materials were delivered was located in the city of East Detroit. Upon the refusal of defendants to pay for the materials plaintiff company filed its declaration in trespass on the case, setting forth but one count, in which it is alleged a fraudulent conspiracy on the part of all defendants for the purpose of obtaining lumber and materials from plaintiff company with intent to defraud plaintiff company.

Defendants Lubinski filed an answer in which they denied owing plaintiff company any sums, and alleged that they were obligated to the defendant Andrew Musetti, Sr., as a general and independent contractor and that all sums owing him were impounded by a writ of garnishment. Subsequently, defendants Lubinski filed a motion to dismiss plaintiff's declaration on the ground that these defendants and plaintiff company have no contractual relation between them, and because plaintiff's cause of action lies solely against defendants Andrew Musetti, Sr., and Andrew Musetti, Jr. An order was entered denying defendants' motion to dismiss the declaration, and the cause proceeded to trial. During the course of the trial defendant Anthony A. Lubinski testified as follows:

"When the first material was delivered I got the invoice that accompanied the shipment. I knew that it bore my name. I did not go to the Gratiot Lumber & Coal Company following the 10th of May, 1941, regarding an account for the payment for materials because I had no money to go there with. I had nothing to offer them. When I received these bills, I did not speak to Mr. Musetti about them. I am speaking now of this group of invoices. I never made complaint to him about them coming in my name. * * *

"I do not deny owing any bill.

"*Q.* Well, do you contend that this material was delivered on your account after you had made arrangements for it?

"*A.* Oh, I did not make any arrangements for it. * * *

"*Q.* * * * My question was, how do you explain your right to receive this material if you had made no arrangements for it?

"*A.* Because I spoke to Mr. Musetti, and as long as the lumber had been shipped out there I took it for granted Mr. Musetti had made arrangements for the shipment of this lumber."

After this testimony had been received in evidence plaintiff's attorney made a motion to waive the claimed fraud and amend the declaration to one in assumpsit. The trial court denied the motion on the theory that an opportunity had been given all parties to amend the pleadings when the cause came up on the pretrial docket, and for the further reason that Anthony A. Lubinski had filed a disclosure that he owed Andrew Musetti, Sr., as a general contractor, and that the Lubinskis could not interplead until the tort action had been dismissed.

Further testimony was taken and at the close thereof defendants' attorney moved for a directed verdict, which was granted. Plaintiff company appeals and urges that the trial court was in error in holding that plaintiff had not proved fraud on the part of the defendants, and for failure to permit plaintiff company to amend its declaration from an action of trespass on the case to an action in assumpsit.

We are in accord with, and the record supports the following statement of the trial court:

"I do not think there is any evidence here that raises any ground for submitting to you the question

whether or not there was such a fraudulent conspiracy entered into between these three parties or these four parties.

"Mr. Lubinski never dealt directly with the Gratiot Lumber [& Coal] Company. He and the two Musettis met. He told them what he wanted to have done. Andrew Musetti, Jr., was there. He was there in his capacity as a salesman for the Gratiot Lumber [& Coal] Company. He took his memoranda as to the materials that were needed. At that time he did not get a written order from the Lubinskis. That was his fault. He is a salesman for the plaintiff company, he is representing the plaintiff company, and if he makes an error of judgment or forgets to do what his instructions call for him to do, that is not chargeable against the Lubinskis, under the testimony in the case. That is his fault, for which he is responsible to his employer, but it is nothing that the employer can lay up as against the Lubinskis. The only thing, under the testimony, that Anthony Lubinski asked for at the hands of the Gratiot Lumber [& Coal] Company through Andrew Musetti, Jr., was, as Mr. Musetti, Sr., testifies, whether or not Musetti, Jr., could get him 60 or 90 days credit. That was all of the talk that took place between them. Andrew Musetti, Jr., went back to the company and he put in orders for the delivery of the goods, but he did not have a signed order from either Andrew Musetti, Sr., as contractor, or from Anthony A. Lubinski, as owner of the property. He should have had such an order as that under the rules and practice of the Gratiot Lumber [& Coal] Company, but there is not one syllable of testimony in the case to show that Anthony A. Lubinski knew anything at all about that practice, not a syllable. And if he did not know it was the duty of Andrew Musetti, Jr., to get such an order and lay that order on Mr. Striffler's desk, nothing can be charged up against them if he did not get that order and if he did not present it to Mr. Striffler. That is a failure

on his part to perform his duty to the Gratiot Lumber [& Coal] Company."

The statute and rule relating to amendments are as follows:

"The court in which any action or proceedings shall be pending, shall have power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment or decree rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings, which do not affect the substantial rights of the parties." 3 Comp. Laws 1929, § 14144 (Stat. Ann. § 27.838).

"If after a verdict or judgment it appears in any action that a different cause of action has been proved and should have been pleaded, a new count setting up the cause of action so proved may by leave of court be added to the declaration by amendment, and the verdict and judgment shall stand." Court Rule No. 19, § 4 (1933).

In furtherance of justice, trial courts should give the statute of amendments a liberal construction.

See *Okulich* v. *Goldman*, 239 Mich. 569.

In *Grant* v. *National Manufacturer & Plating Co.*, 258 Mich. 453, we said:

"As a rule, the permission to amend rests wholly within the discretion of the trial court, and unless this discretion is abused, we will not interfere. This is true irrespective of whether the court refuses or permits the amendment."

In *M. M. Gantz Co.* v. *Alexander*, 258 Mich. 695, we said:

"The right to permit amendments, in accordance with the statute, is vested in the sound judgment and discretion of the trial court. It aims to abolish

technical errors in proceedings and to have cases disposed of as nearly as possible in accordance with the substantial rights of the parties."

See, also, *Johnson* v. *Fremont Canning Co.*, 270 Mich. 524.

In *Annis* v. *Reiser & Co.*, 209 Mich. 512, plaintiff brought suit on the theory of rescission of a fraudulent contract. During the trial plaintiff moved to amend his declaration and proceed on the theory of damages for fraud and deceit. The motion was granted. The measure of damages was different under the original and amended declaration. We there said:

"Granting that the allegations of the declaration as originally drawn were on the theory of rescission, it was afterwards amended to conform to the theory of damages. Had plaintiff persisted in his claim of right to recover under the theory of rescission and no amendment been made, undoubtedly defendants would have been entitled to a directed verdict, but as there was no rescission and the declaration was amended and proof made thereunder we see no reason for a directed verdict on this account. The thing sought to be recovered was the same after amendment as before, and both declarations depended upon substantially the same state of facts. It is true that the case outlined in the amended declaration is one of tort, but after setting forth the facts which constituted the basis of his claim he elected to recover in assumpsit as he had a right to do under section 12350, 3 Comp. Laws 1915."

The above case must be considered as an authority for permitting an amendment from an action for rescission of a contract to a tort action, where there is no showing of surprise or injustice.

It is to be noted that under the pleadings defendant Anthony A. Lubinski claimed he was indebted to Andrew Musetti, Sr., for the materials furnished,

and we must assume that when the cause came before the pretrial docket no changes were made in his claims; but when the cause came on for trial, and after some testimony had been taken, defendant Anthony A. Lubinski claimed that he did not know to whom he was indebted for the materials. He testified as follows:

"*Q.* And then when the materials were delivered, he (Musetti, Sr.) told you that you would have to pay the bills directly to the material people on the 10th of the month following delivery, that is right, isn't it?

"*A.* That is right.

"*Q.* You got all this material from the Gratiot Lumber & Coal Company up to the time you were told, or up to the time you signed Exhibit 2 (purchase agreement), and you never made any complaint about the manner in which these delivery tickets were made out, did you?

"*A.* No, sir. * * *

"*Q.* Didn't you consider you owed the Gratiot Lumber & Coal Company that money?

"*A.* I assume I did, yes.

"*Q.* And you assume now it is owing to the Gratiot Lumber & Coal Company, do you not?

"*A.* That is right."

It appears that the first opportunity plaintiff company had to meet this new theory was during the trial of the cause. The only issue is whether Lubinskis are indebted to plaintiff company.

Under the circumstances in this case plaintiff was entitled to amend its pleading and proceed with a less stringent remedy. It was reversible error to deny plaintiff this privilege. The judgment is reversed, with costs to plaintiff.

STARR, WIEST, BUTZEL, BUSHNELL, and BOYLES, JJ., concurred with SHARPE, J.

NORTH, C. J. (*dissenting*). Mr. Justice SHARPE has written for reversal. I am unable to concur. The conclusion reached by my Brother is based wholly upon the trial court's refusal to grant plaintiff's motion, made at the conclusion of plaintiff's proof, to amend his declaration. The purpose of the amendment sought was to enable plaintiff to recover against Anthony A. Lubinski in assumpsit, instead of relying in tort upon the alleged conspiracy to defraud.

In conformity to the practice in the trial court a pretrial hearing had been had in this case. At that time no application for amendment of pleadings was made. However, this circumstance is met by plaintiff's assertion that at the time of the pretrial hearing plaintiff did not possess knowledge of the facts which prompted the motion to amend at the trial of the case. Instead plaintiff asserts that such facts were first developed and became known to plaintiff at the trial on the cross-examination of the defendant Anthony A. Lubinski. But the trial judge might well have been of the opinion that this contention or assertion was entitled to little credence because plaintiff's own records introduced in evidence plainly disclosed that it sold and charged the materials to Anthony A. Lubinski. Further the trial court's refusal to permit the amendment was of no serious disadvantage to plaintiff because it in no way foreclosed plaintiff's right to institute a new suit in assumpsit in which, upon sufficient proof, a judgment in assumpsit could be secured against Mr. Lubinski. Reversal because of refusal to grant a motion to amend is not justifiable except such refusal constitutes an abuse of discretion on the part of the trial judge. This rule is noted in a case from which my Brother quotes as follows:

"As a rule, the permission to amend rests wholly within the discretion of the trial court, and unless this discretion is abused, we will not interfere. This is true irrespective of whether the court refuses or permits the amendment." *Grant* v. *National Manufacturer & Plating Co.*, 258 Mich. 453.

For like holdings see *Konstantine* v. *City of Dearborn*, 280 Mich. 310; *Lau* v. *Pontiac Commercial & Savings Bank*, 260 Mich. 73; and *People, for use of National Regulator Co.*, v. *Rosewarne*, 247 Mich. 22. In his discretion the trial judge might have granted plaintiff's motion to amend; but under the circumstances of the instant case denial of the motion was not an abuse of discretion on the part of the trial judge and should not be held to be ground for reversal on this appeal.

The above conclusion necessitates consideration of another phase of the instant appeal. Plaintiff and appellant asserts that the testimony produced was such that the jury might justly have concluded that one or more of the defendants incident to procuring the building material from plaintiff was guilty of fraudulent conduct resulting in damage to plaintiff, and that therefore the trial judge was in error in directing a verdict in favor of all defendants on the ground that there was no testimony tending to sustain the charge in plaintiff's declaration of conspiracy to defraud or of a perpetrated fraud. A careful review of the record brings us to the conclusion that the trial judge was correct in holding that there was no testimony which would justify recovery by plaintiff under the allegations of its declaration. We deem it unnecessary to review the testimony in detail, but the following may be noted.

The basic theory of plaintiff's claim of a right to recover in the tort action is that defendant Andrew Musetti, Jr., failed to secure from the proper officer

of plaintiff company approval of credit to Lubinski before delivery of the materials. The undisputed testimony is that this was at the time an oversight on the part of Musetti, Jr., that he "completely forgot" to obtain a signed order and approval of credit to Lubinski. In any event, there is no testimony whatever that any of the other defendants charged with conspiring with Andrew Musetti, Jr., knew of his oversight or neglect of duty. And even on this appeal appellant states in its brief: "If a judgment should be entered in this court, we concede that the judgment should run against the Lubinskis alone and the cause dismissed as to the defendants Musetti." By no stretch of the imagination could it be said that under this record plaintiff is entitled to a judgment against Agnes Lubinski, the wife of Anthony A. Lubinski; and as to the latter, as noted above, there is no testimony tending to show that he was a party to any fraudulent conspiracy or to any fraud in consequence of which the building materials were delivered to Lubinski without first obtaining approval of credit extended incident to the purchase of the materials in question. The trial judge correctly so held.

The judgment entered in the circuit court should be affirmed, with costs to appellees.

REID, J., concurred with NORTH, C. J.

MILES *v.* FREDENHAGEN.

1. EQUITY—CONSTRUCTION OF INTERLOCUTORY DECREE—JOINT ADVENTURE—OIL AND GAS LEASES IN FIELDS IN AND OUT OF STATE.

   Interlocutory decree in suit for accounting, injunction and receivership of joint adventure covering oil and gas leases required that accounting be had as to leases entered into in an out-of-State field as well as those in a Michigan county, hence no modification of the decree is necessary in order to obtain final accounting as to all leases involved.

2. COSTS—BRIEFS.

   No costs are awarded either party on affirmance of decree entered in circuit court where appellee's brief is not in conformity with court rule regarding separate statement of facts and reference to pages of printed record and in combining facts and argument (Court Rule No. 68 [1933]).

Appeal from Van Buren; Warner (Glenn E.), J. Submitted June 14, 1944. (Docket No. 32, Calendar No. 42,575.) Decided October 11, 1944.

Bill by Floyd C. Miles against Donald E. Fredenhagen for an accounting of profits from sale of oil and gas and for an injunction. Decree for plaintiff. Affirmed.

Jackson, Fitzgerald & Dalm, for plaintiff.

Anderson, Anderson & Anderson, for defendant.

BOYLES, J. (*for modification of decree*). Plaintiff's bill of complaint alleges that defendant and one Frank Henigman entered into an oral agreement with plaintiff to prospect for and produce oil

or gas in the Bloomingdale oil and gas field in Van Buren county, that it was agreed each should receive one third of the net profits therefrom, that plaintiff made trips, devoted time to negotiating oil and gas leases, secured leases, particularly one from Mr. and Mrs. Veley, owners of land in the area, negotiated for and secured an agreement from well drillers, and that a producing well was drilled on the Veley lease from which defendant has received and kept large sums of money without accounting to plaintiff for his share. Plaintiff asks for an accounting, an order enjoining defendant from collecting further sums of money, and a receivership to conserve and distribute the proceeds from this oil and gas lease. The circuit court after a hearing decreed that plaintiff and defendant had agreed to share in a joint enterprise, that plaintiff was entitled to his share, that the cause be referred to a circuit court commissioner for an accounting, and that the defendant be restrained from collecting or receiving any further sums of money until plaintiff had been paid in full. Defendant appeals.

Appellant claims that plaintiff's suit is for compensation for services, for work performed by plaintiff. We do not so consider the bill of complaint. It sufficiently alleges facts and circumstances which, if proven, constitute a joint adventure between the parties. *Johnson* v. *Ironside,* 249 Mich. 35; *Hathaway* v. *Porter Royalty Pool, Inc.,* 296 Mich. 90 (138 A. L. R. 955).

Appellant's principal claim is that the testimony fails to establish a joint adventure. The circuit judge held that a joint adventure had been proven, and we have examined the record to ascertain *de novo* whether a joint adventure has been established by the proofs.

The parties resided in Illinois. In 1937 plaintiff, an employee of General Electric Company in Chi-

cago, became interested in exploring for oil and gas as a sideline. Plaintiff and defendant and Frank Henigman—also a resident of Chicago—took leases both in Illinois and Michigan in defendant's name and put down wells in both places. Henigman had an instrument referred to as a "doodlebug" to test for oil. The defendant herein also had a "doodlebug," and with these so-called test instruments they experimented in tests for oil both in Illinois and in Michigan. Henigman and the defendant herein invited plaintiff to come in with them on a deal in western Illinois. They took leases in that territory in defendant's name, and had one or more wells drilled there. Plaintiff testified that during one of their frequent conferences he said to defendant:

"Well, I am—don't know much about this western Illinois but I have had a background of knowledge of what is going on in Michigan and Mr. Henigman and I have been up there a great deal and there is a territory east of Bloomingdale that we think quite a bit of."

Plaintiff's employer objected to his spending so much time in oil prospecting and in 1939 plaintiff took a two-month leave of absence from his employment. During this time plaintiff, Henigman and defendant continued to get together and examine oil prospects. Plaintiff mentioned to Henigman and defendant that he "still liked an area up around Bloomingdale (Michigan)." He testified:

"I said 'Well, let's go over to Michigan—I would like to show that to you, Mr. Fredenhagen, and see what you think of it—' as Henigman and I had not only checked that area but we had stopped in on a couple of occasions to talk to Walter Schock, a lease that we were particularly interested in to find out whether or not it was under lease and when it would

be ready for re-leasing and we had gone out to make some tests on his farm. So he said 'Fine. I would be glad to go over' and said 'This looks good to you fellows,' said 'We will put that in on the play and we will drill a well in western Illinois and drill one in Bloomingdale—' so I brought them over in my car—and during that trip we made a number of tests in the area."

They discussed the taking of leases in Michigan and agreed that leases should be taken in defendant Fredenhagen's name because of the objections voiced by plaintiff's employer. Plaintiff testified:

"I said 'All right, Mr. Henigman and Mr. Fredenhagen, we will start in leasing over there and we will share the profits in the interest equally. Is that agreeable to you fellows?' They both said 'That is entirely agreeable.'"

The record shows that plaintiff assisted in obtaining leases in Michigan, the three men took trips to places in Illinois as well as to Bloomingdale in plaintiff's car, obtained leases in defendant's name in both places. Some of the Michigan leases were prepared by plaintiff in his handwriting and secured by plaintiff, using defendant's name as lessee. Others were obtained by defendant. Plaintiff assisted in raising the funds for drilling, in securing a firm of oil well drillers to develop the leases, and actively participated in obtaining the drilling of wells. Plaintiff tried to procure a written agreement with defendant. He testified:

"I said to Mr. Fredenhagen, 'We ought to have something in writing between us—we haven't got anything here to show what relationship—what agreement we actually have—we don't have anything and something might happen to any one of the three of us—one of us might be killed and leave one

or the other of us holding the sack—and for the protection of all of us we ought to have something—some sort of agreement for the work we have been doing'—Mr. Henigman said that there should be something—Mr. Fredenhagen said we should have something.''

We find from the record that these three parties entered into a joint adventure to explore for oil and gas both in Illinois and in Michigan; that plaintiff actively participated in the venture and materially aided in bringing it to fruition. A well was drilled on the Schock lease and came in a nonproducer. At the same time, concurrently with the work on the Schock lease in Michigan, these parties drilled what they called the Roberts well, in Illinois. Henigman and the defendant stayed in Illinois and looked after the Roberts matter and plaintiff came to Michigan and attended to drilling the Schock well. The Veley lease was a part of the same joint venture. A firm of well drillers—Clapsaddle & Harris—was engaged to drill on some leases, they agreeing to drill four wells. A written agreement was signed by Harris and the defendant (the leases being in defendant's name). Clapsaddle & Harris drilled in a well on the Veley lease which proved to be a producer.

The negotiations between plaintiff and defendant for a written agreement came to nothing. Henigman apparently has been settled with by defendant, or has been paid from the profits, at least it does not appear that he is making any claim, and he does not appear in this suit. Plaintiff claims he has had nothing in return for his part in the venture.

Verbal joint adventure agreements are generally indefinite, and the intention of the parties must be gleaned from the entire course of their conduct and transactions. It is reasonable to believe that plaintiff would not have devoted so much time and ex-

pense in obtaining leases, raising funds to drill wells, arranging for contracts, using his own transportation on a considerable number of trips in Illinois and to Michigan without some agreement to share in the profits. The record supports the finding of the circuit judge that these parties agreed to a joint adventure to procure leases, explore for oil and develop the leases, and share in the proceeds.

Defendant claims that such an agreement, not in writing, is void being within the statute of frauds. The agreement between the parties was to share in the profits, and the sale of an interest in lands is not involved in this case. The statute of frauds (3 Comp. Laws 1929, § 13413 [Stat. Ann. § 26.908]) is not a bar to the action. *Youngs* v. *Read,* 246 Mich. 219; *Stewart* v. *Young,* 247 Mich. 451.

One other question requires consideration. Appellant questions whether the proofs do not disclose a joint adventure covering leases in western Illinois as well as in Van Buren county, Michigan. The bill of complaint makes no claim of an agreement to prospect for oil or gas in any area except the Bloomingdale field in Van Buren county, Michigan. Plaintiff's claim for a share in profits, as set up in his bill of complaint, is limited to the producing oil well on the Veley lease. The bill of complaint seeks an accounting only for the proceeds from the well on this one lease. The defendant claims that the money realized from the Veley lease has been used in exploring for or drilling other wells on other oil and gas leases. In the original decree the lower court granted plaintiff an accounting limited to the Veley lease. Subsequently the court granted a rehearing on its own motion, saying:

"Clearly, if the parties entered into a joint adventure to acquire leases and drill for oil plaintiff

cannot select one well, the operation of which was profitable, and demand an accounting and be awarded a money decree and thus avoid liability for losses on other leases acquired by the joint adventurers.

"A rehearing is hereby ordered on the following:

"1. In addition to the Veley lease, did plaintiff, defendant, and Henigman enter into a joint adventure to acquire other oil leases and prospect for and produce oil and gas?

"2. If so, name, location and description of such leases and operations carried on thereunder?"

Further testimony was taken, following which the court entered a decree designating the leases covered by the joint adventure. The court decreed that plaintiff, defendant and Henigman entered into a joint adventure from which plaintiff and defendant were each to receive one third of the net profits. The decree further provides that the adventure covered leases and operations in the western Illinois field as well as in Van Buren county before November 9, 1940, at which time the parties terminated their operations. However, the decree designates only the Michigan leases, and directs a reference to a circuit court commissioner for an accounting of the profits and losses with respect to the Michigan leases only. The record plainly establishes that the joint adventure was not limited to the Michigan operations, but included the operations in Illinois as well. The decree must be modified in that respect. The equities arising from the entire joint adventure are before the court. We are in accord with the conclusion that plaintiff has established the existence of a joint adventure, and that consideration should not be restricted to the profits from the successful Veley well, disregarding losses and expenses from other operations in the adventure. The chancery court has jurisdiction to determine the

equities of the entire matter and plaintiff cannot have the aid of a court of equity as to a part, and disregard other parts of the venture which are not to his advantage. Further testimony on the accounting may be taken to show to what extent the operations on various leases were paid for by others. We see no reason why the accounting cannot be comprehensive of the entire joint adventure.

The case is remanded for modification of the decree in the above regard, and for an accounting of the profits and losses and expenses with respect to the entire business and operations of plaintiff and defendant in the joint adventure both in Illinois and in Michigan. The court below may have jurisdiction to take any further action in the case that may be necessary to a complete determination of the rights of the parties as justice may require.

Appellee's brief not being in conformity with Court Rule No. 68 (1933) regarding separate statement of facts and reference to pages of the printed record, and in combining facts and argument, and appellant having prevailed only in part, no costs should be awarded.

The decree should be modified and the case remanded for accounting and further proceedings in accordance herewith.

WIEST and SHARPE, JJ., concurred with BOYLES, J.

NORTH, C. J. Mr. Justice BOYLES is of the opinion that the decree entered in the circuit court should be modified. He seems to reach this conclusion by construing the trial court's decree to limit the accounting to operations in Michigan. I think the decree should not be so construed.

While the reference to the commissioner to take testimony was limited to the Michigan transactions,

it appears from the plain wording of the decree entered in the circuit court that the accounting was to include transactions incident to the joint adventure in Illinois as well as those in Michigan. There is testimony in the record pertinent to an accounting as to the operations in Illinois; and if necessary to a full accounting, further testimony may be taken as to those transactions. The decree entered in the circuit court was not a final decree, but only an interlocutory decree. That the trial judge clearly intended the final decree should embody an accounting as to transactions both in Michigan and Illinois appears from the following portion of the decree entered in the circuit wherein the court found:

"That said joint adventure covered oil and gas leases and operations in the so-called western Illinois field and all oil and gas leases on property in Van Buren county, Michigan, taken in the name of defendant Donald E. Fredenhagen on or before November 9, 1940. That an accounting should be taken of the profits and loss *on all such leases and operations thereon.*"

Since the decree specifically provides as above indicated there is no occasion for this Court ordering a modification. The decree entered in the circuit court is affirmed and the case remanded for further proceedings incident to a final accounting. For reasons given by Mr. Justice BOYLES, no costs will be awarded on this appeal.

STARR, BUTZEL, BUSHNELL, and REID, JJ., concurred with NORTH, C. J.

WASHINGTON AGENCY, INC., *v.* COMMISSIONER OF INSURANCE.

1. INSURANCE—CORPORATE AGENCY AFFILIATED WITH BANK—LICENSES—PUBLIC POLICY.

   Finding of commissioner of insurance that corporate insurance agency whose stockholders were the same as those of a national bank and whose stock was held in trust by four trustees, removable at will by a majority of the bank's directors, was not a proper and fit corporation to transact business as an insurance agent because license so to operate was employed contrary to public policy was justified by evidence (12 USCA, § 92; 3 Comp. Laws 1929, § 12339, as amended by Act No. 163, Pub. Acts 1931).

2. OFFICERS—ADMINISTRATIVE OFFICERS—INTERFERENCE BY COURTS.

   Courts will not interfere with the act of a public administrative officer acting within the scope of his authority.

BUTZEL, J., dissenting.

Petition by Washington Agency, Inc., a Michigan corporation, for a writ of mandamus to compel David A. Forbes, Commissioner of Insurance, to vacate an order revoking plaintiff's license as an insurance agent. Submitted June 13, 1944. (Calendar No. 42,587.) Writ denied October 11, 1944.

Butzel, Eaman, Long, Gust & Bills (*Thomas G. Long,* of counsel), for plaintiff.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, *Daniel J. O'Hara* and *Maurice M. Moule,* Assistants Attorney General, for defendant.

REID, J. This petition is brought for mandamus to require the commissioner of insurance to continue the license of plaintiff to write insurance as an agency. Plaintiff is a Michigan corporation, incorporated December 9, 1940, with powers under its charter to conduct the business of an insurance agency. License was applied for and issued December 26, 1940, and has been renewed each year since.

A complaint was filed with the commissioner. He sent plaintiff notice of a hearing which was held in his office October 13, 1943, at the conclusion of which the license was revoked. At the hearing testimony was introduced on the relationship between plaintiff and the Industrial National Bank—Detroit, a Federal corporation.

"Licenses for agents shall be issued only to persons who are actual residents of this State, or to corporations of this State." 3 Comp. Laws 1929, § 12339, as amended by Act No. 163, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 12339, Stat. Ann. 1943 Rev. § 24.133).

Plaintiff, proceeding on the theory that the revocation was on the ground that the same persons held all the shares of the capital stock of the two corporations, claimed that consequently the ruling was discriminatory and a deprivation in violation of section 1 of the Fourteenth Amendment to the Federal Constitution. Defendant admits that his action could not have been well taken on so narrow a ground. He evidently was led by that state of affairs to scrutinize the affairs of plaintiff more closely.

The issue on this appeal is whether plaintiff's activities are controlled by the bank and whether the bank by indirection and subterfuge obtained this license in the name of plaintiff to evade the State statute and the Federal statute (12 USCA, § 92) which

permits a national bank to act as insurance agent only when located in places of less than 5,000 population.

The policy of government respecting such matters as intimate relationships between banks and insurance agencies is for the most part set forth in legislation and executive actions. Congress views with none too great favor a national bank acting as insurance agent, forbidding it in places of 5,000 or more population.

Mr. Bramble, the commissioner's investigator, in his report, made March 27, 1942, found:

"The patent fact that all business of the Washington Agency, Inc., originates in the Industrial National Bank—Detroit, and with clients of the bank, particularly with applicants for loans secured by personal property, presents implications subject to interpretation that the close relationship of the agency and the bank is not conducive to practices desired by this department."

It appears that the bank and plaintiff were organized at the same time.

Plaintiff sets forth that the Industrial National Bank—Detroit succeeded the Industrial Morris Plan Bank which practically from the beginning of its business in 1917 had found it necessary to render assistance to borrowers in obtaining insurance, and claims that requiring such insurance is common practice among lenders of money, individual and corporate; also that by correspondence when the Industrial National Bank—Detroit was organized, the comptroller of the currency treated the Washington Agency, Inc., as an affiliate of the bank, that is, that their relationship consisted only in the fact that their stockholders were the same persons.

When plaintiff was organized, the original capital was paid in December 9, 1940, by Mr. Bowen, who was the sole stockholder; at the first meeting after incorporation, December 17, 1940, Messrs. Lewis, Turnbull, Ropp, Rugg, McLean, Taub and Bowen were elected directors, all of whom except Bowen were officers and directors of the bank. The only shares of stock that were ever issued were the shares to Mr. Bowen, which shares in turn were later issued to the four trustees, Messrs. Lewis, Turnbull, Ropp and Rugg, who were principal officers of the bank.

Their declaration of trust dated January 20, 1941, stated that they held the legal title to the shares for the use and benefit of the stockholders of the bank but trustees had the right to vote and exercise all acts of ownership of the stock of plaintiff. A majority of the directors of the bank could at will remove any or all of the trustees. The shareholders of the Washington Agency, Inc., received their dividends along with their bank's dividends, all in one check. Plaintiff showed that the Washington Agency, Inc., wrote the insurance in an average of about 40 per cent. of the bank's loans in the last three years.

Not until after a preceding hearing before the commissioner of insurance was provision made for the issuing of any certificates to the shareholders of plaintiff corporation. Later and apparently on October 26, 1943, the shareholders were notified of a change in the terms of the trust whereby each had the right to get his certificate on request. The same notice said, "It is believed that it is more convenient and better for all concerned that the shares be left with the trustees." No stockholder asked for his certificate.

There was competent testimony to indicate that plaintiff is organized under a plan by which the

executive officers of the bank have entire control over plaintiff's operations for the financial benefit of the same persons who are the bank's stockholders.

The commissioner found:

"The Washington Agency, Inc., was organized to circumvent 3 Comp. Laws 1929, § 12339, as amended, by indirection and subterfuge, by obtaining an insurance agency license for the benefit of the Industrial National Bank, which is prohibited by such law; and it further appearing that there was sufficient cause shown that the said Washington Agency, Inc., is not a 'proper and fit' corporation to be permitted to transact business as an insurance agent in this State contrary to 3 Comp. Laws 1929, § 12344, as amended [by Act No. 163, Pub. Acts 1931 (Comp. Laws Supp. 1940, § 12344, Stat. Ann. 1943 Rev. § 24.138)] and 12 USCA, § 92, because of its inevitable control by and identity with the said Industrial National Bank; and it further appearing that the said license is employed contrary to public policy;

"It is ordered that the insurance agent's license of the Washington Agency, Inc., be and the same is hereby revoked."

Courts will not interfere with the act of a public administrative officer acting fairly within the scope of his authority. The testimony, taken as a whole, furnished a basis for defendant's finding. The petition must be dismissed, with costs to defendant.

NORTH, C. J., and STARR, WIEST, BUSHNELL, SHARPE, and BOYLES, JJ., concurred with REID, J.

BUTZEL, J. (*dissenting*). I am not in accord with the foregoing opinion. While a writ of mandamus is a writ of grace, nevertheless it should be issued where a public officer does something that he is not authorized to do or refrains from doing something

that he ought to do. It is not merely a question of discretion when he refuses to renew a license for reasons not supported either by law or facts. The foregoing opinion upholds the commissioner on the grounds that the Washington Agency, Inc., is a corporation which by indirection and subterfuge obtained its license in order to evade the State statute and the Federal statute (12 USCA, § 92). There is no breach of the Federal statute when a corporation, not a bank, goes into the insurance field and establishes an insurance agency. The correspondence introduced shows that there was no objection by the controller of currency or any other Federal authority to the plaintiff going into the insurance field. In a letter from the deputy controller, it was stated that it was recognized that the agency corporation would be an affiliate of the bank, and the arrangement had the government's approval. Surely the insurance commissioner could not claim there was any infraction of the Federal statutes.

The main objection is made on the ground that plaintiff was organized so that by indirection and subterfuge it could obtain a license. We fail to see any basis for this claim. The plaintiff was organized legally to do a lawful business that it was precluded from doing as a national bank under the Federal banking law. That law apparently does not prevent a bank from forming an affiliate and engaging in a lawful business. There are many things a bank cannot do. It cannot engage in a mercantile manufacturing business although through foreclosure or some other reason it might be a wise thing for a bank to do. It would be *ultra vires*. There was no subterfuge in what plaintiff did openly and legally. I see no indirection in forming a distinct, separate corporation of this nature.

No claim is made that borrowers at the bank were obliged to take out more insurance than was required as security. They had the option to insure where they preferred. It was a convenience to them as well as to the bank to have any insurance required for a loan placed promptly with a responsible agent. Clearly, it is evident that the business largely originated in the bank and the profit from it went to the stockholders in the corporation who are also stockholders of the bank. A similar situation exists in other corporations formed by finance, mortgage and real-estate companies, as well as other corporations where a large amount of insurance is frequently required for customers or employees. The office of the plaintiff is no longer in the same building as the bank. The trust was partly dissolved, and, to remove even any remote suspicion, it should be completely dissolved so that the stockholders own their stock outright and none of the stock should be tied up in any way with the bank. This would remove any possible objection as far as I can see to the plaintiff being entitled to renewal of its license.

Stress is laid upon the case of *People, ex rel. Attorney General,* v. *Michigan Bell Telephone Co.,* 246 Mich. 198 (P. U. R. 1929 B, 455, P. U. R. 1929 E, 27), but this case and others wherein the corporate entity had been disregarded have been fully discussed and distinguished in *Gledhill* v. *Fisher & Co.,* 272 Mich. 353 (102 A. L. R. 1042).

A similar question was presented in *Finley* v. *Union Joint Stock Land Bank of Detroit,* 281 Mich. 214, 220, wherein we said:

"In the case at bar the land bank did not own directly or indirectly any stock in the Central States

Investment Corporation. The investment company had an independent corporate existence and charter; it filed its annual reports; kept its own minutes of its meetings and from time to time it held meetings of its stockholders and directors. It was organized as a profit-sharing corporation; the profits, if any, were to go to its individual stockholders."

In *Re Watertown Paper Co.*, 94 C. C. A. 528 (169 Fed. 252), in the opinion of Judge Noyes of the circuit court of appeals for the second circuit, the question was presented as to whether a pulp company and a paper company, two corporations in which the stockholders were largely the same, should be treated as one corporation and the corporate entity should be disregarded. The court said:

"Now, it is an elementary and fundamental principle of corporation law that a corporation is an entity separate and distinct from its stockholders and from other corporations with which it may be connected. The fact that the stockholders of two separately chartered corporations are identical, that one owns shares in another, and that they have mutual dealings, will not, as a general rule, merge them into one corporation, or prevent the enforcement against the insolvent estate of the one of an otherwise valid claim of the other. As said by the supreme court of Arkansas in *Lange* v. *Burke*, 69 Ark. 85, 89 (61 S. W. 165), in holding, in a case where two corporations were practically controlled by the same stockholders and had had intimate business relations, including the employment of the same bookkeeper, that a claim of one corporation would be enforced against the insolvent estate of the other:

"'A corporation is an artificial being separate and distinct from its agents, officers, and stockholders. Its dealings with another corporation, although it may be composed in part of persons who own the majority of the stock in each company, and

may be managed by the same officers, if they be in good faith and free from fraud, stand upon the same basis, and affect it and the other corporation in the same manner and to the same extent, that they would if each had been composed of different stockholders and controlled by different officers.' ''

It also quoted from an opinion of the sixth circuit court of appeals in *Richmond & I. Const. Co.* v. *Richmond, N. I. & B. R. Co.,* 15 C. C. A. 289, 292 (68 Fed. 105, 34 L. R. A. 625), as follows:

''The contract company was a legal corporation, wholly distinct and separate from the railroad company. The fact that the stockholders in each may have been the same persons does not operate to destroy the legal identity of either corporation. Neither does the fact that the one corporation exercised a controlling influence over the other, through the ownership of its stock or through the identity of stockholders, operate to make either agent of the other, or to merge the two corporations into one.''

Recently in *Goodpastor* v. *Southern Insurance Agency, Inc.,* 293 Ky. 420 (169 S. W. [2d] 1), a question arose very similar to that presented in the instant case. The court stated:

''Appellant insists that Southern was formed by the stockholders of Commercial merely as a subterfuge and to circumvent § 298.190 KRS and allow Commercial to obtain a resident agent's license through Southern. We are asked to ignore what appellant terms the corporate fiction of Southern and to draw aside its veil as a corporate entity and to hold that it is but Commercial clothed in different raiment, citing *Louisville & N. R. Co.* v. *Carter,* 226 Ky. 561 (10 S. W. [2d] 1064); *Markell* v. *Hilpert,* 140 Fla. 842 (192 South. 392); *State, ex rel. Johnson & Higgins Co.,* v. *Safford,* 117 Ohio St. 576 (159 N. E. 829). An examination of these authorities shows

they hold that where one corporation is owned or so controlled by another as to make it but a sham or dummy for the former, the courts, where necessary to promote justice, will ignore the corporate fiction of the dummy and seize upon the real corporate entity. But here we have no such situation. Southern was separate and distinct from Commercial and was neither owned nor controlled by it. The fact that practically the same stockholders owned both corporations does not affect the corporate entity of the two companies, nor reduce Southern to the status of being a sham or dummy for Commercial. * * *

"In the instant case the majority of Southern's stock was not owned by Commercial but by the stockholders of the latter. Commercial was not attempting to enter Kentucky as a local insurance agent through a dummy corporation. Commercial had no connection with Southern although both were largely owned by the same stockholders. As stated above, it is quite a different situation where one corporation owns the majority of the stock of another from that where the majority of stock in both are owned by the same persons."

It is true that the court came to a different conclusion in *State, ex rel. Johnson & Higgins Co.*, v. *Safford*, 117 Ohio St. 576 (159 N. E. 829), and in *State, ex rel. Federal Union Ins. Co.*, v. *Warner*, 128 Ohio St. 261 (190 N. E. 575). The facts, however, in these cases are far different from those in the instant case.

There is no claim that plaintiff has done anything illegal or unlawful. If it does defendant has an adequate means of stopping it. We believe, to remove any question, the trust by which all the stockholders trusteed their stock, and which has been modified so as to enable them to withdraw the stock from the trust, should be dissolved and the stock turned over

to the stockholders. This should remove any suspicion of the grounds of which defendant is fearful. The license for plaintiff should be renewed on condition that the trust is promptly dissolved and the stock turned over free from such trust to the stockholders, all of which should be done within a reasonable length of time.

A writ of mandamus should be issued to this effect but without costs, a public question being involved.

CAMPBELL *v.* HOMER ORE CO.

1. MINES AND MINERALS—LEASES—UNCONDITIONAL FORFEITURE—SUFFICIENCY OF NOTICE.

   Notice to lessee under mining lease that if certain defaults relative to removing underground ore without weighing by railroad company, mixing with other ores contrary to lease and improperly disposing of lean ore were continued for 60 days after service of notice, holder of an undivided interest of the fee would declare lease terminated conformed to provision of lease for unconditional right of termination on 60 days' notice.

2. SAME—LEASES—FORFEITURE—IMPLIED COVENANTS.

   No forfeiture of a mining lease may be maintained on violation of an implied covenant thereof.

3. SAME—WEIGHING OF ORE BY DISINTERESTED PARTY—FORFEITURE OF LEASE.

   The weighing of iron ore by a disinterested party, as provided by mining lease, was a valuable right to the lessor and where

such right is expressly set forth in the lease, the lessor had a right to terminate the lease for violation thereof.

4. SAME—FORFEITURE—TIME EFFECTIVE.
The termination of a mining lease by the lessor, pursuant to provisions of the lease therefor, became effective upon the expiration of the time limited in the lease and notice given.

5. SAME—FORFEITURE OF LEASE—TENANCY IN COMMON.
Upon the termination of a mining lease by the holder of an undivided interest in the fee, where the lessee also owned an undivided interest in the fee, they became tenants in common.

6. SAME—TENANCY IN COMMON—ACCOUNTING.
Since iron ore in its natural situation is not capable of precise determination as to either quality or amount and because lean ore that is unsalable at one time may later be in demand, a tenant in common who takes possession is not vested with any superior right to choose what ore is most convenient and profitable to mine, remove and sell without accounting therefor.

7. SAME—TENANCY IN COMMON—ACCOUNTING AS TO ORE MINED—COST OF MINING.
A tenant in common who is also lessee under a mining lease is entitled to mine iron ore and to deduct the cost when required to account to a cotenant although such cost might not be deductible by a mere wilful trespasser without any right or claim of title.

8. SAME—TENANCY IN COMMON—FORFEITURE OF LEASE—CONSENT.
One tenant in common who holds the sole remaining lessor interest under a mining lease needs no one's consent to terminate the lease for the lessee's default.

9. SAME—ACCOUNTING—STIPULATIONS—DAMAGES—INTEREST.
In action by holders of an undivided interest in the fee of a mining lease for cotenant's unauthorized mining, removal and sale of a quantity of ore where parties have stipulated the amount of ore mined, its value and cost of mining, judgment is ordered entered for plaintiffs for their damages with interest at 5 per cent. per annum from the date defendant received payment for plaintiffs' share of the ore mined until entry of judgment.

Appeal from Iron; Landers (Thomas J.), J., presiding. Submitted June 13, 1944. (Docket No. 4, Calendar No. 42,622.) Decided October 11, 1944.

Case by David H. Campbell and wife against Homer Ore Company for unauthorized removal of ore. Judgment for defendant. Plaintiffs appeal. Reversed and remanded for entry of judgment for plaintiffs.

Meredith P. Sawyer and *Raymond Turner,* for plaintiffs.

M. S. McDonough and *Leigh C. Caswell* (*Prewitt Semmes* and *W. C. Scott,* of counsel), for defendant.

REID, J. Plaintiffs sue for unauthorized mining, removal and sale of 52,000 tons of iron ore from a 60-acre tract in Iron county known as the Minckler mine, in which plaintiffs have an undivided 1/24 interest.

On January 15, 1913, Minckler, the owner of the tract, made a lease to Woodworth for a term of 50 years, with unconditional right of termination on 60-days' notice. The tract had not then been mined. Plaintiffs acquired their interest December 4, 1936, expressly subject to the lease.

Defendant acquired all of the lessee interest besides 1/6 of the fee, and thereafter made an agreement with all the other owners of interests in the title, except plaintiffs, extending the term to January, 1987, increasing the minimum royalty, doing away with weighing by the railroad company and providing for mixing the ore before weighing.

The original lease, among other things, provided:

"The iron ore removed from said lands shall be weighed by the railroad company transporting the same from said lands, which weights shall prima facie determine the quantity as between the parties hereto. Said party of the second part also agrees to furnish or cause to be furnished said Paul N. Minck-

ler on or before the 20th day of each calendar month, statements showing * * * weights."

Lessor had a right to test and correct statement of weights.

Besides the unconditional termination clause hereinbefore referred to, the lease provided:

"It is further provided and the present lease is granted upon the express condition that if the said party of the second part shall fail to perform or observe any covenants, conditions or provisions of this lease on his part to be observed or performed and such nonobservance or nonperformance shall continue for the period of 60 days after written notice, specifying the particular default complained of, shall have been served upon the said party of the second part, then it shall be lawful, immediately thereafter and while such default continues, and without further or other notice, or demand, for the parties of the first part or those then having their estate in the premises, to enter into and upon said premises or any part thereof in the name of the whole, and repossess the same as of their first and former estates therein, and the second party, his personal representatives or assigns, wholly to exclude therefrom."

Plaintiffs served written notice on defendant January 31, 1941, claiming a violation of the covenants, conditions and provisions of the lease by removing ore underground from the premises without weighing by the railroad company and mixing with other ores contrary to the lease, improperly disposing of lean ore, and reciting:

"If said defaults or any of them continue for a period of 60 days after service of this notice, the undersigned will declare said lease and agreement terminated and will immediately reenter upon said interest in said lands and repossess the same."

Defendant claims this is a conditional notice and not an absolute forfeiture of the lease unless a sub-

sequent notice or assertion of forfeiture were made, citing *Maday* v. *Roth,* 160 Mich. 289 (136 Am. St. Rep. 441), and *Hupp Farm Corp.* v. *Neef,* 294 Mich. 160.

Defendant continued the method of weighing complained of from the service of notice to date of trial. No other or further notice is necessary under the express terms of the lease. The notice served conformed with the forfeiture clause. Plaintiff refused and, on April 20, 1941, returned the check for minimum royalty for the ensuing period. Defendant further claims that the method of weighing the ore was merely optional with the lessee and further, that the matter complained of did not constitute a violation of any express covenant in the lease, and correctly asserts that no forfeiture could be maintained on violation of an implied covenant, citing *DeGrasse* v. *Verona Mining Co.,* 185 Mich. 514, 537. However, in the instant case the lease itself expressly provided forfeiture not only for violation of a covenant but of any condition or provision of the lease. The method of weighing by a disinterested party expressly set forth in the lease was a valuable right to the lessor not to be ignored at the convenience or caprice of the lessee. Without this method, plaintiffs would need to employ an agent to check weights in order to obtain a disinterested statement of weights. Plaintiffs had a right to terminate the lease for this violation. The termination was effective April 1, 1941. Plaintiffs and defendant on that date became tenants in common.

In order to escape liability to plaintiffs for their proportionate share of the value of ore mined and sold by them, defendant ignores its denial of cotenancy, and in effect claims that as long as 1/24 of the total ore not removed or not mined at all on April 1, 1941, is still left, it is not liable to plaintiffs, and cites *Fiquet* v. *Allison,* 12 Mich. 328, 331 (86 Am.

Dec. 54), as to sale of proportionate share of wheat which has been harvested and amount and quality precisely determined. The distinction lies in the fact that iron ore in its natural situation is not capable of precise determination as to either quality or amount. Lean ore unsalable in one period may later be in demand. The tenant in common who takes possession is not vested with any superior right to choose what ore is to him most convenient to mine, select what is more profitable and remove and sell without accounting. *Hennes* v. *Charles Hebard & Sons*, 169 Mich. 670, 675; *Cecil* v. *Clark*, 47 W. Va. 402 (35 S. E. 11, 81 Am. St. Rep. 802).

Defendant cites *Ward* v. *Carp River Iron Co.*, 47 Mich. 65, which was trover brought by assignee of creditor of a mining company, which creditor had obtained a judgment, levy and sale of the mine but the *time for redemption had not expired* when suit was brought alleging that defendant bought wrongfully converted ore taken from the mine. In his opinion in that case Mr. Justice COOLEY says, at page 69:

"The debtor's rights are certainly not less than those of a tenant for years in any particular. He may not open new mines, but the old mines he may continue to work in the customary and *reasonable* way * * * He (plaintiff) has not therefore brought his case within the statute." (Italics supplied.)

That case did not involve rights of tenants in common. The questions were raised on demurrer and there was no claim in the declaration that the interest of plaintiff suffered by the mining done. The action was brought under a statute and the allegations failed to bring the case within the statute. See, also, *Silver King Coalition Mines Com-*

pany of Nevada v. *Silver King Consolidated Mining Company of Utah,* 122 C. C. A. 402 (204 Fed. 166, Ann. Cas. 1918 B, 571).

Defendant is liable in this action to plaintiff for 1/24 of the value of the ore taken without agreement.

Defendant denies plaintiffs' claim that the basis for allowance is 1/24 of the gross sum received for the ore without deducting the cost of mining. Defendant as a tenant in common was entitled to mine the ore and to deduct the cost though such cost might not be deductible to a mere wilful trespasser without any right or claim of title. *Grant* v. *Fletcher,* 283 Fed. 243.

A further contention was that one tenant in common cannot forfeit a lease. Suffice it to say that after all the other interested parties signed the amended lease, the plaintiffs, who therefore are the sole remaining lessors under the original lease, need no one's consent to terminate it for lessee's default.

The parties agreed that the total amount of ore mined from April 1, 1941, to commencement of suit was 63,166 tons. The value of the ore was $2.67 per ton, cost of mining $1.67 per ton, and value of plaintiffs' interest $.041 2/3 per ton. On this basis plaintiffs are entitled to a judgment for damages in the amount of $2,631.91, with interest at 5 per cent. per annum computed from the date defendant received payment for plaintiffs' share of the ore to the date of entering a judgment. The circuit judge, who heard this case without a jury, entered judgment in favor of the defendant with costs to be taxed. That judgment is vacated and the case remanded to the circuit court with direction to enter judgment in favor of plaintiffs in accord with our

determination herein. Plaintiff will have costs of both courts.

NORTH, C. J., and STARR, BUTZEL, BUSHNELL, SHARPE, and BOYLES, JJ., concurred with REID, J. WIEST, J., concurred in the result.

CITY OF DETROIT *v.* A. W. KUTSCHE & CO.

1. ARBITRATION AND AWARD—CONTRACTS—STATUTES.

While the general policy of this State is favorable to arbitration of matters arising out of disputes under contracts and courts will encourage parties to arbitrate, if they desire to do so, their contract must comply with the terms of the statutes or the parties may have to resort to courts to settle their disputes (3 Comp. Laws 1929, § 15394, as amended by Act No. 182, Pub. Acts 1941).

2. SAME—CONSTRUCTION CONTRACTS—WITNESSES—PREVENTION OF DELAYS.

The purpose of requiring that claims under construction contracts be timely presented for arbitration thereunder is to permit the engineer and others to see the status of the construction still in progress, to permit use of available witnesses while they had a better recollection of matters which may be in dispute, and to prevent harassments, delays and losses likely to arise from differences during progress of work.

3. CONTRACTS—CONSTRUCTION.

All clauses of a contract must be given an effective and reasonable meaning if fairly possible.

4. ARBITRATION AND AWARD—CONSTRUCTION CONTRACTS—DELAY IN DEMANDING ARBITRATION.

The delay in making a demand for arbitration under a contract for construction of a sludge digestion tank, elutriation tanks

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Arbitration clauses in contracts, see 2 Restatement, Contracts, §§ 550, 551.

and gas holder for a sewage treatment plant until after the work was completed was an unreasonable delay in making a demand which was intended and required to be made during the progress of the work.

5. SAME—CONSTRUCTION CONTRACTS—CONTINUANCE OF PRIVILEGE OF SPECIAL ARBITRATION.

Claim that plaintiff city had agreed to continue the privilege of special arbitration under contract for construction of certain portions of a sewage treatment plant after contract was almost entirely completed *held*, not sustained by record in suit to enjoin defendant contractor from presenting its claims before an arbitration board.

6. SAME—CONSTRUCTION CONTRACTS—CONSTRUCTION OF ARBITRATION CONTRACT.

A contract for arbitration of claims under a construction contract is to be construed as one instrument notwithstanding different provisions thereof were evidently aimed at different types of claims.

7. SAME—BREACH OF CONTRACT.

A party to an agreement to arbitrate claims under a construction contract who has breached such arbitration agreement cannot be permitted to have arbitration thereafter over the objection of the other party to the contract.

8. SAME—CONSTRUCTION CONTRACT—PRESENTATION OF CLAIMS FOR EXTRAS—BREACH OF ARBITRATION AGREEMENT—DELAY.

Where defendant contractor failed to present its claims for extras under construction contract during the progress of the work and thereby deprived the plaintiff city of its opportunity to demand arbitration thereof at the time and under circumstances that would make it most desirable, efficient and accurate and also failed to make timely demand for arbitration itself of claims that the contract contemplated should be arbitrated as the work progressed, defendant breached agreement as to arbitration and justified city's refusal to arbitrate such matters after contract was completed.

9. EQUITY — UNCLEAN HANDS — INJUNCTION — ARBITRATION — DISALLOWANCE OF CLAIMS AGAINST CITY.

Disallowance of claims for extras under contract for construction of portions of a sewage treatment plant which the city officials considered without merit does not merit aspersion in suit to enjoin arbitration of such claims that city, as plaintiff, was in a court of equity with unclean hands.

10. ARBITRATION AND AWARD—CONTRACTS—SETTING ASIDE AWARD.
A court of equity may set aside an award of arbitrators not made under the contract to arbitrate.

11. ACTION — CONDITION PRECEDENT — ARBITRATION AND AWARD — WAIVER.
Although arbitration is prescribed as a condition precedent to bringing an action under a construction contract where contractor was not entitled to arbitration because of failure to comply with terms of agreement with respect thereto by making timely presentation of claims and city has asserted the right of revocation thereof, the condition precedent is considered as having been waived or abrogated.

12. SAME — CONDITION PRECEDENT — ARBITRATION — INJUNCTION — PREJUDICE.
Where arbitration as a condition precedent to action for claims under construction contract is deemed to have been waived or abrogated in suit to enjoin submission of claims to arbitration, decree for plaintiff city is affirmed without prejudice to defendant contractor's right to sue on its claim.

Appeal from Wayne; Webster (Arthur), J. Submitted June 14, 1944. (Docket No. 16, Calendar No. 42,720.) Decided October 11, 1944. Rehearing denied December 1, 1944.

Bill by City of Detroit against A. W. Kutsche & Company, a Michigan corporation, and others to restrain arbitration of disputes under construction contract. Decree for plaintiff. Defendant A. W. Kutsche & Company appeals. Affirmed without prejudice to action at law.

Paul E. Krause, Clarence E. Page and *Walter E. Vashak,* for plaintiff.

Miller, Canfield, Paddock & Stone, for defendant A. W. Kutsche & Company.

REID, J. The bill was filed for an injunction restraining defendant A. W. Kutsche & Company

from presenting before an arbitration board its claim against the city arising out of a contract for construction of a sludge digestion tank, elutriation tanks and gas holder for a sewage treatment plant, and to restrain three defendants, members of a board of arbitration, from proceeding to arbitrate the claim of A. W. Kutsche & Company, hereinafter referred to as the defendant. The members of the board make no defense.

The contract provided for arbitration of claims and disputes arising under it, but plaintiff claims that the provisions therefor were revocable unilaterally, that defendant lost the right and plaintiff lost the benefits of arbitration by defendant's failure to give timely notice of the various items of its claims from time to time as they arose, thus preventing plaintiff from demanding arbitrations as the work progressed, and that defendant failed to make timely demand for general arbitration.

Defendant denies these statements and theories and claims that plaintiff does not come into the equity court with clean hands and that plaintiff has an adequate remedy at law. The parties agree that the provisions for arbitration in question do not come under or within the Michigan arbitration statute. The general policy of this State is favorable to arbitration, as shown by 3 Comp. Laws 1929, § 15394, as amended by Act No. 182, Pub. Acts 1941 (Comp. Laws Supp. 1943, § 15394, Stat. Ann. 1943 Rev. § 27.2483), enacted after this controversy arose. See, also, *Alpena Lumber Co.* v. *Fletcher*, 48 Mich. 555, 569. If parties desire arbitration, courts should encourage them, but the nature of such a contract requires faithful compliance with its terms, otherwise the parties will find themselves in the forum they sought to avoid.

The contract provides, among other things:

"19. Arbitration.

"The contract contains a provision for arbitration as to any matter of dispute involving time or financial considerations and said arbitration shall be a condition precedent to any right of legal action under the contract. * * *

"20. Claims for extra cost.

"If the contractor claims that any instructions by drawings or otherwise involve extra cost under this contract, he shall give the commissioner written notice thereof within 48 hours after the receipt of such instructions and in any event before proceeding to execute the work, except in emergency endangering life or property, and the procedure shall be as provided for changes in the work. No such claim shall be valid unless so made. * * *

"27. Damages.

"Any claim for damage arising under this contract shall be made in writing to the party liable within a reasonable time of the first observance of such damage and not later than the time of final payment, except as expressly stipulated otherwise in the case of faulty work or materials, and shall be adjusted by agreement or arbitration. * * *

"34. Engineer's decisions.

"The engineer shall, within a reasonable time after their presentation to him, make decisions in writing on all claims of the city or the contractor and on all other matters relating to the execution and progress of the work, or the interpretation of the contract documents.

"All such decisions of the engineer shall be final except in cases where time or financial considerations are involved, which, if no agreement in regard thereto is reached, shall be subject to arbitration. * * *

"39. Arbitration.

"Any decision of the commissioner where time or financial considerations are involved shall be sub-

mitted to arbitration upon the demand of either party to the dispute.

"The contractor shall not cause a delay of the work during any arbitration proceedings, except by agreement with the commissioner.

"The demand for arbitration shall be filed in writing with the commissioner, in the case of an appeal from his decision, within ten days of its receipt and in any other case within a reasonable time after cause thereof and in no case later than the time of final payment, except as otherwise expressly stipulated in the contract. If the commissioner fails to make a decision within a reasonable time, an appeal to arbitration may be taken as if his decision has been rendered against the party appealing."

The benefit that plaintiff would derive from timely notice of a claim is that while the controversy was fresh, the engineer and others could see the status of the construction still in progress, and witnesses would still be available and would possess a better recollection of the matters. In consequence, the plaintiff could seasonably demand arbitration and better present its case. Demand for arbitration could not be made until the claim was presented. Defendant appropriately cites from *McCullough* v. *Clinch-Mitchell Construction Co.* (C. C. A.), 71 Fed. (2d) 17:

"It is common knowledge that arbitration provisions of this character are almost universal in construction contracts to prevent the harassments, delays, and losses likely to result to some or all of the parties thereto arising from differences occurring during the progress of the work. All construction contracts involve matters as to character of materials, of work, and of methods of doing the work. Determination of such is necessarily a matter of judgment and often the diverse interests of

the parties cause difference of opinion with resulting disputes concerning them. It is to the interest of all parties that these disputes be promptly determined and by some one having special knowledge of such matters and who can act upon personal knowledge of the controlling facts."

Plaintiff justly complains of the loss of such benefits through defendant's delay.

The contract was entered into February 23, 1938. The work was to be completed December 31, 1938, the price $261,963.04, all of which was paid except $13,245.75 withheld until final estimate. The work was substantially or 97 per cent. completed on March 1, 1939. Some items of construction claimed as uncompleted were pointed out by plaintiff in July, 1939. Nearly all items of plaintiff's claim occurred before March 27, 1939. All were for matters occurring during the construction. Many of the items were without the 48-hours' notice required in article 20 and many without any notice whatever. Correspondence over contract matters took place. On September 19, 1938, plaintiff wrote defendant:

"Should you still feel you have a claim against us in this, the procedure for arbitration is well outlined in the contract documents. * * * We again want to emphasize the importance of proceeding without delay in accordance with the instructions given you in Mr. Johnson's letter of September 16th and again point out to you that you have the privilege to arbitrate any decision or instruction involving financial considerations, in your opinion, in accordance with article 39 * * * We wish also to point out that *any delay* to the work regarding the matters outlined above caused *by you violates article 39 referred to above.*" (Italics supplied.)

To which defendant replied, September 21, 1938:

"We can see no reason why you should refuse to pay for such charges, nor do we see any reason for leaving matters of this nature for arbitration. However, if you insist on taking advantage of the arbitration clause in our contract, please accept this letter as notice that we shall present a claim for extra cost as called for on page 33, paragraph 20."

This was about midway in point of time from inception to conclusion of construction. In response to requests in July, 1939, for payment, the city was furnished a detailed statement of items of defendant's claim, April 10, 1940, and additional data, May 1, 1940.

During the construction the commissioner did not receive any notice under article 20 of the contract.

Article 20 requires the contractor to give the commissioner written notice that instructions will involve extra cost within 48 hours after receipt of the instructions, otherwise the claim for such extra cost is invalid. Defendant's claim is largely composed of such items. It must surely be a greater burden thrown on plaintiff's shoulders to prove want of such 48-hours' notice after two or three years than promptly to prove that fact before arbitrators during progress of the work.

There would be no point in prescribing in the contract limited periods within which demand for arbitration during the construction must be made, if a demand could be made for a general arbitration to include the same matters after the work was finished.

The words in article 39, "shall not cause a delay of the work during any arbitration proceedings,"

indicate that special arbitrations were contemplated to take place while the work was going on.

Articles 19, 27 and 34 indicate a general arbitration. In article 39 special arbitrations are provided for, which are to be considered as the only kind of arbitration contemplated for the subjects there specified.

Defendant in a very skillful presentation of its case gives in great detail the history of the doctrine of revocability of arbitration contracts. As to the nature of the items in dispute, defendant's brief sets forth:

"The disputes to be arbitrated arise partly out of delays for which plaintiff is claimed to be responsible and partly out of plaintiff's insistence upon erroneous or unreasonable interpretations of the specifications * * * (which) increased the contractor's costs by requiring impractical procedures and extra labor."

Defendant claims the arbitration in this case falls within the second exception announced in *Sieweck* v. *F. Joseph Lamb Co.*, 257 Mich. 670, 676:

"There being no provision for statutory arbitration, defendant has failed to sustain the burden of showing that the agreement came within one of the exceptions to the general rule that an arbitration agreement is not a bar to action. These exceptions are:

"(a) Where the contract makes arbitration a condition precedent, express or implied, to bringing suit.

"(b) Where the contract is one for construction, paving, or installation."

Defendant's own version as to the nature of the disputes in the instant case that are the foundation of its claim is that they "arise out of the execution of the work." Such claim is subject to special

arbitrations as to its various items and not general arbitration.

The time within which arbitration must be demanded for such disputes is expressly limited in the articles herein quoted. The trial judge held the arbitration general and revocable unilaterally.

The construction of article 39 is of controlling importance. Under article 39 either party could appeal to an arbitration board from any decision of the commissioner on any claim by filing with the commissioner a written demand for arbitration within 10 days of receipt of a written decision. If the commissioner did not make a decision within a reasonable time, appeal could be taken by either party the same as though a decision had been rendered against such appellant. If any claim in any other case arose, the demand for arbitration could be made within a reasonable time after cause thereof.

In no case could demand for arbitration be made "later than the time of final payment." These words cover no claim involved in this suit but if given a forced meaning might have the effect of wiping out all preceding limitations on the time for demanding arbitration and practically strike out the words, "within 10 days of its receipt" and "within a reasonable time after cause thereof," just preceding in article 39 if made to apply to the matters covered in the preceding part of the same paragraph.

The rules of construction require that all clauses of the contract be given an effective and reasonable meaning if fairly possible. Therefore whatever effect is to be given to the words, "and in no case later than the time of final payment," these words do not cancel the 10-day limitation or the limitation to a reasonable time within which arbitration

could be demanded. The delay in making the demand until after the work was completed was an unreasonable delay in making a demand which was intended and required to be made during the progress of the work.

The construction was finished before September, 1939. In the midst of the work in September, 1938, plaintiff offered permission to defendant to bring on arbitration, which defendant was otherwise too late to demand as to defendant's then already discussed claims. Defendant declined to institute arbitration proceedings. Plaintiff withdrew its offer long before demand for arbitration was made by defendant in 1940. In its letter in 1938, claimed as a waiver and hereinbefore quoted, plaintiff insisted that there be no delay in respect thereto. Defendant claimed before the trial judge that plaintiff agreed to continue the privilege of special arbitration but the record fails to show such agreement. Arbitration is not defendant's peculiar privilege. Plaintiff is at least equally interested.

The record on this appeal clearly shows that the defendant herein has repeatedly breached the terms of the contract for arbitration. We think the contract for arbitration, notwithstanding it contains provisions evidently aimed at different types of claims, should be construed as one instrument. Since the defendant has breached the contract he cannot be permitted thereafter to have arbitration over the objection of the other party to the contract. To hold otherwise would be to enable the contractor in effect to obtain specific performance of the very contract he had breached. It follows that the defendant herein is not entitled to arbitrate. The foregoing ground of decision in the instant case is applicable rather than the claim of plaintiff that the contract for arbitration is revocable unilaterally.

Defendant neglected to give proper notice of its various items during the progress of the work and thus deprived plaintiff of its opportunity to demand arbitration at the time and under the circumstances that would make it most desirable, efficient and accurate. Defendant has not made demand for arbitration within any of the various periods specified in article 39 for making demand, as to any item of its claim under any proper construction of the article, and now has no right to demand it. By defendant's own statement, its claims are such as the contract contemplated should be arbitrated as the work progressed.

Plaintiff had a right to file this bill on the showing made and its avoidance of the arbitration clauses is justified by defendant's conduct, otherwise revocation would be inequitable. Plaintiff has not merited the aspersion that it comes into a court of equity with unclean hands. So far as this record shows the city officials have simply performed their duty honestly in investigating and disallowing a claim they consider without merit. A court of equity may set aside an award not made under the contract. *M'Curdy* v. *Daniell,* 135 Mich. 55.

The defendant arbitrators have no authority to make an award under or outside of the contract. The question whether defendant's claim can appropriately and lawfully be submitted to a board of arbitration is properly brought before the equity court on this bill of complaint. Defendant has no right to resort to arbitration and plaintiff declines arbitration.

While the contract prescribed arbitration as a condition precedent to bringing suit, plaintiff, having asserted the right of revocation, is relegated to the position of having revoked the contract as to

arbitration, and the condition precedent is considered by us as having been waived or abrogated.

The decree appealed from is affirmed, without prejudice to defendant's right to sue on its claim, and with costs to plaintiff.

NORTH, C. J., and STARR, WIEST, BUTZEL, BUSHNELL, SHARPE, and BOYLES, JJ., concurred.

JANKS *v.* ULEN CONTRACTING CORP.

AUTOMOBILES — ILLEGALLY PARKED TRUCK — CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

Motorist who drove his car at speed of 45 to 55 miles an hour as he came to crest of hill and hit corner of defendant's truck which had been parked illegally on downgrade pavement of same side of highway *held,* guilty of contributory negligence as a matter of law where he had a view of truck for approximately 267 feet and had reduced speed to about 30 miles an hour at time of collision since plaintiff failed to observe the assured clear distance rule, an oncoming car and a ditch preventing plaintiff from going on either side of the truck (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933).

WIEST, BUSHNELL, and REID, JJ., dissenting.

Appeal from Tuscola; Cramton (Louis C.), J. Submitted June 8, 1944. (Docket No. 47, Calendar No. 41,453.) Decided October 11, 1944.

Case by William Janks against Ulen Contracting Corporation and another for personal injuries sus-

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Contributory negligence of plaintiff sufficient to bar recovery, see 2 Restatement, Torts, § 467, also § 475, comment a; causal relation between harm and negligence, §§ 465, 467; contributory negligence defined, § 463.

tained in an automobile accident. Hartford Fire Insurance Company was joined as party plaintiff. Verdict and judgment for plaintiffs. Defendants appeal. Reversed.

Yerkes, Sells & Putnam (*Maurice C. Ransford,* of counsel), for plaintiffs.

Weadock & Weadock, for defendants.

REID, J. (*dissenting*). This suit is brought to recover damages for personal injuries suffered by plaintiff, William Janks, and by Hartford Fire Insurance Company, joined as plaintiff by consent of defendant, for net loss on account of payment of property damage suffered in a collision on March 8, 1938, between his automobile and defendant's truck unlawfully parked on the highway. Coplaintiff Hartford Fire Insurance Company is bound by the contributory negligence, if any, of Janks. The negligence of defendant is conceded in defendant's brief. The jury rendered a verdict for plaintiff Janks for $1,965 and for plaintiff Hartford Fire Insurance Company for $535. Defendant moved the court to direct the jury to return a verdict of no cause of action on the ground that under the undisputed testimony, as a matter of law, plaintiff Janks was guilty of contributory negligence and, secondly, claimed a violation by Janks of 1 Comp. Laws 1929, § 4697, subd. (a), as amended by Act No. 119, Pub. Acts 1933 (Comp. Laws Supp. 1935, § 4697 [a], Stat. Ann. § 9.1565 [a]).

The declaration charged defendant with negligence in parking its truck on highway M-46 just east of an abrupt hill in such a manner as to render it invisible to traffic approaching from the west until the crest of the hill was reached, and blocking

and obstructing the road by electrical wires and equipment so as to render the same impassable to vehicular traffic and failure to give warnings by signals or look-out to advise other users of the highway of such condition. Defendant's answer denied negligence and claimed Janks was guilty of contributory negligence. The only error complained of is denial of the motion for a directed verdict.

Plaintiff testified that he had always lived in Caro, Michigan, except for intervals; is 34 years of age; has driven a car approximately two or three hundred thousand miles; that he traveled about the State as a commission salesman, had to report at Bay City quite often for new samples and merchandise but as a rule he "worked out of Caro." He may be presumed to be familiar with the road at the point in question. He further testified:

"After I left the Heinman store (in Kingston), I proceeded east on M-46. * * * My approximate driving speed would be between 45 and 55. * * * As I approached this hill I was driving on the right-hand side, that is the south side of the highway. * * * The road surface wasn't wet. Naturally the road was froze underneath and some loose (stones) on top. * * * As I approached the crest of the hill, there were no warning signs out there, or any signs of any kind. I did not see any men. * * * Immediately on reaching the crest I noticed the truck. * * * Then I noticed this car approaching right beside the truck. I immediately blew my horn and I could see the driver of the car opposite the truck try to speed up his car to clear the truck, and my sole hope was to slow down enough so I could avoid the truck and go between the car and the truck. * * * It * * * happened he didn't clear the end of it so I hit the truck, and there was men running around on both sides of the road, so naturally I couldn't go to either side of the road.

"*Q.* Did you have any room to drive on the south side of the truck?

"*A.* * * * As near as I can remember there was a big sand bank there. * * * I thought he (the driver of the car coming west) would clear. * * * It was a very small space, but it wasn't big enough. * * * The right-hand side of my car hit the corner of the car, right by the headlight * * * that whole side of the car came right in on me and I hit the windshield, and the steering wheel bent double. * * * I know I was dazed. * * * I remember the horn was still blowing. * * * The blood was in my face and I couldn't see to get out, and I called for some one to help me. Finally one of the men came over there. I was taken to the doctor's office in Kingston. * * * It was not possible to repair my car. They sold it for salvage."

A witness for plaintiff, John Richter, testified:

"I was standing in Mr. Congdon's driveway. * * * The truck of the Ulen Contracting Company * * * was just about straight across from me * * * on the other side of the road, facing east. * * * There was quite a few * * * men around this location who were working * * * for the Ulen Contracting Company. They were pulling on these wires getting ready to hook onto them. * * * I saw Mr. Janks' car coming over the hill from the west. The first I knew about it * * * the horn blowing so loud and down the hill, and he run into the corner of the truck and the truck went into the ditch. * * * Another car was coming right along the side of the truck, almost alongside of it. * * * I have driven a car eight years. * * * My view was good, so I could watch the Janks car from the time it broke over the hill until the collision, and I did watch it. * * * The speed of that Janks' car * * * I would say (was) between 50 and 60 miles per hour. * * * Probably slowed down

to about 30 I would think at the time of the collision. * * * It was slowing down the minute it broke over the hill."

Homer Hilliker, deputy sheriff, testified that he made measurements of the highway at the point where the accident occurred and that the width of the traveled portion of the highway was 30 feet, 6 inches wide, that just back of the truck where the truck made a hole in the fence there was a fence post and the distance from that post westerly to the top of the hill was 150 feet, and that the tops of the jurors' hats as they stood at the post were visible at a point 117 feet westerly from the top of the hill.

It seems therefore a fair inference from the testimony that the plaintiff could have seen the top of the parked truck 117 feet before he reached the crest of the hill and at that time probably could not determine that the truck was parked. The truck was parked with the left wheel about 3 feet southerly of the median line of the highway.

While the testimony indicates that immediately upon arrival at the crest of the hill plaintiff began to apply his brakes, and thus get his car under better control, he was laboring under some uncertainty as to whether the car approaching from the east on the northerly side of the road would permit plaintiff to pass around the truck. There is competent testimony to indicate that as soon as he was able to form a judgment in respect to that matter he applied his brakes further. Plaintiff testified that immediately upon arrival at the crest of the hill he applied his brakes and "continued stopping."

"*Q.* As you topped the hill it looked to you * * * as though he was parked?

"*A.* As though he came almost to a complete stop. If he was moving he was barely moving.

"*Q.* Where was he with reference to the truck at that time?

"*A.* Right opposite.

"*Q.* So he didn't appear to you when you were at the crest of the hill to be moving to any extent at all?

"*A.* * * * I wouldn't want to swear to it, but I thought I saw him shift his speed, the speed of his car to get out of my way. He immediately tried to get out of my way. * * *

"*Q.* * * * Isn't it a fact * * * if you had applied your brakes that you could have stopped your Chrysler sedan in the space between the crest of the hill and where this truck was?

"*A.* No, sir. If I had I couldn't have stopped."

Plaintiff had a right to assume that there was no parked truck or car ahead of him on the highway and that there would be no persons at work around a parked truck in the traveled portion of the highway. He had no right to assume that the northerly half of the highway would be open to him for use in avoiding any obstruction on the southerly half, his half, of the highway. The jury were justified in finding that plaintiff on observing the parked truck did his utmost to avoid the collision.

The statute as to "assured clear distance ahead" does not require the driver to guard against obstructions to his progress unlawfully placed there by other persons until he can be apprised of their existence. 1 Comp. Laws 1929, § 4697, subd. (a), as amended. In the cited case of *Phillips* v. *Inter-City Trucking Service, Inc.,* 280 Mich. 30, 32, is the following:

"Plaintiff, when he discovered the object obstructing the highway, had ample time to perform the manual acts necessary to stop but, instead of stopping, he continued to drive * * * at a rate of speed so that when confronted by the oncoming cars he drove into the rear of the trailer

which he knew was standing on the highway. This was negligence."

The fact that the driver in the *Phillips Case* had time to stop after he discovered the truck was parked differentiates that case from the instant case.

A similar statute in Ohio was under consideration in *Hangen* v. *Hadfield,* 135 Ohio St. 281 (20 N. E. [2d] 715), where the court said, at page 286:

"It is of course true that as the plaintiff approached the brow of the hill he knew that his view was obstructed thereby. However, it is likewise true that the plaintiff was not required to anticipate that the driver of an approaching motor vehicle would violate the law by obstructing the plaintiff's proper path."

The court ruled in that case that the claim of negligence of plaintiff was a jury question.

The question of plaintiff's contributory negligence in the instant case was a proper matter for the jury's determination. The judgment should be affirmed, with costs to plaintiffs.

WIEST and BUSHNELL, JJ., concurred with REID, J.

SHARPE, J. The material facts in this case are not in dispute. The defendant's negligence is conceded and the only question is whether plaintiff is guilty of contributory negligence as a matter of law. The result to be attained will be derived from the following facts: On March 8, 1938, plaintiff, William Janks, a traveling salesman, left the village of Kingston at 10:30 a.m. and traveled east on M-46 at a rate of speed between 45 and 55 miles per hour. As he approached the crest of the hill just east of Kingston he was traveling on the south side

of the highway. At this time defendant's truck was parked on the south side of the highway facing east, and at a distance of 150 feet east of the crest of the hill. The highway at the point where the truck was parked was 30 feet wide.

John Richter, a witness produced by plaintiff, testified as follows:

"I have driven a car eight years. I've driven in that time, oh, 15,000 miles. My view was good, so I could watch the Janks car from the time it broke over the hill until the collision, and I did watch it. My judgment as to the speed of that Janks' car as it came along there, I would say between 50 and 60 miles per hour. * * * I would not say it was going between 50 and 60 miles an hour when it struck the truck.

"*Q.* How fast was it going then?

"*A.* I wouldn't know that. I was watching it. Probably slowed down to about 30 I would think at the time of the collision. When I first saw it coming over the hill it was going, in my judgment, between 50 and 60 miles an hour. It was slowing down the minute it broke over the hill. It started to slow down after it got over the top of the hill. And, it was going 30 miles an hour at the time when it struck the truck, in my judgment. It didn't stop at any time from the time it came over the hill until the collision with the truck. I could tell Mr. Janks applied his brakes in that distance. At what point he started to apply the brakes, I can't remember any more. When the collision came, this truck was forced ahead to the east on the highway and into a ditch that was there, through the ditch into a fence, which would be at the south side of the highway, and there is a break in the fence there now where that collision happened. In my judgment that truck traveled 20 feet from the time of the collision until it stopped. The Janks car at the time of the collision stopped right there. * * *

It stopped it right there, facing east. It did not leave the highway. The right-hand side of the Janks' car, the headlight, struck the left rear of the truck, on the left corner. I don't remember that there were red flags on the truck at the rear of it. This was broad daylight, a bright, clear day."

In the case at bar plaintiff had a distance of approximately 267 feet to travel from a point where he could see a part of the parked truck, and yet while traveling that distance he slackened the speed of his car only from 50 to 30 miles per hour. He did not observe the "assured clear distance" rule. (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933 [Comp. Laws Supp. 1935, § 4697, Stat. Ann. § 9.1565]).

Under the circumstances of this case plaintiff was guilty of contributory negligence as a matter of law and may not recover. Costs to defendants.

NORTH, C. J., and STARR, BUTZEL, and BOYLES, JJ., concurred with SHARPE, J.

DETROIT CLUB *v.* STATE OF MICHIGAN.
DETROIT ATHLETIC CLUB *v.* LIQUOR CONTROL COMMISSION.

1. STATUTES—CONSTRUCTION.
   Judicial construction of a statute which speaks plainly is not permitted.

2. SAME—CONSTRUCTION OF SUBSEQUENT AMENDATORY ACT.
   In considering an amendatory act which in part contains the same language as that of a former amendatory act amending the same section, a court is confined to the act as it stands after the later amendment.

3. INTOXICATING LIQUOR — DISCOUNT — CLAIMS AGAINST STATE — LIMITATION OF ACTIONS.
   Claims for discount for purchases of liquor from the liquor control commission, which were timely presented in the court of claims, were properly allowed (Act No. 8, § 16, Pub. Acts 1933 [Ex. Sess.], as amended by Act No. 281, Pub. Acts 1937; Act No. 135, § 11a, Pub. Acts 1939, as added by Act No. 137, Pub. Acts 1941, and amended by Act No. 237, Pub. Acts 1943).

4. STATUTES—AMENDMENT—IMPLIED REPEAL.
   An amendatory act has a repealing force, by the mechanics of legislation, different from that of an independent statute; repugnancy not being essential element of implied repeal of specifically amended sections.

5. SAME—AMENDMENT.
   Where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there, the provisions carried over having their force from the new act, and not from the former.

6. SAME—AMENDMENT OF SPECIFIC SECTION—EFFECT.
The effect of an act amending a specific section of a former act, in the absence of a saving clause, is to strike the former section from the law, obliterate it entirely, and substitute the new section in its place.

7. SAME—CONSTRUCTION—LEGISLATIVE KNOWLEDGE PRESUMED.
The legislature is presumed to know acknowledged and long-established rules of construction of statutes.

8. SAME—COURT MUST NOT DEPART FROM EXPLICIT DECLARATION OF LEGISLATURE.
Even though the court should be convinced that some other meaning was really intended by the law-making power, and even though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the legislature is the law, and the courts must not depart from it.

NORTH, C. J., and STARR and BUTZEL, JJ., dissenting.

Appeal from Court of Claims; O'Hara (Chester P.), J., presiding. Submitted June 14, 1944. (Docket Nos. 42, 43, Calendar Nos. 42,714, 42,715.) Decided October 11, 1944.

Separate claims by Detroit Club and Detroit Athletic Club against State of Michigan and Liquor Control Commission for discounts on purchase of liquor. Judgments for plaintiffs. Defendants appeal. Affirmed.

Dickinson, Wright, Davis, McKean & Cudlip (*Selden S. Dickinson* and *John G. Garlinghouse,* of counsel), for Detroit Club.

David H. Crowley, George A. Kelly and *Walter E. Kelly* (*Stanley E. Beattie,* of counsel), for Detroit Athletic Club.

Herbert J. Rushton, Attorney General, *Edmund E. Shepherd,* Solicitor General, and *Meredith H.*

Doyle and *Daniel J. O'Hara,* Assistants Attorney General, for defendants.

NORTH, C. J. (*dissenting*). This is an appeal by defendants from a judgment granted to the respective plaintiffs by the court of claims of the State of Michigan. Although each of the plaintiffs filed separate suits and the factual situation as to dates and amounts differs, yet the questions of law involved are identical, and the cases on appeal are consolidated.

Each plaintiff is a Michigan corporation properly licensed to sell certain alcoholic liquors for consumption on the premises, under the provisions of the liquor control act (Act No. 8, Pub. Acts 1933 [Ex. Sess.], as amended*). Prior to November 25, 1942, both plaintiffs had purchased large quantities of liquors from the defendant liquor control commission but had been refused a 15 per cent. discount on such purchases. On that date, this Court granted to plaintiff Detroit Athletic Club a writ of mandamus compelling the liquor control commission to grant the discount on all such purchases, under Act No. 8, § 16, Pub. Acts 1933 (Ex. Sess.), as amended† (Comp. Laws Supp. 1940, § 9209–31, Stat. Ann. 1943 Cum. Supp. § 18.987). See *Detroit Athletic Club* v. *Liquor Control Commission,* 303 Mich. 444.

The present actions are to recover from the State discounts which the State withheld from the plaintiffs during three years prior to the filing of the respective claims, March 1, 1943, for the Detroit Club, and February 23, 1943, for the Detroit Athletic Club. This period is within the general limitation of Act No. 135, Pub. Acts 1939, as amended by

* See Comp. Laws Supp. 1940, 1943, § 9209–16 *et seq.,* Stat. Ann. and Stat. Ann. 1943 Cum. Supp. § 18.971 *et seq.*—REPORTER.

† By Act No. 281, Pub. Acts 1937.—REPORTER.

Act No. 137, Pub. Acts 1941 (Comp. Laws Supp. 1940, 1942, § 13862–1 *et seq.*, Stat. Ann. 1942 Cum. Supp. § 27.3548 [1] *et seq.*). The trial court gave the Detroit Club a judgment for $5,594 and the Detroit Athletic Club a judgment for $59,920.14 as being the agreed amounts of the discounts withheld during that period.

The court of claims act (Act No. 135, Pub. Acts 1939) was amended by Act No. 137, Pub. Acts 1941 (Comp. Laws Supp. 1942, § 13862–11a, Stat. Ann. 1942 Cum. Supp. § 27.3548 [11½]), and this amendment added a section designated 11a, which reads in part as follows:

"No claim shall be maintained against the State unless the claimant shall, within 1 year after such claim shall have accrued, file in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the State or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained. * * *

"Provided, That claim or notice of intention of filing any claim which has accrued prior to the effective date of this amendatory act may be filed within 1 year after the effective date thereof."

It is to be noted that under this amendment a claimant whose claim had accrued prior to January 10, 1942, the effective date of the amendment, was allowed one year, or until January 10, 1943, to file such claim or written notice of intention to file a claim. In the instant case neither plaintiff filed such a claim or written notice thereof within the year; and it is obvious that at this point plaintiffs had

failed to comply with the provisions of the statute and barred portions of their claims could not have been allowed by the court of claims. This is particularly true because on April 19, 1943, in each case an answer was filed and this defense pleaded, so that the cases were then at issue.

However, by Act No. 237, Pub. Acts 1943, effective July 30, 1943, the legislature again amended the court of claims act and to section 11a of Act No. 137, Pub. Acts 1941, the following was added:

"Provided, however, That in all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action." (Comp. Laws Supp. 1943, § 13862–11a, Stat. Ann. 1943 Cum. Supp. § 27.3548 [11½]).

In accordance with article 5, § 21, of the State Constitution (1908), the entire body of 11a was re-enacted with the above-quoted portion being the only new amendment or change in this section. It is the plaintiffs' claim that by the re-enactment of the words "Provided, That claim or notice of intention of filing any claim which has accrued prior to the effective date of this amendatory act may be filed within 1 year after the effective date thereof" (Act No. 137, Pub. Acts 1941), the legislature intended to recreate another one-year period extending to July 30, 1944, within which any claims (including plaintiffs') which had accrued prior to July 30, 1943, might be filed. If this is true, as the trial court held, then the plaintiffs are entitled to their judgments. Defendants deny the above contention of plaintiffs, but concede that even though the time is not so extended plaintiffs are entitled to recover part of their

respective claims. Defendants' concession is that recovery by the Detroit Athletic Club should be only for discounts incident to payments made between February 23, 1942 (one year prior to its notice), and November 28, 1942 (last date discount was withheld), amounting to $4,332.80; and the Detroit Club should recover only for discounts incident to payments made between March 1, 1942 (one year prior to its notice), and November 18, 1942 (last date discount was withheld), amounting to $1,772.30.

Consideration of the court of claims act and its amendments leads to the conclusion that the time for filing these claims was not extended by the 1943 amendment. The court of claims act is in derogation of the common law, and statutes creating it and to some extent relinquishing sovereign immunity must be strictly construed. *Manion* v. *State Highway Commissioner*, 303 Mich. 1, 19. By this act the *privilege* of suing the State was granted to persons claiming injury but without creating any vested right of suit in the claimant. The legislature may at any time broaden or restrict its provisions, or even repeal the entire act. Section 11a of the 1941 amendment was a new provision obviously establishing a procedure which those who exercise their privilege under the act must follow. It is not inconsistent that the act should provide for a three-year limitation on bringing suits and at the same time require that notice of intention to make claim be given within 1 year of the accrual of the cause of action. While it is true that under certain circumstances section 11a may operate as a limitation, yet the State, in voluntarily giving up a defense which it had at common law, could properly restrict the permissive action by a requirement that the State have notice of such claim within a prescribed time limit. The title of the act is sufficiently broad to cover such procedural

requirements, the provision being germane to the subject matter of the act.

The 1943 amendments to the act granted an additional privilege to claimants in that it, by section 24, waives its immunity from liability for the torts of its officers and employees, a waiver not contained in the original act or in the 1941 amendment. By the 1943 amendment permitting tort actions, the legislature as to such actions shortened the one-year period for notice of such claims to a six-months period, which is obviously a limiting rather than a broadening provision. Had the legislature intended to revive other actions which were, on July 30, 1944, barred by failure of claimants to comply with the procedure as provided in the 1941 amendment, it could have readily done so by appropriate language. There is no indication that the legislature intended to give such a broadening effect to the 1943 amendment. Instead the contrary intent appears from the above-noted restriction.

The well-settled rules of statutory construction are stated in *Wade* v. *Farrell,* 270 Mich. 562, which cited with approval 25 R. C. L. p. 907, viz:

"When a statute continues a former statute law, that law common to both acts dates from its first adoption, and only such provisions of the old act as are left out of the new one are gone, and only new provisions are new laws. Where an act is amended 'so as to read as follows' the part of the original act which remains unchanged is considered as having continued in force as the law from the time of its original enactment and the new portion as having become the law only at the time of the amendment."

Under this rule, the first proviso in section 11a dates from the effective date of the 1941 amendment and the second proviso dates from the effective date

of the 1943 amendment. See footnote.* There being no indication to the contrary, the legislature must be presumed to have been mindful of the quoted rule and to have intended the amendments to be so construed. This rule must be followed unless it appears that the legislature intended otherwise.

Plaintiffs urge that the case of *Stebbins* v. *State Board of Pharmacy,* 297 Mich. 676, is authority for their contention that the re-enactment by amendment carries forward a time-limitation period. While it is true that in the *Stebbins Case* the same words appearing in the original act were carried forward in the amendment, and we held that the period of time involved was controlled by the amendment, the holding did not do violence to the rule as enunciated in the *Wade Case.* The basic rule in the *Stebbins Case* is that the *intent* of the legislature controls the interpretation of the statute and although the end result differs, yet the same rule may be and is applied here. If, as noted of the *Wade Case* in the *Stebbins Decision,* vested rights are involved, even the legislature may not deprive the individual of those rights. If however, as in the instant case, vested rights are not involved, decision is controlled by ascertainment of the legislative intent.

The defendants argue that the payments involved were voluntarily made and hence may not be now recovered. The defendant liquor control commission was the only source through which plaintiffs could purchase the liquor requisite to carrying on

* The provisos in section 11a read: "Provided, That claim or notice of intention of filing any claim which has accrued prior to the effective date of this amendatory act may be filed within 1 year after the effective date thereof: Provided, however, That in all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action."

the business for which they had purchased licenses from the State. The commission wrongfully coerced the plaintiffs into paying a price for liquor purchased without allowing a discount to which they were entitled. See *Detroit Athletic Club* v. *Liquor Control Commission, supra; City of Saginaw* v. *Consumers Power Co.*, 304 Mich. 491. For the reason that the commission wrongfully denied the discounts to the plaintiffs, and under the particular situation disclosed by this record, the plaintiffs, having paid under duress sums which they should not have been required to pay, are entitled to recover insofar as they may by having filed a timely claim in the court of claims. But plaintiffs may not recover for items as to which they did not timely give the required statutory notice.

In the brief of the Detroit Athletic Club the position is taken that (1) the notice of claim required by the statute was waived by refusal of defendant commission to allow the discounts, and (2) the notice period was arrested by bringing in the Supreme Court "a kindred action" (*Detroit Athletic Club* v. *Liquor Control Commission, supra*) within the notice period. Neither position is tenable, and the trial court so held. To hold otherwise would in practical effect nullify the statutory provision for notice. It was the refusal to allow discounts on the purchase price that gave rise to the right of action; and the required notice is not only to the commission but by section 11a is also to the attorney general, and to be filed in the court of claims. The liquor control commission was without power to waive the required statutory notice. *Mead* v. *Michigan Public Service Commission*, 303 Mich. 168; *McNair* v. *State Highway Department*, 305 Mich. 181. Nor was running of the notice period arrested by bringing a mandamus suit in the Supreme Court which neither by stat-

ute nor otherwise has original jurisdiction to entertain the instant suits. Exclusive original jurisdiction of these cases is in the court of claims; and prosecution of claims in that court is dependent upon compliance with the conditions precedent imposed by the statute granting the right to sue.

Since the foregoing was written Mr. Justice WIEST has submitted an opinion affirming the judgment entered in the trial court. In so doing my Brother seems to rely solely upon *People* v. *Lowell,* 250 Mich. 349. The inapplicability of our decision in the *Lowell Case* to the instant case plainly appears upon noting the difference between the statutory amendment under consideration in the *Lowell Case* and the statutory amendment in the instant case. Our decision in the former case involved the amendment of Act No. 338, Pub. Acts 1917, as embodied in Act No. 114, Pub. Acts 1929. The 1929 legislature in amending the earlier act entirely omitted from the amendment the pertinent words of the 1917 act—*i.e.,* the words fixing the penalty provided for violation of the law. Therefore it was held in the *Lowell Case* that by entirely omitting the words of the 1917 act when passing the 1929 amendment, the legislature intended to and did repeal the omitted portion. This is not the situation at all in the instant case. Instead when the legislature passed the amended act now under consideration (Act No. 237, Pub. Acts 1943) the identical words of the earlier act (Act No. 137, Pub. Acts 1941), so far as here pertinent, were continued in the 1943 amended act. It is difficult to conceive of any reason for the legislature having done this except the purpose was to perpetuate in the act the 1941 provision thus embodied in the 1943 act; and under the authorities cited earlier in this opinion the amended act of 1943 should be so construed as to the type of claims for which plaintiffs seek recovery.

"'An amendment to a statute will generally be considered as a part of original act and the entire act as amended be given the construction which would be given it if the amendment were a part of the original act. *People, ex rel. Attorney General,* v. *Railroad Co.* (syllabus), 145 Mich. 140.'" *Perry* v. *Hogarth,* 261 Mich. 526.

In *People, ex rel. Parsons,* v. *Wayne Circuit Judge,* 37 Mich. 287, Justice COOLEY speaking for the Court plainly pointed out that the final test of proper construction of a statutory provision is the determination of the intent of the legislature. In the instant case it is difficult to conceive that the intent of the legislature was to revive actions which were plainly barred by the provision in the 1941 amendment. Instead in carrying the proviso of the 1941 amendment literally into the 1943 amendment, the reasonable construction must be that the intent of the legislature was to continue the limitation or the bar of the 1941 amendment.

Under defendants' concession hereinbefore noted, the Detroit Athletic Club should have judgment for $4,332.80, and the Detroit Club for $1,772.30. The cases should be remanded to the court of claims with direction to vacate the judgments entered and to enter judgments in accordance with this opinion. Neither party having fully prevailed on this appeal, no costs should be allowed in this Court.

STARR and BUTZEL, JJ., concurred with NORTH, C. J.

WIEST, J. The judgments should be affirmed.

The provisions carried over from the old act operate wholly under the new act and not the old one. The act of 1943 speaks too plain to admit of judicial

construction. It specifically lifted the time element in the former act by the proviso:

"That claim or notice of intention of filing any claim which has accrued prior to the effective date of this amendatory act may be filed within one year after the effective date thereof."

It is true the same proviso was in the former act, but we are confined to consideration of the act as it now stands and its operative effect upon the claims at bar.

The effective date of the act was July 30, 1943, and the accrued claims were timely presented and judgments thereon properly rendered. The applicable rule of law in the premises was settled by this court in *People* v. *Lowell,* 250 Mich. 349. We there said:

"An amendatory act has a repealing force, by the mechanics of legislation, different from that of an independent statute. Repugnancy is not the essential element of implied repeal of specifically amended sections. The rule is:

"'Where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there.' 25 R. C. L. p. 907. * * *

"The provisions carried over have their force from the new act, not from the former. 1 Lewis' Sutherland Statutory Construction (2d Ed.), § 237.

"It is plain from the authorities in this State and elsewhere that the effect of an act amending a specific section of a former act, in the absence of a saving clause, is to strike the former section from the law, obliterate it entirely and substitute the new section in its place. This effect is not an arbitrary rule adopted by the courts. It is the natural and logical effect of an amendment 'to read as follows.' It accomplishes precisely what the words import. Any

other construction would do violence to the plain language of the legislature. * * *

"Nowhere in the act did the legislature, by words or in the manner provided by any rule of construction, express an intention to save the prosecution of former offenses. On the contrary, both by the natural meaning of the language used and in accordance with the acknowledged and long-established rules with which it was presumably familiar, it affirmatively and appropriately expressed an intention to obliterate the amended section. A contrary conclusion is private speculation, not judicial construction.

" 'The result may or may not be conformable to the actual intent of those who passed the latter statute. We can only ascertain the legal intent of the legislature, by the language which they have used, applied and expounded conformably to the settled and well-known rules of construction.' *Commonwealth* v. *Kimball,* 21 Pick. (38 Mass.) 373.

" 'Even though the court should be convinced that some other meaning was really intended by the lawmaking power, and even though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the legislature is the law, and the courts must not depart from it.' Black on Interpretation of Laws, p. 36. * * *

"At bottom, the argument against repeal is sociological rather than legal, that the effect of repeal will be injurious to the public welfare, in excusing offenders from punishment, and that such 'mischievous and absurd consequences' justify this court in saving the prior penalties by construction. The argument is temptingly forceful, and if Act No. 114 [Pub. Acts 1929] were ambiguous, its meaning being sought, and more than one construction of its language reasonable, it would be persuasive. However Act No. 114 is construed, whether prospective, retroactive, or both, its effect of repeal on amended sections is the same, because, on a day certain, by the language of the law, they were abrogated and new

sections 'to read as follows' were substituted for them.

"No reason can be urged against the rule itself. If observed in making laws, it certainly and accurately expresses the will of the legislature according to the natural meaning of the words used. No principle of sociology would warrant the abrogation of a rule upon which legislation has been enacted and construed since the establishment of the State, because, in a single or a few instances, misfortune follows, not its observance, but its disregard. Nor can it confer upon the court legislative power to correct mistakes in unambiguous laws. * * *

"Nor, upon the grounds of ultimate public good, as distinguished from the immediate consequences, is the sociological argument entirely without answer. There are such offsetting considerations as the overruling of a long line of decisions of this court, upon which personal and property rights have been established; the abrogation of a certain and reasonable rule of statutory construction which accurately mirrors the language of the legislature; the substitution for it of an uncertain or no rule, with confusing effect; the encouragement of carelessness in lawmaking, with the idea that this court will legislate virtue into or evil out of the law as enacted by the legislature; and, of the first importance, the departure of the court from its constitutional judicial function to usurp legislative power by supplying a saving clause which the legislature has purposely or inadvertently omitted."

The opinion of the court, written by Mr. Justice FEAD and concurred in by Mr. Justice NORTH, is a scholarly exposition and can be read with profit.

The judgments are affirmed, with costs to plaintiffs.

SHARPE, BOYLES, and REID, JJ., concurred with WIEST, J. BUSHNELL, J., did not sit.

AUTO PARTS, INC., *v.* JACK SMITH BEVERAGES, INC.

1. LANDLORD AND TENANT—PAYMENT OF RENT—CHANGE OF LEASE PERIOD.

   In the absence of an agreement changing the lease period, the fact that the rent was paid at varying times from 6 to 21 days after the first of the month, and that there had been an allowance of a proportionate amount of the monthly rental representing the number of days which elapsed between the first of the first month and the date upon which alterations were completed did not operate to change lease expressly providing for a term of one year from and after the first of a given month.

2. SAME—RENEWAL OF LEASE—ORAL AGREEMENT—PREPONDERANCE OF EVIDENCE.

   Claimed oral agreement with lessor that one-year lease would be continued from year to year with either party having the right to terminate it by giving the other party notice 60 days prior to the expiration of any year period *held,* not to have been established by a preponderance of the evidence.

3. SAME — EXPIRATION OF LEASE — HOLDING OVER — CONSENT — RENEWAL.

   Where a lessee under a written lease for a fixed term holds over after the expiration of the term, the lessor must consent to or acquiesce in such holding over in order to create a renewal of the tenancy on a year-to-year basis by operation of law.

4. SAME—HOLDING OVER—CONSENT OF LANDLORD—TENANCY FROM YEAR TO YEAR—QUESTION OF FACT.

   Whether or not the receipt of rent by a landlord from a tenant holding over after expiration of a fixed term or other act or acts on the part of a landlord indicate with a certainty a design to continue the relation of landlord and tenant on a tenancy-from-year-to-year basis is a matter of intention in each case to be determined as a question of fact.

5. SAME—HOLDING OVER—TENANCY FROM YEAR TO YEAR—ASSENT OF TENANT—PAYMENT OF RENT.

The assent of a tenant to a new lease from year to year by holding over after the expiration of a fixed term is usually implied from the fact of his remaining in possession and paying rent after his term expired.

6. SAME—HOLDING OVER—TENANCY FROM YEAR TO YEAR.

Though a tenant under lease for fixed term who remains in possession after the expiration of the term is presumed to offer to take the premises for another year, the landlord is not bound to accept the offer and unless he does so by accepting the rent or otherwise, the tenancy is terminated and notice to quit is not required to be given by him.

7. SAME—HOLDING OVER—NATURE OF TENANCY.

Where one has lease for years with annual rent reserved, and holds over after expiration of term with acquiescence of landlord, tenancy is from year to year on conditions of lease, although rent is payable in monthly instalments; but where rent reserved is monthly, holding over is from month to month unless lease otherwise provides.

8. SAME—HOLDING OVER—ACQUIESCENCE—NOTICE TO QUIT.

A tenancy for further term of one year will not be implied where 10 days after expiration of prior term hold-over tenant received notice that its tenancy would terminate two days later and notice to quit a month thereafter, since such notices indicated the lessor's refusal to consent to or acquiesce in such holding over.

9. SAME—TERMINATION OF TENANCY—SUFFICIENCY OF NOTICE TO QUIT.

Where landlord gave tenant holding over after expiration of a lease for a year a one-month's notice to quit, such notice was sufficient to terminate the tenancy of defendant whether he be a tenant at will, by sufferance or on a month-to-month basis (3 Comp. Laws 1929, § 13492, as amended by Act No. 145, Pub. Acts 1935).

Appeal from Washtenaw; Sample (George W.), J. Submitted June 7, 1944. (Docket No. 19, Calendar No. 42,725.) Decided October 11, 1944.

Summary proceedings before circuit court commissioner by Auto Parts, Incorporated, a Michigan

corporation, against Jack Smith Beverages, Incorporated, a Michigan corporation, for possession of land. Judgment for plaintiff. Defendant appealed to circuit court. Judgment for defendant. Plaintiff appeals. Reversed and remanded for entry of judgment for plaintiff.

Hubert Thompson and *Franklin C. Forsythe,* for plaintiff.

Burke & Burke (*Rosenburg, Painter & Navarre,* of counsel), for defendant.

STARR, J. On July 14, 1943, plaintiff began summary proceedings before a circuit court commissioner to recover possession of premises located at 211 West Ann street in the city of Ann Arbor, which defendant claimed to hold under lease from plaintiff's immediate grantors. 3 Comp. Laws 1929, § 14975 (Stat. Ann. § 27.1986). The matter was brought on for hearing, testimony was taken, and on August 27, 1943, the commissioner entered judgment granting plaintiff possession of said premises. Upon appeal and trial *de novo* the circuit court reversed the commissioner and entered judgment for defendant, which in effect denied plaintiff's claimed right of possession. Plaintiff appeals from such judgment.

On May 31, 1940, plaintiff's grantors, W. Howard Grostic and Rhoda Grostic, his wife, leased said premises to defendant for the term of one year "from and after June 1, 1940," at a rental of $40 per month payable in advance, and acknowledged receipt of the rent for the month of June. The lease provided that defendant should make certain alterations in the premises and that the lessors would allow the cost of labor and material in making such

alterations "as a credit upon the rent * * * to become due and payable." It also provided that the lessors would allow, as a further credit upon said rent, "the proportionate amount of said monthly rental representing the number of days which elapse between *the commencement of this lease, June 1, 1940,* and the date upon which said alterations are completed." Defendant went into possession about June 1, 1940, and the alterations, which cost $66.53, were completed by June 12th. There is no dispute regarding the cost of the alterations or the credit on rental to which defendant was entitled. About July 1st defendant sent lessors the following statement, together with a check for $13.47 to cover the balance due on the rent for a three-months' period:

"Rent from June 12 to July 12		40.00
Rent from July 12 to Aug. 12		40.00
Rent from Aug. 12 to Sept. 12		40.00
		120.00
"May 24, 1940, check # 1071	40.00	
Warehouse improvements as per attached statements	66.53	
July 6, 1940, check # 1373	13.47	
	120.00"	

As hereinbefore mentioned, the lease was for a term of one year "from and after June 1st," and defendant was entitled to credit for the amount of rental which accrued during the first 12 days of June while the building alterations were being made. Instead of computing the rental from June 1st and taking credit for such 12-day period, defendant in preparing the above statement computed the rent from June 12th. The Grostics, as lessors, kept their record of rental payments on a monthly basis beginning June 12th. With the apparent approval of

the lessors, defendant continued in possession of the premises and paid the monthly rental until it received the following letter and notice from the lessors on June 10, 1943:

"Ann Arbor, Michigan,
June 9, 1943.

"Jack Smith Beverages, Incorporated, * * *

"Dear Sirs:

"Having entered into agreement for sale of the premises in Ann Arbor, owned by us, being the cement block structure at number 211 West Ann street, which you occupy as tenant for the storage and distributing purposes, this is to inform you that the tenancy which you hold of said premises will not be renewed. Said tenancy terminates as of June 12, 1943, if construed to have been on the annual basis. Our understanding has been that the rental has been on a month-to-month basis since termination of your original lease.

"However, if your tenancy is construed to be on a month-to-month basis you would be entitled to thirty days notice. We desire to give you all of the notice possible, consistent with the terms of the agreement which we have entered into for sale of the property. We therefore deliver to you the attached regular 'notice to quit,' setting the date as late as we can.

"Yours truly,
"W. HOWARD GROSTIC
"RHODA E. GROSTIC."

"NOTICE

"To Jack Smith Beverages, Incorporated

"Please take notice that you are hereby required to quit, surrender and deliver up possession to us of the premises hereinafter described, which you now hold of us as our tenant, on or before July 12, 1943, for the reason that we intend to terminate your tenancy, and to repossess ourselves of such premises on

the date above mentioned, said premises being described as follows, to-wit: (description of premises).
* * *

"You are further notified that from and after this date, you will be liable to the owners for double damages, which the owners may suffer by reason of your continued occupancy of said premises, under and by virtue of the provisions of 3 Comp. Laws 1929, § 14986 (Stat. Ann. § 27.1997).

"Dated at Ann Arbor, Washtenaw county, Michigan, June 10, 1943. * * *

"W. HOWARD GROSTIC
"RHODA E. GROSTIC."

On June 12, 1943, defendant sent lessors a check for $40, which they accepted and cashed. Defendant claims that this check was in payment of the rent from June 1st to July 1st, and lessors claim that it was in payment of the rent from June 12th to July 12th. On June 29, 1943, lessors Grostic and wife conveyed the real estate on which said premises were located to plaintiff Auto Parts, Incorporated, by deed which stated that the property was free from all encumbrances whatever "except as to rights of tenants in possession of any parts of the granted premises." Defendant continued in possession, and on July 10th sent the lessors check for $40, which they refused and returned. On July 14th plaintiff began the present action before the circuit court commissioner.

Plaintiff first contends that by their method and practice of computing, paying, and recording the monthly rentals, the parties to the lease established a new rental period beginning June 12, instead of June 1, 1940, as provided in the lease. The record shows that during the time defendant occupied the premises, it paid the monthly rentals on dates varying from the 6th to the 21st of the respective months,

and that the lessors apparently accepted such payments without objection. In the absence of an agreement changing the lease period, we are satisfied that such method of computing, paying, and recording the rental did not operate to change the lease, which expressly provided for a term of one year "from and after June 1, 1940."

The president of defendant company testified that prior to the expiration of the one-year lease on June 1, 1941, he entered into an oral agreement with lessor W. Howard Grostic that the lease would be continued from year to year, with either party having the right to terminate it by giving the other party notice 60 days prior to the expiration of any year period. Lessor Grostic denied having had any conversation with defendant's president regarding renewal of the lease and denied making any oral agreement for its renewal or extension. The trial court made no finding of fact on this point, and from our examination of the record we conclude that defendant failed to establish such claimed oral agreement by the necessary preponderance of the evidence.

The one-year term of the written lease ended June 1, 1941, and, apparently by mutual consent, the tenancy was continued on a year-to-year basis for a second and a third year term, which defendant contends ended June 1, and which plaintiff contends ended June 12, 1943. On June 10, 1943, defendant received the above-quoted letter of notification that its tenancy would terminate June 12th and also notice to quit the premises on July 12th. From such letter it is apparent that the lessors were uncertain as to whether defendant's tenancy was on a year-to-year or month-to-month basis. Under their theory that a new lease period had been created, whereby the year term ended June 12th, their letter notified de-

fendant that his tenancy terminated on that date. On the theory that the tenancy might be construed to be on a month-to-month basis, they notified defendant to quit and vacate the premises on July 12th. As above stated, defendant sent the lessors a check for $40 on June 12th, which under plaintiff's contention paid the rent to July 12th, and under defendant's contention paid the rent to July 1st. On July 10th defendant sent the lessors another check for $40, which they refused and returned.

The question presented is whether or not there was a renewal of the tenancy for a one-year period from and after June 1, 1943. Defendant contends that its holding over after June 1st and the lessors' acceptance of its check sent June 12th operated as a renewal for a further year period ending June 1, 1944. Plaintiff contends that the lessors did not consent to or acquiesce in defendant's holding over after June 1st; that its holding over until June 10th was not for a sufficient period of time to create a legal renewal of the tenancy for the further term of one year; and that their acceptance of the rent for one month, after they had given notice to quit, could not be construed as a consent to such renewal.

Although defendant held over after June 1, 1943, it is clear that the lessors did not consent to or acquiesce in such holding over. On June 10th they indicated their refusal by serving defendant with notices of termination and to quit. The law is established in this State that where a lessee, under a written lease for a fixed term, holds over after the expiration of the term, the lessor must consent to or acquiesce in such holding over, in order to create a renewal of the tenancy on a year-to-year basis by operation of law. In the case of *Faraci* v. *Fassulo,* 212 Mich. 216, 218, we quoted with approval the rule stated in 24 Cyc. pp. 1031–1033, as follows:

"According to the great weight of authority, where a tenant under a demise for a year or more holds over at the end of his term without any new agreement with the landlord, he may be treated as a tenant from year to year. *It is held, however, that a tenancy from year to year cannot be inferred from the mere fact of holding over by the tenant; the landlord must in some manner recognize the tenancy.* Thus the receipt of rent by the landlord from one so holding over indicates with certainty a design to continue the relation of landlord and tenant, and a tenancy from year to year will arise. Such intention should in each case be found and determined as a question of fact."

In *Rice* v. *Atkinson, Deacon, Elliott Co.*, 215 Mich. 371, 374 (19 A. L. R. 1399), the majority opinion quotes with approval the following statement from 1 Underhill on Landlord and Tenant, p. 157, as follows:

"*The assent of both parties to the original lease is necessary to create the new lease from year to year by holding over.* This assent on the part of the tenant is usually implied from the fact of his remaining in possession and paying rent after his term has expired. * * * And though by remaining in possession the tenant is presumed to offer to take the premises for another year, the landlord is not bound to accept the offer, and unless he does so by accepting rent or otherwise, the tenancy is terminated and notice to quit is not required to be given by him."

In *Marks* v. *Corliss' Estate*, 256 Mich. 460, we said:

"Where one has a lease for years, with annual rent reserved, and holds over after the expiration of the term *with the acquiescence of the landlord*, the tenancy is from year to year on the conditions of the

lease, although the annual rent is payable in monthly instalments (*Laughran* v. *Smith,* 75 N. Y. 205; *Faraci* v. *Fassulo,* 212 Mich. 216), *but where the rent reserved is monthly, the holding over is from month to month* unless the lease otherwise provides (*Barlum* v. *Berger,* 125 Mich. 504)."

In the case of *Scott* v. *Beecher,* 91 Mich. 590, 592, 593, we said:

"When a tenant under a valid lease for years holds over, the law implies a contract on his part to renew the tenancy on the same terms for another year; but the landlord may treat him as a trespasser, *or as a tenant holding upon the terms of the original lease.* * * *

"The holding over is the legal expression of the tenant's intention, and *all that is necessary to complete the contract (of renewal) is the consent or acquiescence of the landlord.*"

In the present case the prior term of tenancy ended June 1, 1943. Defendant held over until June 10th, when it received notice that its tenancy would terminate June 12th, and also notice to quit the premises on July 12th. As such notices indicated the lessors' refusal to consent to or acquiesce in such holding over, the law will not imply a renewal of the tenancy for the further term of one year after June 1, 1943.

Under the facts and circumstances shown, we conclude that after June 1, 1943, defendant became a tenant at will or by sufferance, and a one-month's notice was sufficient to terminate such tenancy. 3 Comp. Laws 1929, § 13492, as amended by Act No. 145, Pub. Acts 1935 (Comp. Laws Supp. 1940, § 13492, Stat. Ann. § 26.1104). Even if, under our holding in *Marks* v. *Corliss' Estate, supra,* such tenancy after June 1st were held to be on a month-to-month basis, a one-month's notice would have been

sufficient to terminate it. Defendant was required to vacate the premises July 12th, that being the date specified in the lessors' notice to quit.

It might be argued under our holdings in *Detroit Free Press* v. *Miller,* 217 Mich. 118, and *Rice* v. *Atkinson, Deacon, Elliott Co., supra,* that as the original written lease terminated June 1, 1941, no notice was thereafter required to terminate defendant's tenancy. For other authorities see *Bay County* v. *Northeastern Michigan Fair Assn.,* 296 Mich. 634; *Hoffman* v. *Willits,* 194 Mich. 276; *Barlum* v. *Berger,* 125 Mich. 504; *Huntington* v. *Parkhurst,* 87 Mich. 38 (24 Am. St. Rep. 146); *Schneider* v. *Lord,* 62 Mich. 141; 20 Michigan Law Review, pp. 340–344..

Other questions presented do not require consideration. We hold that defendant's tenancy was not renewed either by agreement of the parties or by operation of law for the further term of one year after June 1, 1943, and that plaintiff was entitled to possession of the premises on July 12, 1943.

The judgment of the trial court is reversed, and the case is remanded with direction to enter a judgment granting plaintiff possession of the premises as of July 12, 1943. Plaintiff shall recover costs.

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

SILKWORTH *v.* LOCAL NO. 575 OF THE AMERICAN FEDERATION OF LABOR.

1. APPEAL AND ERROR—INJUNCTION—PICKETING—DE NOVO REVIEW.
   A suit by employers to enjoin labor union from picketing and interfering with plaintiff's business, being a chancery case, is reviewed *de novo* by the Supreme Court.

2. INJUNCTION—LABOR UNIONS—PICKETING—STATUTES.
   The statute relating to mediation of labor disputes is not involved in suit by partner employers to enjoin picketing and interference with plaintiffs' business by labor union where plaintiffs' employees were not members of defendant union and there was no labor dispute existing between plaintiffs and their employees (Act No. 176, Pub. Acts 1939).

3. CONSTITUTIONAL LAW—PEACEFUL PICKETING—FREE SPEECH.
   Peaceful picketing is a proper means of exercising the right of free speech.

4. MASTER AND SERVANT—PEACEFUL PICKETING—LABOR DISPUTE.
   Peaceful picketing by a labor union is a proper means by which the facts of a labor dispute may be made known.

5. CONSTITUTIONAL LAW—LIBERTY OF SPEECH AND PRESS—STATE ABRIDGMENT.
   The liberty of speech and press is a part of the fundamental personal rights and liberties secured from State abridgment by the Fourteenth Amendment to the Constitution of the United States.

6. SAME—STATE COURTS.
   It is the duty of the State courts as well as the Federal courts to guard and enforce every right secured by the Constitution of the United States as that Constitution is the supreme law of the land (U. S. Const. art. 6, § 2).

7. MASTER AND SERVANT—PEACEFUL PICKETING BY LABOR UNION—ABSENCE OF DISPUTE BETWEEN EMPLOYER AND OWN EMPLOYEES.
   Although there may be no controversy between an employer and his own employees, if the economic interests of other employees engaged in the same industry are affected, they may, through their labor union, publicize their grievance by means of peaceful picketing.

8. INJUNCTION—LABOR OBJECTIVES—COURTS.
   If the object sought to be obtained by a labor union through peaceful picketing is not a lawful labor objective, a court would be justified in exercising control of its acts.

9. SAME—PEACEFUL PICKETING—UNLAWFUL LABOR OBJECTIVE.
   Where the real objective of defendant labor union in picketing plaintiff employers' bulk oil storage plants was to compel them to put their drivers in defendant union by paying their initiation fees regardless of whether or not the drivers wished to join, the use of the lawful means of peaceful picketing was not permissible since the labor objective was not a lawful one.

Appeal from Washtenaw; Sample (George W.), J. Submitted July 19, 1944. (Docket No. 65, Calendar No. 42,617.) Decided October 11, 1944. Rehearing denied December 1, 1944.

Bill by Donald M. Silkworth and another, copartners doing business as D. M. Silkworth Oil Company, against Local No. 575 of the American Federation of Labor and others to restrain interference with plaintiffs' business. Decree for plaintiffs. Defendants appeal. Affirmed.

John P. Kirk (*Burke, Burke & Smith,* of counsel), for plaintiffs.

Fitzgerald, Hogue, O'Leary & Reardon and *Don Lawrence* (*George Fitzgerald* and *Paul B. Mayrand,* of counsel), for defendants.

STARR, J. Plaintiffs were engaged in the business of selling gasoline and fuel oil to dealers and con-

sumers in Washtenaw county and adjacent territory. They maintained their office and principal place of business in Ypsilanti and bulk storage plants in Ypsilanti, Ann Arbor, and Dexter. They received their principal supply of such petroleum products from the Gulf Refining Company in Toledo by transport trucks, the drivers of which were union members. Defendant Local No. 575 (herein referred to as the union) was a labor union and a part of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, & Helpers of America, commonly known as the Teamsters Union, which is affiliated with the American Federation of Labor. Defendant Flick was the business representative, and defendant Temple the assistant business representative, of said union, which maintained offices in Ann Arbor and Ypsilanti.

On December 22, 1942, plaintiffs filed bill of complaint alleging, in substance, that there was no labor dispute between them and their truck drivers, who were not union members; that defendants had demanded that they place all their drivers in the union by paying their initiation fees of $27.50 each; and that when they refused to pay such fees, defendants established a picket line at their bulk storage plant in Ypsilanti. A temporary injunction was issued restraining defendants from picketing and from interfering with plaintiffs' business. Defendants answered said bill, denying that they had demanded payment by plaintiffs of union initiation fees for their drivers and that they had unlawfully interfered with plaintiffs' business. Defendants alleged that a labor dispute was involved and that they were legally entitled to picket plaintiffs' storage plant in the furtherance of legitimate union aims and activities. It is admitted that there was no strike, no physical violence, and that the picketing was peaceful.

The matter was brought on for hearing and testimony taken. The trial court held that there was "no bona fide labor dispute existing between plaintiffs and any person or persons or any labor organization of any kind," and that defendants' demand for payment of initiation fees by plaintiffs was "illegal, unjust and extortionate." On April 26, 1943, a decree was entered which enjoined defendants from picketing plaintiffs' places of business and from in any manner interfering with their business or with the delivery to them of petroleum products. Defendants appeal from such decree. This being a chancery case, we review the same *de novo*.

The testimony, much of which is in conflict, reasonably establishes the following facts. Plaintiffs were the largest distributors of petroleum products in Washtenaw county. They owned their trucks and employed eight or more drivers in making deliveries to their customers. In the fall of 1942 defendant union put on a campaign to organize the truck drivers in the petroleum industry in Ypsilanti. Some drivers for the Standard Oil Company and for other distributors in that community joined the union. Defendants Flick and Temple solicited plaintiffs' drivers, but they were not willing to join unless plaintiffs paid their initiation fees. It appears that prior to 1942 two of plaintiffs' drivers had belonged to defendant union and plaintiffs had paid their initiation fees. Defendant Flick testified that at the time of the picketing in question only one of plaintiffs' drivers belonged to the union and that his dues were in arrears. Plaintiffs testified that at such time none of their drivers belonged to the union.

In December, 1942, defendants insisted that plaintiffs place all their drivers in the union by paying their initiation fees, but plaintiffs refused, claiming that their drivers were satisfied and that there was

no labor dispute. About December 20th defendants established a picket line at plaintiffs' Ypsilanti plant. There were only one or two men used in such picket line, and they carried banners which stated, "Unfair to organized labor, A. F. of L." The drivers of transport trucks delivering petroleum products to plaintiffs refused to cross such picket line, with the result that plaintiffs were deprived, at least partially, of their supply of such products. Picketing was continued until December 22d, when plaintiffs filed bill of complaint and the temporary injunction was issued, as above mentioned. To present the situation properly, it is necessary to quote briefly from the testimony. Plaintiff Donald Silkworth testified in part:

"No demands were made * * * regarding labor, working conditions, wages, or anything of that character in December, 1942, and I have no knowledge of any labor dispute. * * *

"I saw Mr. Temple (defendant) on or about December 18, 1942. I had a conversation with him in my office. He asked for a check for $27.50 apiece for each of our employees. * * * He said Mr. Flick (defendant) was waiting at his office for our answer and that if it was not favorable he (Mr. Flick), would stop our supplies from coming into our bulk plants. * * *

"Mr. Temple told me he had not talked with our men lately about joining the union, and that they had made no request to join; he doubted if any of our men would join the union."

Plaintiff Wesley Silkworth testified in part as follows:

"Mr. Temple asked for the initiation fee of $27.50 (in) the local teamsters' union for each of our truck drivers. * * * He said that if the money was not forthcoming they would stop transports from coming into the plant. * * *

"He (Flick) said * * * as we didn't see fit to play ball with them that they were going to be tough with us, and that we could settle the whole thing for a few dollars and wouldn't have any more trouble about it. * * *

"There was no labor dispute between our firm and our employees at any time. * * *

"I told Mr. Temple in my office that I didn't think the men wanted to belong to the union, and he said he was quite positive that they didn't want to belong to the union. I wouldn't settle with Mr. Flick."

Defendant Temple testified in part as follows:

"*Q.* What was the purpose of the union in signing up these drivers? What is your program?

"*A.* * * * If we can get them all, we can better working conditions and get them more money. * * *

"*Q.* Tell what the conversation was with Mr. Silkworth. * * *

"*A.* * * * I told him that I had talked to his drivers and none of them was willing to pay the initiation fee into the union, but they didn't have any objection to going in the union * * * if the Silkworth Company would pay the initiation fee, and they had done it on previous occasions, so I couldn't see any reason why they wouldn't do it again. * * * He didn't want to sign them up and * * * I told him that his trucks were going on union jobs and that the other companies were kicking about it, because a nonunion company was getting union business, and that I wanted his trucks for that reason, too. He said, 'If I was to give you the trucks that are going on the union business, would that be all right?' And I said 'No. I want them all.' * * *

"Donald Silkworth said that he thought four of them would go into the union. * * *

"He asked me what steps we would take if we couldn't get the men and I told him we would use a picket line and that would stop his gasoline. * * *

"I never told the Silkworths we would shut off fuel oil; we told him that fuel oil could go through. We have no desire to stop fuel oil. * * *

"We are only asking for the right to peacefully picket the place of business. We are willing to have the number of pickets designated by the court. * * *

"I made efforts to organize the drivers before talking to Wesley. I interviewed the drivers without success. I didn't succeed in getting them to join the union. * * *

"*Q.* So it was your purpose, because you didn't get the $27.50 for each of his drivers, * * * to shut off that supply and you knew that the only way you could do it would be by establishing a picket line? * * *

"*A.* I didn't do it to get the $27.50. * * *

"If we had the membership, and the $27.50, I wouldn't have been over there as a picket. But if we would have a picket line, the men probably would join without the Silkworths putting up the money. * * *

"*Q.* You knew you couldn't get it (initiation fee) from the members, didn't you?

"*A.* No. I could get it from the members, by a picket line."

Defendant Flick testified in part as follows:

"*Q.* You did contact some of the drivers. * * * And as a result of your contact, you didn't succeed in getting them to join your union, did you?

"*A.* Well, I never asked them to. I talked to them about it but they said if they could get in * * * and it wouldn't cost them anything, they would gladly join the union. * * *

"I was at the bulk plant December 20th. * * * Mr. Temple and I had arranged to establish a picket line to prove to the public that Silkworths were unfair to organized labor, and settle the labor dispute.

"*Q.* What labor dispute?

"*A.* Whether we should have all his members or part of them. * * * Some of them would say, 'I have no objection to joining—.'"

There was no showing that plaintiffs had interfered with defendants' efforts to unionize their drivers; and no satisfactory showing that plaintiffs' drivers were willing to join the union even under a check-off system, whereby plaintiffs would pay their initiation fees and deduct the same from their wages. There was no strike and no showing of any argument or dispute between plaintiffs and their drivers over wages, hours of work, collective bargaining or terms and conditions of employment. Only one driver was called as a witness, and he testified in substance that he knew of no dispute between plaintiffs and their drivers, and that he was satisfied with his work and pay.

The question before us is whether or not the trial court was justified in enjoining defendants from picketing plaintiffs' plant. We recognize that this question is of far-reaching and vital importance to the best interests of unions of employees, to employers, and to the general public. *Lafayette Dramatic Productions, Inc.*, v. *Ferentz,* 305 Mich. 193 (145 A. L. R. 1158). It should be noted that no anti-injunction law similar to the Norris-LaGuardia act (47 Stat. at L. 70, chap. 90 [29 USCA, § 101 *et seq.*]) has been adopted by either legislative enactment or judicial decision in this State; also that Act No. 176, Pub. Acts 1939 (Comp. Laws Supp. 1940, § 8628–1 *et seq.,* Stat. Ann. 1943 Cum. Supp. § 17.454 [1] *et seq.*), relating to mediation of labor disputes, is not involved in this case.

We recognize that peaceful picketing has been upheld as an exercise of the right of free speech, and that a union may, by the process of peaceful picketing, make known the facts of a labor dispute. In

Carlson v. *California,* 310 U. S. 106 (60 Sup. Ct. 746, 84 L. Ed. 1104), the supreme court of the United States said, p. 113:

"Publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a State."

In the case of *Book Tower Garage, Inc.,* v. *Local No. 415, International Union, U. A. W. A. (C. I. O.),* 295 Mich. 580, Mr. Justice BUTZEL in the majority opinion said, pp. 586, 587:

"Peaceful picketing is within the right to 'make known the facts of a labor dispute,' and is lawful.

"The liberty of speech and press secured from Federal abridgment by the First Amendment to the Federal Constitution has been carried over and made a part of the fundamental personal rights and liberties secured from State abridgment by the Fourteenth Amendment. * * * It is the duty of the State courts as well as the courts of the Nation to guard and enforce every right secured by the Federal Constitution. *Robb* v. *Connolly,* 111 U. S. 624 (4 Sup. Ct. 544, 28 L. Ed. 542); *Mooney* v. *Holohan,* 294 U. S. 103 (55 Sup. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406). The Federal Constitution is 'the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.'"

See, also, *Bakery & Pastry Drivers & Helpers Local 802 of the International Brotherhood of Teamsters* v. *Wohl,* 315 U. S. 769 (62 Sup. Ct. 816, 86 L. Ed. 1178); *Carpenters & Joiners Union of America, Local No. 213,* v. *Ritter's Cafe,* 315 U. S. 722 (62 Sup. Ct. 807, 86 L. Ed. 1143); *American Federation*

of Labor v. *Swing,* 312 U. S. 321 (61 Sup. Ct. 568, 85 L. Ed. 855); *Thornhill* v. *Alabama,* 310 U. S. 88 (60 Sup. Ct. 736, 84 L. Ed. 1093); *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468 (57 Sup. Ct. 857, 81 L. Ed. 1229); *People* v. *Bashaw,* 295 Mich. 503.

Defendants contend that a labor dispute existed and that under the Federal and State constitutional guarantees of freedom of speech, they were entitled to picket plaintiffs' plant in a peaceful way. Plaintiffs contend that there was no labor dispute; that the picketing was not in furtherance of a lawful labor objective, but was for the purpose of enforcing an extortionate demand. However, a decision of the question as to whether or not a labor dispute existed between plaintiffs and their employee drivers would not alone determine the question of defendants' right to maintain a picket line. In recent decisions it has been held that although there was no controversy between an employer and his own employees, if the economic interests of other employees engaged in the same industry were affected, they could, through their labor union, publicize their grievance by the means of peaceful picketing. In *Bakery & Pastry Drivers & Helpers Local 802 of the International Brotherhood of Teamsters* v. *Wohl, supra,* the court said, p. 774:

"One need not be in a 'labor dispute' as defined by State law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."

In *American Federation of Labor* v. *Swing, supra,* there was no labor dispute or controversy between Swing and his employees, who were not union members. When the union, composed of those engaged in beauty work, was unsuccessful in its attempt to

unionize the workers in Swing's beauty parlor, it picketed his place of business. Swing and his employees began suit and obtained an injunction enjoining such picketing. In upholding the union's right to picket peacefully, the supreme court of the United States said, pp. 325, 326:

"All that we have before us, then, is an instance of 'peaceful persuasion' disentangled from violence and free from 'picketing *en masse* or otherwise conducted' so as to occasion 'imminent and aggravated danger.' *Thornhill* v. *Alabama,* 310 U. S. 88, 105 (60 Sup. Ct. 736, 84 L. Ed. 1093). We are asked to sustain a decree which for purposes of this case asserts as the common law of a State that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.

"Such a ban of free communication is inconsistent with the guarantee of freedom of speech. That a State has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular State regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the State. *A State cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.* The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 209 (42 Sup. Ct. 72, 66 L. Ed. 189, 27 A. L. R. 360). *The right of free*

communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's Case.* 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468, 478 (57 Sup. Ct. 857, 81 L. Ed. 1229)."

See, also, *Cafeteria Employees Union, Local 302,* v. *Angelos,* 320 U. S. 293 (64 Sup. Ct. 126, 88 L. Ed. 58) (decided November 22, 1943), which expressly reaffirms the holding in the *Swing Case; People* v. *Bashaw, supra.*

While recognizing the right to picket peacefully for the purpose of publicizing the facts of a labor dispute, as established by the above authorities, we also recognize that such picketing may become unlawful if directed to the accomplishment of an unlawful purpose. In *Lafayette Dramatic Productions, Inc.,* v. *Ferentz, supra,* we said, p. 208:

"If the object sought to be obtained by defendants was not a lawful labor objective, the court would be justified in exercising control of their acts."

See, also, *Dorchy* v. *Kansas,* 272 U. S. 306 (47 Sup. Ct. 86, 71 L. Ed. 248); *Scavenger Service Corp.* v. *Courtney* (C. C. A.), 85 Fed. (2d) 825; *Opera on Tour, Inc.,* v. *Weber,* 285 N. Y. 348 (34 N. E. [2d] 349, 136 A. L. R. 267); *Fashioncraft, Inc.,* v. *Halpern,* 313 Mass. 385 (48 N. E. [2d] 1),

Therefore, in the present case we must determine whether or not defendants' picketing of plaintiffs' storage plant was for the purpose of obtaining a lawful labor objective. The motive for the picketing, that is, the result sought to be accomplished, was a question of fact. The testimony is convincing that defendants' real objective was to compel plaintiffs to put their drivers in defendant union by paying their initiation fees, regardless of whether or not the drivers wished to join. This was not a lawful labor objective. Defendants could not use the lawful means of peaceful picketing to accomplish such unlawful purpose.

To hold with defendants' contention, under the facts and circumstances shown by the record, would provide a way whereby employers could be coercively compelled to pay union initiation fees for their employees, regardless of whether or not the employees wished to join the union. Such a course would not be in the furtherance of legitimate union aims and activities, nor would it be for the best interests of unions of employees.

We confine our holding in the present case to the point that defendants could not use the lawful means of peaceful picketing to accomplish their unlawful objective. However, our decision should not be construed as in any way limiting or restraining peaceful picketing in the accomplishment of a lawful labor objective.

For the reasons stated in this opinion, the decree of the trial court is affirmed. Plaintiffs shall recover costs of both courts.

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

INDEX.

ABANDONMENT—See APPEAL AND ERROR (10, 37); CRIMINAL LAW (33).

ABATEMENT AND REVIVAL.

1. The survival act is inconsistent with only that part of the statute amending the death act requiring that all actions for wrongful death or injuries resulting in death be thereafter brought only under the death act; otherwise the survival act continues in force (3 Comp. Laws 1929, § 14040; § 14061 *et seq.*, as amended by Act No. 297, Pub. Acts 1939). *In re Olney's Estate*, 66.
2. Under the survival act there is survival of a cause of action regardless of whether the death is that of the injured party or the tortfeasor (3 Comp. Laws 1929, § 14040). *Id.*
3. When the law declares that a cause of action shall survive, it is equivalent to saying that an executor may sue upon it, and that the estate of the deceased tortfeasor may be sued upon it. *Id.*

ABDOMINAL INJURIES—See DAMAGES (1).

ABBREVIATIONS—See CORPORATIONS (8).

ABUSE OF DISCRETION—See PLEADING (2).

ACCIDENT—See AUTOMOBILES (5–8); CONSTITUTIONAL LAW (3); COSTS (9); INSURANCE (2); NEGLIGENCE (2); WORKMEN'S COMPENSATION (2, 6, 7, 11).

ACCOMPLICES—See CRIMINAL LAW (7–9).

ACCOUNTABLE RECEIPT—See CRIMINAL LAW (26); FORGERY (1, 2); INDICTMENT AND INFORMATION (2, 3).

ACCOUNTING.

Motion to dismiss suit for accounting under agreement, attached to the bill of complaint, was properly granted where agreement was contrary to public policy and unenforceable. *Brewer* v. *Stoddard*, 120.

See APPEAL AND ERROR (36); BROKERS (3); COSTS (18); EQUITY (5, 7); INSURANCE (9, 11); MINES AND MINERALS (6, 7, 9); MUNICIPAL CORPORATIONS (53–55).

ACCOUNTS RECEIVABLE—See MUNICIPAL CORPORATIONS (47, 50, 53, 54).

ACQUIESCENCE—See LANDLORD AND TENANT (6, 10, 11).

ACTION.

1. Conditions existing at the time of the commencement of a legal action govern the rights of the parties thereto. *Richardson* v. *Richardson*, 336.
2. Although arbitration is prescribed as a condition precedent to bringing an action under a construction contract where contractor was not entitled to arbitration because of failure to comply with terms of agreement with respect thereto by making timely presentation of claims and city has asserted the right of revocation thereof, the condition precedent is considered as having been waived or abrogated. *City of Detroit* v. *A. W. Kutsche & Co.*, 702.
3. Where arbitration as a condition precedent to action for claims under construction contract is deemed to have been waived or abrogated in suit to enjoin submission of claims to arbitration, decree for plaintiff city is affirmed without prejudice to defendant contractor's right to sue on its claim. *Id.*

See ABATEMENT AND REVIVAL (3); FRAUDULENT CONVEYANCES (3); MORTGAGES (5); MUNICIPAL CORPORATIONS (33).

ACTS OF KINDNESS—See WILLS (5).

ADEQUACY OF REMEDY AT LAW—See EQUITY (5).

ADJOINING LANDOWNERS—See COVENANTS (5); DRAINS (1); WATERS AND WATERCOURSES (1).

ADJUSTMENT OF PROPERTY RIGHTS—See MUNICIPAL CORPORATIONS (38, 39).

ADMINISTRATIVE INTERPRETATION—See STATUTES (8).

ADMINISTRATIVE LAW.

The differences in origin and function of courts and of administrative agencies preclude the wholesale transportation to administrative proceedings of the rules of procedure, trial and review which have evolved from the history and experience of courts, but interested parties before administrative agencies must be afforded an opportunity for a hearing before it and its judgment must express a reasoned conclusion. *Aller* v. *Detroit Police Department Trial Board*, 383.

See APPEAL AND ERROR (24); CONSTITUTIONAL LAW (5); MUNICIPAL CORPORATIONS (29, 30).

ADOPTION.

The legal parent of an adopted child is entitled to all the rights of a parent under the probate code (Act No. 288, chap. 10, § 5, Pub. Acts 1939). *Liebert* v. *Derse*, 495.

See PARENT AND CHILD (1, 3).

ADVANCEMENTS—See APPEAL AND ERROR (12); MORTGAGES (6); MUNICIPAL CORPORATIONS (48, 51, 52); TRUSTS (1, 4, 5).

ADVERTISING STATE—See EVIDENCE (1); WATERS AND WATERCOURSES (2).

AFFILIATES—See INSURANCE (16).

AFFIRMATIVE RELIEF—See EQUITY (4).

AGE—See MARRIAGE.

AGGRAVATION—See APPEAL AND ERROR (37); WORKMEN'S COMPENSATION (4).

ALIAS SUMMONS—See MORTGAGES (3–5); PROCESS.

ALIMONY—See DIVORCE.

AMBIGUITY—See INSURANCE (9, 10); TRUSTS (9).

AMENDMENT—See APPEAL AND ERROR (11); AUTOMOBILES (5, 6); COSTS (9); DEATH (1); PLEADING; STATUTES (3–7, 10–13).

AMICUS CURIAE—See COURTS (5); CRIMINAL LAW (23); JUDGMENT MENT (5); TRUSTS (7, 8).

ANNEXATION—See APPEAL AND ERROR (28); INJUNCTION (2); JUDGMENT (5); MUNICIPAL CORPORATIONS (34–36, 38–45).

ANNULMENT—See MARRIAGE (1, 3).

ANSWERS—See APPEAL AND ERROR (9).

APARTMENT HOUSE—See APPEAL AND ERROR (30).

APPARENT OWNERSHIP—See ESTOPPEL (1).

APPEAL AND ERROR.

1. The Supreme Court does not substitute its judgment on questions of fact for that of the trial court in nonjury actions at law unless the evidence clearly preponderates in the opposite direction. *Webb* v. *Levene,* 38.
2. The Supreme Court takes judicial notice of the contents of its files on application for leave to appeal by defendant in a prosecution for crime and his showing in support thereof resulting in the granting of leave to appeal. *People* v. *Lowenstein,* 94.
3. In considering an appeal from judgment entered on a directed verdict for defendant, the Supreme Court views the testimony in the light most favorable to plaintiff. *Brown* v. *Standard Oil Co.,* 101.
4. Suit to quiet title to mineral rights in certain lands, to construe a certain conveyance and to determine the rights of the several defendants in the lands, being a chancery case, is considered *de novo* by the Supreme Court and where certain defendants appeal, only the rights of plaintiffs and such defendants could be determined on appeal. *Bice* v. *Holmes,* 110.

APPEAL AND ERROR—Continued.

5. In action to recover balance due for lumber material furnished where question of express warranty had been eliminated in former opinion of Supreme Court and was negatived by the testimony on second trial it is not considered on second appeal. *F. M. Sibley Lumber Co.* v. *Schultz*, 193.

6. Verdict of jury against implied warranty in action to recover balance due for plywood sold defendant *held*, not against weight of evidence (2 Comp. Laws 1929, § 9454). *Id.* 194.

7. Objection that motion for new trial was belatedly made, not raised at time of hearing on the motion, comes too late when made for first time on appeal. *Uhrstadt* v. *Sauer Cooperage Co.*, 201.

8. In action against bank and real estate broker to recover amounts plaintiff had paid in taxes and on purchase price under land contract where jury gave verdict against bank but not against broker, testimony is viewed in light most favorable to plaintiff on her appeal from judgment *non obstante veredicto* for defendant bank. *Smith* v. *Highland Park State Bank*, 226.

9. On appeal in chancery mortgage foreclosure proceedings where decree, amended decree and plaintiffs' reply to an answer including a prayer for affirmative relief would indicate that defendants had filed an answer which does not appear in the record and of which there is no calendar entry, the case will be disposed of as though an answer had been filed denying the equities of the bill or leaving plaintiffs to their proofs. *Burroughs* v. *Teitelbaum*, 251.

10. Where it appears that defendants in chancery proceedings to foreclose a mortgage filed preliminary notice of appeal from original decree entered on December 19, 1932, and a supplemental notice of appeal after entry of supplemental decree, but on February 28, 1935, and March 1, 1937, filed petitions for moratorium, such appeal will be considered as having been abandoned on appeal from order denying petition to set aside sale, especially where attorneys for both sides acted as though by stipulation the appeal had been dismissed or had otherwise been abandoned (Court Rule No. 56, § 1 [1931]). *Id.*

11. On petition by trustee under trust mortgage which had been foreclosed for approval and authorization for reorganization and disposition of hotel property, alleged agreement between trustee and proponent of one plan for disposition of the property is not considered on appeal where it was omitted from the record and no motion was made to amend the record but without prejudice to enforcement of certain rights thereunder. *Detroit Trust Co.* v. *Mason*, 282.

12. On petition of trustee under trust mortgage for approval and authorization for reorganization and disposal of hotel property under which trustee appeared willing to forego collection of a substantial portion of its advancements, and plan as finally approved was not that which trustee had proposed, decree is modified so as to provide that purchaser shall indemnify trustee against all claims against it by lessors of land

APPEAL AND ERROR—Continued.

on which hotel stood where such lessors are not parties to the proceedings. *Id.*

13. Claim of individual, who had worked for corporation that had been organized by trustee to own and operate hotel upon which trust mortgage had been foreclosed, for part of capital stock thereof, is not determined by decree entered on trustee's petition for disposal of the property where claimant made no formal presentation of his claim and failed to establish it, and, since claimant was not a party to the proceedings, any decree entered would not be *res judicata* as to such claim. *Id.*

14. In second mortgagee's action on mortgage note under record showing that order, granting leave to file supplemental answer wherein defense of payment was pleaded, was approved as to form by plaintiff's attorney but not signed by trial judge, and that the case was tried as if the order had been made, Supreme Court will consider the case as though order had been made (Court Rule No. 72 [1933]). *Vollmer* v. *Coenis*, 319.

15. Upon trial of case without a jury where trial judge excluded evidence which was admissible upon defense of payment of note sued upon, a new trial is granted since plaintiff may not have deemed it necessary to present further testimony in view of trial court's ruling. *Id.*

16. Question as to whether or not pleadings in action upon health and accident insurance policy raised issue as to continuity of plaintiff's disability may not be raised for the first time in Supreme Court. *Hasson* v. *Mutual Benefit Health & Accident Ass'n, Omaha*, 331.

17. Where it appears that through a miscalculation plaintiff was entitled to $50 more than he had received in consideration for release of claim against insurer under health and accident policy, which amount was tendered to him at the trial, affirmance of judgment for defendant is without prejudice to plaintiff's recovery of amount so tendered. *Id.* 332.

18. On appeal from verdict and judgment of no cause of action in both plaintiff's action and defendant's cross action arising out of automobile collision, the fact that both parties appeal does not necessarily result in confining questions presented to questions of law only. *Carrothers* v. *French*, 341.

19. A suit for specific performance of a land contract is reviewed *de novo* by the Supreme Court since it is a chancery case. *Czeizler* v. *Radke*, 349.

20. On appeal in suit by two children of decedent against their sister and her husband to set aside deed given by defendant sister, as administratrix, to a dummy transferee for consideration furnished by defendant husband, such transferee's deed to defendants and their deeds to others, validity of appointment of defendant sister as administratrix is not considered where deeds resulted from defendants' fraud and if such appointment were valid, statute rendered purchase of property by fiduciary void (Act No. 288, chap. 9, § 27, Pub. Acts 1939). *Smith* v. *Withey*, 364.

APPEAL AND ERROR—Continued.

21. The Supreme Court does not reverse the findings of fact made by a trial judge sitting without a jury, unless the evidence clearly preponderates in the opposite direction. *Yeager* v. *Daniel*, 371.

22. In action by assignees of subcontractor against contractor for balance due for services and materials used in the reconstruction of a public sidewalk in front of a four-store building which defendant constructed for the owner, finding of trial judge that the subcontractor had done the work on a cost-plus basis for defendant, had not been paid in full, and that the owner had not ordered the work or been billed for it by the subcontractor is not disturbed under the evidence presented, since it does not clearly preponderate in the opposite direction. *Id.*

23. Under the discretionary power of the Supreme Court to make any order which ought to have been made and grant such relief, whether mentioned in the notice of appeal or not, as a case may require, an order is granted permitting a legatee to file a brief in case appealed by administrator of a decedent's estate from judgment for claimant in circuit court where legatee's brief raises the only question of importance in the case, notwithstanding leave to file such brief had not been asked (Court Rule No. 72 [1933]). *In re Griffin's Estate*, 376.

24. Under terms of charter providing for police trial board, its finding of fact in proceeding to dismiss police officer for conduct unbecoming to an officer is final where supported by evidence (Detroit Charter, title 4, chap. 21, §§ 16, 17). *Aller* v. *Detroit Police Department Trial Board*, 383.

25. On appeal in suit to enjoin use of lakefront lots as a public fishing site, question as to whether occupancy thereof was within meaning of the restriction is before Supreme Court on *de novo* review. *Gableman* v. *Department of Conservation*, 416.

26. An appeal taken in a chancery case transfers jurisdiction of the case to the Supreme Court. *Maedel* v. *Wies*, 424.

27. Plaintiff's contention that a defendant's claim to the proceeds of a condemnation award was illegally purchased by another defendant's attorney and that such purchase constitutes champerty is passed upon by Supreme Court notwithstanding matter was not mentioned in plaintiff's bill of complaint nor presented to trial court since it challenges the good faith of an officer of the Supreme Court. *Id.*

28. In township's suit to enjoin city from interfering with water mains located within territory annexed to city from township where revenues had been collected during pendency of suit, upon reversal of decree for plaintiff, suit is remanded to jurisdiction of circuit court in chancery to make further orders relative to disposition of sequestered revenues. *Township of Royal Oak* v. *City of Ferndale*, 461.

29. Suit for specific performance of a land contract being a chancery case is reviewed *de novo* by Supreme Court. *Himelson* v. *Galusz*, 512.

APPEAL AND ERROR—Continued.

30. In suit for specific performance of land contract for conveyance of building, located in mixed business and residential neighborhood and which had been divided into six apartments, determination of trial judge that premises were worth $8,000, instead of $12,000 to $14,000 as claimed by defendants, is not disturbed under evidence presented. *Id.*
31. In cases tried without a jury the trial judge is best able to judge the credibility of, and the weight to be accorded, testimony of witnesses he saw and heard and the Supreme Court will not reverse unless the evidence clearly preponderates in the opposite direction. *Wiseman* v. *Musgrave,* 523.
32. The Supreme Court does not concern itself with question of paid or unpaid premiums under insurance policies with defendant finance companies where parties have stipulated that the only question involved was that of the liability of the defendants under the policies. *D. F. Broderick, Inc.,* v. *Continental Credit Corp.,* 546.
33. On *de novo* review of receiver's suit to enjoin alleged owner-lessor of valuable machinery from removing machinery used by firm of which plaintiff was receiver, Supreme Court finds no improper liberality in receiving testimony based on the claim of fraudulent conspiracy. *Equitable Trust Co.* v. *Karos,* 566.
34. The conclusion of the trial court in a chancery case that the evidence as a whole preponderates in favor of a party is not disturbed on appeal where the testimony is conflicting as the trial court was in a better position to judge the credibility of the witnesses and the weight to be given their testimony. *Id.*
35. Where plaintiff receiver had been appointed incident to original chancery case in which the plaintiff therein sought to set aside agreement for dissolution of partnership on ground of fraud and a petition therein to lease machines from defendant herein was denied after hearing on the merits, where testimony as to ownership of such machines in instant case was in conflict, finding for plaintiff receiver that the machines belonged to the firm and not defendant is not disturbed. *Id.*
36. Motion to remand case for taking additional testimony in suit for accounting between township and city incorporated out of township territory is denied where filed seven months after decree was entered in court below while appeal was pending in this court where case was tried below and decree entered on stipulation covering most of the matters involved and remand for such purpose would inject new issues or change the issues previously settled by the stipulation and the need for such action is not apparent. *Township of Royal Oak* v. *City of Berkley,* 575.
37. Alleged error in claimed rejection of testimony tending to show that injury of which workmen's compensation insurer had not been given notice was only minor at first but was aggravated by working and lack of immediate proper care, which appears to have been abandoned by insurer in its action against the employer for breach of the notice provisions in policy, *held,* not reversible. *Fidelity & Casualty Company of New York* v. *Vantaggi,* 634.

APPEAL AND ERROR—Continued.

38. The testimony must be construed in a light most favorable to plaintiff upon an appeal wherein denial of motions for directed verdict and for judgment *non obstante veredicto* is claimed to have been error, even though testimony of witness upon whom plaintiff relies entirely was much discredited. *DiMatteo* v. *Smith*, 640.

39. Questions as to right to operate sewerage system on a revenue basis so as to raise funds for payment of bonds, right to salvage conduits laid in properties not belonging to plaintiff and whether or not bondholders were guilty of laches, not having been raised or passed upon by trial court, are not considered by Supreme Court on appeal in suit for equitable relief. *City of Highland Park* v. *Royal Oak No. 7 Storm Sewer Drain District*, 646.

40. A suit by employers to enjoin labor union from picketing and interfering with plaintiff's business, being a chancery case, is reviewed *de novo* by the Supreme Court. *Silkworth* v. *Local No. 575 of the American Federation of Labor*, 746.

See CONSTITUTIONAL LAW (5); COSTS (2, 7, 10, 16, 20); CRIMINAL LAW (23); JUDGMENT (3); LIS PENDENS (1, 4); WORKMEN'S COMPENSATION (4).

APPEAL BOARD—See COSTS (15); UNEMPLOYMENT COMPENSATION (5).

APPOINTMENT—See APPEAL AND ERROR (20, 35); COSTS (5); EQUITY (1, 5); MUNICIPAL CORPORATIONS (9); OFFICERS (2, 4); TRUSTS (7, 8); UNEMPLOYMENT COMPENSATION (5).

APPORTIONMENT OF AWARD—See WORKMEN'S COMPENSATION (4).

APPROVAL—See APPEAL AND ERROR (12); CORPORATIONS (11); TRUSTS (4, 13).

ARBITRATION AND AWARD.

1. While the general policy of this State is favorable to arbitration of matters arising out of disputes under contracts and courts will encourage parties to arbitrate, if they desire to do so, their contract must comply with the terms of the statutes or the parties may have to resort to courts to settle their disputes (3 Comp. Laws 1929, § 15394, as amended by Act No. 182, Pub. Acts 1941). *City of Detroit* v. *A. W. Kutsche & Co.*, 700.

2. The purpose of requiring that claims under construction contracts be timely presented for arbitration thereunder is to permit the engineer and others to see the status of the construction still in progress, to permit use of available witnesses while they had a better recollection of matters which may be in dispute, and to prevent harassments, delays and losses likely to arise from differences during progress of work. *Id.*

3. The delay in making a demand for arbitration under a contract for construction of a sludge digestion tank, elutriation tanks and gas holder for a sewage treatment plant until after

ARBITRATION AND AWARD—Continued.

the work was completed was an unreasonable delay in making a demand which was intended and required to be made during the progress of the work. *Id.*

4. Claim that plaintiff city had agreed to continue the privilege of special arbitration under contract for construction of certain portions of a sewage treatment plant after contract was almost entirely completed *held*, not sustained by record in suit to enjoin defendant contractor from presenting its claims before an arbitration board. *Id.* 701.
5. A contract for arbitration of claims under a construction contract is to be construed as one instrument notwithstanding different provisions thereof were evidently aimed at different types of claims. *Id.*
6. A party to an agreement to arbitrate claims under a construction contract who has breached such arbitration agreement cannot be permitted to have arbitration thereafter over the objection of the other party to the contract. *Id.*
7. Where defendant contractor failed to present its claims for extras under construction contract during the progress of the work and thereby deprived the plaintiff city of its opportunity to demand arbitration thereof at the time and under circumstances that would make it most desirable, efficient and accurate and also failed to make timely demand for arbitration itself of claims that the contract contemplated should be arbitrated as the work progressed, defendant breached agreement as to arbitration and justified city's refusal to arbitrate such matters after contract was completed. *Id.*
8. A court of equity may set aside an award of arbitrators not made under the contract to arbitrate. *Id.* 702.

See ACTION (2, 3); EQUITY (8).

ARGUMENT—See COSTS (22).

ARGUMENT OF PROSECUTING ATTORNEY—See CRIMINAL LAW (6).

ARREST.

1. A peace officer may arrest without a warrant when he has reasonable cause to believe that a felony has been committed and that person to be arrested has committed it (3 Comp. Laws 1929, § 17149, as amended by Act No. 84, Pub. Acts 1935). *People* v. *Bommarito*, 140.
2. Policeman's arrest without a warrant of persons in whose presence or on whose persons he found gambling paraphernalia while they were upon or near premises upon which all of them had been present under suspicious circumstances and to which he had gained peaceable access while entertaining a reasonable and honest belief that a felony had been committed by them under the circumstances was not an illegal arrest and seizure of their illegal property was proper (3 Comp. Laws 1929, § 17149, as amended by Act No. 84, Pub. Acts 1935; Act No. 328, §§ 301–306, 309, 372, Pub. Acts 1931). *Id.*

ASSAULT—See CRIMINAL LAW (25).

ASSESSMENT—See MUNICIPAL CORPORATIONS (45); TAXATION (1).

ASSIGNMENTS—See APPEAL AND ERROR (22); JUDGMENT (4); LANDLORD AND TENANT (2); MUNICIPAL CORPORATIONS (25); TAXATION (6).

ASSISTANT SUPERINTENDENTS—See COSTS (5); MUNICIPAL CORPORATIONS (11–13).

ASSUMED RISKS—See MASTER AND SERVANT (5).

ASSUMPSIT—See CONTRACTS (4); PLEADING (4).

ASSUMPTION OF LIABILITIES—See CORPORATIONS (3); MUNICIPAL CORPORATIONS (45).

ASSURED CLEAR DISTANCE—See AUTOMOBILES (16).

ATTEMPTED ROBBERY—See CRIMINAL LAW (15).

ATTORNEY AND CLIENT.

1. In determining the amount of an attorney fee it is proper to consider the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite properly to conduct the cause, the customary charges of the bar for similar services, the amount involved in the controversy and benefits resulting to the client from the services, and the contingency or certainty of the compensation. *Schafer* v. *Knuth*, 134.
2. In controversy between attorney and client, where attorney, faced with a difficult and delicate problem, had spent about 43 days in bitterly contested and involved proceedings to quiet title to oil-producing farm of great value for client, charged with misconduct and fraud, but who settled the proceeding without the attorney's consent and behind his back, attorney is awarded $2,150 together with expenses. *Id.*

See APPEAL AND ERROR (27); COURTS (1, 4); FRAUDULENT CONVEYANCES (5); MORTGAGES (1); MUNICIPAL CORPORATIONS (11).

AUDITOR GENERAL—See TAXATION (2); TOWNSHIPS (3).

AUTHORITY—See INSURANCE (6); OFFICERS (3, 4); STATES.

AUTOMOBILES.

1. In action by plaintiff, a motorist, against estate of deceased motorist whose oncoming car was driven onto plaintiff's side of road, evidence sustained finding of trial judge that deceased motorist was guilty of negligence proximately causing accident and justified awarding judgment of $2,540.03 for personal injuries and property damages. *In re Olney's Estate*, 65.
2. In action by motorist, individually and as administrator of his wife's estate, for damages sustained in collision resulting fatally to motorist and his wife in other car as well as plain-

AUTOMOBILES—Continued.

tiff's wife, question of whether plaintiff husband was guilty of contributory negligence was for trier of facts under the evidence which sustained finding for plaintiff. *Id.* 67.

3. On plaintiff's appeal from judgment for defendant *non obstante veredicto* in action arising from collision at intersection of country roads at 10 a.m. on a bright sunshiny day in June, evidence showing that notwithstanding some obstruction to view plaintiff's driver in westbound car when at least 25 feet from intersection and proceeding at not more than 15 miles per hour could see defendant's southbound truck approaching at speed of 50 to 60 miles an hour some 75 to 100 feet to the north and, instead of stopping, "stepped on the gas" and tried to cross in front of the truck, established as a matter of law contributory negligence of plaintiff's driver which, being imputed to plaintiff, an adult, barred her recovery. *Goff* v. *Brewster,* 89.

4. Properly-operated trailer camps are not to be classed as nuisances, and are under strict regulation by State statute (Act No. 143, Pub. Acts 1939, as amended). *Pringle* v. *Shevnock,* 181.

5. The title of the motor vehicle financial responsibility act of 1933 in stating that the primary object of the act was to require financial responsibility on the part of owners and operators of motor vehicles is sufficient to embrace the object of a section added by an amendatory act wherein the operator or owner of a motor vehicle involved in an accident wherein anyone is killed or injured is required to give to the secretary of State a written report containing the names and addresses of owners and operators of all cars involved, of all persons injured or killed, the date, time, and place of accident and name of insurance carrier of operator or owner, and providing for self-insurance, limited inspection of report, penalties and suspension of operator's license (Const. 1908, art. 5, § 21; Act No. 203, § 3a, Pub. Acts 1933, as added by Act No. 248, Pub. Acts 1943). *Surtman* v. *Secretary of State,* 270.

6. Act, amendatory of the motor vehicle financial responsibility act, which requires the filing with the secretary of State of reports of accidents in which persons are killed or injured and containing certain information, does not violate the equal-protection and due-process clauses of the State and Federal Constitutions nor the constitutional guaranty against self-incrimination where report made is not open to general public inspection (U. S. Const. Am. 14; Mich. Const. 1908, art. 2, § 16; Act No. 203, § 3a, Pub. Acts 1933, as added by Act No. 248, Pub. Acts 1943). *Id.* 271.

7. Act, amendatory of the motor vehicle financial responsibility act, which requires the filing with the secretary of State of reports of accidents in which persons are killed or injured and containing certain information, does not infringe upon the reasonable control of streets reserved to municipalities by the Constitution (Const. 1908, art. 8, § 28; Act No. 203,

AUTOMOBILES—Continued.

Pub. Acts 1933, as added by Act No. 248, Pub. Acts 1943). *Id.* 272.

8. Although a motorist may be on a through highway, the right of way accorded him does not relieve him from his duty to make proper observation of traffic approaching on intersecting highways and to use reasonable care and caution to avoid an accident (1 Comp. Laws 1929, § 4713 [c], as amended by Act No. 318, Pub. Acts 1939). *Carrothers* v. *French*, 340.

9. While the law accords the right of way to motorists on trunk line highways, it does not authorize one, in approaching a highway crossing, to assume that in all events he may proceed without looking, or, if unable to see, without exercising precaution commensurate with reasonable prudence (1 Comp. Laws 1929, § 4713 [c], as amended by Act No. 318, Pub. Acts 1939). *Id.*

10. A motorist desiring to cross through highway must anticipate fast traffic on it, and when range of his vision is limited, he may not always assume that a single observation will disclose the whole situation, and proceed as though there were no cars within colliding distance; on the other hand, he may assume that a driver on the through highway, coming into the range of vision, will discover him seasonably and take ordinary care to avoid collision. *Id.*

11. Although defendant motorist on intersecting highway may have been negligent in attempting to cross through highway, testimony presented a question of fact as to whether or not plaintiff's driver, a motorist thereon, made proper observation at unobstructed corner and exercised reasonable care in failing to sound horn, apply brakes or reduce speed after having seen defendant 50 or 60 feet to the south of the intersection while plaintiff's driver was some 300 to 400 feet west of the intersection, hence verdict of no cause for action was not against the great weight of the evidence (1 Comp. Laws 1929, § 4713 [c], as amended by Act No. 318, Pub. Acts 1939). *Id.*

12. Where cross-defendant's driver, on through highway, may have been negligent in failing to make proper observation of cross plaintiff on intersecting road, latter, who had stopped at the through highway but attempted to cross in front of cross defendant's car although his unobstructed view permitted him to see in direction from which such car approached for 750 feet, was guilty of contributory negligence as a matter of law (1 Comp. Laws 1929, § 4713 [e], as amended by Act No. 318, Pub. Acts 1939). *Id.* 341.

13. It is the duty of a motorist on an intersecting highway to stop before entering a through highway upon which there is traffic approaching the intersection and make proper observation before entering the intersection and if he fails to make such observation he is guilty of contributory negligence as a matter of law (1 Comp. Laws 1929, § 4713 [e], as amended by Act No. 318, Pub. Acts 1939). *Id.*

14. Plaintiff's decedent, driving a pickup truck westerly across intersection of paved 40-foot highway at speed of half a mile

AUTOMOBILES—Continued.

per hour on a clear winter day when the pavement was covered with snow and ice and where there were no traffic or other obstructions to his view for many blocks of a rapidly-approaching southbound car and who appeared to have slowed down as he was crossing the westerly half of the intersection in which defendant's car struck the truck, was guilty of contributory negligence as a matter of law. *DiMaiteo* v. *Smith*, 640.

15. Question of contributory negligence of driver of 30-foot tractor and semi-trailer loaded with about 15 tons of paper who had been travelling down hill at a reasonable rate of speed at night some 60 feet behind a preceding car which stopped suddenly and turned to the right immediately before reaching recently-excavated hole 38" deep and 67' long in highway and who turned left and passed through picket fence into excavation *held*, question of fact for jury, the testimony being conflicting as to whether there were flares at the near edge of the excavation. *Norwich Union Fire Insurance Society, Ltd.*, v. *Globe Construction Co.*, 655.

16. Motorist who drove his car at speed of 45 to 55 miles an hour as he came to crest of hill and hit corner of defendant's truck which had been parked illegally on downgrade pavement of same side of highway *held*, guilty of contributory negligence as a matter of law where he had a view of truck for approximately 267 feet and had reduced speed to about 30 miles an hour at time of collision since plaintiff failed to observe the assured clear distance rule, an oncoming car and a ditch preventing plaintiff from going on either side of the truck (1 Comp. Laws 1929, § 4697, as amended by Act No. 119, Pub. Acts 1933). *Janks* v. *Ulen Contracting Corp.*, 712.

See APPEAL AND ERROR (18); CONSTITUTIONAL LAW (3); CORPORATIONS (12, 15); COSTS (9, 17); DAMAGES (3); EVIDENCE (3); INSURANCE (9, 11, 12); MANDAMUS (3, 4); MASTER AND SERVANT (3, 4, 6); NEW TRIAL (7); RAILROADS (1); TOWNSHIPS (6–8); WORKMEN'S COMPENSATION (2).

BADGES OF FRAUD—See FRAUDULENT CONVEYANCES (9).

BANKRUPTCY.

1. Since a bankrupt's interest in property passes to the trustee in bankruptcy, the chancery court has jurisdiction in the trustee's suit to set aside transfers of property by the bankrupt to determine the validity of such transfers. *Becker* v. *Partridge*, 46.

2. Conveyances for which consideration was furnished by bankrupt which resulted in title being placed in bankrupt and his wife while he was insolvent, as disclosed by evidence, including financial statements presented to receiver of bank to which he was greatly indebted, *held*, to have been made with intent to hinder, delay and defraud his creditors (3 Comp. Laws 1929, §§ 13393–13396). *Id.*

See EQUITY (1); FRAUDULENT CONVEYANCES (3).

BANKS AND BANKING.

1. Under the national banking act the stockholders of a bank elect the directors who, in turn, appoint the officers and usually fix the latter's salaries (12 USCA, § 24). *Brewer* v. *Stoddard*, 119.

2. A contract by a stockholder and another to manage and control a bank and share equally in the salaries and compensation received by them was more than a voting trust and was illegal since it was not in the interest of the stockholders and the public but solely for the profit and interest of the contracting parties. *Id.* 120.

See APPEAL AND ERROR (8); BANKRUPTCY (2); CONTRACTS (1); INSURANCE (16).

BATHING BEACH—See MUNICIPAL CORPORATIONS (21, 23).

BATTLE CREEK—See MUNICIPAL CORPORATIONS (5, 6).

BENEFICIAL ASSOCIATIONS.

1. In member's action against fraternal organization to recover damages for humiliation, shame, disgrace and loss of membership rights incident to administration of discipline pursuant to the society's bylaws, it was error for trial judge to prevent defendant from fully presenting its version of incident giving rise to the disciplinary action. *Morris* v. *Lithuanian Sons & Daughters Aid Society*, 621.

2. Member of fraternal organization who actively participated in disciplinary action pursuant to bylaws of the society pertaining to transgressions by members is bound by procedure employed and may not thereafter claim beer-drinking incident which gave rise to the disciplinary action taken against him should have been presented to society pursuant to so-called society court procedure relating to claims against the society for benefits or more serious charges than those calling for mere disciplinary action. *Id.*

BENEFICIARIES—See TRUSTS (3).

BEST INTERESTS OF CHILD—See HABEAS CORPUS (3); PARENT AND CHILD (2).

BIDS—See TAXATION (6).

BILL IN AID OF EXECUTION—See EQUITY (1).

BILLS AND NOTES—See APPEAL AND ERROR (14).

BOAT LIVERY—See COVENANTS (5).

BOAT RAMP—See NUISANCE (3).

BONDHOLDERS' COMMITTEE—See TRUSTS (8, 10).

BONDS—See APPEAL AND ERROR (39); COSTS (11); DRAINS (2); JUDGMENT (5); MORTGAGES (6); MUNICIPAL CORPORATIONS (24–28, 37, 42); TAXATION (7); TRUSTS (1, 4–8, 10–12).

BREACH OF CONTRACT—See ARBITRATION AND AWARD (6, 7).

BREACH OF POLICY—See TRIAL; WORKMEN'S COMPENSATION (8–11).

BREACH OF WARRANTY—See INSURANCE (7).

BREWERY—See FRAUDULENT CONVEYANCES (3).

BREWERY TRUCK—See STREET RAILWAYS (2).

BRIBERY.

1. In prosecution of county auditor for accepting a bribe where insurance agent had testified that he had an agreement with defendant to contribute a portion of his commission to defendant's campaign fund in return for county business, the admission of signed and verified statements of campaign expenses of defendant for his office and of the treasurer of his campaign committee was harmless error where the statements failed to show the agent had made a contribution since the gist of the offense is the acceptance of a bribe, not the use to which the bribe money was put (Act No. 328, § 118, Pub. Acts 1931). *People* v. *Schneider*, 159.
2. The soliciting of a bribe is a complete common-law offense. *Id.*
3. The fact that an agreement involving bribery is not carried out does not make it any the less bribery for when the agreement is consummated the offense is complete. *Id.*
4. In prosecution of a member of the board of county auditors for accepting a bribe from an insurance agent, it was not error for trial court to refuse to give requested instruction that it was necessary to show the proper official records of the board to establish what action was taken by it in the matter of awarding business to insurance agent before jury could find defendant corruptly exercised or agreed to exercise his vote in a particular manner in the matter (Act No. 328, § 118, Pub. Acts 1931). *Id.*
5. In prosecution of one of the county auditors for accepting a bribe, competent evidence *held*, sufficient to permit jury to find defendant guilty (Act No. 328, § 118, Pub. Acts 1931). *Id.*

See CRIMINAL LAW (19, 27–30).

BRIEFS—See APPEAL AND ERROR (23); COSTS (7, 8, 16, 22); COURTS (5); JUDGMENT (5).

BROKERS.

1. It is essential to validity of a realty broker's commission agreement under the statute of frauds that the writing show an agreement or promise; the signature of the party to be charged, or his agent; and an indication that it relates to payment of a commission for the sale of an interest in real estate (3 Comp. Laws 1929, § 13417). *Jaynes* v. *Petoskey*, 32.
2. Oral agreement to pay commission on sale of land being void under statute, no recovery on *quantum meruit* may be had, even though service is rendered and accepted (3 Comp. Laws 1929, § 13417). *Id.*

BROKERS—Continued.

3. In realty broker's suit to recover commission for sale of land pursuant to oral agreement with owners' son who was then handling his parents' affairs, written memorandum with reference to such commission made in accounting by son with the guardian of the estate of his parents which was not signed by the estate or its representative and did not show that defendant son had assumed the liability was not sufficient to establish liability under the pertinent statute of frauds (3 Comp. Laws 1929, § 13417). *Id.*

4. Where written memorandum relating to commission to plaintiff broker for sale of real estate was insufficient to satisfy the statute of frauds as to defendant estate of owners or as to their son who had made oral agreement as to commission with plaintiff, latter may not impose personal liability upon son on theory of breach of implied warranty of authority to enter into the agreement (3 Comp. Laws 1929, § 13417). *Id.*

See APPEAL AND ERROR (8); VENDOR AND PURCHASER (1).

BUILDINGS—See APPEAL AND ERROR (30); MUNICIPAL CORPORATIONS (14, 15).

BULK SALES ACT—See FRAUDULENT CONVEYANCES (2–5).

BULK OIL STORAGE PLANT—See *INJUNCTION* (5).

BURDEN OF PROOF—See CONTINUANCE; CORPORATIONS (4); INSURANCE (1); LOST INSTRUMENTS; NAMES; NEGLIGENCE (1); WILLS (8).

BURIAL EXPENSES—See DAMAGES (1); DEATH (2, 4).

CALENDARS—See APPEAL AND ERROR (9).

CAMPAIGN EXPENSES—See BRIBERY (1).

CANCELLATION OF INSTRUMENTS—See INSURANCE (4, 5).

CAPITAL—See TRUSTS (1).

CARBON MONOXIDE GAS—See EVIDENCE (3); WORKMEN'S COMPENSATION (2, 5).

CARE AND SUPPORT—See DEEDS (5, 6).

CAUCASIANS—See COVENANTS (3).

CERTIFICATES OF DEPOSIT—See TRUSTS (5, 6, 8, 10–12).

CERTIFICATION OF EMPLOYEES—See MUNICIPAL CORPORATIONS (9–13).

CERTIORARI—See CONSTITUTIONAL LAW (5); CRIMINAL LAW (15); HABEAS CORPUS (1).

CHAMPERTY AND MAINTENANCE.

The inhibition of the champerty statute is confined to the purchase of a "thing in action, with the intent and for the purpose of bringing any suit thereon" and the purchase of a claim already in litigation is not barred (3 Comp. Laws 1929, § 13593). *Maedel* v. *Wies,* 425.

See APPEAL AND ERROR (27).

CHANCERY CASES—See APPEAL AND ERROR (4, 10, 12, 19, 25, 26, 29, 34, 36, 39, 40); MORTGAGES (2–5, 7); PROCESS (1); TRUSTS (10).

CHANGE OF LEASE PERIOD—See LANDLORD AND TENANT (4).

CHANGE OF PLEA—See CRIMINAL LAW (25).

CHANGE OF VENUE—See CRIMINAL LAW (16).

CHARTERS—See APPEAL AND ERROR (24); COSTS (5); MUNICIPAL CORPORATIONS (8–13, 28, 29, 30).

CHECKS—See FORGERY (1).

CHEST INJURIES—See DAMAGES (1).

CHIEF INSPECTOR—See MUNICIPAL CORPORATIONS (29).

CHIEF OF DETECTIVES—See MUNICIPAL CORPORATIONS (29).

CHILDREN—See HABEAS CORPUS (3).

CIRCUIT COURT—See APPEAL AND ERROR (28).

CITY MANAGER—See MUNICIPAL CORPORATIONS (44).

CIVIL DISABILITIES—See CRIMINAL LAW (36).

CIVIL SERVICE—See COSTS (5); MUNICIPAL CORPORATIONS (8–13).

CLAIMS AGAINST CITY—See EQUITY (8).

CLAIMS AGAINST ESTATES—See ESTATES OF DECEDENTS; EXECUTORS AND ADMINISTRATORS (3).

CLAIMS AGAINST STATE—See INTOXICATING LIQUORS.

CLAIMS FOR COMPENSATION—See WORKMEN'S COMPENSATION (3).

CLASSIFICATION—See CONSTITUTIONAL LAW (2, 3).

CLEAN HANDS—See MORTGAGES (5).

CLERKS—See MUNICIPAL CORPORATIONS (28).

CLOUD ON TITLE—See QUIETING TITLE.

COAL—See SALES (1).

COLLATERAL ATTACK—See JUDGMENT (3).

COLLOQUY—See TRUSTS (9).

COLORED PERSONS—See COVENANTS (1, 3).

COMMISSIONER OF POLICE—See MUNICIPAL CORPORATIONS (29).

COMMISSIONS—See BRIBERY (1); BROKERS.

COMMITMENT—See CRIMINAL LAW (21); HABEAS CORPUS (1).

COMMITMENT PAPERS—See CRIMINAL LAW (14, 15).

COMMON LAW—See BRIBERY (2); CRIMINAL LAW (35); MASTER AND SERVANT (3); NEW TRIAL (6); UNEMPLOYMENT COMPENSATION (1).

COMMON PLAN—See COVENANTS (1).

COMPENSATION—See ATTORNEY AND CLIENT (1).

COMPROMISE AND SETTLEMENT—See FORCIBLE ENTRY AND DETAINER; INSURANCE (14).

CONDEMNATION PROCEEDINGS—See APPEAL AND ERROR (27); COSTS (4); TAXATION (5); WATERS AND WATERCOURSES (2).

CONDITIONAL SALES—See CORPORATIONS (15).

CONDITION PRECEDENT—See ACTION (2, 3).

CONDITIONS—See LICENSES.

CONFUSION OF NAMES—See CORPORATIONS (7–10, 12–15).

CONSENT—See APPEAL AND ERROR (11); ATTORNEY AND CLIENT (2); INSURANCE (14); LANDLORD AND TENANT (6, 7, 11); MARRIAGE; MINES AND MINERALS (8); TRUSTS (1).

CONSIDERATION—See BANKRUPTCY (2); DEEDS (6); FRAUDULENT CONVEYANCES (6, 7, 12); MORTGAGES (6); SPECIFIC PERFORMANCE (7); TAXATION (3).

CONSPIRACY.

1. In prosecution for conspiracy to violate the gaming laws where seizure of illegal property in possession of some of the conspirators was properly made it was admissible against all of the conspirators (3 Comp. Laws 1929, § 17149, as amended by Act No. 84, Pub. Acts 1935; Act No. 328, §§ 301–306, 309, 372, Pub. Acts 1931). *People* v. *Bommarito*, 140.

2. In prosecution for conspiracy to violate the gaming laws where there was testimony tending to establish connection between company whose store was entered by policeman who made the arrest and another company not a party defendant nor owned or controlled by any of the defendants, testimony regarding activities of latter company was properly received (Act No. 328, §§ 301–306, 309, 372, Pub. Acts 1931). *Id.*

CONSPIRACY—Continued.

3. In prosecution for conspiracy to violate the gaming laws, evidence *held*, sufficient to sustain verdict of guilty on all 14 counts (Act No. 328, §§ 301–306, 309, 372, Pub. Acts 1931). *Id.* 141.

See APPEAL AND ERROR (33); FRAUD; INDICTMENT AND INFORMATION (1); PLEADING (4).

CONSTITUTIONAL LAW.

1. A city ordinance which applies to all citizens alike cannot be held to be discriminatory. *Loose* v. *City of Battle Creek*, 2.
2. That a rule of law may in certain instances work a hardship does not violate the due-process clause of the Constitution, provided it operates without any discrimination and in like manner against all persons of a class. *Surtman* v. *Secretary of State*, 271.
3. The classification of act, amending the motor vehicle financial responsibility act, requiring owners and operators of motor vehicles, except operators of vehicles owned by the public, to file reports of certain accidents containing certain information and providing penalty and suspension of operator's license for failure to do so is neither arbitrary, capricious nor unreasonable (Act No. 203, § 3a, Pub. Acts 1933, as added by Act No. 248, Pub. Acts 1943). *Id.*
4. The reasonable control of highways reserved to municipalities by the Constitution is such control as cannot be said to be unreasonable and inconsistent with regulations which have been established, or may be established, by the State itself with reference thereto, thus permitting a municipality to recognize local and peculiar conditions and to pass ordinances regulating traffic on its streets not contravening State laws (Const. 1908, art. 8, § 28). *Id.* 272.
5. The action of an administrative tribunal designed to afford a hearing on specific charges supported by evidence in the matter of dismissing, demoting, or disciplining police officers is open to public consideration but not to judicial review by appeal or certiorari except as it is made to appear as a matter of law the essentials of jurisdiction have not been followed. *Aller* v. *Detroit Police Department Trial Board*, 382.
6. Peaceful picketing is a proper means of exercising the right of free speech. *Silkworth* v. *Local No. 575 of the American Federation of Labor*, 746.
7. The liberty of speech and press is a part of the fundamental personal rights and liberties secured from State abridgment by the Fourteenth Amendment to the Constitution of the United States. *Id.*
8. It is the duty of the State courts as well as the Federal courts to guard and enforce every right secured by the Constitution of the United States as that Constitution is the supreme law of the land (U. S. Const. art. 6, § 2). *Id.*

See AUTOMOBILES (5–7); COSTS (9); MANDAMUS (4); OFFICERS (3, 5); STATUTES (3–5, 7).

CONSTRUCTION CONTRACTS—See ARBITRATION AND AWARD (2–7); APPEAL AND ERROR (22).

CONSTRUCTION OF CONTRACTS—See ARBITRATION AND AWARD (5); CONTRACTS (4, 5, 7).

CONSTRUCTION OF DECREES—See CORPORATIONS (15); EQUITY (7).

CONSTRUCTION OF DEEDS—See DEEDS (1, 2, 4).

CONSTRUCTION OF INSTRUMENTS—See APPEAL AND ERROR (4).

CONSTRUCTION OF ORDINANCES—See MUNICIPAL CORPORATIONS (2, 3).

CONSTRUCTION OF POLICY—See INSURANCE (9, 10).

CONSTRUCTION OF STATUTES—See COSTS (3, 15); PLEADING (1); STATUTES (1, 8–10, 14, 15); UNEMPLOYMENT COMPENSATION (3).

CONTEMPT—See DIVORCE.

CONTINUANCE.

A party claiming an abuse of discretion in the denial of a motion for a continuance has the burden of proving it. *People* v. *Schneider*, 158.

See CRIMINAL LAW (17–19).

CONTINUITY OF ACTION—See MORTGAGES (5).

CONTRACTS.

1. Contract to secure control of banks and share equally in salaries received as officers thereof, not made for the purpose of benefiting the stockholders, is against public policy and unenforceable. *Brewer* v. *Stoddard*, 119.
2. A contract giving plaintiff an option to purchase stock in a bank will not be enforced where the option was never exercised. *Id.* 120.
3. A contract calling for personal services by one of the parties is terminated by the death of such party. *Id.*
4. In assumpsit on contract whereby defendant railroad company agreed "to buy such ice as may be required" at a certain city it was permissible to submit to jury previous correspondence between the parties to show the amount intended by the word "required," especially where letter transmitting such contract to plaintiff for signature indicated that defendant did not understand the contract merged into it all previous negotiations, and the previous correspondence showed that plaintiff had specifically requested an estimate of daily requirements in order to harvest sufficient ice to meet defendant's needs. *Menominee Lumber & Cedar Co.* v. *Thomson*, 263.
5. Language used in a proposal for the sale of property by a liquidating trustee must be most strictly construed against the person responsible for it. *Detroit Trust Co.* v. *Mason*, 283.

CONTRACTS—Continued.

6. A commitment made in court is not subject to arbitrary withdrawal after the court had stated that it would accept it. *Id.*

7. All clauses of a contract must be given an effective and reasonable meaning if fairly possible. *City of Detroit* v. *A. W. Kutsche & Co.*, 700.

See ACCOUNTING; ARBITRATION AND AWARD (1, 8); APPEAL AND ERROR (22); BANKS AND BANKING (2); BRIBERY (3); BROKERS (1, 3); CORPORATIONS (2–4); COSTS (19); FRAUDULENT CONVEYANCES (3); INSURANCE (8); INTEREST; JOINT ADVENTURES; MORTGAGES (6); MUNICIPAL CORPORATIONS (34); OFFICERS (3); SPECIFIC PERFORMANCE (2, 7, 8); STATES; VENDOR AND PURCHASER (4, 5).

CONTRIBUTIONS—See NEW TRIAL (8); STATUTES (2); TAXATION (1).

CONTRIBUTORY NEGLIGENCE—See AUTOMOBILES (2, 3, 10–16); MASTER AND SERVANT (5); NEGLIGENCE (1); RAILROADS; STREET RAILWAYS.

CONTROL—See BANKS AND BANKING (2); CONTRACTS (1); MASTER AND SERVANT (1–3); UNEMPLOYMENT COMPENSATION (2).

COORDINATE COURTS—See COURTS (2).

CORPORATION AND SECURITIES COMMISSION—See CORPORATIONS (11).

CORPORATIONS.

1. Shareholders in a corporation occupy a fiduciary relationship to other shareholders. *Brewer* v. *Stoddard*, 119.

2. An agreement by one of the stockholders of a corporation for the sale, directly or indirectly, of an office or a permanent position therein is against public policy even though the contracting stockholder had shares sufficient to give him control in the election of officers since by such agreement he might be required to act contrary to the duty he owed the company and other stockholders. *Id.* 120.

3. Corporation, organized to own and operate hotel property upon which trustee had foreclosed trust mortgage, was not relieved of liability for rent to lessors of land on which hotel stood merely because purchaser under plan for disposition of trust estate became owner of capital stock of corporation, hence where purchaser and his assignees are required to assume any individual liability of the trustee to such lessors, the trustee may not object to acceptance of such purchaser's plan rather than its own because of its continuing individual liability. *Detroit Trust Co.* v. *Mason*, 286.

4. The burden is upon a director to show the fairness, reasonableness, and good faith of a bargain made by the corporation with himself. *Wiseman* v. *Musgrave*, 523.

5. Finding of trial judge in nonjury action of assumpsit that defendants were creditors of corporation of which plaintiff was receiver for services rendered corporation while they

CORPORATIONS—Continued.

were directors and in control thereof and that payment of $75 a month made after such relation had terminated was not a fraud upon other creditors of corporation is not disturbed under record showing a resolution authorizing such payments which had been passed before services were performed or payments made. *Id.*

6. Upon the merger of two corporations, the obligations of the merging corporations become the obligation of the resulting corporation. *D. F. Broderick, Inc.*, v. *Continental Credit Corp.*, 546.

7. Whether names of corporations are so similar as to be confusing and deceptive depends upon application of principles to pertinent facts of each particular case (Act No. 327, § 6, Pub. Acts 1931). *Universal Credit Co.* v. *Dearborn Universal Underwriters Credit Corp.*, 608.

8. Corporations doing automobile finance business under name of "Universal Credit Company" are entitled to injunction restraining defendants, who sought to engage in same field of business some 14 years later with offices in same building as plaintiffs, from using the word "universal" as part of corporate name and from using the abbreviation "U. C. C." which by use in plaintiffs' business had come to denote the full name (Act No. 327, § 6, Pub. Acts 1931). *Id.*

9. Fact that defendant corporation had not actually commenced doing business in same field of business in the same building would not preclude issuance of injunction against use of term in name that was the same as that which had been used theretofore by plaintiffs and their predecessors for about 14 years and which name had been used in extensive advertising programs, where the probability of confusion is apparent (Act No. 327, § 6, Pub. Acts 1931). *Id.*

10. Actual confusion in the use of names by corporations need not be shown to entitle one of them to an injunction, it being sufficient that confusion is probable or likely to occur (Act No. 327, § 6, Pub. Acts 1931). *Id.*

11. While the fact that the State corporation and securities commission had "accepted, approved and filed" the articles of incorporation of defendant corporation whose name contained a term which was the dominant term in name under which plaintiff corporations had done business would be a matter for consideration in suit to enjoin the use of such term, it is not controlling, hence, judicial review is not barred (Act No. 327, §§ 5, 6, Pub. Acts 1931; Act No. 13, Pub. Acts 1935). *Id.*

12. The use of the term "universal," which had been used for 14 years as the first word in the name of plaintiff corporations engaged in the business of automobile finance or automobile insurance and which had been an established and quite dominant part of such name, by defendant corporation as a part of its name is enjoined where such use would obviously lead to confusion as latter corporation was to engage in business in same field and have offices in same building as plaintiffs,

CORPORATIONS—Continued.

whether or not it is a mere "geographical adjective" (Act No. 327, § 6, Pub. Acts 1931). *Id.* 609.

13. The fact that corporations in five other States in the same field of business enterprise as plaintiffs have the word "universal" as a part of their corporate names would not preclude plaintiffs from having injunctive relief against defendant corporation using such term in its name where it proposes to do same kind of business as plaintiffs and have offices in same building as plaintiffs and it does not appear that such other corporations have ever done, or are licensed to do, business in this State (Act No. 327, § 6, Pub. Acts 1931). *Id.*

14. The fact that other corporations in this State engaged in types of business wholly unlike that of plaintiff corporations yet had the word "universal" as a part of the firm or corporate name would not bar plaintiffs from injunctive relief against use of such term in name of defendant corporation proposing to engage in same type of business as plaintiffs with offices in the same building (Act No. 327, § 6, Pub. Acts 1931). *Id.*

15. In suit by "Universal Credit Company" and other affiliated foreign corporations using the term "universal" in their corporate name and engaged in conducting automobile finance business against domestic corporation entitled "Dearborn Universal Underwriters Credit Corporation," its corporate owner, and individual who controlled it, decree is construed as enjoining use of term "universal" in name of corporation engaged in either the automobile finance or automobile insurance business where insurance of type involved is a part of each transaction incident to financing automobile conditional sales contracts, but not the term "Dearborn" (Act No. 327, § 6, Pub. Acts 1931). *Id.* 610.

See APPEAL AND ERROR (13); CONSPIRACY (2); ESTOPPEL (2); FRAUDULENT CONVEYANCES (3); INSURANCE (9, 16); MORTGAGES (1); SALES (1, 3); TOWNSHIPS (5); TRADE MARKS AND TRADE NAMES (2); TRUSTS (1, 12).

CORROBORATION—See CRIMINAL LAW (8).

COST-PLUS CONTRACTS—See APPEAL AND ERROR (22).

COSTS.

1. No costs are allowed in suit to determine whether or not war emergency price control regulations applied to judicial sales, a public question being involved (56 Stat. at L. 23, as amended by 56 Stat. at L. 767 and 57 Stat. at L. 566). *Speicher* v. *Sowell*, 55.

2. No costs are awarded to either party on appeal in nonjury actions to recover damages, where neither has fully sustained the position asserted in the Supreme Court. *In re Olney's Estate*, 67.

3. No costs are allowed in husband's suit to annul a marriage where construction of a statute is involved (3 Comp. Laws 1929, §§ 12704, 12753). *Evans* v. *Ross*, 150.

COSTS—Continued.

4. No costs are allowed in suit to determine former owner's right to participate in award made when Federal government condemned lands to which the State had title absolute and before lands were sold at so-called scavenger sale, a public question being involved (Act No. 155, Pub. Acts 1937, as amended). *Mount Clemens Savings Bank* v. *State Land Office Board*, 154.

5. No costs are allowed in suits to compel certification of plaintiffs as assistant superintendents of weights and measures pursuant to civil service provisions of city charter, a public question being involved (Dearborn Charter of 1943, chap. 9, §§ 9.6, 9.9). *Lawlor* v. *City of Dearborn*, 169.

6. In action against two tortfeasors wherein one had been granted a new trial and other has appealed, costs are awarded to plaintiff and the defendant-appellee against defendant-appellant upon affirmance of the judgment against appellant and order granting new trial as to defendant-appellee. *Uhrstadt* v. *Sauer Cooperage Co.*, 202.

7. No costs are allowed on appeal upon affirmance of judgment where appellee did not file a brief. *Lelek* v. *Baker*, 210.

8. No costs are allowed appellees upon affirmance of decree where they filed no brief. *Kathan* v. *Williams*, 219.

9. No costs are allowed in suit against secretary of State to enjoin enforcement of act, amending the motor vehicle financial responsibility act, and requiring reports of certain accidents where public question concerning constitutionality of the amendatory act is involved (Act No. 203, § 3a, Pub. Acts 1933, as amended by Act No. 248, Pub. Acts 1943). *Surtman* v. *Secretary of State*, 272.

10. In action and cross action arising out of automobile collision where both parties appeal and neither prevails, no costs are allowed. *Carrothers* v. *French*, 341.

11. No costs are allowed in mandamus proceeding to compel village clerk to countersign refunding special assessment bonds authorized by village council (1 Comp. Laws 1929, § 1788). *Council of the Village of Allen Park* v. *Allen Park Village Clerk*, 361.

12. No costs are allowed any one where judgment is reversed and new trial granted because court and counsel were all in error in leaving out the essential issue in the case. *In re Griffin's Estate*, 377.

13. No costs are allowed on appeal in consolidated certiorari cases in circuit court to review decisions of municipal police trial board in proceedings to review dismissals of members of police force, a public question being involved. *Aller* v. *Detroit Police Department Trial Board*, 383.

14. No costs are allowed in suit to enjoin the establishment of a public fishing site on four lakefront lots because of the nature of the case. *Gableman* v. *Department of Conservation*, 417.

15. No costs are allowed in action by former member of appeal board of the unemployment compensation commission to re-

COSTS—Continued.

cover salary for services rendered, a public question being involved in construction of statutory provisions relative to payment of salary (49 Stat. at L. 626; Act No. 1, §§ 10, 11, 35, Pub. Acts 1936 [Ex. Sess.], as amended by Act No. 347, Pub. Acts 1937). *Roxborough* v. *Michigan Unemployment Compensation Commission*, 506.

16. No costs are allowed on appeal upon affirmance of judgment where appellees did not file a brief. *Wiseman* v. *Musgrave*, 523.

17. No costs are allowed upon denial of mandamus to compel the secretary of State to issue a motor vehicle dealer's license where dealer is permitted to continue business until holding of statutory hearing upon issuance of such license (1 Comp. Laws 1929, § 4671, as amended by Act No. 151, Pub. Acts 1943). *Powers* v. *Secretary of State*, 530.

18. No costs are awarded in suit for accounting between township and city incorporated out of township territory, where the questions involved are of a public nature (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931). *Township of Royal Oak* v. *City of Berkley*, 575.

19. Costs in action against insured tortfeasor are not allowed plaintiff in action against insurer where latter obtained, before injured party sued insured, a covenant not to sue insurer, coupled with agreement that payment thereunder might reduce judgment by the full extent of insurer's liability. *Kallas* v. *Lincoln Mutual Casualty Co.*, 627.

20. Costs on appeal are allowed insured tortfeasor in his action against insurer which had obtained an injured party's covenant not to sue it before action was brought by the injured party against insured but failed to obtain reduction of judgment in amount of covenant, whether or not condition of reversal of judgment for plaintiff herein is fulfilled. *Id.*

21. No costs are awarded upon modification of decree in a substantial manner, since each party prevails in part. *City of Highland Park* v. *Royal Oak No. 7 Storm Sewer Drain District*, 646.

22. No costs are awarded either party on affirmance of decree entered in circuit court where appellee's brief is not in conformity with court rule regarding separate statement of facts and reference to pages of printed record and in combining facts and argument (Court Rule No. 68 [1933]). *Miles* v. *Fredenhagen*, 674.

See INSURANCE (15).

COUNTER AFFIDAVITS—See EQUITY (3).

COUNTER-SIGNATURES—See COSTS (11); MUNICIPAL CORPORATIONS (28).

COUNTIES—See CRIMINAL LAW (29).

COUNTY AUDITOR—See BRIBERY (1, 4, 5); CRIMINAL LAW (19).

COURT JOURNAL—See CRIMINAL LAW (14, 15).

COURT OF CLAIMS—See INTOXICATING LIQUORS.

COURT RULES—See APPEAL AND ERROR (10, 14, 23); COSTS (22); COURTS (1, 4); DIVORCE (2); NEW TRIAL (3); PLEADING (1, 3); PROCESS (1).

COURTS.

1. In dispute between attorney and client over amount allowable for former's services with reference to litigation wherein a fund had been paid into circuit court in chancery by opposing litigants, such court had jurisdiction of the fund and the attorney for the party to whom the sum was awarded (Court Rule No. 4 [1933]). *Schafer* v. *Knuth*, 133.
2. When a court of competent jurisdiction becomes possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of and no court of coordinate authority is at liberty to interfere with its action, in order to prevent unseemly, expensive and dangerous conflicts of jurisdiction and of process. *Id.*
3. Rule that once a court of competent jurisdiction obtains jurisdiction of a case it retains authority over the case until the matter is finally disposed of applies so as to prevent a court of coordinate jurisdiction from obtaining jurisdiction where the two proceedings have identity of parties, subject matter involved, nature of remedies and character of relief sought. *Id.* 134.
4. The circuit court in chancery has jurisdiction in case before it to inquire into the matter of services rendered by attorney for plaintiffs and to fix the fee (Court Rule No. 4 [1933]). *Id.*
5. Where point argued in brief *amicus curiae* was presented in appeal and rightly considered by the court, the opinion as to such point was a precedent and not merely dictum, although the point was not argued by counsel representing the parties. *Council of the Village of Allen Park* v. *Allen Park Village Clerk*, 361.
6. The rule of *stare decisis* should be adhered to. *City of Highland Park* v. *Royal Oak No. 7 Storm Sewer Drain District*, 646.

See ADMINISTRATIVE LAW (1); APPEAL AND ERROR (2, 12); ARBITRATION AND AWARD (1); CONSTITUTIONAL LAW (8); CONTRACTS (6); CRIMINAL LAW (34, 35); INJUNCTION (4); INSURANCE (13); MORTGAGES (7); MUNICIPAL CORPORATIONS (57); OFFICERS (6); STATUTES (8); TRUSTS (1, 4, 9–11, 13).

COVENANT NOT TO SUE—See COSTS (19, 20); INSURANCE (12, 13, 15); RELEASE.

COVENANTS.

1. Subdivision in which lots were marketed as high-class, residential property and subject to building restrictions but recorded restrictions silent as to use and occupancy by colored

COVENANTS—Continued.

persons may not be restricted against use by such persons where there was no plan or agreement common to all home owners in the subdivision relative to such use. *Kathan* v. *Williams*, 219.

2. "Occupancy," as used in restrictive covenants running with the land, means "actual possession." *Gableman* v. *Department of Conservation*, 416.
3. In suit to enjoin the use of four lakefront lots as a public fishing site, the fact that those of the Negro race might have access to the lake for fishing purposes through the facilities thereby afforded by the State department which purchased the lots would not constitute occupancy or possession of such lands in violation of covenant restricting occupancy to persons belonging to the Caucasian race. *Id.*
4. Restrictions which are not a matter of record and of which a party has neither actual nor constructive notice may not be enforced against such party. *Id.*
5. Use of four contiguous lakefront lots as a public fishing site may not be enjoined by adjoining owner on ground that subdivision in which they are situated has been developed pursuant to plan restricting property to residential use only where one lot therein has been used as a boat livery for 10 years, since the alleged plan has not been followed. *Id.*

See APPEAL AND ERROR (25).

COVERAGE—See INSURANCE (9, 11).

CREDIBILITY—See APPEAL AND ERROR (38); CRIMINAL LAW (2, 8); VENDOR AND PURCHASER (6).

CREDIT—See ESTOPPEL (2).

CREDITORS—See BANKRUPTCY (2); CORPORATIONS (5); FRAUDULENT CONVEYANCES (4).

CREDITORS' BILL—See HUSBAND AND WIFE.

CRIMINAL LAW.

1. In prosecution for sodomy and for debauchery of a boy under the age of 15 years, testimony of boy, an epileptic, and others was sufficient to convince a jury of defendant's guilt under both counts beyond a reasonable doubt (Act No. 328, §§ 158, 340, Pub. Acts 1931). *People* v. *Lowenstein*, 94.
2. In prosecution for sodomy and for debauchery of a boy under the age of 15 years, credibility of witnesses was for the jury (Act No. 328, §§ 158, 340, Pub. Acts 1931). *Id.*
3. In prosecution for sodomy and for debauchery of a boy under the age of 15 years, where new trial was sought after it was claimed the 14-year-old complaining witness had recanted, denial of new trial was not an abuse of discretion where it appears such witness and his mother related circumstances under which the alleged repudiation had been procured (Act No. 328, §§ 158, 340, Pub. Acts 1931). *Id.*

CRIMINAL LAW—Continued.

4. Sentence of defendant on two counts, based on the same act and to run concurrently, was not error, as, in effect, it is but a single sentence. *Id.* 95.

5. Conviction under two counts based on the same act and for which two sentences were imposed to run concurrently does not result in the conviction of defendant so as to subject him to additional punishment for two felonies under the habitual criminal act (3 Comp. Laws 1929, § 17338 *et seq.*). *Id.*

6. Remarks of acting prosecuting attorney in opening and closing addresses to jury at trial of defendant for murder in the first degree, alleged to have been so highly inflammatory and prejudicial that defendant did not have a fair trial, *held*, not to call for any exception to general rule that objections to argument not made at the trial will not be considered when made for the first time on appeal. *People* v. *Zesk*, 129.

7. Defendant, charged with murder in the first degree, may not complain as to the introduction of statements made by other participants in the crime where his own attorney introduced them, notwithstanding the statements undoubtedly had a very damaging effect. *Id.* 130.

8. The credibility of an accomplice, like that of any other witness, is exclusively a question for the jury and a jury may convict on the uncorroborated testimony of an accomplice. *Id.*

9. On trial for murder in the first degree wherein an accomplice who had pleaded guilty was the sole witness against defendant, it was not error for trial judge not to charge jury it must carefully consider the weight of the accomplice's testimony in the absence of a request so to do. *Id.*

10. A person should not be subjected to trial for two separate and distinct offenses at one time. *People* v. *Bommarito*, 139.

11. The people cannot be required to elect between counts where the offenses charged arose out of the same acts at the same time and the same testimony must be relied on for conviction. *Id.*

12. In prosecution of four defendants, evidence as to prior convictions of three of them was inadmissible to establish guilt of defendants charged with conspiracy to violate the gaming laws but it is admissible to establish intent (3 Comp. Laws 1929, § 17320). *Id.* 140.

13. In prosecution for conspiracy to violate the gaming laws it was not error to use exhibits used in previous convictions of three of the four defendants for the purpose of showing intent (3 Comp. Laws 1929, § 17320). *Id.*

14. Ministerial errors in court journal and commitment papers may be corrected pursuant to direction of the Supreme Court under its constitutional power and, by order *nunc pro tunc*, the record made to speak the judicial determination relative to the conviction and grounds for sentence imposed. *In re Gray*, 145.

15. Where record in habeas corpus proceeding and ancillary writ of certiorari shows that, under information, charge of the court

and verdict of the jury, petitioner was convicted of the offense of "assault with intent to commit robbery while armed with a dangerous weapon" but journal entry of sentence and warrant for removal to prison recite he had been convicted of "attempted robbery armed," record is remanded to circuit court for proper correction of journal and issuance of supplemental commitment (3 Comp. Laws 1929, §§ 16723, 17342). *Id.*

16. Generally a change of venue, a mistrial or a new trial will be granted in a criminal case when a community is so aroused that a fair and impartial trial cannot be had. *People* v. *Schneider*, 158.

17. The continuance of a criminal case is within the sound discretion of the trial court. *Id.*

18. To warrant finding an abuse of discretion in the denial of a motion for continuance by a defendant in a criminal case, prejudice to him must be apparent or proved to have been at least probable. *Id.*

19. The denial of a motion for continuance in a criminal case did not constitute an abuse of discretion where defendant's counsel announced that he was satisfied with the jurors selected after they had been questioned concerning their fitness to sit as jurors in trial of a county auditor on charge of accepting a bribe and trial took place shortly after the appearance of newspaper reports pertaining to corruption among the local county officers (Act No. 328, § 118, Pub. Acts 1931). *Id.*

20. On appeal from judgment of conviction of crime, the test is not whether there were some irregularities in the trial but whether defendants had a fair and impartial trial. *Id.* 159.

21. An individual, previously convicted of five sex offenses and upon arrest for indecent exposure, examined and committed to the care of the State hospital commission as a criminal sexual psychopathic person, is not punished for the crime charged but is detained until cured of habit of committing sex offenses, hence detention was not illegal although it has lasted longer than maximum sentence which could have been imposed for crime charged (Act No. 328, § 335, Pub. Acts 1931, Act No. 165, Pub. Acts 1939). *In re Kemmerer*, 313.

22. Denial of petition for discharge, filed by one committed as a criminal sexual psychopathic person, was proper where petition did not present a factual basis showing recovery entitling him to discharge (Act No. 165, § 7, Pub. Acts 1939). *Id.* 314.

23. On appeal from judgment of conviction of the crime of perjury for testifying falsely in a prosecution for crime, the question of whether or not the alleged perjurer was properly granted immunity on motion of an *amicus curiae* at preceding so-called one-man grand-jury proceeding is not before the Supreme Court (3 Comp. Laws 1929, § 17220; Act No. 328, § 422, Pub. Acts 1931). *People* v. *Woodson*, 392.

24. On appeal from conviction of charge of perjury no reversible error is found in court's charge to jury when considered as a

CRIMINAL LAW—Continued.

whole where defendant presented no specific requests to charge and made no objection to charge when given and there does not appear to have been a miscarriage of justice (3 Comp. Laws 1929, § 17354; Act No. 328, § 422, Pub. Acts 1931). *Id.*

25. Where plea of guilty to charge of rape and assault with intent to commit the crime of rape was voluntarily made and trial judge delayed two days before sentencing defendant to life imprisonment, denial of motion to set aside and vacate the sentence and for a new trial is affirmed (3 Comp. Laws 1929, § 17328; Act No. 328, §§ 85, 520, Pub. Acts 1931). *People* v. *Vester*, 409.

26. Defendant in prosecution for uttering a forged accountable receipt may not properly claim the instrument was not such a receipt where he had previously brought an action thereon in justice court (Act No. 328, §§ 248, 249, Pub. Acts 1931). *People* v. *Parmelee*, 431.

27. The statute making it a felony for an executive, legislative or judicial officer to accept a bribe does not make it a crime to use influence (Act No. 328, § 118, Pub. Acts 1931). *People* v. *Leve*, 557.

28. It was error to try defendant, charged with accepting a bribe contrary to section of penal code making it a felony for an executive, legislative or judicial officer to accept a bribe, under an information which not only did not conform to the language of the statute but was so broad that the jury could consider the use of influence by defendant, the use of influence not being an element of the crime as set forth in the statute (Act No. 328, § 118, Pub. Acts 1931). *Id.*

29. Director of bureau of investigation which had been created by board of county auditors to interview and investigate prospective indigent adult patients hospitalized at county expense, whose duties were to ascertain facts and make recommendations but who performed no duties independently and without the control of the board, who had no power to determine policies, enter into contracts, or vote upon any question, was not an executive officer as such term is used in section providing that acceptance of a bribe by an executive officer was a felony (Act No. 328, § 118, Pub. Acts 1931). *Id.* 558.

30. Defendant, charged with accepting a bribe and described in information as a director of bureau of investigation of board of county auditors, should have been proceeded against and, if found guilty, sentenced under section of penal code imposing penalty of misdemeanor upon employees accepting bribes rather than under section imposing felony upon public officers since he was not a public officer (Act No. 328, §§ 118, 125, Pub. Acts 1931). *Id.*

31. The probation provisions of the code of criminal procedure have no application to the question of whether a sentencing court, without complying with the probation statute and after suspending sentence at the request of the defendant for a period of 19 months, lost jurisdiction to impose sentence (3 Comp. Laws 1929, § 17371 *et seq.*). *People* v. *Cordell*, 585.

CRIMINAL LAW—Continued.

32. The statute authorizing the judge of the sentencing court to pronounce judgment and pass sentence on persons convicted of crime does not in express terms declare when sentence must be pronounced (3 Comp. Laws 1929, § 17329). *Id.*

33. Although sentences may be suspended for various purposes, where the prosecution is not abandoned and suspension is had upon defendant's request before commencement of execution of sentence until his discharge from the armed services and it was thereafter continued about a year until after the sentencing judge had had further investigation made through the probation department, the sentencing judge did not lose jurisdiction to resentence defendant for a minimum term that was less than the original term by the length of his service in the armed forces (3 Comp. Laws 1929, § 17329). *Id.*

34. While the power to suspend sentence and the power to grant reprieves and pardons are distinct and different in origin and nature the power to suspend sentence has always been regarded as a judicial function. *Id.*

35. The fact that a statute is enacted which in terms authorizes courts to suspend sentence does not confer upon courts a new power since such power was, at common law, asserted to be a power inherent in the courts (3 Comp. Laws 1929, § 17329). *Id.* 586.

36. The suspension of a sentence simply postpones the judgment of the court temporarily or indefinitely, but the conviction and liability following it, and all civil disabilities, remain and become operative when judgment is rendered. *Id.*

See APPEAL AND ERROR (2); BRIBERY; FORGERY; HABEAS CORPUS (1, 2); INDICTMENT AND INFORMATION (2–4); PERJURY; WITNESSES.

CRIMINAL SEXUAL PSYCHOPATHIC PERSON—See CRIMINAL LAW (21, 22); HABEAS CORPUS (1, 2).

CROSSINGS—See RAILROADS.

CURING ERROR—See CRIMINAL LAW (14, 15).

CUSTODY OF CHILD—See PARENT AND CHILD.

DAMAGES.

1. On appeal from judgment for $5,000 in nonjury action by plaintiff husband as administrator of his wife's estate, remittitur of that in excess of $3,000 is ordered where it appears husband and wife each had an expectancy of about eight years and she had general charge of summer resort hotel and cottages which they operated, her services being stated as worth $100 a month, and that she was dazed during first part of six days that she survived the accident in which she received injuries to her head, face, chest, abdomen and left leg; medical, hospital, funeral and burial expenses having been recovered by husband in action in his own right. *In re Olney's Estate,* 67.

DAMAGES—Continued.

2. Verdict of $8,500 to 21-year-old woman with expectancy of 41.53 years *held,* not so excessive as to require disturbance on appeal where her face was considerably disfigured with scars, she still had severe headaches at time of trial some two years after the accident, had been hospitalized for three weeks and in bed at home thereafter and had suffered injuries to forehead, nose, head and left leg. *Uhrstadt* v. *Sauer Cooperage Co.,* 202.

3. Verdict of $6,000 in favor of miner whose knee was broken in three places in collision between automobile and railroad flat car *held,* not excessive where knee is stiff, plaintiff has lost $2,400 in wages, later worked at 84 cents a day less, had a hospital bill of $93.65, a doctor bill of $150, and had suffered pain and inconvenience. *Silanpa* v. *Thomson,* 326.

See AUTOMOBILES (1); BENEFICIAL ASSOCIATIONS (1); DEATH; EQUITY (2); INTEREST (2); MINES AND MINERALS (9); WORKMEN'S COMPENSATION (10).

DEALERS—See COSTS (17); MANDAMUS (3).

DEARBORN—See COSTS (5); MUNICIPAL CORPORATIONS (8–13).

DEATH.

1. The purpose of the amendment to the death act was to enable a person to bring his action thereunder regardless of whether there was instantaneous death or survival of the injured person and to provide to what person or persons the damages recovered should be distributed (3 Comp. Laws 1929, § 14061 *et seq.,* as amended by Act No. 297, Pub. Acts 1939). *In re Olney's Estate,* 66.

2. Under the death act as amended, damages are recoverable for (1) pecuniary injury resulting from the death to those persons who are entitled to such damages, (2) reasonable medical, hospital, funeral and burial expenses, and (3) reasonable compensation for the pain and suffering undergone by deceased (3 Comp. Laws 1929, § 14061 *et seq.,* as amended by Act No. 297, Pub. Acts 1939). *Id.*

3. In husband's action under the death act as amended for damages arising because of death of wife, while he has no legally enforceable claim to support or maintenance by deceased he was entitled to the value of her services less the reasonable cost of her maintenance (3 Comp. Laws 1929, § 14061 *et seq.,* as amended by Act No. 297, Pub. Acts 1939). *Id.*

4. While a surviving husband is legally liable for the payment of his wife's reasonable medical, hospital, funeral, and burial expenses, where he has recovered therefor in action brought in his own right he may not recover for them in action brought as administrator of his wife's estate under the death act as amended (3 Comp. Laws 1929, § 14061 *et seq.,* as amended by Act No. 297, Pub. Acts 1939). *Id.*

See ABATEMENT AND REVIVAL (1, 2); AUTOMOBILES (5, 7); CONTRACTS (3); DAMAGES (1); DEEDS (4, 5); EQUITY (3); MASTER AND SERVANT (3, 4); MORTGAGES (5); PARTNERSHIP (2).

DEBAUCHERY—See CRIMINAL LAW (1–3).

DEBTOR AND CREDITOR—See FRAUDULENT CONVEYANCES (6, 11).

DEEDS.

1. A deed should be construed so as to give effect to the intention of the parties, such intention to be ascertained, if possible, by considering all provisions of the deed. *Bice* v. *Holmes,* 111.
2. In construing a deed where there is some uncertainty as to the meaning of certain terms, the court may also properly consider the surrounding facts and circumstances in determining the parties' intention. *Id.*
3. In interpreting a reservation clause in a deed, the purpose is to discern the intention of the grantor from the words employed; the subject matter and attending circumstances to be considered where the words have a doubtful meaning. *Id.*
4. Provision of deed conveying undivided fractional interests in several parcels of land, a part of which grantor had inherited from his father, who had died intestate in 1887, and a part of which grantor had acquired by direct conveyance from others, made after death of father's widow and excepting and reserving all ores and minerals therein and thereafter expressing intent to convey to grantee the entire remainder of the interests of grantor's father excepted mineral rights of all lands in question whether received by grantor from his father or otherwise. *Id.*
5. In suit to set aside deeds and other instruments conveying property of mother to defendant daughter and latter's agreement to care for, maintain, and support her mother and make a payment of $500 after the mother's death to defendant's brother, holding of the circuit judge that at the time of the transfer the mother was mentally competent was fully supported by the preponderance of the proof. *Drinski* v. *Drinski,* 479.
6. Finding of trial judge that contention that defendant daughter had failed to perform her contract to support her mother for which the daughter had received deeds and other instruments from the mother conveying property valued at approximately $15,000 had not been proved by parties seeking to set aside the instruments by which the transaction was effected is sustained under record presented, especially where it is shown that upon termination of the daughter's home relation with her mother that latter struck the daughter and later stated she was going to kill the daughter and mother herself sought to set aside instruments solely on ground of fraud. *Id.*

See APPEAL AND ERROR (20); EQUITY (4); HUSBAND AND WIFE; LIS PENDENS (3, 5); LOST INSTRUMENTS; QUIETING TITLE; TAXATION (6).

DEFAULTS—See MINES AND MINERALS (1).

DEFENSES—See APPEAL AND ERROR (14); ESTOPPEL (3); LANDLORD AND TENANT (2).

DELAYS—See ARBITRATION AND AWARD (2, 3, 7).

DELINQUENT TAXES—See COSTS (4); MUNICIPAL CORPORATIONS (54); TAXATION (5).

DEMANDS—See ARBITRATION AND AWARD (3, 7).

DE NOVO REVIEW—See APPEAL AND ERROR (4, 19, 25, 29, 33, 40).

DEPOSIT AGREEMENT—See TRUSTS (10).

DEPOSITS—See COURTS (1); SPECIFIC PERFORMANCE (7).

DESCENT AND DISTRIBUTION—See DEATH (1); DEEDS (4).

DETROIT—See APPEAL AND ERROR (24); MUNICIPAL CORPORATIONS (29, 33).

DICTUM—See COURTS (5).

DIRECTED VERDICT—See APPEAL AND ERROR (3, 38); AUTOMOBILES (12–14, 16); FRAUD; MASTER AND SERVANT (3).

DIRECTOR OF BUREAU OF INVESTIGATION OF BOARD OF COUNTY AUDITORS—See CRIMINAL LAW (29, 30).

DIRECTORS—See BANKS AND BANKING (1); CORPORATIONS (4, 5); INSURANCE (16).

DISABILITY—See APPEAL AND ERROR (16); INSURANCE (2); WORKMEN'S COMPENSATION (1).

DISCHARGE—See CRIMINAL LAW (22).

DISCIPLINE OF MEMBERS—See BENEFICIAL ASSOCIATIONS.

DISCOUNT—See INTOXICATING LIQUORS.

DISCRETION OF BOARD—See TOWNSHIPS (7, 8).

DISCRETION OF COMMISSION—See MUNICIPAL CORPORATIONS (12).

DISCRETION OF COURT—See APPEAL AND ERROR (23); CONTINUANCE; CRIMINAL LAW (3, 17–19); MANDAMUS (2); NEW TRIAL (2, 3, 5); PLEADING (2, 3); SPECIFIC PERFORMANCE (5); TRUSTS (12).

DISCRIMINATION—See CONSTITUTIONAL LAW (1, 2).

DISEASE—See WILLS (2).

DISMISSAL AND NONSUIT—See JUDGMENT (1).

DISPOSAL—See APPEAL AND ERROR (12, 13).

DISSOLUTION—See APPEAL AND ERROR (35); PARTNERSHIP (2).

DIVISION OF PROPERTY—See MUNICIPAL CORPORATIONS (46, 49, 56).

DIVORCE.

1. Divorce decree may join award for alimony with award in lieu of dower, but if so awarded in lump sum, contempt for nonpayment thereof may not be adjudged. *Frohnapel* v. *Frohnapel*, 215.

DIVORCE—Continued.

2. Where property settlement agreement, incorporated in decree of divorce, provided for payment of a certain sum per month to wife in equal semimonthly payments and husband failed to make such payments, trial court was not in error in failing to find husband guilty of contempt for nonpayment of alimony where decree which complied with court rule awarded no alimony, permanent or temporary, to the wife (Court Rule No. 51 [1933, as amended in 1938]). *Id.*

See QUIETING TITLE.

DOING BUSINESS—See CORPORATIONS (9).

DRAINS.

1. A landowner has no right, under any circumstances, to transfer his wet and untillable land to his neighbor by the installation of an artificial drainage system and carrying the water at once upon his neighbor's land so that it will not overflow and percolate his own soil, irrespective of whether or not it was good husbandry to do so. *Ruehs* v. *Schantz*, 245.

2. Funds which had been paid by property owners before drainage district was declared void and are not now recoverable by them are awarded to be divided *pro rata* among holders of outstanding bonds, the proceeds of which were used to pay for the public improvement (Act No. 316, Pub. Acts 1923, as amended). *City of Highland Park* v. *Royal Oak No. 7 Storm Sewer Drain District*, 646.

See INJUNCTION (1); WATERS AND WATERCOURSES (1).

DUAL WHEEL TRUCK TIRE—See MASTER AND SERVANT (6).

DUE PROCESS—See AUTOMOBILES (6); CONSTITUTIONAL LAW (2); HABEAS CORPUS (1).

DUPLICITY—See INDICTMENT AND INFORMATION (1).

DWELLINGS—See MUNICIPAL CORPORATIONS (5, 6).

EARNING CAPACITY—See DAMAGES (1, 3).

ECCENTRICITY OF BEHAVIOR—See WILLS (3).

ELECTION OF COUNTS—See CRIMINAL LAW (10, 11).

ELECTIONS—See MUNICIPAL CORPORATIONS (26, 28).

ELUTRIATION TANK—See ARBITRATION AND AWARD (3).

EMINENT DOMAIN—See APPEAL AND ERROR (27); COSTS (4); TAXATION (5).

ENGINEERS—See ARBITRATION AND AWARD (2).

EPILEPSY—See CRIMINAL LAW (1).

EQUALLY DIVIDED COURT—See JUDICIAL SALES.

EQUAL PROTECTION—See AUTOMOBILES (6); CONSTITUTIONAL LAW (1).

EQUITY.

1. Trial court properly denied motion to dismiss bill to set aside conveyances of real estate as a bill in aid of execution where plaintiff, as trustee of bankrupt's estate, stands in the place of a judgment creditor who had caused a writ of *fieri facias* to be issued and levied on the bankrupt's real estate previous to plaintiff's appointment. *Becker* v. *Partridge,* 46.
2. Since every man has a right to the enjoyment of his property, equity will interfere to protect that right provided the injury to the owner's enjoyment be a substantial one. *Euchs* v. *Schantz,* 245.
3. Two applications for rehearing of suit to set aside instruments whereby mother transferred property valued at approximately $15,000 to her daughter in consideration of latter's promise to care for, maintain and support the mother and pay $500 to brother after mother's death were properly denied in view of the fact that the alleged newly-discovered evidence was merely cumulative and the counter affidavits filed materially weakened the affidavits in support of the motions. *Drinski* v. *Drinski,* 479.
4. Provisions in decree for defendant in suit to set aside transfers of real and personal property to defendant daughter that the conveyances were valid and that the daughter had performed her agreement to support the mother, thereby practically quieting title in such defendant although she had prayed for no affirmative relief in her answer, were germane to issues presented in plaintiffs' amended bill and not error of which plaintiffs might complain. *Id.*
5. Determination of ownership of valuable machinery, property in possession of partnership of which plaintiff was appointed receiver, was a matter within jurisdiction of court in suit to enjoin removal of such machinery by claimed owner-lessor thereof since the receiver had no adequate remedy at law to set aside the claimed lease on the ground of fraud or to prevent him from taking possession of the machines and disrupting the business, ownership had to be determined as a necessary incident to the accounting of the copartnership, the appointment of the receiver, and control of the court and receiver over the firm's property, the parties were before the court and the subject matter was within its jurisdiction. *Equitable Trust Co.* v. *Karos,* 565.
6. While generally on a motion to dismiss allegations well pleaded must be assumed to be true, where attention is called to a previous case involving the same subject matter before the same court, the prior decision insofar as it governs the facts alleged is final as there cannot be a rehearing under the guise of a new bill of complaint. *City of Highland Park* v. *Royal Oak No. 7 Storm Sewer Drain District,* 646.
7. Interlocutory decree in suit for accounting, injunction and receivership of joint adventure covering oil and gas leases required that accounting be had as to leases entered into in an

EQUITY—Continued.

out-of-State field as well as those in a Michigan county, hence no modification of the decree is necessary in order to obtain final accounting as to all leases involved. *Miles* v. *Fredenhagen*, 674.

8. Disallowance of claims for extras under contract for construction of portions of a sewage treatment plant which the city officials considered without merit does not merit aspersion in suit to enjoin arbitration of such claims that city, as plaintiff, was in a court of equity with unclean hands. *City of Detroit* v. *A. W. Kutsche & Co.*, 701.

See APPEAL AND ERROR (9); ARBITRATION AND AWARD (8); BANKRUPTCY (1); EXECUTORS AND ADMINISTRATORS (3); FRAUDULENT CONVEYANCES (1, 12); INSURANCE (5); MORTGAGES (5, 7); NUISANCE (2); SPECIFIC PERFORMANCE (2–4, 6); TRUSTS (4, 6).

ESTATES OF DECEDENTS.

1. Claims against the estates of deceased persons must be proved by the claimants and judicially found. *In re Griffin's Estate*, 376.

2. A claim against the estate of a deceased person, based upon a written agreement, alleged to have been signed by the decedent, must be affirmatively proved by the claimant, it not being within the power of the administrator to waive such proof nor of the court to render such proof unnecessary. *Id.*

See ABATEMENT AND REVIVAL (3); AUTOMOBILES (1); DEATH (4).

ESTHETICS—See NUISANCE (1).

ESTIMATES—See CONTRACTS (4).

ESTOPPEL.

1. A person who permits another, who is in fact the owner and operator of a business, to conduct such business in such a way as to create the appearance of ownership in the first party may be estopped to deny such relationship to or connection with the business as will cause him to be liable for breach of contract to a third party whose dealings with the business were based upon the first party's apparent ownership thereof. *Webb* v. *Levene*, 38.

2. Appellant who operated a laundry under an assumed name and bought coal from plaintiff is estopped from denying liability for coal purchased after assets of the business became property of defendant corporation with the same or a similar name as long as credit was extended to him as owner where he failed to notify plaintiff of any change in personnel of the ownership of the laundry (2 Comp. Laws 1929, § 9825 *et seq.*, as amended by Act No. 104, Pub. Acts 1939). *Id.* 39.

3. A fundamental requisite of estoppel is that conduct, whether action or inaction, on the part of the one against whom the estoppel is asserted has worked to the disadvantage of the

ESTOPPEL—Continued.

party who urges this defense. *Township of Royal Oak* v. *City of Ferndale,* 461.

See FRAUDULENT CONVEYANCES (1); INSURANCE (5); MORTGAGES (4); MUNICIPAL CORPORATIONS (44); SALES (1); TOWNSHIPS (4, 5); TRUSTS (8).

EVICTION PROCEEDING—See JUDGMENT (3); LANDLORD AND TENANT (3).

EVIDENCE.

1. Judicial notice is taken of the fact that public funds have been expended in advertising the State as a summer playground. *Gableman* v. *Department of Conservation,* 417.
2. When questions of handwriting are involved, specimens of admitted or proven writings are admissible for the purpose of comparison regardless of whether or not the paper on which such writing appears is one in evidence or connected with the case. *People* v. *Parmelee,* 431.
3. It is common knowledge among persons whose employment is closely connected with operations around automobiles in enclosed places such as garages that carbon monoxide gas is expelled through the exhaust of a running motor and that even small portions of the gas mixed with air are poisonous and may cause a person who inhales such gas to collapse. *Hutchinson* v. *Tambasco,* 597.

See APPEAL AND ERROR (1, 3, 5, 6, 8, 15, 21, 22, 24, 30, 31, 33–35, 38); AUTOMOBILES (1–3, 11); BANKRUPTCY (2); BENEFICIAL ASSOCIATIONS (1); BRIBERY (1, 5); BROKERS (3); CONSPIRACY; CRIMINAL LAW (1, 9, 11, 12); DEEDS (2, 3, 5, 6); ESTATES OF DECEDENTS; FORGERY (1, 2); FRAUD; INDICTMENT AND INFORMATION (3); INTERPLEADER; LANDLORD AND TENANT (1, 5); MASTER AND SERVANT (2); MORTGAGES (1, 9, 10); MUNICIPAL CORPORATIONS (30, 31); PERJURY; QUIETING TITLE; SALES (1, 7); UNEMPLOYMENT COMPENSATION (4); VENDOR AND PURCHASER (5, 6); WILLS (4–7); WORKMEN'S COMPENSATION (1, 5).

EXCAVATIONS—See AUTOMOBILES (15).

EXECUTION—See HUSBAND AND WIFE (1).

EXECUTION OF INSTRUMENTS—See LOST INSTRUMENTS; VENDOR AND PURCHASER (4, 5, 8).

EXECUTORS AND ADMINISTRATORS.

1. Each suit to set aside a deed of property by a fiduciary for his own benefit must stand upon its own facts (Act No. 288, chap. 9, § 27, Pub. Acts 1939). *Smith* v. *Withey,* 364.
2. An administratrix's sale of estate property for the benefit of herself is void and it makes no difference by what means the benefit is obtained (Act No. 288, chap. 9, § 27, Pub. Acts 1939). *Id.*

EXECUTORS AND ADMINISTRATORS—Continued.

3. Plaintiffs, two of decedent's three children to whom real estate had been devised in equal shares, were properly charged with two-thirds of claims filed, allowed and paid by estate upon being awarded two-thirds of the estate in suit to set aside deed by which administratrix, their sister, had sought to obtain entire estate for her own benefit by means of fraudulent scheme. *Id.*

4. Scheme whereby defendant sister of plaintiffs had sought to obtain benefit of entire estate for herself in property that had been devised to the three of them in equal shares through handling the estate as administratrix was properly *held*, fraudulent, entitling plaintiffs to a two-thirds interest in the estate (Act No. 288, chap. 9, § 27, Pub. Acts 1939). *Id.*

See ABATEMENT AND REVIVAL (3); APPEAL AND ERROR (20, 23); AUTOMOBILES (2); DAMAGES (1); DEATH (4); MASTER AND SERVANT (3, 4, 6).

EXHIBITS—See CRIMINAL LAW (13); INTERPLEADER.

EXPECTANCY—See DAMAGES (1, 2).

EXPRESS WARRANTY—See APPEAL AND ERROR (5).

EXTENSION OF TIME—See NEW TRIAL (3).

EXTRAS—See ARBITRATION AND AWARD (7).

FACE INJURIES—See DAMAGES (1).

FACIAL DISFIGUREMENT—See DAMAGES (2).

FAILURE OF CONSIDERATION—See DEEDS (6).

FAIR TRIAL—See CRIMINAL LAW (20).

FALSE DECLARATIONS—See INSURANCE (4).

FAMILY CORPORATIONS—See MORTGAGES (1).

FAMILY TRANSACTIONS—See FRAUDULENT CONVEYANCES (11).

FEES—See ATTORNEY AND CLIENT; COURTS (4); INJUNCTION (5).

FELLOW SERVANT RULE—See MASTER AND SERVANT (5).

FELONY—See CRIMINAL LAW (29, 30).

FENCES—See AUTOMOBILES (15).

FICTITIOUS SIGNATURES—See VENDOR AND PURCHASER (6, 7).

FIDUCIARIES—See APPEAL AND ERROR (20); EXECUTORS AND ADMINISTRATORS (1); MORTGAGES (1).

FIDUCIARY RELATION—See CORPORATIONS (1).

FILING—See INTOXICATING LIQUORS; LIS PENDENS (3–5).

FINANCE COMPANIES—See APPEAL AND ERROR (32); CORPORATIONS (12, 15); INSURANCE (9, 11).

FINANCIAL RESPONSIBILITY ACT—See AUTOMOBILES (5–7); CONSTITUTIONAL LAW (3); COSTS (9).

FISH—See APPEAL AND ERROR (25); COSTS (14); COVENANTS (3, 5); NUISANCE (1, 3); WATERS AND WATERCOURSES (2).

FIXTURES—See FRAUDULENT CONVEYANCES (4).

FLAGMEN—See RAILROADS.

FLOODING LANDS—See WATERS AND WATERCOURSES (1).

FORCIBLE ENTRY AND DETAINER.

In suit by tenant to restrain execution of writ of restitution issued by circuit court, plaintiff's contention that she was entitled to the statutory notice to quit because she occupied the premises some 11 weeks after entry of unappealed judgment of restitution before the writ was issued is not supported by record showing negotiations were then being had relative to an amicable settlement of the differences between the parties (3 Comp. Laws 1929, § 13492, as amended by Act No. 145, Pub. Acts 1935). *Richardson* v. *Richardson*, 336.

FORECLOSURE—See APPEAL AND ERROR (9, 10); CORPORATIONS (3); MORTGAGES (1–7); TRUSTS (1, 2, 4–10, 12, 13).

FOREHEAD INJURIES—See DAMAGES (2).

FOREMAN—See WORKMEN'S COMPENSATION (2, 6, 7).

FORFEITURE—See INSURANCE (7); MINES AND MINERALS (1–5, 8).

FORGERY.

1. In prosecution for forging and uttering a forged "accountable receipt," it was proper to admit check in evidence which bore the genuine signature of person whose signature is claimed to have been forged on the receipt (Act No. 328, §§ 248, 249, Pub. Acts 1931). *People* v. *Parmelee*, 431.
2. Proof of fraudulent intent in prosecution for forging and uttering a forged accountable receipt was sufficiently shown by action thereon by defendant against complaining witness (Act No. 328, §§ 248, 249, Pub. Acts 1931). *Id.*
3. In prosecution for forging and uttering a forged accountable receipt, claimed impropriety of examination of questioned instrument in a handwriting laboratory and of undue emphasis in court's charge by gratuitous mention of the crime of uttering when jury requested further instruction concerning venue of claimed forgery *held*, inconsequential, there being no impropriety in such examination and no undue emphasis in court's charge (Act No. 328, §§ 248, 249, Pub. Acts 1931). *Id.* 432.

See CRIMINAL LAW (26); INDICTMENT AND INFORMATION (2, 3).

FORGIVING PORTION OF CLAIM—See MORTGAGES (6); TRUSTS (4, 5, 12).

FRAUD.

In action of trespass on the case for alleged fraudulent conspiracy to obtain lumber and materials for modernizing a tavern, evidence *held*, insufficient to submit issue as to fraudulent conspiracy to jury. *Gratiot Lumber & Coal Co.* v. *Lubinski*, 662.

See APPEAL AND ERROR (20, 33); CORPORATIONS (5); DEEDS (6); EXECUTORS AND ADMINISTRATORS (3, 4); FRAUDULENT CONVEYANCES (6, 8, 9, 11); INSURANCE (4); MORTGAGES (1); PLEADING (4); VENDOR AND PURCHASER (5).

FRAUDS, STATUTE OF.

Rule that agent need not have written authorization to bind his principal applies only to statute of frauds pertaining to personal property, not statute relating to realty (Comp. Laws 1929, §§ 9443, 13417). *Jaynes* v. *Petoskey*, 32.

See BROKERS (1, 3, 4).

FRAUDULENT CONVEYANCES.

1. Transferees' motion to dismiss bill by trustee in bankruptcy to set aside transfers of real estate to bankrupt and his wife was properly denied as to certain parcels where wife acquired her interest within six years previous to suit and holders of title were merely nominal title holders, as equity will look through the subterfuge of deeding the property to others in order to reach the real parties in interest and statutes of limitation, applied by analogy in equity, do not strictly control the question as to whether an action is barred in chancery by laches or estoppel (3 Comp. Laws 1929, § 13976, as amended by Act No. 72, Pub. Acts 1941). *Becker* v. *Partridge*, 46.
2. A conveyance of real estate is not within the provisions of the bulk sales act, such act applying to sales of stocks of merchandise (2 Comp. Laws 1929, § 9545 *et seq.*). *Farrell* v. *Paulus*, 441.
3. The status of plaintiff with whom one defendant had a contract to repurchase certain shares of stock in a brewing company which went bankrupt and from whom plaintiff had made demand for return of his money, as a creditor, is determined as of the date when plaintiff's cause of action arose, not the date when judgment was obtained or entered, hence debtor's transfers of interest in partnership which left him insolvent and which were made during pendency of action in which judgment was rendered against him are void as to creditors, notwithstanding an attempted compliance with the bulk sales act (2 Comp. Laws 1929, § 9545 *et seq.*). *Id.*
4. Under the bulk sales act, the transfer of an interest, in whole or in part, in the assets of a copartnership consisting of a stock of merchandise, or merchandise and fixtures, otherwise than in ordinary course of trade and in the regular prosecution of the business, is void as to creditors unless the purchaser

FRAUDULENT CONVEYANCES—Continued.

receives a list of creditors of the seller, under oath, and unless the purchaser notifies every creditor stated in the list, or of which he has knowledge, of the proposed sale (2 Comp. Laws 1929, § 9545 *et seq.*). *Id.*

5. In judgment creditor's suit to reach assets of debtor, brought against debtor and transferees of partnership assets, who were his wife, son, partner and latter's wife, where transfers were arranged by debtor's attorney during pendency of action in which plaintiff obtained his judgment, the knowledge of the attorney of plaintiff's claim was sufficient notice to defendants thereof and, where the parties failed to comply with the bulk sales act, plaintiff has a right to follow the property in the hands of defendants (2 Comp. Laws 1929, § 9545 *et seq.*). *Id.* 442.
6. Transfer by debtor of plaintiff of partnership interest to debtor's wife and "to the said partnership" with intent to hinder, delay and defraud plaintiff creditor who was then prosecuting action against such debtor was void as against such creditor, especially where it does not appear that the debtor's indebtedness, if any, to his wife or to the partnership was satisfied, cancelled or discharged (3 Comp. Laws 1929, §§ 13395, 13434). *Id.*
7. The actual intent of one who transfers his assets to others without a fair consideration is unimportant where it leaves the transferor insolvent (3 Comp. Laws 1929, § 13395). *Id.*
8. In a suit to set aside a conveyance alleged to have been made with actual intent to hinder, delay or defraud present or future creditors, the only method of determining actual intent is by a consideration of the circumstances surrounding the transaction (3 Comp. Laws 1929, § 13398). *Id.*
9. Surrounding circumstances which usually accompany an actual intent to hinder, delay or defraud creditors and from which fraud may be inferred are called badges of fraud (3 Comp. Laws 1929, § 13392 *et seq.*). *Id.*
10. When a questioned conveyance renders the grantor insolvent, fraudulent intent may be inferred (3 Comp. Laws 1929, § 13392 *et seq.*). *Id.*
11. As a general rule transactions between members of a family must be closely scrutinized when the rights of creditors are involved and when such transactions are accompanied by other badges of fraud, a full explanation of the conveyance is required when it is challenged by an unsatisfied creditor (3 Comp. Laws 1929, § 13392 *et seq.*). *Id.* 443.
12. Transfer of one-fourth interest in partnership to debtor's son which left debtor insolvent and which was made without any consideration is only portion of transferred interest set aside where subjection of such portion or the income therefrom is sufficient to satisfy judgment creditor's claim and equity does not require that judgment debtor's wife be divested of her interest in the partnerhip for the benefit of plaintiff herein (Comp. Laws 1929, § 9868, § 13392 *et seq.*). *Id.*

See BANKRUPTCY (1, 2); EQUITY (1).

FREE PRESS—See CONSTITUTIONAL LAW (7).

FREE SPEECH—See CONSTITUTIONAL LAW (6, 7).

FRIEND OF THE COURT—See TRUSTS (7, 8).

FRONTAGE—See MUNICIPAL CORPORATIONS (15).

FUNERAL EXPENSES—See DAMAGES (1); DEATH (2, 4).

GAMING—See ARREST (2); CONSPIRACY; INDICTMENT AND INFORMATION (1).

GARAGES—See EVIDENCE (3).

GAS HOLDER—See ARBITRATION AND AWARD (3).

GASOLINE FILLING STATION—See MASTER AND SERVANT (3–6).

GENERAL AGENTS—See INSURANCE (3, 4).

GENERAL FUND—See MUNICIPAL CORPORATIONS (48, 51, 52).

GOOD FAITH—See APPEAL AND ERROR (27); LANDLORD AND TENANT (1); QUIETING TITLE.

GOVERNOR—See OFFICERS (2, 4); UNEMPLOYMENT COMPENSATION (5).

GRAND JURY—See CRIMINAL LAW (23); PERJURY (1); WITNESSES.

GREAT WEIGHT OF EVIDENCE—See AUTOMOBILES (11); LANDLORD AND TENANT (1); UNEMPLOYMENT COMPENSATION (4).

GUARDIAN AND WARD—See BROKERS (3).

HABEAS CORPUS.

1. Claims of petitioner for habeas corpus that there had been no examination in open court on petition for his commitment as a criminal sexual psychopathic person and that he had not waived a jury trial thereupon *held*, not sustained by record on ancillary writ of certiorari (Act No. 165, Pub. Acts 1939). *In re Kemmerer*, 313.
2. Individual committed as a criminal sexual psychopathic person who fails to receive proper treatment for his condition and is suffering any unusual punishment has remedy of habeas corpus, preferably in circuit court of county wherein institution in which he is confined is located (Act No. 165, Pub. Acts 1939). *Id.*
3. In reviewing habeas corpus proceedings involving the custody of a minor child, the Supreme Court examines the record to ascertain if the welfare and best interests of the child have been protected and the legal rights of the parties properly determined. *Liebert* v. *Derse*, 495.

See CRIMINAL LAW (15).

HABITUAL CRIMINAL ACT—See CRIMINAL LAW (5).

HANDWRITING—See EVIDENCE (2); FORGERY (1, 3).

HEADACHES—See DAMAGES (2).

HEAD INJURIES—See DAMAGES (1, 2).

HEAD-ON COLLISION—See AUTOMOBILES (2).

HEALTH AND ACCIDENT INSURANCE—See APPEAL AND ERROR (16, 17); INSURANCE (1).

HEARING—See ADMINISTRATIVE LAW; APPEAL AND ERROR (35); CONSTITUTIONAL LAW (5); COSTS (17); MANDAMUS (3, 4); MUNICIPAL CORPORATIONS (29, 30); NEW TRIAL (1).

HERNIA—See WORKMEN'S COMPENSATION (1).

HIGHWAYS AND STREETS—See AUTOMOBILES (7–13, 15); CONSTITUTIONAL LAW (4); NEW TRIAL (7); MUNICIPAL CORPORATIONS (36); RAILROADS.

HOLDING OVER—See LANDLORD AND TENANT (6–11).

HOME RULE CITY—See JUDGMENT (5).

HOMICIDE—See CRIMINAL LAW (6, 7, 9).

HOSPITAL EXPENSES—See DAMAGES; DEATH (2, 4).

HOTELS—See APPEAL AND ERROR (11–13); LANDLORD AND TENANT (2); TRUSTS (1, 9, 11–13).

HOUSING LAW—See MUNICIPAL CORPORATIONS (4).

HUMILIATION—See BENEFICIAL ASSOCIATIONS (1).

HUSBAND AND WIFE.

In judgment creditor's suit to reach assets of judgment debtor, quitclaim deed by latter to his wife of his interest in property held by them as tenants by the entirety is not set aside while wife is yet living since plaintiff would not be aided thereby because neither the land nor the rents and profits therefrom would be subject to levy on execution for the sole debt of the husband. *Farrell* v. *Paulus*, 441.

See AUTOMOBILES (2); BANKRUPTCY (2); DAMAGES (1); DEATH (3); FRAUDULENT CONVEYANCES (5, 6, 12).

HYDROCELE—See WORKMEN'S COMPENSATION (11).

ICE—See AUTOMOBILES (14); CONTRACTS (4); MUNICIPAL CORPORATIONS (33).

ILLEGAL ENTERPRISE—See JOINT ADVENTURES (1).

IMMUNITY—See CRIMINAL LAW (23); PERJURY (1); WITNESSES.

IMPLIED CONTRACTS—See STATES (1).

IMPLIED COVENANTS—See MINES AND MINERALS (2).

IMPLIED REPEAL—See STATUTES (11).

IMPLIED WARRANTY—See APPEAL AND ERROR (6); BROKERS (4); SALES (2–7).

IMPROVEMENTS—See LIS PENDENS (5); TAXATION (7).

IMPUTED KNOWLEDGE—See INSURANCE (6).

IMPUTED NEGLIGENCE—See AUTOMOBILES (3).

INDECENT EXPOSURE—See CRIMINAL LAW (21).

INDEPENDENT CONTRACTOR—See MASTER AND SERVANT (1, 2, 4); PLEADING (4).

INDICTMENT AND INFORMATION.

1. Information containing 14 counts was not duplicitous nor was there misjoinder of counts because the various sections of the penal code pertaining to gambling under which the information is laid may cover separate offenses where each count contained a charge of conspiracy to violate each designated section of the penal code (Act No. 328, §§ 301–306, 309, 372, Pub. Acts 1931). *People* v. *Bommarito*, 139.
2. Information in prosecution for forging and uttering a forged accountable receipt *held*, sufficient to charge a violation of the statute making it a felony to falsely make, alter, forge and utter such a receipt (Act No. 328, §§ 248, 249, Pub. Acts 1931). *People* v. *Parmelee*, 431.
3. Asserted variance between recital of accountable receipt in information in prosecution for forging and uttering a forged accountable receipt and the language of the exhibit itself *held*, not sufficient to make the receipt inadmissible in the prosecution (Act No. 328, §§ 248, 249, Pub. Acts 1931). *Id.*
4. It is not imperative always to adopt the exact words of a statute in drafting an indictment or information provided other language of like import and certainty is used. *People* v. *Leve*, 557.

See CRIMINAL LAW (10, 11, 15, 28).

INDIGENT ADULTS—See CRIMINAL LAW (29).

INFANTS—See ADOPTION (1); HABEAS CORPUS (3); MARRIAGE (1, 2); PARENT AND CHILD.

INFERENCES—See FRAUDULENT CONVEYANCES (10).

INFLUENCE—See CRIMINAL LAW (27, 28).

INFRINGEMENT—See TRADE MARKS AND TRADE NAMES (1).

INITIATORY PETITIONS—See TOWNSHIPS (1–3, 5).

INJUNCTION.

1. Where the installation of subsurface tile drains on defendants' lands casts upon plaintiffs' lands water in excess of the amount with which latter are burdened by nature and thereby confers a benefit upon defendants while imposing damage and trespass upon plaintiffs' lands, plaintiffs would be entitled to injunctive relief against such trespass. *Ruehs* v. *Schantz*, 245.
2. Impairments to operation of water system in balance of plaintiff township because of alteration by city of system within territory annexed to city from township *held*, insufficient to justify granting injunction against interference with city's operation of water mains within the annexed area, the interference not affecting the supply of water to the system from a source outside of the township. *Township of Royal Oak* v. *City of Ferndale*, 460.
3. The statute relating to mediation of labor disputes is not involved in suit by partner employers to enjoin picketing and interference with plaintiffs' business by labor union where plaintiffs' employees were not members of defendant union and there was no labor dispute existing between plaintiffs and their employees (Act No. 176, Pub. Acts 1939). *Silkworth* v. *Local No. 575 of the American Federation of Labor*, 746.
4. If the object sought to be obtained by a labor union through peaceful picketing is not a lawful labor objective, a court would be justified in exercising control of its acts. *Id.* 747.
5. Where the real objective of defendant labor union in picketing plaintiff employers' bulk oil storage plants was to compel them to put their drivers in defendant union by paying their initiation fees regardless of whether or not the drivers wished to join, the use of the lawful means of peaceful picketing was not permissible since the labor objective was not a lawful one. *Id.*

See ACTION (3); APPEAL AND ERROR (25, 28, 33, 40); ARBITRATION AND AWARD (4); CORPORATIONS (8–15); COSTS (14); COVENANTS (3, 5); EQUITY (7, 8); FORCIBLE ENTRY AND DETAINER; MUNICIPAL CORPORATIONS (35); NUISANCE (2, 3); TRADE MARKS AND TRADE NAMES (2).

INSOLVENCY—See BANKRUPTCY (2); FRAUDULENT CONVEYANCES (3, 7, 10, 12).

INSPECTION—See AUTOMOBILES (5, 6); UNEMPLOYMENT COMPENSATION (4).

INSTRUCTIONS—See CRIMINAL LAW (24); FORGERY (3); SALES (6); TRIAL.

INSURANCE.

1. One suing under a health and accident policy has burden of showing himself entitled under the policy to the amount claimed. *Hasson* v. *Mutual Benefit Health & Accident Ass'n, Omaha*, 332.

INSURANCE—Continued.

2. Insured who was totally incapacitated for several months after accident, signed a release, resumed work for eight or nine months, and sought compensation for period 28½ months thereafter was not entitled to recover therefor where policy provided for disability payments only when disability was continuous, since continuity ceased upon resumption of work. *Id.*

3. An insurance corporation is bound by the knowledge of its agents who are empowered to represent it generally in the issuance of its policies. *Fidelity & Casualty Company of New York* v. *King*, 488.

4. In suit by insurer under a public liability insurance policy to cancel the policy because it contained a false declaration that a similar policy had not been canceled by an insurance company within the last 12 months, so-called "special agent" whom local agent had requested to examine premises *held*, a general agent vested with such authority as made his knowledge of the circumstances under which other policy was canceled and of the rectification of the condition the knowledge of the company. *Id.*

5. Insurance company which issued a public liability policy on premises after cancellation of a like policy by another company and with knowledge of such cancellation is estopped from obtaining in a court of equity cancellation after an accrued liability under the policy. *Id.*

6. The general rule of insurance law is that the knowledge of, or notice to, an insurance agent as to a matter within the scope of his authority, and which is acquired while the agent is acting within the scope of his authority, is chargeable to the insurer. *Id.*

7. An insurer will not be permitted to take advantage of a material misrepresentation or breach of warranty or condition or cause of forfeiture rendering an insurance policy unenforceable at its inception where knowledge of insurance agent relates to such material misrepresentation or breach. *Id.*

8. An insurer may be estopped or there may be waiver because of its agent's knowledge or acts, notwithstanding provisions in the policy as to the only manner in which conditions may be waived. *Id.* 489.

9. Ambiguously worded insurance policy, issued to cover interest of defendant corporations which financed motor vehicles on both a wholesale and retail basis, which policy was designed to cover cars eligible for coverage and insured thereunder and which also permitted defendants to finance dealers with or without insurance, *held*, not to have provided total insurance, there being no provision for accounting as to all vehicles financed. *D. F. Broderick, Inc.*, v. *Continental Credit Corp.*, 546.

10. An insurance policy or contract prepared by the insurer is construed against the insurer where the contract is ambiguous. *Id.*

INSURANCE—Continued.

11. Under insurance policy covering interest of defendant finance companies in only such cars retailed to purchasers by dealers as defendants chose to cover with insurance but which was not to attach to vehicles for which insurance was not applied for, defendant was under no duty to account to insurer or its agent for vehicles financed by it but not insured through plaintiffs. *Id.*

12. Under provisions of automobile public liability insurance policy as to liability and defense of suits and covenant not to sue insurer obtained from injured party, the insurer had an obligation to save the insured harmless to the extent therein mentioned. *Kallas* v. *Lincoln Mutual Casualty Co.*, 626.

13. An insurer under an automobile public liability policy who had obtained a covenant not to sue it from the injured party had the duty of informing the court of the covenant and obtaining reduction from the judgment on the verdict by the amount expressed in the covenant, when a verdict was rendered for plaintiff in action against the insured. *Id.*

14. An insurer of one of several parties liable jointly for a tort may recognize and settle its limited liability without consent of the insured and save the injured party's right of action, if any, against the insured or other person liable (Act No. 303, § 2, Pub. Acts 1941). *Id.* 627.

15. In action by insured tortfeasor against whom a judgment in the sum of $6,400 had been obtained after his insurer had obtained a covenant not to sue it from the plaintiff therein, which covenant recited a release of $2,500, the maximum amount for which insurer could be held liable, against his insurer for face amount of policy, interest and costs taxed in action by injured party, insurer which had not obtained reduction of judgment against insured by amount of its covenant is permitted a reasonable time within which to make it operative *nunc pro tunc* as of the date of the judgment against insured. *Id.*

16. Finding of commissioner of insurance that corporate insurance agency whose stockholders were the same as those of a national bank and whose stock was held in trust by four trustees, removable at will by a majority of the bank's directors, was not a proper and fit corporation to transact business as an insurance agent because license so to operate was employed contrary to public policy was justified by evidence (12 USCA, § 92; 3 Comp. Laws 1929, § 12339, as amended by Act No. 163, Pub. Acts 1931). *Washington Agency, Inc.*, v. *Commissioner of Insurance*, 683.

See APPEAL AND ERROR (16, 17, 32, 37); AUTOMOBILES (5); BRIBERY (1, 4); CORPORATIONS (12, 15); COSTS (19, 20); RELEASE; TRIAL; WORKMEN'S COMPENSATION (7–11).

INTANGIBLES—See MUNICIPAL CORPORATIONS (47).

INTENT—See BANKRUPTCY (2); CRIMINAL LAW (12, 13, 25); DEEDS (1–4); FORGERY (2); FRAUDULENT CONVEYANCES (6–10); LANDLORD AND TENANT (7).

INTEREST.

1. With certain exceptions and in the absence of contract express or implied, the right to interest in this State is statutory (2 Comp. Laws 1929, § 9238 *et seq.*). *Township of Royal Oak* v. *City of Berkley*, 574.

2. In the absence of agreement and except by way of damages for money withheld, interest does not run on an unliquidated claim. *Id.* 575.

See INSURANCE (15); MINES AND MINERALS (9); MUNICIPAL CORPORATIONS (50, 51, 53, 54, 56, 57).

INTERFERENCE WITH BUSINESS—See APPEAL AND ERROR (40); INJUNCTION (3).

INTERLOCUTORY DECREE—See EQUITY (7).

INTERPLEADER.

In city's interpleader suit wherein record shows exhibit containing specifications for construction of a municipal building was introduced in evidence, finding of trial judge that specifications were never introduced was erroneous. *City of St. Johns* v. *Hudson-Howe, Inc.*, 240.

See MUNICIPAL CORPORATIONS (25).

INTERSECTIONS—See AUTOMOBILES (3, 8, 9, 11–14).

INTOXICATING LIQUORS.

Claims for discount for purchases of liquor from the liquor control commission, which were timely presented in the court of claims, were properly allowed (Act No. 8, § 16, Pub. Acts 1933 [Ex. Sess.], as amended by Act No. 281, Pub. Acts 1937; Act No. 135, § 11a, Pub. Acts 1939, as added by Act No. 137, Pub. Acts 1941, and amended by Act No. 237, Pub. Acts 1943). *Detroit Club* v. *State of Michigan*, 721.

See BENEFICIAL ASSOCIATIONS (2); VENDOR AND PURCHASER (4).

IRREGULARITIES—See CRIMINAL LAW (20).

JOINT ADVENTURES.

1. A contract setting forth the rights of parties to a joint enterprise will not be enforced where it is for the purpose of engaging in an illegal venture. *Brewer* v. *Stoddard*, 120.

2. To the extent that a contract calls for personal services under a joint venture the rights and liabilities of the parties should be governed by the rules which govern partnerships. *Id.*

See EQUITY (7).

JOINT TORTFEASORS—See COSTS (6); JUDGMENT (1); NEW TRIAL (5–8); STATUTES (2).

JUDGMENT.

1. In an action against several tortfeasors it is permissible to dismiss the action against one or more and enter judgment against the remainder (3 Comp. Laws 1929, §§ 14023, 14517). *Uhrstadt* v. *Sauer Cooperage* Co., 202.
2. A decree involving disposition of real estate cannot bind or take away the rights of those not parties to the suit but who hold interests in such real estate. *Detroit Trust Co.* v. *Mason*, 282.
3. Procedural or statutory defects in possessory proceedings must be attacked by way of appeal from judgment given therein and are not open to collateral attack. *Richardson* v. *Richardson*, 336.
4. In action by assignees of subcontractor against contractor for balance due for services and materials used in the reconstruction of a public sidewalk in front of a four-store building which defendant constructed for the owner, where record of case brought by the owner against the same defendant was not introduced in evidence in the instant case, the parties are not the same and the subject matter is different, the determination therein made with respect to the subcontractor's work is not controlling and is not *res judicata* of the instant case. *Yeager* v. *Daniel*, 371.
5. In township's suit against home rule city to restrain latter from interfering with water system which had been supplying domestic and industrial users in territory of township annexed by city, the interests of holders of water-supply-system revenue bonds, issued after the annexation under township ordinance restricting them to system within unincorporated territory, are not adjudicated where bondholders are not parties nor directly represented except by an *amicus curiae* brief and portion of system within the annexed territory is but five per cent. of township's entire system and segregation of portion involved would not imperil bondholder's rights. *Township of Royal Oak* v. *City of Ferndale*, 458.

See ADMINISTRATIVE LAW; APPEAL AND ERROR (9, 36); COSTS (19, 20); EQUITY (4); FORCIBLE ENTRY AND DETAINER; FRAUDULENT CONVEYANCES (3, 5); INSURANCE (13, 15); LANDLORD AND TENANT (3); LIS PENDENS (2–4); MINES AND MINERALS (9); MUNICIPAL CORPORATIONS (57); NEW TRIAL (6); RELEASE; TRUSTS (13); WORKMEN'S COMPENSATION (11).

JUDGMENT CREDITOR—See EQUITY (1); FRAUDULENT CONVEYANCES (3, 5, 12); HUSBAND AND WIFE.

JUDGMENT NON OBSTANTE VEREDICTO—See APPEAL AND ERROR (8, 38).

JUDICIAL NOTICE—See APPEAL AND ERROR (2); EVIDENCE (1, 3).

JUDICIAL SALES.

Order confirming sale by receiver of assets of a partnership engaged in manufacturing at which goods were sold above amount permitted by regulation of the office of price adminis-

JUDICIAL SALES—Continued.

tration is affirmed by an equally divided court (56 Stat. at L. 23, as amended by 56 Stat. at L. 767 and 57 Stat. at L. 566). *Speicher* v. *Sowell*, 54.

See COSTS (1).

JUNK YARD—See TOWNSHIPS (6–9).

JURISDICTION—See APPEAL AND ERROR (26); BANKRUPTCY (1); CONSTITUTIONAL LAW (5); COURTS (1–4); CRIMINAL LAW (31, 33); EQUITY (5); MORTGAGES (4); SPECIFIC PERFORMANCE (1); TOWNSHIPS (1, 4, 5); TRUSTS (1, 10, 11, 13).

JURY.

Newspaper reports are ordinarily regarded as too unreliable to influence a fair-minded man when called to act as a juror and although he may have formed an opinion from reading such reports, he is competent if he states he is without prejudice and can try the case impartially according to the evidence and the court is satisfied that he will do so. *People* v. *Schneider*, 158.

See CRIMINAL LAW (19); HABEAS CORPUS (1); WORKMEN'S COMPENSATION (11).

JUSTICES OF THE PEACE—See CRIMINAL LAW (26).

KNEE INJURY—See DAMAGES (3).

LABOR AND INDUSTRY, DEPARTMENT OF—See WORKMEN'S COMPENSATION (1, 5, 8, 9, 11).

LABORATORY EXAMINATION—See FORGERY (3).

LABOR DISPUTES—See INJUNCTION (3); MASTER AND SERVANT (7, 8).

LABOR OBJECTIVES—See INJUNCTION (4, 5).

LABOR UNION—See APPEAL AND ERROR (40); INJUNCTION (3–5); MASTER AND SERVANT (7, 8).

LACHES—See APPEAL AND ERROR (39); FRAUDULENT CONVEYANCES (1); MORTGAGES (5); VENDOR AND PURCHASER (2).

LAND CONTRACTS—See APPEAL AND ERROR (8, 29, 30); SPECIFIC PERFORMANCE (7, 8); VENDOR AND PURCHASER (2–6).

LANDLORD AND TENANT.

1. In landlord's summary proceeding to obtain possession of a flat after office of price administration rent control regulations had become effective and rent was reduced from $60 to $52 a month, finding of trial judge who made a careful personal investigation of the premises involved that there was a lack of good faith on the part of plaintiff to recover possession of such flat for occupancy as a dwelling for himself was sustained under record presented and was not contrary to the great weight of evidence nor to the applicable law (8 F. R. 7322, 7326). *Lelek* v. *Baker*, 210.

LANDLORD AND TENANT—Continued.

2. Purchaser of hotel property, or his assignee, sold by trustee under trust mortgage pursuant to direction of court upon trustee's petition for disposition, is entitled to notice of claim against trustee by lessors of land upon which hotel stood and full rights to direct the defense against these claims. *Detroit Trust Co.* v. *Mason,* 282.
3. Rent regulation of office of price administration which was not in effect at time of commencement of eviction proceedings nor when judgment of restitution therein was rendered by circuit court commissioner and which regulation by its terms did not affect actions commenced or judgments entered prior to its effective date was not applicable so as to prevent execution of writ of restitution issued after such regulation became effective (Maximum Rent Regulation No. 11, 7 F. R. 4072, 4075). *Richardson* v. *Richardson,* 336.
4. In the absence of an agreement changing the lease period, the fact that the rent was paid at varying times from 6 to 21 days after the first of the month, and that there had been an allowance of a proportionate amount of the monthly rental representing the number of days which elapsed between the first of the first month and the date upon which alterations were completed did not operate to change lease expressly providing for a term of one year from and after the first of a given month. *Auto Parts, Inc.,* v. *Jack Smith Beverages, Inc.,* 735.
5. Claimed oral agreement with lessor that one-year lease would be continued from year to year with either party having the right to terminate it by giving the other party notice 60 days prior to the expiration of any year period *held,* not to have been established by a preponderance of the evidence. *Id.*
6. Where a lessee under a written lease for a fixed term holds over after the expiration of the term, the lessor must consent to or acquiesce in such holding over in order to create a renewal of the tenancy on a year-to-year basis by operation of law. *Id.*
7. Whether or not the receipt of rent by a landlord from a tenant holding over after expiration of a fixed term or other act or acts on the part of a landlord indicate with a certainty a design to continue the relation of landlord and tenant on a tenancy-from-year-to-year basis is a matter of intention in each case to be determined as a question of fact. *Id.*
8. The assent of a tenant to a new lease from year to year by holding over after the expiration of a fixed term is usually implied from the fact of his remaining in possession and paying rent after his term expired. *Id.* 736.
9. Though a tenant under lease for fixed term who remains in possession after the expiration of the term is presumed to offer to take the premises for another year, the landlord is not bound to accept the offer and unless he does so by accepting the rent or otherwise, the tenancy is terminated and notice to quit is not required to be given by him. *Id.*
10. Where one has lease for years with annual rent reserved, and holds over after expiration of term with acquiescence of land-

LANDLORD AND TENANT—Continued.

lord, tenancy is from year to year on conditions of lease, although rent is payable in monthly instalments; but where rent reserved is monthly, holding over is from month to month unless lease otherwise provides. *Id.*

11. A tenancy for further term of one year will not be implied where 10 days after expiration of prior term hold-over tenant received notice that its tenancy would terminate two days later and notice to quit a month thereafter, since such notices indicated the lessor's refusal to consent to or acquiesce in such holding over. *Id.*

12. Where landlord gave tenant holding over after expiration of a lease for a year a one-month's notice to quit, such notice was sufficient to terminate the tenancy of defendant whether he be a tenant at will, by sufferance or on a month-to-month basis (3 Comp. Laws 1929, § 13492, as amended by Act No. 145, Pub. Acts 1935). *Id.*

See APPEAL AND ERROR (12); MASTER AND SERVANT (3–5); MORTGAGES (1, 6); TRUSTS (12).

LAUNDRY—See ESTOPPEL (2); SALES (1).

LEASES—See EQUITY (7); LANDLORD AND TENANT (4–6); MINES AND MINERALS (1–5, 8); MORTGAGES (6).

LEAVE OF COURT—See APPEAL AND ERROR (23).

LEAVE TO APPEAL—See APPEAL AND ERROR (2).

LEG INJURIES—See DAMAGES (1, 2).

LICENSES.

In accepting a license from the State, one must also accept all reasonable conditions imposed by the State in granting it. *Surtman* v. *Secretary of State*, 272.

LICENSES—See AUTOMOBILES (5); CONSTITUTIONAL LAW (3); COSTS (17); INSURANCE (16); MANDAMUS (3, 4); MUNICIPAL CORPORATIONS (1); TOWNSHIPS (6–9).

LIENS—See TRUSTS (1).

LIMITATION OF ACTIONS—See INTOXICATING LIQUORS.

LIQUIDATION PROCEEDINGS—See CONTRACTS (5); TRUSTS (2).

LIS PENDENS.

1. Whether or not a *lis pendens* remains in effect and applies to a case during the period allowed for appeal is dependent upon whether or not the appeal is considered as a continuation of a suit. *Maedel* v. *Wies*, 424.

2. The effect of a notice *lis pendens* continues during the entire time of the pendency of a suit and ends when the suit is actually ended by a final decree (3 Comp. Laws 1929, § 14400). *Id.*

LIS PENDENS—Continued.

3. Grantee of a deed, received after the filing notice of *lis pendens,* knows, or must be held to know, that the property was then in litigation and that his interest is subject to the effect of the final decree in the cause (3 Comp. Laws 1929, § 14400). *Id.*
4. The notice of *lis pendens,* once filed, continues in effect during the time allowed for appeal and during consideration by the Supreme Court of such appeal, and can be terminated only by a final decree (3 Comp. Laws 1929, § 14400). *Id.*
5. Recourse, if any, of grantee under deed received after the filing of notice of *lis pendens* to reimbursement for improvements he made upon the property is against his grantor (3 Comp. Laws 1929, § 14400). *Id.*

LOCAL AGENT—See INSURANCE (4).

LOST INSTRUMENTS.

One claiming title to property under an alleged unrecorded deed subsequently lost or destroyed has the burden of establishing execution of such deed. *Pavela* v. *Balogh,* 368.

LUMBER—See APPEAL AND ERROR (5, 6); FRAUD; PLEADING (4); SALES (2–7).

LUMP-SUM AWARD—See DIVORCE (1); WORKMEN'S COMPENSATION (9).

MACHINERY—See APPEAL AND ERROR (35); EQUITY (5).

MANDAMUS.

1. While mandamus or other relief would not be obtainable under an ordinance invalid *in toto,* where invalid portion of ordinance is eliminated and plaintiff has asserted a clear legal right under the remaining portion which is declared to be valid, mandamus is the proper remedy for the enforcement thereof. *Blumlo* v. *Hampton Township Board,* 453.
2. Mandamus is not a writ of right but of grace and discretion and will not lie to compel a public officer to perform a duty dependent upon disputed and doubtful facts. *Powers* v. *Secretary of State,* 530.
3. Mandamus will not lie to compel the secretary of State to issue a motor vehicle dealer's license where plaintiff is permitted to continue his business pending the holding of statutory hearing before defendant relative to refusal to issue such license (1 Comp. Laws 1929, § 4671, as amended by Act No. 151, Pub. Acts 1943). *Id.*
4. The Supreme Court does not pass upon constitutional questions raised by applicant for mandamus to compel the secretary of State to issue a motor vehicle dealer's license where mandamus is denied without prejudice and a statutory administrative hearing is pending (1 Comp. Laws 1929, § 4671, as amended by Act No. 151, Pub. Acts 1943). *Id.*

See COSTS (11, 17); TOWNSHIPS (9).

MARRIAGE.

1. Prior to enactment of statute declaring void any marriage of female under the full age of 16 years except when performed by the probate judge, the marriage of a minor under the age of consent was voidable but the action for annulment could be instituted only by the minor (3 Comp. Laws 1929, §§ 12690, 12724, 12753). *Evans* v. *Ross*, 149.
2. The statute making void the marriage of a female under the full age of 16 years repealed by implication previous statute making the marriage of minors under the age of legal consent voidable (3 Comp. Laws 1929, §§ 12704, 12753). *Id.*
3. In 27-year-old husband's suit to annul a marriage that had been performed in 1943, brought against 15-year-old wife, there was nothing to annul since the marriage was void, the plaintiff being entitled merely to an adjudication as to the date of defendant's birth so that in case defendant were under the age of consent an order determining marriage to be void could be entered (3 Comp. Laws 1929, § 12704). *Id.* 150.

See VENDOR AND PURCHASER (8).

MASTER AND SERVANT.

1. An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work. *Brown* v. *Standard Oil Company*, 101.
2. Generally the circumstances showing one to be an independent contractor are the independent nature of his business, the existence of a contract for the performance of a specified piece of work, the agreement to pay a fixed price therefor, the employment of assistants by the employee who are under his control, the furnishing by him of the necessary materials, and his right to control the work while it is in progress except as to results. *Id.*
3. In common-law action by administrator of estate of alleged employee of lessee of oil company's gasoline filling station under lease expressly negativing reservation of any control by lessor over the business or operations conducted thereon or power of lessee to employ any persons for or on behalf of the lessor against lessor and lessee, where lessee conducted the station business as an independent contractor, lessor was not, as a matter of law, liable for death of employee who died from injuries received while repairing a tire. *Id.* 102.
4. In action by administrator of estate of 19-year-old boy who received fatal injuries while repairing a truck tire against lessee of gasoline filling station, question as to whether or not decedent was an employee of the lessee or was an independent contractor *held*, for jury under evidence presented. *Id.*
5. While a lessee of a gasoline filling station who has not elected to become subject to the workmen's compensation act is deprived of the defenses of contributory negligence, assumed risks and negligence of fellow employees, one bringing an ac-

MASTER AND SERVANT—Continued.

tion against such lessee for injuries sustained by person claimed to have been an employee must show actionable negligence on the part of defendant lessee (2 Comp. Laws 1929, § 8407 *et seq.*). *Id.*

6. In action by administrator of the estate of a 19-year-old boy who was fatally injured while repairing a tire on inner wheel of truck dual wheel at gasoline filling station leased by defendant lessor to defendant lessee, question of whether or not lessee was negligent in failing to provide decedent with the proper tool or tools to do the work was for jury. *Id.*

7. Peaceful picketing by a labor union is a proper means by which the facts of a labor dispute may be made known. *Silkworth* v. *Local No. 575 of the American Federation of Labor*, 746.

8. Although there may be no controversy between an employer and his own employees, if the economic interests of other employees engaged in the same industry are affected, they may, through their labor union, publicize their grievance by means of peaceful picketing. *Id.* 747.

See UNEMPLOYMENT COMPENSATION (1).

MATCHING BIDS—See TAXATION (2, 4–6).

MATERIAL MISREPRESENTATION—See INSURANCE (7).

MEDICAL EXPENSES—See DAMAGES (1); DEATH (2, 4).

MENTAL CAPACITY—See DEEDS (5); WILLS (1, 2, 4, 7, 8).

MENTAL DISEASE—See WILLS (2).

MERGER—See CORPORATIONS (6).

MERGER OF PREVIOUS NEGOTIATIONS—See CONTRACTS (4).

MERGER WITH FEE—See MORTGAGES (8–10).

MINES AND MINERALS.

1. Notice to lessee under mining lease that if certain defaults relative to removing underground ore without weighing by railroad company, mixing with other ores contrary to lease and improperly disposing of lean ore were continued for 60 days after service of notice, holder of an undivided interest of the fee would declare lease terminated conformed to provision of lease for unconditional right of termination on 60 days' notice. *Campbell* v. *Homer Ore Co.*, 693.

2. No forfeiture of a mining lease may be maintained on violation of an implied covenant thereof. *Id.*

3. The weighing of iron ore by a disinterested party, as provided by mining lease, was a valuable right to the lessor and where such right is expressly set forth in the lease, the lessor had a right to terminate the lease for violation thereof. *Id.*

4. The termination of a mining lease by the lessor, pursuant to provisions of the lease therefor, became effective upon the ex-

MINES AND MINERALS—Continued.

piration of the time limited in the lease and notice given. *Id.* 694.

5. Upon the termination of a mining lease by the holder of an undivided interest in the fee, where the lessee also owned an undivided interest in the fee, they became tenants in common. *Id.*

6. Since iron ore in its natural situation is not capable of precise determination as to either quality or amount and because lean ore that is unsalable at one time may later be in demand, a tenant in common who takes possession is not vested with any superior right to choose what ore is most convenient and profitable to mine, remove and sell without accounting therefor. *Id.*

7. A tenant in common who is also lessee under a mining lease is entitled to mine iron ore and to deduct the cost when required to account to a cotenant although such cost might not be deductible by a mere wilful trespasser without any right or claim of title. *Id.*

8. One tenant in common who holds the sole remaining lessor interest under a mining lease needs no one's consent to terminate the lease for the lessee's default. *Id.*

9. In action by holders of an undivided interest in the fee of a mining lease for cotenant's unauthorized mining, removal and sale of a quantity of ore where parties have stipulated the amount of ore mined, its value and cost of mining, judgment is ordered entered for plaintiffs for their damages with interest at 5 per cent. per annum from the date defendant received payment for plaintiffs' share of the ore mined until entry of judgment. *Id.*

See APPEAL AND ERROR (4); ATTORNEY AND CLIENT (2); DEEDS (4); EQUITY (7); TAXATION (1).

MINORS—See ADOPTION; HABEAS CORPUS (3); MARRIAGE (1, 2); PARENT AND CHILD.

MISCARRIAGE OF JUSTICE—See CRIMINAL LAW (24).

MISDEMEANOR—See CRIMINAL LAW (30).

MISJOINDER—See INDICTMENT AND INFORMATION (1).

MISREPRESENTATIONS—See VENDOR AND PURCHASER (1).

MISTAKE—See APPEAL AND ERROR (17).

MISTRIAL—See CRIMINAL LAW (16).

MODIFICATION OF DECREE—See APPEAL AND ERROR (12); COSTS (21).

MORATORIUM—See APPEAL AND ERROR (10); MORTGAGES (3).

MORTGAGES.

1. In chancery suit to foreclose a mortgage wherein it appears that premises were leased from mortgagors by a family corporation owned by an attorney, his son and daughter, that

MORTGAGES—Continued.

four days before the period of redemption expired the son, on funds procured on his own credit, purchased the mortgagee's interest subject to the mortgagors' right to redeem, that there was no redemption, that the lease was terminated by the foreclosure before expiration of period for which rent had been paid, finding by trial court that attorney was not the mortgagors' attorney, that there was no fraud practiced by either the attorney or his son, that there was no breach of a fiduciary relation and that the mortgagors did not rely on redemption by the lessee as permitted but not required by the foreclosure decree and contract between lessee and mortgagor, was supported by record. *Teal* v. *Hayes*, 221.

2. Upon sale under chancery foreclosure of a mortgage covering several pieces of property, it is permissible to sell all in one parcel when no offers are received for any separate parcel (3 Comp. Laws 1929, § 14377). *Burroughs* v. *Teitelbaum*, 251.

3. Return of service on third alias summons upon second mortgagee of premises upon which first mortgage was foreclosed in chancery, showing service upon such defendant in 1932, is not disturbed on appeal of such defendant from order denying petition, filed in 1938, to set aside the sale had under decree where trial judge found that appellant had been informed of such foreclosure, of the sale, and that a moratorium had been obtained by his sons who were other defendants. *Id.* 252.

4. Second mortgagee of premises upon which first mortgage was foreclosed in chancery was properly treated by the trial court as subject to the jurisdiction of the court and bound by the proceedings where, notwithstanding the third alias summons, returned as having been served, may not have been valid as an alias, was valid as an original summons since the statute of limitations had not run, and he had released part of the premises after foreclosure suit was commenced (3 Comp. Laws 1929, § 13976, as amended by Act No. 193, Pub. Acts 1937. *Id.*

5. Second mortgagee of premises upon which first mortgage was foreclosed in chancery was not entitled to have sale under decree set aside where, notwithstanding he claimed no process had been served on him, and that the third alias summons, returned as served, was invalid for failure to preserve continuity of action, he was not before equity court with clean hands and was guilty of laches, the original trial judge, the original plaintiff, his attorney, and the process server all having died before appellant's petition for relief was filed. *Id.* 253.

6. Claim that written agreement by trustee under trust mortgage, made as part of its proposal to court for disposal of the property upon which the mortgage had been foreclosed, whereby trustee forgave a part of its individual claim for advancements, services and as holder of some of the bonds, was unenforceable because without consideration is not tenable in view of statute relative to agreements to change, modify or discharge contract, obligation, lease, mortgage or other se-

MORTGAGES—Continued.

curity interest in real or personal property without consideration (Act No. 238, Pub. Acts 1941). *Detroit Trust Co.* v. *Mason,* 283.

7. Ordinarily a court cannot make a mortgagee in a chancery foreclosure suit waive part of its mortgage as the obligation to do equity does not extend to foregoing a legal claim. *Id.* 284.

8. As a rule the merging of a mortgage and fee estate extinguishes the mortgage. *Vollmer* v. *Coenis,* 319.

9. Generally a person cannot remain a mortgagee of lands after acquiring the fee estate in the absence of a showing that the mortgage was to be kept alive to protect the rights thereunder against the claims of others. *Id.*

10. Parol testimony is admissible not only to show that a deed was given as a mortgage instead of to pass title immediately but also to show that a deed was intended for the purpose of passing title and not to have the effect of a mortgage. *Id.*

See APPEAL AND ERROR (9–14); CORPORATIONS (3); LANDLORD AND TENANT (2); TRUSTS (1–10, 13).

MOTIONS AND ORDERS—See APPEAL AND ERROR (7); NEW TRIAL (1, 2, 4, 5); TRUSTS (9).

MOTION TO DISMISS—See ACCOUNTING; EQUITY (6).

MUNICIPAL CORPORATIONS.

1. City ordinance regulating parking of trailer coaches within city limits not specifically licensed as a trailer coach park and restricting occupancy to six weeks during a year where trailer is parked on premises also occupied for dwelling purposes did not conflict with State statute regulating trailer parks upon which three or more trailer coaches are parked notwithstanding the statute permits occupancy the year round since the ordinance occupies only the field of legislation left unoccupied by the statute (Act No. 143, §§ 2, 3, Pub. Acts 1939, as amended by Act No. 255, Pub. Acts 1941; Battle Creek Trailer Ordinance). *Loose* v. *City of Battle Creek,* 1.

2. As between two possible interpretations of ordinance, by one of which it would be unconstitutional, and by the other valid, it is the duty of the court to adopt that which will save the ordinance. *Id.*

3. The rule that what the legislature permits, the city cannot suppress, does not apply in construing an ordinance which does not enter into a field already occupied by a State statute. *Id.*

4. City ordinance regulating parking of trailer coaches within city limits does not conflict with State housing law, especially where the State law excepts trailers under certain circumstances and the ordinance is a reasonable exercise of control by the municipality over use and occupancy of trailers within the exception (1 Comp. Laws 1929, § 2487 *et seq.,* as amended

MUNICIPAL CORPORATIONS—Continued.

by Act No. 303, Pub. Acts 1939; Battle Creek Trailer Ordinance). *Id.*

5. City ordinance regulating the use of trailer coaches and limiting occupancy to six weeks during a year where occupied on premises used for dwelling purposes does not prevent the parking of trailer coaches on dwelling premises when not used for residence purposes (Battle Creek Trailer Ordinance, § 4). *Id.* 2.

6. Since the length of time that a trailer coach may be used as a dwelling is a matter for the local law-making body to determine, and limitation of occupancy to six weeks during course of a year is not an unreasonable exercise of municipality's police power, city ordinance containing such limitation is a reasonable exercise of the police power in the promotion of health, morals, safety and general welfare (Battle Creek Trailer Ordinance). *Id.*

7. The authority to enact an ordinance creating the office of city sealer of weights and measures is conferred upon cities by statute (1 Comp. Laws 1929, § 5538). *Lawlor* v. *City of Dearborn,* 168.

8. The mere fact that the statute authorizing cities to create the office of city sealer of weights and measures provides that the enforcing officers are to be "special policemen" does not make appointees of a city members of its police department so as to exempt them from classified civil service under city charter (1 Comp. Laws 1929, § 5540; Dearborn Charter of 1929, amendment of 1935, §§ 5, 15). *Id.*

9. Under new city charter provisions pertaining to retention of employees under the classified civil service where it was required that persons holding positions in such service would be retained without preliminary or performance tests, in case they had been certified by the prior civil service commission, recently appointed employees who had not been so certified were not entitled to benefits of such provision of new charter (Dearborn Charter of 1943, chap. 9, § 9.9). *Id.*

10. Under provisions of new city charter pertaining to civil service where employees had not been certified by previously existing civil service commission as regular or permanent employees, they were subject to new charter provisions and the rules adopted thereunder (Dearborn Charter of 1943, chap. 9, § 9.9). *Id.*

11. The opinion of corporation counsel, that incumbents of positions as assistant superintendents of weights and measures, appointed pursuant to previous city charter but not certified by then-existing civil service commission and who were first continued as temporary employees under new charter operating with similar rules as to civil service employees, were entitled to the positions and salaries thereof as against plaintiffs who had highest ratings on promotional employment list, was no justification for certification of incumbents for permanent employment contrary to plain mandate of charter (Dearborn Charter of 1943, chap. 9, § 9.9.). *Id.* 169.

MUNICIPAL CORPORATIONS—Continued.

12. A municipal civil service commission which certified incumbents for permanent employment as assistant superintendents of weights and measures after adoption of new charter exceeded its authority where incumbents did not receive the highest ratings in the promotional list and, since they had not been certified by previous civil service commission, were not entitled to permanent employment without examination and charter required certification of plaintiffs as the persons highest on such list, the commission having no discretion to exercise in case presented (Dearborn Charter of 1943, chap. 9, §§ 9.6, 9.9). *Id.*

13. Plaintiffs who ranked highest on promotional employment list for office of assistant superintendents of weights and measures were entitled to certification by civil service commission and installation in such positions by the superintendent under mandatory city charter provisions (Dearborn Charter of 1943, chap. 9, §§ 9.6, 9.9). *Id.*

14. Set-back restrictions, imposed by municipal zoning ordinance enacted after nonconforming dwellings had been erected, would not have to be observed by owner of property at end of block at end of street at edge of zoned area; although, in block where there were no established buildings, conformance with the set-back lines would have to be made. *Pringle* v. *Shevnock*, 179.

15. Owner of vacant property in block zoned as residential area in which residences had been erected previous to municipal zoning ordinance which did not conform to the set-back lines would nevertheless have to observe the requirements as to side yards and frontage as to such vacant property. *Id.* 180.

16. Desirability of property lying on outer fringe of most highly-restricted residential zone of city for use for residential purposes is to be measured more by adjacent surroundings than by conditions obtaining in the zone as a whole. *Id.*

17. A zoning ordinance must be reasonable and its reasonableness becomes the test of its legality. *Id.*

18. In determining validity of municipal zoning ordinance as applied to particular parcel of property, the court must consider whether the zoning of such parcel advances the public health, safety, and general welfare of the people. *Id.*

19. Each zoning case, as a rule, stands by itself and its reasonableness must be judged by the circumstances in each particular case. *Id.*

20. Zoning regulations, to be valid, must be made in accordance with plan to lessen traffic congestion, to promote public health, safety and welfare and with reasonable consideration to character of the district, its peculiar suitability for particular uses, conservation of property values and general trend and character of building and population development (1 Comp. Laws 1929, § 2633). *Id.*

21. Zoning ordinance restricting to residence purposes the use of lots located adjacent to municipal tourist camp and public

MUNICIPAL CORPORATIONS—Continued.

bathing beach *held*, unreasonable and confiscatory as to such lots, where it is shown as well as admitted by plaintiffs and intervening city that use of adjacent property made defendant's lots less desirable for residence property. *Id.*

22. In determining validity of municipal zoning ordinance as applied to particular property near outer fringe of zone the validity of the ordinance as applied to other property in the zone is not involved (1 Comp. Laws 1929, § 2633). *Id.* 181.

23. Use for trailer camp purposes of vacant city lots at edge of zone wherein property was restricted to high-class residential purposes is permitted notwithstanding objection by an adjoining owner and city where latter maintains a larger trailer camp than defendant started to establish before ordinance became effective and public bathing beach is adjacent to all properties involved, since zoning ordinance, as applied to defendant's property, is arbitrary and unreasonable. *Id.*

24. A subcontractor who failed to file the proper notice under statutory bond of principal contractor for construction of a public building for a city may not recover under the bond (3 Comp. Laws 1929, § 13132 *et seq.*). *City of St. Johns* v. *Hudson-Howe, Inc.*, 240.

25. In city's interpleader suit to determine ownership of funds withheld by city under contract for construction of a municipal building as between surety on statutory bond and assignee of principal contractor on the one hand and an unpaid subcontractor who had performed work on the other hand where specifications provided that city might withhold a sufficient amount to make proper payments to subcontractors and that assignments were to be made subject to prior lien for services rendered and materials supplied, subcontractor was entitled to the fund withheld by the city to the extent of his contract price (3 Comp. Laws 1929, § 13132 *et seq.*). *Id.*

26. Statute prohibiting a village from authorizing "any issue of bonds except special assessment bonds * * * unless approved by three-fifths of the electors voting thereon" excepts special assessment bonds from need of electoral authorization (1 Comp. Laws 1929, § 1788). *Council of the Village of Allen Park* v. *Allen Park Village Clerk*, 361.

27. The right of a village to issue bonds in anticipation of collection of special assessments carries a liability to pay the bonds, such bonds being excepted from the amount of prohibited village indebtedness (1 Comp. Laws 1929, § 1788). *Id.*

28. A village clerk is under a mandatory duty to countersign refunding special assessment bonds pledging the full faith and credit of the village as authorized by the village council without vote of village electors where village charter requires his signature and statute authorizes issuance of special assessment bonds without such vote (1 Comp. Laws 1929, § 1788). *Id.*

29. The rights of members of city's police department were not prejudiced by reason of the fact that original hearing on petitions for their dismissal was had before trial board, consisting

MUNICIPAL CORPORATIONS—Continued.

of commissioner of police, chief of detectives and superintendent of police, acting as chief inspector, instead of before the commissioner of police only, and charter provisions pursuant to which hearing was had were characterized by trial judge as "a masterpiece of ambiguity" (Detroit Charter, title 4, chap. 21, § 16). *Aller* v. *Detroit Police Department Trial Board*, 382.

30. Purpose of charter provisions setting up trial procedure for dismissal of police officers is to check hasty and inconsiderate action, prevent autocratic tendencies, and publicize the proceeding, but the proceeding is in the nature of an administrative inquiry whose purpose is accomplished by a fair hearing upon specific charges supported by evidence. *Id.*

31. Since law and order can only be maintained in the hands of police officers who are, in the opinion of their superiors, fit and proper persons to administer and enforce the law, the superiors' responsibility should not be curtailed or circumscribed by insistence upon application of technical rules as to the admissibility of proof by city police trial board, although the board's finding of fact must be supported by competent evidence. *Id.* 383.

32. A person appointed as a member of a police force of a city thereby subjects himself to the reasonable rules and regulations adopted by the city board having control of the police force. *Id.*

33. Under ordinance requiring all persons to keep snow and ice removed from public sidewalks in the front, rear or side of their premises or keep them safe for purpose of walking thereon, a person injured by reason of the owner's failure to do so cannot bring private action against such owner (Detroit Compiled Ordinances, chap. 197, § 1; chap. 201, § 11). *Grooms* v. *Union Guardian Trust Co.*, 437.

34. Existence of provision in contract under which city in adjoining county supplied water for use in territory including some which had been annexed to defendant city from plaintiff township that if such township territory so supplied with water should become annexed to first-mentioned city during the life of the contract that all water mains would become the property of such city *held*, immaterial in suit by township against defendant city to restrain latter from interfering with water system in territory which had been annexed to defendant over 10 years before contract between plaintiff and other city was entered into. *Township of Royal Oak* v. *City of Ferndale*, 458.

35. A township's suit to enjoin defendant city from interfering with township water supply system, part of which lay within territory annexed to defendant from plaintiff, must be based upon all the material facts and circumstances applicable to the particular case. *Id.*

36. The right of control of a municipality to water mains laid in its streets, paid for with money obtained from property owners to whom the service was to be rendered, is not that of

MUNICIPAL CORPORATIONS—Continued.

an absolute beneficial owner but that of a trustee, subject to the beneficial interest of the property owners to be served, and is a control which may pass with the territory to the annexing municipality if it can operate the system in the annexed territory without impairment of the rights of the property owners served, even though the municipality from which the territory is taken may be permissively allowed to continue the service. *Id.* 459.

37. The right of a municipality to encumber its water system by issuing revenue bonds is derived purely from statute (Act No. 94, Pub. Acts 1933, as amended by Act No. 66, Pub. Acts 1935). *Id.*

38. The right of a municipality in water mains, installed at the expense of the property owners to be served, is not such a property right as should be considered in adjusting, under the applicable statutes, property rights of the respective municipalities incident to annexations (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931). *Id.*

39. A statute requiring the adjustment of rights of respective municipalities in personal property involved in annexation of territory is not applicable where annexation took place before the enactment of the statute (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931). *Id.*

40. As a matter of public policy, in the absence of extraordinary circumstances requiring otherwise, the annexation of territory carries with it the right of the annexing municipality to take over water mains in the annexed territory that were installed at the expense of the property owners served thereby, in order that such municipality might protect the public health, welfare and safety of the inhabitants of the annexed territory where the annexing municipality can continue such service to the property owners beneficially interested therein. *Id.*

41. If an annexing municipality is unable to continue the service to property owners beneficially interested in the control and operation of water mains, the annexing municipality may not gain the right to their control and operation upon annexation. *Id.* 460.

42. In case territory annexed by a municipality is part of that served by a complete or unified water system, the value of which would be destroyed or greatly impaired by division, the annexing municipality would not necessarily gain control of the water mains by reason of the annexation and previously-issued bonds upon such a system would follow the territory severed from the jurisdiction of the borrower (Act No. 94, § 32, Pub. Acts 1933, as amended by Act No. 210, Pub. Acts 1941). *Id.*

43. The control of water mains serving territory severed from a municipality, which mains had been paid for by property owners serviced thereby but which municipality had an operating plant or pumping station erected from proceeds of general taxation or assessments levied over the municipality at large and whose value would be destroyed or greatly im-

MUNICIPAL CORPORATIONS—Continued.

paired by a division, would not necessarily pass to the annexing municipality. *Id.*

44. City to which territory was annexed from adjoining township was not estopped from interfering with the use of water mains in the annexed territory and which constituted a part of the township water supply service by reason of the fact that city failed to assert ownership for a period of approximately 14 years nor because of letter written by defendant's city manager, at most only an administrative officer, to a second city supplying the water where neither matter has worked to the disadvantage of the township. *Id.*

45. When territory from a township is annexed to a city the liabilities of the township are to be assumed by the city in the same proportion as the assessed valuation of the taxable property in the territory annexed bears to the assessed valuation of the taxable property in the entire township from which such territory is taken (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931). *Township of Royal Oak* v. *City of Berkley*, 572.

46. A city that was incorporated out of township territory after enactment of amendment of statute whereby personal property of the township from which the territory is taken is to be divided on the same proportion as the assessed valuation of the taxable property in territory annexed to a city bears to the assessed valuation of the taxable property in the entire township from which the territory is taken was entitled to division of the personal property on such basis (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931). *Id.*

47. The term "personal property," as used in statute pertaining to adjustment of assets and liabilities incident to incorporation of city out of township territory, connotes intangible as well as tangible personal property and must include choses in action such as accounts receivable (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931). *Id.*

48. Where a city is incorporated out of territory of a township which had advanced township general funds to special assessment districts for which repayment had not been made, while the city is entitled to insist on reassessment, it is entitled to its *pro rata* share of the money when and as collected and is not entitled to be paid in full if the township neglects to reassess (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931). *Id.*

49. In the division of personal property when a city is incorporated out of a township which had advanced its general funds for payment of special assessment district obligations, to the extent that such advancements are worthless items owing to the township, the township cannot be required to include the same as an item of cash but city is entitled to its share only if and when same are collected by the township (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931). *Id.* 573.

MUNICIPAL CORPORATIONS—Continued.

50. Collections from taxpayers in special assessment districts of townships after incorporation of city out of township territory may be used by township toward payment of its *pro rata* share of its accounts receivable to city although collected as interest (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931). *Id.*

51. A township which had made advancements from its general fund to special assessment district funds before part of its territory was incorporated as a city must account to the city for its *pro rata* share of all money thereafter received from special assessments or reassessments if and when collected until its account is paid in full without interest (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931). *Id.*

52. The right of a city to participate in collections made by a township from special assessment districts to which it had made advancements from township general fund after city was incorporated in township territory would not be foreclosed by stipulation filed wherein it was expressly asserted that the parties were not in agreement as to the city's right to such participation (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931). *Id.*

53. A township which receives no interest on its accounts receivable may not be required to account for interest thereon to city incorporated out of township territory (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931). *Id.* 574.

54. Delinquent general taxes and accounts receivable from other cities incorporated out of plaintiff township territory prior to defendant city's incorporation out of territory in same township, which were listed in stipulation filed in accounting suit and charged against township for *pro rata* division, as assets, property on hand at time of defendant's incorporation, were not items upon which city was entitled to interest since they were not charged as deferred accounts receivable (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931). *Id.*

55. Under provision of stipulation filed in suit for accounting between township and city incorporated out of its territory whereby there was reserved to city the right to claim participation in certain uncollected taxes and money received from scavenger sales of real estate, the city would be entitled to participate in uncollected taxes from special assessments, reassessments and scavenger sales so reserved, if and when collected, while the right to other taxes would be foreclosed by such stipulation (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931). *Id.*

56. The statute governing the division of property between a township and a city upon latter's incorporation out of township territory does not provide for interest on an amount found owing (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931). *Id.*

MUNICIPAL CORPORATIONS—Continued.

57. Since the amount of a city's claim against township out of whose territory city was incorporated is unliquidated and unsettled until final decree where the parties have resorted to the courts for settlement of differences and stipulation filed does not provide for interest, city to whom township is found to have owed a substantial amount as of time of incorporation would not be entitled to interest from such time until entry of final decree but would be entitled to interest on the amount found due after date of entry of such decree (1 Comp. Laws 1929, § 2250, as amended by Act No. 233, Pub. Acts 1931; 2 Comp. Laws 1929, § 9238 *et seq.*). *Id.* 575.

See ACTION (2, 3); APPEAL AND ERROR (24, 28, 36); ARBITRATION AND AWARD (4, 7); AUTOMOBILES (7); CONSTITUTIONAL LAW (1, 4); COSTS (11, 13, 18); EQUITY (8); INJUNCTION (2); INTERPLEADER; JUDGMENT (5); OFFICERS (5); RAILROADS.

MURDER—See CRIMINAL LAW (6, 7, 9).

MUTUALITY OF REMEDY—See SPECIFIC PERFORMANCE (6, 8).

NAMES.

Where a firm name remains unchanged after the retirement of a person therefrom, the burden is upon such person to give notice of the retirement to all who have had dealings with the firm in order to absolve himself from liability for credit subsequently extended the firm. *Webb* v. *Levene,* 38.

See CORPORATIONS (7–15); ESTOPPEL (2); TRADE MARKS AND TRADE NAMES; VENDOR AND PURCHASER (6, 7).

NATIONAL BANKS—See BANKS AND BANKING (1).

NEGLIGENCE.

1. In an action against two alleged tortfeasors it is incumbent on plaintiff to establish that the negligence of one or both of defendants was the proximate cause of her injuries, and also that she was free from contributory negligence. *Mitchell* v. *Stroh Brewery Co.,* 231.

2. The mere fact that an accident happened does not establish negligence on the part of defendant as the doctrine of *res ipsa loquitur* is not followed in this State. *Id.*

See AUTOMOBILES (1, 9–11); MASTER AND SERVANT (5, 6); MUNICIPAL CORPORATIONS (33); RAILROADS (2).

NEGROES—See COVENANTS (1, 3).

NEWLY-DISCOVERED EVIDENCE—See EQUITY (3).

NEWSPAPER REPORTS—See CRIMINAL LAW (19); JURY.

NEW TRIAL.

1. Where new trial is sought in a prosecution on the ground that the complaining witness had recanted, it is proper to have such witness testify at the hearing on the motion for new trial. *People* v. *Lowenstein,* 94.

2. The granting or denying of a motion for a new trial rests in the sound discretion of the court. *Id.*

NEW TRIAL—Continued.

3. Granting a motion for a new trial was not error notwithstanding the motion was made more than 20 days after entry of judgment and without an extension of time having been granted since it was within the discretion of the trial court to grant an extension of time and where the motion was heard and disposed of on its merits it should be considered as having in effect extended the time for making the motion (Court Rule No. 47 [1933]). *Uhrstadt* v. *Sauer Cooperage Co.*, 201.

4. A court has power to grant a new trial on its own motion. *Id.*

5. Order granting a new trial to only one of two defendant tortfeasors *held*, not to have constituted such an abuse of discretion under the circumstances as to justify setting the order aside. *Id.*

6. While at common law a new trial could not be granted as to one of several joint tortfeasors without granting a new trial as to other codefendants because the judgment was regarded as an entity to be affirmed or reversed as to all or none, the modern rule, adopted as a matter of case law, generally permits the granting of a new trial to one or more of several defendants and not a new trial as to the others where such action does not work obvious injustice. *Id.*

7. In action by passenger of automobile that collided with truck which had stopped on inside lane alongside car in outside lane of four-lane highway and was in turn crashed into by second tortfeasor's car, there was not such an interrelation between defendant tortfeasors as to require the granting of a new trial to both when granted to defendant truck owner. *Id.* 202.

8. The statute pertaining to contribution among tortfeasors has not changed the generally applicable rule that where two or more are defendants in the same action a new trial may be granted to one or more and denied to the remainder (Act No. 303, Pub. Acts 1941). *Id.*

See APPEAL AND ERROR (7, 15); COSTS (6, 12); CRIMINAL LAW (3, 16, 25); STATUTES (2).

NOISE—See NUISANCE (1).

NOMINAL TITLE HOLDERS—See FRAUDULENT CONVEYANCES (1).

NONJURY CASES—See APPEAL AND ERROR (1, 15, 21, 31); CORPORATIONS (5); COSTS (2); SALES (1).

NONJURY TRIAL—See APPEAL AND ERROR (15).

NOSE INJURIES—See DAMAGES (2).

NOTICE—See APPEAL AND ERROR (10, 23); COVENANTS (4); ESTOPPEL (2); FORCIBLE ENTRY AND DETAINER; FRAUDULENT CONVEYANCES (4, 5); INSURANCE (3, 4, 6, 7); LANDLORD AND TENANT (2, 5, 9, 11, 12); LIS PENDENS (3, 5); MINES AND MINERALS (1, 4); MORTGAGES (3); MUNICIPAL CORPORATIONS (24); NAMES; OFFICERS (4); PARTNERSHIP (1); SALES (1); STATES (2); TRIAL; VENDOR AND PURCHASER (2); WORKMEN'S COMPENSATION (2, 3, 6–10).

NUISANCE.

1. Mere esthetics is beyond the power of the court to regulate in suit by adjacent lot owner to enjoin use in subdivision devoted largely to residences of four lakefront lots as a public fishing site because of destruction of the natural shore line, attendant noise from parking of cars, and establishment of nearby traffic hazard. *Gableman* v. *Department of Conservation,* 416.

2. As rule, equity will not interfere in advance of creation of nuisance, where injury is doubtful or contingent, and anticipated merely from use to which property is to be put. *Id.* 417.

3. A public fishing site on four contiguous 50-foot lakefront lots at an inland lake which involves filling in the ground, grading it, building a boat ramp and parking lot and erecting signs cannot be said to constitute a nuisance, hence the establishment thereof will not be enjoined although the proper authorities may thereafter be required to regulate traffic and supervise its operation. *Id.*

See AUTOMOBILES (4).

NUNC PRO TUNC—See INSURANCE (15).

OBJECTIONS—See APPEAL AND ERROR (7); CRIMINAL LAW (6, 24); TRUSTS (7, 8).

OCCUPANCY—See APPEAL AND ERROR (25); FORCIBLE ENTRY AND DETAINER; COVENANTS (2, 3).

OCCUPATIONAL DISEASE—See WORKMEN'S COMPENSATION (1).

OCCUPATIONAL DISEASE AMENDMENT—See WORKMEN'S COMPENSATION (4).

OFFER AND ACCEPTANCE—See CONTRACTS (6); CORPORATIONS (3); LANDLORD AND TENANT (9); MORTGAGES (6); TRUSTS (4, 5).

OFFICE OF PRICE ADMINISTRATION—See JUDICIAL SALES; LANDLORD AND TENANT (3).

OFFICERS.

1. Those who serve the public, either as makers, interpreters or enforcers of the law, must necessarily surrender some of their presumed private rights while acting in such capacity. *Aller* v. *Detroit Police Department Trial Board,* 383.

2. In fixing an appointee's salary, a governor can exercise only such authority as is delegated to him by legislative enactment. *Roxborough* v. *Michigan Unemployment Compensation Commission,* 505.

3. Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution. *Id.*

OFFICERS—Continued.

4. A governor's appointee is chargeable with knowledge of a limitation on the governor's authority to bind the State to pay him a fixed annual salary (49 Stat. at L. 626; Act No. 1, §§ 10, 11, 35, Pub. Acts 1936 [Ex. Sess.], as amended by Act No. 347, Pub. Acts 1937). *Id.* 506.

5. In order to make any position of public employment a public office of a civil nature, it is necessary to show the office was created by the Constitution or legislature or by a municipality pursuant to authority conferred upon it; there is delegated to it a portion of the sovereign power of government to be exercised for the benefit of the public; the powers conferred and duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority; the duties must be performed independently and without control of a superior power other than the law unless placed thereunder by the legislature; and that it have some permanency and continuity and not be only temporary or occasional. *People* v. *Leve*, 557.

6. Courts will not interfere with the act of a public administrative officer acting within the scope of his authority. *Washington Agency, Inc.*, v. *Commissioner of Insurance*, 683.

See ADMINISTRATIVE LAW; APPEAL AND ERROR (24); BANKS AND BANKING (1); BRIBERY (4, 5); CONSTITUTIONAL LAW (5); CONTRACTS (1); CORPORATIONS (2); CRIMINAL LAW (19, 27–30); MANDAMUS (2); MUNICIPAL CORPORATIONS (7, 8, 29–32, 44); STATES; TOWNSHIPS (5).

OIL AND GAS—See ATTORNEY AND CLIENT (2); EQUITY (7); INJUNCTION (5).

ONE-MAN GRAND JURY—See CRIMINAL LAW (23); PERJURY (1); WITNESSES.

OPINIONS—See COURTS (5); JURY.

OPPORTUNITY—See WILLS (6).

OPTIONS—See CONTRACTS (2).

ORAL AGREEMENT—See BROKERS (2–4); LANDLORD AND TENANT (5).

ORDINANCES—See CONSTITUTIONAL LAW (1, 4); JUDGMENT (5); MANDAMUS (1); MUNICIPAL CORPORATIONS (1, 4–7, 14, 17–22, 33); RAILROADS; TOWNSHIPS (6–9).

ORES—See MINES AND MINERALS (1, 3, 6, 7, 9).

OTHER STATES—See CORPORATIONS (13); EQUITY (7).

PADLOCKED PREMISES—See VENDOR AND PURCHASER (2).

PAIN AND SUFFERING—See DAMAGES (3); DEATH (2).

PARALYSIS—See WORKMEN'S COMPENSATION (5).

PARDONS AND PAROLES.

A pardon reaches both the punishment prescribed for the offense and the guilt of the offender as it releases the punishment and blots out of existence the guilt. *People* v. *Cordell*, 586.

See CRIMINAL LAW (34).

PARENT AND CHILD.

1. In the absence of a showing that he is not a suitable person to have the custody of an adopted child, a widower, who with his wife had adopted a child, is, as her survivor, legally entitled to the child's custody under the probate code (Act No. 288, chap. 3, § 6, Pub. Acts 1939). *Liebert* v. *Derse*, 495.
2. In determining who shall have custody of a minor child, the best interest of the child is of paramount importance and it is the judicial duty of a court to safeguard the child's welfare and care but the parent of the child may not be deprived of his custody except it be shown that the parent was an unsuitable person to have such custody (Act No. 288, chap. 3, § 6, Pub. Acts 1939). *Id.*
3. The custody of a six-year-old boy who had been placed with the sister of plaintiff's first wife and her husband by the adopting father upon accidental death of his wife when child was about two years of age is awarded to plaintiff who has paid for child's keep and upon remarriage has established a suitable home and is not shown to be an unfit person to have his custody, notwithstanding the child prefers to stay with foster mother's sister, since the adopting father is legally entitled to the child's custody (Act No. 288, chap. 3, § 6, chap. 10, § 5, Pub. Acts 1939). *Id.*

See ADOPTION; BROKERS (3); DEEDS (5, 6); FRAUDULENT CONVEYANCES (5, 12); MORTGAGES (1, 3).

PARKED TRUCK—See AUTOMOBILES (16).

PARKING—See MUNICIPAL CORPORATIONS (1); NUISANCE (1, 3).

PARKS—See WATERS AND WATERCOURSES (2).

PAROL EVIDENCE—See CONTRACTS (4); DEEDS (2, 3); MORTGAGES (10).

PARTIES—See ACTION (1); APPEAL AND ERROR (12, 13, 18); COSTS (10); COURTS (3); ESTOPPEL (1); JUDGMENT (2, 4, 5); TRADE MARKS AND TRADE NAMES (2).

PARTNERSHIP.

1. A retiring partner has an affirmative duty of notifying all persons with whom the firm has had dealings of his retirement from the partnership in order to absolve himself from liability for credit subsequently extended. *Webb* v. *Levene*, 38.
2. The death of a partner dissolves a partnership. *Brewer* v. *Stoddard*, 120.

PARTNERSHIP—Continued.

See APPEAL AND ERROR (35); EQUITY (5); FRAUDULENT CONVEYANCES (3–6); INJUNCTION (3); JOINT ADVENTURES (2); JUDICIAL SALES.

PASSENGERS—See STREET RAILWAYS.

PAUPERS—See CRIMINAL LAW (29, 30).

PAVEMENT—See AUTOMOBILES (14, 16).

PAYMENT—See APPEAL AND ERROR (14, 39); BROKERS (1); CORPORATIONS (5); LANDLORD AND TENANT (4, 8); MUNICIPAL CORPORATIONS (27, 51, 52); TRUSTS (7).

PEACEFUL PICKETING—See CONSTITUTIONAL LAW (6); INJUNCTION (5); MASTER AND SERVANT (7, 8).

PERJURY.

1. In prosecution for perjury, charged as having been committed at trial of a criminal case, testimony which had previously been given by alleged perjurer before so-called one-man grand jury was admissible to prove that in the later criminal case he had testified falsely, notwithstanding the statute providing for the granting of immunity may not have been complied with as to defendant herein when he testified before the so-called one-man grand jury (3 Comp. Laws 1929, § 17220; Act No. 328, § 422, Pub. Acts 1931). *People* v. *Woodson*, 392.
2. In prosecution for perjury, evidence *held*, ample from which jury could find defendant guilty beyond a reasonable doubt (Act No. 328, § 422, Pub. Acts 1931). *Id.*

See CRIMINAL LAW (23, 24).

PERSONAL INJURIES—See AUTOMOBILES (5, 7); DAMAGES (1, 2); DEATH (2); RAILROADS (1).

PERSONAL PROPERTY—See MUNICIPAL CORPORATIONS (46, 47, 49).

PERSONAL SERVICES—See CONTRACTS (3); JOINT ADVENTURES (2).

PERSONALTY—See MORTGAGES (6).

PETITION—See CRIMINAL LAW (22); TOWNSHIPS (1–3, 5).

PHYSICAL DISEASE—See WILLS (2).

PHYSICIANS AND SURGEONS—See DAMAGES (3).

PICKETING—See APPEAL AND ERROR (40); CONSTITUTIONAL LAW (6); INJUNCTION (3, 5); MASTER AND SERVANT (7, 8).

PLAN OF DEVELOPMENT—See COVENANTS (5).

PLATS—See TOWNSHIPS (1–4, 7).

PLEADING.

1. In furtherance of justice, trial courts should give the statute of amendments a liberal construction (3 Comp. Laws 1929, § 14144; Court Rule No. 19, § 4 [1933]). *Gratiot Lumber & Coal Co.* v. *Lubinski*, 662.
2. Generally, permission to amend plea rests wholly within discretion of trial court, and unless discretion is abused, Supreme Court will not interfere, whether amendment is granted or refused (3 Comp. Laws 1929, § 14144; Court Rule No. 19, § 4 [1933]). *Id.*
3. The right to permit amendments to pleading, in accordance with the statute, is discretionary with the court and is aimed to abolish technical errors in proceedings and to have cases disposed of as nearly as possible in accordance with the substantial rights of the parties (3 Comp. Laws 1929, § 14144; Court Rule No. 19, § 4 [1933]). *Id.*
4. It was reversible error to deny plaintiff lumber company permission to amend declaration so as to state a cause of action in assumpsit in action of tort for fraudulent conspiracy to obtain lumber and materials for modernizing a tavern and brought against the owners of the tavern, the person who supervised the job and the latter's son, a salesman for plaintiff, where defendant owners' answer stated they were indebted to codefendant as a general and independent contractor but testimony at trial developed that owner claimed he owed money to plaintiff, since amendment at time of trial was first opportunity plaintiff had to meet new theory and remedy of assumpsit is less stringent (3 Comp. Laws 1929, § 14144; Court Rule No. 19, § 4 [1933]). *Id.* 663.

See APPEAL AND ERROR (9, 14); EQUITY (4); INDICTMENT AND INFORMATION (4); SALES (7).

PLYWOOD—See APPEAL AND ERROR (6); SALES (2–7).

POISONS—See EVIDENCE (3); WORKMEN'S COMPENSATION (2, 5).

POLICEMEN—See ARREST (1); CONSPIRACY (2); COSTS (13); MUNICIPAL CORPORATIONS (8, 29–32).

POLICE TRIAL BOARD—See APPEAL AND ERROR (24); COSTS (13); MUNICIPAL CORPORATIONS (29, 31).

POSSESSION—See COVENANTS (2, 3); JUDGMENT (3); LANDLORD AND TENANT (1, 9); MINES AND MINERALS (6).

PRECEDENT—See COURTS (5).

PREJUDICE—See ACTION (3); APPEAL AND ERROR (11, 17); CRIMINAL LAW (16, 18, 19); JURY.

PREMIUMS—See APPEAL AND ERROR (32).

PREPONDERANCE OF EVIDENCE—See LANDLORD AND TENANT (5).

PRESENTATION OF CLAIMS—See ARBITRATION AND AWARD (7).

PRESUMPTIONS—See LANDLORD AND TENANT (9); STATUTES (1, 2, 14); WILLS (8).

PRICE CONTROL—See COSTS (1); JUDICIAL SALES.

PRINCIPAL AND AGENT—See BROKERS (1, 4); FRAUDS, STATUTE OF; INSURANCE (3, 4, 6–8, 11, 16); SALES (3); VENDOR AND PURCHASER (1).

PRINCIPAL AND SURETY—See MUNICIPAL CORPORATIONS (25).

PRIOR CONVICTIONS—See CRIMINAL LAW (12, 13).

PROBABLE CAUSE—See ARREST (1).

PROBATE JUDGE—See MARRIAGE (1).

PROBATION—See CRIMINAL LAW (31, 33).

PROCESS.

1. An alias writ in a chancery case, issued in accordance with court rule then in effect, if not good as an alias, is good as an original summons where the statute of limitations has not run (3 Comp. Laws 1929, § 13976, as amended by Act No. 193, Pub. Acts 1937). *Burroughs* v. *Teitelbaum*, 252.
2. Where a writ purporting to be an alias summons has no proper basis as an alias, the previous writ not having been seasonably returned, the second writ is not for that reason void, but, the statute of limitations not having run against the suit, it should, in case the first suit goes down, be treated as a new writ for a new suit and sustained accordingly (3 Comp. Laws 1929, § 13976, as amended by Act No. 193, Pub. Acts 1937). *Id.*

See MORTGAGES (3–5).

PROFITS—See HUSBAND AND WIFE; TRUSTS (11).

PROMOTIONAL EMPLOYMENT LIST—See MUNICIPAL CORPORATIONS (13).

PROPERTY—See APPEAL AND ERROR (35); EQUITY (2, 5); MORTGAGES (6).

PROPERTY SETTLEMENT—See DIVORCE.

PROXIMATE CAUSE—See AUTOMOBILES (1); NEGLIGENCE (1).

PUBLIC BUILDINGS—See MUNICIPAL CORPORATIONS (24, 25).

PUBLIC FISHING SITE—See APPEAL AND ERROR (25); COSTS (14); COVENANTS (3, 5); NUISANCE (1, 3); WATERS AND WATERCOURSES (2).

PUBLIC HEALTH—See MUNICIPAL CORPORATIONS (18, 20, 40).

PUBLIC IMPROVEMENTS—See TOWNSHIPS (1–4).

PUBLIC LIABILITY POLICY—See INSURANCE (4, 5, 12).

PUBLIC OFFICE—See OFFICERS (5).

PUBLIC PARKS—See WATERS AND WATERCOURSES (2).

PUBLIC POLICY—See ACCOUNTING; BANKS AND BANKING (2); CONTRACTS (1); CORPORATIONS (2); INSURANCE (16); MUNICIPAL CORPORATIONS (40).

PUBLIC QUESTIONS—See COSTS (1, 4, 5, 9, 13, 15, 18).

PUBLIC SAFETY—See MUNICIPAL CORPORATIONS (18, 20, 40).

PUBLIC SIDEWALKS—See MUNICIPAL CORPORATIONS (33).

PUBLIC WELFARE—See MUNICIPAL CORPORATIONS (18, 20, 40).

PUMPING STATION—See MUNICIPAL CORPORATIONS (43).

QUANTUM MERUIT—See BROKERS (2).

QUESTION FOR TRIER OF THE FACTS—See APPEAL AND ERROR (1); AUTOMOBILES (2, 11, 15); CRIMINAL LAW (2); LANDLORD AND TENANT (7); MANDAMUS (2); MASTER AND SERVANT (4, 6); RAILROADS (1); SALES (1).

QUESTIONS REVIEWABLE—See APPEAL AND ERROR (5, 7, 11, 13, 16, 18, 20, 25, 27, 32, 39); CRIMINAL LAW (6, 23, 24); HABEAS CORPUS (3); MANDAMUS (4); WORKMEN'S COMPENSATION (4).

QUIETING TITLE.

Warranty deed, solicited and procured from grantor by appellant-grantee and conveying property to himself and his former wife, after the grantor had previously given a warranty deed to the wife subsequent to her divorce from appellant, was, under evidence presented, properly found to have been a cloud upon title of parties holding under deed from wife and removed as such by trial court, where it appears appellant knew of previous unrecorded deed to wife, as appellant did not obtain his deed in good faith (3 Comp. Laws 1929, § 12767). *Pavela* v. *Balogh*, 368.

See APPEAL AND ERROR (4); ATTORNEY AND CLIENT (2); EQUITY (4).

QUITCLAIM DEEDS—See HUSBAND AND WIFE.

RAILROADS.

1. In automobile passenger's action for personal injuries sustained near shut down iron mine when car in which he was riding collided with first of three railroad flat cars being pushed across unguarded crossing of county highway without a flagman being present or audible warning being given as required by city ordinance and it appears there were various obstructions to view and there was similarity of coloration of cars and background on late November morning, question of whether plaintiff's driver was guilty of contributory negligence was a question for the jury. *Silanpa* v. *Thomson*, 326.
2. The failure of a railroad to have a flagman to warn traffic at an unguarded highway crossing pursuant to city ordinance and its rule and custom would not excuse conduct attributable to plaintiff amounting to contributory negligence *per se* but

RAILROADS—Continued.

some reliance may be placed upon guards or flagmen at highway crossings by users of the highways. *Id.*

See CONTRACTS (4); DAMAGES (3).

RAPE—See CRIMINAL LAW (25).

RATIFICATION—See VENDOR AND PURCHASER (1).

REAL PARTIES IN INTEREST—See FRAUDULENT CONVEYANCES (1).

REALTY—See BROKERS; FRAUDS, STATUTE OF; FRAUDULENT CONVEYANCES (2); MORTGAGES (6).

REASSESSMENTS—See MUNICIPAL CORPORATIONS (48, 55).

RECEIVERS—See APPEAL AND ERROR (35); BANKRUPTCY (2); CORPORATIONS (5); EQUITY (5, 7); JUDICIAL SALES.

RECORD—See APPEAL AND ERROR (2, 9, 11); ARBITRATION AND AWARD (4); CORPORATIONS (5); COSTS (22); CRIMINAL LAW (14, 15); DEEDS (6); HABEAS CORPUS (1, 3); INTERPLEADER; JUDGMENT (4); LANDLORD AND TENANT (1); MORTGAGES (1); TOWNSHIPS (3).

RECORDING—See COVENANTS (4); LOST INSTRUMENTS; QUIETING TITLE.

RECORDS—See BRIBERY (4).

REDEMPTION—See MORTGAGES (1); TOWNSHIPS (3).

REFORMATION OF INSTRUMENTS—See WORKMEN'S COMPENSATION (7).

REFUNDING—See COSTS (11); MUNICIPAL CORPORATIONS (28).

REHEARING—See EQUITY (3, 6).

REIMBURSEMENT—See WORKMEN'S COMPENSATION (8).

RELEASE.

A covenant not to sue an insurer of one liable for a tort may be used to reduce a judgment the injured party might obtain against the insured. *Kallas* v. *Lincoln Mutual Casualty Co.*, 626.

See INSURANCE (12, 13, 15); MORTGAGES (4).

REMAND—See APPEAL AND ERROR (28, 36); CRIMINAL LAW (15).

REMEDY—See PLEADING (4).

REMITTITUR—See DAMAGES (1).

RENEWAL—See LANDLORD AND TENANT (5, 6).

RENT REGULATION—See LANDLORD AND TENANT (1, 3).

RENT—See CORPORATIONS (3); HUSBAND AND WIFE; LANDLORD AND TENANT (4, 7–9).

REORGANIZATION—See APPEAL AND ERROR (12).

REPAIRS—See VENDOR AND PURCHASER (2).

REPEAL—See STATUTES (11).

REPEAL BY IMPLICATION—See MARRIAGE (2).

REPLY—See APPEAL AND ERROR (9).

REPORTS—See AUTOMOBILES (5–7); CONSTITUTIONAL LAW (3); COSTS (9); WORKMEN'S COMPENSATION (3).

REQUEST TO CHARGE—See BRIBERY (4); CRIMINAL LAW (9, 24).

RESCISSION—See VENDOR AND PURCHASER (2, 3).

RESERVATIONS—See DEEDS (3, 4).

RESIDENCES—See COVENANTS (1, 5); MUNICIPAL CORPORATIONS (5, 6); NUISANCE (1); TOWNSHIPS (7).

RESIDENTIAL AREA—See MUNICIPAL CORPORATIONS (16, 21, 23).

RES IPSA LOQUITUR—See NEGLIGENCE (2).

RES JUDICATA—See APPEAL AND ERROR (13); EQUITY (6); JUDGMENT (2, 4); WORKMEN'S COMPENSATION (8, 11).

RESOLUTIONS—See CORPORATIONS (5).

RESTITUTION—See FORCIBLE ENTRY AND DETAINER; LANDLORD AND TENANT (3).

RESTRICTIONS—See COVENANTS (1).

RESULTING CORPORATION—See CORPORATIONS (6).

RETIREMENT OF PERSON FROM A FIRM—See NAMES; PARTNERSHIP (1).

RETURN OF SERVICE—See MORTGAGES (3, 4).

REVENUES—See APPEAL AND ERROR (39).

RIGHT OF WAY—See AUTOMOBILES (8, 9).

ROBBERY—See CRIMINAL LAW (15).

ROOFING AND SIDING APPLICATORS—See UNEMPLOYMENT COMPENSATION (1, 4).

RULES AND REGULATIONS—See MUNICIPAL CORPORATIONS (32); UNEMPLOYMENT COMPENSATION (5).

SALARIES—See BANKS AND BANKING; CONTRACTS (1); COSTS (15); OFFICERS (2, 4); UNEMPLOYMENT COMPENSATION (5).

SALES.

1. In nonjury action by seller of coal against corporate owner and former owner of laundry who had conducted the business under an assumed name similar to that of the corporation, organized after the sale, for balance due on account, the question of whether or not plaintiff had been given oral notice of the sale to the corporation was a question of fact and finding for plaintiff thereupon by trial court is accepted where there is competent evidence to sustain it (2 Comp. Laws 1929, § 9825 *et seq.*, as last amended by Act No. 104, Pub. Acts 1939). *Webb* v. *Levene*, 38.
2. In action to recover balance due for plywood furnished to defendant where special question put to jury as to whether defendant's buyer specified the exact material he wanted and whether plaintiff's salesman procured the exact material he was ordered to was answered affirmatively, such finding determined that the sale was by description without implied warranty. *F. M. Sibley Lumber Co.* v. *Schultz*, 193.
3. In action to recover balance due for concrete form plywood special question proposed by defendant as to whether the particular purpose for which it was to be used was made known to corporate plaintiff by its salesman or secretary and treasurer would not constitute a reason for finding an implied warranty that it was suitable for such use as necessary elements are wanting. *Id.*
4. Special question as to whether defendant, in placing order for carload of concrete form plywood with plaintiff did "rely on the skill or judgment" of plaintiff was vague and failed to specify in what particular and to what extent defendant relied on the skill and judgment of plaintiff, hence jury's affirmative answer thereto could not be the basis for finding an implied warranty that it was suitable for use to which it was put. *Id.*
5. In action to recover balance due for concrete form plywood, it was not error for court to refuse to propound special question, proposed by defendant, to jury as to whether or not plywood furnished was reasonably fit for use to which it was to be put in the absence of a finding of implied warranty, where court did charge that if there was an implied warranty there was no question about its breach. *Id.* 194.
6. Instructions to jury as to matter of whether or not an implied warranty arose because defendant purchaser of plywood had made known to the seller the particular purpose for which the plywood was to be used, because buyer relied on seller's skill and judgment, or because goods delivered were of merchantable quality *held*, sufficient and appropriate under the circumstances (2 Comp. Laws 1929, § 9454 [1] [2]). *Id.*
7. Where plywood was not being marked as to grade and its use to line forms to hold wet concrete was new to the trade and such usage of trade was neither pleaded nor proved, there was no implied warranty by usage of trade as to such particular use (2 Comp. Laws 1929, § 9454 [5]). *Id.*

See BROKERS (1, 3, 4); CONTRACTS (4); CORPORATIONS (2, 3, 15); COSTS (4); LANDLORD AND TENANT (2); MORTGAGES (2, 3, 5); TAXATION (2, 3, 5, 6); TRUSTS (1, 3, 11, 13).

SALESMAN—See SALES (3).

SCAVENGER SALES—See COSTS (4); MUNICIPAL CORPORATIONS (55); TAXATION (2, 4–6).

SEALERS OF WEIGHTS AND MEASURES—See COSTS (5); MUNICIPAL CORPORATIONS (7, 8, 11–13).

SEARCHES AND SEIZURES—See ARREST (2).

SECOND MORTGAGEE—See MORTGAGES (3–5).

SECRETARY—See SALES (3).

SECRETARY OF STATE—See AUTOMOBILES (5–7); COSTS (17); MANDAMUS (3, 4).

SELF-DEALING—See EXECUTORS AND ADMINISTRATORS (1–3).

SELF-INCRIMINATION—See AUTOMOBILES (6).

SEMI-TRAILERS—See AUTOMOBILES (15).

SENTENCE—See CRIMINAL LAW (4, 5, 14, 21, 25, 31–36).

SEPARATE PARCELS—See MORTGAGES (2).

SEQUESTERED REVENUES—See APPEAL AND ERROR (28).

SET-BACK LINES—See MUNICIPAL CORPORATIONS (14, 15).

SETTING ASIDE CONVEYANCES—See BANKRUPTCY (1); EQUITY (1); FRAUDULENT CONVEYANCES (1); MORTGAGES (5).

SEVERANCE CLAUSE—See TOWNSHIPS (9).

SEWAGE TREATMENT PLANT—See ARBITRATION AND AWARD (3, 4).

SEWERS—See APPEAL AND ERROR (39).

SEX OFFENDERS—See CRIMINAL LAW (21); HABEAS CORPUS (1).

SHORE LINE—See NUISANCE (1).

SHORT TITLES—See STATUTES (5).

SIDEWALKS—See APPEAL AND ERROR (22); JUDGMENT (4); MUNICIPAL CORPORATIONS (33).

SIDE YARDS—See MUNICIPAL CORPORATIONS (15).

SIGNATURES—See BROKERS (1, 3); FORGERY (1); TOWNSHIPS (1–3); VENDOR AND PURCHASER (6, 7).

SIGNS—See NUISANCE (3).

SLUDGE DIGESTION TANK—See ARBITRATION AND AWARD (3).

SNOW—See AUTOMOBILES (14); MUNICIPAL CORPORATIONS (33).

SOCIAL SECURITY BOARD—See UNEMPLOYMENT COMPENSATION (5).

SODOMY—See CRIMINAL LAW (1–3).

SPECIAL AGENT—See INSURANCE (4).

SPECIAL ARBITRATION—See ARBITRATION AND AWARD (4).

SPECIAL ASSESSMENT DISTRICTS—See TOWNSHIPS (4, 5).

SPECIAL ASSESSMENTS—See COSTS (11); DRAINS (2); MUNICIPAL CORPORATIONS (26–28, 48–52); TAXATION (7).

SPECIAL POLICEMEN—See MUNICIPAL CORPORATIONS (8).

SPECIAL QUESTION—See SALES (2–5).

SPECIFICATIONS—See INTERPLEADER; MUNICIPAL CORPORATIONS (25).

SPECIFIC PERFORMANCE.

1. The jurisdiction of equity to decree specific performance presupposes that the parties have agreed between themselves upon every material matter and that the matters so agreed upon are of such a nature and the subjects of enforcement are such that the court can collect all elements in their proper relations and proceed intelligently and practically in carrying into execution the very things agreed on and standing to be performed. *Czeizler* v. *Radke*, 349.
2. Equity cannot make a new contract for the parties nor supply any material stipulation thereof but must specifically enforce the contract according to its terms or not at all. *Id.*
3. Equitable relief by way of specific performance should not be granted to plaintiff unless his course of conduct relative to the transaction has been one that warrants the approval of a court of equity. *Id.*
4. Specific performance is a remedy of grace and not a matter of right and the test of whether or not it should be granted depends upon the peculiar circumstances of each case. *Id.*
5. The granting of the remedy of specific performance lies within the discretion of the court. *Id.*
6. Generally speaking, equity will decree the specific performance of a contract only in cases where there is a mutuality of obligation and of remedy. *Id.*
7. In *suit for specific performance of agreement to sell land*, as evidenced by preliminary agreement, signed by plaintiff as purchaser and defendants as vendors, and which was accompanied by plaintiff's deposit of $100 that was turned over to and accepted by defendants, plaintiff was entitled to relief prayed for where the agreement was sufficiently clear, definite and complete to create a valid contract and a mutual right to specific performance. *Id.* 350.
8. Contract for purchase of vendees' interest in land contract, which was obligatory on both parties and was sufficiently com-

SPECIFIC PERFORMANCE—Continued.

plete, definite and certain, gave mutual rights of specific performance. *Himelson* v. *Galusz*, 513.

See APPEAL AND ERROR (19, 29); VENDOR AND PURCHASER (4, 5).

SPEED—See AUTOMOBILES (3, 14, 15).

STANDARDS—See TOWNSHIPS (7, 8).

STARE DECISIS—See COURTS (6).

STATES.

1. A State is not bound by an implied contract made by a State officer where such officer had no authority to make an express contract. *Roxborough* v. *Michigan Unemployment Compensation Commission*, 505.
2. The powers of State officers being fixed by law, all persons dealing with such officers are charged with knowledge of the extent of their authority or power to bind the State, and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. *Id.* 506.

See CONSTITUTIONAL LAW (7, 8); COSTS (4); COVENANTS (3); LICENSES; OFFICERS (3, 4); TAXATION (2–4); TOWNSHIPS (3).

STATE HOSPITAL COMMISSION—See CRIMINAL LAW (21).

STATUS QUO—See VENDOR AND PURCHASER (2, 3).

STATUTE OF LIMITATIONS—See FRAUDULENT CONVEYANCES (1); MORTGAGES (4); PROCESS.

STATUTES.

1. In construing various statutes pertaining to the same subject matter, it must be presumed that the legislature, in enacting the later statute, had in mind the decisions of the Supreme Court upon previous acts. *Evans* v. *Ross*, 149.
2. In enacting statute relative to contributions among tort-feasors, it must be presumed that, had the legislature intended to change the well-established practice in the courts of this State relative to granting a new trial as to some tort-feasors and not all, it would have done so by appropriate enactment (Act No. 303, Pub. Acts 1941). *Uhrstadt* v. *Sauer Cooperage Co.*, 202.
3. The legislature, in amending an act, is not required to re-enact and publish the amended act in full (Const. 1908, art. 5, § 21). *Surtman* v. *Secretary of State*, 270.
4. In so far as an amendatory act does alter or amend a previous act by express language and is published at length and in so far as the change or alteration is by implication merely, it does not offend the provision of the Constitution relative to re-enactment and publication at length (Const. 1908, art. 5, § 21). *Id.*

STATUTES—Continued.

5. Legislative procedure whereby title of bill, proposing amendment to an act which contains a so-called short title, contains such short title until bill is passed by house of legislature other than that of origin, title of bill is then amended to contain full title and amendment is then concurred in by both houses of the legislature does not violate provisions of Constitution that no law shall embrace more than one object which shall be expressed in its title and that no law shall be revised, altered or amended by reference to its title only but that 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; Act No. 203, Pub. Acts 1933, as amended by Act No. 248, Pub. Acts 1943). *Id.*

6. Whatever might have been incorporated into a statute upon its original enactment may be added thereto by way of amendment under the most general title. *Id.* 271.

7. An amendatory act which fails to show any objects foreign to the statement in the title of the act being amended and which amendment contains matter to be expected within the body of an act bearing such title is not unconstitutional because contrary to provisions of Constitution setting forth requisites of titles to acts (Const. 1908, art. 5, § 21; Act No. 203, § 3a, Pub. Acts 1933, as amended by Act No. 248, Pub. Acts 1943). *Id.*

8. The construction placed upon statutory provisions by any particular department of government for a long period of time, although not binding upon the courts, should be given considerable weight. *Aller* v. *Detroit Police Department Trial Board,* 382.

9. Judicial construction of a statute which speaks plainly is not permitted. *Detroit Club* v. *State of Michigan,* 721.

10. In considering an amendatory act which in part contains the same language as that of a former amendatory act amending the same section, a court is confined to the act as it stands after the later amendment. *Id.*

11. An amendatory act has a repealing force, by the mechanics of legislation, different from that of an independent statute; repugnancy not being essential element of implied repeal of specifically amended sections. *Id.*

12. Where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there, the provisions carried over having their force from the new act, and not from the former. *Id.*

13. The effect of an act amending a specific section of a former act, in the absence of a saving clause, is to strike the former section from the law, obliterate it entirely, and substitute the new section in its place. *Id.* 722.

14. The legislature is presumed to know acknowledged and long-established rules of construction of statutes. *Id.*

STATUTES—Continued.

15. Even though the court should be convinced that some other meaning was really intended by the law-making power, and even though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the legislature is the law, and the courts must not depart from it. *Id.*

See ABATEMENT AND REVIVAL (1, 2); ADOPTION; APPEAL AND ERROR (6, 20); ARBITRATION AND AWARD (1); ARREST; AUTOMOBILES (4–6, 8, 9, 11–13, 16); BANKRUPTCY (2); BANKS AND BANKING (1); BRIBERY (1, 4, 5); BROKERS; CHAMPERTY AND MAINTENANCE; CONSPIRACY; CONSTITUTIONAL LAW (3, 4); CORPORATIONS (7–15); COSTS (1, 3, 4, 9, 11, 15, 18); CRIMINAL LAW (1–3, 5, 12, 13, 15, 19, 21–24, 26–33, 35); DEATH; DRAINS (2); ESTOPPEL (2); EXECUTORS AND ADMINISTRATORS (1, 2, 4); FORCIBLE ENTRY AND DETAINER; FORGERY; FRAUDS, STATUTE OF; FRAUDULENT CONVEYANCES; HABEAS CORPUS (1, 2); INDICTMENT AND INFORMATION; INJUNCTION (3); INSURANCE (14, 16); INTEREST (1); INTOXICATING LIQUORS; JUDGMENT (1, 3); JUDICIAL SALES; LANDLORD AND TENANT (12); LIMITATION OF ACTIONS (1); LIS PENDENS (2–5); MANDAMUS (3, 4); MARRIAGE; MASTER AND SERVANT (5); MORTGAGES (2, 4, 6); MUNICIPAL CORPORATIONS (1, 3, 4, 7, 8, 20, 22, 24–28, 37–39, 42, 45–57); NEW TRIAL (8); OFFICERS (2, 3, 5); PARENT AND CHILD; PERJURY; PLEADING (1, 3); PROCESS; SALES (1, 6, 7); TAXATION (2–7); TOWNSHIPS; UNEMPLOYMENT COMPENSATION; WITNESSES; WORKMEN'S COMPENSATION.

STIPULATIONS—See APPEAL AND ERROR (10, 32, 36); MINES AND MINERALS (9); MUNICIPAL CORPORATIONS (52, 54, 55, 57).

STOCK AND STOCKHOLDERS—See APPEAL AND ERROR (13); BANKS AND BANKING (2); CONTRACTS (2); CORPORATIONS (1–3); FRAUDULENT CONVEYANCES (3); INSURANCE (16); TRADE MARKS AND TRADE NAMES (2); TRUSTS (1, 12).

STOPPING—See AUTOMOBILES (12, 13).

STREET RAILWAYS.

1. A passenger who alights from a streetcar with as good an opportunity as the streetcar operators to observe the conditions which confront him and to know as well as they whether such conditions are dangerous to him in an attempt to alight and is injured while alighting in such a dangerous position is guilty of contributory negligence precluding recovery. *Mitchell* v. *Stroh Brewery Co.*, 231.

2. Plaintiff, a stout and heavy woman 56 years of age who, while alighting from city streetcar, became confused by defendant brewery company's truck being parked about two feet from side-exit door of streetcar on narrow street and fell when she attempted to get back into streetcar after having placed one foot on the ground, *held*, guilty of contributory negligence precluding recovery for injuries sustained, where it appears that neither the truck nor the streetcar moved. *Id.*

SUA SPONTE MOTION—See NEW TRIAL (4).

SUBCONTRACTORS—See APPEAL AND ERROR (22); JUDGMENT (4); MUNICIPAL CORPORATIONS (24, 25).

SUBDIVISION—See COVENANTS (1, 5).

SUBSURFACE DRAINS—See INJUNCTION (1).

SUMMARY PROCEEDINGS—See LANDLORD AND TENANT (1).

SUMMER RESORT—See DAMAGES (1).

SUPERINTENDENT OF POLICE—See MUNICIPAL CORPORATIONS (29).

SUPREME COURT—See APPEAL AND ERROR (1–5, 14, 16, 19, 21, 23, 25–27, 29, 32, 33, 39, 40); COSTS (2); CRIMINAL LAW (14, 23); HABEAS CORPUS (3); LIS PENDENS (4); MANDAMUS (4); PLEADING (2); STATUTES (1).

SURFACE OWNERS—See TAXATION (1).

SURVIVAL—See ABATEMENT AND REVIVAL.

SURVIVORS—See PARENT AND CHILD (1).

SUSPENSION OF SENTENCE—See CRIMINAL LAW (31–36).

TAVERNS—See FRAUD; PLEADING (4).

TAXATION.

1. Claim for contribution of taxes, made by surface owners against owners of mineral rights, is without foundation where lands do not appear to have been assessed for their mineral value. *Bice* v. *Holmes*, 111.
2. The right of a former owner to meet the highest bid made at a so-called scavenger sale is not a condition upon which the State acquired title absolute to lands which had been deeded to the State by the auditor general because of tax delinquency but is merely a contingent right which does not become a vested right until a sale has been made by the State to the highest bidder (Act No. 155, § 7, Pub. Acts 1937, as amended). *Mount Clemens Savings Bank* v. *State Land Office Board*, 153.
3. Parcels of land to which the State has acquired title because of nonpayment of taxes may be omitted from public sale without giving monetary consideration to the former owner of the land (Act No. 155, § 5, Pub. Acts 1937, as amended). *Id.* 154.
4. The privilege of matching the highest bid at a so-called scavenger sale applies only to such land as the State may have on the date of sale (Act No. 155, § 7, Pub. Acts 1937, as amended). *Id.*
5. The former owner of lands to which the State had acquired title because of nonpayment of taxes and which were condemned by the Federal government before so-called scavenger sale thereof was held by the State had no interest in the land,

TAXATION—Continued.

merely a privilege of matching the bid if and when a sale was made, hence such former owner was not entitled to participate in the award made on condemnation proceedings (Act No. 155, §§ 5, 7, Pub. Acts 1937, as amended). *Id.*

6. The right to match any bid at a so-called scavenger sale of property to which the State had acquired title for nonpayment of taxes is transferable by assignment or deed (Act No. 155, § 5a, Pub. Acts 1937, as added by Act No. 363, Pub. Acts 1941). *Detroit Trust Co.* v. *Mason*, 281.

7. Funds raised by special assessment are trust funds and must be applied to the payment of the improvement even if the statute under which the bonds are issued and the bonds are void. *City of Highland Park* v. *Royal Oak No. 7 Storm Sewer Drain District*, 646.

See APPEAL AND ERROR (8); MUNICIPAL CORPORATIONS (43, 45, 54, 55); TOWNSHIPS (3); TRUSTS (1); VENDOR AND PURCHASER (2).

TENANCY AT WILL—See LANDLORD AND TENANT (12).

TENANCY BY SUFFERANCE—See LANDLORD AND TENANT (12).

TENANCY FROM MONTH TO MONTH—See LANDLORD AND TENANT (10, 12).

TENANCY FROM YEAR TO YEAR—See LANDLORD AND TENANT (6–10).

TENANCY IN COMMON—See MINES AND MINERALS (5–9); VENDOR AND PURCHASER (8).

TENANTS BY ENTIRETY—See HUSBAND AND WIFE.

TENDER—See APPEAL AND ERROR (17).

TEST OF EMPLOYMENT—See UNEMPLOYMENT COMPENSATION (1, 2).

THIRD PERSONS—See TRUSTS (3).

THREE-CAR COLLISION—See NEW TRIAL (7).

THROUGH HIGHWAYS—See AUTOMOBILES (8–10, 12, 13).

TILE DRAINS—See INJUNCTION (1).

TIME—See ACTION (1); APPEAL AND ERROR (36); ATTORNEY AND CLIENT (1); AUTOMOBILES (5); MINES AND MINERALS (4); MUNICIPAL CORPORATIONS (1, 5, 6); NEW TRIAL (3); TRUSTS (11).

TIRE REPAIRS—See MASTER AND SERVANT (3, 4, 6).

TITLE—See COSTS (4); LOST INSTRUMENTS; MORTGAGES (10); QUIETING TITLE; TAXATION (2, 5, 6); TOWNSHIPS (3).

TITLE OF ACT—See AUTOMOBILES (5); STATUTES (5–7).

TOOLS—See MASTER AND SERVANT (6).

TORTFEASORS—See ABATEMENT AND REVIVAL (2, 3); COSTS (6); JUDGMENT (1); NEGLIGENCE (1); NEW TRIAL (5–8); STATUTES (2).

TORTS—See INSURANCE (14, 15); PLEADING (4).

TOURIST CAMPS—See AUTOMOBILES (4); MUNICIPAL CORPORATIONS (21, 23).

TOWNSHIP BOARD—See TOWNSHIPS (1, 2, 4, 5).

TOWNSHIPS.

1. Under statute providing for special assessment district for public improvements in platted lands in townships, the signatures on the initiatory petition of the owners of the percentage of lands set forth in the statute is necessary in order to give the township board jurisdiction in the matter (1 Comp. Laws 1929, § 2386). *Macomb Building Co.* v. *Clinton Township*, 236.
2. The action of a township board based on a petition for public improvements in platted lands is a nullity where initiatory petition therefor was void because it lacked signatures of owners of sufficient amount of property (1 Comp. Laws 1929, § 2386). *Id.*
3. On a petition to initiate proceedings for public improvements in platted lands in townships, the signatures of persons who were not record owners of lands to which the State held record title under deed from auditor general because of nonpayment of taxes at time when petition was filed would not be counted so as to validate the petition even though later on the property was redeemed from the State for plaintiff's grantor (1 Comp. Laws 1929, § 2386). *Id.* 237.
4. The doctrine of estoppel cannot be invoked to establish jurisdiction of a township board to set up a special assessment district for public improvement in platted land (1 Comp. Laws 1929, § 2386). *Id.*
5. The fact that plaintiff corporation's officers had knowledge of and obtained the benefits from water facilities installed in a special assessment district before corporation purchased lots would not estop latter from claiming levy of assessment was invalid on the ground that initiatory petition failed to give township board jurisdiction to establish the district (1 Comp. Laws 1929, § 2386). *Id.*
6. An automobile dismantling lot is a "junk yard" as that term is used in township ordinance prohibiting operation of junk yards without a license (2 Comp. Laws 1929, § 9766, as amended by Act No. 34, Pub. Acts 1935; Hampton Township Junk Yard Licensing Ordinance, § 1). *Blumlo* v. *Hampton Township Board*, 452.
7. Refusal of a township board to grant a license to operate a junk yard for dismantling automobiles at a place which was not restricted to residential use either by plat restrictions or zoning ordinance, for which restricted areas the ordinance barred issuance of a license, was not authorized by provision of ordinance permitting the township board "in its discretion,

TOWNSHIPS—Continued.

for just cause," to refuse to grant a license, as such provision, being without any standard as a basis of determination, is invalid (2 Comp. Laws 1929, § 9766, as amended by Act No. 34, Pub. Acts 1935; Hampton Township Junk Yard Licensing Ordinance, §§ 1, 4). *Id.*

8. The failure to provide a standard in an ordinance conferring licensing power upon township board as to the business of operating a junk yard for dismantling automobiles renders the discretionary provision of the ordinance invalid (2 Comp. Laws 1929, § 9766, as amended by Act No. 34, Pub. Acts 1935; Hampton Township Junk Yard Licensing Ordinance, §§ 1, 4). *Id.*

9. Under township junk yard licensing ordinance which contains a severance clause, where township board refused issuance of a license pursuant to discretion attempted to be conferred under invalid provision, the remaining portion is held valid and applicant granted mandamus to compel issuance of license (2 Comp. Laws 1929, § 9766, as amended by Act No. 34, Pub. Acts 1935; Hampton Township Junk Yard Licensing Ordinance, §§ 1, 4, 15). *Id.* 453.

See APPEAL AND ERROR (28, 36); COSTS (18); INJUNCTION (2); JUDGMENT (5); MUNICIPAL CORPORATIONS (34, 35, 44–57).

TRACING ASSETS—See FRAUDULENT CONVEYANCES (5).

TRACTORS—See AUTOMOBILES (15).

TRADE MARKS AND TRADE NAMES.

1. Since unfair competition does not necessarily involve the question of the exclusive right of another to the use of a name, symbol, or device, it is distinguishable from the infringement of a trade mark. *Universal Credit Co.* v. *Dearborn Universal Underwriters Credit Corp.*, 609.

2. Corporate incorporator and sole stockholder of recently-formed corporation which bore the term "universal" in its corporate name was a proper party defendant in plaintiff corporations' suit to enjoin the use of such term by another corporation engaged in the same type of business. *Id.* 610.

TRAFFIC HAZARD—See NUISANCE (1).

TRAILER COACHES—See MUNICIPAL CORPORATIONS (1, 4–6).

TRAILERS—See AUTOMOBILES (4); MUNICIPAL CORPORATIONS (23).

TREASURER—See SALES (3).

TREATMENT—See HABEAS CORPUS (2).

TRESPASS—See INJUNCTION (1); MINES AND MINERALS (7).

TRIAL.

Charge of court in action by workmen's compensation insurer against employer for breach of notice provision of policy

TRIAL—Continued.

held, fair and to have squarely presented issue to jury. *Fidelity & Casualty Company of New York* v. *Vantaggi,* 634.

See APPEAL AND ERROR (39); CRIMINAL LAW (10).

TRUCKS—See AUTOMOBILES (3, 14, 16); NEW TRIAL (7); STREET RAILWAYS (2).

TRUNK LINE HIGHWAYS—See AUTOMOBILES (9).

TRUSTEES—See BANKRUPTCY (1); CONTRACTS (5); CORPORATIONS (3); EQUITY (1); FRAUDULENT CONVEYANCES (1); MORTGAGES (6); TRUSTS (2–5, 7, 8, 12).

TRUST MORTGAGES—See APPEAL AND ERROR (11–13); CORPORATIONS (3); LANDLORD AND TENANT (2); MORTGAGES (6); TRUSTS (1–10, 13).

TRUST PROPERTY—See TRUSTS (11).

TRUSTS.

1. Organization of corporation without court's consent with capital of only $50,000 for purpose of owning and operating hotel which trustee had bid in at foreclosure sale with upwards of $3,000,000 deposited bonds and which hotel property had been sold for nonpayment of taxes was not erroneous on part of trustee which had advanced nearly $400,000 of its own funds notwithstanding the original investment of the bondholders would have justified a larger capitalization, in view of all the circumstances including constant and continuing losses of large amounts in the operation of the hotel, the trustee's various gratuitous efforts, large prior liens and the fees and taxes of a larger corporation, especially where it is apparent trustee recognized court's jurisdiction in the matter. *Detroit Trust Co.* v. *Mason,* 281.
2. A trustee under a trust mortgage upon foreclosure becomes a liquidating trustee for the benefit of the bondholders and must administer the trust for them with great fidelity and solely in their interest. *Id.* 283.
3. A trustee under a trust mortgage after foreclosure is under a duty to administer the trust for the beneficiaries and is not to be guided by the interests of any third persons, hence it would be improper for the trustee to sell the property to a third party for purpose of benefiting such third party rather than the estate. *Id.*
4. A trustee under a trust mortgage which had been foreclosed, also interested in the property as a creditor for advancements and services as well as being a bondholder in its individual capacity, which made an offer to forgive a substantial part of its claim in its proposal for disposal of the property submitted to the court for approval as made or as modified by the court was bound by such offer when court orally accepted same with a modification as the trustee was in a court of equity and was bound to do equity. *Id.*

TRUSTS—Continued.

5. After foreclosure of trust mortgage, where trustee, in petition for disposal of the property, had proposed to forgive a substantial part of its claim against the property for advancements and services and as bondholder in its individual capacity, court's acceptance of such offer was not inequitable where modification by court did not affect amount trustee agreed to accept but did result in raising amount realized by holders of certificates of deposit of bonds from 65 cents to about $12 per $100 unit. *Id.* 284.

6. In the foreclosure of a trust mortgage and disposal of the property a court of equity has the right and duty to look after the interests of the holders of certificates of deposit of bonds issued under the mortgage. *Id.*

7. Since a trial judge may not solicit plans for disposal of property upon which trustee had foreclosed a trust mortgage in chancery, where it is reasonably apparent that the interests of the bondholders or their successors may be better protected, in the absence of timely objection, it was not improper for the court to appoint a friend of the court to perform certain labors and make examinations and provide for his payment, the court reserving to itself the exclusive right to make final determination after submission of recommendations by the friend of the court. *Id.*

8. Trustee under trust mortgage, which foreclosed mortgage and then petitioned court for authority to dispose of the property, was foreclosed from making objection to appointment of the friend of the court for purpose of obtaining other plans and making recommendations after it became apparent to the trial court that the trustee and the attorney for the bondholders' committee declined to make further efforts to make an arrangement whereby the holders of certificates of deposit of bonds would realize more on their investment and where no objection was raised at the time of his appointment. *Id.* 285.

9. Claim that final order of trial court did not properly incorporate proposal or offer submitted by appellee for hotel property being disposed of by trustee after foreclosure of trust mortgage thereon was without merit in view of colloquy in open court removing all ambiguity in the matter. *Id.*

10. A court having jurisdiction of proceedings to foreclose trust mortgage in chancery may properly provide for disposal of trust estate notwithstanding the opposition of the holders of certificates of deposit representing a minority of the bonds deposited as the certificate holders are bound by deposit agreement empowering bondholders' committee to protect their interests and which committee participated in proceedings for disposal of the trust estate. *Id.*

11. Sale of trust estate consisting of hotel property to purchaser who presented plan whereby holders of certificates for deposited bonds would presently receive a larger amount than any other plan proposed was proper and within jurisdiction of court where 14 years had elapsed since bondholders or their

TRUSTS—Continued.

successors in interest had realized anything from the trust and whether present profitable operation of hotel would continue after termination of war was speculative. *Id.*

12. Plan for disposal of trust estate, consisting of hotel property upon which trust mortgage had been foreclosed, whereby cash was to be paid by purchaser for outstanding stock of corporation which had been formed by trustee to own and operate hotel, conditioned upon trustee forgiving a substantial part of its claim against the estate as it had proposed in its own plan for disposal and under which the purchaser took his chances on obtaining concessions from lessors of land on which hotel stood, *held*, preferable, under the circumstances, to plan whereby corporation was to pay off trustee, other certificate holders were to share in trustee's individually-owned certificates of deposit of bonds, and corporation was to continue operation of the hotel. *Id.*

13. Upon approval of sale of hotel property which had come into trust estate through foreclosure of trust mortgage, trial court properly retained jurisdiction to settle further questions that may arise including the mechanics of carrying out its decree. *Id.* 286.

See APPEAL AND ERROR (11–13); CORPORATIONS (3); LANDLORD AND TENANT (2); MORTGAGES (6); TAXATION (7).

UNCLEAN HANDS—See EQUITY (8).

UNDUE INFLUENCE—See WILLS (4–7).

UNEMPLOYMENT COMPENSATION.

1. In determining whether or not plaintiff who has been assessed for contributions under the unemployment compensation act was an employer of persons who applied roofing and siding the test of employment applied is that furnished by the unemployment compensation act rather than one supplied by common-law principles (Act No. 1, § 42, subds. [1] [6], Pub. Acts 1936 [Ex. Sess.], as last amended by Act No. 18, Pub. Acts 1942 [2d Ex. Sess.]). *O'Brian* v. *Michigan Unemployment Compensation Commission*, 18.

2. Under the unemployment compensation act where service is performed for remuneration, there is an employment unless it is shown that the individual performing the service is free from control or direction over the performance of the service both under the contract and in fact, that the service is either outside the usual course of business for which the service is performed or is performed outside of all the places of business of the enterprise for which performed and that the individual is customarily engaged in an independently established trade, occupation, profession or business (Act No. 1, § 42, subd. 6 [a, b, c], Pub. Acts 1936 [Ex. Sess.], as amended by Act No. 18, Pub. Acts 1942 [2d Ex. Sess.]). *Id.*

3. The unemployment compensation act should be liberally construed to accomplish its purpose (Act No. 1, Pub. Acts 1936 [Ex. Sess.], as amended). *Id.*

UNEMPLOYMENT COMPENSATION—Continued.

4. On certiorari in suit to determine liability for contributions under the unemployment compensation act, holding of circuit judge that parties who contracted with plaintiff to apply roofing and siding materials were his employees was not against the great weight of the evidence where it appears applicators were not free from control by plaintiff, contracts with property owner were with plaintiff who was liable to the former for defective workmanship or material, contributions for some 77 individuals as applicators were involved, so-called master contract with schedule of payments did not create any contractual relation between plaintiff and applicators, work sheets embodying data as to a particular job were not always executed as a formal contract, tools and equipment were sometimes loaned applicators and work was inspected by plaintiff's inspectors, notwithstanding it also appeared that in so-called master contract applicators were designated as contractors and they were given the right to employ and control men used on the jobs and contractors carried on other jobs at same time they worked for plaintiff (Act No. 1, Pub. Acts 1936 [Ex. Sess.], as amended). *Id.*

5. By virtue of provisions of the unemployment compensation act the governor's authority to fix the salary of his appointed member of the appeal board is subject to the regulations of the Federal social security board, hence under regulations limiting the number of days' payments to such members from the administration fund, a fund 93 to 97 per cent. contributions by Federal government, to less than the maximum amount provided for in the salary as fixed by the governor, his appointee may not recover for days worked in excess of the regulation's maximum where plaintiff accepted lesser payments made monthly and has made no showing he was requested or required to work the additional days (49 Stat. at L. 626; Act No. 1, §§ 10, 11, 35, Pub. Acts 1936 [Ex. Sess.], as amended by Act No. 347, Pub. Acts 1937). *Roxborough* v. *Michigan Unemployment Compensation Commission*, 505.

See COSTS (15).

UNFAIR COMPETITION—See TRADE MARKS AND TRADE NAMES (1).

UNITED STATES—See COSTS (4); TAXATION (5); UNEMPLOYMENT COMPENSATION (5).

"UNIVERSAL"—See CORPORATIONS (8, 12–15); TRADE MARKS AND TRADE NAMES (2).

UNLIQUIDATED CLAIMS—See INTEREST (2); MUNICIPAL CORPORATIONS (57).

UNTILLABLE LAND—See DRAINS (1).

UNUSUAL PUNISHMENT—See HABEAS CORPUS (2).

USAGE OF TRADE—See SALES (7).

UTTERING—See CRIMINAL LAW (26); FORGERY; INDICTMENT AND INFORMATION (2).

VALUE—See APPEAL AND ERROR (30); MINES AND MINERALS (9).

VARIANCE—See INDICTMENT AND INFORMATION (3).

VENDOR AND PURCHASER.

1. Statements to purchaser by broker would not impose liability upon vendor for misrepresentations contained therein where broker acted as agent of the purchaser in the matter and vendor did nothing to ratify the broker's acts merely by accepting benefits of the sale. *Smith* v. *Highland Park State Bank*, 226.
2. Purchaser under land contract requiring her to make repairs upon premises, who failed to make them and who waited nearly a year and a half after purchase and a month after premises were padlocked for one year for illegal use before giving notice of rescission could not place vendor *in statu quo* and was not entitled to recover payments made under contract and for taxes. *Id.*
3. Placing the vendor *in statu quo* is requisite to rescission of a land contract. *Id.* 227.
4. Vendor under contract to sell land who was ill, addicted to the use of liquor, and in a highly nervous state at time of accepting plaintiff's offer to purchase *held*, not shown to have been incompetent to do business at time contract was executed, hence plaintiff was entitled to specific performance thereof. *Czeizler* v. *Radke*, 350.
5. In suit for specific performance of contract to sell vendees' interest in a land contract, finding of trial judge that defendants had failed to establish fraud on the part of plaintiff when contract was executed is not disturbed in view of the conflicting testimony and the fact that the trial judge saw and heard the parties. *Himelson* v. *Galusz*, 513.
6. In suit for specific performance of contract to sell vendees' interest in a land contract, finding of trial court that name of one of the vendees therein named was purely fictitious so far as its use therein is concerned is not disturbed in view of his better position to judge the credibility of and weight to be accorded testimony of witnesses. *Id.*
7. Defendant who signed contract to sell vendees' interest in land contract who had signed the first contract with a fictitious name obligated herself as a vendee thereon. *Id.*
8. Man and woman who were not married at time they executed land contract as purchasers became owners of the vendees' interest as tenants in common where there was no change in the instrument although later they were married. *Id.*

See APPEAL AND ERROR (8); LANDLORD AND TENANT (2); MORTGAGES (1); SPECIFIC PERFORMANCE (7).

VENUE—See FORGERY (3).

VERDICTS AND FINDINGS—See APPEAL AND ERROR (6, 21, 22, 24, 30, 34, 35); AUTOMOBILES (2); CORPORATIONS (5); DEEDS (5, 6); ESTATES OF DECEDENTS (1); INSURANCE (13); INTERPLEADER; LANDLORD AND TENANT (1); MORTGAGES (1); MUNICIPAL CORPORATIONS (31); SALES (1–5); VENDOR AND PURCHASER (5, 6); WORKMEN'S COMPENSATION (1, 5, 8, 11).

VOTING TRUST—See BANKS AND BANKING (2).

WAIVER—See ACTION (2); ESTATES OF DECEDENTS (2); HABEAS CORPUS (1); INSURANCE (8); MORTGAGES (7); WORKMEN'S COMPENSATION (10).

WAR—See CRIMINAL LAW (33); TRUSTS (11).

WARNING—See RAILROADS (1).

WARRANT—See ARREST.

WASHING CARS—See WORKMEN'S COMPENSATION (2).

WATER FACILITIES—See TOWNSHIPS (5.)

WATER MAINS—See APPEAL AND ERROR (28); INJUNCTION (2); MUNICIPAL CORPORATIONS (34, 36, 38, 40–44).

WATERS AND WATERCOURSES.

1. The right to drain or dispose of surface water on land cannot be exercised by concentrating and pouring it, by means of an artificial ditch or drain, in unusual quantities and velocity greater than would be natural, upon adjacent property, *Ruehs* v. *Schantz*, 246.
2. The State should not be required to condemn property surrounding public fishing sites in order to make a lake available to the public in view of the fact that considerable public funds have been expended in advertising the State as a summer playground, and in the upkeep of public parks and playgrounds. *Gableman* v. *Department of Conservation*, 417.

See APPEAL AND ERROR (25); COSTS (14); COVENANTS (5); DRAINS (1); INJUNCTION (1); NUISANCE (1, 3).

WATER SYSTEM—See INJUNCTION (2); JUDGMENT (5); MUNICIPAL CORPORATIONS (34–37, 42, 44).

WEATHER CONDITIONS—See AUTOMOBILES (3).

WEIGHING—See MINES AND MINERALS (1, 3).

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (6, 34); AUTOMOBILES (11); LANDLORD AND TENANT (1); UNEMPLOYMENT COMPENSATION (4); VENDOR AND PURCHASER (6).

WEIGHTS AND MEASURES—See COSTS (5); MUNICIPAL CORPORATIONS (7, 8, 11–13).

WIDOWERS—See PARENT AND CHILD (1).

WIDOWS—See DEEDS (4).

WILLS.

1. Any person has the right to make a will and so long as such person has the mental capacity to understand the business in which he is engaged, to know the extent and value of his property, to know the natural objects of his bounty and to keep these facts in mind long enough to dictate his will without prompting from others, such a person has capacity to make a valid will. *In re Thayer's Estate*, 473.
2. A testator may be suffering physical ills and some degree of mental disease and still execute a valid will, unless the provisions thereof are affected by the indisposition. *Id.*
3. Mere eccentricity of behavior on the part of the testator will not cause an inference strong enough to invalidate a will if he is otherwise competent. *Id.*
4. In will contest, while there was some testimony which might have created an inference of mental incapacity or undue influence, such testimony was controverted by positive testimony as to testatrix' capability of handling her own affairs, including testamentary disposition of property. *Id.*
5. Undue influence of a testator may not be inferred from acts of kindness, but must be proved. *Id.*
6. Proof of opportunity to exercise undue influence upon a testator is not alone sufficient. *Id.*
7. Evidence in will contest *held*, insufficient to justify setting aside of will on the ground of mental incompetency or undue influence. *Id.*
8. While a proponent cannot rest on the presumption of capacity when competent proof to the contrary is produced, yet the burden of proof at all times rests on the contestant to show that the testator did not have mental capacity to make the will. *Id.* 474.

WISHES OF CHILD—See PARENT AND CHILD (3).

WITHHOLDING LANDS—See TAXATION (3).

WITNESSES.

The statute providing for granting immunity to a witness before a so-called one-man grand jury expressly protects the witness against prosecution for any offense concerning which his answers may tend to incriminate him, but it does not protect him from an offense subsequently committed (3 Comp. Laws 1929, § 17220). *People* v. *Woodson*, 391.

See APPEAL AND ERROR (31, 34, 38); ARBITRATION AND AWARD (2); CRIMINAL LAW (2, 3, 8, 23); NEW TRIAL (1); PERJURY (1); VENDOR AND PURCHASER (6).

WORDS AND PHRASES—See COVENANTS (2); MASTER AND SERVANT (1); OFFICERS (5); PARDONS AND PAROLES.

WORKMEN'S COMPENSATION.

1. Plaintiff was not entitled to compensation for hernia under the occupational disease amendment of the workmen's compen-

WORKMEN'S COMPENSATION—Continued.

sation act where there is evidence to support finding of the department of labor and industry that the hernia could not have been recent in origin notwithstanding the fact the condition was not previously disabling (Act No. 10, pt. 7, § 2, subd. 28, Pub. Acts 1912 [1st Ex. Sess.], as added by Act No. 61, Pub. Acts 1937). *Barclay* v. *General Motors Corp.*, 534.

2. Knowledge of foreman who had worked on same car as plaintiff on a cold day in November in an enclosed building for car washing that plaintiff had collapsed after having worked near exhaust pipe of preceding car whose motor had been kept running *held*, sufficient to charge employer with notice of injury from carbon monoxide poisoning (2 Comp. Laws 1929, § 8434; Act No. 10, pt. 7, § 7, Pub. Acts 1912 [1st Ex. Sess.], as added by Act No. 61, Pub. Acts 1937). *Hutchinson* v. *Tambasco*, 597.
3. Claim for workmen's compensation filed about eight months after injury was received was not barred where employer which had timely notice of the injury had not filed a report (2 Comp. Laws 1929, § 8434). *Id.* 598.
4. Defendants' claim that, if plaintiff contracted an occupational disease as he had alleged, it was an aggravation of a pre-existing condition and the department should have proportioned the award under the occupational disease amendment of the workmen's compensation act, not having been raised before the department nor alleged in the claim of appeal, is not considered (Act No. 10, pt. 7, §§ 7, 8, Pub. Acts 1912 [1st Ex. Sess.], as added by Act No. 61, Pub. Acts 1937. *Id.*
5. Finding of department of labor and industry that car washer's paralysis was caused by carbon monoxide gas to which he was exposed as a recurrent condition in his employment was supported by competent testimony (Act No. 10, pt. 7, § 2, Pub. Acts 1912 [1st Ex. Sess], as added by Act No. 61, Pub. Acts 1937). *Id.*
6. Notice to foreman of accidental injury sustained by an employee constituted notice thereof to his employer. *Fidelity & Casualty Company of New York* v. *Vantaggi*, 633.
7. In action under workmen's compensation insurance policy by insurer against employer for failure to give notice as required by policy, the court may not reform the policy, hence the insurer, according to the terms of the policy, was entitled to prompt notice when the employer, through his foreman, learned of the accident. *Id.*
8. Finding of department of labor and industry that employer had notice of injury on day that it occurred was *res judicata* of question of when employer received such notice in action by workmen's compensation insurer for reimbursement by employer whom insurer claimed had failed to give notice to it pursuant to policy provisions. *Id.*
9. The payment of workmen's compensation in a lump sum, pursuant to direction so to do by the department of labor and

WORKMEN'S COMPENSATION—Continued.

industry, would not bar insurer from recovering from the employer for breach of contract as to notice (2 Comp. Laws 1929, § 8438, as amended by Act No. 148, Pub. Acts 1935). *Id.* 634.

10. In action by insurer under a workmen's compensation policy against employer who had failed to give notice to insurer of injury to an employee as required by the policy, where there was no agreement in the policy whereby employer promises to reimburse the insurer, nor waiver by the latter, recovery must be had on the theory of damages suffered because of breach of the notice provision of the policy. *Id.*

11. Finding of department of labor and industry that injured employee's hydrocele developed shortly after the accident was *res judicata* in action by insurer against employer to recover damages suffered because of breach of notice provision of the policy, hence where possible confusion in the minds of the jury in the instant case as to time when hydrocele developed was injected by plaintiff, and error worked to detriment of defendant, plaintiff may not complain of error thereon under the circumstances. *Id.*

See APPEAL AND ERROR (37); MASTER AND SERVANT (5); TRIAL (1).

WORTHLESS DEBTS—See MUNICIPAL CORPORATIONS (49).

ZONING—See MUNICIPAL CORPORATIONS (14–23); TOWNSHIPS (7).