MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JUNE 8 to OCTOBER 1, 1934

HIRAM C. BOND
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1935

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JUL 10 1935

SUPREME COURT.

CHIEF JUSTICE.

	TERM EXPIRES
NELSON SHARPE, WEST BRANCH, . . .	Dec. 31, 1935

ASSOCIATE JUSTICES.

WILLIAM W. POTTER, HASTINGS, . . .	Dec. 31, 1935
WALTER H. NORTH, BATTLE CREEK, . . .	Dec. 31, 1937
LOUIS H. FEAD, NEWBERRY, ...	Dec. 31, 1937
HOWARD WIEST, LANSING, ...	Dec. 31, 1939
HENRY M. BUTZEL, DETROIT, ...	Dec. 31, 1939
GEORGE E. BUSHNELL, DETROIT, . . .	Dec. 31, 1941
EDWARD M. SHARPE, BAY CITY, . . .	Dec. 31, 1941

CLERK—JAY MERTZ, LANSING.
CRIER—DON M. CHILDS, LANSING.

ATTORNEY GENERAL—PATRICK H. O'BRIEN, DETROIT.

CIRCUIT JUDGES.

1.	GUY M. CHESTER,[1] MARK D. TAYLOR,[2]	HILLSDALE.
2.	CHARLES E. WHITE,	NILES.
3.	CLYDE I. WEBSTER, HARRY J. DINGEMAN, ADOLPH F. MARSCHNER, IRA W. JAYNE, ARTHUR WEBSTER, JOSEPH A. MOYNIHAN, THEODORE J. RICHTER, VINCENT M. BRENNAN, DE WITT H. MERRIAM, GUY A. MILLER, ORMOND F. HUNT, HARRY B. KEIDAN, ROBERT M. TOMS, HOMER FERGUSON, LESTER S. MOLL, ALLAN CAMPBELL, JAMES E. CHENOT, THOMAS J. MURPHY,	DETROIT.
4.	BENJAMIN WILLIAMS, JOHN SIMPSON,	JACKSON.
5.	RUSSELL R. McPEEK,	CHARLOTTE.
6.	GLENN C. GILLESPIE, FRANK L. COVERT, FRANK L. DOTY,	PONTIAC.
7.	EDWARD D. BLACK, PAUL V. GADOLA, JAMES S. PARKER,	FLINT.
8.	ROYAL A. HAWLEY,	IONIA.
9.	GEORGE V. WEIMER,	KALAMAZOO.
10.	WILLIAM H. MARTIN, CLARENCE M. BROWNE,	SAGINAW.
11.	HERBERT W. RUNNELS,	SAULT STE. MARIE.
12.	JOHN G. STONE,	HOUGHTON.
13.	PARM C. GILBERT,	TRAVERSE CITY.
14.	JOHN VANDERWERP,	MUSKEGON.
15.	THEO T. JACOBS,	STURGIS.
16.	NEIL E. REID, JAMES E. SPIER,	MT. CLEMENS.
17.	WILLIS B. PERKINS, WILLIAM B. BROWN, LEONARD D. VERDIER,	GRAND RAPIDS.

[1] Deceased.
[2] Appointed July 13, 1934. Elected November 6, 1934.

18.	SAMUEL G. HOUGHTON,	BAY CITY.
19.	HAL L. CUTLER,	LUTHER.
20.	FRED T. MILES,	HOLLAND.
21.	RAY HART,	MIDLAND.
22.	GEORGE W. SAMPLE,	ANN ARBOR.
23.	HERMAN DEHNKE,	HARRISVILLE.
24.	XENOPHON A. BOOMHOWER,	BAD AXE.
25.	FRANK A. BELL,	NEGAUNEE.
26.	FRED P. SMITH,	ALPENA.
27.	EARL C. PUGSLEY,	HART.
28.	FRED S. LAMB,	CADILLAC.
29.	KELLY S. SEARL,	ST. JOHNS.
30.	LELAND W. CARR, CHARLES B. COLLINGWOOD,	LANSING.
31.	FRED W. GEORGE, WILLIAM ROBERTSON,	PORT HURON.
32.	GEORGE O. DRISCOLL,	IRONWOOD.
33.	VICTOR D. SPRAGUE,	CHEBOYGAN.
34.	GUY E. SMITH,	GLADWIN.
35.	JOSEPH H. COLLINS,	CORUNNA.
36.	GLENN E. WARNER,	PAW PAW.
37.	BLAINE W. HATCH,	MARSHALL.
38.	JESSE H. ROOT,[1] CLAYTON C. GOLDEN,[2]	MONROE.
39.	GEORGE A. RATHBUN,	TECUMSEH.
40.	JOHN LOUGHNANE,	LAPEER.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT.

EDWARD J. JEFFRIES,

DONALD VAN ZILE, CHRISTOPHER E. STEIN,
JOHN A. BOYNE, THOMAS M. COTTER,
W. McKAY SKILLMAN, HENRY S. SWEENY,
JOHN P. SCALLEN, JOHN V. BRENNAN,

ARTHUR E. GORDON.

SHERMAN D. CALLENDAR,
JOHN J. MAHER, } TRAFFIC AND ORDINANCE DIVISION.

SUPERIOR COURT OF GRAND RAPIDS, THADDEUS B. TAYLOR.

[1] Deceased.
[2] Appointed September 14, 1934.

JUDICIAL CIRCUITS.

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

TABLE OF CASES REPORTED.

PAGE

Abendroth, Lamb *v*..... 73
Acme Pie Co., Mennel Milling Co. *v*..... 457
Allegan State Savings Bank, Cleffy *v*..... 364
Alma State Savings Bank *v.* Springfield Fire & Marine Ins. Co..... 631
A. M. Campau Realty Co. *v.* City of Detroit.... 417
Ancient Order of Gleaners, Austin *v*..... 568
Anderson *v.* Board of County Road Commissioners of Oakland County..... 643
Arcada Township Board, Scott *v*..... 170
Armstrong *v.* Grimm..... 437
———, McGuire *v*..... 152
Arnold *v.* Masonic Country Club..... 430
Ashbaugh *v.* Sauer..... 467
Attorney General, *ex rel.* Connolly, *v.* Reading. 224
Auditor General *v.* Liquor Control Commission 320
Austin *v.* Ancient Order of Gleaners..... 568

Backus *v.* Connolly..... 495
Balch, People, *ex rel.* Clardy, *v*..... 196
Baldwin, Hunter *v*..... 106
Bankers Trust Co., Equitable Trust Co. *v*..... 394
Bartenbach *v.* Smith..... 653
Bates Valve Bag Corp., Hoskin-Morainville Paper Co. *v*..... 443
Benton Harbor State Bank, McClave *v*..... 619
Berg *v.* Hessey..... 599
Board of County Road Commissioners of Oakland County, Anderson *v*..... 643

PAGE
Boman *v.* Wolverine Power Co..... 59
Bristol *v.* Kalamazoo College..... 79
Brooks *v.* County of Oakland..... 637
Butler *v.* Butler..... 387
———, People *v*..... 408

Campau (A. M.) Realty Co. *v.* City of Detroit.. 417
Candler (J. D.) Roofing Co. *v.* R. S. Knapp Co. 67
Cardott *v.* Chevrolet Motor Co..... 378
Carney *v.* Loveday..... 640
Central West Casualty Co., County of Oakland *v.* 117
Chalker *v.* Fidelity & Deposit Company of Maryland 333
Chapman *v.* Detroit Metropolitan Corp..... 391
Chevrolet Motor Co., Cardott *v*..... 378
Chicago Boulevard Land Co. *v.* Nutten..... 541
City of Detroit, A. M. Campau Realty Co. *v*.... 417
———, Davenport *v*..... 374
———, Marqua *v*..... 380
———, Oleksik *v.* 697
City of Lincoln Park, Welch *v*..... 440
City of Pontiac, Simonton *v*..... 11
Claim of Frye..... 586
Clardy, People, *ex rel.*, *v.* Balch..... 196
Clark *v.* Peninsular Building & Loan Ass'n.... 584
Clawson *v.* Van Wagoner..... 148
Cleffy *v.* Allegan State Savings Bank..... 364
Coleman *v.* Whitehead & Kales Co..... 412
Colter *v.* Salow..... 95
Connolly, Attorney General, *ex rel.*, *v.* Reading 224
———, Backus *v*..... 495
Consumers Power Co., Rowe *v*..... 162
Cooper *v.* Cooper..... 435
Corey *v.* County of Livingston..... 414

PAGE
County of Livingston, Corey *v*..... 414
County of Oakland *v*. Central West Casualty Co. 117
———, Brooks *v*. 637
Curran, Smith *v*..... 366
Curtright, Leibrand *v*..... 98

Davenport *v*. City of Detroit..... 374
Detroit, A. M. Campau Realty Co. *v*..... 417
———, Davenport *v*..... 374
———, Marqua *v*..... 380
———, Oleksik *v*. 697
Detroit Edison Co., Marman *v*..... 166
Detroit Federation of Musicians, Dunn *v*..698, 704
Detroit Fidelity & Surety Co., Sparks *v*..... 183
Detroit Metropolitan Corp., Chapman *v*..... 391
———, Hoffman *v*..... 391
———, Lucas *v*..... 391
Dillman, Hawkins *v*..... 483
Doubleday *v*. Kalamazoo Citizens Loan & Investment Co. 280
Dull *v*. Dull 261
Duluth, South Shore & Atlantic Railway Co., Greenfield *v*. 277
Dunn *v*. Detroit Federation of Musicians..698, 704
Dyer, Simpson *v*. 328

Eadus *v*. Hunter 233
Elson *v*. Wisconsin Public Service Corp..... 180
Equitable Trust Co. *v*. Bankers Trust Co..... 394

Family Creamery Co., Severson *v*..... 348
Farm Crest Bakeries, Inc., Gudenau *v*..... 399
Farmer, Orme *v*..... 425
Fidelity & Deposit Company of Maryland, Chalker *v*. 333
Flannigan *v*. Harder..... 564
Fleischman Yeast Co., Moore *v*..... 668

PAGE
Ford Motor Co., McDonald *v*..... 39
Fraam *v*. Kelley..... 573
Frye, Claim of 586
Furniture Manufacturers Ass'n of Grand Rapids *v*. Grand Rapids Guild of Exhibitors..... 685

Gabriel Steel Co., Watkins *v*..... 264
Galvin, Gregorian Building Co. *v*..... 273
Gaufin *v*. Valind 269
Geraldine, Wurzer *v*. 286
Grand Rapids Guild of Exhibitors, Furniture Manufacturers Ass'n of Grand Rapids *v*..... 685
Grand Rapids Trust Co., Westerlin & Campbell Co. *v*..... 473
Great Lakes Steel Corp., MacDonald *v*..... 591
Greenfield *v*. Duluth, South Shore & Atlantic Railway Co. 277
Gregorian Building Co. *v*. Galvin..... 273
Grimm, Armstrong *v*..... 437
Grodzicki *v*. Revere Copper & Brass, Inc..... 143
Groesbeck, Simons *v*..... 495
Grylls *v*. Hergiton..... 35
Gudenau *v*. Farm Crest Bakeries, Inc..... 399
Gunderson, Zack *v*..... 88
Gunther, Hochrein *v*..... 682

Hajduk *v*. Revere Copper & Brass, Inc..... 220
Hamburger *v*. Kramp..... 611
Harder, Flannigan *v*..... 564
Harvey, Peoples Wayne County Bank of Dearborn *v*..... 47
Hawkins *v*. Dillman..... 483
Henry Hornblower & Weeks, MacDonald *v*..... 626
Hergiton, Grylls *v*..... 35
Hessey, Berg *v*..... 599
Hochrein *v*. Gunther..... 682

PAGE
Hoffman *v.* Detroit Metropolitan Corp..... 391
Hooks *v.* Western & Southern Life Ins. Co..... 421
Hornblower (Henry) & Weeks, MacDonald *v.*.. 626
Hoskin-Morainville Paper Co. *v.* Bates Valve Bag Corp..... 443
H. R. Leonard Furniture Co., Pierson *v*..... 507
Hunter *v.* Baldwin..... 106
———, Eadus *v.* 233

Ianni Construction Co., Slater *v*..... 492
Illinois Bankers Life Assurance Co. *v.* Stringham 360
In re Kutsche's Estate..... 659
——— Overton 325
——— Parker's Estate 79
——— Wright's Estate 586
Irwin *v.* Williamson Candy Co..... 100

Jackson & Tindle, Inc., McKay *v*..... 452
Jackson City Bank & Trust Co. *v.* Townley.... 340
J. D. Candler Roofing Co. *v.* R. S. Knapp Co.. 67
John Smallegan & Sons, Smallegan *v*..... 245
Johns *v.* Wisconsin Land & Lumber Co..... 675

Kalamazoo Citizens Loan & Investment Co., Doubleday *v.* 280
Kalamazoo College, Bristol *v*..... 79
Karp *v.* Metropolitan Life Insurance Co..... 255
Kayne, People *v.* 186
Keeling *v.* Sauer..... 467
Kelley, Fraam *v.* 573
Klyn, Shanahan *v*..... 120
Knapp (R. S.) Co., J. D. Candler Roofing Co. *v.* 67
———, R. C. Mahon Co. *v*..... 67
Kramp, Hamburger *v*..... 611
Kutsche's Estate, *In re*..... 659
———, People *v.* 659

PAGE
Laity, Pupaza *v.* 250
Lamb *v.* Abendroth..... 73
Lapachin *v.* Standard Oil Co..... 477
Lauer *v.* Michigan Life Insurance Co..... 614
Leckner, Mathews *v*..... 376
Lee, Lewis Manufacturing Co. *v*..... 383
Leibrand *v.* Curtright..... 98
Leonard (H. R.) Furniture Co., Pierson *v*..... 507
Lewis Manufacturing Co. *v.* Lee..... 383
Lincoln Park, Welch *v*..... 440
Lipsitz, Union Guardian Trust Co. *v*..... 209
Liquor Control Commission, Auditor General *v.* 320
Livingston, Corey *v*..... 414
Lochmoor, Rex *v*..... 159
Loveday, Carney *v*..... 640
Lucas *v.* Detroit Metropolitan Corp..... 391

McClave *v.* Benton Harbor State Bank..... 619
McDonald *v.* Ford Motor Co..... 39
MacDonald *v.* Great Lakes Steel Corp..... 591
——— *v.* Henry Hornblower & Weeks..... 626
McGaughan *v.* West Bloomfield Township..... 553
McGuire *v.* Armstrong..... 152
McKay *v.* Jackson & Tindle, Inc..... 452
Mahon (R. C.) Co. *v.* R. S. Knapp Co..... 67
Marman *v.* Detroit Edison Co..... 166
Marqua *v.* City of Detroit..... 380
Masonic Country Club, Arnold *v*..... 430
Massachusetts Mutual Life Insurance Co. *v.* Ruetter 175
Mathews *v.* Leckner..... 376
Mennel Milling Co. *v.* Acme Pie Co..... 457
Metropolitan Life Insurance Co., Karp *v*..... 255
Michigan Life Insurance Co., Lauer *v*..... 614
Michigan State Board of Dentistry, Sullivan *v.* 427

PAGE
Mid-West Petroleum Corp., Nay *v*..... 578
Mikulski *v*. Morgan 314
Milligan *v*. S. W. Straus & Co..... 317
Minchella, People *v*..... 123
Mitchell *v*. Reolds Farms Co..... 301
Mogyoros *v*. Prudential Insurance Co. of America 549
Montz *v*. Reutter..... 357
Moore *v*. Fleischman Yeast Co..... 668
Morgan, Mikulski *v*. 314

Nay *v*. Mid-West Petroleum Corp..... 578
Newell *v*. Ritter..... 405
Nutten, Chicago Boulevard Land Co. *v*..... 541

Oakland County *v*. Central West Casualty Co.. 117
———, Brooks *v*. 637
Oakland County Board of Road Commissioners, Anderson *v*..... 643
Oleksik *v*. City of Detroit..... 697
Orme *v*. Farmer..... 425
Overton, *In re* 325

Parker's Estate, *In re*..... 79
Peninsular Building & Loan Ass'n, Clark *v*..... 584
People *v*. Butler..... 408
——— *v*. Kayne 186
——— *v*. Kutsche's Estate..... 659
——— *v*. Minchella..... 123
——— *v*. Prescott 606
——— *v*. Rosa..... 462
——— *v*. Rose 529
——— *v*. Saccoia..... 132
——— *v*. Shaunding 218
———, *ex rel.* Clardy, *v*. Balch..... 196

PAGE
Peoples Wayne County Bank of Dearborn *v.* Harvey 47
Pere Marquette Railway Co. *v.* Slutz..... 388
Pierson *v.* H. R. Leonard Furniture Co..... 507
Pontiac, Simonton *v*..... 11
Prescott, People *v*..... 606
Prudential Insurance Co. of America, Mogyoros *v*. 549
Pupaza *v.* Laity 250

Quimby, Security Storage & Transfer Co. *v*.... 259

R. C. Mahon Co. *v.* R. S. Knapp Co..... 67
Reading, Attorney General, *ex rel.* Connolly, *v.* 224
Reolds Farms Co., Mitchell *v*..... 301
Reutter, Montz *v*..... 357
Revere Copper & Brass, Inc., Grodzicki *v*..... 143
———, Hajduk *v*. 220
Rex *v.* Village of Lochmoor..... 159
Ritter, Newell *v*..... 405
Roehl Storage Co. *v.* Wilson..... 691
Rosa, People *v*..... 462
Rose, People *v*..... 529
Rowe *v.* Consumers Power Co..... 162
Roxbury *v.* Weidman Lumber Co..... 596
R. S. Knapp Co., J. D. Candler Roofing Co. *v*.. 67
———, R. C. Mahon Co. *v*..... 67
Ruetter, Massachusetts Mutual Life Insurance Co. *v*..... 175
Russell *v.* Szczawinski..... 112

Saccoia, People *v*..... 132
Salow, Colter *v*..... 95
Sauer, Ashbaugh *v*..... 467
———, Keeling *v*..... 467

PAGE
Scott *v.* Township Board of Arcada Township. 170
Security Storage & Transfer Co. *v.* Quimby.... 259
Severson *v.* Family Creamery Co..... 348
Shanahan *v.* Klyn..... 120
Shaunding, People *v.* 218
Sima *v.* Wright..... 352
Simons *v.* Groesbeck..... 495
Simonton *v.* City of Pontiac..... 11
Simpson *v.* Dyer 328
Slater *v.* Ianni Construction Co..... 492
Slutz, Pere Marquette Railway Co. *v*..... 388
Smallegan *v.* John Smallegan & Sons..... 245
Smallegan (John) & Sons, Smallegan *v*..... 245
Smith *v.* Curran..... 366
———, Bartenbach *v.* 653
Sparks *v.* Detroit Fidelity & Surety Co..... 183
Spencer, Straube *v*..... 559
Springfield Fire & Marine Ins. Co., Alma State Savings Bank *v*..... 631
Standard Oil Co., Lapachin *v*..... 477
Straube *v.* Spencer..... 559
Straus (S. W.) & Co., Milligan *v*..... 317
Streat *v.* Vermilya..... 1
Stringham, Illinois Bankers Life Assurance Co. *v.* 360
Stuart, Tallis *v*..... 84
Sullivan *v.* Michigan State Board of Dentistry 427
S. W. Straus & Co., Milligan *v*..... 317
Szczawinski, Russell *v*..... 112

Tallis *v.* Stuart..... 84
Townley, Jackson City Bank & Trust Co. *v*..... 340
Township Board of Arcada Township, Scott *v.* 170

Uhl *v.* Wexford Co..... 473

PAGE
Union Guardian Trust Co. *v.* Lipsitz..... 209
Upton *v.* Upton..... 26

Valind, Gaufin *v.*..... 269
Van Wagoner, Village of Clawson *v*..... 148
Vermilya, Streat *v*..... 1
Village of Clawson *v.* Van Wagoner..... 148
Village of Lochmoor, Rex *v*..... 159

Watkins *v.* Gabriel Steel Co..... 264
Weidman Lumber Co., Roxbury *v*..... 596
Welch *v.* City of Lincoln Park..... 440
West Bloomfield Township, McGaughan *v*..... 553
Westerlin & Campbell Co. *v.* Grand Rapids Trust Co. 473
Western & Southern Life Ins. Co., Hooks *v*.... 421
Wexford Co., Uhl *v*..... 473
Whitehead & Kales Co., Coleman *v*..... 412
Williamson Candy Co., Irwin *v*..... 100
Wilson, Roehl Storage Co. *v*..... 691
Wisconsin Land & Lumber Co., Johns *v*..... 675
Wisconsin Public Service Corp., Elson *v*..... 180
Wolverine Power Co., Boman *v*..... 59
Wright, Sima *v*..... 352
Wright's Estate, *In re*..... 586
Wurzer *v.* Geraldine 286

Zack *v.* Gunderson..... 88

TABLE OF CASES CITED.

PAGE

Adams *v.* Acme White Lead & Color Works, 182 Mich. 157..... 680
Adler *v.* Jenkins, 33 Okla. 117..... 6
Albany City Bank *v.* Steevens, Walk. Ch. 6..... 295
Alexander *v.* City of Detroit, 259 Mich. 241..... 381
Allen *v.* Crane, 152 Mich. 380..... 63
——— *v.* Shields, 72 N. C. 504..... 64
Alpena Township *v.* Mainville, 153 Mich. 732..... 447
Alton *v.* Meeuwenberg, 108 Mich. 629..... 490
American Ins. Co. of Newark *v.* Martinek, 216 Mich. 421..... 267
American LaFrance & Foamite Industries, Inc., *v.* Village of Clifford, 267 Mich. 326..... 558
Amperse *v.* City of Kalamazoo, 59 Mich. 78..... 175
Andrejwski *v.* Wolverine Coal Co., 182 Mich. 298..... 680
Angstman *v.* Wilson, 258 Mich. 195..... 117
Armitage *v.* Widoe, 36 Mich. 124..... 318
Asman *v.* Traphagen, 23 Mich. 80..... 624
Assets Realization Co. *v.* Howard, 127 N. Y. Supp. 798..... 76
Attorney General *v.* Detroit Common Council, 58 Mich. 213..... 227
——— *v.* McKelvey, 78 N. J. Law, 3..... 229
——— *v.* Railway Co., 210 Mich. 227..... 430
———, *ex rel.* Conely, *v.* Common Council, City of Detroit, 78 Mich. 545..... 232
———, *ex rel.* Fuller, *v.* Parsell, 99 Mich. 381..... 229
———, *ex rel.* John T. Rich, Governor, *v.* Jochim, 99 Mich. 358.. 203
———, *ex rel.* Lennane, *v.* City of Detroit, 225 Mich. 631..... 20
———, *ex rel.* Selby, *v.* McDonald, 164 Mich. 590..... 228
———, People, *ex rel.*, *v.* Railroad Co., 145 Mich. 140..... 505
———, People, *ex rel.*, *v.* Welch's Estate, 235 Mich. 555..... 663
Auditor General *v.* Bolt, 147 Mich. 283..... 646
——— *v.* Union Lake Land Co., 239 Mich. 437.....150, 647, 649
Averill *v.* Jackson City Bank, 114 Mich. 20..... 624
Aylward's Estate, *In re,* 243 Mich. 9..... 344

Badesch *v.* Congregation Brothers of Willna, 50 N. Y. Supp. 958 702
Bales *v.* Railroad Co., 92 Kan. 771..... 521
Baltimore & Ohio R. Co. *v.* Goodman, 275 U. S. 66..... 280
Baltimore Mayor and City Council *v.* Gamse & Bros., 132 Md. 290 522
Bankers Trust Co. of Detroit *v.* Russell, 263 Mich. 677..... 214
Barak *v.* Detroit Apartments Corp., 232 Mich. 59..... 15
Barlum's Estate, *In re,* 240 Mich. 393..... 346
Barras *v.* Barras, 192 Mich. 584..... 464
Barry *v.* Briggs, 22 Mich. 201.....297, 398

PAGE
Bassett *v.* Shepardson, 57 Mich. 428 307
Bates & Rogers Construction Co. *v.* Emmons, 205 Ky. 21 222
Bauer *v.* Wasson, 66 Mich. 256 438
Baxter *v.* Szucs, 248 Mich. 672 49
Beckwith's Estate *v.* Spooner, 183 Mich. 323 454
Beecher *v.* Baldy, 7 Mich. 488 63
Begole *v.* McKenzie, 26 Mich. 470 305
Benson *v.* Ross, 143 Mich. 452 273
Berrien *v.* Southack (City Ct., N. Y.), 7 N. Y. Supp. 324 404
Bertha B. Simmons' Case, 117 Maine, 175 222
Billingsley *v.* Gulick, 256 Mich. 606 307
Bjorkstrand *v.* Klagstad, 262 Mich. 186 681
Blanton *v.* Knox, 3 Mo. 241 404
Blodgett *v.* Guaranty Trust Co. of New York, 114 Conn. 207 665
——— *v.* Union & New Haven Trust Co., 97 Conn. 405 666
Bloom *v.* Krueger, 182 Wis. 29 424
Bloomingdale *v.* Chittenden, 74 Mich. 698 318
Bobich *v.* Rogers, 258 Mich. 343 279
Bonker *v.* People, 37 Mich. 4 194
Booker *v.* Grand Rapids Medical College, 156 Mich. 95 585
Bookhart *v.* Greenlease-Lied Motor Co., 215 Iowa, 8 ..... 110, 157
Boston *v.* Robbins, 121 Mass. 453 525
Boston Piano & Music Co. *v.* Pontiac Clothing Co., 199 Mich. 141 57
Bosworth *v.* Greiling, 213 Wis. 443 54
Botsford *v.* Beers, 11 Conn. 369 471
Bowen *v.* Prudential Ins. Co. of America, 178 Mich. 63 257
Bowmaster *v.* William H. DePree Co., 252 Mich. 505 116
Boyce *v.* Boyce, 124 Mich. 696 311
Boylon *v.* Reliable Cartage Co., 258 Mich. 5 117
Bozson *v.* Altrincham Urban District Council, 1 K. B. (1903) 547 C. A. 289
Brabon *v.* Gladwin Light & Power Co., 201 Mich. 697 43
Brinkman *v.* Zuckerman, 192 Mich. 624 102
Brown *v.* Thompson, 29 Mich. 72 293
——— *v.* Warner, 159 Mich. 274 639
Brunswick-Balke-Collender Co. *v.* Northern Assurance Co., 142 Mich. 29 634
Budnick *v.* Peterson, 215 Mich. 678 116
Burke *v.* City of River Rouge, 240 Mich. 12 15
Bush *v.* Merriman, 87 Mich. 260 57
Butler *v.* Walker, 98 Ala. 358 5
Butterfield *v.* Seligman, 17 Mich. 95 305
Buzzn *v.* Muncey Cartage Co., 248 Mich. 64 224
Byers *v.* Byers, 65 Mich. 598 178

Calhoon *v.* D. C. & E. Mining Co., 202 Mo. App. 564 424
Campbell (J. A.) Co. *v.* Corley, 140 Ore. 462 460
Carpenter *v.* Dennison, 208 Mich. 441 488
Carson *v.* Exchange Trust Co., 127 Okla. 55 305
Cashin *v.* Pliter, 168 Mich. 386 31
Caswell *v.* Railroad Co., 263 Mich. 18 156
Cawood *v.* Earl Paige & Co., 239 Mich. 485 482
Ceabuske *v.* Smolarz, 229 Mich. 100 561
Chamberlain *v.* Lyell, 3 Mich. 448 63

PAGE
Chandler *v.* McKinney, 6 Mich. 217 318
Chase *v.* Spencer, 150 Mich. 99 141
Chemical Bank & Trust Co. *v.* County of Oakland, 264 Mich. 673 15
Chicago *v.* Lord, 276 Ill. 544 522
Chicago & Erie Ry. Co. *v.* Cummings, 24 Ind. App. 192 192
Chicago & N. R. Co. *v.* Chicago Mechanics' Institute, 239 Ill. 197 522
Chicago Boulevard Land Co. *v.* Apartment Garages, 245 Mich. 448 471
City of Chicago *v.* Lord, 276 Ill. 544 522
City of Detroit *v.* Fidelity & Deposit Co. of Maryland, 240 Mich. 213 70
——— *v.* Railway Co., 134 Mich. 11 443
——— *v.* ———, 163 Mich. 229 420
City of Grand Rapids *v.* Braudy, 105 Mich. 670 174
City of Kalamazoo *v.* Titus, 208 Mich. 252 20
Clarence Township *v.* Dickinson, 151 Mich. 270 .....150, 646
Clarke *v.* Hill, 132 Mich. 434 585
Clarkson *v.* Skidmore, 46 N. Y. 297 522
Clements *v.* McCabe, 210 Mich. 207 20
Clinton *v.* Spencer, 250 Mich. 135 .....151, 638, 648, 649
Coburn *v.* City of Wyandotte, 245 Mich. 314 442
Coit *v.* City of Grand Rapids, 115 Mich. 493 557
Collins, *In re*, 135 Mich. 91 327
Commonwealth *v.* Hope, 22 Pick. (39 Mass.) 1 411
——— *v.* O'Brien, 119 Mass. 342 465
———, *ex rel.* Schnader, *v.* Liveright, Secretary of Welfare, 308 Pa. 35 372
Comstock *v.* Comstock, 27 Mich. 97 63
Conely, Attorney General, *ex rel.*, *v.* Common Council, City of Detroit, 78 Mich. 545 232
Connor *v.* Railway Co., 168 Mich. 29 307
Continental Ins. Co. *v.* H. M. Loud & Sons Lumber Co., 93 Mich. 139 435
Contractors Equipment Co. *v.* Reasner, 242 Mich. 589 476
Cook *v.* Village of Hillsdale, 7 Mich. 115 490
Cooper *v.* Carr, 161 Mich. 405 .....447, 689
——— *v.* Interstate Motor Freight Co., 264 Mich. 131 105
——— *v.* West, 173 Ky. 289 618
Cooper Township *v.* Little, 220 Mich. 62 639
Corbett *v.* Williams, 248 Mich. 541 471
Corey *v.* Hartel, 216 Mich. 675 109
Corrigan *v.* City of Chicago, 144 Ill. 537 521
County of Muskegon *v.* Michigan Surety Co., 264 Mich. 65 185
County of Oakland *v.* Central West Casualty Co., 266 Mich. 438 .....118, 184
Crawford *v.* Edwards, 33 Mich. 354 505
——— *v.* Foster, 110 Cal. App. 81 .....109, 157
Cronkhite *v.* Chaplin (C. C. A.), 282 Fed. 579 242
Cruickshank *v.* Bidwell, 176 U. S. 73 430
Cruse *v.* Railway Co., 138 Kan. 117 223
Cummings *v.* Garner, 213 Mich. 408 .....647, 649
Curry *v.* Raich, 245 Mich. 146 15
Cutter *v.* Gillette, 163 Mass. 95 435

PAGE
Daggett *v.* Davis, 53 Mich. 35 242
Daggs *v.* McDermott, 327 Mo. 73 471
Dahl *v.* Moore, 161 Wash. 503 155
Dalton *v.* Barron, 293 Mo. 36 471
Daly, *In re,* 29 App. Div. (N. Y.) 286 519
Dapper *v.* Smith, 138 Mich. 104 228
Davenport *v.* City of Detroit, 268 Mich. 374 698
Davids *v.* People, 192 Ill. 176 192
Davidson *v.* Supreme Lodge, Knights of Pythias, 22 Mo. App. 263 702
Davis *v.* Michigan Mutual Life Ins. Co., 127 Mich. 559 404
——— *v.* Railway Co., 241 Mich. 166 280
DeLancey Street, *In re,* 120 App. Div. (N. Y.) 700 521
Dennis *v.* Sinclair Lumber & Fuel Co., 242 Mich. 89 671
Detloff *v.* Hammond, Standish & Co., 195 Mich. 117 43
Detroit *v.* Fidelity & Deposit Co. of Maryland, 240 Mich. 213 70
——— *v.* Railway Co., 134 Mich. 11 443
——— *v.* ———, 163 Mich. 229 420
Detroit & T. S. L. Railroad Co. *v.* Campbell, 140 Mich. 384 447
Detroit Trust Co. *v.* Detroit City Service Co., 262 Mich. 14 217
Detroit Tug & Wrecking Co. *v.* Wayne Circuit Judge, 75 Mich. 360 450
Doyle *v.* Election Commission of City of Detroit, 261 Mich. 546 20
Drake *v.* Kinsell, 38 Mich. 232 64
——— *v.* Line-A-Time Manfg. Co., 226 App. Div. (N. Y.) 717 .. 657
———, People, *ex rel.,* *v.* Mahaney, 13 Mich. 481 218
Dullam *v.* Willson, 53 Mich. 392 201
Dunn *v.* Peck, 255 Mich. 391 488
Dunton *v.* Brown, 31 Mich. 182 318
Dutcher *v.* Van Duine, 242 Mich. 477 472
Dutton *v.* Shaw, 35 Mich. 431 434
Dye *v.* Mann, 10 Mich. 291 63
Dyson *v.* Sheley, 11 Mich. 527 63

Eadus *v.* Hunter, 249 Mich. 190 ..... 235, 241
Eames *v.* Clark, 104 Kan. 65 481
Earl of Strathmore, *Ex parte,* 20 Q. B. Div. 512 289
Eaton *v.* Trowbridge, 38 Mich. 454 488
Ebers *v.* Whitmore, 122 Neb. 653 424
Eddy *v.* Eddy, 264 Mich. 328 120
Ellis' Estate, *In re,* 169 Wash. 581 667
Elowitz *v.* Miller, 265 Mich. 551 279
Elrich *v.* Schwaderer, 251 Mich. 33 116
Emmons *v.* City of Detroit, 255 Mich. 558 382
Empey *v.* Thurston, 58 Ont. L. R. 168 115
Epworth Assembly *v.* Railway Co., 236 Mich. 565 ..... 548, 561
Equitable Trust Co. *v.* Milton Realty Co., 261 Mich. 571; 263 Mich. 673 214
——— *v.* Wetsman, 264 Mich. 26 214
Estate of Beckwith *v.* Spooner, 183 Mich. 323 454
Euclid Avenue State Bank *v.* Nesbitt, 201 Iowa, 506 54
Evans *v.* City of Detroit, 255 Mich. 381 447
Ex parte Earl of Strathmore, 20 Q. B. Div. 512 289
——— Moore, 14 Q. B. Div. 627 289
——— Rowland, 104 U. S. 604 585

PAGE
Fairmount Glass Works *v.* Cub Fork Coal Co., 287 U. S. 474.... 452
Faithfull, *In re*, 14 Q. B. Div. 627..... 289
Federal Commercial & Savings Bank *v.* International Clay Machinery Co., 230 Mich. 33..... 476
Federal Surety Co. *v.* A. Bentley & Sons Co. (C. C. A.), 51 Fed. (2d) 24 312
Fender *v.* Feighner, 265 Mich. 536.....542, 548
First National Bank & Trust Co. *v.* Storms, 265 Mich. 453..... 32
First National Bank of Ovid *v.* Steel, 146 Mich. 308..... 338
First National Bank of Petersburg, Ill., *v.* Shipley, 109 Cal. App. 194 471
Fisher *v.* Smith, 259 Mich. 279..... 657
Fitch & Gilbert *v.* Newberry & Goodell, 1 Doug. 1..... 696
Flemming *v.* Heffner & Flemming, 263 Mich. 561..... 689
Fletcher *v.* Kalkaska Circuit Judge, 81 Mich. 186..... 695
——— *v.* Morrell, 78 Mich. 176..... 695
Flint & Pere Marquette R. Co. *v.* Wayne Circuit Judge, 108 Mich. 80 305
Foley *v.* Dwyer, 122 Mich. 587..... 548
——— *v.* Railway Co., 190 Mich. 507..... 593
Ford *v.* Cheever, 113 Mich. 440..... 531
Forest Township *v.* American Bonding Co., 187 Mich. 657..... 185
Fowler *v.* Blount, 191 Mich. 575..... 443
———, People, *ex rel.*, *v.* Brown, 83 Ill. 95..... 6
Frank *v.* American Trust Co., 259 Mich. 394..... 305
Freeman *v.* Mitchell, 198 Mich. 207..... 689
Fuhrman *v.* Sun Ins. Office of London, 180 Mich. 439..... 634
Fuller *v.* Cockerill, 257 Mich. 35..... 647
———, Attorney General, *ex rel.*, *v.* Parsell, 99 Mich. 381..... 229

Gadsby *v.* Monroe, 115 Mich. 282..... 63
Galion Iron Works & Manfg. Co. *v.* Service Coal Co., 264 Mich. 298 476
Gallino *v.* Boland, 221 Mich. 502..... 434
Gallup *v.* Western Board & Paper Co., 252 Mich. 68.....165, 224
Gaylord Farmers' Co-operative Creamery Ass'n, State, *ex rel.*, *v.* District Court of Sibley County, 128 Minn. 486..... 675
Geis *v.* Packard Motor Car Co., 214 Mich. 646..... 593
Genesee County Savings Bank *v.* Ottawa Circuit Judge, 54 Mich. 305 695
German Bundesheim Society *v.* Schmidt, 242 Mich. 139.....39, 438
G. F. Redmond & Co. *v.* Michigan Securities Commission, 222 Mich. 1 429
Gibbs *v.* Redman Fireproof Storage Co., 68 Utah, 298..... 630
Gill *v.* DeArmant, 90 Mich. 425..... 276
Gleason *v.* Lowe, 232 Mich. 300..... 111
Goddard *v.* Foster, 17 Wall. (84 U. S.) 123..... 312
Good *v.* Derr (C. C. A.), 46 Fed. (2d) 411..... 506
——— *v.* Starker, 207 Wis. 567..... 505
Gormley *v.* Potter, 29 Ohio St. 597..... 471
Grand Rapids *v.* Braudy, 105 Mich. 670..... 174
Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308..... 430
Grand River Lumber & Coal Co. *v.* Glenn, 234 Mich. 310..... 386

PAGE
Green *v.* Western Union Telegraph Co. (Mo. App.), 58 S. W. (2d) 772 424
Greene *v.* City of Ann Arbor, 242 Mich. 452 164
——— *v.* Wilson, 90 Col. 562 471
Greene's (Thomas F.) Case, 280 Mass. 506 376
Griffin *v.* Johnson, 37 Mich. 87 64
Grinnell Realty Co. *v.* General Casualty & Surety Co., 253 Mich. 16 185
Guaranty Trust Co. of New York *v.* Blodgett, 287 U. S. 509 666

Hagerman *v.* Wigent, 108 Mich. 192 464
Haines *v.* Haines, 35 Mich. 138 296
Hall *v.* Slaybaugh, 69 Mich. 484 150
Halpin *v.* White, 197 Mich. 549 30
Hamilton *v.* Frothingham, 59 Mich. 253 305
——— *v.* People, 29 Mich. 173 ..... 190, 535
Hammond *v.* Place, 116 Mich. 628 20
Haney *v.* Troost, 242 Mich. 693 116
Hankinson *v.* Deake, 265 Mich. 1 151
Hanold *v.* Common Council of the Village of Stambaugh, 163 Mich. 242 175
Harrington *v.* Calhoun Probate Judge, 153 Mich. 660 447
——— *v.* Department of Labor & Industry, 252 Mich. 87 42
——— *v.* Inter-State Business Men's Accident Ass'n, 210 Mich. 327 307
——— *v.* Secretary of State, 211 Mich. 395 228
Harrington-Wiard Co. *v.* Blomstrom Manfg. Co., 166 Mich. 276 ..... 547, 561
Harris *v.* Northern Blue Grass Land Co., 185 Fed. 192 506
Harrison *v.* Spencer, 110 Mich. 215 178
Harsha *v.* City of Detroit, 261 Mich. 586 20
Hart *v.* Hogan, 173 Wash. 598 157
Haslam *v.* Barge, 69 Neb. 644 404
Hassberger *v.* General Builders' Supply Co., 213 Mich. 489 307
Hayes *v.* Boutell, 253 Mich. 628 164
Heath, *In re,* 52 N. J. Eq. 807 323
Helder *v.* Luce Furniture Co., 217 Mich. 496 249
Heliker *v.* Oakland County, 216 Mich. 595 ..... 647, 649
Henry *v.* Quackenbush, 48 Mich. 415 307
Hickox *v.* Railway Co., 78 Mich. 615 490
Hill *v.* People, 26 Mich. 496 536
Hillyer *v.* Township of Jonesfield, 114 Mich. 644 639
Himebaugh *v.* Chalker, 261 Mich. 80 335
Hoffman *v.* Fleming, 43 W. Va. 762 471
Hogan *v.* Egyptian Portland Cement Co., 257 Mich. 381 643
Holsaple *v.* Superintendents of Poor of Menominee Co., 232 Mich. 603 116
Homann *v.* Allgemeiner Arbeiter Bund of Michigan, 184 Mich. 417 704
Honea *v.* American Council No. 27, 139 Tenn. 21 702
Hooper *v.* Ramsbottom, 6 Taunt. 12 242
Horgan *v.* Railway Co., 208 Mass. 287 629
Hovey *v.* General Construction Co., 242 Mich. 84 164
Hubbard *v.* Callahan, 42 Conn. 564 311
——— *v.* Shepard, 117 Mich. 25 71

PAGE

Hudson (J. L.) Co. *v.* Barnett, 255 Mich. 465 449
Hughes *v.* Noyes, 171 Ill. 575 471
Hurd *v.* People, 25 Mich. 405 194
Husted *v.* Pogue, 249 Mich. 410 ..... 548, 561
Huxtable *v.* Berg, 98 Wash. 616 506

Iden *v.* Huber, 259 Mich. 3 472
In re Aylward's Estate, 243 Mich. 9 344
——— Barlum's Estate, 240 Mich. 393 346
——— Collins, 135 Mich. 91 327
——— Daly, 29 App. Div. (N. Y.) 286 519
——— DeLancey Street, 120 App. Div. (N. Y.) 700 521
——— Ellis' Estate, 169 Wash. 581 667
——— Faithfull, 14 Q. B. Div. 627 289
——— Heath, 52 N. J. Eq. 807 323
——— Merriman's Appeal, 108 Mich. 454 450
——— Quinn's Estate, 180 Mich. 502 447
——— Riddell, 20 Q. B. Div. 512 289
——— Rising's Estate, 186 Minn. 56 663
——— Spangler, 11 Mich. 298 7
——— Spier's Estate, 224 Mich. 658 589
——— Thayer's Estate, 188 Mich. 261 464
——— Van Hyning, 257 Mich. 146 429
——— Walkey's Estate, 249 Mich. 653 344
——— William and Anthony Streets, 19 Wend. (N. Y.) 678 522
——— Wynn's Estate, 193 Mich. 223 83

J. A. Campbell Co. *v.* Corley, 140 Ore. 462 460
Jackson *v.* North Carolina Emergency Relief Administration, 206 N. C. 274 376
——— *v.* Queen, 257 Mass. 515 ..... 110, 157
Jackson Common Council *v.* Harrington, 160 Mich. 550 5
Jameson *v.* Walter S. Newhall Co., 200 Mich. 514 593
Janower *v.* F. M. Sibley Lumber Co., 245 Mich. 571 289
J. B. Millet Co. *v.* Andrews, 175 Mich. 350 57
Jelusich *v.* Wisconsin Land & Lumber Co., 267 Mich. 313 224
Jeremiah Murphy's Case, 226 Mass. 60 222
J. L. Hudson Co. *v.* Barnett, 255 Mich. 465 449
John F. Noud & Co. *v.* Stedman, 193 Mich. 459 385
Johnson *v.* Everett, 9 Paige (N. Y.), 636 291
——— *v.* Ironside, 253 Mich. 428 305
——— *v.* Liquor Control Com'n, 266 Mich. 682 174
——— *v.* Shepard, 35 Mich. 115 288
———, Attorney General, People, *ex rel.*, *v.* Bagley, 85 Cal. 343 5
———, People, *ex rel.*, *v.* Coffey, 237 Mich. 591 201
Johnston *v.* Cornelius, 200 Mich. 209 307
Jones *v.* State, 154 Ark. 288, 151 Ga. 502 372
——— *v.* Van Bochove, 103 Mich. 98 490
Jones' Administrator *v.* Prudential Ins. Co., 225 Ky. 238 553

Kafka *v.* Davidson, 135 Minn. 389 521
Kalamazoo *v.* Titus, 208 Mich. 252 20
Kamman *v.* City of Detroit, 252 Mich. 498 488

PAGE
Kamnkolski *v.* City of Detroit, 260 Mich. 389 382
Kanasovich *v.* Quincy Mining Co., 231 Mich. 39 681
Kastel *v.* Stieber (Cal. App.), 297 Pac. 932 157
Kaufman *v.* Leonard, 139 Mich. 104 696
Kavanaugh *v.* Baird, 241 Mich. 240 443
Keiswetter *v.* Rubenstein, 235 Mich. 36 ..... 273, 305
Kelly *v.* Gaukler, 164 Mich. 519 288
Kent *v.* Quicksilver Mining Co., 78 N. Y. 159 77
Keppen *v.* Rice, 257 Mich. 299 545
Kermott *v.* Ayer, 11 Mich. 181 311
King *v.* Moore, 10 Mich. 538 63
Kingkade *v.* Plummer, 111 Okla. 197 242
Kingsbury *v.* Kingsbury, 20 Mich. 212 298
Kingston-Pocahontas Coal Co. *v.* Maynard, 209 Ky. 431 222
Kinner *v.* Spencer, 257 Mich. 142 ..... 151, 638
Kipp *v.* Miller, 47 Colo. 598 78
Kirchner *v.* Michigan Sugar Co., 206 Mich. 459 43
Kish *v.* California State Automobile Ass'n, 190 Cal. 246 424
Klapp *v.* Merwin, 203 N. Y. Supp. 694 657
Knutson *v.* Lurie, 217 Iowa, 192 157
Kollen *v.* Sooy, 172 Mich. 214 288
Kricinovich *v.* American Car & Foundry Co., 192 Mich. 687 672
Kruy *v.* Smith, 108 Conn. 628 ..... 110, 156
Kubit *v.* City of Detroit, 260 Mich. 388 382
Kyselka *v.* Northern Assurance Co. of Michigan, 208 Mich. 47 .. 434

Labatte *v.* Lavallee, 258 Mass. 527 110
Lacy *v.* Piatt Power & Heat Co., 157 Mich. 544 386
Lake Shore & Michigan Southern R. Co. *v.* People, 46 Mich. 193 .. 311
Lake Township *v.* Millar, 257 Mich. 135 ..... 151, 638, 647, 649
Lakso *v.* Munro Iron Mining Co., 243 Mich. 261 147
Lallevich *v.* Bartoszewiz, 205 Mich. 375 386
Lambrecht *v.* Lee, 264 Mich. 56 215
Lansing *v.* Railroad Co., 126 Mich. 663 318
Lapham *v.* Tarabusi, 247 Mich. 380 81
Larkin *v.* Misland, 100 N. Y. 212 522
La Veck *v.* Parke, Davis & Co., 190 Mich. 604 249
Lawrence *v.* American Surety Co., 263 Mich. 586 118
——— *v.* Bartling & Dull Co., 255 Mich. 580 480
Le Blond *v.* Town of Peshtigo, 140 Wis. 604 489
Leete *v.* Griswold Post, American Legion, 114 Conn. 400 157
Lemm *v.* Spencer, 242 Mich. 366 438
Lennane, Attorney General, *ex rel.*, *v.* City of Detroit, 225 Mich. 631 20
Le Roy, People, *ex rel.*, *v.* Hurlbut, 24 Mich. 44 227
Lett *v.* Summerfield & Hecht, 239 Mich. 699 116
Levanen *v.* Seneca Copper Corp., 227 Mich. 592 456
Lewis *v.* Campau, 14 Mich. 458 398
Lilley State Bank *v.* Burkhardt, 241 Mich. 437 54
Lindsay *v.* Acme Cement Plaster Co., 220 Mich. 367 629
Link *v.* Fahey, 200 Mich. 308 531
Linneman *v.* Moross Estate, 98 Mich. 178 704
Linski *v.* City of Detroit, 260 Mich. 385 382

PAGE
Lipinski *v.* Sutton Sales Co., 220 Mich. 647 423
Lipman *v.* Equitable Life Assurance Society (C. C. A.), 58 Fed. (2d) 15 618
Loftus *v.* Pelletier, 223 Mass. 63 157
Longacre *v.* Robinson, 274 Pa. 35 54
Longcor *v.* Turner, 191 Mich. 240 488
Longstreet *v.* County of Mecosta, 228 Mich. 542 415
Lynch *v.* Kleindolph, 204 Iowa, 762 448
Lyttle *v.* Monto, 248 Mass. 340 ..... 110, 157

McBride *v.* Scott, 132 Mich. 176 629
McBurney *v.* Industrial Accident Commission, 220 Cal. 129 376
McCabe *v.* Railway Co., 235 U. S. 151 430
McCormick *v.* Travelers' Ins. Co., 215 Mo. App. 258 618
McCreery *v.* Green, 38 Mich. 172 305
McDaniels *v.* McDaniels, 40 Vt. 363 451
McDermott *v.* Board of County Road Com'rs of Kent County, 199 Mich. 613 649
MacDonald *v.* Great Lakes Steel Corp., 268 Mich. 591 598
McGovern *v.* Madame Elize, Inc., 244 N. Y. Supp. 169 403
McGrath *v.* Blumenthal, 220 App. Div. (N. Y.) 781 657
McKee *v.* Wilcox, 11 Mich. 358 63
McLaughlin *v.* Antrim County Road Commission, 266 Mich. 73 .. 698
McSloy *v.* Ryan, 27 Mich. 110 438
Mabrey *v.* Cape Girardeau & Jackson Gravel Rd. Co., 92 Mo. App. 596 407
Maes *v.* Olmsted, 247 Mich. 180 488
Mahnke *v.* Freer, 126 Mich. 572 273
Mahon *v.* San Rafael Turnpike Road Co., 49 Cal. 269 489
Mahon (R. C.) Co. *v.* Molin, 252 Mich. 606 276
——— *v.* R. S. Knapp Co., 262 Mich. 325 71
Malolepszy *v.* City of Detroit, 260 Mich. 387 382
Manor Casino *v.* State (Tex. Civ. App.), 34 S. W. 769 372
Manson *v.* Grand Lodge Ancient Order of United Workmen, 30 Minn. 509 702
Marchand *v.* Russell, 257 Mich. 96 102
Maria *v.* Bower, 236 N. Y. Supp. 291 657
Martin *v.* J. A. Mercier Co., 255 Mich. 587 416
Mason *v.* Callender, 2 Minn. 350 311
——— *v.* City of Nashville, 155 Tenn. 256 522
Massachusetts Mutual Life Ins. Co. *v.* Trustees of Michigan Asylum for the Insane, 178 Mich. 193 141
Master *v.* Horowitz, 237 App. Div. (N. Y.) 237 157
Mater *v.* Becraft, 261 Mich. 477 279
May *v.* Heiner, 281 U. S. 238 663
Maynard *v.* Vinton, 59 Mich. 139 464
Mayor and City Council of Baltimore *v.* Gamse & Bros., 132 Md. 290 522
Mead *v.* Railroad Co., 174 Mich. 521 420
Melconian *v.* City of Grand Rapids, 218 Mich. 397 174
——— *v.* Fraam, 265 Mich. 378 574
Melville *v.* Rhodes, 136 Wash. 220 506

PAGE
Merriman *v.* Jackson Circuit Judge, 96 Mich. 603 88
Merriman's Appeal, *In re*, 108 Mich. 454 450
Methodist Church of Newark *v.* Clark, 41 Mich. 730 488
Michigan Air Line R. Co. *v.* Hustina, 255 Mich. 418 643
Michigan Savings Bank *v.* Dime Savings Bank, 162 Mich. 297 ... 690
Millaley *v.* City of Grand Rapids, 231 Mich. 10 164
Millet (J. B.) Co. *v.* Andrews, 175 Mich. 350 57
Mills *v.* Hoag, 7 Paige (N. Y.), 18 290
——— *v.* Warner, 167 Mich. 619 536
Miner *v.* Michigan Mutual Benefit Ass'n, 63 Mich. 338 703
Minock *v.* Shortridge, 21 Mich. 304 318
Mirage Irrigation Co. *v.* Sturgeon, 77 Neb. 175 506
Missaukee Farm & Investment Co. *v.* Ferris, 193 Mich. 286 31
Mitchell *v.* Reolds Farms Co., 255 Mich. 240, 261 Mich. 615 304
Moffit *v.* Endtz, 232 Mich. 2 629
Monaghan *v.* Agricultural Fire Ins. Co., 53 Mich. 238 634
Monnier *v.* Godbold, 116 La. 165 203
Moody *v.* Macomber, 158 Mich. 209 488
Mooney *v.* York Iron Co., 82 Mich. 263 305
Moore *v.* McIntyre, 110 Mich. 237 150
———, *Ex parte*, 14 Q. B. Div. 627 289
Moran *v.* Palmer, 13 Mich. 367 488
Morey *v.* Monk, 142 Ala. 175 702
Morgan *v.* Tourangeau, 259 Mich. 598 155
Morse *v.* Byam, 55 Mich. 594 178
——— *v.* Roach, 229 Mich. 538 472
Mortgage & Contract Co. *v.* Kupalian, 249 Mich. 577 438
Motz *v.* City of Detroit, 18 Mich. 495 430
Muirheid *v.* Smith, 35 N. J. Eq. 303 471
Murphey *v.* Township of Lee, 239 Mich. 551 489
Murphy *v.* Kuhartz, 244 Mich. 54 102
Murphy's (Jeremiah) Case, 226 Mass. 60 222
Muskegon County *v.* Michigan Surety Co., 264 Mich. 65 185
Myers *v.* Wadsworth Manfg. Co., 214 Mich. 636 672

National Bank of Constantine *v.* Jacobs, 50 Mich. 340 64
National Cash Register Co. *v.* Richards, 159 Mich. 128 476
National Conservation Exposition Co., State, *ex rel.*, *v.* Woolen, 128 Tenn. 456 372
Navarre *v.* City of Benton Harbor, 126 Mich. 618 161
Nemoitin *v.* Berger, 111 Conn. 88 109
Nestle *v.* Flemming, 262 Mich. 417 657
Nevins *v.* Roach, 249 Mich. 311 103
Nisbett *v.* Milner, 159 Mich. 337 488
Nixon *v.* Wright, 146 Mich. 231 122
Nockigme *v.* Standard Accident Ins. Co., 227 Mich. 506 704
Noonan *v.* Volek, 246 Mich. 377 481
Norris *v.* Elmdale Elevator Co., 216 Mich. 548 414
Northwestern Mutual Life Ins. Co. *v.* Joseph, 31 Ky. Law Rep. 714 618
Norton Township *v.* Cockerill, 265 Mich. 405 ..... 639, 649
Noud (John F.) & Co. *v.* Stedman, 193 Mich. 459 385
Nusbaum *v.* Shapero, 249 Mich. 252 178
N. Y. C. R. Co. *v.* White, 243 U. S. 188 680

PAGE
Oakland County *v.* Central West Casualty Co., 266 Mich. 438.118, 184
Oak Leaf Mill Co. *v.* Cooper, 103 Ark. 79 404
Oates, Trustee, *v.* Morningside College, 217 Iowa, 1059 390
O'Brien *v.* Albert A. Albrecht Co., 206 Mich. 101 672
O'Connor *v.* Beckwith, 41 Mich. 657 311
Odell *v.* Weberdorfer, 50 App. Div. (N. Y.) 579 404
Orr *v.* Keyes, 37 Mich. 385 696
Osburn *v.* Farr, 42 Mich. 134 318

Pacific States Life Ins. Co. *v.* Bryce (C. C. A.), 67 Fed. (2d) 710 616
Page *v.* State Ins. Fund, 53 Idaho, 177 222
Palmer *v.* Sharp, 112 Mich. 420 71
Panfil *v.* City of Detroit, 246 Mich. 149 382
Pangburn *v.* Sifford, 216 Mich. 153 331
Park *v.* Parker, 216 Mass. 405 552
Park Building Co. *v.* George P. Yost Fur Co., 208 Mich. 349 519
Parry *v.* Frame, 2 Bos. & Pul. 451 242
Patterson *v.* Butterfield, 244 Mich. 330 519
——— *v.* Hopkins, 23 Mich. 541 293
Paulsen *v.* Portland, 149 U. S. 30 6
Peaslee *v.* Ridgway, 82 Minn. 288 471
Peck *v.* City National Bank of Grand Rapids, 51 Mich. 353 695
Peninsular Stove Co. *v.* Crane, 226 Mich. 130 386
Penniman *v.* Perec, 9 Mich. 509 63
People *v.* Aikin, 66 Mich. 460 533
——— *v.* Allan, 263 Mich. 182 355
——— *v.* Black, 231 Mich. 48 611
——— *v.* Bowen, 165 Mich. 231 464
——— *v.* Connors, 251 Mich. 99 466
——— *v.* Dow, 64 Mich. 717 141
——— *v.* Durham, 170 Mich. 598 533
——— *v.* Etter, 81 Mich. 570 194
——— *v.* Gallagher, 75 Mich. 512 190
——— *v.* Goldberg, 248 Mich. 553 466
——— *v.* Grant, 111 Mich. 346 194
——— *v.* Hall, 48 Mich. 482 539
——— *v.* Hatfield, 234 Mich. 574 533
——— *v.* Higgins, 127 Mich. 291 130
——— *v.* Hill, 258 Mich. 79 465
——— *v.* Hillhouse, 80 Mich. 580 219
——— *v.* Kaplan, 256 Mich. 36 125
——— *v.* Kindra, 102 Mich. 147 194
——— *v.* Koukol, 262 Mich. 529 538
——— *v.* Levey, 206 Mich. 129 447
——— *v.* Lewis, 264 Mich. 83 533
——— *v.* Lincourt, 221 Mich. 674 466
——— *v.* Long, 44 Mich. 296 194
——— *v.* McDowell, 63 Mich. 229 533
——— *v.* McMurchy, 249 Mich. 147 230
——— *v.* Mears, 251 Mich. 359 411
——— *v.* Montague, 71 Mich. 447 447
——— *v.* Moran, 48 Mich. 639 539
——— *v.* Mulvaney, 171 Mich. 272 355

PAGE
People *v.* Ninehouse, 227 Mich. 480 411
——— *v.* Pericino, 227 Mich. 440 130
——— *v.* Pitcher, 15 Mich. 397 131
——— *v.* Plumsted, 2 Mich. 465 63
——— *v.* Prague, 72 Mich. 178 533
——— *v.* Quick, 58 Mich. 321 538
——— *v.* Smith, 257 Mich. 319 538
——— *v.* Summers, 115 Mich. 537 533
——— *v.* Sweeney, 55 Mich. 586 533
——— *v.* Tamosaitis, 244 Mich. 258 538
——— *v.* Van Alstine, 57 Mich. 69 190
——— *v.* Vick, 235 Mich. 475 194
——— *v.* Warner, 201 Mich. 547 533
——— *v.* Wysocki, 267 Mich. 52 541
———, *ex rel.* Attorney General, *v.* Railroad Co., 145 Mich. 140 .. 505
———, *ex rel.* Attorney General, *v.* Welch's Estate, 235 Mich. 555 663
———, *ex rel.* Drake, *v.* Mahaney, 13 Mich. 481 218
———, *ex rel.* Fowler, *v.* Brown, 83 Ill. 95 6
———, *ex rel.* Johnson, Attorney General, *v.* Bagley, 85 Cal. 343. 5
———, *ex rel.* Johnson, *v.* Coffey, 237 Mich. 591 201
———, *ex rel.* Le Roy, *v.* Hurlbut, 24 Mich. 44 227
People's Mortgage Corp. *v.* Wilton, 234 Mich. 252 438
Peoples Wayne County Bank *v.* Stott, 246 Mich. 540 393
Pequot Manfg. Corp. *v.* Equitable Life Assurance Society, 253 N. Y. 116 618
Perkins *v.* Great Central Transport Corp., 262 Mich. 616 117
——— *v.* Perkins, 16 Mich. 162 293
Peterson *v.* Wahlquist, 125 Neb. 247 472
Phippen *v.* Morehouse, 50 Mich. 537 305
Pierce *v.* Underwood, 112 Mich. 186 267
Pines *v.* Equitable Trust Co., 263 Mich. 458 178
Pontiac School District *v.* City of Pontiac, 262 Mich. 338 20
Power *v.* Brigham, 237 Mich. 172 31
Price *v.* Township Board of Oakfield Township, 182 Mich. 216 .. 175
Purdon *v.* Seligman, 78 Mich. 132 338
Puziol *v.* Kastle, 231 Mich. 100 39

Quinn's Estate, *In re*, 180 Mich. 502 447
Quirk *v.* Quirk, 259 Fed. 597 657

Rambo *v.* Patterson, 133 Mich. 655 57
Rapid Railway Co. *v.* Michigan Public Utilities Commission, 225 Mich. 425 200
R. C. Mahon Co. *v.* Molin, 252 Mich. 606 276
——— *v.* R. S. Knapp Co., 262 Mich. 325 71
Redmond (G. F.) & Co. *v.* Michigan Securities Commission, 222 Mich. 1 429
Reed *v.* Ogden & Moffett, 252 Mich. 362 115
Regents of the University of Michigan *v.* Rose, 45 Mich. 284 311
Reilly *v.* Connable, 214 N. Y. 586 424
Reinecke *v.* Northern Trust Co., 278 U. S. 339 664
Reliance Automobile & Supply Co. *v.* City of Jackson, 244 Mich. 232 639

PAGE
Repala *v.* John Hancock Mutual Life Ins. Co., 229 Mich. 463.... 704
Reserve Loan Life Ins. Co. *v.* Witt, 264 Mich. 536..... 397
Reynolds *v.* Fenton, 2 Phila. 298..... 630
——— *v.* Garber-Buick Co., 183 Mich. 157..... 319
——— *v.* Knowles, 223 Mich. 70..... 480
Rice *v.* Rice, 50 Mich. 448..... 141
Rich (John T.), Governor, Attorney General, *ex rel.*, *v.* Jochim, 99 Mich. 358..... 203
Richards *v.* Rogers Boiler & Burner Co., 252 Mich. 52..... 45
Riddell, *In re*, 20 Q. B. Div. 512..... 289
Riggs *v.* Sterling, 60 Mich. 643..... 63
Riley *v.* Roach, 168 Mich. 294.....102, 422
Ring *v.* Burt, 17 Mich. 465..... 63
Rising's Estate, *In re*, 186 Minn. 56..... 663
Ritzer *v.* Ritzer, 243 Mich. 406..... 293
Roach *v.* Kelsey Wheel Co., 200 Mich. 299..... 672
Roach (William R.) & Co. *v.* Blair, 190 Mich. 11..... 531
Roberts *v.* State, 55 Miss. 421..... 411
——— *v.* Wyatt, 2 Taunt. 268..... 242
Rockwell *v.* Railway Co., 253 Mich. 144..... 565
Rogers *v.* Common Council of Buffalo, 123 N. Y. 173..... 229
——— *v.* Kuhnreich, 247 Mich. 204..... 109
Roper *v.* Freke, 84 L. J. K. B. 1351..... 675
Rosenthal *v.* American Construction & Realty Co., 262 Mich. 91.. 39
——— *v.* Niles Forge & Manfg. Co., 7 N. C. C. A. 798..... 44
Rowland, *Ex parte*, 104 U. S. 604..... 585
Royal League *v.* Kavanagh, 233 Ill. 175..... 390
Rubatt *v.* Township of Wakefield, 239 Mich. 536..... 559
Russell *v.* Parlee, 115 Conn. 687.....110, 157
Ruth *v.* Vroom, 245 Mich. 88..... 116
Ryan *v.* Wayson, 108 Mich. 519..... 575

St. Clair *v.* A. H. Meyer Music House, 211 Mich. 285..... 249
——— *v.* United States, 154 U. S. 134..... 191
St. Louis *v.* Western Union Telegraph Co., 149 U. S. 465..... 6
Sammon *v.* Wood, 107 Mich. 506..... 63
Saunders *v.* Township of Gun Plains, 76 Mich. 182..... 161
Sayre *v.* Railway Co., 205 Mich. 294..... 268
Schnader, Commonwealth, *ex rel.*, *v.* Liveright, Secretary of Welfare, 308 Pa. 35..... 372
Schon *v.* Lawrence, 258 Mich. 543..... 571
School District of City of Pontiac *v.* City of Pontiac, 262 Mich. 338..... 20
Seabury *v.* Railway, 194 Mich. 423..... 111
Security Trust Co. *v.* Sloman, 252 Mich. 266..... 217
Seibert *v.* Goldstein Co., 99 N. J. Law, 200..... 115
Seibley *v.* Ingham Circuit Judge, 105 Mich. 584..... 366
Selby, Attorney General, *ex rel.*, *v.* McDonald, 164 Mich. 590.... 228
Semons *v.* Towns, 285 Mass. 96..... 157
Seymour *v.* Rood, 121 Mich. 173..... 488
Shank *v.* Lippman, 249 Mich. 22..... 576
Shaw *v.* Township of Saline, 113 Mich. 342..... 161
Sherman *v.* Tax Commissioners of Ohio, 125 Ohio St. 367..... 667

PAGE
Sherrid *v.* Southwick, 43 Mich. 515 63
Shippy *v.* Mason, 90 Mich. 45 21
Showers *v.* Robinson, 43 Mich. 502 63
Shreeves *v.* Caldwell, 135 Mich. 323 318
Shubrook *v.* Tufnell, 9 Q. B. Div. C. A. 621 289
Silsby *v.* Michigan Car Co., 95 Mich. 204 407
Simmons' (Bertha B.) Case, 117 Maine, 175 222
Simpson *v.* Michigan Valve & Foundry Co., 260 Mich. 543 681
Sims *v.* Weldon, 165 Ark. 13 372
Sinkiewicz *v.* Lee & Cady, 254 Mich. 218 249
Skupinski *v.* Provident Mortgage Co., 244 Mich. 309 386
Sloman *v.* Cutler, 258 Mich. 372 544
Smith *v.* Fall River Joint Union High School District, 118 Cal. App. 673 ..... 110, 156
——— *v.* Muirheid, 34 N. J. Eq. 4 471
——— *v.* State Highway Com'r, 227 Mich. 280 490
——— *v.* United States (C. C. A.), 281 Fed. 696 452
Smitter *v.* Geurkink, 261 Mich. 697 545
Snyder *v.* Mathison, 196 Mich. 378 531
——— *v.* People, 26 Mich. 106 63
Solomon *v.* Loud, 173 Mich. 233 447
Spangler, *In re,* 11 Mich. 298 7
Spencer *v.* Taylor, 219 Mich. 110 116
Spier's Estate, *In re,* 224 Mich. 658 589
Spooner *v.* Travelers Ins. Co. of Hartford, 76 Minn. 311 471
Squier *v.* Nash, 240 Mich. 146 647
Stammers *v.* Banner Coal Co., 214 Mich. 215 146
Standard Drug Store *v.* A. E. Wood & Co., 227 Mich. 333 169
Stark *v.* Mansfield, 178 Mass. 76 525
State, *ex rel.* Gaylord Farmers' Co-operative Creamery Ass'n, *v.* District Court of Sibley County, 128 Minn. 486 675
———, *ex rel.* National Conservation Exposition Co. *v.* Woolen, 128 Tenn. 456 372
———, *ex rel.* Thompson, Attorney General, *v.* Winnett, 78 Neb. 379 8
State Life Ins. Co. *v.* Finney, 216 Ala. 562 618
Steinberg *v.* Fine, 225 Mich. 281 548
Stellwagen *v.* Dingman, 229 Mich. 159 647
Sterling Bank of Sleeper & Chamberlain *v.* Scott, 231 Mich. 362 647
Stiles *v.* Des Moines Council Boy Scouts of America, 209 Iowa, 1235 376
Stirling *v.* Buckingham, 46 Conn. 461 191
Stobbelaar *v.* Berg, 247 Mich. 121 427
Stoddard *v.* Cooper-Widenmann Construction Co., 220 Mich. 643. 681
Stoll *v.* Hawks, 179 Mich. 571 319
Strack *v.* Miller, 134 Mich. 311 ..... 150, 646
Strand Lumber Co. *v.* Dostie, 260 Mich. 422 386
Stubbings *v.* Village of Evanston, 136 Ill. 37 525
Sturgis National Bank *v.* Maryland Casualty Co., 252 Mich. 426. 703
Sullivan *v.* Richardson, 119 Cal. App. 367 156
Sumner *v.* Edmunds, 130 Cal. App. 770 157
Sunlin *v.* Skutt, 133 Mich. 208 629

PAGE
Swainston *v.* Kennedy, 253 Mich. 518 261
Sylvester *v.* Metropolitan Life Ins. Co., 255 Mich. 302 553

Tapert *v.* Schultz, 252 Mich. 39 548
Taylor *v.* Sweet, 40 Mich. 736 688
——— *v.* Township of Avon, 73 Mich. 604 639
Territory *v.* Clayton, 8 Mont. 1 192
Terry *v.* Durand Land Co., 112 Mich. 665 505
Thayer's Estate, *In re,* 188 Mich. 261 464
Thomas F. Greene's Case, 280 Mass. 506 376
Thompson *v.* Auditor General, 261 Mich. 624 25
——— *v.* Howard, 31 Mich. 309 630
——— *v.* Loyal Protective Ass'n, 167 Mich. 31 704
——— *v.* Southern Mich. Transportation Co., 261 Mich. 440 116
———, Attorney General, State, *ex rel.,* *v.* Winnett, 78 Neb. 379 8
Thomson Electric Welding Co. *v.* Peerless Wire Fence Co., 190 Mich. 496 702
Toth *v.* Toth, 242 Mich. 23 122
Tousey *v.* Moore, 79 Mich. 564 311
Township of Alpena *v.* Mainville, 153 Mich. 732 447
Township of Clarence *v.* Dickinson, 151 Mich. 270 .....150, 646
Township of Cooper *v.* Little, 220 Mich. 62 639
Township of Forest *v.* American Bonding Co., 187 Mich. 657 185
Township of Lake *v.* Millar, 257 Mich. 135 .....151, 638, 647, 649
Township of Norton *v.* Cockerill, 265 Mich. 405 .....639, 649
Township of Walker *v.* Thomas, 123 Mich. 290 150
Trask *v.* Modern Pattern & Machine Co., 222 Mich. 692 594
Tuller *v.* City of Detroit, 97 Mich. 597 489
——— *v.* Wayne Circuit Judge, 243 Mich. 239 683
Tuttle *v.* Embury-Martin Lumber Co., 192 Mich. 385 671

Union Trust Co. *v.* Detroit Trust Co., 243 Mich. 451 288
United Collieries, Inc., *v.* Martin, 248 Ky. 808 393
United States *v.* Murphy, 224 Fed. 554 229
——— *v.* Rondeau, 4 Woods, 185 229
——— *v.* Wells, 283 U. S. 102 662
University of Michigan *v.* Pray, 264 Mich. 693 640

Vaivida *v.* City of Grand Rapids, 264 Mich. 204 .....376, 698
Vance *v.* Village of Pewamo, 161 Mich. 528 490
Van Driel *v.* Stevens, 200 Mich. 291 414
Van Hyning, *In re,* 257 Mich. 146 429
Van Simaeys *v.* George R. Cook Co., 201 Mich. 540 671
Vaughan *v.* Black, 63 Mich. 215 366
Verhoeks *v.* Gillivan, 244 Mich. 367 629
Village of West Milwaukee *v.* Industrial Commission of Wisconsin, 216 Wis. 29 376
Vincent *v.* Heenan, 194 Mich. 316 447
——— *v.* Van Blooys, 263 Mich. 312 657
Voss *v.* Connecticut Mutual Life Ins. Co., 119 Mich. 161 704

Walker Township *v.* Thomas, 123 Mich. 290 150
Walkey's Estate, *In re,* 249 Mich. 653 344

PAGE
Wallace *v.* H. W. Noble & Co., 203 Mich. 58 306
Walton School of Commerce *v.* Stroud, 248 Mich. 85 312
Ward *v.* Joslin, 186 U. S. 142 76
——— *v.* Oliver, 129 Mich. 300 464
Warner *v.* Fullerton-Powell Hardwood Lumber Co., 231 Mich. 328 671
Warren National Bank *v.* Jamieson, 301 Pa. 45 54
Waters *v.* Johnson, 134 Mich. 436 386
Watkins *v.* Gabriel Steel Co., 260 Mich. 692 265
Watrous *v.* Conor, 266 Mich. 397 ..... 427, 482
Wattles *v.* City of Lapeer, 40 Mich. 624 21
——— *v.* Wayne Circuit Judge, 119 Mich. 356 97
Webb *v.* Depew, 152 Mich. 698 433
——— *v.* Township of Wakefield, 239 Mich. 521 558
Weber *v.* Wayne Circuit Judge, 217 Mich. 561 81
Webster *v.* Stewart, 210 Mich. 13 531
Weightman *v.* Hatch, 17 Ill. 281 471
Weihe *v.* Macatawa Resort Co., 198 Mich. 334 490
Welch *v.* Ware, 32 Mich. 77 407
Wellar *v.* People, 30 Mich. 16 194
Wells *v.* Prudential Ins. Co. of America, 239 Mich. 92 258
——— *v.* Railway Co., 110 Mo. 286 372
West Milwaukee *v.* Industrial Commission of Wisconsin, 216 Wis. 29 376
Wetmore *v.* McDougall, 32 Mich. 276 307
Wetzler *v.* Glassner, 185 Wis. 593 449
Wheelock *v.* Lake, 117 Mich. 11 624
Wiggins *v.* Snow, 89 Mich. 476 475
William and Anthony Streets, *In re,* 19 Wend. (N. Y.) 678 522
William R. Roach & Co. *v.* Blair, 190 Mich. 11 531
Williams *v.* Starr, 5 Wis. 534 64
Wilms *v.* New Hampshire Fire Ins. Co., 194 Mich. 656 635
Wilson *v.* Woolman, 133 Mich. 350 150
Winans *v.* Wilkie, 41 Mich. 264 505
Wolf *v.* District Grand Lodge No. 6, I. O. B. B., 102 Mich. 23 .. 703
Woods *v.* Monroe, 17 Mich. 238 488
Worcester County National Bank *v.* Commissioner of Corporations and Taxation, 275 Mass. 216 667
Wright *v.* Weimeister, 87 Mich. 594 31
Wynn's Estate, *In re,* 193 Mich. 223 83

Zeilman *v.* Fry, 213 Mich. 504 88
Zolla *v.* Grand Rapids Store Equipment Corp., 46 Fed. (2d) 319 657
Zoltowski *v.* Ternes Coal & Lumber Co., 214 Mich. 231 671

LAWS CITED AND CONSTRUED.

CONSTITUTION OF UNITED STATES.

PAGE

14th Amendment, § 1 ..... 226, 668

UNITED STATES STATUTES.

PAGE

4 U. S. Stat. at Large, p. 231 486
38 Stat., p. 273 500
40 Stat., p. 1097 663
Rev. Stat., § 5152 500
12 USCA, § 21 *et seq.* 499
12 USCA, § 63 499
12 USCA, §§ 64, 66 500
15 USCA, § 701 *et seq.* 592
28 USCA, § 412 229

CONSTITUTION OF MICHIGAN (1835).

PAGE

Sched., § 6 8
Sched., § 9 7

CONSTITUTION OF MICHIGAN (1850).

PAGE

Art. xvi, §§ 2–4 63

CONSTITUTION OF MICHIGAN.

PAGE

Art. ii, § 19 135
Art. v, § 22 368
Art. viii, § 20 ..... 4, 12
———, § 21 12
Art. ix, § 7 199
———, § 8 201
Art. x, § 21 20
Art. xvi, § 2 226
———, § 11 172

COMPILED LAWS 1857.

PAGE

§§ 3575–3577 294

COMPILED LAWS 1871.

PAGE

§§ 5157, 5158 295

HOWELL'S STATUTES.

	PAGE
Chap. 267	63
§ 8218	21

COMPILED LAWS 1915.

	PAGE
§§ 5439	147
5458	43

COMPILED LAWS 1929.

	PAGE
§§ 303, 304	322
1193 *et seq.*	184
1465 *et seq.*	4
1796 *et seq.*	4
2228–2274	3, 12
2230, 2241	16
2251	8
2256	5
2694	12
2702	19
2871	232
2903	232
3672	661
3937	557
3996	415
4223	161, 415
4317	650
4381	645, 649
4415 *et seq.*	416
4425, 4426	415
4481 *et seq.*	420
4545	161
4648	108, 154
4697	116
4718	115
4862 *et seq.*	149
4927	639
4937	639
8407 *et seq.*	375
8410, 8436	44
8413	247
8416	681
8417	167, 680
8420	679
8424	678
8425	146
8425, § 9, 8426, § 10	593
8427, §§ 11 b, e	593
8427, subd. e	414, 598
8428	164
8431	162, 223
§§ 8438	181
8440–8459	680
8444	43
8453	181, 453
9454, subd. 4	459
9623–9649	696
9624	694
9711	29
9825	28
9858	33
9876	34
9880	33
9968	504
11006	198
11008	201
11018 *et seq.*	200
11945	504
11997 *et seq.*	74
12016, 12018	75
12024	74, 75, 504
12766	296
13103	385
13392	472
13395	470
13413	331
13417	401
13434	469
13476	588
13498, 13499	178, 216
13752	229
13944, subd. 4	488
13968	622
13976	223, 252, 337
13983	337
13997	390
14010	15
14021	66
14040	407
14179, 14181	310
14219	481
14221	464

COMPILED LAWS 1929—Continued.

	PAGE
§§ 14222	127
14376–14378	298
14549–14552	576
14552, subds. 2, 5	577
14608	472
14617	470
14766, 14777	695
14857	122, 392
14869, 14873	97
14900	393
14956	177, 218
14979	438
15129–15136	684
15328	581
15330	582
15506	577
15508	683
§§ 15518	566
15825, 15841	623
15958	81
16520	136
16541, 16542	125
16717	327
16732	125
17129	135
17241	136
17254	536
17289	534
17290	411
17305	125
17320	535
17322	195
17545	228

SESSION LAWS.

	PAGE
1855, Act 77	536
1857, Act 107	486
1859, Act 138	536
——, Act 160, § 2	29
1889, Act 108	74
1893, Act 118	228
1895, Act 3	4
——, Act 215	4
1907, Act 46	490
——, Act 101	28
1909, Act 279	3, 12
1913, Act 369, § 3	136
1917, Act 158	358
1919, Act 19	416
——, Act 64	146
——, Act 419	201
1921, Act 84	497
1923, Act 83	125
1925, Act 17	415
——, Act 228	178, 216
——, Act 273	12
1925, Act 273, § 5	17
1927, Act 331	149
——, Act 376	594
1929, Act 300	200
1931, Act 142	12
——, Act 212, § 5	206
——, Act 317	137
——, Act 327, § 82	276
——, Act 328, § 520	607
1933, Act 8 (Ex. Sess.)	229
——, ——, §§ 17, 24 (Ex. Sess.)	172
——, ——, § 48 (Ex. Sess.)	322
——, Act 64	173
——, Act 98	288, 396
——, Act 122, § 25a	99
——, Act 176	226
——, Act 235, § 2	428
1934, Act 6 (Ex. Sess.)	370
——, Act 31 (Ex. Sess.)	368

CIRCUIT COURT RULES (1931).

	PAGE
No. 24	66
No. 41	656
No. 57	81
No. 59, § 3, subd. d	275
No. 60	683, 688

CIRCUIT COURT RULES (1933).

PAGE
No. 18 551
No. 37, § 11 105
No. 41 655
No. 60, §§ 4, 5 2
No. 67 697
———, § 2 99
No. 68 678
No. 72 439

JUNE TERM, 1934.*

STREAT *v.* VERMILYA.

1. MUNICIPAL CORPORATIONS—CITY CHARTER COMMISSION—POWERS.
   Under home rule act a city charter commission has power and authority to frame a proposed charter for the city and provide for its submission to electors for adoption or rejection, including fixing a time therefor (1 Comp. Laws 1929, § 2256).

2. SAME—CHARTERS—OFFICES.
   A proposed new charter, if adopted, entirely supersedes former charter and abolishes offices thereunder as a city may not have two separate and distinct charters at the same time.

3. SAME—STATE AGENCIES.
   Cities are municipal corporations deriving their powers from the State and are its agencies for carrying on local government (1 Comp. Laws 1929, §§ 2228–2274).

4. SAME—CHARTERS AS ORGANIC ACTS.
   A city charter is the organic law of the city and is to be considered the same as other organic acts.

5. SAME—IMPLIED POWERS.
   Power of city electors to adopt proposed charter carries with it the implied power and authority to provide the city government which shall function thereunder, if adopted, and, in absence of constitutional or legislative limitation, electors may provide for election of officers.

6. SAME—SIMULTANEOUS SUBMISSION OF PROPOSED CHARTER AND ELECTION OF OFFICERS THEREUNDER.
   Provision of proposed charter for its submission for ratification or rejection by qualified electors in home rule city and election of officers as provided for therein at same special election *held*, constitutional and valid.

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* Continued from Vol. 267.

7. MANDAMUS—MUNICIPAL CORPORATIONS—ELECTIONS—EMERGENCY—COURT RULES.

Writ of mandamus is ordered to issue to dissolve injunction and permit election of officers under proposed charter to be submitted at same special election, as provided for emergency under Court Rule No. 60, §§ 4, 5 (1933).

Appeal from Genesee; Black (Edward D.), J. Submitted May 29, 1934. (Calendar No. 37,928.) Decided June 8, 1934.

Bill by Frank R. Streat against Ned Vermilya, Flint city clerk, and another to enjoin election of city officers under a proposed charter at special election at which charter is to be submitted. Decree for plaintiff. Howard Polzin intervened as party defendant and reviews decree on application for leave to appeal. Mandamus granted pursuant to Court Rule No. 60, §§ 4, 5 (1933).

Carton & Gault and *M. Davison, Jr.*, for plaintiff.

Frank G. Millard, for defendant Vermilya.

Edward N. Barnard, for defendant Polzin.

POTTER, J. This case is here under Court Rule No. 60, §§ 4, 5 (1933), which provide:

"SEC. 4. On showing of emergency, of appellant's due diligence, and of the character of injury to him through observance of the above practice on application for leave to appeal, application may be made on *ex parte* statement of fact, showing of merit, and on proof of such notice to other parties as the circumstances permit, or excuse for lack of notice; and immediate consideration of the application may be prayed.

"SEC. 5. Upon such application the court, in lieu of leave to appeal, may in its discretion order issuance of the proper original writ."

The application is for leave to appeal from an order granting an injunction restraining an election of city officers on June 4, 1934, in the city of Flint, to take office under the proposed new charter if adopted. The case is presented under the sections of Court Rule No. 60 (1933), above quoted, which provide that upon application to appeal, in case of emergency, the court may in lieu of granting leave to appeal, issue its original writ and the case will be treated and disposed of as upon application for a writ of mandamus to direct the dissolution of the injunction restraining the election called as above indicated.

Flint is a city organized under a charter adopted in pursuance of the home rule act (Act No. 279, Pub. Acts 1909, as amended, 1 Comp. Laws 1929, §§ 2228–2274) providing for the incorporation of home rule cities. In pursuance of the home rule act a charter commission was selected in the city of Flint, and it prepared and proposed for adoption a new charter for the city. The proposed charter is to be submitted for adoption or rejection to a vote of the electors of the city to be held June 4, 1934.

Section 224 of the proposed charter provides:

"This charter shall be submitted to the electors of the city of Flint, Michigan, for their approval or rejection at a special election on June 4, 1934."

Section 225 of the proposed charter provides:

"There shall be elected at said special charter election one mayor from the city at large, and one alderman from each of the ten wards designated and provided for herein," etc.

The latter provision of the proposed charter is attacked as unconstitutional, invalid and incapable of being obeyed or enforced.

City charters in Michigan were formerly special legislative enactments. This was true when Michigan was a territory, and for many years after it became a State. Public sentiment demanded uniformity in powers and duties in cities and villages, thus making possible unified judicial construction, and, it was claimed, a consequent saving of expense. In 1895, a uniform village charter act (Act No. 3, Pub. Acts 1895, 1 Comp. Laws 1929, § 1465 *et seq.*) was adopted by the legislature and a uniform city charter act (Act No. 215, Pub. Acts 1895, 1 Comp. Laws 1929, § 1796 *et seq.*), providing for the incorporation of cities of the fourth class. The people were not satisfied with the results attained under the so-called uniform charter provisions, and in the constitutional convention of 1908 home rule was demanded, that is, the right of cities to frame and adopt their own charters. The constitutional convention compromised between these two ideas by giving cities the right to frame, adopt and amend their charters, subject, however, to certain broad general restrictions and limitations fixed by the legislature in the so-called home rule act.

The proposed city charter provides for its submission to the qualified electors of the city of Flint on June 4, 1934, for ratification or rejection, and an election is proposed at the same time of the city officers named therein who, if the charter is adopted, will take office. This is said to be unconstitutional and invalid in that it provides for the election of persons to office when it has not yet been determined such offices shall be created by the adoption of the proposed charter.

Article 8, § 20, of the Constitution provides the legislature shall provide by a general law for the incorporation of cities; and article 8, § 21, provides that under such general laws the electors of each

city shall have power and authority to frame, adopt and amend its charter. In pursuance of this constitutional mandate, the legislature enacted Act No. 279, Pub. Acts 1909.

"It intended to, and did, pass a general law, giving to the electors of cities power to frame, adopt, and amend charters. To that act it gave the title under consideration. It provides for the 'incorporation of cities.' What cities? Obviously *all* cities—as well those already incorporated as those not yet incorporated, since there are no words of qualification or limitation. Every incorporated city must have a charter. Its charter is the definition of its rights and obligations as a municipal entity, so far as they are not otherwise legally granted or imposed. The very act of incorporation, therefore, necessarily includes the idea of a charter and the power to frame and adopt one. If the framing and adoption of a charter *in toto* is fairly within the meaning of the word 'incorporation' and we believe it necessarily is so, it seems clear that the revision of a charter already adopted is likewise within that meaning upon the principle that the greater includes the less." *Jackson Common Council* v. *Harrington,* 160 Mich. 550.

There seems to be no question but that under the home rule act for cities a charter commission has full power and authority to frame a proposed charter for the city and provide for its submission to the electors for adoption or rejection. 1 Comp. Laws 1929, § 2256, confers express authority upon the charter commission to fix a time of submission of the same to the electors.

A city may not have two separate and distinct charters at the same time. *Butler* v. *Walker,* 98 Ala. 358 (13 South. 261, 39 Am. St. Rep. 61). The proposed new charter, if adopted, will entirely supersede the former charter. *People, ex rel. Johnson,*

Attorney General, v. *Bagley,* 85 Cal. 343 (24 Pac. 716). The absolute and unconditional supersession of the present charter of the city by the proposed charter, if adopted, will abolish all offices under the present charter. *People, ex rel. Fowler,* v. *Brown,* 83 Ill. 95, it being the purpose and object of the proposed charter, if adopted, to completely supersede the present form of city government with all its officers and to substitute a new form of government in which the power of the city government will be vested in new officers. *Adler* v. *Jenkins,* 33 Okla. 117 (124 Pac. 29). The right to frame and adopt a charter for the city is conferred by the Constitution. The power to adopt, amend and repeal the existing charter is granted by the home rule act for cities. To effect the constitutionally designated purposes, the legislature provided for the creation of a charter commission which has the power to frame a proposed charter and to fix the time when the proposed charter will be submitted to the electors of the city for adoption or rejection. There is nothing in the present charter of the city or in the home rule act for cities which provides for the selection of officers under the proposed charter, if adopted. Cities are municipal corporations, deriving their powers from the State,—State agencies for carrying on local municipal government; but within the range of the Constitution and the general home rule act for cities, the electors thereof may make, alter, amend, revise or repeal the charter of the city, which is the organic law of the city, and to be considered as other organic acts are considered. *St. Louis* v. *Western Union Telegraph Co.,* 149 U. S. 465 (13 Sup. Ct. 990).

"The city is a miniature State, the council is its legislature, the charter is its Constitution." *Paulsen* v. *Portland,* 149 U. S. 30 (13 Sup. Ct. 750).

The adoption of the proposed charter by the electors of the city would be form without substance, if the electors have not the power to provide for the election of officers under the proposed charter if adopted, and the organization and functioning of the city government thereunder. The power of the electors to adopt the proposed charter carries with it the implied power and authority to provide the government of the city shall function under the proposed charter, if adopted, and in the absence of constitutional prohibition or legislative limitation it was the right and the duty of the electors of the city to provide for the election of officers under the proposed charter to take office in case of its adoption. Recourse is had to the electors of the city.

"According to the theory of our government, the sovereign power is in the people." *In re Spangler,* 11 Mich. 298, 308.

They may make and unmake home rule charters for cities and make and unmake public offices. As a necessary incident to the broad powers expressly granted by the Constitution and the home rule act for cities to the electors of a city, the electors of the city of Flint have the implied power to provide for the effective functioning of the new government under the proposed charter, if adopted, because the greater power necessarily includes the lesser.

Section 9 of the schedule of the Constitution of 1835 provided:

"This Constitution shall be submitted, at the election to be held on the first Monday in October next, and on the succeeding day, for ratification or rejection, to the electors qualified by this Constitution to vote at all elections; and if the same be ratified by the said electors, the same shall become the Constitution of the State of Michigan."

Section 6 of the schedule of the Constitution of 1835 provided:

"The first election for governor, lieutenant governor, members of the State legislature, and a representative in the congress of the United States, shall be held on the first Monday in October next, and on the succeeding day."

The same provision in principle was contained in the Constitution of 1835 as is contained in the proposed charter of the city of Flint, that is, the proposed Constitution of 1835 provided for the election of the members of the State legislature, governor, lieutenant governor and representative in congress on the same day the Constitution was submitted to the qualified electors for ratification or rejection. There is nothing in the home rule act for cities which prohibits voting for the adoption or rejection of a proposed charter and at the same election voting for the city officers who will take office thereunder, in case such charter shall be adopted.

1 Comp. Laws 1929, § 2251, governing the incorporation of new cities, provides that the charter commission,

"Shall provide the manner of nominating the candidates for the first elective officers provided in the proposed charter. It shall fix the date of the first city election, and do and provide all other things necessary for making such nominations and holding such election. Such election may be held at a special election or on the same date as a general election."

A question similar to that in issue here was before the supreme court of Nebraska in *State, ex rel. Thompson, Attorney General,* v. *Winnett,* 78 Neb. 379 (110 N. W. 1113, 10 L. R. A. [N. S.] 149, 15 Ann.

Cas. 781). It was proposed to amend the Constitution of the State of Nebraska to provide for a State railway commission and to elect, at the same election at which the proposed constitutional amendment was submitted for adoption or rejection, the railway commissioners. The question was there raised that is in principle raised here. The supreme court of Nebraska said:

"The next objection to the validity of the amendment suggested by the attorney general is that there was no authority for electing State railway commissioners, and that no such office existed at the time of the general election in 1906. Upon the first proposition, it is sufficient to say that the Constitution provides that, when an amendment is proposed by the legislature, the same shall be submitted to the electors for approval or rejection at the next election of senators and representatives, and, as to the manner of submitting it, prescribes only that, 'when more than one amendment is submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately.' Section 1, art. 15, above quoted. If the amendment has been submitted to the voters at the general election specified, and the manner of its submission does not violate the only limitation which the Constitution provides, it may well be presumed that the intention of the Constitution is that it shall be submitted as other questions are, and that the legislature intended that the means of ascertaining the will of the people upon other questions at the general election at which it is required to be submitted should be employed. It will be conceded that, where there is no office, there can be no officer. Constitutions and amendments thereto are created by the vote of the people, and not by a canvass of that vote, nor by the official declaration of the result. If this amendment was adopted, it was when a majority

of the electors had voted in its favor, and, when that occurred, it became a part of the Constitution, and the office of State railway commissioner existed. By the same act of the people that made the amendment a part of the fundamental law, and created the office, these respondents were elected to fill that office. Both matters might properly be submitted to the electors at the same election. This is in accord with universal precedent both in this and in other States."

We are satisfied both on principle and authority the submission of the proposed charter to the qualified electors of the city of Flint for ratification or rejection, and the election of officers thereunder as provided for in the proposed charter is not only constitutional but valid. In pursuance of Court Rule No. 60, §§ 4, 5 (1933), a writ of mandamus will issue directing the dissolution of the injunction granted, and directing the city clerk to proceed with the election of officers in accordance with the proposed charter to be submitted, but without costs, the matter being one of public interest.

NELSON SHARPE, C. J., and NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

SIMONTON *v.* CITY OF PONTIAC.

1. MANDAMUS—MUNICIPAL CORPORATIONS—BONDHOLDERS' COMMITTEE MEMBERS—PARTIES.

   Members of a bondholders' committee which has legal ownership of 60 per cent. of city's bonds maturing during the ensuing fiscal year may properly bring mandamus to enforce their rights thereunder by suit in their individual names, notwithstanding they are named as trustees in instrument vesting them with title (3 Comp. Laws 1929, § 14010).

2. MUNICIPAL CORPORATIONS—DEBT SERVICE—TAX LIMITATION.

   City is bound to take care of its debt service pursuant to 1 Comp. Laws 1929, § 2694, as amended by Act No. 142, Pub. Acts 1931, notwithstanding the tax imposed may exceed two per cent. limitation placed thereon by home rule act, 1 Comp. Laws 1929, §§ 2230, 2241.

3. STATUTES—TITLE OF ACT—MUNICIPAL CORPORATIONS—DEBT SERVICE—HOME RULE ACT.

   Title of Act No. 273, Pub. Acts 1925 (1 Comp. Laws 1929, § 2690 *et seq.*), regulating issuance and payment of municipal bonds and duties of municipal officers and State treasurer in connection therewith *held*, full and complete and not unconstitutional as failing to show it modifies tax limitation provisions of home rule act, 1 Comp. Laws 1929, §§ 2230, 2241.

4. MANDAMUS—WRIT OF GRACE.

   Writ of mandamus is one of grace.

5. SAME—AMENDMENT OF MUNICIPAL APPROPRIATION ORDINANCE.

   Bondholders' committee *held*, entitled to writ of mandamus to compel city officials to amend annual appropriation ordinance so as to include a sum sufficient to pay principal and interest payments maturing during fiscal year and levy taxes accordingly, although city has suffered from economic depression.

Mandamus by William A. Simonton and others, members of a bondholders' committee, to compel

City of Pontiac, a municipal corporation, Commission of the City of Pontiac, composed of Frank B. Ruf, Mayor, and others, and William R. Ransom and Leo J. Heenan, assessors, to spread on the tax-rolls, levy, and collect sufficient taxes to cover amount due bondholders and others on municipal bonds and for other relief. Submitted June 8, 1934. (Calendar No. 37,852.) Writ granted June 19, 1934.

Claude H. Stevens (Berry & Stevens, of counsel), for plaintiffs.

William A. Ewart, City Attorney *(Andrew L. Moore,* of counsel), for defendants.

Carlos J. Jolly, Walter D. Kline and *James V. Oxtoby, amici curiæ.*

BUTZEL, J. On July 12, 1920, the electors of the city of Pontiac, Michigan, adopted a home rule charter in conformity with the provisions of article 8, §§ 20, 21, of the Constitution of the State of Michigan, and Act No. 279, Pub. Acts 1909, as amended (1 Comp. Laws 1929, § 2228–2274). On November 28, 1933, the city manager submitted to the city commission, which governs the city, a proposed budget for the fiscal year beginning January 1, 1934. In accordance with the provisions of Act No. 273, Pub. Acts 1925, 1 Comp. Laws, 1929, § 2694, as amended by Act No. 142, Pub. Acts 1931, he included the sum of $562,966.41 for payments of the principal and interest on the general bonded obligations that would become due for the 12 months' period from August 1, 1934. This sum included general city and water obligations but no special assessment obligations. It is expected that $68,306.39 will be realized during the year from the

revenues from the water department, and on application of this amount toward payment of interest on the water bonds, the additional sum of $494,660.02 would be required to pay principal and interest on the city obligations exclusive of the special assessment debts during the year. Notwithstanding this action of the city manager, the city commission on or about January 31, 1934, enacted an annual appropriation ordinance that only included $75,204.86 for debt service in a budget in the amount of $861,-112.74, which was to cover the expenditures of the city for the year. The sum thus included for debt service is $419,455.16 short of the $494,660.02 required for principal and interest on the city's obligations exclusive of special assessment debts maturing during the 12 months' period. The total assessed valuation on real and personal property for the year 1933 was $53,168,555. It was estimated that the assessed valuation for the year 1934 will be a similar amount, and if a tax of two per cent. were levied, it would, if paid, bring in the sum of $1,063,-371. The commission, however, by its ordinance intends to levy a tax on the assessed valuation so as to only realize the sum of $861,112.74, the amount of the budget as set forth in the ordinance. This sum is wholly inadequate to take care of the debt service and the other expenses of the city for the year. If the city undertook to raise a sufficient amount so as to include the debt service for the year, it would be necessary to levy a tax of 2.40 per cent. provided the assessed valuation for 1934 is neither larger nor smaller than that for the year 1933.

Plaintiffs are the members of a bondholders' protective committee for the city of Pontiac by virtue of an express trust contained in a written instrument vesting in them the legal title, with all rights

and powers of ownership, in the bonds deposited thereunder. In this capacity they hold over 60 per cent. of the aggregate amount of the bonds and interest maturing during the year beginning August 1, 1934. On February 8, 1934, they sent a written communication to the mayor and the commissioners of the city of Pontiac, demanding that they levy upon the 1934 tax roll a sufficient sum so as to pay the full amount of principal and interest payments maturing during the year for debt obligations, and further that the ordinance previously adopted by the commission for the budget be amended so as to comply with this demand. After futile efforts to agree upon a mutually satisfactory refunding plan, plaintiffs brought the present mandamus proceedings in this court, to compel the commission of the city of Pontiac to convene and amend its budget covering the items for bond principal and interest maturing during the 12-months' period beginning August 1, 1934, so as to provide the sum of $152,045 for the payment of principal and interest maturing during said period upon its water bonds, the sum of $246,250 for the payment of principal maturing during said period upon its other general obligation bonds, and the sum of $160,362.41 for the payment of interest maturing during said period upon its other general obligation bonds, and that said commission meet and amend its annual appropriation ordinance for 1934 so as to provide for a tax levy upon the 1934 city tax roll of the sum of $83,747.61 for the payment of principal and interest maturing during the 12-months' period beginning August 1, 1934, upon its water bonds, the sum of $246,250 for the payment of principal maturing during said period upon its other general obligation bonds, and the sum of $160,362.41 for the payment of interest maturing

during said period upon its other general obligation bonds, and that said annual appropriation ordinance be otherwise amended to conform with the foregoing, and that the city commission cause said taxes to be certified to the board of assessors of said city; that said writ of mandamus further require William R. Ransom and Leo J. Heenan, who constitute the board of assessors of said city, to spread said taxes upon the 1934 city tax roll; and that said writ of mandamus further require the performance by the officials of the city of Pontiac of all duties required by law for the levy and collection of taxes. The case is presented on duly verified petition, answer, reply to answer and answer to reply.

Defendants in their answer claim that plaintiffs are not actually the owners of the bonds, and therefore not the proper parties in interest, and have no right to bring the proceedings. The bondholders' protective committee agreement dated October 27, 1932, and attached to the plaintiffs' petition vests in plaintiffs title to the bonds with full power of ownership. They can give full acquittances and surrender the bonds and coupons on payment which they also have the right to enforce. The fact that they are named as trustees in the instrument does not preclude them from suing in their individual names. See *Barak* v. *Detroit Apartments Corp.*, 232 Mich. 59; *Curry* v. *Raich,* 245 Mich. 146; also 3 Comp. Laws 1929, § 14010. Mandamus is the proper method of enforcing plaintiffs' rights. *Burke* v. *City of River Rouge,* 240 Mich. 12; *Chemical Bank & Trust Co.* v. *County of Oakland,* 264 Mich. 673.

Defendants claim that the constitutional provision and legislative enactments herein set forth limit the rights of taxation for city purposes to a maxi-

mum of two per cent. for any fiscal year. They refer to the following provisions of the Constitution:

"ARTICLE 8, SEC. 20. The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts.

"SEC. 21. Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village, and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, *subject to the Constitution and general laws of this State.*"

Defendants also refer to the following two sections of the home rule act, Act No. 279, Pub. Acts 1909, found in 1 Comp. Laws 1929, §§ 2230, 2241:

"SEC. 3 * * * (f) That the subjects of taxation for municipal purposes shall be the same as for State, county and school purposes under the general law;

"(g) For annually laying and collecting taxes in a sum not to exceed two per centum of the assessed value of all real and personal property in the city.

"SEC. 5. No city shall have power:

"(a) To increase the rate of taxation now fixed by law, unless the authority to do so shall be given by a majority of the electors of said city voting at the election at which said proposition shall be submitted, but the increase in any case shall not be such as to cause such rate to exceed two per centum of the assessed value of the real and personal property in such city."

Charter of city of Pontiac, chap. 9, § 13.

"The aggregate amount which the commission may raise by a general tax upon the taxable real and personal property of the city, for the purpose of defraying the general expenses and liabilities of the corporation, shall not exceed in any one year, two per cent. of the assessed value of all real and personal property in the city, as fixed by the assessment roll of the year preceding the year in which the tax is levied."

Plaintiffs, however, claim that the entire question is ruled by Act No. 273, Pub. Acts 1925, § 5, as amended (1 Comp. Laws 1929, § 2694, as amended by Act No. 142, Pub. Acts 1931), which in part provides as follows:

"SEC. 5. Whenever any money shall be borrowed by any municipality it shall be the duty of every officer or official body charged with any duty in connection with the determination of the amount of taxes to be raised or with the levying of such taxes, to include in the amount of taxes levied each year an amount sufficient to pay the annual interest on all such loans, any instalments of the principal thereof falling due before the time of the following tax collection and all payments required to be made to sinking funds. In any municipality having any debt now outstanding and unpaid, a tax shall in like manner be levied each year, sufficient to pay the interest on such debt falling due before the time of the following tax collection, to pay any principal instalment of serial bonds due before the time of the following tax collection and to deposit into a sinking fund annually an amount which with the increment thereof will be sufficient to pay the principal of such debt at maturity or within the term of any refunding bonds hereby authorized to be issued. * * * Any officer who wilfully fails to perform the duties required of him by this section shall be personally liable to the municipality or to any bond-

holder for any loss or damage arising from such failure. No limitation in any statute or charter shall prevent the levy and collection of the full amount of taxes required by this section for the payment of debts, but nothing herein shall authorize the levy of a tax for any other purpose exceeding the existing tax limitation."

They also claim that chapter 10, § 4, of the charter of the city of Pontiac imposes the duty on the city to raise the taxes for debt service in addition to all other amounts required for the operation of city government irrespective of whether the total tax is in excess of two per cent. or not. The section is as follows:

"Whenever bonds shall be issued, it shall be the duty of the commission annually, at the time and in the manner that other taxes are levied, to levy a tax in addition to all other taxes authorized by this charter, sufficient in amount to pay the principal and interest of such bonds as they respectively become due."

In the address to the people adopted by the constitutional convention at the time it voted to submit the present Constitution, it was stated that while each city was left to frame, adopt and amend its charter provisions, which had reference to its local concerns, the legislature had the power to enact into law such broad, general principles relative to organization and administration as are or may be common to all cities and villages, and it was necessary to impose certain powers and prohibitions designed to secure conservative action on the part of those to become responsible for the future conduct of such affairs. For this reason, the power to limit the rate of taxation and restrict debts was left to the legislature, where it would be subject to such

changes as might be necessary by changing conditions. 2 Debates, Constitutional Convention, p. 1432.

Article 8, § 21, of the Constitution, hereinbefore quoted, expressly states that the charter that might be adopted by a city was subject to the Constitution and general laws of the State. The legislature in the exercise of this power thus reserved, adopted Act No. 273, Pub. Acts 1925 (1 Comp. Laws 1929, § 2694, as amended by Act No. 142, Pub. Acts 1931, hereinbefore quoted), which specifically stated that no limitation in any statute or charter shall prevent the levy and collection of the full amount of taxes required solely for the payment of debts, and made it necessary for the city to include in the amount of the taxes levied each year a sum sufficient to pay the annual interest and the instalments of principal on its obligations falling due before the time of the following tax collection. It specifically referred to all debts then outstanding and unpaid. Defendants claim that this act, if it does apply, is unconstitutional in that the title of the act does not show that it is a modification of the home rule act. The title is as follows:

"An act to regulate the issue of bonds, or other obligations, by municipalities in this State, to provide the method of payment of such bonds, or other obligations, and to prescribe the duties of municipal officers and of the State treasurer in connection therewith."

It further provides in the body of the act that all inconsistent acts and parts of acts are repealed (1 Comp. Laws 1929, § 2702). The title to the act is full and complete. The act was passed in conformity with the provisions of article 8, § 21, of the Constitution, which provided for the incorporation

of the cities subject to the general laws of this State. In *Harsha* v. *City of Detroit,* 261 Mich. 586 (90 A. L. R. 853), we held that the legislature might modify the charters of municipal corporations at will and that the State still retained authority to amend charters and enlarge and diminish their powers. *City of Kalamazoo* v. *Titus,* 208 Mich. 252; *Clements* v. *McCabe,* 210 Mich. 207; *Attorney General, ex rel. Lennane,* v. *City of Detroit,* 225 Mich. 631. In *Doyle* v. *Election Commission of City of Detroit,* 261 Mich. 546, we again held that the general law passed by the 1931 session of the legislature did not infringe upon the right of municipal home rule and was not unconstitutional; that it being a general law, the home rule charter of the city of Detroit was subject thereto and not infringed thereby. Neither does the 15-mill amendment, article 10, § 21, of the Constitution include home rule cities within its scope. *School District of City of Pontiac* v. *City of Pontiac,* 262 Mich. 338. While the case of *Hammond* v. *Place,* 116 Mich. 628 (72 Am. St. Rep. 543), was decided before the present Constitution and the legislative acts hereinbefore referred to, nevertheless the general principles therein stated still apply. In that case, the plaintiffs obtained a writ of mandamus to compel the assessor to levy upon the tax roll the amount of plaintiff's judgment, which represented the amount due on matured bonds. The defendant contended that such a levy would cause the tax rate to exceed the three per cent. provided in the charter of the city. It stressed the fact that owing to the change in conditions and the moving away of large industries, the city was in very great financial distress and unable to meet its obligations. The court said:

"The contention means this: That the municipality may avoid its legal obligations by the reduction

of its valuation, and making its running expenses equal to the limit of taxation. This is practical repudiation. Whether the valuation of the property of this city at $33,000 was reached by the same methods as were severally condemned by this court, speaking through Justice COOLEY, in *Wattles* v. *City of Lapeer,* 40 Mich. 624, we do not know, since there is no explanation in the record. Whether, however, this singular result would follow from a strict construction of the limitation clause in its charter, we need not determine. Possibly in contemplation of such results, a special statute was enacted, providing for the assessment of judgments rendered against municipalities. 3 How. Stat. § 8218. This statute provides that judgments rendered against municipalities shall be assessed by the assessing officers upon its taxable property, and the amount thereof added to the other municipal taxes. It was enforced in *Shippy* v. *Mason,* 90 Mich. 45. It clearly provides for the payment of judgments, exclusive of the limitations to taxation established by municipal charters."

It also stated in answer to the claim that the city was in financial straits, that:

"Poverty, however, is no more defense against just debts in municipal corporations than in any other corporation or an individual."

As the city was bound to take care of its debt service for the year by the provisions of Act No. 273, Pub. Acts 1925, we need not discuss plaintiffs' further contention that chapter 10, § 4 (Pontiac charter), also imposed this duty upon the city.

Defendants further present a dire picture of the financial condition of the city of Pontiac, which is largely dependent upon the automotive industry. They show that owing to the depression and the unemployment that followed, the population of the city decreased from 64,928 inhabitants in 1930 to about

50,000 at the present time; that the assessed valuation of the real and personal property gradually declined from $104,038,274 in 1930 to $53,168,555 in 1933; that the total bonded indebtedness of the city together with past-due interest, and also including special assessment obligations, amounts to $7,767,-989.31, of which $166,739.31 is past due, and that on July 31, 1934, there will be $1,853,024.22 past due; that the territory of the Pontiac union schools is almost co-extensive with the city of Pontiac, so that the property in the city must bear the tax burden to support not only the city of Pontiac and its debt service, but also to maintain the Pontiac union schools and pay the latter's obligations which amount to $3,960,973.98. They further show that the equalized valuation of the city of Pontiac is approximately one-third of that of the entire county of Oakland; that the county has $8,440,514.71 of outstanding Covert bonds, $6,388,012.77 of drain bonds, $1,194,115 of general obligation bonds or a total of $16,022,642.48; that the city of Pontiac has 15 major industries, including two power and electric light plants, and over 34 per cent. of the assessed valuation of the city is on property of industry, which furnishes over one-third of the total tax income; that the city is exercising rigid economy and has cut down its budget over one-half since 1930; that it has delinquent taxes for the years 1930 to and including 1933, amounting to $1,729,607.51, an amount almost sufficient to pay past due obligations of the city up to July 31, 1934; that, based on the experience of the past three years, the city faces a tax delinquency of approximately 50 per cent.; that the resolution fixing the budget at $861,112.74 for the fiscal year expressly contained a provision that nothing therein contained should be construed as

any action on the part of the commission to repudiate or impair any obligations theretofore incurred by the city of Pontiac.

Plaintiffs, on the other hand, claim that defendants have exaggerated the impoverished condition of the city, when, as a matter of fact, it is emerging from its difficulties, and they call attention to the fact that the condition of the automotive industry is much improved; that during the year the number of men unemployed has very much decreased, that the general financial condition of the city is far better than it was a year ago when all the banks in the city had but shortly before closed down and business had come to a standstill. They further show, in answer to defendants' claim that it might be obliged to spend $600,000, or thereabouts, for welfare during the coming year, that such relief has almost entirely come from the State and Federal governments, and that defendants recognized this fact by only appropriating $100,000 in the budget for such purposes; that proper provision has been made to partly relieve county roads from Covert road taxes, and to refund the school district debt, and that, as a matter of fact, the city at the present time has upwards of $400,000 in its treasury, though defendants claim that when necessary expenditures are made and this fund is allocated, this amount will be reduced one-half; that many other claims of defendants are based on erroneous calculations. Plaintiffs further show that, while the assessed valuation, as determined by the State board of tax commissioners was $53,168,555 for the year 1933, the board of supervisors placed it for equalization purposes for State and county taxes at $66,874,793; that the city has refused to pay any debts or interest for a considerable period, and that other court proceed-

ings are now pending to force the city to devote moneys collected for debt service to such purpose.

Defendants show that industry has paid a very large part of the taxes that heretofore have been collected, and that placing the tax rate at too high a rate defeats its own purpose, for if taxes are so high as to become confiscatory, industry may move away. They further claim that raising the rate of taxation to too high a figure operates very much like the law of diminishing returns, and will result in a very much larger delinquency and the raising of less money than if the tax were kept at a lower rate. They show that a very large amount of property has not paid any taxes whatever for a number of years, and that such delinquency will continue. They further contend that if the city is called upon to meet its obligations it may result in so depleting its funds that it will not be able to function properly and untoward results may follow.

A further review of the contentions of the parties is unnecessary. We are impressed with the fact that the city of Pontiac has suffered from the economic depression and the deflation of values more than many other cities. It, however, has even neglected to make provision for the interest on the city's obligations for the year. Defendants simply state that bondholders should wait for the payment of the interest and principal maturing from year to year until the financial clouds disappear, and that in the meantime the city should not be called upon to pay its admitted debts.

We believe that the city has shown that a refunding plan may be necessary, a situation that should appeal most strongly to plaintiffs, and that if they are too harsh in their demands the bondholders will eventually suffer. On the other hand, we cannot overlook plaintiffs' claim that while the city

may not have purposely avoided its obligations, it has not done all it might have to meet its obligations and it has not the right to insist that the bondholders carry the entire burden. We are asked in effect to declare a moratorium of the city of Pontiac's debts, and if we cannot do this, to refuse a writ of mandamus on account of the emergency that exists according to defendants' claims. A writ of mandamus is one of grace. In *Thompson* v. *Auditor General,* 261 Mich. 624, where a temporary but very great emergency arose, and other legislation was contemplated to meet the crisis, we declined to issue a writ of mandamus in considering an emergency measure passed by the legislature under the police power. This was at a time when the banks were closed and it was deemed a useless waste of money to advertise the sale of property for delinquent taxes that could not be paid on account of unusual circumstances. The present condition is in no sense comparable with the one that existed at that time. We are firmly convinced that a fair and proper refunding plan should be agreed upon. The obligation of the city is manifest. The right of the plaintiffs is clear in point of law. We have not the legal right under the conditions as presented to withhold a writ of mandamus. Unless the city commission within the next 10 days reconvenes and amends its annual appropriation ordinance so as to include a sum sufficient to pay the principal payments and interest that mature for the 12-months' period beginning August 1, 1934, and within a reasonable time thereafter taxes are levied accordingly, mandamus will issue as prayed for. No costs will be allowed.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

UPTON *v.* UPTON.

1. TRADE-MARKS AND TRADE NAMES—STATUTES—ASSUMED NAMES—BANKS AND BANKING.

   Act No. 101, Pub. Acts 1907 (2 Comp. Laws 1929, § 9825 *et seq.*), relating to filing of certificate with county clerk by persons doing business under an assumed name is inapplicable to banking partnerships governed by Act No. 160, Pub. Acts 1859 (2 Comp. Laws 1929, § 9710 *et seq.*).

2. BANKS AND BANKING—LIABILITY OF SUBSEQUENT PARTNERS—NEW CERTIFICATES.

   A subsequent partner is liable for debts of banking partnership although a new certificate showing his interest is not filed (2 Comp. Laws 1929, § 9710 *et seq.*).

3. SAME—LIABILITY OF DEBTOR OF PARTNERSHIP.

   Debtors of a banking partnership are not relieved of their obligations by changes in the firm and failure to file new certificates (2 Comp. Laws 1929, § 9710 *et seq.*).

4. SAME—CERTIFICATE OF PRIVATE BANKING PARTNERSHIP.

   Primary purpose of certificate required of members of private banking partnership is to provide evidence of ownership by public record (2 Comp. Laws 1929, § 9710).

5. SAME—ASSUMED NAME—CERTIFICATES—SUFFICIENCY—FRAUD.

   Certificates filed by members of a banking partnership upon its organization and dissolution under assumed name statute which contained substantially same information as required in certificates under private banking partnership act, except that terms of partnership were not set forth, *held*, sufficient, where the situation contained no possibility of fraud (2 Comp. Laws 1929, § 9710 *et seq.*, § 9825 *et seq.*).

6. SAME—RECEIVER—FIRM DEBTS.

   The receiver of a private banking partnership organized under 2 Comp. Laws 1929, § 9710 *et seq.*, may enforce the liability of the partners for firm debts.

7. SAME—RETIRED PARTNER.

Act No. 160, Pub. Acts 1859 (2 Comp. Laws 1929, § 9710 *et seq.*), does not expressly define the liability of a retired banking partner after the filing of a new certificate and at most his continued liability could be no greater nor different than that of a retired partner under the general partnership law.

8. PARTNERSHIP—RECEIVER—ENFORCEMENT OF LIABILITY OF PARTNERS.

Under uniform partnership act a receiver may be authorized to enforce personal liabilities of partners for firm debts because such liability constitutes an asset of the partnership (2 Comp. Laws 1929, §§ 9858, 9880).

9. SAME—DISTRIBUTION OF COLLECTIONS BY RECEIVER.

Contributions collected from partners become general funds in hands of receiver to be distributed proportionately among creditors (2 Comp. Laws 1929, § 9880).

10. SAME—RECEIVERS—RETIRED PARTNERS.

Uniform partnership act does not expressly authorize action by the receiver of a partnership against a retired partner.

11. SAME—RETIRED PARTNERS—SUBSEQUENT DEBTS.

A retired partner has no property interest in the firm assets and in general he is not liable for its debts incurred after his withdrawal.

12. SAME—RETIRED PARTNERS—FIRM DEBTS EXISTING ON WITHDRAWAL—CREDITORS.

Retiring partner's liability for firm debts existing at the time of withdrawal is personal as to each creditor and collection made as result of enforcement of such liability would be for particular creditor's benefit and not for general distribution among creditors.

13. BANKS AND BANKING—RECEIVERS—RETIRED PARTNERS.

Receiver of a private banking partnership may not enforce liability of retired partner for firm debts since his liability does not remain a partnership asset.

Appeal from Ionia; Hawley (Royal A.), J. Submitted April 6, 1934. (Docket No. 67, Calendar No. 37,581.) Decided June 21, 1934.

Receivership proceedings by Victor F. Upton against Arthur A. Stoddard, for the dissolution of a copartnership, doing business as Bank of Muir. Victor F. Upton and J. Lee Strachan, administrators *de bonis non* of the estate of Arthur A. Stoddard, were substituted as parties defendant. Supplemental bill by receiver, Edward W. Fehling, against Fred W. Green to enforce liability as partner. From order denying motion to dismiss supplemental bill, defendant Green appeals. Reversed and supplemental bill dismissed.

Watt & Colwell, for plaintiff Fehling, receiver.

John P. Kirk, for defendant Green.

FEAD, J. Defendant Fred W. Green reviews denial of motion to dismiss a supplemental bill of complaint filed against him by the receiver of the Bank of Muir, a copartnership consisting of Victor F. Upton and Arthur A. Stoddard. Upon the motion, the allegations of the bill must be taken as true.

From 1919 to May 10, 1923, the firm of the Bank of Muir was composed of Upton, Stoddard and two others. The partnership then was dissolved and a new one organized, consisting of Upton, Stoddard and defendant Green. May 12th, a certificate of partnership under the firm name of the Bank of Muir was signed and acknowledged by the three partners and filed in the office of the county clerk. It recited that it was made in pursuance of Act No. 101, Pub. Acts 1907, which is 2 Comp. Laws 1929, § 9825, the "assumed name" statute.

On June 9, 1930, another certificate under Act No. 101 was signed and acknowledged by Stoddard and Upton as copartners under the name of the Bank of Muir and filed with the clerk. On the same

day a notice of dissolution of partnership, signed by the three partners, reciting that defendant had withdrawn from the firm and Stoddard and Upton would pay all debts and liabilities and receive all moneys payable to the firm or Bank of Muir, was filed with the county clerk and attached to the certificate of 1923. On August 21, 1930, a notice of dissolution of the partnership was published in a newspaper in the county in which Muir is located.

After June 9th the business was conducted wholly by Stoddard and Upton and defendant was not identified with it On April 4, 1931, the bank closed its doors, Upton filed a bill against Stoddard for dissolution of partnership, and a receiver was appointed. Three hundred eighty-two creditors have presented claims, which have been allowed at over $206,000, most of which arose while defendant was a partner of the firm and the others after filing the notice of dissolution.

On February 6, 1932, because the partnership assets were insufficient to pay the debts, the receiver was ordered to enforce contributions from the partners on account of their individual liabilities. Defendant was not a party to the suit or order. On petition filed July 25, 1933, an order was entered making defendant a party to the suit. Process was served on him and the supplemental bill filed, to which he made the motion to dismiss. The purpose of the supplemental bill is to charge the defendant for the debts of the firm as a partner, continuing as such to the time the bank closed.

The receiver contends defendant continued as a partner after the dissolution of the firm in June, 1930, by virtue of Act No. 160, § 2, Pub. Acts 1859 (2 Comp. Laws 1929, § 9711). The first section requires brokers and exchange dealers, private bank-

ers, to file with the county clerk a certificate signed by each partner and verified by the affidavit of one member, setting forth the name of all members of the firm, the residence of each, the style of the firm, the terms of the partnership, the length of time it is to continue if limited by contract, and the locality of the place of business. The certificate is to be kept as a public document, open to the inspection of any person. Section 2 (2 Comp. Laws 1929, § 9711), provides:

"In case there shall be, at any time after the making and filing of said certificate, any change in the name or style of said firm, or in the terms of their partnership, then a new certificate, verified as before specified, shall in like manner be filed, as required by section one of this act, before such change shall take effect; and until such new certificate shall have been made and filed, as above specified, the individual member or members of the firm, as set forth in the certificate on file, shall be held to be the actual members of the firm, and in all respects holden and liable for any obligation, debt or liability, incurred by the said company, as brokers or exchange dealers."

Act No. 101, Pub. Acts 1907, under which the certificates at bar were drafted and filed, requires a certificate to be filed with the county clerk, setting up the title of the firm and the names of all partners with their home and postoffice addresses, and to be signed and acknowledged by the partners. Act No. 101 is not applicable to banking partnerships governed by Act No. 160. *Halpin* v. *White*, 197 Mich. 549.

If the certificate of 1923 had no force under Act No. 160, section 2 cannot be invoked to charge defendant as a partner beyond the actual dissolution

in 1930; and, the partnership having been conducted in violation of statute, the situation might be serious because of the defense of illegality against obligations owing to the firm. *Cashin* v. *Pliter,* 168 Mich. 386 (Ann. Cas. 1913 C, 697).

Apparently to avoid the hazard, the receiver urges that the certificate of 1923 was a sufficient compliance with Act No. 160 to establish the partnership but that the similar certificate of 1930 was not sufficient to work a change in the firm and withdraw defendant as a partner. We are unable to find a basis for such distinction between the two certificates.

Act No. 160 has not been given a strained construction or effect by this court nor has strict compliance with the provisions for a certificate been held determinative of the liabilities of actual partners and rights of the partnership. Thus, a subsequent partner is liable for debts of the firm although a new certificate showing his interest is not filed. *Wright* v. *Weimeister,* 87 Mich. 594; and, on the other hand, debtors of the partnership are not relieved of their obligations by changes in the firm and failure to file new certificates. *Power* v. *Brigham,* 237 Mich. 172; *Missaukee Farm & Investment Co.* v. *Ferris,* 193 Mich. 286.

The primary purpose of the certificate is to provide evidence of ownership by public record and obviate the difficulties and hazards of private inquiry and proof. It is evident that, both at the formation and the dissolution of the firm of which defendant was a member, the parties intended to comply with the law. But they mistook the applicable statute. The certificates they filed contained substantially the requirements of Act No. 160 except as to the terms of the partnership. As the original

record shows, the certificate held sufficient in *Power* v. *Brigham, supra,* had the same omission. Both certificates conveyed to the public, as clearly and fully as a technically correct document would have done, notice of the fact and composition of the partnership, its dissolution and the successor firm. The situation contained no possibility of deception of the public.

In view of its substantial conformity with the requirements of Act No. 160, it would be supertechnical to hold the certificate of 1923 insufficient; and it would be unjust to the firm creditors to so outlaw the business from the beginning and imperil collection of partnership assets. We agree with the receiver that such certificate should be sustained as sufficient to establish the firm business as legal. But because no valid distinction can be drawn between them, this results also in holding the certificate of 1930, with the notice of dissolution attached to the certificate of 1923, sufficient under Act No. 160 to evidence dissolution of the partnership and formation of a new firm of which defendant was not a member. We hold, with the circuit court, that both certificates were sufficient.

The remaining question is whether a receiver may enforce the liability of a retired partner to firm creditors.

The receiver of a private banking partnership, organized under Act No. 160, may enforce the liability of the partners for firm debts. *First National Bank & Trust Co.* v. *Storms,* 265 Mich. 453. The question was upon the liability of partners who had transferred their interests in the firm (but no new certificate had been filed), and who, therefore, under Act No. 160, § 2, continued as partners. So, the case covered the liability of those who, in law, were

present partners. The gist of the opinion of Mr. Justice NORTH was (p. 457):

"The liability imposed by the foregoing statute (Act No. 160), is that of a partner. * * * Having been appointed, it was the receiver's duty to take over the assets of the association. When required to satisfy the obligations of the association, the property of its respective members (unless needed for payment of personal debts) becomes part of the assets of the association."

The act does not expressly define the continued liability of a retired partner after a new certificate is filed. The question is not before us whether and for what existing debts Act No. 160 relieves a retiring partner on filing certificate of change of the firm. At most, the continued liability could be no greater nor different than that of a retired partner under the general partnership law.

The uniform partnership act provides, 2 Comp. Laws 1929, § 9880:

"(e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this paragraph."

Clause (d) provides in part:

"The partners shall contribute, as provided by section eighteen (a) the amount necessary to satisfy the liabilities."

The pertinent portion of section 18 (a) (2 Comp. Laws 1929, § 9858), is:

"Each partner * * * must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits."

The assets of the partnership to which the receiver is entitled are, 2 Comp. Laws 1929, § 9880:

"(1) The partnership property,

"(2) The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph,

"(b) The liabilities of the partnership shall rank in order of payment, as follows:

"(1) Those owing to creditors other than partners,

"(2) Those owing to partners other than for capital and profits,

"(3) Those owing to partners in respect of capital,

"(4) Those owing to partners in respect of profits."

Under the uniform partnership act, therefore, a receiver may be authorized to enforce the personal liabilities of partners for firm debts because such liability constitutes an asset of the partnership. Contributions from the partners, when collected, become general funds in the hands of the receiver, to be distributed proportionately among the creditors.

The statute does not, in terms, authorize action by the receiver against a retired partner. A retired partner does not bear the same relation to the firm as a present partner. He has no property interest in the firm assets. In general, he is not liable for its debts incurred after his withdrawal. His liability for debts existing at the time of withdrawal may depend upon various contingencies, as notice to or knowledge of the creditor, estoppel, election, novation, change in the debt as provided in 2 Comp. Laws 1929, § 9876, or the like. His possible defenses emphasize the fact that his liability for firm debts is personal as to each creditor. Any collection thereof

would be for the benefit of individuals and not for distribution among creditors generally. Consequently, the liability does not remain a partnership asset and the receiver may not maintain action upon it.

Order reversed and cause remanded for entry of order dismissing the supplemental bill against defendant Green, with costs.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

GRYLLS *v.* HERGITON.

VENDOR AND PURCHASER—CIRCUIT COURT COMMISSIONERS—SUMMARY PROCEEDING—EQUITABLE DEFENSE.

Default of vendor in payments on mortgage and paving tax is not such an equitable defense as is available to vendee in summary proceedings before circuit court commissioner to recover possession under executory land contract where vendee has not attempted to rescind the contract or obtain other equitable relief, has proceeded in accordance with terms of the contract and paid mortgage interest up until after vendee became in default and there is no showing that vendor has parted with title to the property or contract.

Appeal from Wayne; Spier (James E.), J., presiding. Submitted May 25, 1934. (Docket No. 170, Calendar No. 37,609.) Decided June 21, 1934.

Summary proceedings before circuit court commissioner by Mary Grylls against Alice Hergiton to obtain possession of premises sold under a land contract. Judgment for plaintiff. Defendant appealed to circuit court. Judgment for plaintiff. Defendant appeals. Affirmed.

R. Gerveys Grylls, for plaintiff.

Robert E. Plunkett, for defendant.

BUTZEL, J. Mary Grylls, vendor under an executory land contract, served notice of forfeiture upon Alice Hergiton, vendee, and instituted summary proceedings against her before a circuit court commissioner to recover possession of the premises. The commissioner rendered a judgment of restitution in favor of plaintiff. On appeal to the circuit court, the trial judge held that plaintiff was entitled to possession of the premises, and found that payments aggregating $375 were past due. However, he stated that the judgment was without prejudice to any rights the parties might have in equity. Defendant has appealed from the judgment of restitution.

The contract was entered into on August 2, 1927, for the purchase of property in the city of Detroit. It recited a down payment of $7,000 and provided for the payment by defendant of an additional sum of $8,000, with interest, in instalments of not less than $75 per month. Defendant was given the right to possession of the property while not in default. Plaintiff, the vendor, was permitted to place a mortgage upon the property at any time for an amount not in excess of 50 per cent. of the purchase price of the property, and not exceeding the balance still due on the land contract at the time of the mortgage. Such mortgage was to take priority over the rights

of the vendee. In the event of the vendor's default on the mortgage payments, the vendee had the right to make the payments and credit them upon the purchase price. On August 30, 1927, plaintiff executed a mortgage on the premises to the Guardian National Bank of Commerce to secure the payment of $5,000, payable three years after date. Plaintiff also borrowed other sums from the bank, using the land contract as collateral, and at plaintiff's direction, defendant made her contract payments to the bank, which applied them on plaintiff's other indebtedness. The mortgage fell due on August 13, 1930, and remained unpaid. However, plaintiff continued to make her interest payments thereon, and there is no showing that the bank ever threatened to foreclose. A dispute arose between the parties in regard to a paving tax which, according to a preliminary agreement preceding the land contract, defendant was not bound to pay. The contract itself provided that the defendant should pay all taxes, but plaintiff, in a letter written at a later date, assured defendant that she would assume the obligation. However, the tax was never paid. Defendant, vendee, continued to make her payments of $75 a month regularly on the land contract until August 6, 1931, after which date she refused to make any further payments. The balance due on the contract had then been reduced to $6,106.56.

On February 11, 1932, plaintiff brought suit against defendant in the common pleas court to recover the unpaid instalments on the land contract which had accrued since August, 1931; defendant pleaded the general issue. Some question arose in regard to the nonpayment of the paving tax, and in rendering judgment against defendant for $457, the judge stated informally and off the record that plain-

tiff was bound to pay the tax when the judgment was satisfied. The larger part of this judgment still remains unpaid. Plaintiff subsequently brought another suit in the common pleas court to recover further payments in default, recovering a second judgment for $382. This judgment also remains unpaid. The pleadings in the second case in the common pleas court show that there was no claim of set-off or recoupment. These proceedings were followed by the present action, here appealed from, in which plaintiff secured a judgment of restitution. In finding the amount of $375 due on the last action, the circuit judge did not include the amount of the unpaid judgments rendered by the common pleas court.

In defense of the plaintiff's summary proceeding to recover possession of the property, defendant claimed, both before the circuit court commissioner and on appeal before the circuit court, that she was not bound to make any further payments on the contract while plaintiff was herself in default in payment of the paving tax and the mortgage placed on the premises. It appears that plaintiff has paid interest on the mortgage up to September 1, 1931, subsequent to the time when defendant ceased making payments on the contract. There now remains an unpaid balance of $4,375 on the mortgage. There is no showing that foreclosure proceedings have been begun or even threatened.

No question is raised as to the sufficiency of the notice of forfeiture. Defendant seeks to defend on equitable grounds, but she did not attempt to rescind the contract, or seek the aid of a court of equity. An equitable defense of this nature, even if properly founded, may not be considered by a circuit court commissioner where the plaintiff has pro-

ceeded in accordance with the terms of her contract and there is no claim that she has parted with title to either the property or the contract. The defenses before a circuit court commissioner in a suit for restitution following forfeiture are few and narrow. *Puziol* v. *Kastle,* 231 Mich. 100; *German Bundesheim Society* v. *Schmidt,* 242 Mich. 139; *Rosenthal* v. *American Construction & Realty Co.,* 262 Mich. 91.

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

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

McDONALD v. FORD MOTOR CO.

1. APPEAL AND ERROR—RECORD—MASTER AND SERVANT.
   Record of proceedings before department of labor and industry which are not a part of the record of case at bar may not be considered on appeal from judgment in action at law based on contract between employer and injured employee.

2. SAME — DIRECTED VERDICT — PLAINTIFF'S TESTIMONY ASSUMED TRUE.
   On appeal from directed verdict and judgment for defendants at close of plaintiff's testimony, truth of such testimony will be assumed.

3. MASTER AND SERVANT—STATE AS PARTY—SETTLEMENT—CONSENT.
   The State as a representative of society at large becomes a party to proceedings under the workmen's compensation act and no valid settlement can be made between employer and injured employee without consent of the State.

4. SAME — SETTLEMENT WITH INJURED EMPLOYEE — SUPERVISION — TERMS.

Agreements as to compensation between employer and injured employee are encouraged, but when made they must be made under the direct supervision of the State and in accordance with workmen's compensation act; and the employee may not waive his rights thereunder (2 Comp. Laws 1929, §§ 8410, 8436, 8444).

5. SAME—VOID SETTLEMENT AGREEMENT.

Agreement between employer and injured employee privately made between the parties, which is not in accordance with the terms of the workmen's compensation act and not filed with nor approved by the department of labor and industry which had sole jurisdiction of the subject-matter is void and employer and his agent are not estopped to deny its validity (2 Comp. Laws 1929, § 8410, 8436, 8444).

Appeal from Dickinson; Bell (Frank A.), J. Submitted April 4, 1934. (Docket No. 17, Calendar No. 37,500.) Decided June 21, 1934.

Assumpsit by Willis McDonald against Ford Motor Company, a Delaware corporation, and George Kuss on a contract to furnish employment. Directed verdict and judgment for defendants. Plaintiff appeals. Affirmed.

Derham & Derham, for plaintiff.

H. J. Rushton (*L. J. Colombo,* of counsel), for defendants.

BUTZEL, J. In May, 1924, Willis McDonald suffered an incomplete fracture of a bone in his left foot, and damages to his left leg and side, while employed by the Ford Motor Company at Iron Mountain, Michigan. He was awarded compensation and signed a settlement receipt for $44.33. In June, 1929, he filed a petition with the department of labor

and industry for further compensation. The hearing was noticed for August 5, 1929, when a further small sum was paid to him and he signed an additional settlement receipt for compensation to that date. He claims that when his application came on to be heard before the deputy commissioner, George Kuss, an agent duly authorized by the Ford Motor Company, stated that it would be unnecessary to take any testimony, that the defendant would send plaintiff to the Ford Hospital in Detroit for treatment, and would give him suitable work during his stay in Detroit; and that after he returned to Iron Mountain he would be given such work as his condition permitted. Plaintiff claims that in response to his inquiry as to how long the job would last, Kuss stated it would be for life, at $6.40 a day, the wages he had previously received, and for six days a week. While the award denying compensation does not appear in the record, counsel have filed with the clerk of the court a certified copy of the award of August 5, 1929, which states as follows:

"That the plaintiff now has some disability as a result of the accidental injury he received on May 8, 1924. Defendant has offered plaintiff employment at such work as he can do at Detroit, and has also offered him the medical services and treatment while he is at Detroit as seem necessary to remedy his disability. Plaintiff has accepted the defendant's offer of employment and medical treatment, compensation having been paid him for the time he lost to date. In view of this the plaintiff's petition for further compensation is denied until facts and circumstances warrant a change."

Plaintiff claims that while he did receive medical treatment at the Ford Hospital, as well as work both in Detroit and subsequently at Iron Mountain, he

was afterwards discharged. He contends that this constituted a breach of defendant's alleged agreement to give him life employment at $6.40 a day for six days a week, and has brought an action *ex contractu* against the Ford Motor Company and George Kuss to recover damages for the breach. We note in passing that, according to the exhibit introduced, plaintiff on the 23d day of October, 1929, sought permission to appeal from the order of August 5, 1929, notwithstanding the fact that he claims to have had a binding agreement with the defendant. Other parts of the record of the department of labor and industry, but not part of the record in the instant case, have been filed with this court by plaintiff's attorney, showing further proceedings before the department of labor and industry during the year 1930. We may only consider the record in the case at bar. At the conclusion of plaintiff's testimony the trial judge directed a verdict for defendants, on the ground that the alleged agreement was void and unenforceable under the statute. Since the defendants introduced no testimony, we may assume, solely for the purpose of this discussion, that plaintiff's testimony is true. We shall limit our discussion to the question whether such a contract, if it were entered into, would be of any legal effect.

In *Harrington* v. *Department of Labor and Industry,* 252 Mich. 87, plaintiff, an injured employee, sought a writ of mandamus to compel the commissioners of the department of labor and industry to consider and approve an agreement entered into between plaintiff and his employer in regard to compensation. The writ was denied on the ground that the terms of the agreement did not conform to the provisions of the act. Mr. Justice CLARK, speaking for the court, stated:

"The statute permits the parties to make an agreement in regard to compensation and when filed with, and approved by, the department it is binding. But such agreement may be approved 'only when the terms conform to the provisions of this act.' 2 Comp. Laws 1915, § 5458 (2 Comp. Laws 1929, § 8444). A mere glance at the stipulation shows terms neither provided nor contemplated by the act. It seeks to fix by contract rather than by fact the period of disability and to fix the same finally and beyond right of further recourse to the department.

"See *Detloff* v. *Hammond, Standish & Co.,* 195 Mich. 117 (14 N. C. C. A. 901); *Brabon* v. *Gladwin Light & Power Co.,* 201 Mich. 697; *Kirchner* v. *Michigan Sugar Co.,* 206 Mich. 459.

"Compensation is not a private matter between employer and employee. The public is interested. The act declares a State policy that the burden of industrial accidental personal injuries shall be borne by the industries, not by the general public. To effectuate this policy, the act provides for frequent regular payments, weekly, not monthly, or quarterly, or annually. It opposes payments in gross or in lump sum, except in certain 'special circumstances.' Subject to its limitations, it contemplates weekly payments of compensation during disability, no more, no less.

"In short, an agreement respecting compensation, to merit approval, must follow and conform to the provisions of the act. The agreement before us violates both the letter and the spirit of the act. The department properly refused it."

The following three sections of the workmen's compensation act are applicable:

"Nor shall such employer be subject to any other liability whatsoever, save as herein provided for the death of or personal injury to any employee, for which death or injury compensation is recoverable

under this act, except as to employees who have elected in the manner hereinafter provided, not to become subject to the provisions of this act'' (2 Comp. Laws 1929, § 8410).

''No agreement by an employee to waive his rights to compensation under this act shall be valid'' (2 Comp. Laws 1929, § 8436).

''If the employer, or the insurance company carrying such risk, or commissioner of insurance, as the case may be, and the injured employee reach an agreement in regard to compensation under this act, a memorandum of such agreement shall be filed with the industrial accident board, and, if approved by it, shall be deemed final and binding on the parties thereto. Such agreement shall be approved by said board only when the terms conform to the provisions of this act'' (2 Comp. Laws 1929, § 8444).

The law is well stated in *Dettloff* v. *Hammond, Standish & Co.*, 195 Mich. 117, 135 (14 N. C. C. A. 901), wherein the court stated:

''Upon the second point it is urged that the State through its officials, the industrial accident board, is intrusted with the enforcement of the provisions of the act, and the spirit, as well as the letter of the law, prohibits the employer and employee from frittering away its salutary provisions; that this is evidenced by the fact that while the act countenances and encourages agreements between the employer and employee with reference to compensation arising from accidental injuries, yet all such agreements are under the direct supervision of the State, and they must be filed with, and be approved by, the board, and that such approval may not be given unless the terms conform to the provisions of the act, and the contract is not final and binding upon the parties until filed with, and approved by, the board. We think this position well taken. The interest which the State has in these matters is well expressed by the Ohio Industrial Commission in *Rosen-*

steel v. *Niles Forge & Manfg. Co.,* 7 N. C. C. A. 798."

The case of *Rosensteel* v. *Niles Forge & Manfg. Co., supra,* emphasizes the fact that the State, as the representative of society at large, becomes a party to such proceedings, and that no settlement can therefore be made without its consent. It is largely to the benefit of the workmen that the law demands specific compliance with the terms of the act under the supervision of the department of labor and industry. Otherwise an unscrupulous employer could take advantage of the economic pressure on a disabled workman who, because of his great need, might be unable to withstand the temptation to accept an immediate offer of an inadequate amount, or a doubtful promise, in lieu of the compensation to which he would be entitled under the act. In order to prevent such a situation, the legislature has set up under the workmen's compensation act the machinery by which employees injured in their employment may secure compensation under the impartial supervision of the department of labor and industry. Although it is true, as pointed out in *Dettloff* v. *Hammond, Standish & Co., supra,* that the act countenances and encourages agreements between the employer and employee with reference to compensation for accidental injuries, such agreements must be made under the direct supervision of the State and in accordance with the provisions of the act. Otherwise they can have no binding force or effect. This court will not countenance any attempt to oust the department of jurisdiction in such cases. The effect of a settlement without the consent of the board was carefully considered in *Richards* v. *Rogers Boiler & Burner Co.,* 252 Mich. 52, and in that case the court stated:

"No settlement can be made under this act without the approval of the board, and section 5458, 2 Comp. Laws 1915 (2 Comp. Laws 1929, § 8444), expressly so provides. No final receipt has any binding force and effect when made by the parties alone. The State is a party to every proceeding before the department of labor and industry. The statute is a constitutional exercise of the police power. The employee is expressly prohibited by the language of the act from waiving his right to compensation, and compensation, when fixed, must be fixed in accordance with the statute. If the department of labor and industry, charged with the administration of the act, approve a final settlement, it is valid and binding, if in accordance with the act, but until so approved, it is not binding and conclusive. This must be so, if we are to give section 5458, 2 Comp. Laws 1915 (2 Comp. Laws 1929, § 8444), and the other sections of the act force and effect."

The alleged agreement was void as an attempt to establish the rights of the parties by a private agreement not within the purview of the compensation act, nor filed with or approved by the department of labor and industry, which had the sole jurisdiction of the subject-matter. The agreement being void, defendants were not estopped from denying its validity. The judge was correct in directing a verdict for defendants.

The judgment is affirmed, with costs to defendants.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, and EDWARD M. SHARPE, JJ., concurred. BUSHNELL, J., did not sit.

PEOPLES WAYNE COUNTY BANK OF DEARBORN *v.* HARVEY.

1. JUDGMENT—SUMMARY JUDGMENT—QUESTION FOR COURT TO DETERMINE.

   Province of court, on plaintiff's motion for summary judgment, is to determine judicially whether there is an issue of fact, which, if resolved in favor of defendant, would preclude a verdict for plaintiff in whole or in part of his demand.

2. APPEAL AND ERROR — SUMMARY JUDGMENT — AFFIDAVIT — CONSTRUCTION.

   On appeal from summary judgment, statements in affidavit attributed to official of plaintiff bank are assumed to be true but are construed in the light of actions of the parties and surrounding circumstances.

3. BILLS AND NOTES—RENEWAL—BREACH OF COLLATERAL AGREEMENT —WAIVER OF RECOUPMENT.

   Execution of renewal promissory note with knowledge that payee had already breached alleged agreement as to sale of collateral *held*, a waiver of right to claim of recoupment based on breach of agreement as to collateral in action on note.

4. EVIDENCE—PAROL—FRAUD—VARYING TERMS OF WRITTEN CONTRACT.

   Parol evidence that indorser was induced to indorse promissory note by fraud of payee *held*, not an attempt to vary the terms of a written contract.

5. SAME—PAROL—ADMISSION TO SHOW FRAUD.

   Parol evidence is admissible to show that the execution of a written instrument was procured by fraud, for the purpose of invalidating the instrument.

6. BILLS AND NOTES—FRAUD—INDORSERS—WAIVER.

   Fraud of plaintiff bank in misrepresenting to indorser that his indorsement was to be canceled upon execution of mortgage by maker of note *held*, not waived where indorser did not know that negotiations as to mortgage had been terminated without its execution prior to his indorsement of renewal note sued on.

7. SAME—WAIVER OF DEFENSE—NOTICE.

Execution of renewal note constitutes waiver of previous defense only where defendant had knowledge of the defense at the time of renewal.

8. SAME—FRAUD—PROMISSORY REPRESENTATIONS—MISREPRESENTATIONS AS TO MATERIAL FACT.

Representations to indorser made by payee which are promissory in character but accompanied by misrepresentations as to an existing material fact constitute defense of fraud in action against indorser on note.

9. JUDGMENT—SUMMARY JUDGMENT—INDORSER—QUESTION OF FACT—FRAUD.

Summary judgment against indorser of renewal promissory note *held,* properly refused where he raised question of fact as to presence of fraud in procuring his indorsement.

Appeal from Wayne; Webster (Clyde I.), J. Submitted April 4, 1934. (Docket Nos. 14, 15, Calendar Nos. 37,602, 37,620.) Decided June 21, 1934.

Assumpsit by Peoples Wayne County Bank of Dearborn against John G. Harvey and John A. Mercier, jointly and severally, on a promissory note. Recoupment by defendant Harvey. From summary judgment against defendant Harvey and denial of summary judgment against plaintiff, he appeals. From denial of summary judgment against defendant Mercier, plaintiff appeals. Affirmed.

Wm. Henry Gallagher, for plaintiff.

Henry B. Graves and *Charles H. Hatch,* for defendant Harvey.

Ernest P. LaJoie, for defendant Mercier.

BUTZEL, J. Peoples Wayne County Bank of Dearborn, a Michigan corporation, brought suit against John G. Harvey, the maker, and John A. Mercier,

the indorser, of a promissory note for $23,866.28, dated June 15, 1932, and payable to plaintiff in 90 days, with interest. Both defendants denied liability, Harvey filing a separate notice of recoupment. Plaintiff filed a motion, accompanied by affidavits, for a summary judgment against both defendants. The latter in turn filed affidavits in opposition to the motion, and Harvey, in addition, moved for a summary judgment against plaintiff on his claim of recoupment. Affidavits of merits were filed by all the parties. The trial court granted plaintiff's motion for a summary judgment against Harvey, and entered judgment against him for the full amount of the note and interest, but refused to render a summary judgment against Mercier. Harvey appeals from the judgment rendered against him and the disallowance of his claim of recoupment. Plaintiff appeals from the order denying a summary judgment against Mercier.

In order to discuss the alleged errors, we shall briefly review each claim in detail, treating first the granting of the summary judgment against Harvey.

"The province of the court, on a motion for summary judgment, is to determine judicially whether there is an issue of fact which, if resolved in favor of defendant, would preclude a verdict for the plaintiff in whole or in part of his demand." *Baxter* v. *Szucs,* 248 Mich. 672.

(1) In his affidavit filed in opposition to plaintiff's motion for a summary judgment, Dr. Harvey alleges that in September, 1929, he first sought a loan of $10,000 for the construction costs of his home from the Peoples Wayne County Bank of Detroit, of which he was a stockholder, offering 100 shares of the stock of that bank as collateral. He applied to Edwin J. Eckert, with whom he was personally

acquainted, and who was vice-president of the Detroit bank, as well as of its affiliate, the Peoples Wayne County Bank of Dearborn, plaintiff herein. Eckert told him that the Peoples Wayne County Bank of Detroit could not make the loan because it could not take its own stock as collateral, but said that he would have the loan made through its affiliate, the plaintiff bank. The loan was thereupon made by plaintiff, and Dr. Harvey executed a note for $10,000, depositing with plaintiff as collateral 100 shares of his stock in the Peoples Wayne County Bank of Detroit. The note contained the following provision:

"Which property with any other property hereafter deposited in substitution therefor, or in addition thereto, the holder of this note, in default in payment thereof, is authorized to sell at public or private sale with or without notice, and at its option to purchase at such sale, and to apply the proceeds after deducting all expenses of collection and sale, in payment of this note and the balance upon such other of said liabilities as the holder may elect. In case of decline in the value of the securities at any time pledged for any of the above liabilities, the bank shall have the right in its discretion to call for additional security satisfactory to the bank, and upon failure to furnish the same, or if the undersigned becomes insolvent or commits an act of bankruptcy, or if a petition in bankruptcy or an application for the appointment of a receiver, or for the liquidation of the business or assets of the undersigned be filed by or against the undersigned the bank may declare the principal of said note due and payable forthwith, and may sell said collateral property and apply the proceeds in the manner above provided."

On October 31, 1929, Dr. Harvey again visited Eckert. On this occasion he informed Eckert that

he needed an additional sum of $3,000 and would require more money in the future; that he was fearful that as a result of the depression the value of his stock would so depreciate that he could not obtain enough by its sale to properly finance his enterprise. He thereupon requested Eckert to sell at the market value the 100 shares of stock then held by plaintiff as collateral for the loan, and stated that he would sell the remaining 100 shares which were still in his own hands as he needed the money. At that date the stock was selling for $217 a share, so that Harvey could have realized $43,400 for his 200 shares. A movement had been started to merge a large number of banks in Detroit and its vicinity, including the two Peoples Wayne County Banks, into the Detroit Bankers Company, a holding company. Harvey claims that plaintiff was anxious to have all the stockholders in the Peoples Wayne County Bank join in the merger, and that, therefore, Eckert was unwilling to sell Harvey's stock as directed, but replied instead:

"We will not sell the shares of stock. We will protect you in your loan. You are a good customer, depositor, stockholder and former landlord. Of course, we will protect you."

Harvey contends that the bank meant thereby that it would sell his stock before it fell in value below a sum sufficient to pay his indebtedness to the bank, so that in any event his injury would be limited to the loss of the stock. He claims that on the strength of this promise he borrowed an additional $3,000, and deposited his remaining 100 shares as collateral; that further relying upon said promise and pursuant to Eckert's instructions, he subsequently exchanged his 200 shares in the Peoples Wayne County Bank for 300 shares of stock in the Detroit

Bankers Company, and "collaterated" them for his loan. He borrowed additional sums from time to time and successively renewed the notes in their original form, or in combinations, over a period of almost three years, at all times relying upon the alleged promise made to him by Eckert. Both the very first loan and the last renewal of June 15, 1932, embracing all the previous loans, were evidenced by notes which contained the same provision authorizing the bank to sell the stock prior to the due date of the note in the event of its decline in value and Harvey's subsequent failure to furnish additional security at the bank's request. The bank made no such demand, nor did it sell any of the stock pledged, although the stock steadily declined in value. On June 15, 1932, the date of the last renewal note, which is the subject of the present suit, the collateral had a market value of only $3,300, while the note itself was for $23,866.28. The stock of the Detroit Bankers Company continued to decline to the vanishing point, and the Detroit Bankers Company not only went into the hands of a receiver, but Harvey has been called upon to pay a bank assessment of $4,500, or thereabouts. Harvey's claim of recoupment is based on the damages he claims to have suffered by reason of plaintiff's breach of its alleged promise to protect Harvey by selling his stock before it declined in value to a point below the sum necessary to pay his indebtedness to the bank.

We shall limit our discussion to only a few of the questions raised. Although for the purpose of determining whether or not a summary judgment was proper we must assume to be true the statements attributed to Eckert by Dr. Harvey, it does not follow that we must give to that language a different construction than the words themselves indi-

cate, when viewed in the light of the actions of the parties and the surrounding circumstances. We are impressed with the fact that the original note executed by Dr. Harvey authorized the bank to sell the collateral under certain conditions; that when Harvey later communicated his fears to Eckert, the latter reassured him by declaring,

"We will *not* sell the shares of stock. We will protect you in your loan."

We are also impressed by the fact that although the stock declined in value below the amount of the loan, the bank continued to grant extensions of time. Furthermore, on June 15, 1932, although Harvey knew that the value of the stock had declined until it was only worth approximately 15 per cent. of the amount of the loan, and that the bank had as yet made no effort to sell any of the stock, he nevertheless again renewed the note, without making any objection or asserting any claim of recoupment. The conduct of the parties is more in harmony with the construction that Eckert merely agreed not to sell out Harvey's collateral in the event of a decline, than with the construction insisted upon by Dr. Harvey.

However, we shall base our decision on the ground that under the circumstances of the instant case, when Harvey executed the last renewal note under the conditions hereinbefore set forth, with knowledge that the bank had already breached its alleged agreement, he waived his right to any claim of recoupment. In an affidavit made on behalf of defendant Mercier, Harvey states that at the time of the last renewal the stock had declined in market value, to his personal knowledge, so that it was worth much less than the amount of the loans; but that he acted

in the belief that ultimately his shares of stock in the Detroit Bankers Company would become worth more than the total amount borrowed. Harvey could not play fast and loose in this manner. Had he at that time asserted any such claim as he now makes, the bank might have refused to grant the extension, sold out the collateral, and, if it became the purchaser and the stock had later advanced in price as Harvey expected it would, the bank might then have had the full benefit of such an advance.

In *Lilley State Bank* v. *Burkhardt,* 241 Mich. 437, we held that where at the time the maker of the note signed his last renewal, he had knowledge of an alleged fraud in the sale to him of corporation stock for which the original note was given, the fraud, if any, was waived by the renewal. To like effect are *Longacre* v. *Robinson,* 274 Pa. 35 (117 Atl. 408); *Euclid Avenue State Bank* v. *Nesbitt,* 201 Iowa, 506 (207 N. W. 761); *Bosworth* v. *Greiling,* 213 Wis. 443 (250 N. W. 856). Although the alleged defense on which Harvey relies was not a claim of fraud, but rather one of recoupment based upon the breach of a collateral promise by the plaintiff, we believe that the same result should follow, and that Harvey, by renewing his note under the circumstances, waived any claim of recoupment. We are much impressed with the case of *Warren National Bank* v. *Jamieson,* 301 Pa. 45 (151 Atl. 672), where the facts were somewhat similar. In that case the defendant claimed that the bank had agreed to sell 3,000 shares of stock pledged by defendant as collateral, and with the proceeds purchase other stock, which was to be substituted as collateral. The bank failed to make the sale and the stock originally "collaterated" declined very much in value, while that which it was claimed the bank should have pur-

chased appreciated. In a suit upon the promissory note, the defendant set up a counterclaim for breach of the alleged agreement, exceeding the amount of the note sued for, as in the instant case. The court held that in view of the fact that subsequent to the date of the alleged agreement defendant had renewed the note, paid discount on all of the notes, made substantial payments on the principal and pledged additional collateral, he could not set up the agreement antecedent to such renewals as a defense. We believe that the principle involved is correct and that where a defendant, with knowledge of his right to a counterclaim based on the plaintiff's breach of an agreement arising out of the very transaction sued upon, proceeds to give a renewal note without making any objection or asserting any claim of recoupment, he waives all defense arising out of an alleged breach by the plaintiff of the collateral agreement. The court was therefore correct in rendering a summary judgment against Harvey.

(2) Did the trial court err in denying the motion for a summary judgment against Mercier?

In the affidavits filed by Mercier in opposition to plaintiff's motion for a summary judgment against him, the following facts are alleged: At the time of the first indorsement, Dr. Harvey was dangerously ill in the hospital. He was being pressed by the bank on his loans, and at his request Mercier, who was an intimate friend of Dr. Harvey, went to the bank to intercede for him. Mercier was requested by the bank to indorse Harvey's notes, merely as an interim protection for the bank. The bank stated to him at the time that the indorsement was only to be for a few days; that a mortgage had been arranged on Dr. Harvey's home for approximately $15,000, and that as soon as that mortgage was put

through and Dr. Harvey was able to execute it, Mercier's indorsement would be canceled. Relying upon the above representations, Mercier indorsed Harvey's notes. It is alleged in the affidavits filed by Mercier that, as a matter of fact, at that time Dr. Harvey had not entered into any negotiations whatsoever with the bank in regard to placing a mortgage on his home, and that the representation made to Mercier was therefore absolutely untrue. However, it does appear that subsequently, in December, 1931, Harvey did enter into negotiations with the bank in regard to such a mortgage, and made an application for a mortgage in the sum of $15,000. Instead of granting the mortgage as so requested, the bank changed Harvey's application to one for a mortgage in the sum of $18,000, and made other changes as to important provisions. Upon being informed of these changes in April, 1932, Harvey protested to the bank, and a dispute arose between Harvey and the bank which prevented the culmination of the negotiations, although negotiations were still carried on for some time. However, the mortgage was never executed.

The notes came due on two or three different occasions, and Mercier alleges that on each occasion he made inquiry of the bank concerning the mortgage, and was told that the mortgage would be given as agreed and his indorsement would be released. He also claims that prior to June 15, 1932, when he indorsed the last note, upon which the present suit is brought, the same statements were made to him. A letter written to Mercier by the bank partly substantiates this claim. Mercier claims that in spite of the fact that the situation had been materially altered in the meantime by the change made by the

bank in Harvey's application and the resulting dispute, the bank continued to make the same representations to him, and gave him no notice whatsoever of the true situation. He alleges that if he had received such information he would not have signed the renewal of June 15, 1932; that he was induced to sign the notes as indorser by the fraudulent representations and conduct of the bank; and that he is therefore not liable.

Plaintiff claims that the above defense is inadmissible as an attempt to vary the terms of a written contract. However, it is well established that parol evidence is admissible to show that the execution of a written instrument was procured by fraud, for the purpose of invalidating the instrument. *J. B. Millet Co.* v. *Andrews,* 175 Mich. 350; *Bush* v. *Merriman,* 87 Mich. 260; *Boston Piano & Music Co.* v. *Pontiac Clothing Co.,* 199 Mich. 141; *Rambo* v. *Patterson,* 133 Mich. 655. Plaintiff further contends that even if there were any fraud, it was waived by the signing of the renewal note. There is no merit in this contention, inasmuch as Mercier alleges that he had no knowledge of the true state of facts until some time after the last indorsement. The execution of a renewal note constitutes a waiver of a previous defense only where the defendant had knowledge of the defense at the time of the renewal. *Lilley State Bank* v. *Burkhardt, supra.*

We now come to plaintiff's claim that the alleged representations were wholly promissory in character, and can, therefore, not be the basis of a charge of fraud. It is true that the bank's representations that Mercier's indorsement was to be for only a few days and would be canceled as soon as Harvey executed his mortgage, if taken alone, are merely prom-

issory in character, nevertheless, it also appears, as alleged by Mercier, that the said promissory representations were accompanied by misrepresentations as to an existing fact—the situation between Harvey and the bank in regard to the mortgage. They were also accompanied by a subsequent failure on the part of the bank, although it continued to make such representations, to disclose to Mercier the change that had occurred in the fact situation as a result of its own act.

Assuming all of Mercier's claims to be true, but without now deciding the question of fraud in the absence of further facts, we do believe that there was a sufficient question of fact raised so that Mercier is entitled to a trial of the case at which all the facts may be brought out more fully. The trial court properly refused to grant plaintiff's motion for a summary judgment against Mercier.

The judgment against defendant Harvey is affirmed, with costs to plaintiff. The order denying summary judgment against defendant Mercier is affirmed, with costs from plaintiff to defendant Mercier.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, and EDWARD M. SHARPE, JJ., concurred. FEAD and BUSHNELL, JJ., did not sit.

BOMAN *v.* WOLVERINE POWER CO.

1. HOMESTEAD—SELECTION BY WIDOW.
   The right of a widow to select her homestead is absolute and may not be impaired by a conveyance in which she does not join, nor may she be required to select portion of less desirable land not subject to litigation.

2. SAME—EXTENT.
   The owner is entitled to take for a homestead the property upon which the home is situated and not to exceed 40 acres of adjoining lands.

3. SAME—WAIVER OF WIFE'S RIGHT.
   No waiver of homestead right by the husband can affect a wife's interest therein.

4. SAME—EASEMENT—NON-SIGNING SURVIVOR.
   Conveyance of easement to perpetually flood homestead lands not signed by grantor's wife is not binding on her as survivor of her husband.

5. SAME—SIGNATURE OF BOTH HUSBAND AND WIFE ON CONVEYANCE.
   Purchaser of land which may be claimed as a homestead acts at his peril, if he fails to secure the signature of both husband and wife to conveyance.

6. APPEAL AND ERROR—MISJOINDER OF WIDOW AND ADMINISTRATRIX.
   Joinder of action of widow, as administratrix of estate of deceased husband who had given defendant perpetual easement of flooding lands, to her individual suit for damage to said lands selected by her as homestead since husband's death *held*, not prejudicial error, where there was no plea of misjoinder, proof was entirely directed to showing damage to plaintiff in her individual capacity and charge to jury limited recovery to damages occurring after husband's death.

7. SAME—MISJOINDER—CORRECTION.
   Correction of misjoinder of parties may be made in accordance with 3 Comp. Laws 1929, § 14021.

8. SAME—PLEADING—CORRECTION.

In action for damages to widow's homestead lands permission granted plaintiff to file proper reply after attention had been called to her failure to specifically deny allegations in defendant's answer setting forth deed from husband signed by him only, conveying easement to flood lands *held,* not prejudicial error, where deed itself was introduced in evidence (Court Rule No. 24 [1931]).

9. SAME—CHARGE TO JURY.

Objections to excerpts of charge *held,* without merit, where charge to jury appears to properly limit issues when read in its entirety.

Appeal from Midland; Hart (Ray), J. Submitted April 19, 1934. (Docket No. 32, Calendar No. 37,630.) Decided June 21, 1934.

Case by Josephine Boman, as widow and as administratrix of the estate of George W. Boman, deceased, against Wolverine Power Company, a corporation, and Frank I. Wixom, receiver, for damage caused by floods due to construction of a dam. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

Leibrand & Leibrand, for plaintiff.

Manchester & Rice, for defendant Wolverine Power Co.

John C. Shaffer, for defendant Wixom, receiver.

BUTZEL, J. George W. Boman, for many years prior to his death, was the owner of fractional lots 7 and 8, section 11, town 16 north, range 1 west, Midland county, Michigan. On April 30, 1924, for a consideration of $250, Boman, together with his wife, plaintiff herein, gave to defendant Wolverine Power Company a warranty deed conveying:

"The meandered and riparian rights to the river frontage of fractional lots 7 and 8 of section 11, town 16 north of range 1 west, in Midland county, State of Michigan, that is to say, the right to raise the low water level of the Tittabawassee River in front of said fractional lots 7 and 8, town and county aforesaid, to a height that will not injure said lands for farming purposes, except at freshet time. Reserving to ourselves and to our heirs, successors and assigns, forever, the right of access to the river at all times for the purpose of watering stock, boating, or any other privilege that we are now possessed of. The intention of this deed being to sell only the right to raise the water level as above mentioned, together with all and singular the hereditaments and appurtenances belonging to or in any wise appertaining."

Defendant secured the deed because it intended to erect a dam at the village of Sanford, in Midland county, which would raise the water in the Tittabawassee river alongside the Boman farm. The testimony shows that after the construction of the dam, the water evidently overflowed the Boman farm, beyond the limitations expressed in the deed. Subsequently, on February 1, 1927, by a deed not signed or acknowledged by plaintiff, Boman conveyed to defendant for a consideration of $150 the right of flowage or riparian rights over the lands, including the right to perpetually overflow or saturate such lands by the construction and maintenance of an artificial dam, as had already been constructed across the Tittabawassee river. Boman and plaintiff, his wife, continued to occupy the farm until the former's death on or about April 27, 1929. Mrs. Boman was appointed administratrix of the estate, and also elected, in a proper proceeding, to take as her homestead the 40 acres bordering on the Tittabawassee river. The house and outbuildings were

located on the property so selected. The entire farm consisted of lot 8, containing 53.80 acres, and lot 7 with 27.40 acres, or a total slightly over 80 acres. The farm itself was somewhat in the form of a triangle, and the part selected by Mrs. Boman was in similar form, bordering on a section road on the north. The 40 acres not selected by her also fronted a section road on the north, and in addition, one on the west. Had she so elected, she could have selected 40 acres, including the buildings, so that very little, if any of it, would have adjoined the river. However, Mrs. Boman's selection of the 40 acres adjoining the river gave her land which, according to the testimony, was far more desirable on account of its arability than the remaining property, which was of a light soil not as suitable for agricultural purposes.

Both as administratrix of her husband's estate, and in her own right as owner of the land selected by her for her homestead land, Mrs. Boman subsequently brought suit against defendant, and its receiver, for damages caused by the overflow of water resulting from the construction of the dam. She recovered a judgment for $755, entered on a jury's verdict.

We limit our discussion to the questions raised on appeal. Defendants claim that plaintiff is not entitled to any damages whatsoever; that the second instrument, signed solely by George W. Boman, settled all controversy as to the extent of defendants' right to an easement in the property in question, and that the consideration paid by the company in connection with the conveyances was accepted in full payment and satisfaction of all damages. The question is also raised whether, under the circumstances, plaintiff should not have selected 40 acres in a different part of the farm, and thus avoided the litiga-

tion. While we are not unimpressed with defendants' claims, nevertheless, the right to select a homestead is absolute, guaranteed by the Constitution of the State, and the right of a wife to such property may not be lessened or impaired by a deed of conveyance in which she does not join. *Ring* v. *Burt,* 17 Mich. 465 (97 Am. Dec. 200); *Gadsby* v. *Monroe,* 115 Mich. 282; *Sammon* v. *Wood,* 107 Mich. 506; *Allen* v. *Crane,* 152 Mich. 380 (16 L. R. A. [N. S.] 947). The owner is entitled to take for a homestead the property upon which the home is situated, and any adjoining land, not to exceed 40 acres. In *Riggs* v. *Sterling,* 60 Mich. 643 (1 Am. St. Rep. 554), the court said:

"The homestead exemption, as established by the Constitution and laws of this State, is not alone for the husband, and his protection, but for the benefit of the wife and children as well. Const. art. 16, §§ 2, 3, 4 (1850); How. Stat. chap. 267; *People* v. *Plumsted,* 2 Mich. 465, 471; *Beecher* v. *Baldy,* 7 Mich. 488; *Dye* v. *Mann,* 10 Mich. 291, 297; *King* v. *Moore,* 10 Mich. 538; *Snyder* v. *People,* 26 Mich. 106, 110 (12 Am. Rep. 302); *Comstock* v. *Comstock,* 27 Mich. 97; *Showers* v. *Robinson,* 43 Mich. 502; *Sherrid* v. *Southwick,* 43 Mich. 515; *Penniman* v. *Perce,* 9 Mich. 509; *Dyson* v. *Sheley,* 11 Mich. 527.

"The homestead exemption, as it now exists, is not only a privilege conferred (*Chamberlain* v. *Lyell,* 3 Mich. 448, 458), but, under the Constitution, it is an absolute right. 'It was intended to secure against creditors a home, and, to a certain extent, the means of support, to every family in the State.' *Dye* v. *Mann, supra,* 297; *McKee* v. *Wilcox,* 11 Mich. 358 (83 Am. Dec. 743). * * *

"When such homestead, in amount within the constitutional limit, is once established by such election, selection, and occupancy, the Constitution is a positive prohibition against levy and sale by the own-

er's creditors, unless it exceed $1,500 in value: *Beecher* v. *Baldy, supra; Drake* v. *Kinsell,* 38 Mich. 232. * * *

"No waiver of the homestead right by the husband can affect a wife's interest therein: *Beecher* v. *Baldy, supra,* 506; *Williams* v. *Starr,* 5 Wis. 534; *Ring* v. *Burt,* 17 Mich. 465 (97 Am. Dec. 200); *First National Bank of Constantine* v. *Jacobs,* 50 Mich. 340; neither can the abandonment or waiver of the homestead right or homestead by one entitled to enjoy the same affect the interest of any other equally entitled thereto: *Showers* v. *Robinson, supra,* 513; *Griffin* v. *Johnson,* 37 Mich. 87, 92; *Allen* v. *Shields,* 72 N. C. 504."

The language employed in the first deed expressly limited the easement granted to defendant power company. Plaintiff did not join in the second instrument, by which her husband attempted to convey an unrestricted easement to the company in perpetuity, and she was therefore not bound by that deed. Notwithstanding defendants' contention that it is unjust to ask them to pay again for something they claim to have once bargained and paid for, we have no right to depart from an absolute rule of law. When a purchaser seeks to acquire title to land which may be claimed as a homestead, he acts at his peril if he fails to secure the signature of both husband and wife. The rights in the homestead are not lost to the survivor of husband and wife, who did not sign the instrument of conveyance. We do not believe that any estoppel has been shown, or such acquiescence as to bar plaintiff from asserting her rights.

There is some question as to the propriety of plaintiff's bringing suit as administratrix as well as in her own right. However, there was no plea of misjoinder and the proofs were all directed to show-

ing the loss and damage to plaintiff in her individual capacity as owner of the homestead lands selected by her subsequent to her husband's death.

The judge charged the jury as follows:

"After Mr. Boman's death, which occurred in April, 1929, Mrs. Boman, the plaintiff in this case, had her homestead assigned to her, which was the east 40 acres of fractional lots 7 and 8, and bordered upon the river. This instrument would not affect her homestead rights after he died. That is, after the death of George Boman, and if, after a fair and careful consideration of all the evidence in the case you find that the land has really been damaged and was injured by water in question, except, as I have told you, the lowest five acres of the Boman flats as stated in the request, you will render the plaintiff such damages as you think she is entitled to, taking into consideration all the elements that have been allowed to go to you, and taking into consideration your own view of the premises, which you have seen at the request of the attorneys involved in the case and using your judgment, based upon the evidence entirely, if any damages have been proven. * * *

"But, if you find that it has actually damaged the crops and depreciated the value of the land since his, Mr. Boman's death, you may allow her such amount as from all the evidence in the case, you can determine is reasonable and proper, taking into consideration the value of the crops she has been deprived of, if any, for farming purposes, caused by the water raised by the dam of the Wolverine Power Company—that is the value of the land for farming purposes, caused by the raising of the water of the defendant company and since the water was raised."

We believe that this correctly defined the issue, and that the description of plaintiff as administratrix of her husband's estate in no way affected the result. The charge limited the damages to those

occurring after the death of plaintiff's husband. Had defendants objected to plaintiff's suing both as administratrix of her husband's estate and in her own right, the correction could have been made in accordance with 3 Comp. Laws 1929, § 14021.

Error is also claimed on the ground that the trial judge gave plaintiff the right to file a proper reply after attention had been called to her failure to specifically deny the allegations in defendants' answer setting forth the instrument of February 1, 1927, in accordance with Court Rule No. 24 (1931). The defendants were not prejudiced thereby, for the deed showing the consideration was introduced in evidence, and defendants were not precluded from submitting further testimony, nor was the result affected in any manner. Defendants failed to secure the signature of the grantor's wife to the deed, and must suffer the consequence.

Further objections are made to short excerpts from the charge, but when it is read in its entirety, the issues appear to be properly limited, and the verdict is substantiated by the testimony.

Judgment is affirmed, with costs to plaintiff.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

R. C. MAHON CO. *v.* R. S. KNAPP CO.

J. D. CANDLER ROOFING CO. *v.* SAME.

1. PRINCIPAL AND SURETY—BREACH OF PRIVATE CONSTRUCTION BOND.
   Failure of principal contractor to pay for labor or material, resulting in the filing of a mechanic's lien by party who furnished same, constituted such breach of performance bond as to render effective, as of date of bond, assignment of balance due principal contractor.

2. ESTOPPEL—EQUITABLE ESTOPPEL.
   Generally, to constitute an equitable estoppel, the statement or conduct which is alleged to have worked the estoppel must have been a statement made, or conduct known, to the party who was expected to act upon it or to his agent or someone in privity with him.

3. PRINCIPAL AND SURETY—ESTOPPEL—SUBCONTRACTOR.
   Evidence *held*, insufficient to show that surety on private construction bond either said or did anything on which subcontractors relied to their detriment.

4. ESTOPPEL—DEFINITION.
   The doctrine of estoppel rests upon the inequity of permitting one to allege the existence of facts which by his own conduct he has induced another to believe do not exist.

5. GARNISHMENT—PRINCIPAL AND SURETY—SUBCONTRACTORS—PRIORITY AS TO FUND GARNISHEED.
   Surety on principal contractor's private construction bond, who was also assignee by an assignment of balance due in payment of principal contractor, effective as of date of bond, for a previous consideration, *held*, entitled to priority as to said balance over subcontractors who subsequently garnisheed balance due as judgment creditors, where bond was not given for benefit of subcontractors and surety was not estopped as to them.

Appeal from Wayne; Miller (Guy A.), J. Submitted April 5, 1934. (Docket Nos. 55, 56, Calendar Nos. 37,635, 37,636.) Decided June 21, 1934.

Separate garnishment proceedings by R. C. Mahon Company and J. D. Candler Roofing Company, Michigan corporations, judgment creditors, against R. S. Knapp Company, a Michigan corporation, principal defendant, and Inter-City Trucking Service, Inc., a Michigan corporation, garnishee defendant. Fidelity & Deposit Company of Maryland, a Maryland corporation, was interpleaded in both cases as claimant to garnisheed fund. Cases consolidated for trial and appeal. From judgment for plaintiffs against garnishee defendants, claimant appeals. Garnishment proceedings dismissed and judgment entered for claimant against garnishee defendant.

Wilkinson, Lowther & O'Connell, for plaintiff R. C. Mahon Company.

John McNeil Burns (*Charles E. Moore,* of counsel), for plaintiff J. D. Candler Roofing Company.

Lightner, Hanley, Crawford, Sweeny & Dodd (*Clifford M. Toohy* and *Dudley W. Apps,* of counsel), for claimant.

NORTH, J. November 1, 1929, the garnishee defendant herein, the Inter-City Trucking Service, Inc., entered into a contract with the principal defendant, R. S. Knapp Company, for the construction of a building in the city of Detroit. A performance bond was given and the appellant herein, Fidelity & Deposit Company of Maryland, was the surety on this bond. The plaintiffs in the two cases here collectively considered were subcontractors or materialmen who have recovered judgments against the principal contractor. There is still due and unpaid

on the principal contract $11,261.28. In May, 1930, or subsequent thereto the respective subcontractors instituted garnishment proceedings against the owner of the building and sought to satisfy their judgments out of the balance unpaid to the principal contractor. Upon disclosure by the garnishee defendant, the Fidelity & Deposit Company was interpleaded. This company claims the unpaid balance of $11,261.28 under an assignment made to it. The details of such assignment will be noted shortly. The trial court held that plaintiffs under their respective garnishment proceedings had a right to the fund in controversy prior to that of the surety under its assignment. Judgments were rendered accordingly and the Fidelity & Deposit Company has appealed.

The principal defendant, hereinafter called the contractor, applied to appellant to become its surety on a performance bond. The application for the bond contains the assignment under which appellant makes claim to the fund in question. The material portion of the assignment contained in the application for the bond provides that the principal contractor, in event of abandonment, forfeiture or breach of the principal contract:

"Does * * * hereby assign, transfer and set over to the (Fidelity & Deposit) Company, as collateral, to secure the obligations herein and any other indebtedness and liabilities of the undersigned to the company, whether heretofore or hereafter incurred, such assignment to become effective as of the date of said contract bond * * * any and all percentages retained on account of said contract, and any and all sums that may be due under said contract at the time of such abandonment, forfeiture or breach, or that thereafter may become due."

In violation of its building contract and bond the contractor failed to pay for labor or material furnished by one Slowman. A mechanic's lien was filed by Slowman and this lien was paid by the surety. This constituted a breach of the performance bond and rendered the quoted assignment effective as of the date of the bond, December 14, 1929. The effective date of the assignment and the rights thereunder of a subrogated surety were adjudicated in *City of Detroit* v. *Fidelity & Deposit Co. of Maryland,* 240 Mich. 213. The principal question presented for determination on this appeal is whether the appellant's claim to the fund by virtue of its assignment is prior to the claim of appellees made to the same fund based upon their respective garnishment proceedings.

The indebtedness due from the contractor to appellant incident to which it here seeks to exercise its rights under the assignment is indebtedness which is in no way related to the performance of the building contract hereinbefore mentioned. In the circuit court appellant was permitted to reimburse itself for the $2,082 paid by it in settlement of Slowman's mechanic's lien. The right it now seeks to assert under its assignment is incident to indebtedness due to appellant from the R. S. Knapp Company entirely independent of the Inter-City Trucking Service contract. On the other hand, as noted above, appellees' claims are for the payment of labor or materials furnished in the execution of this particular contract. Further, the performance bond on which appellant was surety provided that the principal contractor should satisfy all claims and demands incurred in the performance of the building contract and should pay all persons who had contracts directly with the principal contractor

for labor or materials. Because of the facts just above noted, the trial judge placed his decision on the ground that an equitable estoppel arose against the surety company and barred it from asserting priority of its claim.

In *R. C. Mahon Co.* v. *R. S. Knapp Co.,* 262 Mich. 325, it was held by an equally divided court that the bond here in suit "was not made for the benefit of" the subcontractors. Instead, it was given for the sole benefit and protection of the Inter-City Trucking Service, Inc. The subcontractors can assert no legal right under the performance bond, nor can they make successful claim to equitable rights thereunder by way of equitable estoppel in the absence of conduct on the part of the surety company on which the subcontractors had a right to rely and did rely. It is a general rule that to constitute an equitable estoppel the statement or conduct which is alleged to have worked the estoppel must have been a statement made to or conduct known to the party who was expected to act upon it or to his agent or someone in privity with him. *Palmer* v. *Sharp,* 112 Mich. 420. This record does not contain testimony which brings the subcontractors within the stated rule. The surety neither said nor did anything on which the subcontractors or any of them had a right to rely or on which they did rely to their detriment.

"The doctrine of estoppel rests upon the inequity of permitting one to allege the existence of facts which by his own conduct he has induced another to believe do not exist." *Hubbard* v. *Shepard,* 117 Mich. 25 (72 Am. St. Rep. 548).

As noted just above, this record does not disclose that appellant misled appellees to their detri-

ment. There is nothing illegal or inequitable in appellant's taking an assignment from the contractor of the particular fund here in question to secure payment to it of any indebtedness due from the contractor. The assignment was prior to the garnishment proceedings. No reason appears for denying to appellant the right of asserting such priority. We think the trial judge was in error in applying to the facts of the instant case the doctrine of equitable estoppel. The subcontractors had a complete and adequate remedy by claiming and enforcing mechanics' liens which in effect would have given them priority over appellant's assignment. Instead of doing so, each of them has seen fit to resort to a remedy on the law side of the court. In doing so they have subjected themselves to the law governing rights of priority of the respective claimants to the $11,261.28 unpaid on the building contract. Appellant's claim is in excess of this amount. It follows, for the reasons above stated, that appellees' garnishment proceedings must be dismissed and judgment entered in this court against the garnishee defendant and in favor of appellant for the above-noted balance. Appellant will have costs of both courts against plaintiffs.

NELSON SHARPE, C. J., and POTTER, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

LAMB *v.* ABENDROTH.

1. BANKS AND BANKING—TRUST COMPANY CERTIFICATES OF DEPOSIT—ESTOPPEL OF STOCKHOLDER.

   Stockholders of trust company who are chargeable with notice that it had issued certificates of deposit upon authority of opinion of attorney general that statutes conferred power upon trust companies to do so *held*, estopped to deny liability therefor as are the trust company and its receiver (3 Comp. Laws 1929, §§ 12016, 12018, 12024).

2. ESTOPPEL.

   Acquiescence or tacit assent means the neglect to promptly and actively condemn the unauthorized act and to seek judicial redress, after knowledge of it, whereby innocent third parties have been led to put themselves in a position from which they cannot be taken without loss.

3. BANKS AND BANKING—TRUST COMPANY CERTIFICATES OF DEPOSIT—ULTRA VIRES—ESTOPPEL OF STOCKHOLDERS.

   In action by receivers of trust company to enforce statutory liability of its stockholders based largely upon 400 certificates of deposit, question of whether or not certificates were *ultra vires* is not decided where stockholders are held estopped to deny liability.

Appeal from Wayne; Webster (Clyde I.), J. Submitted April 4, 1934. (Docket No. 19, Calendar No. 37,668.) Decided June 21, 1934. Rehearing denied September 18, 1934.

Bill by Scott E. Lamb and Charles A. Smith, receivers of Metropolitan Trust Company, against Florence Abendroth and others to enforce a stock assessment. Decree for plaintiffs. Defendants Allerton and others appeal. Affirmed.

Emmons, Oren & Sleeper (*David A. Howell*, of counsel), for plaintiffs.

Hugh G. Allerton, in pro. per.

Butzel, Levin & Winston, for defendant Roy A. Plumb.

Robert M. Brownson (*Kenneth Murray* and *Paul Marco,* of counsel), for defendant Brownson.

Berry & Stevens, for defendant Campbell.

Harry M. Stone and *Ernest C. Stieler,* for defendants Holmes, Mead, Watson, Van de Walker, Gardner, Dant, Lyons and Ellis.

NELSON SHARPE, C. J. The bill of complaint herein was filed by the receivers of the Metropolitan Trust Company to enforce the liability fixed by statute (3 Comp. Laws 1929, § 12024) of its stockholders under an order of the court therefor. The claims filed with and allowed by the receivers amount to the sum of $1,262,198.24, of which $1,000,507.80 are in the nature of certificates of deposit. It appears that the appraised value of the assets of the company amounts to $968,246.39. It is the claim of the appellants that the trust company had no power or authority under the statute or its charter to issue these certificates, and that no liability on the part of the stockholders attached by reason thereof, and that, as the assets as appraised are of greater value than the indebtedness with these certificates eliminated, no necessity existed for the enforcement of such liability.

The Metropolitan Trust Company of Highland Park was incorporated on April 22, 1925, under Act No. 108, Pub. Acts 1889, and the amendments thereto (see 3 Comp. Laws 1929, § 11997 *et seq.*). Its articles were later amended by changing its name to Metropolitan Trust Company and its place of busi-

ness from Highland Park to the city of Detroit. Its capital stock was increased to $500,000, divided into 25,000 shares of $20 each. The applicable sections of the statute read as follows:

SEC. 12016. "It shall be lawful for any such corporation * * * to execute and issue in the transaction of its business all necessary receipts, certificates, papers and contracts, which shall be signed by such person or persons as may be designated by the by-laws of such corporation."

SEC. 12018. "Any corporation organized or existing under this act shall have power in and by its corporate name to take, receive and hold, and repay, reconvey and dispose of any effects and property, both real and personal, which may be granted, committed, transferred or conveyed to it, with its consent, upon any terms, or upon any trust or trusts whatsoever at any time or times, by any person or persons. * * * Such corporation shall have power to loan money upon real estate and collateral security, and execute and issue its notes and debentures, payable at a future date, and to pledge its mortgages on real estate and other securities as security therefor. But nothing herein contained shall be construed as giving the right to issue bills to circulate as money or buy or sell bank exchange or do a general banking business."

SEC. 12024. "The stockholders of every trust company shall be individually liable, equally and ratably, and not one for another, for the benefit of the creditors of said trust company to the amount of their stock at the par value thereof, in addition to the said stock."

In 1912, the then commissioner of banking wrote the attorney general of the State with regard to the power of trust companies to issue certificates of deposit in return for moneys received by them. In

answer thereto, the attorney general replied in a lengthy opinion in which he discussed the question and reviewed the authorities bearing thereon, and concluded that such power was conferred by the statute.

In the opinion filed by the trial court he found:

"The trust companies that were in existence at that time, and all trust companies that have been formed since, have followed that opinion. This is the first time that it has been questioned. This particular trust company was not in existence at the time that opinion was given, so when it was formed and it started to sell its stock and put it upon the market, the trust companies were doing business in accordance with this opinion, and so it must be held that when these defendants purchased this stock in this particular company they did it with the knowledge that that was the way trust companies were doing business in Michigan and that they were doing business in Michigan that way under high authority."

He expressed doubt as to whether, under the statute and its articles of incorporation, the trust company was authorized and empowered to issue such certificates, but found that the stockholders were estopped to deny liability, and entered a decree against them severally for the amount of their stock, from which a number of them have prosecuted this appeal.

Counsel for the appellants contend that, while the trust company and its receivers may be estopped to deny liability under the certificates issued, the stockholders are not bound thereby. They cite authority to support this contention. 14 C. J. p. 1033; *Ward* v. *Joslin,* 186 U. S. 142 (22 Sup. Ct. 807); *Assets Realization Co.* v. *Howard,* 70 Misc. Rep. 651 (127 N. Y. Supp. 798).

Had the issue been involved in a single transaction, a different question would be presented. There were 400 of such certificates allowed as claims, and they were issued by the company in reliance upon the opinion of the attorney general that the law permitted it to do so, and the stockholders apparently acquiesced in its action for the same reason. The creditors who deposited their money and accepted these certificates were doubtless also so impressed. Had they hesitated about the investment or questioned the power of the company to issue them, all doubts would seemingly have been removed by a reference to the opinion.

The question is, who must stand the loss. We agree with the trial court that it should be the stockholders. They either had notice or were chargeable therewith that the company was issuing these certificates under a claim of right to do so. They accepted the benefits derived therefrom in the way of dividends without protest, and may not now resist the enforcement of the assessment on the ground that the company had no lawful authority to issue them.

There is authority to support this holding. In *Kent* v. *Quicksilver Mining Co.*, 78 N. Y. 159, 187, the court said:

"And where third parties have dealt with the company, relying in good faith upon the existence of corporate authority to do an act, there it is not needed that there be an express assent thereto on the part of stockholders to work an equitable estoppel upon them. Their conduct may have been such, though negative in character, as to be taken for an acquiescence in the act; and when harm would come to such third parties if the act were held invalid, the stockholders are estopped from questioning it. We suppose acquiescence or tacit assent to mean the neglect to promptly and actively condemn the

unauthorized act, and to seek judicial redress, after knowledge of the committal of it, whereby innocent third parties have been led to put themselves in a position from which they cannot be taken without loss."

In *Kipp* v. *Miller*, 47 Col. 598, 607 (108 Pac. 164, 135 Am. St. Rep. 236), it was said:

"The suit is in equity for a judicial ascertainment of the stockholders' liability, and for an adjudication according to the very right. Shall the creditors, who, acting in good faith, have dealt with these branch banks as part of the State bank, and deposited their moneys upon the credit of the associated banks, with a capital of $80,000, be turned away empty handed, on a plea by the stockholders, who have acquiesced in this course of dealing for upwards of eight years, accepting profits accruing therefrom, that the corporation had no authority in law to carry on and conduct its business after that particular manner, or in that particular place? Upon every consideration of fair dealing the answer to this proposition must be in the negative. The bank was a private corporation; no public question is involved. The matter is one calling merely for a just and equitable adjustment of money claims between individuals. The very right can only be done by holding the stockholders to their statutory liability, thus affording the innocent creditor such relief as that course may bring. By this method justice is done to all and wrong to none."

"Nor can the shareholders of a corporation avoid responsibility for the unauthorized acts of their agents, by abstaining from inquiry into the affairs of the company, or by absenting themselves from the company's meetings, and at the same time reap the benefit of their acts in case of success.

"If a shareholder fails to take the trouble of inquiring into the affairs of the corporation of which he is a member, or to attend its meetings, it seems

no more than just that his supineness should be construed as an acquiescence in the proceedings of the majority.'' 2 Morawetz on Private Corporations (2d Ed.), § 630.

''And generally, when an act done by the directors is in excess of their authority, yet has been done with the *bona fide* intent of benefiting the corporation, and a shareholder, knowing thereof, does not dissent within a reasonable time, his assent to the act will be presumed, and he will be estopped from gainsaying it.'' Thompson on Corporations (3d Ed.), § 2094.

The conclusion reached renders it unnecessary to decide whether a trust company in this State is authorized and empowered by the statute to issue certificates of deposit. The attention of the legislature is respectfully called to the uncertainty existing relative thereto, and it may very properly amend the sections quoted so as to expressly grant such power or deny its existence, as to it shall seem meet.

The decree is affirmed. As a public question is involved, no costs will be allowed.

POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred. BUTZEL, J., did not sit.

In re PARKER'S ESTATE.

BRISTOL *v.* KALAMAZOO COLLEGE.

1. APPEARANCE—SPECIAL—JURISDICTION.

A special appearance for the purpose of moving to dismiss is not a submission to the general jurisdiction of the court.

2. SAME—STIPULATION—GENERAL APPEARANCE.

Stipulation entered into after special appearance and upon which the court acts in the exercise of its jurisdiction will be treated as a general appearance.

3. COURTS—APPEAL AND ERROR—COURT RULES—MOTION TO DISMISS—JURISDICTION.

Denial of motion to dismiss appeal from probate court for failure to comply with provisions of court rule giving circuit court jurisdiction *held,* proper, where circuit court had acquired and exercised jurisdiction by virtue of stipulation to transfer cause to jury calendar (Court Rule No. 57 [1931]).

4. WILLS—INTEREST OF BENEFICIARY UNDER FORMER WILL.

Beneficiaries under a former will, but not under will admitted to probate by probate judge, *held,* to have such an interest in the estate of the deceased as entitled them to make contest of validity of later will, where record shows that former will was executed and later destroyed under direction of testator.

Appeal from Kalamazoo; Rathbun (G. Arthur), J., presiding. Submitted May 29, 1934. (Calendar No. 37,651.) Decided June 21, 1934.

In the matter of the estate of Rachel Arvilla Parker, deceased. Glenard H. Bristol presented for probate the last will and testament of deceased. Kalamazoo College and another objected thereto. From order denying motion to dismiss appeal to circuit court, proponent appeals. Affirmed and remanded for trial.

Adams, Van Horn & Bloem, for proponent.

Jackson, Fitzgerald & Dalm, for contestants.

NELSON SHARPE, C. J. The last will and testament of Rachel Arvilla Parker, executed on October 10, 1930, was admitted to probate by the probate court of the county of Kalamazoo on December 1, 1931. A contest had been filed by parties claiming under

a former will. An appeal was taken to the circuit court pursuant to the provisions of the statute (3 Comp. Laws 1929, § 15958), and not in conformity with Court Rule No. 57 (1931) then in force. A motion to dismiss was denied, from which the executor, by leave of the court, has taken this appeal.

Court Rule No. 57 (1931), entitled: "Time for perfecting appeal," is plain and explicit. Section 1 reads:

"The period of time after the entry of the order, determination, decision, action, judgment, decree or other matter for review, within which the appeal shall be perfected, is as follows:—

"(a) In appeals to the Supreme Court and in appeals from probate courts, within 20 days," and appeals from the probate court to the circuit court must be taken in conformity therewith.

The docket entries in the circuit court disclose that the motion to dismiss the appeal was filed on February 20, 1932; that on April 10, 1933, an order was entered dismissing the cause for "want of progress;" that on August 3, 1933, a motion was made to reinstate it and granted on the following day; that on September 11, 1933, an order was entered "transferring case to jury calendar upon stipulation of counsel made in open court," and that thereafter several stipulations of counsel were filed therein.

A special appearance for the purpose of moving to dismiss is not a submission to the general jurisdiction of the court. *Weber* v. *Wayne Circuit Judge,* 217 Mich. 561. But stipulations thereafter entered into, upon which the court acts in the exercise of its jurisdiction, will be treated as a general appearance. *Lapham* v. *Tarabusi,* 247 Mich. 380. Unless the trial court had jurisdiction of the cause of action and of

the parties, he could not place the case on the jury docket, as he did by stipulation of counsel. Without in any way qualifying the effect to be given to the provision for appeal from probate court contained in Court Rule No. 57 (1931), we agree with the trial court in its holding that for this reason the motion to dismiss should be denied.

The motion was also based upon the claim that the Kalamazoo College and the Bronson Methodist Hospital did not have sufficient interests in the estate of the deceased to entitle them to make the contest. The petition for probate was filed on February 2, 1931. On March 10, 1931, the First National Bank & Trust Company, of Kalamazoo, filed in said court what purported to be a copy of a last will and testament of the deceased, executed on the 28th day of April, 1930, in which it was named as executor, and a codicil thereto, executed on the 6th day of July, 1930, accompanied by a petition for the probate thereof. Among the legatees named in this will were the Kalamazoo College and the Bronson Methodist Hospital.

Objections to the probate of the will of October 10, 1930, were based upon the claims that it was not executed by the deceased and that its execution was procured by undue influence exercised over her. The record does not disclose the proofs, if any were taken, in the probate court, but Judge Hollander held that, while those interested in a prior will might contest, the college and hospital did not satisfactorily establish that they were parties in interest under a former will, and dismissed the objections and admitted the will to probate.

At the hearing of the motion to dismiss in the circuit court, some testimony was taken in support thereof. It clearly appeared that the deceased had

made a former will, and the executor named in the later will, and who prepared it, testified that at the request of the deceased, and on her written order, he went to the office of the First National Bank & Trust Company and got her former will and delivered it to her, and advised her that it should be destroyed, and there is testimony of another witness that in his presence she tore it up and asked him to throw it into the stove, and that he did so.

The witnesses to the former will were not called. Counsel for the contestants offered to produce them, but the court did not think it was necessary to do so. Counsel for the appellant rely on our holding in *Re Wynn's Estate,* 193 Mich. 223, to sustain their claim that it devolved upon the contestants to show "that the formalities of the law were complied with in the execution of the prior will" (p. 226). In that case the former will was not produced or accounted for. Here it clearly appears that one was executed by the deceased, that it was kept on deposit in her box in a bank, and that it was delivered to and destroyed by her. Under the record here presented, we think the trial court was justified in holding that the contestants had such an interest in the estate of the deceased as entitled them to make contest of the later will.

The appeal is dismissed, but without costs, and the case remanded for trial of the will contest upon the merits.

POTTER, NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

TALLIS *v.* STUART.

1. MALICIOUS PROSECUTION—FALSE IMPRISONMENT—DEFENSES.
Meritorious defense to action for malicious prosecution and false imprisonment *held*, disclosed by affidavits showing defendants had advice of their private attorney and prosecuting attorney before prosecuting plaintiff for embezzlement.

2. ATTORNEY AND CLIENT—ABSENCE OF CLIENT.
Clients who retain attorney have a right to rely, not only upon his ability, but upon his allegiance to their cause so that where he knows they are out of the State and do not expect to return on date set for trial, he should at once get continuance or endeavor to secure their attendance at the trial.

3. JUDGMENT—MALICIOUS PROSECUTION—NEW TRIAL.
Affidavits *held*, to justify order of court setting aside verdict and judgment and granting new trial in action for malicious prosecution and false imprisonment, where defendants were not present at trial through neglect of attorney then representing them and affidavits disclose they had meritorious defense.

Appeal from Wayne; Brennan (Vincent M.), J. Submitted April 3, 1934. (Calendar No. 37,724.) Decided June 21, 1934. Rehearing denied September 18, 1934.

Case by A. Irving Tallis against Mary Stuart and Alexander J. Stuart for alleged malicious prosecution and false arrest. Verdict and judgment for plaintiff. From order setting aside verdict and judgment and granting new trial, plaintiff appeals. Affirmed.

Wm. Henry Gallagher (*S. Reymont Paul* and *Francis Fitzgerald,* of counsel), for plaintiff.

Wiley, Streeter, Smith & Ford, for defendants.

NELSON SHARPE, C. J. On May 25, 1932, the plaintiff took judgment, in the absence of defendants, for $15,000 on a charge of malicious prosecution and false imprisonment. A motion, filed by the defendants on July 25th to vacate the judgment and grant a new trial, was denied on October 8, 1932. On January 16, 1934, there was a substitution of defendants' present attorneys, followed by another motion to vacate the judgment and grant a new trial. No leave to make such motion was obtained, but on the court's statement that he would grant leave there seems to have been no objection to proceeding to a hearing on the motion. After a consideration of the affidavits presented and the testimony submitted, an order was entered setting aside the verdict and judgment and granting a new trial. Leave having been granted by this court, plaintiff seeks review of this order.

The plaintiff was charged with embezzlement. The affidavit of merits discloses that the defendants submitted the facts relative thereto to an attorney, and he advised that a prosecution be had; that they accompanied him to the office of the prosecuting attorney of the county, and that one of the deputies, after a full disclosure of the facts to him, advised that the complaint be made and the warrant issued, on which plaintiff was arrested.

The civil case came on for trial before Judge Hunt of the Wayne circuit. It appears that defendants' then attorney had agreed with plaintiff's attorney that the trial should be had on May 18, 1932. The defendants were at that time traveling in the south. Fred Stuart, the defendants' son, who was living in their home in Detroit, in an affidavit made by him deposed that about the first of May, 1932, defendants' then attorney called him on the telephone, and in-

formed him that the case was to come up about the middle of May; that he told the attorney that he "did not think his father, A. J. Stuart, intended to return to the city that soon," and that the attorney then said to him "that that might be just as well as the said A. J. Stuart was quite involved legally and that from the effect of the conversation this deponent did assume that there was no need to inform his father of the conversation, and actually did not inform either parent of the conversation."

There is no denial of the statements therein on the part of the attorney. When the case was called on the 18th, defendants' then attorney sought a continuance for the reason that his clients were not in the city. It does not appear that any affidavit was filed in support thereof, and it was denied. The attorney then left the court room and the trial was proceeded with, and a verdict for $15,000 rendered, on which a judgment was thereafter entered.

On July 25, 1932, there was apparently a substitution of attorneys for the defendants, and a motion to vacate the judgment and grant a new trial was filed. It was supported by several affidavits. The defendant Alexander J. Stuart deposed that he was at the time of the trial in Atlanta, Georgia; that from the information furnished him he had assumed that the case would not come on for trial until the fall of 1932; that he first learned of the trial and verdict from reading about it in a Detroit newspaper on May 20, 1932, and that he at once wrote his attorney and telegraphed to his son to get in touch with his attorney and see that proper action was taken to protect his interest. Pearl Stuart, the wife of defendants' son, Fred, deposed that on the receipt of a telegram at their home on the evening of May 23, 1932, from her father-in-law relative to the

matter she called up the attorney for the defendants the next morning and talked with him, and that he said "that he would do nothing in the matter whatsoever." Judge Hunt held the showing made insufficient, and denied the motion on October 8, 1932.

It appears that, following this denial, the plaintiff had the defendant Alexander J. Stuart arrested on a *capias ad respondendum;* that an attorney for him filed a motion to have it withdrawn, which was denied, and that a petition for a writ of *habeas corpus* to inquire into the cause of his detention was sought in the United States district court.

A careful reading of the affidavits filed in support of the motion and of those submitted when the former motion was made, which are included in the record, indicates, not only that the defendants have a meritorious defense to plaintiff's action, but that they were in no way personally to blame for their absence when the trial was had. When they retained an attorney to defend the action, they had a right to rely, not only upon his ability, but upon his allegiance to their cause. He knew that they were sojourning in the south, and his right to assent to the fixing of a date for the trial without obtaining their consent thereto might well be questioned. When he was informed by their son that they did not intend to return by the day he had agreed upon, he should at once have sought a consent to continuance from the attorney for the plaintiff, and, if it could not be obtained, have taken immediate steps to secure the attendance of the defendants at the trial.

From the foregoing it appears that if the defendants can establish the facts set forth in the affidavits of merit, they have a complete defense to the action; that their failure to be present at the trial was in no way due to negligence on their part, and that as soon

as they knew that a judgment against them had been entered they sought relief therefrom but until the present time they have been unable to obtain it.

"There is no doubt the trial judge has a wide discretion in granting or refusing to grant new trials either upon his own motion or upon the motion of a party." *Zeilman* v. *Fry,* 213 Mich. 504, 510.

In *Merriman* v. *Jackson Circuit Judge,* 96 Mich. 603 (syllabus), the court held:

"Where an appellant employs an attorney in regular standing, and does all that he is required by the advice of his attorney to do to perfect his appeal, he ought not to lose his right to an appeal through the neglect or oversight of the attorney, where justice requires a revision of the case."

See, also, cases therein cited.

On the record here presented there was no such abuse of discretion as will justify this court in setting aside the order made. The appeal is dismissed, but without costs.

POTTER, NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred. BUSHNELL, J., did not sit.

ZACK *v.* GUNDERSON.

SPECIFIC PERFORMANCE—CONTRACTS FOR FILIAL SERVICE—WILLS.

Decree for plaintiff in suit for specific performance of deceased's oral contract to convey real and personal property to her in return for leaving remunerative employment and rendering filial service to him during remainder of his lifetime and which was fully performed by her, notwithstanding devise of same property to her by his will, is affirmed by equally divided court.

Appeal from Gogebic; Driscoll (George O.), J. Submitted April 10, 1934. (Docket No. 80, Calendar No. 37,689.) Decided June 21, 1934.

Bill by Elizabeth Zack against Carl E. Gunderson, executor of the estate of Joseph Davis, deceased, for specific performance of agreement to convey property. Decree for plaintiff. Defendant appeals. Affirmed by an equally divided court.

Edward W. Massie, for plaintiff.

Belmont Waples (*Humphrey & Humphrey,* of counsel), for defendant.

NELSON SHARPE, C. J. Joseph Davis, an old time resident of the city of Ironwood, passed away on April 23, 1933. His wife had died on August 21, 1926. They had no children. On October 21, 1932, Mr. Davis had executed his last will and testament, in which he devised and bequeathed to the plaintiff his home in the city and all of the personal property therein and certain certificates of stock in an insurance company. It was duly admitted to probate, and the defendant, Carl E. Gunderson, qualified as executor thereof.

The bill of complaint herein was filed on June 16, 1933. In it the plaintiff alleges that she is the grandniece of the deceased; that in the year 1928 an oral agreement was entered into between her and the deceased, under which, in consideration of her leaving the employment in the city of New York in which she was then engaged and coming to the home of the deceased and living with and rendering filial service to him during the remainder of his lifetime, he would convey to her the home in which he then lived and all the personal property belonging thereto, and

that she fully performed said agreement on her part but deceased neglected to make such conveyance to her during his lifetime. In her prayer for relief she asks that the defendant, as executor, be ordered to specifically perform the said agreement. The answer is a denial of the relief sought.

The property described in the bill of complaint is the same as that devised and bequeathed to plaintiff in the will. It appears, however, that the deceased, in 1928, was possessed of a considerable amount of property besides his home and its furnishings, but that at the time of his decease he had an indebtedness which will probably result in the executor's being required to dispose of at least a part of the property devised to plaintiff to satisfy the same, and the purpose of the plaintiff is to secure it relieved therefrom by specific performance of the claimed oral agreement.

To entitle the plaintiff to recover, the proofs submitted must be convincing that the testator during his lifetime agreed that he would convey this property to her in consideration of the service to be rendered by her and that she fully performed on her part. The trial court so found, and entered a decree as prayed for in the bill of complaint, from which the defendant has taken this appeal.

It is undisputed that the testator after the death of his wife felt very lonely and depressed, and was somewhat addicted to drinking. He was then about 70 years of age. He tried to get plaintiff's mother, his niece, who lived in Milwaukee, to come and live with him, but she declined. He then asked her if the plaintiff might not be induced to do so. While the plaintiff was not permitted to testify to the reason therefor, it does appear that she came to the home of the testator in September, 1928, and lived with him therein, except on a few occasions when she

visited others, until his death on April 23, 1933. The house was quite large and roomy, and, while a maid was employed to assist her, she took charge of it and entertained and looked after him as a daughter would do. She had been in New York for about four years, and when she left there was earning about $150 a week in theatrical employment.

Two old friends of the deceased, Adolph E. Schwefel, an attorney, and Paul Muenzberg, both residents of Milwaukee, visited him at his cottage on Manitowish Lake on September 30, 1928. Mr. Schwefel testified that deceased then told him that during the lifetime of his wife they had expressed a desire to adopt the plaintiff, but that her father would not consent thereto; that she "had come there now and that she was of a vivacious disposition, she could relate things, read things to him, and he has society at home and it was more of a home to him. Then he said that he had made an agreement with Betty (the plaintiff) that she should stay with him the rest of his life, and that he had deeded to her the homestead and everything that was in it;" that there was some talk about the effect of a deed. "He did not indicate in any manner that he had changed his idea about giving her the deed. He said that he wanted her to have that. That was satisfactory to him. He was elated with the arrangement. He was more than pleased. He repeatedly mentioned that it is a home to him again now that she was there now; that he can go home and forget his business troubles and feel more refreshed, and that she is a great solace to him; that he can talk to her, and she reads to him. Well, he went into a great deal of detail;" that he also said, "I am approximately worth $70,000." Mr. Muenzberg testified to the same effect. This conversation was in the presence of the plaintiff.

Frances Wilcox and her sister, Jeanette Wilcox, testified that while visiting at the home after the arrival of the plaintiff the deceased told them that he was giving her the home, and its contents; that he took a legal paper out of his pocket, and said it was a deed, and that the home and everything in it was hers, and put the paper back in his pocket.

Hazel Zack, plaintiff's mother, testified that the deceased asked her to use her influence to get the plaintiff to leave the theatrical business in New York, and after she came he "told me of this agreement that had been established between him and Betty, that she would remain with him. He told me she was to have the home and its contents for that."

The plaintiff was not permitted to testify as to the arrangement under which she came to the home of the deceased and lived with him for about five years prior to his death. It seems clear, however, that she would not have given up her remunerative employment in New York without some agreement for compensation to her for the service to be rendered. The home was assessed at $3,250. The value of the furnishings is not disclosed, but it seems apparent that plaintiff made a financial sacrifice when she left New York and came to live with the deceased.

In our opinion the agreement here sought to be enforced is clearly established. If the deceased had executed a deed to her, as stated by him, he doubtless destroyed it after his conversation with attorney Schwefel relative to its immediate effect. He doubtless was of the opinion that the provision in his will secured to her all that the deed would have given her. But, under the circumstances, she is entitled to enforce the agreement, and may not be required to take under the will.

There is some evidence that the deceased at times made presents to her. Her acceptance of them in no way affected her rights under the agreement. Neither does the fact that she and her mother delivered the will, after his decease, to the judge of probate. It was in the home, and it was their duty to do so.

The decree is affirmed, with costs payable out of the estate.

POTTER, BUTZEL, and EDWARD M. SHARPE, JJ., concurred with NELSON SHARPE, C. J.

WIEST, J. (*dissenting.*) I am not in accord with the opinion of the Chief Justice.

The evidence is persuasive that plaintiff was to have the house and furnishings by will and was content therewith, until she was informed that payment of debts of the deceased came ahead of her devise.

Plaintiff and her mother presented the will for probate and, upon hearing, it was admitted to probate.

The executor of the estate testified:

"Apart from the home and contents I have not found enough property in the Joseph Davis estate to pay the debts which have now been filed against it."

Mr. Davis died April 23, 1933. The will was executed October 21, 1932.

The attorney who drew the will testified:

"Mr. Davis said he wanted me to draw his will and I had, or received then, a piece of paper with a pencil and he told me what disposition he wished made of his property. Miss Zack was present during the entire time and aided him in giving me the names and addresses of the various several beneficiaries. In the course of that he said that he wanted to leave to her the house and contents. * * * I

drew the will and went back there to his residence the second day afterwards with the will already drawn and ready for execution. I had the original and two carbon copies of the will as drawn. I gave one to him, one to her and read the third. I read it through as it was executed, including 'after the payment of my just debts and funeral expenses;' everything in the will from start to finish. As I started to read it I said to him, 'If there is anything here which isn't now just the way you want it, stop me as I read it over; do not wait until I get through; and if necessary the will will be redrawn, for I want to have it express your present wishes as to the disposition of your property.' When I finished reading it all through he said, 'I think that is all right.' He said to her, 'Wasn't that it?' and she said, 'It is exactly the way you told Mr. Waples when he was here.' * * * Miss Zack did not make any claim or say anything to the effect that the house or contents were already hers. There was no claim made by her at that time that she owned the house. Mr. Davis did not say anything to me in her presence to the effect that she owned the house or its contents.''

Plaintiff testified that she was not present when the will was discussed or when it was executed.

I think Mr. Davis at one time intended to give plaintiff a deed but, after talking with the attorney from Milwaukee, concluded to devise the property by will.

I am of the opinion that plaintiff must take under the will and may not have specific performance of the alleged contract and consequent exclusion of creditors of the deceased.

The decree should be reversed and the bill dismissed, with costs to defendant.

NORTH, FEAD, and BUSHNELL, JJ., concurred with WIEST, J.

COLTER *v.* SALOW.

APPEAL AND ERROR—GARNISHMENT—PENDING APPEAL.

Pending appeal from judgment in principal case, trial of garnishment on judgment may not be had against seasonable objection of third party claimant to fund (3 Comp. Laws 1929, §§ 14869, 14873).

Appeal from Washtenaw, Sample (George W.), J. Submitted April 4, 1934. (Docket No. 12, Calendar No. 37,629.) Decided June 21, 1934.

Garnishment proceedings by Thomas A. Colter and Jessie C. Campbell against Louis F. Salow and Grace I. Salow, principal defendants, and Monitor Insurance Company, garnishee defendant. Salow Farms, Inc., a Michigan corporation, interpleaded as claimant of garnisheed fund. Claimant appeals from orders striking demand for jury, requiring garnishee defendant to pay proceeds of insurance policy into court and requiring clerk of court to pay same to plaintiffs. Orders striking demand for jury and requiring clerk of court to pay proceeds to plaintiffs reversed. Order requiring garnishee defendant to pay proceeds of insurance policy into court affirmed. Case remanded.

Burke & Burke, for plaintiffs.

John R. Rood, for claimant.

BUSHNELL, J. Salow Farms, Inc., as intervening claimant, appeals from certain orders of the circuit court entered in this cause, which may be summar-

ized as follows: (1) An order entered September 25, 1933, striking from the files appellant's demand for a trial by jury; (2) An order entered September 30, 1933, requiring the Monitor Insurance Company, garnishee defendant, to pay into court $2,000; and (3) An order entered on the same day requiring the clerk to pay the money forthwith to the plaintiffs.

Plaintiffs garnisheed a fund of $2,000 held by the insurance company. This fund represented the adjusted amount of a claim for damage by fire to buildings located on land previously sold by defendants on contract to one McCreedy. The amount due on the insurance claim was determined on April 1, 1933, the writ of garnishment was issued on April 27th, and the garnishee defendant's disclosure was filed on May 22d. Defendants quitclaimed their interest in the premises by an instrument dated April 18, 1933, to Salow Farms, Inc. There are inferences in the record to the effect that, despite its date, the deed was not executed until after the writ of garnishment was served. An assignment of the land contract accompanied the deed.

The interpleader contained a demand for a jury trial. Plaintiffs countered with a motion to strike claimant's demand and asked the court to set the cause down for immediate hearing, alleging the interpleader to be "a conspiracy founded on falsehood intended to mislead this court," and further, that it falsely implied that an issue of fact existed and was filed to hinder and delay plaintiffs in collecting their rightful claim. On the issue thus framed, the court, over claimant's objection, heard the testimony of the secretary-treasurer of the garnishee defendant and its attorney. The land contract purchaser was examined, as well as Mr. Rood, who represented both the intervening claimant and

the principal defendants. No direct testimony was offered by claimants, although the witnesses were subjected to cross-examination. After the hearing the court struck the claimant's demand for a jury. Three days later the subsequent orders hereinbefore described were entered, without any additional testimony being taken. It is necessary to consider but one of the questions stated in appellant's brief, *viz.*: "Can garnishment on judgment for plaintiff be tried in the circuit court pending appeal to the Supreme Court by defendant from that judgment?"

The calendar entries show that judgment was entered in the principal case on May 3, 1933, and a preliminary notice of appeal was filed on May 22d. At the hearing of the statutory issue on September 30th, the intervening claimant called the court's attention to the pending appeal, and using *Wattles* v. *Wayne Circuit Judge,* 119 Mich. 356, as its authority, pointed out that the court was without jurisdiction to try the garnishment question. We there held, quoting the syllabus:

"That it is contrary to the intent of the statutes for the circuit judge to require the garnishee to go to trial during the pendency of an appeal, because he believes the same to have been taken for purposes of delay, although no notice thereof was served on the garnishee."

See 3 Comp. Laws 1929, §§ 14869, 14873.

We think the same reasoning applies to a seasonable objection on the part of intervening claimants. The court was in error in entering its order of October 2, 1933, in which it found that the plaintiffs are entitled to the garnisheed moneys, and ordering the clerk to pay the same to plaintiffs or their attorneys.

The order permitting garnishee defendants to pay the sum of $2,000 to the clerk may stand but the other orders entered herein are set aside. The plaintiffs shall return the money so received to the clerk. The cause is remanded for further proceedings not inconsistent with this opinion. The appellant shall be allowed costs.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred.

LEIBRAND *v.* CURTRIGHT.

1. VENDOR AND PURCHASER—RECEIVERS—APPOINTMENT.
   Appointment of defendants' attorney as receiver to collect rent from vendees under land contract pending foreclosure thereof under Act No. 122, § 25a, Pub. Acts 1933, not providing therefor, *held,* error.

2. COSTS—UNSATISFACTORY BRIEF.
   No costs are allowed where nature of appellant's brief is unsatisfactory.

Appeal from Wayne, Marschner (Adolph F.), J. Submitted April 3, 1934. (Calendar No. 37,650.) Decided June 21, 1934.

Bill by G. C. Leibrand against Dios M. Curtright and Esther A. Curtright to foreclose a land contract, for the appointment of a receiver and other relief. Cross-bill by defendants against plaintiff. From order appointing defendants' attorney receiver, plaintiff appeals. Reversed.

Leibrand & Leibrand, for plaintiff.

Charles Bowles, for defendants.

BUSHNELL, J. Plaintiff filed a bill to foreclose a land contract and a receiver was appointed *ex parte*. An order to show cause why one of the tenants of the property should not be punished for contempt of court was dismissed. Defendant's motion to vacate the order of appointment of the receiver was argued and granted, from which no appeal was taken. Plaintiff later filed a motion seeking an order to require defendants to comply with their land contract, or for the appointment of a receiver. The court on August 8, 1933, ordered the defendants to pay a rental of $20 a month for six months, and deliver to plaintiff all welfare rental certificates received by them. No appeal was taken from this order. Later, plaintiff sought a modification of the order of August 8th, and the court on October 6th, on its own motion, appointed defendant's attorney as receiver. We granted plaintiff leave to appeal from this order, whereupon the receiver submitted his first and final account and tendered his resignation. The account was approved, the receiver discharged and his bond canceled.

Appellee argues that there remains no issue for determination by this court.

Appellant's brief does not comply with Court Rule No. 67, § 2 (1933), in that the "Statement of Facts" is not "a clear and concise chronological statement in brief, narrative form, of the facts of the case," etc. Section 3 of the rule seems to be entirely ignored, but instead we find a heading entitled, "Conclusion," consisting of 13 pages.

Both parties agree that the court was in error in the appointment of the receiver, but neither of them satisfactorily points out the nature of the error except that plaintiff claims his petition is brought under the provisions of Act No. 122, § 25a, Pub. Acts

1933. This act does not provide for the appointment of a receiver. The order of October 6, 1933, is set aside and the matter remanded for proceedings in conformity to this opinion. Because of the unsatisfactory nature of appellant's brief, no costs will be allowed.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred.

IRWIN *v.* WILLIAMSON CANDY CO.

1. MASTER AND SERVANT—LIABILITY FOR ACTS OF SERVANT.
   Test of liability of master for acts of servant is whether the latter was at the time acting within the scope of his employment.

2. SAME—NEGLIGENT ACT OF SERVANT DURING DEVIATION FROM DIRECT ROUTE.
   Master is not liable for negligent act of servant who had departed from direct route and had not returned to a place where his duty required him to be although the place of occurrence of act was less distant from destination than point of deviation.

3. MOTOR VEHICLES—MASTER AND SERVANT—THIRD PARTY DRIVER.
   Fact that defendant's employee permitted friend, with whom employee was in habit of traveling, to drive car which injured plaintiff has no effect upon liability of defendant employer.

4. TRIAL—RENDITION OF OPINION—COURT RULES.
   Court Rule No. 37, § 11 (1933), requires trial judge to render opinion in actions at law tried without a jury.

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted April 20, 1934. (Docket No. 33, Calendar No. 37,515.) Decided June 21, 1934.

Separate actions of case by Frank and Ethel Irwin against Williamson Candy Company, an Illinois corporation, for personal injuries and loss of services resulting from automobile collision. Cases consolidated for trial and appeal. Judgment for defendant. Plaintiffs appeal. Affirmed.

R. M. Connor, for plaintiffs.

Stevens T. Mason and *Carl F. Davidson,* for defendant.

BUSHNELL, J. The facts of these two cases, which were consolidated by stipulation, are not disputed. Ethel Irwin, the wife of Frank Irwin, was injured in an automobile accident at the corner of Seward and Second avenues in the city of Detroit some time after 11 o'clock on the night of January 21, 1929. Marcus C. Mills, a salesman in the employ of defendant, was riding in a car owned by himself and being driven at the time by his friend, Earnest G. Gallagher, a railroad representative. Second avenue is a stop street which runs north and south and crosses Seward at right angles several blocks north of Grand Boulevard. Mills' car, proceeding east on Seward, did not come to a stop before entering Second avenue, and collided with the car in which Mrs. Irwin was riding.

Gallagher and Mills had known each other for several years and were in the habit of traveling together, visiting the same territory in the interests of their respective employers. On the night in question, they met by arrangement in the city of Mt.

Clemens, from where they were to go to Flint, Saginaw, Bay City and Midland. Instead, they came to Mills' home in Grosse Pointe, between Harper and Jefferson avenues, to get some samples. Leaving there for Flint on their most direct route, they picked up two women at the corner of Gratiot and East Grand Boulevard, and departed from their route in order to drive them to the vicinity of the Statler Hotel in downtown Detroit. The next stop was to be at a doctor's office on Woodward avenue in the city of Highland Park on the direct route to Flint, in order to permit Gallagher to inspect some X-ray plates. Leaving the vicinity of the Statler, they finally proceeded north on Third avenue which, at Seward, is two blocks west of and parallel with Woodward avenue. They were approaching Woodward avenue, by way of Seward, when the accident occurred.

The trial court, hearing the case without a jury, held that defendant was not liable in that Gallagher, who was driving the car, was not an employee of defendant, and Mills was not at that time engaged in company business. The sole question raised by the appeal is whether Mills was acting in the course of his employment when the accident occurred.

Appellant claims that under the authority of *Murphy* v. *Kuhartz,* 244 Mich. 54, and *Marchand* v. *Russell,* 257 Mich. 96, the court was in error. Appellee rejects the *Marchand Case* as inapplicable. It contends that *Riley* v. *Roach,* 168 Mich. 294 (37 L. R. A. [N. S.] 834), and *Brinkman* v. *Zuckerman,* 192 Mich. 624, are controlling, and that if the holding in the *Murphy Case* is properly applied to the facts shown in the record, defendant must be relieved of responsibility.

Justice NORTH collected the cases in *Nevins* v. *Roach,* 249 Mich. 311, and we there again held, quoting from *Riley* v. *Roach, supra,* to the effect that:

"The test of the liability of the master for his servant's acts is whether the latter was at the time acting within the scope of his employment. The phrase 'in the course or scope of his employment or authority' when used relative to the acts of a servant, means while engaged in the service of his master, or while about his master's business."

Brinkman v. *Zuckerman, supra,* as indicated in *Murphy* v. *Kuhartz, supra,* is authority for the rule that, in case of a departure from the route, the master is not liable until the servant gets back on a direct route to the place where his duty requires him to be. As applied to the instant case, Mills had not reached the direct route to Flint when he crossed Second at Seward. The effect of appellant's argument would be to construe *Murphy* v. *Kuhartz, supra,* as holding that when a servant reaches a point less distant from his proper destination than the point of deviation, he would then re-enter the employment of his master. Such is not the meaning of the decision, nor is it a proper construction of the language of the opinion. The decision states:

"There are cases which hold that where a servant in driving his master's truck so deviates from his regular route as to suspend the relation of master and servant, it is immediately restored when he starts to return. * * * But by better authority it is held that the relation of master and servant is not restored until he has returned to the place where the deviation occurred or to a corresponding place, some place where, in the performance of his duty, he should be."

The writer of the opinion determined from the facts presented that the driver, at the time of the accident, had reached a route where, in the performance of his duty, he should be, and then stated:

"When he reached this route at a point less distant than the last place of delivery, he had completed the trip which he had taken on his independent business and had re-entered the employment of his master. He was then engaged in no business of his own but was exclusively in the service of his master."

The emphasis must be placed on the last sentence of the quotation. To place a different construction upon the decision would result in absurd applications of the rule. Cases would be determined by comparisons of distances rather than upon proper consideration of the facts. Servants who engage in larks or escapades of their own, wholly unrelated to the business of their master, would thereby subject the master to damages. Such is neither the contemplation of the law nor the intent of our holding in that case.

Mills was neither engaged "exclusively in the service of his master" when he met with the accident at Seward and Second, nor was he at a "place where in the performance of his duty, he should be."

The fact that another was driving the car for Mills has no effect upon the result. As was said by Chief Justice SHARPE in *Marchand* v. *Russell, supra,* the car was an instrumentality used by Mills in the prosecution of the business of his employer and in the accomplishment of objects within his line of duty as an employee. The fact that it was driven by Gallagher would not relieve Mills nor his employer from responsibility for a failure to exercise

due care, if there were no other question to be determined in the case.

See, also, *Cooper* v. *Interstate Motor Freight Co.*, 264 Mich. 131.

The question of whether Mills was an independent contractor is not raised by the pleadings. The court did not render an opinion setting forth the reasons for its decision, as required by Court Rule No. 37, § 11 (1933). We are aided, however, by the trial judge's opinion denying the motion for new trial, in which he said:

"Of course, some leeway should be allowed for a driver's judgment in the use of streets to attain his ultimate destination, but it does not follow that where an accident as grave and with injuries so painful resulting, such as this one, through the carelessness of a driver, that his principal must be called upon to respond in damages. From the record in this case, I felt and gave voice to my thoughts that Mills and Gallagher should have both been made defendants in this connection. * * * I still hold to that belief that if there is any liability at all, it is the personal liability of the driver of this car and that the defendant in no wise could be beholden for damages upon this record."

The judgment is affirmed, with costs to appellee.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred.

HUNTER *v.* BALDWIN.

1. MOTOR VEHICLES—CAR IN GEAR—CRANKING—DUTY OF OPERATOR.
   Operator of motor vehicle owes duty to one he asks to crank his car not to leave same in gear.

2. SAME—CRANKING CAR IN GEAR.
   One asked to crank a motor vehicle has a right to rely on driver having car in control and is not bound to anticipate it would be in gear.

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.
   Contributory negligence is not imputable to any person for failing to look out for danger when, under the surrounding circumstances, he had no reason to suspect that danger was to be apprehended.

4. MOTOR VEHICLES—CONSTRUCTION OF STATUTES—GUEST ACT.
   Statute known as guest act, restricting liability of owner or operator of motor vehicle for injury, death or loss to guest to such accidents as are caused by gross negligence or wilful and wanton misconduct of owner or operator, being in derogation of the common law, must be strictly construed (1 Comp. Laws 1929, § 4648).

5. SAME—GUESTS—CAR IN MOTION.
   It is not necessary that motor vehicle be actually in motion in order for one to be a guest therein.

6. SAME—PAYMENT BY PASSENGER.
   Not everyone riding in a motor vehicle without payment is a guest.

7. SAME—CRANKING CAR.
   Plaintiff who cranked automobile at request of operator before re-entering car after absence of several hours *held*, not a guest within meaning of 1 Comp. Laws 1929, § 4648, known as guest act, so as to relieve owner of car from liability for plaintiff's injuries suffered when car ran over him.

8. DAMAGES—PERSONAL INJURIES TO FARMER—MEASURE OF DAMAGES. Measure of damages for personal injuries sustained by man who owns and works his own farm is the value, in the open market, of the services which he had been able to perform before the injury and was, thereafter, unable to perform.

WIEST and BUTZEL, JJ., dissenting.

Appeal from Tuscola; Smith (Henry H.), J. Submitted April 17, 1934. (Docket No. 112, Calendar No. 37,762.) Decided June 21, 1934.

Case by Walter N. Hunter against Eber Baldwin and Anna Baldwin for personal injuries received while cranking an automobile. Judgment for plaintiff. Defendant Anna Baldwin appeals. Affirmed.

George W. DesJardins and *Eugene E. Johnson,* for plaintiff.

Elbern Parsons, for defendant Anna Baldwin.

EDWARD M. SHARPE, J. September 9, 1930, the plaintiff, a farmer of the age of 40 years, was driven from his home to the village of Kingston, a distance of about three and a half miles, by the defendants in a Chevrolet auto owned by the defendant Anna Baldwin and driven by her stepson, defendant Eber Baldwin. While in town all parties attended to some business which took two or three hours. As they were about to return home, the defendant Anna Baldwin was seated in the rear seat of the car and the defendant Eber Baldwin was seated behind the steering wheel. Plaintiff was standing beside the car. When the motor failed to start by the use of the starter, the defendant Eber Baldwin gave plaintiff the hand crank, requesting him to crank the engine. Plaintiff inserted the crank in its proper place, but in doing so it was necessary for plaintiff

to put one foot and leg inside the front bumper. The car was in gear and, upon being cranked, immediately started forward up over the curb where it was parked and pushed plaintiff against a building and under the car, causing him serious personal injuries.

Plaintiff sued both the owner and the driver of the car. A default judgment was taken as to defendant Eber Baldwin. Upon the trial a judgment was found for the plaintiff in the amount of $1,909. Defendant Anna Baldwin appeals.

Plaintiff claims that he was not familiar with gear shift cars such as the one in question and does not know how they operate; that as a result of the injuries sustained through defendants' negligence, he has a permanent disability of 30 per cent. Defendant claims that plaintiff was guilty of contributory negligence in not ascertaining that the gear shift of the car was in neutral; that the plaintiff was transported as a guest within the meaning of 1 Comp. Laws 1929, § 4648, commonly known as the guest act; that the court erred in permitting the plaintiff to testify as to his loss of earnings since plaintiff was engaged in farming on his own account.

When defendant Eber Baldwin handed the crank to plaintiff and asked him to crank the car, he knew the position plaintiff was in and he also knew that if the car was left in gear when the engine started the car would move and likely injure plaintiff. Defendant Eber Baldwin owed plaintiff a duty that he failed to observe. The plaintiff had a right to rely on the driver of the car having his car in control and was not called upon to anticipate that the driver would have his car in gear while it was being cranked.

"Contributory negligence is not imputable to any person for failing to look out for danger when, under the surrounding circumstances, he had no reason to suspect that danger was to be apprehended." *Corey* v. *Hartel,* 216 Mich. 675, 679.

The guest act (1 Comp. Laws 1929, § 4648) reads:

"Provided, however, that no person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator of such motor vehicle and unless such gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought."

This statute, being in derogation of the common law, must be strictly construed. *Rogers* v. *Kuhnreich,* 247 Mich. 204.

Several other States have guest acts similar to that in Michigan which the courts of those States have been called upon to construe. It has been held that it is not necessary that the car be actually in motion in order for one to be a guest therein. Under the Connecticut statute, which is identical with that of Michigan, a plaintiff who had entered the car at the invitation of the driver was held to be a guest so as to prevent recovery for injury to plaintiff's fingers caused by the driver slamming the car door before starting the engine. *Nemoitin* v. *Berger,* 111 Conn. 88 (149 Atl. 233).

On the other hand, not everyone riding in a car without payment is a guest. A prospective purchaser of the automobile is not a guest within the guest act. *Crawford* v. *Foster,* 110 Cal. App. 81

(293 Pac. 841). Accord, *Bookhart* v. *Greenlease-Lied Motor Co.*, 215 Iowa, 8 (244 N. W. 721). Likewise, a child riding in a school bus is not a guest. *Smith* v. *Fall River Joint Union High School District*, 118 Cal. App. 673 (5 Pac. [2d] 930). In *Kruy* v. *Smith*, 108 Conn. 628 (144 Atl. 304), it was held that whether plaintiff, who was being transported by defendant to defendant's house to work as a laundress, was a guest was a question for the jury and a directed verdict for defendant was reversed. Where plaintiff had been hired by defendant's agent to work on defendant's farm and was being transported to such work by defendant at the time of the injury, the court refused to reverse a finding of the jury that plaintiff was not a guest within the meaning of the guest act. *Russell* v. *Parlee*, 115 Conn. 687 (163 Atl. 404).

While Massachusetts has no guest act, the courts of that State have evolved a guest rule by judicial decision. However, they have held that one who is a passenger for the mutual benefit of both parties is not a "guest." In *Lyttle* v. *Monto*, 248 Mass. 340 (142 N. E. 795), a nine-year-old boy had been requested by the driver of a delivery truck to show him to a certain address. The court allowed the boy to recover for personal injuries on the ground that he was not a guest. In *Jackson* v. *Queen*, 257 Mass. 515 (154 N. E. 78), a purchaser of goods who had been requested by the vendor to guide the deliveryman to the place of delivery was held not subject to the rule preventing recovery for personal injuries by a guest passenger. *Labatte* v. *Lavallee*, 258 Mass. 527 (155 N. E. 433), held that one who accompanied defendant on a business call at the latter's request for the purpose of advising defendant was not a guest in defendant's car.

The guest act was passed to protect owners and operators from liabilities while carrying passengers gratuitously, the theory being that the benefit was entirely for the passenger. However, in this case we find that the plaintiff was injured while performing an act for the benefit of the owner or operator and at the latter's request.

While this is a case of first impression, we are constrained to hold that when plaintiff left the car upon arrival at the village of Kingston and remained away from it for a period of two or three hours, he ceased to be a guest passenger and that while in the act of cranking the car at the request of the operator of the car he had not resumed the position of that of a guest passenger.

Defendant next contends that plaintiff's damage, if any, should be computed upon loss of profits rather than upon the basis of loss of earnings. This is not the rule. This court has said in an action for personal injuries to a man who owned and worked on his own farm:

"The true measure of plaintiff's loss is the value, in the open market, of the labor and services which he had been able to perform before the injury and was, thereafter, unable to perform." *Gleason* v. *Lowe,* 232 Mich. 300, 309.

To the same effect is *Seabury* v. *Railway,* 194 Mich. 423, 426.

To say that the measure of damages is the loss of profit on the farm would be practically to deny any damages whatever, for as a general rule loss of profits is too speculative to be permitted as a measure of damages.

Judgment affirmed, with costs to plaintiff.

NELSON SHARPE, C. J., and NORTH, FEAD, and BUSHNELL, JJ., concurred with EDWARD M. SHARPE, J.

WIEST, J. (*dissenting*). Plaintiff was a guest on the trip to town, was present as such for the return trip and remained a guest in the operation of the car toward making the return trip, whether in or out of the car. Wanton or wilful negligence was not shown.

The judgment should be reversed, with costs to defendant.

BUTZEL, J., concurred with WIEST, J. POTTER, J., did not sit.

RUSSELL *v.* SZCZAWINSKI.

1. MOTOR VEHICLES—PARKING ON PAVEMENT—BREAKDOWN—NEGLIGENCE.

   Stopping a truck on pavement of a highway outside the limits of a village or city because of a breakdown does not constitute parking as prohibited by statute nor is it necessarily negligence (1 Comp. Laws 1929, § 4718).

2. SAME—LIGHTING OF STALLED TRUCK—QUESTION FOR JURY.

   Matter of negligence of owner and operator of stalled motor truck in lighting same or otherwise warning approaching traffic *held*, question for jury in view of conflicting testimony in action by motorist colliding with rear end of truck.

3. SAME—STOPPING WITHIN ASSURED CLEAR VISION AHEAD—ATMOSPHERIC CONDITIONS.

   Driver of motor vehicle should drive slow enough so he could stop within the range of the assured clear vision ahead notwithstanding oncoming glaring lights or atmospheric conditions which may impair vision or affect surface of pavement (1 Comp. Laws 1929, § 4697).

4. SAME—DRIVING IN THE DARK.

Driving automobile in the dark at such speed it cannot be stopped within the distance objects can be seen ahead is negligence as a matter of law (1 Comp. Laws 1929, § 4697).

5. SAME—CARE REQUIRED OF DRIVER.

Care required of motorist in driving car is ability to perform manual acts necessary to stop it immediately, if necessary, not merely begin to stop within range of his vision or use diligence in stopping after discerning object (1 Comp. Laws 1929, § 4697).

Appeal from Wayne; Webster (Clyde I.), J. Submitted March 30, 1934. (Docket No. 152, Calendar No. 37,373.) Decided July 2, 1934. Rehearing denied September 18, 1934.

Case by Peyton Russell against Roman Szczawinski and another for personal injuries received in collision with rear end of truck upon highway. Verdict and judgment for plaintiff. Defendants appeal. Plaintiff cross-appeals. Reversed, without a new trial.

Harry J. Lippman, for plaintiff.

Robert E. Plunkett, for defendant Szczawinski.

Frederick J. Ward, for defendant Motor Freight, Inc.

POTTER, J. Plaintiff recovered a judgment for damages against defendants alleged to have resulted from defendants' negligence. Defendants appeal. Defendant Motor Freight, Inc., hired defendant Szczawinski, the owner of a three and a half ton truck and defendant Szczawinski was the operator thereof between Detroit and Flint. At the time of the accident the truck was loaded with motor crank shafts. It became disabled and was stopped on the

highway. Plaintiff, operating an automobile coming from the same direction, ran into the rear of the motor truck and was injured. Various questions are raised. Plaintiff testified he was driving a Nash touring car with a permanent top.

"As I drove toward the scene of the accident on the morning in question, I had my headlights burning. They lighted up the road pavement ahead of me as I drove.

"*Q.* From the time you left Pontiac until you reached the Clarkston Station road, did you observe the condition of the road pavement as you drove along? * * *

"*A.* Yes, I did.

"*Q.* What was the condition?

"*A.* Dry as far as I could see. * * * As I went down into the hollow the mist became fog; it became very dense. I put on my dim lights when the other car was approaching and when I went down the incline my vision became poor and I slowed down. In fact, I slowed down to about 25, I should say. And this fog, as I say, became more dense as I approached the bottom of that valley and I was still slowing down considerably when all of a sudden, about 25 feet ahead of me, this truck loomed up. The first thing that was apparent to me were the cross bars in this tail gate. I could not tell exactly what it was for a minute. I knew very well there was something there so I slammed on my brake and my car started to stop as it always had. * * * My car started to stop and I thought it would, all right. * * * I seemed to lose control and I saw that I was going to hit that object and I turned the car to the left and ducked my head over this way. * * *

"*Q.* Did you know on that morning as you drove into that fog that with that vision, going at the speed of 25 miles an hour, upon a dry pavement, you could have stopped your car within 25 feet?

"*A.* Yes."

The accident occurred on a dark and foggy night. Defendants claim the truck was properly lighted. When it was stopped, there is testimony to show, the truck was on the pavement. The statute prohibits parking on the pavement (1 Comp. Laws 1929, § 4718), but the mere stopping of defendants' truck because of defendants' breakdown does not constitute parking, nor is it necessarily negligence. It is a disputed question of fact whether the truck was lighted. Defendants put out no flares and did nothing to warn oncoming traffic. If defendants' negligence is not established as a matter of law, it was clearly a question for the jury under the facts. *Empey* v. *Thurston,* 58 Ont. L. R. 168; *Seibert* v. *Goldstein Co.,* 99 N. J. Law, 200 (122 Atl. 821); *Reed* v. *Ogden & Moffett,* 252 Mich. 362. We must dispose of the case as if defendants' negligence were established.

Plaintiff called both the owner of the truck Szczawinski and Stanley Pawlowski who was his driver. Both testified there were lights on the truck. Mr. Deland DeWitt was also called. His testimony, we think, tends to corroborate that of plaintiff, that there were no proper lights upon the truck, although he testifies there was a man working under the truck with a lantern. In view of this testimony, the question of whether or not the truck was properly lighted was a question for the jury.

There is testimony the pavement was damp, probably as a result of the fog. This increased the burden upon plaintiff who should drive slow enough so he could stop his car within the range of the assured clear vision ahead. If it was foggy or misty so that plaintiff's vision was bad or obscured, the duty was incumbent upon him to exercise greater care and caution.

"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 Co.,* 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 sufficient to take the case to the jury that the driver was confused or blinded by the lights of an oncoming car. If her vision was obscured by glaring lights of an approaching car, it was her duty to slacken her speed and have her car under such control as she might stop it immediately if necessary. *Budnick* v. *Peterson,* 215 Mich. 678; *Holsaple* v. *Superintendents of Poor of Menominee Co., supra; Lett* v. *Summerfield & Hecht,* 239 Mich. 699. 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, supra; Haney* v. *Troost, supra; Lett* v. *Summerfield & Hecht, supra; Elrich* v. *Schwaderer,* 251 Mich. 33." *Thompson* v. *Southern Mich. Transportation Co.,* 261 Mich. 440, 446.

Substantially the same rule was followed by the court in *Bowmaster* v. *William H. DePree Co.,*

supra; Boylon v. *Reliable Cartage Co.*, 258 Mich. 5; *Angstman* v. *Wilson*, 258 Mich. 195 (31 N. C. C. A. 1), and *Perkins* v. *Great Central Transport Corp.*, 262 Mich. 616.

Judgment reversed, with costs. No new trial.

NELSON SHARPE, C. J., and NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

COUNTY OF OAKLAND *v.* CENTRAL WEST CASUALTY CO.

ON MOTION FOR REHEARING.

1. DEPOSITARIES—PRO RATA CLAUSE OF BOND.
   The *pro rata* clause of a public fund depository bond merely sets a maximum amount payable by the surety.

2. SAME—PRO TANTO SUBROGATION CLAUSE—STATUTES.
   The *pro tanto* subrogation clause of a public fund depository bond does not fix a maximum amount of liability but undertakes to require county to surrender certain rights against principal and, being in contravention of statute intending that bond shall be security in addition to liability of principal, is void (1 Comp. Laws 1929, §§ 1193–1202).

Appeal from Oakland; Dehnke (Herman), J., presiding. Submitted January 10, 1934. (Docket No. 126, Calendar No. 37,600.) Decided April 3, 1934. Motion for rehearing submitted April 21, 1934. Decided July 2, 1934.

Assumpsit by County of Oakland and John C. Spaulding and Irvin Long, receivers, against Central West Casualty Company, a Michigan corporation, on a depository bond. Judgment for plaintiffs. Defendant appeals. Modified and affirmed (266 Mich. 438). Rehearing denied.

Arthur P. Bogue, Prosecuting Attorney, and *Robert D. Heitsch,* Assistant Prosecuting Attorney, for plaintiff county.

Goodenough, Voorhies, Long & Ryan, for plaintiff receivers.

Beaumont, Smith & Harris, for defendant.

Stevens T. Mason, Payne & Payne and *Lightner, Hanley, Crawford, Sweeny & Dodd, amici curiæ.*

ON MOTION FOR REHEARING.

PER CURIAM. We think that the correct conclusion was reached in our former opinion in this case, reported in 266 Mich. 438.

Defendant in its brief on application for rehearing again contends that this case cannot be distinguished from *Lawrence* v. *American Surety Co.,* 263 Mich. 586 (88 A. L. R. 535). In the *Lawrence Case* we upheld a clause in a bond securing State deposits which limited the amount of the surety's liability to a *pro rata* fraction of the total loss. The instant case involves the validity of a clause in a county depository bond providing for *pro tanto* subrogation of the surety to any dividends or payments received from the principal.

The cases involve different statutes, but there is a more vital distinction than this. The *Lawrence Case* was a limitation on the *amount* of the surety's

liability; the provision here in question is a *condition* on the liability, a limitation as to the character or accrual of liability. The *pro rata* clause merely sets a maximum amount payable by the surety, an indeterminate amount, to be sure, but one easily capable of ascertainment when the amount of the loss is known. If the public officials require sufficient bonds, the public will be completely protected, barring insolvency of a surety; and to offset such possible insolvency, there is still the possibility of recovery from the principal. The *pro tanto* subrogation clause, on the other hand, does not fix a maximum amount of liability but undertakes as a condition to payment by the surety (or, as the appellant prefers to state it, in return or consideration for such payment) to require the county to give up certain of its rights against the principal. The extent of dividends paid by the principal need not be known at the time of the payment of the bond, nor, indeed, whether such dividends will ever be paid to any extent. Thus the *pro tanto* clause is not a limitation on the amount of the surety's liability but a qualification of the duty of the surety to pay and of the nature of the protection received by the public. The statute intends the depository bond to furnish security *in addition to* the liability of the principal. The *pro tanto* subrogation clause, if enforced, would contravene the statute by giving up to the surety a part of this liability of the principal and thus changing the nature of the security required by the statute.

SHANAHAN *v.* KLYN.

GARNISHMENT—ALIMONY—STIPULATION.

Sum, due from husband under stipulation in divorce proceeding which had not been incorporated in modified decree and which merely amounted to wife's receipt or forgiveness of portion of alimony then due, *held,* not subject to garnishment by judgment creditor of wife.

SHARPE, C. J., and POTTER and WIEST, JJ., dissenting.

Appeal from Kent; Verdier (Leonard D.), J. Submitted April 17, 1934. (Docket No. 113, Calendar No. 37,247.) Decided July 2, 1934.

Garnishment proceedings by Camilla Shanahan, doing business as La Mode Chez Nous, against Geneva V. Klyn, principal defendant, and George B. Klyn, garnishee defendant. Judgment for garnishee defendant. Plaintiff appeals. Affirmed.

Dunham & Sherk, for plaintiff.

Knappen, Uhl, Bryant & Snow, for garnishee defendant.

FEAD, J. Alimony is a matter of decree of court, not of contract. *Eddy* v. *Eddy,* 264 Mich. 328. A stipulation of parties does not modify a decree. The stipulation at bar was not incorporated into a modified decree by the court and, therefore, amounted to no more than an agreement, or a receipt or forgiveness of the alimony due in excess of $400. The $400 was owing, not as a debt by private agreement but by force of the decree, and remained enforceable under it by contempt proceedings.

Judgment affirmed, with costs.

NORTH, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred with FEAD, J.

NELSON SHARPE, C. J. (*dissenting*). About the year 1920 (the record does not disclose the exact date) a decree of divorce was granted to the principal defendant, Geneva V. Klyn, from her then husband, the garnishee defendant, George B. Klyn. It contained a provision that he should pay to her the sum of $350 per month for the support of herself and their minor daughter, Louise. He got behind in his payments, and by stipulation filed in said cause on or about January 20, 1932, it was agreed that he should pay to her the sum of $400 for all claims of past due alimony and $200 per month thereafter.

In 1930, Mrs. Klyn sought and obtained credit from the plaintiff for the purpose of properly equipping her daughter, Louise, with clothing for a contemplated trip abroad, and promised to pay the same out of her alimony allowances. She made no effort to do so, and in an action brought therefor the plaintiff recovered a judgment against her on November 1, 1932, in the sum of $1,056.94.

A writ of garnishment was thereafter served on George B. Klyn. In his disclosure he stated that he was indebted to the principal defendant in the sum of $275, the balance of the $400 due her under the terms of the stipulation, and in default in his monthly payments in the sum of $150. On the trial of the statutory issue a judgment was entered in favor of the garnishee defendant, from which the plaintiff, by leave of the court, has taken this appeal.

No brief has been filed on behalf of the principal defendent. The garnishee defendant "makes no argument as to the law of the case." His only inter-

est is in not being "subjected to double payment of alimony."

There is authority sustaining plaintiff's claim that an allowance for alimony may be subjected to the payment of a debt contracted by the wife after decree for her support or that of a minor child. I R. C. L. p. 869; 19 C. J. p. 298, and cases cited. In this State, however, this court is committed to the rule that an action at law may not be maintained upon a provision for alimony in a divorce decree (*Nixon* v. *Wright,* 146 Mich. 231, 10 Ann. Cas. 547), and that:

"An action in garnishment is an action of law and it cannot be maintained on a decree for alimony —for a periodical allowance." *Toth* v. *Toth,* 242 Mich. 23, 27 (56 A. L. R. 839).

As to the $275 unpaid on the stipulation filed in which the claim for alimony then due was settled at $400, a different question is presented. This sum was not payable to her under the decree of the court, and could not have been enforced by her in the manner provided for in the statute. It became a debt owing to her by Mr. Klyn, and for the recovery of which she would have been compelled to resort to a court of law. As such it was subject to garnishment under our statute. 3 Comp. Laws 1929, § 14857.

The judgment entered should be reversed and set aside and the cause remanded, with direction to the trial court to enter a judgment for the plaintiff against the garnishee defendant in the sum of $275. No costs should be allowed.

POTTER and WIEST, JJ., concurred with NELSON SHARPE, C. J.

PEOPLE *v.* MINCHELLA.

1. INDICTMENT AND INFORMATION—RESTRICTION OF GRAND JURY.
   Motion to quash indictment for kidnapping on the ground the grand jury was restricted in its powers and had no right to find the indictment *held*, without merit.

2. JURY—CHALLENGE TO ARRAY.
   Challenge to array of jurors summoned under 3 Comp. Laws 1929, §§ 16541, 16542, providing for selection of jurors in municipal courts of record, *held*, properly overruled.

3. SAME—PEREMPTORY CHALLENGES.
   Peremptory challenges of one indicted for kidnapping were properly limited to five since sentence which may be imposed is limited to any term of years (3 Comp. Laws 1929, §§ 16732, 17305).

4. WITNESSES—TESTIMONY OF MISTRESS OF DEFENDANT.
   Admission of testimony of woman who had been married twice, perhaps divorced, and lived with defendant indicted for kidnapping and posed as his wife on certain occasions *held*, proper as against claim she was his wife.

5. CRIMINAL LAW—EVIDENCE—ABDUCTED CHILD.
   Credibility of seven and one-half year old boy who had been kidnapped two years previously and weight to be given his testimony on trial of his abductors was for jury and, on motion for new trial, for court.

6. KIDNAPPING—EVIDENCE.
   Evidence given on trial of defendants indicted for kidnapping boy five and one-half years old *held*, sufficient to sustain conviction and to warrant denial of new trial, where it was based largely on testimony of abducted boy, then two years older, who was unusually bright and had been examined by the court pursuant to 3 Comp. Laws 1929, § 14222, no objection raised by defendant's counsel as to omission to administer oath to boy, rigid cross-examination failed to shake his testimony as to material facts and there were some corroborating circumstances.

7. ARREST.

Officer's arrest of defendant after observing that he was driving car with foreign license plates in residential district at high rate of speed without lights, apparently going no particular place and occupants were closely watching onlookers *held*, legal.

8. CRIMINAL LAW—ARREST—PRESUMPTIONS.

There is no presumption that a man who is arrested is guilty of any offense, but what he may then say or do is admissible in its bearing upon effect of the arrest upon him.

9. SAME—FALSE ACCUSATION—PRESUMPTIONS.

The presumption is that one who is falsely accused will rely on his consciousness of innocence, while one who is guilty will resort to other means to obtain his freedom.

10. SAME—ARRESTING OFFICER—EVIDENCE AS TO OTHER OFFENSES.

Admission of testimony of arresting officer that defendant, on trial for kidnapping, had told of bootlegging activities *held*, proper in view of court's instruction that such testimony could not be taken as substantive evidence of crime charged.

11. SAME—ARRESTING OFFICER—OFFER OF BRIBE.

Admission of testimony of arresting officer that defendant, on trial for kidnapping, had offered a bribe *held*, proper, as tending to establish guilt where identification of defendant as an abductor had already been made.

Appeal from Recorder's Court of City of Detroit; Skillman (W. McKay), J. Submitted April 12, 1934. (Docket No. 147, Calendar No. 36,269.) Decided July 2, 1934.

Charles Minchella and Vincent Lamonna were convicted of kidnapping. Defendant Minchella appeals. Affirmed.

Frank M. Kenney, Jr., for appellant.

Patrick H. O'Brien, Attorney General, *Harry S. Toy*, Prosecuting Attorney, *W. Gomer Krise*, Chief Assistant Prosecuting Attorney, and *Frank Sche-*

manske and *Edmund E. Shepherd,* Assistants Prosecuting Attorney, for the people.

NELSON SHARPE, C. J. The defendant, Minchella, and one Vincent Lamonna were tried, convicted and sentenced under an indictment charging them with having, on the 30th day of September, 1929, kidnapped one Jackie Thompson. Minchella, hereafter spoken of as the defendant, appeals.

Prior to the opening of the trial, defendant's counsel moved to quash the indictment on the ground that the grand jury was restricted in its powers, and had no right to find the indictment. A quite similar question was presented in *People* v. *Kaplan,* 256 Mich. 36, and held to be without merit.

A challenge was interposed to the array of jurors. They were summoned under the provisions of Act No. 83, Pub. Acts 1923 (3 Comp. Laws 1929, §§ 16541, 16542), which was adopted in the city of Detroit on November 6, 1923, and became effective nine days thereafter. The challenge was properly overruled.

Defendant's counsel insisted that under the charge as laid they were entitled to 20 peremptory challenges. The punishment provided for kidnapping is—"by imprisonment in the State prison for any term of years, or by a fine of five thousand dollars, or by both such fine and imprisonment, in the discretion of the court." 3 Comp. Laws 1929, § 16732.

Chapter 8, § 12 of our code of criminal procedure (3 Comp. Laws 1929, § 17305), provides that:

"Any person who is put on trial for an offense which is not punishable by death or life imprisonment shall be allowed to challenge peremptorily five of the persons drawn to serve as jurors and no more."

The section following reads:

"Any person who is put on trial for an offense punishable by death or imprisonment for life, shall be allowed to challenge peremptorily twenty of the persons drawn to serve as jurors, and no more."

Section 17305 clearly applies to a kidnapping charge. The sentence imposed may be for any term of years, or by a fine. Imprisonment for life may not be imposed thereunder. There was no error in limiting the right of peremptory challenge to five jurors.

Error is assigned upon the admission of the testimony of Betty Kendall. When she was called the jury were excused at the request of defendant's counsel and she was interrogated as to her relation to the defendant, the claim being made that she was his wife. Defendant's counsel asked her if she knew the defendant, and she answered in the affirmative. He then asked her, "Are you his wife?" to which she answered, "No, sir." She further testified that she was then 25 years of age; that she was married in the State of Indiana to George Leader, and lived with him for three years; that her sister told her that she had read in a paper that her husband got a divorce; that she later married one Arlene Null; that "he was supposed to get a divorce, and he is married again now;" that she began living with the defendant as his mistress in Detroit in 1929; that they later went to Chicago, where they lived at a hotel under the name of Mr. and Mrs. Charles Fournier, and while living with him "we signed papers for a rooming house as husband and wife and we took each other as husband and wife at that time." She admitted that she had said to the prosecutor that she was "just living with him," and that

"He said sometime we would get married but he wouldn't say just when." We find no error in the admission of her testimony.

Jackie was but five and a half years of age at the time of his abduction, and seven and a half years old at the time of the trial. His was the only direct evidence connecting the defendant with the commission of the crime, and defendant's counsel strongly urges that it was insufficient to base a conviction upon, and that, in any event, a new trial should have been granted for this reason. His examination disclosed that he was an unusually bright boy. Before he was permitted to testify, he was examined by the court to ascertain whether he had sufficient intelligence and sense of obligation to tell the truth, as required by 3 Comp. Laws 1929, § 14222, and no objection was made by defendant's counsel to the fact that no oath or affirmation was administered to him.

There is no dispute about the fact that while Jackie was playing in front of his father's home he was kidnapped by two men, who took him some distance to a cottage for two days, and then taken by the same men to a farm, where he was kept concealed for 24 days, and then returned to his father after payment by him of the ransom agreed upon therefor. Jackie positively identified the defendant as the man who drove the car on both occasions. He also identified the car in which he was taken, and it was clearly established that the car belonged to the defendant. He was submitted to a rigid cross-examination by one of defendant's attorneys, and his testimony was not shaken as to any material fact.

His credibility and the weight to be given to his testimony were for the jury to pass upon, and also for the court on the motion for a new trial. Some children are very observant and are able to detail

with much accuracy that which they may see and hear. There were some corroborating circumstances. Lamonna as a witness admitted that he participated in the negotiations for ransom, but claimed that he had been forced to take part in them. Before his arrest, he and the defendant met and had several private conferences in New York, and they had together gone to a police officer in Detroit to intercede on behalf of James Fernando, who was then under arrest, charged with the kidnapping, and to whom the ransom had been paid. We find no error in the ruling of the court in this respect.

Error is assigned upon the admission of the testimony of Paul H. Wencel, a detective lieutenant in the city police department. He testified that after observing the actions of the defendant and Betty Kendall, heretofore referred to, he arrested the defendant, and, while riding in the rear seat of a car on the way to the police station, he asked the defendant what he was doing in the neighborhood, and he answered, "Well, I might as well tell you. I am a bootlegger. I just delivered ten cases of liquor in a garage back there;" that defendant took out his pocketbook, and offered him a $100 bill, and later increased the offer to $50 more as the car was pulling into the station. He stated that his name was Charles Mitchell.

As to his reason for making the arrest, the officer testified that he saw the two of them driving in a residence district in a car with an Illinois license on it; that he went to his home nearby, and that—

"While I was getting my cuffs, and gun and coat, they passed by in the car with the lights turned out. They went to the end of the street, and turned around again, and when they got to my place, they turned around the corner at a high rate of speed,

went south on Monica one block, and then turned east on Webb to Livernois, and then I saw them come around Tuxedo again on Livernois. That is when I called the radio car."

The actions of the defendant were such as would attract the attention of any observant police officer. He was driving at a high rate of speed in a car with a foreign license on it, and apparently going no particular place. When he first saw them, they were not in the car, were separated, and then together, and were apparently closely watching all onlookers. Under the circumstances it cannot be said that the arrest was illegal.

Error in the admission of the testimony of this witness is based upon the claim that the jury—"might have in their own minds tried him for bribery or attempted bribery and violation of the State prohibition law."

The only request relative to this testimony preferred by counsel for the defendant reads as follows:

"Testimony has been offered by the State to show that at the time of his arrest the defendant, Minchella, told the arresting officer that he had been delivering beer. I charge you that you are not to consider this matter in passing upon this case as it has no bearing whatever upon the question as to whether or not defendant was involved in the case upon trial."

It was included in the instructions as given. The court, however, added thereto:

"That fact alone, ladies and gentlemen of the jury, could not be taken by you as substantive evidence of the guilt of Minchella of the charge of kidnapping Jackie Thompson."

There is no presumption that a man who is arrested is guilty of any offense. What he may then say or do is admissible in its bearing upon the effect of the arrest upon him. An innocent man may be confused and excited and do and say things out of the ordinary, but it would be most unusual for him to attempt to bribe the officer for the purpose of securing his release. The presumption is that one who is falsely accused will rely on his consciousness of innocence, while one who is guilty will resort to other means to obtain his freedom. This effort on the part of the defendant may, or may not, have been due to his fear of arrest for the kidnapping of Jackie Thompson. He knew at that time that James Fernando, to whom the ransom had been paid, had been arrested on the kidnapping charge and that he and Lamonna had gone to a police officer, Herbert L. Hines, to intercede on his behalf, as before stated. Had the offer of the bribe been the only evidence connecting the defendant with the kidnapping, the holding in *People* v. *Pericino,* 227 Mich. 440, on which the defendant's counsel relies, would be applicable. But, as already stated, he had been identified as one of the men who abducted the boy.

In *People* v. *Higgins,* 127 Mich. 291, the defendant was convicted of the murder of one Dr. Ladd. A detective, looking for a man who was suspected of a burglary, went to the house where the defendant lived, and, seeing him standing upon the porch, recognized him as the man he wanted. When the defendant saw him, he went into the house and attempted to escape through the back door. He was captured and made certain admissions relative to the disposal by him of the articles stolen, and signed a letter referring thereto. He was afterwards tried on the charge of murder, and the testimony of what

had occurred at his home was admitted. The court said (p. 295):

"It was contended that, as the arrest had no connection with this offense, and the defendant did not know what he was arrested for, his conduct on that occasion was not admissible, and that it was not permissible to show that he had committed other offenses, and that the story was not so connected with the Ladd matter—especially as respondent testified that it was written before that occurrence—as to be admissible. We think that the learned circuit judge was commendably careful in receiving this testimony. The conduct of the defendant may or may not have been due to his fears of arrest for the Ladd matter, and the story may or may not show his knowledge of that affair. These are questions to be determined by the jury; but the circumstances were such as to make such inferences legitimate. Again, the fact that he owned and carried a 32-caliber revolver was pertinent. The testimony was none the less admissible because it necessarily involved a charge and arrest for other crimes. We think the court did not err in admitting the testimony of O'Brien, or in receiving the manuscript."

In *People* v. *Pitcher,* 15 Mich. 397, an officer went to the home of the defendant to serve a subpœna upon him. His wife told the officer that he was not at home, that he had gone to Ohio to purchase cattle. Proof was offered that the defendant was in the house at that time. It also appeared that on the next day he went to Adrian and falsely stated that he had just come in on the cars from Ohio. The court in its opinion, written by Mr. Justice CHRISTIANCY, said (p. 406):

"I see no legal objection to this testimony. It tended to show that he must have heard all that took place at his house while the officer was there; and

that he was in fear of arrest, which could ordinarily arise only from a consciousness of guilt."

In 16 C. J. p. 541, it is said:

"An offer of a bribe by accused to the arresting officer to permit him to escape does not raise a presumption of law that accused is guilty, but is only a matter from which the jury are permitted to infer a fact when taken in connection with other evidence tending to establish guilt."

No error was committed in the admission of this testimony. From a careful consideration of the entire record, we find that the defendant had a fair and impartial trial.

The judgment is affirmed.

POTTER, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred with NELSON SHARPE, C. J. NORTH and WIEST, JJ., concurred in the result.

PEOPLE *v.* SACCOIA.

1. CRIMINAL LAW—REPORTS—PSYCHOPATHIC CLINIC—SANITY COMMISSION—CONFRONTATION OF WITNESSES.

Report of psychopathic clinic or sanity commission on matter of defendant's sanity may not be introduced on his trial for murder over his objection that he be confronted with witnesses (Const. 1908, art. 2, § 19, 3 Comp. Laws 1929, § 17129).

2. SAME—ACCESS TO REPORTS OF PUBLIC BODIES.
   Psychopathic department of court and sanity commissions are public bodies and accused has right of access to their reports to obtain knowledge of their contents (3 Comp. Laws 1929, §§ 16520, 17241, as amended by Act No. 317, Pub. Acts 1931).

3. WITNESSES—CREDIBILITY—IMPEACHMENT.
   Defendant who places witness on stand vouches for his credibility and may not, ordinarily, impeach him.

4. CRIMINAL LAW—REPORTS—CROSS-EXAMINATION.
   The people have the right to have entire report of sanity commission placed before the jury on cross-examination of witness placed on stand by defendant and examined by him as to contents.

5. SAME—SPECULATIVE TESTIMONY.
   Speculative testimony of member of sanity commission as to his impression of what the mental condition of defendant might have been at a time prior to that in relation to which examination by commission was held and before doctor ever knew him *held,* properly excluded.

6. SAME—REPORTS—PSYCHOPATHIC CLINIC—SANITY COMMISSION.
   Reports of psychopathic clinic and sanity commission based upon observation of people making them, are not admissible upon the part of the people without proof of authenticity and truthfulness, requiring witness on stand for examination and subject to cross-examination.

7. SAME—ADVERSE WITNESSES—QUESTION FOR COURT.
   Whether or not member of sanity commission is an adverse witness on trial of defendant for murder is primarily a question for court to determine.

8. EVIDENCE—REPORTS—PSYCHOPATHIC CLINIC—SANITY COMMISSION.
   Exclusion of reports of psychopathic clinic and sanity commission when sought to be introduced by defendant, charged with murder, for purpose of impeaching member of sanity commission called by defendant *held,* proper, in view of holding by court that witness was not an adverse one.

Appeal from Recorder's Court for City of Detroit; Gordon (Arthur E.), J. Submitted April 12, 1934. (Docket No. 150, Calendar No. 37,163.) Decided July 2, 1934.

Antonio Saccoia was convicted of murder in the first degree. Affirmed.

Lewis J. Weitzman, for appellant.

Patrick H. O'Brien, Attorney General, *Harry S. Toy,* Prosecuting Attorney, and *Verne C. Amberson* and *Edmund E. Shepherd,* Assistants Prosecuting Attorney, for the people.

POTTER, J. At the July, 1932, term of the recorder's court for the city of Detroit, defendant was informed against, charged with the murder of Ralph DeMarte, June 28, 1932, in the city of Detroit. On arraignment July 22, 1932, defendant pleaded not guilty. October 17th, defendant withdrew his plea of not guilty and pleaded guilty and was remanded to await sentence. The cause was referred to the probation department and defendant to the psychopathic clinic. November 1, 1932, the court appointed Drs. Edward J. Agnelly, Sam J. Eder and I. L. Polozker as a sanity commission to examine into the sanity of defendant. November 9th, the sanity commission reported it found defendant sane. December 9th, defendant's plea of guilty was set aside and vacated and a plea of not guilty entered. January 18, 1933, a jury was impaneled and sworn and the trial proceeded until January 25, 1933, when the jury returned a verdict of guilty of murder in the first degree. Subsequently a motion for a new trial was made and overruled, and defendant sentenced to life imprisonment in the State prison at Jackson. He appeals, claiming the trial court erred in excluding the report of the psychopathic clinic of the recorder's court; in excluding the report of the sanity commission appointed by one of the judges of the recorder's court;

in refusing to permit appellant to cross-examine the witness Dr. I. L. Polozker, as to statements previously made and signed by him, in the reports of the psychopathic clinic and sanity commission, and in refusing to permit appellant to examine the witness Dr. Edward J. Agnelly, as to his findings concerning appellant's mental condition.

(1) It is contended the rules of evidence in civil cases are the same in criminal cases. One of the long established, firmly fixed and generally recognized exceptions is that stated in article 2, § 19 of the Constitution, which gives to defendant, on trial, the right "to be confronted with the witnesses against him," which constitutional provision is amplified by 3 Comp. Laws 1929, § 17129, which gives to defendant, on trial, the right to meet the witnesses who are produced against him face to face. Had the people sought to introduce, upon defendant's trial, the report of the psychopathic clinic or of the commission on insanity, defendant could have successfully objected to their introduction upon well-settled statutory and constitutional grounds; that he was entitled to be confronted with the witnesses against him and to meet such witnesses face to face. These constitutional and statutory provisions are not accidental. They were incorporated in the jurisprudence of this country by reason of the universal condemnation of the inquisitorial methods of the star chamber which had been in force in England.

(2) It is suggested the report of an inquisition of sanity was introduced in the trial of Earl Ferrers. 19 Howell's State Trials, 538. Defendant in that case was tried before the house of peers, in Westminster Hall in 1760. The defendant was indicted in the usual way. He pleaded not guilty. As stated by the attorney general, the prisoner had a right under the law of England, by reason of being an

Earl, to the privilege of being tried before the house of peers. Participating in this trial was Attorney General Pratt, afterward Lord Chief Justice Camden and lord chancellor of England, the solicitor general, Lord Mansfield, and Earl Hardwicke. The case did not involve the introduction or consideration of the report of an inquisition into the sanity of the prisoner, but on the contrary, upon the trial of the case witnesses were produced, examined and cross-examined in the presence of the accused in the usual way. Among the witnesses to defendant's insanity were Dr. John Monroe, Thomas Kirkland, surgeon, and Thomas Goostrey. The defense was handled substantially as the defense of insanity is made here, in the absence of psychopathic clinics and commissions on insanity. The particular thing of importance in the case is the insistence of the attorney general that the witnesses, though medical men, detail the specific things which indicated insanity, a position in which he was sustained by Earl Hardwicke. This case in no sense involves the question here.

(3) The psychopathic clinic is authorized by Act No. 369, § 3, Pub. Acts 1913; 3 Comp. Laws 1929, § 16520, which provides:

"The court shall also have power to make provision for a psychopathic department of the court and have medical and psychopathic investigations and examinations and treatment of persons coming before said court."

The psychopathic department of the court is a part of the court. Its reports are public reports, authorized by law and the defendant had a right to have access thereto and to learn their contents.

Sanity commissions are regulated by chapter 7, § 27, of the code of criminal procedure; 3 Comp.

Laws 1929, § 17241, as amended by Act No. 317, Pub. Acts 1931, which provides:

"When a person accused of any felony shall appear to be insane or shall have been acquitted upon trial upon the ground of insanity, the court, being certified by the jury or otherwise of the fact, shall carefully inquire and ascertain the issue of insanity. The court shall fix the time and place for the hearing of said issue, and shall cause notice thereof to be served on the party filing the petition or making the suggestion of insanity for or on behalf of such person or on one or more of the nearest relatives or friends of such person, if known. The court shall call two or more reputable physicians and other credible witnesses to testify at said hearing, and the prosecuting attorney to aid in the examination and if it be deemed necessary to call a jury for that purpose, is fully empowered to compel the attendance of witnesses and jurors. Such alleged insane person may be represented by counsel who may appear and take part in the proceedings, cross-examine the witnesses and produce witnesses and testimony for and on behalf of such person. If it is claimed that such person became insane after the commission of the felony with which he is charged and before or during the trial thereon, the test on the trial of such issue shall be whether such person is capable of understanding the nature and object of the proceedings against him and of comprehending his own condition in reference to such proceedings and of assisting in his defense in a rational or reasonable manner. If such person is found insane, the judge of said court shall order that he be discharged from imprisonment and that he be turned over to the sheriff for safe custody and removal to the Ionia State hospital, to which hospital such person shall be committed to remain until restored to sanity. When such person shall be restored to sanity, and that fact has been determined by the superintendent of said hospital or by any other pro-

ceeding authorized by this section, the said superintendent of said hospital shall forthwith certify that fact in writing to said judge and prosecuting attorney. The judge shall thereupon immediately require the sheriff without delay to bring such person from the said hospital and place him in proper custody until he is remanded to prison, brought to trial or judgment, as the case may be, or is legally discharged. Any person who has been committed to said hospital as herein provided shall be entitled to a writ of *habeas corpus,* upon a proper petition to the circuit court of the county in which said hospital is situated, made by him or some friend in his behalf. Upon the return of such writ, the fact of his sanity shall be inquired into and determined by the court or by a jury if it is deemed necessary by the court to call a jury for that purpose. If any such person be sent to said hospital, the county from which he is sent shall defray all expenses of such person while at the hospital for a period of two years, and the expense of returning home to such county if his discharge is effected during such period. If he shall not be discharged from said hospital until after his transfer to the State shall have been effected in the manner provided by law, the expenses of his return to said county shall be paid by the State of Michigan. The county or State may recover the amount so paid from such person's own estate, if he have any, or from any relative, town, city or county that would have been bound under existing laws to provide for and maintain him elsewhere."

This too is a body authorized by statute to be created by the court to aid it in the performance of its public functions. It is a public body and its reports are public reports to which defendant was entitled to access in order to obtain knowledge of their contents.

(4) When Dr. Polozker was on the witness stand for defendant, defendant offered in evidence the re-

port of the psychopathic clinic and of the sanity commission. These were objected to by the prosecuting attorney and the jury excused. During a following colloquy between court and counsel, it does not appear defendant's counsel contended these reports were independently relevant, but claimed that if the doctor deviated in his testimony from his statement made in the reports, defendant had a right to cross-examine, and if upon cross-examination Dr. Polozker took a view different from that stated in the reports, he might be cross-examined on the reports for the purpose of impeachment. The court suggested the reports were made after defendant had pleaded guilty and if the reports were introduced in evidence that fact would be before the jury. Counsel for the respective parties conceded they did not want that part of the reports which indicated the sanity commission was appointed after defendant's plea of guilty and its recommendation that he be confined to the penitentiary introduced. This colloquy finally concluded with a suggestion by the court, "Let the doctor tell what he thinks." No ruling was made. The jury was then brought back. The doctor was upon the stand. He was refreshing his recollection by reading to the jury from the report of the sanity commission, when his testimony was objected to and the court again excused the jury. The court said:

"It was agreed these exhibits would not be offered, and all that has been done so far is to read in the record, and to the jury what was written on the piece of paper."

Considerable colloquy followed. It does not appear the jury was again recalled while this witness was upon the stand. The trial court said:

"There isn't any doubt in my mind but that counsel for defendant may offer and examine any

psychiatrist who has examined this defendant, and examine him as to the course of the examination and as to the conclusions. What I object to is the proposition of the use of these reports in such a way they will be brought before the jury. I am not so sure, however, that this Dr. Maloney, if he deviates from that report, he might not be asked if he did not state so and so in the report. I will say I don't like the proposition of bringing in the officers of the court here to defend one of them. It has been agreed by defense counsel these reports are not to be presented to the jury. I suggest that you let the doctor read the report before he takes the stand to familiarize himself, and in that event he, or they will follow pretty closely the statements made in those reports. Until you show me further law, I am not going to permit you to cross-examine as to the reports, and what they said in the reports which are the confidential reports of this court."

If, as suggested by the trial court, it was agreed between counsel for the respective parties these reports were not to be introduced in evidence, there was no error in excluding them. Whether the court was correct or not it does appear to have been agreed upon by counsel for the respective parties the reports were not to be placed before the jury in their entirety. This agreement was made because the sanity commission's report had been made after a plea of guilty by defendant, and recommended he be imprisoned. Counsel for defendant did not want these facts before the jury. Defendant placed the doctor on the stand. He vouched for his credibility. He could not, ordinarily, impeach his own witness. If the witness was examined at all by defendant in relation to the contents of the report of the sanity commission it is well settled the people had a right on cross-examination to have the entire document placed before the jury. Criminal cases should not

be tried piecemeal. The entire case must be tried and submitted to the jury. The court is interested only in the application of the law to the concrete facts.

(5) Dr. Edward J. Agnelly was on the stand as a witness for defendant. He did not claim to be an expert on mental diseases. He narrated no facts indicating mental incompetency on the part of defendant. On the contrary, when pressed for an opinion, he states he thought defendant was normal mentally at the time he made the examination. The only question about his testimony is the refusal of the court to permit the witness to testify to impressions the witness might have had as to what the mental condition of defendant might have been at a time prior to that in relation to which he was being examined by the members of the sanity commission and before the doctor ever knew him.

This was merely adding conjecture to conjecture and we find no error in the refusal of the court to permit further speculation along this line.

(6) These reports were not admissible upon the part of the people. They could not have been offered in evidence by the prosecuting attorney and received against defendant's objection without proof of their authenticity and truthfulness. The facts contained in such reports were facts based upon observation by the persons who made them, capable of being established by oral testimony. Before such records could have been introduced by the people it would have been necessary to prove their authenticity and accuracy by a witness upon the stand for examination and subject to cross-examination. *People* v. *Dow,* 64 Mich. 717 (8 Am. St. Rep. 873).

There is nothing in *Rice* v. *Rice,* 50 Mich. 448; *Chase* v. *Spencer,* 150 Mich. 99, and *Massachusetts Mutual Life Ins. Co.* v. *Trustees of Michigan Asylum*

for the Insane, 178 Mich. 193 (51 L. R. A. [N. S.] 22, Ann. Cas. 1915 D, 146), all civil cases, which militates against this holding.

(7) Dr. Polozker was called by defendant who claims he had a right to introduce the report and cross-examine Dr. Polozker as an adverse witness. Whether the doctor was an adverse witness or not was primarily for the court. We think it was correct in holding the witness was not an adverse witness, and defendant did not have a right to contradict him by introducing the reports of the psychopathic clinic and of the sanity commission for that purpose. There is nothing to take the case out of the general rule that one who calls a witness ordinarily vouches for his credibility. Had these witnesses been called by the people, defendant would have had the right of cross-examination, and the right to introduce in evidence the prior statements signed by the witnesses for the purpose of contradiction. This was not the case here. On the contrary it was agreed between counsel for defendant and the prosecuting attorney these reports were not to be introduced in their entirety in evidence, but parts of them were to be kept from the jury. We find no error. Conviction affirmed.

NELSON SHARPE, C. J., and NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

GRODZICKI *v.* REVERE COPPER & BRASS, INC.

1. MASTER AND SERVANT—DURATION OF COMPENSATION—TOTAL DISABILITY.

   Employee is entitled to compensation for period of not more than 500 weeks from date of injury rather than 500 weeks from commencement of total disability which took place about six months later (2 Comp. Laws 1929, § 8425).*

2. SAME—WEIGHT OF EVIDENCE—BLINDNESS.

   Award to employee for blindness alleged to have been caused by injury to eye, sustained by some evidence, is affirmed on appeal in the nature of certiorari although weight of evidence is decidedly against finding for plaintiff.

Appeal from Department of Labor and Industry. Submitted April 4, 1934. (Docket No. 20, Calendar No. 37,591.) Decided July 2, 1934.

Andrew Grodzicki presented his claim against Revere Copper & Brass, Incorporated, for accidental injuries sustained while in defendant's employ. Award to plaintiff is reviewed by defendant by appeal in the nature of certiorari. Affirmed.

William A. Rhodes (*Daniel P. O'Brien,* of counsel), for plaintiff.

Clark, Klein, Ferris & Cook, for defendant.

POTTER, J. Certiorari by defendant to the department of labor and industry. Plaintiff filed a claim against defendant for injury to his eye while employed by defendant. He claimed that while in defendant's employ he was operating a grinder in its plant and, August 15, 1930, a piece of brass got in his eye and as a result thereof he became blind.

* This paragraph of the syllabi is written in view of the court order that the judgment be modified in accordance with opinion of POTTER, J.—REPORTER.

He claims, at the time of the injury, he reported it to one Stanley Adamcjyk in charge, in the absence of the foreman, but who was unable to remove the piece of brass from plaintiff's eye and sent him to one Pete Gora who removed the piece of brass; that plaintiff later informed his foreman, Paul Matusik. The blindness of plaintiff is admitted. The important question is whether there is proof of causal connection between the injury and petitioner's blindness. The department found that while they could not positively say the injury caused the blindness, there was sufficient evidence to justify the finding of the deputy commissioner that it did. Appellant claims there is no testimony to support plaintiff's claim; if there was testimony, the award made was too much, and if the testimony and the award are correct, the amount awarded did not begin to run at the right time. There is proof plaintiff was an employee of defendant, getting 55 cents an hour and, at the time of the injury, was operating a grinder, in defendant's plant; that plaintiff got a piece of brass in his eye; reported it to the acting foreman who sent him to a fellow workman who removed the piece; that he reported his injury to the foreman; that he told a nurse employed by defendant what had happened; that after the injury plaintiff had a burning feeling in his eye for about three months, and after about six months could not see from either eye; that before his injury he could see all right, but after the injury tears came into his eye and he could not see; that the assistant foreman of defendant took him off the work on the grinder and put him at work in the shipping room; that plaintiff did not stop working. Later when an examination was made of workmen it was discovered plaintiff could not see and he was discharged. It

is conceded he has no useful vision. After plaintiff became blind he went with his brother-in-law to defendant who gave the brother-in-law work so plaintiff could be supported. There is some dispute as to what hours plaintiff worked, but in response to questions by the deputy commissioner he testified he went to work at seven o'clock in the morning and worked until five o'clock at night, and worked that way for four years.

Plaintiff was treated by one Millbrand, a physician at Croswell for some months. Eventually he went to Eloise hospital and at the time of the hearing was a public patient. There is, we think, sufficient testimony to justify the finding of the deputy commissioner. Dr. James testified the condition of blindness could have resulted from the injury and that such injury undoubtedly set up a low inflammation which affected both eyes. A cross-examination did not vary this testimony. Dr. William Evans was sworn by defendant who interpreted certain X-ray films. Dr. Pino, a physician employed by defendant, testified to plaintiff's blindness, said such blindness might result from certain conditions other than the injury but he did not testify as to the existence of any of these conditions. Dr. Parker Heath, who never saw plaintiff, also testified that many causes, none of which are shown to have existed, might have caused blindness. Dr. Gurdjian testified the plaintiff might have conjunctivitis or an infection of the eye and that there was a remote possibility only that it might have resulted from the injury; and he testified quite fully as to the manner in which a piece of brass, if it got into plaintiff's eye, might have traveled as a foreign body in various places in the eye. The substance of all the testimony is that the injury which plaintiff complained of might have

caused the injury, and there is no testimony it resulted from anything else. This was sufficient to warrant the finding made when considered in connection with the conditions testified to by plaintiff. Plaintiff's testimony indicated he worked nine hours a day, allowing an hour for noon; that he received 55 cents an hour; if he did, 66⅔ of his weekly wage would be $19.80 and would warrant the finding of the department of $18 a week.

Plaintiff was injured August 15, 1930. February 23, 1931, it was discovered he was blind, at which time he was discharged. The department of labor and industry awarded compensation for total disability for 500 weeks from February 23, 1931. The statute provides:

"In no case shall the period covered by such compensation be greater than 500 weeks from the date of injury." 2 Comp. Laws 1929, § 8425.

If the award of total disability begins from the date of injury, then plaintiff would be awarded compensation for a period when he was not totally disabled and when he was working and earning wages, and if we should deduct the wages earned by plaintiff from the date of injury to the date of total disability from the award, plaintiff would not be entitled to anything for such intervening period because his average weekly wages during the period of employment exceeded the compensation awarded by the commission. If he had made a claim of partial disability and been awarded compensation from the date of injury to the date of blindness, defendants, we have held, would not be entitled to claim credit for such payments. *Stammers* v. *Banner Coal Co.*, 214 Mich. 215. Under the statute as it stood prior to Act No. 64, Pub. Acts 1919, plaintiff would have

been entitled to compensation for a full 500 weeks. 2 Comp. Laws 1915, § 5439. But in *Lakso* v. *Munro Iron Mining Co.*, 243 Mich. 261, in commenting upon the prior statute and Act No. 64, Pub. Acts 1919, it is said:

"The amendment increases the maximum amount to be paid for all compensation and provides that the 500 weeks' period shall begin from the date of the injury."

The award of the department of labor and industry will be modified so the 500 weeks will begin to run from the date of injury, and as so modified, will be affirmed.

NELSON SHARPE, C. J., and NORTH, J., concurred with POTTER, J.

WIEST, J. (*concurring.*) Under the rulings regulating review by certiorari I am constrained to join in affirmance of the award.

I think the weight of evidence decidedly against plaintiff, but the board held otherwise and, as there was some evidence, though weak, in support of the finding, I am barred from holding in accord with the great weight of the evidence.

FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred with WIEST, J.

VILLAGE OF CLAWSON *v.* VAN WAGONER.

1. ESTOPPEL—MUNICIPAL CORPORATIONS—APPORTIONMENT OF DRAIN ASSESSMENT.

   Village *held*, estopped from claiming want of notice and irregularities in drain apportionment proceedings where it had actual notice of them and allowed incurring of expense of construction without pursuing remedy of certiorari then open to it, especially since the village was a moving party in furthering the project constructed in part to care for its particular needs and which, as constructed, saves it over twice the amount of assessment (Act No. 331, Pub. Acts 1927).

2. DRAINS—JURISDICTION—BURDEN OF PROOF—SEWERS.

   Burden of proving lack of jurisdiction of drain commissioner *held*, not shown where major purpose of project is that of draining open country and while characteristics of a sewer are present in a portion of it, village is not permitted to run raw sewage into it.

3. EVIDENCE—PUBLIC OFFICERS—DRAINS.

   Public officers are presumed to act in accordance with the law, so where proceedings designating project as drain are conducted by proper drain officers under the drain law, it will be assumed project is a drain until the contrary is shown.

Appeal from Oakland; Covert (Frank L.), J. Submitted May 5, 1934. (Docket No. 168, Calendar No. 37,614.) Decided July 2, 1934.

Bill by Village of Clawson, a municipal corporation, against Murray D. Van Wagoner, Oakland county drain commissioner, Albert W. Willson, Oakland county treasurer, and Board of County Auditors of Oakland county, to enjoin enforcement of an assessment for drain taxes. Decree for plaintiff. Defendants appeal. Reversed, and bill dismissed.

Arthur E. Moore, for plaintiff.

Arthur P. Bogue, Prosecuting Attorney, and *Robert D. Heitsch,* Assistant Prosecuting Attorney, for defendants.

FEAD, J. Plaintiff filed bill and had decree restraining enforcement of an assessment against it for drain taxes.

Petition for the drain was filed in 1925. At that time a village could not be assessed as a unit for drain benefits.

Plaintiff village commissioners and officers individually signed petitions for laying out the district and locating the drain at bar; by resolutions in January and June, 1927, the village commission formally urged construction of the drain; on July 8th the village released right of way in a street for it. By Act No. 331, Pub. Acts 1927 (see 1 Comp. Laws 1929, § 4862 *et seq.*), effective September 5th, a village could be assessed at large for drain benefits. On September 15th the drain commissioner entered notice of letting contracts and of review of apportionment of benefits; notices of the review were published but made no reference to the village; and no notice was served on the village president as required by the act. On September 15th, also, the drain commissioner entered in his office the statutory order as to the number of instalments and the issue of bonds. It shows the apportionment of benefits to plaintiff at 10 per cent. of the cost. The bond form was approved by the treasurer and probate judge.

The village manager of plaintiff and a commissioner attended the hearing on apportionment, learned that the village had been charged with 10 per cent. of the cost, reported the fact to the village

commission, and the manager solicited the drain commissioner to reduce the apportionment. He knew how to make application for review but did not do so as the village wanted the drain constructed because it would save it a large sum of money in the disposal of sewage.

Afterwards a determination of costs was made and the contract for construction let. A village engineer did preliminary work and the drain commissioner paid the village for it. The engineer who designed the drain worked under the orders of the official village engineer. No objection to the project was made by the village and it paid to the township, February, 1929, $5,019 to reimburse it for amounts it had paid on the assessment. Plaintiff claims the apportionment and assessment against it are void for want of notice and irregularities in not naming it in all the proceedings and because the proceeding had been commenced before it could be assessed for benefits.

Plaintiff, having had actual notice of all the apportionment proceedings against it, should promptly have pursued the remedy of certiorari for the matters now claimed (*Strack* v. *Miller,* 134 Mich. 311; *Township of Clarence* v. *Dickinson,* 151 Mich. 270; *Auditor General* v. *Union Lake Land Co.,* 239 Mich. 437), and, having stood by and seen the drain constructed and the expense incurred without pursuing such remedy, it is estopped from complaining of them (*Moore* v. *McIntyre,* 110 Mich. 237; *Hall* v. *Slaybaugh,* 69 Mich. 484; *Township of Walker* v. *Thomas,* 123 Mich. 290; *Wilson* v. *Woolman,* 133 Mich. 350). It may be said that the facts present a particularly strong case of estoppel because the village was a moving and insistent party in furthering the project, part of the drain was constructed to care for its particular needs, the drain saves the village over twice the amount of the assessment against

it and its complaint of statutory irregularities is purely technical in the light of its actual knowledge.

Assuming it is open, the serious question is whether the whole proceeding was void for lack of jurisdiction on the ground that the project is a sewer and not a drain. It runs along the easterly boundary of the village about 2,000 feet and then 7,000 feet to a natural watercourse, which had been improved and is called the Red Run Drain. It is constructed of reinforced concrete, has a diameter of 7.6 feet at the outlet, 3 feet at the upper end, is covered, and its greatest depth is 17.5 feet. It has manholes, catch basins, junctions, chambers and basins. It can take care of surface water. It is so constructed that it can carry raw sewage. Stubs for house connections in the village were installed about 20 feet apart. Connections have been made in the village but the sewage must first pass through septic tanks. The village surface water had been satisfactorily cared for by open ditches. The principal concern of the village in the drain was in disposal of its sewage. Obviously the thing has many of the characteristics of a sewer, as indicated in *Clinton* v. *Spencer,* 250 Mich. 135; *Township of Lake* v. *Millar,* 257 Mich. 135; *Kinner* v. *Spencer,* 257 Mich. 142, and of a drain, *Hankinson* v. *Deake,* 265 Mich. 1.

If the drain had been built merely to serve the purpose of the village, probably the facts would preponderate in designating it as a sewer. But, as measured by the cost, 90 per cent. of it, or, as measured by length, nearly fourth-fifths of it serves other territory, including two townships. Except that there are some eighty houses in the district outside of plaintiff village, we are not told of the conditions in such territory. The evidence was confined almost wholly to the village. The fact that the village is not permitted to run raw sewage into the drain, that

it leads to a natural watercourse, and that most of it serves open country, would raise strong inferences that the major purpose of the project is drainage. The fact that a small part of it has joint drainage and sewage functions would not establish the character of the whole project as a sewer.

It is a presumption that public officers act in accordance with the law. The proceedings designated the project as a drain and were conducted by the proper drain officers under the drain law. It must be assumed, then, until the contrary is shown, that the project is a drain. Want of jurisdiction must be affirmatively proved. We do not think plaintiff has sustained the burden of proof.

Decree reversed and bill dismissed.

NELSON SHARPE, C. J., and POTTER, NORTH, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred with FEAD, J.

WIEST, J. (*concurring.*) I concur in reversal on the ground of estoppel.

McGUIRE *v.* ARMSTRONG.

1. MOTOR VEHICLES—EVIDENCE—JUDGMENT NON OBSTANTE VEREDICTO—PASSENGERS.

   Testimony that deceased wife was patient of township instead of county, given at hearing on motion for judgment *non obstante veredicto* after entry of judgment for plaintiff in action

by husband against county nurse in her individual capacity for loss of wife's services due to injuries received while a passenger as indigent patient in defendant's car *held,* improper at such hearing.

2. SAME—PASSENGER—CONSIDERATION FROM THIRD PARTY.
Recovery may be had for injuries sustained by passenger as a result of ordinary negligence when a third party compensates defendant for transporting his passenger, the test being whether transportation was furnished gratuitously (1 Comp. Laws 1929, § 4648).

3. SAME—TRANSPORTATION OF INDIGENT PATIENTS—COUNTY NURSE.
Transportation of indigent patients to clinics by county nurse *held,* within the scope of her duties as county nurse for which she was paid by county and not by patient or her husband, so as to render nurse liable for injuries to patient received as result of ordinary negligence (1 Comp. Laws 1929, § 4648).

4. SAME—GUEST.
The word "guest" as used in motor vehicle guest act connotes both a social relationship and the existence of a host (1 Comp. Laws 1929, § 4648).

Appeal from Kent; Verdier (Leonard D.), J. Submitted April 5, 1934. (Docket No. 28, Calendar No. 37,427.) Decided July 2, 1934.

Case by Con McGuire against Anna Armstrong for loss of services of wife who died as a result of personal injuries received while a passenger in defendant's automobile. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Cornelius Hoffius (*R. Van Kovering,* of counsel), for plaintiff.

Arthur F. Shaw, for defendant.

BUSHNELL, J. Plaintiff recovered a judgment of $1,000 against defendant, a nurse employed by Kent

county, for the loss of his wife's services. The sole question presented by the appeal is whether deceased was a guest passenger in the automobile driven by defendant. The deceased, who was being treated for cataracts on her eyes, had made four previous trips with the defendant for this purpose. There is some immaterial dispute as to whether plaintiff's wife was a county or township patient, but, in any event, she was being taken by the county nurse to Grand Rapids for the purpose of having glasses fitted for her eyes, and neither she nor her husband was paying for the treatment or transportation.

The morning of the accident, the nurse had five passengers in her car, and Mrs. McGuire was in the front seat. The fog had just lifted and there was a bright sun blinding Mrs. Armstrong's vision. Her knowledge of the head-on collision, which resulted in Mrs. McGuire's death a few hours later, is limited to the following testimony:

"I thought I was on my own side of the road. I always aim to drive on that side and the first thing I saw was this car loomed up right in front of me and that is all I know."

Did the trial court err in holding that Mrs. McGuire was not a guest passenger of either the county or its employee, Mrs. Armstrong? The so-called guest statute, 1 Comp. Laws 1929, § 4648, reads, in part:

"Provided, however, that no person, transported by the owner or operator of a motor vehicle *as his guest without payment for such transportation* shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been

caused by the gross negligence or wilful and wanton misconduct of the owner or operator of such motor vehicle and unless such gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought."

At the trial, no testimony was offered by the defendant and plaintiff's witnesses were not subjected to cross-examination. Eighteen days after the entry of the judgment on the jury's verdict, on the hearing of a motion for entry of judgment *non obstante veredicto,* defendant attempted to show that the transportation was furnished by the county as a convenience to the township, and the claim was then made that the deceased was the patient of the township. This testimony was not proper on the hearing of the motion.

Appellant's brief cites only one case, *Morgan* v. *Tourangeau,* 259 Mich. 598, in support of her contention that since Mrs. McGuire was being transported without payment, she must necessarily have been a guest. That case held that plaintiff was a gratuitous passenger, even though she was permitted to buy some gasoline during the course of a pleasure trip. The language of the statute does not emphasize the necessity of payment by the passenger himself, but rather the question is, Was the transportation furnished gratuitously? There is ample authority for allowing a recovery for ordinary negligence when a third party compensates the defendant for transporting his passenger.

In *Dahl* v. *Moore,* 161 Wash. 503 (297 Pac. 218), defendant was employed by a realty company to sell real estate. Prospects were furnished with transportation tickets and were driven by the defendant to view the property. If a sale was made, the company paid a commission. Otherwise, the defendant

only received reimbursement for her expenditures for gas and oil. The court refused to find that a prospect was a guest under such an arrangement.

See, also, *Sullivan* v. *Richardson,* 119 Cal. App. 367 (6 Pac. [2d] 567).

A school pupil, transported to school in a special bus provided for that purpose under contract with the bus driver, was held not to be a guest in *Smith* v. *Fall River Joint Union High School Dist.,* 118 Cal. App. 673 (5 Pac. [2d] 930). After a discussion of the reasons for the enactment of the guest statute, the court held:

"We do not believe * * * that it was ever the intent of the legislature, in a case where the driver received compensation for the passenger, that the latter should be classed as a 'guest' where the result would be the deprivation of the right to recover upon the ground of ordinary negligence."

The consideration need not pass from the passenger to the driver. If the driver receives a direct benefit from another, the service is not gratuitous and there is no guest relationship. Mrs. Armstrong admitted that it was her duty as a county nurse to bring patients to various clinics in Grand Rapids. It is reasonable to infer that the transportation of such passengers as the deceased was within the course of defendant's employment. From the testimony, it seems that it was within the scope of the county's duties to provide medical services for the indigent. Transportation was furnished by the county for that purpose and defendant, at the time of the accident, was engaged in the performance of one of the duties for which she was paid.

In addition to our own case of *Caswell* v. *Railroad Co.,* 263 Mich. 18, and *Kruy* v. *Smith,* 108 Conn. 628

(144 Atl. 304), cited by appellee, we have also examined the following guest cases, which we tabulate as a matter of information.

The plaintiff was held to be a guest where he was a passenger solely for the purpose of showing the defendant the way to his destination, in *Master* v. *Horowitz,* 237 App. Div. 237 (261 N. Y. Supp. 722), but, see *contra, Lyttle* v. *Monto,* 248 Mass. 340 (142 N. E. 795); and a patient riding in a private ambulance without payment therefor was determined to be a guest in *Leete* v. *Griswold Post, American Legion,* 114 Conn. 400 (158 Atl. 919).

Passengers were held not to be guests in the following cases: farm employee driven to work by employer, *Russell* v. *Parlee,* 115 Conn. 687 (163 Atl. 404); servant being driven by employer to buy shoes for use in employment, *Knutson* v. *Lurie,* 217 Iowa, 192 (251 N. W. 147); nurse riding with patient, *Hart* v. *Hogan,* 173 Wash. 598 (24 Pac. [2d] 99); one to whom a car was being demonstrated, *Crawford* v. *Foster,* 110 Cal. App. 81 (293 Pac. 841), and *Bookhart* v. *Greenlease-Lied Motor Co.,* 215 Iowa, 8 (244 N. W. 721); one gratuitously helping to deliver goods, *Jackson* v. *Queen,* 257 Mass. 515 (154 N. E. 78); skilled driver accompanying novice for benefit of novice, *Semons* v. *Towns,* 285 Mass. 96 (188 N. E. 605); prospective employee looking over a paper route, *Sumner* v. *Edmunds,* 130 Cal. App. 770 (21 Pac. [2d] 159); a child forced to ride in car against her will, *Kastel* v. *Stieber* (Cal. App.), 297 Pac. 932.

The reasoning of the case of *Loftus* v. *Pelletier,* 223 Mass. 63 (111 N. E. 712), is helpful. Plaintiff, a district nurse, was injured while being driven to the home of a patient by Dr. Pelletier. The nurse was employed by a charitable organization to attend indigent patients, and it was a common thing for doc-

tors to drive nurses to such cases when making calls, it being the nurse's duty to accompany the doctor upon his request. In holding plaintiff was not a guest, the court said:

"These two pieces of testimony taken together warranted a finding that a right to be transported to the patient was an implied term of the plaintiff's contract of employment when the patient lived two miles out of town, and that under that contract the plaintiff was bound to accept the doctor's automobile as the method of that transportation when it was offered to her. From these findings it followed or at least could have been inferred that at the time of the accident the plaintiff was being carried under her contract of employment, that is to say, that she was being carried by the defendant for hire."

In the instant case, the transportation offered the deceased was adopted by her under the direction of the county which had assumed charge of her case. The word "guest" connotes both a social relationship and the existence of a host. Neither situation is present in this case. Mrs. McGuire was not a guest and the judgment is affirmed, with costs to appellee.

NELSON SHARPE, C. J., and POTTER, FEAD, BUTZEL, and EDWARD M. SHARPE, JJ., concurred with BUSHNELL, J. NORTH and WIEST, JJ., concurred in the result.

REX *v.* VILLAGE OF LOCHMOOR.

1. MUNICIPAL CORPORATIONS—SIDEWALKS—GUARD RAILS.
   A village is not an insurer of its sidewalks but must maintain them in a reasonably safe condition for travel and may also be liable for failure to maintain guard rail to protect pedestrians (1 Comp. Laws 1929, § 4223).

2. SAME—NEGLIGENCE—SIDEWALKS—MAINTENANCE—GUARD RAILS.
   Jury could reasonably find negligence on part of village in maintaining slippery sidewalk sloping downwardly to low ground and toward a precipitous drop to water with no guard rail to protect pedestrians for a period of more than 30 days, it being a jury question where reasonable and prudent men may fairly disagree upon how duty of maintenance by village shall be performed, including the question of whether or not guard rails should have been maintained.

3. BRIDGES—SIDEWALKS—TOWNSHIPS—VILLAGES.
   Sidewalk constructed in accordance with village powers and duties as prescribed by charter *held*, a sidewalk in fact and law and not a part of approach proper to bridge built and maintained by township, so as to render village liable for death of nine-year old boy from drowning through its failure to maintain sidewalk in safe condition for pedestrians (1 Comp. Laws 1929, § 4545).

Appeal from Wayne; Webster (Clyde I.), J. Submitted April 24, 1934. (Docket No. 143, Calendar No. 37,770.) Decided July 2, 1934.

Case by Orvial O. Rex, administrator of the estate of Wilbur Sherman Rex, deceased, against Village of Lochmoor, a municipal corporation, for death of plaintiff's decedent from drowning alleged to have been due to negligence of village in maintaining sidewalk. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Anderson, Wilcox, Lacy & Lawson (*Earl L. Shimer,* of counsel), for plaintiff.

Colby, Berns & Costello, for defendant.

FEAD, J. Plaintiff had judgment for negligent injuries to Wilbur Rex, nine years old, resulting in his death by drowning. The question is upon the duty of defendant to maintain a sidewalk in a reasonably safe condition for public travel and to provide guard rails at the approach to a bridge.

The bridge was built by the township but is within the corporate limits of defendant village. Some 60 feet away the road between the sidewalks is wider than the bridge and the sidewalk in question curves in to meet the bridge; 25 feet away the sidewalk begins to narrow from 6 feet wide and reduces to 3 feet 6 inches wide at the bridge. The sidewalk is of cement but it is claimed it was rough and broken close to the bridge and was covered with wet clay and dirt in places so that the edge of the walk could not be seen. It is said it had been so covered for more than 30 days prior to the injury.

A cement wing or retaining wall extended diagonally away from near the end of the bridge. The top of the wall was 5 feet from the water and 16 inches below the sidewalk. Between the wing and sidewalk the ground was low and covered with weeds. The sidewalk sloped downwardly toward the low ground, the outer edge being lower than the inner.

It is claimed that while Wilbur and two other children were going to the school playground, Wilbur slipped on the clay on the sidewalk a short distance from the bridge proper, was thrown into the river and drowned. The photographs demonstrate that a person, slipping at the place it is said Wilbur

began to fall, easily could be precipitated into the water.

It is true that a village is not an insurer of its sidewalks but it must maintain them in a reasonably safe condition for travel. 1 Comp. Laws 1929, § 4223. In cases where reasonable and prudent men may fairly disagree upon how the duty shall be performed, the question is for the jury. With a slippery sidewalk sloping downwardly to low ground and toward a precipitous drop to water and no guard rail to protect a pedestrian, a jury reasonably could find negligence. *Navarre* v. *City of Benton Harbor,* 126 Mich. 618.

It is contended it was the duty of the township to maintain the bridge itself and the approaches. 1 Comp. Laws 1929, § 4545; *Shaw* v. *Township of Saline,* 113 Mich. 342. But, by the charter of the village, it had the control of and duty to maintain sidewalks. The sidewalk was constructed in accordance with village powers and duties, was a sidewalk in fact and in law, and was not a part of the approach proper to the bridge. *Saunders* v. *Township of Gun Plains,* 76 Mich. 182. Even though the township might have been liable for the failure to maintain guard rails, in case of accident resulting from the use of the road, the village, in assuming control of part of it by the construction of a sidewalk, must also maintain that part so controlled in a reasonably safe condition and may also be liable for the failure to maintain guard rails to protect pedestrians. Whether a guard rail should have been maintained presented a question for the jury. *Shaw* v. *Township of Saline, supra.*

Judgment affirmed, with costs.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred. BUSHNELL, J., did not sit.

ROWE *v.* CONSUMERS POWER CO.

MASTER AND SERVANT—STATUTE OF LIMITATIONS—SUBSEQUENTLY APPEARING DISABILITY.

Two-year statute of limitations has no application to proceedings for compensation for subsequently appearing disability where actual disability developed within six months after the accident and compensation was awarded, as all subsequent proceedings for compensation for developments of same injury are administrative of, or incidental or supplemental to, the original award, the department of labor and industry having authority to review payments from time to time (2 Comp. Laws 1929, § 8431).

Appeal from Department of Labor and Industry. Submitted April 5, 1934. (Docket No. 57, Calendar No. 37,590.) Decided July 2, 1934.

Earl Rowe presented his claim against Consumers Power Company, a corporation, for accidental injuries sustained while in defendant's employ. On petition for further compensation. Defendant reviews award to plaintiff by appeal in the nature of certiorari. Affirmed.

Linsey, Shivel & Phelps, for plaintiff.

Arthur J. Paul, for defendant.

FEAD, J. This is certiorari to review an award of the department of labor and industry granting plaintiff specific compensation for 100 weeks for loss of an eye. The question is whether the claim is barred by the statute of limitations, 2 Comp. Laws 1929, § 8431, which provides that claim for compen-

sation shall be made within six months after an accident:

"Provided, however, That in all cases in which the employer has been given notice of the injury, or has notice or knowledge of the same within three months after the happening thereof, but the actual injury, disability or incapacity does not develop or make itself apparent within six months after the happening of the accident, but does develop and make itself apparent at some date subsequent to six months after the happening of the same, claim for compensation may be made within three months after the actual injury, disability or incapacity develops or makes itself apparent to the injured employee, but no such claim shall be valid or effectual for any purpose unless made within two years from the date the accidental personal injury was sustained."

Plaintiff was injured January 20, 1927, and, on approved agreement, was paid compensation until he returned to work for defendant in May, 1928. He continued in defendant's employ until June 19, 1931, when he quit working. April 28, 1931, he had filed petition for further compensation, which was denied by the deputy commissioner on July 13th. The commissioner held that plaintiff was physically able to do the work he had been doing at the time of his injury. No appeal was taken from the award.

Plaintiff was paid wages by defendant and treated by its doctor from June, 1931, to April, 1932. May 25, 1932, he filed a second petition for further compensation alleging, among other disabilities, the "left eye has been covered and is lost for all practical uses." Defendant pleaded several defenses, including that the claim for loss of an eye was not made within the statutory time. The deputy commissioner denied the petition and, on appeal to the

full board, the award was affirmed. The board held that the eye difficulty could be corrected by glasses.

June 30, 1933, plaintiff filed the instant petition for further compensation, claiming total disability and specific loss of an eye. The deputy awarded compensation for total disability. The board on appeal modified the award to allow specific compensation for loss of an eye. It is undisputed the loss of eye developed more than two years after the accident.

Counsel for defendant rely on *Millaley* v. *City of Grand Rapids,* 231 Mich. 10; *Hayes* v. *Boutell,* 253 Mich. 628. In both cases the disability developed and became apparent within the initial six-months' period, compensation was paid for a time, the employee later resumed his employment and continued to work for several years and to the time of his death without claim of disability. It was held that his widow's claim of compensation for his death was barred by the statute.

Counsel for plaintiff cite *Hovey* v. *General Construction Co.,* 242 Mich. 84, in which the disability developed within six months, compensation was paid to the employee continuously to the time of his death, and it was held the widow's claim for the balance of compensation (2 Comp. Laws 1929, § 8428) was not barred by the statute. See, also, *Greene* v. *City of Ann Arbor,* 242 Mich. 452.

The evident distinction is that where disability is actual and apparent within six months after the accident and continues to the time of death, death is merely a phase or climax of the disability and is not a separate "injury, disability or incapacity" within the meaning of the statute. But where incapacity to labor has ceased, the employee has become able to resume his employment and has con-

tinued able to work to the time of death, death from the injury is a new and different disability or incapacity from that on which compensation to the employee was based.

The above cases have no application to the situation before us. At bar, actual disability developed within six months after the accident and compensation was awarded. All subsequent proceedings for compensation are administrative of, or incidental or supplemental to, the original award. The department has authority to review payments from time to time and the statute of limitations is not applicable to proceedings therefor. *Gallup* v. *Western Board & Paper Co.*, 252 Mich. 68. The reason for such power is that the original injury may be cured, ameliorated or aggravated. The employee may be able to resume work at times and have recurrences of disability. The department is given the power to take into consideration the existing conditions and withhold or award compensation accordingly. We think that where a compensable injury makes itself apparent within six months after the accident, the two-year statute of limitations has no application to compensation to the employee for any developments of the same injury which may occur thereafter. If this were not so, an employee already receiving compensation would be required to make claim of complications developing after six months on penalty of loss of compensation for disability arising out of such complications.

Affirmed.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

MARMAN *v.* DETROIT EDISON CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PERSONAL INJURY.

   The term "personal injury," as used in workmen's compensation act, contemplates some intervention which either produces a direct injury or so operates upon an existing physical condition as to cause an injurious result, reasonably traceable thereto (2 Comp. Laws 1929, § 8417).

2. SAME—BURDEN OF PROOF—DEATH DUE TO ACCIDENT.

   The burden is upon those claiming compensation under workmen's compensation act to show that death of employee due to congenital *status lymphaticus* was precipitated by accident (2 Comp. Laws 1929, § 8417).

3. SAME—DEPARTMENT OF LABOR AND INDUSTRY—FINDING OF DEATH DUE TO ACCIDENT.

   It is duty of department of labor and industry in making finding that death of employee was due to accident, to designate the accident and make a finding of personal injury therefrom (2 Comp. Laws 1929, § 8417).

4. SAME—REASONABLE INFERENCES—POSSIBILITY.

   Department of labor and industry may draw reasonable inferences from established facts and circumstances but may not indulge in the assumption of a possibility based on a possibility and a consequent guess (2 Comp. Laws 1929, § 8417).

5. SAME—CONGENITAL STATUS LYMPHATICUS—ACCIDENT.

   Death of employee, dusting neutral electrical appliances, from congenital *status lymphaticus held*, noncompensable under workmen's compensation act, where there is no evidence that death was precipitated either by fall from stepladder, electric shock, or other personal injury arising out of and in the course of his employment (2 Comp. Laws 1929, § 8417).

Appeal from Department of Labor and Industry. Submitted April 26, 1934. (Docket No. 121, Calendar No. 37,580.) Decided July 2, 1934.

Jolan Marman, widow, and Carl Marman, minor, presented their claim for compensation against Detroit Edison Company, a New York corporation, for alleged accidental injuries causing the death of Carl Marman. Award to plaintiffs. Defendant appeals. Reversed.

Levin, Levin & Dill and *Gloster, Giller & Briggs,* for plaintiffs.

Oxtoby, Robison & Hull, for defendant.

WIEST, J. This is an appeal from the finding of the department of labor and industry that Carl Marman met with a personal injury, causing his death, while in the employ of defendant, and the question is whether the finding has supporting evidence.

The employee was found dead. An autopsy disclosed a physical condition which, it is claimed, might have proved fatal if subjected to an electric shock or a fall. The board found that death was the result of an accident, but did not designate the nature of the accident. The statute, 2 Comp. Laws 1929, § 8417, provides compensation for a personal injury, arising out of and in the course of employment. Personal injury implies something more than changes in the human system incident to the general process of nature or existing disease or weakened physical condition. The term, as employed in the compensation act, contemplates some intervention which either produces a direct injury or so operates upon an existing physical condition as to cause an injurious result, reasonably traceable thereto.

The employee had *status lymphaticus.* The medical witnesses disagreed upon whether such a physical condition of an adult, without a precipitating cause, might result in sudden death and, therefore, we must leave that subject amidst the uncertainty

evidently existing among members of the medical profession. We know, however, that the cause of his death was *status lymphaticus*.

Was fatality precipitated by a fall or an electric shock? The burden was on plaintiffs to show that it was. The employee was engaged in dusting neutral electrical appliances. He had an air hose to blow dust, and a four-foot stepladder with which to reach the tops of appliances, and was furnished with rubber gloves. He was found lying on the floor and without the gloves on his hands. The electric current was cut off by an open wall switch.

Two theories were advanced; one that he may have fallen from the stepladder and the other that he may have reached over and outside the ambit of his work and touched the clips of the open slice electric switch, and have received an electric shock, sufficient to cause his death from *status lymphaticus*. The stepladder was found standing in place and no bruises were found upon the body of the employee, and his position on the floor negatived a fall from the stepladder. The electric switch was found open so he received no electric shock, unless he reached over and touched the stationary clips of the switch. No electric burns were found upon his hands or body and an autopsy disclosed conditions negativing any severe electric shock.

It is true the mother of the employee testified that, after the autopsy, she saw the body of her son at the morgue, and his right hand was all crippled up and had black marks on it, and Mrs. Marman testified that, when the body came back from the undertakers, the "right hand sort of seemed to be shriveled up. * * * It seems as though his hands were put in hot water. Just shriveled up. Little black marks on."

The doctor who held the autopsy testified that he cleaned the hands of the deceased, examined them carefully and found nothing unusual, that "the body was in *rigor mortis,* and the fingers of both hands were partially contracted, as expected in *rigor mortis.*"

His death was caused by *status lymphaticus* and was not occasioned by the accident unless, in the course of his employment, there was brought to bear a precipitating cause.

The department of labor and industry found that his death was the result of an accident. It was highly important, if there was an accident, to designate it and make a finding of personal injury therefrom. His death was not compensable unless an accident operated in precipitation of his congenital *status lymphaticus* ailment.

Was his death precipitated by a personal injury? No one knows, and no one can tell whether there was, in fact, any accident resulting in personal injury.

The department of labor and industry may draw reasonable inferences from established facts and circumstances, but may not indulge in the assumption of a possibility based on a possibility and a consequent guess. See *Standard Drug Store* v. *A. E. Wood & Co.,* 227 Mich. 333.

There was no evidence that death of the employee, from *status lymphaticus,* was precipitated by a personal injury, arising out of and in the course of his employment.

The award is vacated, with costs to defendant.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, and EDWARD M. SHARPE, JJ., concurred. BUTZEL and BUSHNELL, JJ., did not sit.

SCOTT *v.* TOWNSHIP BOARD OF ARCADA TOWNSHIP.

1. INTOXICATING LIQUORS—LIQUOR CONTROL COMMISSION—LIMITATIONS.

   The control conferred upon the liquor control commission by the Constitution is subject to statutory limitations (Const. 1908, art. 16, § 11, Act No. 8, §§ 17, 24, Pub. Acts 1933 [Ex. Sess.]).

2. SAME—DISCRETION OF TOWNSHIP BOARD—REVIEW.

   In the matter of approving applications for licenses to sell beer and wine for consumption on the premises the township board has discretionary power which is not subject to review by a court even though claimed to be arbitrarily or capriciously exercised (Act No. 8, § 17, Pub. Acts 1933 [Ex. Sess.]).

3. SAME—CONTROL OF TRAFFIC.

   The liquor business is such that local communities should be permitted to regulate the traffic within their own bounds in the proper exercise of their police powers subject to the larger control of the liquor control commission as to matters of which it is given exclusive power by the legislature.

4. SAME—RESTAURANT OPERATED IN CONNECTION WITH GASOLINE FILLING STATION IN RURAL AREA.

   Denial of approval of application for license to sell beer and wine for consumption on the premises by owner of restaurant operated in connection with gasoline filling station at intersection of two highways in rural area *held*, within power of the township board to act officially according to what appears to it to be just and proper under the circumstances and is not subject to review by a court (Act No. 8, § 17, Pub. Acts 1933 [Ex. Sess.]).

Appeal from Gratiot; Searl (Kelly S.), J. Submitted June 19, 1934. (Calendar No. 37,927.) Decided July 2, 1934.

Mandamus by Clarence H. Scott to compel the Township Board of Arcada Township and Orlin Fletcher and others, constituting said board, to approve his application for license to sell beer and wine for consumption on his premises. Writ denied. Appeal dismissed.

David E. McLaughlin, for plaintiff.

Charles H. Goggin (*Paul R. Cash, Robert H. Baker* and *O. G. Tuttle,* of counsel), for defendants.

NELSON SHARPE, C. J. Plaintiff made application to the defendant township board for approval of his application to the liquor control commission for a license to sell beer and wine in a restaurant on his premises in said township, and, on its refusal to approve, petitioned the circuit court of the county of Gratiot for a writ of mandamus to compel such action on its part. An order to show cause was issued, to which the defendant filed its answer, alleging therein that it had acted in good faith in its refusal. After a hearing, in which witnesses were sworn, the trial court entered an order denying the writ, from which the plaintiff has taken this appeal.

The evil resulting from the intemperate use of alcoholic beverages has been the subject of much concern to the people of the State of Michigan for many years. Regulation by act permitting the sale upon compliance with certain requirements proved ineffective, and this State joined many others in the adoption of the 18th amendment to the Federal Constitution in 1919, which prohibited the manufacture, sale, etc., of intoxicating liquors. This amendment was repealed in 1933.

At the fall election in 1932, the following amendment to our Constitution was adopted (article 16, § 11):

"The legislature may by law establish a liquor control commission, who, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this State, including the retail sales thereof; and the legislature may also provide for an excise tax on such sales: Providing, however, that neither the legislature nor such commission may authorize the manufacture or sale of alcoholic beverages in any county in which the electors thereof, by a majority vote, shall prohibit the same."

Pursuant thereto, Act No. 8, Pub. Acts 1933 (Ex. Sess.), was enacted. It created a liquor control commission of five members and prescribed their powers and duties. It provides for the issuing of licenses by the commission to restaurants wherein beer and wine may be sold for consumption on the premises only (section 24). Section 17 contains the following provision:

"*Provided, however,* That all applications for licenses to sell beer and/or wine and/or spirits for consumption on the premises shall be approved by the local legislative body in which said applicant's place of business is located before being granted a license by the commission."

Plaintiff's application to the defendant board was made pursuant to this provision. The record discloses that he owned and operated a gasoline filling station and a restaurant connected therewith at the intersection of two highways, at a point about six miles north of the village of Ithaca and two miles south of the city of St. Louis, in the defendant town-

ship, in the county of Gratiot. It appears from the evidence submitted that he had sold beer in his restaurant during the preceding year, having had a license therefor under Act No. 64, Pub. Acts 1933, and that no complaint had been made of any disturbance or violation of law in connection therewith, and that he is a reputable citizen of the community in which he lives. His counsel admit that under the proviso in section 17 a discretion is vested in the township board in passing upon the application for approval made by him, but insist that it was exercised arbitrarily and capriciously and without any sufficient reason therefor.

The control conferred upon the liquor control commission under the constitutional proviso is "subject to statutory limitations." The legislature provided in no uncertain terms that plaintiff's application for a license must be approved by the defendant board. It contains no direction or guide to the board and no definite rule by which it shall be governed in its action in approving or declining to do so. The purpose of the provision undoubtedly was to permit each local municipality to determine whether beer and wine should be sold for consumption on the premises within its limits. To avoid the expense incident to submitting the question of approval to the voters, its determination was left to the township board, the official representative of the township. By so doing the legislature assumed that this board by its determination would represent the judgment of the voters.

As already stated, the people of this State have for many years been impressed with the evils resulting from the intemperate use of alcoholic beverages, and under the law no person can engage in

the sale thereof without a license to do so. There is a clear distinction between the discretion which may be exercised in relation to a business thus conducted and one lawful in its purpose and the carrying on of which creates a property interest or vested right in the person engaged in it.

The discretion to be exercised by the board under this statute in acting upon the application here made means the power or right to act officially according to what appears to it to be just and proper under the circumstances, and action so taken by it is not subject to review by a court. As was said in the recent case of *Johnson* v. *Liquor Control Com'n,* 266 Mich. 682, 685:

"The very nature of the liquor business is such that local communities, as a matter of policy, should be permitted to regulate the traffic within their own bounds in the proper exercise of their police powers, subject to the larger control of the liquor commission as to those matters wherein the commission is given exclusive powers by the legislature."

Counsel for the plaintiff insists that as it was said in that case that no claim was made that the action of the common council was "either arbitrary or capricious" an inference should be drawn that, if such a claim had been made, a different conclusion would have been reached. The question there involved was the revocation of a license theretofore issued. The distinction is apparent. The suggestion there made is in no way controlling on the facts here presented. The distinction between the discretion which may be exercised by local bodies in the control of different kinds of business was pointed out in *City of Grand Rapids* v. *Braudy,* 105 Mich. 670 (32 L. R. A. 116, 55 Am. St. Rep. 472), and in *Melconian* v. *City of Grand*

Rapids, 218 Mich. 397. See, also, the annotation in 12 A. L. R. 1453.

The cases relied on by counsel for the plaintiff (*Amperse* v. *City of Kalamazoo,* 59 Mich. 78; *Hanold* v. *Common Council of the Village of Stambaugh,* 163 Mich. 242, and *Price* v. *Township Board of Oakfield Township,* 182 Mich. 216) are not, in our opinion, applicable. In those cases it became the duty of the municipal boards to pass upon the sufficiency of liquor bonds, and it was held that they might not arbitrarily refuse to approve them.

The appeal is dismissed. As a public question is involved, no costs will be allowed.

POTTER, NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

MASSACHUSETTS MUTUAL LIFE INSURANCE CO. *v.* RUETTER.

1. MORTGAGES—ASSIGNMENT OF RENTS AND PROFITS—RECEIVERS. Generally, an assignment of rents and profits as additional security under a mortgage and appointment of a receiver to collect same prior to passage of absolute title are invalid in this State, although there are some exceptions (3 Comp. Laws 1929, §§ 13498, 13499, 14956).

2. SAME—EXTENSION OF MORTGAGE—ASSIGNMENT AS CONSIDERATION. Extension of mortgage is valid consideration for assignment of rents as additional security for payment of taxes, assessments and insurance premiums, and such assignment is valid.

3. SAME—RECEIVERS—FORECLOSURE.

Court of equity *held,* without power to appoint receiver to collect rents and profits pursuant to bill for specific performance of agreement extending mortgage and assigning rents which contemplated such appointment only in case of institution of foreclosure proceedings and his appointment was not incidental to other relief.

Appeal from Wayne; Marschner (Adolph F.), J. Submitted April 4, 1934. (Docket No. 16, Calendar No. 37,557.) Decided July 2, 1934.

Bill by Massachusetts Mutual Life Insurance Company, a Massachusetts corporation, against Jacob J. Ruetter and wife for the appointment of a receiver and for other relief. Decree for plaintiff. Defendants appeal. Reversed.

Dudley E. Whiting, for plaintiff.

Robert J. Hesse, for defendants.

EDWARD M. SHARPE, J. In January, 1926, defendants gave a first mortgage in the usual form to plaintiff company in the amount of $18,000 with interest at the rate of six per cent. payable semi-annually. This mortgage became due January 1, 1931, and the defendants being unable to pay the indebtedness, the parties agreed to an extension for an additional five years. Annual payments of $750 were provided and interest was made payable semi-annually. All the provisions in the original mortgage, including the acceleration clause, were continued in force. The extension agreement contained the following provision:

"In consideration of such extension, said parties of the first part hereby assign to said party of the

second part the rents of said premises as additional security for the payment of taxes, assessments and insurance premiums, and towards keeping said premises in good repair and condition, and in case of foreclosure of said mortgage, if there shall then or thereafter be default in the payment of such taxes or assessments, or insurance premiums, or failure to keep said mortgaged premises in good repair and condition said party of the second part shall be entitled to the appointment of a receiver of such rents, to be applied by such receiver towards the payment of such taxes, assessments, insurance premiums and towards keeping said premises in good repair and condition; and said first parties hereby consent to such appointment and to such disbursements of such rents by such receiver, who, in addition to such disbursements, shall be entitled out of such rents to his reasonable charges and expenses."

On May 15, 1933, defendants having defaulted in the payment of principal, interest and taxes for 1931 and 1932, plaintiff filed a bill of complaint in equity praying for specific performance of the agreement for assignment of rents and profits and for the appointment of a receiver. On September 29, 1933, the lower court issued an order for specific performance and for a receiver.

The defendants contend, first, that inasmuch as the mortgage and extension do not constitute a trust mortgage, the agreement for the assignment of rents and profits is unenforceable; and, second, that conceding the validity of the agreement, the court had no authority to appoint a receiver to collect the rents and profits and apply the same to the liabilities of the mortgagors.

Since the enactment in 1843 of what corresponds to 3 Comp. Laws 1929, § 14956, the general rule in Michigan has been that an assignment of rents and

profits as additional security under a mortgage is invalid and that there can be no appointment of a receiver prior to the passage of absolute title to the mortgagee. However there are some exceptions to this general rule. Act No. 228, Pub. Acts 1925 (3 Comp. Laws 1929, §§ 13498, 13499), provides that an assignment of rents clause in a trust mortgage is valid.

In *Nusbaum* v. *Shapero,* 249 Mich. 252, the court said at pp. 263, 264:

"We do not believe the ejectment statute prevents a court of equity from enforcing provisions of the mortgage which insure the payment of taxes and insurance premiums. The failure to pay them out of the large revenue from the property might result in the destruction of the larger part of the security."

In *Morse* v. *Byam,* 55 Mich. 594, the court held that the mortgagor may waive his right to possession and permit the mortgagee to take possession and that such consent would be good until revoked. Accord, *Byers* v. *Byers,* 65 Mich. 598; *Harrison* v. *Spencer,* 110 Mich. 215.

In *Pines* v. *Equitable Trust Co.,* 263 Mich. 458, in which an assignment of rents was given after default in payment under the terms of the mortgage, the court held that the acts of 1843 and 1925 did not constitute a restraint on alienation and that the contract for the assignment of rents was valid.

In the instant case we find that there was a valid consideration for the assignment of the rents. The defendants obtained an extension of the mortgage in consideration of their pledge of the rentals for the upkeep of the premises. Where supported by a valid consideration, such an assignment is valid.

"An independent assignment of rents to a mortgagee subsequent to a mortgage and based on a valuable consideration is valid." 41 C. J. p. 630.

"An agreement by a mortgagee to extend the time of payment of the debt secured by a mortgage whether indorsed on the instrument or otherwise evidenced will continue the lien of the mortgagee and all his rights and remedies thereunder for the new period. * * * It must be supported by a sufficient consideration." 41 C. J. p. 808.

It is next contended that the trial court had no power to appoint a receiver. In this we must agree as the appointment of a receiver must be ancillary to other relief sought in the bill of complaint. The record discloses that the only relief asked for is the appointment of a receiver to collect the rents and profits. In addition to this the assignment clause contemplates the appointment of a receiver only in the event that foreclosure proceedings were instituted.

The plaintiff's bill of complaint is dismissed and the receiver appointed under the decree of the trial court will account to defendants for all rents and profits received while acting in such capacity.

Defendants will recover costs.

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

ELSON *v.* WISCONSIN PUBLIC SERVICE CORP.

MASTER AND SERVANT—UNAUTHORIZED INCREASE OF AWARD OF COMPENSATION.

Increased award made by deputy commissioner without request therefor having been made by any authorized party after hearing upon petition to review payment of lump sum settlement of weekly award for partial disability previously approved by department of labor and industry and not appealed from *held*, without jurisdiction of deputy (2 Comp. Laws 1929, §§ 8438, 8453).

Appeal from Department of Labor and Industry. Submitted April 24, 1934. (Docket No. 68, Calendar No. 37,490.) Decided July 2, 1934.

Joseph Elson presented his claim against Wisconsin Public Service Corporation and Menominee & Marinette Light & Traction Company, employers, and Fidelity & Casualty Company of New York, insurer, for an accidental injury sustained while in defendants' employ. On petition to review payment of lump sum settlement. Increased award to plaintiff. Defendants appeal. Reversed.

John J. O'Hara, for plaintiff.

Derham & Derham, for defendants.

POTTER, J. Plaintiff, employed by defendants Wisconsin Public Service Corporation and Menominee & Marinette Light & Traction Company, as a lineman, was injured June 26, 1931, by falling from a pole. He was awarded and paid compensation for total disability for seven weeks at $18 a week. He then

went back to work for the same wages received before his injury. Plaintiff later filed a petition for further compensation. August 22, 1932, his application was heard, plaintiff was found to be permanently partially disabled and awarded compensation at $1.83 a week for 493 weeks from August 24, 1931; that is for the full 500 weeks provided by statute less the seven weeks during which he had been awarded and paid compensation for total disability. No appeal was taken from this award, and no request, petition or application to review weekly payments has been made by anyone authorized to do so by 2 Comp. Laws 1929, § 8453.

An agreement between plaintiff and defendants for a lump sum settlement was made, subject to the approval of the department of labor and industry, and September 16, 1932, an order was made by the department of labor and industry in accordance with 2 Comp. Laws 1929, § 8438, authorizing it. This lump sum was paid and a receipt therefor filed. The lump sum settlement had been approved by the department of labor and industry. If it was paid that ended the matter. If it was not paid suit could have been instituted on the award. The department set the case for hearing. The only thing before it for determination was whether the amount of the lump sum settlement previously authorized had been paid. Testimony was taken November 18, 1932, and the case again set for hearing February 19, 1933. At the latter hearing the following occurred:

"*The Commissioner:* This man didn't file a petition. The matter is on for hearing at this time to approve the final settlement receipt.

"*Q.* You filed petition the 29th day of February, 1932, didn't you?

"*A.* Yes.

"*Q.* In which you alleged at that time that you were unable to work?

"*The Commissioner:* That has all been adjudicated and taken care of."

The deputy commissioner subsequently made an award of $6.75 a week to plaintiff. Neither the employer, the insurance company, the commissioner of insurance, or the plaintiff requested a review of weekly payments. In the absence of such a request by any authorized party the department was without jurisdiction to grant such review. 2 Comp. Laws 1929, § 8453.

Stress seems to be placed upon Rule No. 29 (department of labor and industry). The rule provides that "in approving said settlement receipt the department determines no facts."

The department had made an award upon plaintiff's petition of $1.83 a week. This was an adjudication. This award was not appealed from. It was subsequently commuted to a lump sum settlement and paid. Hearing before the commissioner was had on the approval of the settlement receipt given upon payment of the lump sum awarded which had been previously authorized by the department. The only question before the department was whether the amount of such lump sum award had been paid. Notwithstanding this the deputy commissioner proceeded upon this hearing without an application upon the part of plaintiff to increase the award made. This he was without authority to do.

We are constrained to reverse the holding of the department. It is so ordered.

NELSON SHARPE, C. J., and NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred. BUSHNELL, J., did not sit.

SPARKS *v.* DETROIT FIDELITY & SURETY CO.

1. DEPOSITARIES—BONDS—LIMITATIONS ON COMMENCEMENT OF ACTION.

   Provision of public fund depository bond limiting time within which to commence action against surety to period between 60 days and six months after default of principal, being in conflict with statutory mandate that bond be conditioned for the safekeeping and repayment of moneys deposited, *held*, invalid in action of assumpsit on the bond instituted more than six months after default (1 Comp. Laws 1929, § 1193 *et seq.*).

2. SUBROGATION—DEPOSITORY BOND.

   Pro tanto subrogation clause of county fund depository bond *held*, void where amount deposited exceeds total amount of bond and county has not been reimbursed in full (1 Comp. Laws 1929, § 1193 *et seq.*).

3. DEPOSITARIES—PRINCIPAL AND SURETY—INTEREST.

   Upon default of depository of funds deposited by county treasurer the debt becomes the obligation of the surety to the extent of the principal sum of the bond together with interest from the time of default of the principal (1 Comp. Laws 1929, § 1193 *et seq.*).

Appeal from Oakland; Simpson (John), J., presiding. Submitted April 26, 1934. (Docket No. 76, Calendar No. 37,677.) Decided July 2, 1934.

Assumpsit by Charles W. Sparks, Oakland county treasurer, Oakland County, a municipal corporation, and John C. Spaulding and Irvin Long, receivers, against Detroit Fidelity & Surety Company, a Michigan corporation, on a depository bond. Judgment for plaintiffs. Defendant appeals. Plaintiffs cross-appeal. Modified and remanded.

Arthur P. Bogue, Prosecuting Attorney, and *Robert D. Heitsch,* Assistant Prosecuting Attorney, for plaintiffs Sparks and Oakland County.

Goodenough, Voorhies, Long & Ryan, for plaintiff receivers.

Friedman, Meyers & Keys (*Sylvan Rapaport,* of counsel), for defendant.

NORTH, J. Plaintiffs brought this suit on a $50,000 depository bond given by the defendant incident to the deposit of funds of Oakland county in the Pontiac Commercial & Savings Bank. At the time the bank failed, June 15, 1931, the county had on deposit $2,205,448.03. There were six other depository bonds incident to this account. They aggregated $825,000. All were given in accordance with the statute governing the deposit of public moneys received by county treasurers. 1 Comp. Laws 1929, § 1193 *et seq.* On trial before the court without a jury plaintiffs had judgment for $45,837.90. Defendant appealed and plaintiffs perfected a cross-appeal.

Counsel for the respective parties agree that all questions presented by this appeal, except the one hereinafter considered, are controlled by our recent decision in *County of Oakland* v. *Central West Casualty Co.,* 266 Mich. 438. It follows that in case plaintiffs' right to recover is sustained judgment should be entered for the full amount of defendant's bond ($50,000) together with interest thereon from the time the bank defaulted.

The bond in suit contains the following provision:

"That no suit, action or proceeding shall be brought or instituted against the surety upon or by reason of any default of the principal until after the

expiration of 60 days after such default or in no event after the expiration of six months after such default."

This suit was not instituted until more than six months after the default and defendant pleaded in the trial court that plaintiffs' cause of action was barred by the above-quoted provision of the bond. Defendant's contention was overruled; and this ruling is assigned as error. We think the ruling was correct and is sustained by decision in *County of Muskegon* v. *Michigan Surety Co.*, 264 Mich. 65, from which we quote:

"It is contended that defendant was discharged from liability on the bond because timely notice of default was not served upon defendant in accordance with the terms of the bond. The requirement of notice conflicted with the statutory mandate that the bond be conditioned for the safekeeping and repayment of moneys deposited. The bond was a public bond and the provisions as to notice were surplusage. See *Township of Forest* v. *American Bonding Co.*, 187 Mich. 657. Although cancellation and *pro rata* provisions may be described as consistent with the statute in that they affect the penalty rather than the conditions of the bond, it is clear that a requirement of notice adds a condition precedent to liability. No showing was made of any injury resulting to defendant from lack of notice. *Grinnell Realty Co.* v. *General Casualty & Surety Co.*, 253 Mich. 16."

In view of our decision in *County of Oakland* v. *Central West Casualty Co., supra*, it must be held that the trial judge was in error in holding that the *pro tanto* subrogation clause in the bond was valid and also in holding plaintiffs were not entitled to recover interest.

The judgment entered in the circuit court will be vacated and one entered there in accordance herewith. The case is remanded. Plaintiffs will have costs.

NELSON SHARPE, C. J., and POTTER, FEAD, WIEST, and EDWARD M. SHARPE, JJ., concurred. BUTZEL and BUSHNELL, JJ., did not sit.

PEOPLE *v.* KAYNE.

1. WITNESSES—CONFIDENTIAL RELATIONSHIP—WAIVER OF PRIVILEGE.
   People's witness who waived any right she might have asserted as to self-incrimination in her joint effort with defendant and others to obtain money from automobile insurance company in falsely pretending injury to herself by voluntarily testifying as to pretension of injury also waived privilege attached to confidential relationship with doctor called to attend her.

2. CRIMINAL LAW—INDORSEMENT OF NAMES ON INFORMATION.
   Failure to indorse on information for obtaining money under false pretenses from insurance company name of doctor called to attend one allegedly injured by prearranged automobile accident *held*, reversible error, where privilege attached to his relationship with patient had been waived by latter.

3. SAME—FALSE PRETENSES—RES GESTÆ WITNESSES.
   Doctor called to attend woman shortly after alleged injury in automobile accident was a *res gestæ* witness in prosecution of driver charged with obtaining money from insurance company by false pretenses, being present at, and a party to, a material part of the transaction.

4. SAME—RES GESTÆ—FALSE PRETENSES.
   Evidence of acts and statements of woman who allegedly joined defendant and others to obtain money from his automobile insurance company by false pretenses, made at the time of the commission of the crime, are part of the *res gestæ* and admissible against each of the other joint wrongdoers.

5. SAME—RES GESTÆ—DEFINITION.

Res gestæ are the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character.

6. SAME.

Res gestæ are the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction and render the latter necessary to exhibit the former in its proper effect.

7. SAME.

Acts and deeds emanating from the transaction as long as it continues become part of it, the time limits not being arbitrary, and are admissible in evidence as *res gestæ*.

8. SAME—RES GESTÆ WITNESS—INDORSEMENT ON INFORMATION—PRESENCE IN COURT.

Trial court committed reversible error in refusing defendant's application to have name of *res gestæ* witness indorsed on information and in failing to require his presence in court in the absence of a showing of inability to produce him.

9. SAME—PRESENTATION OF ONLY PART OF RES GESTÆ.

Conviction of a crime may not properly be claimed by prosecution upon evidence which expressly or by implication shows but a part of the *res gestæ*, if it appear that evidence of the rest of the transaction is attainable.

10. SAME—INDORSEMENT AND CALLING OF WITNESS BY PROSECUTION—RES GESTÆ—FALSE ACCUSATION.

Prosecution may not be required to indorse name of witness nor call him unless he is a *res gestæ* witness; nor need it indorse and call all such witnesses, especially when crime charged is not one of violence; but he should be called if his testimony is reasonably necessary to protect accused against a false accusation.

11. SAME—CHARGE OF THE COURT—REQUESTS TO CHARGE.

Charge of the court in criminal case, lacking some details essential to a technically correct statement of the law involved *held*, not reversible error in the absence of requests to charge preferred by defendant (3 Comp. Laws 1929, § 17322).

12. SAME—EVIDENCE—INSURANCE.

On appeal from conviction for obtaining money under false pretenses from insurance company, defendant may not complain of admission of certain insurance office records, where he later testified concerning this insurance.

13. FALSE PRETENSES—SUBSEQUENT NOTICE OF CANCELLATION OF INSURANCE INADMISSIBLE.

Insurance company's record of serving notice of cancellation of defendant's automobile insurance some time after the commission of alleged offense of obtaining money from company under false pretenses *held*, inadmissible on trial as immaterial and possibly prejudicial.

Appeal from Recorder's Court for City of Detroit; Van Zile (Donald), J. Submitted April 12, 1934. (Docket No. 151, Calendar No. 37,222.) Decided July 2, 1934.

Samuel A. Kayne was convicted of obtaining money under false pretenses. Reversed, and new trial granted.

Harry Cohen, for appellant.

Patrick H. O'Brien, Attorney General, *Harry S. Toy,* Prosecuting Attorney, and *Chester P. O'Hara* and *Edmund E. Shepherd,* Assistants Prosecuting Attorney, for the people.

NORTH, J. Defendant was convicted of obtaining money under false pretenses. According to the people's theory, the scheme by which plaintiff obtained money under false pretenses was as follows: Defendant, the owner of an automobile, carried automobile insurance in the Commercial Casualty Insurance Company. It was arranged that Mrs. Harry Bluestein was to be at the intersection of certain streets in the city of Detroit at the time defendant drove his automobile around the corner and she was supposed to have been struck and injured by defendant's machine. Defendant put her in his automobile, took her to her home, and assisted her into

the apartment where the Bluesteins resided. A Dr. Atler was called by Charles Schnitzer, who is claimed to have planned the details of the offense charged. Before the doctor arrived Schnitzer applied iodine to certain portions of Mrs. Bluestein's body to give the appearance of a bruised and injured condition. Dr. Atler attended Mrs. Bluestein the same evening of the supposed accident, prepared surgical dressings, applied bandages and attended her for some time thereafter. The woman's right shoulder was encased in a dressing of adhesive plaster and bandages, fixing the right arm close to the side; her ribs were taped and one of her knees treated by the doctor. Defendant notified the insurer of the accident. An investigation was made, physical examination of Mrs. Bluestein by the insurance company's physician, settlement agreed upon, and $362.50 paid by draft to the order of Mr. and Mrs. Bluestein. This draft was delivered to Schnitzer. Of this amount it is claimed defendant received $104, the Bluesteins $100, and Schnitzer received the balance out of which the doctor's bill and other expenses were paid. Mr. and Mrs. Bluestein and Schnitzer were witnesses for the prosecution and testified in support of its theory of the case.

The defense urged was that the injury actually happened to Mrs. Bluestein, that the accident was a fact, not fiction as claimed by the people. The further claim was made that Schnitzer, prompted by ulterior motives, has "framed" this case against defendant.

The first ground of appeal discussed in appellant's brief is that the trial court erred in denying defendant's motion to indorse on the information the name of Dr. Atler as a witness for the people, after it appeared that he was a material witness and

no privileged communication existed. Three days before the trial defendant made a motion to have the name of this witness indorsed on the information. This application was denied by the court on the ground that any communications between the doctor and the patient arose from a confidential relationship, were privileged, and the doctor could not be compelled to testify. At the trial Mrs. Bluestein voluntarily testified in behalf of the people and in accordance with their theory of the case, having waived any right she might have asserted as to self-incrimination. Having so testified, she waived the right to assert a claim of privileged communication as against testimony that might be given by Dr. Atler. *Hamilton* v. *People,* 29 Mich. 173; *People* v. *Van Alstine,* 57 Mich. 69; *People* v. *Gallagher,* 75 Mich. 512. A further motion was made by defendant after Mrs. Bluestein had testified to have Dr. Atler indorsed as a people's witness. This application was denied on the ground that the doctor's testimony would be immaterial. In the people's brief it is now urged that regardless of the reason given, the trial court's ruling was correct because the doctor was not a *res gestæ* witness. In this connection it is pointed out that the doctor visited Mrs. Bluestein "several hours after the supposed event," and for this reason could not be a *res gestæ* witness. We think the prosecution's position cannot be sustained under the facts in the instant case. According to the theory of the prosecution, an indispensable portion of the people's case was proof that Mrs. Bluestein's claimed personal injury was fictitious; that it was not an actual injury as claimed by defendant. Aside from Mrs. Bluestein, no one could have had much more definite knowledge of this

phase of the case than Dr. Atler. Only shortly after defendant claims the accident happened the doctor saw and treated Mrs. Bluestein because of her actual or feigned injury. If there was an attempt to secure money by false pretense, her feigned injured condition was a necessary part of the criminal scheme. Such was the theory of the people's case. On the other hand, if Mrs. Bluestein was actually injured, as claimed by defendant, the attending physician must have had knowledge of such fact. The doctor was an eyewitness, not of the accident, but of the physical injuries, real or feigned, incident to which the insurance company made the payment of the money alleged to have been obtained by false pretense. The physician employed by the insurance company, Dr. Naylor, when investigating this case, "called up" Dr. Atler. The details of the interview are not in the record. But as charged in the information and according to the prosecution's theory and testimony, Mrs. Bluestein, as well as her husband and Schnitzer, joined defendant in committing the crime charged; and therefore her acts and statements at the time are clearly part of the *res gestæ,* and evidence thereof was admissible against each of the other joint wrongdoers. *St. Clair* v. *United States,* 154 U. S. 134, 149 (14 Sup. Ct. 1002). By being called to attend Mrs. Bluestein, Dr. Atler, innocently or otherwise, was present at and a party to a material part of the transaction which went to make up the fraud charged. He was a *res gestæ* witness.

"*Res gestæ* are the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character." *Stirling* v. *Buckingham,* 46 Conn. 461.

"No inflexible rule has ever been and probably never can be adopted as to what is a part of the *res gestæ*. It must be determined largely in each case by the peculiar facts and circumstances incident thereto; but it may be stated as a fixed rule that, included in the *res gestæ* are the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect." *Chicago & Erie Ry. Co.* v. *Cummings,* 24 Ind. App. 192, 209 (53 N. E. 1026, 1031).

"And as long as the transaction continues, so long do acts and deeds emanating from it become part of it, so that, describing it in a court of justice, they can be detailed. * * * Nor are there any limits of time within which the *res gestæ* can be arbitrarily confined (citing Wharton on Criminal Evidence (9th Ed.), § 262)." *Territory* v. *Clayton,* 8 Mont. 1 (19 Pac. 293, 297).

See, also, *Davids* v. *People,* 192 Ill. 176 (61 N. E. 537, 541).

The materiality of Dr. Atler's testimony is apparent from the facts hereinbefore stated. It was seriously important to the defendant that the doctor should be called as a witness for the people. This not only gave defendant the right to cross-examine the witness, but it also saved defendant from being bound by the testimony given by the witness. In the absence of a showing of inability to produce this witness, who appears to have been a resident of the county and presumably readily reached, reversible error was committed by refusing defendant's application to have the witness indorsed on the information and produced in court by the prosecution. It seems quite unnecessary to again detail the duty of the prosecution in criminal cases. The subject has

been covered many times by decisions of this court. We quote from only one:

"But the prosecution can never, in a criminal case, properly claim a conviction upon evidence which, expressly or by implication, shows but a part of the *res gestæ,* or whole transaction, if it appear that the evidence of the rest of the transaction is attainable. This would be to deprive the defendant of the benefit of the presumption of innocence, and to throw upon him the burden of proving his innocence. It is the *res gestæ,* or whole transaction, the burden of proving which rests upon the prosecution (so far at least as the evidence is attainable). It is that which constitutes the prosecutor's case, and as to which, the defendant has the right of cross-examination; it is that, which the jury are entitled to have before them, and, 'until this is shown, it is difficult to see how any legitimate inference of guilt, or of the degree of the offense, can be drawn.'

"The prosecutor in a criminal case, is not at liberty like a plaintiff in a civil case, to select out a part of an entire transaction which makes against the defendant, and then, to put the defendant to the proof of the other part, so long as it appears at all probable from the evidence, that there may be any other part of the transaction undisclosed; especially, if it appears to the court that the evidence of the other portion is attainable. The only legitimate object of the prosecution is, 'to show the whole transaction, as it was, whether its tendency be to establish guilt or innocence.' * * * But, certainly, if the facts stated by those who are called show *prima facie,* or even probable reason for believing that there are other parts of the transaction to which they have not testified, and which are likely to be known by other witnesses present at the transaction, then such other witnesses should be called by

the prosecution, if attainable, however nearly related to the prisoner." *Hurd* v. *People,* 25 Mich. 405, 415.

See, also, *Wellar* v. *People,* 30 Mich. 16; *People* v. *Etter,* 81 Mich. 570; and *People* v. *Vick,* 235 Mich. 475.

The indorsement and calling of a witness by the prosecution is not required unless he is a *res gestæ* witness. *People* v. *Grant,* 111 Mich. 346. And it is not the rule that all *res gestæ* witnesses must be indorsed on the information and called by the State. *People* v. *Kindra,* 102 Mich. 147. Especially is this true when the offense charged is not a crime of violence. *Bonker* v. *People,* 37 Mich. 4. Instead the rule is that, apart from cumulation of testimony, any *res gestæ* witness should be indorsed and called by the prosecution if the testimony of such witness is reasonably necessary to protect the accused against a false accusation. In *People* v. *Long,* 44 Mich. 296, it was held that failure of the prosecution to call a *res gestæ* witness was not error because, as stated by Justice CAMPBELL:

"His (the witness') position in regard to the facts was not such as to make him a necessary witness for the prosecution *to enable defendant to be protected against a false accusation.*"

But where a fair presentation of the *res gestæ* of the crime charged cannot otherwise be made to the court or jury, the State is required to indorse and call the witness or witnesses whose testimony is necessary to protect the accused from being the victim of a false accusation. Such is the rule, as stated in *Hurd* v. *People, supra,* "so long as it appears at all probable from the evidence, that there may be any other part of the transaction undisclosed; espe-

cially, if it appears to the court that the evidence of the other portion is attainable."

Appellant presents certain objections to the charge of the court. There are lacking some details essential to a technically correct statement of the law embodied in the court's instructions. But in the absence of requests to charge preferred by defendant we are not prepared to hold that this was reversible error. 3 Comp. Laws 1929, § 17322. Objection is also made to the admission in evidence of certain records of the insurance office through which defendant obtained his automobile insurance. Defendant later testified concerning this insurance and hence has no cause of complaint in this particular. However, the company's record of serving notice on defendant of cancellation of his insurance some time subsequent to the commission of the alleged offense was wholly immaterial, possibly prejudicial, and should not have been received. Other questions covered by appellant's brief are either without merit or such as in all probability will not arise incident to a new trial.

Judgment and verdict are set aside and a new trial ordered.

NELSON SHARPE, C. J., and POTTER, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

PEOPLE, *ex rel.* CLARDY, *v.* BALCH.

1. OFFICERS—CONSTITUTIONAL LAW—PUBLIC UTILITIES COMMISSIONERS.

   Members of the public utilities commission are not judicial officers within the meaning of that term as used in article 9, § 7, of the Constitution excepting judicial officers from removal from office by governor, although commission has statutory power to ascertain facts and make orders thereon and has been referred to as a *quasi*-judicial body.

2. SAME—TRANSFER OF RIGHTS, POWERS AND DUTIES—STATUTES.

   Rights, powers and duties of railroad commission transferred to public utilities commission by statute organizing it are those which may be exercised and performed by the commission and do not include right of member to 10-day notice from governor of hearing on removal to which railroad commissioners were entitled (2 Comp. Laws 1929, §§ 11008, 11018 *et seq.*).

3. CONSTITUTIONAL LAW—REMOVAL OF PUBLIC OFFICER.

   Constitutional provision permitting governor to remove public officer from office for gross neglect of duty, for corrupt conduct in office, misfeasance or malfeasance is self-executing and requires no legislation to make it effective (Const. 1908, art. 9, § 7).

4. OFFICERS—OPPORTUNITY TO DEFEND REMOVAL PROCEEDNGS.

   Public officer into whose acts governor makes inquiry on petition for removal is entitled to reasonable opportunity to make defense (Const. 1908, art. 9, § 7).

5. SAME—NOTICE—HEARING—REMOVAL—JURISDICTION.

   Notice served on public utilities commissioner on February 9th of hearing to be held February 14th on petition for his removal *held*, sufficient to give governor jurisdiction of removal proceedings where commissioner neither filed answer to petition nor requested further time within which to make his defense but merely appeared specially and moved to dismiss petition (Const. 1908, art. 9, § 7).

6. SAME—MEMBER OF COMMISSION—FAILURE TO ACT.

   Governor, in proceedings to remove member of public utilities commission for gross neglect of duty, has right to assume that

each commissioner participated in the work of the commission, in absence of proof to the contrary, as each of the members is chargeable with its failure to act.

7. SAME—MERGER OF OFFICIAL ACTION BY INDIVIDUAL MEMBERS OF COMMISSION.

Right to remove member of public utilities commission is not affected by fact that official action of its different members is merged into the official action of the commission itself as an entity.

8. SAME—REMOVAL—PLEADING.

Allegations in petition for removal of certain members of public utilities commission for gross neglect of duty *held*, sufficient statement of fact, which, if proved, would justify governor in making order removing them, including relator in instant *quo warranto* proceedings.

9. SAME—REMOVAL—NEGLECT OF DUTY—EVIDENCE.

Removal of public utilities commissioners by governor based on allegations in petition therefor and supported by competent evidence that commissioners failed to act with reasonable promptitude on application for rate reduction in village and on a number of applications for permits under motor vehicle carrier statute *held*, justified in absence of denial or explanation on part of commissioner sought to be removed (Act No. 212, Pub. Acts 1931).

10. CARRIERS—EXTENSION OF CREDIT FOR FEES.

Discretion vested in public utilities commission by Act No. 212, § 5, Pub. Acts 1931, even if construed as applicable to permission to motor vehicle carrier to operate without previous payment of fee required by statute, did not warrant extension of credit to carriers of upwards of $25,000 with much of it months later uncollected or uncollectible and justified finding of governor that commissioners violated official duty in doing so.

Quo warranto proceedings by the people of the State of Michigan, on the relation of Kit F. Clardy, against James B. Balch to try title to the office of member of the public utilities commission. Submitted June 12, 1934. (Docket No. 40, Calendar No. 37,802.) Writ dismissed July 2, 1934.

O. L. Smith, for plaintiff.

Patrick H. O'Brien, Attorney General, *Gerald K. O'Brien,* Deputy Attorney General, and *M. Thomas Ward,* Assistant Attorney General, for defendant.

NELSON SHARPE, C. J. The public utilities commission of this State consists of five members, appointed by the governor. They hold office for the term of four years. (2 Comp. Laws 1929, § 11006.) On February 8, 1934, a petition, signed by three citizens, was presented to the governor, William A. Comstock, in which three of the members of the commission, one of whom was Kit F. Clardy, the plaintiff in this proceeding, were charged with "gross, wilful and habitual neglect of duty" and "malfeasance and misfeasance in office," and their removal prayed for. The governor gave written notice that he would proceed with an examination of witnesses in relation thereto at his office on the 14th day of February, 1934, beginning at 10 o'clock in the forenoon of that day. A copy thereof was duly served on the three commissioners on February 9, 1934. It appears that the resignations of the other two commissioners were then in the hands of the governor.

At the time set for the hearing, counsel for the plaintiff, appearing specially for him, filed motions to dismiss, which were denied. During their consideration, plaintiff's counsel stated that "we would like the record to be positive and certain that we have appeared specially on each and every one of the motions, and objections and requests that we have heretofore made," and they took no further part in the proceedings. A number of witnesses were then sworn, and at the conclusion of the hearing on that day, the governor, apparently being

satisfied that the evidence was sufficient to justify the removal of plaintiff, asked his counsel if they desired a further hearing, and stated that, if they did not, plaintiff would be summarily removed, to which no positive reply was made. On convening the next morning, the governor asked if plaintiff was represented, and, it appearing that he was not, the governor announced that an order would be entered removing him from membership on the commission, and a written order to that effect was signed by him and filed with the secretary of State on that day. Soon thereafter, the governor appointed James B. Balch, the defendant herein, a public utilities commissioner, and he duly qualified and took formal possession of the office on February 26, 1934. His appointment was confirmed by the State senate on the 8th day of March following. Thereupon the plaintiff petitioned this court for leave to file an information in the nature of a *quo warranto* to test the right of the defendant to hold such office. Such leave was granted and the information filed, to which the defendant has filed his answer.

The questions raised by the motions to dismiss which are discussed by counsel may be stated as follows:

1. Constitution precludes removal.
2. Notice insufficient and unreasonable.
3. Charges are all directed to the members of the commission, and not to plaintiff in his individual capacity.
4. Charges must state facts, not conclusions.

1. Article 9, § 7, of our Constitution, reads as follows:

"The governor shall have power and it shall be his duty, except at such time as the legislature may

be in session, to examine into the condition and administration of any public office and the acts of any public officer, elective or appointive; to remove from office for gross neglect of duty or for corrupt conduct in office, or any other misfeasance or malfeasance therein, any elective or appointive State officer, except legislative or judicial, and report the causes of such removal to the legislature at its next session."

Counsel for the plaintiff urges that the members of the commission are within the exception noted in this provision; that in the performance of their duties they are acting "in a legislative or a judicial or *quasi*-judicial capacity." This claim is based upon a statement in the opinion in *Rapid Railway Co.* v. *Michigan Public Utilities Commission,* 225 Mich. 425, 428 (P. U. R. 1924B, 585), that "It is an official board, and its orders certainly are of a *quasi*-judicial nature."

The term "*quasi*-judicial" is not found in any of our laws. When the power is conferred by statute upon a commission such as the public utilities, or a board such as the department of labor and industry, to ascertain facts and make orders founded thereon, they are at times referred to as *quasi*-judicial bodies, but their members are in no sense judicial officers within the meaning of that term as used in the exception in the constitutional provision. It clearly refers to the judicial officers provided for therein.

2. The act creating the Michigan railroad commission (Act No. 300, Pub. Acts 1909, 2 Comp. Laws 1929, § 11018 *et seq.*) contained the following:

Section 2 (b). "The governor may at any time remove any commissioner for any neglect of duty or malfeasance in office. Before such removal, he shall give such commissioner a copy of the charges

against him, and shall fix a time when he can be heard in his own defense, which shall not be less than ten days thereafter."

The act creating the Michigan public utilities commission (Act No. 419, Pub. Acts 1919), in section three thereof (2 Comp. Laws 1929, § 11008), provides that:

"All the rights, powers and duties now vested by law in said railroad commission shall be deemed to be transferred to and vested in said public utilities commission and shall be exercised and performed thereby, except as herein otherwise provided."

We are not impressed that the word "rights" used therein was intended to refer to the 10-days' notice in the railroad commission act, as claimed by plaintiff. The "rights, powers and duties" vested in the railroad commission are such as can, and shall, be "exercised and performed" by it.

The constitutional provision is self-executing. It requires no legislation to make it effective. *Dullam* v. *Willson,* 53 Mich. 392, 400 (51 Am. Rep. 128). The grant of power to the governor is coupled with the duty enjoined on him to examine into the acts of any public officer. When doing so, the officer must have a reasonable opportunity to make his defense.

Article 9, § 8, of the Constitution provides:

"Any officer elected by a county, city, village, township or school district may be removed from office in such manner and for such cause as shall be prescribed by law."

The distinction is apparent. In *People, ex rel. Johnson,* v. *Coffey,* 237 Mich. 591, 598 (52 A. L. R. 1), this court said:

"The provision of the Constitution, basic law made by the people themselves, constitutes the gov-

ernor the sole tribunal in such cases. No right of appeal or review is given. If he acts within the law his decision is final."

The hearing was set by the governor for February 14th. The notice thereof was served on the plaintiff on February 9th. Counsel claims that the time was insufficient in which to prepare his defense. Had he filed an answer to the petition, or requested additional time to do so, or at the conclusion of the hearing on the first day had he requested further time in which to make his defense, a different question would be presented. But, apparently, relying upon the motions filed in his behalf, his counsel informed the governor that they desired the record to show positively that they appeared specially and in support of the motions only. Under the record before us we cannot say that the time between the service of the notice and the day of hearing was so unreasonable as to oust the governor of jurisdiction to hear the petition.

3. The charges set forth in the petition allege gross neglect of duty on the part of the members of the commission. Counsel urges that a charge upon which removal is predicated must be directed against the individual members and that "before such a charge can involve any individual member, it must be further alleged and proved that he has refused to take part in the necessary work involved in reaching an agreement as to the order of the commission to be issued."

When considering applications for licenses or other matters in which authority to act is conferred upon the commission, the parties interested have no knowledge of the action of the individual members in relation thereto. The record discloses the action taken by it. Its failure to act is apparent and, in the

absence of proof to the contrary, each of its members is chargeable therewith. On the hearing, the plaintiff might have testified or submitted proof that the neglect charged should not be attributed to him personally. The governor had the right to assume that the plaintiff participated in all of its proceedings, as it was his duty to do.

In *Attorney General, ex rel. John T. Rich, Governor,* v. *Jochim,* 99 Mich. 358 (23 L. R. A. 699, 41 Am. St. Rep. 606), three State officers, who acted under the statute as *ex officio* members of the board of State canvassers, were removed from office by the governor for gross neglect of duty in that they failed to personally canvass the election returns from the various counties of the State and declare the result. The proceedings for removal were not against them as individuals, but as officers "composing the board of State canvassers." The charges in this case were preferred against the three commissioners as "members of the Michigan public utilities commission."

Counsel calls our attention, and with seeming reliance thereon, to the rule as stated in 22 R. C. L. p. 487,—

"That a public officer, who is a member of a corporate body upon which a duty rests, cannot be held liable for the neglect of duty of that body."

The case of *Monnier* v. *Godbold,* 116 La. 165 (40 South. 604, 5 L. R. A. [N. S.] 463, 7 Ann. Cas. 768), is cited in support thereof. In that case an action for damages was brought against the individual members of a board of pharmacy for their refusal to register the plaintiff as a pharmacist, and the court held that:

"The official action of its different members is merged into the official action of the board itself as an entity."

The liability sought to be imposed in that case was a civil one. This holding would in no way affect the right of removal for a violation of the duties of the office. 46 C. J. p. 1043.

4. A consideration of several of the charges, hereafter set forth at length, discloses that there is no merit in this contention.

Are the charges of such a nature, and were they supported by sufficient competent evidence, to justify the order of removal?

The people of this State have the right to expect efficient service on the part of officers entrusted by law with the administration of its affairs. The duties imposed on the public utilities commission by the statute call for, not only ability on the part of its members, but reasonably prompt and faithful service. Good faith and right action are at all times required, not only by the State, from which they receive their compensation, but by the persons necessarily dealing with them under the provisions of the law.

The fifth paragraph of the petition reads as follows:

"That, on or about the 7th day of February, 1933, the city of Dowagiac filed a petition for a rate reduction against the Michigan Gas & Electric Company. A hearing was held on April 17, 1933, in which the three members of the commission named above were present. At determination of the hearing the chairman ordered briefs to be filed by all parties interested. It appears from the records and files of this case that the last brief was filed on or about May 11, 1933. To date there has been no decision in this case, although approximately eight months have passed. This results in an unwarranted delay contrary to public interest."

In support thereof, Clint Voorhees, the superintendent of public works of the city of Dowagiac, testified:

"Some citizens of Dowagiac filed a petition February 7, 1933, and had a hearing thereon. The Michigan Gas & Electric Company, who supply electric current, was the defendant. We asked for a rate reduction and an appraisal. There has been no decision so far as I know. I believe I would know if one had been made. The hearing was held April 17, 1933."

The eighth paragraph reads:

"That said Michigan public utilities commission and the said members thereof were charged by statute with the duty of administering the bus and truck transportation laws and in so doing the said commissioners favored the interests of common carriers, prejudicial to the interest of contract and private carriers, and were habitually negligent of the fulfilment of their statutory duties in the administration of the said law in that they continually took and held fees filed with applications by contract and private carriers for long periods of time without justification and without making any decision of such applications, particularly in the cases of applications filed by one Bert Kraack, Zeeland, Michigan; C. E. Stoner, Fayette, Ohio; C. H. Williams, Leonard, Michigan; Roy Schnepp, Raco, Michigan; Peter Boer, Holland, Michigan; Ray E. Hough, Grand Ledge, Michigan; and the Nelson Truck Lines, % Glen Nelson, 351 Richardson Avenue, Detroit, Michigan."

This allegation was supported by the testimony of Peter Boer, Roy Otis Schnepp, Ray E. Hough and Charles H. Williams. A consideration of their testimony by the governor justified a finding that the commission failed to act upon their applications

for licenses as private carriers with reasonable promptitude and kept in its possession the fees tendered by them for licenses for an unreasonable length of time, and had not granted the licenses or returned the fees at the time of the hearing.

The ninth paragraph reads:

"Petitioners allege upon information and belief, and charge the fact to be, that said members of the public utilities commission extended credit to various licensees and to public utilities within the State of Michigan in an amount of $25,000 and upwards for fees for the right to operate trucks upon the highways and for fees for audits and appraisals, contrary to the practice of the Michigan public utilities commission, and contrary to the law of the State of Michigan."

The evidence disclosed that on April 20, 1933, one of the commissioners, Edward T. Fitzgerald, sent to the office of the attorney general a statement of fees due the State for licenses issued by the commission to operators of truck lines to the amount of $25,284.12. Of this amount, $11,123.93 had been collected at the time of the hearing; $1,994.07, written off as uncollectible, and the balance then unpaid. It appears that more than 40 of such licenses had been issued without requiring the payment of the statutory fee therefor.

The statute fixes the fees to be paid for such licenses. Section 5 of Act No. 212, Pub. Acts 1931, which provides for the fees to be charged in certain cases, contains the following proviso:

"*Provided, however,* That no such carrier shall be entitled to such permit nor be permitted to operate upon the highways of this State while in default in the payment of the fees herein required or of any other provision of law or while refusing or failing

to comply with the orders of the commission with respect to their vehicles or operations, except in the discretion of the commission."

Counsel contends that under it "the commission may require payment of the fees in advance or that it may in its discretion waive that requirement." It may seem doubtful whether the exception does not apply to the orders of the commission only, but, if also applicable to the payment of fees, the extension of credit to the amount stated warranted the governor in finding that it was in "violation of the duties of said members of the commission." Were the number of persons to whom the credit was extended but few, and but a comparatively small amount due the State, there would be force in the contention. But, if such a discretion be conferred, it cannot with any degree of fairness be said to extend to so many licenses and to such an amount as is above stated. The purpose of the statute, when considered in the light of its other provisions, is to secure to the State a certain fee for the right to engage in the business for which the license is granted. Circumstances might arise which would permit the commission to issue the license without immediate payment, but in any event the payment should have been enforced within a reasonable time.

The plaintiff was an appointive officer. Under the constitutional provision the governor not only had the power, but it was his duty, to remove him from office under the charges preferred if the evidence submitted established gross neglect of duty on his part. The object to be attained thereby was not to punish the plaintiff, but to improve the public service. The three charges above considered specifically stated facts which, if true, warranted a finding that the members of the commission were

guilty of such neglect in their administration of the law under which they were appointed. There was competent evidence to establish the truth of these charges, and in the absence of any denial or explanation on the part of the plaintiff we cannot say that the removal of plaintiff from the office of commissioner was not justified thereby.

The petition contained other charges of neglect of duty on the part of the members of the commission, but, in view of the conclusion reached, we find it unnecessary to consider them.

We close by quoting from the opinion in *Attorney General, ex rel. John T. Rich, Governor,* v. *Jochim, supra,* written by Mr. Justice HOOKER (pp. 377, 378):

"While there is an inclination upon the part of the average American to accept good intentions as an excuse for mistakes, it is not for the general public good that responsible public offices shall be confided to, or remain in the custody of, those whose duties and responsibilities rest so lightly upon them as to permit the public interests to be injured or endangered through neglect; and when such neglect, from the gravity of the case, or the frequency of the instances, becomes so serious in its character as to endanger or threaten the public welfare, it is gross, within the meaning of the law, and justifies the interference of the executive, upon whom is placed, by this amendment, the responsibility of keeping the affairs of State in a proper condition. We cannot think that the term 'gross neglect' means only intentional official wrongdoing. Such acts would hardly be described by the word 'neglect.'"

The writ is dismissed. No costs will be allowed.

POTTER, NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

UNION GUARDIAN TRUST CO. *v.* LIPSITZ.

1. ACTION—TRUST MORTGAGES—RECEIVERS—RENTS.
   Question of whether or not mortgage was a trust mortgage was not rendered moot on petition for appointment of receiver in foreclosure proceedings by reason of professed willingness of defendants to pay rent to plaintiff under assignment of rents, nor by the finding that rents were not inadequate or that lease between mortgagor's assignees and their lessee was not collusive, where court was justified in finding some control of rents by it was advisable.

2. MORTGAGES—CORPORATION CLOSELY ALLIED TO MORTGAGEE-TRUSTEE.
   Consideration of investment company, closely associated with trust company in transaction involving trust mortgage and sale of bonds thereunder is not indulged, where result would be the same if trust company had done all the things done by the investment company.

3. SAME—TRUSTS—ASSIGNMENT OF RENTS.
   Mortgage which ran to mortgagee as trustee for the benefit of bondholders when executed, in which mortgagee had no power to change or control it, and which was recorded and bonds sold thereunder *held*, a trust mortgage, no subterfuge having been employed to evade ejectmeent statute by use of clause intended to operate as assignment of rents (3 Comp. Laws 1929, §§ 13498, 13499, 14956).

4. SAME—TRUSTS—BONDHOLDERS—SECRET AGREEMENTS.
   Purchasers of bonds secured by trust mortgage are not required to go behind instrument to which bonds refer them to discover any private intent or secret agreement of parties to instruments.

5. SAME—ASSIGNMENT OF RENTS AND PROFITS—STATUTES.
   Statute authorizing assignment of rents in or in connection with trust mortgage to secure bonds issued thereunder does not require that assignment operate immediately and deprive

mortgagor of income before default but merely authorizes an assignment theretofore forbidden (Act No. 228, Pub. Acts 1925 [3 Comp. Laws 1929, §§ 13498, 13499]).

6. SAME—AUTHORITY TO COLLECT RENTS—INTENT.

Authority to collect rents under a trust mortgage and apply them on the debt, to take effect on default of mortgagor or parties deriving interest from him, and upon giving notice to tenant or other occupier of premises *held*, valid and intended to operate as assignment of rents under Act No. 228, Pub. Acts 1925 (3 Comp. Laws 1929, §§ 13498, 13499).

7. STATUTES—AMENDMENT—ASSIGNMENT OF RENTS AND PROFITS—EJECTMENT.

Contention that statute authorizing assignment of rents under trust mortgages is invalid because it alters or amends ejectment statute without re-enacting or publishing latter at length contrary to article 5, § 21 of the Constitution *held*, untenable (3 Comp. Laws 1929, §§ 13498, 13499, 14956).

Appeal from Wayne; Miller (Guy A.), J. Submitted June 14, 1934. (Docket No. 68, Calendar No. 37,870.) Decided July 2, 1934.

Bill by Union Guardian Trust Company, against Harry Lipsitz and others to foreclose an alleged trust mortgage. On petition for appointment of receiver to collect rents and profits under alleged assignment. From order denying appointment of receiver but requiring payment of rents to plaintiff and monthly accountings, defendants Glasser and Hoffman appeal. Affirmed.

Monaghan, Crowley, Reilley & Kellogg, for plaintiff.

Shapero & Shapero, for defendants Glasser and Hoffman.

FEAD, J. August 3, 1926, defendant Lipsitz applied to the Guaranty Trust Company for a con-

struction loan of $185,000. August 9th he executed and acknowledged a memorandum that he had entered into an agreement with the Guaranty Trust Company whereby he was to execute a mortgage as security for services to be rendered and money to be loaned him by the company. No such agreement appears in the record.

Under date of August 16th he executed to the Guaranty Trust Company, "trustee, for the holders of the bonds or obligations secured hereby," a real estate mortgage to secure 208 bonds aggregating $180,000. The mortgage was acknowledged August 18th and recorded August 26th.

Under date of August 16th an agreement was made by Lipsitz, Guaranty Trust Company and Guaranty Investment Company, under which the latter contracted to sell the bonds to the public and to account to the mortgagor for the full amount of the issue, whether sold or not, less compensation for selling. Dated the same day (but filed September 16th) Lipsitz executed an application to the Michigan securities commission for authority to sell the bonds, representing that they were trusteed by the Guaranty Trust Company and that the Guaranty Investment Company had purchased them at $167,400.

Defendants, by oral testimony, claim the Guaranty Investment Company did not become a party to the transaction and the agreement made with it and the application to the securities commission were not executed until after the recording of the mortgage.

The first money paid to Lipsitz was on September 1st, by checks of the Guaranty Investment Company. All future sums were disbursed through the investment company. The first bond was sold to

the public September 27th, and all were finally disposed of. Pending printing of the individual bonds Lipsitz issued a single temporary bond for $180,000, which was held by the Guaranty Trust Company.

The Guaranty Trust Company and the Guaranty Investment Company were separate corporations but closely associated. They had the same officers, the same offices, the trust company paid all salaries and expenses but there was not an identity of stock owners. Defendants contend the participation of the investment company was merely colorable and a subterfuge and the trust company was always the real party in interest.

The Guaranty Trust Company became insolvent and, on November 13, 1931, plaintiff was appointed successor trustee of the mortgage loan by the circuit court for Wayne county. July 15, 1932, it filed bill for foreclosure in the instant suit.

In 1927 Lipsitz conveyed the premises to defendants Glasser and Hoffman. In 1929 the latter executed a 10-year lease to defendant Helpert at rent of $2,250 per month. In 1931 the lease was canceled by agreement and a new one executed for the balance of the term with monthly rents of $1,900 for five months and $2,250 thereafter. June 1, 1932, an agreement was made that the rent be reduced to $700 per month until July 1, 1934, and thereafter adjusted to conditions. June 10, 1932, the trustee served notice of default and demand for rents. It then discovered that the premises were in possession of Helpert under a lease. The rent at $700 per month was paid to the trustee to January, 1933. Nothing was paid in February or March and, since April, 1933, only $300 per month has been paid to the trustee.

March 17, 1933, without knowledge of the trustee, the Helpert lease was canceled and a new one made expiring July 31, 1934, with rent for four months of $300 per month, the fifth month at $400, and thereafter $500 per month. October 2, 1933, a new notice of default and assignment of rents was served on tenants by the trustee and in a few days countermanded under an agreement between the parties that Helpert deposit the rent with his attorney to abide the action.

October 24, 1933, plaintiff filed petition for receiver to collect the rents pledged by the mortgage. Its principal claim was that the rents reserved in the last Helpert lease were inadequate and the lease was not made in good faith. The court held that the rents did not appear to be grossly inadequate nor the result of collusion among defendants but that there was sufficient suspicion of improper management to require the court to maintain some sort of supervision. It entered an order that defendants pay plaintiff the rents reserved in the Helpert lease until the lease terminates; that defendants furnish plaintiff monthly statements of receipts and disbursements; and that the petition for appointment of receiver be denied, on condition of the regular payment of rents and without prejudice to the right to renew the application upon change in conditions. The appeal is from such order.

The court held the instrument a trust mortgage and the clause for assignment of rents valid. The question was not made moot by defendants' professed willingness to pay the rents to plaintiff nor the finding that the rents were not inadequate or the lease collusive because the court held that some control of rents by it was advisable. To justify any

control required determination of the character of the instrument and the validity of the assignment clause. We think the facts justify supervision by the court, as conditions demand, if it be authorized by the mortgage.

Defendants contend the instrument is not a trust mortgage, on the authority of *Equitable Trust Co.* v. *Milton Realty Co.,* 261 Mich. 571; *Equitable Trust Co.* v. *Milton Realty Co.,* 263 Mich. 673; *Bankers Trust Co. of Detroit* v. *Russell,* 263 Mich. 677; *Equitable Trust Co.* v. *Wetsman,* 264 Mich. 26. The argument is that as the Guaranty Investment Company did not become a party to the transaction until after the mortgage was recorded and, in any event, was merely an *alter ego* of the trust company, the sole consideration for the mortgage when executed and recorded was the money to be loaned and services to be performed by the trust company; therefore, no other beneficiaries were then interested in it and, because it was security only to the trust company, which was also mortgagee-trustee, it was not a trust mortgage when recorded nor until bonds were sold. The contention attributes controlling force to what was merely one of the considerations in the above cases.

We do not deem it necessary to consider the investment company in the transaction. The result would be the same if the trust company had done all the things done by the investment company.

As a matter of fact, the mortgage secured nothing when it was recorded because nothing had been advanced on it. As in most bond issues, the mortgage was executed and recorded before the bonds were sold. The distinction between the cited cases and the one at bar is manifest and fundamental. In the cited cases it was clearly pointed out that the mort-

gage ran to the mortgagee individually and not as trustee; when recorded, the mortgagee, and no one else, was a beneficiary in it; while a trust would arise between the mortgagee and bondholder on sale of bonds, the trust would be created by act of the mortgagee, not of the mortgagor; and the mortgagor had established no trust but, on the contrary, had conveyed the whole mortgage title to an individual and thereby established a private relationship. Many times Mr. Justice SHARPE stated the basic idea, expressed in 263 Mich. 673 (*Equitable Trust Co.* v. *Milton Realty Co.*):

"The trust thus created was by the mortgagee and not by the mortgagors, or by anything contained in the mortgage itself." p. 676.

"They (the mortgagors) placed no property in the hands of the mortgagee to be held by it in trust." p. 675.

At bar, the mortgage, by its terms, runs to a trustee for the benefit of all bondholders; the trust was created by the mortgagor, without power of the mortgagee to change or control it; it was impressed upon the property by the conveyance of the mortgagor to a trustee in trust, not to an individual; and the mortgagee took in trust, not as an individual.

It is true that, although an instrument is in form a trust mortgage, it may be shown to be a private instrument; as if the lender intends to, and does, retain all the securities and the mortgage is given in trust form merely as a subterfuge to evade the ejectment statute. *Lambrecht* v. *Lee,* 264 Mich. 56. No such subterfuge appears at bar. General distribution of the bonds was contemplated by the parties, contracted for, and had. Moreover, regardless of the mutual rights or liabilities of the orig-

inal parties in a private controversy between them, they established the character of the instrument as to the public when they executed and recorded it in trust form and sold bonds thereunder. Purchasers of bonds are not required to go behind the instruments to which their bonds refer them and conduct an inquisition of the parties to discover their private intent or secret agreement. Unless a mortgagor is so estopped from claiming that such a mortgage is not what it purports to be, no one could safely buy bonds without procuring unassailable and unretractable evidence from the parties for use in a lawsuit.

The instrument is a trust mortgage.

Act No. 228, Pub. Acts 1925 (3 Comp. Laws 1929, §§ 13498, 13499), authorizes assignment of rents in or in connection with a trust mortgagee "to secure bonds or obligations issued or to be issued thereunder."

The instant mortgage was executed in 1926, apparently on an old form which had been used for private mortgages. The assignment is long, involved, and somewhat anomalous. In essentials, it reads:

"That should default be made in the payment of any of the sums of money above mentioned, then, at the option of said trustee, its successors or assigns, and without notice to said mortgagors, their personal representatives or assigns, the said trustee, its successors or assigns, as agent for said mortgagors, their personal representatives or assigns, may ask, demand, collect and receive all such rents and profits, * * * as then are or may thereafter be due or owing to said mortgagors, * * * giving notice of its intention to collect and receive such rents, or instalment of principal and interest under

land contract, to such tenants, occupiers or lessees, or vendees, and in such event said mortgagors, their personal representatives or assigns, shall be deemed to have assigned and transferred all such rents and profits, and arrears of rent, and instalments of principal and interest under land contracts, to said trustee, its successors and assigns, until the indebtedness secured hereby is fully paid and satisfied and * * * said trustee * * * may proceed by suit or suits at law for the recovery thereof, as it shall deem advisable. * * * Such assignment shall continue, and be and remain in full force and effect, until the indebtedness secured hereby, with all interest, and items paid in pursuance of any provisions hereof, are fully paid and satisfied,'' etc.

It is further provided that the rents collected by the trustee shall be applied upon the debt and the trustee may relinquish and revive the right to collect.

Defendants contend this is a power of attorney to collect rents, not an assignment *in præsenti.* The mortgage specifically provides that upon notice it shall be an assignment. The statute does not require that the assignment operate immediately and thus deprive the mortgagor of the benefit of the income before default. Its purpose is to authorize an assignment theretofore forbidden, not to restrict the parties in contracting for the rents as additional security (*Security Trust Co.* v. *Sloman,* 252 Mich. 266, 273), in the manner they deem advisable. There is no statutory prohibition on the assignment taking effect *in futuri,* as on default. In fact, under the statute it does not become effective against tenants until notice. Reading the clause as a whole makes it plain that the parties intended it as an assignment of rents under the statute. *Detroit Trust Co.*

v. *Detroit City Service Co.*, 262 Mich. 14, 41. It is valid.

Defendants contend Act No. 228, Pub. Acts 1925, is invalid because it alters or amends the ejectment statute, 3 Comp. Laws 1929, § 14956, without re-enacting and publishing the latter at length, contrary to Constitution, article 5, § 21. The contention is untenable. *People, ex rel. Drake,* v. *Mahaney,* 13 Mich. 481, 496.

Order affirmed, with costs.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

PEOPLE *v.* SHAUNDING.

1. CRIMINAL LAW—EVIDENCE-OF LACK OF SPECIFIC INTENT—LARCENY.
   In trial on charge of entering horse shed, without breaking, with intent to commit larceny, exclusion of testimony offered by defendant as to his belief that he had the right to take property in question from place taken *held,* reversible error.

2. LARCENY—TAKING UNDER CLAIM OF RIGHT.
   One who takes property under claim of right, however unfounded, has not committed larceny as felonious intent is an essential ingredient in every larceny.

Appeal from Allegan; Miles (Fred T.), J. Submitted June 14, 1934. (Docket No. 113, Calendar No. 37,786.) Decided July 2, 1934.

Brenton Shaunding was convicted of entering a horse shed, without breaking, with intent to commit larceny therein. Reversed, and new trial granted.

Clare E. Hoffman (*Leo W. Hoffman* and *Carl E. Hoffman,* of counsel), for appellant.

Patrick H. O'Brien, Attorney General, and *Welbourne S. Luna,* Prosecuting Attorney, for the people.

BUSHNELL, J. The trial court was in error in excluding testimony offered by the respondent as to his belief that he had the right to take the property in question from the place from which it was taken.

"The felonious intent is an essential and inseparable ingredient in every larceny, and if a person takes property under a claim of right, however unfounded, he has not committed larceny." *People* v. *Hillhouse,* 80 Mich. 580, 586.

The judgment is reversed, and a new trial is granted.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred.

HAJDUK *v.* REVERE COPPER & BRASS, INC.

1. MASTER AND SERVANT—FINDING OF DEPARTMENT OF LABOR AND INDUSTRY—EYE INJURY.

   Finding of department of labor and industry that notice of injury to eye of employee was communicated to employee's foreman is accepted where testimony is conflicting (2 Comp. Laws 1929, § 8431).

2. SAME—NOTICE TO FOREMAN SUFFICIENT.

   Notice to foreman or immediate superior of employee is notice to employer (2 Comp. Laws 1929, § 8431).

3. SAME—STATUTES OF LIMITATIONS.

   Statute of limitations referred to in 2 Comp. Laws 1929, § 8431, as suspended in favor of employee until employer files report of accident involved is the six-months' statute provided in the same section and not the six-years' general statute of limitations (3 Comp. Laws 1929, § 13976).

4. SAME—GENERAL STATUTE OF LIMITATIONS.

   General statute of limitations does not apply to proceeding brought under the workmen's compensation act before department of labor and industry since it is not a court and proceeding before it is not an action (3 Comp. Laws 1929, § 13976).

5. SAME—EYE INJURY—TOTAL BLINDNESS—PROCEEDING TO BE COMMENCED WITHIN REASONABLE TIME.

   Award for loss of sight of left eye, on petition filed over 10 years after injury causing same, *held,* barred for failure to commence proceeding within a reasonable time, notwithstanding employee remained employed by same employer until total blindness followed nearly 10 years later than injury and employer never filed a report of the accident (2 Comp. Laws 1929, § 8431).

Appeal from Department of Labor and Industry. Submitted June 5, 1934. (Docket No. 18, Calendar No. 37,787.) Decided July 2, 1934.

John Hajduk presented his claim against Revere Copper & Brass, Incorporated, a Michigan corporation, for an accidental injury alleged to have been sustained while in defendant's employ. Award to plaintiff. Defendant appeals. Reversed.

Cyrowski, Cyrowski & Cyrowski (*Edward F. Traver,* of counsel), for plaintiff.

Clark, Klein, Ferris & Cook (*Joseph H. Parsons,* of counsel), for defendant.

EDWARD M. SHARPE, J. October 15, 1922, plaintiff was engaged in defendant's plant in moving metal bars from an acid bath to a water bath. In this process some of the water containing a percentage of acid splashed into plaintiff's left eye causing pain and a burning sensation. Plaintiff washed his eye with clean water and continued with his work. The eye became inflamed and tears and matter came from it. Three days later he lost the sight of this eye, but continued in the employ of the defendant company, being transferred from one job to another until April 27, 1932, when he became totally blind and was discharged. May 5, 1933, plaintiff filed a claim for compensation, asserting that the loss of sight in the left eye was due to the acid getting into it and that the loss of sight in the right eye was caused by sympathetic opthalmia. The department of labor and industry awarded plaintiff compensation for the loss of sight of his left eye.

Plaintiff contends that, while he did not give the defendant company written notice of claim for compensation, the statute of limitations within the compensation act is not a bar to relief because the company had actual notice of the injury; that at the

time of the accident and injury he told his foreman by words, signs and gestures that he had injured his eye and later lost the sight of it.

The defendant contends that its failure to report the accident and injury was due to the fact that it had no actual knowledge or notice of the injury; and further that a claim made for the first time nearly 10 years after the happening of the accident is barred by the general statute of limitations.

There was some dispute in the testimony as to whether plaintiff had communicated the fact of his injury to defendant's foreman, but as to this matter the conclusion of the department must be accepted and we must assume that plaintiff succeeded in communicating the fact of the injury to the foreman under whom he worked.

Defendant claims that notice to the foreman was not enough and that the officer of the company having charge of compensation claims should have been notified. We cannot agree with this contention. Notice to the injured employee's foreman or immediate superior is notice to the employer. *Bates & Rogers Construction Co.* v. *Emmons,* 205 Ky. 21 (265 S. W. 447); *Kingston-Pocahontas Coal Co.* v. *Maynard,* 209 Ky. 431 (273 S. W. 34); *Jeremiah Murphy's Case,* 226 Mass. 60 (115 N. E. 40); *Bertha B. Simmons' Case,* 117 Maine, 175 (103 Atl. 68); *Page* v. *State Ins. Fund,* 53 Idaho, 177 (22 Pac. [2d] 681), and cases cited therein.

The compensation act provides that claim for compensation shall be made within six months after the occurrence of the injury and provides:

"That in all cases in which the employer has been given notice of the happening of the accident, or has notice or knowledge of the happening of the accident, within three months after the happening of

the same, and fails, neglects, or refuses to report said accident to the industrial accident board as required by the provisions of this act, the statute of limitations shall not run against the claim of the injured employee or his dependents, or in favor of either said employer or his insurer, until a report of said accident shall have been filed with the industrial accident board." 2 Comp. Laws 1929, § 8431.

The general statute of limitations reads as follows (3 Comp. Laws 1929, § 13976):

"All actions in any of the courts of this State shall be commenced within six years next after the causes of action shall accrue, and not afterward, except as hereinafter specified."

The statute of limitations referred to in section 8431 of the compensation act means the limitation within the act and not the general statute of limitations. The purpose of the general statute of limitations is to fix some time at which litigation concerning a subject matter must be at an end as well as to limit the possibility of fraud which arises from unreasonable delay in bringing actions or asserting claims. One of the objects of the compensation act was to secure a speedy and inexpensive method of adjusting compensation claims. While the general statute of limitations has no application in the instant case because the department of labor and industry is not a court and a proceeding before it is not an action, yet we can conceive of no reason why there should not be a limit of time within which a proceeding for compensation should be commenced. That limit of time must be a reasonable one, which by analogy to the statute of limitations will be deemed to be six years. *Cruse* v. *Railway Co.*, 138 Kan. 117 (23 Pac. [2d] 471).

This is in no way inconsistent with the recent case of *Jelusich* v. *Wisconsin Land & Lumber Co.*, 267 Mich. 313, wherein we held that the general statute of limitations did not apply to petitions for review of payments upon a change in condition where there has already been an award. That case, not being an action for collection of payments already due on an award, did not come within the holdings of *Buzzn* v. *Muncey Cartage Co.*, 248 Mich. 64, or *Gallup* v. *Western Board & Paper Co.*, 252 Mich. 68, in regard to the statute of limitations. On the other hand, it presented very different considerations from the situation in the present case wherein the plaintiff made no move to obtain any compensation whatsoever until more than 10 years had elapsed from the time of injury.

The award is vacated, with costs to defendant.

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

ATTORNEY GENERAL, *ex rel.* CONNOLLY, *v.* READING.

1. CONSTITUTIONAL LAW—ELECTION INSPECTORS—APPOINTMENT.

   Act No. 176, Pub. Acts 1933, amending the general election law so as to provide for appointment of not more than 50 per cent. of election inspectors from the same political party for State and national elections *held*, not violative of either letter or spirit of the Constitutions of Michigan or the United States (Mich. Const., art. 16, § 2, U. S. Const., am. 14, § 1).

2. STATUTES — CONSTRUCTION — ELECTION INSPECTORS — LEGISLATIVE INTENT.

Portion of statute reading "The provisions of this act *requiring that members of the dominant minority political party be appointed as election inspectors* shall apply only to State and national elections" construed as though meaningless italicized words were omitted, is in accord with common sense construction of act as a whole and, so construed, renders intent of the legislature clear (Act No. 176, § 19a, Pub. Acts 1933).

3. ELECTIONS—INSPECTORS—POLITICAL AFFILIATION.

Statute requiring that not more than 50 per cent. of election inspectors for State and national elections shall belong to same political party *held,* not to make membership in a political party a prerequisite or disqualification to appointment as election inspector nor an unconstitutional interference with local self-government (Act No. 176, Pub. Acts 1933).

4. CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.

An act of the legislature must be plainly at variance with some provision of the Constitution before a court will so declare it, doubtful questions being resolved in favor of validity.

5. ELECTIONS—STATUTES—INSPECTORS.

Claim that statute requiring that not more than 50 per cent. of election inspectors for State and national elections shall belong to same political party is impossible of performance *held,* without merit (Act No. 176, Pub. Acts 1933).

6. STATUTES—EXPENSE OF OBEDIENCE.

Expense attendant upon obedience to a valid election law is not a sufficient reason for not obeying it, but matter of cost of performance should be addressed to the legislature (Act No. 176, Pub. Acts 1933).

Petition by Patrick H. O'Brien, Attorney General, on the relation of William F. Connolly, Andrew C. Baird and Ferris H. Fitch, for mandamus to compel Richard W. Reading, John W. Smith, and John A. Boyne, City Election Commissioners of the City of Detroit, to comply with Act No. 176, Pub. Acts 1933. Submitted July 27, 1934. (Calendar No. 37,987.) Writ granted August 24, 1934. Opinion filed September 18, 1934.

Patrick H. O'Brien, Attorney General, *William F. Dorn* and *Perry A. Maynard,* Assistants Attorney General, and *Thomas F. Chawke,* for plaintiff.

James R. Walsh and *John H. Witherspoon,* Assistants Corporation Counsel (*Raymond J. Kelly,* Corporation Counsel, and *Chester J. Morse,* of counsel), for defendants.

BUSHNELL, J. Petitioners, resident electors of the city of Detroit, seek by mandamus to require compliance by the city election commission of the city of Detroit with the provisions of Act No. 176, Pub. Acts 1933.

The act amends the general election law and provides that:

"In case four inspectors of election shall be appointed, not more than two of the four inspectors shall be of the same political party, and in case more than four such inspectors are appointed, not more than fifty per centum, as nearly as possible, of such inspectors shall be of the same political party."

Similar provisions are made where the boards consist of three inspectors, the act covering city, village and township boards, and is applicable only to State and national elections.

Defendants have refused to comply with the act, submitting the following reasons:

1. That it is repugnant to article 16, § 2 of the Constitution of the State of Michigan, and amendment 14, § 1 of the Constitution of the United States.

2. That it is invalid because of an interference with the constitutional and municipal right of local self-government.

3. That the act is invalid because of impossibility of performance and it fails to set up a standard whereby party affiliation may be determined.

4. That section 19 (a) of the act refers to other provisions of the general election laws which are non-existent, but being inseparably connected with the remainder of the act, the entire act is thereby invalidated.

The principal question is the constitutional one. Article 16, § 2, of the Constitution of this State reads as follows:

"Members of the legislature and all officers, executive and judicial except such officers as may by law be exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of this State, and that I will faithfully discharge the duties of the office of ..... according to the best of my ability.' No other oath, declaration or test shall be required as a qualification for any office or public trust."

Defendants say the issue is controlled by *People, ex rel. Le Roy,* v. *Hurlbut,* 24 Mich. 44 (9 Am. Rep. 103), and *Attorney General* v. *Detroit Common Council,* 58 Mich. 213 (55 Am. Rep. 675). The first case declared an act unconstitutional as violating the test oath section which required the members of the board of public works to be selected in equal numbers from two political parties represented in the common council, and the second relying on the *Hurlbut* opinion reached the same result with respect to an act creating a board of commissioners of elections of four members, two members thereof to be from each of the two leading political parties in the city of Detroit.

20 C. J. p. 92, points out that:

"It is a usual provision that the election officers of each district shall consist of members of opposing political parties, and in a number of jurisdictions there are also provisions for the nomination or recommendation by certain committees or chairmen of committees of the leading political parties of names of persons for appointment as election officials. In one jurisdiction (citing *Attorney General* v. *Detroit Common Council, supra*) such provisions have been held unconstitutional as making political opinions a condition to holding public office, but in others where the question has been raised it has been held that such provisions do not establish such a political test of office as is repugnant to the Constitution but is rather a rule for the guidance of the appointing power."

While 9 R. C. L. p. 1014, says of the same authority:

"It has been held that the power of appointment cannot be redelegated and for this reason a statute providing for the appointment of election inspectors by a board to be appointed by the mayor and council of a city, to consist of two persons from each of the two leading political parties, is unconstitutional."

Defendants also cite *Dapper* v. *Smith,* 138 Mich. 104, *Attorney General, ex rel. Selby,* v. *McDonald,* 164 Mich. 590 (32 L. R. A. [N. S.] 835), and *Harrington* v. *Secretary of State,* 211 Mich. 395, in support of their constitutional arguments.

The language of the act in question is entirely different from that construed in the authorities cited. It is, however, identical with that contained in Act No. 118, Pub. Acts 1893, which created the board of control of the prison and house of correction, 3 Comp. Laws 1929, § 17545; the board of jury

commissioners act, 3 Comp. Laws 1929, § 13752; the liquor control commission, Act No. 8, Pub. Acts 1933 (Ex. Sess.), and section 2, chapter 2, title 4 of the charter of the city of Detroit, creating its civil service commission. It is also somewhat similar in its provisions to the Federal jury commission act, 28 USCA, § 412. See *United States* v. *Murphy,* 224 Fed. 554, and *United States* v. *Rondeau,* 4 Woods, 185 (16 Fed. 109, 111). The first-named act was attacked in *Attorney General, ex rel. Fuller,* v. *Parsell,* 99 Mich. 381. Mr. Justice LONG, speaking for the court, said:

"That section provides that the board shall consist of three members, to be appointed by the governor, and not more than two of such members so appointed shall be of the same political party. The governor, by the same section is made *ex officio* member of the board. This provision of the act, we think, was passed for a salutary purpose, and was within the province of the legislature. We know of no provision of the Constitution of the State which it violates."

Mr. Justice Peckham in *Rogers* v. *Common Council of Buffalo,* 123 N. Y. 173, 185 (25 N. E. 274, 9 L. R. A. 579), distinguished the case of *Attorney General* v. *Detroit Common Council, supra,* in upholding the validity of a statute creating the civil service commission for the State of New York containing the same language as the instant statute, the language of the New York Constitution, article 13, § 1, being identical with ours. The same distinction appears in *Attorney General* v. *McKelvey,* 78 N. J. Law, 3 (74 Atl. 316, 138 Am. St. Rep. 583).

Our opinion in the *Parsell Case* is controlling and the act does not violate the Constitution of this State nor the Constitution of the United States.

The argument that the act interferes with the right of local self-government is of no merit in that it is limited in its application to State and national elections by section 19 (a). That section is, however, properly subject to criticism in its use of the words

"The provisions of this act requiring that members of the dominant minority political party be appointed as election inspectors shall apply only to State and national elections."

The words "requiring that members of the dominant minority political party be appointed as election inspectors" are meaningless as there is nothing in the act to which this language is applicable. We do not rewrite statutes, but it is elementary that the rules of common sense shall apply to the construction of statutes. Eliminating the meaningless words does no violence whatever to a common sense reading of the act. The intent of the legislature is clear and the section if read: "The provisions of this act shall apply only to State and national elections" clearly conforms to the remainder of the act without destroying its purpose and completeness and we shall so construe it. *People* v. *McMurchy,* 249 Mich. 147, 156.

No standard of party affiliation is set up in the act and none is necessary.

"Instead of prescribing political qualifications as a requisite for membership in these boards, the statutes permit them to be filled by persons who belong to no political party, who have no political affiliations. Nor do they make membership of a political party a ground of disqualification. All that they do is to limit the representation in the board of any existing political party." *Attorney General* v. *McKelvey, supra.*

Defendants argue that "the difficulty presented is the fundamental one of imposing a declaration of party affiliation as a condition of the right to hold public office." This argument entirely overlooks the fact that practically every judicial and administrative office in the State and nation has either been appointed or nominated and elected as a member of a political party and that the claimed sacrosanct non-partisan system is the exception rather than the rule. We can see no difference between this statute and any other which requires that candidates for election to any certain public office shall be limited to a certain number from each political party.

We adopt the language of Mr. Justice Peckham in *Rogers* v. *Common Council of Buffalo, supra:*

"If the legislative acts under consideration violate in any particular the Constitution of our State, it is the duty of this court to so decide without regard to consequences. In determining that question, however, we must be guided in the discussion by the rules of construction which are so well known and which should control all courts. The act of the legislature must be plainly at variance with some provision of the Constitution before a court will so declare it. Doubtful questions will be resolved in favor of the validity of the legislative act."

And we concur in the view he there expressed, as stated in *Attorney General* v. *McKelvey, supra,* that "a statute, the purpose of which is to secure the appointment of persons who are not all of the same political views, and thus provide for a representation in the body so appointed, of different and probably conflicting interests in the municipality, does not, because it carries such a purpose into execution, violate either the letter or the spirit of the Constitu-

tion by reason of the fact that it prohibits the appointment to the board which it creates of more than a certain proportion of members of the same political party and are entirely content to rest this conclusion upon the reasoning of Mr. Justice Peckham in the very elaborate and able opinion from which we have quoted."

We might add that every elector must declare his political affiliation if he desires to cast his ballot at a primary election, 1 Comp. Laws 1929, § 2903, and in order to sign a nominating petition, 1 Comp. Laws 1929, § 2871.

Defendants say the act is impossible of performance and imposes an unjust financial burden upon the people of the city of Detroit. We find no merit whatever in the claim of impossibility of performance and any appeal with respect to the cost of performance should be addressed to the legislature and not to this court.

"The expense attendant upon obedience to a valid law cannot be alleged as a sufficient reason for not obeying it." *Attorney General, ex rel. Conely,* v. *Common Council, City of Detroit* (syllabus), 78 Mich. 545 (7 L. R. A. 99, 18 Am. St. Rep. 458).

The writ of mandamus will issue as prayed for, but without costs, this being a public matter.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred.

EADUS *v.* HUNTER.

1. ESTOPPEL—ESCROW—HUSBAND'S WRONGFUL DELIVERY—RATIFICATION BY WIFE.

   Husband's delivery of escrowed oil and gas lease of property they owned by the entireties contrary to wife's rights therein *held,* ratified by wife, where she used money received therefor knowing it came to her by reason of such delivery, and estopped her from recovering damages resulting therefrom.

2. TROVER AND CONVERSION—REMEDIES.

   Trover is not the remedy of lessors for claimed conversion of an oil and gas lease by recording it after delivery from escrow, where wrong done lessors was in not entering into new lease.

3. MINES AND MINERALS—OIL AND GAS IN PLACE.

   Oil and gas, unsevered, are part of the real estate and as such are not property for the conversion of which an action of trover will lie, it being a remedy for wrongful removal after severance.

4. SAME—OPPORTUNITY TO SEVER OIL AND GAS.

   Deprivation of opportunity to remove oil and gas from the containing soil does not constitute conversion.

5. EVIDENCE—VALUE OF LAND—SPECULATIVE DAMAGES.

   Testimony, in action for claimed conversion of leasehold interest under oil and gas lease, relative to lessened value of lands by reason of nearby wells and possible effect of drainage of oil *held,* highly speculative.

6. DAMAGES—EXCESSIVE—CONVERSION OF OIL AND GAS LEASEHOLD INTEREST.

   Judgment of $8,000 for alleged conversion of oil and gas leasehold interest *held,* not only excessive because of speculative nature of testimony as to damages, but based on elements not within the scope of the action of trover for such conversion, where measured by what could have obtained had there been no lease.

7. FRAUD—EVIDENCE—CONVERSION OF OIL AND GAS LEASEHOLD INTEREST.

Evidence, in action for alleged conversion of leasehold interest under oil and gas lease delivered from escrow by lessor to lessee for $100 paid for extension *held*, insufficient to establish fraud, where extension was not executed, $100 was not returned and lease was recorded by defendants upon advice of their attorney.

POTTER, NORTH, and FEAD, JJ., dissenting.

Appeal from Muskegon; Vanderwerp (John), J. Submitted January 12, 1934. (Docket No. 30, Calendar No. 37,478.) Decided September 18, 1934.

Trover by Fred A. Eadus and wife against Alfred J. Hunter and William H. Gage for alleged conversion of an oil and gas leasehold interest. Judgment for plaintiffs. Defendants appeal. Reversed, and new trial granted.

Harry D. Reber, for plaintiffs.

Penny & Clark and *Cross, Foote & Sessions,* for defendants.

WIEST, J. I cannot join in the opinion of Mr. Justice FEAD.

Counsel for plaintiffs, at the trial, disclaimed that the action was for slander of title and stated that it was only to recover damages "for conversion of the leasehold interest under the lease."

As I shall endeavor to point out in the course of this opinion plaintiffs, by their own acts, are estopped from having substantial damages; the husband by direct acts, and the wife by acquiescence and waiver; and in any event the damages are not only excessive but, in large measure, based upon elements not within the scope of the action.

In *Eadus* v. *Hunter,* 249 Mich. 190, it was held that, after deposit of the lease in escrow by Mr. Eadus, Mrs. Eadus conferred on her husband no authority to further manage the transaction for her, nor were there circumstances or a course of dealing from which new authority or a continuance of the original power to make unconditional delivery could be implied. The lease was, therefore, canceled and, upon that holding, plaintiffs, in the action at bar, have been awarded $8,000 damages, occasioned, it is claimed, by defendants wrongfully obtaining the lease and placing it of record.

If the lease was delivered by Mr. Eadus, contrary to the rights of Mrs. Eadus, and she learned of the delivery and knew that money coming to her hands was by reason of such delivery and used the money, instead of repudiating the transaction, then she ratified what Mr. Eadus had done and is estopped from recovering damages. The dearth of evidence on this point in the previous case is now supplied by this record.

Plaintiff Fred Eadus took the lease out of escrow and both plaintiffs were trying to obtain a substitute lease when it was placed of record.

Plaintiffs filed an amended declaration in May, 1932. An answer to the amended declaration averred payment of $100 to plaintiffs as a "consideration for the release of said lease from escrow and the immediate delivery thereof to defendants for recording, and said plaintiffs have not, nor has either of them, returned or offered to return said $100 to defendants, but on the contrary have applied the same to their own use and benefit."

In reply to such answer plaintiffs pleaded that "the sum of $100 was paid to Fred A. Eadus in consideration of his consenting to the release of said

lease from escrow temporarily so that a new lease might be executed whereby the defendants would obtain an extension of time of 60 days additional; that plaintiff Katherine J. Eadus had no use or benefit of the said sum of $100 or any part thereof."

Plaintiff Fred Eadus took the lease out of escrow and both plaintiffs were trying to obtain a substitute lease when it was placed of record. Mrs. Eadus testified:

"My husband told me afterwards about getting the $100 from Mr. Gage. I understood that he was to pay it back. What I told him to do before I went to work was to go to the bank and borrow it and get a signer. We wanted the money to send my daughter at college. She was at Ypsilanti and needed her tuition money and other expenses and it had to be paid right at that time for her quarter semester. * * * I knew the lease had been taken out of the bank. My husband told me that night. I didn't know at that time that my husband had gotten $100 from Mr. Gage. I didn't think my husband had the $100 yet. I cannot tell you for sure whether my husband got the lease before or after he got the $100. Mr. Hunter told me that he and Mr. Gage would come over Monday night and we would talk it over and be friendly about it, we weren't going to have trouble about it. I hadn't had trouble with Mr. Hunter and I never saw Mr. Gage before that. Mr. Hunter said we were going to be on friendly terms. I was angry because they took the lease out of the bank. I knew at that time that the lease had been taken out. That is why I happened to go to Mr. Hunter. I cannot tell exactly how long that was before the 60 days expired. I know it was a short time.

"It was in October and it was November the lease was supposed to be up. It was only a matter of a week or two it would be up, and I told him that we

only had a short time * * * before the lease would be up. I was awfully anxious to get a well on the place. * * * I never had a talk with either of these people about putting this lease on record. It wasn't supposed to go on record. That was understood or I wouldn't have signed the lease."

One plaintiff consented to taking the lease from escrow and the other plaintiff, when made aware of such taking, was perfectly willing to enter into another lease and supplant the old one, and also knew the $100 had been given to her husband and, with such knowledge, used the money.

The conversion was not in recording the lease. The wrong was in not entering into a new lease which plaintiffs were willing to give after the lease, now claimed to have been converted, was taken from escrow. This subject was not passed on in the equity case brought to cancel the lease; nor did that record enlighten us on this subject. Even if it be held that defendants converted the lease it must be said that from then on all their acts and the consequences to plaintiffs were wrongs for which an action of tort, perhaps, might be brought but for which conversion is not the remedy.

Had defendants removed any of the oil or gas then trover for such would lie; but they removed nothing.

It is elementary that one, otherwise entitled to bring an action of trover, may afford the wrongdoer a complete defense to the action by waiving the right to treat the act as wrongful. 26 R. C. L. p. 1144.

Trover lies only for the conversion of personal property and not for property while it is a part of the realty. 26 R. C. L. p. 1106.

Oil and gas, until severed from the containing soil, are a part of the realty. Deprivation of opportunity to remove oil and gas from the containing soil does not constitute conversion. Conversion of the lease could not carry the consequences imposed by the judgment herein.

At the time the lease was made plaintiffs' land was "wildcat territory," but after the Prather well came in as a producer there was considerable activity in acquiring leases, and then there was a speculative value.

The testimony relative to lessened value of plaintiffs' lands, by reason of nearby wells and possible effect of drainage of the oil was highly speculative, as one witness for plaintiff testified. There may be a flowing well at one point, and 100 feet away there might be a dry hole put down, and characterized this as the "oilman's luck," and made the trite observation that he had had considerable experience himself. Another witness said that the matter of a lease was a gamble anyhow, but from hearsay about other properties and leases he thought a lease of plaintiffs' property would have been worth about $1,500 in 1928. Another witness thought the lease, at about the time it was given, was worth about $1,000 per acre, and this is probably the estimate accepted by the jury.

Plaintiffs' case is not planted for an equitable conversion. If it were, then the court of equity would have had sole jurisdiction and, instead of canceling the lease, defendants would have been asked to respond for taking it without right and the damages would have been measured by the loss occasioned by nonperformance of the lease. Instead, plaintiffs have been awarded damages, measured by

what could have been obtained had there been no lease.

Defendants, by answer, pleaded:

"The good faith of the defendants in the premises was adjudicated by the Supreme Court of the State of Michigan in the case of *Eadus* v. *Hunter,* 249 Mich. 190, where the court on page 192 specifically held:

"'There was no indication of fraud or overreaching on the part of defendants.'

"This was an adjudication by said court upon the question of fraud upon which plaintiffs' right to recover here depends, binding on the parties to this suit, and conclusive of their rights herein, and sufficient to bar plaintiffs' right to recover."

In reply to this plaintiffs pleaded:

"As to paragraph two, plaintiffs admit that said opinion of the Supreme Court contains the statement quoted, but deny that said statement is conclusive upon the question of the good faith of the defendants.

"In support of this denial, plaintiffs will show that said statement was not necessary to the decision of said cause but was merely *obiter dictum* and not *res judicata* on that issue.

"As to paragraph three, plaintiffs deny that there has been an adjudication by the Supreme Court in any respect conclusive upon the right of plaintiffs relative to the fraud of the defendants, and deny that said decision is sufficient to bar plaintiffs' rights to recover."

Defendants wanted an extension of the lease and paid $100 for that purpose. Both plaintiffs were willing to give the extension. The proper extension was not executed. Plaintiffs should have returned the $100.

There was no fraud. At the most, there was an honest assertion of rights, supported by advice of an attorney, but unjustified under holding by this court.

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

NELSON SHARPE, C. J., and BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred with WIEST, J.

FEAD, J. *(dissenting)*. Plaintiffs had verdict of a jury and judgment in action for damages for conversion of an oil and gas lease. Defendants contend verdict for them should have been directed on the ground of ratification or estoppel and also that the court erred in refusing their requests to charge.

August 13, 1928, plaintiffs owned five acres of land by the entireties and another three and a half acres were owned by Eadus and occupied by plaintiffs as their homestead. They executed an oil and gas lease to defendant Hunter, who took and held for himself, Gage, and one Moyer. The latter negotiated the lease but was not served herein.

The lease provided that a well be commenced by November 13, 1928, or the lessee pay $45 rental to cover extension of one year for commencing the well. Moyer and Eadus deposited the lease in a bank in escrow, upon the condition that the lessee should commence drilling within 60 days after a neighborhood well should produce oil or gas in paying quantities. The other well produced on September 14th.

October 20th defendants paid Eadus $100 and he executed an instrument extending the drilling time on the lease held in escrow. The period of extension was not stated in the instrument but, con-

cededly, it was 30 days. On November 3d Eadus and Moyer withdrew the lease from escrow. Moyer, on advice of his attorney, had it recorded the same day. Mrs. Eadus claims she did not know of the withdrawal of the lease for a few days and, on learning of it, protested to Hunter. Eadus claims he asked both Moyer and Hunter to return the lease but could not get it. November 13th defendants tendered the $45 rental to plaintiffs but it was refused. November 21st plaintiffs commenced suit in chancery to have the lease declared void and the record cleared, and it was so decreed. *Eadus* v. *Hunter,* 249 Mich. 190.

The conversion arose from breach of the arrangement between Eadus and Moyer when they withdrew the lease from escrow. Eadus claimed that the lease was withdrawn in order that a new one should be executed in its place to provide for a 30-day extension for drillng and the new lease was to be deposited in escrow upon the same conditions as the old one. Defendants claimed the lease was delivered to Moyer without conditions. The issue of fact so made was submitted to the jury, which found for plaintiffs. No new lease was executed and defendants did not commence drilling on the Eadus land within any period of the extension.

Defendants contend Mrs. Eadus ratified the 30-day extension of time for drilling because she used for her daughter's education the $100 received by Eadus for the extension and did not return the money on discovery of its source. Granting the claim, it would not work a ratification of defendants' breach of the arrangement under which the lease was withdrawn from escrow and sanction defendants' recording the lease and claiming under it.

Defendants say they could not be guilty of conversion because the lease was in force and was their property. Aside from the fact that the chancery proceedings settled the issue of delivery of the lease, the verdict in the instant case determined that there was no delivery to convey to defendants.

Defendants further contend that the action is for slander of title, to which good faith and want of malice is a defense, and the court erred in refusing their requests to charge to that effect. It is conceivable that the action of slander might have been brought (*Kingkade* v. *Plummer,* 111 Okla. 197 [239 Pac. 628]), but plaintiffs declared on conversion of the lease, so elected at the trial, and the court charged on that theory.

Actions of trover for conversion of leases or muniments of title long have been known to the law. 65 C. J. p. 21, 50 A. L. R. 1171, note. Not in point but of special interest in connection with the facts at bar are: *Daggett* v. *Davis,* 53 Mich. 35 (51 Am. Rep. 91); *Parry* v. *Frame,* 2 Bos. & Pul. 451 (126 Eng. Repr. 1379); *Robert* v. *Wyatt,* 2 Taunt. 268 (127 Eng. Repr. 1080); *Hooper* v. *Ramsbottom,* 6 Taunt. 12 (128 Eng. Repr. 936); *Cronkhite* v. *Chaplin* (C. C. A.), 282 Fed. 579. Good faith and want of malice is not a defense to an action of conversion.

I think Mr. Justice WIEST overlooks three facts, (a) that excessiveness of damages is not raised in the statement of questions involved nor argued in the briefs; (b) the conversion consisted of taking and using the lease in a manner contrary to the agreement of the parties (65 C. J. p. 36); and (c) all damages to plaintiffs caused by the misuse are re-

ferable to the conversion (65 C. J. p. 130), and do not constitute an independent tort.

Judgment should be affirmed, with costs.

NORTH, J. *(dissenting).* In reviewing a law case tried by a jury this court should render decision upon the question or questions presented and briefed by appellant. In the instant case appellants' brief presents two questions for review. One of them relates to refusal of the trial judge to give requests to charge pertaining to recovery by plaintiffs on the theory of slander to title. The case was not submitted to the jury upon this theory, hence on that phase of the appeal there is nothing before us for review.

The only remaining question presented and briefed by appellants is:

"Ought not the court to have directed verdict for defendants on the ground of ratification or estoppel of plaintiffs?"

The ratification or estoppel asserted is that the $100 paid by defendants to plaintiffs was retained by the latter. Plaintiffs' testimony was to the effect that this $100 was paid for an extension of an oil lease, that incident to such extension defendants were to have a new lease prepared and presented to plaintiffs for execution. Admittedly defendants did not prepare or present the new lease for plaintiffs' signatures. Hence plaintiffs did not breach their undertaking, and therefore were not obligated to return the $100. If not obligated to return this money, then retaining it did not result in ratification or estoppel. Defendants asserted a conflicting

claim. An issue of fact was thus presented. The jury found for plaintiffs.

On this record judgment should be affirmed.

POTTER, J. *(dissenting)*. In defendants' claim of appeal these questions are raised:

That the trial court erred in its instructions to the jury on the measure of damages; the evidence in support of the claimed deterioration of the leasehold was remote, speculative and uncertain; the verdict was excessive; as to defendants Hunter and Gage the verdict was contrary to the great weight of the evidence and there was no testimony to warrant a judgment against such defendants.

The declaration alleges plaintiffs' ownership of the premises and defendants' conversion of a lease and leasehold interest in the premises by which plaintiffs were deprived of the prospective profits which they might have made but for defendants' wrongful acts. An action for the conversion of the lease will lie. An action will lie for wrongful interference with a leasehold interest.

A lease is a specific chattel, a paper writing subject to conversion, and a suit will lie for its conversion. It is personal property, and damages for its conversion are measured by what is adequate compensation for its loss. Defendants are liable if they converted the lease for the injuries suffered by reason of its conversion.

A leasehold interest in real estate is real property. It is not personal property. An action will not lie for its conversion. A leasehold interest is not personal property subject to conversion. It is an interest in real estate and conversion is not an appropriate remedy for its injury. Damages for the conversion of a leasehold interest in real estate,

in its inherent nature not subject to conversion, may not be recovered in a suit for conversion.

No one would think another could be convicted of the larceny of a leasehold interest in real estate. It is not a subject for an action of replevin, and an action of trover at common law would not lie for its conversion though ejectment might lie for its recovery if one were unreasonably excluded from its enjoyment.

The court erred in its instructions to the jury on the measure of damages. The verdict was excessive in amount. There was no evidence competent under the declaration to support a verdict for damages for the conversion of a leasehold interest in real estate,—the leasehold interest which from its nature was not capable of conversion, and such verdict was therefore contrary to the great weight of the evidence.

Judgment should be reversed and a new trial granted unless plaintiffs elect to reduce the judgment to $2,000 and interest. If they so elect, judgment should be affirmed at that amount, with costs.

SMALLEGAN *v.* JOHN SMALLEGAN & SONS.

1. APPEAL AND ERROR—WORKMEN'S COMPENSATION ACT—WORKING MEMBER OF PARTNERSHIP.

   Finding of department of labor and industry that plaintiff member of partnership was working member receiving wages irrespective of profits is affirmed on appeal where there is evidence to support it (2 Comp. Laws 1929, § 8413).

2. MASTER AND SERVANT—LIFTING BARREL OF LIME AND SULPHUR—ACCIDENTAL INJURY.

Brain hemorrhage resulting from injury received by working member of partnership while waiting on customer purchasing lime and sulphur contained in barrels weighing 450 pounds *held,* an accidental injury justifying award of compensation, where circumstances surrounding lifting of the barrel were unexpected by plaintiff.

WIEST and BUSHNELL, JJ., dissenting.

Appeal from Department of Labor and Industry. Submitted April 12, 1934. (Docket No. 100, Calendar No. 37,738.) Decided September 18, 1934. Rehearing denied October 23, 1934.

D. E. Smallegan presented his claim for compensation against John Smallegan & Sons, a partnership, employer, and Builders & Manufacturers Mutual Casualty Company, insurer, for an accidental injury sustained while in defendant's employ. Award to plaintiff. Defendants appeal. Affirmed.

John R. Dethmers, for plaintiff.

Kelley, Sessions, Warner & Eger, for defendants.

EDWARD M. SHARPE, J. Defendant John Smallegan & Sons is a copartnership consisting of three brothers, one of whom is plaintiff in this suit. They operated a general store and each brother had a more or less particular duty to perform. On April 17, 1933, plaintiff in the course of his regular work was waiting upon a customer who desired to purchase some lime and sulphur. This solution was kept in barrels outside the store and upon a raised platform about two feet high. Upon this particular occasion it was necessary to set up a new barrel upon the platform. Plaintiff produced testimony to show that before he attempted to set up the barrel

he took a long pipe wrench to remove the plug from the barrel and in so doing the wrench slipped from the plug and plaintiff stumbled back. Plaintiff then called one of his brothers to help him lift the barrel, weighing 450 pounds, a job that theretofore had required the efforts of two men. The barrel was resting on its side and had to be placed in an upright position. Plaintiff took hold of the bottom of the barrel and his brother Arthur took hold of the top side on the same end. Plaintiff started lifting before his brother and as he did so he felt a sharp pain in the back of his head, followed by some dizziness. Plaintiff then went into the store and later had to be taken home suffering from subarachnoid hemorrhage. Plaintiff made a claim for compensation to the department of labor and industry where an order was made granting him an award. From this award the defendants have appealed.

The defendants contend that plaintiff was not an employee, that he was a member of a partnership receiving a share of the partnership profits for services rendered.

Section 8413, 2 Comp. Laws 1929, in defining "employees" subject to the act includes:

"Every person in the service of another, under any contract of hire, express or implied, including aliens, including working members of partnerships, receiving wages irrespective of profits from such."

There is some testimony that tends to show that plaintiff's salary was received from the profits of the partnership, but the finding of the commission controls if there is evidence to support it. We quote the testimony of plaintiff as found in the record:

"*Q.* How were you compensated for your work?
"*A.* At the rate of $20 per week.

"*Q.* What about your brothers?
"*A.* They also received $20 a week.
"*Q.* And that payment to you of $20 per week, was that a division of the profits?
"*A.* No, sir.
"*Q.* What was it?
"*A.* It was a straight salary of $20 a week.
"*Q.* When had you started to be paid at the rate of $20?
"*A.* January 1, 1933."

The defendants next contend that the plaintiff did not suffer an accidental personal injury within the meaning of the compensation act.

The record discloses that the barrel weighed 450 pounds, that it was a part of plaintiff's usual work to help lift this barrel upon a platform which stood about two feet off from the ground and that prior to lifting the barrel it was the usual thing to remove the plug from the barrel. On this particular occasion, in attempting to remove the plug, the pipe wrench that plaintiff was using slipped from the plug and plaintiff stumbled back. The jar received from stumbling was an unusual and unexpected result. The regular way to lift the barrel upon the platform was for one man to take hold of one end of the barrel while the other man lifted the opposite side of the barrel and both lift together. Upon this occasion both men were in their proper position to lift, yet Arthur did not start lifting when plaintiff did so that the full weight of the lifting was borne by the plaintiff alone. As a result of this unusual lifting, plaintiff felt a sharp pain in the back of the head, became dizzy and subsequently suffered a brain hemorrhage.

To justify compensation for accidental injury, there must have been "some unusual, fortuituous

or unexpected happening which caused the injury and which was in essence accidental in character." *Sinkiewicz* v. *Lee & Cady,* 254 Mich. 218, 220. The circumstances surrounding the lifting of the barrel were unexpected by plaintiff. The sudden lifting of a weight twice as heavy as customary was an unusual event not contemplated by plaintiff and resulting in an undue strain upon plaintiff. In our opinion plaintiff suffered an accidental injury such as is contemplated by the compensation act. *La Veck* v. *Parke, Davis & Co.,* 190 Mich. 604 (L. R. A. 1916 D, 1277); *St. Clair* v. *A. H. Meyer Music House,* 211 Mich. 285; *Helder* v. *Luce Furniture Co.,* 217 Mich. 496.

The award is affirmed, with costs to plaintiff.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, and BUTZEL, JJ., concurred with EDWARD M. SHARPE, J.

WIEST, J. *(dissenting).* Where three brothers, as copartners, devoted their time to carrying on joint business, each one withdrawing a sum weekly, ahead of distribution of profits, no one of them sustained the relation of a working member receiving wages, irrespective of profits, for there was no contract of hire, express or implied, but only the relation of copartners and mutual endeavor accompanying joint association.

I also have doubt upon the question of compensable injury arising out of the usual method of handling the barrel.

The award should be vacated.

BUSHNELL, J., concurred with WIEST, J.

PUPAZA *v.* LAITY.

1. ESTATES OF DECEDENTS—PARENT AND CHILD—GRATUITOUS SERVICES—PRESUMPTIONS—BOARDER.

   Presumption that services rendered by children to their parents are gratuitous does not apply in case where man who came to live at decedent's home as a boarder remained throughout in that relationship and performed odd jobs for decedent before and after working hours.

2. SAME—WORK AND LABOR—PERSONAL SERVICES—QUESTION FOR JURY.

   Evidence *held*, sufficient to make question of whether or not boarder rendered services for decedent with expectation of pay an issue of fact for the jury.

3. SAME—WORK AND LABOR—INSTRUCTIONS—LIMITATION OF ACTIONS.

   Instructions that if payment for personal services rendered deceased was to be made after death that recovery could be had for entire period during which they were given but if such time were not set the statute of limitations limited recovery to period of six years immediately preceding death *held*, correct, where verdict was for considerably less than amount claimed (3 Comp. Laws 1929, § 13976).

4. WITNESSES—ESTATES OF DECEDENTS—WEIGHT OF TESTIMONY.

   Witnesses for plaintiff claiming payment for personal services rendered deceased in her lifetime *held*, qualified to testify as to the value thereof, the weight of their testimony being for the jury.

Appeal from Berrien; White (Charles E.), J. Submitted April 19, 1934. (Docket No. 65, Calendar No. 37,674.) Decided September 18, 1934.

Achim Pupaza presented his claim against the estate of Ida S. Dedrick, deceased. Claim allowed.

Harry Laity, administrator, and Nora Beeney, residuary legatee, appealed to circuit court. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

Stuart B. White, for plaintiff.

Charles W. Gore and *Arthur E. Leckner,* for defendant Beeney.

Gore & Harvey, for defendant Laity.

EDWARD M. SHARPE, J. Ida S. Dedrick for many years was a resident of Benton Harbor, Michigan, and died November 12, 1932. She was a widow of the age of 73 years. Plaintiff, who had roomed and boarded with the decedent for 12 years prior to her death, presented a claim to the probate court for labor and services amounting to $365 a year or a total of $4,380, "less board owing not more than $600." From a $1,000 award of the commissioners of claims, the cause was appealed to the circuit court and a jury returned a verdict for plaintiff of $1,500. The residuary legatee, Nora Beeney, and the administrator, Harry Laity, now appeal to this court.

Plaintiff, though not a relative of deceased, had lived in her home since about 1920 and had been considered by some of the neighbors as a member of the family. During the greater part of this time he was employed at various factories and on farms as a laborer. Most of the services he claims to have performed for decedent were done before and after working hours. These services consisted of such tasks as mowing the lawn, working in the garden, pruning vines and shrubs, beating rugs, building fires, making coffee, waiting on decedent when she

was sick, and many other odd jobs about the house. For any permanent repairs or improvements to the house, outside contractors were called in, and nurses and doctors had been engaged on various occasions and paid in cash.

Several neighbors and friends of decedent testified that she had told them that she intended to see that plaintiff was paid for his services after her death and that she could not do without him. There was no testimony as to any agreed rate of compensation.

The defendants contend that plaintiff should be considered as a member of the family, subject to the presumption that in the absence of an express contract his services were rendered gratuitously; that inasmuch as plaintiff had made no claim for services during the lifetime of decedent, his claim for services should be limited to six years before her death and that other services prior to the six-year period are outlawed by the statute of limitations (3 Comp. Laws 1929, § 13976); that there was no proof to submit to the jury as to the value of the services claimed to have been rendered by plaintiff.

While there is a presumption that services rendered by children to their parents are gratuitous, yet in the instant case the plaintiff came to live at decedent's home as a boarder and remained throughout in that relationship.

Counsel for the estate insist that there was no sufficient proof that a contract was made to justify the submission to the jury.

Mrs. Lillian Niephaus, a neighbor, testified that she had known decedent a long time and had talked to her about plaintiff several times and that:

"In my conversations with her, she told me that what he had done for her she appreciated and that

when she was done, he was to have what was left. He was to have what was left for his pay and if she died first, he was to get paid out of her estate, and if he died first, she was to have his insurance."

Lottie Pauls, a neighbor who had known decedent four years, testified as to a conversation with decedent regarding plaintiff:

"Well, she told me, said anything happened to her she wanted the place to go to him and she said she didn't know what she would have done without him and said he helped her out a good bit and he was good to her."

Charles Hose, a neighbor who had known decedent 10 years, testified:

"Since the year of 1926 all that I could tell you is what she told me. She said Archie (referring to plaintiff) done the major part of her work and she felt she certainly owed him something and she would see that he would get it sometime."

This and other like evidence made the question of whether the services were rendered with expectation of pay an issue of fact for the jury. Counsel for the estate complain that the court erred in the following instruction to the jury:

"If the jury should find that the contract was, or agreement was that the deceased was to pay the claimant after her death out of her estate the reasonable value of these services, then the claimant would be entitled to recover the reasonable value of those services covering the entire period. If, however, the jury should find that the agreement was that the deceased should pay the reasonable value of those services without having it agreed or was to be paid at the death of the deceased, then in that event what the law knows as the statute of limita-

tions intervenes and the plaintiff could only recover for a period of six years immediately preceding the time of the death of the deceased."

We think the instructions were correct. There was some evidence from which the jury might find that the services were not to be paid for until the death of the decedent and in such case the statute of limitations would not begin to run until such decease. However, in awarding their verdict, the jury may have considered only the six years immediately preceding the death of decedent, as the award was considerably less than the amount claimed.

An examination of the testimony of the witnesses produced by the plaintiff satisfies us that they were qualified to testify as to the value of the services. The weight of their testimony was for the jury and we find no error in the ruling of the court upon this subject.

Other objections have been made by the counsel for the estate and we have considered them but we do not regard them as of sufficient importance to change the result.

Judgment affirmed. Costs to plaintiff.

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

KARP *v.* METROPOLITAN LIFE INSURANCE CO.

1. INSURANCE—DELIVERY OF POLICY—FINDING OF COURT.
   Finding of court in trial without a jury that life insurance policy had not been delivered is sustained on appeal where testimony on the subject is conflicting.

2. SAME—CONSTRUCTION OF CONTRACT.
   A contract of insurance is measured by what the parties intended, mutually agreed to and their minds meet upon, the same principles as are applicable to any other type of contract.

3. SAME—DELIVERY OF POLICY DURING LIFE OF INSURED—PAYMENT OF FULL FIRST PREMIUM.
   Stipulations in application attached to life insurance policy that it would not become effective until the policy was delivered and the full first premium was paid to and accepted by the company during the lifetime of the applicant *held*, binding upon beneficiary therein so as to preclude recovery where policy was not delivered nor first premium paid in full prior to death of insured.

Appeal from Wayne; Richter (Theodore J.), J. Submitted June 6, 1934. (Docket No. 47, Calendar No. 37,850.) Decided September 18, 1934.

Assumpsit by Nettie Karp against Metropolitan Life Insurance Company, a foreign corporation, on a life insurance policy. Judgment for defendant. Plaintiff appeals. Affirmed.

Peter P. Boyle and *Louis Rosenzweig*, for plaintiff.

Bulkley, Ledyard, Dickinson & Wright, for defendant.

NELSON SHARPE, C. J. On December 19, 1932, Louis Karp applied for insurance on his life in the defendant company. A policy for $2,000 was issued pursuant thereto on December 28, 1932, and sent to M. Chesley Moran, defendant's agent at Detroit, for delivery. The first premium payable thereon was $34.26. Karp died on January 16, 1933. This action is brought by the plaintiff, the beneficiary named in the policy, to recover the amount thereof. It was tried before the court without a jury and resulted in a judgment for the defendant, based upon a finding that there had been no delivery of the policy. The plaintiff has appealed.

The application, a copy of which was annexed to the policy, contained the following provision:

"That the company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the company during the lifetime of the applicant, in which case such policy shall be deemed to have taken effect as of the date of issue as recited on the first page thereof."

A paragraph in the policy reads as follows:

"The provisions and benefits printed or written by the company on the following pages are a part of this policy as fully as if recited over the signatures hereto affixed."

It appears that at the time the application was delivered to the agent, $3 was paid to him to apply on the first premium, the amount of which was $34.26. A receipt therefor was sent to the agent with the policy but it was stated therein that it was "not binding upon the company until the premium has actually been paid in cash."

If delivery of the policy was necessary in order to create liability on the part of the defendant, the burden was upon plaintiff to establish it by a preponderance of the evidence. She testified that, on or about January 7, 1933, Moran brought the policy to their home and left it with her on her promise to pay the balance of the premium on the following Saturday; that she then had the money to pay it but he did not call for it until the Monday following and after the death of her husband and that she then returned the policy to him. The agent, Moran, denied that he had at any time left the policy with the plaintiff and Charles H. Patterson, an inspector sent by the defendant to investigate her claim, testified that she admitted to him that she had never seen the policy. The trial court found that the policy had not been delivered and with this finding we are in accord.

Counsel for the plaintiff insist that "actual manual delivery" was not necessary in order to create liability. In *Bowen* v. *Prudential Ins. Co. of America,* 178 Mich. 63 (51 L. R. A. [N. S.] 587), the following from 1 May on Insurance (4th Ed.), § 60, was quoted with approval:

"To constitute a delivery of a policy, it is not necessary that there should be an actual manual transfer from one party to the other. The agreement upon all the terms, and the issue and transmission to the agent of a policy in accordance therewith, for delivery without conditions, is tantamount to a delivery to the insured."

In the opinion in that case, written by Chief Justice STEERE, it was said:

"A contract of insurance rests upon and is controlled by the same principles of law applicable to

any other contract. What the contracting parties intended, mutually agreed to, and their minds met upon, is the measure of their obligations. They could agree that the policy, though approved and executed, should have no effect until delivered, or till a certain time had arrived, or until some other condition had been performed, and when this is established the courts have no authority to make the contract binding upon either party contrary to their intention and the terms of their express agreement."

In *Wells* v. *Prudential Ins. Co. of America,* 239 Mich. 92, the holding in the *Bowen Case* was commented on and approved and the provisions in the application and policy for delivery were held to be binding upon the beneficiary.

The policy was not sent to the agent for unconditional delivery to the insured. It was to be delivered after the first premium was paid in full. Such payment not having been made, prior to the death of the insured, the plaintiff, as beneficiary, acquired no rights thereunder.

The judgment is affirmed.

POTTER, NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

SECURITY STORAGE & TRANSFER CO. *v.* QUIMBY.

1. MOTOR VEHICLES—EXCESSIVE SPEED—INTERSECTIONS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—FINDING OF COURT.
   Testimony that each of two motorists approached intersection of city streets at excessive speed and failed to use proper precautions where view was partially obstructed *held*, sufficient to justify finding of court in case tried without a jury that each was guilty of negligence.

2. SAME—NEGLIGENCE—DRIVERS APPROACHING INTERSECTION.
   Automobile drivers approaching street intersection at right angles to each other are each required to use such care under circumstances as would be required of ordinarily prudent person to avoid collision; and each may assume that other will conduct himself as reasonably prudent driver would under like circumstances.

Appeal from Superior Court of Grand Rapids; Taylor (Thaddeus B.), J. Submitted June 7, 1934. (Docket No. 63, Calendar No. 37,453.) Decided September 18, 1934.

Case by Security Storage & Transfer Company, a Michigan corporation, against Irving Quimby for damages sustained in a motor vehicle collision at a street intersection. Judgment for defendant. Plaintiff appeals. Affirmed.

Glocheski & Glocheski (*Wencel Milanowski*, of counsel), for plaintiff.

Mason, Alexander, McCaslin & Cholette, for defendant.

NELSON SHARPE, C. J. This action is brought to recover the damages sustained by plaintiff in a collision between a truck owned by it and driven by an

employee named Broughton Wells and an automobile owned and driven by the defendant at the intersection of Weston street and La Grave avenue in the city of Grand Rapids, which occurred at about three o'clock in the afternoon of January 25, 1933. Plaintiff's truck approached the intersection from the west on Weston street. Defendant was driving in a northerly direction on La Grave avenue, which has a width of about 30 feet.

The case was tried before the court without a jury. He found that both drivers were guilty of negligence and entered a judgment for the defendant. Plaintiff has appealed therefrom.

Wells testified that, as he approached the intersection, he lessened his speed to about seven or eight miles per hour; that he looked in both directions and saw no car approaching; that his view was obstructed by a pop corn stand and cars parked on the street; that when more than half of the way across the street he first saw defendant's car approaching at a speed of about 30 miles per hour; that he was then "directly in the path of it;" that when he first entered La Grave avenue his view was unobstructed and if he had then looked and had seen defendant's car approaching he would have had ample time to have stopped the truck.

The defendant testified that he first saw plaintiff's truck when his car was about a car length from the intersection; that he was traveling about 15 or 20 miles per hour and had his car under perfect control; that plaintiff's truck was traveling 25 miles an hour when he first saw it; that a pop corn stand on the corner partially obscured his view and that cars were there parked on both sides of the street; that he applied his brakes and made an effort to stop his car but could not do so.

In our opinion the testimony submitted sustains the finding of the trial court that both drivers were guilty of negligence. It can but be inferred that each of them assumed that the other would give him the right of way with the result, not unusual, in such cases.

The applicable rule is well stated in the syllabus in *Swainston* v. *Kennedy,* 253 Mich. 518:

"Automobile drivers approaching street intersection at right angles to each other are each required to use such care under circumstances as would be required of ordinarily prudent person to avoid collision; and each may assume that other will conduct himself as reasonably prudent driver would under like circumstances."

The judgment is affirmed.

POTTER, NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

DULL *v.* DULL.

DIVORCE—ALIMONY.

Modification of decree of divorce to reduce monthly alimony payments of $100 to $70 *held,* justified on showing made, subject to change on showing of former husband's ability to make larger payments.

Appeal from Monroe; Root (Jesse H.), J. Submitted June 5, 1934. (Docket No. 19, Calendar No. 37,608.) Decided September 18, 1934.

Bill by Ray C. Dull against Dessie Dull for a divorce. Cross-bill by defendant against plaintiff. Decree for defendant on cross-bill. On petition of plaintiff to reopen decree for reduction of alimony or to obtain custody of minor children. From amended decree, defendant appeals. Affirmed.

William F. Haas, for plaintiff.

Ralph E. Routier, for defendant.

NELSON SHARPE, C. J. On October 13, 1924, a decree of divorce for extreme cruelty was granted to the defendant from the plaintiff on her cross-bill therefor. It gave to her the care, custody and maintenance of their two minor children, but reserved to him the right to see, visit with and take them out at certain hours on certain days stated therein. It ordered the plaintiff to convey to the defendant the house they occupied together in the city of Monroe and to pay to her the sum of $5,000, these provisions being in lieu of her dower interest in any property then owned or afterwards acquired by him.

It further provided that he should pay to her through the clerk of the court the sum of $100 per month for the care, custody and support of the minor children until the younger should arrive at the age of 16 years, and that a further allowance might at any time be asked for.

On January 14, 1932, the plaintiff filed a petition to reopen the decree for the purpose of obtaining the custody of the minor children or for a reduction in the amounts to be paid to defendant for their support and maintenance. The defendant filed an answer thereto denying that plaintiff was entitled to

the relief sought. Proofs were submitted on the hearing thereof after which the trial court amended the decree and therein ordered the plaintiff to pay into court the sum of $500, the amount of the arrears due under the former decree, and thereafter the sum of $70 per month. The defendant has appealed therefrom.

When the decree was granted the plaintiff was engaged in the automobile business in the city of Monroe. That it was then a profitable business and that he was possessed of other property is disclosed by the provisions for the plaintiff in the decree, which conformed to a settlement then made with the defendant.

At the hearing he testified that for two years his sales business had been conducted at a loss, the amount of the loss in 1932 being $5,794.49. The income from repair work reduced such loss somewhat. He had remarried and the home he was living in was mortgaged for $6,000. While he was the owner of certain stocks in corporations he had received no income therefrom.

It appears that the defendant had also been unfortunate in financial matters. She sold the house he had conveyed to her for $7,000. She also got $5,000 in cash from him. She moved to Detroit in 1926, performed small services there for several years but claimed that she was then unable to work and could not support and maintain the two children on less than $100 per month.

The amended decree was signed on August 19, 1933. There has been much improvement in the automobile business since that time. The decree is subject to change on a showing of plaintiff's ability to at this time make larger monthly payments.

The trial court heard and saw the parties as they testified and, under the record as made, we find no justification for enlarging the payments as fixed by him in the amended decree.

It is affirmed. No costs will be allowed.

POTTER, NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

WATKINS *v.* GABRIEL STEEL CO.

1. MASTER AND SERVANT—NEGLIGENCE—INDEPENDENT CONTRACTOR—UNUSUAL DANGER.

   Contractor who had contract for furnishing and fastening steel joists on structure being erected may not evade liability for injuries received by mason working on third floor because joists were improperly fastened on the ground that work was sublet to an independent contractor since said work was of such nature that it subjected mason to unusual danger.

2. APPEAL AND ERROR—LAW OF CASE.

   Conclusion reached on question of law on former appeal became the law of the case and is not reviewable on appeal from judgment in subsequent trial.

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—APPEAL AND ERROR—EVIDENCE.

   Claim of contributory negligence of mason in not seeing that steel joists were insecurely fastened, apparently not passed upon by trial court during trial nor on motion for new trial is not sustained where architect testified mason might not know where to look for such fastenings and mason said he had never worked before on building where steel joists were used.

4. ASSIGNMENTS—CAUSE OF ACTION—TORTS.

   Assignment of a cause of action for tort as security in no way affected plaintiff's right to recover.

5. APPEAL AND ERROR—DAMAGES—REDUCTION—NEW TRIAL.
   Judgment by court sitting without a jury for personal injuries, reduced on motion for new trial from $8,340 to $6,340, is not disturbed where both parties appeal, since trial court heard and saw the witnesses.

6. COSTS—APPEAL BY BOTH PARTIES.
   No costs are allowed where judgment for personal injuries is affirmed and both parties have appealed.

Appeal from Wayne; Campbell (Allan), J. Submitted June 20, 1934. (Docket No. 124, Calendar No. 37,912.) Decided September 18, 1934.

Case by Louis Watkins against Gabriel Steel Company, a Michigan corporation, for personal injuries alleged to have been due to defendant's negligence in the erection of a building. Judgment for plaintiff. Defendant appeals. Affirmed.

Wm. Henry Gallagher (*Francis Fitzgerald* and *Abraham Satovsky,* of counsel), for plaintiff.

Ernest P. LaJoie, for defendant.

NELSON SHARPE, C. J. The defendant company entered into a contract with the owner of a building for the erection of the steel joists used in the construction thereof. It sublet this work to one J. L. Peters Company. It is the claim of the plaintiff that he sustained an injury due to the negligent manner in which this work was performed. The first trial thereof resulted in a judgment for the defendant. On appeal to this court it was reversed and a new trial ordered (260 Mich. 692). In the opinion there filed it was said:

"The safety of plaintiff was dependent upon the joists on which the planks were placed being securely fastened, and the neglect of Peters and his employees to do so subjected plaintiff to an unusual

danger in the performance of his work. If his injury was due to such neglect, defendant may not be relieved from the consequences thereof by the fact that the work was being done by Peters as an independent contractor.''

On trial by the court without a jury it found that the plaintiff was entitled to recover and entered a judgment in his favor for $8,340.

A motion for a new trial based in part upon the fact that new evidence had been discovered bearing upon its liability was granted conditional on the testimony theretofore taken being considered as submitted thereon. A number of additional witnesses were then examined, after which the court filed an opinion in which he stated:

''The testimony taken as a whole satisfies the court that for some unexplained reason Peters failed to properly brace the joists in the east bay, and inasmuch as his negligence in law is the negligence of the defendant, the Gabriel Steel Company, the plaintiffs (plaintiff is) entitled to recover in the amount hereinbefore determined.''

A judgment was entered pursuant thereto.

Defendant's counsel then filed a ''motion to dismiss or render judgment of no cause of action'' based upon the claim that after the judgment first entered had been set aside, the plaintiff had ''assigned all his right, title and interest in and to this cause of action to Gladys Amada.'' The trial court found that the assignment had been made but was for security only and dismissed the motion.

Some time later defendant's counsel filed another motion for a new trial based in part upon the claim that the judgment was contrary to the great weight of the evidence and was excessive. The trial court, upon reflection, found that the allowance made for

"lost earnings and pain and suffering was excessive" and entered a judgment in the sum of $6,340, from which the parties have appealed.

1. The accident happened on Tuesday, the 17th day of July, 1928. There was evidence that plaintiff and one of his employees were assured by some of the employees of the Peters Company that the joists would be in position for placing the scaffolding thereon on Monday morning; that on that morning when plaintiff's men went to work, the joists were "looking right, like they were looking on the first and second floor;" that the planking was then placed thereon and that the next morning as the plaintiff and his foreman were standing thereon, the joists loosened and fell into the basement, taking the planking and the plaintiff with them, and causing the injury for which he here seeks to recover damages.

When the joists were placed in position for putting the planking upon them, the plaintiff and his workmen had the right to assume that they were fastened in such a manner as would afford reasonable security to them in the furtherance of their work on the building and if they were not, as found by the court, the neglect to do so necessarily subjected them to an unusual danger. And as was said in the former opinion, "If his (plaintiff's) injury was due to such neglect, defendant may not be relieved from the consequences thereof by the fact that the work was being done by Peters as an independent contractor."

The conclusion thus reached became the law of this case and is not subject to review upon this appeal. *Pierce* v. *Underwood,* 112 Mich. 186; *American Ins. Co. of Newark* v. *Martinek,* 216 Mich. 421.

2. It is argued that the plaintiff was guilty of contributory negligence; that he or his workmen

could and should have seen that the joists had not been securely fastened; and that the work thereon had not been completed. This question was not presented to the trial court except in the last motion made by defendant for a new trial and was apparently not passed upon by him. It may be disposed of, against the contention of the defendant, by the evidence of the architect. He testified:

"*Q.* What is there that would possibly, or could possibly prevent a contractor, a mason contractor, from observing an unclipped and unbridged condition of a steel joist, laid across two I-beams, before he puts his planks on there?

"*A.* Well, a mason contractor might or might not be familiar with the steel joists, which might be laid in there every place and not fastened. He might not be able—he would not know where to look for fastenings, whether clipped or not."

The plaintiff testified that prior to that time he "had never worked on a building where steel joists were used."

3. The assignment of the cause of action in no way affected plaintiff's right to recover. *Sayre* v. *Railway Co.*, 205 Mich. 294.

Defendant urges that the amount of the judgment is still excessive, while plaintiff contends that the evidence did not justify the reduction made. The trial court heard and saw the witnesses who testified to plaintiff's injury, his pain and suffering, and the loss in earnings he would be likely to sustain therefrom. We see no reason for interference with the conclusion reached by him as to the amount for which plaintiff was entitled to recover.

The judgment is affirmed. As both parties have appealed, no costs will be allowed.

POTTER, NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

GAUFIN *v.* VALIND.

1. NEGLIGENCE — FINDING OF JURY — EVIDENCE — FOOD PRODUCTS — STREET PARADE.

   Finding by jury that traveling representative of food packer while in truck of wholesale grocer displaying and distributing food products threw can of food which struck and injured plaintiff *held*, justified by the evidence.

2. APPEAL AND ERROR—WEIGHT OF EVIDENCE—MOTION FOR NEW TRIAL.

   The weight of the evidence is not a reviewable matter on appeal where no motion was made for a new trial.

3. NEGLIGENCE—JOINT ADVENTURE—INSTRUCTIONS—LIABILITY TO INJURED THIRD PARTY.

   Finding of community of interest between traveling representative of food packer and wholesale grocer in displaying and distributing merchandise from latter's truck in street parade *held*, justified by evidence so as to warrant instruction permitting jury to find both defendants liable for negligent act of one which injured plaintiff.

Appeal from Delta; Bell (Frank A.), J. Submitted June 13, 1934. (Docket No. 43, Calendar No. 37,105.) Decided September 18, 1934.

Case by Alma Gaufin against Norbert R. Valind and the Hewett Grocery Company, a Michigan corporation, for personal injuries due to negligence of defendants in distributing samples of canned food during street parade. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

Torval E. Strom, for plaintiff.

Ryall & Frost, for defendants.

NELSON SHARPE, C. J. On July 4, 1930, there was a parade of floats and similar devices on the streets of the city of Escanaba promoted by its Chamber of Commerce. The defendant Hewett Grocery Company, engaged in the wholesale business of selling groceries and provisions in that city, accepted the invitation to participate in the parade. The defendant Valind was at that time the traveling representative of the Van Camp Produce Company.

The grocery company had in stock a quantity of the products of the Van Camp Company, consisting of small cans of milk and beans. Valind purchased five or six cases of them, each containing six or eight dozen cans, and arranged with the grocery company to distribute the cans from its truck in the parade. On each side of the truck was a sign of the defendant company and an advertising sign reading "Van Camp Famous Foods." Both Valind and employees of the defendant company took part in decorating the truck. It was driven by the truck driver of the company. Valind sat in the seat alongside of the driver at least a part of the time and the cans were tossed or thrown to the right and left as they proceeded along the streets.

The plaintiff with several of her friends was standing on the sidewalk watching the parade as the truck passed a drug store on Ludington street and one of the cans was thrown with such force that it struck the pavement near the sidewalk and bounced up and struck one of her feet, injuring her somewhat severely. This action was brought to recover the damages for the injury thus sustained. She had verdict and judgment for $1,668.75, from which the defendants have taken this appeal.

The errors assigned are the refusal of the court to direct a verdict in favor of the defendant company, and on the instructions to the jury.

1. It is urged that the evidence does not support the allegations in the declaration.

The declaration alleged that the can which struck plaintiff's foot was thrown from the rear of the truck "and struck the curb and bounced high in the air and dropped * * * upon the plaintiff's left foot."

The plaintiff testified that as the truck was passing the store a man "was standing in the truck throwing cans," that "when I was standing there I saw this can come directly, thrown with force, like that; and as it came towards me it hit the pavement, and shot up on the sidewalk and hit my foot, directly from the pavement."

The defendant Valind admitted that he threw cans out of the truck but testified that he did so from the cab in which he was sitting; that the cans were passed to him by two girls sitting in the truck; and that he was not on the rear of the truck at any time. Other witnesses also so testified. But Stanley Osman, who stood on the sidewalk in front of the store, testified that the cans were thrown by a man in the rear of the truck, whom he positively identified as Valind, and that some of them glanced over the pavement. Harold Norell, who was driving the truck, testified that he dropped out some cans but did not throw any. There was evidence to justify a finding by the jury that the can which struck the plaintiff was thrown with some force from the truck; that Valind threw it; and whether from the front or rear thereof and whether before it bounded and struck the plaintiff it struck the curb or the sidewalk, is immaterial. The trial was had more than two years after the occurrence and that witnesses differed as to where the can was thrown from or where it struck might well be expected.

As no motion was made for a new trial, we are not here concerned with the weight of the evidence.

2. The instructions complained of read as follows:

"If two persons act in concert or with a common design or purpose, and one of them commits a negligent act by which a third person is injured without fault or negligence on the part of the third person, then the two so acting in concert are joint wrongdoers and both are liable for the injury, so done, because both owed the common duty to the injured person to do no negligent act towards him.

"In the absence of any common design or some concerted action on the part of the defendants, one person is not responsible for the negligent acts of the other, except under circumstances which are not material here in this case.

"To summarize, if there was concerted action on the part of the defendants in distributing advertising or merchandise in the manner claimed by plaintiff, and one of them in doing so was negligent, and that the plaintiff was injured thereby, and that such negligence was the proximate cause of her injury, then the plaintiff can recover against both defendants. But if you find any act of negligence by either defendant, which did not result from any concerted action, then the plaintiff can recover only against the one at fault."

There was evidence that the truck from which the can, which injured the plaintiff, was thrown belonged to the defendant company; that defendant company accepted the invitation to participate in the parade; that its employees assisted in decorating the truck and it was driven by one of them; that the purpose of exhibiting it in the parade and of casting the cans therefrom was not only to advertise the products of the produce company but also to direct attention to the fact that such products were being

sold by the defendant company. The evidence was sufficient to justify a finding of community of interest in the display as made and the manner in which it was sought to be made effective, and warranted the instruction as given. See *Mahnke* v. *Freer,* 126 Mich. 572; *Benson* v. *Ross,* 143 Mich. 452 (114 Am. St. Rep. 675); and *Keiswetter* v. *Rubenstein,* 235 Mich. 36 (48 A. L. R. 1049).

We have examined the authorities cited and relied on by counsel for the defendants, but in our opinion they are not applicable to the facts here presented.

The judgment is affirmed.

POTTER, NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

GREGORIAN BUILDING CO. *v.* GALVIN.

1. APPEAL AND ERROR—SUMMARY PROCEEDINGS.

   Question as to jurisdiction of court in summary proceedings because of failure to offer proofs tending to show termination of contract by notice of forfeiture, may not be first raised on appeal from circuit court where record does not contain the full record on appeal from the circuit court commissioner to the circuit court and the question is not raised in defendant's claim of appeal (Court Rule No. 59, § 3, subd. d [1931]).

2. CORPORATIONS—ANNUAL REPORT—SUSPENSION OF CORPORATE POWERS.

   Mere irregularity by corporation in filing annual report required by Act No. 327, § 82, Pub. Acts 1931, did not work suspension of its corporate powers, where report filed was later approved upon receipt of name of omitted director, so as to render corporation unable to bring summary proceedings to recover possession of property sold on land contract executed before report was finally accepted.

3. JUDGMENT—SUMMARY PROCEEDINGS—FORM.

Judgment in summary proceedings on appeal from circuit court commissioner should be limited to a determination of the right of possession and a determination of the amount due and should not be in form of a money judgment.

4. APPEAL AND ERROR—BELATED CROSS-APPEAL.

Belated cross-appeal in summary proceedings under land contract *held*, proper in case where defendant made down payment of $3,500 on $82,450 purchase price, failed to make repairs or payments of principal, interest or taxes and obtained appeal to circuit court by use of worthless bonds necessitating that plaintiff move for order requiring sufficient bonds.

5. SAME—REMAND FOR DETERMINATION OF AMOUNT DUE.

Case is remanded for redetermination of amount due on land contract as of time of such rehearing where amount due thereunder is sole question for decision on belated cross-appeal and case on defendant's appeal is affirmed.

Appeal from Wayne; Jayne (Ira W.), J. Submitted June 6, 1934. (Docket No. 49, Calendar No. 37,757.) Decided September 18, 1934.

Summary proceedings by Gregorian Building Company, a Michigan corporation, against Patrick J. Galvin to obtain possession of premises. From judgment for plaintiff, defendant appeals. Plaintiff filed motion for leave to file belated cross-appeal. Affirmed on main appeal. Motion granted and case remanded for redetermination of amount due.

Samuel Shimans (*John Sklar,* of counsel), for plaintiff.

Maurice D. Smilay, for defendant.

POTTER, J. Plaintiff brought suit in circuit court commissioner's court to recover possession of premises sold under land contract. Plaintiff had judgment and defendant appealed to the circuit court

where the case was tried, resulting in a verdict for plaintiff for the possession of the premises and a finding that there was due the sum of $1,853 and costs. Defendant filed notice of appeal, claiming:

"1. The court erred in overruling the testimony of the appellant, Patrick J. Galvin.
"2. The court erred in overruling the defendant's motion for a verdict of not guilty on the ground that the said plaintiff had failed to file its annual report for the year of 1931 as required by law.
"3. The court erred in denying the defendant's motion for a verdict of not guilty on the ground that a correct construction of the land contract automatically rendered the defendant not guilty.
"4. The court erred in entering a judgment both for the restitution of the premises and for a money judgment and costs."

In the full notice of appeal defendant specified the following portions of the records and files to be incorporated in the record on appeal:

"1. The full record on appeal from the circuit court commissioner of Wayne county;
"2. Verdict;
"3. Judgment."

Under Court Rule No. 59, § 3, subd. d (1931), no other grounds or reasons for appeal shall be considered except those stated. Defendant claims the court did not acquire jurisdiction in view of the fact no proofs were offered tending to show plaintiff had terminated the contract by notice of forfeiture. Defendant may not raise that question. The record does not contain the full record on appeal from the circuit court commissioner of Wayne county to the circuit court and this question is not raised by the defendant's claim of appeal.

It is claimed the court erred in overruling defendant's motion for a verdict of not guilty on the ground plaintiff had failed to file its annual report for the year 1931 as required by law (Act No. 327, § 82, Pub. Acts 1931). The record shows plaintiff submitted to the secretary of State its annual report for 1931 on September 8th, with sufficient fees, and the report was held by the secretary of State pending receipt of the name of the third director, the report having been signed by only two directors; that the name was received and the report accepted for final filing May 31, 1932. We think defendant's contention is fully answered by *R. C. Mahon Co.* v. *Molin,* 252 Mich. 606, and the contention made is without merit.

We find no error in the court's construction of the contract. The judgment entered should have been limited to a determination of the right of possession and a determination of the amount due and should not have been in the form of a money judgment. This evidently was a clerical mistake and, had it been called to the attention of the trial court, would undoubtedly have been corrected. *Gill* v. *DeArmant,* 90 Mich. 425.

Plaintiff filed a motion in this court for leave to file a belated cross-appeal, from which it appears that apart from a down payment of $3,500 upon an agreed purchase price of $82,450, nothing has been paid on the principal or interest on the land contract or upon the taxes accrued and accruing; that defendant, by means of worthless bonds, succeeded in appealing to the circuit court where plaintiff was compelled to move for an order requiring sufficient bonds; that plaintiff, although awarded possession of the property, has been compelled to expend a large sum of money for repairs and replacements made

necessary through the failure of the defendant to properly maintain the premises during the period of his occupancy. There is no question but what the court, upon a proper showing, has a right to grant a belated cross-appeal. We think one should be granted in this case. The sole question on such cross-appeal being the amount due under the land contract, the case should be remanded to the circuit court for a redetermination of the amount due thereon as of the date of such rehearing in the circuit court thereon, and for entry of a finding of such amount due, with costs.

NELSON SHARPE, C. J., and NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

GREENFIELD *v.* DULUTH, SOUTH SHORE & ATLANTIC RAILWAY CO.

1. MOTOR VEHICLES—IMPUTABLE NEGLIGENCE—GUESTS—RAILROADS. Failure to see railroad track and train in time to stop automobile and avoid accident was at most ordinary negligence imputable to guest passenger in action by his administratrix against his host and railroad company, and was not gross negligence or wanton and wilful misconduct so as to permit recovery against either defendant.

2. RAILROADS—CROSSING—MOTOR VEHICLES—SIGNALS—NEGLIGENCE. Motorist who drives upon railroad track at crossing without having heard a train or any signal in broad daylight and takes no further precaution, does so at his own risk.

Appeal from Baraga; Stone (John G.), J. Submitted June 6, 1934. (Docket No. 36, Calendar No. 37,529.) Decided September 18, 1934.

Case by Louise Greenfield, administratrix of the estate of Joseph Greenfield, deceased, against Duluth, South Shore & Atlantic Railway Company and Elroy Andrews for personal injuries resulting in death of plaintiff's decedent, alleged to be due to negligence of defendant railway company and gross negligence of defendant Andrews in whose car decedent was a guest passenger. Directed verdict and judgment for defendants. Plaintiff appeals. Affirmed.

Glenn W. Jackson (*Richard W. Nebel,* of counsel), for plaintiff.

Joseph J. O'Connor (*A. E. Miller* and *Ralph R. Eldredge,* of counsel), for defendant railway company.

L. J. Carey and *George J. Cooper,* for defendant Andrews.

POTTER, J. Plaintiff's decedent was riding as a guest passenger with defendant Andrews in an automobile when the automobile was struck by the Duluth, South Shore & Atlantic Railway train and decedent suffered injuries ultimately resulting in his death. Suit was brought by his administratrix to recover damages therefor. The accident occurred at a crossing of a trunk line highway and the tracks of the railroad company on the railroad right of way. There is the main track and a spur or loading track along which forest products were piled up. It is plaintiff's claim defendant Andrews was guilty of gross negligence and wanton and wilful misconduct and that such gross negligence and wanton and wilful misconduct is not imputable to plaintiff's decedent; and defendant railway company is liable for its own negligence. Apparently by agreement of parties, the case was disposed of on motion made by

the defendants to direct a verdict after the opening statement of plaintiff's counsel. The important question is whether, under the undisputed facts, defendant Andrews was guilty of gross negligence or wanton and wilful misconduct. It is claimed by plaintiff that Andrews did not see the railroad track and train in time to stop his automobile. In *Elowitz* v. *Miller,* 265 Mich. 551, it was held the failure of an automobile driver to see a curve in time to slow down and make the turn in safety did not constitute gross negligence or wanton and wilful misconduct, even though the driver of the automobile was familiar with the road and turn. A substantially similar ruling was made in *Mater* v. *Becraft,* 261 Mich. 477; while in *Bobich* v. *Rogers,* 258 Mich. 343, it was held not to constitute gross negligence or wanton and wilful misconduct, though defendant was driving at a high rate of speed and was warned by the guest who was injured by defendant making a turn at high speed.

We think the court was correct in holding the defendant Andrews was not guilty of gross negligence or wanton and wilful misconduct. Defendant Andrews may have been guilty of negligence, and being guilty of ordinary negligence his negligence is imputed to plaintiff's decedent who was riding with him, and such negligence upon the part of defendant Andrews contributed to the injury of plaintiff's decedent which resulted in his death, and plaintiff may not recover against the railroad company, even though the railroad company may have been negligent in the operation of its train which, under the opening statement of counsel, does not affirmatively appear.

A railroad company owns its own right of way. It has a right to operate its trains thereon. A railroad crossing is a place of danger. The accident involved

occurred in broad daylight; the train was being operated in a place where it had a right to be. It is not claimed it was operating at an undue rate of speed. There is no affirmative statement that the whistle was not blown nor the bell rung. The only claim being that plaintiff's decedent and those riding with him in the automobile heard no warning sign from bell or whistle. This court in *Davis* v. *Railway Co.*, 241 Mich. 166, approved the rule as laid down by the supreme court of the United States in *Baltimore & Ohio R. Co.* v. *Goodman*, 275 U. S. 66 (48 Sup. Ct. 24, 56 A. L. R. 645), the language from which is peculiarly applicable to the facts here involved. We see no reason for disturbing the judgment of the trial court which is affirmed, with costs.

NELSON SHARPE, C. J., and NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

DOUBLEDAY *v.* KALAMAZOO CITIZENS LOAN & INVESTMENT CO.

1. CORPORATIONS—STOCK AND STOCKHOLDERS—DEBENTURES.

   Plaintiffs, as holders of cumulative preferred stock with prospect of big dividends, cannot at the same time have the interest on debentures for which such stock was exchangeable and which they have not owned or held and be a creditor of the corporation.

2. SAME—JUDICIAL INTERFERENCE.

   Court cannot alter the position of holders of cumulative preferred stock who elected not to exchange their stock for debentures nor make a new contract between such holders, corporation controlled by holders of common stock, and holders of debentures.

Appeal from Kalamazoo; Weimer (George V.), J. Submitted June 13, 1934. (Docket No. 37, Calendar No. 37,849.) Decided September 18, 1934.

Bill by Ulysses F. Doubleday and Donald B. Doubleday against Kalamazoo Citizens Loan & Investment Company, a Michigan corporation, Vernon T. Barker and others, officers and directors, to obtain an adjudication as to priority between holders of cumulative preferred stock and debenture holders and for other relief. From decree rendered, both parties appeal. Modified and affirmed.

Adams, Van Horn & Bloem, for plaintiffs.

Mason & Sharpe, for defendants.

POTTER, J. Plaintiffs filed a bill against the Kalamazoo Citizens Loan & Investment Company, a corporation, its officers and directors, claiming to be the owners of 221 shares of 8 per cent. cumulative preferred stock of defendant corporation, organized with $390,000 capital ($130,000 in common stock and $260,000 in preferred stock), the par value of each share of stock being $25. This stock was sold by the corporation on the basis of $35 a share, thus creating a paid up but unearned surplus amounting to $10 a share. The corporation for a time made money, but when the bubble of credit inflation burst, this corporation, with commendable foresight, sought shelter by seeking to keep expenses in line with diminished earnings. Its common stockholders control the officers of the corporation. They voted to issue the corporation debentures and to exchange them with the holders of the preferred stock on the basis of $25, plus $10, plus $1 a share to cover the dividends on the preferred stock up to July 1, 1930, or $36 in debentures for each share of preferred

stock, which preferred stock when so acquired was canceled and destroyed. The holders of all but 396 shares of the preferred stock accepted the offer and of this 396 shares which did not accept, plaintiffs represent 221 shares which they still own. Plaintiffs, by their bill of complaint, ask the issuance of the company's debentures in exchange for its preferred stock be declared *ultra vires,* illegal, contrary to the company's charter, null and void, in violation of plaintiffs' rights and confiscatory of their property, and the debenture holders be declared to have no prior rights over the holders of plaintiffs' preferred stock and the corporation pay the amount of interest upon the preferred stock and the principal amount thereof; that the corporation be restrained from paying any more interest on its debentures until plaintiffs are paid back the principal amount of their preferred stock and the interest thereon, the corporation come to an accounting and for other relief.

The trial judge filed a written opinion in which he stated:

"In my opinion this record will not support the conclusion that the action of defendant company in providing for the issuance of debentures for preferred stock under the particular circumstances shown was *ultra vires* or unwarranted or taken in bad faith.

"We must look at the situation as it then appeared to the stockholders and to those in charge of the affairs of defendant company and not as it may since, in the light of later events, have proved to be. It is highly probable that it is very different than they anticipated.

"Plaintiffs are not entitled to the specific relief prayed but they have at all times had, and still have, the right to exchange their preferred stock for debentures. They are not barred therefrom by laches.

They are entitled to cash or debentures for accrued interest equal to that paid the other holders of debentures. If they had exercised their right to exchange earlier they would have received interest in cash with the others. For reasons satisfactory to themselves they elected to delay their acceptance of defendant's proposal.

"It may or may not be that defendant company should have created a reserve fund for the payment of interest on all debentures that might be issued at any time no matter how remote. Apparently that was not done and apparently defendant company had no reason to expect there would ever be any demand by the plaintiffs for debentures or interest thereon.

"Under all the particular circumstances shown I do not think plaintiffs are now entitled in a court of equity to insist that defendant company pay accrued interest on the debentures to be issued to them in cash from the capital assets of the company.

"Upon the surrender of their preferred stock they should receive debentures therefor and for accrued interest thereon."

The decree of the trial court followed this opinion. From the decree entered plaintiffs appeal and defendants take a cross-appeal.

Plaintiffs contend the decree of the trial court, in addition to providing plaintiffs may exchange their preferred stock upon the basis of $36 a share, should provide:

"In addition thereto that said defendant corporation shall pay to each one of the plaintiffs in cash the same *pro rata* amount of interest as has been heretofore paid by defendant to the preferred stockholders who surrendered their preferred stock and took debentures therefor and that plaintiffs be placed upon the same footing and in the same position that the holders of debentures are in who sur-

rendered preferred stock and took debentures therefor."

Defendants and cross-appellants ask the decree of the trial court be modified by striking therefrom the following language:

"In addition thereto said defendant corporation shall issue to each of the said plaintiffs the like debentures of said defendant corporation for the same amount of interest per dollar of each of plaintiffs' said preferred stock as the said defendant corporation has heretofore paid as interest per dollar on the debentures issued by said corporation to other holders of preferred stock who surrendered their preferred stock and took debentures therefor."

Plaintiffs had a chance to surrender their preferred stock and become holders of debentures. They did not choose to do so. In case the corporation should succeed after the payment of 8 per cent. upon the preferred stock and 8 per cent. upon the common stock, the holders of the preferred stock would be entitled to a distribution of one-half of the amount earned in excess of such 8 per cent. on all stock and under the circumstances with the greater amount of the preferred stock surrendered and debentures taken therefor, this amount distributed among the 396 shares might amount to a substantial sum.

Plaintiffs did not elect to exchange their preferred stock for debentures but held it and still continue to hold it. Plaintiffs cannot be stockholders in defendant corporation and at the same time, based on the same transaction, claim the rights of debenture holders. They cannot hold the preferred stock of the defendant corporation with a prospect, however remote, of big dividends and at the same time, on the same transaction, have the benefit of interest on debentures as a creditor of the corporation. They

cannot be part owners of the corporation as preferred stockholders and creditors of the corporation at the same time based upon debentures which might have been but never were issued in exchange for the preferred stock. As stockholders they cannot be entitled to interest on the debentures they did not own, or hold, and at the same time be entitled to dividends on the preferred stock in case the same were earned and declared. We cannot make a new contract for the parties nor may we change the position which they elected to take. After it was ascertained dividends on the preferred stock were not going to be declared, plaintiffs now seek to get debentures on the same basis as other persons who exchanged their preferred stock for debentures, and also to have the benefit of interest upon the debentures which they did not hold, and for which they had not exchanged their preferred stock, the same as if they had exchanged their preferred stock for debentures at the time the proposition was first offered. We think plaintiffs are not entitled to this relief.

The decree of the trial court will be modified so as to permit plaintiffs if they so elect, to exchange their preferred stock for debentures upon the same basis exchange was made by the other holders of preferred stock in defendant corporation, and, as so modified, the decree will be affirmed, with costs to defendant corporation.

NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred. NELSON SHARPE, C. J., did not sit.

WURZER *v.* GERALDINE.

1. MORTGAGES—FORECLOSURE—STATUTES—EQUITY.
   Mortgage foreclosure proceedings are special and statutory and not an exercise of inherent equity powers of the court.

2. JUDGMENT—FINAL JUDGMENTS.
   Final judgments are such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy for which he sues.

3. SAME—INTERLOCUTORY ORDERS.
   An order is interlocutory which does not deal with the final rights of the parties but is made before judgment on a matter of procedure or, after judgment, directing how declarations of right already given are to be worked out.

4. EQUITY—PRACTICE.
   Chancery practice in Michigan is based upon that of England and largely copied from that of New York.

5. MORTGAGES—FORECLOSURE DECREE—FINALITY.
   Consent decree of foreclosure which gave mortgagor time within which to make instalment payments of amount found due and stayed execution in the meantime is none the less final because it also required subsequent action of court in determination of whether or not default occurred and amount due according to terms of decree.

6. JUDGMENT—APPEALABILITY.
   An adjudication made at any stage of a cause may be appealable but whether or not an order is interlocutory or final from that standpoint depends entirely on the effect it produces upon the rights and interests of the parties.

7. MORTGAGES—FORECLOSURE—TIME FOR PAYMENT.
   In mortgage foreclosure decrees custom of giving time for payment before sale of property does not render decree interlocutory since it is the essence of an interlocutory order or decree that it may on final hearing be set aside, altered, changed or modified.

8. SAME—FORECLOSURE SALE—INSTALMENT DECREE.
Court may order sale of such portion of premises as is necessary to satisfy amount found due under final foreclosure decree providing for payment of sum due in instalments where day in court upon question of default and amount due pursuant to terms of said decree is afforded upon motion for order of sale of premises (3 Comp. Laws 1929, §§ 14376–14378).

9. SAME—CONSENT DECREE—FORECLOSURE FOR INSTALMENTS.
Consent decree in mortgage foreclosure proceedings providing for its payment in instalments and in case of default substantially the same provisions as in statutes for foreclosure of instalment due under a mortgage *held,* a final decree which settled the controversy then pending between the parties (3 Comp. Laws 1929, §§ 14376–14378).

10. SAME—MORATORIUM ACT.
Plaintiff who was granted final decree of foreclosure entered prior to effective date of mortgage moratorium act *held,* entitled to order of sale for instalment due under said decree on motion filed after moratorium act became effective (Act No. 98, Pub. Acts 1933).

Appeal from Otsego; Smith (Guy E.), J. Submitted June 5, 1934. (Docket No. 9, Calendar No. 37,534.) Decided September 18, 1934.

Bill by Louis C. Wurzer, administrator of the estate of Herman L. Benz, deceased, against Dion Geraldine and others to foreclose a mortgage. Decree for plaintiff. On motions for order for sale and for continuance under Act No. 98, Pub. Acts 1933. From order granting continuance, plaintiff appeals. Reversed and order for sale granted.

Wurzer & Higgins (*John T. Higgins,* of counsel), for plaintiff.

John McNeil Burns and *Cyril E. Bailey,* for defendants Geraldine.

POTTER, J. Upon a bill to foreclose a real estate mortgage, a decree was entered. Defendants defaulted in making payments decreed to be made January 20, 1933. Plaintiff filed a motion under paragraph 11, of the decree, to enter an order or supplemental decree determining the amount due under such decree and directing foreclosure sale, provided for therein, be proceeded with for the reasons the payment provided for in the decree to be made on January 20, 1933, was in default, and the amount due under the decree was the sum of $23,739.03 plus taxes, interest and penalties as shown by the records of the treasurer's office of Otsego county.

This motion was supported by affidavit and noticed for hearing on June 6, 1933, before the circuit judge. No answer was filed thereto, but defendants filed a petition for a continuance until March 1, 1935, upon conditions to be determined by the court pursuant to Act No. 98, Pub. Acts 1933, and the trial court holding no final decree had been entered, ordered an adjournment of all proceedings therein until March 1, 1935.

Plaintiff appeals, claiming the decree first entered was a final decree and such decree being a final decree, entered before the effective date of Act No. 98, Pub. Acts 1933, the trial court was without power to stay foreclosure sale thereunder but could only extend the period of redemption after sale. The important question is whether such decree was a final decree.

1. Mortgage foreclosure proceedings are special and statutory and not an exercise of inherent equity powers of the court. *Johnson* v. *Shepard,* 35 Mich. 115; *Kelly* v. *Gaukler,* 164 Mich. 519; *Kollen* v. *Sooy,* 172 Mich. 214; *Union Trust Co.* v. *Detroit Trust Co.,*

243 Mich. 451; *Janower* v. *F. M. Sibley Lumber Co.*, 245 Mich. 571.

2. Blackstone says:

"Final judgments are such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for." 3 Blackstone Commentaries (8th Ed.), p. 398.

In *Shubrook* v. *Tufnell*, 9 Q. B. Div. 621 C. A. (46 L. T. 749), the order in question did not decide the matter in litigation but referred it back to an arbitrator. Upon the application on which it was made, a final adjudication might have been made. The order was held to be final. This holding was approved by Lord Halsbury, L. C., in *Bozson* v. *Altrincham Urban District Council*, 1 K. B. (1903) 547 C. A. (72 L. J. K. B. 271, 67 J. P. 397, 19 T. L. R. 266).

"To constitute an order a final judgment, nothing more is necessary than a proper *litis contestatio*, and a final adjudication between the parties to it on the merits." *Ex parte Moore, In Re Faithfull*, 14 Q. B. Div. 627 (54 L. J. Q. B. 190, 52 L. T. 376).

In re Riddell, Ex parte Earl of Strathmore, 20 Q. B. Div. 512 (57 L. J. Q. B. 259, 58 L. T. 838), Lord Esher suggested this definition of a final judgment, namely:

"A judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined in favor either of the plaintiff or of the defendant."

And in 18 Halsbury's Laws of England, p. 178, it is said:

"A judgment or order which determines the principal matter in question is termed 'final.' An order

which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure; or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory.' ''

3. Chancery practice in Michigan is based upon that of England and largely copied from that of New York.

In *Mills* v. *Hoag,* 7 Paige (N. Y.), 18 (31 Am. Dec. 271), it is said:

''Chief Justice Savage defines a final decree to be the last decree which is necessary to be entered to give to the parties the full and entire benefit of the judgment of the court. The decree in this case comes within that definition, as no further questions or directions are reserved for the future judgment of the court. And although some further proceedings are to be had before a master to carry into effect the decree, all the consequential directions depending upon the result of those proceedings are given in the present decree. It is true there may be exceptions to the master's report; and in that case a further order of the court will be necessary to dispose of those exceptions. But a decree is not the less final in its nature because some future orders of the court may possibly become necessary to carry such final decree into effect. The usual decree in mortgage cases, for the sale of the property and the distribution of the fund among the parties and finally disposing of the question of costs, is a final decree as between the complainant and the defendants, and is constantly enrolled as such; although the master's report of the sale and distribution may be excepted to if it is erroneous, and it may require a subsequent order of the court to dispose of the questions which may thus arise.''

In *Johnson* v. *Everett*, 9 Paige (N. Y.), 636, it is said:

"A decree never can be said to be final where it is impossible for the party in whose favor the decision is made ever to obtain any benefit therefrom without again setting the cause down for hearing before the court, upon the equity reserved, upon the coming in and confirmation of the report of the master, to whom it is referred to ascertain certain facts which are absolutely necessary to be ascertained before the case is finally disposed of by the court; or which the chancellor thinks proper to have ascertained before he grants any relief whatever to the complainant. But if the decree not only settles the rights of the parties, but gives all the consequential directions which will be necessary to a final disposition of the cause, upon the mere confirmation of the report of the master by a common order in the register's office, it is a final decree and may be enrolled at the expiration of 30 days; although the amount to which the complainant may be entitled under such decree is still to be ascertained upon a reference to a master for that purpose. Thus, in the ordinary case of a bill for the foreclosure of a mortgage, if the decree merely decides or declares the rights of the complainant by virtue of his bond and mortgage, and refers it to a master to compute and ascertain the amount due to him, reserving all further questions and directions until the coming in and confirmation of the master's report, it is an interlocutory decree merely; as the complainant cannot obtain the benefit of his suit until he brings the cause on to be heard again upon the equity reserved and for further directions as to a sale of the mortgaged premises and the payment of his debt and costs out of the proceeds of such sale. But if the decree, in addition to the reference to the master to compute the amount due upon the bond and mort-

gage, proceeds further and gives the usual directions in such cases, that upon the coming in and confirmation of the report of the master, the premises shall be sold, and that the master who makes such sale shall pay the amount so reported due, together with the interest and costs, out of the proceeds of such sale, and directing the mortgagor to pay the deficiency reported due upon such sale, the decree is final; although the mortgagor may have the right to except to the master's report of the amount due. For the questions arising upon the exceptions to the master's report, in such a case, are merely incidental to the carrying of the final decree in the cause into full effect."

"The true rule seems to be, that if that which remains to be done or decided will require the action or consideration of the court before the rights involved in the cause can be fully and finally disposed of, the decree is interlocutory; but it is none the less final if, after settling the equities, it leaves a necessity for some further action or direction of the court in execution of the decree as it stands." 1 Black on Judgments (2d Ed.), § 41.

"A decree is final which directs the sale of property and fixes the rights and interests of the respective parties therein, though the officer who is to make the sale is required, after paying a specified claim, to pay the surplus in his hands to the complainant 'after deducting such costs as the court shall decree to be paid out of the same.' A judgment dissolving a partnership, directing a sale of the firm property and providing for the distribution of the proceeds between the parties, is a final judgment, though the compensation of the receiver and the amount to be paid to the creditors are reserved for future determination. A decree in other respects final is not rendered interlocutory by a direction therein contained, in aid of the execution

of the decree, requiring the defendants to account concerning certain specified matters, and a reservation to the court of the right to make 'such further directions as may be necessary to carry this decree into effect concerning costs, or as may be equitable and just.' If, in an action to recover moneys on a contract for the sale of land and to subject the land to sale for such amount as should be found due, a cross-petition is filed, alleging the existence of a cloud on plaintiff's title, and the court, after trial, adjudges that the cloud has been removed, that the complainant has deposited with the clerk deeds conveying to defendant a clear title, that a specified amount is due plaintiff, that such amount be paid to the clerk of the court within 30 days, and in default thereof that execution issue therefor, and that on payment thereof by defendant the deeds be delivered to him, the provision delaying execution and declaring that the deeds shall be delivered only after payment, does not prevent this adjudication from being a final judgment. Generally, clauses in judgments or decrees suspending their operation for a specified time, or giving defendant a period within which to make payment, and staying execution in the meantime, are not regarded as rendering interlocutory decrees which are otherwise final.'' 1 Freeman on Judgments (5th Ed.), § 37.

4. Defendants rely upon *Perkins* v. *Perkins,* 16 Mich. 162; *Patterson* v. *Hopkins,* 23 Mich. 541; *Brown* v. *Thompson,* 29 Mich. 72, and *Ritzer* v. *Ritzer,* 243 Mich. 406, to show the decree in question is interlocutory.

Perkins v. *Perkins, supra,* involved an appeal from an order setting aside a circuit court commissioner's sale of real estate under a decree of divorce declaring the real estate liable for alimony and providing if default was made in its payment the premises could be sold. It is said:

"It certainly did not and could not adjudicate in advance for future defaults. No court, either of law or of equity, can lawfully direct judgment to go against a party until his default has been made out. The determination of the amount of any debt actually due, which is to stand as the basis of a judicial sale or execution, is a judicial act; and a hearing must precede the condemnation. In mortgage cases, a decree for the first instalment, while it must necessarily go upon a finding of the existence and validity of the entire mortgage, will not justify any assumption that a second default has occurred, without new proceedings calling on the defendant to respond to the new cause of action: 2 Comp. Laws (1857), §§ 3575, 3576, 3577. As often as a new instalment becomes due, if it is desired to enforce payment of it, the party must be allowed a hearing. The determination of the sum actually due is necessary to an enforceable decree; and until this sum is judicially ascertained there can be nothing to collect. It is a necessary part of a complete judgment."

In *Patterson* v. *Hopkins, supra,* a suit for specific performance, it was said of the decree entered:

"It declares that the complainant ought to have a specific performance, but it does not fix the terms nor direct either party to act. In order to ascertain what shall be fixed as the specific action to be had by each, it orders a reference involving a multitude of nice and complicated inquiries, including, first, an inquiry into the rents received, the rental value, and the damages for waste or otherwise done or incurred during a possession wrongfully taken away from a receiver in the cause; second, an inquiry into liens and incumbrances, and into the state of the title; third, the state of the accounts after allowing and applying the sums estimated on the other inquiries. And in addition to these references, the

decree goes on to require that upon or after various periods from the confirmation of the report, the defendants or the receiver shall pay off the incumbrances reported to exist, and in case the sums they should pay exceed what they may be entitled to receive on the contract, that they pay that excess or stand in contempt.

"But every matter which legitimately belongs to a final decree is left to be determined. There is no adjudication whether any, and if so what, title will be found to exist to be conveyed; nor how much money is to be paid by either party to the other on the specific performance."

Brown v. *Thompson, supra,* was an appeal from an order refusing to vacate a chancery sale under a decree for the payment of instalments due on a mortgage. The order appealed from was *ex parte.* It is said:

"Where a mortgage is made payable in different instalments, each instalment is so far separate from the rest that a payment before decree of the amount due, puts an end to the suit. 2 Comp. Laws (1871), § 5157. It is only by virtue of the statute that such a payment after decree does not have the same effect. (2 Comp. Laws 1871), § 5158. The effect of a default in such a case can only be to admit the securities as alleged, and the amount then due. It cannot operate as an admission of any matter *ex post facto,* and therefore the nonpayment of any future instalment can only be established when the fact is alleged of record, and the defendant has an opportunity to meet it. He is not bound to deny allegations before they are made. *Albany City Bank* v. *Steevens,* Walk. Ch. 6; *Perkins* v. *Perkins,* 16 Mich. 166."

Ritzer v. *Ritzer, supra,* held that the general rule permitting appeals only from final orders or decrees

was particularly applicable in divorce cases under the statute which provides:

"When any decree of divorce is hereafter granted in any of the courts of this State, it shall be the duty of the court granting such decree to include in it a provision in lieu of the dower of the wife in the property of the husband, and such provision shall be in full satisfaction of all claims that the wife may have in any property which the husband owns or may thereafter own, or in which he may have any interest." 3 Comp. Laws 1929, § 12766.

The court holding there could not be several final decrees at the same time in the same divorce proceeding between the same parties, and the orders and decrees entered by the trial court directing the sale of real estate before final decree of divorce granted were all reviewable on an appeal from the final decree; such orders of sale having been made in violation of the statute.

5. We understand plaintiff does not question the correctness of the decisions made in these cases, but contends they are not applicable.

"The term decree is not applicable to the interlocutory orders made for the furtherance of suits, but belongs to such adjudications as settle some right or liability pertaining to the substance of the controversy." *Haines* v. *Haines,* 35 Mich. 138, 145.

"It may be said in brief, that the nature of any order, as a decree or final order, or as not final, depends entirely on the effect produced by the adjudication upon the rights and interests of parties; and that the usual distinction between interlocutory and other orders depending on the cause in which they are made, is not the test for appellate purposes. An adjudication made at any stage of a cause may

have such an effect as to render it appealable." *Barry* v. *Briggs,* 22 Mich. 201.

In the case last cited suit was filed for a receiver of copartnership assets after the death of one partner. Under the law, the surviving partner was entitled to possession of the property, to wind up the partnership business, settle the debts, make such compromises as were necessary, convert the assets into distributable form, acting not only for himself but in a fiduciary capacity for the benefit of the estate of his deceased partner. The trial court appointed a receiver to collect all claims, sell the property, convert it into cash, restraining defendant from interfering with the property or assets, directing him to transfer and turn over to the receiver all of the books, papers, vouchers and property of the former copartnership so as to vest title thereto in the receiver. The court held this order was appealable, its effect being to divest the entire legal estate of defendant, in property over which he had exclusive control as well as exclusive title, and in which he was equitably as well as legally interested.

"Decrees relate directly to the merits of the controversy, and are decisions made upon the issues in the cause. Whenever finally adjudicating upon these matters, they are necessarily final as to both parties and therefore either, if aggrieved, may appeal. But what are known as final orders are adjudications upon motions or other applications, not involving a hearing upon pleadings and proofs, but upon other issues interlocutory or collateral, whereby some supposed right of a party is definitely cut off, or some liability fixed upon him. Usually, if not always, an order made on such a side hearing is only final if made in a certain way; whereas, if the de-

cision had been otherwise it would have been interlocutory; while an absolute decree made in favor of either party is final. If the decision of a motion opens a case it is not generally final, unless it cuts off some acquired right under a decree. If it closes the matter and precludes any further hearing or investigation it is final.'' *Kingsbury* v. *Kingsbury,* 20 Mich. 212.

6. It is customary in mortgage foreclosure decrees to give time for payment before sale of the property. That does not render the decree interlocutory. In this case the decree entered settled all of the controverted questions involved in the litigation. It is the essence of an interlocutory order or decree that it may on final hearing be set aside, altered, changed or modified. This cannot be said of the decree in question which settled the controversy pending between the parties, but permitted payment of the sum decreed to be due, in instalments. Order of sale was sought by plaintiff by reason of defendants' default in the payment of instalments due. This gave rise to the appeal. The statutes have long recognized the right to foreclose mortgages for default in the payment of instalments due thereon. The statutes were specifically mentioned in *Perkins* v. *Perkins, supra,* and *Brown* v. *Thompson, supra,* relied upon by defendant.

The decree here involved found the amount due and that defendants were in default. It provided the amount due could be paid in instalments over a limited fixed time. Had the instalments been paid as directed when due, defendant would have been entitled to a stay of proceedings; the property could not have been sold so long as defendant was not in default in carrying out the terms of the decree.

"If, after a decree for sale entered against a defendant in such case, he shall bring into court the principal and interest due, with costs, the proceedings in the suit shall be stayed; but the court shall enter a decree of foreclosure and sale, to be enforced by a further order of the court, upon a subsequent default in the payment of any portion or instalment of the principal, or of any interest thereafter to grow due." 3 Comp. Laws 1929, § 14376.

There is no doubt but that under the rule of *Perkins* v. *Perkins, supra,* and *Brown* v. *Thompson, supra,* as well as under the express terms of the statute, 3 Comp. Laws 1929, § 14377, defendants were entitled to their day in court upon the question of default and the amount due. This was given them by plaintiff by motion and default was conceded. When such default is admitted, the statute provides:

"If, in the case mentioned in the preceding section, there shall be any default subsequent to such decree, in the payment of any portion or instalment of the principal or of any interest due upon such mortgage, the court may, upon the petition of the plaintiff, by a further order founded upon such first decree, direct a sale of so much of the mortgaged premises to be made under such decree, as will be sufficient to satisfy the amount so due, with the costs of such petition and the subsequent proceedings thereon, and the same proceedings may be had, as often as a default shall happen." 3 Comp. Laws 1929, § 14378.

Other sections of the statute direct special statutory procedure on mortgage foreclosure cases which are here applicable. The decree originally entered was a final decree. It provided defendant First National Fur Farms was indebted to Herman L.

Benz in the sum of $41,335.40; that to secure the payment of this indebtedness the real estate mortgage in question was given; that subsequently it was agreed between Benz and appellants the amount due on the real estate mortgage was $37,879.95, which said sum appellants covenanted and agreed to pay; that the real estate mortgage contained a clause in relation to taxes, insurance, title insurance, abstracts, care, upkeep and repairs and the payment and discharge of prior liens. It established there had been default in the payment of principal, interest, taxes and insurance upon the mortgaged premises; that there was due $17,682.45, plus $2,065.88 on a prior mortgage lien and $2,330.70 for unpaid taxes, together with interest. It provided the defenses set up in the answers of the several defendants filed were settled, compromised and merged in the decree; it provided for the payment of the amount found by the decree to be due in six instalments of principal and interest; that if any default be made in the payment of such instalments or in the payment of insurance premiums or taxes on the premises, plaintiff could apply to the trial court by motion, and on notice to defendant, have the question of default in payments fixed, determined, and the premises ordered sold to satisfy the amount due upon the mortgage indebtedness, for foreclosing appellant's equity of redemption, if the premises sold were not redeemed from such sale; the purchaser at such mortgage sale being let into possession of the premises bought, and for a deficiency decree.

This decree was a consent decree. It was approved both as to the form and substance by the attorneys for the several parties; it provided for payment of the amount due in instalments. It fol-

lowed substantially the applicable statutes in case of foreclosure of real estate mortgages for default in the payment of instalments due. Its terms were not contrary to statute nor opposed to public policy. The procedure provided was agreed upon, assented to and the parties are bound thereby.

The order of the trial court continuing the case to March 1, 1935, is reversed and set aside and decree will be entered for plaintiff, with costs.

NELSON SHARPE, C. J., and NORTH, FEAD, BUTZEL, and EDWARD M. SHARPE, JJ., concurred with POTTER, J.

WIEST, J. *(concurring.)* I concur in the result.

The decree was final and the subsequent petition was merely subservient.

BUSHNELL, J., concurred with WIEST, J.

MITCHELL *v.* REOLDS FARMS CO.

1. ASSUMPSIT—COMMON COUNTS.

   Recovery may not be had under the common counts in assumpsit for breach of a written contract between the parties, nor for preventing plaintiff from carrying out such contract.

2. SAME—COMMON COUNTS—JOINT ADVENTURES.

   Plaintiff may recover under the common counts from defendant corporation for his share of proceeds of sale of product of their joint enterprise, to which he was entitled under written contract, where he had fully performed on his part, defendant had sold the product of the enterprise and converted the entire proceeds to its own use and nothing remained to be done except to pay plaintiff his share.

3. JOINT ADVENTURES—CONVERSION—ASSUMPSIT.

One joint adventurer may recover damages in assumpsit from a coadventurer who converts joint property to its own use on an implied promise, where the amount of plaintiff's claim is capable of ascertainment by a jury.

4. SAME—QUESTION FOR JURY—PROCEEDS OF ENTERPRISE.

In action by one claiming share of proceeds of joint adventure, verdict could not be directed for defendant where there was testimony it had money or property in its hands as a result of the sale or trade of the product of the enterprise.

5. EVIDENCE—ADMISSIONS—SUBSEQUENT TRIAL.

Generally, where an admission is made on one trial, the admitting party, on a subsequent trial, is estopped from taking a position inconsistent with that taken on the former trial.

6. SAME.

Judicial admissions made on one trial in order to be binding upon a subsequent trial must have been intelligently and deliberately, and not inadvertently, made as a fact and not merely to expedite the particular proceeding.

7. SAME.

Admission made upon one trial that proceeds of sale of four houses had been settled for, discovered on second trial to have been inadvertently made, *held*, not conclusive.

8. DAMAGES—MEASURE OF DAMAGES—INSTRUCTIONS.

Charge of court in action by one joint adventurer against coadventurer for conversion of joint property that it was to be sold at price agreed upon in so far as one had been agreed to, or, otherwise, at fair market value and recovery was to be based upon agreed value or fair market value *held*, proper as against contention that recovery should be based upon depreciated selling price at which properties were sold by defendant, if any profit were then shown.

9. INTEREST—AVERMENT—PROOF.

Interest according to the law of another State may not be recovered in an action brought in this State unless such law is specially averred and proved.

10. EVIDENCE—CONSTITUTION AND STATUTES OF OTHER STATES—JUDICIAL NOTICE.

Printed copies of the Constitution and statutes of any other State of the United States published under the authority of that State or commonly used as evidence in its courts may be

admitted in all courts of this State as *prima facie* evidence thereof or the court may take judicial notice of such statute (3 Comp. Laws 1929, § 14179).

11. SAME—COMMON LAW OF OTHER STATES—JUDICIAL NOTICE.
The common law of any other State of the United States may be proved as a fact by parol evidence and the books of reports of cases adjudged in their courts may be admitted as evidence or the court may take judicial notice of such law (3 Comp. Laws 1929, § 14181).

12. SAME—FLORIDA STATUTES—INTEREST.
Proof of Florida statutes permitting recovery of interest at eight per cent. *held,* introduced in proper manner in action brought in this State on a contract made, performed and concerning property in Florida (3 Comp. Laws 1929, § 14179).

13. INTEREST—STATUTES—IMPLIED PROMISE.
The manner of recovery of interest is governed by statute as no implied promise is raised to pay it.

14. SAME—DAMAGES—LEX FORI.
Interest by way of damage for improper detention of money is a matter of remedy and the rate is governed by the *lex fori.*

15. EVIDENCE—PROSPECTUS—WITNESSES.
In action between members of a joint adventure in the development and sale of a real estate subdivision the receipt of a prospectus in evidence and examination of witnesses with respect thereto *held,* without error.

16. TRIAL—ARGUMENT OF COUNSEL—JOINT ADVENTURE.
Argument of plaintiff's counsel in action between members of joint adventure for conversion of joint property *held,* fairly within range of testimony.

Appeal from Ingham; Carr (Leland W.), J. Submitted June 19, 1934. (Docket No. 78, Calendar No. 37,886.) Decided September 18, 1934.

Assumpsit by Edward H. Mitchell against Reolds Farms Company, a Michigan corporation, under a construction contract and the common counts. Verdict and judgment for plaintiff. Defendant appeals.

Reversed and remanded for modified judgment for plaintiff.

Shields, Silsbee, Ballard & Jennings, for plaintiff.

Kelley, Sessions, Warner & Eger, for defendant.

POTTER, J. The facts in this case were sufficiently reported when it was here in 255 Mich. 240 and 261 Mich. 615. Plaintiff's declaration consists of two counts, one upon written contracts annexed thereto and the other upon the common counts in assumpsit. When the case was here in 255 Mich. 240 it was reversed. The sole question presented was whether plaintiff was properly denied the right to give testimony to establish his cause of action under the common counts of the declaration. *Mitchell* v. *Reolds Farms Co.,* 261 Mich. 615. When the case was last here it was reversed because defendant was denied the right to introduce proof tending to show the houses had not been sold after unsuccessful efforts to sell them over a period of more than three years; real estate values had shrunken, the houses had depreciated in value and plaintiff had suffered no damages.

Plaintiff recovered judgment for $5,794.94. Defendant appeals, claiming the court erred in refusing to grant defendant's motion for judgment notwithstanding the verdict and, in the alternative, in refusing to grant defendant's motion for a new trial; the verdict was excessive and against the great weight of the evidence; the court erred in refusing defendant's request to charge regarding the measure of damages, and failed to properly instruct the jury respecting the damages and measure thereof; in receiving in evidence the statutes of Florida showing the rate of interest in that State; in allowing de-

fendant to be examined as to the volume of its business, and in permitting plaintiff's exhibit 1 to be received in evidence, and the arguments of counsel for plaintiff were so prejudicial and unfair as to constitute reversible error.

(1) Recovery could not be had under the common counts in assumpsit for breach of the written contract between the parties. *Butterfield* v. *Seligman,* 17 Mich. 95; *Phippen* v. *Morehouse,* 50 Mich. 537. Nor could recovery be had, under the common counts, of damages for preventing plaintiff from carrying out the contract. *Hamilton* v. *Frothingham,* 59 Mich. 253, in effect overruled in *Mooney* v. *York Iron Co.,* 82 Mich. 263. The only tenable theory of recovery under the common counts is that the parties engaged in a joint enterprise, and after plaintiff had fully performed the contract on his part, and built the houses in question, defendant in pursuance of the contract sold the same and converted them, and the proceeds arising from the sale thereof to its own use and benefit to the exclusion of plaintiff, and has not accounted for or paid over to plaintiff the part of the proceeds of such sale to which, under the written contracts, he was entitled, and nothing remaining to be done but to pay to plaintiff his share of the proceeds of such sale, recovery may be had on the common counts. *Begole* v. *McKenzie,* 26 Mich. 470; *Flint & Pere Marquette R. Co.* v. *Wayne Circuit Judge,* 108 Mich. 80.

(2) It is contended the parties engaged in a joint enterprise, are to be regarded as partners, and consequently plaintiff may not maintain this action against defendant. *Keiswetter* v. *Rubenstein,* 235 Mich. 36 (48 A. L. R. 1049); *Johnson* v. *Ironside,* 253 Mich. 428; *Frank* v. *American Trust Co.,* 259 Mich. 394; *Carson* v. *Exchange Trust Co.,* 127 Okla. 55 (259 Pac. 857); but, in *McCreery* v. *Green,* 38

Mich. 172, it was held that, in a proper case, one joint adventurer could recover damages in assumpsit against another coadventurer, and a similar rule was followed in *Wallace* v. *H. W. Noble & Co.*, 203 Mich. 58. The general rule sustained by many authorities is thus stated in 33 C. J. p. 866:

"A member of a joint adventure who has been injured by a breach of contract by his associate, or by the latter's conversion to his own use of the joint property or some part of it, * * * may, in a case where the amount of plaintiff's claim is capable of ascertainment and computation by a jury, bring an action at law to redress his grievance, and may in such action recover the damages which he has suffered from the injury alleged."

(3) There could be no recovery until defendant sold the property and converted it, or the proceeds thereof, to its own use and benefit; but, upon the sale and conversion of the property in which the parties were mutually interested, by defendant, the law implies a promise by defendant to account and pay over to its associate or coadventurer the share of the proceeds of the venture to which he was entitled. 33 C. J. p. 866.

(4) There was testimony which warranted a finding defendant had money or property in its hands as a result of the sale or trade of the houses in question. A verdict could not have been properly directed for defendant.

(5) It is claimed plaintiff may not recover the proceeds of the four houses disposed of in November, 1919, for the reason it was admitted on the former trial these houses had been settled for and such admission is binding here.

"Where an admission is made on one trial, the admitting party, on a second trial, is estopped from

taking a position inconsistent with that taken on the first trial. *Connor* v. *Railway Co.,* 168 Mich. 29; *Johnston* v. *Cornelius,* 200 Mich. 209 (L. R. A. 1918D, 880); *Harrington* v. *Inter-State Business Men's Accident Ass'n,* 210 Mich. 327; *Hassberger* v. *General Builders' Supply Co.,* 213 Mich. 489." *Billingsley* v. *Gulick,* 256 Mich. 606 (79 A. L. R. 166).

This rule is generally recognized. Bigelow on Estoppel (6th Ed.), p. 633; *Wetmore* v. *McDougall,* 32 Mich. 276; *Henry* v. *Quackenbush,* 48 Mich. 415; *Bassett* v. *Shepardson,* 57 Mich. 428. Judicial admissions made in one trial in order to be binding upon a second trial must have been intelligently made as a fact, and not merely to expedite the particular proceeding, and must have been deliberately and not inadvertently made. The record shows the admission in relation to the four houses was made on a former trial. Defendant insists this particular point is *res judicata.* Plaintiff says the first case was brought about four years ago and upon the trial thereof counsel for defendant stated they had checked up and the four houses had been settled for and plaintiff proceeded on that assumption in the first case in making the admission. On the second trial plaintiff discovered the admission was inadvertently made and but one house was settled for.

"A judicial admission made intelligently and with deliberation establishes the fact with reference to which it is made, and the jury must accept it as so established." *Connor* v. *Railway Co.,* 168 Mich. 29.

The court quoted with approval from Greenleaf on Evidence (16th Ed.), § 186:

"To this end, they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the for-

mal proof of some fact at the trial; in such cases, they are in general conclusive, and may be given in evidence, even upon a new trial," and cited 2 Chamberlayne on Evidence (1st Ed.), § 1232 *et seq.*; 4 Wigmore on Evidence (1st Ed.), § 2588 *et seq.*, and other authorities.

The court was not in error in holding upon a retrial of the case, after reversal, the parties had a right to go into all the facts and this admission was not conclusive.

(6) Defendant assigns error upon the failure of the trial court to give its request to charge:

"I further charge you that it is undisputed that the properties identified as lot 2, block 21; lot 6, block 27; and lot 7, block 27, were sold at a price which did not enable the defendant to realize a profit; and said properties not having been sold at a profit over and above the cost of construction, plus the stipulated lot prices, plaintiff is not, therefore, entitled to recover as a result of the sale of said properties."

The court did not give this request in relation to the three houses and lots above discussed. The court charged the jury it was the duty of defendant in selling these lots to sell them at the prices fixed by the parties and account to plaintiff on the basis of the selling price agreed upon, if it was agreed upon; if, on the other hand, Mr. Bolles and plaintiff did not agree on the selling prices of these lots, failure would not deprive defendant of the right to sell the lots, but it would be the duty of the defendant to sell them, in the absence of any express agreement, at not less than the fair market value thereof. We find no error in this charge.

Defendant contends the court was in error in charging upon the measure of damages. The trial court charged, it was the duty of defendant under

the circumstances to sell the properties at the prices fixed by Bolles and Mitchell and if such prices were not fixed to sell them at not less than their fair market value. He charged that if defendant sold the properties for less than the fair market value, then, such loss of the difference between the fair market value and the selling price, in case they were sold for less than they should have been sold for, resulting in a loss to defendant, was not binding upon plaintiff, who was to be compensated upon the basis of one-half the difference between the cost of the properties and the fair market value thereof, and not on the basis of one-half the difference between the cost and the depreciated selling price at which they might have been sold by defendant.

(7) Defendant assigns error upon the failure of the court to charge the jury as follows:

"I charge you that before the plaintiff shall be entitled to recover a verdict in this case, he must establish by a preponderance of the evidence that in the exchange of the properties in question the defendant realized an actual profit over and above the contract cost of the houses, which cost includes the contract price of the lots and the cost of construction."

The charge was properly refused. The determination of the amount of damages was governed not by what defendant received, but by what defendant ought to have received, the fair market value of the premises, and the fair market value of the premises less the cost, equaled the profits which were to be divided between the joint adventurers on the basis of contract.

(8) It is contended the trial court erred in admitting in evidence the Florida statutes under which interest at eight per cent. was recoverable. The only mention of interest in plaintiff's declaration is at

the conclusion of the first count the language "to plaintiff's damage $5,000 with interest to date of trial at eight per cent." No recovery was had upon this count of the declaration. Recovery was had upon the basis of the common counts. While the declaration in the first count claims interest to date of trial at eight per cent. the general rule is stated in 33 C. J. p. 258 that:

"In order to support the recovery of interest according to the law of another State, such law must be specifically averred and proved. Proof at the trial in the absence of such averment is insufficient."

The common law of any other State of the United States may be proved as a fact by parol evidence and the books of reports of cases adjudged in their courts may be admitted as evidence of such law. 3 Comp. Laws 1929, § 14181. Printed copies of the Constitution and laws of any other of the United States purporting to be published under the authority of the State government or if commonly admitted and used as evidence in their courts may be admitted in all courts of this State as *prima facie* evidence thereof. 3 Comp. Laws 1929, § 14179. The courts of this State may take judicial notice of the common law of other States of the United States, 3 Comp. Laws 1929, § 14181, and of the statutory law of such foreign States without the formal introduction in evidence of the printed copies thereof. 3 Comp. Laws 1929, § 14179. The proof of the rate of interest in Florida was introduced in a proper manner.

The important question is whether in rendering a verdict in this State the jury should have been directed to consider the evidence of the rate of interest in Florida rather than the rate of interest in this

State. The contract in question was a Florida contract made and entered into in Florida. It concerned Florida property. It contemplated performance in Florida, and a settlement and division of profits in that State. The basis of plaintiff's recovery is the failure of defendant to account and pay over to plaintiff his part of the profits which the law implies a contract to do.

The question of interest is purely statutory. *Kermott* v. *Ayer,* 11 Mich. 181; *Tousey* v. *Moore,* 79 Mich. 564. Though interest is generally a matter of contract, the written contracts here involved do not provide for interest. "It is a question of damages not of positive agreement." *O'Connor* v. *Beckwith,* 41 Mich. 657. "No implied contract can grow up under which interest can be recovered." *Regents of the University of Michigan* v. *Rose,* 45 Mich. 284, 300. "After default interest is strictly allowable only as damages." *Mason* v. *Callender,* 2 Minn. 350 (72 Am. Dec. 102). *Hubbard* v. *Callahan,* 42 Conn. 524 (19 Am. Rep. 564), for lost use. *Boyce* v. *Boyce,* 124 Mich. 696. "Failure to pay money promised when by law it ought to be paid, authorizes the allowance of interest in the nature of damages for the improper detention of the sum so promised." *McCreery* v. *Green, supra,* 185. "Interest is allowed where money is withheld, either upon the ground of a promise, express or implied, to pay interest or as damages for default in retaining money due and owing another. But upon whatever ground it may be placed, in the absence of an express promise, until the principal becomes due, no promise to pay interest can be implied, or be awarded as damages." *Lake Shore & Michigan Southern R. Co.* v. *People,* 46 Mich. 193.

There is no doubt the contract was made in Florida and contemplated performance in Florida, but suit

was brought in Michigan, and the remedy available was the remedy afforded by the laws of Michigan.

Plaintiff relies upon 5 R. C. L. p. 986, § 67, which declares the weight of authority sustains the rule that the measure of damages is a matter of substantive right rather than of remedy. This rule was expressly repudiated in *Walton School of Commerce* v. *Stroud,* 248 Mich. 85, which holds (quoting syllabus): "In action in this State on foreign contract, remedy available to plaintiff is the remedy afforded by the laws of Michigan." 5 R. C. L. p. 986, § 67, also states: "As to interest which is not contractual, but is allowed by way of damages, or as some of the courts term it, interest *ex mora,* there is a decided conflict of authority, many cases holding that the *lex fori* should govern," citing note, 56 L. R. A. 303. Interest is not here allowed under contract stipulating therefor but by way of damages. Where interest is allowed, not under contract but by way of damages, the rate must be according to the *lex fori. Goddard* v. *Foster,* 17 Wall. (84 U. S.) 123. Where "the only claim for interest is because of the delay for payment after the principal is due, it is now generally agreed that the interest is to be computed according to the law of the place where the judgment is recovered and not according to that of the place where the contract was made." Story, Conflict of Laws (7th Ed.), § 296a.

In *Federal Surety Co.* v. *A. Bentley & Sons Co.* (C. C. A.), 51 Fed. (2d), 24 (78 A. L. R. 1041), it is said:

"We think the prevailing rule is, however, that where interest is not specified in the contract, but is awarded merely as damages for the breach thereof, the rate of interest is to be computed according to

the law of the State where the court rendering judgment is located.''

It is clear the interest here involved is recoverable by way of damages, for refusal to pay over money claimed to be rightfully due plaintiff,—for unlawful detention. It is not based on contract providing therefor. The measure of damages therefor is in this State governed by its law. We think plaintiff should have been limited to the recovery of interest at the legal rate in Michigan.

(9) We find no error in the court receiving plaintiff's exhibit 1 in evidence nor in the examination of the witnesses in relation thereto.

(10) Error is alleged upon the argument of counsel for plaintiff. We think the argument was fairly within the range of the testimony and no reversible error was committed.

The judgment will be reversed and the cause remanded, with directions to enter judgment for plaintiff on the basis of including interest at five per cent. instead of at eight per cent. Defendant will recover costs of this court.

NELSON SHARPE, C. J., and NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

MIKULSKI *v.* MORGAN.

1. NEGLIGENCE—DEFINITION.
   Negligence is the failure to exercise that degree of care and caution which an ordinarily prudent person usually exercises under the same or similar circumstances.

2. THEATERS AND SHOWS—BATHING BEACH EQUIPMENT.
   It is incumbent upon owner of public bathing beach equipment for the use of which a fee is charged to furnish reasonably safe appliance.

3. SAME—BATHING BEACH EQUIPMENT—IMPROPER USE.
   Defendant, owner of public bathing beach equipment for use of which plaintiff paid fee charged, *held,* not liable for injury sustained by plaintiff who used equipment in an improper manner, where defendant could not reasonably foresee plaintiff's probable injury, equipment was not defective in construction nor out of repair, and his alleged negligence in furnishing inherently dangerous equipment is not shown to have been the sole or effective cause of plaintiff's injury.

Appeal from Kent; Verdier (Leonard D.), J. Submitted June 7, 1934. (Docket No. 64, Calendar No. 37,830.) Decided September 18, 1934.

Case by Chester Mikulski against Morgan, first name unknown, proprietor of Morgan's Bathing Beach, for personal injuries sustained while using bathing beach equipment. Judgment for defendant. Plaintiff appeals. Affirmed.

Glocheski & Glocheski (*Wencel Milanowski,* of counsel), for plaintiff.

Mason, Alexander, McCaslin & Cholette, for defendant.

POTTER, J. Plaintiff sued defendant to recover damages for alleged injuries claimed in the first

count of plaintiff's declaration to be due to defendant's negligence; and in the second count, to breach of an implied contract between the plaintiff and defendant. The case was submitted to the trial court upon a stipulation of facts, as follows:

"On the 26th day of June, 1932, plaintiff was a patron of a beach operated by the defendant for the use of the public. A fee was charged to all customers and they were permitted to use the bath house and avail themselves of the privileges of the bathing beach and equipment. Plaintiff paid the required fee on the aforementioned date.

"Part of the equipment provided for the use of the public was a device made by the defendant consisting of a ladder placed perpendicularly to a large gasoline tank, the ladder being held in position by four braces running from the tank to the side of the ladder. The braces formed an acute angle of approximately 20 degrees with the portion of the ladder to which they were attached, and this space between the braces and the ladder which formed the acute angle was an open space. The tank was weighted so that the ladder would stand perpendicular to the water. The practice of the bathers in using this piece of equipment was to have several of them hang on the rungs of the ladder so as to force the ladder to a position parallel with the water, and to the water level. Then, one person would hang onto the top rung of the ladder and the others would let go. This would swing the top man back and forth, or throw him into the water on the opposite side.

"Plaintiff, with other bathers, caught hold of the rungs of the ladder. The ladder was brought down to the water and everyone let go. The plaintiff's left thumb caught in the space between the brace and the rung of the ladder, and when the ladder swung upwards, it tore off the plaintiff's left thumb.

"Plaintiff suffered a great deal of pain occasioned by the loss of said thumb, and was forced to pay a

doctor bill of $56, a hospital bill of $11.50, and was out of work for a period of two weeks, thereby suffering a loss of $30. Plaintiff lost his thumb which has impaired his effectiveness in using a typewriter, which was part of the plaintiff's vocation."

The trial court found for defendant. Plaintiff appeals. The gist of plaintiff's claim is defendant's claimed negligence.

Negligence is want of due care,—the failure to exercise that degree of care and caution which an ordinarily prudent person usually exercises under the same or similar circumstances. The question is whether, under the facts herein, defendant may be held liable for negligence. This is not a case of claimed defective premises but a question of furnishing by defendant to an invitee of an alleged dangerous appliance. Defendant kept a public resort. The appliance was furnished for use in connection therewith. It was incumbent upon defendant to furnish a reasonably safe appliance. The question is whether the appliance was unsafe or unsuitable for the purpose for which it was designed to be used. It is not claimed the appliance was defective in construction or was out of repair. It is claimed it was inherently dangerous. The injury which resulted to plaintiff arose from the use of the appliance. If plaintiff had used the appliance in a reasonable and proper manner, no injury would have occurred. Defendant could not reasonably foresee plaintiff's probable injury. The risk was apparent to plaintiff, and defendant had a right to expect plaintiff would avoid the known risk of injury. Defendant's alleged negligence is not shown to be either the sole or the effective cause of plaintiff's injury. If plaintiff used the appliance in an improper manner he barred himself from recovery. The appliance was sound, not defective in construc-

tion, its character was apparent. Any one could see it might be dangerous if used as it was used by plaintiff. Plaintiff saw it, knew its character, used it, and he knew if it was improperly used it might be dangerous. Knowing this, he undertook to use it in the manner in which it was used and was injured. He chose to take the risk.

We think defendant not liable. Judgment of the trial court affirmed, with costs.

NELSON SHARPE, C. J., and NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

MILLIGAN *v.* S. W. STRAUS & CO.

INFANTS—DISAFFIRMANCE OF CONTRACTS DURING MINORITY.

Contract for purchase of bonds made by an infant may not be disaffirmed by him during his minority.

Appeal from Wayne; Merriam (DeWitt H.), J. Submitted June 8, 1934. (Docket No. 80, Calendar No. 37,879.) Decided September 18, 1934.

Assumpsit by John F. Milligan, an infant, by next friend, against S. W. Straus & Company, an Illinois corporation, to recover money paid for bonds. Judgment for defendant. Plaintiff appeals. Affirmed.

Harry C. Milligan and *Maxwell I. Silverstein,* for plaintiff.

Butzel, Levin & Winston, for defendant.

POTTER, J. Plaintiff, an infant, by his next friend sued defendant in assumpsit to recover money paid for certain bonds purchased by plaintiff from defendant. From a judgment for defendant, plaintiff appeals. Plaintiff's declaration alleges his infancy, the purchase of and payment for the bonds, the disaffirmance of the contract to purchase by plaintiff, and the refusal of defendant to pay back the money received. The facts are not in dispute. Plaintiff was a minor when he bought the bonds, when he attempted to disaffirm the contract, when he brought suit, and when the case was tried. There are many cases which hold that the time for ratification of a contract or undertaking of an infant is after his arrival at majority, because prior to that time the rules which preclude his binding himself by his personal contracts also preclude him from binding himself by any subsequent ratification thereof; that ratification during the infancy of the minor is void for the same reason any other contract of the minor is void. 31 C. J. p. 1062. By the numerical weight of authority a different rule applies as to disaffirmance of a contract by an infant.

"In most jurisdictions, an infant has the right and power to avoid, on the ground of his infancy, his personal contracts or contracts relating to personalty during his minority, as well as after he has attained his full age." 31 C. J. p. 1067.

In Michigan the same rule applies to the disaffirmance of an infant's contract as to ratification. *Chandler* v. *McKinney,* 6 Mich. 217 (74 Am. Dec. 686); *Minock* v. *Shortridge,* 21 Mich. 304; *Dunton* v. *Brown,* 31 Mich. 182; *Armitage* v. *Widoe,* 36 Mich. 124; *Osburn* v. *Farr,* 42 Mich. 134; *Bloomingdale* v. *Chittenden,* 74 Mich. 698; *Lansing* v. *Railroad Co.,* 126 Mich. 663 (86 Am. St. Rep. 567); *Shreeves* v.

Caldwell, 135 Mich. 323 (106 Am. St. Rep. 396, 3 Ann. Cas. 592); *Stoll* v. *Hawks,* 179 Mich. 571 (51 L. R. A. [N. S.] 28); *Reynolds* v. *Garber-Buick Co.,* 183 Mich. 157 (L. R. A. 1915C, 362).

"We have found no authority which enables the infant or his guardian to determine whether a voidable contract shall be affirmed or annulled, while the infancy continues. It appears to be a matter for his own decision when he arrives at mature age." *Dunton* v. *Brown, supra.*

"In *Dunton* v. *Brown,* 31 Mich. 182, the right to disaffirm a voidable contract during infancy was denied." *Armitage* v. *Widoe, supra,* 130.

In *Lansing* v. *Railroad Co., supra,* plaintiff claiming to have been injured sued defendant and settlement was made, reduced to writing, signed by the parties and plaintiff paid. Subsequently plaintiff, claiming she was an infant when the case was settled, sought to repudiate the settlement and sued the company. It is said:

"If she was of age when the settlement was made, as it is not claimed that defendant was party to any fraud, the plaintiff would be bound by it; * * * if she was not 21 years of age when the case was tried, then she was too young to disaffirm the settlement, and for that reason could not recover."

In *Reynolds* v. *Garber-Buick Co., supra,* 162, Reynolds, after he was 21 years old, sued to recover money paid by him, while an infant, for an automobile. It is said:

"After reaching his majority one may disaffirm a contract made by him during infancy and recover what he paid or parted with pursuant to such contract, if he return what he received. * * * On disaffirming the contract and returning the article purchased during infancy, the money paid thereon may be recovered, though the value of its use while the

infant had it may exceed the payment made upon it."

Either the Michigan authorities above cited must be overruled or the judgment of the court below affirmed. It is affirmed, with costs.

NELSON SHARPE, C. J., and NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred. BUTZEL, J., did not sit.

AUDITOR GENERAL *v.* LIQUOR CONTROL COMMISSION.

OFFICERS—AUDITOR GENERAL—LIQUOR CONTROL COMMISSION—AUDIT.

Auditor general *held,* to have no power to accept or reject items in an audit of books of liquor control commission so as to establish legal right or liability of the commission or its members, but to have the power to make an examination of the books and records of the commission and take such physical inventories as he finds necessary to determine correctness of its report to State treasurer of moneys due the State.

POTTER, J., dissenting.

Mandamus by John K. Stack, Jr., auditor general, to compel the Liquor Control Commission composed of Frank A. Picard, chairman, and others, to submit to an official examination and detailed audit of its records. Submitted June 20, 1934. (Calendar No. 37,967.) Writ granted September 18, 1934.

James P. Stewart, for plaintiff.

Patrick H. O'Brien, Attorney General, and *William L. Brunner,* Assistant Attorney General, for defendants.

FEAD, J. With explanations, I concur in Mr. Justice POTTER's opinion except as to the result.

I agree that the auditor general has no power to "audit" the books in the sense of authority to accept and reject items and thereby establish legal right or liability of the commission or its members. But it should be made plain that he has the power and duty to examine the books, as well as invoices, vouchers and other records, and to take such physical inventories as he finds necessary, to determine whether the report of the commission to the State treasurer represents the correct amount of money due the State. In certifying to the report he may, and should, report all items which in his judgment are not proper but having in mind that the statute commits to the discretion of the commission certain policies and the methods of working them out.

At all times, including the final briefs, so far as the commission has disclosed its position to the auditor general or to this court, it has contended that the auditor general has no power to do more than add, subtract, multiply and divide the figures on the report of the commission. Formal demand by the auditor general for opportunity to make an audit, made months ago, was not granted. The public business ought no longer to be delayed.

If the commission now shall offer its affairs to audit by the auditor general, there will be no necessity for issuance of a writ. But the writ will issue, if necessary, on request of the auditor general, without costs.

NELSON SHARPE, C. J., and NORTH, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred with FEAD, J.

POTTER, J. (*dissenting*). Plaintiff seeks mandamus directed to the State liquor control commission,

its officers and members, to permit him to make an official examination and inventory of its property, and an audit of its books, accounts, vouchers and all its other records from December 15, 1933, to date. He bases his right to the writ upon two grounds,—

First, Upon 1 Comp. Laws 1929, §§ 303, 304, and

Second, Upon Act No. 8, Pub. Acts 1933 (Ex. Sess.).

A motion to dismiss plaintiff's petition was made by the attorney general which motion is denied and we proceed to pass upon the merits of the controversy. Voluminous arguments have been presented. The discussion has taken a wide range.

The case is determined by the language of Act No. 8, § 48, Pub. Acts 1933 (Ex. Sess.).

"All moneys received by the commission under the provisions of this act, except as herein provided, shall be turned over monthly to the State treasurer, less the actual and necessary expenses of the commission for the preceding month. A monthly report thereof shall be made to the State treasurer which shall contain an itemized account of all moneys received and all expenditures made by the commission during the month covered in the report. The State treasurer shall submit such report to the auditor general for audit, who shall certify on the report as to the audit thereof and return the same to the State treasurer. All moneys received by the commission while under the custody of the commission shall be deposited in a depository designated by the State treasurer."

This section of the statute provides (a) that all moneys received by the commission under the provisions of the act except as provided therein, shall be turned over monthly to the State treasurer, less (b) actual and necessary expenses of the commission for the preceding month. In order to be entitled to

credit for the expenses it will be seen that they must be both actual and necessary.

It is the duty of the commission to make a monthly report of all moneys received by it under the provisions of the act and of its actual and necessary expenses for the preceding month in the form of an itemized account of all moneys received and all expenditures made during the month covered by the report.

This monthly report, together with the itemized account of moneys received and expenditures made, is to be presented to the State treasurer together with the moneys properly payable by the commission to the State treasurer, according to the account.

It is the duty of the State treasurer to submit this monthly report of the commission to the auditor general for audit. The thing to be submitted by the State treasurer to the auditor general to be audited is the report which shall contain an itemized account of the moneys received and expenditures made. It is submitted to the auditor general, in the language of the statute, for audit. Obviously the only thing that could be audited by the auditor general is the thing submitted to him, namely, the account made by the commission and filed with the State treasurer, together with its remittance of the moneys payable to the State treasurer.

"To audit an account is to examine and digest it, or examine and verify it, or examine and adjust it. In actual practice, to audit an account is to see that the accountant is charged with everything with which he is justly chargeable, and that nothing is placed on the credit side of the account for which he is not justly entitled to credit, and then, after debit and credit are thus made up, to ascertain the balance remaining in his hands." *In re Heath,* 52 N. J. Eq. 807 (33 Atl. 46).

When the auditor general has audited the report of the commission and the account of the moneys received and expenditures made by it, which is to be presented to him, not by the commission but by the State treasurer, it is made the duty of the auditor general to certify as to his audit on the report, and then to return the same to the State treasurer with his certificate as auditor indorsed thereon. The primary purpose of this audit is obviously to ascertain whether the correct amount of money has been accounted for by the commission and paid over by it to the State treasurer. Whatever is necessary to enable the auditor general to determine whether the expenses charged are actual and necessary expenses of the commission may be inquired into. He is not given power and authority by this statute to audit the books and accounts of the liquor control commission, to substitute his judgment for that of the commission as to whether expenses are actual or necessary, dictate its policies, pass upon the prices paid for liquor, fix the prices for its sale, interfere with the collection of license fees, the issuing of licenses, the collection of taxes, or the other things vested by the statute in the sound judgment and discretion of the commission. His power and authority is defined by the section of the statute above quoted, which statute is in derogation of the common law, and is to be strictly construed.

Plaintiff is not entitled to mandamus as prayed. He has a right to perform his statutory duty as above indicated. This does not seem to have been denied him. Mandamus should be denied, but without costs.

In re OVERTON.

HABEAS CORPUS — DEFECTIVE COMMITMENT — AMENDMENT — CURING ERROR.

Writ of *habeas corpus* is denied where warrant of commitment of one convicted of manslaughter, which recited conviction of murder, was amended to correspond with fact, the sentence imposed being within statutory provision for manslaughter (3 Comp. Laws 1929, § 16717).

Habeas corpus proceedings by Charles Overton, with accompanying certiorari to Neil E. Reid, Macomb circuit judge, to obtain release from State prison at Jackson. Submitted May 29, 1934. (Calendar No. 37,736.) Writ denied September 18, 1934.

Leo W. Pigott, for petitioner.

Patrick H. O'Brien, Attorney General, and *George Murphy,* Assistant Attorney General, for the people.

NORTH, J. This is a *habeas corpus* proceeding by Charles Overton who is confined in the Michigan State prison. Petitioner was charged with murder. He entered a plea of guilty to the crime of manslaughter, and on July 11, 1928, was sentenced for a maximum term of 15 years, minimum of 12 years. The warrant for petitioner's commitment to the State prison recites that he was convicted of *murder.* The petition for the writ of *habeas corpus* contains the following:

"It is alleged that the confinement of the said Charles Overton under the present warrant of commitment is illegal, in that, the warrant specifies that he has been convicted of the crime of murder, and it

is obvious, according to the records and files of said court and cause, that the respondent has not been convicted of the crime of murder. It therefore appears that Peter L. Gray, warden of the Jackson prison, has no legal and proper writ of commitment in his possession, at the present time, to restrain the defendant Charles Overton of his liberty, and the warrant of commitment now in his possession is void. Further detention by the warden of the Michigan State prison of the said Charles Overton is illegal."

Incident to granting the writ of *habeas corpus* an ancillary writ of certiorari was issued to the circuit court and from the return to this writ it appears, as charged by petitioner, that the warrant for his commitment recites he was "duly convicted of the crime of murder," when in fact he was convicted of manslaughter. This, as appears from the return, was a clerical error. After the writ of certiorari was issued and before return thereto, upon application of the assistant prosecuting attorney, the circuit judge by whom petitioner was sentenced amended the warrant for removal and commitment. The order entered by the court reads as follows:

"This cause having come on to be heard upon the motion of Vincent L. Fitzgerald, assistant prosecuting attorney, for an order amending the warrant for removal of prisoner to any prison heretofore filed in said cause and the court having read the said motion and examined the files and records in the said cause, and the court being fully advised in the premises, therefore, on motion of Vincent L. Fitzgerald, attorney for the people,

"It is ordered that the warrant for removal of prisoner to any prison heretofore filed in this cause be and the same hereby is amended to read: 'Whereas Charles Overton has lately in our circuit court for the county of Macomb been duly convicted of the crime of manslaughter,' instead of the recital

of a conviction for murder, the warrant otherwise to stand."

In this connection it may be noted that the circuit court in the original prosecution had jurisdiction of defendant's person and of the offense charged and that of which defendant was convicted. The sentence imposed was for manslaughter to which the defendant had pleaded guilty, and the penalty imposed was within the statutory provision. 3 Comp. Laws 1929, § 16717. While it does not so appear from the return to the writ of certiorari, it may be assumed that the amended warrant for removal and commitment has been or will be forwarded to the warden of the Jackson State prison. Under these conditions, the commitment having been amended, petitioner has been granted all the relief to which he is entitled. He has not been subjected to illegal detention by the warden because the commitment under which the prisoner has been held is fair upon its face.

"There is no reason in discharging criminals for defective commitments if the defects can be remedied in accordance with the facts. The rights of the prisoner are not infringed by permitting the amendment, while the rights of the public might suffer greatly if such technicalities were allowed to prevail." *In re Collins,* 135 Mich. 91.

Because of the disposition of this matter above indicated, we do not pass upon the question of whether *habeas corpus* is the proper remedy, which question is presented herein by the people's brief.

Petitioner's discharge on *habeas corpus* is denied.

NELSON SHARPE, C. J., and POTTER, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

SIMPSON *v.* DYER.

1. VENDOR AND PURCHASER — LAND CONTRACTS — EXECUTION — DELIVERY—CONSIDERATION—FRAUDS, STATUTE OF.

   Vendee under proposed executory land contract is not bound thereby where no part of the consideration is paid and the contract is neither signed by nor delivered to him (3 Comp. Laws 1929, § 13413).

2. APPEAL AND ERROR—RECORD—IMPERFECTIONS AND IRREGULARITIES.

   Alleged inperfections and irregularities in record on appeal *held*, insufficient cause for dismissal of appeal.

Appeal from Wayne; Covert (Frank L.), J., presiding. Submitted June 6, 1934. (Docket No. 35, Calendar No. 37,808.) Decided September 18, 1934. Rehearing denied October 23, 1934.

Bill by George T. Simpson and wife against John A. Dyer and Thomas A. Griffin, individually and as copartners doing business as Dyer-Griffin Realty Company, and Dyer-Griffin Land Company, a Michigan corporation, to enjoin forfeiture of a land contract, commencement of a summary proceeding and for a money decree. From decree for plaintiffs against defendants Dyer and Griffin, they appeal. Bill dismissed.

George T. Simpson, for plaintiffs.

Frank C. Cook and *John P. O'Hara* (*John F. Wagner,* of counsel), for defendants.

NORTH, J. Plaintiffs were purchasing on contract a parcel of land in the city of Detroit. Because of their default in making instalment payments notice of forfeiture was served by the vendor. Thereupon plaintiffs filed the bill of complaint herein and

sought to have the vendor enjoined "from proceeding with the forfeiture of said land contract * * * and from commencing summary proceedings * * * and from taking proceedings at law for the collection of the unpaid balance claimed to be due" on the land contract. The theory upon which plaintiffs assert a right to the injunctive relief prayed is that there was due to plaintiffs on another land contract dated October 3, 1928, an amount of money in excess of the amount due from plaintiffs to their vendor and that therefore plaintiffs were not in default but instead should be given an affirmative decree for a balance due them from defendants Dyer and Griffin, either as individuals or as copartners doing business under the firm name of Dyer-Griffin Realty Company. In this connection plaintiffs claim that their vendor, the Dyer-Griffin Land Company, a Michigan corporation, was in legal effect the same entity as the Dyer-Griffin Realty Company copartnership, the vendee in the alleged contract of October 3, 1928. The trial court sustained plaintiffs' contention and gave them a decree for $1,675.88 against defendants Dyer and Griffin individually and as copartners. The defendants just above named have appealed.

One of the grounds of appeal asserted is that the alleged contract of October 3, 1928, was not consummated in that it was not signed either by or in behalf of appellants or any of them and that it was never delivered to or accepted by appellants or any of them, and therefore never became a fully consummated and binding contract. If appellants are right in their contention, it will necessitate a reversal of the decision of the circuit judge and dismissal of plaintiffs' bill of complaint.

Briefly the pertinent facts are as follows: Plaintiffs had a prospective purchaser for the property

which they were buying on contract. Approximately $700 was then unpaid on plaintiffs' contract. Mrs. Simpson went to the vendor, the Dyer-Griffin Land Company, to secure an abstract of the title down to date. While there she was informed that Mr. Dyer desired to purchase the property. Mrs. Simpson informed her husband who by telephone on that same day advised Mr. Dyer of the acceptance of his proposed terms of purchase. Thereupon Mr. Dyer, pursuant to his arrangement with Mr. Simpson, prepared in duplicate a land contract in which plaintiffs were named as vendors and Dyer-Griffin Realty Company, a copartnership, vendee. The contract provided a purchase price of $2,100, down payment of $300 and payment of balance due plaintiffs within 90 days from date. Mr. Dyer delivered these duplicate contracts to Mrs. Simpson at her home. They were left there with the understanding that she and her husband, who was not present at the time, would execute the contracts and that Mr. Dyer would call the following day, make the down payment of $300, and receive a copy of the contract. Plaintiffs signed these contracts in the evening of the same day that they were delivered to Mrs. Simpson. Mr. Dyer did not return as arranged. The next day Mr. Simpson telephoned Mr. Dyer and their conversation was to the effect that the transaction would be consummated. Notwithstanding these negotiations and the steps taken looking towards completion of the contract, the undisputed testimony is that the contract never was signed by the vendee or by anyone in its behalf, the down payment was not made, nor was there any delivery of the contract to the vendee or to anyone in its behalf. Instead both duplicates remained in the possession of the plaintiffs.

The factual aspect of this case is stated in appellees' brief as follows:

"Mr. Dyer did not return to keep his arrangement. Plaintiffs did not make any tender of the contracts to Mr. Dyer, other than the telephone conversation telling him that they had been signed and were ready for him; the contracts being retained in the possession of plaintiffs all of the time waiting for defendant Dyer to call. The contracts which Mr. Dyer prepared provided that his copartnership, the Dyer-Griffin Realty Company, was to have paid all balance by January 1, 1929, when plaintiffs, whose title was evidenced by land contract, were to have given a deed to the Dyer-Griffin Realty Company with a covenant by grantee to assume the first land contract and pay the same; but the Dyer-Griffin Realty Company did not make any of the payments on either of the contracts."

Appellees contend that the contract in which they were vendors was "completely valid" notwithstanding it was neither signed by nor delivered to the vendees therein named. Appellees cite and rely upon numerous cases quoted or referred to in *Pangburn* v. *Sifford,* 216 Mich. 153, and apparently in particular upon the *Pangburn Case.* This latter case does not sustain appellees' position but instead holds that a vendor who receives and receipts for part of the purchase price and signs and delivers a memorandum of sale of land sufficient to comply with the statute (3 Comp. Laws 1929, § 13413) is bound thereby. No case is cited by appellees, and we apprehend none can be found, holding, as appellees contend herein, that a vendee in a proposed executory land contract is bound thereby notwithstanding no part of the consideration is paid and the contract or memorandum is not signed by or delivered to the

vendee. There is quite a full review of Michigan decisions in *Pangburn* v. *Sifford, supra,* and it seems unnecessary to restate the authorities herein. Under the circumstances disclosed by this record it conclusively appears that the contemplated execution of this land contract was never consummated nor did a written memorandum pass between the parties which was sufficient to make the contemplated agreement binding upon defendants. It follows that plaintiffs' bill of complaint must be dismissed and the relief therein sought denied.

Prior to the hearing on the merits, appellees made a motion to dismiss this appeal. The motion was based upon several alleged imperfections and irregularities in the record on appeal to this court. We have given this motion due consideration but do not find sufficient cause for dismissal. The motion is therefore denied. Decree will be entered in this court in accordance herewith. Appellants will have costs of both courts.

NELSON SHARPE, C. J., and POTTER, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

CHALKER *v.* FIDELITY & DEPOSIT COMPANY OF MARYLAND.

1. VENDOR AND PURCHASER — SURETY ON SHERIFF'S BOND — FALSE RETURN.

   Evidence *held*, insufficient to establish right of land contract vendor to recover alleged damages from surety on sheriff's bond in action for false return of circuit court commissioner's process, where record does not show that plaintiff's breach of contract for which he had to respond in damages to vendee was made in reliance upon the admittedly false return nor that summary proceedings were necessary.

2. SAME—DAMAGES.

   Vendor who breached land contract with first vendee by deeding premises to subsequent purchaser for an increased price *held*, not to have sustained such damage in being compelled to return payments made by first vendee less fair rental value as to be entitled to reimbursement therefor from surety on sheriff's bond for false return of circuit court commissioner's process in summary proceedings against first vendee.

3. LIMITATION OF ACTIONS—SHERIFF'S BOND—FRAUDULENT CONCEALMENT.

   Action against surety on sheriff's bond for false return of process begun over two years after such return was made *held*, barred by statute of limitations unless running of statute was tolled by fraudulent concealment in which case the suit may be commenced within two years after discovery (3 Comp. Laws 1929, §§ 13976, 13983).

4. SAME—KNOWLEDGE OF FRAUD—DILIGENCE IN DISCOVERY.

   One who has knowledge of fraud having been perpetrated against him or notice thereof sufficient to put him on inquiry cannot remain inactive and rely upon concealment to stay the statute of limitations but must use reasonable diligence to discover facts pertaining thereto (3 Comp. Laws 1929, §§ 13976, 13983).

5. SHERIFFS AND CONSTABLES—ACTION ON BOND—STATUTE OF LIMITATIONS.

Motion for judgment of no cause of action made at close of plaintiff's proofs in his action against surety on sheriff's bond for false return in summary proceedings should have been granted, where record shows he did not commence action within two years of time when he first had knowledge of facts sufficient to put him on inquiry as to the falsity of return and made no inquiry (3 Comp. Laws 1929, §§ 13976, 13983).

Appeal from Livingston; Collins (Joseph H.), J. Submitted June 13, 1934. (Docket No. 97, Calendar No. 37,895.) Decided September 18, 1934.

Action by Merritt H. Chalker against Fidelity & Deposit Company of Maryland, a foreign corporation, on a sheriff's bond for alleged damages sustained because of a false return of service of process. Judgment for plaintiff. Defendant appeals. Reversed.

Don W. VanWinkle (*Fewlass & Frisbee,* of counsel), for plaintiff.

Yerkes, Goddard & McClintock, for defendant.

NORTH, J. At the time plaintiffs' alleged cause of action arose defendant herein was the surety on the bond of the sheriff of Wayne county. Plaintiff by this suit against the surety seeks to recover damages alleged to have been suffered by reason of a false return of service of process made by a deputy sheriff. From a judgment in favor of plaintiff, after trial by the court without a jury, defendant has appealed.

The return of service by the deputy sheriff, made April 30, 1930, was that personal service of a circuit court commissioner's summons had been made on

Mrs. Helen Himebaugh April 19, 1930. It is undisputed that such service was not made. Plaintiff alleges this false return subjected him to damages in a substantial amount. See *Himebaugh* v. *Chalker,* 261 Mich. 80. In the instant suit it is plaintiff's theory that he should be permitted to recover from the surety on the sheriff's bond because the false return of the deputy sheriff was the proximate cause of the loss or damage which plaintiff claims he sustained by reason of being compelled by a judgment rendered in the case above cited to return to Mrs. Himebaugh payments made by her to plaintiff herein on a land contract.

Recovery by Mrs. Himebaugh arose from the fact that plaintiff herein had sold the property covered by the land contract to another purchaser and was therefore unable to convey and refused to convey title to Mrs. Himebaugh upon tender of the purchase price. Appellant asserts that under the record presented in the instant case plaintiff is not entitled to recover because he failed "to prove he had sustained any damages resulting from the false return."

It therefore becomes necessary to inquire what was the proximate cause of the damage for which Mrs. Himebaugh recovered a judgment against plaintiff herein in the case of *Himebaugh* v. *Chalker* above cited. So far as this record discloses clearly it was Chalker's breach of his contract to convey to Mrs. Himebaugh certain real estate upon tender of the purchase price. Payment was tendered and plaintiff herein refused to convey. He could not do so because he had already deeded the property to and received the purchase price from a third person. It was the breach of this contract which was the real or proximate cause of Chalker's having to respond

in damages to Mrs. Himebaugh, and not the false return of the deputy sheriff. However, it is plaintiff's theory that he would not have deeded the property to a third person had he not believed the foreclosure of Mrs. Himebaugh's contract was regular and complete, and that he was induced to believe such to have been the fact by the false return of the commissioner's process in a summary proceeding against Mrs. Himebaugh. Plaintiff's right to recover on this theory cannot be sustained because nowhere in this record does it appear by any testimony that plaintiff's second conveyance of the contract property was made in reliance upon the deputy sheriff's false return and that in the absence of such return plaintiff would not have deeded the property to the second purchaser. He did not have to rely upon such return because if, as plaintiff contends, he served notice of forfeiture upon Mrs. Himebaugh and that at the time of the proceedings before the commissioner and the subsequent deeding of the property she was not in possession, there was no necessity for instituting summary proceedings. The proof fails to establish a right of recovery for alleged damages resulting from the false return of the circuit court commissioner's process.

The real cause of plaintiff's damage was his failure to pay back to Mrs. Himebaugh her investment in the contract property less the reasonable rental value thereof while occupied or possessed by her as a contract vendee. There was no good reason why Mr. Chalker should not have so adjusted the controversy which was adjudicated in *Himebaugh* v. *Chalker, supra.* That was exactly what the judgment in that case, for which he now seeks to be reimbursed by the sheriff's surety, required him to do. Instead, after Mr. Chalker had deeded the contract

property to a subsequent purchaser for an increased purchase price, Mr. Chalker attempted to retain the portion of the purchase price paid by Mrs. Himebaugh and also the purchase price paid by the second purchaser. This he was not permitted to do. He suffered no loss except the expense of litigation to which he subjected himself. For this reason, as noted above, he has not established a case entitling him to reimbursement by way of damages to be paid by the sheriff's surety.

Appellant also asserts that plaintiff's action was barred by the two-year statutory limitation (3 Comp. Laws 1929, § 13976), and the trial court's holding to the contrary was error. The record sustains appellant. The false return was made April 30, 1930. This suit was started July 14, 1933. The action was then barred unless the running of the statute was tolled by fraudulent concealment. If fraudulent concealment is established the time within which suit may be commenced is extended by the statutory provision for two years after one's discovery of his cause of action. 3 Comp. Laws 1929, § 13983. Plaintiff herein asserts fraudulent concealment of his cause of action and claims that in consequence thereof the statutory limitation of two years is not a bar.

One who has knowledge of the perpetration of a fraud against him cannot thereafter claim that concealment of the fraud suspends the running of the statute. And further, one who has notice of a fraud perpetrated upon him sufficient to put him on inquiry cannot remain inactive and rely upon concealment to stay the statute. Instead he must exercise such care and make such effort to ascertain the facts regarding the perpetrated fraud as in the exercise of reasonable care and diligence he could and should make.

"The statute was not designed to help those who negligently refrain from prosecuting inquiries plainly suggested by the facts known, and plaintiff must be held chargeable with knowledge of the facts which it ought in the exercise of reasonable diligence to have discovered." *First National Bank of Ovid* v. *Steel,* 146 Mich. 308.

As stated above, the false return in consequence of which plaintiff brought this suit was made April 30, 1930. On June 22, 1930, Mrs. Himebaugh told plaintiff she had not been served with the commissioner's summons. Notwithstanding this plaintiff made no inquiry of anyone who would have actual knowledge of the truth or falsity of the return made. The record discloses that plaintiff did talk with the circuit court commissioner who said to plaintiff: "It was perfectly all right." But obviously, the commissioner had no more knowledge of the truth or falsity of the return than plaintiff himself. He made no inquiry of the sheriff or deputy sheriff, as he might easily have done and in the exercise of reasonable diligence should have done. The deputy sheriff admitted the falsity of his return to Mrs. Himebaugh about two months after the return was made. If plaintiff had made a like inquiry, one of two things would have then happened, either the falsity of the return would have been disclosed or denied. If disclosed plaintiff would have had full information and should have acted accordingly. If denied, in the absence of something indicating the contrary, plaintiff might have relied upon such denial and thereby been justified in claiming concealment of the fraud perpetrated. In *Purdon* v. *Seligman,* 78 Mich. 132, recovery was sought in consequence of fraud and misrepresentation incident to the sale of bonds and the claim made that plaintiff's cause of action was fraudulently concealed.

The court, finding that plaintiff "received strong hints * * * which should have set him on inquiry, which he neglected to make," held that his cause of action was barred; and concerning plaintiff said:

"He entirely neglected to search where the only information was to be found, and defendant threw no obstacle in the way of his doing so. How this inaction could, under such circumstances, amount to a concealment of anything it is hard to see. Plaintiff did not, so far as appears, even complain to defendant, or ask information. Had he done so, and had defendant then tried to put him off his guard, the case might possibly have been different. But the statute was not meant to help parties who take no pains to see what is before their eyes."

Defendant's motion for judgment of no cause of action, made at the close of plaintiff's proofs, on the ground that plaintiff's suit was barred by the statute should have been granted.

For the reason above indicated the judgment entered is reversed, with costs of both courts to appellant.

NELSON SHARPE, C. J., and POTTER, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred with NORTH, J.

FEAD, J. I concur on ground of bar by limitations.

JACKSON CITY BANK & TRUST CO. *v.* TOWNLEY.

1. WILLS—MENTAL COMPETENCY—EVIDENCE.

   Evidence *held,* insufficient to raise an issue of fact as to mental competency of testatrix to make will disposing of large estate in which mention but no property provision was made for her youngest son with whom she had quarreled, where no unskilful business transaction was recounted in her management of a large farm, alone instructed her attorney how and why to make such disposition of her property, contestant had made a contract with her relative to share in his father's estate and doctor who had treated her said she was mentally abnormal but did not say she was incompetent; although she was a queer, jealous, melancholic and, often, despondent person.

2. SAME—UNDUE INFLUENCE.

   Record *held,* barren of evidence that brother exercised undue influence upon his mother, the testatrix, in eliminating contestant as an object of her bounty, where evidence demonstrates her feeling toward contestant was personal, deep-seated and of long standing and before brother became her adviser.

3. SAME—WILFUL SLANDER—INSANE DELUSIONS.

   Wilful slander is not such an insane delusion as will defeat probation of a will.

4. SAME—INSANE DELUSIONS—BURDEN OF PROOF.

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

5. SAME—INSANE DELUSIONS—EVIDENCE.

   Will may not be set aside as made by testatrix harboring an insane delusion as to the morality of mother-in-law and wife of contestant son, where he fails to show information or evidence upon which testatrix believed charge of immorality, if she believed it, and there was no testimony connecting it with will.

6. SAME—INSANE DELUSIONS—EVIDENCE—PERSONAL CONFLICT.
Charges of testatrix made by her as a result of impressions received from personal conflict and controversy with contestant may not be held as insane delusions by a jury without knowing all the facts as they appeared to her and, not then, if there was basis for the impressions however exaggerated they may be.

7. SAME—BITTER FEELING—FAMILY CONFLICT—INSANE DELUSIONS.
Testimony *held*, conclusive that statements of testatrix and her bitterness of feeling toward contestant arose out of long-continued family conflict and that will, omitting property provision from large estate to contestant son, was result of such feeling and not of an insane delusion.

8. SAME—DIRECTED VERDICT.
Verdict *held*, properly directed for proponents where contestant failed to show any evidence of mental incompetency or undue influence and failed to sustain burden of proof that will was result of insane delusions.

Appeal from Jackson; Williams (Benjamin), J. Submitted June 13, 1934. (Docket No. 12, Calendar No. 37,471.) Decided September 18, 1934. Rehearing denied December 11, 1934.

Jackson City Bank & Trust Company presented for probate the will of Nettie H. Townley, deceased. Over objections of Fay V. Townley, the will was admitted to probate. Contestant appealed to circuit court. Directed verdict and judgment for proponent. Contestant appeals. Affirmed.

Richard Price and *Birney E. Brower*, for appellant.

Whiting, Kleinstiver & Aubrey and *Bisbee, McKone, Wilson & King*, for appellee.

FEAD, J. Contestant reviews judgment, on direction of verdict, allowing the will of his mother, Nettie Townley, against his claims of (a) her mental incompetency, (b) undue influence of his brother Neal, and (c) her insane delusions.

Montgomery and Nettie Townley, first cousins, were married in Arkansas, where their three sons, Richard (42), Neal (37), and Fay (36) were born. In 1906 they returned to Michigan, built a home in the city of Jackson, later acquired large contiguous farms formerly owned by their fathers some 14 miles from Jackson, built a home and lived on the farm for the rest of their lives. They took title by the entireties.

Richard married in 1909, later went west, where he has since lived. His wife divorced him and he remarried. Neal, except while in the world war service, has been connected with the Walcott Lathe Company in Jackson. Fay conducted his parents' farm from 1917 to 1921, then acquired a ranch in Colorado, and has since engaged in different sorts of labor.

Montgomery Townley died in April, 1923, leaving an estate appraised at $361,000, but with losses of $135,000 accruing during administration. He had properties in Missouri, large stockholdings in the Walcott Lathe Company, other corporate shares and real and personal property. Claims of $405,000 were allowed against the estate, principally on his indorsement of obligations of the Lathe Company. In his will he gave Richard and Neal each a parcel of land, Richard the Missouri property, Neal the Lathe Company stock, Fay the life income of a trust fund of $5,000, a grandchild a similar trust income, Nettie $100,000 and some personal property and life income in the residue, with remainder to charities.

Fay was dissatisfied with the will, threatened contest, and in a few days his mother paid him $1,000, engaged in writing to pay him $26,000, and took an assignment of his legacy. She made various payments to him on the contract. In 1925 she was in

default. The claims against her husband's estate had not been settled. She did not know how much could be salvaged for her. Fay brought suit against her on the contract and moved for summary judgment. The matter was settled by Nettie conveying to Fay a farm at $15,000 and paying him cash of $8,000 or $9,000.

Nettie died in July, 1931, leaving a will executed in 1928. Her estate inventoried $158,000. She gave a grandniece $1,000, Neal a 480-acre farm and certain personal property appraised at about $38,000, and divided the residue in trust equally between Richard and Neal, each to have income for life, with principal to his heirs. As to Fay she provided:

"Sixth. In making and executing this my last will, I am not unmindful of my son, Fay V. Townley. Inasmuch, however, as by written contract, entered into with him on the 16th day of April, 1923, I among other things, obligated myself for the payment to him of $26,000 (which obligation I have since met), I do not, for such and other reasons, which, to my mind, abundantly justify my action, feel called upon to make provision for him in this my last will."

The scrivener testified that testatrix said Fay had abused her verbally.

Mrs. Townley was queer. She worshipped her husband. She became jealous at his slightest attention to another woman, even a daughter-in-law. She was melancholy, often despondent, cried frequently, threatened suicide but never attempted it, and sometimes shunned callers and friends. Fay said both his parents were accustomed to charge virtuous girls with immoral conduct and he had remonstrated with them often about it. Testatrix told folks that Fay's wife, Grace, had to get married and had induced an abortion. She made similar statements

regarding other daughters-in-law. A doctor, who thought her sane when he treated her, expressed an opinion on hypothetical question that she was "mentally abnormal." But he did not say she did not have competency to make a will under the legal test. Nor did incidents related by other witnesses so tend. Fay did not question her capacity to contract, be sued or make a settlement; she managed a large farm, with advice from Neal, and no unskilful business transaction was recounted; alone she instructed her attorney to draft her will, told him how, and gave reasons for the disposition of her property. The testimony did not raise an issue of fact as to her mental competency. *In re Walkey's Estate,* 249 Mich. 653; *In re Aylward's Estate,* 243 Mich. 9.

The record is barren of evidence that Neal dominated his mother or attempted to influence the disposition of her property. As late as 1927 he tried to reconcile his mother and Fay. The evidence demonstrates that testatrix's feeling toward Fay was personal, deep-seated and of long standing, dating from before her husband's death and before Neal became her adviser.

The insane delusions claimed are that testatrix believed (a) Fay had abused her and called her a liar, (b) he had tried to kill her and poison her, (c) he had tried to kill his father, (d) Fay's wife, Grace, was immoral and unworthy and her mother conducted a lewd resort. These claims must be viewed against the background of the relations of the parties.

In 1917, when Neal went to war, Fay was induced by his parents to remain at home and conduct the farm on salary and profit, his father to make necessary advancements of money. When Fay began courting Grace in 1918 and became engaged to her

in September, his parents were pleased. They often invited her to the farm. Grace's mother opposed the marriage because Mr. and Mrs. Townley were first cousins. In November, when Mr. Townley was bringing Grace to the farm for a surprise visit, his car ran off the road and he was delayed beyond his usual time, testatrix's attitude toward Grace changed. It is said she became jealous. At all events, she opposed the marriage. Fay and Grace were married at a neighbor's home in January, with no parent present.

They went at once to the farm and lived with Fay's parents for three months. They then moved to a bungalow on the farm. Trouble arose. Fay and Grace put all blame on testatrix. They do not give the details but the trouble evidently was serious because it resulted in quarrels which sent Grace home to her mother several times; and in August, 1919, Mr. Townley offered Fay $100,000 if he would desert Grace and go west.

Fay and Grace remained on the farm until 1921. To Fay as well as others Mrs. Townley said Grace's mother conducted a bawdy house. She told Fay that Grace would kill him for his life insurance. Mr. Townley gave Fay a new car but with injunction that Grace should not drive it. The prohibition was withdrawn when Fay refused to accept the car on that condition. Fay claims he overpaid his father on settlement of advances in 1920 and his salary was discontinued. Early in 1921 testatrix received a party invitation which included both Grace and Neal's wife. She promised to take them. She did not come for Grace. Fay took her to task for it. She said Grace was not included in the invitation. Fay testified he told her she was mistaken. There was no ground for mistake and she evidently understood him to use the stronger term,

because, as he was about to leave, his father and brother upbraided him and referred to Grace in degrading terms.

At once after this incident Fay prepared to leave the farm. He wanted to conduct an auction sale. There was controversy as to the property belonging to him. Through the ministrations of Mr. Townley's attorney, whom Fay consulted, an agreement was reached that certain property should be left there until fall. Further trouble occurred in the fall.

Shortly afterward, Mr. Townley advised Fay to go west. He helped him finance the purchase of a ranch in Colorado. His estate later paid the loan. Mr. Townley cautioned Fay to conceal from testatrix the fact he was aiding him. Thereafter Fay spent his summers in Colorado for some years, returning to Michigan in the winter and working at various jobs. At times his mother was cordial to him and at other times unfriendly. When the father died, Fay's mother took occasion to tell him that she thought his practical disinheritance by his father was deserved by him. After they entered into the contract their relations were not cordial except on a few occasions. In 1927, shortly before the will was executed, when Fay, at Neal's suggestion, attempted a reconciliation with his mother, she stated that while she might forgive what he had done to her, she could not forgive what he had done to his father.

The tests of an insane delusion are set up in *Re Barlum's Estate,* 240 Mich. 393. To defeat a will on this ground it is not enough to show that testator has made false accusations. Wilful slander is not a delusion. Contestant had the burden of proving that testatrix believed her statements, she had no reasonable information or evidence support-

ing them and, but for such belief, she would not have disinherited him.

Testatrix's charge that Grace and her mother were immoral may have been a vicious statement arising from the habit of speaking evil of women or from dislike of Grace. In any event, contestant failed to show the information or evidence upon which testatrix believed the charge, if she believed it, and there was no testimony connecting it with the will.

Testatrix's charge that Fay wanted to kill her was a casual remark, made while the lawsuit was pending and she was complaining of him, and in connection with an incident where testatrix and a companion were almost struck by a car. There was no indication that she seriously believed it then or thereafter. If she did, it obviously was a conclusion from years of controversy. The incident as to poison occurred when Fay gave his mother a box of candy. After it had been eaten, an employee suggested it might have been poisoned. Testatrix merely told what the employee had said. Any delusion about it was his, not hers.

Testatrix's charge that Fay did not love her was a conclusion from his conduct. She may have been mistaken. But, aside from the general quarrels, his suit against her when she was anxious about her finances furnishes reason for the feeling.

The charges which appear to have directly influenced the will are that Fay had abused testatrix and had tried to kill his father. Testatrix made these charges as an eye-witness and of her own knowledge. The record shows many controversies between Fay and his parents. It is not for a jury to appraise the impressions which a testator receives from personal conflict and controversy and hold them insane delusions, without knowing all the

facts as they appeared to the testator and, not then, if there was basis for the impressions however exaggerated they may be.

The testimony is conclusive that all the conclusions of testatrix, her bitterness of feeling toward Fay and her charges against him arose out of family conflict and controversy. The will was the result of such feeling and not of an insane delusion.

We think the court properly directed the verdict and the judgment is affirmed, with costs.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

SEVERSON *v.* FAMILY CREAMERY CO.

1. MOTOR VEHICLES—NEGLIGENCE—CHARGE TO JURY—INFANTS.

In action against creamery for alleged negligent operation of its truck which resulted in death of child four years and five months old, charge of court taken as a whole *held,* to have presented issue of truck driver's negligence so the jury could not have mistaken its duty although isolated expressions in it were objectionable, where plaintiff's requests to charge as to freedom of child from contributory negligence and duty of truck driver to anticipate sudden and unexpected action from small children and guard against it were given.

2. NEGLIGENCE—STATUTORY—COMMON LAW.

Possible confusion in minds of jury caused by reference in main charge to jury to both statutory and common-law negligence *held,* cured by subsequent instruction in which court stated plaintiff relied solely upon common-law negligence, where issue was the same under either theory.

3. SAME—GREAT WEIGHT OF EVIDENCE.

In action against creamery for alleged negligence causing death of small boy, verdict for defendant *held,* not against great weight of evidence.

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted June 5, 1934. (Docket No. 11, Calendar No. 37,542.) Decided September 18, 1934.

Case by Gilmore S. Severson, administrator of the estate of Kenneth Erland Severson, deceased, against Family Creamery Company, a Michigan corporation, for personal injuries resulting in death of plaintiff's decedent allegedly due to defendant's negligence. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Clarence P. Milligan and *Kenneth Weber* (*Harry Slavin,* of counsel), for plaintiff.

E. Dean Alexander and *Harry Wickey,* for defendant.

FEAD, J. Defendant had verdict of a jury and judgment in a personal injury action.

John R. street in Hazel Park, Oakland county, runs north and south. At Bernhard street it has a 20-foot cement pavement with shoulders of crushed stone and cinders. The foot path on the west side is of cinders. About noon, December 17, 1931, Max Bernstein, driving one of defendant's milk trucks,

struck and killed Kenneth Severson, four years and five months old, at the intersection.

Bernstein testified that, as he was proceeding south on John R. street at a speed of 20 to 22 miles per hour and when a block from Bernhard street, he saw Kenneth and another boy on the cinder path near the corner of the intersection and 18 to 20 feet from the pavement; they appeared to be breaking ice formed in depressions in the cinders; when a half block away he sounded his horn but did not know whether they heard it; he slackened speed to 18 to 20 miles per hour; he continued to see the boys until he was nearly abreast of them; then he glanced to the left to a car approaching from the south and about to pass him; he looked back almost instantly and saw Kenneth running in front of his truck; he swerved to the left and applied his brakes but could not avoid striking Kenneth; the last he saw of the boys before shifting his glance to the approaching car they were on or close to the cinder path.

Another witness said Kenneth was standing a foot or two from the pavement as the truck approached, apparently waiting for the northbound car to pass, and when it passed he ran in front of the truck. Kenneth's companion said Kenneth walked diagonally across the intersection, stepped on the pavement and was struck. At all times when the truck was within a block Bernstein and the boys had a clear, unobstructed view of each other. There was evidence that Bernstein did not sound his horn.

In the charge the court gave plaintiff's request as to the freedom of Kenneth from contributory negligence and the duty of the truck driver to anticipate sudden and unexpected action from small children and to guard against it.

Plaintiff assigns many errors in the charge and failure to instruct. Isolated expressions of the

charge were objectionable. Most of the requests refused and not covered by the charge, as far as they apply to liability, were not correct statements of the law without change of language or modification. The case is one which does not lend itself to specific rules of law relative to speed, warning, crossings and the like. It presented a definite situation in which the question was whether Bernstein had exercised the care which an ordinarily prudent person would have used under the particular circumstances. The injection of rules applicable to other circumstances likely would have been confusing. The charge, as a whole, presented the issue so the jury could not have mistaken its duty.

Both statutory and common-law negligence were charged in the declaration. The court might well have made no reference to them as such in the charge because the issue was the same under either. If any confusion existed in the minds of the jury as to its duty to find violation of statute or ordinance, it was removed by colloquy at the conclusion of the charge in which the court instructed the jury that plaintiff relied upon common-law negligence, the definition of which he had already given them.

None of the witnesses was so clear and outstanding in his testimony, nor does the physical evidence so tend, that we can say the verdict was against the great weight of the evidence. As a matter of fact, the issue was peculiarly a jury question.

The other assignments have no merit and need no discussion.

Judgment affirmed, with costs.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

SIMA *v.* WRIGHT.

1. TRIAL—PREJUDICIAL REMARKS BY COUNSEL.

   Repetition of assertion that case did not amount to much to doctor, defendant in action for negligent malpractice, since he was not present at opening of the trial nor until subpœnaed by plaintiff after objection by defendant's counsel *held*, error inclining toward reversal.

2. APPEAL AND ERROR—PREJUDICIAL ARGUMENT OF COUNSEL.

   Error assigned on alleged prejudicial argument to the jury in action for negligent malpractice, is not considered, on appeal, where it was not called to the attention of the trial court.

3. TRIAL—REVERSE ORDER—HYPOTHETICAL QUESTION—BASIC FACTS—DISCRETION OF COURT.

   Practice of asking hypothetical questions before presentation of basic facts is not a commendable one since it prevents opposing counsel from making specific objections to such questions and hinders the court in keeping the testimony to the issue, although the order of proof is largely a matter of discretion of the court.

4. EVIDENCE—HYPOTHETICAL QUESTIONS.

   In action for alleged negligent malpractice resulting in burns from diathermy machine, element in hypothetical question that flesh stuck to the plates *held*, prejudicial, where plaintiff did not so testify.

5. SAME—REPEATED COMPLAINTS AS TO BURNS FROM ELECTRICAL MACHINE.

   Controlling hypothetical question to ascertain duty of physician under local practice in use of diathermy machine, grounded on element that patient "repeatedly" complained of being "burned" *held*, technically objectionable, although not such error as to require reversal without a new trial, where plaintiff did not precisely so state and question was not one exclusively of medical knowledge.

6. SAME—EXPERT TESTIMONY ON LOCAL MEDICAL PRACTICE—OSTEOPATHS.

Testimony of doctor of osteopathy as expert on local medical practice *held,* inadmissible where no showing is made of his knowledge of such practice.

7. DAMAGES—APPEAL AND ERROR—REMITTITUR—EVIDENCE.

On appeal from verdict and judgment of $7,000 for damages suffered by patient as result of doctor's negligent malpractice, reversal is directed notwithstanding plaintiff's claim that remittitur of $1,000 would correct alleged error in charge where court submitted as elements of damage pecuniary loss and impairment or loss of earning capacity without evidence on such elements having been presented, where said amount as claimed in the bill of particulars was not called to attention of jury and verdict indicates a considerable sum must have been allowed therefor.

Appeal from Washtenaw; Sample (George W.), J. Submitted June 5, 1934. (Docket No. 23, Calendar No. 37,807.) Decided September 18, 1934.

Case by Frank F. Sima against Walter J. Wright for negligent malpractice. Verdict and judgment for plaintiff. Defendant appeals. Reversed, and new trial granted.

Andrew J. Sawyer and *Jacob F. Fahrner,* for plaintiff.

Douglas, Barbour, Desenberg & Purdy (*Rodgers & Dunn,* of counsel), for defendant.

FEAD, J. Plaintiff had judgment for $7,000 in an action for negligent malpractice.

Defendant, a physician, gave plaintiff a diathermic treatment for pain in the back. The treatment was administered with an electrical machine, designed to produce deep heat through lead plates on

the back and abdomen. Patients react differently to the treatment. Some are sensitive to heat and are easily burned. Others can stand more. Some complain of excessive heat when it is neither excessive nor dangerous. Others are stoical and may not complain when they should. The machine may be regulated at points ranging from absolute immunity from burning to probability or assurance of harm. Because of the difference in people a patient may be burned although the machine is properly operated. Defendant did not testify to the reading at which he set the machine, plaintiff could not show it, and the issue of negligence was upon the duty of the doctor when the patient complains.

Plaintiff had a burn on his back. Defendant and his office nurse testified that plaintiff did not complain of heat nor get burned in the treatment. Plaintiff said:

"One plate was put on the abdomen and one on my back. They were put on with some kind of gauze to hold them there around my body by Dr. Wright. After the plates were on, Dr. Wright put on the switch of some kind, then done something on the machine and said: 'Mr. Sima has got a severe case of neuritis, or something, and we've got to give it to him pretty strong.' He adjusted the machine some way, I don't know what he done and he said to the nurse: 'Now leave it on 15 minutes and we got to give it to him pretty strong. He has got a severe case of arthritis.' The first thing I noticed in about a minute or two I felt heat and it was uncomfortable and I said to the nurse, she was in there alone with me: 'The thing is getting too hot.' And she looked at the machine and she said: 'Oh, no, that didn't get too hot.' And I waited a little longer and perspiration started to run out of my head and face and I said: 'It's getting too hot. Turn it off.' And she said: 'No, it isn't.' And I said: 'Call

the doctor.' And she looked at the machine again and she said: 'No, that's just imagination.' She opened the door and looked in but the doctor was busy and pretty soon the doctor came in and I said: 'You are burning me. Take it off.' And he said: 'It's all right.' And I said: 'You are burning me. I can smell it.' And he looked at it and he took the plates off and I felt an awful pain as though flesh was coming off. It burned so bad I could smell it.''

Defendant was the first witness. He was called by plaintiff as an adverse witness and was immediately met with a prejudicial statement in the form of a question to the effect that, because he had not been present at the opening of trial nor until subpoenæd by plaintiff, the case did not amount to much to him. On the court's sustaining the objection, counsel repeated the assertion. The incident inclines toward reversal.

Defendant complains of prejudicial argument to the jury but because it was not called to the attention of the court at the time it is not here for review. *People* v. *Mulvaney,* 171 Mich. 272, 277; *People* v. *Allan,* 263 Mich. 182, 206.

In spite of frequent warning by the court that the practice was hazardous, plaintiff's counsel tried the case in reverse order. They presented their medical witnesses and asked hypothetical questions before plaintiff testified and were permitted to do so only on their assurance that the basic facts would be shown later. While the order of proof is largely in the discretion of the court, the practice employed in this case is not to be commended because it prevents opposing counsel from making specific objections to hypothetical questions and hinders the court in keeping the testimony to the issue.

Included in a hypothetical question was the element that ''the flesh stuck to the plates.'' Plaintiff

did not so testify. The prejudicial nature of such a gruesome claim is obvious.

The controlling hypothetical question to ascertain the duty of the physician under the local practice was grounded on the element that the patient "repeatedly" complained of being "burned." Plaintiff did not precisely so state. The question was technically objectionable, as an inquiry into the proper medical practice, and, if the case had been presented in an orderly manner, it would have been excluded. The answer was the doctor should shut off the current and investigate by removing the plates. However, the error does not justify reversal without new trial. Under the testimony, the case is not exclusively one of medical knowledge. Laymen generally are acquainted with the proclivity of an electrical apparatus to burn. Defendant did not disclose the point at which he set the machine nor other circumstances to indicate an impossibility or improbability of burning, so that the complaints were likely to be psychological rather than physical and the procedure a matter for doctors alone to determine. The conclusion of repeated complaints embraced in the question was not so violent a departure from plaintiff's testimony as to be wholly unfounded. And, without circumstances indicating that the practice was exclusively a matter of medical knowledge, the jury could reasonably find that the answer merely stated the obvious duty of anyone operating such a device.

Testimony of a doctor of osteopathy was improperly received as expert testimony of local medical practice without a showing that he knew the local practice.

The court submitted to the jury as elements of damage pecuniary loss, loss of time and impairment or loss of earning capacity. While there was testi-

mony that for a time plaintiff was incapacitated from conducting his business as a tailor, there was no evidence of the worth of his services nor of pecuniary loss. Plaintiff contends the error may be corrected by remittitur of $1,000, the amount claimed in the bill of particulars for such loss. The record does not show that the amount so claimed was called to the attention of the jury, we have no means of knowing the sum the jury allowed on such damage and the amount of the verdict indicates that a considerable sum must have been allowed for such element of loss.

Reversed, with costs and new trial.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

MONTZ v. REUTTER.

1. HUSBAND AND WIFE—REFORMATION OF INSTRUMENTS—APPEAL AND ERROR—EVIDENCE.

In suit to reform promissory notes given pursuant to a contract by insertion of statutory noncoercion clause over signature of husband and wife, decision must be made on papers involved, where oral testimony is of little value, defendants did not appear as witnesses and no conversation with the wife is shown (Act No. 158, Pub. Acts 1917).

2. BILLS AND NOTES—NONCOERCION CLAUSE—HUSBAND AND WIFE.

Promissory notes, executed pursuant to contract containing statutory noncoercion clause signed by husband and wife, which

were executed as part of the same transaction *held*, intended to evidence the same liability as in the contract, where there is no showing they were not so intended (Act No. 158, Pub. Acts 1917).

3. REFORMATION OF INSTRUMENTS — INSERTION OF NONCOERCION CLAUSE.

Reformation of promissory notes to include statutory noncoercion clause as to wife is granted, where it works no evasion of statute nor harm to wife who signed contract containing said clause and pursuant to which the notes were given (Act No. 158, Pub. Acts 1917).

Appeal from Wayne; Ferguson (Homer), J. Submitted June 12, 1934. (Docket No. 121, Calendar No. 37,877.) Decided September 18, 1934.

Bill by Anton Montz and Emma Montz against George W. Reutter and Alice C. Reutter to reform promissory notes. Bill dismissed. Plaintiffs appeal. Reversed, and decree entered for plaintiffs.

James Segesta (*Abraham Croll,* of counsel), for plaintiffs.

Daniel W. Ross, for defendants.

FEAD, J. Act No. 158, Pub. Acts 1917, abrogated the common-law disabilities of married women to contract, in the respect of enabling them to become jointly liable with their husbands on written instruments and thereby subjecting to execution property held by the entireties. Section 2 provides:

"Such instrument shall contain a statement that no undue influence or constraint has been exerted against the wife in the execution thereof."

In February, 1927, defendant Reutter sought a loan of $1,650 from plaintiffs. It was arranged and Reutter prepared a contract covering it, signed by

himself alone. In the contract he was described as "party of the second part," and agreed to execute promissory notes in denomination of $25, payable monthly with six per cent. interest, to make the payments when due and additional payments when possible, and "that no undue influence or coercion has been used to secure his signature."

Plaintiffs objected to the contract on the ground that they wanted Reutter's wife to be a party to the transaction and liable for the loan. Reutter took the contract away and amended the form by inserting his wife's name with his as "party of the second part," and in other places, and she executed it with him. The notes were also signed by her at the time but the noncoercion clause was not inserted in them. Reutter prepared the notes. Plaintiffs brought this suit to reform the notes by inserting the clause.

The oral testimony is slight and of little value. Defendants did not take the stand. No conversation with Mrs. Reutter was shown. We cannot speculate as to her knowledge of the statute. The case must be decided on the papers.

While not in the best form, the contract established a joint obligation on defendants to pay the loan. It contained the noncoercion clause over the signatures of both and it thereby fulfilled the statute. The notes were contracted for and signed as part of the transaction. There was no showing they were not intended to harmonize with the contract. The unavoidable inference is that they were to evidence the same liability expressed in the signed agreement. The noncoercion clause was omitted from them by Reutter's mistake or fraud, depending upon whether he appreciated the necessity for the clause. Plaintiffs are entitled to the character of evidence of the debt and the kind of liability

which defendants contracted to give. Reformation would work no evasion of the statute nor harm to Mrs. Reutter because it merely confirms, through the notes, the same liability she assumed under the contract and in form required by the statute.

Decree reversed and one will be entered for reformation, with costs.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

ILLINOIS BANKERS LIFE ASSURANCE CO. *v.* STRINGHAM.

1. INSURANCE—CANCELLATION OF POLICY—FRAUD—BURDEN OF PROOF.
   In suit to cancel reinstatement of life insurance policy for fraud, after death of insured, plaintiff has burden of proof of fraud which it must establish by a preponderance of the evidence, not beyond a reasonable doubt nor to an absolute certainty.

2. SAME—BURDEN OF PROOF—MEDICAL OPINION.
   Plaintiff *held*, to have sustained burden of proof in suit to cancel life insurance policy for fraud in reinstating it, where medical opinion on clinical examination was that he had tuberculosis although the doctors could not be certain as they had not made their test according to the most scientific and accurate method.

3. SAME—FRAUD—EVIDENCE.
   Policy of life insurance is set aside for fraud where the overwhelming evidence is that assured was afflicted with tuberculosis when he applied for reinstatement approximately two years prior to his death from that disease.

Appeal from Eaton; McPeek (Russell R.), J. Submitted June 19, 1934. (Docket No. 130, Calendar No. 37,947.) Decided September 18, 1934.

Bill by Illinois Bankers Life Assurance Company, an Illinois corporation, against Ruby J. Stringham for cancellation of a life insurance policy and for an injunction restraining a suit at law. Bill dismissed. Plaintiff appeals. Reversed, and decree entered for plaintiff.

C. B. Fisk Bangs (*John H. Passmore,* of counsel), for plaintiff.

Rosslyn L. Sowers, for defendant.

FEAD, J. The suit is to cancel, for fraud, reinstatement of a life insurance policy issued in 1917, which lapsed for nonpayment of premium in 1930. The assured, Jesse T. Stringham, died May 23, 1932.

Both the original application, made a basis of reinstatement, and the application for reinstatement contained the usual representations that assured was in sound health, and had not and did not have consumption nor other serious disease. The claim of fraud is that the representations were false.

Stringham was a veteran of the Spanish-American war. In 1900 he filed sworn declaration for invalid pension, stating he was unable to earn a living by reason of "varicocele of left side and disease of lungs," and that to the best of his knowledge the disabilities were permanent. Supporting affidavit of Dr. Stimson, filed in 1902, averred, in addition to specific symptoms, that assured's lungs were in "very bad condition" and he had advised him to go west on account of them.

In 1926, assured filed application for increased pension in which he stated he was disqualified from

manual labor by reason of "varicocele and lung trouble," to the best of his belief permanent. Dr. Moyer supported the application by affidavit, stating he had "examined said Jesse T. Stringham at least twice a year for seven years, and have noted the progress of his disease, which is T. B. of the lungs. He has a cavity in one lung practically healed but at times causes him a good deal of trouble;" and further stating that the condition was bound to be progressive, was worse each winter, the doctor was positive it had progressed in the preceding six months but expected improvement during warm weather.

In proof of death submitted to plaintiff, defendant stated the character of the assured's last illness to be a "bad cough and troubled breathing;" an acquaintance made a statement that the assured had been in poor health for about a year and death had resulted from lung trouble; the attending physician, Dr. Moyer, gave both the remote and immediate causes of death as "T. B." The death certificate stated the cause of death as "T. B. of both lungs."

In the medical examination for the original policy the assured, in answer to a question whether he had ever applied for pension, stated: "Yes, for varicocele." In his report, Dr. Huber, the medical examiner, stated he found no indication of tuberculosis or serious disease, past or present. He confirmed his report on the stand. Similar statement was made in the medical report on reinstatement by Dr. Stealy, who, however, was not sworn as a witness. It does not appear that assured mentioned his lung troubles to the examiners.

Drs. Stimson, Moyer and Rickerd, the latter a member of the pension examining board in 1926, tes-

tified. It was shown that Stringham was a stonecutter from 1913 to 1929 and that the occupation produces dust which, getting into the lungs, causes a condition somewhat similar to consumption. All the doctors testified that assured had lung trouble. None gave an opinion that it was stone dust disease. Drs. Stimson and Moyer did not deny their diagnoses as set up in the pension papers and proof of death. Their attitude is that, as put by Dr. Stimson, "clinically" they had found tuberculosis but "pathologically" they did not know. They said that without a microscopic examination of sputum they could not be certain assured had consumption.

Plaintiff has the burden of proof of fraud, not beyond a reasonable doubt nor to an absolute certainty but by a preponderance of the evidence. The evidence is convincing that assured had lung trouble from 1900 to the time of his death and it was the cause of death. The medical opinion, so far as stated, is that he had tuberculosis. Against the opinion is only a possibility that his lung trouble arose from stone dust, so remote a possibility that no doctor hazarded an opinion that stone dust, and not tuberculosis, was the trouble.

The essential question is whether plaintiff had the burden of proof beyond a doubt and must fail because the doctors stated that they could not be certain that assured had tuberculosis as they had not made a test according to the most scientific and accurate method. Such standard of proof of the character of disease and cause of death could not fail to work injustice in innumerable cases where claims are made under policies. It would destroy the evidentiary value of opinions of physicians who have not at their command the means of the ultimate test. As between medical opinion based upon "clin-

ical'' diagnosis and a mere remote possibility there can be no choice.

The overwhelming evidence is that the assured was afflicted with tuberculosis when he applied for reinstatement and the policy must be set aside for fraud.

Decree is reversed and one will be entered in accordance with this opinion, with costs.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

CLEFFY *v.* ALLEGAN STATE SAVINGS BANK.

1. MORTGAGES—DECREE OF REFORMATION—UNDERWRITING.
   Decree of reformation of a mortgage *held,* within jurisdiction of court granting same notwithstanding underwriting in summons did not state that reformation was prayed.

2. EQUITY—PLEADING—RELIEF—PROCESS.
   The specific character of the relief sought in equity is a matter for the pleading, not for the process.

3. SAME—UNDERWRITING.
   Underwriting in chancery summons in suit to reform and foreclose a mortgage which gave notice of prayer for personal as well as property relief *held,* sufficient.

4. ADVERSE POSSESSION—FINDING OF COURT—EVIDENCE.
   Finding of trial court that plaintiff's possession was not adverse *held,* amply sustained by the evidence.

Appeal from Allegan; Miles (Fred T.), J. Submitted June 8, 1934. (Docket No. 86, Calendar No. 37,841.) Decided September 18, 1934.

Bill by Samuel Cleffy against Allegan State Savings Bank and others to set aside decree reforming and foreclosing mortgage and to quiet title on ground of adverse possession. Bill dismissed. Plaintiff appeals. Affirmed.

Irving H. Smith and *Peter J. Danhof,* for plaintiff.

Leo W. Hoffman and *Clare E. Hoffman* (*Carl E. Hoffman,* of counsel), for defendants.

FEAD, J. The bill is to set aside a decree of foreclosure of mortgage and to quiet title to premises on the ground of adverse possession.

In 1903 plaintiff executed a mortgage in which the land was described as "the west 42 acres of the west half," etc. It was foreclosed in chancery in 1906. The foreclosure bill prayed for reformation of the description and the decree reformed it to read "the west half of the west half," etc., and "a parcel" of two acres, described by metes and bounds. The underwriting in the chancery subpœna was in the regular form required by court rule.

It is contended the decree of reformation was without jurisdiction because the underwriting did not recite that reformation was prayed. The underwriting never has been required to state the nature of the action. Its purpose is to give notice whether personal decree is prayed, and against whom, in addition to relief against property. The specific character of the relief is a matter for the pleading, not for the process. The underwriting at bar gave

notice of prayer for both personal and property relief and was sufficient. *Vaughan* v. *Black,* 63 Mich. 215; *Seibly* v. *Ingham Circuit Judge,* 105 Mich. 584.

Plaintiff's mother had possession of the two-acre parcel under a life lease. She died in 1915. Plaintiff was in possession of the premises without interruption to about 1921 and claims he rented them to another person in 1922 and 1923. He asserts his possession was adverse. Defendants claim plaintiff rented the premises from them and their predecessors in title after the mother's death and they rented to the tenants in 1922 and 1923 and thereafter. Upon the issue of the character of plaintiff's possession, whether adverse or permissive, the court held with defendants and the testimony amply sustained the finding that plaintiff's possession was not adverse.

Decree dismissing the bill affirmed, with costs.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

SMITH *v.* CURRAN.

1. CONSTITUTIONAL LAW — SPECIAL SESSION OF LEGISLATURE — GOVERNOR'S MESSAGE.

Language in governor's message to special session of legislature that it was called "to reconsider several important matters" which had been before it in its general and preceding special sessions *held,* to require further designation before the subjects could be deemed submitted to it.

2. SAME—SPECIAL SESSION OF LEGISLATURE.

The guiding principle in sustaining legislation enacted at a special session is that it be germane to, or within, the apparent scope of the subjects which have been designated as proper fields for legislation.

3. SAME—PRESUMPTIONS.

The presumption is always in favor of the constitutionality of a statute passed at a special session of the legislature and it will be held within the call therefor if it can be done by any reasonable construction.

4. STATUTES—APPROVAL BY GOVERNOR.

Whether a statute enacted at a special session of the legislature falls within the subjects submitted by the governor is a judicial question and it is immaterial that he has approved the bill after its enactment.

5. SAME—LEGISLATIVE ACTION.

The legislature has freedom to act upon the subjects submitted to it for consideration at a special session and may not be restricted to consideration of a particular bill, although the governor may limit the subject.

6. SAME—MUNICIPAL BOND VALIDATION ACT.

Statute enacted at special session of legislature permitting validation of any municipal bonds even when issued without legal power, *held,* unconstitutional as not included within governor's message submitting for consideration the subject of "validation of bonds issued by a municipality under sufficient popular vote regardless of technical requirements" (Const., art. 5, § 22; Act No. 31, Pub. Acts 1934 [Ex. Sess.]).

Mandamus by John W. Smith and others, comprising the common council of the City of Detroit, a municipal corporation, to compel William J. Curran, controller of the City of Detroit, to execute and issue refunding bonds. Submitted June 26, 1934. (Calendar No. 37,972.) Writ denied September 18, 1934.

Raymond J. Kelly, Corporation Counsel, and *Paul T. Dwyer,* Assistant Corporation Counsel, for plaintiffs.

Clarence J. Huddleston, for defendant.

FEAD, J. The city of Detroit is engaged upon a project to refund $360,000,000 of bonds. Some are original obligations of the city. Some were issued by other municipalities and assumed by the city on annexation of territory of issuing districts. Some were approved by popular vote. Some were issued by the legislative bodies of municipalities without vote of the people. The records of some have been wholly lost. The city of Detroit had recognized its obligation for them, has levied taxes for many years and made payments of principal and interest and provided sinking funds without protest or objection of taxpayers. In the refunding operation, however, approval of the validity of the bonds by counsel has been demanded and, because of the loss of records, the city desires the aid of a validation act of the legislature. To provide a test case, the city controller has formally refused to issue the refunding bonds and the members of the common council have petitioned for a writ of mandamus to compel him to issue them. His defense is that the validation law, Act No. 31, Pub. Acts 1934 (Ex. Sess.), was adopted in violation of the Constitution, article 5, § 22:

"No bill shall be passed at a special session of the legislature on any other subjects than those expressly stated in the governor's proclamation or submitted by special message."

March 15, 1934, the common council of the city of Detroit adopted a resolution assuming liability for all bonds above mentioned and providing for their inclusion in the refunding plan. On the same day a bill was introduced in the legislature, convened in special session, which was afterwards enacted as Act No. 31, Pub. Acts 1934 (Ex. Sess.). The act reads:

"An act to provide for the ratification, validation and confirmation of certain bonds heretofore issued by any city, or by any school district or territory which has become annexed to any city, acknowledgment of which bonded indebtedness has heretofore been or shall hereafter be made by such city; and authorizing the refunding of such bonds.

"*The People of the State of Michigan enact:*

"SECTION 1. Whenever the legislative body of any city shall have adopted prior to April fifteen, nineteen hundred thirty-four, a resolution by a majority vote of its members-elect, acknowledging as valid indebtedness of said city any outstanding bonds theretofore issued by said city, and any outstanding bonds of any township, city, village or school district, the payment of all or a portion of which has been assumed through the annexation of additional territory to said city, all such bonds are hereby ratified, validated and confirmed as binding obligations of said city. All said outstanding bonds of the city, and all said outstanding annexed district bonds, or the portion so assumed by such city, may be refunded from time to time under the provisions of the general laws by the issuance of refunding bonds of said city, and no irregularity or other infirmity in or absence of the proceedings authorizing such outstanding bonds shall ever be set up as a defense to the payment of said refunding bonds or the interest thereon. The legislative or governing body of said city and of the existing unannexed township, village, city or school district, may enter into any contract relative to the payment of the balance of said bonds and interest as shall not be prejudicial to the rights of the bondholders. Any bonds so assumed on any territory not so annexed shall not be construed to be included in the bond limitation of the city assuming same in cases where the school district, township, village or city primarily liable on said bonds shall agree to reimburse the obligating city."

The governor called the session "for the consideration of such matters as may be submitted by special message."

Upon the legislature convening, the governor delivered a message beginning:

"You have been called in special session to reconsider several important matters which have been before you in your general session, or in your special session, or in both of these sessions. In addition, legislation has been requested on some matters which either have not been before you heretofore, or which are indicated as a result of the administration of laws previously passed by you."

Petitioners contend this language submitted all subjects considered at the general session. But by its own words it was confined to "several important matters," which needed further designation before they could have been deemed to be submitted to the legislature.

The message further stated:

"Upon the recommendation of legislative council, I am also submitting to you for consideration and action, the following bills: * * *

"4. A bill providing for the validation of bonds issued by a municipality under sufficient popular vote regardless of technical requirements."

Apparently the bill so referred to by the governor was one introduced to validate certain bonds issued by cities to acquire light and power plants and which was enacted as Act No. 6, Pub. Acts 1934 (Ex. Sess.).

The primary problem is to determine the "subject" submitted by the special message. A multitude of cases illustrating the scope and limitation of subjects under similar constitutional provisions are

cited in 59 C. J. p. 530, note, but none is in direct point. The principles involved are established with practical unanimity and are well stated in the following excerpts:

"This constitutional provision contemplates that there shall first exist in the executive mind a definite conception of the public emergency which demands an extraordinary session. His mental attitude or intention is expressed in his proclamation, the purpose of which is to inform the members of the legislature of subjects for legislation, and to advise the public generally that objections may be presented if desired. It is not only a guide or chart with respect to which the legislature may act, but also a check restricting its actions so that rights may not be affected without notice. The proclamation may contain many or few subjects according to the governor's conception of the public need. While the subjects may be stated broadly or in general terms, the special business, as related to the general subject on which legislation is desired, should be designated by imposing qualifying matter to reduce or restrict. Although the subjects should be sufficient to evoke intelligent and responsive action from the legislature, it is not necessary that they include all the methods of accomplishment. The guiding principle in sustaining legislation of a special session is that it be germane to, or within, the apparent scope of the subjects which have been designated as proper fields for legislation. In construing a call the words of any portion thereof must be interpreted not only as commonly and universally understood, but also as applicable to the subject intended to be affected by legislation.

"While the legislature must confine itself to the matters submitted, it need not follow the views of the governor or legislate in any particular way. Within the special business or designated subjects

submitted, the legislature cannot be restricted or dictated to by the governor. It is a free agent, and the governor, under the guise of definition, cannot direct or control its action. Nor is it confined to any one subject but may chose (choose) from parts of different subjects, provided a new subject, unrelated to those stated, is not acted upon." *Commonwealth, ex rel. Schnader,* v. *Liveright, Secretary of Welfare,* 308 Pa. 35 (161 Atl. 697).

"It is agreed, so far as any of the cases speak on the matter, and this view is undoubtedly sound, that the presumption is always in favor of the constitutionality of an act, and that any piece of legislation so under consideration should be held within the call if it can be done by any reasonable construction." *State, ex rel. National Conservation Exposition Co.,* v. *Woolen,* 128 Tenn. 456, 487 (161 S. W. 1006, Ann. Cas. 1915C, 465).

Whether a statute enacted at a special session of the legislature falls within the subjects submitted by the governor is a judicial question. *Sims* v. *Weldon,* 165 Ark. 13 (263 S. W. 42); *Jones* v. *State,* 154 Ark. 288 (242 S. W. 377).

It is immaterial that the governor, by formal signature, has approved the bill after its enactment by the legislature. *Wells* v. *Railway Co.,* 110 Mo. 286 (19 S. W. 530, 15 L. R. A. 847); *Manor Casino* v. *State* (Tex. Civ. App.), 34 S. W. 769; *Jones* v. *State,* 151 Ga. 502 (107 S. E. 765).

We may disregard the reference in the governor's message to the bill prepared by the legislative council because the governor cannot restrict the legislature to consideration of a particular bill. Within the subject submitted, the legislature has freedom of action.

The scope of the message is plain. Stretched to the breaking point in an attempt to sustain the law,

it permitted the legislature to provide for the validation of all bonds issued upon existing basic legal authority, *i. e.*, upon approval of the required number of voters when popular vote was required by statute and upon action of the legislative body of the municipality when popular vote was not necessary. Obviously an essential of validation under the message would be a showing of such basic authority.

Act No. 31 goes further. It permits validation of bonds where issued without legal power, *i. e.*, without sufficient popular vote when such vote was required and without authority of law of the issuing body.

To sustain Act No. 31, the message would need to be construed as submitting the subject of validation of municipal bonds without limit or condition as to the character of their imperfections, whether mere irregularity in the issuance or total want of authority to issue. It would cover bonds issued without sufficient popular vote in direct conflict with the express words of the message.

The "subject" submitted in the message was not wholesale validation of bonds. It covered only kinds of bonds which form a logical and natural class for validation, separate and distinct from the other class also covered by Act No. 31. While the governor, within the range of a "subject" may not restrict the legislature, he has the authority to limit the subject according to his conception of the need for legislation. Thus, a proposal for action upon a certain tax would not throw open the whole matter of taxation for legislation or a recommendation as to a crime would not include the entire realm of criminal law.

We hold Act No. 31 unconstitutional.

The immediate effect of this ruling upon the city of Detroit may be temporarily disturbing but the

record shows that a refunding plan has been under negotiation for nearly two years, one regular and three special sessions of the legislature have intervened, a contract for refunding was executed a year ago, and another session of the legislature will be held in about six months. The situation does not indicate such dire need nor diligence as would induce extension of the governor's message beyond its plain terms and constitutional effect.

Writ denied, no costs.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

DAVENPORT *v.* CITY OF DETROIT.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PAUPERS.

Indigent inmate of city charity at which two meals a day and lodging were furnished, who was willing to wash dishes for contractor furnishing meals and serving equipment and received three meals a day and 50 cents a week *held*, not an employee of the city within meaning of workmen's compensation act and therefore not entitled to compensation for loss of eye due to injury received while preparing to wash dishes.

Appeal from Department of Labor and Industry. Submitted June 8, 1934. (Docket No. 87, Calendar No. 37,709.) Decided September 18, 1934.

Earl Davenport presented his claim against City of Detroit, a municipal corporation, for accidental injury sustained while allegedly employed by defendant. Award to plaintiff. Defendant appeals. Reversed.

Gloster, Giller & Briggs, for plaintiff.

John Atkinson, Assistant Corporation Counsel (*Raymond J. Kelly,* Corporation Counsel, of counsel), for defendant.

WIEST, J. In March, 1932, plaintiff was an indigent inmate of Fisher Lodge, a charity maintained by the city of Detroit for indigent single men. There he was furnished two meals a day and lodging. The meals for the inmates were provided, together with serving equipment, by the Industrial Lunch Company under contract. The lodge had accommodations for upward of 1,500 men and, to aid in serving meals and washing dishes, inmates who were willing to so work were given three meals a day and 50 cents per week. Plaintiff was willing to so work washing dishes and, while preparing a compound substitute for soap to be used in washing dishes, splashed lye in his left eye, causing blindness and removal of that eye. The accident was known to city employees in charge of the lodge but no report thereof was made to the department of labor and industry. Plaintiff applied for an award under the workmen's compensation act (2 Comp. Laws 1929, § 8407 *et seq.*) for loss of an eye and, upon hearing before a deputy commissioner and upon appeal to the board, he was granted compensation. Review is had by appeal in the nature of certiorari.

The relation was not that of employer and employee under the workmen's compensation act.

The case is ruled by our opinion in *Vaivida* v. *City of Grand Rapids,* 264 Mich. 204 (88 A. L. R. 707).

In *Village* of *West Milwaukee* v. *Industrial Commission of Wisconsin,* 216 Wis. 29 (255 N. W. 728), and *McBurney* v. *Industrial Accident Commission,* 220 Cal. 129 (30 Pac. [2d] 414), the *Vaivida Case* was cited and like holdings made.

See also *Jackson* v. *North Carolina Emergency Relief Administration,* 206 N. C. 274 (173 S. E. 580); *Thomas F. Greene's Case,* 280 Mass. 506 (182 N. E. 857); *Stiles* v. *Des Moines Council Boy Scouts of America,* 209 Iowa, 1235 (229 N. W. 841).

The award is vacated, with costs to defendant.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

MATHEWS *v.* LECKNER.

WILLS—MENTAL COMPETENCY.

Instruction to jury in will contest certified to circuit court that it was conceded that invalid testatrix possessed mental capacity to make the will *held,* harmless error, where there was no evidence justifying submission of such an issue to the jury, evidence clearly established that she wanted to make a will, directed that scrivener be summoned, fully informed him of her desire and was mentally competent, although no such concession is found in the record.

Appeal from Berrien; White (Charles E.), J. Submitted June 7, 1934. (Docket No. 69, Calendar No. 37,664.) Decided September 18, 1934.

George Samuel Webber presented for probate the last will and testament of Florence L. Webber, deceased. Adele Mathews and Leslie Scott filed objections thereto. Upon the death of George Samuel Webber, Arthur E. Leckner was appointed special administrator. Case certified to circuit court. Verdict and judgment for proponent. Contestants appeal. Affirmed.

W. J. Barnard (*Carl W. Benton,* of counsel), for appellants.

Charles W. Gore, for appellee.

WIEST, J. This will contest, on the grounds of undue influence and want of mental capacity, was certified to the circuit court, tried by jury and the will found to be that of the testatrix. Contestants appeal, claiming the court was in error in instructing the jury it was conceded that testatrix possessed mental capacity to make the will. We find no such concession in the record, but we do find that the evidence wholly fails to support the claim of mental incapacity and, while the court may have been in error in stating testatrix's mental capacity was conceded, the error, if such, was harmless, for there was no evidence justifying submission of such an issue to the jury.

The issue of undue influence was submitted to the jury under suitable instructions and no error is alleged thereon.

The testatrix was an elderly woman, living with her husband in the township of Benton, Berrien

county. For several years before executing the will she had been an invalid and confined to a wheel chair. In the will, executed at her home on January 11, 1932, she bequeathed $500 to a friend and the rest, residue and remainder of her estate to her husband. Mr. and Mrs. Webber had been married 31 years at the time of her death. Heirs at law contest probate of the will. The day the will was executed testatrix sent for a resident of Benton Harbor to prepare her will, stated to him what she wanted and he so drew it, and she signed it, sitting in the wheel chair. The evidence clearly established that she wanted to make the will, directed the summoning of the scrivener, fully informed him of her desire and was mentally competent.

We infer that Mr. and Mrs. Webber had no children.

We find no reversible error. The judgment is affirmed, with costs against contestants.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

CARDOTT *v.* CHEVROLET MOTOR CO.

MASTER AND SERVANT—HEARING BEFORE DEPARTMENT OF LABOR AND INDUSTRY.

Reversal of award of deputy commissioner for employer without according him an opportunity to present and argue case at adjourned hearing before department of labor and industry *held*, reversible error.

Appeal from Department of Labor and Industry. Submitted May 24, 1934. (Docket No. 169, Calendar No. 37,784.) Decided September 18, 1934.

Henry F. Cardott, Sr., presented his claim for compensation against the Chevrolet Motor Company, a division of General Motors Corporation, for alleged accidental injuries sustained while in defendant's employ. Award to plaintiff. Defendant appeals. Reversed and remanded.

J. G. Stevenson, for defendant.

WIEST, J. This is an appeal in the nature of certiorari to review an order of the department of labor and industry awarding compensation to plaintiff.

In the application for leave to appeal it was alleged that, upon a hearing before the deputy commissioner, compensation was denied and an appeal to the full board taken by plaintiff; that November 22, 1933, at the time and place fixed for hearing such appeal, the attorney for defendant appeared and plaintiff not only did not appear but had not procured and filed a transcript of the testimony taken before the deputy commissioner and the board, on its own motion, postponed the hearing without any definite date; but with an assurance to counsel for defendant that, when plaintiff filed the transcript, an opportunity to argue the appeal would be afforded; that on January 12, 1934, the board, without according defendant an opportunity to present and argue the case, made an award of compensation to plaintiff.

In the application for leave to appeal defendant stated:

"The department erred as a matter of law, when the award of the deputy commissioner, in favor of defendant, was reversed without according said defendant, Chevrolet Motor Company, the right to be heard in opposition thereto."

The right to be heard is fundamental and deprivation thereof, as here disclosed, commands vacation of the award and the remanding of the case for a hearing.

So ordered, with costs to defendant.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred. BUTZEL, J., did not sit.

MARQUA *v.* CITY OF DETROIT.

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENT.

Two-foot strip of land between sidewalk and lot line left to enable installation of sidewalk without trespassing upon abutting property, in fact a part of the street, and formerly part of an alley abutting lot and improved with other land into a better public way, *held*, not to separate street from lot so as to relieve latter from assessment for opening, grading, paving and sidewalk.

Appeal from Wayne; Webster (Clyde I.), J. Submitted June 5, 1934. (Docket No. 15, Calendar No. 37,804.) Decided September 18, 1934.

Bill by Walter Marqua and wife against City of Detroit, a municipal corporation, and another to set

aside special assessments for street purposes. Bill dismissed. Plaintiffs appeal. Affirmed.

Jorgenson & Alexander, for plaintiffs.

Raymond J. Kelly, Corporation Counsel, and *John H. Witherspoon,* Assistant Corporation Counsel, for defendant.

WIEST, J. Plaintiffs owned premises in the city of Detroit, abutting a 20-foot alley, which alley was dedicated, by recorded plat, to public use. In 1921 the city opened a street, taking the public alley as part thereof, and obtained additional land by condemnation, then paved the center of the street to a width of 30 feet, left a grass plot between the curb and sidewalk and installed a sidewalk opposite plaintiffs' premises and alley, less than two feet from their lot line, and assessed plaintiffs for the opening, grading, paving and sidewalk.

Plaintiffs filed the bill herein in November, 1930, to have the assessments declared void, money paid refunded and future instalments enjoined on the ground that the part of the alley abutting their premises, and lying between their premises and the sidewalk, was not taken for street purposes, either by condemnation or actual user and, therefore, under the city charter and our holding in *Alexander* v. *City of Detroit,* 259 Mich. 241, there is still a part of the alley between their premises and the street and they are not abutting owners upon the street and cannot be assessed. The bill was dismissed and plaintiffs prosecute this appeal.

It seems to be the uniform practice in the city of Detroit to install sidewalks a short distance from lot lines and such was done in this instance. The strip between the edge of the sidewalk and the lot

line was left to enable installation of the sidewalk without trespassing upon abutting property and was, in fact, a part of the street. Here was no taking of excess land, leaving plaintiffs' property abutting the excess and, therefore, not abutting the street like in the *Alexander Case* but use of the whole alley upon which plaintiffs' premises abutted. It was not necessary for the city to exercise the right of eminent domain in making use of the alley for it did not seek to discontinue the use of the land for the purpose for which it was dedicated to the city but improved it, with other land, into a better public way.

The city of Detroit, it seems, may exercise the right of condemnation in excess of need and when it does so and takes more property than it intends to use for street purposes and, therefore, holds title to such excess property between the street, as established, and property adjoining such excess, it cannot assess such adjoining property for the improvement under the provisions of the charter. For such cases see *Panfil* v. *City of Detroit,* 246 Mich. 149; *Emmons* v. *City of Detroit,* 255 Mich. 558; *Linski* v. *City of Detroit,* 260 Mich. 385; *Malolepszy* v. *City of Detroit,* 260 Mich. 387; *Kubit* v. *City of Detroit,* 260 Mich. 388; *Kamnkolski* v. *City of Detroit,* 260 Mich. 389; *Alexander* v. *City of Detroit, supra.* The rule established by these cases does not apply to the case at bar. The whole alley was absorbed by the better public way and no part thereof left to separate plaintiffs' premises from the street, so established, and the sidewalk installed.

The decree is affirmed, with costs to defendant.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

LEWIS MANUFACTURING CO. *v.* LEE.

1. MECHANICS' LIENS—FORECLOSURE—AMENDMENT—PERIOD COVERED BY LIEN.

   Amendment of bill to foreclose mechanic's lien by changing averment as to when period covered by lien began in order to accord with undisputed fact as to period within which materials were furnished merely corrected a mistake which was not fatally defective.

2. SAME—CLAIM OF LIEN—NOTICE.

   Failure to name in claim of lien and serve notice on wife of man with whom materialman contracted renders lien inoperative where she had no legal title at time contract was made but acquired it prior to time claim of lien was filed.

Appeal from Oakland; Gillespie (Glenn C.), J. Submitted June 19, 1934. (Docket No. 90, Calendar No. 37,887.) Decided September 18, 1934.

Bill by Lewis Manufacturing Company, a Michigan corporation, against Charles W. Lee, receiver of the First State Savings Bank of Birmingham, and others to foreclose a mechanic's lien. Cross-bill by defendant receiver against plaintiff and other defendants. Decree for plaintiff. Defendant receiver appeals. Reversed and bill dismissed.

Pelton & McGee, for plaintiff.

Goodloe H. Rogers, for defendant receiver.

WIEST, J. December 10, 1930, George W. Smith was vendee in a land contract covering 45 lots in a subdivision. That day, and without the legal title,

he commenced erection of a dwelling house on one of the lots and, January 28, 1931, entered into contract with plaintiff for material. December 26, 1930, the vendors in the land contract executed a deed to George W. Smith and left it in escrow at a bank, pending financial arrangements which evidently were not completed until February 5, 1931, when Mr. and Mrs. Smith gave a mortgage to defendant First State Savings Bank of Birmingham for $10,000, and February 6, 1931, when they gave a second mortgage to the land contract vendors. In the meantime, however, and on January 6, 1931, Mr. Smith, by quitclaim deed, conveyed the premises to his secretary and she, on the same day, by like deed, conveyed to Mr. and Mrs. Smith. The mentioned deeds and mortgages were not recorded until about the middle of March, 1931. January 28, 1931, Mr. Smith, individually, contracted with plaintiff for building material and, between that date and June 29, 1931, material was furnished. August 22, 1931, plaintiff filed a claim of lien on the building and land for material furnished between April 15 and June 29, 1931, under contract with George W. Smith, owner, and made service upon Mr. Smith, August 22, 1931.

The bill herein was filed to foreclose the lien. Defendant Charles W. Lee, receiver of the First State Savings Bank of Birmingham, appeared and, by answer, averred priority of the mortgage, and by cross-bill, asked affirmative relief and now reviews adverse decision and decree by appeal. The other defendants, inclusive of Mrs. Smith, have not appealed.

At the hearing plaintiff was permitted to amend the bill by averring the furnishing of material from January 28 to June 29, 1931. The fact is not dis-

puted but it is contended that dates in the claim of lien cannot be varied.

In *John F. Noud & Co.* v. *Stedman,* 193 Mich. 459, we held:

"The last date is the more important of the two, because from the last one it is determined whether the claim for a lien was filed within the statutory period of 60 days. Where the last date is stated definitely, we do not think the claim should be declared fatally defective because the first date is stated too generally."

The claim of lien was timely filed and the mistake mentioned did not defeat the lien but only had bearing upon the subject of priority of the bank mortgage.

When Mr. Smith commenced the building he had no legal title to the lot and the court limited the lien and foreclosure thereof to the building under 3 Comp. Laws 1929, § 13103. If the lien was valid upon the building and not as well upon the lot no one has been harmed by such holding.

Defendant bank claims that, on January 28, 1931, when the contract for material was made with Mr. Smith, title to the lot was in Mr. and Mrs. Smith by the entirety under the quitclaim deed from Mr. Smith's secretary on January 6, 1931, or, if that deed did not pass the legal title, it operated as a conveyance of a vendees' interest in the land contract and constituted Mrs. Smith a joint vendee with Mr. Smith and, therefore, the contract with Mr. Smith alone was invalid.

It is also contended that the claim of lien was invalid because Mrs. Smith was not mentioned therein as an owner or served with notice.

Title from the land contract vendor did not vest in Mr. Smith while the deed was in escrow and,

therefore, his quitclaim deed to his secretary and her quitclaim deed to Mr. and Mrs. Smith conveyed no then legal title and Mr. and Mrs. Smith, on January 28, 1931, had no legal title and failure to contract with Mrs. Smith did not defeat the lien upon the building. *Strand Lumber Co.* v. *Dostie,* 260 Mich. 422.

However, in August, 1931, when the claim of lien was filed, the mentioned deeds had all become operative and Mrs. Smith was then an owner and entitled to be so named in the claim of lien and to be served with notice. The failure to name her as an owner at that time and serve her with notice rendered the lien inoperative. *Waters* v. *Johnson,* 134 Mich. 436; *Lacy* v. *Piatt Power & Heat Co.,* 157 Mich. 544 (133 Am. St. Rep. 360); *John F. Noud & Co.* v. *Stedman, supra; Lallevich* v. *Bartoszewiz,* 205 Mich. 375; *Peninsular Stove Co.* v. *Crane,* 226 Mich. 130; *Grand River Lumber & Coal Co.* v. *Glenn,* 234 Mich. 310; *Skupinski* v. *Provident Mortgage Co.,* 244 Mich. 309; *Strand Lumber Co.* v. *Dostie, supra.*

Counsel for plaintiff cite the *Strand Lumber Company Case* as authority for not requiring notice of filing of the lien to be given the owner in case the lien is upon the building alone. In the *Dostie Case* we held that, in case of lien against the building only, notice was not required to be given to one who became owner subsequent to the filing of the lien and before filing the bill for foreclosure.

The decree is reversed and the bill dismissed, with costs to the appealing defendant.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

BUTLER *v.* BUTLER.

DIVORCE—EXTREME AND REPEATED CRUELTY.

Record *held,* to justify decree of separate maintenance to wife on ground of extreme and repeated cruelty.

Appeal from Washtenaw; Sample (George W.), J. Submitted June 21, 1934. (Docket No. 136, Calendar No. 37,962.) Decided September 18, 1934.

Bill by Laura Butler against Guy Butler for separate maintenance on grounds of extreme cruelty. Cross-bill by defendant for absolute divorce on grounds of extreme cruelty. Decree of separate maintenance for plaintiff. Defendant appeals. Affirmed.

John P. Kirk, for plaintiff.

Burke & Burke, for defendant.

WIEST, J. This is an appeal by defendant from a decree granting plaintiff separate maintenance and denying him a divorce from the bonds of matrimony under his cross-bill.

The circuit judge found defendant guilty of extreme and repeated cruelty and awarded plaintiff a weekly allowance, use of the home and furniture and upkeep thereof.

The main ground of cruelty was defendant's association with and attentions paid to a married woman. Whether plaintiff's suspicions were well-founded or not we need not say for, in any event,

his attitude toward plaintiff was cruel and inexcusable. He claims that his wife was of a jealous and nagging disposition and exercised unjust domination over all of his friendships. The record furnishes the particulars of the one instance of alleged dominance and enough appears to justify the attempted restraint, and no excuse for his determination to pursue the course he took.

The record has been carefully read and brings us to agreement with the circuit judge in awarding plaintiff a decree for separate maintenance.

The decree is affirmed, with costs to plaintiff.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

PERE MARQUETTE RAILWAY CO. *v.* SLUTZ.

1. INJUNCTION—VENUE.

Court of equity has power to enjoin a person, over whom it has jurisdiction, from prosecuting an action in the court of another State for personal injuries as rights of parties thereto should be determined according to the law of the State where accident happened, injured party was and is domiciled and alleged tortfeasor domesticated.

2. VENUE—ACTION AGAINST RAILROAD.

Action against railroad company by resident of this State must be brought in county of plaintiff's residence if railroad traverses that county (3 Comp. Laws 1929, § 13997).

3. INJUNCTION—ACTION AGAINST RAILROAD—STATUTES.

Statute placing venue of action by resident of this State against railroad for personal injuries received in collision with train must be complied with and justifies injunction restraining action at law in a foreign jurisdiction (3 Comp. Laws 1929, § 13997).

Appeal from Van Buren; Warner (Glenn E.), J. Submitted June 7, 1934. (Docket No. 59, Calendar No. 37,797.) Decided September 18, 1934.

Bill by Pere Marquette Railway Company, a Michigan corporation, against Meyer Slutz to enjoin an action at law for personal injuries pending in Cook county, Illinois. Decree for plaintiff. Defendant appeals. Affirmed.

David Anderson and *David Anderson, Jr.,* for plaintiff.

Alex Meyerovitz, for defendant.

WIEST, J. This is an appeal by defendant from a decree enjoining him from prosecuting an action at law he instituted against plaintiff in Cook county, Illinois, to recover damages for personal injuries, alleged to have been occasioned him in a collision with one of plaintiff's trains at the city of Benton Harbor, this State, in June, 1932.

Defendant herein, plaintiff in the action at law in the State of Illinois, is a resident of Van Buren county, Michigan, and plaintiff herein is a Michigan corporation, with a line of its railroad traversing Van Buren county, and extending to the city of Chicago, Cook county, Illinois. The right of action, if any, accrued in this State; defendant is a resident of this State; rights of the parties should be determined according to established law of the State

where the accident happened and the injured party was and is domiciled and the alleged tortfeasor domesticated. The court of equity has unquestioned power in a proper case to enjoin a person, over whom the court has jurisdiction, from prosecuting a civil action in the court of another State.

In *Oates* v. *Morningside College,* 217 Iowa, 1059 (252 N. W. 783, 91 A. L. R. 563), it was well said:

"Where an action is brought in a foreign State for the purpose of evading or avoiding the laws of this State, or for other unjust and inequitable purposes, harassing its citizens and causing them irreparable injury, injunction is properly brought."

See, also, *Royal League* v. *Kavanagh,* 233 Ill. 175 (84 N. E. 178); 32 C. J. p. 115.

The statute, 3 Comp. Laws 1929, § 13997, provides:

"Actions shall be commenced and tried in the proper county as follows: * * *

"All actions founded upon wrongs, and contracts, except as herein otherwise provided, shall be commenced and tried in the county where one of the parties shall reside at the time of commencing such action;

"Suits may be commenced against any street railway or railroad company in any county where the principal office of such company within the State may be situated, or in any county traversed by a line of railroad, owned or operated by such company, or in any county in which such company shall be the owner or lessee of a right of way for a line of road: Provided, That if such line of road traverses the county of the plaintiff's residence, suit shall be brought in such county."

This statute required plaintiff in the action at law to bring suit in Van Buren county. The evident

purpose of the statute is to keep the venue of actions against railroads close to the point where witnesses are available. It was the duty of defendant herein to comply with this statute, and the court was fully justified in restraining him from prosecuting the action at law in a foreign jurisdiction.

The decree, restraining defendant from prosecuting the action at law in the State of Illinois, is affirmed, with costs to plaintiff.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

CHAPMAN *v.* DETROIT METROPOLITAN CORP.

HOFFMAN *v.* SAME.

LUCAS *v.* SAME.

1. GARNISHMENT—STRICT CONSTRUCTION OF STATUTES.
   Garnishment statutes being in derogation of the common law must be strictly construed and exactly followed.

2. SAME—AFFIDAVIT—SUFFICIENCY OF AVERMENT AS TO AMOUNT.
   Averment in affidavit for writ of garnishment that indebtedness was *not exceeding* stated amount *held,* insufficient to comply with statute requiring averment that principal defendant is indebted to plaintiff "in a given amount" (3 Comp. Laws 1929, § 14857).

3. SAME—AFFIDAVIT—JURISDICTION.

Affidavit for writ of garnishment which does not state the exact amount principal defendant was indebted to plaintiff *held,* not to give court jurisdiction to issue writ (3 Comp. Laws 1929, § 14857).

Appeal from Wayne; Campbell (Allan), J. Submitted June 26, 1934. (Calendar Nos. 37,934, 37,935, 37,936.) Decided September 18, 1934.

Separate garnishment proceedings by Goldie K. Chapman, Mary L. Hoffman and Thelma Lucas against Detroit Metropolitan Corporation, a Michigan corporation, principal defendant, and Union Guardian Trust Company, garnishee defendant. Cases consolidated. From denial of motion to dismiss, Ned W. Andrus, receiver of principal defendant, prosecutes appeal in the nature of certiorari. Reversed, and writs dismissed.

Dohany & Hersch (*Alvin D. Hersch,* of counsel), for plaintiffs.

Warren, Hill, Hamblen, Essery & Lewis (*Thomas H. Adams,* of counsel), for principal defendant.

WIEST, J. The principal defendant in three garnishment suits moved the circuit court to dismiss the writs for noncompliance with a statutory requirement and, upon denial of the motion, reviews by appeal in the nature of certiorari.

Affidavits for the writs averred that the principal defendant was indebted to plaintiffs in sums *not exceeding* stated amounts. The statute, 3 Comp. Laws 1929, § 14857, requires the affidavit for writ of garnishment to state that the principal defendant is indebted to plaintiff "in a given amount."

The point is made that the affidavits did not state given amounts. Subsequent provisions of the statute (3 Comp. Laws 1929, § 14900) provide for release of the writ upon giving a bond by the principal defendant "in a penal sum equal to double the amount of the claim of the plaintiff, as sworn to in the affidavit filed for the writ of garnishment."

The statute being in derogation of the common law, must be strictly construed and, as it outlines the averments required in order to warrant issuance of the writ, its requirements must be exactly followed. It may be that the averments of indebtedness, as not exceeding a stated amount, did not, in the instances at bar, exceed possible future judgments, inclusive of accruing interest and costs, but, if the practice is sanctioned in this instance, it will stand as an amendment to the statute and permit uncertainty in place of the certainty required by the statute.

It was said in *United Collieries, Inc.*, v. *Martin*, 248 Ky. 808 (60 S. W. [2d] 125, 89 A. L. R. 971):

"The proceeding in garnishment is special and statutory, affording a harsh remedy, and one pursuing it must bring himself within the statute and follow its mandates. The steps are outlined for vesting the court with jurisdiction over the person of the garnishee and the property in his hands belonging to the principal defendant. It is generally held that these provisions are jurisdictional and unless they have been strictly complied with the court has no authority to proceed;" citing, among other authority, *Peoples Wayne County Bank* v. *Stott*, 246 Mich. 540 (64 A. L. R. 427).

It is manifest that the affidavits did not state given amounts but only much or little within stated sums. It is no hardship to require a plaintiff to

state the amount of his claim and thereby afford employment of the statutory method of release from the writ.

The affidavit is the foundation upon which arises jurisdiction to issue the writ of garnishment, and the statute requires that the exact amount claimed be given. Given amounts were not stated in the affidavits for the writs and the court acquired no jurisdiction.

The writs are dismissed, with costs to the principal defendant.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

EQUITABLE TRUST CO. *v.* BANKERS TRUST CO.

1. APPEAL AND ERROR—INTERLOCUTORY ORDER—LEAVE TO APPEAL.
An appeal from the granting or denial of an interlocutory order, as a rule, is in the nature of mandamus and if not a final disposition of all or part of the subject matter of the suit, this court will dismiss the appeal unless leave has been first obtained since it will not review a case piecemeal.

2. SAME—APPOINTMENT OF RECEIVER AD LITEM—TRUST MORTGAGES.
An appointment of receiver *ad litem* to hold the proceeds of income from multiple-apartment building pending outcome of suit by trustee under second mortgage against trustee under first mortgage and fee owner would not be appealable without leave of court.

3. MORTGAGES — TRUSTS — RECEIVERS — APPEAL AND ERROR — FINAL ORDER.

On bill to enforce rent assignment clause under second trust mortgage and restrain trustee under first trust mortgage and fee owner from interfering with collection of rents, order appointing receiver to collect rents and pay past due taxes may result in benefit to first mortgagee and is appealable since it may finally dispose of a portion of the subject matter in case insufficient is realized on foreclosure sale under first mortgage to pay amount due thereunder and the fact that there may be a possible or even probable return of such subject matter is immaterial.

Appeal from Wayne; Chenot (James E.), J. Submitted June 14, 1934. (Docket No. 48, Calendar No. 37,864.) Decided September 18, 1934.

Bill by Equitable Trust Company, a Michigan corporation, as trustee, against the Bankers Trust Company, a Michigan corporation, and Norman Fill to enjoin interference with collection of rents and to enforce a rent assignment clause under a trust mortgage. Cross-bill by defendant Fill against plaintiff and defendant Bankers Trust Company for relief under mortgage moratorium act. From order appointing receiver, plaintiff appeals. Modified and remanded.

Morris Garvett, for plaintiff.

Frank C. Cook and *John P. O'Hara* (*A. L. Baumann,* of counsel), for defendant Bankers Trust Company.

Joslyn, Joslyn & Joslyn, for defendant Fill.

BUTZEL, J. On December 20, 1926, Samuel K. Melon and wife executed a first mortgage to the Bankers Trust Company of Detroit and subsequent-

ly a second mortgage to the United States Trust Company, as trustee for bondholders, on property improved with a multiple-apartment building in Detroit, Michigan. The Equitable Trust Company claims that it became vested with the title to the mortgage, as successor trustee, after the United States Trust Company changed its name and later merged with the Equitable Trust Company. The second mortgage contained a rent assignment clause. On August 1, 1933, the Equitable Trust Company, as trustee, notified the tenants of its rights under the mortgage and demanded payment. It also recorded a notice thereof in the office of the register of deeds. Dispute having arisen as to who was entitled to the rents, the Equitable Trust Company, as trustee, filed a bill of complaint against the Bankers Trust Company. In an amended bill of complaint it also joined as defendant one Norman Fill of Toronto, Canada, who acquired title to the premises subject to incumbrances by quitclaim deed. The sole relief sought in the amended bill of complaint is the enforcement of the rent assignment clause and an injunction to restrain the defendants from interfering with the collection of rents by plaintiff. Defendants deny the valid effect of the assignment clause in the mortgage and also plaintiff's right to enforce it, even if valid. Defendant Fill also claims the benefit of the moratorium statute (Act No. 98, Pub. Acts 1933). He bases his claim on the fact that the Bankers Trust Company has begun foreclosure proceedings by advertisement. We shall not discuss his claim as the only question presented on appeal is whether the court properly entered an interlocutory order appointing receivers to collect the rents and apply the amounts collected toward payment of past due taxes on the property.

The question arose as to whether the appeal should not be dismissed because appellant failed to first obtain consent to appeal. An appeal from the granting or denial of an interlocutory order, as a rule, is in the nature of mandamus. If the order is not a final disposition of the subject matter of the suit or a part of it, the court will dismiss the appeal unless consent to appeal has been first obtained. This court will not review a case piecemeal. If it should finally be determined that plaintiff is not entitled to the rents, a decision at the present time as to the propriety of the interlocutory order would be futile. An appointment of a receiver *ad litem* to hold the proceeds until the outcome of the suit would not be appealable without the consent of the court. However, plaintiff claims the rents as the trustee under a valid trust mortgage with a rent assignment clause and that such rents should be paid to it as trustee for the bondholders. Obviously, the property would realize more on foreclosure sale under the first mortgage if the taxes were paid. If the rents belong to the plaintiff, as claimed, they may not be diverted for the benefit of the first mortgagee, who can pay the taxes and add the sums so paid to the amount due on its mortgage. *Reserve Loan Life Ins. Co.* v. *Witt,* 264 Mich. 536. If insufficient should be realized on the foreclosure sale under the first mortgage to pay the amounts due under it, all moneys paid for taxes may result in a loss to plaintiff which might encounter much difficulty or fail in efforts to recover such amounts. The order appealed from thus might finally dispose of a portion of the subject matter in controversy. The test, to determine whether an interlocutory order may be appealed from or not, is whether it affects with finality any of the rights of the parties in the subject

matter or a part of it. The fact that there may be a possible or even a probable return of such subject matter does not warrant it being treated as a mere interlocutory proceeding *pendente lite*. *Lewis* v. *Campau*, 14 Mich. 458 (90 Am. Dec. 245); *Barry* v. *Briggs*, 22 Mich. 201.

Neither defendant has appealed from the order. We are unable to determine plaintiff's rights on the present record. If it is entitled to the rents, the present order would be improper. On the argument in this court, counsel consented that the order be modified so as to provide that if plaintiff finally prevails in its contentions it should be repaid such amounts as receivers have collected from the rentals and that such sum be a first lien on all moneys realized from the foreclosure of the Bankers Trust Company's mortgage. Inasmuch as it is being foreclosed by advertisement and not in the instant suit, plaintiff should be protected by a bond or in some other manner approved of by the court.

The proceedings are remanded to the lower court with instructions to modify the order in accordance with this opinion. The costs of the court will abide the final outcome of the case.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

GUDENAU *v.* FARM CREST BAKERIES, INC.

1. APPEAL AND ERROR — EVIDENCE — JUDGMENT FOR DEFENDANT AT CLOSE OF PLAINTIFF'S CASE.

   Plaintiff's evidence must be taken as true for purpose of appeal where judgment was directed for defendant at close of plaintiff's testimony.

2. FRAUDS, STATUTE OF—ORAL CONTRACT OF EMPLOYMENT FOR ONE YEAR.

   Record *held*, to show that oral contract of employment was not to be performed within one year from time it was made, hence unenforceable under the statute of frauds (3 Comp. Laws 1929, § 13417).

3. SAME—RATIFICATION OF ORAL CONTRACT OF EMPLOYMENT WITHIN YEAR.

   Circumstance that oral contract was restated or confirmed within the year does not remove it from operation of the statute of frauds where it was not to be performed within one year from time of making it (3 Comp. Laws 1929, § 13417).

Appeal from Wayne; Webster (Arthur), J. Submitted June 7, 1934. (Docket No. 75, Calendar No. 37,883.) Decided September 18, 1934.

Assumpsit by Edward J. Gudenau against Farm Crest Bakeries, Incorporated, a Delaware corporation, and others on an alleged parol contract of employment. Judgment for defendants. Plaintiff appeals. Affirmed.

Fildew & DeGree, for plaintiff.

Carey, Armstrong, Weadock & Essery (*Joseph J. Marshall,* of counsel), for defendants.

BUTZEL, J. Edward J. Gudenau brought suit against Farm Crest Bakeries, Inc., Orchard Farm

Pie Company, Jersey Farm Baking Company, all corporations, who, by stipulation, may be considered for the purposes of this suit, as one person and referred to as the "defendant." Plaintiff had been a salesman for the Grennan Cake Corporation, in which P. H. Grennan, Ray Grennan and K. L. Grennan had been interested. P. H. Grennan and Ray Grennan became associated with defendant. One Arthur L. Force has also left the service of the Grennan Cake Company and became defendant's regional sales manager. Plaintiff had worked for the Grennan Cake Corporation for approximately 12 years and was receiving $65 per week, when he claims Force asked him to give up his position as salesman with the Grennan Cake Corporation and accept employment with defendant at a salary of $70 per week; that after several interviews with Force he agreed during the middle of the last week of August, 1930, to accept the position and was promised employment for an entire year. He claims that Force wanted him to come to work at once, but he deemed it proper to give some notice to his former employer and he therefore was unwilling to come to work until the following Monday in September. The contract was entered into for a year's employment beginning the following week. It was not to be performed within one year. More than a year would elapse from the time it was entered into until the date agreed upon for its expiration. On the following Monday in September plaintiff reported for duty to Force, drove around with him for several days, but was put off as to the time when he should begin active work, Force offering various excuses from day to day, and finally refusing to see him. Plaintiff claims that, after being unsuccessful in efforts to secure other work in order to minimize

his losses, he brought suit for a year's salary at $70 per week.

The case was heard without a jury, and on motion, the trial court was forced to direct a judgment in favor of defendant because the alleged agreement was not to be performed within one year and therefore was void under the statute of frauds (3 Comp. Laws 1929, § 13417). Plaintiff in his appeal contends that the record shows that the contract was subsequently made and did not begin until the Monday that he went to work. We must take the statements as made by plaintiff as true inasmuch as judgment was rendered against him at the conclusion of his testimony. We are not at all unimpressed with the equities of the claim as set forth by plaintiff, but neither the trial judge nor we can overlook the provisions of the statute of frauds. A very careful reading of the record shows that the contract extended over a year. Plaintiff did at times intimate that the contract was made the Monday he went to work, but he explained his testimony by immediately referring back to the contract that had been made the previous week. He did not make contradictory statements, but explained them by saying that the contract sued upon was the one made the previous week before he reported for work. Counsel claim that plaintiff became confused, but his testimony is plain, direct and to the point. We quote the following excerpts:

"*Re-direct examination by Mr. Fildew:*

"*Q.* You say that on the first Monday you went to work, you did discuss the definite terms of the agreement with Mr. Force?

"*A.* Yes, sir.

"*Q.* And how long did Mr. Force agree that you were employed?

"*A.* Mr. Force says that it would be permanent, but he would take care of the year contract.

"*Q.* What salary did he agree that he would pay you?

"*A.* $70 per week.

"*Q.* And that is the contract you are suing on?

"*A.* Yes, sir.

* * *

"*Q.* And you claim that the first day you went to work you had a definite agreement on the terms of employment?

"*A.* A definite agreement between Mr. Force and I.

"*Q.* And that is the contract you are claiming here?

"*A.* That is the contract I am claiming.

"*Mr. Fildew:* That is all.

"*Re-cross examination by Mr. Weadock:*

"*Q.* The contract that you are suing on here is a contract for a year's employment?

"*A.* For a year's employment.

"*Q.* As sales manager?

"*A.* As sales manager.

"*Q.* At $70 a week?

"*A.* Yes, sir.

"*Q.* And that contract was made with Mr. Force only?

"*A.* Mr. Force only.

"*Q.* And that was made in the latter part of August?

"*A.* Yes, sir.

"*Q.* And as soon as the contract was made, you put in your resignation?

"*A.* I did.

"*Q.* And that resignation took effect a few days afterward?

"*A.* Yes.

"*Q.* On a Saturday?

"*A.* Yes.

"*Q.* The following Monday, in accordance with the agreement that you had made with Mr. Force, you reported at the plant?
"*A.* Yes.
"*Q.* And on that Monday talked over with him the terms of the agreement?
"*A.* Yes.
"*Q.* There was no change?
"*A.* No.
"*Q.* No other contract made?
"*A.* No.
"*Q.* And the contract you are suing on was the one you claim to have made with him before you made your resignation; you insisted on having a definite agreement before you would resign, you said. Is that correct?
"*A.* I did.
"*Q.* You had to be protected?
"*A.* Yes.
"*Q.* Now did it not strike you that that contract was a bit unusual, Mr. Gudenau?
"*A.* No.
"*Q.* You never heard of another one, you had never had one like it?
"*A.* Well, no. I had not another contract from Mr. Force.
"*Q.* What?
"*A.* I didn't have another one from Mr. Force.
"*Q.* That is the only contract?
"*A.* That is the only contract I had."

The law is well stated in *McGovern* v. *Madame Elize, Inc.,* 137 Misc. Rep. 599 (244 N. Y. Supp. 169), as follows:

"No term of the employment was changed, but on the contrary all its terms were ratified and confirmed and the defendant agreed to adhere to these without the execution of any written instrument. There was no rescission of the earlier contract;

there was no modification of the terms of the employment, and there was no renewal, but only a restatement or confirmation, coupled with a declaration by the defendant that it would adhere to the contract previously made without the compulsion of a written instrument."

And in stating the law applicable to the facts, the court said at page 601:

"Where a verbal contract has been made which, by its terms, cannot be performed within a year, the circumstance that it is restated or confirmed within the year does not remove it from the operation of the statute. *Odell* v. *Webendorfer,* 50 App. Div. 579 (64 N. Y. Supp. 451); *Berrien* v. *Southack* (City Ct., N. Y.), 7 N. Y. Supp. 324."

See, also, *Davis* v. *Michigan Mutual Life Ins. Co.,* 127 Mich. 559; *Odell* v. *Webendorfer, supra; Blanton* v. *Knox,* 3 Mo. 241; *Oak Leaf Mill Co.* v. *Cooper,* 103 Ark. 79 (146 S. W. 130); *Haslam* v. *Barge,* 69 Neb. 644 (96 N. W. 245).

We are constrained, as the trial judge was, to hold that plaintiff, in accordance with his own statements, brought suit for a contract not to be performed within a year from the time it was made, and, therefore, the judgment must be affirmed, with costs to defendant.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

NEWELL *v.* RITTER.

1. MOTOR VEHICLES — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — QUESTIONS FOR JURY.

   In action under survival act by administrator of estate of person fatally injured by defendants' car passing place where decedent was aiding disabled motorist, evidence *held*, sufficient to present matters of negligence and contributory negligence for consideration of jury (3 Comp. Laws 1929, § 14040).

2. SAME—DAMAGES—SURVIVAL ACT—FUTURE EARNINGS OF FARMER.

   In action under survival act by administrator of estate of prosperous farmer 67 years of age when fatally injured as result of motorist's negligence, facts *held*, sufficient to permit jury to allow such damages as they deemed reasonable; verdict of $2,500 indicating but small allowance for future earnings.

Appeal from Shiawassee; Collins (Joseph H.), J. Submitted June 7, 1934. (Docket No. 60, Calendar No. 37,827.) Decided September 18, 1934.

Case by Fern Newell, administrator of the Estate of Ovid Newell, deceased, against John and Arthur Ritter for personal injuries received when hit by defendants' automobile and resulting in death of plaintiff's decedent. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

Seymour H. Person, for plaintiff.

Rodgers & Dunn, for defendants.

BUTZEL, J. Fern Newell, administrator of the estate of Ovid Newell, deceased, brought suit against John Ritter, the owner, and Arthur Ritter, driver of an automobile that on the night of August

13, 1933, at about 2 a. m. struck plaintiff's decedent and caused injuries from which he died the following morning. Plaintiff's decedent was 67 years of age and just prior to the accident was traveling south with his daughter on highway M-47 in a car owned and driven by Orville Wakley, a neighbor. As they approached the northerly end of Maple river bridge about four miles from Owosso they discovered a disabled Ford that had collided with the bridge abutment at the northeast corner of the bridge. They first passed the Ford but seeing that it was in trouble, they returned to render assistance. Shortly thereafter another car, proceeding north, passed both the Wakley car and the disabled Ford and also stopped in order to help. The Wakley car was brought back and a chain attached to it was tied to the disabled Ford car. It became necessary, however, to move the Ford automobile into a proper position, and decedent and two others undertook to push it, decedent getting hold of the car at the left rear fender. Just at that time Arthur Ritter, driving the car of his father, John Ritter, had come around a curve about three-tenths of a mile distant from the bridge where the decedent and others were trying to move the Ford car. Witnesses testified that defendant's car was being driven at the rate of 50 miles per hour. This was denied and became a question of fact for the jury. However, immediately before the accident decedent was helping the others to push the car, standing at the left rear fender. In an instant defendant's car passed by. It came so close to the disabled Ford that one of the men assisting with decedent was obliged to jump upon the running board of the Ford for safety, and another, also helping, had part of his shoe cut off. Decedent was struck and knocked between the two

cars and was found a short distance away, badly broken up. He was immediately removed to a hospital, where he died six hours later. Suit was brought under the survival act (3 Comp. Laws 1929, § 14040). It is claimed that defendants were not guilty of negligence and that decedent must have stepped into the path of the oncoming car and thus was struck. The fact that he was seen immediately at the rear and alongside the disabled Ford car just prior to the accident, and the further fact that the two others just barely escaped injury on account of being alongside the Ford car, was sufficient to indicate how the accident occurred and it was proper to submit the question to the jury.

Error is claimed because the trial court instructed the jury to find as an element of damages the amount that the decedent probably would have earned during the balance of his life. Mortality tables were introduced to show the expectancy of life, but no figures were introduced as to the net earnings or wages of decedent. It was shown, however, that he was a prosperous farmer, strong, vigorous, and the owner of a 40-acre farm where he had four or five head of cattle and raised a good crop. He had also at times rented and cultivated an additional 40 acres. The difficulties of estimating the probable earnings has been frequently commented upon by this court. It is even more difficult when it becomes necessary to admeasure the earnings of a farmer who, as a rule, keeps no set of books to show his earnings or profits. From the facts presented, it was proper for the jury to allow such damages as they deemed reasonable in accordance with their common knowledge and experience. *Welch* v. *Ware,* 32 Mich. 77; *Silsby* v. *Michigan Car Co.,* 95 Mich. 204; *Mabrey* v. *Cape Girardeau &*

Jackson Gravel Rd. Co., 92 Mo. App. 596 (69 S. W. 394).

Various objections were made to the charge of the court, and excerpts are quoted by appellant, but when the charge is taken as a whole it fully protected defendants' rights. The jury only awarded $2,500 damages, which indicates that but little was allowed for the future earnings of decedent.

Judgment for plaintiff is affirmed, with costs.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

PEOPLE *v.* BUTLER.

1. CRIMINAL LAW—VARIANCE IN TESTIMONY AS TO TIME OF EVENTS.
   Slight variance in testimony as to exact time of various events as testified to by witnesses in prosecution of defendants under charges of burglary and larceny *held*, unimportant, where events are numerous and it is evident that all of them occurred within a short time of one another.

2. LARCENY—CIRCUMSTANTIAL EVIDENCE.
   Conviction of grand larceny *held*, justified by the evidence, though circumstantial.

3. INDICTMENT AND INFORMATION—LARCENY.
   Conviction of grand larceny under count including charge of breaking and entering with intent to commit larceny and one of stealing property worth over $50 is affirmed since both offenses of larceny were provable by same evidence.

Appeal from St. Joseph; Jacobs (Theo T.), J. Submitted June 14, 1934. (Docket No. 112, Calendar No. 37,742.) Decided September 18, 1934.

Eugene Butler and George Tamer were convicted of grand larceny. Affirmed.

Harry C. Hanley and *Benton B. Wolfe,* for appellants.

Patrick H. O'Brien, Attorney General, and *George H. Arnold,* Prosecuting Attorney, for the people.

BUTZEL, J. Defendants were convicted of grand larceny. The information contained a count charging breaking and entering a certain store building at Three Rivers, Michigan, with intent to commit a felony and larceny therein, "and did steal, take and carry away" a large quantity of clothing of the value of more than $50, being the property of one Bernard Johnson. Another count charged respondents with receiving stolen property. The jury found them guilty of larceny of goods exceeding $50, to-wit, $1,200, in the manner and form charged in the information. Respondents claim that the verdict was contrary to the great weight of evidence, and further that the conviction was for an offense not charged in the information.

The evidence is entirely circumstantial. It was shown that the clothing store of one Bernard Johnson at Three Rivers, Michigan, was broken into between 2:10 a.m. and 3:00 a.m. on November 19, 1933. A local police officer heard an automobile leaving the rear of the Johnson store at about 2:50 a.m. Upon investigation he discovered the rear window of the store broken and near the window he found a cushion which he thought belonged to a Hudson car,

possibly a 1926 model from the design of the cloth. The superintendent of the hospital in the village of Constantine, Michigan, approximately eight miles from Three Rivers, Michigan, heard an automobile crash at about 3:00 a.m. It occurred about 100 feet from where she was standing. She called out to find if anyone was injured but received no reply. For 20 or 30 minutes thereafter she kept the automobile under observation. She saw two persons walking around the car but could not identify them. She examined the car, saw that the rear seat was missing and a coat hanger was on the ground under the right running board. She called the State police at 3:00 a.m. They found the rear seat and the right front seat were missing. They not only discovered a coat hanger at the side of the car, but about 30 feet south they found one overcoat and a small bunch of neckties. The coat was new and bore a store tag showing it came from Johnson's store. Other coat hangers that had been dropped created a trail to a barn where the stolen clothing was discovered. Respondents had stopped at a gasoline station in White Pigeon, Michigan, only three miles from Constantine, where one of them telephoned to Detroit stating that they had had an accident and asking that someone come out and meet them. Defendants secured the aid of a wrecker to take the car to White Pigeon and one of them left with the wrecker. The car wrecked was a Ford V–8 automobile. Defendant Tamer told one of the State police that the wrecked car was the one that he and Butler were driving when they met with an accident near Constantine, Michigan. While defendants' attorneys point out slight discrepancies, particularly as to the exact time when these various events took place, it is evident that they all oc-

curred within such a short time of one another that a slight variance in the exact time, as testified to by witnesses, is unimportant. Defendants offered no testimony whatever. The undisputed testimony of the witnesses for the plaintiff leads us to the conclusion that the evidence, though circumstantial, justified the verdict.

There is no merit to claim of defendants that they were convicted of a crime not charged in the information. The first count not only charged breaking and entering, but also stealing property of the value of more than $50. It was not even necessary to ask for a severance of the two charges in the first count, as might have been done under the provisions of 3 Comp. Laws 1929, § 17290, had a demand been made by the defendants. The count would not have been quashed. In both offenses the larceny charge was provable by the same evidence. *People* v. *Ninehouse,* 227 Mich. 480; *People* v. *Mears,* 251 Mich. 359. In Louisiana, where the two charges are triable before different tribunals, it has been held that one may not be convicted of the crime of larceny, when burglary and larceny are charged in the same information. By the great weight of authority, both burglary and larceny may be charged in the same count, and a conviction of larceny is proper thereunder. *Commonwealth* v. *Hope,* 22 Pick. (39 Mass.) 1; *Roberts* v. *State,* 55 Miss. 421; 2 Wharton's Criminal Law (12th Ed.), § 1040.

The judgment of conviction is affirmed.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

COLEMAN *v.* WHITEHEAD & KALES CO.

1. MASTER AND SERVANT—SUBSEQUENT EMPLOYMENT AT LIGHTER WORK—PARTIAL DISABILITY.

   Injured employee does not lose his right to compensation for partial, permanent disability incapacitating him from doing heavy work and he is unable to obtain lighter work which he is able and willing to do although for a period after the injury he received a higher wage than before it occurred.

2. SAME—IMPAIRMENT OF EARNING CAPACITY—MEASUREMENT.

   The proportionate impairment in earning capacity in the employment in which the employee was working at the time of the injury admeasures the compensation and determination of diminution is made by comparing amount he is capable of earning at the time he seeks further compensation to his earning capacity at time of injury (2 Comp. Laws 1929, § 8427, subd. [e]).

Appeal from Department of Labor and Industry. Submitted June 8, 1934. (Docket No. 88, Calendar No. 37,675.) Decided September 18, 1934.

Monroe Coleman presented his claim against Whitehead & Kales Company for accidental injuries sustained while in its employ. On petition for further compensation. From award to plaintiff, defendant appeals. Affirmed.

Gloster, Giller & Briggs, for plaintiff.

Frederick J. Ward, for defendant.

BUTZEL, J. On the 28th day of September, 1927, plaintiff, Monroe Coleman, suffered a compensable injury while employed by Whitehead & Kales Co., defendant, at $27 per week. As a result he has ankylosis of the ring finger of the right hand. The

accident was duly reported and on October 13, 1927, plaintiff and defendant entered into an agreement for compensation by which plaintiff was to receive $10 per week. On January 6, 1928, plaintiff signed a settlement receipt showing that he received $252 up to that date. The settlement receipt was never approved by the department. Subsequently plaintiff secured other employment at a larger daily wage than he had received while working for defendant. He retained his new position for approximately four years and then was laid off with others. In January, 1933, he petitioned for further compensation. It was shown that he suffered a permanent disability. He testified that his work for defendant was that of a laborer doing heavy work; that after he left defendant, he was able to obtain lighter work that he could easily do, notwithstanding his injury; that he was willing to continue to do such lighter work, were he able to obtain it, but that he could not obtain such work, and further, was unable to do the heavier work he had done for defendant even were he given such work. Compensation for partial disability at $6 per week was awarded until the further order of the department.

When a person doing heavy work receives an injury causing a partial, permanent disability which incapacitates him from continuing to do such heavy work and he is unable to obtain lighter work which he is able and willing to do, he does not lose his right to compensation notwithstanding the fact that for a period after the accident he received a higher wage than before it occurred. Cases cited by defendant involving awards for total disability to employees only partially disabled are not pertinent. The "proportionate impairment" in earning capacity in the employment in which the employee was working at

the time of the injury admeasures the compensation. 3 Comp. Laws 1929, § 8427, subd.(e). The correct rule is set forth in *Van Driel* v. *Stevens,* 200 Mich. 291, and *Norris* v. *Elmdale Elevator Co.,* 216 Mich. 548, although they are not compensation cases. The amount the employee was capable of earning at the time he seeks further compensation is to be compared with his earning capacity at the time he received his injury in order to determine the diminution in his earning power. Plaintiff's earning capacity was undoubtedly diminished by the injury, and the fact that now he cannot secure employment at lighter work does not prevent him from recovering compensation for partial disability.

The award of the department is affirmed, with costs to plaintiff.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

CORY *v.* COUNTY OF LIVINGSTON.

HIGHWAYS AND STREETS—STATE TRUNKLINE HIGHWAYS—LIABILITY FOR DEFECTS.

In action against county by motorist alleged to have been injured because of defect in State trunkline highway, judgment was properly entered for defendant on motion to dismiss, since statute provided that townships and counties should be relieved of all expenses and legal liability in connection with such highways (1 Comp. Laws 1929, §§ 4425, 4426).

Appeal from Livingston; Collins (Joseph H.), J. Submitted June 6, 1934. (Docket No. 41, Calendar No. 37,854.) Decided September 18, 1934.

Case by Charles Cory against County of Livingston, a municipal corporation, for personal injuries received due to alleged negligence in not keeping State trunkline highway in proper repair. Plaintiff appeals from order dismissing declaration. Affirmed.

Frank B. DeVine and *James E. O'Neill,* for plaintiff.

Jay P. Sweeney and *Don W. Van Winkle,* for defendant.

BUTZEL, J. While Charles Cory was driving an automobile in a southerly direction on highway No. 23 at about 9 p.m. on May 8, 1932, the car ran into a large hole or depression in the roadway so that it was deflected against and through a guard rail on the west side of the highway and Cory suffered a very serious injury. It is conceded that the highway in question was at the time of the occurrence of the accident a State trunkline highway. Plaintiff brought suit against the county of Livingston, claiming that it failed to perform its duty to keep the road in good repair in accordance with 1 Comp. Laws 1929, § 3996, and that because of such negligence it was liable to plaintiff under 1 Comp. Laws 1929, § 4223. The trial court granted a motion to dismiss upon the ground that the defendant had been relieved of liability by reason of Act No. 17, Pub. Acts 1925 (1 Comp. Laws 1929, §§ 4425, 4426), which superseded or repealed previous acts which made the county liable under sections 3996, 4223, *supra.* Plaintiff relies upon the case of *Longstreet* v. *County of Mecosta,* 228 Mich. 542, where the coun-

ty was held liable notwithstanding Act No. 19, Pub. Acts 1919, as amended (1 Comp. Laws 1929, § 4415 *et seq.*), which gave the State highway department certain supervisory rights, duties and obligations and further provided that a portion of the cost of maintenance of State trunkline highways should be paid by the State. In the cited case, attention is called to the fact that the mere placing of supervisory or administrative powers in the State board does not by any implication repeal or supersede the provisions of previous acts making the county liable. Shortly after the case of *Longstreet* v. *County of Mecosta, supra,* was decided, the legislature enacted Act No. 17, Pub. Acts 1925 (1 Comp. Laws 1929, §§ 4425, 4426), which provides that on and after January 1, 1926, the cost of constructing, improving and maintaining trunkline highways should be met entirely by the State and the townships and counties shall thereafter be relieved of all expenses and legal liability in connection therewith. Upon the enactment of the statute imposing upon the State the duty of maintaining trunkline highways, the county was relieved of such obligation. It was not the duty of the county to maintain the highway and it could not be held for the failure to make repairs. A somewhat similar question arose in *Martin* v. *J. A. Mercier Co.,* 255 Mich. 587 (78 A. L. R. 520), in which the city of Lincoln Park was relieved of liability for failure to repair a former city road which, previous to the time of the accident, had been taken over by the board of county road commissioners of Wayne county as a county road.

Judgment for defendant is affirmed, with costs.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

A. M. CAMPAU REALTY CO. *v.* CITY OF DETROIT.

1. APPEAL AND ERROR—MOTION TO DISMISS—PLEADINGS.
   On appeal from decree dismissing bill in suit to enjoin city from lowering street grade at railroad crossing without first compensating abutting owner therefor, facts stated in the judge's opinion which are not fully set forth in the pleadings and not complained of by appellant are assumed to be true.

2. EMINENT DOMAIN—LOWERING OF STREET GRADE—CONSEQUENTIAL DAMAGES.
   Consequential damages resulting from a subsequent lowering of a street grade at railroad crossing could not have been considered by jury in main condemnation proceedings.

3. CONSTITUTIONAL LAW—LOWERING OF STREET GRADE.
   The lowering of street grade at railroad crossing without first compensating abutting property owner for damages sustained thereby is not a taking of property without due process of law.

4. MUNICIPAL CORPORATIONS—GRADE SEPARATION—RAILROADS.
   Bill to enjoin city from lowering street grade at railroad crossing without first compensating abutting property owner for such damage as it would suffer *held*, properly dismissed since plaintiff has adequate remedy at law under the grade separation act where a city may proceed to lower the grade of a street and then begin appropriate proceedings to ascertain damages, if any (1 Comp. Laws 1929, § 4481 *et seq.*).

Appeal from Wayne; Moll (Lester S.), J. Submitted June 6, 1934. (Docket No. 26, Calendar No. 37,805.) Decided September 18, 1934.

Bill by A. M. Campau Realty Company, a Michigan corporation, against City of Detroit, a municipal corporation, to enjoin the lowering of a street grade. Bill dismissed. Plaintiff appeals. Affirmed.

McLeod, Fixel, Abbott & Fixel and *Harry N. Deyo*, for plaintiff.

Raymond J. Kelly, corporation counsel, and *James H. Lee,* assistant corporation counsel, for defendant.

BUTZEL, J. Proceedings to widen Woodward avenue in the city of Detroit to the width of 120 feet as authorized by the common council on July 12, 1927, were begun in the recorder's court the latter part of the following year. The property sought to be acquired for the project included the easterly 20 feet of the land and building thereon at the southwest corner of Woodward and Baltimore avenues, the property of A. M. Campau Realty Company, plaintiff. It is part of a parcel with a frontage of 120 feet on the west side of Woodward avenue and 215 feet on the south side of West Baltimore avenue. A one-story building, used as a retail store and having large display windows, stood on the Woodward avenue side of the property with an entrance at the corner of the building at the intersection of the two streets. The southerly side of the property adjoined a wide railroad right of way on which there were five sets of tracks which extended across Woodward avenue by means of a viaduct spanning the street. The jury found necessity and awarded plaintiff a substantial sum for the loss of the 20 feet appropriated and damages to the building. The verdict was affirmed on July 21, 1932. The original plan as presented in the recorder's court proceedings called for a very slight and almost imperceptible lowering of the grade along the Woodward avenue side of plaintiff's property, so that the level of the street in front of the property nearest to the railroad crossing would be but two and one-half feet lower than the show windows of the building. On January 5, 1934, plaintiff received payment of the amount of its award. On December 11, 1933, almost six

years after the court proceedings, showing the original plan, were instituted, and over 17 months after the verdict was confirmed, the city filed with the proper authorities a new plan providing for a much lower grade of the street at the crossing. As a result, the Woodward avenue frontage of plaintiff's building with the 20 feet removed would be much higher than the street level. It showed that Woodward avenue would taper down from Baltimore avenue to such an extent that at the most southerly point of plaintiff's property the show windows would be seven and one-half feet above the street level. Plaintiff, claiming that its building thus was ruined for retail purposes, filed a bill seeking an injunction to restrain the city from lowering the grade without first determining and paying such damages as plaintiff claimed it would suffer. Defendant in its motion to dismiss contends that plaintiff has an adequate remedy at law. The trial court so found and entered a decree dismissing the bill. Plaintiff has appealed from the order of dismissal.

Many of the facts stated in the judge's opinion are not fully set forth in the pleadings, but inasmuch as the trial judge was undoubtedly familiar with the Woodward avenue condemnation proceedings out of which so many questions have arisen for judicial determination, and appellant has not found any fault with such findings, we shall assume them to be true in discussing the question of law, which is the sole question on appeal.

Through the condemnation proceedings, which are *res judicata,* the city acquired and paid for the easterly 20 feet of plaintiff's land and the buildings thereon. Plaintiff does not claim that when the proceedings were instituted or while they were pending, the city intended to lower the grade to a greater

depth than was shown by the plan presented at that time. The good faith of the city is not impugned. The consequential damages resulting from a subsequent lowering of the grade could not have been considered in the main proceeding. Plaintiff calls our attention to a number of cases where the question of damages for lowering of the grade was considered in condemnation cases or not long after the proceedings were concluded. We have repeatedly held that the lowering of the street grades is not the taking of abutting property without due process of law. *City of Detroit* v. *Railway Co.*, 163 Mich. 229; *Mead* v. *Railroad Co.*, 174 Mich. 521. The city may proceed to lower the grades and then begin appropriate proceedings under the grade separation act. 1 Comp. Laws 1929, § 4481 *et seq.*, as amended. The appellant, however, claims that the 20 feet had not yet become part of the street and that, therefore, the grade crossing act is not applicable. The 20 feet had been acquired and paid for for street purposes by the city. The razing of the building had been begun and it had been torn down to the level of the street. If the city had undertaken to separate the grade in front of plaintiff's property prior to the condemnation, plaintiff would have been relegated to the damages in a grade crossing proceeding. The grade was being lowered along the street at the crossing. This included the 20 feet acquired by the city.

Plaintiff has an adequate remedy at law and the trial judge was correct in entering a decree dismissing the bill of complaint. The decree is affirmed, with costs to defendant.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

HOOKS *v.* WESTERN & SOUTHERN LIFE INS. CO.

MASTER AND SERVANT—MOTOR VEHICLES—NEGLIGENCE OF EMPLOYEE ON WAY TO LUNCH.

Employer, an insurance company, *held,* not liable for injuries caused by negligent use of automobile owned and operated by employee who was on his way home to lunch from duties as house to house canvasser at time of accident on day during which employees doing such work were instructed not to use cars and at time of day during which such work was forbidden.

Appeal from Wayne; Chenot (James E.), J. Submitted June 13, 1934. (Docket No. 39, Calendar No. 37,853.) Decided September 18, 1934.

Separate actions of case by Dorothy Hooks and William Hooks against Western & Southern Life Insurance Company, a foreign corporation, and Benedict Usovich for personal injuries received in an intersection collision allegedly due to defendants' negligence. Cases consolidated for trial and appeal. Judgment for plaintiffs against defendant Usovich. Plaintiffs appeal. Affirmed.

Harry C. Markle, for plaintiffs.

E. Dean Alexander and *Harry L. Wickey,* for defendant.

BUTZEL, J. Plaintiffs Dorothy Hooks and William Hooks were injured by an automobile driven by Benedict Usovich, an employee of the Western & Southern Life Insurance Company. Separate suits, brought by each of them against Usovich and the insurance company, were consolidated and heard by

the trial judge without a jury. Judgments were rendered against Usovich but the insurance company was absolved from liability. The main question, presented on appeal, is whether judgment should also have been rendered against defendant insurance company, herein referred to as the appellee. Liability hinges on whether Usovich at the time of the accident was acting within the scope of his employment, whether he was "engaged in the service of his master, or while about his master's business." *Riley* v. *Roach,* 168 Mich. 294, 307 (37 L. R. A. [N. S.] 834).

Usovich's duties, for the performance of which he received a stated salary, and also a commission under certain conditions, consisted of canvassing, making collections, and such other work as might be specially detailed to him, all under the instructions of appellee. Although his contract of employment did not require the use of a car, Usovich used his own automobile in his work, paying all the expenses incidental to its operation. Appellee was aware of this, and did not object. However, employees were instructed not to use cars in their work on Thursdays and Fridays, days on which they were directed to canvass from house to house on designated streets. In work of that nature an automobile might obviously become a hindrance rather than an aid. In order not to disturb prospects while at lunch, agents were also instructed not to canvass from 11:30 a. m. to 1:00 p. m. During this period the employment was suspended, and agents could go wherever they pleased.

The accident occurred on Thursday, August 4, 1932, a day appointed for canvassing. On that day Usovich drove in his car from his home in Wyandotte, Michigan, a short distance to the company's

office at River Rouge. He then drove back to where he had been instructed to canvass portions of two streets. He parked his car at the end of one of these streets, and canvassed from house to house until about noon, when he returned to the car in order to go home to lunch, as was his usual custom. Shortly after he started the car, and within half a block from where it had been parked during the morning, Usovich struck the plaintiffs.

We shall not discuss cases, relied upon by appellants, where an employer was held liable under the statute imposing liability upon the owner of a car driven with his consent; where employers have been held liable under the doctrine of *respondeat superior* for accidents caused by an employee; nor where the accident occurred on premises owned by the employer; nor where the employee was driving his own car, or his master's car, on a journey to attend to his master's business; nor where there was a slight deviation from the route with the master's consent in order to shorten time required by the employee for lunch, and thus lengthen the time of service to the employer. Neither shall we discuss compensation cases in which the courts, in order to give a liberal contruction to the workmen's compensation act, have at times gone far in determining what is included in the term "scope of employment."

However, a correct statement of the law applicable to the case before us is found in *Lipinski* v. *Sutton Sales Co.*, 220 Mich. 647, a compensation case. In finding that a workman was not acting within the scope of his employment while riding back from lunch in a fellow workman's car, the court said:

"An examination of the cases where the accident was upon the street and liability was sustained will disclose that in each case the employee was *at the*

time of the accident in the discharge of his duties to the employer and the accident arose out of the discharge of such duties. Not so the instant case. When the accident occurred here the decedent was in discharge of no duty to the employer and the accident did not arise out of such employment."

Except under certain conditions which do not exist in the present case, the courts as a rule have repeatedly held that when an employee, going to or returning from his lunch or dinner, injures another through the negligent use of an automobile, the employer is not liable. *Reilly* v. *Connable,* 214 N. Y. 586 (108 N. E. 853, L. R. A. 1916 A, 954, Ann. Cas. 1916 A, 656); *Bloom* v. *Krueger,* 182 Wis. 29 (195 N. W. 851); *Calhoon* v. *D. C. & E. Mining Co.,* 202 Mo. App. 564 (209 S. W. 318); *Ebers* v. *Whitmore,* 122 Neb. 653 (241 N. W. 126); *Green* v. *Western Union Telegraph Co.* (Mo. App.), 58 S. W. (2d) 772; *Kish* v. *California State Automobile Ass'n,* 190 Cal. 246 (212 Pac. 27).

Even if there were any merit to the other grounds of error set forth by appellant, they would not affect the result. The trial court correctly found defendant insurance company not liable. The judgment is affirmed, with costs to appellee.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

ORME *v.* FARMER.

1. MOTOR VEHICLES—EVIDENCE—PROXIMATE CAUSE—NEGLIGENCE.
In action by pedestrian injured while crossing wide city street accompanied by two others at 1:30 a. m. when struck by defendants' taxicab, evidence *held,* insufficient to show plaintiff's alleged failure to see defendants' cab was proximate cause of the accident, where driver had wide street almost to himself and could have seen plaintiff and companions and avoided accident by using reasonable care.

2. APPEAL AND ERROR—FINDING OF COURT—GREAT WEIGHT OF EVIDENCE.
Finding of court in action for personal injuries by pedestrian against owner and driver of taxicab, tried without a jury, that defendants were guilty of negligence and that plaintiff was free from contributory negligence *held,* not against the great weight of the evidence.

Appeal from Genesee; Parker (James S.), J. Submitted June 5, 1934. (Docket No. 16, Calendar No. 37,791.) Decided September 18, 1934.

Case by Alex Orme against James Farmer, individually and doing business as LaSalle 25-cent Cab Company, and Everett LaDuke for personal injuries received while crossing street when struck by defendants' automobile. Judgment for plaintiff. Defendants appeal. Affirmed.

Carton & Gault (*Matthew Davison, Jr.,* of counsel), for plaintiff.

Stewart A. Ricard, for defendants.

BUTZEL, J. On October 11, 1931, at about 1:30 a. m., Alex Orme, plaintiff, was proceeding across

North Saginaw street in the city of Flint, Michigan. He was walking between two companions, with his arms interlocked with theirs as they left the curb near the intersection of Alma street. A slight mist was falling, and the pavement was wet but there was sufficient visibility from the street lights so that a car or person could be seen almost a block away. Plaintiff claims that although he and his companions crossed at a diagonal, he looked in each direction before he stepped from the curb and that he looked again in like manner when he reached the double car line in the center of the street, but that neither time did he see defendant's car approaching; that shortly after he passed the center of the street he was struck by a cab, owned by James Farmer, and driven by Everett LaDuke, both of whom are made defendants herein. There was testimony that plaintiff and his two companions narrowly escaped being run down by another car, just as they left the curb, that they had been drinking about four hours prior to the accident, that LaDuke was only driving at the rate of 20 miles per hour, that his car was in good condition. He claimed that he was blinded by the lights of another car and did not see plaintiff until his car struck him. On the other hand, it was shown that the accident occurred at a time when the street was almost deserted, that one of plaintiff's companions saw the approaching car, as they were proceeding in a straight direction along a diagonal line, and that if LaDuke had proceeded in a straight line without deflecting his car, he would not have struck plaintiff. LaDuke admitted that he was not looking straight ahead just prior to the accident but had turned his head towards the occupants of the rear seat of the car while carrying on a conversation with them; also that he had swerved the car to the side

just before he struck plaintiff. The testimony does not show that plaintiff's alleged failure to see defendant's car was the proximate cause of the accident. It does show that LaDuke had a wide road almost to himself, that he could have seen plaintiff and his companions and easily avoided the accident by exercising reasonable care. *Stobbelaar* v. *Berg,* 247 Mich. 121; *Watrous* v. *Conor,* 266 Mich. 397. The testimony is somewhat conflicting but the finding of the trial judge that the defendants were guilty of negligence and plaintiff free of contributory negligence is not against the great weight of the testimony. He rendered judgment in favor of plaintiff. It is affirmed, with costs to plaintiff.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

SULLIVAN *v.* MICHIGAN STATE BOARD OF DENTISTRY.

1. CONSTITUTIONAL LAW—POLICE POWER—LEGISLATIVE POWER.
   A board or commission to which police power to regulate a profession is delegated has no legislative power to adopt rules and regulations as to practices thereof which the legislature has neither expressly nor inferentially outlawed.

2. SAME—STATUTES—PRESUMPTIONS.
   Statute will be presumed constitutional where it may be construed in either of two ways, one of which is consistent with constitutionality.

3. INJUNCTION—STATUTE REGULATING PRACTICE OF DENTISTRY.

Bill to enjoin enforcement of act regulating practice of dentistry *held,* properly dismissed as wholly anticipatory where no showing is made that any rules and regulations have been promulgated and it is not to be presumed that any will be adopted which are unconstitutional, since court will not pass on moot questions or abstract propositions (Act No. 235, Pub. Acts 1933).

Appeal from Wayne; Murphy (Thomas J.), J. Submitted June 12, 1934. (Docket No. 123, Calendar No. 37,909.) Decided September 18, 1934.

Bill by Gordon B. Sullivan and others against Michigan State Board of Dentistry and members thereof to enjoin the enforcement of Act No. 235, Pub. Acts 1933. Michigan State Dental Society, a Michigan corporation, and officers thereof intervened as parties defendant. Bill dismissed. Plaintiffs appeal. Affirmed.

Edward N. Barnard, for plaintiffs.

Patrick H. O'Brien, Attorney General, and *Francis K. Young,* Assistant Attorney General, for defendants.

Frank Darin and *Wilbur M. Brucker,* for intervening defendants.

BUTZEL, J. Gordon B. Sullivan and others, duly licensed and practicing dentists, filed a bill to restrain the Michigan State board of dentistry from enforcing Act No. 235, Pub. Acts 1933. The Michigan State Dental Society has intervened as a defendant.

Section 2 of the act provides:

"Said board shall adopt rules and regulations for its own organization and for the practice of den-

tistry in this State and for carrying out the provisions of this act, and may amend, modify and repeal said rules and regulations from time to time. The said rules and regulations and any amendments thereto shall become effective upon the legality of same being established by the attorney general."

Plaintiffs claim that the quoted provision empowering the board to adopt rules and regulations for the practice of dentistry is an unlawful and unconstitutional delegation of legislative powers, vitiates the entire act and destroys its constitutionality. They fear that the board, instead of merely adopting rules and regulations setting forth the details for carrying out the expressed provisions of the act and forbidding practices unquestionably within the purview of the act, may assume legislative functions and attempt to proscribe practices that the legislature has neither expressly nor inferentially outlawed. A board or commission has no such legislative power. See *G. F. Redmond & Co.* v. *Michigan Securities Commission,* 222 Mich. 1; *In re Van Hyning,* 257 Mich. 146.

No rules or regulations have thus far been promulgated by the board, nor is it shown that any have been submitted to the attorney general to establish their legality. It is not to be presumed that the board will adopt any rules and regulations for the practice of dentistry that do not meet the test of constitutionality. It is not our duty to pass on moot questions or abstract propositions. As no unconstitutional rule has been pointed out, the presumption of the constitutionality of the act remains. Even if the law could be construed in two ways, one consistent with the constitutionality, and the other inconsistent therewith, the former will be considered as the one presumptively intended by the legisla-

ture. *Motz* v. *City of Detroit*, 18 Mich. 495; *Grand Rapids Booming Co.* v. *Jarvis*, 30 Mich. 308; *Attorney General* v. *Railway Co.*, 210 Mich. 227. Plaintiffs' action is wholly anticipatory. They have not shown any right to equitable relief at the present time. See *Cruickshank* v. *Bidwell*, 176 U. S. 73 (20 Sup. Ct. 280); *McCabe* v. *Railway Co.*, 235 U. S. 151 (35 Sup. Ct. 69).

The decree dismissing the bill is affirmed, with costs to defendants.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

ARNOLD *v.* MASONIC COUNTRY CLUB.

1. CONTRACTS—EMPLOYMENT—ANNUAL—CALENDAR YEAR.

   In action for salary under contract of employment as superintendent of country club, contract *held*, an annual contract for the calendar year as against contention that year began April 1st, the anniversary of commencement of employment.

2. ACCORD AND SATISFACTION—EVIDENCE—DISCHARGE FROM EMPLOYMENT.

   Evidence *held*, insufficient to establish accord and satisfaction between country club and its superintendent upon latter's discharge from employment.

3. ACTION — SPLITTING CAUSE OF ACTION — WRONGFUL DISCHARGE FROM EMPLOYMENT.

Final judgment for plaintiff in action for salary due for two months' period immediately following unjustified discharge from annual contract of employment operated as bar to subsequent action for balance of salary for year since plaintiff has but one cause of action for entire amount of his damages due to breach of contract of employment by wrongful discharge.

Appeal from Kent; Verdier (Leonard D.), J. Submitted June 5, 1934. (Docket No. 3, Calendar No. 37,476.) Decided September 18, 1934.

Assumpsit by Albert E. Arnold against Masonic Country Club of Western Michigan, a Michigan corporation, on an alleged contract of employment. Judgment for plaintiff. Defendant appeals. Plaintiff cross-appeals. Reversed, without a new trial.

Dilley & Dilley, for plaintiff.

Rodgers & Dunn, for defendant.

BUSHNELL, J. The questions raised by the appeals are:

1. Did plaintiff have an annual contract of employment?
2. Did the yearly period begin on January 1st or April 1st?
3. Do the facts show accord and satisfaction?
4. Did plaintiff split his cause of action?

The employment of plaintiff to begin on April 1, 1922, was authorized by a resolution of defendant's board of directors, which fixed the compensation as $2,000 a year and the use of a house. Plaintiff accepted and continued in defendant's service for about nine years during which time the compensa-

tion was paid each week. The corporate records show a resolution on February 10, 1926, reading:

"Motion was made by Parmelee to pay superintendent Arnold $50 per week or $2,600 per year from January 1, 1926, and that he be privileged to use the superintendent's house as heretofore."

Another dated February 23, 1927, recites:

"Brother Schneider moved that the contract with superintendent Arnold for the balance of the year 1927 be renewed, namely $50 a week or $2,600 a year,"

while the last formal resolution fixed the salary for 1929 as the same for the past year. Plaintiff's testimony shows he was present at the 1927 meeting and acquiesced in the terms of the various resolutions. No citation of authorities seems necessary in order to determine that there was an annual contract of employment for the calendar year.

June 11, 1931, defendant's president wrote plaintiff that because it was necessary to reduce operating expenses his services would be terminated "on or before 30 days from June 15, 1931," and on June 17th plaintiff received two checks, one for $53.70 marked salary for two weeks ending June 13th, and the other for $247.90 covering June 14th and 15th and the 30 days following. Plaintiff replied that he claimed the right to occupy the house and his full salary to April 1, 1932, but that he would hold the checks until the 20th and, if he heard nothing further, he would assume that his understanding of the matter as set forth in his letter was identical with that of the defendant. To this he received a reply on the 19th, which said that the time fixed was too short in which to investigate the records in order to determine the facts. July 23d, plaintiff wrote that

he was cashing the checks without waiving his claim and having heard nothing assumed such action was satisfactory. Further correspondence between the parties asserting and denying justification of the termination of the employment and evidencing attempts at settlement add little to the facts, none of which, however, constitute accord and satisfaction.

Plaintiff commenced suit in the justice's court on September 18, 1931, the bill of particulars reading:

"To salary due from July 15, 1931, to September 15, 1931, under contract of hire for the year ending April 1, 1932—two months at $2,800 per year—$466.66 (the time after September 15, 1931, is not included in this suit but is expressly reserved)."

Defendant pleaded the general issue and that no contract existed after June 15, 1931, no services had been subsequently rendered, payment, and justification of the discharge. Plaintiff's judgment was affirmed on appeal to the circuit.

This action for the breach of his contract was brought by plaintiff and damages were claimed for unpaid salary from September 15th to April 1st. Defendant moved to dismiss on the grounds that plaintiff's action was barred by the previous judgment as both suits arose out of the same breach of the same contract, which motion was denied and plaintiff had judgment for unpaid salary from September 15th to December 31st with certain deductions.

The opinion of the trial court quotes 1 R. C. L. p. 354 and the rule forbidding the splitting of a cause of action arising out of the breach of a contract of employment, and says:

"Michigan has followed this rule since the case of *Webb* v. *Depew,* 152 Mich. 698 (16 L. R. A. [N. S.]

813, 125 Am. St. Rep. 431), at least to the extent of holding that in an action for breach of contract of employment by wrongful discharge, plaintiff may recover in one action all his damages for an entire nonfulfillment of the contract. See, also, *Kyselka* v. *Northern Assurance Co. of Michigan,* 208 Mich. 47; *Gallino* v. *Boland,* 221 Mich. 502.

"I am unable, however, to find any Michigan case which goes to the extent of holding that a plaintiff in such a case must recover in one action all his damages for an entire nonfulfillment of contract or be barred from any further action upon the same contract where he has had recovery for a part of the loss of wages claimed; though I realize that there is ample authority for that proposition."

Plaintiff's contract had been breached at the time of the justice court suit. If he could obtain a judgment for two months' salary and later for the six and one-half months' period, he might, if he so desired, maintain some 30 odd separate actions for each successive week's wages. Assuming that the same defense of justifiable discharge were interposed to each action, one suit might result in a verdict for plaintiff and another for defendant and so on through the various actions. If successive leaves to appeal were granted in each case, there would be no end to the litigation of the same subject matter.

As stated by Mr. Justice CAMPBELL:

"The principle which prevents the splitting up of causes of action, and forbids double vexation for the same thing, is a rule of justice, and not to be classed among technicalities. It was intended to suppress serious grievances." *Dutton* v. *Shaw,* 35 Mich. 431.

"It is a well-settled rule that an entire claim or demand arising out of a single transaction, whether in the nature of a contract or tort, cannot be divided

into separate and distinct claims, and the same form of action brought for each, or two suits maintained, without defendant's consent." *Continental Ins. Co.* v. *H. M. Loud & Sons Lumber Co.,* 93 Mich. 139 (32 Am. St. Rep. 494).

"The plaintiff's cause of action accrued when he was wrongfully discharged. His suit is not for wages, but for damages for the breach of his contract by the defendant. For this breach he can have but one action." *Webb* v. *Depew, supra,* quoting from *Cutter* v. *Gillette,* 163 Mass. 95 (39 N. E. 1010).

Defendant did not consent or waive its rights and plaintiff's statement in his bill of particulars did not abrogate the rule.

The judgment is reversed but without a new trial. Costs to appellant.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred.

COOPER *v.* COOPER.

APPEAL AND ERROR—ASSUMPSIT—FINDING OF FACT—RECORD.

Judgment for defendant in action of assumpsit, tried without jury, is affirmed on appeal where only a question of fact as to whether parties were copartners or mere debtor and creditor is presented and record sustains finding of court thereon.

Appeal from Wayne; Van Zile (Donald), J., presiding. Submitted June 5, 1934. (Docket No. 17, Calendar No. 37,720.) Decided September 18, 1934. Rehearing denied April 11, 1935.

Assumpsit by Abe Cooper against Sam Cooper, William Goldman and Jinne Ferdson. Judgment for defendant Cooper. Plaintiff appeals. Affirmed.

Ralph R. Goldsmith (*Louis Rosenzweig,* of counsel), for plaintiff.

BUSHNELL, J. Plaintiff, a man 81 years of age with but a limited education, claims he loaned defendant, his son, money in order to enable him to purchase his partner's interest in a store.

The son denies borrowing the money and claims his father became a silent partner in the business, which was afterward sold, the creditors paid and the proceeds divided. The two other defendants were the purchasers and makers of the notes offered in proof of the debt, but were never served with process.

The case was tried without a jury. The record contains two opinions because of the denying of the motion for a new trial after the substitution of attorneys for both parties. Judgment was entered for defendant. Plaintiff appeals to this court. Appellant's assignments of error are not justified by the record, which record presents only a question of fact. It supports the finding of the trial court that the parties were co-partners.

The judgment is affirmed, with costs to defendant.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred.

ARMSTRONG *v.* GRIMM.

1. COURT COMMISSIONERS—JURISDICTION—SCOPE.
   Jurisdiction of circuit court commissioner in summary proceeding or circuit court on appeal therefrom is strictly statutory and does not include right to try title to land, determine whether an instrument is a land contract or, in legal effect, a mortgage, or equitable jurisdiction (3 Comp. Laws 1929, § 14975 *et seq.*).

2. FORCIBLE ENTRY AND DETAINER—EQUITABLE DEFENSES.
   Equitable defenses are not permissible in summary proceedings before circuit court commissioner (3 Comp. Laws 1929, § 14979).

3. SAME—JUDGMENT—STATEMENT OF AMOUNT DUE.
   Omission to state amount due in judgment for plaintiff in summary proceedings does not void the judgment since such statement is not a part thereof (3 Comp. Laws 1929, § 14979).

4. APPEAL AND ERROR—SUMMARY PROCEEDINGS—AMENDMENT OF JUDGMENT—REDEMPTION.
   On appeal from judgment for plaintiff in summary proceedings which omitted to state amount due under contract sued on as provided by statute, judgment is amended pursuant to Court Rule No. 72 (1933), to include amount of payments shown to be past due and redemption permitted by payment of said sum together with interest at contract rate from date of judgment in circuit court (3 Comp. Laws 1929, § 14979).

Appeal from Wayne; Toms (Robert M.), J. Submitted June 6, 1934. (Docket No. 42, Calendar No. 37,779.) Decided September 18, 1934.

Summary proceedings by Robert C. Armstrong and Frances A. Armstrong against Christopher Grimm to recover possession of land, alleged to have been sold under a land contract. Judgment for plaintiffs. Defendant appeals. Modified and affirmed.

Daniel M. Lynch, for plaintiffs.

Maurice D. Smilay, for defendant.

BUSHNELL, J. This is a summary proceeding under the statute before a circuit court commissioner and but two questions are raised by the appeal: (1) Is the defense that a land contract is in legal effect a mortgage available in a summary proceeding before a circuit court commissioner or before a circuit court on appeal from the commissioner? (2) May a judgment be entered for possession without including the amount due in such judgment?

We have held that a circuit court commissioner, whose jurisdiction in summary proceedings for the possession of real estate is strictly statutory, has no right to try title to land or determine whether or not a particular instrument is a land contract or, in legal effect, a mortgage. *Mortgage & Contract Co.* v. *Kupalian,* 249 Mich. 577. Equitable defenses are not permissible in summary proceedings. *People's Mortgage Corp.* v. *Wilton,* 234 Mich. 252. Circuit court commissioners have no equitable jurisdiction. *German Bundesheim Society* v. *Schmidt,* 242 Mich. 139. We are not aware of any authority for a greater jurisdiction on the part of the circuit court on appeal.

The amount due is not a part of the judgment and its omission does not void the judgment. *McSloy* v. *Ryan,* 27 Mich. 110; *Bauer* v. *Wasson,* 66 Mich. 256; *Lemm* v. *Spencer,* 242 Mich. 366. Section 14979, 3 Comp. Laws 1929, provides, however, that:

"The court, or the jury, if the case is tried by a jury, shall, in addition, ascertain and determine the amount due the said plaintiff, and such amount shall be stated in said judgment."

The amount due should have been stated. Court Rule No. 72 (1933), reads:

"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 testimony of plaintiffs shows nine monthly contract payments of $115 each past due, totaling $1,035. The notice of intention to forfeit the land contract gives the details of defaults totaling $2,501.21. The record does not aid us in reconciling the two items.

The judgment will be modified to include the amount of $1,035 due. Appellant may have the statutory period of 90 days from the date of this opinion in which to pay this sum, with interest at 7 per cent. in addition, as agreed in the contract, which interest shall be computed from the date of the circuit court judgment, October 18, 1933.

The judgment is affirmed as modified, with costs to appellees.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred.

WELCH *v.* CITY OF LINCOLN PARK.

1. MUNICIPAL CORPORATIONS—HIGHWAY CONTINUED AS BOULEVARD INTO ADJOINING PLAT AND MUNICIPALITY.

   Thoroughfare dedicated as boulevard in one municipality and held to be such by former decision of this court and continued in plat of adjoining subdivision in adjoining municipality and accepted under like circumstances and charter provisions in each *held,* boulevard in latter municipality, relieving abutting lot owners of assessments for paving.

2. JUDGMENT—RES JUDICATA—PARTIES.

   Previous case between other lot owners than plaintiffs herein but against same defendant for relief from same assessments for paving *held,* not *res judicata* for lack of identity of parties plaintiff in the two suits.

Appeal from Wayne; Houghton (Samuel G.), J., presiding. Submitted July 2, 1934. (Docket No. 28, Calendar No. 37,716.) Decided September 18, 1934.

Bill by Thomas H. Welch and others against City of Lincoln Park to set aside a special assessment for paving. Decree for plaintiffs. Defendant appeals. Affirmed.

Arthur J. Abbott and *Joseph L. Hutting,* for plaintiffs.

Frank G. Mixter, for defendant.

BUSHNELL, J. Defendant appeals from a decree holding the thoroughfare known as Emmons boulevard in the city of Lincoln Park in law and in fact a boulevard, setting aside the special assessment roll

of its paving, ordering a refund of the assessments paid by abutting property owners, with interest at five per cent., and permanently enjoining the collection of the unpaid balances on such assessments.

The easterly boundary of the city of Lincoln Park is the south branch of the Ecorse river, which is also the westerly boundary of the city of Wyandotte. The 80-foot thoroughfare, with parkways 22 feet wide on both sides of a 36-foot pavement, crosses the river over a bridge and continues through the city of Wyandotte to Jefferson avenue on the east. Fort street on the west and Jefferson avenue on the east are main arterial highways, Emmons boulevard connecting the two without any distinguishing characteristics or features in either city except the absence of ornamental street lights in Lincoln Park, which had been removed by the city in 1931 just prior to the filing of this bill of complaint. The contiguous property in Lincoln Park, known as Emmons Orchard Subdivision No. 1, was platted by its proprietors and accepted in its present condition by the township board of Ecorse on March 17, 1920, while that lying in Wyandotte, known as Emmons Orchard Subdivision, was platted by its proprietors September 25, 1916, and accepted by the then village of Ford and the township of Ecorse.

The trial court found that:

"Emmons boulevard, which was a continuous street from Jefferson street to Fort street, was platted and dedicated by the same proprietors, prepared in the same manner in both said present municipal corporations, * * * and since it appears also that the provisions for boulevards and the method of maintaining them is by general taxation rather than a special assessment, and other provisions incident thereto in the two city charters are

practically identical, there is but one answer to this proposition, and that is that Emmons boulevard in the city of Lincoln Park is a boulevard, and that the city officers had no authority in improving it to raise money by special assessment on the abutting property for that purpose, since it is mandatory under the provisions of the charter that such money be raised by general taxation."

The trial judge, after a personal inspection of the thoroughfare in both cities, considered our opinion in *Coburn* v. *City of Wyandotte,* 245 Mich. 314, controlling. There Mr. Justice McDONALD, speaking for the court, held Emmons boulevard in the city of Wyandotte to be in law and in fact a boulevard. No other conclusion seems possible and the case is controlled by that decision.

Defendant raises the further question of *res judicata* and says in its brief:

"Defendant wishes to call to the attention of this court the case of *Erlich* v. *City of Lincoln Park,* No. 177502, Wayne county circuit court, in chancery. This was a suit by the plaintiff in behalf of himself and other taxpayers similarly situated, for the same relief as here sought by the plaintiffs. The case was heard on the merits by Honorable James S. Parker and decision and decree rendered holding that Emmons boulevard in the city of Lincoln Park was not a boulevard in fact."

The record does not contain the pleadings and the unappealed decree in that cause, but merely the colloquy of court and counsel. None of the plaintiffs here were parties to that action and the opinion and decree before us are silent as to the matter. While this appeal is a trial *de novo,* we are not inclined to require additional proofs because of the lack of identity of parties plaintiff in the two actions. See

City of Detroit v. *Railway Co.*, 134 Mich. 11 (104 Am. St. Rep. 600); *Fowler* v. *Blount*, 191 Mich. 575, and *Kavanaugh* v. *Baird*, 241 Mich. 240.

The decree is affirmed, with costs to plaintiffs.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred.

HOSKIN-MORAINVILLE PAPER CO. *v.* BATES VALVE BAG CORP.

1. NEW TRIAL—DISCRETION OF COURT.

A circuit judge has a wide discretion in either granting or refusing a new trial either upon his own motion or that of the parties, somewhat greater latitude being allowed in granting same since it is not a final settlement of the rights of the parties.

2. SAME—ABUSE OF DISCRETION.

An abuse of discretion by the circuit judge in granting a new trial will not be interfered with unless so plain that an unprejudiced person can say there was no excuse for the ruling so made.

3. SAME—MISCONDUCT OF JURORS.

Misconceived celebration of defendant's victory in which seven or eight of the jurors participated for about an hour immediately after rendition of verdict *held*, insufficient cause to grant a new trial where serving of liquor and other acts of defendant's employee and of jurors were not such as to render it reasonably doubtful whether verdict had been legitimately procured and new trial was not otherwise allowable.

Appeal from Menominee; Bell (Frank A.), J. Submitted June 12, 1934. (Calendar No. 37,815.) Decided September 18, 1934.

Action by Hoskin-Morainville Paper Company, a Michigan corporation, against Bates Valve Bag Corporation, a New Jersey corporation, on contract. Verdict and judgment for plaintiff. Defendant reviews order granting new trial by appeal in the nature of mandamus. Reversed.

George Barstow (*A. H. Ryall,* of counsel), for plaintiff.

John J. O'Hara (*Miller & Kuchenberg,* of counsel), for defendant.

BUSHNELL, J. Defendant's appeal in the nature of mandamus deals with events which followed the verdict of the jury in the principal case. Plaintiff is a Michigan corporation, domiciled at Menominee, and defendant is a New Jersey corporation, whose principal offices are in New York City.

Three questions were submitted to the jury: (1) Nonpayment of the purchase price of 70 tons of paper; (2) loss of profit on an alleged contract for the purchase of 20,000 tons of paper for the year 1929; and (3) loss of profit on a similar contract for 10,000 tons of paper for the year 1930. The trial began December 4, 1933, and ended December 12th, when, after four hours of deliberation, the jury at 8:30 p. m. returned a verdict in favor of plaintiff for $7,354 on item (1), and no cause of action as to items (2) and (3); the jurymen were then discharged and resumed their status as private citizens. The case was of considerable interest and a number of defendant's employees and officers came to Menominee to attend the hearing. Immediately

after the verdict, counsel and one of defendant's officers met in the chambers of the circuit judge to discuss the question of custodian's fees arising out of the attachment issued in the cause. Plaintiff's counsel, defendant's officer and the trial judge then walked to the hotel where they met defendant's counsel about 9:30 p. m., he having preceded them by automobile, and who immediately informed them that a number of the jurors were in the hotel room of one Douglas, the western sales manager of the defendant, and that liquor was being served. Several more jurors arrived later and visited the same room.

The next morning the trial judge conferred with counsel in his chambers and the inquiry disclosed that seven or eight of the jurors were entertained, the chief executive officer of defendant company stating that he had visited the room and expressed his disapproval of the entire affair. The party, evidently a misconceived celebration of defendant's victory, lasted about one hour, after which time defendant's officers and employees left the hotel to board a train for their respective homes.

Plaintiff moved the court to set aside the verdict and judgment entered, and grant a new trial, assigning various errors in the court's charge to the jury and alleging misconduct of the jury, after its verdict, stating that the contact with the jury was made so quickly and accepted so promptly that the relationship between defendant and members of the jury could only be accounted for on the ground of direct and intimate contact during the trial of the cause. Plaintiff's counsel also executed an affidavit containing all the available facts, which was neither contradicted nor disputed by defendant. We infer that the principal offenders' immediate departure from the jurisdiction of the court explains the ab-

sence of any action for contempt of court, and we presume that the thoughtless jurymen will not be considered qualified for jury service for some considerable time, if at all.

The learned judge, in a well-considered and informative opinion, in referring to plaintiff's allegations of error, stated:

"So far as that part of the action for a new trial is concerned there is nothing in the motion or in the argument of counsel that tends to change my mind as to the correctness of the charge, and I shall hold that the jury was properly charged until the Supreme Court holds otherwise."

And he added:

"I think I am well within the facts when I say that the verdict was supported by the overwhelming weight of the evidence, and I am not at all sure now, although I offer no opinion on it, but that it would have been the duty of the court,—but that it was the duty of the court to direct a verdict for the defendant on both the questions upon which the jury found for the defendant."

The remainder of the opinion is also important and is, therefore, quoted:

"I am satisfied that this entertainment was innocent. I am satisfied that it did not affect the result, and I am satisfied from what I have been advised, or what I was advised on the following morning that the man who furnished the entertainment was advised by counsel that he was doing no wrong in so doing, but, he was ill-advised. It was misconduct. It was, I think, without any doubt a reproach to and a reflection on our jury system and upon our administration of justice which tended to bring the courts and juries into contempt and disgrace.

"I agree with counsel that under the holdings of the court, the Supreme Court of this State, and of

the general holdings laid down by our text writers that, much as I regret it, it is the duty of this court to grant a new trial, and I am going to do it on this ground alone and no other. I do not know that I need to say any more. I am putting counsel in a position to mandamus this court from the Supreme Court if they do not agree with me.

"I think under the rulings of our court that it would be error for me to refuse to grant a new trial on this ground. As I say, I regret it.

"The trial cost the litigants of Menominee a lot of money and it cost the litigants a lot of money. Another trial will cost as much, but, I cannot help that. It is my duty, it seems to me to point it out. I appreciate this is all done after the verdict, and that possibly the court should have directed a verdict as the jury found, nevertheless, I think it is my duty to grant a new trial on this ground, and, making these findings, I do grant a new trial on the ground that this entertainment tended to bring the courts into contempt and reproach, and was a reflection on the administration of justice and upon our jury system. I think that is all I can say. Nobody regrets this more than I do but I must say it."

Had the misconduct occurred during the progress of the trial, there would be no question about the correctness of the order. *Harrington* v. *Calhoun Probate Judge,* 153 Mich. 660; *Solomon* v. *Loud,* 173 Mich. 233 (48 L. R. A. [N. S.] 540); *In re Quinn's Estate,* 180 Mich. 502, and *People* v. *Levey,* 206 Mich. 129. See, also, *People* v. *Montague,* 71 Mich. 447; *Detroit & T. S. L. Railroad Co.* v. *Campbell,* 140 Mich. 384; *Township of Alpena* v. *Mainville,* 153 Mich. 732; *Cooper* v. *Carr,* 161 Mich. 405; *Vincent* v. *Heenan,* 194 Mich. 316, and *Evans* v. *City of Detroit,* 255 Mich. 381. But we have not had occasion to pass upon the question of misconduct occurring after the rendering of the verdict.

It is suggested that there should be but one rule. Where a juror rode during the trial of a cause with defendant to a county home of which the defendant had charge, the supreme court of Iowa said:

"The question involved herein is of a more serious character than would appear at first blush. There is probably no more interesting or fascinating question involved in the history of courts than the origin and development of the jury system. It is one of the most vital elements of our system of government. So far as the average citizen is concerned, he is less in touch with the executive and legislative departments. When he is confronted with private or public differences, he naturally turns to the court for relief. His faith in the courts must be encouraged. When the time comes that our people lose faith in the courts, our form of government is fast nearing its end. It is meet and proper, therefore, that on questions of this kind the ruling should be such as to support the faith of litigants in our judicial system. That faith can only be sustained by keeping our judicial proceedings not only free from wrong, but free from all suspicion of wrong. In other words, all our court proceedings should be, like Caesar's wife,—'above suspicion.'

"The question before us is not a question of whether any actual wrong resulted from the association of this defendant with the juror, under the circumstances related, but whether it created a condition from which the opposing litigants and the general public might suspect that wrong resulted from this association. It is not a question of whether both the defendant and the juror were high-class citizens, and would not be guilty of discussing this lawsuit on this trip, but rather a question of whether or not this conduct should be countenanced by the court." *Lynch* v. *Kleindolph,* 204 Iowa, 762 (216 N. W. 2, 55 A. L. R. 745).

As early as 2 Butler & Hargraves Notes on Coke on Littleton, L. 3, chap. 5, § 366, a distinction was made between acts of jurors during a trial and those occurring after verdict. The rule there is stated as follows:

"If the jurie after their evidence given unto them at the barre, doe at their owne charges eat or drinke either before or after they be agreed on their verdict, it is finable, but it shall not avoid the verdict: but if before they be agreed on their verdict, they eat or drinke at the charge of the plaintiffe, if the verdict be given for him, it shall avoid the verdict: but if it be given for the defendant, it shall not avoid it, and *sic e converso*. But if after they be agreed on their verdict they eat or drinke at the charge of him for whom they do passe, it shall not avoid the verdict."

"The vigilance of the court in this case is to be commended. Certainly everything possible should be done to maintain the highest standards of conduct in the administration of justice. On the other hand, parties should not be deprived of their rights except for substantial reasons within the well-recognized rules of law." *Wetzler* v. *Glassner,* 185 Wis. 593 (201 N. W. 740).

We are likewise mindful of the rights of the taxpayers who bear the burden of the costs of operation of our judicial system. Should they be penalized for the indiscretions and misconduct of parties whose acts had no effect upon the verdict? The question of reviewing the discretion of trial courts in granting or refusing new trials is a most delicate one. The rule in this State is that the judge has a wide discretion in either granting or refusing a new trial, either upon his own motion or that of the parties. *J. L. Hudson Co.* v. *Barnett,* 255 Mich. 465.

"Even greater latitude is allowed the trial court in granting than in refusing new trials, and the appellate court will interfere more reluctantly where the new trial is granted than where it is denied, since in such cases the rights of the parties are not finally settled as they are where the new trial is refused." 4 C. J. pps. 831, 832, § 2813.

"It is true that the Constitution has given this court a general superintending control over all inferior courts, but in the exercise of this jurisdiction it has never been claimed that this court can substitute its discretion for that of the inferior tribunal, and compel it to exercise and enforce our discretion, and not theirs." *Detroit Tug & Wrecking Co.* v. *Wayne Circuit Judge,* 75 Mich. 360.

We are aided by the reasoning in *Re Merriman's Appeal,* 108 Mich. 454:

"The circuit judge found that it did not appear that either of these jurors drank during the time that court was in session, and that it did not appear that their misconduct was incited by, or known to, proponents or their counsel, and, in effect, that their misconduct did not unfit the jurors for the performance of their duty, except as it showed them to be wanting in that sense of duty to themselves and the county which is to be expected of those called to perform the important office of determining rights between litigants. The jurors were part of the regular panel, and, under the circumstances, we are of the opinion of the circuit judge,—that, at least in a civil case, inasmuch as the alleged misconduct did not directly influence the action of the jurors, a new trial should not be granted for this reason. The acts charged against them no more affected their conduct as jurors than as if they had taken place before they were called to serve, and it would be unsafe to set aside a verdict on the grounds of such

misconduct occurring before the jury is called, when discovered after the verdict."

Mr. Justice STONE must have anticipated our problem when he said:

"We are aware of the rule that the granting of a new trial ordinarily rests in the discretion of the trial court, which, if not abused, cannot be interfered with by this court. To warrant such interference, the abuse ought to be so plain that upon consideration of the facts upon which the trial judge acted, an unprejudiced person can say that there was no justification or excuse for the ruling made." *Cooper* v. *Carr, supra,* 412.

The learned judge quoted from *McDaniels* v. *McDaniels,* 40 Vt. 363 (94 Am. Dec. 408), as follows:

"It is true that a verdict should not be set aside for every trifling error of law by the court, or for every trifling misconduct of a juror which occurs without the fault of the prevailing party, but it should be whenever the error or misconduct renders it reasonably doubtful whether the verdict has been legitimately procured."

We are persuaded by the language just quoted that the misconduct in the instant matter did not render it reasonably doubtful whether the verdict had been legitimately procured.

We would be unmindful of our responsibility if we permitted our disapproval of the stupidity of defendant's employee and the lack of civic responsibility of some of the jurors to interfere with the application of the law. The orderly administration of justice requires that courts be bound by the facts and the law rather than their outraged sense of the proprieties of conduct. The facts in the case at bar are conclusive that the verdict of the jury was

in no way affected by the subsequent improprieties of some of its members. A review of the entire matter requires the conclusion that the learned circuit judge, justly indignant and rightfully zealous of the probity of the court, inadvertently misinterpreted the full effect of the facts. See *Smith* v. *United States* (C. C. A.), 281 Fed. 696, and *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474 (53 Sup. Ct. 252), reviewed in 13 Michigan State Bar Journal, p. 387 (January, 1934).

Our suggestion that the order be set aside and a judgment entered on the verdict will no doubt make it unnecessary to issue our writ of mandamus, but such will be issued if required. Appellant shall have its costs.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred.

McKAY *v.* JACKSON & TINDLE, INC.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW OF PAYMENTS—CHANGE OF CONDITION.

Review of weekly payments provided by workmen's compensation act is possible only when there has been a change in the physical condition of the employee (2 Comp. Laws 1929, § 8453).

2. Same—Petition for Further Compensation—Evidence—Same Disability.

Testimony taken at hearing on petition for further compensation which disclosed that physical condition of employee at and since time of previous award, not appealed from, was one of total incapacity to perform work engaged in at time injury occurred *held,* insufficient to support award increasing compensation to minimum for total disability, since failure to appeal from previous award precludes recovery on subsequent petition showing same disability.

Potter, J., dissenting.

Appeal from Department of Labor and Industry. Submitted June 6, 1934. (Docket No. 46, Calendar No. 37,706.) Decided September 18, 1934.

Dan McKay presented his claim against Jackson & Tindle, Incorporated, employer, and Lumbermen's Mutual Casualty Company, insurer, for injuries received while in defendant's employ. On petition for further compensation. Award to plaintiff. Defendants appeal. Reversed.

Dan McKay, in pro. per.

Kerr, Lacey & Scroggie, for defendants.

Edward M. Sharpe, J. Prior to December 21, 1931, plaintiff was an able-bodied man and able to do such manual labor as might be required from a man employed in lumbering. On the above date and while so employed by defendant Jackson & Tindle, Inc., in cutting a road through to some logs, a tree fell upon him, striking his head, back, arm and shoulders. By agreement filed and approved January 23, 1932, plaintiff was to be paid compensation at the rate of $7 per week during the period of total disability, based on the fact that his average weekly wage was $7.86.

June 16, 1932, defendants filed a petition to stop compensation. Hearing on this petition was had September 3, 1932, by a deputy commissioner and an award was made allowing plaintiff compensation for partial disability at the rate of $3.50 per week. At this hearing no testimony was taken and the award was based on verbal stipulations between the parties and their attorneys. No appeal was taken from this award.

July 17, 1933, plaintiff filed a petition for further compensation claiming total disability as of January 1, 1933. A hearing was held on this petition September 23, 1933, at which time the plaintiff testified that he suffered more pain than usual, was more crippled and had been totally disabled since September 3, 1932. It was conceded that at this last hearing the plaintiff had a 100 per cent. disability. The deputy commissioner entered an award making no change in the amount of compensation to be paid plaintiff. Upon appeal the department of labor and industry awarded plaintiff compensation of $7 per week from April 1, 1933, from which order defendants appeal to this court.

In a long series of cases beginning with *Estate of Beckwith* v. *Spooner,* 183 Mich. 323 (Ann. Cas. 1916 E, 886), this court has held that the review of weekly payments provided by the compensation act (2 Comp. Laws 1929, § 8453) is possible only where there has been a change in the physical condition of the injured employee.

In the present case the department found as a fact from the testimony that there had been a change in plaintiff's condition since the hearing of September 3, 1932. The only question for us to decide is whether the department was justified in reaching that conclusion. The following testimony is taken from plaintiff's examination:

"*Q.* Mr. McKay, you say that you have not done any work since the last hearing here in 1932?

"*A.* Yes.

"*Q.* Have you attempted to get a job at all since that time?

"*A.* No.

"*Q.* This pain that you have been having in your head that you tell us about, has that been continuous? Have you had that ever since the time of the injury?

"*A.* Yes.

"*Q.* And this inability to use your neck that you testified to and to turn your head, has that been continuous since the time of the injury?

"*A.* Pretty near but it is getting worse all the time.

"*Q.* And it has been in that condition since the time of the last hearing we had here?

"*A.* Yes, sir.

"*Q.* And this pain you have up and down your spine from the hips, as you indicate, clear up to your head, has that been there ever since the injury?

"*A.* Yes.

"*Q.* At the time of the last hearing that we had here on September 3, 1932, you claimed at that time that you were totally disabled, didn't you?

"*A.* Yes.

"*Q.* And in your opinion were you totally disabled at that time?

"*A.* Yes, sir.

"*Q.* And you claim you have been totally disabled ever since that time?

"*A.* Yes, sir.

"*Mr. Peters* (attorney for defendants): That's all.

"*Mr. Peura* (attorney for plaintiff): *Q.* Dan, why haven't you tried to work since September, 1932?

"*A.* I couldn't work.

"*Q.* Dan, do you feel any better or worse than you did in September of last year?

"*A.* I am feeling worse all the time.

"*Q.* How, in what way?

"*A.* In my back and head. I am weak."

From the above testimony we must conclude that at the hearing held September 3, 1932, plaintiff was totally incapacitated from performing manual labor and that the only change in his condition is that he has become weaker and suffers more pain. As was said in *Levanen* v. *Seneca Copper Corp.*, 227 Mich. 592, 601:

"The test of an injured employee's right to compensation is his inability by reason of the accident to work and earn wages in the employment at which he was engaged when injured. If he was totally incapacitated when he filed his first petition, his condition in that respect could not change for the worse."

The failure of the plaintiff to appeal from the award made by the deputy commissioner September 3, 1932, when he (the plaintiff) was totally incapacitated from performing manual labor, now precludes him from recovering upon a subsequent petition showing the same disability.

As there is no evidence to support the finding of the department, the award is vacated with costs to defendants.

NELSON SHARPE, C. J., and NORTH, FEAD, WIEST, BUTZEL, and BUSHNELL, JJ., concurred with EDWARD M. SHARPE, J.

POTTER, J. I think the award should be affirmed.

MENNEL MILLING CO. *v.* ACME PIE CO.

1. PRINCIPAL AND AGENT—QUESTION FOR JURY—EVIDENCE.
   Question as to authority of broker's representative to bind milling company on written contract containing express warranty as to quality of flour sold thereunder *held*, properly submitted to the jury in action by company against buyer.

2. SAME—VERDICT—EVIDENCE—CONTRACTS.
   Finding for defendant on question of agent's authority to sign contract on behalf of plaintiff *held*, sustained by evidence that he received authority over telephone before taking order.

3. SALES—TRADE NAMES—WARRANTIES.
   Section of uniform sales act which excludes implied warranties in sale of articles under a trade name does not extend to exclusion of express warranties of written contract (2 Comp. Laws 1929, § 9454, subd. 4).

4. SAME—REJECTION OF FUTURE SHIPMENTS—WARRANTY AS TO QUALITY.
   In action for damages for refusal to accept further shipments of flour pursuant to contract containing express warranty as to quality, instruction that rejection of flour must be in good faith and that plaintiff must have had knowledge of purpose for which it was intended *held*, correct, where there was ample proof of unsatisfactory quality of flour previously shipped and plaintiff admits future shipments would be of same quality.

Appeal from Wayne; Richter (Theodore J.), J. Submitted June 6, 1934. (Docket No. 29, Calendar No. 37,774.) Decided September 18, 1934.

Assumpsit by Mennel Milling Company, an Ohio corporation, against Acme Pie Company, a Michi-

gan corporation, on contract for sale of flour. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Pear, Beattie & Langs (*Donald K. Tyler,* of counsel), for plaintiff.

Joseph P. Uvick, for defendant.

EDWARD M. SHARPE, J. July 31, 1930, plaintiff company sold to defendant company 1,500 barrels of "Challenge" brand flour at $4.30 per barrel for scattered shipment over several months. Plaintiff is a milling company in Ohio and receives orders for flour through various brokers. Defendant company is located in Detroit. In the instant case the sale was made through the brokerage office of J. M. Bour & Company of Toledo, Ohio. The order for the flour was taken by George E. Amendt, a salesman employed by J. M. Bour & Company. Before taking the order, Mr. Amendt called John W. Enright, sales manager of plaintiff company, by long distance telephone in regard to the terms of the order and received Mr. Enright's approval. The order was then incorporated in the form of a letter to the Mennel Milling Company dated July 31, 1930, and containing the following paragraphs:

"Kindly enter our order for the following: 3,000 —98 lb. bags, new cotton (1,500 bbls.) Challenge at $4.30 per bbl.

"Composed of one-half red wheat and one-half white wheat. 93% selected soft winter patent flour. Packed in new 98 lb. cottons. * * *

"Right of inspection and rejection reserved by the Acme Pie Co., also the flour to conform to our standard of quality."

This letter was signed by P. J. LeCody on behalf of the Acme Pie Company and by George E. Amendt on behalf of the Mennel Milling Company. The original remained in the possession of the defendant and there is no showing as to what happened to the copy although Mr. Amendt testified that he supposed he turned it over either to J. M. Bour & Company or to the Mennel Milling Company.

By letter dated July 31, 1930, plaintiff acknowledged the order as follows:

"Thank you for the order you have given our Mr. G. E. Amendt this morning, and we are pleased to confirm booking for you 1,500 barrels of our Challenge select soft winter patent flour at $4.30, basis cotton halves Detroit, for scattered shipment from November 1, 1930, to May 1, 1931."

Several shipments of flour were made and accepted by defendant. On November 20, 1931, defendant complained to the milling company as to the quality of the flour and after July 16, 1932, defendant refused to accept any more flour and notified plaintiff to that effect. Plaintiff began suit for loss on the remaining 585 barrels of flour.

Plaintiff claims that the contract was an oral contract and that George E. Amendt had no authority to sign the written contract on its behalf; that where goods are furnished under a brand name, the furnishing of goods of that brand name is a full compliance with the contract under 2 Comp. Laws 1929, § 9454, subd. 4; that the contract was severable, and that failure to meet the requirements on one instalment would not entitle defendant to rescind future instalments.

Defendant contends that George E. Amendt had special authority to sign the written contract; that

such contract contained an express warranty or condition that the flour conform to defendant's standard of quality; and that defendant had the right to rescind when plaintiff admitted that future instalments would be of the same grade as those already received.

The case was tried before a jury and resulted in a verdict for defendant from which plaintiff appeals.

The question of the authority of the salesman to bind the plaintiff company was properly submitted to the jury, which found in favor of defendant. The evidence regarding the telephone call by Amendt to plaintiff's sales manager was sufficient to sustain a finding of the agent's authority.

Under the terms of the written contract the defendant had the right of inspection and rejection and the flour was to conform to defendant's standard of quality. The defendant was not only purchasing flour under a brand name with certain specifications, but there was also an express stipulation as to quality. The statute excluding implied warranties in sales of articles under a trade name does not extend to express warranties or conditions.

"But the mere fact that the article happens to have a trade name and is denoted by it in the contract does not exclude all warranties and assign the transaction to subdivision 4 of § 64-315, Oregon Code 1930 (same as 2 Comp. Laws 1929, § 9454, subd. 4)." *J. A. Campbell Co.* v. *Corley,* 140 Ore. 462, 475 (13 Pac. [2d] 610, 613).

The court charged the jury as follows:

"I further charge you, members of the jury, that if you decide that the defendant was entitled to the benefits of the written contract, or the purported

written contract, more particularly the right of rejection, that the defendants in rejecting the flour must act in good faith and be honestly dissatisfied. * * * It becomes a question of fact for you whether the defendant was reasonable in rejecting the balance of that shipment. If you find that the flour did not answer the purpose for which it was intended, and that the plaintiff had knowledge that the flour was to be used for baking pies, it would be your duty to render a verdict for the defendant of no cause for action."

We think the court was correct in this instruction, and defendant presented ample proof of the unsatisfactory quality of the flour.

Plaintiff admits that future deliveries of flour will be of the same quality as that already delivered. Here there is positive proof that the unshipped flour would not be suitable for the purpose intended by the defendant and under such circumstances, we think the defendant had the right to reject future shipments.

Judgment affirmed, with costs to defendant.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, and BUSHNELL, JJ., concurred with EDWARD M. SHARPE, J. WIEST, J., concurred in the result.

PEOPLE *v.* ROSA.

1. WITNESSES—PRIVILEGED COMMUNICATIONS—HUSBAND AND WIFE—STATUTES.

   Statute relating to privilege of communication between husband and wife is intended to embody the common law and therefore extends only to confidential communications (3 Comp. Laws 1929, § 14221).

2. SAME—CONFIDENTIAL COMMUNICATIONS.

   A communication is not confidential where made for the purpose, or with the expectation, of being disclosed or if made in the presence of others (3 Comp. Laws 1929, § 14221).

3. SAME—PRIVILEGED COMMUNICATIONS.

   The privilege and the right to waive it belong to the person making the communication (3 Comp. Laws 1929, § 14221).

4. SAME—HUSBAND AND WIFE—CRIMINAL LAW—EVIDENCE.

   Wife's communication to husband in custody on charge of murder made in the presence of others is not privileged and its reception in evidence as part of his confession *held,* not error.

5. SAME—CHARACTER—CREDIBILITY—CRIMINAL LAW.

   Character witness may be questioned concerning previous specific acts of misconduct of defendant charged with murder merely to test credibility and ascertain weight to be given the testimony of such witness.

6. CRIMINAL LAW — TRIAL — REMARKS OF COURT — STENOGRAPHIC NOTES—CONFESSION.

   Remark of trial judge that he never heard of anyone requesting the reading of stenographic notes taken during defendant's confession, made when defendant's attorney demanded same, *held,* not prejudicial error.

7. APPEAL AND ERROR—PREJUDICIAL REMARKS OF COUNSEL—OBJECTION.

   Alleged prejudicial remarks of prosecuting attorney made on trial of one charged with murder will not be considered on appeal in the absence of objection thereto or ruling on the part of the trial court.

Appeal from Recorders Court of the City of Detroit; Van Zile (Donald), J. Submitted June 14,

1934. (Docket No. 129, Calendar No. 37,008.) Decided September 18, 1934.

Albert Rosa, Anthony Rosa and Joseph Frendo were charged with murder. Albert Rosa and Anthony Rosa were convicted and Joseph Frendo was acquitted. Albert Rosa appeals. Affirmed.

Harry J. Lippman, for appellant.

Patrick H. O'Brien, Attorney General, *Harry S. Toy,* Prosecuting Attorney, *Sherman F. Kelly* and *Edmund E. Shepherd,* Assistants Prosecuting Attorney, for the people.

EDWARD M. SHARPE, J. On May 12, 1931, one Simon Pryzena was murdered in his place of business in the city of Detroit and Anthony Rosa, Albert Rosa and Joseph Frendo were arrested and charged with the crime. Joseph Frendo was acquitted and the other defendants convicted, from which conviction the defendant Albert Rosa appeals.

On May 25, 1931, and while in custody, the defendant Albert Rosa made a statement, the purport of which was to implicate his brother Anthony Rosa and at the same time to disclaim any part in the murder for himself. On May 30, 1931, the defendant Albert Rosa made a second statement, admitting his guilt and stating that the reason he changed his story was that his wife had by letter and conversations urged him to tell the truth. On the trial the confession was read in evidence without objection.

The defendant cites a large number of errors alleged to have been committed on the part of the prosecuting attorney and the trial judge. The errors enumerated, however, may be classified as follows:

1. Introduction of that part of defendant's confession relating to a letter from defendant's wife to

defendant urging him to tell the truth and conversations between defendant and his wife to the same effect.

2. Prejudicial remarks of the prosecuting attorney during the trial of the case.

3. Prejudicial remarks of the trial judge.

4. Cross-examination of defendant's character witnesses as to their knowledge of certain other offenses having been committed by defendant prior to the trial in this case.

The facts in relation to the first group of claimed errors are that while defendant was in jail his wife wrote him a letter and later called at the jail to see him and while there had a conversation with defendant in the presence of several officers. Defendant claims that the part of his confession telling of this letter and conversation should have been excluded as its admission was a violation of 3 Comp. Laws 1929, § 14221, relating to privileged communications between husband and wife.

While the statute refers to "any communication," it is intended to embody the common law and therefore extends only to confidential communications. *Hagerman* v. *Wigent,* 108 Mich. 192; *Ward* v. *Oliver,* 129 Mich. 300; *In re Thayer's Estate,* 188 Mich. 261. A communication is not confidential if it was made for the purpose of or with the expectation of being disclosed. *Hagerman* v. *Wigent, supra; Barras* v. *Barras,* 192 Mich. 584. Likewise, a communication is not confidential if made in the presence of others. *People* v. *Bowen,* 165 Mich. 231; and see cases cited in annotation, 63 A. L. R. 116. The general rule is that the privilege and right to waive it belong to the person making the communication. *Maynard* v. *Vinton,* 59 Mich. 139 (60 Am. Rep. 276); 5 Wigmore on Evidence (2d Ed.), § 2340.

In the instant case the communication complained of was made by the wife and not by the husband, and was in no way prejudicial to her rights. Assuming that the statutory privilege applies to admissions and confessions of the party claiming the privilege, the communication between defendant and his wife, having been made in the presence of others, was not privileged nor contrary to the rule above stated.

Defendant also complains that it was error on the part of the prosecuting attorney to ask Mrs. Baranowski, a character witness produced by the defendant, if she knew of certain other offenses in which the defendant had been implicated. However, in a statement made prior to the examination of Mrs. Baranowski, counsel for defendant stated that the defendant had been implicated in the offenses upon which the prosecuting attorney questioned Mrs. Baranowski. The case of *People* v. *Hill,* 258 Mich. 79, relied upon by defendant, is authority for the proposition that when a defendant has put his character in issue by proof of general reputation, it is not competent nor relevant on the part of the prosecution to introduce evidence of independent acts of misconduct. However, a witness who testifies to another's good reputation may be cross-examined to test his knowledge and candor (22 C. J. p. 483), and for that purpose he may be asked if he has heard of specific acts of misconduct. He may be asked these questions only to test his credibility and ascertain the weight to be given his testimony. *Commonwealth* v. *O'Brien,* 119 Mass. 342 (20 Am. Rep. 325). From an examination of the record we are satisfied that the cross-examination of Mrs. Baranowski was for the purpose of testing her credibility and the basis of her opinion.

Counsel for defendant next contends that the trial court committed prejudicial error during the trial of the cause in that, when the attorney for the defense demanded the stenographic notes taken while defendant was making his confession, the trial judge remarked that he had never heard of anyone requesting the reading of stenographic notes. We cannot see how this remark could have had any effect upon the outcome of the trial.

Counsel for defendant also claims numerous errors upon the part of the prosecuting attorney for prejudicial remarks made during the trial. In some instances no objections were raised at the time the alleged error was committed; in some, objections were made but counsel for the defense did not ask the court for a ruling; while in other cases the remarks were stricken out and the jury instructed to pay no attention to such remarks. Our examination of the record reveals that in many instances the remarks of the prosecuting attorney were called forth by statements and actions on the part of one of the attorneys for the defense.

Prejudicial remarks of counsel may be cured by proper and timely instructions. *People* v. *Limcourt,* 221 Mich. 674; *People* v. *Connors,* 251 Mich. 99. However, this court has repeatedly stated that errors will not be considered on review in the absence of objection to the prejudicial remark or comment, and that it is the duty of the opposing counsel to seek and obtain a ruling of the trial judge. *People* v. *Goldberg,* 248 Mich. 553.

The remaining questions have been considered, and as it appears that there has been no miscarriage of justice, we think the conviction should be affirmed.

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

ASHBAUGH *v.* SAUER.

KEELING *v.* SAME.

1. FRAUDULENT CONVEYANCES—PRESUMPTIONS—BURDEN OF PROOF.
   Presumption that deed of real estate was a conveyance in fraud of creditors prevails in trial to set it aside where plaintiffs made *prima facie* case by documentary evidence as prescribed by statute and defendants failed to sustain burden of proof that transaction was in all respects *bona fide* (3 Comp. Laws 1929, § 14617).

2. VENDOR AND PURCHASER—DEFAULT—OPTION OF VENDOR.
   Upon default, vendor in land contract may, at his option, treat the contract as continuing in force, sue for payments due and after securing judgment he is not compelled to resort to the vendee's equity before levying upon any other property of vendee.

3. FRAUDULENT CONVEYANCES—ATTORNEY AS CREDITOR.
   Attorney who performed services prior to alleged fraudulent conveyance *held*, creditor within meaning of fraudulent conveyances act, although he did not commence action and recover judgment therefor until after execution of such conveyance, since his status as creditor is determined as of date the cause of action arose (3 Comp. Laws 1929, §§ 13392, 13395, 13434).

4. APPEAL AND ERROR—ISSUE NOT PRESENTED BY EVIDENCE—HOMESTEADS—EXECUTION.
   Issue that property conveyed by deed alleged to be in fraud of creditors was homestead property, not presented by the evidence, need not be decided on appeal from decree setting aside conveyance of five city lots since homestead rights apply only to one lot not exceeding $1,500 in value and matter may be taken care of at execution sale (3 Comp. Laws 1929, § 14608).

Appeal from Oakland; Doty (Frank L.), J. Submitted June 13, 1934. (Docket No. 126, Calendar No. 37,917.) Decided September 18, 1934.

Separate bills in aid of execution by Murray M. Ashbaugh, receiver of First National Bank of Pontiac, and another and Ralph T. Keeling against Constance Sauer and Gerald H. Thompson. Cases consolidated. Decrees for plaintiffs. Defendants appeal. Affirmed.

Pelton & McGee, for plaintiffs.

David E. Roberts, for defendants.

EDWARD M. SHARPE, J. These cases were consolidated and seek by a bill in aid of execution to set aside as in fraud of creditors a deed given by defendant Constance Sauer to defendant Gerald H. Thompson, trustee.

Plaintiffs in the bank case are vendors in a land contract in which defendant Constance Sauer is the vendee. The vendee defaulted in her payments in June, 1931. Suit was brought for the defaulted payments and a judgment was obtained December 27, 1932, for $10,425. A levy was made January 14, 1933, on the five city lots described in the deed here involved. These are not the same premises as covered by the land contract.

Plaintiff in the Keeling case is an attorney at law who commenced suit against defendant Constance Sauer on August 19, 1932, for services rendered from December 1, 1930, to September 1, 1931. Judgment was rendered in favor of plaintiff on March 22, 1933, for $1,182.50. Levy was made on this judgment April 19, 1933, on the same property as levied on by the judgment creditor in the first suit. Prior to either levy and on May 24, 1932, the defendant Constance Sauer had given a quitclaim deed on the five city lots to defendant Gerald H. Thompson, trustee. This deed was part of a living trust agree-

ment made by Constance Sauer for the benefit of her sons.

On the trial of the suits to set aside the deed as a fraudulent conveyance, the plaintiffs introduced documentary evidence to support their cases. The defendants offered no evidence, but in their answer admitted that defendant Constance Sauer owned no other substantial property subject to execution.

The circuit court held that plaintiffs had made a *prima facie* case of a fraudulent transfer and, as defendants had produced no evidence of a valuable consideration for the deed of May 24, 1932, or any evidence of solvency at the time the deed was given or at the time of the trial, ordered that the deed be set aside and that plaintiffs have execution upon the lands in question.

The defendants claim in the bank case that the defendant Constance Sauer is still the owner of the vendee's equity in the land contract (which has not been foreclosed), and that the bank must levy on this equity before resorting to other property of the defendant.

In the Keeling case it is the claim of defendants that plaintiff was not determined to be a creditor until judgment was rendered, which was approximately 10 months after the conveyance complained of was made.

Section 13434, 3 Comp. Laws 1929, provides:

"Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and any charge upon lands, goods or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond

or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed or defrauded, shall be void."

Section 13395, 3 Comp. Laws 1929, provides:

"Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation incurred without a fair consideration."

Section 14617, 3 Comp. Laws 1929, provides:

"All the real estate of any debtor, including legal and equitable interests in lands acquired by the parties to contracts for the sale and purchase of lands, whether in possession, reversion or remainder, including lands fraudulently conveyed, with intent to defeat, delay or defraud his creditors, and the equities and rights of redemption hereinafter mentioned, shall be subject to the payment of his debts, liabilities and obligations, and may be levied upon and sold on execution as hereinafter provided. In all suits begun or hereafter to be begun by the filing of bills in aid of execution, the complainant shall make a *prima facie* case by introducing in evidence the judgment against the principal defendant, the execution with the levy or levies thereon indorsed and proof of the conveyance or conveyances complained of. The burden of proof shall then be upon the judgment debtor, or the person or persons claiming through or under him or the person or persons whom it is claimed are holding property in trust for said judgment debtor to show that the transaction or transactions are in all respects *bona fide* or that such person or persons are not holding as a trustee or trustees of said judgment debtor."

The statute putting the burden of proof on defendant was construed and applied by this court in *Corbett* v. *Williams,* 248 Mich. 541.

Under 3 Comp. Laws 1929, § 14617, after the showing made by the plaintiffs in these cases, it became the duty of defendants to show that the transaction was in all respects *bona fide.* This the defendants failed to do. No consideration or other evidence of good faith having been shown, the presumption that the conveyance was fraudulent prevails.

Upon default, the vendor in a land contract may at his option treat the contract as continuing in force and sue for payments due. *Chicago Boulevard Land Co.* v. *Apartment Garages,* 245 Mich. 448. Under this rule, the plaintiffs in the first case could, after securing judgment, levy upon any property of the vendee and not be compelled to resort to the vendee's equity in the land contract. *First National Bank of Petersburg, Ill.,* v. *Shipley,* 109 Cal. App. 194 (292 Pac. 996); *Greene* v. *Wilson,* 90 Col. 562 (11 Pac. [2d] 225); *Botsford* v. *Beers,* 11 Conn. 369; *Weightman* v. *Hatch,* 17 Ill. 281; *Hughes* v. *Noyes,* 171 Ill. 575 (49 N. E. 703); *Spooner* v. *Travelers Ins. Co. of Hartford,* 76 Minn. 311 (79 N. W. 305, 77 Am. St. Rep. 651); *Peaslee* v. *Ridgway,* 82 Minn. 288 (84 N. W. 1024); *Dalton* v. *Barron,* 293 Mo. 36 (239 S. W. 97, 22 A. L. R. 187); *Daggs* v. *McDermott,* 327 Mo. 73 (34 S. W. [2d] 46); *Smith* v. *Muirheid,* 34 N. J. Eq. 4, reversed on other grounds; *Muirheid* v. *Smith,* 35 N. J. Eq. 303; *Gormley* v. *Potter,* 29 Ohio St. 597; *Hoffman* v. *Fleming,* 43 W. Va. 762 (28 S. E. 790).

As to the second case, plaintiff's legal services were performed between December 1, 1930, and September 1, 1931. The conveyance in question was made May 24, 1932. On August 19, 1932, plaintiff

started suit against Mrs. Sauer on an implied contract and recovered judgment March 22, 1933.

The fraudulent conveyance statute defines "creditor" as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." 3 Comp. Laws 1929, § 13392.

One who has a tort claim is a creditor from the date of the tort. *Morse* v. *Roach,* 229 Mich. 538; *Dutcher* v. *Van Duine,* 242 Mich. 477; *Iden* v. *Huber,* 259 Mich. 3. Similarly, any liability is considered as existing from the date the cause of action arose.

"Whoever has a claim or demand on a contract in existence at the time when a fraudulent conveyance is made is a creditor within the meaning of the statute, and the holder of a contingent claim is as fully protected by the statute as one that is absolute. Consequently liability as surety is as clearly within the statute as liability as principal. In cases of contingent liability, the liability, whenever happening, relates back to the date when it was originally incurred." 12 R. C. L. p. 492, § 25, quoted in *Peterson* v. *Wahlquist,* 125 Neb. 247, 252 (249 N. W. 678, 89 A. L. R. 747).

It is therefore quite clear that the plaintiff in the second case must be considered a creditor as of the time of the conveyance and therefore protected by the fraudulent conveyance act. The status of creditor is determined, not as of the date of judgment, but as of the date the cause of action arose.

Defendant raises in her brief an issue not presented by the evidence, that is, that the land in question is a homestead. If it is homestead, it can be such only to the extent of one lot not exceeding $1,500 in value (3 Comp. Laws 1929, § 14608). This

is a question that need not be decided now, but may be taken care of at the execution sale.

Both decrees will be affirmed, with costs to the plaintiff in each case.

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

UHL *v.* WEXFORD CO.

WESTERLIN & CAMPBELL CO. *v.* GRAND RAPIDS TRUST CO.

1. SALES—CONDITIONAL SALE CONTRACT—CHATTEL MORTGAGES.
   Instrument providing that title of refrigerating equipment should remain in vendor until purchase price is paid, for acceleration of payment of purchase price, for a reasonable attorney's fee and insurance for benefit of vendor *held*, a conditional sale contract and not a chattel mortgage.

2. SAME—POSSESSION.
   The right of vendor to reenter into possession of personalty depends not on contract but on law.

3. SAME—RESERVATION OF TITLE.
   Reservation of title of personalty should be given effect where there is nothing in the instrument inconsistent with a conditional sale.

4. SAME—CONSTRUCTION OF CONTRACT—CONDITIONAL SALE CONTRACT.
   Provision for accelerating payment of purchase price and requiring insurance for benefit of vendor in instrument for sale of personalty and the taking of promissory notes for balance of purchase price are not inconsistent with construction as a conditional sale contract.

5. SAME—CONDITIONAL SALE CONTRACT.

Statements in correspondence between vendor and vendee indicating vendor considered instrument relating to refrigerating equipment a conditional sale contract, which were not refuted by vendee, *held*, indicative that it was such a contract.

Appeal from Kent; Perkins (Willis B.), J. Submitted June 7, 1934. (Docket No. 77, Calendar No. 37,885.) Decided September 18, 1934.

Receivership proceedings by David E. Uhl, receiver, against Wexford Company, a Michigan corporation. Grand Rapids Trust Company was appointed receiver. On petition of Westerlin & Campbell Company, an Illinois corporation, to reclaim machinery and cancel notes. From order allowing petition, receiver appeals. Affirmed.

Smith, Searl & Strawhecker, for petitioner.

Thomas F. McAllister, for receiver.

EDWARD M. SHARPE, J. The facts in this case are not in dispute. Appellee sold refrigerating equipment to the Wexford Company in May, 1929, for the sum of $6,375, part of which was paid in cash and the balance to be paid in 18 monthly instalments. A balance of $2,291, represented by 12 promissory notes, dated from May 26, 1931, to September 26, 1932, and falling due from December 26, 1932, to May 26, 1933, was in default on January 3, 1934, at the time the Grand Rapids Trust Company was appointed receiver of the Wexford Company.

The contract was not recorded and contained the following provisions:

"And in case you shall fail to make any of the said payments upon the due dates thereof, then we

may, at our election, call the whole purchase price, or any part thereof remaining unpaid, immediately due and payable. In case of any suit either in law or in equity to enforce the payment of the above-mentioned purchase price or any part thereof or any of our rights hereunder, a reasonable attorney's fee shall be allowed us as part of the cost therein, the same to be taxed and fixed by the court as such.

"Title of all machinery and equipment furnished under this proposal is not to pass to you but is to remain vested in us until the purchase price is fully paid to us in cash, and you are in the meantime to keep such machinery and equipment fully insured for the protection of our interest."

Appellee filed a petition for reclamation of the machinery and for the cancellation of the notes evidencing the indebtedness, claiming that the agreement was a conditional sales contract. Upon the trial evidence was produced to show that the Wexford Company had paid upon the contract the sum of $4,337.02 while the rental value of the property during the time the property was in the possession of the Wexford Company was $4,850. The trial court held that the instrument in question was a conditional sales contract and ordered that the machinery be turned over to petitioner upon cancellation of the promissory notes.

The defendant claims that there is no provision in the contract for retaking the property in case of default and that inasmuch as the contract also provides that title is not to pass to the vendee until the purchase price is fully paid, this provision and lack of provision makes the transaction a sale with retention of title in the nature of a mortgage for security. However, the right of the vendor to reenter into possession depends not on contract but on law. *Wiggins* v. *Snow,* 89 Mich. 476; *Ryan* v. *Wayson,* 108

Mich. 519; *National Cash Register Co.* v. *Richards,* 159 Mich. 128.

We cannot agree with defendant that the two paragraphs of the contract above referred to give the vendor the right to sue for the debt while at the same time retaining title to the chattels. The contract does not in terms give the vendor any specific rights of action of any nature whatever, but merely provides that if action is brought a reasonable attorney's fee shall be allowed. The contract also provides that title to the machinery shall remain in the vendor, but this provision does not conflict with the rule that a conditional vendor cannot recover both the purchase price and possession of the property.

Where there is nothing in the instrument inconsistent with a conditional sale, there is no reason why the reservation of title should not be given its primary and natural meaning. The acceleration clause is not inconsistent with a conditional sales contract. *Galion Iron Works & Manfg. Co.* v. *Service Coal Co.,* 264 Mich. 298. Neither is the provision that the purchaser shall insure. *Federal Commercial & Savings Bank* v. *International Clay Machinery Co.,* 230 Mich. 33 (43 A. L. R. 1245). Nor the taking of promissory notes for the balance of the purchase price. *Federal Commercial & Savings Bank* v. *International Clay Machinery Co., supra; Contractors Equipment Co.* v. *Reasner,* 242 Mich. 589; *Galion Iron Works & Manfg. Co.* v. *Service Coal Co., supra.*

Indicative of the fact that the instrument is a conditional sales contract is the correspondence between the parties prior to the time that the promissory notes were given. In a letter from the vendor to vendee dated July 3, 1929, the vendor refers to the "equipment which we are furnishing you." Another letter dated June 10, 1930, refers to "our

equipment" and in a third letter dated January 15, 1931, the vendor says:

"As regards the Wexford Company account, the greater portion of this balance remains unpaid on conditional sales contract for the refrigerating equipment and ice cream freezer which we furnished during June, 1929."

While the attitude of the vendor as expressed in the above letters is not controlling, yet the fact that defendant did not in any way refute these statements strengthens petitioner's contention that both the vendor and vendee at the time the contract was made considered it as a conditional sales contract.

Affirmed, with costs to appellee.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, and BUSHNELL, JJ., concurred with EDWARD M. SHARPE, J. BUTZEL, J., concurred in the result.

LAPACHIN *v.* STANDARD OIL CO.

1. MOTOR VEHICLES — CONTRIBUTORY NEGLIGENCE — PEDESTRIANS — CORROBORATING TESTIMONY.

   Contention that pedestrian was guilty of contributory negligence in walking along snow-covered street, plowed 20 feet wide, at 7 a. m. on winter morning *held*, not sustained on appeal of motor vehicle owner, where preponderance of evidence is in favor of plaintiff and disinterested witnesses corroborated his testimony as to manner in which accident happened.

2. SAME—PEDESTRIANS.

Pedestrians have equal rights on highways with motorists and where beaten path is wide enough for several vehicles to pass, former have right to assume they will not be run down and may not always have to get completely off traveled portion of highway.

3. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—BURDEN OF PROOF.

Testimony of plaintiff as to what part of his body was struck by car and what part struck the ground, where he was lying on the pavement, and that right front fender of car hit him *held,* admissible since defendant did not sustain burden of showing, and court may not infer, facts so asserted were matters equally within knowledge of driver, dead at the time of trial (3 Comp. Laws 1929, § 14219).

4. APPEAL AND ERROR—MEDICAL WITNESSES—HEARSAY—CASE TRIED WITHOUT JURY.

Testimony of medical witnesses as to facts related to them by plaintiff of manner in which accident happened in case tried without jury *held,* not prejudicial error where judge did not consider same as substantive proof.

5. DAMAGES—EXCESSIVENESS—PAIN AND SUFFERING—HOSPITAL CARE—PERMANENT DISABILITY.

Judgment of $3,000 for personal injuries sustained by 61-year old miner when struck by defendant's car while he was walking along highway *held,* not excessive, where he suffered severe pain, confinement in hospital for three weeks and permanent disability.

Appeal from Gogebic; Driscoll (George O.), J. Submitted June 20, 1934. (Docket No. 98, Calendar No. 37,824.) Decided September 18, 1934.

Case by Michael Lapachin against Standard Oil Company, a corporation, for personal injuries sustained when struck by defendant's automobile alleged to have been negligently operated. Judgment for plaintiff. Defendant appeals. Affirmed.

Jones & Patek (*John S. McDonald,* of counsel), for plaintiff.

Edward W. Massie, for defendant.

EDWARD M. SHARPE, J. Prior to January 11, 1933, plaintiff was of the age of 61 years, a miner employed in the iron mines and in good health. On said date about seven o'clock in the morning, he was proceeding to his work, walking easterly on McLeod avenue in the city of Ironwood toward the Aurora mine where he was employed. There are no sidewalks on McLeod avenue where the accident occurred, and the street is used for travel by pedestrians as well as by automobiles. The street was covered with snow and there were banks of snow on each side to a height of about three and one-half feet. The traveled portion of the street was then about 20 feet wide. Plaintiff was walking on the right side of the street in company with one Lewinski when he was struck by an automobile approaching from the rear. This automobile was owned by defendant and operated by its employee.

Plaintiff claims that the automobile had dim lights, that it was traveling at an excessive rate of speed, that the driver failed to give any warning or signal or blow his horn and without turning to the left to avoid an accident ran into plaintiff, throwing him up into the air a distance of 8 or 10 feet; that as a result of this accident and injury plaintiff was laid up in the hospital for three weeks and that it was 54 days before he attempted to do any work; that as a result of the collision he sustained two fractured ribs, a fractured vertebra, an aggravation of osteoarthritis of the spine and that in addi-

tion a latent and inactive pneumoconiosis was activated resulting in permanent and total disability; that plaintiff suffered and now suffers severe pain and at times becomes dizzy; that he is unable to work and is permanently and totally disabled as a result of the accident.

Defendant claims that as the car approached plaintiff and while in the middle of the road, the driver of the car blew his horn; that as the car approached within a few feet of the two men, plaintiff became excited and turned toward the center of the road; that the car was not traveling more than nine miles per hour, and that plaintiff ran into the right rear fender of the car.

The case was tried without a jury and a judgment was rendered in favor of plaintiff in the sum of $3,000. Defendant appeals, assigning as grounds that plaintiff was as a matter of law guilty of contributory negligence, that defendant or its agents were not negligent, that the court committed reversible error in admitting certain testimony of plaintiff, that the award of damages was excessive.

The defendant contends that plaintiff was guilty of contributory negligence in walking upon the street where he did at the time of the collision. While there is a dispute as to how the accident happened, the preponderance of the evidence is in favor of the plaintiff. Two disinterested witnesses corroborated the testimony of plaintiff as to the manner in which the accident occurred.

In the case of *Reynolds* v. *Knowles,* 223 Mich. 70, 76, and again in the case of *Lawrence* v. *Bartling & Dull Co.,* 255 Mich. 580, 582, this court cited with approval the following quotation from a recognized authority on automobile law:

"When one is standing in the street in a place where he has a right to be, or is walking along the highway, he can properly assume that the driver of a motor vehicle will not run him down, but will avoid contact with him. And he may also assume that the driver of an approaching machine will give a signal of warning so that an accident may be avoided. Huddy on Automobiles (5th Ed.), pp. 593, 594." (See 5–6 Huddy, Cyclopedia of Automobile Law [9th Ed.], pp. 132, 133.)

In *Eames* v. *Clark,* 104 Kan. 65, 71 (177 Pac. 540), it was said:

"Foot travelers have equal rights upon the highway with drivers of vehicles, and the usual statement of their obligation is that they must use what amounts to reasonable care in the particular circumstances (note 51 L. R. A. [N. S.] 992). * * * Where the beaten track is wide enough for several vehicles to pass * * * there can be no hard and fast rule that pedestrians must get completely outside of the highway or of the traveled portion of it."

Defendant claims that since the driver of the car was deceased at the time of the trial, the court erred in permitting plaintiff to testify as to what part of his body was struck by the car, what part of his body struck the ground, where he was lying on the pavement, and that the right front fender of the car hit him, on the ground that such testimony was in violation of 3 Comp. Laws 1929, § 14219. The difficulty in this case is to know which, if any, of this testimony was known to the deceased driver. The testimony was admissible unless the facts asserted, if true, were equally within the knowledge of the driver. We may not infer. The burden is upon the one invoking the prohibition of the statute. *Noonan* v.

Volek, 246 Mich. 377. The trial court in his opinion indicates that there was in the record testimony of persons other than plaintiff ample to sustain the conclusion that plaintiff was free from contributory negligence. We find no reversible error in his findings therein.

Defendant next contends that the court erred in permitting the medical witnesses to testify to facts related to them by plaintiff of the manner in which the accident happened. Yet an examination of the record disclosed that the trial judge did not consider such facts as substantive proof. In view of the fact that the suit was submitted for determination without a jury, we are satisfied that no prejudicial error resulted.

We cannot agree with defendant that the award of damages was excessive. As a result of this accident plaintiff was confined to the hospital for three weeks, suffered severe pain, and is permanently disabled.

This court has said in *Watrous* v. *Conor,* 266 Mich. 397, 401, 402:

"The amount allowed for pain and suffering must rest in the sound judgment of the trier of the facts. * * * We are loath to disturb verdicts for personal injuries on the ground that the amount is excessive. *Cawood* v. *Earl Paige & Co.,* 239 Mich. 485. We do not substitute our judgment on this question unless a verdict has been secured by improper methods, prejudice or sympathy."

Judgment affirmed, with costs to plaintiff.

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

HAWKINS *v.* DILLMAN.

1. QUIETING TITLE—EQUITY—JURISDICTION.

   Although chancery court has statutory jurisdiction to try title to land, bill to quiet title will not lie so as to deprive defendant of jury trial where question of title may be tried at law unless there be an independent ground of equity jurisdiction in which case title may be tried even though ejectment is also open (3 Comp. Laws 1929, § 13444, subd. 4).

2. SAME—EQUITY—JURISDICTION.

   Equity has jurisdiction to quiet title where there is fraud, to avoid multiplicity of suits, to set aside a mortgage or to reform an instrument.

3. EJECTMENT—EASEMENTS—POSSESSION.

   Although an easement is an intangible and incorporeal right, when its exercise requires complete possession of the land itself to the exclusion of the holder of the fee, such as use for a public street, ejectment is the proper remedy.

4. EQUITY — JURISDICTION — QUIETING TITLE — CONDEMNATION PROCEEDINGS.

   Jurisdiction of bill to quiet title to strip of land used as part of wide public street is retained in equity in order to grant injunction conditioned on institution of condemnation proceedings, where real relief sought is payment for the land and ejectment is not an adequate remedy.

5. HIGHWAYS AND STREETS—TAX ROLL—EVIDENCE.

   Inclusion or omission of property from the tax roll is not of very great probative value in determining whether land belongs to highway or is private property.

6. ADVERSE POSSESSION—HIGHWAYS AND STREETS.

   Title by adverse possession of strip of land adjacent to highway cannot be sustained where possession was not continued for sufficient time to establish such title prior to enactment of statute forbidding acquisition of rights in public highways by adverse possession (Act No. 46, Pub. Acts 1907).

7. RAILROADS—CESSATION OF USER—REVERTER.
Record *held*, to show that legal title to vacant strip of land between highway and steam railroad right of way, granted to electric railway for its purposes, reverted to grantors upon cessation of use for electric railway purposes.

8. DEDICATION—INTENT—ACCEPTANCE.
The matter of dedication of land for public highway is largely one of intention and since no presumption of intent to dedicate land arises, it is necessary that an unequivocal showing be made of intent on the part of the owner to give it over to the use of the public and an acceptance on the part of the public.

9. SAME—DEEDS—ACCEPTANCE.
Land between highway and railroad right of way *held*, not dedicated to highway purposes although deed to railroad company described land as bounded by highway, since description in such deed does not afford basis for presumption of dedication where railroad fences were not located on adjacent land and there was neither acceptance or user by the public.

10. SAME—USE OF LAND FOR RAILWAY PURPOSES—INTENT.
Fact that strip of land was being used for electric railway purposes, where located between highway and railroad right of way is indicative that there was no intention to make dedication thereof at time of platting lands on other side of railroad.

11. SAME—EXCLUSION FROM SUBDIVISION.
On question of dedication, subdivision plats of property by some heirs and grantees of others of property which had been apportioned between them on one side of railroad right of way does not bind or estop heirs who are owners of legal title of strip of land on other side of railroad which had not been apportioned nor included in plat and did not revert to them until after the platting.

Appeal from Oakland; Doty (Frank L.), J. Submitted July 7, 1934. (Docket No. 118, Calendar No. 37,908.) Decided September 18, 1934.

Bill by Elsie Mildred Hawkins and others against Grover C. Dillman, State highway commissioner, and City of Royal Oak, a municipal corporation, to

quiet title. Decree for plaintiffs. Defendants appeal. Affirmed.

Arthur E. Moore and *George A. Dondero,* for plaintiffs.

Patrick H. O'Brien, Attorney General, *Arthur F. Lederle,* Special Assistant Attorney General, *Frank Kolodziejski* and *Nicholas V. Olds,* Assistants Attorney General, and *W. C. Hudson,* City Attorney, for defendants.

EDWARD M. SHARPE, J. This suit involves the title to a strip of land 16½ feet wide and approximately 142 rods long, lying in what is now the central portion of wider Woodward avenue in section 8, town 1 north, range 11 east, of Royal Oak township. Prior to 1838, John Benjamin and wife owned all of the southwest one-quarter of section 8 in the township of Royal Oak. On May 7, 1838, John Benjamin and wife conveyed to the president and directors of the Detroit & Pontiac Railroad Company, a steam railroad, a strip of land in section 8 described as:

"Lying on the east side of the Detroit and Pontiac turnpike and bounded thereby, being 24 feet wide and running parallel with said turnpike through the said described land."

The railroad company immediately built a fence along the west side of its right of way, which fence remained in the same place until the recent widening of Woodward avenue.

Since early times there has been a road from Detroit to Saginaw in the approximate location of the present Woodward avenue. In 1827 an act of

congress (4 U. S. Stat. at L. p. 231) authorized the laying out of a road between Detroit and Saginaw but there is nothing to show that a survey was actually made. In 1857 the Michigan legislature established the Detroit and Saginaw road as a State highway to be of the uniform width of four rods (Act No. 107, Pub. Acts 1857). In 1895 a franchise was granted the Detroit & Pontiac Railway Company by the township of Royal Oak to construct a street car line along the Saginaw turnpike, now Woodward avenue. A single track was so constructed on the east part of the highway. In 1898 the heirs of John Benjamin granted a right of way to the Detroit & Pontiac Railway Company of

"that certain strip of land existing and lying between the eastern boundary of said Saginaw turnpike and the Detroit, Grand Haven & Milwaukee Railroad; the same being about one rod in width and about 142 rods long, more or less."

This grant was for railway purposes only and upon cesser of such use was to become void. Prior to the granting of this right of way the strip of land was never used for any purpose except in the spring of 1898 when the Benjamins planted potatoes thereon. Old photographs show it as grown up to grass. The traveled portion of the highway was close to the fence inclosing the Benjamin property on the west side of the highway, property which was later acquired by the Roseland Park Cemetery Association. A fence remained on this west line of the old highway until removed for the widening of Woodward avenue.

Some time prior to 1924 the Benjamin property east of Woodward avenue and the railroad tracks was partitioned between the heirs. In 1924 the

southern portion was platted as the Benjamin Estates Subdivision and in this plat the streets and alleys were dedicated to the public. The plat shows Woodward avenue as being 200 feet wide at the point where the disputed property lies. In 1925 the northern portion was platted as Roywood Subdivision and also contains the same provisions as to streets and alleys and the width of Woodward avenue. However, the Roywood plat was made by grantees of part of the plaintiffs and the Benjamin Estates plat was joined in only by those of the plaintiffs to whom that part of the estate had been apportioned.

In 1931 and after the above property was platted, the Eastern Michigan Railways, successor to the Detroit United Railway and the Detroit & Pontiac Railway Company, ceased operating its electric lines, removed its wires and tracks and quitclaimed to the State highway commissioner. Later the State highway department paved the property formerly occupied by the Eastern Michigan Railways including the 16½-foot strip.

Plaintiffs, heirs of John Benjamin, bring this suit in equity asking that the title to the fee in this strip be quieted in them, free and clear of any public easement, on the ground that they are the rightful owners by recorded legal title and by adverse possession.

Defendants contend that the land in question is part of a public highway and that if plaintiffs ever had any title to the same it has been lost to them by reason of platting the adjoining property and dedicating the streets to the use of the public. Defendants also contend that a court of chancery has no jurisdiction of the subject matter.

The lower court held for plaintiffs and defendants appeal.

While the circuit courts in chancery of this State have express statutory jurisdiction (3 Comp. Laws 1929, § 13944, subd. [4]) to hear and determine title to land, such bills to quiet title will not be entertained and the defendant thus deprived of jury trial where the question of title may be tried at law. *Moran* v. *Palmer,* 13 Mich. 367; *Carpenter* v. *Dennison,* 208 Mich. 441; *Dunn* v. *Peck,* 255 Mich. 391; *Kamman* v. *City of Detroit,* 252 Mich. 498. Of course, where a court of chancery has jurisdiction of the subject matter on an independent ground, it may determine the question of title although an action of ejectment would likewise be open. *Moody* v. *Macomber,* 158 Mich. 209; *Carpenter* v. *Dennison, supra; Nisbett* v. *Milner,* 159 Mich. 337. So equity has jurisdiction to quiet title where there is fraud. *Moran* v. *Palmer, supra.* Or to avoid a multiplicity of suits. *Woods* v. *Monroe,* 17 Mich. 238; *Eaton* v. *Trowbridge,* 38 Mich. 454; *Maes* v. *Olmsted,* 247 Mich. 180. Or to set aside a mortgage. *Methodist Church of Newark* v. *Clark,* 41 Mich. 730. Or to reform an instrument. *Nisbett* v. *Milner, supra.*

Where the defendant is in actual possession of the land, ejectment is the proper remedy. *Seymour* v. *Rood,* 121 Mich. 173; *Longcor* v. *Turner,* 191 Mich. 240. The plaintiffs contend that an easement is an intangible and incorporeal right, for which ejectment will not lie. But when the exercise of the easement requires complete possession of the land itself to the exclusion of any acts of ownership by the holder of the fee, ejectment will lie. It would be hard to conceive of any more complete possession than that of the public in a crowded thoroughfare

like Woodward avenue. It has been held both in this State and others that ejectment is a proper remedy for lands used as a public street. *Tuller* v. *City of Detroit,* 97 Mich. 597; *Kamman* v. *City of Detroit, supra; Mahon* v. *San Rafael Turnpike Road Co.,* 49 Cal. 269; *Le Blond* v. *Town of Peshtigo,* 140 Wis. 604 (123 N. W. 157, 25 L. R. A. [N. S.] 511).

However, in the present case ejectment would not be an adequate remedy. The only remedy possible at law is damages for the trespass and a writ of possession. The real relief desired by plaintiffs is payment for their land. This was secured by the decree of the lower court which made the granting of an injunction against defendants conditional on their failure to take condemnation proceedings within 60 days. Such conditional and injunctive relief is possible only in chancery and the suit will be retained in order that it may be granted.

On the merits, counsel for defendants contend that the disputed strip of land is not private property because it was not assessed for taxes. This is true to the extent that it was not separately described and assessed, but the inclusion or omission of the property from the tax roll is not of very great probative value in determining whether the property belongs to the highway or is private property. *Murphey* v. *Township of Lee,* 239 Mich. 551.

Plaintiffs' claim of title by adverse possession cannot be sustained. Prior to the granting of right of way to the Detroit & Pontiac Railway Company, the only act of possession which could be considered adverse was the planting of the disputed strip to potatoes in the year 1898. This possession and that of the Detroit & Pontiac Railway did not continue for sufficient time to establish title by adverse

possession prior to the enactment of Act No. 46, Pub. Acts 1907, forbidding the acquisition of rights in public highways by adverse possession.

However, the record shows that the legal title is in the plaintiffs as heirs of John Benjamin. While there is no definite record of a survey of Woodward avenue as originally located, the westerly boundary of the old highway is well established by a line fence, the legislative authorization limited the highway to four rods in width, and photographs and testimony show that the actual highway occupied only the westerly 66 feet. This left a 16½-foot strip between the highway and the steam railroad right of way which was vacant and unused until the construction of the second electric railway track about 1898.

Whatever rights the Detroit & Pontiac Railway Company acquired under the grant of 1898 terminated and reverted to plaintiffs with the cessation of operation of the railway in 1931. *Hickox* v. *Railway Co.,* 78 Mich. 615; *Jones* v. *Van Bochove,* 103 Mich. 98.

Defendants contend, however, that there was a dedication of the land for a public highway either by John Benjamin about the time of the grant to the Detroit & Pontiac Railroad Company in 1838 or by the subdivision plats of 1924 and 1925. Dedication requires an intention of the owner of the property to give it over to the use of the public and an acceptance on the part of the public. *Alton* v. *Meeuwenberg,* 108 Mich. 629; *Smith* v. *State Highway Com'r,* 227 Mich. 280. The question of dedication is largely one of intention. *Cook* v. *Village of Hillsdale,* 7 Mich. 115; *Weihe* v. *Macatawa Resort Co.,* 198 Mich. 334. In *Vance* v. *Village of Pewamo,* 161 Mich. 528, 535, this court adopted the following statement of the law:

"The facts and circumstances relied upon to prove the existence of an intent on the part of the dedicator must be of a positive and unequivocal character. Since, by a dedication, valuable rights in lands pass from the owner, no presumption of an intent to dedicate arises, unless it is clearly and expressly shown by his acts and declarations, or by a line of conduct the only reasonable explanation of which is that a dedication was intended. 9 Am. & Eng. Enc. Law (2d Ed.), p. 38, and cases cited."

The description of the right of way in the deed of 1838 as bounded by the highway and the subsequent location of the railroad fences is no more open to the presumption of the dedication of the intervening strip as highway than to the inference that the right of way was not located where originally planned. Moreover, there was no acceptance or user by the public.

The subdivision plats did not constitute a dedication of the strip because the plats showed the west boundary of the properties as the eastern line of the railroad right of way. The fact that both the electric and steam railways were operating at the time of the platting is indicative also that there was no intention to include this property in the streets dedicated. Moreover, the Roywood plat was made by third persons who could not bind or estop the plaintiffs, and only two of those of the plaintiffs interested in the Benjamin Estates Subdivision had reached their majority at the time of the platting.

The decree of the lower court will be affirmed, with costs to plaintiffs.

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

SLATER *v.* IANNI CONSTRUCTION CO.

1. RELEASE—COMMON LAW—JOINT TORTFEASORS.
   At common law there could be but one satisfaction for a tort so that a settlement with one tortfeasor constituted a settlement as to all.

2. CONTRIBUTION—JOINT TORTFEASORS.
   One tortfeasor who takes an assignment of a tort judgment against himself and another cannot enforce contribution against the other joint tortfeasor since the law does not concern itself with equities between joint wrongdoers.

3. TORTS—JOINT LIABILITY—PROOF.
   Merely charging two or more parties with tort is no proof of their joint liability.

4. JUDGMENT—TORTS—ASSIGNMENTS—JUSTICES OF THE PEACE.
   Judgment in justice's court by owner of muck land for damages thereto by subcontractor who set fire to brush on adjacent highway, assigned to contractor against which action was also brought but which was held not liable and no appeal as to it taken, may be enforced by assignee since it was conclusively adjudicated not to be a joint tortfeasor and such judgment was assignable.

Appeal from Lapeer; Smith (Henry H.), J. Submitted June 12, 1934. (Docket No. 115, Calendar No. 37,603.) Decided September 18, 1934.

Case in justice's court by Glenn Slater against Ianni Construction Company, a Michigan corporation, and Edwin D. Frink for damage to muck land by fire. From judgment for plaintiff against defendant Frink only, he appealed to circuit court. From judgment for plaintiff against defendant Frink only, he appeals. Affirmed.

George W. DesJardins, for plaintiff.

Herbert W. Smith, for defendant Frink.

POTTER, J. Plaintiff sued defendants in justice's court to recover damages alleged to have been suffered by reason of defendant Edwin D. Frink having set a brush fire in the highway on plaintiff's premises, which fire communicated to plaintiff's muck land, burning out and destroying the value of about two acres. Ianni Construction Company had a contract for building a road. Frink was a subcontractor thereunder at the time of the alleged tortious acts. Frink subsequently abandoned the contract and the work was taken over and finished by Ianni Construction Company. Suit was commenced in justice's court before one Hollenbeck, a justice of the peace, where a judgment was rendered against the defendant Frink for $250 damages and a judgment of no cause of action in favor of the defendant Ianni Construction Company. After suit brought in justice's court defendant Ianni Construction Company agreed to pay plaintiff $50 for an assignment from plaintiff to it of any judgment which he might obtain against defendant Frink which assignment was as follows:

"October 22, 1931.

"I assign to Ianni Construction Company any judgment I may obtain against E. D. Frink in Hollenbeck court.

"GLENN SLATER."

The judgment of no cause of action against defendant Ianni Construction Company was not appealed. It remains in full force and effect, as a final judgment. Defendant Frink appealed from the judgment in justice's court to the circuit court where

the case was retried and judgment awarded plaintiff against defendant Frink in the sum of $250. Defendant Frink appeals, contending the settlement by plaintiff with defendant Ianni Construction Company released one defendant and the assignment of plaintiff's right of action and judgment to one joint tortfeasor released the other.

It was the rule of the common law there could be but one satisfaction for a tort. A settlement with one joint tortfeasor constituted a settlement as to all. No contribution may be enforced between joint wrongdoers. The law does not concern itself with equities between wrongdoers. One tortfeasor who takes an assignment of a tort judgment against himself and another cannot enforce contribution against the other joint tortfeasor. As assignee he takes only the rights of his assignor. He stands in the shoes of his assignor and is in no better position than his assignor to enforce contribution and as assignee cannot do so. That two persons, firms or corporations are jointly charged with tort is no proof of joint liability. Defendant Ianni Construction Company was held not liable, and from that judgment no appeal was taken. It remains in full force and effect. Plaintiff assigned the judgment recovered against Frink to defendant Ianni Construction Company which agreed to pay him therefor $50. Defendant then appealed and on appeal the judgment against defendant Frink was affirmed. Plaintiff will be compensated for the tort but once. There will be paid but one satisfaction for plaintiff's claim. Defendant Ianni Construction Company has been conclusively adjudicated not to be a joint tortfeasor. The judgment in justice's court recovered by plaintiff against defendant Frink was assignable. It was assigned by plaintiff to one who has been conclusively

adjudicated not to be a joint tortfeasor. No reason exists why such assignment could not be made and why the judgment in the hands of the assignee could not be enforced. Defendant Frink saw fit to appeal.

The judgment was affirmed as to him in circuit court and is affirmed here, with costs.

NELSON SHARPE, C. J., and NORTH, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

SIMONS *v.* GROESBECK.

BACKUS *v.* CONNOLLY.

1. BANKS AND BANKING — STOCKHOLDER'S LIABILITY — STATUTES — CONTRACTS.

Bank stockholder's liability to the bank is primarily based upon statute but is also contractual so that legislature may not impair such obligation by taking it away once it has accrued or attached, it being an asset of the bank (12 USCA, §§ 63, 64, 66; 3 Comp. Laws 1929, § 11945).

2. SAME—HOLDING COMPANIES—STOCKHOLDER'S LIABILITY.

Holding companies authorized to hold stock in State and national banks are subject to assessments on such stock as the owners thereof under State and Federal statutes (12 USCA, §§ 63, 64, 66; 2 Comp. Laws 1929, § 9968; 3 Comp. Laws 1929, § 11945).

3. CORPORATIONS—HOLDING COMPANIES—ASSESSMENT ON STOCK.
Assessment on capital stock of holding company provided for in articles of association which were referred to on face and printed on reverse of stock certificate is enforceable against owner thereof since he took it with knowledge of such liability which is neither prohibited by statute nor contrary to public policy.

4. SAME—DUTY OF RECEIVER.
Receiver of insolvent corporation should not be enjoined from performance of duty of collecting assets and paying proved debts.

5. CONTRACTS—ACCEPTANCE—LIABILITY FOR ASSESSMENT ON STOCK.
Acceptance of certificate of stock of holding company upon face of which reference was made to articles of association printed on back thereof and providing for assessments, constituted assent to provisions of an express contract.

6. CORPORATIONS—STOCK AND STOCKHOLDERS—CONSENT TO ASSESSMENT.
Although generally stockholders of bankrupt corporation are not subject to assessment on stock, where charter, articles of association, or statute provide for one, or stockholders consent to it upon fully paid-up stock, such liability is enforceable.

7. SAME—STOCK ASSESSMENT.
Stockholders may voluntarily agree to assess themselves for the betterment of the corporation even though such assessment may not be authorized by statute.

8. SAME—RECEIVERS—ASSESSMENT.
Assessment on capital stock of holding company, owning bank and trust company stock and authorized by articles of association of which the stockholders had notice, may be levied and collected by receivers although stock has been fully paid up, since it is an asset of the corporation.

Appeal from Wayne; Miller (Guy A.), J. Submitted August 10, 1934. (Docket Nos. 137, 138, Calendar Nos. 37,970, 37,971.) Decided September 18, 1934. Rehearing denied October 23, 1934.

Separate bills by Nathan Simons and others against Alexander J. Groesbeck, receiver of Guard-

ian Detroit Union Group, Inc., a Michigan corporation, and by Henry N. Backus and others against William F. Connolly, receiver of Detroit Bankers Company, a Michigan corporation, to restrain collection of assessments on stock. Bills dismissed. Plaintiffs appeal. Affirmed.

William Alfred Lucking and *Lucking, VanAuken & Sprague,* for plaintiffs.

A. W. Sempliner, for defendant Groesbeck.

Wm. Henry Gallagher and *A. W. Sempliner,* for defendant Connolly.

POTTER, J. These suits involving substantially the same questions will be disposed of together. In one, plaintiffs, owners of the common stock of the Detroit Bankers Company, a corporation organized under Act No. 84, Pub. Acts 1921, filed their bill of complaint against William F. Connolly, receiver of the Detroit Bankers Company, alleging they are owners of the stock in the Detroit Bankers Company. The certificates of stock held by plaintiffs recite:

"This certificate and the shares of stock represented thereby, and the rights of the owner thereof, are subject to the provisions of those parts of the articles of association of this company, which appear on the reverse hereof."

On the back of each certificate of stock is the following, quoted from the articles of association of the Detroit Bankers Company:

"(A) The holder of each share of common stock of this corporation shall be individually and severally liable for such stockholder's ratable and pro-

portionate part (determined on the basis of their respective stockholdings of the total issued and outstanding stock of this corporation) for any statutory liability imposed upon this corporation by reason of its ownership of shares of the capital stock of any bank or trust company, and the stockholders of this company—by the acceptance of their certificates of stock of this company—severally agree that such liability may be enforced in the same manner and to the same extent as statutory liability may now or hereafter be enforceable against stockholders of banks or trust companies under the laws under which said banks or trust companies are organized or operate. A list of the stockholders of this company shall be filed with the banking commissioner of Michigan or the comptroller of the currency, whenever requested by either of those officers.

"(B) The stock of the corporation authorized by these articles and any stock of this corporation authorized by any certificate of increase of the capital stock may be issued and disposed of by the board of directors to such persons, firms, corporations or associations in exchange for capital stock and/or assets of banks, trust companies or other corporations or associations included within the provisions of article 3 and upon such terms as the board of directors in their discretion may determine. In any of such instances no holder of any stock of this corporation shall be entitled, as of right, to subscribe for, purchase or receive any proportionate or other share of stock so to be issued. In case, however, the board of directors shall determine to issue any stock of the corporation created by these articles or by any certificate of increase of the capital thereof, for any other purpose than exchange as aforesaid, the holders of common stock of this corporation shall first be entitled to subscribe for, purchase and receive such stock to be issued, ratably and at such price and up-

on such terms as may be fixed from time to time by the board of directors. * * *

"(D) No substantial part of the shares of the capital stock at any time owned by this corporation in any of the following named institutions:

Peoples Wayne County Bank
First National Bank—Detroit
Detroit & Security Trust Company
Bank of Michigan
Peninsular State Bank

shall be mortgaged, pledged or sold, nor shall consent be given to the mortgage, pledge or sale of the property or business of any of said institutions except by and with the vote of at least two-thirds of all of the outstanding shares of the common stock and until December 31, 1934—of a like proportion of the trustee stock."

By exchange of stock the Detroit Bankers Company acquired controlling interest in the capital stock of the First National Bank—Detroit, Peoples Wayne County Bank, Detroit & Security Trust Company, Bank of Michigan, Peninsular State Bank and 14 other banks. The First National Bank—Detroit, organized under the national banking act (12 USCA, § 21 *et seq.*), was closed by proclamation of the President of the United States, March 6, 1933, and C. O. Thomas was appointed receiver therefor, by the comptroller of currency, May 12, 1933, and has since been acting as such. The national banking act provides (12 USCA):

"SEC. 63. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their

stock therein, at the par value thereof, in addition to the amount invested in such shares. * * *

"SEC. 64. Individual liability of shareholders; transfer of shares. The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagement of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. (Dec. 23, 1913, c. 6, § 23, 38 Stat. 273.) * * *

"SEC. 66. Personal liability of representatives of stockholders. Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name. (R. S. § 5152.)"

All of the stock of plaintiffs in the First National Bank—Detroit was transferred to the Detroit Bankers Company more than 60 days prior to its being closed by presidential proclamation. The Detroit Bankers Company May 10, 1933, was dissolved and William F. Connolly appointed receiver therefor. The trial court held that upon his appointment as

receiver of the Detroit Bankers Company, defendant Connolly as such became entitled to all the property and assets of the Detroit Bankers Company; that the liability imposed upon the stockholders thereof by the provisions of its articles of association constituted an asset of the Detroit Bankers Company; that the Detroit Bankers Company became legally liable under the national banking act to the receiver of the First National Bank—Detroit to an assessment of 100 per cent. of the par value of the capital stock of the First National Bank—Detroit held by it. It held substantially the same thing as to the liability of the Detroit Bankers Company as the holder of the stock of the Peoples Wayne County Bank under the banking law of the State of Michigan, and that such liability was to be enforced by defendant Connolly, receiver of the Detroit Bankers Company.

The other case involved similar questions growing out of alleged stockholders' liability in the Guardian Detroit Union Group, Inc., the certificates of stock in which provide:

"This certificate is issued subject to all of the provisions of the company's articles of association as amended article 9 of which containing certain special provisions respecting the rights and liabilities of stockholders of this company appears on the reverse of this certificate. Each holder of this certificate shall be deemed by the acceptance thereof to have assented to all such provisions."

And article 9 of whose articles of association provides:

"The holders of stock of this corporation shall be individually and severally liable (in proportion to the number of shares of its stock held by them re-

spectively) for any statutory liability imposed upon this corporation by reason of its ownership of shares of the capital stock of any bank or trust company, and the stockholders of this corporation by the acceptance of their certificates of stock of this corporation severally agree that such liability may be enforced in the same manner as statutory liability may now or hereafter be enforceable against stockholders of banks or trust companies under the laws of the United States or the State of Michigan. A list of the stockholders of this corporation shall be filed with the banking commissioner of Michigan and the comptroller of the currency whenever requested by either of those officers.

"This corporation reserves and shall have the right from time to time upon the affirmative vote of three-fourths of its directors to issue and dispose of all or any of its unissued or increased stock for the purpose of acquiring stock of banks, trust companies and other corporations without offering to the stockholders of this corporation for subscription any of the stock so to be disposed of."

Copies of article 9 from the articles of association are printed on the reverse side of its certificates of stock. The Guardian Detroit Union Group, Inc., acquired by exchange of its stock therefor, considerable stock in Highland Park State Bank, Highland Park Trust Company, Bank of Dearborn, National Union Bank & Trust Company of Jackson, Federal Commercial & Savings Bank of Port Huron, First National Bank & Trust Company of Port Huron, and many other banks in Michigan. The Guardian Detroit Union Group, Inc., acquired the capital stock of the Union Commerce Corporation which owned and controlled the capital stock of the National Bank of Commerce, a national banking institution, and May 12, 1933, B. C. Schram was appointed receiver

of the Guardian National Bank of Commerce, by appointment by the comptroller of the currency of the United States. Alexander J. Groesbeck, May 29, 1933, was appointed permanent receiver of defendant Guardian Detroit Union Group, Inc. The trial court made the same holding, as to the liability of the stockholders in the Guardian Detroit Union Group, Inc., its liability to assessment and the duty of its receiver, Alexander J. Groesbeck, as it made in the other case. The court holding in both cases it was the duty of the receiver to enforce the liability of the stockholders in each of the said holding companies. From the decree entered plaintiffs appeal. The controlling questions presented by appellants are stated by appellants and conceded by appellees to be:

1. Is there a primary statutory liability of the holding companies under the national banking act, and the Michigan banking act, by reason of their ownership of bank shares—that is, a purely statutory liability,—and if so,

2. Is there a secondary contractual liability of the stockholders of the holding companies under the provisions of article 9 of their articles of association, that is, a purely contractual liability depending for its enforcibility upon the power or right of the holding companies to make such a contract of proportionate liability with their stockholders, and whether the holding companies are first and primarily liable themselves for any statutory liability upon the corporations by reason of their ownership of shares of the capital stock of the banks and trust companies involved herein?

The liability of the stockholders of a bank to the bank itself is a primary liability based upon statute, but it is not strictly a statutory liability. It is con-

tractual in its nature, so much so that the legislature has been regarded as prohibited by the constitutional prohibition against impairing the obligation of contracts from taking away the stockholders' liability after it has once accrued or attached. This statutory stockholders' liability is a part of the assets of the insolvent bank and consequently a liability upon the part of the holders of its stock.

The liability of the stockholders of the banks here concerned is a primary liability imposed upon stockholders by the statutes of the United States and of this State (3 Comp. Laws 1929, §§ 11945, 12024). 6 Thompson on Corporations, § 4812. The holding companies here involved were owners of such bank stock. They were authorized by statute to hold it. 2 Comp. Laws 1929, § 9968. The holding companies were each liable to an assessment on that stock as the owners thereof under the statutes of the United States and of this State. The articles of association of each of the holding companies here concerned provided for an assessment upon the capital stock of such company. The provisions of the articles of association relating thereto are referred to on the face of the stock certificates and printed in full on the back of such certificates so that every person who purchased or acquired the stock in such holding companies took and acquired it with knowledge of the stockholders' liability thereon. This agreement for liability is contractual. It is not prohibited by statute nor contrary to public policy and we see no reason why it may not be enforced. This contractual stockholders' liability is just as much a trust fund for the benefit and protection of the creditors as the capital stock of the corporation itself. One of the usual and ordinary duties of the receiver of an insolvent corporation is to reduce its corporate assets

to possession for the payment of the debts proved and established against it, and a receiver of the court ought not to be enjoined from the performance of a duty which the law imposes upon him. It seems fundamental that, regardless of statutory authority therefor, the stockholders of a corporation may agree to be liable for the superadded liability that the terms of article 9 of the corporate articles of the association of each of the holding companies here imposes. Every person who purchased or acquired stock in such holding companies had notice and knowledge of such superadded liability and agreed to it and became bound by it upon acquiring his stock. *Crawford* v. *Edwards,* 33 Mich. 354; *Winans* v. *Wilkie,* 41 Mich. 264; *Terry* v. *Durand Land Co.,* 112 Mich. 665; *People, ex rel. Attorney General,* v. *Railroad Co.,* 145 Mich. 140. The law itself does not impose this contractual liability upon the parties, but the acceptance of the certificates of stock by those who purchased or acquired it, constitutes an assent to the terms and conditions of the contract as expressed in the articles of association, which contract is an express one. *People, ex rel. Attorney General,* v. *Railroad Co., supra.* The liability to respond to the obligation imposed is statutory.

"As the stockholders' liability rests upon a contract entered into by himself, why should the receiver, on the principle of comity, not be permitted to sue in our courts upon that contract just as he would be permitted to sue on a promissory note?" *Good* v. *Starker,* 207 Wis. 567, 575 (242 N. W. 204).

While it is generally true that the holders of the bankrupt corporate stock are not liable to assessment, yet where the power to make such assessment upon fully paid-up stock is conferred by corporate

charter or by the articles of association of the corporation or by a valid statute or by consent of the stockholders or members of the corporation, such liability is enforceable. 2 Clark & Marshall, Private Corporations, § 402; *Mirage Irrigation Co.* v. *Sturgeon,* 77 Neb. 175 (108 N. W. 977).

Stockholders can agree that an assessment can be levied on their stock; they may voluntarily assess themselves for the betterment of the corporation, even though such assessment may have no statutory warrant or authority. *Harris* v. *Northern Blue Grass Land Co.,* 185 Fed. 192; *Good* v. *Derr* (C. C. A.), 46 Fed. (2d) 411; 1 Cook on Corporations (8th Ed.), § 76.

Where the articles of association of a corporation authorize an assessment upon its capital stock, such assessment may be levied and collected, notwithstanding the stock has been fully paid. *Huxtable* v. *Berg,* 98 Wash. 616 (168 Pac. 187); *Melville* v. *Rhodes,* 136 Wash. 220 (239 Pac. 560); 14 C. J. p. 845, § 1286. This is in accordance with the general rule. This superadded liability, fixed by the articles of association of the holding companies here concerned, constitutes a liability upon the part of the stockholders and an asset upon the part of the corporation to be collected by the respective receivers therefor. Such receivers ought not to be enjoined from the performance of their duty. The decree of the trial court is affirmed, with costs.

NORTH, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred. NELSON SHARPE, C. J., and FEAD and BUSHNELL, JJ., did not sit.

PIERSON *v.* H. R. LEONARD FURNITURE CO.

1. LANDLORD AND TENANT—EMINENT DOMAIN—RENT.
   Reduction in rent reserved under long-term lease, containing clause for proportionate reduction in case of partial condemnation, is required where 37.4 per cent. of the area of the property is taken although frontage on main thoroughfare remains the same.

2. SAME—VALUE OF LEASEHOLD INTEREST—EVIDENCE.
   In suit to determine rights, if any, of lessors, lessee and latter's mortgagees in joint award under condemnation proceedings, brought pursuant to stipulation filed therein, for its subsequent apportionment by a court of chancery, testimony taken as a whole *held*, to show that the once valuable lease had become a liability rather than an asset.

3. SAME—FINANCIAL ABILITY OF LESSEE UNDER LONG-TERM LEASE.
   On bill to determine rights in joint award made in condemnation proceedings taking part of valuable city property under long-term lease, financial ability of lessee furniture company to carry out obligations under lease is all important, where record shows it had vacated store prior to depression of 1929, had sublet it at a loss on various occasions and it had been vacant for a number of years, was located near many other unoccupied buildings, and annual corporation reports show lessee's financial condition is very precarious.

4. SAME—RENT—PARTIAL CONDEMNATION.
   Lessee must pay full rent provided for in lease during balance of term and recoup its damages for loss of part of property through condemnation proceedings where lease contains no provision for reduction of rent in such event.

5. EQUITY—LANDLORD AND TENANT—JOINT AWARD IN CONDEMNATION PROCEEDINGS.
   On bill to determine rights of lessors, lessee and latter's mortgagees in joint award under condemnation proceedings, it is not the function of court of equity to rewrite eminent domain clause in 99-year lease but to determine equitable result based on the evidence.

6. EMINENT DOMAIN—PARTIAL CONDEMNATION—DAMAGES TO LESSEE.
In case of partial condemnation of property held under a profitable long-term lease, a lessee might be entitled to damages in addition to a reduction of the annual rent for the remainder of the term, although the eminent domain clause in the lease provides solely for a reduction of rent.

7. SAME—LANDLORD AND TENANT—MEASURE OF DAMAGES.
The measure of a lessee's damages for the condemnation of his leasehold interest is the market value of the leasehold condemned, that is, the difference between the rental value of the remainder of the term and the rent reserved in the lease or the actual value of the leasehold where there is no market value.

8. LANDLORD AND TENANT—DIVISION OF JOINT AWARD FOR PARTIAL CONDEMNATION.
Division of joint award under condemnation proceedings to lessors, lessee and latter's mortgagees by court of equity so as to pay taxes due, give lessors past due rent and loss in rentals for balance of term plus present value of right of reversion after expiration of 80-year balance of term and the balance of award to lessee and its mortgagees *held,* erroneous, where lease has no market value and was badly in default, the property had been vacant for years, and the lessee had no financial responsibility so as to continue the lease for the part of the premises remaining after condemnation.

9. EQUITY—LANDLORD AND TENANT—DIVISION OF JOINT AWARD FOR PARTIAL CONDEMNATION.
It would be inequitable to give lessee the major portion of joint award for part of premises taken under condemnation proceedings, where the lease provides that the lessee's interest in the leasehold shall be held by the lessors as security for the payment of rent to the lessors.

10. SAME—CONTINUANCE OF LEASE BY LESSEE.
In chancery suit for apportionment of joint award between lessors, lessee and latter's mortgagees in case of partial condemnation of property of very doubtful rental value, the court was in error in giving the lessee and its mortgagee the major portion of the award upon the theory that the lease was to continue for 80-year balance of term when there was every indication that lessee would not continue it after the payment of the award.

11. LANDLORD AND TENANT — CONDEMNATION AWARD — VALUE OF LEASEHOLD INTEREST.

In suit to determine interest of lessors, lessee and latter's mortgagees in joint award of $174,747.12 in condemnation proceedings for part of valuable city property, such amount *held,* to bear no relationship to value of the leasehold, where lessee was badly in default in payment of rent and taxes and its ability to continue the lease for the remainder of the term very doubtful.

12. EQUITY—JOINT AWARD FOR PARTIAL CONDEMNATION—DETERMINATION OF INTEREST.

No arbitrary rule may be set up which may be applied in every suit brought in chancery to determine value of interest of various parties concerned in joint award given in condemnation proceedings for part of premises subject to long-term lease.

13. LANDLORD AND TENANT—EMINENT DOMAIN.

Subject to the exercise of the power of eminent domain, a lessee is entitled to use of entire premises leased for the entire term so long as it performs its obligations under the lease.

14. EQUITY—LESSEE'S COVENANTS AS TO REMAINDER OF PREMISES AND TERM.

In apportioning joint award given in condemnation proceedings, court of chancery must consider and safeguard the obligation and ability of the lessee to perform the covenants of the lease for the portion of the premises not condemned during the remainder of the term.

15. SAME—DIVISION OF JOINT AWARD FOR PARTIAL CONDEMNATION.

Division of joint award for part of premises subject to long-term lease taken under power of eminent domain is equitably made when lessee receives interest from fund, consisting of award less sum impounded for cost of rehabilitating building, present value of lessor's loss of rental, past due rent and taxes and lessors receive past due rent, and present value of their loss of rental at once and principal of above fund at termination of lease.

16. SAME.

An apportionment of joint award between lessors and lessee in case of partial condemnation of property subject to long-term lease is equitable when the award, after deduction of all past due rent and taxes, present value of the reduction of rent

provided by the lease over the remainder of the term and the cost of rehabilitation, is invested in highest grade securities, lessee receives or is credited with the interest therefrom as long as it carries out the covenants of the lease, and the principal is paid to lessors at end of term, the award after proper deductions being thus substituted for the property taken.

17. SAME—JOINT CONDEMNATION AWARD—IMPOUNDING.
It is unnecessary to impound or trustee balance of joint award for partial condemnation of land under long-term lease after proper deduction where fee is owned by lessors and there are no conflicting interests among them.

18. SAME—JOINT CONDEMNATION AWARD—INTEREST CREDIT TO LESSEE.
Of joint award for taking by condemnation part of valuable city lot subject to long-term lease after deduction of present value of loss of lessors' rentals and cost of rehabilitating building, balance is turned over to lessors with exclusive title thereto and subjecting them to charge of interest payable as credit to lessee for duration of his relationship as such at rate fixed by court of equity from time to time as if fund were invested in highest grade securities.

19. APPEAL AND ERROR—REMAND—FURTHER TESTIMONY—INTEREST.
On appeal from decree dividing joint award for taking by condemnation part of valuable city property, case is ordered remanded to take further testimony, to correct inaccuracies, determine interest rate to be credited on future rentals and for entry of decree.

Appeal from Wayne; Webster (Clyde I.), J. Submitted April 6, 1934. (Docket No. 60, Calendar No. 37,648.) Decided October 1, 1934. Rehearing denied December 11, 1934.

Bill by Caroline R. Pierson and others against H. R. Leonard Furniture Company, a Michigan corporation, City of Detroit, a municipal corporation, and Claude M. Harmon and Union Guardian Trust Company, a Michigan corporation, executors and trustees of estate of Mary S. Mandelle, deceased, for the distribution of an award under condemnation proceedings. From decree rendered, plaintiffs appeal. Modified and remanded.

William E. Tarsney, for plaintiffs.

Lewis & Watkins (*John R. Watkins* and *Milton F. Mallender,* of counsel), for defendant company.

Corliss, Leete & Moody (*Alexander P. Leete,* of counsel), for defendant executors and trustees.

BUTZEL, J. On May 20, 1913, George O. Robinson leased to the H. R. Leonard Furniture Company, a Michigan corporation, property at 306–308–310 Woodward avenue, Detroit, Michigan, for a term of 99 years from June 1, 1913. The property has a frontage of 54.08 feet on the east side of Woodward avenue, and a depth of approximately 100 feet. The lease provided for a graduated rental, rising from lower amounts for the first 16 years to $6,000 per year for the five-year period after April 1, 1929, then to $6,600 per year for the following five years, and to $7,200 per year for the remainder of the term. Lessee agreed to pay all taxes and assessments levied on the demised premises, as well as insurance premiums, water rates, etc. It also expressly agreed that on or before April 1, 1916, it would erect at its own expense a permanent new building, at least five stories in height, covering substantially the entire premises, and costing not less than $50,000; that it would keep the building adequately insured, and would rebuild it in the event of fire or other damage; and that the building would be surrendered to lessor without compensation and in good condition, reasonable use, wear and tear thereof excepted, upon the termination of the lease, or sooner, in the event of forfeiture, there being provisions for forfeiture and repossession in case of lessee's default in its payments, or in the performance of other covenants. The lessee was entitled to

mortgage its leasehold interest as security for any loans, but a subsequent clause distinctly provided that lessor should have a valid first lien upon the leasehold interest of the lessee and upon all buildings and improvements erected thereon for the payment of the rent, notwithstanding anything appearing thereinbefore to the contrary in the lease.

The sole reference in the lease to condemnation proceedings appears in the following clause, entitled "eminent domain:"

"If at any time during the existence of this lease the State or municipality under any legal power of eminent domain shall condemn and acquire title to any portion of the premises herein demised, then and in that case the rent herein stipulated and payable at that time shall be decreased in proportion to the amount or portion of said premises as shall be taken under such proceedings."

Lessee erected a five-story building, with basement, in accordance with the terms of the lease, and on May 16, 1914, borrowed $45,000 from Mary S. Mandelbaum (who subsequently changed her name to Mary S. Mandelle) in order to pay the cost of construction. On November 1, 1914, it secured a further loan of $20,000 from Mrs. Mandelle in order to complete and equip the building. About 14 years later it borrowed from her the additional sum of $20,000 for purposes undisclosed by the record. The three loans, aggregating $85,000, were secured by successive mortgages of the leasehold. Upon the death of Mrs. Mandelle the mortgage interest in the leasehold became vested in Claude M. Harmon and the Union Guardian Trust Company, as executors of the Mandelle estate and as trustees of certain trusts created by her will. The lessor's interest in the title to the fee of the property is now vested

in Caroline R. Pierson *et al.*, who for convenience are referred to as the lessors. Reference herein to the rights of the lessee also includes those of the trustees of the Mandelle estate.

In the proceedings to widen Woodward avenue, the city of Detroit condemned a strip of land approximately 38 feet in depth off the west side of the property. When the widening is completed, it will leave the property with a depth of approximately 62 feet, but the amount of frontage on Woodward avenue will remain unchanged. Since 37.4 per cent. of the demised premises is to be taken, there will be a corresponding reduction of the rent under the eminent domain clause of the lease.

On October 12, 1931, prior to the verdict in the widening proceedings, the lessor, lessee and the trustees of the Mandelle estate stipulated that a joint award might be entered; that a bill should subsequently be filed by the interested parties in the Wayne circuit court, in chancery, to determine the rights, if any, of the various parties in the award, and to apportion it accordingly; that from any part of the award that might be apportioned to the lessee in such proceedings there should first be paid to lessor all rents due, including the amounts due and unpaid at the time the stipulation was entered into, together with interest at the rate of five per cent. per annum from the due dates of the respective rentals to the time of payment; that no action should be taken to forfeit the lease until 30 days after the rights of the parties to the award had been determined and payment had been made by the city; that any notices of forfeiture theretofore given to the lessee by lessor should not be avoided by the stipulation, but that action thereon should be suspended until the expiration of the 30 days; that the

stipulation was not an admission by the lessor that the lessee or any person other than the lessor had any right or interest in the award.

The record presents but a meager statement of the factual background so necessary for the proper determination of the law of a case of this nature. Lessee occupied the building for several years after its erection, but vacated it about the year 1927. At one time it sublet the northerly 20 feet of the building to a restaurant; later the building was sublet "for a while" to a concern by the name of "Wextark," at a rental much less than lessee was obligated to pay the lessor. The building has been vacant for a number of years. The Leonard Furniture Company ceased to use it for a furniture store over six years ago, although the widening has not yet taken place. The record shows that the building is being carried by lessee at a large loss, that the rent due to lessors under the lease has been unpaid since April 1, 1931, and that a large sum is due for unpaid taxes. It appears from the stipulation that at least one notice of forfeiture of the lease has been given to lessee, but the record does not reveal any other facts relating thereto. Taken altogether, the testimony indicates indisputably that the lease, though at one time of great value, has become a liability rather than an asset. Whether it will ever be of any value again is largely a matter of conjecture. There is no doubt but that the widening proceedings which have been pending for so many years would discourage prospective tenants from leasing a building which is shortly to be cut down in size and which will possibly become untenantable during the process of rehabilitation. Many other buildings in the neighborhood are also unoccupied. In addition, it is undisputed that the depression has

had a most disastrous effect upon business, and that a collapse of real estate values has taken place. The record, moreover, indicates that the furniture company ceased to occupy the building even prior to the beginning of the depression in 1929.

Inasmuch as the briefs filed on behalf of plaintiffs refer to the distressed financial condition of the lessee, and this is largely borne out by the record, the question of the ability of the lessee to carry out its obligations under the lease becomes all important. For this reason the court ordered that the public records consisting of lessee's articles of association and its last annual report filed with the secretary of State be made a part of the record in this case, and that the parties be given the right to introduce further testimony if they so desired. The annual report for 1931, which was the latest one filed by lessee at the time of the argument, shows that lessee's sole asset consists of "buildings" of the value of $82,655.44; that its indebtedness amounts to $128,000; that its paid-in capital stock of $72,940 has been entirely depleted; and that, even assuming it to be the owner of the buildings it claims, the company is still $118,284.56 "in the red." Since the taking of additional testimony was closed, lessee has filed its 1932 and 1933 annual reports, and our attention has been called thereto. Even if such reports, as to which plaintiffs have not had the opportunity of cross-examination, were admissible, they merely confirm the fact that lessee's financial condition, euphemistically stated, is very precarious. The 1932 report again lists the "buildings" as the sole asset, and shows that the liabilities have grown to $147,492.40 and that the company is $137,776.96 "in the red." The 1933 report, in addition to claiming the buildings again valued

by it at $82,655.44, also includes as an asset an item of $120,433 classified as "bills receivable." This latter amount is almost identical with the sum of $120,433.13, the portion of the award decreed to lessee by the trial court without reference to lessee's obligation to expend $26,801.54 for reconstruction of the building. The liabilities, however, have grown to $169,224.11, exclusive of capital stock, so that even were lessee entitled to the assets claimed, it would still be $39,075.67 "in the red." The company evidently has ceased to carry on its business, since the reports for the three years above mentioned show that it had neither cash nor merchandise with which to do business. The building has been vacant for years, and the liability for rent and taxes continues to grow.

The conclusion is irresistible that even were lessee to receive the portion of the award decreed to it by the trial court, after the setting aside of a fund for reconstruction of the building, the deduction of amounts due plaintiffs, the payment of past-due taxes, and the application of the balance on the mortgages held by the trustees, the lessee would still find itself heavily in debt, without working capital, with its paid-in capital stock entirely depleted, and without any asset other than a leasehold of very doubtful value, which leasehold, after application of the balance of the fund upon the mortgages, would still remain heavily mortgaged to the trustees.

The jury in the condemnation proceedings rendered a joint award in favor of the lessee, lessors and the trustees, in the amount of $110,045.69 for the land taken, and $64,701.43 for damages to the building and cost of rehabilitation, or a total of $174,747.12. We shall not comment upon the size of the award. It may have reflected values prior to

the deflation accompanying the depression. There is no question but that the property was of very great value at one time.

In accordance with the stipulation, lessors filed a bill against lessee and the trustees for a determination as to the manner in which the award should be divided. The city of Detroit was also joined as defendant so that it would be bound by the decree. At the hearing before the chancellor, lessors claimed that lessee's damages should be limited to the proportionate reduction of the rent provided for by the eminent domain clause of the lease; that such reduction would fully compensate lessee for its loss; that the lease had no market value whatsoever, and, as a matter of fact, no actual value, and that the entire award, after paying for the rehabilitation of the building, should therefore belong to lessors.

On the other hand, lessee claimed that the lessors were entitled only to, (1) the amount of the present worth of their loss through the reduction of rental, plus (2) the present value of their reversionary interest in the property condemned, and that the remainder of the award should go to lessee. According to lessee's computation, the average rental for the remainder of the term, amounting to about 80 years from the time of the confirmation of the award, is $7,120 per year. Since this amount is to be reduced 37.4 per cent., lessors' loss in rentals will be $2,670.46 per year. This sum, compounded over a period of 80 years at five per cent. per annum, is represented to be $51,242.25, which according to lessee's claims constitutes the amount lessors are entitled to as the present worth of their loss through the reduction of rental. The present value of lessors' reversionary right in the property condemned is computed by lessee as follows: Lessee claims that according to mathematical tables the

use of the land, based upon a five per cent. interest rate, for a period of 80 years henceforth, is almost equal to its full value, and that the present value of the right to the reversion after 80 years is only 2.05 per cent. of the total value of the land (which is to be taken as found by the jury). Lessee therefore contends that for the loss of the land lessors are only entitled to 2.05 per cent. of $110,045.69, or to $2,255.94, which sum, if compounded at five per cent. per year, would amount, at the end of 80 years, to almost the entire amount of the award for the taking of the land. By the same process lessee finds that the present value of lessors' reversionary interest in the portion of the building taken is also only 2.05 per cent. of its total value (as found by the jury), or $815.86. Under lessee's theory these three amounts, $51,242.25 for loss of rental, $2,255.95 for loss of land, and $815.86 for loss of building, aggregating $54,313.99, constitute the total damages to which the lessors are entitled; and the lessee should receive the balance of the award, or $120,433.13, from which the cost of rehabilitation, amounting to $26,801.54, should be deducted.

The trial court adopted the lessee's theory of apportionment and entered a decree accordingly, providing first for the payment of all past-due rent and taxes, the balance to be applied on the mortgages held by the trustees of the Mandelle estate. Lessors have appealed. The decree made no provision whatsoever for rebuilding, although lessee concedes that it should bear this cost.

The first query is whether the reduction in rent, as provided for in the lease, is not the sole compensation to which lessee is entitled. The lease is silent as to any other damages. Were it not for the eminent domain clause, lessee would have been obliged to pay the full amount of the rent provided for

in the lease and to recoup its loss in the condemnation suit. See 21 L. R. A. 212; 12 A. L. R. 830; 43 A. L. R. 1182; 53 A. L. R. 679. It is lessors' claim that the lease becomes cancelled as to the part taken by condemnation, and that the eminent domain clause gives lessee full compensation by reduction of rent. On the other hand, lessee claims that the lease must be construed most favorably to the lessee (see *Park Building Co.* v. *George P. Yost Fur Co.,* 208 Mich. 349; *Patterson* v. *Butterfield,* 244 Mich. 330), and that since the eminent domain clause of the lease does not expressly limit lessee's compensation to the reduction of rent, it is not precluded from recovering any other damages it may have suffered. A more complete condemnation clause could have avoided all uncertainties. It is not within our province to rewrite the contract. The issues have been submitted to a court of equity, which seeks an equitable result based upon the evidence. In the case of *In re Daly,* 29 App. Div. 286 (51 N. Y. Supp. 576), largely relied upon by lessee, there was a partial condemnation of leased property. The State of New York provides by statutory enactment for a proportionate reduction of the rent in the case of partial condemnation of property against which there is an outstanding leasehold interest. The court, in holding that such reduction in rent did not preclude lessee from recovering any additional damages, stated:

"The representatives of the lessor insist upon the proposition that the whole compensation is involved in the apportionment of the rent, and, upon that theory, that they are entitled to the whole award made by the commissioners in this case. * * * The tenant is considered owner of the term, and the landlord of the reversion, and the benefit and damage in respect to each interest in the premises are to

be regarded by the commissioners in making their estimate. * * * The apportionment seems to relate merely to the ascertainment of what rent shall be paid by the tenant for the untaken portion of the land, regard being had to the rental value of the part taken. * * * It seems to me that the statute intends merely to fix a ratio of rent between the property as it stood and the untaken part, * * * and that in the fixing of damages as between landlord and tenant, or as between reversioner and owner of the term, the damages sustained by the tenant, and not entering into the apportionment of rent are to be allowed upon some equitable basis. Both the landlord and the tenant may suffer by reason of the taking of the land; the former, by the destruction *pro tanto* of the term; the latter, by the extinguishment of the fee and loss of rent of the part taken.

"It is impossible to formulate any general rule to cover each case * * * but I think it is quite clear that the same rule applies with respect to damage between reversioner and the holder of a term for years, whether the land is wholly taken or whether it is only partially taken, and that just and proper compensation to a tenant cannot always be made in the apportionment of the rent under the section of the statute now under consideration. This case presents precisely that feature. The property is so situated, the lessees' relation to it is such, the uses to which it has been put are such, and the value of the term to the lessees is such, that they cannot be compensated for the taking of their interest in the land simply by an ascertainment of how much rent shall be paid in the future to the lessor for the property reserved from the improvement, and as to which covenants of the lease continue.

"It is further urged * * * that the statute terminates all the covenants of the lease in such a way as to deprive the tenants of any other benefit than that of an apportionment of the rent, and that

the terms of the statute are incorporated in the lease by operation of law precisely as if there had been an express stipulation between the parties contained in the lease. That is undoubtedly so, but the statute reads into the lease no other or further or wider term than that of the act itself, and with the same effect, which is that the covenants of the lease are terminated *pro tanto,* subject to the rights of either party as they exist at law.

"If I am right in the foregoing view of the case, it follows that the lessees were entitled to some award of substantial damages not included in the apportionment of rent."

We can readily see how, in the case of partial condemnation of property held under a profitable lease a lessee might suffer damages not compensated for by a mere reduction in rent.

Assuming that there is merit to lessee's claim, the important question still remains as to what were the additional damages actually suffered by lessee in the instant case, and what is the proper test for their determination. If the lessee has been partially released from an unprofitable lease, and the building retains the same frontage on the main thoroughfare at a lower rental, has the lessee suffered any real damages? The measure of a lessee's damages for the condemnation of his leasehold interest is said to be the market value of the leasehold condemned, that is, the difference between the rental value of the remainder of the term and the rent reserved in the lease, or the actual value of the leasehold, where there is no market value. See *In re DeLancey Street,* 120 App. Div. 700 (105 N. Y. Supp. 779); *Kafka* v. *Davidson,* 135 Minn. 389 (160 N. W. 1021); *Corrigan* v. *City of Chicago,* 144 Ill. 537 (33 N. E. 746, 21 L. R. A. 212); *Bales* v. *Railroad Co.,* 92 Kan. 771 (141 Pac. 1009, L. R. A. 1916 C,

1090); *Clarkson* v. *Skidmore,* 46 N. Y. 297; *Larkin* v. *Misland,* 100 N. Y. 212 (3 N. E. 79); *In re William and Anthony Streets,* 19 Wend. (N. Y.) 678; *Mayor and City Council of Baltimore* v. *Gamse & Bros.,* 132 Md. 290 (104 Atl. 429); *Mason* v. *City of Nashville,* 155 Tenn. 256 (291 S. W. 1074). In the case at bar the lease has no market value, nor is it shown that it has any actual value. Lessee, however, contends that its loss should be determined by adopting the amount of the jury's award as the value of the property taken, and that after deducting therefrom the loss of rentals capitalized in the manner hereinbefore stated, and also allowing lessors the present value of their reversionary interest in the portion of the land and buildings taken by condemnation, the balance should belong to the lessee, as the actual value of the leasehold interest condemned. In support of its claim that an almost negligible sum should be allowed lessors for the value of their reversionary interest in the land at the end of the term, lessee cites *Chicago & N. R. Co.* v. *Chicago Mechanics' Institute,* 239 Ill. 197, 219 (87 N. E. 933), an isolated case with a different factual set-up, in which the court stated that "the reversion after termination of the ground lease for 99 years may not be regarded as an element of value unless the lease expires in the very near future,—say 10 or 15 years." Such statement is not corroborated by any testimony in the instant case. Furthermore, the case cited, as well as *City of Chicago* v. *Lord,* 276 Ill. 544 (115 N. E. 8), also relied upon by lessee, does not involve the apportionment of an award between lessor and lessee by a court of equity.

In adopting lessee's theory as to the method in which the damage to its leasehold interest should be measured, the chancellor erroneously assumed that the property belonged absolutely to the lessee and

those claiming under it, subject only to some slight reversionary interest in the lessors. He totally failed to take into consideration the fact that lessee's continuing rights in what may be an unprofitable leasehold are wholly contingent upon its making large annual payments for rent, taxes and assessments, and carrying out the other covenants contained in the lease, and that the lease may be terminated almost immediately by forfeiture, should the award be paid in accordance with the decree of the lower court. Again referring to *In re Daly, supra,* so strongly relied upon by appellees, an appeal was taken in that case from an order of the commissioners allowing lessees but $9,750 out of a total award of $112,250 for the partial condemnation of a leasehold having 10 years to run. In affirming the award, the court stated:

"Upon an examination of the whole evidence, I am not satisfied that they were entitled to any more than the commissioners allowed. They are not entitled as against the lessor to everything in the way of damage they may sustain, irrespective of the detriment the lessor may suffer by the taking of the property and the destruction of the term. The entire value of the lessees' term is not to be carved out so that the whole burden will come exclusively upon the landlord. The latter it is true gets compensation for the property taken, but there may be resulting losses that are not covered by the actual market value of the land condemned. If such a rule were to be applied, it is quite evident that, upon long leases, the whole value of the fee might be absorbed for the benefit of the tenant. A fair and equitable adjustment is to be made, based upon all the facts connected with the situation of the property, its uses, and its value, and I do not perceive that the commissioners have committed any error in their adjustment of the rights of the parties in this par-

ticular case. Here was a lease which imposed upon the lessees various duties and obligations of the payment, in addition to rent, of taxes and water rents, and they were to be at charges for repairs and interest upon investment. In the exercise of their best judgment, the commissioners found that the tenants were entitled to a certain sum as damages. With their finding I see no reason to interfere, unless the whole loss occasioned by the improvement is to be charged against the owners of the fee, which certainly cannot be the rule."

We have been referred to many cases, almost all of which involve short-term leases. In a case of the nature of the one at bar, involving a long-term lease, the size of the award bears no relationship whatever to the value of the leasehold. An exhaustive research by counsel as well as by the court has been unsuccessful in the attempt to find an adjudicated case with a factual set-up in any way similar to the present one. We are satisfied that no arbitrary rule can be set up which may properly be applied to every case. The award of $174,747.12 in the instant case compensates for the loss of land and building and the cost of rehabilitation. Were it not for the condemnation proceedings, lessee would be entitled to the use of the entire premises for the balance of the term, as long as it performed its obligations under the lease. If, therefore, the sum required for rehabilitation be impounded and used for that purpose, and if the lessee, while not in default in meeting its obligations under the lease, receives the income from a fund consisting of the award, after the cost of rehabilitation has been set aside, and the present value of lessors' loss of rental has been deducted, the lessee will have received everything to which it is equitably entitled. If lessors now receive an amount equal to the present

value of their loss of rental, and if, in addition, at the end of the term provided in the lease, or its termination prior thereto, lessors receive the principal of the fund above described, they will receive all they are equitably entitled to, the fund so constituted being thus substituted for the property taken by condemnation.

We are much impressed with the equity of the Massachusetts statute which provides for the apportionment of a joint award in condemnation cases between tenants for life or for years and the remainderman or reversioner. 1 Mass. Gen. Laws, chap. 79, § 24, p. 750 (1921) (1 Mass. Gen. Laws, chap. 79, § 24, p. 911 [1932]), provides that:

"If a tenant for life or for years and the remainderman or reversioner sustain damages which are recoverable under this chapter, by the taking of their property by eminent domain or by injury thereto under authority of law * * * entire damages shall be assessed without apportionment thereof, and shall be paid to, or be recoverable by, any person whom the parties may appoint, and be held in trust by him for their benefit according to their respective interests. The trustees shall, from the income thereof, pay to the reversioner or remainderman the value of any annual rent or other payment which would, but for such damages, have been payable by the tenant, and the balance thereof to such tenant during the period for which his estate was limited, and upon its termination, he shall pay the principal to the reversioner or remainderman."

See, also, *Boston* v. *Robbins,* 121 Mass. 453; *Stark* v. *Mansfield,* 178 Mass. 76 (59 N. E. 643).

In *Stubbings* v. *Village of Evanston,* 136 Ill. 37 (26 N. E. 577, 11 L. R. A. 839, 29 Am. St. Rep. 300), the Illinois court declared, in providing for the impounding of an award:

"It is, however, contended, if the tenant is allowed to recover for the full value of the leasehold interest, and the landlord is compelled to rely upon the personal obligation of the tenant for the payment of rent, a rule of this character would in many cases result in great loss to the landlord. In a proceeding to condemn a part of leased premises, the rule which we have adopted fixes the relative amount of damages to be recovered by each party interested in the premises; and if a case should arise where, upon the payment of the value of the leasehold interest to the tenant, the remedy of the landlord to collect his rent might be impaired or defeated on account of the insolvency of the tenant, or other cause, a court of equity might interpose to prevent the payment of the damages recovered into the hands of the tenant, and appropriate the fund, or so much thereof as might be necessary, to the payment of the rents due or to become due from the tenant to the landlord during such time as the lease might, by its terms, continue to run."

We can readily see the advisability of impounding the award with trustees where the tenants for life or for years hold the property free from any obligation to pay rent, or where there are various conflicting interests so as to make it necessary to trustee the award for the protection of the parties. In the instant case, however, the fee is apparently owned by the lessors and there are no conflicting interests which necessitate the appointment of trustees.

We therefore decree that the following disposition be made of the award: (1) The amount required for rehabilitation of the building shall be impounded, to be used solely for that purpose. (2) There shall be paid to lessors a sum equal to the present value of their loss of rentals. We shall not

disturb the order of the trial court fixing the rate at five per cent. for the purpose of determining such present value. (3) The balance of the award shall be turned over to the lessors, who thereupon shall be charged with the payment of interest on such fund while the lease remains in full force and effect, which interest shall be credited annually on the rent lessee is obligated to pay under the lease. If at any time such interest shall exceed the rent reserved, the excess shall be paid in cash to the holders of the leasehold, who shall have a lien on the property for the payment to them of such excess, if any.

The question of the rate of interest with which lessors shall be charged becomes important. The fund thus created in a way resembles a trust fund, which for a long period would properly be invested only in securities of the very highest grade. Although in view of the present depression it might be preferable to invest such moneys in United States government securities, we shall leave the question of the rate of interest to be determined by the chancellor, who may take testimony and hear arguments in regard to such question, and who may also provide that the rate may be changed from time to time upon application of any interested party. The title to the fund so created shall be exclusive in the lessors, who shall not be obligated to place it aside as a trust fund. However, they and their assigns shall be charged with interest at the rate to be fixed by the chancellor at the same rate as if the moneys were invested in the highest grade securities. In the event of forfeiture of the lease through the default of lessee or those claiming under it, lessors' obligation to pay interest shall cease. Lessee's obligation to pay the amounts due for rent

at the time of the payment of the award, and to pay taxes and all assessments, shall not be affected by the decree. Nor shall it affect any right lessors may have to forfeit the lease in accordance with the stipulation, if lessee's defaults be not cured within 30 days after the payment of the award.

While we realize the impossibility of making an apportionment with mathematical precision, we believe that by applying the Massachusetts rule in this manner, we are doing substantial equity. If the lessee cares to continue the lease by making all the payments due thereunder at the time of the payment of the award, the annual rental payable to lessors, after the latter have credited the lessee's account with interest on the fund as above ordered, will become negligible. Lessee will, however, still be obliged to pay the large sums due each year for taxes and assessments. It is lessee's contention that the leasehold interest still has a substantial value. If this claim is well founded, lessee will be more than compensated.

The figures used in this opinion are taken from the record. Any inaccuracies shall be corrected on final decree. The cause is remanded to the trial court, with instructions to take further testimony, if necessary, to correct the figures and to determine the rate of interest and any other details, and to enter a decree in accordance with this opinion. Plaintiffs will recover costs against the lessee and trustee defendants.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

PEOPLE *v.* ROSE.

1. JURY—TRIAL—VOIR DIRE EXAMINATION—DISCRETION OF COURT.
   The trial judge may limit, reasonably, the extent of the *voir dire* examination of jurors.

2. SAME — CRIMINAL LAW — VOIR DIRE EXAMINATION—PEREMPTORY CHALLENGES—WAIVER.
   In trial of one charged with crime, alleged errors in restriction or extension of *voir dire* examination were waived where appellant failed to exhaust his peremptory challenges.

3. APPEAL AND ERROR—BURDEN OF ESTABLISHING ERROR.
   Burden of establishing error on appeal in the nature of a writ of error is on the party who claims it.

4. CRIMINAL LAW—DIRECTION OF ACQUITTAL—EVIDENCE.
   Verdict of acquittal of a crime should not be directed where there is direct evidence of defendant's guilt, since the credibility of witnesses and weight to be given the testimony are matters for consideration by the jury.

5. INDICTMENT AND INFORMATION—INDORSEMENT OF NAMES OF WITNESSES.
   Failure of court to require that prosecuting attorney indorse names of eyewitnesses to alleged assault with intent to do great bodily harm less than the crime of murder charged in first count of information *held*, not prejudicial, where defendant was acquitted on that count, although convicted under second count charging that he went armed with a dangerous weapon.

6. SAME—ELECTION BETWEEN COUNTS.
   Although information may not charge two or more separate and distinct offenses, an election between the counts thereof may not be compelled where the different offenses charged grow out of the same transaction and are covered by the same testimony (3 Comp. Laws 1929, § 17289).

7. SAME—CONVICTION OF LESSER OFFENSE.
   Conviction may be had of lesser offense not charged in information where it is necessarily included within greater offense that is charged.

8. CRIMINAL LAW — OTHER OFFENSES — DANGEROUS WEAPONS — EQUALLY DIVIDED COURT.

Rejection of testimony proffered to impeach rebuttal witnesses asserting defendant had had a chain blackjack in his possession on prior occasions after his denial of same is affirmed by an equally divided court. Per NORTH, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ.

9. INDICTMENT AND INFORMATION—INDORSEMENT OF NAMES OF REBUTTAL WITNESSES.

Rule as laid down by statute requiring that names of witnesses known to prosecuting attorney at time of filing information must be indorsed thereon extends to rebuttal witnesses, if known, since it is as important to impeach them as any other (3 Comp. Laws 1929, § 17254).

10. SAME—ADDITIONAL WITNESSES.

Leave of court upon adequate showing made and notice to defendant are prerequisites to indorsement of names of additional witnesses during the course of the trial.

11. CRIMINAL LAW—ORDER OF PROOF.

While the order of introduction of testimony is a matter largely in the discretion of the trial court and such discretion will not ordinarily be interfered with, defendant is entitled to fair trial and have all the testimony in chief introduced in its proper order.

Appeal from Newaygo; Pugsley (Earl C.), J. Submitted June 14, 1934. (Docket No. 133, Calendar No. 37,525.) Decided October 1, 1934.

John W. Rose was convicted of going armed with a dangerous weapon. Reversed, and new trial granted.

Maurice Sugar and *John Safran,* for appellant.

Patrick H. O'Brien, Attorney General, *Stanley B. Streeter,* Prosecuting Attorney, and *Harry D. Reber,* Special Assistant Prosecuting Attorney, for the people.

POTTER, J. Defendant was arrested and informed against, charged in the first count of the information with assault with intent to do great bodily harm, less than the crime of murder; and in the second count with going armed with a dangerous weapon, to-wit, a chain blackjack, contrary to the form of the statute, etc. On trial defendant was convicted under the second count in the information and on appeal assigns 113 errors. These may be grouped under a few heads.

It is claimed the trial court excluded questions to certain jurors which might have been a proper ground for peremptory challenge. The trial judge must be allowed to place some limit upon the extent of such examination. *Ford* v. *Cheever,* 113 Mich. 440.

(a) A large discretion is vested in the trial court as to the scope of examination of jurors on their *voir dire.*

(b) Even though the trial court improperly and erroneously restricted or extended the examination of jurors prior to their being sworn to try the case, such error is waived if plaintiff in error fails to exhaust his peremptory challenges. *William R. Roach & Co.* v. *Blair,* 190 Mich. 11; *Link* v. *Fahey,* 200 Mich. 308; *Webster* v. *Stewart,* 210 Mich. 13.

(c) If the objecting party afterwards expresses himself as satisfied with the jury, he thereby waives the error. *Snyder* v. *Mathison,* 196 Mich. 378.

(d) Though this case is here on appeal, it must be considered and disposed of the same as if it were here under writ of error, the issuance of which is an exercise of the original jurisdiction of this court and under which the burden of establishing error is on the party who claims it.

We cannot consider these assignments of error for the reason it does not appear the defendant was in any way prejudiced thereby. There is no showing defendant exhausted his peremptory challenges and no showing he was not satisfied with the jury as sworn. *Ford* v. *Cheever, supra.*

It is claimed a verdict for defendant should have been directed. There was direct evidence of defendant's guilt. The credibility of the witnesses testifying thereto and the weight of their testimony were for the jury.

Defendant asked that the names of eyewitnesses to the assault be indorsed on the information. This motion was supported by affidavit. It is claimed the failure of the court to order these names indorsed constitutes reversible error. Defendant was acquitted on the first count of the information, that is, of assault with intent to do great bodily harm less than the crime of murder, and it does not, therefore, appear defendant was prejudiced by the action of the court.

Defendant contends the information filed against him should have been quashed for the reason that it includes separate and distinct offenses arising out of different transactions and supported by different testimony, and these cannot be charged in the same information.

"The true and only just rule as regards the joinder of counts in an information or indictment seems to be, if the different counts are drawn and used with a view to one and the same transaction, so that one of them, upon the trial, may be found to meet the evidence, the court will not interfere with the proceeding, as such an object is a legitimate one. It is a proceeding calculated to promote justice, and cannot confuse or prejudice the defense of the ac-

cused. But when the object and purpose is apparent to prosecute the respondent, and such is the logical effect, for separate felonies by means of one information or indictment, the court will not permit it to be done. The prosecutor has no right to do this, as its injustice and prejudice to the accused overbalance all possible benefits to be derived to the public from such a practice." *People* v. *Aikin,* 66 Mich. 460, 470 (11 Am. St. Rep. 512).

This rule does not apply where the information charges a greater offense which necessarily includes a lesser. Under such circumstances a defendant may be convicted of the lesser offense though the same is not charged in the information. *People* v. *Prague,* 72 Mich. 178.

"The reasons are that the offense springs from the same transaction, and is supported by the same class of testimony." *People* v. *Prague, supra.*

Nor does this rule apply to different offenses, charged in separate counts, growing out of the same transaction and covered by the same testimony. In such cases the court will not quash the information nor compel an election between counts. *People* v. *Sweeney,* 55 Mich. 586; *People* v. *McDowell,* 63 Mich. 229; *People* v. *Prague, supra; People* v. *Summers,* 115 Mich. 537; *People* v. *Durham,* 170 Mich. 598; *People* v. *Warner,* 201 Mich. 547; *People* v. *Hatfield,* 234 Mich. 574; *People* v. *Lewis,* 264 Mich. 83.

The applicable statute provides:

"No indictment shall be quashed, set aside or dismissed for any one or more of the following defects: (first) That there is a misjoinder of the parties accused; (second) That there is a misjoinder of the offenses charged in the indictment, or duplicity therein; (third) That any uncertainty exists there-

in. If the court be of the opinion that the first and second defects or either of them exist in any indictment, it may sever such indictment into separate indictments or informations or into separate counts as shall be proper. If the court be of the opinion that the third defect exists in any indictment, it may order that the indictment be amended to cure such defect." 3 Comp. Laws 1929, § 17289.

There was no error in the court refusing to quash the information or to compel an election between counts by the people.

Defendant testified he did not have a chain blackjack prior to the commission of the alleged offense. The people called certain rebuttal witnesses who testified defendant had a chain blackjack in his possession on prior occasions. Defendant sought to impeach these rebuttal witnesses by showing by other witnesses their reputation for truth and veracity was bad and they should not be believed under oath. This proffered testimony was excluded by the court.

"The purpose of any inquiry into the character of a witness is to enable the jury to determine whether he is to be believed on oath. Evidence of his reputation would be irrelevant for any other purpose. And a reputation which would not affect a witness so far as to touch his credibility under oath, could have no proper influence. * * *

"The reason given is that, unless the impeaching witness is held to showing the extent to which an evil reputation has affected a person's credit, the jury cannot accurately tell what the witness means to express by stating that such reputation is good or bad, and can have no guide in weighing his testimony. And since it has become settled that they are not bound to disregard a witness entirely, even if he falsifies in some matters, it becomes still more im-

portant to know the extent to which the opinion in his neighborhood has touched him." *Hamilton* v. *People,* 29 Mich. 173, 185, 186.

In the case above, the court reviewed the English authorities, and textbooks in common use, and came to the conclusion indicated. This rule has not since been departed from in this State. It was prejudicial error not to permit this impeachment.

It is alleged the court was in error in permitting witnesses to be impeached upon a collateral matter. Defendant was cross-examined in relation to his conduct on an occasion similar to that which gave rise to the offense charged in the information, at another time, in another county, and on a different occasion.

"In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant." 3 Comp. Laws 1929, § 17320.

The object of the statute above quoted was to make testimony relevant which might otherwise not be so; to broaden the scope of inquiry as to similar transactions; to make relevant evidence of transactions which in the absence of the statute would not be relevant. Ordinarily a witness may not be impeached upon questions relating to a separate and

distinct offense at another time and place. A witness may not be impeached upon a collateral issue. *Mills* v. *Warner,* 167 Mich. 619. But the purpose and object of the statute above quoted was to do away with the rule as to proof of other offenses and permit the introduction of such testimony even though it might show or tend to show the commission of another prior or subsequent offense by defendant.

At common law the names of witnesses were not required to be indorsed on an indictment for any purpose connected with the trial. Witnesses before a grand jury were usually sworn in open court before being sent before the grand jury and a list of such witnesses was indorsed on the back of the proposed indictment as drawn and laid before the grand jury. This was considered necessary in order that the grand jury might know what witnesses to call and what witnesses had been sworn, and that the officer whose duty it was to swear the witnesses might know who were to be called and sworn and that he might certify to their having been sworn. *Hill* v. *People,* 26 Mich. 496.

When informations were substituted for indictments by Act No. 138, Laws of 1859, it was provided the provisions of Act No. 77, Laws of 1855, relative to indictments should apply to informations. Informations were required to be filed by the prosecuting attorney who was directed to indorse thereon the names of witnesses known to him at the time of filing the same. This act with little modification, now stands as 3 Comp. Laws 1929, § 17254, as follows:

"All informations shall be filed during term in the court having jurisdiction of the offense specified therein, after the proper return is filed by the ex-

amining magistrate by the prosecuting attorney of the county as informant; he shall subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same. Names of other witnesses may be indorsed before or during the trial by leave of the court and upon such conditions as the court shall determine."

"While there are some good reasons to require the indorsement of the names of such witnesses as are known to the prosecuting attorney prior to the commencement of the trial, and which he then expected to have sworn, we can discover no reason founded on justice or common sense, for requiring the indorsement of such as the prosecutor, during the progress of the trial, shall happen to discover to be important witnesses, or for the exclusion of such witnesses upon such ground. And we think it would be exceedingly pernicious in the administration of criminal law, to recognize such an objection. Should a criminal go unpunished because all the evidence of his guilt has not come to the knowledge of the prosecuting attorney before the commencement of the trial, when it is always the interest of criminals to conceal all knowledge of this kind, and when the guilt of the prisoner can be proved beyond doubt, by evidence which the prosecuting attorney has discovered during the progress of the trial?

"This would be a new feature in the administration of the criminal law, which no court ought ever to adopt without the express requirement of the legislature, and which we cannot suppose any intelligent legislature will be likely to adopt, with any reference to an honest administration of justice." *Hill* v. *People, supra,* 499.

The statute has been frequently before the court. It is mandatory that the prosecuting attorney indorse on the information the names of the witnesses known to him at the time of filing the same. The

statute grants to defendant substantial rights; to be informed of the nature of the accusation against him and to have the names of the witnesses who are to be produced in order that he may properly prepare for trial by knowing something of the history, antecedents and character of the witnesses who are to be produced.

"The object of this is not merely to advise a respondent what witnesses will be produced on the main charge. It is to guard him against the production of persons who are unknown, and whose character he should have an opportunity to canvass." *People* v. *Quick,* 58 Mich. 321.

"The right of the defendant to know the witnesses to be called against him is a substantial one, and the statutory requirement should be faithfully observed by the prosecuting attorney." *People* v. *Tamosaitis,* 244 Mich. 258; *People* v. *Koukol,* 262 Mich. 529 (87 A. L. R. 878).

The same rule which requires names of the witnesses in chief to be upon the information requires the indorsement of rebutting witnesses if known.

"It is as important to impeach a rebutting witness as any other." *People* v. *Quick, supra.* See, also, *People* v. *Smith,* 257 Mich. 319.

Intimately connected with this assignment of error is that based upon the fact the prosecuting attorney indorsed witnesses upon the information without notice to defendant and without any adequate showing.

In *People* v. *Smith, supra,* 325, it was said:

"No request to the court was made to add her name to the information and no excuse appears in the record or in the people's brief for not having done so as soon as her testimony was discovered.

In the language of Justice Campbell, 'this was an unfair suppression, in contravention of law.' (*People* v. *Hall,* 48 Mich. 482, 488 [42 Am. Rep. 477].) It was said in *People* v. *Quick,* 58 Mich. 321:

"'We have held on several occasions that the defendant has a right to know in advance of the trial what witnesses are to be produced against him, so far as then known, and to have any new witnesses indorsed on the information as soon as discovered.'

"This right of a defendant in a criminal case to know in advance what witnesses are to be produced against him is a substantial right, not a mere formality. *People* v. *Hall, supra.*

"So strictly has the court upheld this right that in *People* v. *Moran,* 48 Mich. 639, a conviction for burglary was set aside because the prosecuting attorney, during the trial, indorsed the names of additional witnesses on the information without first having obtained leave of the court. And as recently as 1928 this court said in *People* v. *Tamosaitis,* 244 Mich. 258:

"'The right of the defendant to know the witnesses to be called against him is a substantial one, and the statutory requirement should be faithfully observed by the prosecuting attorney.'"

It is claimed by defendant the court was in error in permitting evidence properly introduced in chief to be introduced as rebutting testimony; that this was a surprise to defendant and a violation of the order of proof prevalent in criminal trials. The order in which testimony shall be introduced is largely in the discretion of the trial court, and this discretion will not ordinarily be interfered with. 4 Encyc. of Evidence, p. 651; 9 Encyc. Evidence, p. 236; 3 Wigmore on Evidence (1st Ed.), § 1871. As said in 3 Wigmore on Evidence (1st Ed.), § 1867:

"There may occur instances where an opponent has been unfairly deprived of showing the truth by reason of such a variation of the customary order of evidence; but the trial court can better be trusted

to understand the situation. The doctrine of new trials is not within the present purview; but no opportunity should be lost to rebuke the abuse by which these rules of customary order are sought to be turned into inflexible dictates of absolute justice, and new trials are asked merely because an unusual sequence of evidence was adopted. Courts often lend ear to such appeals, and thereby partake in the abuse of such a practice. To purport to preside over the investigation of truth, and then, at an inordinate expense of time, labor, and money, to insist on reopening the entire investigation because a minor witness has been asked a minor question some half-hour before he should have been asked, is to furnish a spectacle fit to make Olympus merry over the serious follies of mortals."

But notwithstanding this general principle, defendant is entitled to a fair trial and to have the testimony introduced in its proper order.

"In the present case, however, the witnesses who were received as rebutting witnesses were not such. They were called to prove what belonged to the people's case in chief. Cases may sometimes arise where testimony which could not be had in the opening may be let in upon good cause shown thereafter. But it is not proper to divide up the testimony on which the people propose to rest their case, and nothing which tends to prove the commission of the crime itself or its immediate surroundings can be classed as rebutting evidence under ordinary circumstances, if at all." *People* v. *Quick, supra.*

For the errors above indicated conviction is reversed, and new trial granted.

NELSON SHARPE, C. J., and FEAD and BUSHNELL, JJ., concurred with POTTER, J.

WIEST, J. (*concurring.*) I concur in reversal.

For reasons stated in the prevailing opinion in *People* v. *Wysocki,* 267 Mich. 52, I do not concur in the views of Mr. Justice POTTER upon admissibility of evidence impeaching defendant's denial of the commission of a previous crime. The inquiry was, perhaps, proper on cross-examination but, upon his denial, it could not be made an issue either for purposes of impeachment, as stated by the prosecutor, or showing intent in the case on trial.

NORTH, BUTZEL, and EDWARD M. SHARPE, JJ., concurred with WIEST, J.

CHICAGO BOULEVARD LAND CO. *v.* NUTTEN.

1. NOVATION—PARTIES.

   Novation of parties is determined from consideration of all the facts and circumstances of a given case.

2. VENDOR AND PURCHASER—NOVATION—FINDING OF COURT—ESTOPPEL.

   In suit to foreclose land contract and for deficiency decree against original purchaser and assignee, finding of court that novation of parties had been effected and releasing him from liability is affirmed on appeal, where plaintiff had consented to the assignment for a valuable consideration, had replaced original purchaser's name on its ledger sheet with that of assignee and had failed to notify or try to collect from original purchaser for upwards of a year and a half after assignee's default, during which time assignee had lost his property.

3. NOVATION—CONSENT OF PARTIES—EVIDENCE.

Consent of all parties to novation is necessary but need not be expressed in writing, it being inferable from attendant facts and circumstances.

POTTER, FEAD, and WIEST, JJ., dissenting.

Appeal from Oakland; Covert (Frank L.), J. Submitted June 5, 1934. (Docket No. 20, Calendar No. 37,715.) Decided October 1, 1934.

Bill by Chicago Boulevard Land Company, a Michigan corporation, against Wesley L. Nutten, Highland Corporation, a Michigan corporation, and Bertram B. Haskins to foreclose a land contract and for a deficiency decree. From a deficiency decree against Highland Corporation and defendant Haskins only, plaintiff appeals. Affirmed.

William Abramsohn, for plaintiff.

Herbert J. Newman (*Clinton McGee,* of counsel), for defendant Nutten.

NORTH, J. In determining whether in a given case there has been novation of parties, all the facts and circumstances of that case are to be considered. *Fender* v. *Feighner,* 265 Mich. 536. There may not be a single act or transaction which in and of itself would disclose or establish novation; but from all the acts of the parties concerned it may appear that in fact and in law there has been a novation. In each case determination of this question should be based upon the particular facts therein disclosed. As bearing upon novation in the instant case the following facts are important and I think controlling.

In April, 1925, plaintiff's predecessor in title sold defendant Nutten on contract a vacant lot in the village of Royal Oak. The purchase price was

$6,000, $600 down payment, balance in monthly payments of $54 each. The contract payments were regularly met by Nutten until December, 1927, when he assigned his vendee's interest to the Highland Corporation. This corporation in turn assigned to defendant Bertram Haskins. Nutten promptly advised the plaintiff herein that he had transferred his vendee's interest to the Highland Corporation and that the vendee should look to the assignee for further payments. Later Nutten received two or three receipts for monthly payments which Haskins had evidently made to plaintiff. Thereupon Nutten again advised plaintiff of the transfer of his interest and requested plaintiff to send future receipts to Haskins. Plaintiff asked Nutten something about the assignment, indicating that plaintiff did not have the assignment. In this particular Nutten testified:

"I made some statement about getting the assignment and doing anything I could to get the matter in shape for them and to satisfy them."

Thereafter (July 26, 1928) plaintiff wrote defendant Nutten as follows:

"*Before Mr. Haskins can be recognized as a purchaser,* it will be necessary for us to have an assignment of the land contract together with the customary assignment fee of $5. Will you kindly furnish us with the same or advise us from whom it can be obtained."

Nutten then took the matter up with Haskins who stated that he would get together with the company "and meet the requirements." Thereafter for three and a half years nothing further was said to Nutten by plaintiff or its collecting agency, the James S. Holden Company, in regard to this contract. Nutten's assignee and the subsequent assignee assumed and

agreed to pay the contract. After Nutten's receipt of the letter from plaintiff setting forth the conditions upon which Haskins could "be recognized as purchaser" the parties got together and entered into a written agreement whereby plaintiff for a valid consideration consented to the assignments of the vendee's interest. The agreement contains the following:

"And the said Bertram B. Haskins in consideration of the premises, hereby assumes and agrees to carry out all parts of said contract. * * * And the said Chicago Boulevard Land Company, party of the first part in and to the above-described contract, in consideration of the undertakings above entered into by the assignee, hereby consents to the foregoing assignment."

Execution of this instrument gave plaintiff the right to proceed either at law or in equity to enforce the contract against Haskins. *Sloman* v. *Cutler,* 258 Mich. 372. This circumstance in connection with other facts disclosed herein is strongly indicative of plaintiff's acceptance of Nutten's assertion that he was no longer in the transaction; and there having been compliance with the conditions specified in plaintiff's letter of July 26, 1928, above quoted, that henceforth Haskins was to be "recognized as purchaser" under the assigned contract. It is somewhat significant that throughout the original contract itself Nutten is referred to as "purchaser." Plaintiff received the assignment fee of $5 and also the benefit of Haskins' assuming and agreeing to pay the contract. It seems of importance that plaintiff herein for a "consideration" subscribed and became a party to the assignment and thereupon struck Nutten's name from its ledger account pertaining to this contract and substituted therefor the

name of Nutten's assignee. For many months contract payments were made by the assignee and received by the plaintiff; but notwithstanding contract payments were continually in default after May, 1930, plaintiff gave no notice to Nutten or made any claim against him until December, 1931. At this time past-due payments on principal and interest approximated $700 in addition to unpaid taxes in excess of $100.

"Consent of all the parties to novation is necessary but need not be expressed in writing. It is sufficient if it appears from the facts and circumstances attending the transaction." *Keppen* v. *Rice,* 257 Mich. 299.

In *Smitter* v. *Geurkink,* 261 Mich. 697, it was held:

"Consideration for the novation was furnished by the arrangement itself."

We quote and approve the following from the opinion of the trial judge:

"The proofs show clearly that defendant Nutten considered himself released from any obligations to pay and so advised plaintiff. The important question is, as to whether or not plaintiff also considered Nutten released from any liability? As bearing upon that question we have the contract (of assignment) itself together with the fact that after the execution of the assignment and the consent thereto by plaintiff no notice was ever served upon defendant Nutten of any demand made against him for payment until after the lapse of many months. It is true as a matter of law plaintiff would be under no obligation to notify him, but it would be very strange that if plaintiff still considered him liable in the face of repeated defaults by Haskins, it made no attempt to collect from Nutten. There is also the further fact of the change of name in the ledger

account together with other facts and circumstances appearing in the testimony which leads to the reasonable conclusion that the plaintiff accepted defendant Haskins and the Highland Corporation as the purchasers under the contract and did not for a long period of time consider Nutten liable. * * *

"I am satisfied from the proofs in the case that there was a novation consented to by all parties and the defendant Nutten was entirely released by plaintiff from any liability."

While the trial judge did not plant decision upon that ground, it might also be noted that defendant Nutten sets forth in his answer that in consequence of plaintiff allowing Haskins to become badly in default without any notice thereof to Nutten "this defendant is released from any obligation under the terms of said contract." While not very specific evidently this injected into the case an element of estoppel which defendant Nutten asserted as a bar to defendant's right to equitable relief. In this connection defendant Nutten testified:

"If they had notified me, I could have protected myself in time and I think they ought to have done it under the circumstances in view of the letter they wrote me and the impressions they had given me. I could have protected myself because Mr. Haskins was at that time, at the time of that default, he was in good financial condition and he lost his money, as I understand it, later."

Without holding that the testimony just quoted is sufficient to have established an estoppel, it clearly has a material bearing upon Nutten's claim of novation; and we think affords another equitable reason for sustaining the determination of the circuit judge.

Under all the circumstances disclosed by this record we find the trial judge was fully justified in

holding that there had been a novation of parties and his decree to that effect is affirmed. Costs of this court to appellee.

NELSON SHARPE, C. J., and BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred with NORTH, J.

POTTER, J. (*dissenting*). Plaintiff filed a bill to foreclose a land contract and for decree for deficiency against defendant Wesley L. Nutten. From a decree denying plaintiff a deficiency decree against defendant Nutten, plaintiff appeals. April 3, 1925, Jacob Singer and Goldie Singer his wife agreed to sell on land contract to Wesley L. Nutten for $6,000 lands in Oakland county mentioned and described in the land contract here involved. By mesne conveyances plaintiff acquired the Singers' interest and Nutten assigned his contract interest in the premises to the defendant Highland Corporation. On foreclosure plaintiff asked for decree for deficiency against Nutten and the court denied such decree upon the ground there had been a novation.

"It is a well-established rule that the necessary legal elements to establish novation are: (1) Parties capable of contracting; (2) a valid prior obligation to be displaced; (3) the consent of all parties to the substitution, based upon sufficient consideration; and (4) lastly, the extinction of the old obligation and the creation of a valid new one. All of these elements must be established by the evidence; not necessarily by direct evidence, but by evidence of such facts and circumstances as logically lead one to the conclusion that a new contract has been made." *Harrington-Wiard Co.* v. *Blomstrom Manfg. Co.*, 166 Mich. 276, 286.

The agreement for a novation need not be in writing but there must be a substitution of one debtor for another or the substitution of a new obligation

for an old one which is thereby extinguished. *Husted* v. *Pogue,* 249 Mich. 410. The fact the assignment of the land contract by Nutten to the Highland Corporation was consented to by plaintiff does not constitute a novation: *Foley* v. *Dwyer,* 122 Mich. 587, and the acceptance of payments by plaintiff from the assignee of the land contract, the Highland Corporation, does not operate to discharge the vendee from his liability under the contract. *Steinberg* v. *Fine,* 225 Mich. 281. There must have been an agreement between all the parties whereby plaintiff released the purchaser from liability under the land contract and agreed to take the assignee of such land contract as his debtor in place of the original vendee under the land contract who agreed to pay the purchase price for the premises. *Fender* v. *Feighner,* 265 Mich. 536. There must have been a release of the original debtor, the vendee under the land contract, and the substitution of a new debtor in the place thereof. *Epworth Assembly* v. *Railway Co.,* 236 Mich. 565. In this case plaintiff could not have maintained a suit at law against defendant Highland Corporation. *Tapert* v. *Schultz,* 252 Mich. 39; *Fender* v. *Feighner, supra.* We think under the circumstances the proof insufficient to show there was any release from liability of defendant Nutten by plaintiff or any agreement upon the part of plaintiff to look solely to the Highland Corporation for payment and satisfaction of the contract. The decree of the trial court should be reversed, with costs, and decree should be entered for plaintiff.

FEAD and WIEST, JJ., concurred with POTTER, J.

MOGYOROS *v.* PRUDENTIAL INSURANCE CO. OF AMERICA.

1. INSURANCE—FACILITY OF PAYMENT CLAUSE IN INDUSTRIAL TYPE POLICY—QUESTION OF LAW.

In action by widow of insured as administratrix of his estate, the right of insurance company to raise defense of payment to mother of insured under facility of payment clause in industrial type policy is a question of law which may be raised on a motion to dismiss.

2. SAME—PAYMENT—DISCHARGE BY MOTHER.

Mother of insured under a so-called industrial type policy may receive payment thereunder and discharge the same under facility of payment clause authorizing payment to "relative by blood" notwithstanding lack of consent of widow of insured, then a minor.

3. APPEAL AND ERROR—MOTION TO DISMISS—INSURANCE.

Dismissal of action of assumpsit by widow of insured, administratrix of his estate, on industrial type policy containing facility of payment clause, *held*, justified under record disclosing undisputed payment of insurance in full to mother of insured.

Appeal from Wayne; Callender (Sherman D.), J., presiding. Submitted June 7, 1934. (Docket No. 65, Calendar No. 37,874.) Decided October 1, 1934.

Assumpsit by Rose Mogyoros, administratrix of the estate of Zigmond Mogyoros, deceased, against Prudential Insurance Company of America, a New Jersey corporation, for sums allegedly due on two life insurance policies. Case dismissed. Plaintiff appeals. Affirmed.

Henry Stone, for plaintiff.

Emmons, Oren & Sleeper (*Donald McGaffey*, of counsel), for defendant.

NORTH, J. Plaintiff is the widow and the administratrix of the estate of Zigmond Mogyoros who died April 4, 1930. Deceased was insured in defendant company under two policies totaling $758.61. On April 8th defendant paid the insurance in full to Klara Mogyoros, mother of deceased. At the time of Mogyoros' death the widow was a minor. There are also two children surviving deceased, the younger being a posthumous child. The widow as administratrix brought this suit to recover the amount of the insurance carried by deceased. Defendant made a motion to dismiss plaintiff's suit on the ground that "the claim or demand set forth in the plaintiff's pleading has been released." From the affidavit in support of the motion to dismiss it appears that these insurance policies were of the so-called "industrial type" and each contained a "facility of payment" clause which, omitting immaterial provisions, reads as follows:

"Facility of payment: It is understood and agreed that the said company may make any payment, or grant any nonforfeiture privilege provided for in this policy to any relative by blood or connection by marriage of the insured, * * * and the production by the company of receipt signed by any or either of said persons, or of other sufficient proof of such payment or grant of such privilege to any or either of them, shall be conclusive evidence that such payment or privilege has been made or granted to the person or persons entitled thereto, and that all claims under this policy have been duly satisfied."

It further appears from the affidavit in support of the motion to dismiss, and is undenied in this record:

"That after the death of the said Zigmond Mogyoros, one Klara Mogyoros furnished to the defendant, through deponent's office, certain proofs of death of said Zigmond Mogyoros and the said Klara Mogyoros at the same time delivered to defendant's agents the said policies of insurance, the premium receipt books and the attending physician's certificate of death, etc., and made claim for the proceeds of the said insurance as a relative by blood of the said Zigmond Mogyoros, to-wit, as his mother."

Thereupon defendant paid the insurance to the mother of deceased and took from her a receipt therefor incident to her indorsement upon defendant's check by which the payment was made. It is upon this showing and evidently under the practice provided in Court Rule No. 18 (1933), that defendant moved the trial court to dismiss plaintiff's suit. At the hearing of the motion plaintiff filed a counter-affidavit in which she set forth that the payment of the insurance by defendant was "made without the consent of this deponent and against her will." And further:

"That the agent of said defendant knew the conditions and circumstances at the time the deponent's husband died; that this deponent was in ill health and unable to attend to her business, and that the insured was the father of minor child.

"Deponent further says that the funeral expenses of her husband, and other expenses were paid out of certain $1,100 death benefit paid by a fraternal lodge.

"Deponent further says that the defendant has disregarded her rights, and the rights of the two minor children, the survivors and the beneficiaries of Zigmond Mogyoros."

The trial court granted defendant's motion to dismiss and plaintiff's appeal presents the following question:

"Is a motion to dismiss the proper pleading to raise the defense that the insurance company had been discharged from any further liability by reason of the payment to Klara Mogyoros?"

The record discloses that there is no dispute of fact between these parties as to the controlling issue. Payment is admitted, at least not denied. The right of defendant to make such payment and assert the same as a discharge of or release from its contractual obligation is a question of law. Whether wisely or unwisely, deceased in his lifetime saw fit to enter into this contract of insurance with defendant. Plainly and specifically it provides that "payment" may be made to any blood relative or connection by marriage of the insured and thereby *all claims* under the policy shall have been "fully satisfied."

This contract in this particular is no different than A's promissory note payable to B or C. Payment by A to B is a satisfaction of the obligation and C may not be heard to complain. *Park* v. *Parker,* 216 Mass. 405 (103 N. E. 936). See, also, 8 C. J. p. 597, note 57, citing numerous cases.

"Where two or more persons are joint creditors, payment may ordinarily be made to any of them, even though some are minors, unless it is otherwise agreed by all the parties." 48 C. J. p. 590.

The policies in suit contained other contingent provisions as to payment "to any person appearing to said company to be equitably entitled to the same;" but these provisions are not here involved. When payment is made under such provisions, the

insurer must exercise caution and good faith. That issue was involved in *Sylvester* v. *Metropolitan Life Ins. Co.*, 255 Mich. 302. It is not presented in the instant case and therefore the cited decision is not controlling of the case before us on this appeal. As bearing upon this phase of the case, see *Jones' Administrator* v. *Prudential Ins. Co.*, 225 Ky. 238 (8 S. W. [2d] 412).

The order and judgment of the trial court granting defendant's motion to dismiss was justified by the record and is affirmed. Costs to appellee.

NELSON SHARPE, C. J. and POTTER, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

McGAUGHAN *v.* WEST BLOOMFIELD TOWNSHIP.

1. MUNICIPAL CORPORATIONS — AUTHORITY — EMPLOYMENT OF SURVEYORS.

   In action of assumpsit against township for reasonable value of services of surveyors, record *held*, to sustain finding of court that recorded action of township board authorized employment of plaintiffs, residents of county, to perform services, as respects contention that the county surveyor was to be employed.

2. WORK AND LABOR—SURVEY OF LAKE MEANDER AND HIGHWAY LINES.

   In action of assumpsit by surveyors for services rendered township, evidence *held*, to show that in so far as they involved survey of lake meander and highway lines, services were performed, all of the work done was necessary to determine whether or not there were encroachments on the highway, and the charges therefor reasonable.

3. MUNICIPAL CORPORATIONS — SERVICES OF SURVEYORS — TOWNSHIP HIGHWAY COMMISSIONER.

Township may not escape obligation to pay for services of surveyors where it permitted and induced the performance and accepted the benefits thereof, notwithstanding statutory power to accomplish the same result lay in township highway commissioner who was present and approved action of the township board (1 Comp. Laws 1929, § 3937).

4. SAME—TOWNSHIP BOUNDARY LINE SURVEY.

Authorization of a survey of township boundary line which crossed diagonally through several lots of a subdivision in a village, necessary to enable assessor to properly perform his duties, was a legitimate exercise of the power vested in a township board.

5. SAME—EVIDENCE.

Evidence that surveyors were authorized to survey township boundary line through village *held*, sufficient, where testimony of former members of the board to that effect is convincing.

6. EVIDENCE—PAROL—SUPPLEMENTING RECORDS OF TOWNSHIP BOARD.

In action for services rendered township, parol evidence of action of township board was properly received to supplement imperfectly kept records, but not to change them.

Appeal from Oakland; Covert (Frank L.), J. Submitted June 5, 1934. (Docket No. 10, Calendar No. 37,795.) Decided October 1, 1934.

Assumpsit by Henry T. McGaughan and William R. Ransom, copartners, against West Bloomfield Township, a municipal corporation, and Fred A. Draper and others constituting township board for sums due for surveying and platting. From judgment for plaintiff against defendant township, it appeals. Affirmed.

Patterson & Patterson, for plaintiffs.

James H. Lynch, for defendant township.

North, J. Plaintiffs, copartners, did certain surveying and engineering work for the township of West Bloomfield. They brought this suit against the township and also against the members of the township board to recover the reasonable value of such services. Trial was without a jury. Plaintiffs had judgment against the township but not against the individual members of the township board. The township has appealed.

Plaintiffs' suit involves recovery for five items. As to two of these items, amounting to $60.60, defendant township admits liability. The three controverted items as set forth in plaintiffs' bill of particulars are:

1. Engineering services, location meander line Pine lake	$ 90.00
2. Establishing center line of road on northerly side of Pine lake	523.65
3. Locating West Bloomfield township north line through Sylvan village	320.55

Appellant asserts there is no competent testimony by which liability of the township is established as to any of the contested items. Plaintiffs' testimony was that the supervisor of the township, Mr. Salmers, employed them. As bearing upon his authority plaintiffs' proof disclosed that on June 2, 1925, the following action was taken at a meeting of the township board:

"It was further moved and supported that the township employ county engineer to resurvey the meandered lines of Orchard lake and Pine lake, thus to re-establish the lines of the government survey made in 1817, said engineer to also establish road lines; this survey to take in the east and southwest shores of Orchard lake and the north shore of Pine lake. Motion carried."

Plaintiffs contend that the above-noted action of the board was intended to and did authorize their employment for the services covered by the items one and two of the bill of particulars. Appellant first points out that the action of the township above quoted did not authorize employment of plaintiffs, but instead specifically provided for the employment of the "county engineer." Review of the record satisfies us the circuit judge correctly found that the proceedings of the township board were not always accurately recorded; and the testimony justifies his conclusion that the quoted expression merely meant "a county engineer," one who resided in the county. The undisputed testimony is that following the action taken by the township board the supervisor did employ plaintiffs to perform the services covered by items one and two of the bill of particulars, that the services were rendered and the charges therefor are reasonable.

But appellant also urges that in so far as the services consisted in relocating the meander line of Pine lake or in locating the lines of the concrete road on the west side of Pine lake, any attempt by the township to contract for such services was *ultra vires*. Appellant argues that the township was in no way concerned with the relocation of the meander line of Pine lake and that the concrete road was a county road over which the township had no control. In view of the undisputed facts about to be stated, we think appellant's position is not tenable.

For a considerable distance along the north shore of Pine lake there was an ordinary dirt highway, established by user. Various persons were erecting buildings along this north shore between the water line and the traveled portion of the highway. Town-

ship officers believed these buildings were encroaching upon the highway, but its course was so irregular and its location so uncertain, the fact as to encroachments could be determined only by a survey which would definitely locate the highway boundaries. Relocating the meander line of the lake had a material bearing on locating the highway; but inaccuracies in the original government survey discovered by plaintiffs rendered this effort impractical if not wholly useless. The survey along the concrete highway was to obtain a proper starting point in the survey of the dirt road which led off from the concrete in an easterly direction. The engineer testified it was necessary to have a "tie in" to some permanent object so the location of the highway boundaries could be reproduced in the future. There is no testimony that the work of the surveyors was not proper and essential to an accurate location of the road along the north shore of Pine lake.

Notwithstanding appellant's contention that by statute (1 Comp. Laws 1929, § 3937) the power to accomplish the result here sought is in the township highway commissioner, we think the members of the present township board cannot be heard to disavow the authority and action of their predecessors, of whom the highway commissioner was one. He was present and approved the action taken by the township board. By so doing he officially approved and authorized performance of the services. Plaintiffs having been permitted and induced to perform the services and the township having accepted the benefits thereof, it cannot, under the circumstances, escape its obligation to pay. The following cases are much to the point here involved: *Coit* v. *City of*

Grand Rapids, 115 Mich. 493; *Webb* v. *Township of Wakefield,* 239 Mich. 521; *American LaFrance & Foamite Industries, Inc.,* v. *Village of Clifford,* 267 Mich. 326.

There is no question concerning the power of the township board to contract for plaintiffs' services covered by item three of the bill of particulars. Locating the north township line through Sylvan village was necessary because this line crossed diagonally through several lots of a subdivision. Buildings were erected on some of these lots. Exact information as to the location of the north township line was necessary to enable the supervisor to properly assess so much of the divided properties as was located within defendant township. Without this information exact valuations could not be fixed. The auditor general's department had advised the township supervisor that these divided properties had theretofore been improperly assessed. Legal advice of local counsel was taken and followed. The need and propriety of the survey is evident. But as pointed out by appellant, the township records disclose no official action by the township board authorizing the employment of plaintiffs. Plaintiffs in fact were employed by the township supervisor. Convincing testimony of those who at the time were members of the township board establishes beyond question that in fact the board did by proper action authorize the supervisor to have this survey made and the supervisor so informed plaintiffs at the time he employed them. The township records were not accurately kept and this action of the township board as well as other important items were omitted from the record of the township board proceedings. Plaintiffs have not sought to change the township records as made by the township clerk. Instead

they assert the right to supplement the record. This they may do. *Rubatt* v. *Township of Wakefield,* 239 Mich. 536. We cannot agree with appellant that the testimony in the record does not disclose any action or authority by which the township is obligated to pay for plaintiffs' services in surveying the township line through Sylvan village. The township board, presumably acting in good faith, found the survey necessary to enable township officials to properly discharge their public duties. Employment of plaintiffs for such survey was a legitimate exercise of authority vested in the township board.

Affirmed, with costs to appellees.

NELSON SHARPE, C. J., and POTTER, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

STRAUBE *v.* SPENCER.

VENDOR AND PURCHASER—NOVATION—RELEASE OF VENDEES.

In action of assumpsit by vendors against land contract purchasers for past-due payments, record *held,* insufficient to establish novation of parties, where there was no definite understanding between plaintiffs and defendants, at the time of latter's assignment to third parties who assumed vendees' liability, that defendants were released, nor anything in plaintiffs' subsequent conduct indicative of a fixed intention on their part to do so, although they did not communicate to defendants fact of assignees' defaults for a considerable time.

Appeal from Jackson; Simpson (John), J. Submitted June 7, 1934. (Docket No. 54, Calendar No. 37,694.) Decided October 1, 1934. Rehearing denied December 11, 1934.

Assumpsit by William N. Straube and Mary Agnes Straube against Dean S. Spencer and Grace R. Spencer for sums due under a land contract. Judgment for defendants. Plaintiffs appeal. Reversed, and judgment ordered entered for plaintiffs.

Reading & Reading, for plaintiffs.

Bisbee, McCone, Wilson, King & Kendall and *Norman E. Leslie,* for defendants.

NORTH, J. Plaintiffs on August 19, 1925, entered into a land contract with defendants whereby the latter purchased a parcel of land in the city of Ann Arbor. The total purchase price was $8,500, down payment $1,250 and balance in monthly instalments. October 6, 1928, defendants assigned their vendees' interest to Allan H. Paton and Dugald Duncanson. The assignees agreed "to assume and fulfill all the obligations" of the contract. For approximately one year after the assignment the assignees made payments to plaintiffs as required by the contract, but thereafter payments were irregular and the assignees at all times were in default. On April 4, 1932, plaintiffs began this suit in assumpsit to recover from defendants $1,453, the amount past due and unpaid on the contract as of March 31, 1932.

Defendants' answer sets up cancellation of the contract, discharge of liability and estoppel. Also, at least in their amended answer, defendants plead novation. On trial without a jury the court found novation and rendered judgment in favor of defendants. Plaintiffs have appealed.

Notwithstanding other defenses above noted decision turns on the question of novation. It is stated in appellees' brief:

"It appears fair to state that the word 'estoppel' cannot be accurately employed in this argument. It is recognized that the necessary elements of duty cannot be claimed to exist. It is apparent that the use of the word 'estoppel' and an analysis of its application to the instant case show that it is in reality an approach to the theory of novation in the sense that the acts and conduct of plaintiffs are so clearly indicative of a novation that they cannot now be heard to say that they did not intend a novation. * * * This case appears to present a clear question of law for determination by this court. As stated at the outset of this brief the whole inquiry is whether or not there was a novation."

What in general constitutes novation need not be here stated. This subject has received consideration in numerous decisions of this court. Reference is made to *Harrington-Wiard Co.* v. *Blomstrom Manfg. Co.,* 166 Mich. 276; *Ceabuske* v. *Smolarz,* 229 Mich. 100; *Epworth Assembly* v. *Railway,* 236 Mich. 565, and *Husted* v. *Pogue,* 249 Mich. 410. In the instant case it is conceded there was no written agreement as the basis of the alleged novation. But appellees assert that the conduct of plaintiffs was for a considerable period of such a character that we should hold under the facts and circumstances here presented that plaintiffs accepted Paton and Duncanson as vendees in the place of defendants, thus consummating a novation of parties. Appellees stress the following facts: (1) before assigning their vendees' interest in this contract, Mr. Spencer interviewed Mr. Straube. (2) Paton and Duncanson were originally plaintiffs' agents and

for some time received defendants' contract payments and accounted for them to plaintiffs. (3) Plaintiffs made no objection to the assignment. (4) Although defendants' assignees were in default for some considerable time, plaintiffs did not communicate with defendants relative to the contract indebtedness, but instead offered to take the property back if defendants' assignees would pay taxes then in arrears, and subsequently offered to destroy the contract upon payment of one-half of delinquent taxes by defendants' assignees. (5) Mr. Straube at one time attempted to collect rental due from a tenant in possession under Paton and Duncanson. (6) It appears from the testimony that until Mr. Straube was so advised by his attorney he was not aware that he could claim that defendants were liable on this contract. Touching his interview with Mr. Straube, defendant Spencer testified:

"I can state only in a general way what the conversation was. Of course, I was very anxious to get rid of the house because I had moved to Jackson. * * * My recollection is that it was a very general conversation; * * * that it (the property) was to be turned over to his agent, as I understood it; at least, the people with whom I had done all the business for him, and that he had no objection—was very glad to."

Then in response to a leading question the witness further testified:

"*Q.* In other words, he was taking Allan H. Paton and Dugald Duncanson in your place on the contract as purchasers?

"*A.* That is the best of my recollection. * * * At the time I signed this agreement (the assignment of the contract) it was absolutely my intention

to be relieved from liability under the contract. * * * I do not think there was anything said between me and Mr. Straube in regard to my being released."

Notwithstanding the course of conduct on the part of the respective parties above noted, we are not persuaded that there was a novation. We think it clearly appears from this record that at the time of the assignment of the vendees' interest in this contract none of the parties to this suit considered whether as a legal consequence of that transaction defendants were released from their contract obligation. Certainly there was no definite understanding at that time in that particular between plaintiffs and defendants. Nor is there anything in the subsequent conduct of plaintiffs which is at all indicative of a fixed intention on their part to release defendants. Instead the course of conduct on the part of all parties concerned is typical of that which usually occurs incident to the assignment of a vendee's interest in a land contract. There is testimony in this record that plaintiffs did not learn of the assignment to Paton and Duncanson until three or four weeks after the assignment was consummated. No claim is made that defendants requested of plaintiffs a release from the contract liability or that defendants at any time prior to suit definitely advised plaintiffs of a claimed release. At no time have the vendors exercised any authority over the property which was indicative of a cancellation of the contract. A careful review of the record in this case leads to the conclusion that the circuit judge was in error in finding that defendants were released by novation from their obligation as vendees in this land contract. The judgment en-

tered in the circuit court will be set aside and the case remanded for entry of judgment in accordance herewith. Plaintiff will have costs of both courts.

NELSON SHARPE, C. J., and POTTER, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

FLANNIGAN *v.* HARDER.

APPEAL AND ERROR — TRIAL — INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE.

In pedestrian's action for damages for personal injuries received while walking along highway when overtaken by defendant's automobile, instruction that recovery would be precluded if plaintiff was guilty of any negligence which contributed to accident and but for which accident would not have occurred irrespective of the negligence of defendant *held*, not so prejudicial as to result in miscarriage of justice, where other portions of charge and special questions submitted to the jury presented issue of contributory negligence so that it could not have been misunderstood (3 Comp. Laws 1929, § 15518).

Appeal from Newago; Pugsley (Earl C.), J. Submitted June 12, 1934. (Docket No. 117, Calendar No. 37,906.) Decided October 1, 1934.

Case by Lawrence Flannigan against Edmund G. Harder, by Herman P. Harder, guardian *ad litem*, for personal injuries received in an automobile accident. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

William J. Branstrom, for plaintiff.

Harry D. Reber, Penny & Clark (*William E. Robb* and *Don W. Van Winkle,* of counsel), for defendant.

NORTH, J. This is a suit arising out of an automobile accident. Plaintiff had verdict and judgment. He claims that while he was walking along a paved highway in a lawful manner he was struck and injured by an automobile going in the same direction and driven by defendant. The issues of defendant's negligence as a proximate cause and plaintiff's contributory negligence were submitted to a jury. In part the court charged the jury:

"If the plaintiff was guilty of any negligence which contributed to the accident, and except for which the accident would not have occurred, irrespective of the negligence of the defendant Harder, then the plaintiff cannot recover."

Appellant makes the quoted portion of the charge the sole basis of this appeal. On the record before us defendant's negligence is conceded, and decision is controlled by the question of plaintiff's contributory negligence.

The quoted portion of the charge is not a correct definition of contributory negligence. *Rockwell* v. *Railway Co.,* 253 Mich. 144. But careful reading discloses that the quoted words were not given as a definition of contributory negligence. Instead the court therein asserted and instructed the jury that plaintiff could not recover if his negligence was the sole cause of the accident. Correctness of this statement will not be challenged. But assuming that the jury might have construed the quoted statement as a definition of contributory negligence, the question

remains:—was it prejudicial? 3 Comp. Laws 1929, § 15518.

In the *Rockwell Case* the challenged portion of the charge really had to do with the extent or scope of the burden of proof on the issue of contributory negligence, rather than a definition of contributory negligence; and the trial judge in the *Rockwell Case* limited this burden to a showing by plaintiff that his negligence "was not the proximate cause of the injury." As pointed out by our decision in that case, the statement was too narrow and further: "This instruction was emphasized by frequent repetitions throughout the charge;" and it was also noted that under the proofs in the *Rockwell Case* "contributory negligence was a close question."

In the instant case the issue of contributory negligence is by no means a "close question." Instead the record is such that plaintiff might well have asked the trial court to hold as a matter of law that plaintiff was not guilty of contributory negligence. However, we do not plant decision on that ground. In addition to the above quoted portion, the trial judge in his charge to the jury repeatedly touched upon the question of contributory negligence. These other portions of the court's charge, together with special questions submitted, were such that the jury could not have misunderstood the issue of contributory negligence, notwithstanding that part of the charge isolated by appellant and made the basis of his appeal. Immediately preceding this quoted part of the charge the court instructed the jury:

"I charge you further, as a matter of law, that to enable the plaintiff to recover, he has the burden of proof of establishing by a fair preponderance of the evidence, first, that the defendant was guilty of negligence and, second, that he was himself free

from any negligence which *contributed* to the accident."

A little later in the charge the court again said:

"I have already stated to you that to entitle the plaintiff to recover you must find, from a preponderance of the evidence, that the plaintiff himself was free from contributory negligence. Contributory negligence in order to constitute a defense must have been negligence *contributing* to the injury itself, for which the action is brought. Contributory negligence is such action as *contributes* by direct consent to or participation in the injury complained of. One cannot recover for an injury caused by another if his own negligence *contributed* thereto. Where a party by his own negligence *contributes* to his own injury he cannot recover excepting where the defendant is guilty of gross negligence, and there is no claim of gross negligence in this case."

From the record it also appears that four separate questions were submitted to the jury. Each of them was aimed at plaintiff's contributory negligence. We quote as to only one of them:

"Did the failure of the plaintiff to exercise due care for his own safety at the time of the accident *contribute* in any degree to the accident? Answer: No."

In view of the above noted phases of the record, it would be going beyond all reason to hold that the quoted portion of the charge upon which appellant relies constituted reversible error.

Judgment is affirmed. Costs to appellee.

NELSON SHARPE, C. J., and POTTER, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

AUSTIN *v.* ANCIENT ORDER OF GLEANERS.

1. APPEAL AND ERROR—CONFLICTING TESTIMONY—INSTRUCTIONS.
In action against land contract vendor for conversion of chattel mortgaged property, verdict and judgment for plaintiff, assignee of defaulted vendee, is not disturbed on appeal, where testimony was decidedly conflicting and issue was submitted under a fair charge.

2. TROVER AND CONVERSION—POSSESSION—QUESTION FOR JURY.
Defendant land contract vendor in action for conversion of chattel mortgaged property who claimed property had been taken pursuant to amicable termination of land contract conditioned upon voluntary surrender of farm and personal property thereon *held,* not entitled to directed verdict either at the close of plaintiff's proofs or at conclusion of all the testimony, where there was clearly a question of fact for the jury as to manner in which possession was obtained.

3. SAME—GREAT WEIGHT OF EVIDENCE.
Verdict for plaintiff in action for conversion of chattel mortgaged property *held,* not against the great weight of the evidence.

Appeal from Clinton; Searl (Kelly S.), J. Submitted June 12, 1934. (Docket No. 100, Calendar No. 37,812.) Decided October 1, 1934.

Action by Charles W. Austin against the Ancient Order of Gleaners, a Michigan corporation, now Gleaner Life Insurance Society, a Michigan corporation, for conversion. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Smith, Hunter & Spaulding, for plaintiff.

H. P. Orr, for defendant.

NORTH, J. Plaintiff as the assignee of Calvin M. Parks brought this action to recover from defendant damages for the alleged unlawful conversion of personal property belonging to Mr. and Mrs. Parks. Prior to the assignment to plaintiff, Mrs. Parks had died leaving Mr. Parks the sole party in interest. On trial by jury plaintiff had verdict and judgment thereon. In this appeal defendant asserts that the trial court committed error in denying defendant's motion for a directed verdict at the conclusion of plaintiff's testimony and again at the conclusion of all the testimony in the case. In this connection defendant points out that it is essential to the maintenance of plaintiff's action in conversion that he show the taking of the personal property was wrongful and without consent of plaintiff's assignor, unless his consent was obtained by fraud or duress. It is defendant's claim that the testimony of plaintiff's assignor discloses that there was no such unlawful taking of the personal property.

The following facts are pertinent. Prior to January 29, 1929, defendant held a mortgage on a farm owned by Mr. and Mrs. Parks. The original loan was $12,000. By reason of defaults the mortgage indebtedness increased to $13,626.30. Thereupon, on the date above noted, the farm was deeded to defendant and a contract taken back by Mr. and Mrs. Parks for the purchase of the farm at the amount of the indebtedness. The land contract contained a chattel mortgage clause covering the stock, tools, farm equipment and other personal property on the premises. This chattel mortgage was taken by the vendor as additional security for the payment of the contract price. The vendees defaulted in making payments required by the land contract. Thereafter, in November, 1931, a representative of

defendant together with two other men took possession of the farm buildings and the chattel mortgaged property. There is no claim on the part of defendant that there was foreclosure of either the chattel mortgage or the land contract. The manner in which and the circumstances under which defendant's agents took possession of both the real and personal property of Mr. and Mrs. Parks is the crux of this litigation. It is plaintiff's claim that three men in behalf of the defendant company went to the farm in November, 1931, and that one of these men, Mr. John R. Hudson, then informed Mr. and Mrs. Parks that they were "all through." Mr. Parks testified:

"Mr. Hudson came to my house along with the other two gentlemen mentioned and he told me that I was all through and that I must go that night. That was Thursday. I told Mr. Hudson that it would be impossible and I would not move Thursday night. He says that the buildings are to be locked and that I would have to move. He had not brought back the contract (which plaintiff claimed and offered testimony to show Hudson had previously secured from Parks by a trick) and he put padlocks on the garage, the granary, the tool house and on the barn, and he told me that I would have to move and with no contract. I told Mr. Hudson that it would be impossible for me to move before Saturday. * * * We moved one load of material on Thursday night."

By the following Saturday Mr. and Mrs. Parks had vacated the farm and, with the exception of certain items which they were permitted to take, defendant had taken possession of all the personal property on the farm. It is plaintiff's theory that by the conduct of its agents the defendant company

cancelled and terminated its land contract with Mr. and Mrs. Parks; and that this resulted in releasing Mr. and Mrs. Parks from the obligation to pay the purchase price and *ipso facto* discharged the chattel mortgage obligation. On this ground it is claimed that defendant in taking possession of the personal property acted unlawfully and rendered itself liable in damages for conversion thereof.

On the other hand defendant asserts that the land contract was terminated as the result of a mutual and amicable agreement entered into between Mr. Hudson, representing the defendant, and Mr. and Mrs. Parks. This agreement in brief was that upon the voluntary surrender of possession of the farm and the chattel mortgaged property by Mr. and Mrs. Parks the latter would be released from their obligation to purchase and pay for the farm on the one hand, and on the other the defendant would also be released from its contract obligation. The issue made by these conflicting claims was fairly submitted to the jury under a charge of which appellant has made no just complaint. The legal aspect of the case is somewhat similar to *Schon* v. *Lawrence,* 258 Mich. 543, since it involves the legal proposition that by unlawfully ousting a vendee from possession a vendor may terminate or annul a land contract if the vendee so elects. There is a decided conflict in the testimony. The record discloses no good reason for disturbing the jury's determination. The testimony of Mr. Parks above quoted was given as a part of plaintiff's principal case. Under the record it must be held that appellant was not entitled to a directed verdict either at the close of the testimony in behalf of plaintiff or at the conclusion of all the testimony. In so holding we have not overlooked that on his direct examination Mr.

Parks, as emphasized by appellant, testified as follows:

"*Q.* Had you any knowledge, had you been informed as to their right to come there and take that property on that day?

"*A.* No.

"*Q.* I will ask you whether or not you took it for granted at that time that the Gleaners would have the right to do what they came there and forcibly did?

"*A.* Yes."

And on cross-examination he testified:

"*Q.* When was the first date that any of the personal property that you have mentioned was taken from the farm?

"*A.* On the 13th. * * *

"*Q.* Did you make any objection to that?

"*A.* Not any other than—

"*Q.* You can answer it by yes or no.

"*A.* No, sir. * * *

"*Q.* There was no feeling was there at that time? It was talked over in a friendly manner, wasn't it?

"*A.* Why, what little talk there was on the 13th.

"*Q.* That was friendly talk, wasn't it?

"*A.* Yes, sir."

Notwithstanding the foregoing testimony, clearly there was a question of fact for the jury as to whether possession of the personal property was obtained in the manner asserted by plaintiff or as contended by defendant.

Appellant also claims that, apart from the asserted adjustment of contract obligations, instead of there having been an unlawful or tortious taking of the personal property, the testimony discloses that the property was voluntarily surrendered to

defendant by Mr. Parks; or possibly the transfer of possession resulted from mutual mistake of the parties; or at most, if taking possession was "high handed and unwarranted," this constituted only a breach of the contract, not conversion. The theory of plaintiff's case and the testimony offered in support thereof are wholly inconsistent with the above noted claims of appellant; and the jury's verdict in favor of plaintiff removes such claims from controlling consideration on appeal. Appellant's contention that the verdict was against the great weight of the evidence is not sustained by the record.

Judgment is affirmed, with costs to appellee.

NELSON SHARPE, C. J., and POTTER, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

FRAAM *v.* KELLEY.

1. ATTORNEY AND CLIENT—LIEN ON JUDGMENT.

   An attorney has a lien upon a judgment obtained through his efforts for his services and disbursements in a particular case.

2. EXECUTION—ASSIGNMENTS—SET-OFF.

   Assignee of execution who knew of execution against his assignor is not entitled to prevail as mere assignee when assignor's judgment creditor seeks to set off the executions one against the other (3 Comp. Laws 1929, § 14552, subd. 2).

3. SAME—ATTORNEY AND CLIENT—ASSIGNMENTS—SET-OFF.
Execution issued under decree assigned by client to attorney in satisfaction of his lien thereon for services is not subject to set-off by assignor's judgment creditor's execution for the amount of attorney's taxable fees and disbursements (3 Comp. Laws 1929, § 14552, subd. 5).

4. APPEAL AND ERROR—CERTIORARI—REMAND—EXECUTION.
On appeal in the nature of certiorari from order granting mandamus to set off executions against each other, case is remanded to determine amount of execution assigned to client's attorney for taxable fees and disbursements not subject to such set off (3 Comp. Laws 1929, § 14552, subd. 5).

5. COSTS—CERTIORARI.
On appeal in the nature of certiorari in civil action, prevailing party is granted costs in the Supreme Court (3 Comp. Laws 1929, § 15506).

Appeal from Kent; Perkins (Willis B.), J. Submitted June 26, 1934. (Calendar No. 37,898.) Decided October 1, 1934.

Mandamus by George Fraam to compel Fred Kelley, sheriff of Kent county, and Albert C. Matzen, deputy sheriff, to set off writs of execution in their possession. Writ allowed. Defendants appeal. Reversed.

Linsey, Shivel & Phelps (*John H. VanderWal,* of counsel), for plaintiff.

Dunham & Sherk, for defendants.

NORTH, J. In a suit for accounting in the circuit court of Kent county in chancery, George Fraam had decree for $9,753.48 and taxable costs against Harry Melconian. Melconian appealed to this court and secured a reduction in the amount of the decree against him to $2,800 and accrued interest. *Melconian* v. *Fraam,* 265 Mich. 378. Melconian had costs

in this court which were taxed at $809.08. Prior to January 15, 1934, Melconian's counsel asserted a lien on the decree for costs, took an assignment from Melconian and notified opposing counsel. On the date above noted a writ of *fieri facias* was issued out of the Supreme Court in the name of Melconian's attorney as assignee. On the date the writ was issued, the sheriff and deputy sheriff of Kent county, defendants herein, levied upon property belonging to Fraam. Two days later (January 17, 1934), Fraam taxed his costs at $78.70 against Melconian incident to the decree theretofore rendered in the circuit court, placed the writ of *fieri facias* for $2,922.48 plus the taxed costs in the hands of the sheriff, and demanded that the execution issued to Melconian's assignee for the $809.08 costs taxed in the Supreme Court be set off against the execution issued to Fraam. The sheriff and deputy sheriff refused to make the set-off. Mandamus proceedings in the circuit court followed and the writ issued commanding the set-off to be made. Leave having been granted, the defendants in the mandamus suit review in this court by certiorari.

Decision in the circuit court was based upon the fact that since Melconian's assignee had knowledge of all the facts he acquired no greater rights than those possessed by his assignor. Appellants contend that since Melconian's assignee has an attorney's lien upon the decree for costs in Melconian's favor, as well as an assignment thereof, such assignee has a right of a different character and superior to that of an ordinary assignee; and since the assignee's claim is based upon an attorney's lien the Melconian execution cannot be used as a set-off against the Fraam execution.

In this State there can be no question but that an attorney as between himself and his client has a lien upon a judgment obtained through the attorney's efforts for services and disbursements in a particular case. *Shank* v. *Lippman,* 249 Mich. 22. Incident to setting off executions the following provisions from 3 Comp. Laws 1929 are pertinent:

Sec. 14549. "If upon an appeal, a recovery for a debt or damages be had by one party, and costs be awarded to the other party, execution shall issue only in favor of the party to whom there shall be a balance due for the amount of such balance."

Sec. 14550. "Executions between the same parties may be set off one against another, if required by either party, in the manner, and subject to the provisions mentioned in the following sections."

When counter executions are delivered to the same officer the provision is as follows:

Sec. 14551. "The officer shall apply it (the counter execution), as far as it will extend, to the satisfaction of the first execution, and make an indorsement of such application on each of said executions, and the balance due on the larger execution may be collected and paid in the same manner as if there had been no set-off."

Sec. 14552. "Such set-off shall not be allowed in the following cases: * * *

"(2) When the sum due on the first execution shall have been lawfully and in good faith assigned to another person, before the creditor in the second execution became entitled to the sum due thereon. * * *

"(5) Nor shall it be allowed as to so much of the first execution as may be due the attorney in that suit, for his taxable fees and disbursements."

It may be noted that Fraam's decree for the amount due him on the accounting and for costs was

prior to Melconian's decree, although subsequently modified by the Supreme Court decree; and costs to Fraam in the circuit were taxed after Melconian's costs were taxed in the Supreme Court. It may also be noted that Melconian's assignee, the attorney who had represented him throughout this litigation, had full knowledge of the whole situation; and therefore 3 Comp. Laws 1929, § 14552, subd. 2, above quoted, is not controlling in the instant case.

In view of the provisions in 3 Comp. Laws 1929, § 14552, subd. 5, above quoted, it is plain that Melconian's assignee, both as an assignee and as the attorney in the case, has the first call upon so much of the costs taxed in favor of Melconian "as may be due the attorney in that suit for his taxable fees and disbursements." This would cover the amount specifically taxed as attorney's fees and for the attorney's disbursements. There is no showing in this record as to what amount, if any, Melconian's attorney disbursed incident to the suit in which the costs were taxed. The case should be remanded to the circuit court and opportunity afforded Melconian's assignee to establish and have entered of record the amount of his disbursements, if any, in this suit. The Melconian execution should be held effective as to the amount of the assignee's taxed attorney's fees and disbursements; but any additional amount of the costs taxed in favor of Melconian should be set off and indorsed as a credit on the Fraam execution. Appellants will have costs of this court. See 3 Comp. Laws 1929, § 15506.

NELSON SHARPE, C. J., and POTTER, FEAD, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

NAY *v.* MID-WEST PETROLEUM CORP.

1. EQUITY—CORPORATIONS—VISITORIAL JURISDICTION.
   Chancery court's visitorial jurisdiction over corporate officers and trustees to compel restoration of certain improperly alienated corporate property or respond in damages, conferred by statute, does not extend to suit by stockholders for alleged fraud in inducing exchange of stock for that of another corporation (3 Comp. Laws 1929, § 15328, subds. 2, 7, § 15330).

2. SAME—JURISDICTION—STOCKHOLDERS' BILL—MULTIFARIOUS.
   Bill by stockholders of one corporation praying relief against promoters of another corporation and others for inducing exchange of stock and seeking cancellation of agreement as between promoted corporation and third corporation, accounting and drilling of offset wells by latter and for other relief *held*, multifarious as not within either chancery's visitorial jurisdiction as conferred by statute or general equity jurisdiction (3 Comp. Laws 1929, § 15328, subds. 2, 7, § 15330).

3. CORPORATIONS—EQUITY—VISITORIAL JURISDICTION.
   Court, for sufficient cause, may remove directors, order an election, appoint a receiver or enjoin dissipation of corporate assets, but cannot, under bill by stockholders of one corporation, exercise visitorial powers over another independent corporation by way of assuming direction of its affairs or management (3 Comp. Laws 1929, § 15328, subds. 2, 7, § 15330).

4. APPEAL AND ERROR—MULTIFARIOUS BILL—AMENDMENT.
   On affirmance of order holding bill multifarious and granting leave to amend, plaintiffs are allowed to select consonant remedies in an amended bill.

Appeal from Muskegon; Vanderwerp (John), J. Submitted June 6, 1934. (Docket No. 24, Calendar No. 37,759.) Decided October 1, 1934.

Bill by Frank D. Nay and others against Mid-West Petroleum Corporation, a Michigan corporation, and others for cancellation of an agreement, an accounting and other relief. From order dismissing bill if not amended, plaintiffs appeal. Affirmed.

A. S. Hinds, for plaintiffs.

Turner, Engle & Cochran, for defendants.

WIEST, J. Plaintiffs held shares of stock in the Consolidated Oil Company. That company held leases on oil producing property and they filed the bill herein, alleging, as stated in plaintiffs' brief:

"That prior to the incorporation of The Mid-West Petroleum Corporation in 1929, they were stockholders in a corporation known as Consolidated Oil Company which was the owner of various valuable oil and gas leases in the Muskegon oil field and had drilled a producing well on lands covered by the Plunkett lease and was making money therefrom; that certain promoters of The Mid-West Petroleum Corporation, and especially the defendant, Willard G. Turner, acting for himself and other promoters, including the defendants, Beardsley, Wilson, Lovelace, Flanders and Thomas B. Bennett, now deceased, as inducements to plaintiffs to exchange their stock in the Consolidated for stock in Mid-West, and to permit the assignments of the Plunkett and Mary Bolt leases to the Mid-West, promised plaintiffs that said promoters would put $50,000 in cash into the Mid-West, that they had on hand and would put in sufficient drilling equipment, that new wells were to be drilled, including an additional well on the Plunkett lease; that plaintiffs believed these representations and relied thereon, and surrendered their stock in the Consolidated and ac-

cepted stock in the Mid-West and consented to the assignments of the Consolidated leases to the Mid-West.

"Plaintiffs charge further that the $50,000 in cash was not paid to the Mid-West as agreed, that no drilling equipment was turned over, that no new wells were drilled, and that the Mid-West did not even continue the operation of the Plunkett well but on the contrary entered into an agreement with Reed Oil Company by which it took over the management and control of the Plunkett well and all the oil and gas leases theretofore owned by the Mid-West, such agreement providing that the net profits should be divided between them.

"The bill further charges that the Reed Oil Company, either by fraud and collusion with the directors of the Mid-West, or because it is thus enabled to make a greater profit, has so neglected the operation of the Plunkett well that its production has dwindled from being a large producer to a condition where it produces a mere eight barrels per day or less. It is alleged that the Reed Oil Company has drilled two oil wells just to the east of the Plunkett property and is thus taking out of the ground oil in large quantities that should be produced by the Plunkett well and is thus robbing the Mid-West; that the owners of the Plunkett lease have accepted, in lieu of an offset well that should be drilled, a quarter share of the gas and oil as against the eighth share to which the lease entitled them; that other wells have been drilled in that vicinity, further demonstrating the value of the Plunkett lease and the dereliction of the Mid-West directors.

"The bill also alleges that the directors have been remiss in their duty in other respects.

"The following relief is prayed:

"1. That the promoters may be required to pay into the treasury of the Mid-West the sum of $50,000.

"2. That if it be shown that Turner had no authority to make such promises he may be required to pay it in himself.

"3. That the agreement between the Mid-West and the Reed Oil may be set aside and canceled.

"4. That the Reed Oil may be required to drill offset wells.

"5. That the Mid-West be required to perform its promises made to the stockholders of the Consolidated as inducements to become stockholders in the Mid-West.

"6. That objectionable directors may be removed and replaced.

"7. That the Reed Oil may come to an accounting with the Mid-West.

"8. That if necessary a receiver be appointed to manage the Mid-West.

"9. That if a dissolution of the Mid-West is decided on, the statutory receiver may be made a party to these proceedings.

"10. That a temporary injunction be issued restraining the Mid-West, its officers and directors from dissipating the company's funds.

"11. That general relief may be afforded."

On motion of defendants Willard G. Turner, Jr., Mid-West Petroleum Corporation, Myron Powell and Harry Brown the court held the bill multifarious and granted plaintiffs leave to amend. Plaintiffs stand by their bill and review by appeal.

The bill and measures of relief prayed disclose diversity of interests. The bill alleges acts by diverse defendants, wholly unrelated by interest, rights, liability or remedy.

Plaintiffs claim that their procedure is authorized by 3 Comp. Laws 1929, § 15328, relative to equity proceedings against corporations, and point to subdivisions two and seven of the section. The section

gives the equity court jurisdiction over directors, managers, trustees and other officers of corporations. Subdivision two thereof provides:

"To decree and compel payment by them to the corporation whom they represent, and to its creditors, of all sums of money and of the value of all property which they may have acquired to themselves or transferred to others, or may have lost or wasted by any violation of their duties as such directors, managers, trustees or other officers."

Subdivision seven provides:

"To set aside all alienations of property made by the trustees or other officers of any corporation, contrary to the provisions of law, or for purposes foreign to the lawful business and objects of such corporations, in cases where the person receiving such alienation knew the purpose for which the same was made."

Such visitorial jurisdiction and power may be invoked by any stockholder. 3 Comp. Laws 1929, § 15330. These provisions do not authorize equity cognizance of the alleged representation inducing plaintiffs to exchange their stock in the Consolidated Oil Company for stock in the Mid-West Petroleum Corporation.

The statute deals with actions bearing on the relation of officers to a corporation. The cause of action, attempted to be stated between the Mid-West Corporation and the Reed Oil Company, seeking cancellation of the working agreement, an accounting and the drilling of offset wells, does not fall within that statute. Neither does the general power of the equity court reach to the extent here invoked.

The court, for sufficient cause, may remove directors and order an election; may appoint a re-

ceiver, and enjoin dissipation of corporation assets, but cannot, under a bill by stockholders of one corporation, exercise visitorial power over another and wholly independent corporation by way of assuming direction of its affairs or management.

We think counsel for defendants have well separated the alleged causes of action, substantially as follows:

Action by stockholders of the Mid-West on its behalf against the Reed Oil; for cancellation of the working agreement; mandate that the Reed Oil drill offset wells and come to an accounting; action by stockholders on behalf of the Mid-West against the directors in that objectionable directors be removed, a receiver be appointed to manage and a receiver be appointed in case of dissolution and the directors be enjoined from dissipating assets; action by plaintiffs, each as individually damaged, against promoters of the Mid-West, in that the promoters be required to pay $50,000 into the treasury of the corporation or that, at least, defendant Turner be required to make such payment and, incidentally, that the Mid-West be required to perform the promise of its promoters.

The bill must be held multifarious, and it is left to counsel for plaintiffs to select consonant actions and remedies in an amended bill if he so desires within 20 days.

The order appealed from is affirmed, with costs against plaintiffs.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

CLARK *v.* PENINSULAR BUILDING & LOAN ASS'N.

MANDAMUS—BUILDING AND LOAN ASSOCIATIONS—STOCKHOLDERS' RIGHT OF SET-OFF.

Mandamus is not a remedy available to stockholder of building and loan association to compel association to set unincumbered shares of stock against shares pledged as security for a mortgage loan, under withdrawal right, since the relation of stockholder to the association is a contractual one and plaintiff has another adequate legal remedy.

Appeal from Jackson; Williams (Benjamin), J. Submitted May 29, 1934. (Calendar No. 37,788.) Decided October 1, 1934.

Mandamus by Aaron B. Clark to compel Peninsular Building & Loan Association, a Michigan corporation, to allow unincumbered shares of stock to be set off against a mortgage. Plaintiff reviews denial of the writ by appeal in the nature of certiorari. Affirmed.

William K. Sagendorph, for plaintiff.

Burney E. Brower, for defendant.

WIEST, J. This is an appeal in the nature of certiorari to review refusal of a writ of mandamus in the circuit court.

Plaintiff pledged 12 shares of his stock in the defendant company as security for a mortgage loan. Later he tendered 12 free shares of the stock to the company and demanded that the free shares, under withdrawal right, be set against the pledged shares and his indebtedness discharged. His de-

mand not being complied with he petitioned the circuit court to issue a writ of mandamus directing the adjustment.

Defendant contends that mandamus will not lie to compel a private corporation to perform contract obligations. If right in this the refusal of the writ must be affirmed.

Private contract rights are not enforceable by mandamus. Plaintiff has remedy without the writ of mandamus.

In *Clarke* v. *Hill,* 132 Mich. 434, mandamus was sought to compel transfer of stock in a private corporation to the relator upon the books of the company. It was there said:

"Mandamus is an extraordinary remedy, and is recognized as such. We have often held that it is inappropriate where there is another adequate remedy in law or in equity; and, as it is never supposed to be issued where there is not a clear legal right, it can hardly rest upon the ground that the right is undisputed. * * * To sustain the jurisdiction contended for would be to make the summary remedy by mandamus the substitute for an action or suit in a large class of cases."

See, also, *Booker* v. *Grand Rapids Medical College,* 156 Mich. 95 (24 L. R. A. [N. S.] 447).

As stated in *Ex parte Rowland,* 104 U. S. 604, 617:

"The general principle which governs proceedings by mandamus is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it. It only lies when there is practically no other remedy."

Even when contract duty is fixed by statute the writ of mandamus is not available if there is other adequate legal remedy.

Denial of the writ is affirmed, with costs to defendant.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

In re WRIGHT'S ESTATE.

CLAIM OF FRYE.

1. CERTIORARI—BOARD OF ESCHEATS—REVIEW OF EVIDENCE.
   On appeal in the nature of certiorari from State board of escheats, evidence may be examined by Supreme Court to determine whether finding of the board has any support in the evidence or want of evidence; to determine whether it has made a finding contrary to uncontroverted and credible evidence; and while court may not pass on any conflict in the evidence or exercise the functions of the board, the court may determine whether undisputed evidence supports or refutes the findings of the board.

2. ESCHEAT—STATUTES—EVIDENCE.
   Statute authorizing claimant to file satisfactory proof of right to an escheated estate with board of escheats vests no arbitrary or discretionary power in the board but commands that sufficient proof be deemed satisfactory proof (3 Comp. Laws 1929, § 13476).

3. SAME—EVIDENCE OF CLAIMANT.
   Evidence, including depositions by claimants, documents, letters and certified copies of records presented by claimants of escheated estate *held,* ample to prove them sole heirs at law of deceased.

4. WILLS—LAPSED BEQUESTS TO WIFE.
Residuary bequest to wife lapses where she predeceases her husband and no other testamentary disposition was made.

5. DEATH—PRESUMPTION FROM LONG ABSENCE.
On petition of nephews and nieces claiming escheated estate, son of deceased is presumed dead where he has been absent for over 30 years and his whereabouts are unknown.

Appeal from State Board of Escheats. Submitted June 13, 1934. (Docket No. 25, Calendar No. 37,820.) Decided October 1, 1934.

Lena A. Frye and others filed their petition as alleged heirs at law of B. Frank Wright, deceased, requesting the turning over of said estate to them. Claimants review order denying petition by appeal in the nature of certiorari. Reversed, and board ordered to turn over estate to claimants.

George C. Brown, for petitioners.

Patrick H. O'Brien, Attorney General, and *Maxwell L. Black,* State Public Administrator, for appellee.

WIEST, J. This is certiorari to review an order of the State board of escheats denying claimant's petition to have turned over to them the escheated estate of B. Frank Wright, deceased.

B. Frank Wright died at the city of Detroit, Michigan, April 10, 1920, and his estate, amounting to the sum of $5,592.98, was administered in the probate court for the county of Wayne and, for want of known heirs at law, there was escheat to the State of Michigan September 13, 1923.

Claimants, alleged heirs at law, on September 8, 1932, petitioned the board of escheats to turn the estate over to them. Proofs, in behalf of claimants

and unquestioned by counter showing, were submitted to the board and a finding was made in February, 1934, that insufficient evidence had been presented to prove claimants the heirs at law of B. Frank Wright, deceased.

We have examined the proofs, so submitted, and find the same amply sufficient.

The attorney general contends that, review being by certiorari, we may entertain no opinion contrary to that of the board. We may examine the evidence and determine whether the finding of the board has any support, either in the evidence given or want of evidence. There was no want of evidence and there was unquestioned and credible evidence showing the necessary relationship. While we may not exercise the functions of the board we may determine whether the board has made a finding contrary to uncontroverted and credible evidence. We cannot, under this right, pass on any conflict in the evidence but we can determine whether the undisputed evidence supports or refutes the finding of the board.

The statute, 3 Comp. Laws 1929, § 13476, requires a claimant to—"file with the State board of escheats satisfactory proof, to be determined by said board of escheats, of the right of such person * * * to the estate." This vests no arbitrary or discretionary power in the board but rather commands that sufficient proof must be determined satisfactory proof.

The common ancestors of B. Frank Wright and of claimants were Asa Wright and Polly (Chase) Wright of Hanover, State of New Hampshire, and now deceased. Asa and Polly had four children, B. Frank Wright, Austin Wright (father of claimants Frye, Durkee, Kroener, Axelson and Skog-

lund), Augusta Wright, later Tenney by marriage (mother of claimants Tenney and Withington), and Walter Melvin Wright (father of claimant Rogers).

The evidence, by deposition of claimants, documents, letters and certified copies of records, clearly established the fact that claimants are nephews and nieces of the deceased and, by death of their parents and others, are the sole heirs at law.

B. Frank Wright resided in the city of Detroit for many years. He was a city detective for a time and held responsible positions on Detroit newspapers. He was married four times, and had a son born in 1867. December 29, 1904, B. Frank Wright married Seddie P. Smith, who predeceased him without issue. On that day he executed a will, written by himself in longhand, and admitted to probate in the matter of his estate, in which he stated that he was born in Hanover, New Hampshire, October 13, 1841, and had lived in Detroit since March, 1863. In the will he bequeathed:

"To my son, Asa Earl Wright, my watch and chain. It is many years since I have seen him or heard from him, and I believe him to be dead. The condition of this bequest therefore is that he shall appear and claim the same from my executor within one year from the date of my death. Failing to do so, the watch and chain shall revert to my estate."

The residue of his estate he bequeathed to his wife. Testator survived his wife and, therefore, the bequest did not go to her heirs at his death. *In re Spier's Estate,* 224 Mich. 658.

The certified record of the marriage on December 29, 1904, shows that B. Frank Wright, resident of Detroit, aged 63, born in New Hampshire, father's name Asa, mother's name Polly Chase, and Seddie P. Smith were joined in matrimony.

In April, 1890, Earl Wright was convicted in the Berrien circuit of larceny from a dwelling house in the day time, and sentenced to the Michigan Reformatory for the period of three years. He was then 23 years of age, and stated he was born in Detroit, and gave the residence of his parents as 683 Seventeenth street, Detroit. The city directory of Detroit for that year shows that to have been the residence of B. Frank Wright. Earl Wright escaped from the reformatory March 5, 1892, was returned April 9, 1892, and discharged March 11, 1893. In December, 1904, as stated in the will, his father believed him to be dead. His absence for over 30 years, with whereabouts unknown, leads to the presumption of his death and leaves claimants the heirs at law of B. Frank Wright, deceased.

We omit further recital of the proofs, such as letters written by deceased, visits made by him, recitals in his father's family Bible and much else.

The proofs were remarkably strong and credibility vouched for by public records to a large extent.

The board was in error in not finding in accord with the proofs. The order denying the petition is vacated and the board of escheats is directed to convene and enter an order turning the estate over to claimants. No costs.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

MacDONALD *v.* GREAT LAKES STEEL CORP.

1. MASTER AND SERVANT—MEASUREMENT OF IMPAIRMENT OF EARNING CAPACITY.

   Impairment of earning capacity is computed upon the basis of the employment engaged in at the time of the injury, notwithstanding proviso added to part 2, § 11e, of the workmen's compensation act by Act No. 376, Pub. Acts 1927, limiting compensation payable, since it evidences no intent to abolish the difference between skilled and unskilled labor nor to affect basic computation of compensation (2 Comp. Laws 1929, §§ 8425, 8426, 8427b, e).

2. SAME.

   Body of section 11e, part 2, of the workmen's compensation act provides method of determining the percentage or degree of incapacity to reduce compensation but does not affect the first determination of the basic figure, *i. e.*, the earning capacity in the employment at time of injury (2 Comp. Laws 1929, §§ 8425, 8426, 8427b, e).

3. SAME.

   Rule for ascertaining percentage of impairment of earning capacity is inapplicable in case employee is totally incapacitated to work in the employment engaged in at time of the injury.

4. SAME—CARPENTER—REEMPLOYMENT AT UNSKILLED LABOR.

   Allowance to carpenter with average weekly wage of $25.20 at time of injury who was reemployed by same employer at unskilled labor at $16 a week, of compensation at $9.20 a week is affirmed under part 2, § 11e, of compensation act, proviso in said section restricting compensation in such event to such sum as added to earning capacity in another occupation does not exceed average weekly earnings at time of injury (2 Comp. Laws 1929, § 8427).

5. STATUTES—LEGISLATIVE POLICY.

   Consideration of justice of statutory rule, as to compensation payable to employee for accidental injury, in its general and long time administration are for the legislature.

Appeal from Department of Labor and Industry. Submitted June 13, 1934. (Docket No. 45, Calendar No. 37,822.) Decided October 1, 1934.

A. H. MacDonald presented his claim against Great Lakes Steel Corporation, employer, and Michigan Mutual Liability Company, insurer, for compensation for an accidental injury while in the defendant's employ. On petition to stop or reduce compensation. From award made, defendants appeal. Affirmed.

Charles Bowles, for plaintiff.

Kerr, Lacey & Scroggie, for defendants.

FEAD, J. Plaintiff, a carpenter, with "average weekly wage" of $25.20, was injured and compensation fixed at $16.80 per week upon approved agreement. He returned to work for the same employer as a watchman, unskilled labor, at $16 per week. He was still totally disabled as a carpenter. The employer had adopted a code under the National Industrial Recovery Act (15 USCA, § 701 *et seq.*). Under the code plaintiff would have earned $21.80 weekly had he worked full time as a carpenter but his average weekly wage, computed according to statute, would have been $26.16, with compensation, if based thereon, of $17.44.

On petition to stop or reduce compensation the deputy commissioner awarded $3.87 per week, being two-thirds of $5.80, the difference between $21.80, present actual weekly wage of a carpenter, and $16, earned as watchman. The department allowed $9.20 per week, being the difference between $25.20, average weekly wage at time of accident, and $16 now earned. The question is upon the method of computation under the facts.

Section 9 of the compensation act, 2 Comp. Laws 1929, § 8425, provides, for total incapacity for work, weekly compensation equal to two-thirds of the employee's average weekly wage. Section 10 (2 Comp. Laws 1929, § 8426), provides, for partial incapacity for work, weekly compensation of two-thirds "of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter."

Under section 11(b) (2 Comp. Laws 1929, § 8427), the "average weekly wages" are "six times the daily wage, salary or emolument which the injured employee is earning at the time he suffers the accidental injury."

Prior to 1927, section 11(e) (2 Comp. Laws 1929, § 8427), read:

"The weekly loss in wages referred to in this act shall consist of such percentage of the average weekly earnings of the injured employee computed according to the provisions of this section as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury."

In this state of the statutes, except as to rates of compensation, it was held that a skilled workman was entitled to full compensation for an injury as long as he was totally disabled from pursuing his trade (within the statutory period), although he could earn wages at another occupation and his actual earnings therein were more than his original wages at his trade. *Foley* v. *Railway Co.,* 190 Mich. 507; *Jameson* v. *Walter S. Newhall Co.,* 200 Mich. 514 (18 N. C. C. A. 855); *Geis* v. *Packard Motor Car Co.,* 214 Mich. 646.

In 1927 the legislature amended the compensation act in several respects. With the exception of amounts, which were increased, sections 9, 10, 11(b) and 11(e) were reenacted *in haec verba*. But, evidently to remedy the situation above mentioned, the legislature added a proviso to section 11(e), by Act No. 376, Pub. Acts 1927, reading:

"Provided, The compensation payable, when added to his wage earning capacity after the injury in the same or another employment, shall not exceed his average weekly earnings at the time of such injury."

Defendants' contention is that the proviso operated to abolish the distinction between skilled and unskilled labor, so that if the employee retains ability to work in any occupation he is not totally disabled although he cannot work at his trade; he must be treated as partially incapacitated; his compensation is to be computed under section 10; section 10 is to be read in connection with section 11(e); and, in determining "the proportionate extent of impairment of earning capacity" in his trade, changes in labor conditions and wages are to be considered. *Trask* v. *Modern Pattern & Machine Co.*, 222 Mich. 692.

We discover in the proviso added in 1927 no intention to abolish the difference between skilled and unskilled labor pointed out in the cases cited. On the contrary, the reenactment of the body of section 11(e), in the light of the decisions, demonstrates an intention that impairment of earning capacity shall continue to be computed upon the basis of the employment at the time of the injury.

The proviso has no effect upon the determination of the basic computation of compensation. It merely allows a sort of set-off against it. The first

controlling figure in the computation is found from section 9, as to total disability, section 10 as to partial disability, and section 11(b). In both cases the start is made at the average weekly wage at the time of injury.

The body of section 11(e) provides a method of determining the percentage or degree of impairment of earning capacity. As construed in the *Trask Case,* it makes changes in labor and wage conditions factors in finding the "proportionate extent" of impairment. It does not affect the first determination of the basic figure. It operates merely to find the percentage to reduce it. Where continued incapacity to work in the employment at the time of injury is total, there is no occasion for using any rule to find the percentage of impairment. The rule in the *Trask Case* is applicable only on partial incapacity in such employment.

Section 9 and the proviso in section 11(e) govern the rate of compensation at bar. Under section 9 the basic rate was $16.80. Against it the proviso allows such set-off, by reason of earning capacity in another occupation, as will restrict earning capacity plus compensation to $25.20, the average weekly earnings at time of injury.

It would be strange if, under some circumstances and in individual cases, the statutory rule did not work injustice to employer or employee, whether, on general and long-time administration, the rule works justly or otherwise, we cannot say. Such considerations are for the legislature.

The department reached the correct result and the award is affirmed.

Nelson Sharpe, C. J., and Potter, North, Wiest, Butzel, Bushnell, and Edward M. Sharpe, JJ., concurred.

ROXBURY *v.* WEIDMAN LUMBER CO.

1. MASTER AND SERVANT—NATIONAL CODES—COMPENSATION.
   National codes regulating wages *held*, to have no bearing on issues involved on employer's petition to stop compensation under workmen's compensation act in admeasuring compensation for partial disability.

2. SAME—AVERAGE WEEKLY EARNINGS.
   Millwright whose average weekly earnings were $27 at time of injury and $17.40 at time of hearing on petition to stop compensation, may properly receive $6 weekly for partial disability since present average weekly earnings and compensation do not exceed his average weekly earnings at time of injury (2 Comp. Laws, 1929, § 8427e).

3. SAME—BASIS OF COMPUTING COMPENSATION—GENERAL WAGE DECREASE.
   General wage decrease for millwrights may not be considered in determining compensation payable since statute designates basic figure as average weekly earnings at time of injury (2 Comp. Laws 1929, § 8427e).

Appeal from Department of Labor and Industry. Submitted June 6, 1934. (Docket No. 38, Calendar No. 37,644.) Decided October 1, 1934.

Roy Roxbury presented his claim against Weidman Lumber Company, employer, and State Accident Fund, insurer, for accidental injuries sustained while in defendant's employ. On petition to stop compensation. From denial of petition, defendants appeal. Affirmed.

Donnelly & Walsh, for plaintiff.

Derham & Derham, for defendants.

WIEST, J. This is certiorari to the department of labor and industry, and brings to review refusal to stop compensation awarded plaintiff for partial disability arising out of a personal injury while in the employ of defendant Weidman Lumber Company.

Plaintiff was a millwright and, in April, 1928, sustained a dislocation of his left shoulder and fracture of his left leg and, while now in the same employ, he has a stiff leg but, by being favored with the assistance of another millwright, is able to hold his job and receives the same wages as his fellow millwright.

By agreement he received $18 per week for the period of total disability. In April, 1931, a petition to stop compensation was denied and an award of partial disability at nine dollars per week was made. September 7, 1933, upon another petition to stop compensation, an award was made of six dollars per week for partial disability. Upon review defendant seeks reversal of this award and a stop to compensation.

The injuries have partially disabled plaintiff but defendant contends that, under the undisputed evidence, he is suffering no impairment of his earning capacity because he is receiving the wages of a millwright and earning the wage prescribed by the NRA code, and defendant would not be permitted by that code to pay more if it wished to do so. Defendant also contends that an award must be made on loss of earnings only and, when it appears that plaintiff is earning the wage of a millwright, his earning capacity in the same employment is not lessened.

Plaintiff contends that the NRA code has nothing to do with his employment for the employer is under the lumber code of fair competition and that code makes no attempt at fixing maximum wages.

The mentioned codes have no bearing upon issues here involved.

In an opinion the board stated the burden was on defendant to establish the fact that the man had fully recovered and is now able to do the work that he did when injured.

Defendant contends that under 2 Comp. Laws 1929, § 8427, subd. (e), there is appointed a different test. That section reads:

"(e) The weekly loss in wages referred to in this act shall consist of such percentage of the average weekly earnings of the injured employee computed according to the provisions of this section as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury: *Provided,* The compensation payable, when added to his wage earning capacity after the injury in the same or another employment, shall not exceed his average weekly earnings at the time of such injury."

Defendant contends that plaintiff's wage now equals that of the times, payable to others of the same craft, and, therefore, he is suffering no loss of his wage earning capacity.

In *MacDonald* v. *Great Lakes Steel Corp., ante,* 591, the mentioned statutory provision is construed and it is unnecessary to restate what we have there said.

At the time plaintiff was injured his average weekly wage was $27. At the time of the hearing, now under review, his average weekly wage was $17.40. The weekly compensation of $6, awarded, "when added to his wage earning capacity after the injury in the same * * * employment," does "not

exceed his average weekly earnings at the time of such injury." Plaintiff's injuries now materially lessen his earning capacity as a millwright. That he cannot now perform the full duties of a millwright is conceded. Wages of millwrights may be less now than in 1928, but the statute, in designating the wage at the time of injury and constituting such the basic figure, permits no consideration of a general wage decrease.

The award, added to plaintiff's wage earnings now, does not exceed his weekly wage earnings at the time of his injury and is affirmed, with costs to plaintiff.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

BERG v. HESSEY.

1. VENDOR AND PURCHASER—RESCISSION—SUMMER RESORT.

   Vendees of summer resort property who purchased for resale of platted lots *held*, to have waived right to rescind for alleged false representations as to value and probable resale value by subsequent acts with respect to the property, where they are unable to restore *status quo*, are estopped, and guilty of laches in waiting five years before bringing suit.

2. CONTRACTS—RESCISSION—FRAUD.

   Rescission is not a vent for bad bargains unless induced by fraud, and not then unless promptly disaffirmed after discovery of the fraud.

Appeal from Muskegon; Vanderwerp (John), J. Submitted June 14, 1934. (Docket No. 50, Calendar No. 37,833.) Decided October 1, 1934.

Bill by Oscar Berg, individually and as trustee, and Gerald Stufflebeam against Marie Hessey for rescission of purchase of lands. Cross-bill by defendant Hessey against plaintiffs and defendant Alvin L. Jackson for foreclosure of mortgage. Decree for plaintiffs. Defendant Hessey appeals. Reversed, bill dismissed and case remanded for proceedings under cross-bill.

Alexis J. Rogoski, for plaintiffs.

William H. Messinger and *Dean S. Face,* for defendant Hessey.

WIEST, J. In 1926 there was a boom in real estate for summer resort subdivision purposes in lake regions in western Michigan, and especially in the vicinity of Muskegon. In 1925 defendant Marie Hessey and Charles Hessey, her husband (now deceased), purchased about 100 acres of farm land near Lake Michigan and touching Black lake, 60 acres lying in Muskegon county and the adjoining parcel in Ottawa county. They purchased at an executor's sale and paid $5,000 in cash for the property. They engaged the services of defendant Alvin L. Jackson in planning a plat, subdividing the 60 acres in Muskegon county. The plat, showing 603 lots, was prepared but not recorded. Some of the lots were sold under land contracts by the Hesseys. In the fall of 1926, Mr. Jackson made contact with plaintiff Gerald Stufflebeam, then captain of a vessel on Lake Michigan, and plaintiff Oscar Berg, then clerk of Muskegon county, and they became inter-

ested in the possibilities of the property for sale for resort purposes. Plaintiffs viewed the property and claimed that Mr. Jackson represented it could be purchased by the three for $22,700, of which he would at once pay $5,000, and that the three could purchase and sell lots and probably realize $60,000 from the 60-acre parcel and $40,000 from the remainder. Mr. Jackson showed plaintiffs the plat but said nothing about it being unrecorded and plaintiffs did not give it much attention although, at that time, Mr. Berg, by virtue of his office as county clerk, was a member of the board having approval of plats. The three agreed to make the purchase and share in the contemplated profits and, November 12, 1926, entered into a land contract with the owners for the purchase at the sum of $22,700.

The contract recited an agreement by the vendees therein "to pay * * * $10,700 at the delivery of this contract, the receipt of which is hereby acknowledged, said amount consisting of $5,000 already paid in by A. L. Jackson, $2,700 to be paid in cash, and six notes of $500 each, * * * and the balance of the purchase price, $12,000 to be paid" in instalments of $2,000 each.

The acknowledged payment by Mr. Jackson was in satisfaction of services previously rendered the vendors in and about this property.

The purchasers found the prepared plat, because of narrow streets and small lots, would not be approved and caused a survey to be made and a new plat to be prepared and it was approved and recorded some time in 1927. This rearrangement necessitated adjustment with purchasers under the old plat and this was accomplished. Efforts were then made to sell lots and some were sold and suitable papers executed by the vendors.

In December, 1926, the vendees entered into an agreement with Forde and Anderson of Chicago, for the sale of the lots on commission and placed the selling price upon each lot. May 12, 1928, the vendees in the land contract, upon executing a mortgage on the property to the vendors for $12,000, received a deed, and May 26, 1928, the grantees entered into a written agreement constituting plaintiff Berg trustee to manage the property. Thereafter plaintiffs and Mr. Jackson continued efforts to sell lots but encountered a rapid decline in value and found no demand for lots and this continued until, in 1931, there was no demand for lots. Plaintiffs and Mr. Jackson gave the wife of Mr. Stufflebeam a mortgage for $1,000 on out-lot A, which contained about an acre of land with a farmhouse on it.

In March, 1931, plaintiffs claim they first learned that they had been defrauded by the false representations of Mr. Jackson and made verbal offer to surrender the property upon discharge of their obligations. Upon declination, plaintiffs filed the bill herein to obtain rescission and Mrs. Hessey, by cross-bill, asked for foreclosure of the mortgage. The court granted rescission, together with nullification of Mrs. Hessey's mortgage and validation of Mrs. Stufflebeam's mortgage, and gave plaintiffs a personal decree against Mrs. Hessey for $10,401.01, "less the interest due on the mortgage held by Margaret Stufflebeam, being from January 15, 1928, to the date fixed for said payment," awarded execution against Mrs. Hessey and a lien on the property, except out-lot A.

In an opinion the circuit judge found that the land in Muskegon county—"was not fit for sale at a profit for subdivision purposes, and was not worth $60,000, but was worth not over $6,500, and for agricultural purposes mostly," and that Mr. Jackson misrepre-

sented the property in all the particulars claimed; that plaintiffs were deceived thereby to their damage and that they acted promptly after discovery of the fraud. Defendant Marie Hessey reviews by appeal.

Upon the question of prospective profits the testimony of plaintiff Berg is illuminative. He said:

"I knew there was a boom going on in west Michigan resort property. * * * I know that there was a rapid decline in 1927 and 1928 so far as this property was concerned. * * *

"The purpose of going into this transaction was to attempt to make some money from it as an investment, one-third of whatever the property might develop. I knew there was nothing sure or certain about that. I knew that no one was guaranteeing me the property would sell for $100,000."

Mr. Stufflebeam testified that Mr. Jackson said:

"The platted portion of that property ought to sell for $60,000. * * * He said, approximately, as I remember it, $60,000 it ought to sell for. And at that time he also told us the 40 acres over in Ottawa county, when it was platted, ought to sell for $40,000, or approximately that. He told us that he would sign these notes or contracts or whatever was to be prepared and he would be able to meet his part of the obligation. He didn't tell us how he would be able to meet it or of any particular pieces of property he owned anywhere, or how much money he had in the bank, or state what his income was."

He also testified:

"When Mr. Jackson first started to talk to me, I didn't know how the Hesseys acquired this property. What I was interested in was the chance to make money on this property myself. It didn't interest me whether the Hesseys made a profit or not, not necessarily. If I got the property cheap enough and

could sell it and make money enough, that is what I was interested in. I didn't care if Mr. and Mrs. Hessey inherited this property and got it for nothing."

The plaintiffs held this property for over five years, and we have set up the use they made of it. They now claim that they did not discover they had been defrauded until in March, 1931, when they talked with Glenn Porter, a real estate man of Muskegon, and were informed by him that he did not think there was much sale for the land and he thought they had paid altogether too much for it.

If any fraudulent representations were made (which is extremely doubtful) they were by Jackson, who was accepted as an associate and became a party to the purchase and subsequent management. We are satisfied that, even if there were any misrepresentations, plaintiffs, by their subsequent acts, have waived right to rescission by affirmative action, have been guilty of laches, are in no position to restore the *status quo* and are estopped.

We find no testimony tending to show the credit of $5,000, accorded Jackson, was a fictitious one and, therefore, a fraud upon plaintiffs. There was no representation that the first plat was recorded and, upon its face, disclosed it had not been recorded.

It is inconceivable that plaintiffs, during a trial of five years to dispose of the lots, were not aware of their bad bargain until informed by Mr. Porter. Plaintiffs, by their own acts in selling lots, have rendered it impossible to restore the property to Mrs. Hessey.

Plaintiff Berg was no gullible novice. He was county clerk at the time of the purchase, and at the time of the hearing, and had been register of deeds. He was well aware of the demand, in 1926, for resort

lots and the boom leading to many, later found, ill-advised subdivisions and, when the slump came, he was caught like many others who had had dreams of sudden wealth.

There was no representation that the plat, exhibited by Jackson, had been approved and recorded. Plaintiffs knew in 1927 that it had not been approved for they had a survey made and a new plat executed and recorded and, for about four years thereafter, operated in accordance therewith without murmer.

The new plat commanded readjustment with purchasers of lots under the old descriptions and plaintiffs then knew the number of lots previously sold and did not demur.

Plaintiffs did not claim that Jackson represented the property to be worth $100,000 at the time of the purchase, but only that it ought to bring such an amount in the sale of lots. The slump, commencing in 1927, rendered any and all possibility of such realization utterly impossible, yet plaintiffs carried on without complaint of fraudulent estimate of probable gain.

Out-lot A was sold by plaintiffs for $3,500, but was taken back and is now subject to the mortgage, as before mentioned, to Mrs. Stufflebeam. About 80 lots have been sold, the lowest price being $148; however, with small down payments.

Plaintiffs evidently made a bad bargain, considering the slump, but endeavored to make the best of it, and they did not need to wait for upwards of five years to be told that they had made a bad bargain.

Rescission is not a vent for bad bargains unless induced by fraud, and not then, unless promptly disaffirmed after discovery of the fraud.

The court was in error in granting rescission and the decree is reversed and the bill dismissed, with costs to Mrs. Hessey.

Under her cross-bill Mrs. Hessey is entitled to decree of foreclosure of the mortgage and to that end proceedings under the cross-bill are remanded to the circuit court.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

PEOPLE *v.* PRESCOTT.

1. RAPE—ESSENTIALS OF STATUTORY CHARGE.

In trial of the accused of statutory rape, prosecution has burden of showing, and jury obligation of finding, beyond reasonable doubt, before a verdict of guilty, that accused had sexual intercourse with prosecutrix on or about date alleged and that she was under 16 years of age at that time (Act No. 328, § 520, Pub. Acts 1931).

2. SAME—EVIDENCE—AGE OF PROSECUTRIX.

Testimony of mother as to age of prosecutrix at time of alleged rape was competent but its weight was a question for the jury in view of the appearance of the girl and all other circumstances of the case.

3. CRIMINAL LAW—REMARKS OF TRIAL JUDGE—BIRTH CERTIFICATE.

Remarks of the trial judge in trial of one accused of statutory rape, which operated as an assurance to the jury that the court would save error, if any, on their part by examination of the record of birth of the prosecutrix *held*, reversible error, since accused had right to have issue of her age determined by jury without any thought of divided responsibility (Act No. 328, § 520, Pub. Acts 1931).

4. NEW TRIAL—INDORSEMENT OF NAMES OF WITNESSES.
Indorsement of names of persons in house at time of alleged rape may not be reserved as basis for new trial where no motion to so indorse was made at time of trial.

5. CRIMINAL LAW—GREAT WEIGHT OF EVIDENCE.
Trial court was not in error in holding verdict of guilty was not against great weight of evidence, where proofs presented an issue of fact as to commission of the act by accused.

6. RAPE—FIRST COMPLAINT BY PROSECUTRIX—CREDIBILITY.
In statutory rape case, admission of testimony of prosecutrix on direct examination that she first made complaint nearly four months after intercourse is alleged to have taken place *held*, not error, since such testimony is not substantive evidence but merely a circumstance affecting credibility of prosecutrix.

Appeal from Recorder's Court of City of Detroit; Boyne (John A.), J. Submitted June 14, 1934. (Docket No. 111, Calendar No. 37,584.) Decided October 1, 1934.

Tom Prescott was convicted of statutory rape. Reversed.

Weidman & Kramer (*Hyman Kransberg,* of counsel), for appellant.

Patrick H. O'Brien, Attorney General, *Harry S. Toy,* Prosecuting Attorney, *Verne C. Amberson* and *Edmund E. Shepherd,* Assistants Prosecuting Attorney, for the people.

WIEST, J. Upon trial by jury defendant was convicted of the crime of statutory rape (Act No. 328, § 520, Pub. Acts 1931). He prosecutes review by appeal and alleges five errors. One error commands reversal.

The prosecution had the burden of showing and the jury the obligation of finding, beyond a reasonable doubt, before verdict of guilty, that defendant

had sexual intercourse with Virginia Summerland on or about September 2, 1932, and at that time she was under the age of 16 years.

The girl testified to the act, and her mother testified that the girl was born March 14, 1917, and, therefore, was 15 years, 5 months and 19 days of age on September 2, 1932. The testimony of the mother was competent but the weight thereof, in view of the appearance of the girl and all else disclosed in the case, was for determination by the jury.

At the close of the proofs and during the argument of counsel for the defendant he stated:

"Now the girl and her mother said she was born in Detroit, and she was born, they said, in Detroit on March 14, 1917, and they have birth records in Detroit, and yet they have not been produced. Why? I ask you to look at the girl, and I ask you do you believe she was under the age of 16 years old?"

The prosecutor objected, stating:

"It is not in issue here."

The court stated:

"The age is absolutely in issue. If the age is not proven, you are out of court entirely if she was over 16."

Counsel for defendant said:

"I have not heard anything admitting yet—"

The Court (interrupting):

"Wait a minute. I have sometimes even sent out people for the birth certificate. I don't care what the verdict is but before I pass sentence, I will always have a birth certificate first. This police officer knows better than to come into court without a birth record. From past experience she should know. Sometimes people don't absolutely remember the birth date."

Thereupon counsel for defendant continued his argument to the jury and, at the close thereof, the prosecutor, in arguing, stated:

"Now, if there is a record over there showing that the girl's age is 16, don't you think that defense counsel has investigated to see, and would have—"

Counsel for defendant, interrupting:

"Now, I object again; that we are not required to prove anything. You are required to prove this man guilty beyond a reasonable doubt."

The Court:

"Incidentally, both of you forget that I am presiding here. I am going to tell them what the law is. You go ahead and tell them, and then, perhaps, I will change it all. You can go ahead and argue on the testimony. I am going to give the law, and I won't give in on that."

The remarks by the trial judge relative to the certificate of birth constituted reversible error, for it operated as an assurance to the jury that the court would take evidence upon the question of age after verdict, if defendant was convicted, and tended strongly to relieve the jurors of their otherwise essential sense of ultimate responsibility. The jurors might well have felt that, in case they found defendant guilty, the trial judge would subsequently save error, if any, on their part by examination of the record of the birth of the girl. Sense of conscientious responsibility on the part of jurors must not be lessened by any such assurance by the court.

Upon the question of the age of the girl, defendant had the right of submission of that issue to the jury and have determination wholly apart from any thought of divided responsibility.

Defendant moved for a new trial, one ground being the failure of the prosecution to indorse on the information the names of the 10-year old sister of the prosecutrix and an adult boarder at defendant's home, who were both in another part of the house at the time of the alleged offense. No motion to so indorse was made at the trial and the point could not be reserved as grounds for a motion for a new trial.

Upon the question of commission of the act by defendant the proofs presented an issue of fact for submission to the jury and the court was not in error in holding the verdict was not contrary to the great weight of the evidence.

On direct examination of the prosecutrix the following occurred:

"*Q.* When did you first tell anybody about that?
"*A.* It was after Christmas.
"*Q.* It was after Christmas?
"*Mr. McCrea* (counsel for defendant): I object to it, if your honor please. It is too remote.
"*The Court:* You mean after September 2d? Be more definite.
"*Q.* And who did you tell?
"*A.* I told one of the matrons in the boarding school.
"*Q.* Do you know her name?
"*A.* Yes, Mrs. McFee.
"*Q.* And by the boarding school, you mean the place you are at now?
"*A.* No.
"*Q.* What boarding school was it?
"*A.* It was the St. Agnes Home.
"*Q.* Where is that?
"*A.* In Romeo."

It is claimed the testimony was inadmissible. The prosecutrix was of tender years and the delay is

explained by discovery of her pregnancy about that time. The fact of complaint is not substantive evidence but merely a circumstance bearing upon the credibility of the witness. Counsel for defendant cite *People* v. *Black,* 231 Mich. 48. The prosecutrix in that case was above the age of consent.

There was not reversible error in admitting such testimony.

For the reason before stated the conviction is reversed and a new trial granted. Defendant is remanded to await trial.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

HAMBURGER *v.* KRAMP.

1. COVENANTS—BUILDING RESTRICTIONS.

   Building restriction cases are governed by particular facts and it is neither possible nor desirable to establish a measuring stick and thereafter cut cases to fit.

2. SAME—GASOLINE FILLING STATION—EQUITY.

   Bill to enforce residential building restrictions and enjoin erection of gasoline filling station on lot several blocks away from lot owned by plaintiffs in same subdivision but upon another street which has lost much of its residential character partially because of efforts of one of plaintiffs in violating restrictions in same and adjoining plats *held,* properly dismissed where violation contemplated will not seriously affect plaintiffs' lot and they were moved by desire to prevent competition with nearby filling station which they operated.

Appeal from Wayne; Marschner (Adolph F.), J. Submitted June 12, 1934. (Docket No. 104, Calendar No. 37,765.) Decided October 1, 1934.

Bill by Charles Hamburger and wife against George A. Kramp to enjoin the alleged violation of building restrictions in erection of a gasoline filling station. Bill dismissed. Plaintiffs appeal. Affirmed.

Abram Sapiro, for plaintiffs.

Maurice P. Rhodes, for defendant.

WIEST, J. The bill herein was filed to obtain a decree maintaining the integrity of building restrictions imposed upon lots in a subdivision.

Upon the hearing the court found that, by reason of violations and changed conditions, it would be inequitable to maintain the restriction on defendant's lot in the subdivision facing Schoolcraft avenue; that plaintiff Charles Hamburger had violated the restrictions elsewhere on the plat and upon a lot facing Schoolcraft avenue on an adjoining plat, and plaintiffs were moved by desire to prevent competition on the part of defendant with a nearby gasoline filling station operated by plaintiffs. Plaintiffs review by appeal.

The plat, known as Restmore Homes Subdivision, consists of 225 lots and was recorded in 1915. At that time the land was commons and Schoolcraft avenue was a dirt road. The lots were restricted to residence purposes. Plaintiffs own lot No. 51, located on Manor avenue, at the extreme northerly side of the plat, and Schoolcraft avenue is near the southerly side of the plat. Defendant owns lot No. 171 on Schoolcraft avenue and had started to

erect a gasoline filling station thereon at the time the bill herein was filed. The restrictions were repeatedly violated as to lots on Meyers road at the west boundary of the plat, three blocks west of defendant's property, and a store and apartment building on Schoolcraft avenue near Meyers road. On Schoolcraft avenue, commencing in the second block east of defendant's lot, are rows of stores and a gasoline station, but these are in another and like restricted subdivision. Schoolcraft avenue has been widened and paved, has become a much traveled highway and has lost much of its character of a residence street and plaintiff Charles Hamburger has been an active participant in bringing about change by constructing buildings on the plat and the adjoining plat in violation of building restrictions.

The residence character of plaintiffs' lot on Manor avenue, a block and a quarter north of Schoolcraft avenue, will not be seriously affected by a gasoline filling station on defendant's lot at such a distance south and nearly two blocks east on Schoolcraft avenue.

Building restriction cases are governed by particular facts and it is neither possible nor desirable to establish a measuring stick and thereafter cut cases to fit for that would be too Procrustean.

Schoolcraft avenue has, in many respects, become a business thoroughfare and the change has induced uncontested violations of the building restrictions east and west of defendant's lot, and the march of business from both directions will, undoubtedly, soon pinch out the oasis plaintiffs want maintained for the benefit of their lot on another street. The change appears to have been recognized by, and acquiesced in by other owners of lots, and the business character of Schoolcraft avenue accepted by

plaintiff Charles Hamburger in his violation of building restrictions east of defendant's lot in the adjoining plat.

The circuit judge reached a right result.

The decree, dismissing plaintiffs' bill, is affirmed, with costs to defendant.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

LAUER *v.* MICHIGAN LIFE INSURANCE CO.

INSURANCE—SURRENDER—DEATH.

Surrender of life insurance policy by insured and beneficiary in accordance with terms of policy and promise of payment of surrender value by insurer *held,* not abrogated by death of insured prior to payment of surrender value.

Appeal from Saginaw; Browne (Clarence M.), J. Submitted June 19, 1934. (Docket No. 103, Calendar No. 37,901.) Decided October 1, 1934.

Bill by Violet L. Lauer against Michigan Life Insurance Company to set aside surrender receipt of an insurance policy and restoration of policy to full force and effect. Decree for plaintiff. Defendant appeals. Reversed.

Robert H. Brucker (*Raymond R. Kendrick,* of counsel), for plaintiff.

Samuel D. Pepper (*Herbert P. Orr,* of counsel), for defendant.

WIEST, J. The husband of plaintiff was insured by defendant company with plaintiff as beneficiary. May 5, 1932, the insured desired to obtain the surrender value of the policy and sent to defendant a receipt printed on the policy, signed by himself and the beneficiary, in order to accomplish that end. Defendant's local agent at Saginaw forwarded the policy and receipt to defendant and, on May 13, 1932, wrote the insured that the surrender value of $144 would be paid on or about July 8, 1932. It was not so paid and the insured, by letter, on July 15, 1932, made inquiry as to the reason. July 17, 1932, the insured died very suddenly and defendant's local agent was notified of his death the next day. July 19, 1932, the local agent visited defendant's office in Detroit and made report of the insured's death and defendant company sent out a letter, addressed to the insured, inclosing a check for the surrender value of the policy dated as of July 15, 1932. Plaintiff refused the check and filed the bill herein to have the surrender receipt canceled and the insurance decreed in force and obtained a decree to such effect. Defendant appeals, claiming that, upon receipt of the surrender of the policy and the promise, by letter, to pay, the policy was canceled and payment of the obligation after death of the insured was valid.

The insured and beneficiary had a right to surrender the policy. This they did. Defendant accepted the surrender by letter promising payment. Thereupon the surrender value and obligation to pay became fixed in accordance with contract rights. Rights so fixed were not changed by death of the

insured nor the accomplished surrender abrogated. The circuit judge found:

"That the plaintiff and her husband did in fact execute and forward to the defendant the policy bearing the indorsement, in form a receipt for $144 under the mistaken belief that the money would be paid promptly; that the defendant having full knowledge of the death of plaintiff's decedent and for the purpose of attempting the completion of the surrender of the policy, did on July 19, 1932, forward what purported to be a check issued July 15, 1932, but which was in fact issued after the assured's death; that in sending this remittance, the defendant did not act in good faith and that no effect can be given to their attempted payment as any evidence of an acceptance of surrender, or cancellation of the policy by them. Although the policy was in the possession of the defendant, no witness appeared in its behalf to fix the time of the alleged cancellation of the policy.

"The court finds from all of the testimony and the documentary evidence introduced that the policy was never canceled by defendant as a matter of fact."

There was no fraud perpetrated by the insurance company, nor was the accomplished surrender abrogated or the policy reinstated by the death of the insured before payment.

In *Pacific States Life Ins. Co.* v. *Bryce* (C. C. A.), 67 Fed. (2d) 710 (91 A. L. R. 1446), the pivotal questions here presented were before the court of appeals of the tenth circuit. There an insured and his beneficiary mailed the policy to the insurance company and before payment of the surrender value the insured died. The court stated:

"Plaintiff's theory, adopted by the trial court, is that the execution of the surrender agreement was

an offer by the insured to the company to surrender the policy for a cash payment of $435; that such offer lapsed and the surrender agreement voided because the surrender value was not paid within a reasonable time or before the death of the insured.

"With this construction of the policy contract we are not in accord. It puts the cart before the horse. The policy vested in the insured certain definite rights, among them the right to be paid the reserve on his policy in cash upon a surrender of his policy, if demanded within a specified time. The insured did demand the surrender value within the prescribed time, and surrendered his policy. When he did so—a month before his death—he became absolutely entitled to payment in cash of $435. Upon his death his estate, and not his beneficiary, became entitled to that sum. The offer is contained in the policy contract, and is from the company to the insured; the option is in the insured and not the company, and his acceptance completes the contract; the company has no right to accept or reject; its obligation to pay is absolute. Under plaintiff's theory, an insured may only offer to surrender his policy for its cash value; the company may then accept or reject the offer, and if it fails to pay as agreed, the offer lapses. Such a construction would wipe out the right of an insured to the cash surrender value of his policy, because the company could defeat his right by rejecting his offer, or by failing to pay. To construe an exercise of an option as an offer to the company, subject to rejection or lapse, would be to warp the plain terms of the contract and to deny the insured a right he has paid for. If Bryce, on March 15th, had sued the company for $435, could the company have defended on the ground that it had not accepted his offer to take the cash surrender value? Clearly not; yet plaintiff's contention comes down to that.

"The cases, as far as we are advised, are at one in holding that the rights of the parties are fixed

when an option given by a policy is exercised by the insured. In *Lipman* v. *Equitable Life Assurance Society* (C. C. A.), 58 Fed. (2d) 15, 18, the insured was killed the day the application for the surrender value was received by the company and before the check therefor was mailed. The fourth circuit court of appeals held that liability was limited to the surrender value, Judge Parker saying:

"'Since the insured had the option to surrender her policy and take the cash surrender value on October 10th, there can be no question but that the rights of the parties became fixed and insured became entitled to the cash surrender value, and nothing more, when she exercised the option. It was not necessary that defendant do anything. There was a meeting of the minds of the parties when insured accepted the continuing offer of the company evidenced by the option.'

"Other cases to the same effect are *Pequot Manfg. Corp.* v. *Equitable Life Assurance Society,* 253 N. Y. 116 (170 N. E. 514); *State Life Ins. Co.* v. *Finney,* 216 Ala. 562 (114 South. 132); *Northwestern Mutual Life Ins. Co.* v. *Joseph,* 31 Ky. Law Rep. 714 (103 S. W. 317, 12 L. R. A. [N. S.] 439); *McCormick* v. *Travelers' Ins. Co.,* 215 Mo. App. 258 (264 S. W. 916); *Cooper* v. *West,* 173 Ky. 289 (190 S. W. 1085). Plaintiff distinguishes these cases upon the ground that there was an unreasonable delay of some 40 days in the case at bar, not present in the cited cases. The delay of the company, assuming it to be unreasonable, was a breach of its contract to pay the surrender value; it does not follow from the fact that a contract is breached, that there never was a contract."

That case was an action at law brought by the beneficiary but the legal principles there stated effectually bar this suit.

The decree is reversed and the bill dismissed, with costs to defendant.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

McCLAVE *v.* BENTON HARBOR STATE BANK.

1. GUARDIAN AND WARD—SALE OF INTEREST IN REALTY.
   Guardian's sale to widow of interests of minors in farm for notes secured by mortgage on entire farm *held,* sale on credit within meaning of statutes providing for such sale by guardian and not a sale for cash and reinvestment of proceeds notwithstanding statutes as to credit sales were not complied with (3 Comp. Laws 1929, §§ 15825, 15841).

2. SAME—PROBATE COURT RECORDS—PROTECTION TO PURCHASER.
   Good-faith purchasers of real estate at probate sale may rely upon probate records and the judgment of the court, where the court has jurisdiction, but one who has knowledge of infirmities or is chargeable with notice of them will not be protected in his title.

3. SAME—CONFIRMATION OF SALE BY PROBATE COURT.
   Confirmation of sale of minors' interest in real estate by probate court which had jurisdiction to license sale and confirm it *held,* effective as to good-faith purchasers notwithstanding sale was actually in violation of statute regarding same, where facts as to such violation were not brought to the attention of the probate court (3 Comp. Laws 1929, §§ 15825, 15841).

4. SAME—BANK CHARGEABLE WITH NOTICE.
   Bank taking mortgage from widow but withholding advancement of portion of money until after widow acquired interests of minors *held,* chargeable with knowledge of subsequent report of guardian's sale to widow as for cash when sale was actually for credit and therefore not a *bona fide* purchaser, where statutory requirements for credit sales had not been complied with (3 Comp. Laws 1929, §§ 15825, 15841).

5. SAME—EASEMENT PURCHASER—GOOD FAITH.
   Electric company which purchased easement to maintain power lines from bank after foreclosure of mortgage from widow *held,* not chargeable with notice of interests of minors whose guardian had not complied with statutes as to sale of their interests on credit and probate court records disclosed regular

and legal license to sell for cash, though abstract showed that mortgage by widow to guardian was executed on same day as his conveyance to her (3 Comp. Laws 1929, §§ 15825, 15841).

6. APPEAL AND ERROR—ABANDONMENT OF CONTENTION.
Contention of appellant upon which neither authority nor argument is presented is presumed abandoned.

7. GUARDIAN AND WARD—RECEIVERS—BANKS.
Failure of minors to file claim against bank while in receivership where it was chargeable with notice of fact that their guardian had violated statutes as to sale of their interest which it had acquired and sold *held*, not a bar to their subsequent suit against reorganized bank to set aside guardian's conveyance to bank's grantor since they merely seek recovery of interest in land to which bank never had acquired valid title.

Appeal from Berrien; White (Charles E.), J. Submitted June 20, 1934. (Docket No. 135, Calendar No. 37,946.) Decided October 1, 1934.

Bill by Alice McClave, individually and as guardian of Esther Handy and George Handy, minors, Everett Handy and wife and Daniel Handy against Benton Harbor State Bank, Adolph Belter, Willis H. Handy and Indiana & Michigan Electric Company, a corporation, to set aside a mortgage, quiet title and for other relief. Cross-bills by defendant bank and electric company to quiet title. Decree for plaintiffs Daniel Handy and Alice McClave, as guardian, against defendant bank. Bill dismissed as to Alice McClave, individually, and Everett Handy and wife as to defendant bank and as to all plaintiffs against defendants electric company, Belter and Handy. Defendant bank appeals and all plaintiffs cross-appeal as to dismissal of bill against defendant electric company. Affirmed.

Stuart B. White, for plaintiffs.

Gray & Gray, for defendant bank.

Gore, Harvey & Fisher, for defendant electric company.

Fead, J. W. J. Handy and his divorced wife, Imogene, were tenants in common of a farm. Handy died in 1921 and his interest devolved upon two adult sons and five minor children. In 1922 Mrs. Handy contracted to sell the farm to Edward Schultz for $34,000, taking in payment on account a farm at $10,500. January 11, 1923, Willis Handy was appointed and qualified as guardian of the minors.

To obtain money to pay the adult sons and to support the family, Mrs. Handy arranged an $8,000 loan with defendant bank. The arrangement contemplated Mrs. Handy obtaining the whole title to the premises. On March 3, 1923, the guardian petitioned the probate court for license to sell the minors' interest at private sale. On March 10th Mrs. Handy executed a mortgage to the bank covering the entire farm and warranting title. The bank paid $4,000 to the joint account of Mrs. Handy and the guardian and issued a certificate of deposit for the balance but retained possession of it.

Appraisers valued the minors' estate at $10,000. On April 11th license to sell was granted "for purpose of investing proceeds for support of wards." April 14th the guardian executed statutory bond and gave Mrs. Handy a deed of the 5/14 interest of the minors for consideration of $10,000. On the same day the adult sons executed to their mother a conveyance of their interest and were paid $2,100 each. On the same day Mrs. Handy executed to the guardian a mortgage of the entire farm, subject to

the bank mortgage of $8,000, to secure her five promissory notes of $2,000 each, payable in nine years. The statutory oath was dated April 16th. These instruments were recorded or filed April 17th, on which day the guardian made report of sale alleging that he had sold the minors' interests to Mrs. Handy for $10,000. The sale was confirmed April 27th. In subsequent reports of the guardian to probate court the mortgage was listed as an investment of the minors' estate.

The bank paid Mrs. Handy and the guardian jointly the balance of the loan on April 16th. Schultz lived on the premises about five years, paid principal of $1,500 and interest, and then defaulted. The mortgage became in default and, on April 11, 1927, was foreclosed and the land sold to the bank mortgagee. After expiration of the period of redemption, the bank sold the farm on contract to defendant Belter for $11,628, taking a vendor's interest of $3,000 in a land contract as part payment, and executed to defendant Indiana & Michigan Electric Company an easement to maintain power lines, poles and towers on the land for a consideration of $284. No part of Mrs. Handy's mortgage to the guardian was ever paid.

This suit is by the five minor children to set aside the guardian's deed to Mrs. Handy and the latter's mortgage to the bank, to quiet title in the minors, for partition, and other relief. The court denied relief to two plaintiffs who have become of age on the ground that their claims are barred by the statute of limitations, 3 Comp. Laws 1929, § 13968; dismissed the bill as to Belter and the electric company because they were *bona fide* purchasers; and entered decree against the bank. Plaintiffs and the bank appeal, plaintiffs attacking the decree in favor of the electric company.

The case presents three questions, (1) whether the sale by the guardian to Mrs. Handy, with mortgage back, was an investment of the minors' funds, as claimed by defendants, because security was taken on other property than that sold, or was a sale on credit, (2) if the latter, whether defendants are protected by the records of the probate court, and (3) whether they were purchasers in good faith.

3 Comp. Laws 1929, § 15825, covering public sales, provides:

"On such sale, the executor, administrator or guardian may give such length of credit, not exceeding five years, and for not more than two-thirds of the purchase money, as shall seem best calculated to produce the highest price, and shall have been directed, or shall be approved by the judge of probate, and shall secure the moneys for which credit is given, by a bond of the purchaser, and by a mortgage of the premises sold, with interest payable semi-annually."

3 Comp. Laws 1929, § 15841, pertaining to private sales, in part reads:

"All other provisions of this chapter, except where plainly inapplicable, shall be applicable to sales under this section, except this, that if any guardian or testamentary trustee shall file in said court a petition setting forth that after continued and diligent effort he has been unable to dispose of any real estate for cash, or on such length of credit, and on such terms as provided in * * * (section 15825 above), and such petition shall set forth the best terms upon which he is able to make sale of such real estate, the court, after due notice to the parties interested, and after the taking or causing to be taken of testimony of freeholders, as hereinbefore provided, may grant a license to such guardian or testamentary trustee to dispose of said real

estate, upon such terms as the court shall find to be for the best interest of the ward or beneficiary."

Reasons may be adduced to support defendants' contention that the transaction was in fact an investment, or plaintiffs' claim that it was a sale on credit. In view of the basic requirement, however, that sales of real estate be made for cash unless otherwise expressly authorized by probate court, and that the sale was on time in fact, we think it must be held a sale on credit within the meaning of the statute. Any other rule would hold serious possibilities of hazards to minors' estates.

It is a general rule that purchasers of real estate at probate sale may rely upon probate records and the judgment of the court, where the court has jurisdiction. *Averill* v. *Jackson City Bank,* 114 Mich. 20; *Wheelock* v. *Lake,* 117 Mich. 11.

We need not trace the rule through its ramifications, applications and exceptions. Reference to the cases discloses that it may be invoked only by purchasers in good faith. Such purchaser, relying upon records not disclosing the defect, would be protected in his title although the sale were on credit and the statutory requirements therefor not observed. *Asman* v. *Traphagen,* 23 Mich. 80, 84. Obviously the rule could not aid a purchaser who had knowledge of the infirmities or was chargeable with notice of them.

At bar, the court had jurisdiction to license and confirm the sale. The jurisdiction appears of record. The proceedings were wholly regular and legal on the face of the records, except as to certain irregularities in filing completed before and cured by final order of confirmation which gives the deed effect. 3 Comp. Laws 1929, § 15841.

A different question would confront us had the probate court been advised of the facts and passed upon the legality of the sale as actually made. The infirmity lies in violation of the statute as to sales on credit, which was not disclosed to the probate court and, therefore, was not cured by its judgment upon law and facts.

The court held that the bank was not a *bona fide* purchaser. It did not present evidence that it bought in good faith and without knowledge of the facts. Its original arrangement for loan contemplated Mrs. Handy acquiring the whole title. It withheld part of the purchase price awaiting that event. It paid the balance before the sale was confirmed. As the deed to her would not be of effect until the order of confirmation, the bank was chargeable with knowledge of the report of sale. The inferences from the facts are that it knew the report of sale for cash was not correct, that the records did not disclose the true situation, that the sale was on credit and had not been approved by the probate court as required by statute. In the absence of testimony impeaching the inferences from the facts, it cannot be said the bank was a purchaser in good faith.

Defendant electric company bought in reliance on the records. The only fact disclosed which could have put it on inquiry was that the abstract showed the mortgage by Mrs. Handy, recorded on the same day the guardian conveyed to her. If the fact was sufficient to send it to the probate court for further information, it found the probate records disclosing a regular and legal license and sale for cash. There was no reason for further inquiry. We think the court was right in holding this defendant a purchaser in good faith.

Before this suit was instituted, defendant bank had been closed, a receiver appointed, and statutory reorganization conducted resulting in its reopening. Defendant bank contends the proceeding is a bar to the action because plaintiffs filed no claims in the receivership proceedings. Counsel for the bank present no authority or argument on this point and we assume it is abandoned. In any event, plaintiffs' claims were not against assets owned by the bank but to recover premises to which the bank never acquired valid title.

Decree affirmed, with costs to plaintiffs against defendant bank and to defendant electric company against plaintiffs.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

MACDONALD *v.* HENRY HORNBLOWER & WEEKS.

1. TORTS—NATURE.

   A tort is single and cause of action therefor indivisible and either exists against all feasors or none.

2. JUDGMENT—TORTS.

   Judgment against one tortfeasor, until satisfied, is not a bar to separate suit against others, since injured party is entitled to satisfaction for the wrong.

3. RELEASE—TORTS.

   Injured party may release tortfeasors by contract for satisfaction which need not be in money, by compromise, accord and satisfaction or waiver.

4. Same—Other Tortfeasors.

By release of cause of action against one tortfeasor, other tortfeasors are discharged even though contract of release expressly reserves right of action against them.

5. Torts—Waiver—Brokers—Principal and Agent.

Tort for conversion of funds *held,* waived so as to bar action by customer against brokers where customer took note from brokers' agent for sum converted, received payment thereon, accepted renewal note for balance, brought two actions at law *ex contractu* against him and pleaded waiver of tort action as consideration for the note, and there was no express agreement between the parties to other effect.

6. Waiver—Torts.

Waiver of a tort, made for a consideration, cannot be recalled.

Appeal from Wayne; Webster (Arthur), J. Submitted June 19, 1934. (Docket No. 92, Calendar No. 37,896.) Decided October 1, 1934.

Action by Evelyn M. MacDonald against Henry Hornblower & Weeks, a copartnership, and others for alleged conversion of funds. Directed verdict and judgment for defendants. Plaintiff appeals. Affirmed.

Hugh K. Davidson and *David E. Kull,* for plaintiff.

Monaghan, Crowley, Reilley & Kellogg (*Crawford S. Reilley* and *Edward T. Kelley,* of counsel), for defendants.

Fead, J. In 1929 plaintiff bought and sold stocks through defendant brokers. Her account was handled by E. F. Lee, a "customer's man" in their employ. Lee made some purchases and sales for plaintiff without her authorization and sustained a loss of $3,026, which defendants charged against plaintiff's account. About July 1st plaintiff trans-

ferred her account to another broker, learned of Lee's unauthorized transactions, and informed defendants, who denied responsibility or liability therefor. Lee admitted his misconduct, figured the loss at $3,000, and offered her his note therefor. She accepted the note, dated July 3d. October 3d, Lee paid her $500 and gave her a new note for $2,500. A few months thereafter plaintiff sued Lee on the note in attachment, property was seized, the attachment afterward dissolved, and the suit dismissed for want of progress. Later she brought another action on the note, the action pending at the time of trial of the instant case. In the latter suit Lee pleaded there was no consideration for the note and plaintiff replied that the consideration was "waiver of a valid and enforceable tort action," which plaintiff had against him.

Plaintiff brought this suit against defendants for conversion as joint tortfeasors with Lee. The court directed a verdict on the ground that plaintiff had released Lee from liability for the tort and, therefore, had released his joint tortfeasors.

The law of joint tortfeasors has been the subject of many refinements of reasoning and much conflict of opinion. 27 A. L. R. 805; 50 A. L. R. 1057; 65 A. L. R. 1087; 66 A. L. R. 206; 26 R. C. L. p. 765. The underlying principle is that the tort is single and the cause of action indivisible and exists against all feasors or none. The English rule was that action against one, pursued to judgment, was a bar to action against the others. The doctrine approved by the weight of authority in this country is that the injured party is entitled to actual satisfaction for the wrong; and, although separate suits may be brought, judgment against one, until satisfied, does not bar suit against others. Such is the rule in this

State. *Verhoeks* v. *Gillivan,* 244 Mich. 367 (65 A. L. R. 1083).

However, the injured person has freedom to contract for satisfaction. For such consideration as he pleases he may release one or all of the tortfeasors. Compromise, accord and satisfaction are open to him and he may waive his cause of action. It is not necessary that he receive satisfaction in money in order that he lose his cause of action by contract. *Horgan* v. *Railway Co.,* 208 Mass. 287 (94 N. E. 386). And when the cause of action is destroyed as to one tortfeasor, it falls as to the others, even though it is attempted to preserve the liability of the others. So, where one tortfeasor is released from liability on payment of part of the damage, the others are discharged although the contract expressly reserves right of action against them. *McBride* v. *Scott,* 132 Mich. 176 (61 L. R. A. 445, 102 Am. St. Rep. 416, 1 Ann. Cas. 61, 13 Am. Neg. Rep. 335); *Sunlin* v. *Skutt,* 133 Mich. 208; *Lindsay* v. *Acme Cement Plaster Co.,* 220 Mich. 367; *Moffit* v. *Endtz,* 232 Mich. 2.

The situation at bar is not complicated by agreement or mutual understanding of the parties modifying what they did. Plaintiff asserted that she took the note from Lee as evidence of his guilt. Such intention was not communicated to Lee nor made part of her agreement with him and is of no legal consequence. The case rests upon the bare facts that plaintiff took Lee's note for the loss, received a payment on it, accepted a renewal note for the balance, brought two actions at law *ex contractu* against him, and pleaded waiver of the tort action as consideration for the note.

By so doing, plaintiff changed her relation toward Lee from tort to contract. She acquired his

acknowledgment of liability, liquidation of damages, promise to pay, a new cause of action bearing different rules of pleadings, proofs, limitations and remedies for enforcing judgment and an instrument which she could sell and against which, in the hands of a holder in due course, Lee would have had no defense. She thereby substituted a tort liability for one in contract, and waived not merely a choice of remedies but the cause of action itself for the tort. The cause of action for the tort having been partially destroyed, it was wholly destroyed and the defendants were released from liability.

Aside from its legal effect, the combination of taking the note, suing on it, and pleading waiver of the tort as consideration for it, without express agreement between the parties to other effect, leaves no ground for inference, as a matter of fact, other than that the tort was settled and waived. Such waiver cannot be recalled. 1 C. J. p. 1039; *Thompson* v. *Howard,* 31 Mich. 309.

Counsel have discovered no authorities in point but our conclusion is sustained by *Reynolds* v. *Fenton,* 2 Phila. 298, holding that joint tortfeasors are released from liability when the injured party takes a note for the injury from one, and *Gibbs* v. *Redman Fireproof Storage Co.,* 68 Utah, 298 (249 Pac. 1032), where similar effect was given a contract.

Judgment affirmed, with costs.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

ALMA STATE SAVINGS BANK *v.* SPRINGFIELD FIRE & MARINE INS. CO.

1. INSURANCE—FALSE SWEARING.
   While clause voiding policy in case of false swearing by insured in proof of loss is effective, in order to avoid the policy such false swearing must have been done with an actual intent to defraud insurer.

2. SAME—ISSUE OF FACT—FALSE SWEARING—WAIVER—PROOF OF LOSS.
   Issue of fact as to whether false swearing by insured in his proof of loss was done with intent to defraud insurer would have been raised had insurer rested upon proof of loss prepared by insured and not made a subsequent adjustment in which such proof of loss was disregarded and waiver of fraud effected.

3. SAME—AUTHORITY—ADJUSTER.
   Adjuster may bind insurer as to the amount of the loss where insured knows of no limitations as to adjuster's authority.

4. SAME—CONTRACTS OF ADJUSTMENT.
   Contract ascertaining amount of loss according to terms of fire insurance policy arose when proof of loss prepared by insurer was signed by adjuster and insured and sent to insurer.

5. SAME—JURY QUESTION—CHATTEL MORTGAGES.
   Jury question was not raised as to effect of provision of fire insurance policy excluding coverage on chattel mortgaged property unless otherwise provided for in writing, where it is undisputed that chattel mortgage was released before fire loss occurred.

Appeal from Gratiot; Searl (Kelly S.), J. Submitted June 12, 1934. (Docket No. 101, Calendar No. 37,730.) Decided October 1, 1934. Rehearing denied December 11, 1934.

Action by Alma State Savings Bank against Springfield Fire & Marine Insurance Company, a

Massachusetts corporation, for sums allegedly due under a fire insurance policy. Directed verdict and judgment for plaintiff. Defendant appeals. Affirmed.

William A. Bahlke, Charles H. Goggin, and *Smith, Hunter & Spaulding,* for plaintiff.

Chester P. O'Hara (*Stanley W. Greene,* of counsel), for defendant.

FEAD, J. Plaintiff had directed verdict in action on a fire insurance policy.

The policy, dated April 28, 1931, in the sum of $5,000, to Frank L. Napieralski, covered machinery, equipment, tools, printed matter, office furniture, fixtures and supplies in his baking plant at Alma. The fire occurred March 6, 1932.

Two days after issuance of the policy, assured executed a chattel mortgage on the insured property and other chattels, to plaintiff to secure a loan. August 31, 1931, plaintiff released the insured property and took a lien on the policy. In a few days after the fire assured assigned to plaintiff, as security, his claim under the policy. In all subsequent negotiations plaintiff was recognized by defendant as a party in interest. Before suit an unconditional assignment to plaintiff was made.

Defendant and 11 other companies carrying insurance on the property damaged sent experienced adjusters to the scene about March 31, 1932. The adjusters examined the premises. A week later, and again a week later, they made further and complete examinations, with the aid of lists prepared by the assured and substantially identical with the schedule in his proof of loss afterwards filed. On

each occasion they consulted assured and officers of plaintiff. At the last visit, and after making full examination, the adjusters consulted together and finally made an offer of $50,000 in settlement, the amount including $20,000 for machinery and equipment. Plaintiff and assured countered with an offer to take $65,000. No agreement was made.

About April 30th, and to avoid default, there having been no settlement, proofs of loss were prepared showing $40,800 insurance on the property covered by defendant's policy and claiming cash value of the property of about $41,000 and loss of $38,700. In the schedules assured exaggerated the cost to him of some of the machinery. A jury would have been justified in holding he had actual intent to defraud the insurance company in making overvaluations.

Mr. Mapes, cashier of plaintiff, made personal delivery of some of the proofs of loss in New York. On returning through Detroit he called on defendant's adjuster and, after some negotiations and several offers, they agreed upon the loss for machinery and equipment at $25,250, subject to approval by plaintiff and assured. Mapes returned home, consulted the interested parties and notified the adjuster that the offer was satisfactory. The adjuster prepared proofs of loss dated May 19th, called "supplemental compromise," and giving the loss and damage "in compromise" as $25,250. The proofs of loss were executed, returned to the adjuster, signed by it, forwarded to defendant and received.

At the expiration of the 30 days for payment of the loss, plaintiff, by letter and telegram, attempted collection or declaration by defendant of its position. Defendant made no specific defenses but expressed unwillingness to pay without further investigation.

In October its general agent, who had become suspicious of the cause of the fire in May, made further investigation and, in conversation with plaintiff's officers, informed them that, while he would neither admit nor deny liability, the company was inclined to the latter. After waiting some months, this suit was begun.

The court held that the compromise agreement was an "ascertainment" of the loss or damage "by agreement between the insured and this company, expressed in writing," within the meaning of the policy and could not be attacked except for fraud or mistake; that defendant had not rescinded or repudiated the agreement nor charged fraud or mistake and could not defend on such ground; and refused leave to amend. This raises the principal question in the case.

Preliminary thereto, defendant claims the policy is void, because assured swore falsely in his proofs of loss, under the provision:

"This entire policy shall be void * * * in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

The clause is effective. *Monaghan* v. *Agricultural Fire Ins. Co.,* 53 Mich. 238. But, in order to avoid the policy, the false swearing must have been done with an actual intent to defraud the insurer. *Brunswick-Balke-Collender Co.* v. *Northern Assurance Co.,* 142 Mich. 29. Had defendant rested upon the proof of loss and not made a subsequent adjustment, the testimony would have presented an issue of fact on this point.

In *Fuhrman* v. *Sun Ins. Office of London,* 180 Mich. 439 (Ann. Cas. 1916 A, 466), it is suggested

that a false proof of loss does not avoid a policy where the insurer has not been misled thereby. 26 C. J. p. 386. Obviously such provision, like many others, may be waived by the insurer. Where, disregarding the proof of loss, the insurer makes an adjustment with the insured, in which the proof of loss is not a factor, no reasonable construction of the contract, or view of its purpose, could permit the insurer to repudiate its agreed adjustment and hark back to the proof of loss.

The proof of loss was filed with the company before the adjustment was made. It does not appear that the false proof covering the property in issue was received by the adjuster before it agreed with plaintiff and assured upon the amount of the loss. In any event, there is no evidence that the adjuster had examined the proof of loss before entering into the compromise or, in fixing the amount of any offer or the final sum, relied on any representations of assured made therein or otherwise. The evidence does not raise an issue of fact of fraud.

An adjuster, where the assured knows no limitations on his authority, may bind the insurer as to the amount of the loss. When the adjuster signed the proof of loss prepared by it and executed by the assured, and forwarded it to the company, it became a contract between the company and the assured, ascertaining the amount of the loss according to the terms of the policy. *Wilms* v. *New Hampshire Fire Ins. Co.*, 194 Mich. 656.

In proceeding to compromise without reference to the proof of loss or reliance on it, defendant waived the right to later attack it.

Defendant contends a jury question was raised as to chattel mortgages. It points to no provision of

the policy rendering it void for such incumbrances. The policy provided:

"Unless otherwise provided by agreement in writing added hereto this company shall not be liable for loss or damage to any property insured hereunder while incumbered by a chattel mortgage, and during the time of such incumbrance this company shall be liable only for loss or damage to any other property insured hereunder."

It is undisputed that the chattel mortgage executed to plaintiff two days after the policy was issued was released as to the insured property before the fire.

Another mortgage, given in 1927 to George Gerhauser, with renewals, covered property once in assured's plant. Some of it was removed before the policy was written, leaving a small part unreleased. We find no testimony in the record that the property covered by this mortgage was included in the claim of loss nor considered in reaching the compromise.

Several other questions are raised but they are controlled by the above and need not be discussed.

Judgment affirmed, with costs.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

BROOKS *v.* COUNTY OF OAKLAND.

1. DRAINS—COUNTY TREASURER—DRAIN COMMISSIONER—RETURN OF VOID SPECIAL ASSESSMENTS.

   Neither county treasurer who is not shown to have had possession of void special assessments collected from plaintiff's assignor for drain construction nor defendant county drain commissioner who had no connection with drain proceedings may be held personally liable in action at law brought for return of such assessments.

2. SAME—LIMITATION OF ACTIONS.

   Delay beyond 30 days after payment of special assessment for drains is bar to action to recover same, since statutory leave expires in that time (1 Comp. Laws 1929, § 4927).

3. SAME—COUNTIES.

   County is not liable for refund of void drain taxes since its officers are not agents of the county but perform special statutory duties for drainage districts, notwithstanding statute providing for payment of drain bonds out of general county funds when drain fund is insufficient, since such payments are merely by way of advancements to be reimbursed from drain tax collections (1 Comp. Laws 1929, § 4937).

Appeal from Oakland; Covert (Frank L.), J. Submitted June 14, 1934. (Docket No. 94, Calendar No. 37,663.) Decided October 1, 1934.

Assumpsit by Joshua M. Brooks, assignee of Leinbach-Humphrey Company, against County of Oakland, a municipal corporation, Albert Willson, county treasurer, and M. D. Van Wagoner, county drain commissioner, to recover sums paid for special assessments in drain proceedings. Judgment for defendants. Plaintiff appeals. Affirmed.

Wilkinson, Lowther & O'Connell, for plaintiff.

Arthur P. Bogue, Prosecuting Attorney, and *Robert D. Heitsch,* Assistant Prosecuting Attorney, for defendants.

FEAD, J. Plaintiff, as assignee of the Leinbach-Humphrey Company, brought suit at law to recover approximately $63,000 paid by his assignor, without protest, for special assessments in drain proceedings. Defendants had judgment on trial before the court.

The case is submitted on agreed statement of facts. Seven drain proceedings are involved, all of which were void for want of jurisdiction because, under them, sewers instead of drains were constructed. *Clinton* v. *Spencer,* 250 Mich. 135; *Township of Lake* v. *Millar,* 257 Mich. 135; *Kinner* v. *Spencer,* 257 Mich. 142. Plaintiff's assignor, through its officers, took part in the proceedings and construction, signed some of the petitions and made sewer connections with numerous houses belonging to it. It paid from three to seven annual instalments of the respective assessments, to and including 1928. The construction of the sewers was financed by bond issues. Out of collections of assessments all maturing bonds to and including those due in 1931 were paid. Fifty thousand dollars of collections of assessments are ostensibly held by the treasurer but in fact are on deposit in a closed bank. The agreed statement does not indicate that any assessments paid by plaintiff's assignor are represented in such fund.

Defendant Willson was county treasurer from 1929 to 1932 inclusive. Defendant Van Wagoner was drain commissioner from 1931 to the time of trial in 1933. The action was commenced in 1932. The agreed statement of facts does not allege that

Willson now has, or ever had, possession of any money collected from plaintiff's assignor nor that Van Wagoner had any connection with the drain proceedings. Plaintiff suggests no ground upon which either could be held personally liable for return of assessments.

To recover special assessments paid, plaintiff must have statutory leave. *Reliance Automobile & Supply Co.* v. *City of Jackson,* 244 Mich. 232. Action within 30 days after payment is a requisite to recovery of drain assessments. 1 Comp. Laws 1929, § 4927. Further delay is a bar to action. *Township of Norton* v. *Cockerill,* 265 Mich. 405.

Moreover, the county is not liable for the refund of void drain taxes. The drain commissioner, in establishing the project, and the county treasurer, in taking and handling the assessments, are not agents of the county nor are the funds received for the use of the county. The officers perform special statutory duties for drainage districts. The reasons and principles governing township liability under similar statutes and set out in the following cases are applicable: *Taylor* v. *Township of Avon,* 73 Mich. 604; *Hillyer* v. *Township of Jonesfield,* 114 Mich. 644; *Brown* v. *Warner,* 159 Mich. 274. And *Township of Cooper* v. *Little,* 220 Mich. 62, in which the court, after a review of the authorities, said:

"These authorities conclusively establish the law to be that the municipality is not in any way interested in the fiscal affairs of the drain. The township is in no way chargeable with the acts of its officers in the administration of the drain law, nor can the county be so chargeable."

Liability of the county is not established by 1 Comp. Laws 1929, § 4937, which provides for pay-

ment of principal and interest on bonds out of general county funds when the drain fund is insufficient. The payments are merely by way of advances, the county to be reimbursed from collections of the drain taxes. *University of Michigan* v. *Pray,* 264 Mich. 693. The statute does not afford a remedy to the taxpayer.

Judgment affirmed, with costs.

NELSON SHARPE, C. J., and POTTER, NORTH, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred with FEAD, J. WIEST, J., concurred in the result.

CARNEY *v.* LOVEDAY.

ADVERSE POSSESSION—GRANTOR AND GRANTEE.

Evidence *held,* insufficient to show that grantor or his privies under warranty deed had ever acquired adverse possession from grantee or his privies where grantor had never notoriously asserted claim of title to all of land conveyed and portion of land had been used by a successor of grantee for railroad purposes without protest from grantor or his privies.

Appeal from Charlevoix; Gilbert (Parm C.), J. Submitted June 1, 1934. (Docket No. 66, Calendar No. 37,571.) Decided October 1, 1934.

Bill by Mark Carney and others against W. Asa Loveday and Michigan Central Railroad Company to quiet title to land. Disclaimer filed by defendant

company. Decree for plaintiffs. Defendant Loveday appeals. Reversed.

E. N. Clink (*C. M. Bice,* of counsel), for defendant Loveday.

FEAD, J. Plaintiffs had decree quieting title by adverse possession. The testimony was not as certain, in some respects, as it could have been and, as the conveyances described the premises by metes and bounds and no maps were presented, some facts must be stated rather indefinitely.

John H. Carney owned a farm, government lot No. 1, touching the south arm of Pine Lake (Lake Charlevoix) in Charlevoix county. In 1896 he conveyed to David Ward of Detroit, for $500, a strip along the lake shore, by ordinary warranty deed, describing the land by two metes and bounds descriptions, north and south respectively of a quarter line road. The property is also intersected by the East Jordan and Charlevoix highway running northwesterly. This highway once ran along the water's edge but (time not disclosed) was later rebuilt some distance (not shown) from the shore.

Ward was a lumberman and purchased for railroad and docking purposes but did not carry out his plans. He died. In 1901 his representatives conveyed part of the premises to the Detroit & Charlevoix Railroad Company, evidently a Ward enterprise. In 1907 the railroad company executed conveyance of some premises back to the trustees of Ward's will and, in 1916, conveyed to the Michigan Central Railroad Company all its land in Charlevoix county, probably including a right of way on this land. In 1912 the Ward trustees conveyed to the Ward heirs and in 1924 the latter conveyed to de-

fendant Loveday, who purchased in reliance on the records and without notice of adverse claims. Defendant railroad company has disclaimed interest.

Since 1896, lot 1 has been in possession of the Carney family in the same manner as before the conveyance. Probably about 1906 to 1908 railroad tracks were laid on the parcel south of the quarter section road and they remained until 1918 or later, when the rails and ties were removed. We do not know how long the tracks were in actual use. The Carneys made no protest or claim of title when the tracks were built, used or taken up. In fact they never gave notice or made claim of title to Ward or any of his successors in interest until 1926 or 1927, when a controversy arose with Loveday. Nor does the testimony indicate that they made claim of title to anyone nor that Ward or his successors had knowledge, or occasion for knowledge or notice, that they claimed title.

There was no evidence that the Carneys had actual possession of the premises south of the quarter line road. Its use for railroad purposes is conclusive that they never had exclusive possession and, the use being without protest or claim of title by them, that they never had adverse possession. Their claim of title must be confined to the parcel north of the road.

John Carney died in 1911. In 1912 Mark Carney fenced the north parcel, built a house and dug a well on it. He lived there about seven years, removed the house and has abandoned the well but has used the premises for pasturing purposes since. His fence ran along the west side of the East Jordan road and when the road was moved back from the shore he moved the fence.

The Carneys paid taxes on lot 1, except when exempted to Mrs. Carney as soldier's widow's home-

stead. In assessing lot 1 the premises at bar were not excepted by the supervisor. On motion for rehearing defendants produced records to show that the premises at bar had also been assessed separately for many years and the taxes paid by the Ward estate, but the rehearing was denied. Defendants ask consideration of such evidence but, in view of our disposition of the case, we need not pass upon the request.

The case must be disposed of under the rule that, before possession of a vendor becomes adverse to the title of his vendee, the vendor shall explicitly disclaim the right of the vendee and notoriously assert right in himself. *Michigan Air Line R. Co.* v. *Hustina,* 255 Mich. 418; *Hogan* v. *Egyptian Portland Cement Co.,* 257 Mich. 381.

Decree reversed and bill dismissed, with costs.

NELSON SHARPE, C. J., and POTTER, NORTH, WIEST, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

ANDERSON *v.* BOARD OF COUNTY ROAD COMMISSIONERS OF OAKLAND COUNTY.

1. HIGHWAYS AND STREETS—STATUTES—COVERT ROADS—REVIEW OF PROCEEDINGS.

Statute limiting review of proceedings for improvement of highway under Covert act to certiorari and as to time is strictly construed since, after elapse of time provided, bonds may be issued and assessments made for their payment (1 Comp. Laws 1929, § 4381).

2. SAME—COVERT ROADS—PETITION FOR IMPROVEMENT—SIGNATURES.
Question as to validity of signatures on petition for improvement of highway under Covert act conferring jurisdiction on board of county road commissioners must be raised by certiorari within time prescribed by that act since the petition itself is merely a statutory, and not a constitutional, requirement (1 Comp. Laws 1929, § 4381).

3. SAME—AFFIDAVITS.
Constitutional rights of parties included within special assessment district under Covert road act *held,* not affected by falsity of affidavits attached to petition for the improvement that statutory requirements had been satisfied.

4. SAME—RECOVERY OF ASSESSMENTS.
Bill to set aside special assessments and recover sums paid is dismissed notwithstanding insufficiency of valid signatures on petition for road improvement under Covert act and falsity of affidavits attached to petition, where no review of such matters was sought by certiorari within time prescribed by statute (1 Comp. Laws 1929, § 4381).
POTTER and WIEST, JJ., dissenting.

Appeal from Oakland; Doty (Frank L.), J. Submitted April 11, 1934. (Docket No. 83, Calendar No. 37,731.) Decided October 1, 1934.

Bill by Clarence L. Anderson and others against Board of County Road Commissioners of Oakland County, Elston C. McClure, supervisor, and County of Oakland, a municipal corporation, to set aside special assessments and recover sums paid thereunder. Decree for plaintiffs. Defendants appeal. Reversed.

A. L. Moore, for plaintiffs.

James H. Lynch, for defendant board.

Arthur P. Bogue, Prosecuting Attorney, and *Robert D. Heitsch,* Assistant Prosecuting Attorney, for defendants county and McClure.

NELSON SHARPE, C. J. Section 66 of what is known as the Covert act, being 1 Comp. Laws 1929, § 4381, reads, in part, as follows:

"The proceedings herein provided for improving any highway, shall be subject to review upon certiorari. * * * The entire proceedings shall not be set aside except where the county road commissioners, or the State highway commissioner, are found to have no jurisdiction to act upon the petition presented. * * * If no certiorari be brought within the time herein described, the improvements shall be deemed to have been legally ordered and established, and its legality shall not thereafter be questioned in any suit at law, or in equity."

The right of plaintiffs to the relief sought is based upon the claim that the petition for the improvement of the highway conferred no jurisdiction upon the commissioners to act thereon, and that the proceedings taken pursuant thereto were void and may be attacked collaterally. The petition on its face disclosed the signatures of the number of owners of property required by the statute, but the proofs show that certain of the names were not signed by the parties themselves, and that some of the purported owners did not have title in fee thereto.

The purpose of the provision restricting the time within which the proceeding may be attacked, and confining the remedy to certiorari, is apparent. After the time for review in that manner has elapsed, bonds may be issued to pay for the improvement, and assessments made for their payment, as provided for in the statute. The security of the bondholders is dependent upon the legality of the proceedings taken by the commissioners. To that end this court has construed the provision for review by certiorari with strictness.

In, I think, all of the cases in which the question has been involved under the Covert act, the decisions of this court, under somewhat similar provisions in the drain law, have been referred to with approval. In *Auditor General* v. *Bolt,* 147 Mich. 283, this court said, quoting from *Strack* v. *Miller,* 134 Mich. 311:

"The purpose of the statute undoubtedly is to give an opportunity to have a speedy hearing upon any question of jurisdiction or any question of irregularity."

In *Township of Clarence* v. *Dickinson,* 151 Mich. 270, a suit in equity was brought to enjoin the construction of a drain for the reason that, although it was called in the application therefor "the extension of an existing drain," it was intended thereby to construct a new drain, and, as it did not have the number of signatures required therefor, the drain commissioners had no jurisdiction to take any proceedings thereunder. Mr. Justice CARPENTER, speaking for the court in that case, pointed out the distinction between a want of jurisdiction due to the violation of a constitutional right and the lack of compliance with a statutory provision, and as to the latter said "that the legislature has a right to say how they shall be raised, or, in its wisdom, deprive one altogether of the privilege of raising them." He further said (p. 273):

"The jurisdictional objection raised by complainant is not of a constitutional character. The Constitution does not require the petition to be signed by five property owners liable to assessments for benefits. That requirement is purely statutory. The legislature might have dispensed with it altogether. It therefore possessed ample constitutional

authority to declare how objections to its non-observance should be made. It had authority to declare that objections not so raised should be disregarded. It exercised that authority by the statute under consideration. That statute is therefore constitutional in its application to this case and it prevents complainants maintaining this suit."

This decision has been quoted from or cited with approval in the following cases: *Cummings* v. *Garner,* 213 Mich. 408, 424; *Heliker* v. *Oakland County,* 216 Mich. 595, 598; *Stellwagen* v. *Dingman,* 229 Mich. 159, 161; *Sterling Bank of Sleeper & Chamberlain* v. *Scott,* 231 Mich. 362, 366; *Auditor General* v. *Union Lake Land Co.,* 239 Mich. 437, 439; *Squier* v. *Nash,* 240 Mich. 146, 150; *Fuller* v. *Cockerill,* 257 Mich. 35, 39; *Township of Lake* v. *Millar,* 257 Mich. 135, 141. See, also, 9 A. L. R. 856.

In the drain case of *Stellwagen* v. *Dingman, supra,* it was referred to and quoted from, and it was said that it "must be accepted as the settled law of this State."

In *Heliker* v. *Oakland County, supra,* an action was brought to recover taxes paid under protest, assessed under the Covert act, for an improvement similar to that here involved. The application asked for the construction of about five miles of road, only two of which were at that time a part of a public highway. The other three miles were subsequently conveyed to the county. This act does not authorize the laying out of a new road or the extension of an old one. Clearly, there was no jurisdiction for the commissioners to act thereunder. The opinion, written by Mr. Justice BIRD, is so accessible that I hesitate to quote at length therefrom. He stated therein that—

"The question is one that has perplexed the profession to determine when the exclusive remedy of certiorari must be invoked and when the proceedings might be attacked collaterally in other actions."

He referred to the drain case of *Strack* v. *Miller, supra,* wherein this court reversed the trial court and held that the remedy for the defect in the petition, in that it lacked the signatures of the requisite number of freeholders, was by certiorari. He then referred to, and quoted at length from, the opinion in *Township of Clarence* v. *Dickinson, supra,* and concluded by saying:

"The legislature might have provided that the commissioners could have done just what they did do, and hence it follows that for an infraction of this legislative rule the remedy by certiorari was exclusive."

This case has been cited with approval in *Stellwagen* v. *Dingman, supra,* and *Auditor General* v. *Union Lake Land Co., supra,* and *Township of Lake* v. *Millar, supra.*

Counsel for the plaintiffs stresses the fact that a fraud was perpetrated on the commissioners by the false affidavits annexed to the petition. While these affidavits were made for the purpose of satisfying the commissioners that the application conformed to the statutory requirements, the fact that they were false, and that in the absence of them the commission would doubtless not have taken the action they did take, cannot in my opinion be sufficient ground for a claim that plaintiffs' constitutional rights were affected thereby.

Counsel also urges that the rule as stated has been modified or changed by our recent decisions in *Clinton* v. *Spencer,* 250 Mich. 135, and *Township of Lake*

v. *Millar, supra.* In those cases applications for drains were filed with the commissioners, and, assuming to act on them, sewers were constructed. The distinction is obvious.

The decree is reversed and set aside and one here entered dismissing the bill of complaint, with costs to the defendants.

NORTH, FEAD, BUTZEL, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred with NELSON SHARPE, C. J.

WIEST, J. (*dissenting*). Defendants appeal from a decree voiding assessments for improving a public highway and permitting recovery of sums paid. The proceeding was voidable *ab initio* for want of sufficient signatures of owners of lineal frontage.

Defendants contend that, under the statute, 1 Comp. Laws 1929, § 4381, and holdings in *McDermott* v. *Board of County Road Com'rs of Kent County,* 199 Mich. 613; *Cummings* v. *Garner,* 213 Mich. 408; *Heliker* v. *Oakland County,* 216 Mich. 595; *Auditor General* v. *Union Lake Land Co.,* 239 Mich. 437, and decisions like *Township of Norton* v. *Cockerill,* 265 Mich. 405, upon comparable drain statutes, review is by certiorari only, and if not so tested the legality cannot thereafter be questioned in any suit at law or in equity.

Plaintiffs contend that certiorari is not the sole remedy in case of total want of jurisdiction to act and not the remedy at all in case the proceeding is founded upon fraud, forgery, false affidavit and false certificate. See *Clinton* v. *Spencer,* 250 Mich. 135; *Township of Lake* v. *Millar,* 257 Mich. 135.

Plaintiffs have no frontage on the highway and did not sign the petition for the improvement, but have property within the assessment district and some have paid levies assessed and others have paid instalments.

The circuit judge, in an opinion, stated:

"The petition (for the improvement) before the court does not contain a sufficient number of signatures. This alone in the opinion of the court would not entitle plaintiffs to relief as this question has been passed on in a number of cases."

The basis for such holdings is that the number of signatures required is fixed by statute and the same statute cures a defect of that nature if not raised within a specified time.

The circuit judge also found that the supervisor of the township falsely certified that he had " 'compared the ownership of property represented by the signatures as signed to the foregoing petition with records in the office of the register of deeds and find that they are the owners in fee simple of more than 66 per cent. of the lands fronting on the road described in this petition.' "

The statute, 1 Comp. Laws 1929, § 4317, requires an application for the improvement to be signed by "owners of more than sixty-six per cent. of the lineal frontage of lands fronting or touching upon any highway or portion thereof," desired improved, and that "the eligibility of signers to any application hereby authorized shall be determined by their interest of record in the office of the register of deeds or in the probate court of the county in which such lands are situated, at the time the petition is presented."

Under the evidence the proceeding, at its inception, was illegal and void.

Was review by certiorari the sole remedy? If certiorari is the exclusive method of review, regardless of fraud, false certificate, false affidavit and forgery, at inception of the proceeding, then the de-

cree herein should be reversed and the bill dismissed. If, under such circumstances, certiorari is not the exclusive remedy then the decree, voiding the proceeding, should be affirmed.

Upon the question of remedy the adjudications in this jurisdiction cannot be harmonized into statement of a general rule, and it must be left for each case to rest upon its peculiar facts. It may be said, however, that want of jurisdiction, if apparent on the face of the proceeding, must be reviewed, if at all, by certiorari, and intermediate steps, if so voidable, must be so challenged. For, if so found, the statute authorizes correction and continuance of the proceeding. But, where want of jurisdiction at inception is concealed by fraud, false certificate, false affidavit and forgery, and not reasonably discoverable within the time fixed for review by certiorari, then the court of equity has jurisdiction.

It would be a sorry commentary on rights and remedies, under modern procedure, to hold that an illegal proceeding, like the one at bar, is vested with all the attributes and force of legality by failure of victims to uncover such fraud in season to have review by certiorari. No statute can supply substance to such a mere shell, nor stay right of the wronged to have remedy according to equity and good conscience.

Sufficient signatures of eligible owners of lineal frontage were not obtained. Eligibility of purported signers was not determined by interest of record, as required by the mentioned statute. Instead the supervisor of the township certified that he had made such comparison, which was untrue.

Attached to the petition was an affidavit in which the affiant deposed:

"That he circulated the foregoing petition, and that each signature thereon is genuine and is the signature of an owner of property fronting on the highway described."

This was false. Two signatures were either forged or unauthorized. The board of highway commissioners accepted the certificate of eligibility of signers and their ownership of lineal frontage and the affidavit of the genuineness of signatures as true, and rested action thereon. The petition gave the board of county road commissioners no power to act.

The remaining question is that of right of plaintiffs to have return of assessments paid.

Bonds were issued by the county to pay for the improvement, and in this court it is urged that the bondholders are necessary parties. The point seems not to have been raised in the circuit court. The obligation of the county on the bonds is not before us, and cannot have any bearing upon the question of validity of the proceeding here tested.

We agree with the following statement of the circuit judge:

"There is no actual fraud upon the part of any member of the road commission or * * * office force."

The false certificate and false affidavit worked a fraud.

The proceeding was void at every stage, and plaintiffs have been subjected to unlawful exactions which, if withstood without judicial pronouncement, would impose a tax enforceable by sale of the property assessed.

The decree should be affirmed, with costs to plaintiffs.

POTTER, J., concurred with WIEST, J.

BARTENBACH *v.* SMITH.

1. DISCOVERY—MATTERS WITHIN KNOWLEDGE OF PLAINTIFF—DISCRETION OF COURT.

   Entry of order for examination of defendant, as to his alleged fraudulent representations made to plaintiff, pursuant to rule for discovery *held*, not an abuse of discretion notwithstanding such matters were obviously within knowledge of plaintiff, although the court might very properly have excluded such matters (Court Rule No. 41 [1933]).

2. SAME—PURPOSE OF RULE.

   One of the main purposes of rule allowing discovery before trial is to shorten the time of trial, not to provide an additional inquisitorial procedure (Court Rule No. 41 [1933]).

3. SAME — FRAUDULENT REPRESENTATIONS — MATTERS PECULIARLY WITHIN KNOWLEDGE OF PARTY EXAMINED.

   In action for damages for fraud, order for discovery as to defendant's knowledge of condition of companies as to which he made representations in sale of stock, *held*, proper since such matters were peculiarly within knowledge of defendant and unknown to plaintiff and a material part of her cause of action (Court Rule No. 41 [1933]).

4. SAME—MATTERS NOT INCLUDED IN APPLICATION.

   Court did not abuse its discretion in entering order for discovery which embraced matters not included in plaintiff's application therefor but which pleadings revealed were in a state of confusion (Court Rule No. 41 [1933]).

5. SAME—DISCRETION OF TRIAL JUDGES.

   Operation of rule for discovery before trial must be left to discretion of trial judges (Court Rule No. 41 [1933]).

Appeal from Calhoun; Hatch (Blaine W.), J. Submitted June 26, 1934. (Calendar No. 37,821.) Decided October 1, 1934.

Action by Nellie S. Bartenbach against Wendell L. Smith, for alleged misrepresentation in sale and exchange of stocks. On motion of plaintiff for discovery under Court Rule No. 41 (1933). From order allowing discovery, defendant appeals. Affirmed.

N. A. Cobb, for plaintiff.

James Cleary and *Burritt Hamilton,* for defendant.

BUTZEL, J. Nellie S. Bartenbach brought suit against Wendell L. Smith, alleging that defendant, an officer and director of the A-B Stove Company, contracted to purchase from her 4,000 shares of the common stock of that company at $20 per share; that he subsequently advised her that he was unable to pay the full amount in cash and that she, therefore, would be obliged to accept a small amount of preferred stock in the stove company as part of the purchase price; that she informed defendant of her unfamiliarity with the condition of the A-B Stove Company and of her desire to take cash in payment, as agreed upon, and purchase preferred stock of the Firestone Tire & Rubber Company; that thereupon defendant, professing familiarity with the financial condition of both companies, made representations as to the relative values and merits of the preferred stock of the two companies and the strength of their financial positions, etc., and that relying on these representations, which plaintiff alleges were false, she was induced to accept preferred stock of the stove company instead of cash as first agreed upon; that she repeatedly requested statements of the condition of the stove company from defendant, but was unable to obtain them; and that as a result of such

false representations she suffered a severe loss. Defendant filed an answer in which he denied that he ever contracted to purchase common stock of the A-B Stove Company from plaintiff for cash, alleging instead that no contract was made with her until the final one, in which he and another severally purchased 2,000 shares each of plaintiff's common stock, for cash and preferred stock of the stove company. Defendant further denied that he made any of the statements or representations ascribed to him by plaintiff, but alleged that, as a matter of fact, at the time of the transaction the preferred stock of the A-B Stove Company was a sound and valuable stock, not inferior to that of the Firestone Tire & Rubber Company. After defendant's answer was filed, plaintiff moved the court for an order directing that defendant's deposition be taken within a scope sufficient to cover the following subjects:

"The question of the representations made by him to the plaintiff in said cause, respecting the exchange of stock set forth in said declaration; and as to the financial condition of the A-B Stove Company for a period of years, commencing in 1926 down to and including 1932; and as to the knowledge of said defendant concerning the financial condition of the Firestone Tire & Rubber Company at the date of said exchange of stock."

The court entered an order in accordance with the provisions of Court Rule No. 41 (1933), directing that defendant submit to an examination in reference to—

"An agreement by defendant to purchase plaintiff's common stock in the A-B Stove Company; the question of the representations claimed to have been made by defendant to plaintiff respecting the exchange of said stock, as set forth in plaintiff's dec-

laration; the financial condition of the A-B Stove Company at the date of the exchange of said stock; the knowledge of defendant concerning the financial condition of the Firestone Tire & Rubber Company, at the date of the exchange of said stocks; who purchased said stock of plaintiff and the consideration therefor."

The sole question presented is whether plaintiff is entitled to discovery as granted by the trial court under Court Rule No. 41 (1933), under the particular facts of this case. Court Rule No. 41 provides as follows:

"On application, notice and hearing, any court of record may, in its discretion, in any civil action therein pending at any time before trial, authorize and order the taking of the deposition of the opposite party or parties, its or their officers and agents, or of any person who for such opposite party has verified a pleading or an affidavit attached thereto; also of the plaintiff's assignor, if any, from or through whom plaintiff became possessed of his rights in the subject-matter of the suit. The scope of such deposition, the time, the place, the person before whom the same is to be taken and the manner of taking the deposition may be fixed in such order; and the court may require the party who proposes to take such deposition or its or his agent also to appear and submit to examination at the taking of such deposition."

The above rule was substituted for Court Rule No. 41 (1931), which provided:

"Any party to an action or suit may cause to be taken by deposition * * * at any time after action commenced and before trial, the testimony of any other party * * * which is material and necessary in the prosecution or defense of the action or suit."

In *Vincent* v. *Van Blooys,* 263 Mich. 312, this court pointed out the purpose and advantages of the discovery procedure, indicating that if evils should develop from an abuse of the rule, a remedy would be found. (Also, see, *Fisher* v. *Smith,* 259 Mich. 279, and *Nestle* v. *Flemming,* 262 Mich. 417.) The discovery practice has been used to advantage in Ontario and in many jurisdictions in this country, and its benefits are manifold, while many of the evils which it was feared would result from its use have failed to materialize. See Ragland on "Discovery before Trial."

Defendant claims that the trial court erred in ordering discovery in regard to the representations alleged to have been made by him, on the ground that plaintiff has full knowledge as to whatever representations were made. The same objection was raised in *Klapp* v. *Merwin,* 122 Misc. 708 (203 N. Y. Supp. 694); *Maria* v. *Bower,* 134 Misc. 800 (236 N. Y. Supp. 291); *McGrath* v. *Blumenthal,* 220 App. Div. 781 (222 N. Y. Supp. 140), and *Drake* v. *Line-A-Time Manfg. Co.,* 226 App. Div. 717 (233 N. Y. Supp. 481), in all of which cases the court held that the fact that the matters as to which examination was sought were within the knowledge of the opposite party did not bar the use of the discovery rule. It is true that in *Zolla* v. *Grand Rapids Store Equipment Corp.,* 46 Fed. (2d) 319, the court required that on a bill of discovery ancillary to a proceeding at law the interrogatories be refrained so as to eliminate matters within the knowledge of the party seeking the information. However, another Federal court, in *Quirk* v. *Quirk,* 259 Fed. 597, came to an opposite conclusion, holding that:

"It makes no difference whether the facts are as much within the knowledge of the plaintiff as of the

defendant. The facts have to be proven, and if the plaintiff can get an admission from the defendant, it saves the necessity of proving the facts, except by such admission of the defendant."

One of the main purposes of the discovery rule is to shorten the time of trial, and it would serve no good purpose if the rule were used solely as a means of harassing defendant by subjecting him unnecessarily to an additional inquisitorial procedure, or as defendant claims, forcing him to two trials instead of one. We believe that in the instant case the court might very properly have excluded from the scope of the discovery the question of the representations made by defendant, which were obviously within the knowledge of the plaintiff. However, we cannot say that the court abused the discretion granted it by Court Rule No. 41 (1933), in not so doing.

The other questions relative to the financial condition of the stove company at the time of the transaction, and defendant's knowledge concerning the financial condition of the Firestone company, were unquestionably proper subjects on which to interrogate defendant. Such matters were peculiarly within the knowledge of defendant, while not known to plaintiff, and were so material a part of plaintiff's cause of action that the purpose of the discovery rule would have been thwarted had they been omitted from the examination.

Objection is further made that the court erred in embracing in its order matters not included in plaintiff's application. This was done in order that the benefits of the examination might more completely be realized by bringing out facts which the pleadings revealed to be in a state of confusion. We find that there was no abuse of discretion on the part of the court in thus defining the scope of the

examination, as it had a right to do under Court Rule No. 41 (1933). We might add that the rule is still in an experimental stage and its operation must be left to the discretion of the trial judges, so that its advantages and benefits, as experienced by other States, may be fully realized, and the evils, if any, be eliminated.

We do not believe that the trial court in the instant case abused its discretion in entering the order in question, which is, therefore, affirmed, with costs to plaintiff.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred with BUTZEL, J.

WIEST, J. (*concurring*). I concur, because I think the order within the rule, but I do not join in the laudation of the rule.

POTTER, J., concurred with WIEST, J.

In re KUTSCHE'S ESTATE.

PEOPLE *v.* KUTSCHE'S ESTATE.

1. TAXATION—INHERITANCES—CONTEMPLATION OF DEATH—QUESTION OF FACT.

In determining inheritance tax, whether or not the thought of death was the impelling motive of trustor in making transfer was a question of fact (1 Comp. Laws 1929, § 3672).

2. SAME—TRANSFER IN CONTEMPLATION OF DEATH—EVIDENCE.
Evidence *held,* sufficient to support finding of trial court that transfer of property by woman 80 years of age who was then in excellent physical condition and lived for five years more was not made in contemplation of death (1 Comp. Laws 1929, § 3672).

3. SAME—TRANSFER SUBJECT TO INHERITANCE TAX—POSSESSION OR ENJOYMENT—DEATH.
Transfer of estate by way of irrevocable trust to beneficiaries upon death of trustor who had a life income from the estate *held,* taxable under State inheritance tax law since possession or enjoyment became effective upon death of trustor (1 Comp. Laws 1929, § 3672).

4. SAME—CONSTITUTIONAL LAW—DUE PROCESS—EQUAL PROTECTION.
Inheritance tax upon transfers not made in contemplation of death but where possession or enjoyment became effective upon that event does not offend due process or equal protection clauses of the Constitution of the United States (1 Comp. Laws 1929, § 3672, U. S. Const., Am. 14, § 1).

5. COSTS—PUBLIC QUESTION—CONSTRUCTION OF STATUTES.
In case involving determination of public question as to constitutionality and construction of taxation statute about which there has been much uncertainty, no costs are allowed (1 Comp. Laws 1929, § 3672).

Appeal from Kent; Perkins (Willis B.), J. Submitted June 26, 1934. (Docket No. 51, Calendar No. 37,861.) Decided October 1, 1934.

Probate proceeding fixing inheritance tax due State of Michigan by Estate of Auguste L. Kutsche. From order of probate court, estate appealed to circuit court. Reversed. The people appeal. Reversed and remanded.

Patrick H. O'Brien, Attorney General, and *M. Thomas Ward* and *William L. Brunner*, Assistants Attorney General, for the people.

Knappen, Uhl, Bryant & Snow, for estate of Kutsche.

BUTZEL, J. In 1928 Auguste L. Kutsche, a spinster almost 80 years of age, sought the assistance of counsel for the express purpose of so placing her property as to relieve herself of the burden of its management, and to put it beyond her power to yield to the demands of importuning relatives. Counsel suggested the creation of an irrevocable trust. At the same time he asked what ultimate disposition she desired to make of her property in the event of death. In accordance with Miss Kutsche's instructions, an irrevocable trust indenture was then executed, by which the management and control of her property was turned over to a trust company, which was directed to pay the entire income to her, as trustor, during her lifetime. Upon her death the property was to go to certain beneficiaries designated by her, some of whose shares were also trusteed. Miss Kutsche died five years later.

The question raised is whether the transfer of the property is subject to the Michigan State inheritance tax. If the gift was made in contemplation of the trustor's death or intended to take effect in possession or enjoyment at or after such death, it is taxable as provided by 1 Comp. Laws, 1929, § 3672. The probate court found the transfer taxable, but its decision was reversed on appeal to the circuit court, where the trial judge held the transfer nontaxable solely for the reason that it was not made in contemplation of death. He did not discuss the question whether the transfer was one intended to take effect in possession or enjoyment at or after the death of the donor. The amount of the tax is not shown by the record.

The test for the determination of whether or not a transfer was made in contemplation of death is: Was the thought of death the impelling motive of the transfer? This is a question of fact and the trial judge's conclusions are borne out by the testimony. The settlor, though advanced in years, was in good physical condition, and in executing the trust was motivated by entirely different reasons than a desire to make disposition of her property in the event of death. In *United States* v. *Wells,* 283 U. S. 102, 115 (51 Sup. Ct. 446), the court said:

"It is recognized that the reference is not to the general expectation of death which all entertain. It must be a particular concern, giving rise to a definite motive. * * * the differentiating factor must be found in the transferor's motive. Death must be 'contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. * * *

"It is contemplation of death, not necessarily contemplation of imminent death, to which the statute refers. It is conceivable that the idea of death may possess the mind so as to furnish a controlling motive for the disposition of property, although death is not thought to be close at hand. Old age may give premonitions and promptings independent of mortal disease. Yet age in itself cannot be regarded as furnishing a decisive test, for sound health and purposes associated with life, rather than with death, may motivate the transfer. The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer. * * *

"If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive. * * * 'The immediate and moving cause of the transfers was the carrying out of a

policy, long followed by decedent in dealing with his children, of making liberal gifts to them during his lifetime.' * * * The motive for the transfers brought them within the category of those which, as described by the government, are intended by the donor 'to accomplish some purpose desirable to him if he continues to live.' ''

See, also, *In re Rising's Estate,* 186 Minn. 56 (242 N. W. 459).

We believe, however, that the transfer was taxable as a gift intended to take effect in possession or enjoyment at or after the trustor's death. It is held by practically all courts that a transfer of property to trustees to pay the income to the transferor during life, with directions that upon his death the *corpus* shall be paid to designated beneficiaries, falls within the meaning of a transfer intended to take effect at or after death, even though the trust may be irrevocable. See 49 A. L. R. 878, and cases therein cited. The question has never been directly passed upon in Michigan, although in *People, ex rel. Attorney General,* v. *Welch's Estate,* 235 Mich. 555, it was conceded that such a transfer was taxable until the settlor by a later instrument transferred the income to the beneficiaries designated as entitled to the property upon her death.

Counsel for defendant, however, insist that the rule has been changed by the United States supreme court in the case of *May* v. *Heiner,* 281 U. S. 238 (50 Sup. Ct. 286, 67 A. L. R. 1244). This case involved the construction of a former Federal statute, section 402(c) of the 1918 revenue act (40 Stat. p. 1097), containing a clause similar to the one in question in the Michigan inheritance tax statute. The United States supreme court held that the transfer, with an income reservation by the settlor

for life, was not a transfer in contemplation of death or intended to take effect in possession or enjoyment upon the donor's death, within the meaning of the Federal estate tax act. The court stated that since the transfer was not testamentary in character and could not be recalled by the grantor, no interest in the property held under the trust passed from her to the living upon her death; that the title thereto had been definitely fixed by the trust deed; and that the interest therein which decedent possessed immediately prior to her death was obliterated by that event. However, this case merely construed the Federal estate tax act as it stood at that time. The decision is not binding upon the State courts in construing their respective inheritance tax statutes.

In the case of *In re Rising's Estate, supra,* decided after *May* v. *Heiner, supra,* the Minnesota court held that a transfer similar to the one involved in the instant case was taxable under the State inheritance tax act taxing transfers intended to take effect in possession or enjoyment at or after the death of the grantor. The court said:

"The opposing argument seeks justification in *May* v. *Heiner,* 281 U. S. 238 (50 Sup. Ct. 286, 67 A. L. R. 1244). Consideration of that decision must begin with *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339 (49 Sup. Ct. 123, 66 A. L. R. 397), involving seven trusts. Two were revocable and so taxable. The other 'five trusts,' not revocable, were yet held not taxable because there was no transfer by reason of death, within the meaning of the Federal law. Life interests in income were created, but not for the settlor. There were provisions for accumulation of income but not for the donor. The gifts were instantly complete, *inter vivos,* because nothing of substance remained to pass from donor to or for the benefit or enjoyment of donees at or after death of the donor.

"The reason why there was no transfer subject to the Federal tax was thus stated: 'In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. * * * It is not a gift tax. * * * One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos,* equally absolute and complete without subjecting it to a tax if the gift takes the form of a life estate in one (other than the donor) with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result, and we think it is wanting in the present statute.'

"This language was lifted bodily, by quotation, to justify and explain the result in *May* v. *Heiner, supra,* notwithstanding the very different sort of gift there considered—different in that there was reserved to the donor a very substantial kind of right and enjoyment not to cease until her death. The gift was in trust to pay income to the donor's husband for life, then to the donor, if she survived him, with remainder over. Again, simply because there was doubt of construction, to be resolved in favor of the taxpayer, it was held there was no taxable transfer."

In *Blodgett* v. *Guaranty Trust Co. of New York,* 114 Conn. 207 (158 Atl. 245), the court in holding a similar transfer to be taxable, declared:

"The raising of the question we are now considering appears to be due to the construction placed, by the representatives of the several estates involved, upon certain recent decisions of the supreme court of the United States, as evincing a departure in effect from the decisions above referred to and lending encouragement to a renewed attack upon the pro-

vision under consideration and its applicability to the facts of cases such as those now before us."

The court then distinguished the cases of *May* v. *Heiner, supra,* and *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339 (49 Sup. Ct. 123, 66 A. L. R. 397), as follows:

"It is obvious from the quotation from the opinion in the *Reinecke Cases* which we have given above, that the decision, upon which the succeeding cases relied, was motivated by the nature of the Federal estate tax, which is upon the transfer of, rather than the succession to, property of the decedent. * * * On the other hand, with a few exceptions, the State inheritance tax statutes levy a duty or excise upon the beneficiary for the privilege or right of succession to property. * * * We have been able to discover no relevant subsequent case which has given these decisions an effect adverse to the taxability of such gifts under State succession tax statutes. * * * Therefore, we feel that we are not constrained to place a similar construction upon our own statute and are still at liberty to adhere to the views as to its meaning and scope which usually have been held as to State statutes of similar nature and terms which we indicated in *Blodgett* v. *Union & New Haven Trust Co.,* 97 Conn. 405 (116 Atl. 908); these lead to the conclusion that the property which was the subject of transfer was within the meaning of the statute, and taxable accordingly."

This case was subsequently appealed to the United States supreme court, and the decision of the lower court was affirmed, in *Guaranty Trust Co. of New York* v. *Blodgett,* 287 U. S. 509 (53 Sup. Ct. 244), the court holding itself bound by the construction placed upon the State statute by the State supreme court "as though the meaning as fixed by the court had been expressed by the statute itself in specific words."

The question has also been passed upon but recently in a number of other States, and the tax has been upheld. In *Worcester County National Bank* v. *Commissioner of Corporations and Taxation,* 275 Mass. 216, 220 (175 N. E. 726), the court said:

"Though upon the creation of the trust an equitable remainder in the trust fund, after the life estate of the decedent in such fund, vested in interest in the beneficiary, she was not entitled to 'possession or enjoyment' of the fund, * * * until the death of the decedent. The 'deed, grant or gift' was 'intended to take effect in possession or enjoyment after his death.' Her present right to the future 'possession or enjoyment' of the trust fund, which was 'vested' in the sense of being assignable or transmissible by her during the life of the decedent, was not 'possession or enjoyment,' within the meaning of the statute. The statute recognizes the familiar distinction between taking effect in possession or enjoyment and vesting in right, title or interest. * * * Apparently the legislature intended to reach for the purpose of taxation the shifting of the enjoyment of property—the 'economic benefits' thereof or 'economic interest' therein * * * —from a former owner at his death, even though such shifting of enjoyment followed necessarily from a prior transfer of title *inter vivos.* * * * 'The policy of the law is, that the owner of property shall not defeat or evade the tax by any form of conveyance of transfer, where after death the income, profit or enjoyment inures to the benefit of those who are not exempted.'"

Other recent cases to like effect are *Sherman* v. *Tax Commissioners of Ohio,* 125 Ohio St. 367 (181 N. E. 539); and *In re Ellis' Estate,* 169 Wash. 581 (14 Pac. [2d] 37, 86 A. L. R. 734).

Appellee's claim that the imposition of an inheritance tax upon transfers of the nature of the one here involved offends the due process and equal protec-

tion clauses of the United States Constitution (Am. 14, § 1) is fully answered by *Guaranty Trust Co. of New York* v. *Blodgett, supra,* in which the United States supreme court held that, inasmuch as such a tax was imposed upon an event generated by the death of the decedent, it did not conflict with any provision of the Federal Constitution.

The judgment of the lower court is reversed and the case remanded to the trial court to determine the tax and enter judgment. The question being a public one and involving the constitutionality and construction of a statute about which there has been much uncertainty, no costs will be allowed.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

MOORE *v.* FLEISCHMAN YEAST CO.

1. MASTER AND SERVANT — INDEPENDENT CONTRACTOR — CONTROL — PAY.

   Janitor suffering injury to heel while removing ashes *held,* employee and not an independent contractor where employer retained right of control as to how and by whom the work was done although janitor received his pay from sale of waste he hauled away with equipment which he furnished.

2. SAME—CLAIM RAISED FOR FIRST TIME ON APPEAL.

   Suspension of compensation as of date janitor refused antisyphilitic treatment for injury to heel was refused, urged for first time on appeal from department of labor and industry, is denied where defendants failed to follow provisions of de-

partment's rule No. 15, requiring an answer in reasonable detail as to all essential grounds of defense and defendants' principal claim was that employer-employee relation did not exist.

3. SAME—MOTION TO DISMISS—DELAYED TRANSCRIPT.
Denial of defendants' motion to dismiss plaintiff's appeal to full department, made after belated transcript was filed amounted to an extension of time for filing same where finding was made by department that delay beyond time allowed by its rule No. 16 was excused by circumstances.

4. SAME—AVERAGE WEEKLY EARNINGS—DEDUCTIONS—CONSTRUCTION OF STATUTE.
In determining average weekly wage of janitor paid by proceeds he received from sale of waste material but which necessitated his hiring a horse to haul it away, sum paid for horse hire is deducted from gross earnings and compensation computed on balance notwithstanding workmen's compensation act is silent on the subject since it is not to be interpreted as authorizing payment during disability of more than his net average weekly wage.

Appeal from Department of Labor and Industry. Submitted June 19, 1934. (Docket No. 89, Calendar No. 37,823.) Decided October 1, 1934.

John Moore presented his claim against Fleischman Yeast Company, employer, and Employer's Liability Assurance Corporation, insurer, for an accidental injury while in defendant's employ. Award to plaintiff. Defendants appeal. Modified and remanded.

Gloster, Giller & Briggs, for plaintiff.

Mason, Alexander, McCaslin & Cholette (*E. Dean Alexander,* of counsel), for defendants.

BUTZEL, J. The Fleischman Yeast Company and its insurer appeal from an order of the department

of labor and industry awarding John Moore compensation of $17.33 per week. As they claim that the relation of employer and employee never existed and that Moore was either an independent contractor or at most a licensee, we shall briefly review the testimony.

The company employed 34 salesmen at its branch in Detroit where they assembled each day and as they removed the coffee, etc., required for the day's business from the containers, they scattered the broken cartons, boxes, waste paper, and tin foil on the floor of the premises and sidewalk leading thereto. Later in the day, passing junkmen would collect this waste material without cleaning up the premises.

One day, while Moore was driving a horse and wagon, the company's foreman hailed him and stated that he was looking for "a man to do the janitor's work on the first floor, keep the paper cleaned up, sweep the place out and clean the office out." He was to haul the waste away, dispose of it as it had a market value, and as compensation for his work he could keep the proceeds. Moore agreed to the proposal, went to work and realized the sum of $25 per week from the sale of the waste materials. He was obliged to be at the plant at 5 a. m., work for from 4 to 5 hours, then return again at 5 p. m., and again work an equal length of time. After working three weeks he was given the additional job of removing the ashes, for which he was paid the sum of $1 per week, thus bringing his gross earnings to $26 per week. Once when tardy on account of slippery weather, he was reprimanded by the foreman and told that the place had to be kept clean, because the inspectors came in each day; that if he could do this, he could keep the job, otherwise, he would be replaced. He further was obliged to remove the

paper from the cans in the lavatory, sweep it out, see that all the hand trucks were in the garage at nighttime and if not in, then to bring them in and line them up, sweep all the places from which he took the paper, etc., and dust the shelves. One day while bringing up cans of ashes from the basement, his foot was caught in the elevator and the flesh was torn off at the heel. The testimony shows that Moore was not an independent contractor or licensee. He was hired to do the work of a janitor. The fact that the employer retained the right of control over his work is very persuasive of an employer-employee relationship. *Tuttle* v. *Embury-Martin Lumber Co.*, 192 Mich. 385 (Ann. Cas. 1918 C, 664); *Zoltowski* v. *Ternes Coal & Lumber Co.*, 214 Mich. 231. The fact that Moore received his pay through hauling away the waste materials with horse and wagon furnished by him does not make him an independent contractor. The relationship is somewhat analogous to hauling by teamsters who use their own horses and wagons and receive a stipulated price per load. We have held that under certain circumstances they were employees. *Tuttle* v. *Embury-Martin Lumber Co., supra; Van Simaeys* v. *George R. Cook Co.*, 201 Mich. 540; *Warner* v. *Fullerton-Powell Hardwood Lumber Co.*, 231 Mich. 328; *Dennis* v. *Sinclair Lumber & Fuel Co.*, 242 Mich. 89. At the time Moore was employed, it was recognized that the waste material could be readily sold, that Moore was to haul it away and keep the proceeds from its sale, in return for doing the janitor's work. Under the circumstances, he was receiving the equivalent of cash for his services. Moore was at all times subject to the company's control, he could not substitute someone else in his place, he could be discharged at any time without a breach of contract. We are in accord

with the department's findings as to the employment relationship.

Appellants contend that although Moore's injury was serious, it did not affect the bone, and that, were it not for a syphilitic condition, it would have been cured within a comparatively short time; that anti-syphilitic treatment was necessary to condition the blood so as to permit the healing, and that during the period he submitted to such treatment his condition improved; that he stopped taking the treatment and has, therefore, made no further progress. They therefore claim that compensation should have been suspended from the time when Moore refused to submit to such further treatment. See *Kricinovich* v. *American Car & Foundry Co.*, 192 Mich. 687; *O'Brien* v. *Albert A. Albrecht Co.*, 206 Mich. 101 (6 A. L. R. 1257); *Myers* v. *Wadsworth Manfg. Co.*, 214 Mich. 636. Defendants, however, raise this claim for the first time on the appeal to this court. The department of labor and industry adopted rules of practice and procedure for carrying out the provisions of the workmen's compensation act. Rule No. 15 provides that if the employer or insurer deny liability, they must file an answer setting forth with reasonable detail and certainty all the essential grounds of defense, to which they will be limited both on the hearing before the deputy and on review before the commission, unless in exceptional cases and for good cause shown an amendment is permitted to be filed. Appellants based their defense almost exclusively on the ground that there was no employment. Appellants gave no notice of this additional ground of defense and plaintiff was not bound to meet it. *Roach* v. *Kelsey Wheel Co.*, 200 Mich. 299.

It is further claimed by appellants that plaintiff filed his claim of appeal to the full department on

June 1, 1933, but did not file the transcript of testimony until December 6, 1933. The rule of the department (Rule No. 16) provides that the transcript should be filed within 20 days after the claim of appeal is filed. The time may be extended for good and sufficient cause upon application to any commissioner of the compensation department. The rule is silent as to dismissal of the appeal if the transcript is not filed within 20 days. Appellants made no motion to dismiss during the entire time the filing of the transcript was delayed, nor for over a month thereafter. Had they acted promptly, plaintiff could have applied for an extension of time in which to file the transcript. The correspondence shown in the affidavit filed with the department discloses that appellants knew that the transcript had not been filed and urged that it be filed. It is not shown, though claimed, that appellants were prejudiced by the delay. Their petition to dismiss made no such claim. The full department denied the motion to dismiss, and found that the delay was excused by the circumstances. This action amounted to an extension of time. The full department could do what any one of them was empowered to do.

It was necessary for plaintiff to hire a horse in order to perform his duties which included hauling away the waste materials. Plaintiff testified as follows:

"*Q.* How much did you pay the Italian for the use of the horse?
"*A.* I didn't get it from Italian.
"*Q.* Well, whoever you got it from?
"*A.* $2 a day.
"*Q.* You paid this person $2 a day?
"*A.* That's what it would cost; I didn't pay him that."

Plaintiff's daughter claimed that the horse belonged to her six-year old son, and her father paid for the use of the horse. She testified:

"*Q.* Did your father pay you anything for the use of the horse?

"*A.* Sure, he gave me when he would have it.

"*Q.* Paid you so much a week, did he?

"*A.* Yes, and fed the horse days; when he could he would give me $2; some days he wouldn't be able to give me that much, but when he was able to give me more he would give it to me.

"*Q.* $2 a day, you say?

"*A.* Yes."

Though the testimony is not entirely clear, it indicates that Moore was to pay $2 a day for the hire of the horse required by him in order to haul away the waste. On becoming disabled he no longer was put to the expense of $2 a day, which had to come out of his earnings. If he is awarded compensation of $17.33 per week, and is also saved the hiring of a horse at $2 a day, he will be netting a larger sum per day than he received before he was disabled. Under the compensation act, an employee is entitled to receive 66 2/3 per cent. of his "average weekly wages" during total disability. The question arises whether the percentage is to be figured on the net or gross amount of the average weekly wages. We do not believe that the statute contemplated the deduction of minor expense such as the transportation to and from the place of employment, or the cost of small tools, or supplies of an inexpensive nature that an artisan is supposed to be equipped with in order to do his work. We do believe that payments for assistants or for hire of some expensive facilities necessary for the performance of the work and the cost of which is to be paid by the employee out of his wages, should be deducted in

arriving at the average weekly wages. *Roper* v. *Freke,* 84 L. J. K. B. 1351 (31 Times L. R. 507, 59 Sol. Jo. 596); *State, ex rel. Gaylord Farmers' Co-operative Creamery Ass'n,* v. *District Court of Sibley County,* 128 Minn. 486 (151 N. W. 182). Notwithstanding plaintiff's contention that the law is silent on the subject and that we should follow its exact words, we cannot adopt a construction that would more than compensate an employee and pay him during disability a sum in excess of his net average weekly wage. That is not the purport of the compensation act.

The award is set aside, with costs to defendant. The proceedings are remanded to the department of labor and industry with directions to enter an award in accordance with this opinion.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUSHNELL, and EDWARD M. SHARPE, JJ., concurred.

JOHNS *v.* WISCONSIN LAND & LUMBER CO.

1. APPEAL AND ERROR—ABANDONMENT OF CLAIMED ERROR.
   Errors not discussed on appeal in either appellants' brief or in the oral argument are presumed abandoned (Court Rule No. 68 [1933]).

2. MASTER AND SERVANT—EMPLOYER-EMPLOYEE RELATION.
   Relation of employer and employee must be admitted or proved in order to allow recovery under the workmen's compensation act.

3. SAME—FINDINGS OF DEPARTMENT—EVIDENCE—UNDERTAKER.

Record *held,* insufficient to support findings of department of labor and industry that deceased was an employee of contractor cutting cross ties in the woods, or that $200 undertaker bill was reasonable for removal of body from woods and burial (2 Comp. Laws 1929, § 8424).

4. SAME—UNDERTAKER—WORKMEN'S COMPENSATION ACT.

Undertaker may not recover burial fee allowed under workmen's compensation act for man who left no dependents merely because act was intended to make an easier adjustment of matters as between the parties (2 Comp. Laws 1929, §§ 8420, 8424).

5. SAME—CONSTRUCTION OF WORKMEN'S COMPENSATION ACT—UNDERTAKER.

Workmen's compensation act, being in derogation of common law, is strictly construed so as to preclude recovery thereunder from contractor by undertaker who tended to burial of man found dead in the woods who had been employed theretofore by loggers (2 Comp. Laws 1929, § 8417).

6. SAME—CONTRACT RELATIONS.

Workmen's compensation act does not set aside remedy at law of undertaker claiming to have furnished burial services with respect to a teamster at request of alleged employer (2 Comp. Laws 1929, § 8424).

7. SAME—INFERENCES BY DEPARTMENT—EVIDENCE—CERTIORARI.

Department of labor and industry may draw inferences from facts and circumstances but, where there is no evidence in the record to support the findings, the award will be vacated on certiorari.

8. CERTIORARI—DEPARTMENT OF LABOR AND INDUSTRY—EVIDENCE—INFERENCES.

On certiorari from department of labor and industry, Supreme Court will determine whether there is any competent evidence to support the findings and whether inferences were properly deducible from the testimony.

Appeal from Department of Labor and Industry; Submitted June 12, 1934. (Docket No. 108, Calendar No. 37,676.) Decided October 1, 1934.

William J. Johns and Johns Funeral Home presented their claim against Wisconsin Land and Lumber Company, alleged employer of Andy Gardner, and Employers' Mutual Liability Company, insurer, for burial expenses of Andy Gardner. Award to plaintiffs. Defendants appeal. Reversed.

August J. Waffen, for plaintiffs.

Derham & Derham, for defendants.

BUSHNELL, J. Defendants appeal in the nature of certiorari from an order entered by the department of labor and industry affirming an award to Johns Funeral Home in the sum of $200 for the burial of Andy Gardner. The deceased was a teamster employed by Brandt & Kayser, loggers for the Wisconsin Land & Lumber Company, who operated under a contract for the cutting of cross ties. The contractors, having finished their work in the woods some time in February, discharged their entire crew. Gardner came back to the camp in April and worked for the contractors about four days skidding ties. Kayser testified that on the day of the accident the deceased finished putting ties on the deck at the sawmill, which was two miles from camp, and about 10 o'clock he was told to take the team back to camp and put them in the barn. Except by inference, the record does not disclose what followed. After dinner Gardner was found about 50 feet from the barn where a log jammer had come in contact with an electric power line. One of the horses was dead; the other was standing up but was hooked on the jammer. No one seems to know why Gardner was moving the jammer. Kayser called Coroner Fanscher, who is also an undertaker, and as Fanscher was going out of the woods,

Johns appeared, claiming he had been instructed to get the body. Johns testified that he had acted upon receipt of a telephone call from the defendant company but was unable to state who had phoned and did not recognize the voice. As far as is known, Gardner was a single man, without dependents.

Appellees do not state in their brief that they accept the statement of questions set forth in appellants' brief, nor do they submit a "counter-statement of questions involved." Court Rule No. 68 (1933). Appellants denied at the hearing that deceased was in defendants' employ but this question is not followed up in the brief. We have repeatedly held that errors not discussed on appeal in either appellants' brief or in the oral argument are presumed to have been abandoned.

It is fundamental, however, that the relation of employer and employee must be either admitted or proved. We find no facts in the record upon which either the deputy or the department could find that the deceased was in defendants' employ either as a matter of fact or a conclusion of law. 2 Comp. Laws 1929, § 8424, reads as follows:

"If death results from the injury the employer shall pay, or cause to be paid as hereinafter provided, in addition to the indemnity paid to dependents, the reasonable expense of his last sickness and burying, which shall not exceed two hundred dollars, in addition to any sum the employer may be required to pay under the provisions of section four of part two of this act."

Not only is there no showing that defendant was the employer of the deceased, but there is no testimony that the expense was reasonable. The record shows that plaintiff took the body and buried it. That is all. Appellants contend that the plain-

tiff undertaker is not a proper party to bring compensation proceedings. 2 Comp. Laws 1929, § 8420, which is part 2, § 4, of the act, requires the employer to furnish or cause to be furnished reasonable medical, surgical, and hospital services and medicines when they are needed, during the first 90 days after the injury.

"In those jurisdictions wherein the question has been decided, it is generally held that proceedings by a physician for recovery of compensation for medical services are ancillary to proceedings by the injured employee for compensation for injuries sustained, and are dependent upon the existence of a claim by the injured employee for compensation therefor." 72 A. L. R. 1012, and cases cited thereunder.

Our statute, 2 Comp. Laws 1929, § 8420, is silent as to the right of recovery by one who furnishes medical, surgical and hospital services and medicine, and we have not had occasion to pass upon the question. The expenses of the last sickness and burial to be paid by the employer as provided in 2 Comp. Laws 1929, § 8424, is in addition to the indemnity paid to dependents and is not to exceed $200 in addition to any sum the employer is required to pay for medical and hospital services.

While we cannot say that the statute is clear, and, as stated by the department, "There might be some question as to the proper party," we do not agree with the language that immediately follows, viz.:

"But since this man left no known dependents and since the act was prepared to make easier an adjustment of matters as between parties under it, we can see no objections to the procedure taken by the plaintiff to recover the funeral fee allowed in the act."

This is not the purpose of the workmen's compensation act. As stated by Mr. Justice STONE in *Adams* v. *Acme White Lead & Color Works,* 182 Mich. 157, 161 (L. R. A. 1916 A, 283, Ann. Cas. 1916 D, 689, 6 N. C. C. A. 482):

"The paramount object has been for the enactment of what has been claimed to be more just and humane laws to take the place of the common-law remedy for the compensation of workmen for accidental injuries received in the course of their employment, by the taking away and removal of certain defenses in that class of cases."

Mr. Justice Pitney described its purpose as follows:

"The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and is to be judged in its entirety." *N. Y. C. R. Co.* v. *White,* 243 U. S. 188 (37 Sup. Ct. 247, L. R. A. 1917 D, 1, Ann. Cas. 1917 D, 629).

We have held that:

"This statute, being in derogation of the common law, should be strictly construed." *Andrejwski* v. *Wolverine Coal Co.,* 182 Mich. 298, 303 (Ann. Cas. 1916 D, 724, 6 N. C. C. A. 807).

Part 3 of the act, 2 Comp. Laws 1929, §§ 8440 to 8459, covers procedure; section 8445 provides for a hearing if the employer and employee shall fail to reach an agreement; and section 8417 limits the payment of compensation to the employee's dependents in case of death resulting from injuries.

The entire act is for the benefit of the employer, the employee and his dependents. The facts submitted by the record in the instant case disclose a claimed contractual relation between plaintiff and

defendant, for breach of which either party has its adequate remedy at law. Section 8424 does not set aside such actions.

The department may draw inferences from the facts and circumstances, *Simpson* v. *Michigan Valve & Foundry Co.*, 260 Mich. 543, but where there is no evidence in the record to support the findings, the award will be vacated on certiorari. *Kanasovich* v. *Quincy Mining Co.*, 231 Mich. 39. We may also determine whether there is any competent evidence to support the findings and whether the inferences drawn are properly deducible from the testimony. *Bjorkstrand* v. *Klagstad*, 262 Mich. 186.

The application for adjustment of the claim and the testimony do not bring the case within the provisions of 2 Comp. Laws 1929, § 8416, so as to show any liability on the part of the principal employer, Wisconsin Land & Lumber Company, to a workman employed by its "contractor," Brandt & Kayser.

There being no evidence of a relation of employer and employee between defendant company and the deceased (see *Stoddard* v. *Cooper-Widenmann Construction Co.*, 220 Mich. 643), and the statute giving no right of recovery to one who cares for the burial of one leaving no dependents, the award must be vacated, with costs to appellants.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred.

HOCHREIN *v.* GUNTHER.

1. RECEIVERS—FRAUDULENT CONVEYANCES.
   Receiver appointed for property of judgment debtor has no authority over property in hands of transferee until and unless alleged fraudulent conveyance has been set aside (3 Comp. Laws 1929, § 15129).

2. APPEAL AND ERROR—RECEIVERS—FINAL ACCOUNT—LEAVE TO APPEAL.
   Supreme Court will not pass upon order allowing final account where no leave to appeal therefrom has been obtained and there has been no final determination of issues raised by bill praying his appointment (Court Rule No. 60 [1931]; 3 Comp. Laws 1929, §§ 15136, 15508).

3. COSTS — DISMISSAL OF APPEAL — CONTROLLING QUESTION NOT RAISED BY APPELLEE'S BRIEF.
   Costs are not allowed on dismissal of appeal where controlling question is not raised in appellee's brief.

Appeal from Washtenaw; Sample (George W.), J. Submitted June 8, 1934. (Docket No. 93, Calendar No. 37,653.) Decided October 1, 1934. Rehearing denied December 11, 1934.

Bill by Henry J. Hochrein and Oscar Hochrein, copartners, doing business as H. J. Hochrein & Son, against Edmund E. Gunther, Gunther Gardens, a Michigan corporation, and H. Seger Hall, for the appointment of a receiver and other relief. From order allowing receiver's final account, defendants appeal. Appeal dismissed.

Edward F. Conlin, for plaintiffs.

Griffin, Heal & Emery, for defendants.

BUSHNELL, J. Edmund E. Gunther was a florist and plaintiffs are his judgment creditors on a labor claim. Gunther Gardens, Inc., took over all his assets, paying Gunther in stock which he was endeavoring to sell in order to pay his creditors. Plaintiffs filed a judgment creditor's bill and the Ann Arbor Trust Company was appointed receiver of the corporation without notice to defendants. A few days later Gunther filed a petition in bankruptcy and Gunther Gardens was subsequently adjudicated a bankrupt. The receiver's final account showing disbursements of $733.88 was ordered allowed, from which order, according to appellants' brief, this appeal is being prosecuted by authority of the bankruptcy court for the benefit of the trustee in bankruptcy and the creditors of the corporation.

Appellant Gunther Gardens, Inc., says the sole question presented by this appeal is whether the court may, upon *ex parte* application, appoint a receiver of a corporation in a proceeding instituted neither by a stockholder nor a creditor of the corporation. Appellees claim the sole question involved is: Has a court of equity the right to discharge a receiver appointed by it *ex parte* when the said receiver has acted in accordance with the court's order and the good faith and propriety of its acts are not questioned?

No application was made for leave to appeal from the interlocutory order, and no leave has been granted. Court Rule No. 60 (1931), and 3 Comp. Laws 1929, § 15508.

The Chief Justice has so recently discussed the matter of *ex parte* appointments of receivers in *Tuller* v. *Wayne Circuit Judge,* 243 Mich. 239, that we shall not restate our views. The instant application resulted in a receiver being appointed for a

corporation of which petitioner was neither a stockholder nor a creditor.

Appellants describe plaintiffs' bill of complaint as a judgment creditor's bill. By its prayer a decree is sought determining that the corporate defendant holds Gunther's assets as a trustee for his creditors. 3 Comp. Laws 1929, § 15129, provides for the appointment of a receiver for the property of the judgment debtor but the receiver does not have authority over property belonging to others until and unless the alleged fraudulent conveyance has been duly set aside. 3 Comp. Laws 1929, § 15136, governs appellate procedure in such matters. Nowhere do we find any provisions for appeal except from a final order. The order allowing the receiver's account in the instant case is not a final order, for the reason that there has been no final determination of the issues raised by the bill. It is true that the record does not contain the answer of the defendant corporation. In fact, the record contains little except testimony pertaining to the account.

Without leave to appeal as required by Court Rule No. 60 (1931), we will not pass upon the order allowing the final account.

The appeal is dismissed, but without costs for the reason that the controlling question is not raised by the brief of appellees.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred.

FURNITURE MANUFACTURERS ASS'N OF GRAND RAPIDS *v.* GRAND RAPIDS GUILD OF EXHIBITORS.

1. APPEAL AND ERROR—INJUNCTION—APPEALABLE ORDER—DECISION ON MERITS.

   Determination of whether or not order denying motion to set aside an injunction is appealable without leave is not made where all parties are desirous of decision on the merits (Court Rule No. 60 [1931]).

2. SAME—INJUNCTION—DISCRETION OF COURT.

   Granting or dissolving an interlocutory injunction is an exercise of discretion by trial court with which Supreme Court will interfere only upon a showing of palpable abuse.

3. SAME—ABUSE OF DISCRETION—DEFINITION.

   Abuse of discretion, in order to warrant interference by Supreme Court, must be such that upon consideration of facts upon which trial court acted, an unprejudiced person can say there was no justification or excuse for the ruling made.

4. TRADE-MARKS AND TRADE-NAMES—MISLEADING PUBLIC.

   Courts should not lend their aid to schemes whereby the buying public may be misled.

5. SAME—USE OF GEOGRAPHICAL WORDS IN BUSINESS NAME.

   Use of geographical words in a business name, where properly descriptive, will not be enjoined in the absence of estoppel or actual fraud, or public misleading.

6. SAME—INJUNCTION—GRAND RAPIDS FURNITURE.

   Injunction restraining Grand Rapids Guild of Exhibitors from advertising, exhibiting or selling furniture manufactured elsewhere as made in Grand Rapids or using word "guild," in connection with term "Grand Rapids" in so doing, *held*, proper, where furniture made in Grand Rapids had become nationally and favorably known to the buying public.

Appeal from Kent; Verdier (Leonard D.), J. Submitted June 7, 1934. (Docket No. 76, Calendar No. 37,884.) Decided October 1, 1934. Rehearing denied December 11, 1934.

Bill by Furniture Manufacturers Association of Grand Rapids, a Michigan corporation, and others against Grand Rapids Guild of Exhibitors, a Michigan corporation, to restrain the use of the name "Grand Rapids" on furniture not manufactured in Grand Rapids, Michigan, and other relief. From order denying motion to set aside injunction, defendant appeals. Affirmed.

Francis D. Campau, for plaintiffs.

Knappen, Uhl, Bryant & Snow, for defendant.

BUSHNELL, J. Grand Rapids Guild of Exhibitors, a nonprofit corporation, appeals without leave of this court from an order denying its motion to set aside an injunction which restrains it and those who are or may become its members from:

"A. In any manner selling or offering for sale, as the product of the factories of the city of Grand Rapids, Michigan, or as Grand Rapids furniture, any furniture not in fact the product of the factories of that city.

"B. From attaching or placing upon any furniture being offered for sale, any label, ticket or tag containing the words 'Grand Rapids,' unless such furniture was in fact manufactured at Grand Rapids, Michigan.

"C. From offering for sale or selling; from aiding or abetting the offering for sale, selling or advertising any furniture not actually made in the city of Grand Rapids, in such manner as to deceive the purchasing public, or assist in deceiving the purchasing public into the belief that said furniture is in fact the product of factories located in the city of Grand Rapids, Michigan.

"D. From using the name 'Guild' in connection with the words 'Grand Rapids' and/or in connection

with other words as the name, style or designation of an organization to promote in Grand Rapids, Michigan, the sale, or advertising for sale, of furniture not actually made in the city of Grand Rapids, Michigan."

Upon the argument on the motion there was presented for consideration six opinions of the Federal Trade Commission, viz.: docket No. 1192, *Commission* v. *Kritzer* (11 F. T. C. 19); docket No. 1193, *Commission* v. *Grand Rapids Sales Co.* (11 F. T. C. 28); docket No. 1198, *Commission* v. *Chessler* (9 F. T. C. 324); docket No. 1225, *Commission* v. *Weil* (9 F. T. C. 333); docket No. 1243, *Commission* v. *Greenberger* (9 F. T. C. 304); docket No. 1244, *Commission* v. *Meyer* (10 F. T. C. 421), of which it is claimed the following from docket No. 1243 is a typical finding of fact (315):

"Paragraph six: The city of Grand Rapids, Michigan, has been for many years and is now a large and important centre of the furniture industry in the United States, which fact is generally known to the public throughout the United States. Furniture manufactured in the city of Grand Rapids has for many years enjoyed a widespread popularity, good will and demand throughout the United States. 'Grand Rapids furniture' is, and the public understands it to be, furniture manufactured in the city of Grand Rapids, in the State of Michigan. There are among the purchasing public many who prefer Grand Rapids furniture to furniture made at points other than at Grand Rapids, Michigan."

Appellees also submitted decrees which had been entered in the United States district courts of the western district of New York, the northern district of Ohio and the district of Rhode Island. The material part of the decree entered June 25, 1919, in the case of the *Furniture Manufacturers' Ass'n of*

Grand Rapids v. *Conrad-Baisch-Kroehle Co.,* equity No. 337, in the district court of the United States for the northern district of Ohio, eastern division, is as follows:

"That a perpetual injunction be issued in this cause against the said defendants, Conrad-Baisch-Kroehle Company *et al.,* restraining and perpetually enjoining them, their servants or agents:

"1. From selling or offering for sale as the product of the factories in Grand Rapids, or as Grand Rapids Furniture, any furniture not in fact the product of the factories of that city, or from affixing to such furniture any label containing the words 'Grand Rapids,' or using the words 'Grand Rapids' alone or in connection with other words, in signs, newspaper advertisements, show windows or otherwise, in such a way as to lead the public to believe that furniture to be that which is the product of the factories in the city of Grand Rapids, Michigan; or from using the words, 'Grand Rapids' alone or in connection with other words, in advertisements, offering for sale, or marketing of furniture not in fact the product of the factories of the city of Grand Rapids, Michigan, or from selling goods manufactured elsewhere than in Grand Rapids, Michigan, as and for the goods manufactured in that city, or with the intent that they shall be represented to be, or sold as the product of the Grand Rapids factories, to the purchaser.

"2. From using the name of Grand Rapids alone or in connection with other words, as the designation, name or style of a retail store, in which less than a substantial representative stock of goods, which are the product of the furniture factories in the City of Grand Rapids, are offered for sale."

Court Rule No. 60 (1931), requires leave to appeal where such leave is expressly required by statute or rule, and Mr. Justice COOLEY said in *Taylor* v. *Sweet,* 40 Mich. 736, 739:

"In its terms this order is interlocutory, but it has been several times held by this court that if an order finally disposes of any portion of the subject matter in controversy, it is *quoad hoc* a final decree or order and therefore appealable."

However, it is unnecessary to pass upon this question in the instant case as all parties are desirous of a decision on the merits.

Appellees accept appellant's statement of the following questions involved in the appeal: (1) A claimed abuse of judicial discretion in the issuance of the injunction; (2) Should defendant be denied the right to use the words "Grand Rapids" on labels attached to furniture if they also show the actual place of manufacture? (3) Was it proper to restrain the use of the word "guild" in connection with the words "Grand Rapids?" (4) Has plaintiff an exclusive property right in the word "guild" as applied to the promotion of the sale of furniture? (5) Should defendant's members be subject to the injunction when not made parties to the action?

"Granting or dissolving an interlocutory injunction is discretionary with the trial court; and this court will rarely interfere with the exercise of such discretionary power and then only upon a showing of a palpable abuse thereof." *Flemming* v. *Heffner & Flemming,* 263 Mich. 561, citing *Freeman* v. *Mitchell,* 198 Mich. 207.

Mr. Justice STONE defined "abuse of discretion" in *Cooper* v. *Carr,* 161 Mich. 405, 412, saying:

"To warrant such interference (on our part), the abuse ought to be so plain that upon consideration of the facts upon which the trial judge acted, an unprejudiced person can say there was no justification or excuse for the ruling made."

As will presently be seen, the trial court did not abuse its discretion in issuing the injunction.

The remaining questions can be answered by saying that courts should not lend their aid to schemes whereby the buying public may be misled. The injunction does not in any way prevent defendant from conducting an exhibition of furniture in the city of Grand Rapids, regardless of where it is manufactured, but it does and should prevent defendant, and any one associated with it, from leading the buying public to believe that furniture so exhibited is manufactured at Grand Rapids.

"It is the general rule that when they are properly descriptive, the use of geographical words in a business name will not be enjoined, in the absence of estoppel or of actual fraud, or public misleading." *Michigan Savings Bank* v. *Dime Savings Bank*, 162 Mich. 297 (139 Am. St. Rep. 558).

Defendant's statement in the exhibit attached to the pleading says, in part:

"Into the making of every piece of furniture should go the priceless element that cannot be bought in any market. The priceless ingredient is the honor and integrity of him who makes it. Therefore, it behooves the purchaser to consider the name before he buys. Confusion can, of course, readily occur. As a national institution (not local), too much confusion has already been applied to the Grand Rapids furniture exposition."

Confusion clouds the faculties and makes distinctions obscure. Defendant's answer denies all intent to mislead the public and avers that "its members design and intend in good faith to give further and greater publicity to and to promote the said furniture expositions and the Grand Rapids market to the benefit of themselves as well as all others exhibiting or manufacturing in Grand Rapids; and to that end to advertising in appropriate ways the

fact that said members are exhibitors at Grand Rapids and entitled to be known to the trade as such, and entitled to share in the prestige of said Grand Rapids furniture market, which prestige they have largely been instrumental in building up, and to obviate measurably the confusion which now to a considerable extent exists in the public mind between those manufacturing furniture in Grand Rapids and those exhibiting in Grand Rapids but not manufacturing thereat."

A fair reading of the injunction will not prevent defendant, or its members, from doing any of these things so long as the public is not confused or misled as to the place of manufacture.

The order is affirmed and the appeal dismissed, with costs to appellee.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUTZEL and EDWARD M. SHARPE, JJ., concurred.

ROEHL STORAGE CO. *v.* WILSON.

1. ATTACHMENT—CUSTODY OF SHERIFF.

   Property attached by sheriff remains in his custody until the suit is disposed of, unless bonded, or the attachment is dissolved.

2. SHERIFFS AND CONSTABLES—FEES—CUSTODY OF ATTACHED PROPERTY.

   Right of sheriff to fees is dependent upon statute and though he might equitably be entitled to compensation as custodian of attached property, consisting of oriental rugs, court may not go beyond plain letter of statute and allow same (3 Comp. Laws 1929, § 14777).

3. ATTACHMENT—DISMISSAL OF ACTION.
Right to hold attached property ceases when cause is dismissed.

4. SAME—AGREEMENT FOR STORAGE—WAREHOUSEMAN.
Agreement between storage company and sheriff with respect to storage and care of oriental rugs which had been attached can have no effect upon owner of attached property or his administrator (3 Comp. Laws 1929, § 14766).

5. WAREHOUSEMAN—LIENS—STATUTES.
Lien for storage provided by statute is general, but, being statutory, must be strictly construed (2 Comp. Laws 1929, § 9624).

6. SAME—LIENS—ORIENTAL RUGS.
Storage company which received attached property, consisting of oriental rugs, from sheriff *held*, not entitled to lien for charges in keeping and caring for it, since sheriff had no power to create one and there is absence of personal acts on part of owner or his knowledge or assent required under warehousemen's act, where he had not been served with process (Comp. Laws 1929, §§ 9623–9649, 14766).

Appeal from Wayne; Murphy (Thomas J.), J. Submitted June 19, 1934. (Docket No. 58, Calendar No. 37,725.) Decided October 1, 1934.

Bill by Roehl Storage Company, a Michigan corporation, against Ira Wilson, Russell W. Coon and Edward C. Moran, special administrator of the estate of James V. Priest, deceased, to establish a warehousemen's lien and for other relief. From decree for plaintiff against defendant Moran, he appeals. Reversed.

Schulte & Pare, for plaintiff.

George B. Murphy, for defendant Moran.

BUSHNELL, J. James V. Priest was the owner of two oriental rugs subsequently appraised at $1,666 which were taken on March 21, 1929, by the then sheriff of Wayne county under a writ of attachment,

and left in plaintiff's custody. Priest, who was never served in the attachment case, died May 2, 1929, and the suit was dismissed for want of prosecution on May 1, 1930. Defendant Moran was appointed special administrator of his estate May 23, 1933, and on June 12th, following, made a formal demand upon plaintiff for the return of the property, refusing, however, to pay plaintiff the sum it claimed for 51 months storage at $5 per month, and certain incidental charges for moving, handling and packing, totaling $290.50. Plaintiff then filed a bill of complaint seeking a lien, or, in the alternative, that the amount due be fixed and the administrator be restrained from instituting a replevin action.

The proofs show that plaintiff accepted attached property from the sheriff with the understanding he would not be liable for storage charges, even though at times, and in this instance at least, it did not know who might claim the property. The rugs were cared for and precaution taken from time to time to make them moth proof.

The trial court held that it was the duty of the heirs or representatives of the estate to make a demand upon the sheriff to produce the property after the dismissal of the writ, and that while no lien existed during the pendency of the attachment action, plaintiff was, nevertheless, entitled to its storage charges from a reasonable time after the death of Priest, the defendant in the attachment action. This time the court fixed as beginning one month from the dismissal of the writ. A decree was entered giving plaintiff a lien upon the property as of June 1, 1930, and enforcement authorized by foreclosure if defendant administrator failed to pay charges of $197 and costs. The decree dismissed the bill of complaint as to defendant sheriff and his deputy.

Appellant claims plaintiff had an adequate remedy at law, either by suit for its storage charges or the submission of a claim to the commissioners on claims in the estate, and the bill should have been dismissed. He argues that since the statutory lien cannot exist unless the goods were stored "by the owner thereof or by any person with the owner or owners' knowledge or assent," 2 Comp. Laws 1929, § 9624, equity cannot create a lien. The liability, he contends, can only be imposed upon the sheriff, and it was the duty of the sheriff to return the property to the owner upon the dismissal of the attachment action.

Appellee argues from the standpoint of an implied contract; presents questions of laches and estoppel; reminds us that the special administrator was appointed on the petition of a creditor who alone is benefited, and that in equity and good conscience plaintiff is entitled to reasonable compensation for the storage, care and preservation of the goods subsequent to the dismissal of the attachment suit.

It may be true that the deceased had no knowledge of the seizure of the goods, that the rugs were cared for and the estate benefited by plaintiff's acts, and that it seems unreasonable to hold that the estate should not pay a reasonable amount for the preservation of the property, especially since more than three years passed during which time no action was taken to obtain possession of the rugs. Plaintiff's secretary denies any knowledge of the agreement with the sheriff, which was apparently made by Harold Roehl, although the deputy, who at the time was in charge of the execution department of the sheriff's office, testified that for some years it was agreed that there "would be no liability on that

account to the sheriff, that any liability for storage would be paid by the party who ultimately got the goods."

"The property attached remains in the custody of the sheriff or officer who served the writ until the suit is disposed of, unless bonded or the attachment is dissolved. (See 3 Comp. Laws 1929, § 14777.) * * *

"If he has any valid charges as custodian, he should make out his bill of items, and present it to the clerk or other taxing officer for taxation, or, if there are no fees allowed by statute, he should apply to the court for such allowance upon notice and motion to the parties interested." *Fletcher* v. *Morrell,* 78 Mich. 176.

"The right of the sheriff to fees is derived from and depends upon the statute. At common law, he could not lawfully receive them. * * * It may be equitable that the sheriff * * * should be allowed compensation for the responsibility assumed in taking care of such property. * * * These equitable considerations are for the legislature, who may fix some basis for the determination of the question of just compensation, but the courts cannot go beyond the plain letter of the statute now in force." *Fletcher* v. *Kalkaska Circuit Judge,* 81 Mich. 186.

See, *Genesee County Savings Bank* v. *Ottawa Circuit Judge,* 54 Mich. 305, and *Peck* v. *City National Bank of Grand Rapids,* 51 Mich. 353 (47 Am. Rep. 577).

Where the property was released by a *supersedeas* bond, it was held there was not authority for making the expenses of caring for the goods either taxable as costs or imposing a lien on the property after such action. *Genesee County Savings Bank* v. *Ottawa Circuit Judge, supra.* Section 14766, 3 Comp. Laws 1929, provides for security for costs

in attachment cases. The right to hold the attached property ceased when the cause was dismissed (*Orr* v. *Keyes,* 37 Mich. 385), and the agreement between the sheriff and plaintiff could have no binding effect upon the deceased or his administrator.

To create a lien it is necessary that the party vesting it should have the power to do so. A person can neither acquire a lien by his own wrongful act, nor can he retain one when he obtains possession of goods without consent of the owner, express or implied, or unless the relation of debtor and creditor exists so as to maintain a suit at law for the debt or duty which gives rise to the lien, in case the pledge be destroyed or the possession lost, *Fitch & Gilbert* v. *Newberry & Goodell,* 1 Doug. 1 (40 Am. Dec. 33), or where provided by statute, as in 2 Comp. Laws 1929, § 9624. The lien provided for by statute is general, *Kaufman* v. *Leonard,* 139 Mich. 104, but being statutory, must be strictly construed. The facts show an absence of the personal acts of the owner or his knowledge or assent as required by the warehousemen's act, 2 Comp. Laws 1929, §§ 9623–9649.

The circuit judge in the present case sought to fix the equitable rights of the parties to the controversy, but there is no warrant of law for the decree entered and it must be set aside. *Fletcher* v. *Kalkaska Circuit Judge, supra.*

The decree is reversed, with costs to appellant, and a decree entered here dismissing the bill.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred.

OLEKSIK *v.* CITY OF DETROIT.

MASTER AND SERVANT—WELFARE WORKER—COMPENSATION.

One who had been accepting welfare aid and pursuant to instructions from welfare department worked as wage-earner with department of public works and who received injury while collecting rubbish, *held*, not entitled to compensation.

Appeal from Department of Labor and Industry. Submitted June 6, 1934. (Docket No. 27, Calendar No. 37,707.) Decided October 1, 1934.

Ludwig Oleksik presented his claim against City of Detroit, a municipal corporation, for accidental injury sustained while in the alleged employment of defendant. Award to plaintiff. Defendant appeals. Reversed.

Charfoos & Gilbert, for plaintiff.

John Atkinson, Assistant Corporation Counsel (*Raymond J. Kelly,* Corporation Counsel, of counsel), for defendant.

BUSHNELL, J. This is an appeal from an order of the department of labor and industry granting plaintiff compensation at the rate of $12.80 per week. Appellant's brief does not contain a statement of the questions involved, as required by Court Rule No. 67 (1933). We quote the statement of facts from appellant's brief:

"Ludwig Oleksik and family had been accepting welfare from the city of Detroit for months prior to

September 19, 1931. September 19, 1931, in compliance with instructions issued to him by the welfare department, he presented himself for work and began to work as a wage-earner with the department of public works. He worked and was paid up to and including March 16, 1932. March 15th, during the course of his employment, he was thrown or fell out of a truck in which he was assisting in gathering rubbish from the alleys of Detroit."

Appellant says the case is controlled by *Vaivida* v. *City of Grand Rapids,* 264 Mich. 204 (88 A. L. R. 707), and appellee says *McLaughlin* v. *Antrim County Road Commission,* 266 Mich. 73, is controlling, both of which cases are so recent that we refrain from quoting from either. We have examined the facts and agree with appellant that the *Vaivida Case* is controlling.

See, also, *Davenport* v. *City of Detroit, ante,* 374.

The order is vacated, with costs to appellant.

NELSON SHARPE, C. J., and POTTER, NORTH, FEAD, WIEST, BUTZEL, and EDWARD M. SHARPE, JJ., concurred.

DUNN *v.* DETROIT FEDERATION OF MUSICIANS.

1. BENEFICIAL ASSOCIATIONS—INTERPRETATION OF BY-LAWS.
   Courts are not bound by the interpretation given by-laws of mutual benefit association by its officers.

2. INSURANCE—BENEFICIAL ASSOCIATIONS—CONSTITUTION AND BY-LAWS AS CONTRACT WITH MEMBERS.
   Constitution and by-laws of a mutual benefit association, in the absence of a certificate of insurance, constitute the entire contract between members and association.

3. CONTRACTS—BENEFICIAL ASSOCIATIONS—MEMBERS.

Actual agreement between mutual benefit association and its members must be ascertained from the entire constitution and by-laws constituting the contract, taking into consideration each and every clause.

4. BENEFICIAL ASSOCIATIONS—CONSTITUTION—BY-LAWS—INTERPRETATION.

Court in construing constitution and by-laws of a mutual benefit association may not ignore direct provisions thereof, will read instrument as a whole and if doubt is raised as to whether or not a forfeiture is claimed, it will not be upheld.

5. SAME—INSURANCE.

Equitable rights of members of mutual benefit association, who are untrained in technicalities of language and law, will be safeguarded and when constitution and by-laws contain inconsistent or ambiguous provisions, that most favorable to insured will be followed, but where language is clear its effect cannot be destroyed by judicial construction.

6. SAME—DEATH BENEFITS—FORFEITURE—BY-LAWS.

In action of assumpsit by beneficiary for death benefit under mutual benefit association's constitution and by-laws, forfeiture *held,* improper where by-law provided for payment of benefits if dues were paid for quarter within which death occurred, dues were paid after death and within additional time according to another by-law also providing for expulsion of member for nonpayment of dues after due notice.

7. INSURANCE—ACTION BY BENEFICIARY.

Beneficiary under a contract of insurance may bring action thereon.

WIEST and EDWARD M. SHARPE, JJ., dissenting.

Appeal from Wayne; Toms (Robert M.), J. Submitted June 19, 1934. (Docket No. 127, Calendar No. 37,918.) Decided October 1, 1934. Rehearing denied December 11, 1934.

Assumpsit by Lawrence K. Dunn against Detroit Federation of Musicians, Local No. 5, American Federation of Musicians, a voluntary musical and

fraternal association, for death benefit. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

Schmalzriedt, Frye, Granse & Frye (*Thomas J. Drouillard,* of counsel), for plaintiff.

Meurer & Meurer and *Freedman & Drexelius,* for defendant.

BUTZEL, J. On April 27, 1919, Alfred D. Dunn, a Detroit musician, became a member of Detroit Federation of Musicians, Local No. 5, American Federation, a voluntary musical and fraternal association, the defendant herein. In 1928, Dunn moved to Colorado, but kept up his membership in defendant, which also insured its members. At the time of Dunn's death, it paid a $1,200 death benefit to the beneficiary designated by the member. Each time a death occurred, an assessment was levied on the surviving members.

Dunn paid his dues and assessments throughout the 13 years of his membership including the first quarter of 1932. The dues for the second quarter were unpaid at the time of his death, May 26, 1932. They were paid within a day or two thereafter by Joe Dunn, a brother of Lawrence K. Dunn, plaintiff herein and beneficiary of the death benefit. Defendant did not know who paid the dues until the time of the trial of the instant suit. It kept them, and made no offer either at the trial or prior thereto, to return them to anyone. They were paid for the quarter in which Alfred Dunn's death occurred. Defendant based its refusal to pay on the ground that Dunn's dues were not paid for the quarter in which his death occurred.

Defendant issued no policy or certificate of insurance to its members. The insurance is provided for

in the by-laws. Article 18, § 1, of the by-laws provides:

"Upon the death of a member of this local whose dues are paid for the quarter in which the death occurs, the secretary-treasurer shall, after having ascertained the facts of the death, draw a warrant upon the treasury for the sum of $1,500," etc.

This amount was subsequently changed by resolution to $1,200.

Article 3, § 7, of the by-laws provides:

"The dues become payable on the first day of January, April, July and October and shall be $2 per quarter, if paid before the expiration of the current quarter. If not paid before the expiration of the current quarter, they shall be $2.50 per quarter. If not paid before the expiration of the second quarter, the member, after due notice, shall stand expelled."

The trial judge, who heard the case without a jury, held that inasmuch as Alfred Dunn's dues were not paid until after his death, plaintiff was not entitled to recover. Plaintiff appeals, claiming that the dues were paid for the quarter in which Dunn died, as provided by article 18, § 1, but even if there were any doubt as to the meaning of this section, article 3, § 7, gives additional time in which to pay dues, and in case of nonpayment provides for expulsion only after due notice.

Under objection, defendant's records were introduced to show that, in other cases, payment of insurance was refused because the dues for the quarter in which the member died were not paid prior to his death. Defendant also introduced copies of bulletins mailed to its members warning them

against losing their insurance in this manner; also an article in one of the bulletins in which the editor explained the operation of the death benefit by-law, and stated that in order to be in good standing so that the insurance would be in force, the dues for the current quarter in which the death occurred must have been paid prior to the death of the member. The court is not bound to follow the construction placed upon a by-law of the organization by its officers. *Morey* v. *Monk,* 142 Ala. 175 (38 South. 265); *Manson* v. *Grand Lodge Ancient Order of United Workmen,* 30 Minn. 509 (16 N. W. 395); *Davidson* v. *Supreme Lodge, Knights of Pythias,* 22 Mo. App. 263. Were the rule otherwise, payment might be refused upon the most frivolous and unjust grounds, and a precedent thus established to defeat valid claims.

Where there is no certificate of insurance, the constitution and by-laws constitute the entire contract between the members and the association. *Badesch* v. *Congregation Brothers of Willna,* 23 Misc. Rep. 160 (50 N. Y. Supp. 958); *Honea* v. *American Council No. 27,* 139 Tenn. 21 (201 S. W. 127). The actual agreement must be ascertained from the entire instrument, taking into consideration each and every clause. *Thomson Electric Welding Co.* v. *Peerless Wire Fence Co.,* 190 Mich. 496.

Defendant shows that members have other benefits and advantages and that the insurance feature is incidental and not the main purpose of the defendant. The by-laws provide that persons joining the organization shall not participate in the death benefit fund until they have been members in good standing for six months or longer; that any person becoming a member of the organization after April 1, 1921, who is 50 years of age or over, shall not be

eligible to participate in the benefits of the fund. Members who are reinstated after one year from the date of expulsion shall not participate in the death benefit fund until six months after date of reinstatement, provided they are not 50 years or over at the time of reinstatement.

Courts may not ignore the direct provisions of the constitution and by-laws of a mutual benefit association. They will give a reasonable and liberal construction to them, and when, read as a whole, there is considerable doubt as to whether a forfeiture is rightfully claimed, it will not be upheld. The members of the organization are untrained in the technicalities of language and law, and their equitable rights will be safeguarded, provided no violence is done to the by-laws and constitution. When the latter contain two inconsistent or ambiguous provisions, that most favorable to the insured will be followed. *Miner* v. *Michigan Mutual Benefit Ass'n*, 63 Mich. 338; *Wolf* v. *District Grand Lodge No. 6, I. O. B. B.*, 102 Mich. 23. Where the language of the entire contract is clear and unambiguous, its effect cannot be destroyed by judicial construction. *Sturgis National Bank* v. *Maryland Casualty Co.*, 252 Mich. 426.

Under article 18, § 1, of the by-laws the dues must be paid for the quarter in which the death occurred. The section does not provide that they must be paid prior to the death of the member. Dunn's dues for the quarter in which he died were paid and kept by defendant. Article 3, § 7, further gives additional time to pay the dues. Article 18, § 1, also provided that all sums due defendant shall be deducted from the amount due for death benefit. It is possible that the clause requiring payment of dues for the quarter in which the death occurred was inserted so that the

member would be charged with them, and the amount deducted from the death benefit. Following the general rules of construction to the facts as presented, we believe the forfeiture was improper, and that plaintiff should recover.

Defendant further claims that plaintiff may not maintain an action at law on a contract to which it is only a third party beneficiary. It relies on the case of *Linneman* v. *Moross Estate,* 98 Mich. 178 (39 Am. St. Rep. 528), in which an insurance contract was not involved. We have always properly recognized the right of a beneficiary to bring suit on an insurance contract made by another for his benefit. *Voss* v. *Connecticut Mutual Life Ins. Co.,* 119 Mich. 161 (44 L. R. A. 689); *Nockigme* v. *Standard Accident Ins. Co.,* 227 Mich. 506; *Repala* v. *John Hancock Mutual Life Ins. Co.,* 229 Mich. 463; *Homann* v. *Allgemeiner Arbeiter Bund of Michigan,* 184 Mich. 417; *Thompson* v. *Loyal Protective Ass'n,* 167 Mich. 31; 1 Williston on Contracts (1st Ed.), § 369.

The judgment for defendant is reversed and the case remanded to the trial court with instructions to enter a judgment for $1,200, with interest. Plaintiff will recover costs.

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

WIEST, J. (*dissenting*). I am of the opinion that article 18, § 1, of the by-laws, in limiting liability to instances where dues are paid for the quarter in which death occurs, clearly states the governing rule relative to death benefits and requires payment of dues during the life of the member. Other provisions relate to mere membership and cannot be con-

sidered as qualifying the death benefit provision. I think the judgment should be affirmed.

EDWARD M. SHARPE, J., concurred with WIEST, J.

ON MOTION FOR REHEARING.

PER CURIAM. Rehearing is denied. The case was decided upon a record which presented defendant's claims very fully. Our attention is called to a statement by the trial court that if the motion for judgment were decided adversely to the defendant, the latter would be permitted to bring in further proofs if it desired. Our opinion is therefore amended so as to remand the case to the trial court for the taking of further proofs and making decision.

INDEX.

ABANDONMENT—See APPEAL AND ERROR (35, 36).

ABDUCTED CHILD—See CRIMINAL LAW (1); KIDNAPPING.

ABSENCE—See ATTORNEY AND CLIENT (1); DEATH; JUDGMENT (3).

ABSTRACTS—See GUARDIAN AND WARD (5).

ABUSE OF DISCRETION—See APPEAL AND ERROR (40); NEW TRIAL (2).

ABUTTING OWNERS—See APPEAL AND ERROR (21); MUNICIPAL CORPORATIONS (10, 11).

ACCELERATION CLAUSE—See SALES (3, 6).

ACCEPTANCE—See CONTRACTS (2); CORPORATIONS (1); DEDICATION (1, 2).

ACCESS TO REPORTS OF PUBLIC BODIES—See CRIMINAL LAW (7).

ACCIDENT—See APPEAL AND ERROR (27); CRIMINAL LAW (13); INJUNCTION (1); MASTER AND SERVANT (8, 10, 11, 13, 19, 20, 26); MOTOR VEHICLES (23, 24).

ACCORD AND SATISFACTION.

Evidence *held*, insufficient to establish accord and satisfaction between country club and its superintendent upon latter's discharge from employment. *Arnold* v. *Masonic Country Club*, 430.

See RELEASE (2).

ACCOUNTING—See EQUITY (15).

ACQUITTAL—See CRIMINAL LAW (26).

ACTION.

1. Question of whether or not mortgage was a trust mortgage was not rendered moot on petition for appointment of receiver in foreclosure proceedings by reason of professed willingness of defendants to pay rent to plaintiff under assignment of rents, nor by the finding that rents were not inadequate or that lease between mortgagor's assignees and their lessee was not collusive, where court was justified in finding some control of rents by it was advisable. *Union Guardian Trust Co.* v. *Lipsitz*, 209.

ACTION—Continued.

2. Final judgment for plaintiff in action for salary due for two months' period immediately following unjustified discharge from annual contract of employment operated as bar to subsequent action for balance of salary for year since plaintiff has but one cause of action for entire amount of his damages due to breach of contract of employment by wrongful discharge. *Arnold* v. *Masonic Country Club*, 431.

See DEPOSITARIES (3); INJUNCTION (1, 2); INSURANCE (16); JUDGMENT (5, 10); RELEASE (3); SHERIFFS AND CONSTABLES (1); TORTS (3); VENUE.

ACTION AT LAW—See APPEAL AND ERROR (1); TRIAL (1).

ADEQUACY OF REMEDY—See MANDAMUS (5).

ADJUSTER—See INSURANCE (11–13).

ADMISSIONS—See EVIDENCE (6–8).

ADVERSE POSSESSION.

1. Finding of trial court that plaintiff's possession was not adverse *held*, amply sustained by the evidence. *Cleffy* v. *Allegan State Savings Bank*, 364.
2. Title by adverse possession of strip of land adjacent to highway cannot be sustained where possession was not continued for sufficient time to establish such title prior to enactment of statute forbidding acquisition of rights in public highways by adverse possession (Act No. 46, Pub. Acts 1907). *Hawkins* v. *Dillman*, 483.
3. Evidence *held*, insufficient to show that grantor or his privies under warranty deed had ever acquired adverse possession from grantee or his privies where grantor had never notoriously asserted claim of title to all of land conveyed and portion of land had been used by a successor of grantee for railroad purposes without protest from grantor or his privies. *Carney* v. *Loveday*, 640.

ADVERSE WITNESSES—See CRIMINAL LAW (11); EVIDENCE (3).

ADVERTISING—See TRADE-MARKS AND TRADE-NAMES (4).

ADVICE OF ATTORNEY—See FRAUD; MALICIOUS PROSECUTION.

AFFIDAVITS—See APPEAL AND ERROR (3); GARNISHMENT (4, 5); HIGHWAYS AND STREETS (5, 6); JUDGMENT (3); MALICIOUS PROSECUTION (1).

AGENCY—See PRINCIPAL AND AGENT.

AGE OF PROSECUTRIX—See CRIMINAL LAW (29); RAPE (1, 2).

ALIMONY—See DIVORCE (1); GARNISHMENT (2).

AMENDMENTS—See APPEAL AND ERROR (24, 34); HABEAS CORPUS (1); MANDAMUS (4); MECHANICS' LIENS (1); STATUTES (2).

ANNUAL CONTRACT—See ACTION (2); CONTRACTS (1).

ANNUAL REPORT—See CORPORATIONS (1).

ANSWER—See OFFICERS (4).

APPEAL AND ERROR.

1. Record of proceedings before department of labor and industry which are not a part of the record of case at bar may not be considered on appeal from judgment in action at law based on contract between employer and injured employee. *McDonald* v. *Ford Motor Co.*, 39.
2. On appeal from directed verdict and judgment for defendants at close of plaintiff's testimony, truth of such testimony will be assumed. *Id.*
3. On appeal from summary judgment, statements in affidavit attributed to official of plaintiff bank are assumed to be true but are construed in the light of actions of the parties and surrounding circumstances. *Peoples Wayne County Bank of Dearborn* v. *Harvey*, 47.
4. Joinder of action of widow, as administratrix of estate of deceased husband who had given defendant perpetual easement of flooding lands, to her individual suit for damage to said lands selected by her as homestead since husband's death *held*, not prejudicial error, where there was no plea of misjoinder, proof was entirely directed to showing damage to plaintiff in her individual capacity and charge to jury limited recovery to damages occurring after husband's death. *Boman* v. *Wolverine Power Co.*, 59.
5. Correction of misjoinder of parties may be made in accordance with 3 Comp. Laws 1929, § 14021. *Id.*
6. In action for damages to widow's homestead lands permission granted plaintiff to file proper reply after attention had been called to her failure to specifically deny allegations in defendant's answer setting forth deed from husband signed by him only, conveying easement to flood lands *held*, not prejudicial error, where deed itself was introduced in evidence (Court Rule No. 24 [1931]). *Id.* 60.
7. Objections to excerpts of charge *held*, without merit, where charge to jury appears to properly limit issues when read in its entirety. *Id.*
8. Pending appeal from judgment in principal case, trial of garnishment on judgment may not be had against seasonable objection of third party claimant to fund (3 Comp. Laws 1929, §§ 14869, 14873). *Colter* v. *Salow*, 95.
9. Finding of department of labor and industry that plaintiff member of partnership was working member receiving wages irrespective of profits is affirmed on appeal where there is evidence to support it (2 Comp. Laws 1929, § 8413). *Smallegan* v. *John Smallegan & Sons*, 245.
10. Conclusion reached on question of law on former appeal became the law of the case and is not reviewable on appeal from judgment in subsequent trial. *Watkins* v. *Gabriel Steel Co.*, 264.

APPEAL AND ERROR—Continued.

11. Judgment by court, sitting without a jury, for personal injuries, reduced on motion for new trial from $8,340 to $6,340, is not disturbed where both parties appeal, since trial court heard and saw the witnesses. *Id.* 265.

12. The weight of the evidence is not a reviewable matter on appeal where no motion was made for a new trial. *Gaufin* v. *Valind*, 269.

13. Question as to jurisdiction of court in summary proceedings because of failure to offer proofs tending to show termination of contract by notice of forfeiture, may not be first raised on appeal from circuit court where record does not contain the full record on appeal from the circuit court commissioner to the circuit court and the question is not raised in defendant's claim of appeal (Court Rule No. 59, § 3, subd. d [1931]). *Gregorian Building Co.* v. *Galvin*, 273.

14. Belated cross-appeal in summary proceedings under land contract *held*, proper in case where defendant made down payment of $3,500 on $82,450 purchase price, failed to make repairs or payments of principal, interest or taxes and obtained appeal to circuit court by use of worthless bonds necessitating that plaintiff move for order requiring sufficient bonds. *Id.* 274.

15. Case is remanded for redetermination of amount due on land contract as of time of such rehearing where amount due thereunder is sole question for decision on belated cross-appeal and case on defendant's appeal is affirmed. *Id.*

16. Alleged imperfections and irregularities in record on appeal *held*, insufficient cause for dismissal of appeal. *Simpson* v. *Dyer*, 328.

17. Error assigned on alleged prejudicial argument to the jury in action for negligent malpractice, is not considered on appeal, where it was not called to the attention of the trial court. *Sima* v. *Wright*, 352.

18. An appeal from the granting or denial of an interlocutory order, as a rule, is in the nature of mandamus and if not a final disposition of all or part of the subject matter of the suit, this court will dismiss the appeal unless leave has been first obtained since it will not review a case piecemeal. *Equitable Trust Co.* v. *Bankers Trust Co.*, 394.

19. An appointment of receiver *ad litem* to hold the proceeds of income from multiple-apartment building pending outcome of suit by trustee under second mortgage against trustee under first mortgage and fee owner would not be appealable without leave of court. *Id.*

20. Plaintiff's evidence must be taken as true for purpose of appeal where judgment was directed for defendant at close of plaintiff's testimony. *Gudenau* v. *Farm Crest Bakeries, Inc.*, 399.

21. On appeal from decree dismissing bill in suit to enjoin city from lowering street grade at railroad crossing without first

APPEAL AND ERROR—Continued.

compensating abutting owner therefor, facts stated in the judge's opinion which are not fully set forth in the pleadings and not complained of by appellant are assumed to be true. *A. M. Campau Realty Co.* v. *City of Detroit*, 417.

22. Finding of court in action for personal injuries by pedestrian against owner and driver of taxicab, tried without a jury, that defendants were guilty of negligence and that plaintiff was free from contributory negligence *held*, not against the great weight of the evidence. *Orme* v. *Farmer*, 425.

23. Judgment for defendant in action of assumpsit, tried without jury, is affirmed on appeal where only a question of fact as to whether parties were copartners or mere debtor and creditor is presented and record sustains finding of court thereon. *Cooper* v. *Cooper*, 435.

24. On appeal from judgment for plaintiff in summary proceedings which omitted to state amount due under contract sued on as provided by statute, judgment is amended pursuant to Court Rule No. 72 (1933), to include amount of payments shown to be past due and redemption permitted by payment of said sum together with interest at contract rate from date of judgment in circuit court (3 Comp. Laws 1929, § 14979). *Armstrong* v. *Grimm*, 437.

25. Alleged prejudicial remarks of prosecuting attorney made on trial of one charged with murder will not be considered on appeal in the absence of objection thereto or ruling on the part of the trial court. *People* v. *Rosa*, 462.

26. Issue that property conveyed by deed alleged to be in fraud of creditors was homestead property, not presented by the evidence, need not be decided on appeal from decree setting aside conveyance of five city lots since homestead rights apply only to one lot not exceeding $1,500 in value and matter may be taken care of at execution sale (3 Comp. Laws 1929, § 14608). *Ashbaugh* v. *Sauer*, 467.

27. Testimony of medical witnesses as to facts related to them by plaintiff of manner in which accident happened in case tried without jury *held*, not prejudicial error where judge did not consider same as substantive proof. *Lapachin* v. *Standard Oil Co.*, 478.

28. On appeal from decree dividing joint award for taking by condemnation part of valuable city property, case is ordered remanded to take further testimony, to correct inaccuracies, determine interest rate to be credited on future rentals and for entry of decree. *Pierson* v. *H. R. Leonard Furniture Co.*, 510.

29. Burden of establishing error on appeal in the nature of a writ of error is on the party who claims it. *People* v. *Rose*, 529.

30. Dismissal of action of assumpsit by widow of insured, administratrix of his estate, on industrial type policy con-

APPEAL AND ERROR—Continued.

taining facility of payment clause, *held,* justified under record disclosing undisputed payment of insurance in full to mother of insured. *Mogyoros* v. *Prudential Insurance Co. of America,* 549.

31. In pedestrian's action for damages for personal injuries received while walking along highway when overtaken by defendant's automobile, instruction that recovery would be precluded if plaintiff was guilty of any negligence which contributed to accident and but for which accident would not have occurred irrespective of the negligence of defendant *held,* not so prejudicial as to result in miscarriage of justice, where other portions of charge and special questions submitted to the jury presented issue of contributory negligence so that it could not have been misunderstood (3 Comp. Laws 1929, § 15518). *Flannigan* v. *Harder,* 564.

32. In action against land contract vendor for conversion of chattel mortgaged property, verdict and judgment for plaintiff, assignee of defaulted vendee, is not disturbed on appeal, where testimony was decidedly conflicting and issue was submitted under a fair charge. *Austin* v. *Ancient Order of Gleaners,* 568.

33. On appeal in the nature of certiorari from order granting mandamus to set off executions against each other, case is remanded to determine amount of execution assigned to client's attorney for taxable fees and disbursements not subject to such set off (3 Comp. Laws 1929, § 14552, subd. 5). *Fraam* v. *Kelley,* 574.

34. On affirmance of order holding bill multifarious and granting leave to amend, plaintiffs are allowed to select consonant remedies in an amended bill. *Nay* v. *Mid-West Petroleum Corp.,* 578.

35. Contention of appellant upon which neither authority nor argument is presented is presumed abandoned. *McClave* v. *Benton Harbor State Bank,* 620.

36. Errors not discussed on appeal in either appellants' brief or in the oral argument are presumed abandoned (Court Rule No. 68 [1933]). *Johns* v. *Wisconsin Land & Lumber Co.,* 675.

37. Supreme Court will not pass upon order allowing final account where no leave to appeal therefrom has been obtained and there has been no final determination of issues raised by bill praying his appointment (Court Rule No. 60 [1931]; 3 Comp. Laws 1929, §§ 15136, 15508). *Hochrein* v. *Gunther,* 682.

38. Determination of whether or not order denying motion to set aside an injunction is appealable without leave is not made where all parties are desirous of decision on the merits (Court Rule No. 60 [1931]). *Furniture Manufacturers Ass'n of Grand Rapids* v. *Grand Rapids Guild of Exhibitors,* 685.

39. Granting or dissolving an interlocutory injunction is an exercise of discretion by trial court with which Supreme Court will interfere only upon a showing of palpable abuse. *Id.*

APPEAL AND ERROR—Continued.

40. Abuse of discretion, in order to warrant interference by Supreme Court, must be such that upon consideration of facts upon which trial court acted, an unprejudiced person can say there was no justification or excuse for the ruling made. *Id.*

See CERTIORARI (1); COSTS (1–3, 5); COURTS; CRIMINAL LAW (22, 23); DAMAGES (4); HUSBAND AND WIFE (1); INSURANCE (1); JUDGMENT (7, 9); MASTER AND SERVANT (7, 14, 37); MORTGAGES (16); NEGLIGENCE (2).

APPEARANCE.

1. A special appearance for the purpose of moving to dismiss is not a submission to the general jurisdiction of the court. *In re Parker's Estate,* 79.

2. Stipulation entered into after special appearance and upon which the court acts in the exercise of its jurisdiction will be treated as a general appearance. *Id.* 80.

See OFFICERS (4).

APPEARANCE OF GIRL—See RAPE (2).

APPOINTMENT—See ACTION (1); APPEAL AND ERROR (19, 37); CONSTITUTIONAL LAW (2); ELECTIONS (1); MORTGAGES (1, 3, 16); RECEIVERS; VENDOR AND PURCHASER (2).

APPORTIONMENT—See EQUITY (7, 9–11); ESTOPPEL (4); LANDLORD AND TENANT (2).

APPROACHES TO BRIDGE—See BRIDGES.

APPROPRIATIONS—See MANDAMUS (4).

ARGUMENT OF COUNSEL—See APPEAL AND ERROR (17); TRIAL (2).

ARREST.

Officer's arrest of defendant after observing that he was driving car with foreign license plates in residential district at high rate of speed without lights, apparently going no particular place and occupants were closely watching onlookers *held,* legal. *People* v. *Minchella,* 124.

See CRIMINAL LAW (2, 4, 5).

ARTICLES OF ASSOCIATION—See CORPORATIONS (6, 8).

ASHES—See MASTER AND SERVANT (36).

ASSAULT—See INDICTMENT AND INFORMATION (3).

ASSESSMENTS—See BANKS AND BANKING (11); CONTRACTS (2); CORPORATIONS (4, 6–8); DRAINS (2); ESTOPPEL (4); HIGHWAYS AND STREETS (3, 6); MORTGAGES (2); MUNICIPAL CORPORATIONS (10, 12, 15).

ASSETS—See PARTNERSHIP (1, 4).

ASSIGNMENT OF RENTS—See ACTION (1); MORTGAGES (5, 7, 8, 16); STATUTES (2).

ASSIGNMENTS.

Assignment of a cause of action for tort as security in no way affected plaintiff's right to recover. *Watkins* v. *Gabriel Steel Co.*, 264.

See APPEAL AND ERROR (33); CONTRIBUTION; EXECUTION; GARNISHMENT (1); JUDGMENT (9); MORTGAGES (1, 2); PRINCIPAL AND SURETY (1); VENDOR AND PURCHASER (7, 8).

ASSUMED NAME—See BANKS AND BANKING (4); TRADE-MARKS AND TRADE-NAMES (1).

ASSUMPSIT.

1. Recovery may not be had under the common counts in assumpsit for breach of a written contract between the parties, nor for preventing plaintiff from carrying out such contract. *Mitchell* v. *Reolds Farms Co.*, 301.
2. Plaintiff may recover under the common counts from defendant corporation for his share of proceeds of sale of product of their joint enterprise, to which he was entitled under written contract, where he had fully performed on his part, defendant had sold the product of the enterprise and converted the entire proceeds to its own use and nothing remained to be done except to pay plaintiff his share. *Id.*

See APPEAL AND ERROR (23, 30); BENEFICIAL ASSOCIATIONS (4); DEPOSITARIES (3); JOINT ADVENTURES (1); MUNICIPAL CORPORATIONS (13); VENDOR AND PURCHASER (8); WORK AND LABOR.

ASSUMPTION OF LIABILITY—See VENDOR AND PURCHASER (8).

ASSUMPTIONS—See APPEAL AND ERROR (2, 3, 21); MASTER AND SERVANT (12); MOTOR VEHICLES (18).

ASSURED CLEAR VISION AHEAD—See MOTOR VEHICLES (10, 11).

ATMOSPHERIC CONDITIONS—See MOTOR VEHICLES (10).

ATTACHMENT.

1. Property attached by sheriff remains in his custody until the suit is disposed of, unless bonded, or the attachment is dissolved. *Roehl Storage Co.* v. *Wilson*, 691.
2. Right to hold attached property ceases when cause is dismissed. *Id.* 692.
3. Agreement between storage company and sheriff with respect to storage and care of oriental rugs which had been attached can have no effect upon owner of attached property or his administrator (3 Comp. Laws 1929, § 14766). *Id.*

See SHERIFFS AND CONSTABLES (2); WAREHOUSEMEN (2).

ATTORNEY AND CLIENT.

1. Clients who retain attorney have a right to rely, not only upon his ability, but upon his allegiance to their cause so that where he knows they are out of the State and do not expect to return on date set for trial, he should at once get continuance or endeavor to secure their attendance at the trial. *Tallis* v. *Stuart*, 84.
2. An attorney has a lien upon a judgment obtained through his efforts for his services and disbursements in a particular case. *Fraam* v. *Kelley*, 573.

See EXECUTION (2); FRAUD; FRAUDULENT CONVEYANCES (2); JUDGMENT (3); MALICIOUS PROSECUTION; SALES (3); VENDOR AND PURCHASER (2).

ATTORNEY-GENERAL—See BANKS AND BANKING (8).

AUDIT—See OFFICERS (9).

AUDITOR GENERAL—See OFFICERS (9).

AUTHORITY—See INSURANCE (12); MORTGAGES (8); MUNICIPAL CORPORATIONS (13, 16); PRINCIPAL AND AGENT (1, 2); RECEIVERS.

AUTOMOBILE INSURANCE—See CRIMINAL LAW (14).

AVERAGE WEEKLY EARNINGS—See MASTER AND SERVANT (39).

BAD BARGAINS—See CONTRACTS (3).

BANKS AND BANKING.

1. A subsequent partner is liable for debts of banking partnership although a new certificate showing his interest is not filed (2 Comp. Laws 1929, § 9710 *et seq.*). *Upton* v. *Upton*, 26.
2. Debtors of a banking partnership are not relieved of their obligations by changes in the firm and failure to file new certificates (2 Comp. Laws 1929, § 9710 *et seq.*). *Id.*
3. Primary purpose of certificate required of members of private banking partnership is to provide evidence of ownership by public record (2 Comp. Laws 1929, § 9710). *Id.*
4. Certificates filed by members of a banking partnership upon its organization and dissolution under assumed name statute which contained substantially same information as required in certificates under private banking partnership act, except that terms of partnership were not set forth, *held*, sufficient, where the situation contained no possibility of fraud (2 Comp. Laws 1929, § 9710 *et seq.*, § 9825 *et seq.*). *Id.*
5. The receiver of a private banking partnership organized under 2 Comp. Laws 1929, § 9710 *et seq.*, may enforce the liability of the partners for firm debts. *Id.*
6. Act No. 160, Pub. Acts 1859 (2 Comp. Laws 1929, § 9710 *et seq.*), does not expressly define the liability of a retired banking partner after the filing of a new certificate and at most his continued liability could be no greater nor different than that of a retired partner under the general partnership law. *Id.* 27.

BANKS AND BANKING—Continued.

7. Receiver of a private banking partnership may not enforce liability of retired partner for firm debts since his liability does not remain a partnership asset. *Id.*

8. Stockholders of trust company who are chargeable with notice that it had issued certificates of deposit upon authority of opinion of attorney general that statutes conferred power upon trust companies to do so *held*, estopped to deny liability therefor as are the trust company and its receiver (3 Comp. Laws 1929, §§ 12016, 12018, 12024). *Lamb* v. *Abendroth*, 73.

9. In action by receivers of trust company to enforce statutory liability of its stockholders based largely upon 400 certificates of deposit, question of whether or not certificates were *ultra vires* is not decided where stockholders are held estopped to deny liability. *Id.*

10. Bank stockholder's liability to the bank is primarily based upon statute but is also contractual so that legislature may not impair such obligation by taking it away once it has accrued or attached, it being an asset of the bank (12 USCA, §§ 63, 64, 66; 3 Comp. Laws 1929, § 11945). *Simons* v. *Groesbeck*, 495.

11. Holding companies authorized to hold stock in State and national banks are subject to assessments on such stock as the owners thereof under State and Federal statutes (12 USCA, §§ 63, 64, 66; 2 Comp. Laws 1929, § 9968; 3 Comp. Laws 1929, § 11945). *Id.*

See APPEAL AND ERROR (3); CORPORATIONS (8); GUARDIAN AND WARD (4–6); TRADE-MARKS AND TRADE-NAMES (1).

BARRELS—See MASTER AND SERVANT (20).

BATHING BEACH EQUIPMENT—See THEATERS AND SHOWS (1, 2).

BEER—See INTOXICATING LIQUORS (2, 4).

BELATED CROSS-APPEAL—See APPEAL AND ERROR (14).

BENEFICIAL ASSOCIATIONS.

1. Courts are not bound by the interpretation given by-laws of mutual benefit association by its officers. *Dunn* v. *Detroit Federation of Musicians*, 698.

2. Court in construing constitution and by-laws of a mutual benefit association may not ignore direct provisions thereof, will read instrument as a whole and if doubt is raised as to whether or not a forfeiture is claimed, it will not be upheld. *Id.* 699.

3. Equitable rights of members of mutual benefit association, who are untrained in technicalities of language and law, will be safeguarded and when constitution and by-laws contain inconsistent or ambiguous provisions, that construction most favorable to insured will be followed, but where language is clear its effect cannot be destroyed by judicial construction. *Id.*

BENEFICIAL ASSOCIATIONS—Continued.

4. In action of assumpsit by beneficiary for death benefit under mutual benefit association's constitution and by-laws, forfeiture *held*, improper where by-law provided for payment of benefits if dues were paid for quarter within which death occurred, dues were paid after death and within additional time according to another by-law also providing for expulsion of member for nonpayment of dues after due notice. *Id.*

See CONTRACTS (4); INSURANCE (15).

BENEFICIARY—See BENEFICIAL ASSOCIATIONS (4); INSURANCE (16); WILLS (1).

BILL OF PARTICULARS—See DAMAGES (4).

BILLS AND NOTES.

1. Execution of renewal promissory note with knowledge that payee had already breached alleged agreement as to sale of collateral *held*, a waiver of right to claim of recoupment based on breach of agreement as to collateral in action on note. *Peoples Wayne County Bank of Dearborn* v. *Harvey*, 47.
2. Fraud of plaintiff bank in misrepresenting to indorser that his indorsement was to be canceled upon execution of mortgage by maker of note *held*, not waived where indorser did not know that negotiations as to mortgage had been terminated without its execution prior to his indorsement of renewal note sued on. *Id.*
3. Execution of renewal note constitutes waiver of previous defense only where defendant had knowledge of the defense at the time of renewal. *Id.* 48.
4. Representations to indorser made by payee which are promissory in character but accompanied by misrepresentations as to an existing material fact constitute defense of fraud in action against indorser on note. *Id.*
5. Promissory notes, executed pursuant to contract containing statutory noncoercion clause signed by husband and wife, which were executed as part of the same transaction *held*, intended to evidence the same liability as in the contract, where there is no showing they were not so intended (Act No. 158, Pub. Acts 1917). *Montz* v. *Reutter*, 357.

See EVIDENCE (1); GUARDIAN AND WARD (1); HUSBAND AND WIFE; REFORMATION OF INSTRUMENTS; SALES (6); TORTS (3).

BIRTH CERTIFICATE—See CRIMINAL LAW (29).

BITTER FEELING—See WILLS (8).

BLACKJACK—See CRIMINAL LAW (27).

BLINDNESS—See MASTER AND SERVANT (7, 19).

BOARDERS—See ESTATES OF DECEDENTS (1, 2).

BOARDS AND COMMISSIONS—See CONSTITUTIONAL LAW (8); CARRIERS.

BONDHOLDERS' COMMITTEE—See MANDAMUS (2, 4).

BONDS—See APPEAL AND ERROR (14); ATTACHMENT (1); DEPOSITARIES (1–4); DRAINS (4); GARNISHMENT (1); HIGHWAYS AND STREETS (3); INFANTS; LIMITATION OF ACTIONS (1); MANDAMUS (2, 4); MORTGAGES (4–6); PRINCIPAL AND SURETY (1, 2); SHERIFFS AND CONSTABLES (1); STATUTES (1, 7); SUBROGATION; VENDOR AND PURCHASER (4, 5).

BOOTLEGGING—See CRIMINAL LAW (4).

BOULEVARDS—See MUNICIPAL CORPORATIONS (12).

BOUNDARIES—See MUNICIPAL CORPORATIONS (10, 15).

BRAIN HEMORRHAGE—See MASTER AND SERVANT (20).

BREACH OF CONTRACT—See ACTION (2); PRINCIPAL AND SURETY (1).

BREAKDOWN—See MOTOR VEHICLES (8).

BREAKING AND ENTERING—See INDICTMENT AND INFORMATION (2).

BRIBERY—See CRIMINAL LAW (5).

BRIDGES.

Sidewalk constructed in accordance with village powers and duties as prescribed by charter *held*, a sidewalk in fact and law and not a part of approach proper to bridge built and maintained by township, so as to render village liable for death of nine-year old boy from drowning through its failure to maintain sidewalk in safe condition for pedestrians (1 Comp. Laws 1929, § 4545). *Rex* v. *Village of Lochmoor*, 159.

BRIEFS—See APPEAL AND ERROR (36); COSTS (1, 5).

BROKERS—See PRINCIPAL AND AGENT (1); TORTS (3).

BROTHER—See WILLS (3).

BUILDING AND LOAN ASSOCIATIONS—See MANDAMUS (5).

BUILDING RESTRICTIONS—See COVENANTS (1, 2).

BURDEN OF PROOF—See DRAINS (1); FRAUDULENT CONVEYANCES (1); INSURANCE (4, 5); MASTER AND SERVANT (10); RAPE (1); WILLS (5, 9); WITNESSES (10).

BURGLARY—See CRIMINAL LAW (24).

BURIAL—See MASTER AND SERVANT (41–43).

BURNS—See EVIDENCE (13, 14).

BUSINESS NAME—See TRADE-MARKS AND TRADE-NAMES (3).

BY-LAWS—See BENEFICIAL ASSOCIATIONS (1–4); CONTRACTS (4); INSURANCE (15).

CALENDAR YEAR—See CONTRACTS (1).

CANCELLATION—See FALSE PRETENSES; INSURANCE (4, 5).

CANVASSER—See MASTER AND SERVANT (26).

CAR IN GEAR—See MOTOR VEHICLES (2, 3).

CARPENTER—See MASTER AND SERVANT (32).

CARRIERS.

Discretion vested in public utilities commission by Act No. 212, § 5, Pub. Acts 1931, even if construed as applicable to permission to motor vehicle carrier to operate without previous payment of fee required by statute, did not warrant extension of credit to carriers of upwards of $25,000 with much of it months later uncollected or uncollectible and justified finding of governor that commissioners violated official duty in doing so. *People, ex rel. Clardy,* v. *Balch,* 197.

See OFFICERS (8).

CAUSE OF ACTION—See ASSIGNMENTS; FRAUDULENT CONVEYANCES (2).

CERTIFICATES—See BANKS AND BANKING (1–4, 8, 9); CORPORATIONS (4); TRADE-MARKS AND TRADE-NAMES (1).

CERTIORARI.

1. On appeal in the nature of certiorari from State board of escheats, evidence may be examined by Supreme Court to determine whether finding of the board has any support in the evidence or want of evidence; to determine whether it has made a finding contrary to uncontroverted and credible evidence; and while court may not pass on any conflict in the evidence or exercise the functions of the board, the court may determine whether undisputed evidence supports or refutes the findings of the board. *In re Wright's Estate,* 586.
2. On certiorari from department of labor and industry, Supreme Court will determine whether there is any competent evidence to support the findings and whether inferences were properly deducible from the testimony. *Johns* v. *Wisconsin Land & Lumber Co.,* 676.

See APPEAL AND ERROR (33); COSTS (3); ESTOPPEL (4); HIGHWAYS AND STREETS (3, 6); MASTER AND SERVANT (7, 45).

CESSATION OF USER—See RAILROADS (2).

CHAIN BLACKJACK—See CRIMINAL LAW (27).

CHALLENGES—See JURY (1, 2).

CHANGE OF CIRCUMSTANCES—See DIVORCE (1).

CHANGE OF CONDITION—See MASTER AND SERVANT (27, 28).

CHARACTER—See WITNESSES (9).

CHARTER—See BRIDGES; CORPORATIONS (6); MANDAMUS (1); MUNICIPAL CORPORATIONS (1, 2, 4–6).

CHATTEL MORTGAGES—See APPEAL AND ERROR (32); INSURANCE (14); SALES (3, 5–7); TROVER AND CONVERSION (2, 3).

CIRCUIT COURT—See COURTS (1).

CIRCUIT COURT COMMISSIONERS—See COURT COMMISSIONERS.

CIRCUMSTANTIAL EVIDENCE—See LARCENY (2).

CITY CHARTER COMMISSION—See MUNICIPAL CORPORATIONS (1).

CLINICAL EXAMINATION—See INSURANCE (5).

CLINICS—See MOTOR VEHICLES (15).

COERCION—See BILLS AND NOTES (5); HUSBAND AND WIFE; REFORMATION OF INSTRUMENTS.

COLLATERAL AGREEMENT—See BILLS AND NOTES (1).

COLLECTIONS—See PARTNERSHIP (2).

COLLUSION—See ACTION (1).

COMMENCEMENT OF ACTION—See DEPOSITARIES (3).

COMMITMENT—See HABEAS CORPUS.

COMMON COUNTS—See ASSUMPSIT (1, 2).

COMMON LAW—See EVIDENCE (10); GARNISHMENT (3); MASTER AND SERVANT (43); NEGLIGENCE (6); RELEASE (1); WITNESSES (5).

COMPENSATION—See ACTION (2); APPEAL AND ERROR (21); CONSTITUTIONAL LAW (7); CONTRACTS (1); MASTER AND SERVANT (8, 14, 24, 25, 30, 32–36, 46); SHERIFFS AND CONSTABLES (2); STATUTES (8); WORK AND LABOR (1).

COMPETITION—See COVENANTS (2).

COMPROMISE AND SETTLEMENT—See INSURANCE (11); RELEASE (1, 2); TORTS (3).

CONCEALMENT—See LIMITATION OF ACTIONS (1, 2).

CONCEDED FACT—See WILLS (10).

CONDEMNATION PROCEEDINGS—See APPEAL AND ERROR (28); EMINENT DOMAIN (1–3); EQUITY (4–13); LANDLORD AND TENANT (1–7).

CONDITIONAL SALE CONTRACTS—See SALES (3, 5–7).

CONFESSION—See CRIMINAL LAW (25); WITNESSES (8).

CONFIDENTIAL COMMUNICATION—See CRIMINAL LAW (12); WITNESSES (3, 5, 6).

CONFIRMATION OF SALE—See GUARDIAN AND WARD (3).

CONFLICT OF LAWS—See INTEREST (3).

CONFRONTATION OF WITNESSES—See CRIMINAL LAW (6, 18).

CONGENITAL STATUS LYMPHATICUS—See MASTER AND SERVANT (13).

CONSENT—See CORPORATIONS (6, 7); INSURANCE (8); MASTER AND SERVANT (1); NOVATION (2); VENDOR AND PURCHASER (7).

CONSENT DECREE—See MORTGAGES (13).

CONSEQUENTIAL DAMAGES—See EMINENT DOMAIN (1).

CONSIDERATION—See GARNISHMENT (1); MOTOR VEHICLES (14); TORTS (3); VENDOR AND PURCHASER (3, 7); WAIVER.

CONSTITUTION—See BENEFICIAL ASSOCIATIONS (2–4); CONTRACTS (4); INSURANCE (15).

CONSTITUTIONAL LAW.

1. Constitutional provision permitting governor to remove public officer from office for gross neglect of duty, for corrupt conduct in office, misfeasance or malfeasance is self-executing and requires no legislation to make it effective (Const. 1908, art. 9, § 7). *People, ex rel. Clardy,* v. *Balch,* 196.
2. Act No. 176, Pub. Acts 1933, amending the general election law so as to provide for appointment of not more than 50 per cent. of election inspectors from the same political party for State and national elections *held,* not violative of either letter or spirit of the Constitutions of Michigan or the United States (Mich. Const., art. 16, § 2, U. S. Const., am. 14, § 1). *Attorney General, ex rel. Connolly,* v. *Reading,* 224.
3. An act of the legislature must be plainly at variance with some provision of the Constitution before a court will so declare it, doubtful questions being resolved in favor of validity. *Id.* 225.

CONSTITUTIONAL LAW—Continued.

4. Language in governor's message to special session of legislature that it was called "to reconsider several important matters" which had been before it in its general and preceding special sessions *held,* to require further designation before the subjects could be deemed submitted to it. *Smith* v. *Curran,* 366.
5. The guiding principle in sustaining legislation enacted at a special session is that it be germane to, or within, the apparent scope of the subjects which have been designated as proper fields for legislation. *Id.* 367.
6. The presumption is always in favor of the constitutionality of a statute passed at a special session of the legislature and it will be held within the call therefor if it can be done by any reasonable construction. *Id.*
7. The lowering of street grade at railroad crossing without first compensating abutting property owner for damages sustained thereby is not a taking of property without due process of law. *A. M. Campau Realty Co.* v. *City of Detroit,* 417.
8. A board or commission to which police power to regulate a profession is delegated has no legislative power to adopt rules and regulations as to practices thereof which the legislature has neither expressly nor inferentially outlawed. *Sullivan* v. *Michigan State Board of Dentistry,* 427.
9. Statute will be presumed constitutional where it may be construed in either of two ways, one of which is consistent with constitutionality. *Id.*

See CRIMINAL LAW (6); EVIDENCE (9); HIGHWAYS AND STREETS (4, 5); INJUNCTION (3); INTOXICATING LIQUORS (1); MUNICIPAL CORPORATIONS (6); OFFICERS (1, 3, 4); STATUTES (2, 6, 7); TAXATION (4).

CONSTRUCTION OF CONTRACT—See INSURANCE (2); SALES (6).

CONSTRUCTION OF STATUTE—See CONSTITUTIONAL LAW (3, 9); COSTS. (4); GARNISHMENT (3); MASTER AND SERVANT (39, 43); MOTOR VEHICLES (4); STATUTES (3).

CONTEMPLATION OF DEATH—See TAXATION (1, 2, 4).

CONTINUANCE—See ATTORNEY AND CLIENT (1).

CONTRACTS.

1. In action for salary under contract of employment as superintendent of country club, contract *held,* an annual contract for the calendar year as against contention that year began April 1st, the anniversary of commencement of employment. *Arnold* v. *Masonic Country Club,* 430.

CONTRACTS—Continued.

2. Acceptance of certificate of stock of holding company upon face of which reference was made to articles of association printed on back thereof and providing for assessments, constituted assent to provisions of an express contract. *Simons* v. *Groesbeck*, 496.

3. Rescission is not a vent for bad bargains unless induced by fraud, and not then unless promptly disaffirmed after discovery of the fraud. *Berg* v. *Hessey*, 599.

4. Actual agreement between mutual benefit association and its members must be ascertained from the entire constitution and by-laws constituting the contract, taking into consideration each and every clause. *Dunn* v. *Detroit Federation of Musicians*, 699.

See ACTION (2); APPEAL AND ERROR (1, 24); ASSUMPSIT (1, 2); BANKS AND BANKING (10); BILLS AND NOTES (5); EVIDENCE (1, 11); HUSBAND AND WIFE; INFANTS; INSURANCE (2, 13, 15); MANDAMUS (5); MASTER AND SERVANT (44); PRINCIPAL AND AGENT (1, 2); REFORMATION OF INSTRUMENTS; RELEASE (2, 3); SALES (1, 4–7); SPECIFIC PERFORMANCE (1); TORTS (3); WILLS (2).

CONTRIBUTION.

One tortfeasor who takes an assignment of a tort judgment against himself and another cannot enforce contribution against the other joint tortfeasor since the law does not concern itself with equities between joint wrongdoers. *Slater* v. *Ianni Construction Co.*, 492.

See PARTNERSHIP (2).

CONTRIBUTORY NEGLIGENCE—See APPEAL AND ERROR (22, 31); MOTOR VEHICLES (17, 20, 21, 23, 24); NEGLIGENCE (1, 2).

CONTROL—See MASTER AND SERVANT (36).

CONVERSION—See APPEAL AND ERROR (32); ASSUMPSIT (2); DAMAGES (2); EVIDENCE (5); FRAUD; JOINT ADVENTURES (1); MINES AND MINERALS (1, 2); TORTS (3); TROVER AND CONVERSION (1–3).

CONVEYANCES—See APPEAL AND ERROR (6); HOMESTEADS (1, 4, 5).

CONVICTION OF LESSER OFFENSE—See INDICTMENT AND INFORMATION (5).

CORPORATIONS.

1. Mere irregularity by corporation in filing annual report required by Act No. 327, § 82, Pub. Acts 1931, did not work suspension of its corporate powers, where report filed was later approved upon receipt of name of omitted director, so as to render corporation unable to bring summary proceedings to

CORPORATIONS—Continued.

recover possession of property sold on land contract executed before report was finally accepted. *Gregorian Building Co.* v. *Galvin*, 273.

2. Plaintiffs, as holders of cumulative preferred stock with prospect of big dividends, cannot at the same time have the interest on debentures for which such stock was exchangeable they have not owned or held and be a creditor of the corporation. *Doubleday* v. *Kalamazoo Citizens Loan & Investment Co.*, 280.

3. Court cannot alter the position of holders of cumulative preferred stock who elected not to exchange their stock for debentures nor make a new contract between such holders, corporation controlled by holders of common stock, and holders of debentures. *Id.*

4. Assessment on capital stock of holding company provided for in articles of association which were referred to on face and printed on reverse of stock certificate is enforceable against owner thereof since he took it with knowledge of such liability which is neither prohibited by statute nor contrary to public policy. *Simons* v. *Groesbeck*, 496.

5. Receiver of insolvent corporation should not be enjoined from performance of duty of collecting assets and paying proved debts. *Id.*

6. Although generally stockholders of bankrupt corporation are not subject to assessment on stock, where charter, articles of association, or statute provide for one, or stockholders consent to it upon fully paid-up stock, such liability is enforceable. *Id.*

7. Stockholders may voluntarily agree to assess themselves for the betterment of the corporation even though such assessment may not be authorized by statute. *Id.*

8. Assessment on capital stock of holding company, owning bank and trust company stock and authorized by articles of association of which the stockholders had notice, may be levied and collected by receivers although stock has been fully paid up, since it is an asset of the corporation. *Id.*

9. Court, for sufficient cause, may remove directors, order an election, appoint a receiver or enjoin dissipation of corporate assets, but cannot, under bill by stockholders of one corporation, exercise visitorial powers over another independent corporation by way of assuming direction of its affairs or management (3 Comp. Laws 1929, § 15328, subds. 2, 7, § 15330). *Nay* v. *Mid-West Petroleum Corp.*, 578.

See ASSUMPSIT (2); EQUITY (14, 15); LANDLORD AND TENANT (3); MORTGAGES (4).

CORROBORATION—See KIDNAPPING; MOTOR VEHICLES (24).

CORRUPT CONDUCT—See CONSTITUTIONAL LAW (1).

COSTS.

1. No costs are allowed where nature of appellant's brief is unsatisfactory. *Leibrand* v. *Curtright*, 98.
2. No costs are allowed where judgment for personal injuries is affirmed and both parties have appealed. *Watkins* v. *Gabriel Steel Co.*, 265.
3. On appeal in the nature of certiorari in civil action, prevailing party is granted costs in the Supreme Court (3 Comp. Laws 1929, § 15506). *Fraam* v. *Kelley*, 574.
4. In case involving determination of public question as to constitutionality and construction of taxation statute about which there has been much uncertainty, no costs are allowed (1 Comp. Laws 1929, § 3672). *In re Kutsche's Estate*, 660.
5. Costs are not allowed on dismissal of appeal where controlling question is not raised in appellee's brief. *Hochrein* v. *Gunther*, 682.

See APPEAL AND ERROR (33); EXECUTION (2).

COUNTIES—See DEPOSITARIES (2, 4); DRAINS (4); HIGHWAYS AND STREETS (1); MOTOR VEHICLES (13, 15); SUBROGATION; VENUE.

COUNTRY CLUB—See ACCORD AND SATISFACTION; CONTRACTS (1).

COUNTY CLERK—See TRADE-MARKS AND TRADE-NAMES (1).

COUNTY DRAIN COMMISSIONER—See DRAINS (1, 2).

COUNTY FUNDS—See DEPOSITARIES (4); SUBROGATION.

COUNTY ROAD COMMISSIONERS—See HIGHWAYS AND STREETS (4).

COUNTY SURVEYOR—See MUNICIPAL CORPORATIONS (13).

COUNTY TREASURER—See DRAINS (2).

COURT COMMISSIONERS.

Jurisdiction of circuit court commissioner in summary proceeding or circuit court on appeal therefrom is strictly statutory and does not include right to try title to land, determine whether an instrument is a land contract or, in legal effect, a mortgage, or equitable jurisdiction (3 Comp. Laws 1929, § 14975 *et seq.*). *Armstrong* v. *Grimm*, 437.

See APPEAL AND ERROR (13); FORCIBLE ENTRY AND DETAINER (1); JUDGMENT (4); VENDOR AND PURCHASER (1, 4, 5).

COURT RULES—See APPEAL AND ERROR (6, 13, 24, 36–38); COURTS; DISCOVERY (1–5); MANDAMUS (1); TRIAL (1).

COURTS.

Denial of motion to dismiss appeal from probate court for failure to comply with provisions of court rule giving circuit court jurisdiction *held*, proper, where circuit court had acquired and exercised jurisdiction by virtue of stipulation to transfer cause to jury calendar (Court Rule No. 57 [1931]). *In re Parker's Estate*, 80.

See APPEAL AND ERROR (25, 27); JURY (1); KIDNAPPING.

COVENANTS.

1. Building restriction cases are governed by particular facts and it is neither possible nor desirable to establish a measuring stick and thereafter cut cases to fit. *Hamburger* v. *Kramp*, 611.
2. Bill to enforce residential building restrictions and enjoin erection of gasoline filling station on lot several blocks away from lot owned by plaintiffs in same subdivision but upon another street which has lost much of its residential character partially because of efforts of one of plaintiffs in violating restrictions in same and adjoining plats *held*, properly dismissed where violation contemplated will not seriously affect plaintiffs' lot and they were moved by desire to prevent competition with nearby filling station which they operated. *Id.*

See EQUITY (10, 11).

COVERT ROADS—See HIGHWAYS AND STREETS (3–6).

CRANKING CAR—See MOTOR VEHICLES (2, 3, 7).

CREAMERY—See MOTOR VEHICLES (20); NEGLIGENCE (7).

CREDIBILITY—See CRIMINAL LAW (1, 26); WITNESSES (2, 9).

CREDIT—See CARRIERS.

CREDITORS—See CORPORATIONS (2); FRAUDULENT CONVEYANCES (1, 2); PARTNERSHIP (2–5).

CREDIT SALE—See GUARDIAN AND WARD (1, 4, 5).

CRIMINAL LAW.

1. Credibility of seven and one-half year old boy who had been kidnapped two years previously and weight to be given his testimony on trial of his abductors was for jury and, on motion for new trial, for court. *People* v. *Minchella*, 123.
2. There is no presumption that a man who is arrested is guilty of any offense, but what he may then say or do is admissible in its bearing upon effect of the arrest upon him. *Id.* 124.
3. The presumption is that one who is falsely accused will rely on his consciousness of innocence, while one who is guilty will resort to other means to obtain his freedom. *Id.*
4. Admission of testimony of arresting officer that defendant, on trial for kidnapping, had told of bootlegging activities *held*, proper in view of court's instruction that such testimony could not be taken as substantive evidence of crime charged. *Id.*
5. Admission of testimony of arresting officer that defendant, on trial for kidnapping, had offered a bribe *held*, proper, as tending to establish guilt where identification of defendant as an abductor had already been made. *Id.*

CRIMINAL LAW—Continued.

6. Report of psychopathic clinic or sanity commission on matter of defendant's sanity may not be introduced on his trial for murder over his objection that he be confronted with witnesses (Const. 1908, art. 2, § 19, 3 Comp. Laws 1929, § 17129). *People* v. *Saccoia,* 132.

7. Psychopathic department of court and sanity commissions are public bodies and accused has right of access to their reports to obtain knowledge of their contents (3 Comp. Laws 1929, §§ 16520, 17241, as amended by Act No. 317, Pub. Acts 1931). *Id.* 133.

8. The people have the right to have entire report of sanity commission placed before the jury on cross-examination of witness placed on stand by defendant and examined by him as to contents. *Id.*

9. Speculative testimony of member of sanity commission as to his impression of what the mental condition of defendant might have been at a time prior to that in relation to which examination by commission was held and before doctor ever knew him *held,* properly excluded. *Id.*

10. Reports of psychopathic clinic and sanity commission based upon observation of people making them, are not admissible upon the part of the people without proof of authenticity and truthfulness, requiring witness on stand for examination and subject to cross-examination. *Id.*

11. Whether or not member of sanity commission is an adverse witness on trial of defendant for murder is primarily a question for court to determine. *Id.*

12. Failure to indorse on information for obtaining money under false pretenses from insurance company name of doctor called to attend one allegedly injured by prearranged automobile accident *held,* reversible error, where privilege attached to his relationship with patient had been waived by latter. *People* v. *Kayne,* 186.

13. Doctor called to attend woman shortly after alleged injury in automobile accident was a *res gestæ* witness in prosecution of driver charged with obtaining money from insurance company by false pretenses, being present at, and a party to, a material part of the transaction. *Id.*

14. Evidence of acts and statements of woman who allegedly joined defendant and others to obtain money from his automobile insurance company by false pretenses, made at the time of the commission of the crime, are part of the *res gestæ* and admissible against each of the other joint wrongdoers. *Id.*

15. *Res gestæ* are the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. *Id.* 187.

16. *Res gestæ* are the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction and render the latter necessary to exhibit the former in its proper effect. *Id.*

CRIMINAL LAW—Continued.

17. Acts and deeds emanating from the transaction as long as it continues become part of it, the time limits not being arbitrary, and are admissible in evidence as *res gestæ*. *Id.*

18. Trial court committed reversible error in refusing defendant's application to have name of *res gestæ* witness indorsed on information and in failing to require his presence in court in the absence of a showing of inability to produce him. *Id.*

19. Conviction of a crime may not properly be claimed by prosecution upon evidence which expressly or by implication shows but a part of the *res gestæ*, if it appear that evidence of the rest of the transaction is attainable. *Id.*

20. Prosecution may not be required to indorse name of witness nor call him unless he is a *res gestæ* witness; nor need it indorse and call all such witnesses, especially when crime charged is not one of violence; but he should be called if his testimony is reasonably necessary to protect accused against a false accusation. *Id.*

21. Charge of the court in criminal case, lacking some details essential to a technically correct statement of the law involved *held*, not reversible error in the absence of requests to charge preferred by defendant (3 Comp. Laws 1929, § 17322). *Id.*

22. On appeal from conviction for obtaining money under false pretenses from insurance company, defendant may not complain of admission of certain insurance office records, where he later testified concerning this insurance. *Id.*

23. In trial on charge of entering horse shed, without breaking, with intent to commit larceny, exclusion of testimony offered by defendant as to his belief that he had the right to take property in question from place taken *held*, reversible error. *People* v. *Shaunding*, 218.

24. Slight variance in testimony as to exact time of various events as testified to by witnesses in prosecution of defendants under charges of burglary and larceny *held*, unimportant, where events are numerous and it is evident that all of them occurred within a short time of one another. *People* v. *Butler*, 408.

25. Remark of trial judge that he never heard of anyone requesting the reading of stenographic notes taken during defendant's confession, made when defendant's attorney demanded same, *held*, not prejudicial error. *People* v. *Rosa*, 462.

26. Verdict of acquittal of a crime should not be directed where there is direct evidence of defendant's guilt, since the credibility of witnesses and weight to be given the testimony are matters for consideration by the jury. *People* v. *Rose*, 529.

27. Rejection of testimony proffered to impeach rebuttal witnesses asserting defendant had a chain blackjack in his possession on prior occasions after his denial of same is affirmed by an equally divided court. *Id.* 530.

CRIMINAL LAW—Continued.

28. While the order of introduction of testimony is a matter largely in the discretion of the trial court and such discretion will not ordinarily be interfered with, defendant is entitled to fair trial and have all the testimony in chief introduced in its proper order. *Id.*

29. Remarks of the trial judge in trial of one accused of statutory rape, which operated as an assurance to the jury that the court would save error, if any, on their part by examination of the record of birth of the prosecutrix *held*, reversible error, since accused had right to have issue of her age determined by jury without any thought of divided responsibility (Act No. 328, § 520, Pub. Acts 1931). *People* v. *Prescott*, 606.

30. Trial court was not in error in holding verdict of guilty was not against great weight of evidence, where proofs presented an issue of fact as to commission of the act by accused. *Id.* 607.

See JURY (4); KIDNAPPING; MALICIOUS PROSECUTION (1); RAPE (1); WITNESSES (3, 8, 9).

CROSS-APPEAL—See APPEAL AND ERROR (14, 15).

CROSS-EXAMINATION—See CRIMINAL LAW (8, 10); KIDNAPPING.

CROSSING—See RAILROADS (1).

CROSS TIES—See MASTER AND SERVANT (41).

CUMULATIVE PREFERRED STOCK—See CORPORATIONS (2, 3).

CURING ERROR—See APPEAL AND ERROR (5, 6); HABEAS CORPUS (1).

CUSTODY—See ATTACHMENT (1); SHERIFFS AND CONSTABLES (2).

DAMAGES.

1. Measure of damages for personal injuries sustained by man who owns and works his own farm is the value, in the open market, of the services which he had been able to perform before the injury and was, thereafter, unable to perform. *Hunter* v. *Baldwin*, 107.

2. Judgment of $8,000 for alleged conversion of oil and gas leasehold interest *held*, not only excessive because of speculative nature of testimony as to damages, but based on elements not within the scope of the action of trover for such conversion, where measured by what could have obtained had there been no lease. *Eadus* v. *Hunter*, 233.

3. Charge of court in action by one joint adventurer against co-adventurer for conversion of joint property that it was to be sold at price agreed upon in so far as one had been agreed to, or, otherwise, at fair market value and recovery was to be based upon agreed value or fair market value *held*,

DAMAGES—Continued.

proper as against contention that recovery should be based upon depreciated selling price at which properties were sold by defendant, if any profit were then shown. *Mitchell* v. *Reolds Farms Co.*, 302.

4. On appeal from verdict and judgment of $7,000 for damages suffered by patient as result of doctor's negligent malpractice, reversal is directed notwithstanding plaintiff's claim that remittitur of $1,000 would correct alleged error in charge where court submitted as elements of damage pecuniary loss and impairment or loss of earning capacity without evidence on such elements having been presented, where said amount as claimed in the bill of particulars was not called to attention of jury and verdict indicates a considerable sum must have been allowed therefor. *Sima* v. *Wright*, 353.

5. Judgment of $3,000 for personal injuries sustained by 61-year old miner when struck by defendant's car while he was walking along highway *held*, not excessive, where he suffered severe pain, confinement in hospital for three weeks and permanent disability. *Lapachin* v. *Standard Oil Co.*, 478.

See ACTION (2); APPEAL AND ERROR (4, 6, 11); EMINENT DOMAIN (2, 3); EQUITY (14); EVIDENCE (5); INTEREST (3); MOTOR VEHICLES (22); MUNICIPAL CORPORATIONS (11); VENDOR AND PURCHASER (5).

DANGEROUS WEAPONS—See CRIMINAL LAW (27); INDICTMENT AND INFORMATION (3).

DEATH.

On petition of nephews and nieces claiming escheated estate, son of deceased is presumed dead where he has been absent for over 30 years and his whereabouts are unknown. *In re Wright's Estate*, 587.

See APPEAL AND ERROR (4); BENEFICIAL ASSOCIATIONS (4); BRIDGES; ESTATES OF DECEDENTS (3); INSURANCE (3, 6, 9); MASTER AND SERVANT (10, 11); MOTOR VEHICLES (13); TAXATION (1–4); WILLS (11); WITNESSES (10).

DEATH BENEFIT—See BENEFICIAL ASSOCIATIONS (4).

DEBENTURES—See CORPORATIONS (2, 3).

DEBTOR AND CREDITOR—See APPEAL AND ERROR (23); BANKS AND BANKING (1); PARTNERSHIP (1, 2, 4, 5).

DEBT SERVICE—See MUNICIPAL CORPORATIONS (7); STATUTES (1).

DECISION ON MERITS—See APPEAL AND ERROR (38).

DEDICATION.

1. The matter of dedication of land for public highway is largely one of intention and since no presumption of intent to dedicate land arises, it is necessary that an unequivocal showing be made of intent on the part of the owner to give it over to the use of the public and an acceptance on the part of the public. *Hawkins* v. *Dillman*, 484.
2. Land between highway and railroad right of way *held*, not dedicated to highway purposes although deed to railroad company described land as bounded by highway, since description in such deed does not afford basis for presumption of dedication where railroad fences were not located on adjacent land and there was neither acceptance or user by the public. *Id.*
3. Fact that strip of land was being used for electric railway purposes, where located between highway and railroad right of way is indicative that there was no intention to make dedication thereof at time of platting lands on other side of railroad. *Id.*
4. On question of dedication, subdivision plats of property by some heirs and grantees of others of property which had been apportioned between them on one side of railroad right of way does not bind or estop heirs who are owners of legal title of strip of land on other side of railroad which had not been apportioned nor included in plat and did not revert to them until after the platting. *Id.*

DEDUCTIONS—See MASTER AND SERVANT (39).

DEEDS—See APPEAL AND ERROR (6); DEDICATION (2); FRAUDULENT CONVEYANCES (1).

DEFAULT—See DEPOSITARIES (3, 4); MORTGAGES (7, 8, 10, 12, 13); VENDOR AND PURCHASER (1, 6–8).

DEFECTS—See HIGHWAYS AND STREETS (1).

DEFENSES—See BILLS AND NOTES (3); FORCIBLE ENTRY AND DETAINER (1); INSURANCE (7); JUDGMENT (3); MALICIOUS PROSECUTION; MASTER AND SERVANT (37); VENDOR AND PURCHASER (1).

DEFICIENCY—See VENDOR AND PURCHASER (7).

DELAY—See DRAINS (3); MASTER AND SERVANT (19, 38); VENDOR AND PURCHASER (8).

DELIVERY—See ESTOPPEL (5); FRAUD; INSURANCE (1, 3); TROVER AND CONVERSION (1); VENDOR AND PURCHASER (3).

DENTISTRY—See INJUNCTION (3).

DEPOSITARIES.

1. The *pro rata* clause of a public fund depository bond merely sets a maximum amount payable by the surety. *County of Oakland* v. *Central West Casualty Co.*, 117.

DEPOSITARIES—Continued.

2. The *pro tanto* subrogation clause of a public fund depository bond does not fix a maximum amount of liability but undertakes to require county to surrender certain rights against principal and, being in contravention of statute intending that bond shall be security in addition to liability of principal, is void (1 Comp. Laws 1929, §§ 1193–1202). *Id.*

3. Provision of public fund depository bond limiting time within which to commence action against surety to period between 60 days and six months after default of principal, being in conflict with statutory mandate that bond be conditioned for the safekeeping and repayment of moneys deposited, *held*, invalid in action of assumpsit on the bond instituted more than six months after default (1 Comp. Laws 1929, § 1193 *et seq.*). *Sparks* v. *Detroit Fidelity & Surety Co.*, 183.

4. Upon default of depository of funds deposited by county treasurer the debt becomes the obligation of the surety to the extent of the principal sum of the bond together with interest from the time of default of the principal (1 Comp. Laws 1929, § 1193 *et seq.*). *Id.*

See SUBROGATION.

DEPOSITIONS—See ESCHEAT (2).

DEPUTY COMMISSIONER—See MASTER AND SERVANT (23).

DESCENT AND DISTRIBUTION—See ESCHEAT (2).

DEVIATION FROM DIRECT ROUTE—See MASTER AND SERVANT (5).

DIATHERMY MACHINE—See EVIDENCE (13, 14).

DIRECTED VERDICT—See APPEAL AND ERROR (2); CRIMINAL LAW (26); JOINT ADVENTURES (2); TROVER AND CONVERSION (2); WILLS (9).

DIRECTORS—See CORPORATIONS (1, 9).

DISABILITY—See MASTER AND SERVANT (6, 8, 28).

DISAFFIRMANCE OF CONTRACT—See INFANTS.

DISCHARGE—See ACCORD AND SATISFACTION; ACTION (2); INSURANCE (8); RELEASE (3).

DISCOVERY.

1. Entry of order for examination of defendant, as to his alleged fraudulent representations made to plaintiff, pursuant to rule for discovery *held*, not an abuse of discretion notwithstanding such matters were obviously within knowledge of plaintiff, although the court might very properly have excluded such matters (Court Rule No. 41 [1933]). *Bartenbach* v. *Smith*, 653.

DISCOVERY—Continued.

2. One of the main purposes of rule allowing discovery before trial is to shorten the time of trial, not to provide an additional inquisitorial procedure (Court Rule No. 41 [1933]). *Id.*

3. In action for damages for fraud, order for discovery as to defendant's knowledge of condition of companies as to which he made representations in sale of stock, *held*, proper since such matters were peculiarly within knowledge of defendant and unknown to plaintiff and a material part of her cause of action (Court Rule No. 41 [1933]). *Id.*

4. Court did not abuse its discretion in entering order for discovery which embraced matters not included in plaintiff's application therefor but which pleadings revealed were in a state of confusion (Court Rule No. 41 [1933]). *Id.*

5. Operation of rule for discovery before trial must be left to discretion of trial judges (Court Rule No. 41 [1933]). *Id.*

See LIMITATION OF ACTIONS (1, 2); SHERIFFS AND CONSTABLES (1).

DISCOVERY OF FRAUD—See CONTRACTS (3).

DISCRETIONARY POWER—See CARRIERS; ESCHEAT (1).

DISCRETION OF COURT—See APPEAL AND ERROR (39); CRIMINAL LAW (28); DISCOVERY (1, 4, 5); JURY (3); NEW TRIAL (1); TRIAL (4).

DISCRETION OF TOWNSHIP BOARD—See INTOXICATING LIQUORS (2).

DISHES—See MASTER AND SERVANT (22).

DISMISSAL AND NONSUIT—See ATTACHMENT (2); HIGHWAYS AND STREETS (1); INJUNCTION (3).

DISMISSAL OF APPEAL—See COSTS (5).

DISSOLUTION—See BANKS AND BANKING (4).

DISTANCE—See MASTER AND SERVANT (5).

DISTRIBUTION—See PARTNERSHIP (2).

DIVIDENDS—See CORPORATIONS (2).

DIVORCE.

1. Modification of decree of divorce to reduce monthly alimony payments of $100 to $70 *held*, justified on showing made, subject to change on showing of former husband's ability to make larger payments. *Dull* v. *Dull*, 261.

DIVORCE—Continued.

2. Record *held*, to justify decree of separate maintenance to wife on ground of extreme and repeated cruelty. *Butler* v. *Butler*, 387.

See GARNISHMENT (2); WITNESSES (1).

DOMICILE—See INJUNCTION (1).

DRAINAGE—See EVIDENCE (5).

DRAIN COMMISSIONER—See DRAINS (1, 2).

DRAINS.

1. Burden of proving lack of jurisdiction of drain commissioner *held*, not shown where major purpose of project is that of draining open country and while characteristics of a sewer are present in a portion of it, village is not permitted to run raw sewage into it. *Village of Clawson* v. *Van Wagoner*, 148.
2. Neither county treasurer who is not shown to have had possession of void special assessments collected from plaintiff's assignor for drain construction nor defendant county drain commissioner who had no connection with drain proceedings may be held personally liable in action at law brought for return of such assessments. *Brooks* v. *County of Oakland*, 637.
3. Delay beyond 30 days after payment of special assessment for drains is bar to action to recover same, since statutory leave expires in that time (1 Comp. Laws 1929, § 4927). *Id.*
4. County is not liable for refund of void drain taxes since its officers are not agents of the county but perform special statutory duties for drainage districts, notwithstanding statute providing for payment of drain bonds out of general county funds when drain fund is insufficient, since such payments are merely by way of advancements to be reimbursed from drain tax collections (1 Comp. Laws 1929, § 4937). *Id.*

See ESTOPPEL (4); EVIDENCE (4).

DRIVING IN THE DARK—See MOTOR VEHICLES (11).

DROWNING—See BRIDGES.

DUE PROCESS—See CONSTITUTIONAL LAW (7); TAXATION (4).

DUES—See BENEFICIAL ASSOCIATIONS (4).

EARNING CAPACITY—See MASTER AND SERVANT (25, 29–32, 39).

EASEMENTS—See APPEAL AND ERROR (4, 6); EJECTMENT; GUARDIAN AND WARD (5); HOMESTEADS (4).

ECONOMIC DEPRESSION—See MANDAMUS (4).

EJECTMENT.

Although an easement is an intangible and incorporeal right, when its exercise requires complete possession of the land itself to the exclusion of the holder of the fee, such as use for a public street, ejectment is the proper remedy. *Hawkins* v. *Dillman*, 483.

See EQUITY (4); MORTGAGES (5); QUIETING TITLE (1); STATUTES (2).

ELECTION BETWEEN COUNTS—See INDICTMENT AND INFORMATION (4).

ELECTION OF REMEDY—See VENDOR AND PURCHASER (6).

ELECTIONS.

1. Statute requiring that not more than 50 per cent. of election inspectors for State and national elections shall belong to same political party *held*, not to make membership in a political party a prerequisite or disqualification to appointment as election inspector (Act No. 176, Pub. Acts 1933). *Attorney General, ex rel. Connolly*, v. *Reading*, 225.
2. Claim that statute requiring that not more than 50 per cent. of election inspectors for State and national elections shall belong to same political party is impossible of performance *held*, without merit (Act No. 176, Pub. Acts 1933). *Id.*

See CONSTITUTIONAL LAW (2); CORPORATIONS (9); MANDAMUS (1); MUNICIPAL CORPORATIONS (1, 5, 6); STATUTES (3).

ELECTRICAL MACHINERY—See EVIDENCE (13, 14); MASTER AND SERVANT (13).

ELECTRIC RAILWAYS—See DEDICATION (3); RAILROADS (2).

ELECTRIC SHOCK—See MASTER AND SERVANT (13).

EMBEZZLEMENT—See MALICIOUS PROSECUTION.

EMERGENCY—See MANDAMUS (1).

EMINENT DOMAIN.

1. Consequential damages resulting from a subsequent lowering of a street grade at railroad crossing could not have been considered by jury in main condemnation proceedings. *A. M. Campau Realty Co.* v. *City of Detroit*, 417.
2. In case of partial condemnation of property held under a profitable long-term lease, a lessee might be entitled to damages in addition to a reduction of the annual rent for the remainder of the term, although the eminent domain clause in the lease provides solely for a reduction of rent. *Pierson* v. *H. R. Leonard Furniture Co.*, 508.

EMINENT DOMAIN—Continued.

3. The measure of a lessee's damages for the condemnation of his leasehold interest is the market value of the leasehold condemned, that is, the difference between the rental value of the remainder of the term and the rent reserved in the lease or the actual value of the leasehold where there is no market value. *Id.*

See APPEAL AND ERROR (28); EQUITY (4–13); LANDLORD AND TENANT (1–7).

ENCROACHMENTS—See WORK AND LABOR.

ENTERING WITHOUT BREAKING—See CRIMINAL LAW (23).

ENTRY OF JUDGMENT—See MOTOR VEHICLES (13).

EQUALLY DIVIDED COURT—See CRIMINAL LAW (27); SPECIFIC PERFORMANCE.

EQUAL PROTECTION—See TAXATION (4).

EQUITABLE ESTOPPEL—See ESTOPPEL (1).

EQUITY.

1. Chancery practice in Michigan is based upon that of England and largely copied from that of New York. *Wurzer* v. *Geraldine,* 286.
2. The specific character of the relief sought in equity is a matter for the pleading, not for the process. *Cleffy* v. *Allegan State Savings Bank,* 364.
3. Underwriting in chancery summons in suit to reform and foreclose a mortgage which gave notice of prayer for personal as well as property relief *held,* sufficient. *Id.*
4. Jurisdiction of bill to quiet title to strip of land used as part of wide public street is retained in equity in order to grant injunction conditioned on institution of condemnation proceedings, where real relief sought is payment for the land and ejectment is not an adequate remedy. *Hawkins* v. *Dillman,* 483.
5. On bill to determine rights of lessors, lessee and latter's mortgagees in joint award under condemnation proceedings, it is not the function of court of equity to rewrite eminent domain clause in 99-year lease but to determine equitable result based on the evidence. *Pierson* v. *H. R. Leonard Furniture Co.,* 507.
6. It would be inequitable to give lessee the major portion of joint award for part of premises taken under condemnation proceedings, where the lease provides that the lessee's interest in the leasehold shall be held by the lessors as security for the payment of rent to the lessors. *Id.* 508.
7. In chancery suit for apportionment of joint award between lessors, lessee and latter's mortgagees in case of partial condemnation of property of very doubtful rental value, the court

EQUITY—Continued.

was in error in giving the lessee and its mortgagee the major portion of the award upon the theory that the lease was to continue for 80-year balance of term when there was every indication that lessee would not continue it after the payment of the award. *Id.*

8. No arbitrary rule may be set up which may be applied in every suit brought in chancery to determine value of interest of various parties concerned in joint award given in condemnation proceedings for part of premises subject to long-term lease. *Id.* 509.

9. In apportioning joint award given in condemnation proceedings, court of chancery must consider and safeguard the obligation and ability of the lessee to perform the covenants of the lessee for the portion of the premises not condemned during the remainder of the term. *Id.*

10. Division of joint award for part of premises subject to long-term lease taken under power of eminent domain is equitably made when lessee receives interest from fund consisting of award less sum impounded for cost of rehabilitating building, present value of lessors' loss of rental, past due rent and taxes, and lessors receive past due rent and present value of their loss of rental at once and principal of above fund at termination of lease. *Id.*

11. An apportionment of joint award between lessors and lessee in case of partial condemnation of property subject to long-term lease is equitable when the award, after deduction of all past due rent and taxes, present value of the reduction of rent provided by the lease over the remainder of the term and the cost of rehabilitation, is invested in highest grade securities, lessee receives or is credited with the interest therefrom as long as it carries out the covenants of the lease, and the principal is paid to lessors at end of term, the award after proper deductions being thus substituted for the property taken. *Id.*

12. It is unnecessary to impound or trustee balance of joint award for partial condemnation of land under long-term lease after proper deductions, where fee is owned by lessors and there are no conflicting interests among them. *Id.* 510.

13. Of joint award for taking by condemnation part of valuable city lot subject to long-term lease after deduction of present value of loss of lessors' rentals and cost of rehabilitating building, balance is turned over to lessors with exclusive title thereto and subjecting them to charge of interest payable as credit to lessee for duration of his relationship as such at rate fixed by court of equity from time to time as if fund were invested in highest grade securities. *Id.*

14. Chancery court's visitorial jurisdiction over corporate officers and trustees to compel restoration of certain improperly alienated corporate property or respond in damages, conferred by statute, does not extend to suit by stockholders for alleged

EQUITY—Continued.

fraud in inducing exchange of stock for that of another corporation (3 Comp. Laws 1929, § 15328, subds. 2, 7, § 15330). *Nay* v. *Mid-West Petroleum Corp.*, 578.

15. Bill by stockholders of one corporation praying relief against promoters of another corporation and others for inducing exchange of stock and seeking cancellation of agreement as between promoted corporation and third corporation, accounting and drilling of offset wells by latter and for other relief *held*, multifarious as not within either chancery's visitorial jurisdiction as conferred by statute or general equity jurisdiction (3 Comp. Laws 1929, § 15328, subds. 2, 7, § 15330). *Id.*

See CONTRIBUTION (1); CORPORATIONS (9); COURT COMMISSIONERS; COVENANTS (2); FORCIBLE ENTRY AND DETAINER (1); LANDLORD AND TENANT (2, 3, 5); MORTGAGES (3, 9); QUIETING TITLE (1, 2); SHERIFFS AND CONSTABLES (2); VENDOR AND PURCHASER (1).

ESCHEAT.

1. Statute authorizing claimant to file satisfactory proof of right to an escheated estate with board of escheats vests no arbitrary or discretionary power in the board but commands that sufficient proof be deemed satisfactory proof (3 Comp. Laws 1929, § 13476). *In re Wright's Estate*, 586.
2. Evidence, including depositions by claimants, documents, letters and certified copies of records presented by claimants of escheated estate *held*, ample to prove them sole heirs at law of deceased. *Id.*

See CERTIORARI (1); DEATH.

ESCROW—See ESTOPPEL (5); FRAUD; TROVER AND CONVERSION (1).

ESTATES OF DECEDENTS.

1. Presumption that services rendered by children to their parents are gratuitous does not apply in case where man who came to live at decedent's home as a boarder remained throughout in that relationship and performed odd jobs for decedent before and after working hours. *Pupaza* v. *Laity*, 250.
2. Evidence *held*, sufficient to make question of whether or not boarder rendered services for decedent with expectation of pay an issue of fact for the jury. *Id.*
3. Instructions that if payment for personal services rendered deceased was to be made after death that recovery could be had for entire period during which they were given but if such time were not set the statute of limitations limited recovery to period of six years immediately preceding death *held*, correct, where verdict was for considerably less than amount claimed (3 Comp. Laws 1929, § 13976). *Id.*

See DEATH; ESCHEAT (2); WILLS (1–3, 6); WITNESSES (4).

ESTOPPEL.

1. Generally, to constitute an equitable estoppel, the statement or conduct which is alleged to have worked the estoppel must have been a statement made, or conduct known, to the party who was expected to act upon it or to his agent or someone in privity with him. *R. C. Mahon Co.* v. *R. S. Knapp Co.*, 67.
2. The doctrine of estoppel rests upon the inequity of permitting one to allege the existence of facts which by his own conduct he has induced another to believe do not exist. *Id.*
3. Acquiescence or tacit assent means the neglect to promptly and actively condemn the unauthorized act and to seek judicial redress, after knowledge of it, whereby innocent third parties have been led to put themselves in a position from which they cannot be taken without loss. *Lamb* v. *Abendroth*, 73.
4. Village *held*, estopped from claiming want of notice and irregularities in drain apportionment proceedings where it had actual notice of them and allowed incurring of expense of construction without pursuing remedy of certiorari then open to it, especially since the village was a moving party in furthering the project constructed in part to care for its particular needs and which, as constructed, saves it over twice the amount of assessment (Act No. 331, Pub. Acts 1927). *Village of Clawson* v. *Van Wagoner*, 148.
5. Husband's delivery of escrowed oil and gas lease of property they owned by the entireties contrary to wife's rights therein *held*, ratified by wife, where she used money received therefor knowing it came to her by reason of such delivery, and estopped her from recovering damages resulting therefrom. *Eadus* v. *Hunter*, 233.

See BANKS AND BANKING (8, 9); DEDICATION (4); EVIDENCE (6); GARNISHMENT (1); MASTER AND SERVANT (3); PRINCIPAL AND SURETY (2); TRADE-MARKS AND TRADE-NAMES (3); VENDOR AND PURCHASER (7–9).

ETHICS—See ATTORNEY AND CLIENT (1).

EVIDENCE.

1. Parol evidence that indorser was induced to indorse promissory note by fraud of payee *held*, not an attempt to vary the terms of a written contract. *Peoples Wayne County Bank of Dearborn* v. *Harvey*, 47.
2. Parol evidence is admissible to show that the execution of a written instrument was procured by fraud, for the purpose of invalidating the instrument. *Id.*
3. Exclusion of reports of psychopathic clinic and sanity commission when sought to be introduced by defendant, charged with murder, for purpose of impeaching member of sanity commission called by defendant *held*, proper, in view of holding by court that witness was not an adverse one. *People* v. *Saccoia*, 133.

EVIDENCE—Continued.

4. Public officers are presumed to act in accordance with the law, so where proceedings designating project as drain are conducted by proper drain officers under the drain law, it will be assumed project is a drain until the contrary is shown. *Village of Clawson* v. *Van Wagoner*, 148.

5. Testimony, in action for claimed conversion of leasehold interest under oil and gas lease, relative to lessened value of lands by reason of nearby wells and possible effect of drainage of oil *held*, highly speculative. *Eadus* v. *Hunter*, 233.

6. Generally, where an admission is made on one trial, the admitting party, on a subsequent trial, is estopped from taking a position inconsistent with that taken on the former trial. *Mitchell* v. *Reolds Farms Co.*, 302.

7. Judicial admissions made on one trial in order to be binding upon a subsequent trial must have been intelligently and deliberately, and not inadvertently, made as a fact and not merely to expedite the particular proceeding. *Id.*

8. Admission made upon one trial that proceeds of sale of four houses had been settled for, discovered on second trial to have been inadvertently made, *held*, not conclusive. *Id.*

9. Printed copies of the Constitution and statutes of any other State of the United States published under the authority of that State or commonly used as evidence in its courts may be admitted in all courts of this State as *prima facie* evidence thereof or the court may take judicial notice of such statute (3 Comp. Laws 1929, § 14179). *Id.*

10. The common law of any other State of the United States may be proved as a fact by parol evidence and the books of reports of cases adjudged in their courts may be admitted as evidence or the court may take judicial notice of such law (3 Comp. Laws 1929, § 14181). *Id.* 303.

11. Proof of Florida statutes permitting recovery of interest at eight per cent. *held*, introduced in proper manner in action brought in this State on a contract made, performed and concerning property in Florida (3 Comp. Laws 1929, § 14179). *Id.*

12. In action between members of a joint adventure in the development and sale of a real estate subdivision the receipt of a prospectus in evidence and examination of witnesses with respect thereto *held*, without error. *Id.*

13. In action for alleged negligent malpractice resulting in burns from diathermy machine, element in hypothetical question that flesh stuck to the plates *held*, prejudicial, where plaintiff did not so testify. *Sima* v. *Wright*, 352.

14. Controlling hypothetical question to ascertain duty of physician under local practice in use of diathermy machine, grounded on element that patient "repeatedly" complained of being "burned" *held*, technically objectionable, although not such error as to require reversal without a new trial, where plaintiff did not precisely so state and question was not one exclusively of medical knowledge. *Id.*

EVIDENCE—Continued.

15. Testimony of doctor of osteopathy as expert on local medical practice *held,* inadmissible where no showing is made of his knowledge of such practice. *Id.* 353.

16. In action for services rendered township, parol evidence of action of township board was properly received to supplement imperfectly kept records, but not to change them. *McGaughan* v. *West Bloomfield Township,* 554.

See ACCORD AND SATISFACTION; ADVERSE POSSESSION (1, 3); APPEAL AND ERROR (1, 2, 6, 9, 12, 20, 22, 26, 28, 32); BANKS AND BANKING (3); CERTIORARI (1, 2); CRIMINAL LAW (1, 4, 5, 9, 14, 17, 19, 20, 22–24, 26–28, 30); DAMAGES (4); EQUITY (5); ESCHEAT (1, 2); ESTATES OF DECEDENTS (2); FALSE PRETENSES (1); FRAUD; FRAUDULENT CONVEYANCES (1); HIGHWAYS AND STREETS (2); HUSBAND AND WIFE; INDICTMENT AND INFORMATION (2, 4); INSURANCE (1, 4, 6); INTEREST (1); JOINT ADVENTURES; KIDNAPPING; LANDLORD AND TENANT (2); LARCENY (2); MASTER AND SERVANT (7, 15, 28, 40, 41, 45); MOTOR VEHICLES (13, 17, 21, 23, 24); MUNICIPAL CORPORATIONS (16); NEGLIGENCE (2–4, 7); NOVATION (2); OFFICERS (8); PRINCIPAL AND AGENT (1, 2); PRINCIPAL AND SURETY (2); RAPE (3); SALES (2, 7); TAXATION (2); TORTS (1); TRIAL (2, 4); TROVER AND CONVERSION (2, 3); WILLS (2, 3, 5–10); WITNESSES (1, 4, 8–10).

EXAMINATION BY COURT—See KIDNAPPING (1).

EXCESSIVE DAMAGES—See DAMAGES (2, 5); MOTOR VEHICLES (22).

EXCESSIVE SPEED—See MOTOR VEHICLES (17).

EXCHANGE OF STOCK—See EQUITY (14, 15).

EXECUTION.

1. Assignee of execution who knew of execution against his assignor is not entitled to prevail as mere assignee when assignor's judgment creditor seeks to set off the executions one against the other (3 Comp. Laws 1929, § 14552, subd. 2). *Fraam* v. *Kelley,* 573.

2. Execution issued under decree assigned by client to attorney in satisfaction of his lien thereon for services is not subject to set-off by assignor's judgment creditor's execution for the amount of attorney's taxable fees and disbursements (3 Comp. Laws 1929, § 14552, subd. 5). *Id.* 574.

See APPEAL AND ERROR (26, 33); EVIDENCE (2); VENDOR AND PURCHASER (3, 6).

EXECUTORS AND ADMINISTRATORS—See APPEAL AND ERROR (4); ATTACHMENT (3); MOTOR VEHICLES (19, 21, 22).

EXEMPTION—See APPEAL AND ERROR (26).

EXPENSE OF OBEDIENCE—See STATUTES (4).

EXPERT TESTIMONY—See EVIDENCE (15).

EXPRESS WARRANTIES—See SALES (1, 2).

EXPULSION—See BENEFICIAL ASSOCIATIONS (4).

EXTENSION—See FRAUD; MORTGAGES (2, 3).

EXTREME CRUELTY—See DIVORCE (2).

EYE INJURY—See MASTER AND SERVANT (7, 15, 19, 22).

EYEWITNESSES—See INDICTMENT AND INFORMATION (3).

FACILITY OF PAYMENT CLAUSE—See APPEAL AND ERROR (30); INSURANCE (7, 8).

FALSE ACCUSATION—See CRIMINAL LAW (3, 20).

FALSE IMPRISONMENT—See JUDGMENT (3); MALICIOUS PROSECUTION.

FALSE PRETENSES.

Insurance company's record of serving notice of cancellation of defendant's automobile insurance some time after the commission of alleged offense of obtaining money from company under false pretenses *held*, inadmissible on trial as immaterial and possibly prejudicial. *People* v. *Kayne*, 188.

See CRIMINAL LAW (12–14, 22); WITNESSES (3).

FALSE RETURN—See LIMITATION OF ACTIONS (1); SHERIFFS AND CONSTABLES (1); VENDOR AND PURCHASER (4, 5).

FAMILY CONFLICT—See WILLS (7, 8).

FARMER—See DAMAGES (1); MOTOR VEHICLES (22).

FEES—See APPEAL AND ERROR (33); ATTORNEY AND CLIENT (2); CARRIERS; EXECUTION (2); SHERIFFS AND CONSTABLES (2); THEATERS AND SHOWS (2).

FENCES—See DEDICATION (2).

FILIAL SERVICE—See SPECIFIC PERFORMANCE.

FILING—See MECHANICS' LIENS (2); TRADE-MARKS AND TRADE-NAMES (1).

FINAL ACCOUNT—See APPEAL AND ERROR (37).

FINAL JUDGMENTS—See JUDGMENT (5); MORTGAGES (10–14).

FINAL ORDER—See MORTGAGES (16).

FINANCIAL ABILITY—See LANDLORD AND TENANT (3).

FINDING OF BOARD OF ESCHEATS—See CERTIORARI (1).

FINDING OF COURT—See ACTION (1); ADVERSE POSSESSION (1); APPEAL AND ERROR (22, 23); INSURANCE (1); MOTOR VEHICLES (17); MUNICIPAL CORPORATIONS (13); TAXATION (2); VENDOR AND PURCHASER (7).

FINDING OF DEPARTMENT OF LABOR AND INDUSTRY—See APPEAL AND ERROR (9); MASTER AND SERVANT (7, 11, 15, 41).

FINDING OF FACT—See APPEAL AND ERROR (23).

FINDING OF GOVERNOR—See CARRIERS.

FINDING OF JURY—See NEGLIGENCE (3).

FIRE INSURANCE—See INSURANCE (13, 14).

FIRES—See JUDGMENT (9).

FIRM DEBTS—See BANKS AND BANKING (5, 7); PARTNERSHIP (5).

FIRST COMPLAINT OF PROSECUTRIX—See RAPE (3).

FIRST PREMIUM—See INSURANCE (3).

FISCAL YEAR—See MANDAMUS (2).

FLOODING—See APPEAL AND ERROR (4, 6); HOMESTEADS (4).

FLORIDA—See EVIDENCE (11).

FLOUR—See PRINCIPAL AND AGENT (1); SALES (2).

FOOD PRODUCTS—See NEGLIGENCE (3, 4).

FORCIBLE ENTRY AND DETAINER.

1. Equitable defenses are not permissible in summary proceedings before circuit court commissioner (3 Comp. Laws 1929, § 14979). *Armstrong* v. *Grimm*, 437.
2. Omission to state amount due in judgment for plaintiff in summary proceedings does not void the judgment since such statement is not a part thereof (3 Comp. Laws 1929, § 14979). *Id.*

FORECLOSURE—See ACTION (1); EQUITY (3); GUARDIAN AND WARD (5); MECHANICS' LIENS (1); MORTGAGES (3, 9–13, 16); VENDOR AND PURCHASER (2, 7).

FOREIGN LICENSE PLATES—See ARREST.

FOREMAN—See MASTER AND SERVANT (15, 16).

FORFEITURE—See APPEAL AND ERROR (13); BENEFICIAL ASSOCIATIONS (2, 4).

FORM—See JUDGMENT (4).

FORMER WILL—See WILLS (1).

FRAUD.

Evidence, in action for alleged conversion of leasehold interest under oil and gas lease delivered from escrow by lessor to lessee for $100 paid for extension *held*, insufficient to establish fraud, where extension was not executed, $100 was not returned and lease was recorded by defendants upon advice of their attorney. *Eadus* v. *Hunter*, 234.

See BANKS AND BANKING (4); BILLS AND NOTES (2, 4); CONTRACTS (3); DISCOVERY (1, 3); EQUITY (14); EVIDENCE (1, 2); HIGHWAYS AND STREETS (5); INSURANCE (4–6, 10, 11); JUDGMENT (2); LIMITATION OF ACTIONS; QUIETING TITLE (2); TRADE-MARKS AND TRADE-NAMES (3); VENDOR AND PURCHASER (9).

FRAUDS, STATUTE OF.

1. Record *held*, to show that oral contract of employment was not to be performed within one year from time it was made, hence unenforceable under the statute of frauds (3 Comp. Laws 1929, § 13417). *Gudenau* v. *Farm Crest Bakeries, Inc.*, 399.

2. Circumstance that oral contract was restated or confirmed within the year does not remove it from operation of the statute of frauds where it was not to be performed within one year from time of making it (3 Comp. Laws 1929, § 13417). *Id.*

FRAUDULENT CONVEYANCES.

1. Presumption that deed of real estate was a conveyance in fraud of creditors prevails in trial to set it aside where plaintiffs made *prima facie* case by documentary evidence as prescribed by statute and defendants failed to sustain burden of proof that transaction was in all respects *bona fide* (3 Comp. Laws 1929, § 14617). *Ashbaugh* v. *Sauer*, 467.

2. Attorney who performed services prior to alleged fraudulent conveyance *held*, creditor within meaning of fraudulent conveyances act, although he did not commence action and recover judgment therefor until after execution of such conveyance, since his status as creditor is determined as of date the cause of action arose (3 Comp. Laws 1929, §§ 13392, 13395, 13434). *Id.*

See APPEAL AND ERROR (26); RECEIVERS.

FURNITURE—See TRADE-MARKS AND TRADE-NAMES (4).

FURNITURE COMPANY—See LANDLORD AND TENANT (3).

FURTHER COMPENSATION—See MASTER AND SERVANT (25, 28).

FUTURE EARNINGS—See MOTOR VEHICLES (22).

FUTURE SHIPMENTS—See SALES (2).

GARNISHMENT.

1. Surety on principal contractor's private construction bond, who was also assignee by an assignment of balance due in payment of principal contractor, effective as of date of bond, for a previous consideration, *held,* entitled to priority as to said balance over subcontractors who subsequently garnisheed balance due as judgment creditors, where bond was not given for benefit of subcontractors and surety was not estopped as to them. *R. C. Mahon Co.* v. *R. S. Knapp Co.,* 67.
2. Sum, due from husband under stipulation in divorce proceeding which had not been incorporated in modified decree and which merely amounted to wife's receipt or forgiveness of portion of alimony then due, *held,* not subject to garnishment by judgment creditor of wife. *Shanahan* v. *Klyn,* 120.
3. Garnishment statutes being in derogation of the common law must be strictly construed and exactly followed. *Chapman* v. *Detroit Metropolitan Corp.,* 391.
4. Averment in affidavit for writ of garnishment that indebtedness was *not exceeding* stated amount *held,* insufficient to comply with statute requiring averment that principal defendant is indebted to plaintiff "in a given amount" (3 Comp. Laws 1929, § 14857). *Id.*
5. Affidavit for writ of garnishment which does not state the exact amount principal defendant was indebted to plaintiff *held,* not to give court jurisdiction to issue writ (3 Comp. Laws 1929, § 14857). *Id.* 392.

See APPEAL AND ERROR (8).

GASOLINE FILLING STATION—See COVENANTS (2); INTOXICATING LIQUORS (4).

GENERAL APPEARANCE—See APPEARANCE (2).

GENERAL WAGE DECREASE—See MASTER AND SERVANT (35).

GEOGRAPHICAL WORDS—See TRADE-MARKS AND TRADE-NAMES (3).

GLARING LIGHTS—See MOTOR VEHICLES (10).

GOOD FAITH—See FRAUDULENT CONVEYANCES (1); GUARDIAN AND WARD (2–5).

GOVERNOR—See CARRIERS; CONSTITUTIONAL LAW (1, 4); OFFICERS (1, 5, 7, 8); STATUTES (5–7).

GRADE SEPARATION—See APPEAL AND ERROR (21); CONSTITUTIONAL LAW (7); EMINENT DOMAIN (1); MUNICIPAL CORPORATIONS (11).

GRAND JURY—See INDICTMENT AND INFORMATION (1).

GRAND LARCENY—See INDICTMENT AND INFORMATION (2); LARCENY (2).

GRAND RAPIDS—See TRADE-MARKS AND TRADE-NAMES (4).

GRANTOR AND GRANTEE—See ADVERSE POSSESSION (3).

GRATUITOUS SERVICES—See ESTATES OF DECEDENTS (1).

GREAT WEIGHT OF EVIDENCE—See APPEAL AND ERROR (22); CRIMINAL LAW (30); NEGLIGENCE (7); TROVER AND CONVERSION (3).

GROSS NEGLIGENCE—See MOTOR VEHICLES (4, 19).

GUARDIAN AND WARD.

1. Guardian's sale to widow of interests of minors in farm for notes secured by mortgage on entire farm *held*, sale on credit within meaning of statutes providing for such sale by guardian and not a sale for cash and reinvestment of proceeds notwithstanding statutes as to credit sales were not complied with (3 Comp. Laws 1929, §§ 15825, 15841). *McClave* v. *Benton Harbor State Bank*, 619.
2. Good-faith purchasers of real estate at probate sale may rely upon probate records and the judgment of the court, where the court has jurisdiction, but one who has knowledge of infirmities or is chargeable with notice of them will not be protected in his title. *Id.*
3. Confirmation of sale of minors' interest in real estate by probate court which had jurisdiction to license sale and confirm it *held*, effective as to good-faith purchasers notwithstanding sale was actually in violation of statute regarding same, where facts as to such violation were not brought to the attention of the probate court (3 Comp. Laws 1929, §§ 15825, 15841). *Id.*
4. Bank taking mortgage from widow but withholding advancement of portion of money until after widow acquired interests of minors *held*, chargeable with knowledge of subsequent report of guardian's sale to widow as for cash when sale was actually for credit and therefore not a *bona fide* purchaser, where statutory requirements for credit sales had not been complied with (3 Comp. Laws 1929, §§ 15825, 15841). *Id.*
5. Electric company which purchased easement to maintain power lines from bank after foreclosure of mortgage from widow *held*, not chargeable with notice of interests of minors whose guardian had not complied with statutes as to sale of their interests on credit and probate court records disclosed regular and legal license to sell for cash, though abstract showed that mortgage by widow to guardian was executed on same day as his conveyance to her (3 Comp. Laws 1929, §§ 15825, 15841). *Id.*

GUARDIAN AND WARD—Continued.

6. Failure of minors to file claim against bank while in receivership where it was chargeable with notice of fact that their guardian had violated statutes as to sale of their interest which it had acquired and sold *held,* not a bar to their subsequent suit against reorganized bank to set aside guardian's conveyance to bank's grantor since they merely seek recovery of interest in land to which bank never had acquired valid title. *Id.* 620.

GUARD RAILS—See MUNICIPAL CORPORATIONS (8, 9).

GUESTS—See MOTOR VEHICLES, (4–7, 14–16, 19).

HABEAS CORPUS.

Writ of *habeas corpus* is denied where warrant of commitment of one convicted of manslaughter, which recited conviction of murder, was amended to correspond with fact, the sentence imposed being within statutory provision for manslaughter (3 Comp. Laws 1929, § 16717). *In re Overton,* 325.

HEARING—See MASTER AND SERVANT (23); MORTGAGES (11); MOTOR VEHICLES (13); OFFICERS (2, 4).

HEARSAY—See APPEAL AND ERROR (27).

HEEL INJURY—See MASTER AND SERVANT (36, 37).

HEIRS AT LAW—See DEATH (1); ESCHEAT (2).

HEMORRHAGE—See MASTER AND SERVANT (20).

HIGHWAYS AND STREETS.

1. In action against county by motorist alleged to have been injured because of defect in State trunkline highway, judgment was properly entered for defendant on motion to dismiss, since statute provided that townships and counties should be relieved of all expenses and legal liability in connection with such highways (1 Comp. Laws 1929, §§ 4425, 4426). *Cory* v. *County of Livingston,* 414.
2. Inclusion or omission of property from the tax roll is not of very great probative value in determining whether land belongs to highway or is private property. *Hawkins* v. *Dillman,* 483.
3. Statute limiting review of proceedings for improvement of highway under Covert act to certiorari and as to time is strictly construed since, after elapse of time provided, bonds may be issued and assessments made for their payment (1 Comp. Laws 1929, § 4381). *Anderson* v. *Board of County Road Commissioners of Oakland County,* 643.
4. Question as to validity of signatures on petition for improvement of highway under Covert act conferring jurisdiction on board of county road commissioners must be raised by cer-

HIGHWAYS AND STREETS—Continued.

tiorari within time prescribed by that act since the petition itself is merely a statutory, and not a constitutional, requirement (1 Comp. Laws 1929, § 4381). *Id.* 644.

5. Constitutional rights of parties included within special assessment district under Covert road act *held*, not affected by falsity of affidavits attached to petition for the improvement that statutory requirements had been satisfied. *Id.*

6. Bill to set aside special assessments and recover sums paid is dismissed notwithstanding insufficiency of valid signatures on petition for road improvement under Covert act and falsity of affidavits attached to petition, where no review of such matters was sought by certiorari within time prescribed by statute (1 Comp. Laws 1929, § 4381). *Id.*

See ADVERSE POSSESSION (2); APPEAL AND ERROR (21, 31); CONSTITUTIONAL LAW (7); COVENANTS (2); DAMAGES (5); DEDICATION (1–3); EJECTMENT; EMINENT DOMAIN (1); EQUITY (4); INTOXICATING LIQUORS (4); LANDLORD AND TENANT (1); MOTOR VEHICLES (8, 23–25); MUNICIPAL CORPORATIONS (10–12); RAILROADS (2); WORK AND LABOR.

HOLDING COMPANIES—See BANKS AND BANKING (11); CONTRACTS (2); CORPORATIONS (4).

HOME RULE—See MUNICIPAL CORPORATIONS (1, 7); STATUTES (1).

HOMESTEADS.

1. The right of a widow to select her homestead is absolute and may not be impaired by a conveyance in which she does not join, nor may she be required to select portion of less desirable land not subject to litigation. *Boman* v. *Wolverine Power Co.*, 59.

2. The owner is entitled to take for a homestead the property upon which the home is situated and not to exceed 40 acres of adjoining lands. *Id.*

3. No waiver of homestead right by the husband can affect a wife's interest therein. *Id.*

4. Conveyance of easement to perpetually flood homestead lands not signed by grantor's wife is not binding on her as survivor of her husband. *Id.*

5. Purchaser of land which may be claimed as a homestead acts at his peril, if he fails to secure the signature of both husband and wife to conveyance. *Id.*

See APPEAL AND ERROR (4, 6, 26).

HOMICIDE—See APPEAL AND ERROR (25); CRIMINAL LAW (6, 11); HABEAS CORPUS.

HORSE HIRE—See MASTER AND SERVANT (39).

HORSE SHED—See CRIMINAL LAW (23).

HOSPITAL CARE—See DAMAGES (5).

HUSBAND AND WIFE.

In suit to reform promissory notes given pursuant to a contract by insertion of statutory noncoercion clause over signature of husband and wife, decision must be made on papers involved, where oral testimony is of little value, defendants did not appear as witnesses and no conversation with the wife is shown (Act No. 158, Pub. Acts 1917). *Montz* v. *Reutter*, 357.

See APPEAL AND ERROR (4, 6); BILLS AND NOTES (5); ESTOPPEL (5); GARNISHMENT (2); HOMESTEADS (3–5); MECHANICS' LIENS (2); MOTOR VEHICLES (13, 15); REFORMATION OF INSTRUMENTS; WILLS (4, 11); WITNESSES (1, 5, 8).

HYPOTHETICAL QUESTIONS—See EVIDENCE (13); TRIAL (4).

IMPAIRMENT OF EARNING CAPACITY—See MASTER AND SERVANT (25, 29, 31).

IMPAIRMENT OF OBLIGATION—See BANKS AND BANKING (10).

IMPEACHMENT—See CRIMINAL LAW (27); EVIDENCE (3); INDICTMENT AND INFORMATION (6); RAPE (3); WITNESSES (2).

IMPLIED POWER—See MUNICIPAL CORPORATIONS (5).

IMPLIED PROMISE—See INTEREST (2); JOINT ADVENTURES (1).

IMPLIED WARRANTIES—See SALES (1).

IMPOUNDING—See EQUITY (10, 12).

IMPROVEMENTS—See MUNICIPAL CORPORATIONS (10).

IMPUTED NEGLIGENCE—See MOTOR VEHICLES (19).

INCOME—See MORTGAGES (7).

INCREASE OF AWARD—See MASTER AND SERVANT (14).

INDEPENDENT CONTRACTOR—See MASTER AND SERVANT (21, 36).

INDICTMENT AND INFORMATION.

1. Motion to quash indictment for kidnapping on the ground the grand jury was restricted in its powers and had no right to find the indictment *held*, without merit. *People* v. *Minchella*, 123.

2. Conviction of grand larceny under count including charge of breaking and entering with intent to commit larceny and one of stealing property worth over $50 is affirmed since both offenses of larceny were provable by same evidence. *People* v. *Butler*, 408.

INDICTMENT AND INFORMATION—Continued.

3. Failure of court to require that prosecuting attorney indorse names of eyewitnesses to alleged assault with intent to do great bodily harm less than the crime of murder charged in first count of information *held*, not prejudicial, where defendant was acquitted on that count, although convicted under second count charging that he went armed with a dangerous weapon. *People* v. *Rose*, 529.

4. Although information may not charge two or more separate and distinct offenses, an election between the counts thereof may not be compelled where the different offenses charged grow out of the same transaction and are covered by the same testimony (3 Comp. Laws 1929, § 17289). *Id.*

5. Conviction may be had of lesser offense not charged in information where it is necessarily included within greater offense that is charged. *Id.*

6. Rule as laid down by statute requiring that names of witnesses known to prosecuting attorney at time of filing information must be indorsed thereon extends to rebuttal witnesses, if known, since it is as important to impeach them as any other (3 Comp. Laws 1929, § 17254). *Id.* 530.

7. Leave of court upon adequate showing made and notice to defendant are prerequisites to indorsement of names of additional witnesses during the course of the trial. *Id.*

See CRIMINAL LAW (12, 18, 20).

INDIGENTS—See MASTER AND SERVANT (22).

INDORSEMENT OF NAMES OF WITNESSES—See CRIMINAL LAW (12, 18, 20); INDICTMENT AND INFORMATION (3, 6, 7); NEW TRIAL (4).

INDORSERS—See BILLS AND NOTES (2, 4); EVIDENCE (1); JUDGMENT (2).

INDUSTRIAL TYPE POLICY—See APPEAL AND ERROR (30); INSURANCE (7, 8).

INFANTS.

Contract for purchase of bonds made by an infant may not be disaffirmed by him during his minority. *Milligan* v. *S. W. Straus & Co.*, 317.

See BRIDGES; CRIMINAL LAW (1); GUARDIAN AND WARD (1, 3, 5); INSURANCE (8); KIDNAPPING; MOTOR VEHICLES (20).

INFERENCES—See CERTIORARI (2); MASTER AND SERVANT (12, 45); NOVATION (2); WITNESSES (10).

INHERITANCE TAX—See TAXATION (1, 3, 4).

INJUNCTION.

1. Court of equity has power to enjoin a person, over whom it has jurisdiction, from prosecuting an action in the court of another State for personal injuries as rights of parties thereto should be determined according to the law of the State where accident happened, injured party was and is domiciled and alleged tortfeasor domesticated. *Pere Marquette Railway Co.* v. *Slutz,* 388.
2. Statute placing venue of action by resident of this State against railroad for personal injuries received in collision with train must be complied with and justifies injunction restraining action at law in a foreign jurisdiction (3 Comp. Laws 1929, § 13997). *Id.* 389.
3. Bill to enjoin enforcement of act regulating practice of dentistry *held,* properly dismissed as wholly anticipatory where no showing is made that any rules and regulations have been promulgated and it is not to be presumed that any will be adopted which are unconstitutional, since court will not pass on moot questions or abstract propositions (Act No. 235, Pub. Acts 1933). *Sullivan* v. *Michigan State Board of Dentistry,* 428.

See APPEAL AND ERROR (21, 38, 39); MANDAMUS (1); MORTGAGES (16); TRADE-MARKS AND TRADE-NAMES (3, 4).

INNOCENCE—See CRIMINAL LAW (3).

INSANE DELUSIONS—See WILLS (4–9).

INSPECTORS—See CONSTITUTIONAL LAW (2); ELECTIONS; STATUTES (3).

INSTALMENTS—See MORTGAGES (10, 12–14).

INSTRUCTIONS—See APPEAL AND ERROR (4, 7, 31, 32); CRIMINAL LAW (21); DAMAGES (3); ESTATES OF DECEDENTS (3); MOTOR VEHICLES (20); NEGLIGENCE (4, 6); WILLS (10).

INSURANCE.

1. Finding of court in trial without a jury that life insurance policy had not been delivered is sustained on appeal where testimony on the subject is conflicting. *Karp* v. *Metropolitan Life Insurance Co.,* 255.
2. A contract of insurance is measured by what the parties intended, mutually agreed to and their minds met upon, the same principles as are applicable to any other type of contract. *Id.*
3. Stipulations in application attached to life insurance policy that it would not become effective until the policy was delivered and the full first premium was paid to and accepted by the company during the lifetime of the applicant *held,* binding upon beneficiary therein so as to preclude recovery where policy was not delivered nor first premium paid in full prior to death of insured. *Id.*

INSURANCE—Continued.

4. In suit to cancel reinstatement of life insurance policy for fraud, after death of insured, plaintiff has burden of proof of fraud which it must establish by a preponderance of the evidence, not beyond a reasonable doubt nor to an absolute certainty. *Illinois Bankers Life Assurance Co.* v. *Stringham*, 360.

5. Plaintiff *held*, to have sustained burden of proof in suit to cancel life insurance policy for fraud in reinstating it, where medical opinion on clinical examination was that he had tuberculosis although the doctors could not be certain as they had not made their test according to the most scientific and accurate method. *Id.*

6. Policy of life insurance is set aside for fraud where the overwhelming evidence is that assured was afflicted with tuberculosis when he applied for reinstatement approximately two years prior to his death from that disease. *Id.*

7. In action by widow of insured as administratrix of his estate, the right of insurance company to raise defense of payment to mother of insured under facility of payment clause in industrial type policy is a question of law which may be raised on a motion to dismiss. *Mogyoros* v. *Prudential Insurance Co. of America*, 549.

8. Mother of insured under a so-called industrial type policy may receive payment thereunder and discharge the same under facility of payment clause authorizing payment to "relative by blood" notwithstanding lack of consent of widow of insured, then a minor. *Id.*

9. Surrender of life insurance policy by insured and beneficiary in accordance with terms of policy and promise of payment of surrender value by insurer *held*, not abrogated by death of insured prior to payment of surrender value. *Lauer* v. *Michigan Life Insurance Co.*, 614.

10. While clause voiding policy in case of false swearing by insured in proof of loss is effective, in order to avoid the policy such false swearing must have been done with an actual intent to defraud insurer. *Alma State Savings Bank* v. *Springfield Fire & Marine Ins. Co.*, 631.

11. Issue of fact as to whether false swearing by insured in his proof of loss was done with intent to defraud insurer would have been raised had insurer rested upon proof of loss prepared by insured and not made a subsequent adjustment in which such proof of loss was disregarded and waiver of fraud effected. *Id.*

12. Adjuster may bind insurer as to the amount of the loss where insured knows of no limitations as to adjuster's authority. *Id.*

13. Contract ascertaining amount of loss according to terms of fire insurance policy arose when proof of loss prepared by insurer was signed by adjuster and insured and sent to insurer. *Id.*

INSURANCE—Continued.

14. Jury question was not raised as to effect of provision of fire insurance policy excluding coverage on chattel mortgaged property unless otherwise provided for in writing, where it is undisputed that chattel mortgage was released before fire loss occurred. *Id.*

15. Constitution and by-laws of a mutual benefit association, in the absence of a certificate of insurance, constitute the entire contract between members and association. *Dunn* v. *Detroit Federation of Musicians,* 698.

16. Beneficiary under a contract of insurance may bring action thereon. *Id.* 699.

See APPEAL AND ERROR (30); BENEFICIAL ASSOCIATIONS (3, 4); CRIMINAL LAW (12–14, 22); FALSE PRETENSES; MORTGAGES (2); SALES (3, 6).

INTENT—See BILLS AND NOTES (5); CRIMINAL LAW (23); DEDICATION (1, 3); INSURANCE (2, 10, 11); LARCENY (1); MASTER AND SERVANT (29); MORTGAGES (5, 6, 8); STATUTES (3); VENDOR AND PURCHASER (8).

INTEREST.

1. Interest according to the law of another State may not be recovered in an action brought in this State unless such law is specially averred and proved. *Mitchell* v. *Reolds Farms Co.,* 302.

2. The manner of recovery of interest is governed by statute as no implied promise is raised to pay it. *Id.* 303.

3. Interest by way of damage for improper detention of money is a matter of remedy and the rate is governed by the *lex fori. Id.*

See APPEAL AND ERROR (14, 24, 28); DEPOSITARIES (4); EQUITY (11, 13); EVIDENCE (11); MANDAMUS (4); VENDOR AND PURCHASER (1).

INTEREST OF BENEFICIARY—See WILLS (1).

INTERLOCUTORY INJUNCTION—See APPEAL AND ERROR (39).

INTERLOCUTORY ORDER—See APPEAL AND ERROR (18); JUDGMENT (6); MORTGAGES (11).

INTERPRETATION OF INSTRUMENT—See BENEFICIAL ASSOCIATIONS (1, 2).

INTERSECTIONS—See MOTOR VEHICLES (17, 18).

INTOXICATING LIQUORS.

1. The control conferred upon the liquor control commission by the Constitution is subject to statutory limitations (Const. 1908, art. 16, § 11, Act No. 8, §§ 17, 24, Pub. Acts 1933 [Ex. Sess.]). *Scott* v. *Township Board of Arcada Township,* 170.

INTOXICATING LIQUORS—Continued.

2. In the matter of approving applications for licenses to sell beer and wine for consumption on the premises the township board has discretionary power which is not subject to review by a court even though claimed to be arbitrarily or capriciously exercised (Act No. 8, § 17, Pub. Acts 1933 [Ex. Sess.]). *Id.*
3. The liquor business is such that local communities should be permitted to regulate the traffic within their own bounds in the proper exercise of their police powers subject to the larger control of the liquor control commission as to matters of which it is given exclusive power by the legislature. *Id.*
4. Denial of approval of application for license to sell beer and wine for consumption on the premises by owner of restaurant operated in connection with gasoline filling station at intersection of two highways in rural area *held*, within power of the township board to act officially according to what appears to it to be just and proper under the circumstances and is not subject to review by a court (Act No. 8, § 17, Pub. Acts 1933 [Ex. Sess.]). *Id.*

INVESTMENT COMPANY—See MORTGAGES (4).

INVESTMENT OF FUNDS—See GUARDIAN AND WARD (1).

IRREGULARITIES—See APPEAL AND ERROR (16); ESTOPPEL (4).

JANITOR—See MASTER AND SERVANT (36, 37, 39).

JOINT ADVENTURES.

1. One joint adventurer may recover damages in assumpsit from a coadventurer who converts joint property to its own use on an implied promise, where the amount of plaintiff's claim is capable of ascertainment by a jury. *Mitchell* v. *Reolds Farms Co.*, 302.
2. In action by one claiming share of proceeds of joint adventure, verdict could not be directed for defendant where there was testimony it had money or property in its hands as a result of the sale or trade of the product of the enterprise. *Id.*

See ASSUMPSIT (2); EVIDENCE (12); NEGLIGENCE (4); TRIAL (2).

JOINT AWARD—See APPEAL AND ERROR (28); EQUITY (6–13); LANDLORD AND TENANT (2, 3, 5).

JOINT TORTFEASORS—See CONTRIBUTION; JUDGMENT (9, 10); RELEASE (1); TORTS (1).

JOISTS—See MASTER AND SERVANT (21); NEGLIGENCE (2).

JUDGES—See APPEAL AND ERROR (25); CRIMINAL LAW (25).

JUDGMENT.

1. Province of court, on plaintiff's motion for summary judgment, is to determine judicially whether there is an issue of fact, which, if resolved in favor of defendant, would preclude a verdict for plaintiff in whole or in part of his demand. *Peoples Wayne County Bank of Dearborn* v. *Harvey*, 47.
2. Summary judgment against indorser of renewal promissory note *held*, properly refused where he raised question of fact as to presence of fraud in procuring his indorsement. *Id.* 48.
3. Affidavits *held*, to justify order of court setting aside verdict and judgment and granting new trial in action for malicious prosecution and false imprisonment, where defendants were not present at trial through neglect of attorney then representing them and affidavits disclose they had meritorious defense. *Tallis* v. *Stuart*, 84.
4. Judgment in summary proceedings on appeal from circuit court commissioner should be limited to a determination of the right of possession and a determination of the amount due and should not be in form of a money judgment. *Gregorian Building Co.* v. *Galvin*, 274.
5. Final judgments are such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy for which he sues. *Wurzer* v. *Geraldine*, 286.
6. An order is interlocutory which does not deal with the final rights of the parties but is made before judgment on a matter of procedure or, after judgment, directing how declarations of right already given are to be worked out. *Id.*
7. An adjudication made at any stage of a cause may be appealable but whether or not an order is interlocutory or final from that standpoint depends entirely on the effect it produces upon the rights and interests of the parties. *Id.*
8. Previous case between other lot owners than plaintiffs herein but against same defendant for relief from same assessments for paving *held*, not *res judicata* for lack of identity of parties plaintiff in the two suits. *Welch* v. *City of Lincoln Park*, 440.
9. Judgment in justice's court by owner of muck land for damages thereto by subcontractor who set fire to brush on adjacent highway, assigned to contractor against which action was also brought but which was held not liable and no appeal as to it taken, may be enforced by assignee since it was conclusively adjudicated not to be a joint tortfeasor and such judgment was assignable. *Ianni* v. *Slater Construction Co.*, 492.
10. Judgment against one tortfeasor, until satisfied, is not a bar to separate suit against others, since injured party is entitled to satisfaction for the wrong. *MacDonald* v. *Henry Hornblower & Weeks*, 626.

See APPEAL AND ERROR (1, 8, 20, 24, 28); ATTORNEY AND CLIENT (2); DAMAGES (2); FORCIBLE ENTRY AND DETAINER (2); GARNISHMENT (2); MORTGAGES (10, 12, 13); VENDOR AND PURCHASER (6).

JUDGMENT CREDITORS—See GARNISHMENT (1, 2).

JUDGMENT NON OBSTANTE VEREDICTO—See MOTOR VEHICLES (13).

JUDICIAL CONSTRUCTION—See BENEFICIAL ASSOCIATIONS (3).

JUDICIAL INTERFERENCE—See CORPORATIONS (3).

JUDICIAL NOTICE—See EVIDENCE (9, 10).

JUDICIAL OFFICERS—See OFFICERS (1).

JUDICIAL QUESTION—See STATUTES (5).

JURISDICTION—See APPEAL AND ERROR (13); APPEARANCE (1, 2); CORPORATIONS (9); COURT COMMISSIONERS; COURTS; DRAINS (1); EQUITY (4, 14, 15); GARNISHMENT (5); GUARDIAN AND WARD (2, 3); HIGHWAYS AND STREETS (4); INJUNCTION (1); MASTER AND SERVANT (3, 8, 14); MORTGAGES (15); OFFICERS (4); QUIETING TITLE (1, 2).

JURY.

1. Challenge to array of jurors summoned under 3 Comp. Laws 1929, §§ 16541, 16542, providing for selection of jurors in municipal courts of record, *held,* properly overruled. *People* v. *Minchella,* 123.
2. Peremptory challenges of one indicted for kidnapping were properly limited to five since sentence which may be imposed is limited to any term of years (3 Comp. Laws 1929, §§ 16732, 17305). *Id.*
3. The trial judge may limit, reasonably, the extent of the *voir dire* examination of jurors. *People* v. *Rose,* 529.
4. In trial of one charged with crime, alleged errors in restriction or extension of *voir dire* examination were waived where appellant failed to exhaust his peremptory challenges. *Id.*

See JOINT ADVENTURES (1); NEGLIGENCE (6); NEW TRIAL (3); TITLE (1); WILLS (7).

JUSTICES OF THE PEACE—See JUDGMENT (9).

KIDNAPPING.

Evidence given on trial of defendants indicted for kidnapping boy five and one-half years old *held,* sufficient to sustain conviction and to warrant denial of new trial, where it was based largely on testimony of abducted boy, then two years older, who was unusually bright and had been examined by the court pursuant to 3 Comp. Laws 1929, § 14222, no objection raised by defendant's counsel as to omission to administer oath to boy, rigid cross-examination failed to shake his testimony as to material facts and there were some corroborating circumstances. *People* v. *Minchella,* 123.

See CRIMINAL LAW (1, 4, 5); INDICTMENT AND INFORMATION (1); JURY (2); WITNESSES (1).

LABOR AND INDUSTRY, DEPARTMENT OF—See APPEAL AND ERROR (1, 9); CERTIORARI (2); MASTER AND SERVANT (8, 11, 12, 15, 18, 23, 45).

LACHES—See VENDOR AND PURCHASER (9).

LAKES—See WORK AND LABOR.

LAND CONTRACTS—See APPEAL AND ERROR (13–15); CORPORATIONS (1); COURT COMMISSIONERS; TROVER AND CONVERSION (2); VENDOR AND PURCHASER (1–8).

LANDLORD AND TENANT.

1. Reduction in rent reserved under long-term lease, containing clause for proportionate reduction in case of partial condemnation, is required where 37.4 per cent. of the area of the property is taken although frontage on main thoroughfare remains the same. *Pierson* v. *H. R. Leonard Furniture Co.*, 507.
2. In suit to determine rights, if any, of lessors, lessee and latter's mortgagees in joint award under condemnation proceedings, brought pursuant to stipulation filed therein for its subsequent apportionment by a court of chancery, testimony taken as a whole *held,* to show that the once valuable lease had become a liability rather than an asset. *Id.*
3. On bill to determine rights in joint award made in condemnation proceedings taking part of valuable city property under long-term lease, financial ability of lessee furniture company to carry out obligations under lease is all important, where record shows it had vacated store prior to depression of 1929, had sublet it at a loss on various occasions and it had been vacant for a number of years, was located near many other unoccupied buildings, and annual corporation reports show lessee's financial condition is very precarious. *Id.*
4. Lessee must pay full rent provided for in lease during balance of term and recoup its damages for loss of part of property through condemnation proceedings where lease contains no provision for reduction of rent in such event. *Id.*
5. Division of joint award under condemnation proceedings to lessors, lessee and latter's mortgagees by court of equity so as to pay taxes due, give lessors past due rent and loss in rentals for balance of term plus present value of right of reversion after expiration of 80-year balance of term and the balance of award to lessee and its mortgagees *held,* erroneous, where lease has no market value and was badly in default, the property had been vacant for years, and the lessee had no financial responsibility so as to continue the lease for the part of the premises remaining after condemnation. *Id.* 508.
6. In suit to determine interest of lessors, lessee and latter's mortgagees in joint award of $174,747.12 in condemnation proceedings for part of valuable city property, such amount *held,* to bear no relationship to value of the leasehold, where

LANDLORD AND TENANT—Continued.

lessee was badly in default in payment of rent and taxes and its ability to continue the lease for the remainder of the term very doubtful. *Id.* 509.

7. Subject to the exercise of the power of eminent domain, a lessee is entitled to use of entire premises leased for the entire term so long as it performs its obligations under the lease. *Id.* 509.

See ACTION (1); EQUITY (5–13); MORTGAGES (8).

LAPSED BEQUESTS—See WILLS (11).

LARCENY.

1. One who takes property under claim of right, however unfounded, has not committed larceny as felonious intent is an essential ingredient in every larceny. *People* v. *Shaunding*, 218.
2. Conviction of grand larceny *held*, justified by the evidence, though circumstantial. *People* v. *Butler*, 408.

See CRIMINAL LAW (23, 24); INDICTMENT AND INFORMATION (2).

LAW OF CASE—See APPEAL AND ERROR (10).

LEASES—See EMINENT DOMAIN (2, 3); EQUITY (5–13); ESTOPPEL (5); FRAUD; LANDLORD AND TENANT (1–7); TROVER AND CONVERSION (1).

LEAVE TO APPEAL—See APPEAL AND ERROR (18, 19, 37, 38).

LEGACY—See WILLS (1).

LEGISLATIVE POLICY—See STATUTES (8).

LEGISLATURE—See CONSTITUTIONAL LAW (4, 5, 8); STATUTES (3–7).

LEX FORI—See INTEREST (3).

LICENSES—See INTOXICATING LIQUORS (2, 4).

LIENS—See ATTORNEY AND CLIENT (2); EXECUTION (2); MECHANICS' LIENS; WAREHOUSEMEN (1, 2).

LIFE INCOME—See TAXATION (3).

LIFE INSURANCE—See INSURANCE (1, 3–6).

LIFTING BARREL—See MASTER AND SERVANT (20).

LIGHTER WORK—See MASTER AND SERVANT (24).

LIGHTS—See ARREST; MOTOR VEHICLES (9, 10).

LIME AND SULPHUR—See MASTER AND SERVANT (20).

LIMITATION OF ACTIONS.

1. Action against surety on sheriff's bond for false return of process begun over two years after such return was made *held,* barred by statute of limitations unless running of statute was tolled by fraudulent concealment in which case the suit may be commenced within two years after discovery (3 Comp. Laws 1929, §§ 13976, 13983). *Chalker* v. *Fidelity & Deposit Company of Maryland,* 333.
2. One who has knowledge of fraud having been perpetrated against him or notice thereof sufficient to put him on inquiry cannot remain inactive and rely upon concealment to stay the statute of limitations but must use reasonable diligence to discover facts pertaining thereto (3 Comp. Laws 1929, §§ 13976, 13983). *Id.*

See DEPOSITARIES (3); DRAINS (3); ESTATES OF DECEDENTS (3); MASTER AND SERVANT (8, 17–19); SHERIFFS AND CONSTABLES (1).

LIQUOR CONTROL—See INTOXICATING LIQUORS (1–4); OFFICERS (9).

LOWERING OF STREET GRADE—See APPEAL AND ERROR (21); CONSTITUTIONAL LAW (7); EMINENT DOMAIN (1); MUNICIPAL CORPORATIONS (11).

LUMP SUM SETTLEMENT—See MASTER AND SERVANT (14).

LUNCH HOUR—See MASTER AND SERVANT (26).

MALFEASANCE—See CONSTITUTIONAL LAW (1).

MALICIOUS PROSECUTION.

Meritorious defense to action for malicious prosecution and false imprisonment *held,* disclosed by affidavits showing defendants had advice of their private attorney and prosecuting attorney before prosecuting plaintiff for embezzlement. *Tallis* v. *Stuart,* 84.

See JUDGMENT (3).

MALPRACTICE—See APPEAL AND ERROR (17); DAMAGES (4); TRIAL (3).

MANDAMUS.

1. Writ of mandamus is ordered to issue to dissolve injunction and permit election of officers under proposed charter to be submitted at same special election, as provided for emergency under Court Rule No. 60, §§ 4, 5 (1933). *Streat* v. *Vermilya,* 2.

MANDAMUS—Continued.

2. Members of a bondholders' committee which has legal ownership of 60 per cent. of city's bonds maturing during the ensuing fiscal year may properly bring mandamus to enforce their rights thereunder by suit in their individual names, notwithstanding they are named as trustees in instrument vesting them with title (3 Comp. Laws 1929, § 14010). *Simonton* v. *City of Pontiac*, 11.
3. Writ of mandamus is one of grace. *Id.*
4. Bondholders' committee *held*, entitled to writ of mandamus to compel city officials to amend annual appropriation ordinance so as to include a sum sufficient to pay principal and interest payments maturing during fiscal year and levy taxes accordingly, although city has suffered from economic depression. *Id.*
5. Mandamus is not a remedy available to stockholder of building and loan association to compel association to set unincumbered shares of stock against shares pledged as security for a mortgage loan, under withdrawal right, since the relation of stockholder to the association is a contractual one and plaintiff has another adequate legal remedy. *Clark* v. *Peninsular Building & Loan Ass'n*, 584.

See APPEAL AND ERROR (18, 33).

MANSLAUGHTER—See HABEAS CORPUS.

MARKET VALUE—See DAMAGES (3).

MASON—See MASTER AND SERVANT (21); NEGLIGENCE (2).

MASTER AND SERVANT.

1. The State as a representative of society at large becomes a party to proceedings under the workmen's compensation act and no valid settlement can be made between employer and injured employee without consent of the State. *McDonald* v. *Ford Motor Co.*, 39.
2. Agreements as to compensation between employer and injured employee are encouraged, but when made they must be made under the direct supervision of the State and in accordance with workmen's compensation act; and the employee may not waive his rights thereunder (2 Comp. Laws 1929, §§ 8410, 8436, 8444). *Id.* 40.
3. Agreement between employer and injured employee privately made between the parties, which is not in accordance with the terms of the workmen's compensation act and not filed with nor approved by the department of labor and industry which had sole jurisdiction of the subject-matter is void and employer and his agent are not estopped to deny its validity (2 Comp. Laws 1929, §§ 8410, 8436, 8444). *Id.*

MASTER AND SERVANT—Continued.

4. Test of liability of master for acts of servant is whether the latter was at the time acting within the scope of his employment. *Irwin* v. *Williamson Candy Co.*, 100.

5. Master is not liable for negligent act of servant who had departed from direct route and had not returned to a place where his duty required him to be although the place of occurrence of act was less distant from destination than point of deviation. *Id.*

6. Employee is entitled to compensation for period of not more than 500 weeks from date of injury rather than 500 weeks from commencement of total disability which took place about six months later (2 Comp. Laws 1929, § 8425). *Grodzicki* v. *Revere Copper & Brass, Inc.*, 143.

7. Award to employee for blindness alleged to have been caused by injury to eye, sustained by some evidence, is affirmed on appeal in the nature of certiorari although weight of evidence is decidedly against finding for plaintiff. *Id.*

8. Two-year statute of limitations has no application to proceedings for compensation for subsequently appearing disability where actual disability developed within six months after the accident and compensation was awarded, as all subsequent proceedings for compensation for developments of same injury are administrative of, or incidental or supplemental to, the original award, the department of labor and industry having authority to review payments from time to time (2 Comp. Laws 1929, § 8431). *Rowe* v. *Consumers Power Co.*, 162.

9. The term "personal injury," as used in workmen's compensation act, contemplates some intervention which either produces a direct injury or so operates upon an existing physical condition as to cause an injurious result, reasonably traceable thereto (2 Comp. Laws 1929, § 8417). *Marman* v. *Detroit Edison Co.*, 166.

10. The burden is upon those claiming compensation under workmen's compensation act to show that death of employee due to congenital *status lymphaticus* was precipitated by accident (2 Comp. Laws 1929, § 8417). *Id.*

11. It is duty of department of labor and industry in making finding that death of employee was due to accident, to designate the accident and make a finding of personal injury therefrom (2 Comp. Laws 1929, § 8417). *Id.*

12. Department of labor and industry may draw reasonable inferences from established facts and circumstances but may not indulge in the assumption of a possibility based on a possibility and a consequent guess (2 Comp. Laws 1929, § 8417). *Id.*

13. Death of employee, dusting neutral electrical appliances, from congenital *status lymphaticus held*, noncompensable under workmen's compensation act, where there is no evidence that death was precipitated either by fall from stepladder,

MASTER AND SERVANT—Continued.

electric shock, or other personal injury arising out of and in the course of his employment (2 Comp. Laws 1929, § 8417). *Id.*

14. Increased award made by deputy commissioner without request therefor having been made by any authorized party after hearing upon petition to review payment of lump sum settlement of weekly award for partial disability previously approved by department of labor and industry and not appealed from *held*, without jurisdiction of deputy (2 Comp. Laws 1929, §§ 8438, 8453). *Elson* v. *Wisconsin Public Service Corp.*, 180.

15. Finding of department of labor and industry that notice of injury to eye of employee was communicated to employee's foreman is accepted where testimony is conflicting (2 Comp. Laws 1929, § 8431). *Hajduk* v. *Revere Copper & Brass, Inc.*, 220.

16. Notice to foreman or immediate superior of employee is notice to employer (2 Comp. Laws 1929, § 8431). *Id.*

17. Statute of limitations referred to in 2 Comp. Laws 1929, § 8431, as suspended in favor of employee until employer files report of accident involved is the six-months' statute provided in the same section and not the six-years' general statute of limitations (3 Comp. Laws 1929, § 13976). *Id.*

18. General statute of limitations does not apply to proceeding brought under the workmen's compensation act before department of labor and industry since it is not a court and proceeding before it is not an action (3 Comp. Laws 1929, § 13976). *Id.*

19. Award for loss of sight of left eye, on petition filed over 10 years after injury causing same, *held*, barred for failure to commence proceeding within a reasonable time, notwithstanding employee remained employed by same employer until total blindness followed nearly 10 years later than injury and employer never filed a report of the accident (2 Comp. Laws 1929, § 8431). *Id.*

20. Brain hemorrhage resulting from injury received by working member of partnership while waiting on customer purchasing lime and sulphur contained in barrels weighing 450 pounds *held*, an accidental injury justifying award of compensation, where circumstances surrounding lifting of the barrel were unexpected by plaintiff. *Smallegan* v. *John Smallegan & Sons*, 246.

21. Contractor who had contract for furnishing and fastening steel joists on structure being erected may not evade liability for injuries received by mason working on third floor because joists were improperly fastened on the ground that work was sublet to an independent contractor since said work was of such nature that it subjected mason to unusual danger. *Watkins* v. *Gabriel Steel Co.*, 264.

MASTER AND SERVANT—Continued.

22. Indigent inmate of city charity at which two meals a day and lodging were furnished, who was willing to wash dishes for contractor furnishing meals and serving equipment and received three meals a day and 50 cents a week *held,* not an employee of the city within meaning of workmen's compensation act and therefore not entitled to compensation for loss of eye due to injury received while preparing to wash dishes. *Davenport* v. *City of Detroit,* 374.

23. Reversal of award of deputy commissioner for employer without according him an opportunity to present and argue case at adjourned hearing before department of labor and industry *held,* reversible error. *Cardott* v. *Chevrolet Motor Co.,* 378.

24. Injured employee does not lose his right to compensation for partial, permanent disability incapacitating him from doing heavy work and he is unable to obtain lighter work which he is able and willing to do although for a period after the injury he received a higher wage than before it occurred. *Coleman* v. *Whitehead & Kales Co.,* 412.

25. The proportionate impairment in earning capacity in the employment in which the employee was working at the time of the injury admeasures the compensation and determination of diminution is made by comparing amount he is capable of earning at the time he seeks further compensation to his earning capacity at time of injury (2 Comp. Laws 1929, § 8427, subd. [e]). *Id.*

26. Employer, an insurance company, *held,* not liable for injuries caused by negligent use of automobile owned and operated by employee who was on his way home to lunch from duties as house to house canvasser at time of accident on day during which employees doing such work were instructed not to use cars and at time of day during which such work was forbidden. *Hooks* v. *Western & Southern Life Ins. Co.,* 421.

27. Review of weekly payments provided by workmen's compensation act is possible only when there has been a change in the physical condition of the employee (2 Comp. Laws 1929, § 8453). *McKay* v. *Jackson & Tindle, Inc.,* 452.

28. Testimony taken at hearing on petition for further compensation which disclosed that physical condition of employee at and since time of previous award, not appealed from, was one of total incapacity to perform work engaged in at time injury occurred *held,* insufficient to support award increasing compensation to minimum for total disability, since failure to appeal from previous award precludes recovery on subsequent petition showing same disability. *Id.* 453.

29. Impairment of earning capacity is computed upon the basis of the employment engaged in at the time of the injury, notwithstanding proviso added to part 2, § 11e, of the workmen's compensation act by Act No. 376, Pub. Acts 1927, limiting compensation payable, since it evidences no intent to abolish the difference between skilled and unskilled labor nor to affect

MASTER AND SERVANT—Continued.

basic computation of compensation (2 Comp. Laws 1929, §§ 8425, 8426, 8427b, e). *MacDonald* v. *Great Lakes Steel Corp.*, 591.

30. Body of section 11e, part 2, of the workmen's compensation act provides method of determining the percentage or degree of incapacity to reduce compensation but does not affect the first determination of the basic figure, *i. e.*, the earning capacity in the employment at time of injury (2 Comp. Laws 1929, §§ 8425, 8426, 8427b, e). *Id.*

31. Rule for ascertaining percentage of impairment of earning capacity is inapplicable in case employee is totally incapacitated to work in the employment engaged in at time of the injury. *Id.*

32. Allowance to carpenter with average weekly wage of $25.20 at time of injury who was reemployed by same employer at unskilled labor at $16 a week, of compensation at $9.20 a week is affirmed under part 2, § 11e, of compensation act, proviso in said section restricting compensation in such event to such sum as added to earning capacity in another occupation does not exceed average weekly earnings at time of injury (2 Comp. Laws 1929, § 8427). *Id.*

33. National codes regulating wages *held*, to have no bearing on issues involved on employer's petition to stop compensation under workmen's compensation act in admeasuring compensation for partial disability. *Roxbury* v. *Weidman Lumber Co.*, 596.

34. Millwright whose average weekly earnings were $27 at time of injury and $17.40 at time of hearing on petition to stop compensation, may properly receive $6 weekly for partial disability since present average weekly earnings and compensation do not exceed his average weekly earnings at time of injury (2 Comp. Laws 1929, § 8427e). *Id.*

35. General wage decrease for millwrights may not be considered in determining compensation payable since statute designates basic figure as average weekly earnings at time of injury (2 Comp. Laws 1929, § 8427e). *Id.*

36. Janitor suffering injury to heel while removing ashes *held*, employee and not an independent contractor where employer retained right of control as to how and by whom the work was done although janitor received his pay from sale of waste he hauled away with equipment which he furnished. *Moore* v. *Fleischman Yeast Co.*, 668.

37. Suspension of compensation as of date janitor refused antisyphilitic treatment for injury to heel, urged for first time on appeal from department of labor and industry, is denied where defendants failed to follow provisions of department's rule No. 15, requiring an answer in reasonable detail as to all essential grounds of defense and defendants' principal claim was that employer-employee relation did not exist. *Id.*

MASTER AND SERVANT—Continued.

38. Denial of defendants' motion to dismiss plaintiff's appeal to full department, made after belated transcript was filed amounted to an extension of time for filing same where finding was made by department that delay beyond time allowed by its rule No. 16 was excused by circumstances. *Id.* 669.

39. In determining average weekly wage of janitor paid by proceeds he received from sale of waste material but which necessitated his hiring a horse to haul it away, sum paid for horse hire is deducted from gross earnings and compensation computed on balance notwithstanding workmen's compensation act is silent on the subject since it is not to be interpreted as authorizing payment during disability of more than his net average weekly wage. *Id.*

40. Relation of employer and employee must be admitted or proved in order to allow recovery under the workmen's compensation act. *Johns* v. *Wisconsin Land & Lumber Co.*, 675.

41. Record *held*, insufficient to support findings of department of labor and industry that deceased was an employee of contractor cutting cross ties in the woods, or that $200 undertaker bill was reasonable for removal of body from woods and burial (2 Comp. Laws 1929, § 8424). *Id.* 676.

42. Undertaker may not recover burial fee allowed under workmen's compensation act for man who left no dependents merely because act was intended to make an easier adjustment of matters as between the parties (2 Comp. Laws 1929, §§ 8420, 8424). *Id.*

43. Workmen's compensation act, being in derogation of common law, is strictly construed so as to preclude recovery thereunder from contractor by undertaker who tended to burial of man found dead in the woods who had been employed theretofore by loggers (2 Comp. Laws 1929, § 8417). *Id.*

44. Workmen's compensation act does not set aside remedy at law of undertaker claiming to have furnished burial services with respect to a teamster at request of alleged employer (2 Comp. Laws 1929, § 8424). *Id.*

45. Department of labor and industry may draw inferences from facts and circumstances but, where there is no evidence in the record to support the findings, the award will be vacated on certiorari. *Id.*

46. One who had been accepting welfare aid and pursuant to instructions from welfare department worked as wage-earner with department of public works and who received injury while collecting rubbish, *held*, not entitled to compensation. *Oleksik* v. *City of Detroit*, 697.

See ACCORD AND SATISFACTION; ACTION (2); APPEAL AND ERROR (1); CONTRACTS (1); FRAUDS, STATUTE OF (1); MOTOR VEHICLES (1); STATUTES (8).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—See WITNESSES (10).

MEALS—See MASTER AND SERVANT (22).

MEANDER LINE—See WORK AND LABOR.

MEASURE OF DAMAGES—See DAMAGES (1, 3).

MECHANICS' LIENS.

1. Amendment of bill to foreclose mechanic's lien by changing averment as to when period covered by lien began in order to accord with undisputed fact as to period within which materials were furnished merely corrected a mistake which was not fatally defective. *Lewis Manufacturing Co.* v. *Lee*, 383.

2. Failure to name in claim of lien and serve notice on wife of man with whom materialman contracted renders lien inoperative where she had no legal title at time contract was made but acquired it prior to time claim of lien was filed. *Id.*

See PRINCIPAL AND SURETY (1).

MEDICAL OPINION—See INSURANCE (5).

MEDICAL PRACTICE—See EVIDENCE (15).

MEDICAL WITNESSES—See APPEAL AND ERROR (27).

MEMBERS—See CONTRACTS (4); INSURANCE (15).

MENTAL COMPETENCY—See WILLS (2, 9, 10).

MERITORIOUS DEFENSE—See JUDGMENT (3); MALICIOUS PROSECUTION.

MILLWRIGHTS—See MASTER AND SERVANT (34, 35).

MINES AND MINERALS.

1. Oil and gas, unsevered, are part of the real estate and as such are not property for the conversion of which an action of trover will lie, it being a remedy for wrongful removal after severance. *Eadus* v. *Hunter*, 233.

2. Deprivation of opportunity to remove oil and gas from the containing soil does not constitute conversion. *Id.*

See DAMAGES (2); EQUITY (15); ESTOPPEL (5); EVIDENCE (5); FRAUD; TROVER AND CONVERSION (1).

MINORITY—See INFANTS.

MISCARRIAGE OF JUSTICE—See APPEAL AND ERROR (31).

MISCONDUCT OF JURORS—See NEW TRIAL (3).

MISFEASANCE—See CONSTITUTIONAL LAW (1).

MISJOINDER—See APPEAL AND ERROR (4, 5).

MISLEADING PUBLIC—See TRADE-MARKS AND TRADE-NAMES (2–4).

MISREPRESENTATIONS AS TO MATERIAL FACT—See BILLS AND NOTES (4).

MISTAKE—See MECHANICS' LIENS (1).

MISTRESS—See WITNESSES (1).

MODIFICATION OF DECREE—See DIVORCE (1); GARNISHMENT (2).

MOOT QUESTION—See ACTION (1); INJUNCTION (3).

MORATORIUM ACT—See MORTGAGES (14).

MORTGAGES.

1. Generally, an assignment of rents and profits as additional security under a mortgage and appointment of a receiver to collect same prior to passage of absolute title are invalid in this State, although there are some exceptions (3 Comp. Laws 1929, §§ 13498, 13499, 14956). *Massachusetts Mutual Life Insurance Co.* v. *Ruetter*, 175.
2. Extension of mortgage is valid consideration for assignment of rents as additional security for payment of taxes, assessments and insurance premiums, and such assignment is valid. *Id.*
3. Court of equity *held*, without power to appoint receiver to collect rents and profits pursuant to bill for specific performance of agreement extending mortgage and assigning rents which contemplated such appointment only in case of institution of foreclosure proceedings and his appointment was not incidental to other relief. *Id.* 176.
4. Consideration of investment company, closely associated with trust company in transaction involving trust mortgage and sale of bonds thereunder is not indulged, where result would be the same if trust company had done all the things done by the investment company. *Union Guardian Trust Co.* v. *Lipsitz*, 209.
5. Mortgage which ran to mortgagee as trustee for the benefit of bondholders when executed, in which mortgagee had no power to change or control it, and which was recorded and bonds sold thereunder *held*, a trust mortgage, no subterfuge having been employed to evade ejectment statute by use of clause intended to operate as assignment of rents (3 Comp. Laws 1929, §§ 13498, 13499, 14956). *Id.*
6. Purchasers of bonds secured by trust mortgage are not required to go behind instrument to which bonds refer them to discover any private intent or secret agreement of parties to instruments. *Id.*

MORTGAGES—Continued.

7. Statute authorizing assignment of rents in or in connection with trust mortgage to secure bonds issued thereunder does not require that assignment operate immediately and deprive mortgagor of income before default but merely authorizes an assignment theretofore forbidden (Act No. 228, Pub. Acts 1925 [3 Comp. Laws 1929, §§ 13498, 13499]). *Id.*

8. Authority to collect rents under a trust mortgage and apply them on the debt, to take effect on default of mortgagor or parties deriving interest from him, and upon giving notice to tenant or other occupier of premises *held,* valid and intended to operate as assignment of rents under Act No. 228, Pub. Acts 1925 (3 Comp. Laws 1929, §§ 13498, 13499). *Id.* 210.

9. Mortgage foreclosure proceedings are special and statutory and not an exercise of inherent equity powers of the court. *Wurzer* v. *Geraldine,* 286.

10. Consent decree of foreclosure which gave mortgagor time within which to make instalment payments of amount found due and stayed execution in the meantime is none the less final because it also required subsequent action of court in determination of whether or not default occurred and amount due according to terms of decree. *Id.*

11. In mortgage foreclosure decrees custom of giving time for payment before sale of property does not render decree interlocutory since it is the essence of an interlocutory order or decree that it may on final hearing be set aside, altered, changed or modified. *Id.*

12. Court may order sale of such portion of premises as is necessary to satisfy amount found due under final foreclosure decree providing for payment of sum due in instalments where day in court upon question of default and amount due pursuant to terms of said decree is afforded upon motion for order of sale of premises (3 Comp. Laws 1929, §§ 14376–14378). *Id.* 287.

13. Consent decree in mortgage foreclosure proceedings providing for its payment in instalments and in case of default substantially the same provisions as in statutes for foreclosure of instalment due under a mortgage *held,* a final decree which settled the controversy then pending between the parties (3 Comp. Laws 1929, §§ 14376–14378). *Id.*

14. Plaintiff who was granted final decree of foreclosure entered prior to effective date of mortgage moratorium act *held,* entitled to order of sale for instalment due under said decree on motion filed after moratorium act became effective (Act No. 98, Pub. Acts 1933). *Id.*

15. Decree of reformation of a mortgage *held,* within jurisdiction of court granting same notwithstanding underwriting in summons did not state that reformation was prayed. *Cleffy* v. *Allegan State Savings Bank,* 364.

MORTGAGES—Continued.

16. On bill to enforce rent assignment clause under second trust mortgage and restrain trustee under first trust mortgage and fee owner from interfering with collection of rents, order appointing receiver to collect rents and pay past due taxes may result in benefit to first mortgagee and is appealable since it may finally dispose of a portion of the subject matter in case insufficient is realized on foreclosure sale under first mortgage to pay amount due thereunder and the fact that there may be a possible or even probable return of such subject matter is immaterial. *Equitable Trust Co.* v. *Bankers Trust Co.*, 395.

See ACTION (1); APPEAL AND ERROR (19); BILLS AND NOTES (2); COURT COMMISSIONERS; EQUITY (5, 7); GUARDIAN AND WARD (1, 5); LANDLORD AND TENANT (2, 5, 6); MANDAMUS (5); QUIETING TITLE (2); VENDOR AND PURCHASER (1).

MOTHER—See APPEAL AND ERROR (30); INSURANCE (7, 8).

MOTION FOR NEW TRIAL—See APPEAL AND ERROR (12); NEGLIGENCE (2).

MOTION TO DISMISS—See APPEAL AND ERROR (21, 30); APPEARANCE (1); COURTS; HIGHWAYS AND STREETS (1); INSURANCE (7); MASTER AND SERVANT (38).

MOTION TO QUASH—See INDICTMENT AND INFORMATION (1).

MOTOR VEHICLES.

1. Fact that defendant's employee permitted friend, with whom employee was in habit of traveling, to drive car which injured plaintiff has no effect upon liability of defendant employer. *Irwin* v. *Williamson Candy Co.*, 100.
2. Operator of motor vehicle owes duty to one he asks to crank his car not to leave same in gear. *Hunter* v. *Baldwin*, 106.
3. One asked to crank a motor vehicle has a right to rely on driver having car in control and is not bound to anticipate it would be in gear. *Id.*
4. Statute known as guest act, restricting liability of owner or operator of motor vehicle for injury, death or loss to guest to such accidents as are caused by gross negligence or wilful and wanton misconduct of owner or operator, being in derogation of the common law, must be strictly construed (1 Comp. Laws 1929, § 4648). *Id.*
5. It is not necessary that motor vehicle be actually in motion in order for one to be a guest therein. *Id.*
6. Not everyone riding in a motor vehicle without payment is a guest. *Id.*
7. Plaintiff who cranked automobile at request of operator before re-entering car after absence of several hours *held*, not a guest within meaning of 1 Comp. Laws 1929, § 4648, known as guest act, so as to relieve owner of car from liability for plaintiff's injuries suffered when car ran over him. *Id.*

MOTOR VEHICLES—Continued.

8. Stopping a truck on pavement of a highway outside the limits of a village or city because of a breakdown does not constitute parking as prohibited by statute nor is it necessarily negligence (1 Comp. Laws 1929, § 4718). *Russell* v. *Szczawinski*, 112.

9. Matter of negligence of owner and operator of stalled motor truck in lighting same or otherwise warning approaching traffic *held*, question for jury in view of conflicting testimony in action by motorist colliding with rear end of truck. *Id.*

10. Driver of motor vehicle should drive slow enough so he could stop within the range of the assured clear vision ahead notwithstanding oncoming glaring lights or atmospheric conditions which may impair vision or affect surface of pavement (1 Comp. Laws 1929, § 4697). *Id.*

11. Driving automobile in the dark at such speed it cannot be stopped within the distance objects can be seen ahead is negligence as a matter of law (1 Comp. Laws 1929, § 4697). *Id.* 113.

12. Care required of motorist in driving car is ability to perform manual acts necessary to stop it immediately, if necessary, not merely begin to stop within range of his vision or use diligence in stopping after discerning object (1 Comp. Laws 1929, § 4697). *Id.*

13. Testimony that deceased wife was patient of township instead of county, given at hearing on motion for judgment *non obstante veredicto* after entry of judgment for plaintiff in action by husband against county nurse in her individual capacity for loss of wife's services due to injuries received while a passenger as indigent patient in defendant's car *held*, improper at such hearing. *McGuire* v. *Armstrong*, 152.

14. Recovery may be had for injuries sustained by passenger as a result of ordinary negligence when a third party compensates defendant for transporting his passenger, the test being whether transportation was furnished gratuitously (1 Comp. Laws 1929, § 4648). *Id.* 153.

15. Transportation of indigent patients to clinics by county nurse *held*, within the scope of her duties as county nurse for which she was paid by county and not by patient or her husband, so as to render nurse liable for injuries to patient received as result of ordinary negligence (1 Comp. Laws 1929, § 4648). *Id.*

16. The word "guest" as used in motor vehicle guest act connotes both a social relationship and the existence of a host (1 Comp. Laws 1929, § 4648). *Id.*

17. Testimony that each of two motorists approached intersection of city streets at excessive speed and failed to use proper precautions where view was partially obstructed *held*, sufficient to justify finding of court in case tried without a jury that each was guilty of negligence. *Security Storage & Transfer Co.* v. *Quimby*, 259.

MOTOR VEHICLES—Continued.

18. Automobile drivers approaching street intersection at right angles to each other are each required to use such care under circumstances as would be required of ordinarily prudent person to avoid collision; and each may assume that other will conduct himself as reasonably prudent driver would under like circumstances. *Id.*

19. Failure to see railroad track and train in time to stop automobile and avoid accident was at most ordinary negligence imputable to guest passenger in action by his administratrix against his host and railroad company, and was not gross negligence or wanton and wilful misconduct so as to permit recovery against either defendant. *Greenfield* v. *Duluth, South Shore & Atlantic Railway Co.*, 277.

20. In action against creamery for alleged negligent operation of its truck which resulted in death of child four years and five months old, charge of court taken as a whole *held,* to have presented issue of truck driver's negligence so the jury could not have mistaken its duty although isolated expressions in it were objectionable, where plaintiff's requests to charge as to freedom of child from contributory negligence and duty of truck driver to anticipate sudden and unexpected action from small children and guard against it were given. *Severson* v. *Family Creamery Co.*, 348.

21. In action under survival act by administrator of estate of person fatally injured by defendants' car passing place where decedent was aiding disabled motorist, evidence *held,* sufficient to present matters of negligence and contributory negligence for consideration of jury (3 Comp. Laws 1929, § 14040). *Newell* v. *Ritter,* 405.

22. In action under survival act by administrator of estate of prosperous farmer 67 years of age when fatally injured as result of motorist's negligence, facts *held,* sufficient to permit jury to allow such damages as they deemed reasonable; verdict of $2,500 indicating but small allowance for future earnings. *Id.*

23. In action by pedestrian injured while crossing wide city street accompanied by two others at 1:30 a. m. when struck by defendants' taxicab, evidence *held,* insufficient to show plaintiff's alleged failure to see defendants' cab was proximate cause of the accident, where driver had wide street almost to himself and could have seen plaintiff and companions and avoided accident by using reasonable care. *Orme* v. *Farmer,* 425.

24. Contention that pedestrian was guilty of contributory negligence in walking along snow-covered street, plowed 20 feet wide, at 7 a. m. on winter morning *held,* not sustained on appeal of motor vehicle owner, where preponderance of evidence is in favor of plaintiff and disinterested witnesses corroborated his testimony as to manner in which accident happened. *Lapachin* v. *Standard Oil Co.*, 477.

MOTOR VEHICLES—Continued.

25. Pedestrians have equal rights on highways with motorists and where beaten path is wide enough for several vehicles to pass, former have right to assume they will not be run down and may not always have to get completely off traveled portion of highway. *Id.* 478.

See APPEAL AND ERROR (22, 31); ARREST; CARRIERS; CRIMINAL LAW (12–14); FALSE PRETENSES; MASTER AND SERVANT (26); OFFICERS (8); RAILROADS (1).

MUCK LAND—See JUDGMENT (9).

MULTIFARIOUSNESS—See APPEAL AND ERROR (34); EQUITY (15).

MULTIPLICITY OF SUITS—See QUIETING TITLE (2).

MUNICIPAL CORPORATIONS.

1. Under home rule act a city charter commission has power and authority to frame a proposed charter for the city and provide for its submission to electors for adoption or rejection, including fixing a time therefor (1 Comp. Laws 1929, § 2256). *Streat* v. *Vermilya,* 1.
2. A proposed new charter, if adopted, entirely supersedes former charter and abolishes offices thereunder as a city may not have two separate and distinct charters at the same time. *Id.*
3. Cities are municipal corporations deriving their powers from the State and are its agencies for carrying on local government (1 Comp. Laws 1929, §§ 2228–2274). *Id.*
4. A city charter is the organic law of the city and is to be considered the same as other organic acts. *Id.*
5. Power of city electors to adopt proposed charter carries with it the implied power and authority to provide the city government which shall function thereunder, if adopted, and, in absence of constitutional or legislative limitation, electors may provide for election of officers. *Id.*
6. Provision of proposed charter for its submission for ratification or rejection by qualified electors in home rule city and election of officers as provided for therein at same special election *held,* constitutional and valid. *Id.*
7. City is bound to take care of its debt service pursuant to 1 Comp. Laws 1929, § 2694, as amended by Act No. 142, Pub. Acts 1931, notwithstanding the tax imposed may exceed two per cent. limitation placed thereon by home rule act, 1 Comp. Laws 1929, §§ 2230, 2241. *Simonton* v. *City of Pontiac,* 11.
8. A village is not an insurer of its sidewalks but must maintain them in a reasonably safe condition for travel and may also be liable for failure to maintain guard rail to protect pedestrians (1 Comp. Laws 1929, § 4223). *Rex* v. *Village of Lochmoor,* 159.

MUNICIPAL CORPORATIONS—Continued.

9. Jury could reasonably find negligence on part of village in maintaining slippery sidewalk sloping downwardly to low ground and toward a precipitous drop to water with no guard rail to protect pedestrians for a period of more than 30 days, it being a jury question where reasonable and prudent men may fairly disagree upon how duty of maintenance by village shall be performed, including the question of whether or not guard rails should have been maintained. *Id.*

10. Two-foot strip of land between sidewalk and lot line left to enable installation of sidewalk without trespassing upon abutting property, in fact a part of the street, and formerly part of an alley abutting lot and improved with other land into a better public way, *held,* not to separate street from lot so as to relieve latter from assessment for opening, grading, paving and sidewalk. *Marqua* v. *City of Detroit,* 380.

11. Bill to enjoin city from lowering street grade at railroad crossing without first compensating abutting property owner for such damage as it would suffer *held,* properly dismissed since plaintiff has adequate remedy at law under the grade separation act where a city may proceed to lower the grade of a street and then begin appropriate proceedings to ascertain damages, if any (1 Comp. Laws 1929, § 4481 *et seq.*). *A. M. Campau Realty Co.* v. *City of Detroit,* 417.

12. Thoroughfare dedicated as boulevard in one municipality and held to be such by former decision of this court and continued in plat of adjoining subdivision in adjoining municipality and accepted under like circumstances and charter provisions in each *held,* boulevard in latter municipality, relieving abutting lot owners of assessments for paving. *Welch* v. *City of Lincoln Park,* 440.

13. In action of assumpsit against township for reasonable value of services of surveyors, record *held,* to sustain finding of court that recorded action of township board authorized employment of plaintiffs, residents of county, to perform services, as respects contention that the county surveyor was to be employed. *McGaughan* v. *West Bloomfield Township,* 553.

14. Township may not escape obligation to pay for services of surveyors where it permitted and induced the performance and accepted the benefits thereof, notwithstanding statutory power to accomplish the same result lay in township highway commissioner who was present and approved action of the township board (1 Comp. Laws 1929, § 3937). *Id.* 554.

15. Authorization of a survey of township boundary line which crossed diagonally through several lots of a subdivision in a village, necessary to enable assessor to properly perform his duties, was a legitimate exercise of the power vested in a township board. *Id.*

MUNICIPAL CORPORATIONS—Continued.

16. Evidence that surveyors were authorized to survey township boundary line through village *held,* sufficient, where testimony of former members of the board to that effect is convincing. *Id.*

See APPEAL AND ERROR (21); BRIDGES; ESTOPPEL (4); JURY (1); MANDAMUS (1, 2, 4); MOTOR VEHICLES (13); OFFICERS (8); STATUTES (1, 7).

MURDER—See APPEAL AND ERROR (25); CRIMINAL LAW (6, 11); EVIDENCE (3); HABEAS CORPUS; INDICTMENT AND INFORMATION (3); WITNESSES (8, 9).

NATIONAL CODES—See MASTER AND SERVANT (33).

NEGLECT OF DUTY—See OFFICERS (5, 8).

NEGLIGENCE.

1. Contributory negligence is not imputable to any person for failure to look out for danger when, under the surrounding circumstances, he had no reason to suspect that danger was to be apprehended. *Hunter* v. *Baldwin,* 106.
2. Claim of contributory negligence of mason in not seeing that steel joists were insecurely fastened, apparently not passed upon by trial court during trial nor on motion for new trial is not sustained where architect testified mason might not know where to look for such fastenings and mason said he had never worked before on building where steel joists were used. *Watkins* v. *Gabriel Steel Co.,* 264.
3. Finding by jury that traveling representative of food packer while in truck of wholesale grocer displaying and distributing food products threw can of food which struck and injured plaintiff *held,* justified by the evidence. *Gaufin* v. *Valind,* 269.
4. Finding of community of interest between traveling representative of food packer and wholesale grocer in displaying and distributing merchandise from latter's truck in street parade *held,* justified by evidence so as to warrant instruction permitting jury to find both defendants liable for negligent act of one which injured plaintiff. *Id.*
5. Negligence is the failure to exercise that degree of care and caution which an ordinarily prudent person usually exercises under the same or similar circumstances. *Mikulski* v. *Morgan,* 314.
6. Possible confusion in minds of jury caused by reference in main charge to jury to both statutory and common-law negligence *held,* cured by subsequent instruction in which court stated plaintiff relied solely upon common-law negligence, where issue was the same under either theory. *Severson* v. *Family Creamery Co.,* 349.

NEGLIGENCE—Continued.

7. In action against creamery for alleged negligence causing death of small boy, verdict for defendant *held*, not against great weight of evidence. *Id.*

See APPEAL AND ERROR (17, 22, 31); CONSTITUTIONAL LAW (1); DAMAGES (4); JUDGMENT (3); MASTER AND SERVANT (5, 21, 26); MOTOR VEHICLES (8, 9, 11, 14, 15, 17–21, 23); MUNICIPAL CORPORATIONS (9); OFFICERS (5, 8); RAILROADS (1); THEATERS AND SHOWS (2); TRIAL (3).

NEPHEWS AND NIECES—See DEATH.

NEW TRIAL.

1. A circuit judge has a wide discretion in either granting or refusing a new trial either upon his own motion or that of the parties, somewhat greater latitude being allowed in granting same since it is not a final settlement of the rights of the parties. *Hoskin-Morainville Paper Co.* v. *Bates Valve Bag Corp.*, 443.
2. An abuse of discretion by the circuit judge in granting a new trial will not be interfered with unless so plain that an unprejudiced person can say there was no excuse for the ruling so made. *Id.*
3. Misconceived celebration of defendant's victory in which seven or eight of the jurors participated for about an hour immediately after rendition of verdict *held*, insufficient cause to grant a new trial where serving of liquor and other acts of defendant's employee and of jurors were not such as to render it reasonably doubtful whether verdict had been legitimately procured and new trial was not otherwise allowable. *Id.*
4. Indorsement of names of persons in house at time of alleged rape may not be reserved as basis for new trial where no motion to so indorse was made at time of trial. *People* v. *Prescott*, 607.

See APPEAL AND ERROR (11, 12); CRIMINAL LAW (1); EVIDENCE (14); JUDGMENT (3); NEGLIGENCE (2).

NIGHT—See MOTOR VEHICLES (11).

NONCOERCION CLAUSE—See BILLS AND NOTES (5); HUSBAND AND WIFE; REFORMATION OF INSTRUMENTS.

NOTICE—See APPEAL AND ERROR (13); BANKS AND BANKING (8); BENEFICIAL ASSOCIATIONS (4); BILLS AND NOTES (3); ESTOPPEL (3, 4); FALSE PRETENSES; GUARDIAN AND WARD (2, 4–6); INDICTMENT AND INFORMATION (7); LIMITATION OF ACTIONS (2); MASTER AND SERVANT (15, 16, 37); MECHANICS' LIENS (2); MORTGAGES (8); OFFICERS (2, 4); SHERIFFS AND CONSTABLES (1); VENDOR AND PURCHASER (7); WAREHOUSEMEN (2).

NOVATION.

1. Novation of parties is determined from consideration of all the facts and circumstances of a given case. *Chicago Boulevard Land Co.* v. *Nutten*, 541.
2. Consent of all parties to novation is necessary but need not be expressed in writing, it being inferable from attendant facts and circumstances. *Id.* 542.

See VENDOR AND PURCHASER (7, 8).

NURSE—See MOTOR VEHICLES (13, 15).

OATHS AND AFFIRMATIONS—See KIDNAPPING.

OBSTRUCTED VIEW—See MOTOR VEHICLES (17).

OFFICERS.

1. Members of the public utilities commission are not judicial officers within the meaning of that term as used in article 9, § 7, of the Constitution excepting judicial officers from removal from office by governor, although commission has statutory power to ascertain facts and make orders thereon and has been referred to as a *quasi*-judicial body. *People, ex rel. Clardy*, v. *Baldh*, 196.
2. Rights, powers and duties of railroad commission transferred to public utilities commission by statute organizing it are those which may be exercised and performed by the commission and do not include right of member to 10-day notice from governor of hearing on removal to which railroad commissioners were entitled (2 Comp. Laws 1929, §§ 11008, 11018 *et seq.*). *Id.*
3. Public officer into whose acts governor makes inquiry on petition for removal is entitled to reasonable opportunity to make defense (Const. 1908, art. 9, § 7). *Id.*
4. Notice served on public utilities commissioner on February 9th of hearing to be held February 14th on petition for his removal *held*, sufficient to give governor jurisdiction of removal proceedings where commissioner neither filed answer to petition nor requested further time within which to make his defense but merely appeared specially and moved to dismiss petition (Const. 1908, art. 9, § 7). *Id.*
5. Governor, in proceedings to remove member of public utilities commission for gross neglect of duty, has right to assume that each commissioner participated in the work of the commission, in absence of proof to the contrary, as each of the members is chargeable with its failure to act. *Id.*
6. Right to remove member of public utilities commission is not affected by fact that official action of its different members is merged into the official action of the commission itself as an entity. *Id.* 197.
7. Allegations in petition for removal of certain members of public utilities commission for gross neglect of duty *held*,

OFFICERS—Continued.

sufficient statement of fact, which, if proved, would justify governor in making order removing them, including relator in instant *quo warranto* proceedings. *Id.*

8. Removal of public utilities commissioners by governor based on allegations in petition therefor and supported by competent evidence that commissioners failed to act with reasonable promptitude on application for rate reduction in village and on a number of applications for permits under motor vehicle carrier statute *held*, justified in absence of denial or explanation on part of commissioner sought to be removed (Act No. 212, Pub. Acts 1931). *Id.*

9. Auditor general *held*, to have no power to accept or reject items in an audit of books of liquor control commission so as to establish legal right or liability of the commission or its members, but to have the power to make an examination of the books and records of the commission and take such physical inventories as he finds necessary to determine correctness of its report to State treasurer of moneys due the State. *Auditor General* v. *Liquor Control Commission*, 320.

See APPEAL AND ERROR (3); BENEFICIAL ASSOCIATIONS (1); CONSTITUTIONAL LAW (1); CORPORATIONS (9); CRIMINAL LAW (4, 5); DRAINS (4); EQUITY (14); EVIDENCE (4); MUNICIPAL CORPORATIONS (2, 5, 6); STATUTES (1).

OIL AND GAS—See DAMAGES (2); EQUITY (15); ESTOPPEL (5); EVIDENCE (5); FRAUD; MINES AND MINERALS (1, 2); TROVER AND CONVERSION (1).

OPINIONS—See BANKS AND BANKING (8); TRIAL (1).

OPPOSITE PARTY—See DISCOVERY (1, 3).

ORAL CONTRACTS—See FRAUDS, STATUTE OF; SPECIFIC PERFORMANCE.

ORDER OF PROOF—See CRIMINAL LAW (28).

ORDINANCES—See MANDAMUS (4).

ORGANIC ACTS—See MUNICIPAL CORPORATIONS (4).

ORIENTAL RUGS—See ATTACHMENT (3); SHERIFFS AND CONSTABLES (2); WAREHOUSEMEN (2).

ORIGINAL AWARD—See MASTER AND SERVANT (8).

OSTEOPATHS—See EVIDENCE (15).

OTHER OFFENSES—See CRIMINAL LAW (4, 27).

OTHER STATES—See EVIDENCE (9, 10).

PAIN AND SUFFERING—See DAMAGES (5).

PARADE—See NEGLIGENCE (3, 4).

PARKING ON PAVEMENT—See MOTOR VEHICLES (8).

PAROL EVIDENCE—See *EVIDENCE* (1, 2, 10, 16); HUSBAND AND WIFE.

PARTIAL DISABILITY—See MASTER AND SERVANT (14, 24, 28).

PARTIES—See APPEAL AND ERROR (5); JUDGMENT (8); MANDAMUS (2); MASTER AND SERVANT (1); NOVATION (1, 2); VENDOR AND PURCHASER (7, 8).

PARTNERSHIP.

1. Under uniform partnership act a receiver may be authorized to enforce personal liabilities of partners for firm debts because such liability constitutes an asset of the partnership (2 Comp. Laws 1929, §§ 9858, 9880). *Upton* v. *Upton*, 27.

2. Contributions collected from partners become general funds in hands of receiver to be distributed proportionately among creditors (2 Comp. Laws 1929, § 9880). *Id.*

3. Uniform partnership act does not expressly authorize action by the receiver of a partnership against a retired partner. *Id.*

4. A retired partner has no property interest in the firm assets and in general he is not liable for its debts incurred after his withdrawal. *Id.*

5. Retiring partner's liability for firm debts existing at the time of withdrawal is personal as to each creditor and collection made as result of enforcement of such liability would be for particular creditor's benefit and not for general distribution among creditors. *Id.*

See APPEAL AND ERROR (9, 23); BANKS AND BANKING (1–7); TRADE-MARKS AND TRADE-NAMES (1).

PARTY IN INTEREST—See ASSIGNMENTS (1).

PASSENGERS—See MOTOR VEHICLES (4–7, 13, 14).

PATIENTS—See MOTOR VEHICLES (13, 15).

PAUPERS—See MASTER AND SERVANT (22, 46); MOTOR VEHICLES (13, 15).

PAVEMENT—See MOTOR VEHICLES (10); MUNICIPAL CORPORATIONS (10–12); VENDOR AND PURCHASER (1).

PAYMENT—See APPEAL AND ERROR (30); ESTATES OF DECEDENTS (3); INSURANCE (3, 7–9); MORTGAGES (11); MOTOR VEHICLES (6); TORTS (3); VENDOR AND PURCHASER (1, 6).

PEDESTRIANS—See APPEAL AND ERROR (22, 31); BRIDGES; MOTOR VEHICLES (23–25); MUNICIPAL CORPORATIONS (8, 9).

PENDING APPEAL—See APPEAL AND ERROR (8).

PEREMPTORY CHALLENGES—See JURY (2, 4).

PERFORMANCE BOND—See PRINCIPAL AND SURETY (1, 2).

PERMANENT DISABILITY—See DAMAGES (5).

PERPETUAL EASEMENT—See APPEAL AND ERROR (4).

PERSONAL INJURIES——See APPEAL AND ERROR (11, 22, 31); COSTS (2); DAMAGES (1, 5); INJUNCTION (1, 2); MASTER AND SERVANT (9, 13); MOTOR VEHICLES (7); THEATERS AND SHOWS (2).

PERSONAL SERVICES—See ESTATES OF DECEDENTS (1).

PETITION FOR IMPROVEMENT—See HIGHWAYS AND STREETS (4, 6).

PHYSICAL CONDITION—See MASTER AND SERVANT (27, 28).

PHYSICIANS AND SURGEONS—See APPEAL AND ERROR (17, 27); CRIMINAL LAW (12, 13); DAMAGES (4); EVIDENCE (13–15); INSURANCE (5); TRIAL (3); WITNESSES (3).

PLATS—See COVENANTS (2); DEDICATION (3, 4); MUNICIPAL CORPORATIONS (12); VENDOR AND PURCHASER (9).

PLEADING—See APPEAL AND ERROR (4, 6, 21, 34); DISCOVERY (4); EQUITY (2); GARNISHMENT (4, 5); INSURANCE (7); INTEREST (1); OFFICERS (7); TORTS (1, 3).

PLEDGES—See MANDAMUS (5).

POLICE POWERS—See CONSTITUTIONAL LAW (8); INTOXICATING LIQUORS (3).

POLITICAL PARTIES—See CONSTITUTIONAL LAW (2); ELECTIONS (1).

POOR PERSONS—See MASTER AND SERVANT (46).

POSSESSION—See ADVERSE POSSESSION (1–3); EJECTMENT; SALES (4); TAXATION (3); TROVER AND CONVERSION (2).

PRACTICE—See EQUITY (1); EVIDENCE (15).

PREFERRED STOCK—See CORPORATIONS (2, 3).

PREJUDICIAL ERROR—See APPEAL AND ERROR (4, 17, 27, 31); CRIMINAL LAW (25); EVIDENCE (13); FALSE PRETENSES; INDICTMENT AND INFORMATION (3); TRIAL (3).

PREJUDICIAL REMARKS—See APPEAL AND ERROR (25).

PREMIUMS—See INSURANCE (3).

PREPONDERANCE OF EVIDENCE—See INSURANCE (4); MOTOR VEHICLES (24).

PRESENCE IN COURT—See CRIMINAL LAW (18).

PRESUMPTIONS—See APPEAL AND ERROR (35); CONSTITUTIONAL LAW (6, 9); CRIMINAL LAW (2, 3); DEATH (1); DEDICATION (1); ESTATES OF DECEDENTS (1); FRAUDULENT CONVEYANCES (1); INJUNCTION (3); OFFICERS (5).

PRIMA FACIE CASE—See FRAUDULENT CONVEYANCES (1).

PRIMA FACIE EVIDENCE—See EVIDENCE (9).

PRINCIPAL AND AGENT.

1. Question as to authority of broker's representative to bind milling company on written contract containing express warranty as to quality of flour sold thereunder *held*, properly submitted to the jury in action by company against buyer. *Mennel Milling Co.* v. *Acme Pie Co.*, 457.
2. Finding for defendant on question of agent's authority to sign contract on behalf of plaintiff *held*, sustained by evidence that he received authority over telephone before taking order. *Id.*

See ESTOPPEL (1); MASTER AND SERVANT (3); TORTS (3).

PRINCIPAL AND SURETY.

1. Failure of principal contractor to pay for labor or material, resulting in the filing of a mechanic's lien by party who furnished same, constituted such breach of performance bond as to render effective, as of date of bond, assignment of balance due principal contractor. *R. C. Mahon Co.* v. *R. S. Knapp Co.*, 67.
2. Evidence *held, insufficient to show that surety on private* construction bond either said or did anything on which subcontractors relied to their detriment. *Id.*

See DEPOSITARIES (1, 2, 4); GARNISHMENT (1); SHERIFFS AND CONSTABLES (1); VENDOR AND PURCHASER (4, 5).

PRINCIPAL PAYMENTS—See APPEAL AND ERROR (14).

PRIORITY—See GARNISHMENT (1).

PRIVATE BANKING PARTNERSHIP—See BANKS AND BANKING (1, 3–7); TRADE-MARKS AND TRADE-NAMES (1).

PRIVATE CONSTRUCTION BOND—See GARNISHMENT (1); PRINCIPAL AND SURETY (1, 2).

PRIVILEGED COMMUNICATIONS—See CRIMINAL LAW (12); WITNESSES (3, 5, 7, 8).

PRIVITY—See ESTOPPEL (1).

PROBATE COURT—See COURTS; GUARDIAN AND WARD (2, 3, 5); WILLS (1).

PROCESS—See EQUITY (2, 3); LIMITATION OF ACTIONS (1); MORTGAGES (15); VENDOR AND PURCHASER (4, 5); WAREHOUSEMEN (2).

PROFESSIONAL ETHICS—See ATTORNEY AND CLIENT (1).

PROFITS—See APPEAL AND ERROR (9); DAMAGES (3); MORTGAGES (1, 3, 7); STATUTES (2).

PROMISSORY REPRESENTATIONS—See BILLS AND NOTES (4).

PROMOTERS—See EQUITY (15).

PROOF OF LOSS—See INSURANCE (10, 11, 13).

PRO RATA CLAUSE—See DEPOSITARIES (1).

PROSECUTING ATTORNEY—See APPEAL AND ERROR (25); MALICIOUS PROSECUTION.

PROSPECTUS—See EVIDENCE (12).

PRO TANTO SUBROGATION CLAUSE—See DEPOSITARIES (2).

PROXIMATE CAUSE—See MASTER AND SERVANT (9); MOTOR VEHICLES (23); THEATERS AND SHOWS (2).

PSYCHOPATHIC CLINIC—See CRIMINAL LAW (6, 7, 10); EVIDENCE (3).

PUBLIC FUNDS—See DEPOSITARIES (1–4); SUBROGATION (1).

PUBLIC OFFICERS—See EVIDENCE (4).

PUBLIC POLICY—See CORPORATIONS (4).

PUBLIC QUESTION—See COSTS (4).

PUBLIC RECORD—See BANKS AND BANKING (3).

PUBLIC UTILITIES COMMISSION—See CARRIERS (1); OFFICERS (1, 2, 4–8).

QUALITY—See PRINCIPAL AND AGENT (1); SALES (2).

QUASI-JUDICIAL OFFICERS—See OFFICERS (1).

QUESTION FOR COURT—See CRIMINAL LAW (11); INSURANCE (7); JUDGMENT (1).

QUESTION FOR JURY—See CRIMINAL LAW (26, 30); ESTATES OF DECEDENTS (2); INSURANCE (14); JOINT ADVENTURES (2); MOTOR VEHICLES (9, 21); MUNICIPAL CORPORATIONS (9); PRINCIPAL AND AGENT (1); TROVER AND CONVERSION (2); WILLS (2, 10); WITNESSES (4).

QUESTION OF FACT—See INSURANCE (11); JUDGMENT (2); TAXATION (1).

QUESTIONS REVIEWABLE—See APPEAL AND ERROR (10, 12, 13, 26).

QUIETING TITLE.

1. Although chancery court has statutory jurisdiction to try title to land, bill to quiet title will not lie so as to deprive defendant of jury trial where question of title may be tried at law unless there be an independent ground of equity jurisdiction in which case title may be tried even though ejectment is also open (3 Comp. Laws 1929, § 13444, subd. 4). *Hawkins* v. *Dillman*, 483.
2. Equity has jurisdiction to quiet title where there is fraud, to avoid multiplicity of suits, to set aside a mortgage or to reform an instrument. *Id.*

See EQUITY (4).

QUO WARRANTO—See OFFICERS (7).

RAILROADS.

1. Motorist who drives upon railroad track at crossing without having heard a train or any signal in broad daylight and takes no further precaution, does so at his own risk. *Greenfield* v. *Duluth, South Shore & Atlantic Railway Co.*, 277.
2. Record *held*, to show that legal title to vacant strip of land between highway and steam railroad right of way, granted to electric railway for its purposes, reverted to grantors upon cessation of use for electric railway purposes. *Hawkins* v. *Dillman*, 484.

See ADVERSE POSSESSION (3); APPEAL AND ERROR (21); CONSTITUTIONAL LAW (7); DEDICATION (2–4); EMINENT DOMAIN (1); INJUNCTION (2); MOTOR VEHICLES (19); MUNICIPAL CORPORATIONS (11); VENUE.

RAPE.

1. In trial of the accused of statutory rape, prosecution has burden of showing, and jury obligation of finding, beyond reasonable doubt, before a verdict of guilty, that accused had sexual intercourse with prosecutrix on or about date alleged and that she was under 16 years of age at that time (Act No. 328, § 520, Pub. Acts 1931). *People* v. *Prescott*, 606.

RAPE—Continued.

2. Testimony of mother as to age of prosecutrix at time of alleged rape was competent but its weight was a question for the jury in view of the appearance of the girl and all other circumstances of the case. *Id.*

3. In statutory rape case, admission of testimony of prosecutrix on direct examination that she first made complaint nearly four months after intercourse is alleged to have taken place *held*, not error, since such testimony is not substantive evidence but merely a circumstance affecting credibility of prosecutrix. *Id.* 607.

See CRIMINAL LAW (29); NEW TRIAL (4).

RATES—See OFFICERS (8).

RATIFICATION—See ESTOPPEL (5); FRAUDS, STATUTE OF (2).

REAL ESTATE—See GUARDIAN AND WARD (1–4, 6).

REAR END COLLISION—See MOTOR VEHICLES (9).

REASONABLE INFERENCE—See MASTER AND SERVANT (12).

REBUTTAL—See CRIMINAL LAW (27); INDICTMENT AND INFORMATION (6).

RECEIVER AD LITEM—See APPEAL AND ERROR (19).

RECEIVERS.

Receiver appointed for property of judgment debtor has no authority over property in hands of transferee until and unless alleged fraudulent conveyance has been set aside (3 Comp. Laws 1929, § 15129). *Hochrein* v. *Gunther*, 682.

See ACTION (1); APPEAL AND ERROR (37); BANKS AND BANKING (5, 7–9); CORPORATIONS (5, 8, 9); GUARDIAN AND WARD (6); MORTGAGES (1, 3, 16); PARTNERSHIP (1–3); VENDOR AND PURCHASER (2).

RECORDING—See BANKS AND BANKING (3); FRAUD; MORTGAGES (5).

RECORDS—See APPEAL AND ERROR (1, 16, 23, 30); CRIMINAL LAW (22); DIVORCE (2); ESCHEAT (2); EVIDENCE (16); FALSE PRETENSES; FRAUDS, STATUTE OF (1); GUARDIAN AND WARD (2, 5); LANDLORD AND TENANT (3); MASTER AND SERVANT (41); SHERIFFS AND CONSTABLES (1); VENDOR AND PURCHASER (4, 8); WILLS (1, 3, 10).

REDEMPTION—See APPEAL AND ERROR (24).

REEMPLOYMENT—See MASTER AND SERVANT (32).

REFERENDUM—See MUNICIPAL CORPORATIONS (6).

REFORMATION OF INSTRUMENTS.

Reformation of promissory notes to include statutory non-coercion clause as to wife is granted, where it works no evasion of statute nor harm to wife who signed contract containing said clause and pursuant to which the notes were given (Act No. 158, Pub. Acts 1917). *Montz* v. *Reutter*, 358.

See EQUITY (3); HUSBAND AND WIFE; MORTGAGES (15); QUIETING TITLE (2).

REFRIGERATING EQUIPMENT—See SALES (3, 7).

REGULATION—See INTOXICATING LIQUORS (3).

REHABILITATION—See EQUITY (10, 13).

REINSTATEMENT—See INSURANCE (5, 6).

REJECTION—See SALES (2).

RELEASE.

1. At common law there could be but one satisfaction for a tort so that a settlement with one tortfeasor constituted a settlement as to all. *Slater* v. *Ianni Construction Co.*, 492.
2. Injured party may release tortfeasors by contract for satisfaction which need not be in money, by compromise, accord and satisfaction or waiver. *MacDonald* v. *Henry Hornblower & Weeks*, 626.
3. By release of cause of action against one tortfeasor, other tortfeasors are discharged even though contract of release expressly reserves right of action against them. *Id.* 627.

See INSURANCE (14); VENDOR AND PURCHASER (7, 8).

REMAND—See APPEAL AND ERROR (15, 33).

REMARKS OF TRIAL JUDGE—See CRIMINAL LAW (29).

REMEDY—See APPEAL AND ERROR (34); EQUITY (4); JUDGMENT (5); MANDAMUS (5); MINES AND MINERALS (1); TROVER AND CONVERSION (1).

REMITTITUR—See DAMAGES (4).

REMOVAL FROM OFFICE—See CONSTITUTIONAL LAW (1); OFFICERS (1–8).

RENEWAL NOTE—See BILLS AND NOTES (1–3); TORTS (3).

RENTS—See ACTION (1); EMINENT DOMAIN (2, 3); EQUITY (6, 7, 10, 11, 13); LANDLORD AND TENANT (1, 4–7); MORTGAGES (1–3, 8, 16); VENDOR AND PURCHASER (2).

REORGANIZATION OF BANK—See GUARDIAN AND WARD (6).

REPORTS—See CORPORATIONS (1); CRIMINAL LAW (6–8, 10); EVIDENCE (3, 10); GUARDIAN AND WARD (4); LANDLORD AND TENANT (3); MASTER AND SERVANT (17, 19).

REQUESTS TO CHARGE—See CRIMINAL LAW (21); MOTOR VEHICLES (20).

RESCISSION—See CONTRACTS (3); VENDOR AND PURCHASER (1, 9).

RES GESTÆ—See CRIMINAL LAW (13–20).

RESIDENCE—See VENUE.

RES JUDICATA—See JUDGMENT (8); MASTER AND SERVANT (28).

RESTAURANT—See INTOXICATING LIQUORS (4).

RESTORATION—See EQUITY (14).

RETIRED PARTNER—See BANKS AND BANKING (6, 7); PARTNERSHIP (3–5).

REVERSE ORDER—See TRIAL (4).

REVERSIBLE ERROR—See CRIMINAL LAW (18, 29); EVIDENCE (14); MASTER AND SERVANT (23); TRIAL (3).

REVERSION—See LANDLORD AND TENANT (5).

REVERTER—See RAILROADS (2).

REVIEW—See INTOXICATING LIQUORS (2).

REVIEW OF PAYMENTS—See MASTER AND SERVANT (8, 27).

RIGHT OF WAY—See DEDICATION (3, 4).

RUBBISH—See MASTER AND SERVANT (46).

RUGS—See ATTACHMENT (3); SHERIFFS AND CONSTABLES (2).

RULES AND REGULATIONS—See CONSTITUTIONAL LAW (8); INJUNCTION (3).

RURAL AREA—See INTOXICATING LIQUORS (4).

SALARY—See ACTION (2).

SALES.

1. Section of uniform sales act which excludes implied warranties in sale of articles under a trade name does not extend to exclusion of express warranties of written contract (2 Comp. Laws 1929, § 9454, subd. 4). *Mennel Milling Co.* v. *Acme Pie Co.*, 457.

SALES—Continued.

2. In action for damages for refusal to accept further shipments of flour pursuant to contract containing express warranty as to quality, instruction that rejection of flour must be in good faith and that plaintiff must have had knowledge of purpose for which it was intended *held*, correct, where there was ample proof of unsatisfactory quality of flour previously shipped and plaintiff admits future shipments would be of same quality. *Id.*
3. Instrument providing that title of refrigerating equipment should remain in vendor until purchase price is paid, for acceleration of payment of purchase price, for a reasonable attorney's fee and insurance for benefit of vendor *held*, a conditional sale contract and not a chattel mortgage. *Uhl* v. *Wexford Co.*, 473.
4. The right of vendor to re-enter into possession of personalty depends not on contract but on law. *Id.*
5. Reservation of title of personalty should be given effect where there is nothing in the instrument inconsistent with a conditional sale. *Id.*
6. Provision for accelerating payment of purchase price and requiring insurance for benefit of vendor in instrument for sale of personalty and the taking of promissory notes for balance of purchase price are not inconsistent with construction as a conditional sale contract. *Id.*
7. Statements in correspondence between vendor and vendee indicating vendor considered instrument relating to refrigerating equipment a conditional sale contract, which were not refuted by vendee, *held*, indicative that it was such a contract. *Id.* 474.

See DISCOVERY (3); MORTGAGES (12); TRADE-MARKS AND TRADE-NAMES (4).

SANITY COMMISSION—See CRIMINAL LAW (6–11); EVIDENCE (3).

SCOPE OF EMPLOYMENT—See MASTER AND SERVANT (4).

SCRIVENER—See WILLS (10).

SECRET AGREEMENT—See MORTGAGES (6).

SECURITY—See EQUITY (6); MANDAMUS (5); MORTGAGES (1, 2).

SELECTION—See HOMESTEADS (1, 2).

SELF-EXECUTING PROVISIONS—See CONSTITUTIONAL LAW (1).

SELF-INCRIMINATION—See WITNESSES (3).

SENTENCE—See HABEAS CORPUS; JURY (2).

SEPARATE MAINTENANCE—See DIVORCE (2).

SERVICES—See ESTATES OF DECEDENTS (1).

SET-OFF AND RECOUPMENT—See APPEAL AND ERROR (33); BILLS AND NOTES (1); EXECUTION; MANDAMUS (5).

SETTLEMENT—See MASTER AND SERVANT (1–3, 14).

SEVERANCE—See MINES AND MINERALS (1, 2).

SEWERS—See DRAINS (1).

SEXUAL INTERCOURSE—See RAPE (1, 3).

SHERIFFS AND CONSTABLES.

1. Motion for judgment of no cause of action made at close of plaintiff's proofs in his action against surety on sheriff's bond for false return in summary proceedings should have been granted, where record shows he did not commence action within two years of time when he first had knowledge of facts sufficient to put him on inquiry as to the falsity of return and made no inquiry (3 Comp. Laws 1929, §§ 13976, 13983). *Chalker* v. *Fidelity & Deposit Company of Maryland*, 334.
2. Right of sheriff to fees is dependent upon statute and though he might equitably be entitled to compensation as custodian of attached property, consisting of oriental rugs, court may not go beyond plain letter of statute and allow same (3 Comp. Laws 1929, § 14777). *Roehl Storage Co.* v. *Wilson*, 691.

See ATTACHMENT (1, 3); LIMITATION OF ACTIONS (1); VENDOR AND PURCHASER (4, 5); WAREHOUSEMEN (2).

SIDEWALKS—See BRIDGES; MUNICIPAL CORPORATIONS (8–10).

SIGNALS—See RAILROADS (1).

SIGNATURES—See HIGHWAYS AND STREETS (4, 6); HOMESTEADS (5); HUSBAND AND WIFE.

SKILLED LABOR—See MASTER AND SERVANT (29, 32).

SLANDER—See WILLS (4).

SPECIAL APPEARANCE—See APPEARANCE (1, 2); OFFICERS (4).

SPECIAL ASSESSMENTS—See DRAINS (2); HIGHWAYS AND STREETS (6).

SPECIAL DAMAGES—See DAMAGES (2).

SPECIAL ELECTION—See MANDAMUS (1); MUNICIPAL CORPORATIONS (6).

SPECIAL QUESTIONS—See APPEAL AND ERROR (31).

SPECIAL SESSION OF LEGISLATURE—See CONSTITUTIONAL LAW (4–6); STATUTES (5–7).

SPECIFIC INTENT—See CRIMINAL LAW (23).

SPECIFIC PERFORMANCE.

Decree for plaintiff in suit for specific performance of deceased's oral contract to convey real and personal property to her in return for leaving remunerative employment and rendering filial service to him during remainder of his lifetime and which was fully performed by her, notwithstanding devise of same property to her by his will, is affirmed by equally divided court. *Zack* v. *Gunderson*, 88.

See MORTGAGES (3).

SPECULATIVE DAMAGES—See DAMAGES (2); EVIDENCE (5).

SPECULATIVE TESTIMONY—See CRIMINAL LAW (9).

SPEED—See ARREST; MOTOR VEHICLES (10, 11, 17).

SPLITTING CAUSE OF ACTION—See ACTION (2).

STALLED TRUCK—See MOTOR VEHICLES (9).

STATE—See ELECTIONS (1); MASTER AND SERVANT (1).

STATE AGENCIES—See MUNICIPAL CORPORATIONS (3).

STATEMENT OF AMOUNT DUE—See APPEAL AND ERROR (24); FORCIBLE ENTRY AND DETAINER (2).

STATE TREASURER—See OFFICERS (9); STATUTES (1).

STATE TRUNKLINE HIGHWAYS—See HIGHWAYS AND STREETS (1).

STATUS LYMPHATICUS—See MASTER AND SERVANT (10, 13).

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES.

1. Title of Act No. 273, Pub. Acts 1925 (1 Comp. Laws 1929, § 2690 *et seq.*), regulating issuance and payment of municipal bonds and duties of municipal officers and State treasurer in connection therewith *held*, full and complete and not unconstitutional as failing to show it modifies tax limitation provisions of home rule act, 1 Comp. Laws 1929, §§ 2230, 2241. *Simonton* v. *City of Pontiac*, 11.

2. Contention that statute authorizing assignment of rents under trust mortgages is invalid because it alters or amends eject-

STATUTES—Continued.

ment statute without re-enacting or publishing latter at length contrary to article 5, § 21 of the Constitution *held*, untenable (3 Comp. Laws 1929, §§ 13498, 13499, 14956). *Union Guardian Trust Co.* v. *Lipsitz*, 210.

3. Portion of statute reading "The provisions of this act *requiring that members of the dominant minority political party be appointed as election inspectors* shall apply only to State and national elections" construed as though meaningless italicized words were omitted, is in accord with common sense construction of act as a whole and, so construed, renders intent of the legislature clear (Act No. 176, § 19a, Pub. Acts 1933). *Attorney General, ex rel. Connolly*, v. *Reading*, 225.

4. Expense attendant upon obedience to a valid election law is not a sufficient reason for not obeying it, but matter of cost of performance should be addressed to the legislature (Act No. 176, Pub. Acts 1933). *Id.*

5. Whether a statute enacted at a special session of the legislature falls within the subjects submitted by the governor is a judicial question and it is immaterial that he has approved the bill after its enactment. *Smith* v. *Curran*, 367.

6. The legislature has freedom to act upon the subjects submitted to it for consideration at a special session and may not be restricted to consideration of a particular bill, although the governor may limit the subject. *Id.*

7. Statute enacted at special session of legislature permitting validation of any municipal bonds even when issued without legal power, *held*, unconstitutional as not included within governor's message submitting for consideration the subject of "validation of bonds issued by a municipality under sufficient popular vote regardless of technical requirements" (Const., art. 5, § 22; Act No. 31, Pub. Acts 1934 [Ex. Sess.]). *Id.*

8. Consideration of justice of statutory rule, as to compensation payable to employee for accidental injury, in its general and long time administration are for the legislature. *MacDonald* v. *Great Lakes Steel Corp.*, 591.

See ADVERSE POSSESSION (2); APPEAL AND ERROR (5, 8, 9, 24, 26, 31, 33); ATTACHMENT (3); BANKS AND BANKING (1–6, 8–11); BILLS AND NOTES (5); BRIDGES; CARRIERS; CONSTITUTIONAL LAW (2, 3, 5, 6, 9); CORPORATIONS (4, 6, 7, 9); COSTS (3, 4); COURT COMMISSIONERS (1); CRIMINAL LAW (6, 7, 21); DEPOSITARIES (2–4); DRAINS (3, 4); ELECTIONS; EQUITY (14, 15); ESCHEAT (1); ESTATES OF DECEDENTS (3); ESTOPPEL (4); EVIDENCE (9–11); EXECUTION; FORCIBLE ENTRY AND DETAINER; FRAUDS, STATUTE OF; FRAUDULENT CONVEYANCES; GARNISHMENT (4, 5); GUARDIAN AND WARD (1, 3–6); HABEAS CORPUS; HIGHWAYS AND STREETS (1, 3–6); HUSBAND AND WIFE; INDICTMENT AND INFORMATION (4, 6); INJUNCTION (2, 3); INTEREST (2); INTOXICATING LIQUORS (1, 2, 4); JURY (1, 2); KIDNAPPING; LIMITATION OF ACTIONS; MAN-

STATUTES—Continued.

DAMUS (2); MASTER AND SERVANT (1–3, 6, 8–19, 25, 27, 29, 30, 34, 35, 39, 41–44); MORTGAGES (1, 5, 7–9, 12–14); MOTOR VEHICLES (4, 7, 8, 10–12, 14–16, 21); MUNICIPAL CORPORATIONS (1, 3, 7, 8, 11, 14); NEGLIGENCE (6); OFFICERS (2, 8); PARTNERSHIP (1–3); QUIETING TITLE (1); RAPE (1); RECEIVERS; REFORMATION OF INSTRUMENTS; SALES (1); SHERIFFS AND CONSTABLES; SUBROGATION; TAXATION; TRADE-MARKS AND TRADE-NAMES (1); VENDOR AND PURCHASER (2); VENUE; WAREHOUSEMEN; WITNESSES (5–7, 10).

STEEL JOISTS—See MASTER AND SERVANT (21); NEGLIGENCE (2).

STENOGRAPHIC NOTES—See CRIMINAL LAW (25).

STEPLADDER—See MASTER AND SERVANT (13).

STIPULATION—See APPEARANCE (2); COURTS; GARNISHMENT (2); LANDLORD AND TENANT (1).

STOCK AND STOCKHOLDERS—See BANKS AND BANKING (8–11); CONTRACTS (2); CORPORATIONS (2–4, 6–9); DISCOVERY (3); EQUITY (14, 15); MANDAMUS (5).

STOPPING—See MOTOR VEHICLES (10, 12).

STORAGE—See ATTACHMENT (3); WAREHOUSEMEN.

STREET PARADE—See NEGLIGENCE (3, 4).

SUBCONTRACTORS—See GARNISHMENT (1); JUDGMENT (9); PRINCIPAL AND SURETY (2).

SUBDIVISION—See DEDICATION (4); MUNICIPAL CORPORATIONS (12).

SUBDIVISION LOT OWNER—See COVENANTS (2).

SUBROGATION.

Pro tanto subrogation clause of county fund depository bond *held*, void where amount deposited exceeds total amount of bond and county has not been reimbursed in full (1 Comp. Laws 1929, § 1193 *et seq.*). *Sparks* v. *Detroit Fidelity & Surety Co.*, 183.

See DEPOSITARIES (2).

SUBSEQUENT DEBTS—See PARTNERSHIP (4).

SUBSEQUENT EMPLOYMENT—See MASTER AND SERVANT (24).

SUBSEQUENTLY APPEARING DISABILITY—See MASTER AND SERVANT (8).

SUBSEQUENT PARTNERS—See BANKS AND BANKING (1).

SUBSEQUENT PURCHASER—See VENDOR AND PURCHASER (5).

SUBSEQUENT TRIAL—See APPEAL AND ERROR (10); EVIDENCE (6–8).

SUMMARY JUDGMENT—See APPEAL AND ERROR (3); JUDGMENT (1, 2).

SUMMARY PROCEEDINGS—See APPEAL AND ERROR (13, 14, 24); CORPORATIONS (1); COURT COMMISSIONERS; FORCIBLE ENTRY AND DETAINER; JUDGMENT (4); SHERIFFS AND CONSTABLES (1); VENDOR AND PURCHASER (1, 4, 5).

SUMMER RESORT—See VENDOR AND PURCHASER (9).

SUPERINTENDENT—See ACCORD AND SATISFACTION; CONTRACTS (1).

SUPPLEMENTING RECORDS—See EVIDENCE (16).

SUPREME COURT—See APPEAL AND ERROR (37, 39, 40); CERTIORARI; COSTS (3).

SURETY—See PRINCIPAL AND SURETY.

SURRENDER—See INSURANCE (9); TROVER AND CONVERSION (2).

SURVEY—See MUNICIPAL CORPORATIONS (13–16); WORK AND LABOR.

SURVIVAL ACT—See MOTOR VEHICLES (21, 22).

SURVIVORSHIP—See HOMESTEADS (4).

SUSPENSION OF POWERS—See CORPORATIONS (1).

SUSPICION—See ARREST (1).

SYPHILIS—See MASTER AND SERVANT (37).

TAXABLE FEES—See APPEAL AND ERROR (33); EXECUTION (2).

TAXATION.

1. In determining inheritance tax, whether or not the thought of death was the impelling motive of trustor in making transfer was a question of fact (1 Comp. Laws 1929, § 3672). *In re Kutsche's Estate,* 659.
2. Evidence *held,* sufficient to support finding of trial court that transfer of property by woman 80 years of age who was then in excellent physical condition and lived for five years more was not made in contemplation of death (1 Comp. Laws 1929, § 3672). *Id.* 660.

TAXATION—Continued.

3. Transfer of estate by way of irrevocable trust to beneficiaries upon death of trustor who had a life income from the estate *held*, taxable under State inheritance tax law since possession or enjoyment became effective upon death of trustor (1 Comp. Laws 1929, § 3672). *Id.*
4. Inheritance tax upon transfers not made in contemplation of death but where possession or enjoyment became effective upon that event does not offend due process or equal protection clauses of the Constitution of the United States (1 Comp. Laws 1929, § 3672, U. S. Const., Am. 14, § 1). *Id.*

See APPEAL AND ERROR (14); COSTS (4); DRAINS (4); EQUITY (11); LANDLORD AND TENANT (5, 6); MANDAMUS (4); MORTGAGES (2); VENDOR AND PURCHASER (1).

TAXICAB—See APPEAL AND ERROR (22); MOTOR VEHICLES (23).

TAX LIMITATION—See MUNICIPAL CORPORATIONS (7); STATUTES (1).

TAX ROLL—See HIGHWAYS AND STREETS (2).

TEAMSTER—See MASTER AND SERVANT (44).

TELEGRAPHS AND TELEPHONES—See PRINCIPAL AND AGENT (2).

THEATERS AND SHOWS.

1. It is incumbent upon owner of public bathing beach equipment for the use of which a fee is charged to furnish reasonably safe appliance. *Mikulski* v. *Morgan*, 314.
2. Defendant, owner of public bathing beach equipment for use of which plaintiff paid fee charged, *held*, not liable for injury sustained by plaintiff who used equipment in an improper manner, where defendant could not reasonably foresee plaintiff's probable injury, equipment was not defective in construction nor out of repair, and his alleged negligence in furnishing inherently dangerous equipment is not shown to have been the sole or effective cause of plaintiff's injury. *Id.*

THIRD PARTY—See MOTOR VEHICLES (1, 14); NEGLIGENCE (4).

THIRD PARTY CLAIMANT—See APPEAL AND ERROR (8).

TIME—See CRIMINAL LAW (24); MASTER AND SERVANT (26).

TITLE—See ADVERSE POSSESSION (2, 3); COURT COMMISSIONERS; EQUITY (4, 13); GUARDIAN AND WARD (2, 6); MANDAMUS (2); MECHANICS' LIENS (2); MORTGAGES (1); QUIETING TITLE (1, 2); RAILROADS (2); VENDOR AND PURCHASER (1).

TITLE OF ACT—See STATUTES (1).

TITLE-RETAINING CONTRACT—See SALES (3, 5).

TORTS.

1. Merely charging two or more parties with tort is no proof of their joint liability. *Slater* v. *Ianni Construction Co.*, 492.
2. A tort is single and cause of action therefor indivisible and either exists against all feasors or none. *MacDonald* v. *Henry Hornblower & Weeks*, 626.
3. Tort for conversion of funds *held*, waived so as to bar action by customer against brokers where customer took note from brokers' agent for sum converted, received payment thereon, accepted renewal note for balance, brought two actions at law *ex contractu* against him and pleaded waiver of tort action as consideration for the note, and there was no express agreement between the parties to other effect. *Id.* 627.

See ASSIGNMENTS; CONTRIBUTION; JUDGMENT (9, 10); RELEASE (1–3); WAIVER.

TOTAL DISABILITY—See MASTER AND SERVANT (6, 28).

TOWNSHIP BOARD—See EVIDENCE (16); INTOXICATING LIQUORS (2, 4); MUNICIPAL CORPORATIONS (13–16).

TOWNSHIP HIGHWAY COMMISSIONER—See MUNICIPAL CORPORATIONS (14).

TOWNSHIPS—See BRIDGES; EVIDENCE (16); HIGHWAYS AND STREETS (1); MOTOR VEHICLES (13); MUNICIPAL CORPORATIONS (14, 15); WORK AND LABOR.

TRADE-MARKS AND TRADE-NAMES.

1. Act No. 101, Pub. Acts 1907 (2 Comp. Laws 1929, § 9825 *et seq.*), relating to filing of certificate with county clerk by persons doing business under an assumed name is inapplicable to banking partnerships governed by Act No. 160, Pub. Acts 1859 (2 Comp. Laws 1929, § 9710 *et seq.*). *Upton* v. *Upton*, 26.
2. Courts should not lend their aid to schemes whereby the buying public may be misled. *Furniture Manufacturers Ass'n of Grand Rapids* v. *Grand Rapids Guild of Exhibitors*, 685.
3. Use of geographical words in a business name, where properly descriptive, will not be enjoined in the absence of estoppel or actual fraud, or public misleading. *Id.*
4. Injunction restraining Grand Rapids Guild of Exhibitors from advertising, exhibiting or selling furniture manufactured elsewhere as made in Grand Rapids or using word "guild," in connection with term "Grand Rapids" in so doing, *held*, proper, where furniture made in Grand Rapids had become nationally and favorably known to the buying public. *Id.*

See SALES (1).

TRANSFER OF CAUSES—See COURTS.

TRAVELING REPRESENTATIVE—See NEGLIGENCE (3, 4).

TRESPASSING—See MUNICIPAL CORPORATIONS (10).

TRIAL.

1. Court Rule No. 37, § 11 (1933), requires trial judge to render opinion in actions at law tried without a jury. *Irwin* v. *Williamson Candy Co.*, 100.
2. Argument of plaintiff's counsel in action between members of joint adventure for conversion of joint property *held*, fairly within range of testimony. *Mitchell* v. *Reolds Farms Co.*, 303.
3. Repetition of assertion that case did not amount to much to doctor, defendant in action for negligent malpractice, since he was not present at opening of the trial nor until subpœnaed by plaintiff after objection by defendant's counsel *held*, error inclining toward reversal. *Sima* v. *Wright*, 352.
4. Practice of asking hypothetical questions before presentation of basic facts is not a commendable one since it prevents opposing counsel from making specific objections to such questions and hinders the court in keeping the testimony to the issue, although the order of proof is largely a matter of discretion of the court. *Id.*

See APPEAL AND ERROR (8, 31); ATTORNEY AND CLIENT (1); CRIMINAL LAW (25, 26, 29); DISCOVERY (2, 5); EVIDENCE (6–8); INDICTMENT AND INFORMATION (7); JURY (3).

TROVER AND CONVERSION.

1. Trover is not the remedy of lessors for claimed conversion of an oil and gas lease by recording it after delivery from escrow, where wrong done lessors was in not entering into new lease. *Eadus* v. *Hunter*, 233.
2. Defendant land contract vendor in action for conversion of chattel mortgaged property who claimed property had been taken pursuant to amicable termination of land contract conditioned upon voluntary surrender of farm and personal property thereon *held*, not entitled to directed verdict either at the close of plaintiff's proofs or at conclusion of all the testimony, where there was clearly a question of fact for the jury as to manner in which possession was obtained. *Austin* v. *Ancient Order of Gleaners*, 568.
3. Verdict for plaintiff in action for conversion of chattel mortgaged property *held*, not against the great weight of the evidence. *Id.*

See APPEAL AND ERROR (32); DAMAGES (2); MINES AND MINERALS (1).

TRUCKS—See MOTOR VEHICLES (8, 9, 20).

TRUNKLINE HIGHWAYS—See HIGHWAYS AND STREETS (1).

TRUSTS—See ACTION (1); APPEAL AND ERROR (19); BANKS AND BANKING (8, 9); CORPORATIONS (8); MANDAMUS (2); MORTGAGES (4–8, 16); STATUTES (2); TAXATION (1, 3).

TUBERCULOSIS—See INSURANCE (5, 6).

ULTRA VIRES—See BANKS AND BANKING (9).

UNDERTAKER—See MASTER AND SERVANT (41–43).

UNDERWRITING—See EQUITY (3); MORTGAGES (15).

UNDUE INFLUENCE—See WILLS (3, 9).

UNIFORM PARTNERSHIP ACT—See PARTNERSHIP (1, 3).

UNIFORM SALES ACT—See SALES (1).

UNSATISFACTORY BRIEF—See COSTS (1).

UNUSUAL DANGER—See MASTER AND SERVANT (21).

VACANCY—See LANDLORD AND TENANT (5).

VALIDATING STATUTE—See STATUTES (7).

VALUE—See DAMAGES (3).

VALUE OF LAND—See EVIDENCE (5).

VARIANCE—See CRIMINAL LAW (24).

VARYING TERMS OF WRITTEN CONTRACT—See EVIDENCE (1).

VENDOR AND PURCHASER.

1. Default of vendor in payments on mortgage and paving tax is not such an equitable defense as is available to vendee in summary proceedings before circuit court commissioner to recover possession under executory land contract where vendee has not attempted to rescind the contract or obtain other equitable relief, has proceeded in accordance with terms of the contract and paid mortgage interest up until after vendee became in default and there is no showing that vendor has parted with title to the property or contract. *Grylls* v. *Hergiton*, 35.
2. Appointment of defendants' attorney as receiver to collect rent from vendees under land contract pending foreclosure thereof under Act No. 122, § 25a, Pub. Acts 1933, not providing therefor, *held*, error. *Leibrand* v. *Curtright*, 98.
3. Vendee under proposed executory land contract is not bound thereby where no part of the consideration is paid and the contract is neither signed by nor delivered to him. *Simpson* v. *Dyer*, 328.
4. Evidence *held*, insufficient to establish right of land contract vendor to recover alleged damages from surety on sheriff's

VENDOR AND PURCHASER—Continued.

bond in action for false return of circuit court commissioner's process, where record does not show that plaintiff's breach of contract for which he had to respond in damages to vendee was made in reliance upon the admittedly false return nor that summary proceedings were necessary. *Chalker* v. *Fidelity & Deposit Company of Maryland*, 333.

5. Vendor who breached land contract with first vendee by deeding premises to subsequent purchaser for an increased price *held*, not to have sustained such damage in being compelled to return payments made by first vendee less fair rental value as to be entitled to reimbursement therefor from surety on sheriff's bond for false return of circuit court commissioner's process in summary proceedings against first vendee. *Id.*

6. Upon default, vendor in land contract may, at his option, treat the contract as continuing in force, sue for payments due and after securing judgment he is not compelled to resort to the vendee's equity before levying upon any other property of vendee. *Ashbaugh* v. *Sauer*, 467.

7. In suit to foreclose land contract and for deficiency decree against original purchaser and assignee, finding of court that novation of parties had been effected and releasing him from liability is affirmed on appeal, where plaintiff had consented to the assignment for a valuable consideration, had replaced original purchaser's name on its ledger sheet with that of assignee and had failed to notify or try to collect from original purchaser for upwards of a year and a half after assignee's default, during which time assignee had lost his property. *Chicago Boulevard Land Co.* v. *Nutten*, 541.

8. In action of assumpsit by vendors against land contract purchasers for past-due payments, record *held*, insufficient to establish novation of parties, where there was no definite understanding between plaintiffs and defendants, at the time of latter's assignment to third parties who assumed vendees' liability, that defendants were released, nor anything in plaintiffs' subsequent conduct indicative of a fixed intention on their part to do so, although they did not communicate to defendants fact of assignees' defaults for a considerable time. *Straube* v. *Spencer*, 559.

9. Vendees of summer resort property who purchased for resale of platted lots *held*, to have waived right to rescind for alleged false representations as to value and probable resale value by subsequent acts with respect to the property, where they are unable to restore *status quo*, are estopped, and guilty of laches in waiting five years before bringing suit. *Berg* v. *Hessey*, 599.

See APPEAL AND ERROR (14, 15, 32); CORPORATIONS (1); TROVER AND CONVERSION (2).

VENUE.

Action against railroad company by resident of this State must be brought in county of plaintiff's residence if railroad traverses that county (3 Comp. Laws 1929, § 13997). *Pere Marquette Railway Co.* v. *Slutz*, 388.

See INJUNCTION (1).

VERDICT—See JUDGMENT (1); NEW TRIAL (3); PRINCIPAL AND AGENT (2).

VILLAGES—See BRIDGES (1); ESTOPPEL (4); MUNICIPAL CORPORATIONS (16).

VISITORIAL JURISDICTION—See CORPORATIONS (9); EQUITY (14, 15).

VOIR DIRE EXAMINATION—See JURY (3, 4).

WAGES—See APPEAL AND ERROR (9); MASTER AND SERVANT (22, 24, 32–36, 39).

WAIVER.

Waiver of a tort, made for a consideration, cannot be recalled. *MacDonald* v. *Henry Hornblower & Weeks*, 627.

See BILLS AND NOTES (1–3); CRIMINAL LAW (12); HOMESTEADS (3); INSURANCE (11); JURY (4); MASTER AND SERVANT (2); RELEASE (2); TORTS (3); VENDOR AND PURCHASER (9); WITNESSES (3, 7).

WANTON AND WILFUL MISCONDUCT—See MOTOR VEHICLES (4, 19).

WAREHOUSEMEN.

1. Lien for storage provided by statute is general, but, being statutory, must be strictly construed (2 Comp. Laws 1929, § 9624). *Roehl Storage Co.* v. *Wilson*, 692.

2. Storage company which received attached property, consisting of oriental rugs, from sheriff *held*, not entitled to lien for charges in keeping and caring for it, since sheriff had no power to create one and there is absence of personal acts on part of owner or his knowledge or assent required under warehousemen's act, where he had not been served with process (Comp. Laws 1929, §§ 9623–9649, 14766). *Id.*

See ATTACHMENT (3).

WARNING—See MOTOR VEHICLES (9).

WARRANTIES—See PRINCIPAL AND AGENT (1); SALES (1, 2).

WASHING DISHES—See MASTER AND SERVANT (22).

WEEKLY EARNINGS—See MASTER AND SERVANT (32, 34, 35).

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (12, 22); CRIMINAL LAW (1, 26, 30); MASTER AND SERVANT (7); NEGLIGENCE (7); RAPE (2); TROVER AND CONVERSION (3); WITNESSES (4, 9).

WELFARE WORKER—See MASTER AND SERVANT (46).

WIDOW—See APPEAL AND ERROR (4, 6, 30); GUARDIAN AND WARD (1, 4, 5); HOMESTEADS (1, 3, 4); INSURANCE (7, 8).

WILLS.

1. Beneficiaries under a former will, but not under will admitted to probate by probate judge, *held*, to have such an interest in the estate of the deceased as entitled them to make contest of validity of later will, where record shows that former will was executed and later destroyed under direction of testator. *In re Parker's Estate*, 80.
2. Evidence *held*, insufficient to raise an issue of fact as to mental competency of testatrix to make will disposing of large estate in which mention but no property provision was made for her youngest son with whom she had quarreled, where no unskilful business transaction was recounted in her management of a large farm, she alone instructed her attorney how and why to make such disposition of her property, contestant had made a contract with her relative to share in his father's estate and doctor who had treated her said she was mentally abnormal but did not say she was incompetent; although she was a queer, jealous, melancholic and, often, despondent person. *Jackson City Bank & Trust Co.* v. *Townley*, 340.
3. Record *held*, barren of evidence that brother exercised undue influence upon his mother, the testatrix, in eliminating contestant as an object of her bounty, where evidence demonstrates her feeling toward contestant was personal, deep-seated and of long standing and before brother became her adviser. *Id.*
4. Wilful slander is not such an insane delusion as will defeat probation of a will. *Id.*
5. Contestant who seeks to defeat a will on ground of insane delusions of testatrix has burden of proving that she believed her statements, had no reasonable information or evidence supporting them and would not have disinherited him but for such belief. *Id.*
6. Will may not be set aside as made by testatrix harboring an insane delusion as to the morality of mother-in-law and wife of contestant son, where he fails to show information or evidence upon which testatrix believed charge of immorality, if she believed it, and there was no testimony connecting it with will. *Id.*
7. Charges of testatrix made by her as a result of impressions received from personal conflict and controversy with contestant may not be held as insane delusions by a jury without knowing

WILLS—Continued.

all the facts as they appeared to her and, not then, if there was basis for the impressions however exaggerated they may be. *Id.* 341.

8. Testimony *held,* conclusive that statements of testatrix and her bitterness of feeling toward contestant arose out of long-continued family conflict and that will, omitting property provision from large estate to contestant son, was result of such feeling and not of an insane delusion. *Id.*

9. Verdict *held,* properly directed for proponents where contestant failed to show any evidence of mental incompetency or undue influence and failed to sustain burden of proof that will was result of insane delusions. *Id.*

10. Instruction to jury in will contest certified to circuit court that it was conceded that invalid testatrix possessed mental capacity to make the will *held,* harmless error, where there was no evidence justifying submission of such an issue to the jury, evidence clearly established that she wanted to make a will, directed that scrivener be summoned, fully informed him of her desire and was mentally competent, although no such concession is found in the record. *Mathews* v. *Leckner,* 376.

11. Residuary bequest to wife lapses where she predeceases her husband and no other testamentary disposition was made. *In re Wright's Estate,* 587.

See SPECIFIC PERFORMANCE.

WINE—See INTOXICATING LIQUORS (2, 4).

WITHDRAWAL—See MANDAMUS (5); PARTNERSHIP (5).

WITNESSES.

1. Admission of testimony of woman who had been married twice, perhaps divorced, and lived with defendant indicted for kidnapping and posed as his wife on certain occasions *held,* proper as against claim she was his wife. *People* v. *Minchella,* 123.

2. Defendant who places witness on stand vouches for his credibility and may not, ordinarily, impeach him. *People* v. *Saccoia,* 133.

3. People's witness who waived any right she might have asserted as to self-incrimination in her joint effort with defendant and others to obtain money from automobile insurance company in falsely pretending injury to herself by voluntarily testifying as to pretension of injury also waived privilege attached to confidential relationship with doctor called to attend her. *People* v. *Kayne,* 186.

4. Witnesses for plaintiff claiming payment for personal services rendered deceased in her lifetime *held,* qualified to testify as to the value thereof, the weight of their testimony being for the jury. *Pupaza* v. *Laity,* 250.

WITNESSES—*Continued.*

5. Statute relating to privilege of communication between husband and wife is intended to embody the common law and therefore extends only to confidential communications (3 Comp. Laws 1929, § 14221). *People* v. *Rosa*, 462.
6. A communication is not confidential where made for the purpose, or with the expectation, of being disclosed or if made in the presence of others (3 Comp. Laws 1929, § 14221). *Id.*
7. The privilege and the right to waive it belong to the person making the communication (3 Comp. Laws 1929, § 14221). *Id.*
8. Wife's communication to husband in custody on charge of murder made in the presence of others is not privileged and its reception in evidence as part of his confession *held*, not error. *Id.*
9. Character witness may be questioned concerning previous specific acts of misconduct of defendant charged with murder merely to test credibility and ascertain weight to be given the testimony of such witness. *Id.*
10. Testimony of plaintiff as to what part of his body was struck by car and what part struck the ground, where he was lying on the pavement, and that right front fender of car hit him *held*, admissible since defendant did not sustain burden of showing, and court may not infer, facts so asserted were matters equally within knowledge of driver, dead at the time of trial (3 Comp. Laws 1929, § 14219). *Lapachin* v. *Standard Oil Co.*, 478.

See APPEAL AND ERROR (11); CRIMINAL LAW (1, 6, 8, 12, 13, 18, 20, 26, 27); EVIDENCE (3, 12); HUSBAND AND WIFE; INDICTMENT AND INFORMATION (3, 6, 7); KIDNAPPING (1); NEW TRIAL (4).

WORDS AND PHRASES—See ESTOPPEL (1–3); NEGLIGENCE (5).

WORK AND LABOR.

In action of assumpsit by surveyors for services rendered township, evidence *held*, to show that in so far as they involved survey of lake meander and highway lines, services were performed, all of the work done was necessary to determine whether or not there were encroachments on the highway and the charges therefor reasonable. *McGaughan* v. *West Bloomfield Township*, 553.

See ESTATES OF DECEDENTS (2, 3); MUNICIPAL CORPORATIONS (13).

WORKING MEMBER OF PARTNERSHIP—See APPEAL AND ERROR (9); MASTER AND SERVANT (20).

WORKMEN'S COMPENSATION ACT—See APPEAL AND ERROR (9); MASTER AND SERVANT (1–3, 6–20, 22–25, 27–44).

WRITTEN CONTRACT—See EVIDENCE (1).