MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

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MAY 5 1934

SUPREME COURT.

CHIEF JUSTICE.

	TERM EXPIRES
JOHN S. McDONALD, GRAND RAPIDS, . . .	Dec. 31, 1933

ASSOCIATE JUSTICES.

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WILLIAM W. POTTER, HASTINGS, . . .	Dec. 31, 1935
NELSON SHARPE, WEST BRANCH, . . .	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

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

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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.
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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.

18.	SAMUEL G. HOUGHTON,	BAY CITY.
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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,	MONROE.
39.	GEORGE A. RATHBUN,	TECUMSEH.
40.	HENRY H. SMITH,	CARO.

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JOHN A. BOYNE, THOMAS M. COTTER,
W. McKAY SKILLMAN, HENRY S. SWEENY,
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JANUARY TERM, 1933.*

HIGHTOWER *v.* DETROIT EDISON CO.

APPEAL OF TOLONEN.

1. STATUTES—CONSTRUCTION—CRIMINAL LAW.

   Rule of strict construction confines offense to words of statute, but it permits words not only to be read naturally but to be given meaning in harmony with purpose and intent of law as far as may be done without distortion of language.

2. CHAMPERTY AND MAINTENANCE—SOLICITING PERSONAL INJURY CLAIMS—ATTORNEY AND CLIENT—AMBULANCE CHASING—STATUTES.

   Purpose of Act No. 328, Pub. Acts 1931, § 410, prohibiting solicitation of personal injury claims, is to discourage practice commonly known as "ambulance chasing," with its attendant evils.

3. SAME—INDIRECT SOLICITATION.

   Soliciting great-aunt for grandniece's personal injury claim is "indirect" solicitation within condemnation of statute (Act No. 328, Pub. Acts 1931, § 410), regardless of their legal status, where great-aunt had control of person and cause of action of grandniece, and therefore contract between solicitor and great-aunt, who was later legally appointed to represent grandniece, is void.

4. ATTORNEY AND CLIENT—RIGHTS AND DUTIES.

   Rights and duties arising out of relationship of attorney and client are not measured by yardstick of commercial or trade transactions, but relation is purely personal, lawyer owes to client undivided allegiance, and there is no place in relationship for its establishment by middleman having interest in *res* or control of procedure.

5. SAME—PRINCIPAL AND AGENT—VOID CONTRACT—NOTICE.

   If relationship of attorney and client is established or initiated by middleman, attorney is so far agent of middleman as to be

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* Continued from Vol. 261.

chargeable with knowledge of all arrangements under which middleman assumes to act, and if he acts under void contract, attorney may acquire no rights thereunder.

6. SAME—CHAMPERTY AND MAINTENANCE—LIEN FOR FEES.

Attorney, who was engaged by middleman to prosecute personal injury claim secured by solicitation in violation of Act No. 328, Pub. Acts 1931, § 410, was properly denied lien on judgment obtained in said case, since contract was illegal.

7. SAME—RIGHT TO RECOVER VALUE OF SERVICES.

Attorney, who was engaged by middleman to prosecute personal injury claim secured by solicitation in violation of statute, did not establish *bona fide* relationship of attorney and client by having personal consultation with client, where he continued to recognize fact that he owed some duty to middleman, and therefore is not entitled to recover fair value of work done independent of lien on judgment obtained.

8. SAME—BURDEN OF PROOF—FEES.

Burden of proof of right to fees for services is on attorney claiming them.

9. SAME—CHAMPERTY AND MAINTENANCE—CRIMINAL LAW—STATUTES.

No recovery on *quantum meruit* may be had for services performed by attorney under contract which was wholly void because in violation of criminal statute designed, among other purposes, to prevent champerty and maladministration of justice (Act No. 328, Pub. Acts 1931, § 410).

10. SAME—FUNCTIONS OF ATTORNEY—ILLEGAL PRACTICE OF LAW.

In case in court, determination of steps to be taken and control of procedure and proceedings to enforce remedy are exclusive functions of attorney at law, where party does not appear in his own person, so that layman who exercises such functions, as well as performing other acts which are usually done by attorney, is engaged in illegal practice of law.

11. SAME—ILLEGAL PRACTICE OF LAW—FRAUD ON COURT.

Attorney's representation in court of one engaged in illegal practice of law was not only breach of professional ethics and standards, of duty to client, and in violation of law, but was also fraud on court, going directly to integrity of relationship between bench and bar and to heart of orderly administration of justice.

12. SAME—AWARD FOR FEES.

Judgment of court will not be given in aid of or to encourage unprofessional conduct infringing integrity of judicial proceedings, and therefore will not award fees to attorney for services rendered under illegal contract in case which amounted to fraud on court.

Appeal from Wayne; Reid (Neil E.), J., presiding. Submitted January 17, 1933. (Calendar No. 36,915.) Decided March 1, 1933.

Action by Minnie Lee Clark Hightower, by next friend, against Detroit Edison Company, a New York corporation, for personal injuries alleged to be due to defendant's negligence. On petition of Jacob A. Tolonen for attorney fees. Petition denied. Petitioner appeals. Affirmed.

Jacob A. Tolonen, in pro. per.

George E. Brand, amicus curiæ.

FEAD, J. May 5, 1932, plaintiff, seven years old, was injured by defendant's truck. For about four years she had been living with and was supported by her great-aunt, Mrs. Mable Powell. Mrs. Powell took her because her mother, who lived in Alabama, had not cared for her properly.

A few days after the injury Mrs. Powell was solicited by one Bailey, a representative of J. C. Donohue, who conducts business under the name of the Michigan Accident Claims Company, to place the accident claim with Donohue. He told her suit would be commenced. He also said Donohue was a lawyer. The next day she signed papers in Donohue's office, but their contents are not disclosed. Donohue's brother is associated with him, and it was also represented to Mrs. Powell that he had been admitted to practice.

June 2d, suit was commenced by summons, with Roscoe C. Griffith as attorney for plaintiff, and

Mrs. Powell as next friend. Declaration was filed June 14th, with notice that Griffith claimed lien for his services on settlement, recovery, or judgment. Mrs. Powell never talked with Griffith. The declaration was prepared by a stenographer in Donohue's office, examined by Griffith, and then filed. It had no *ad damnum* clause, which indicates the character of Griffith's employment and inspection. Griffith immediately executed blank substitution of attorney to be kept in Donohue's files. It was executed in blank because Donohue had three or four attorneys who tried such cases for him, and he did not then know which would be chosen. Donohue, not the client, named the trial attorney. Griffith's connection with the case ceased at this point. The procedure was routine, under which Griffith had handled a large number of cases for Donohue. Griffith did not try the cases he so commenced. In a few instances he presented a motion, sought appointment of guardian or administrator, or took consent judgment, but Donohue settled most of the cases himself, and Griffith merely took judgments for such amounts as Donohue told him. Griffith was paid each Saturday by Donohue for the work done during the week.

Appellant Tolonen, an attorney, tried many of Donohue's cases, beginning late in 1930 or early in 1931. He claims he set his own fee, in all cases talked with the clients, and rejected some cases offered him because something put him on guard, but refused to give the reason for the rejection, as privileged communication between attorney and client. He declined to say whether it was solicitation. He considered that both the party to the suit and Donohue were his clients. He relied on Donohue, at least morally, to see that his fee was paid. He had heard that Donohue had solicited personal injury claims,

and he once represented Donohue in an action involving an alleged solicited claim. He was usually employed through a telephone call from Donohue's office. In case of settlement or payment of judgment to him, he would take out his fee, obtain receipt from the client in full, and lay the balance on the table in Donohue's office in the presence of both Donohue and the client. He assumed that Donohue was collecting fees in the cases he tried.

July 20th, on telephone call from Donohue's office, appellant was employed to procure the appointment of Mrs. Powell as plaintiff's guardian. The appointment was made September 14th. Appellant had not then been employed to try plaintiff's case. He was engaged a few days later by Donohue's brother, who informed him that $400 had been offered in settlement. Appellant negotiated a settlement for $600. September 21st he saw Mrs. Powell, and she approved the settlement. She asked his fees, and he said the court would set them. The next day the case came on for trial. The purpose was to take consent judgment on the basis of the compromise. Plaintiff being an infant, the court had the duty to investigate the fairness of the settlement. Appellant was a little late at the trial, and before he arrived Mrs. Powell had told the court that the claim had been solicited.

When appellant appeared, he presented substitution of attorney, signed by Griffith, dated the preceding day, and still blank as to name of attorney to be substituted. He received it from Donohue. The court notified the Detroit Bar Association of Mrs. Powell's claim of solicitation, and Mr. George Brand, its representative, appeared as *amicus curiæ*. The court entered consent judgment for plaintiff for $600. Mrs. Powell filed motion for substitution of

Charles J. DeLand as attorney for plaintiff in place of Roscoe C. Griffith, prayed that the court determine the amount due Griffith and appellant and the lien of either on the cause of action or judgment, and objected to allowance of lien or fees to either. October 3d, the court made an order substituting DeLand as attorney for plaintiff, subject to determination of appellant's fees. Answers, supplemental motion, and affidavits were filed and testimony was taken. October 8th the court denied Griffith and appellant any fees or lien on the grounds that the claim had been solicited in violation of statute (Act No. 328, Pub. Acts 1931, § 410), and that Donohue was illegally practicing law through Griffith and appellant. The appeal is from disallowance of the fee.

Appellant has been so frank in his testimony and fair in his brief that we are prompted to give full credit to his claim of honest intent. He was not wholly Donohue's servant, but maintained an attitude of ostensible independence and insisted upon personal contact with clients. It was not shown that he took any other solicited case. He knew, or had ample information to cause him to suspect, that Donohue solicited personal injury claims. But we think he might have refused a case if he actually had known Donohue had solicited the claim. Mrs. Powell did not inform him that the instant claim had been solicited, nor did he make inquiry of her. The issue is whether, although appellant felt he conducted himself with propriety, he mistook his duties as an attorney and may be denied a fee.

Was plaintiff's claim for damages solicited by Donohue in violation of Act No. 328, Pub. Acts 1931, chap. 60, § 410:

"Any person, firm, copartnership, association, or corporation or any of the officers, agents, servants,

or employees of any such person, firm, copartnership, association, or corporation, who shall directly or indirectly, individually or by agent, servant, or employee, solicit any person injured as the result of an accident, his administrator, executor, heirs, or assigns, for the purpose of representing such person in making claim for damages or prosecuting any action or causes of action arising out of any personal injury claim against any other person, firm or corporation, shall be guilty of a misdemeanor, and any contract entered into as a result of such solicitation shall be void: *Provided, however,* That nothing herein shall affect an unsolicited contract entered into by any person, firm or corporation with an attorney duly admitted to practice law in this State."

The act is constitutional. *Kelley* v. *Judge of Recorder's Court,* 239 Mich. 204 (53 A. L. R. 273).

Appellant, invoking the rule of strict construction of penal statutes, contends the act does not apply, because Mrs. Powell, the person actually solicited, was not the person injured nor her administrator, executor, heir, or assign.

The rule of strict construction confines an offense to the words of the statute, but it permits the words not only to be read naturally but to be given a meaning in harmony with the purpose and intent of the law as far as may be done without distortion of language. *Deloria* v. *Atkins,* 158 Mich. 232, 241; *People* v. *Gould,* 237 Mich. 156, 163; 2 Lewis' Sutherland on Statutory Construction (2d Ed.), § 528 *et seq.;* 59 C. J. p. 1113 (§ 660).

The purpose of the act is to discourage the practice commonly known as "ambulance chasing." The practice has developed recognized evils, the major of which are, (1) fomenting litigation with resultant burdens on the courts and public purse, (2) subornation of perjury, (3) mulcting of innocent persons by judgments, upon manufactured causes of action and

perjured testimony, and by settlements to buy peace, and (4) defrauding of injured persons having proper causes of action, but ignorant of legal rights and court procedure, by means of contracts which retain exorbitant percentages of recovery and illegal charges for court costs and expenses and by settlements made for quick return of fees and against the just rights of the injured persons.

The words of the statute must be read in the light of the evil to be cured. With the purpose in mind, we cannot examine the statute from the viewpoint that it was not intended to cover solicitation of claims of injured infants who have no power to contract. The offense is solicitation for the forbidden purpose. We are not obliged to, nor should we, read into the act words which would add to the offense such elements as actual execution of an agreement, capacity of the injured person to contract or legal control of the party injured by the person solicited. Indirect approach is equally under condemnation of the statute as a frontal attack. The word "indirect" in the statute is not to be confined to intentional subterfuge but is to be given the fair meaning of including any circuitous means to reach the statutory person and obtain control of the claim.

Regardless of her legal status toward plaintiff, Mrs. Powell in fact had control of her person and cause of action. Solicitation of Mrs. Powell was at least indirect solicitation of the person injured, because it necessarily contemplated her arranging with plaintiff, as far as the latter was legally capable of arrangement, for Donohue handling the claim. Moreover, having become successful, by Mrs. Powell's legal appointment to represent plaintiff and Donohue's control of the claim, the solicitation operated upon the person injured within the scope of the statute.

The act applies, and the contract between Mrs. Powell and Donohue was void. Was appellant affected by the invalidity of his claim of fees?

Appellant contends Donohue had the right to handle unsolicited claims (*Kelley* v. *Judge of Recorder's Court, supra,* 214), and that he, appellant, is not chargeable with violation of the statute by Donohue because he had no actual knowledge of solicitation. In the *Kelley Case* the court did not pass upon the general right of a layman to handle unsolicited personal injury claims. It merely said that unsolicited claims were not covered by the statute. Whether their control by a layman is in violation of public policy and the circumstances which would render such control lawful or unlawful are beside the issue here and must be left to a proper case. The case at bar came to appellant from Donohue, as had others. There is ample in the record, by way of former dealings and appellant's information of Donohue's practices and the character of his business, to have put a reasonable person on inquiry and charge him with knowledge that the claim had been solicited. But we do not rest decision on that ground.

The rights and duties arising out of the relationship of attorney and client are not measured by the yardstick of commercial or trade transactions. The relation is purely personal. The lawyer owes to his client undivided allegiance. There is no place in the relationship for its establishment by a middleman having an interest in the *res* or control of the procedure. The fact it is so established or initiated makes the attorney so far the agent of the middleman as to charge him with knowledge of all arrangements under which the middleman assumes to act. If the middleman acts under a void contract, the attorney can acquire no rights thereunder. Lien

on the judgment was properly denied, because claimed under an illegal contract.

But appellant contends that he established the relationship of attorney and client by personal consultation with Mrs. Powell, and under it performed services in good faith, in ignorance that the claim had been solicited, and is entitled to recover the fair value of the work done, independently of lien.

An attorney employed by a middleman cannot close his eyes to the implications of the transaction, claim ignorance of its real character, and demand that his actual knowledge of irregularities be proved. Nor can his character as agent of a middleman be changed to that of independent attorney to his client by the mere sound of words used by the middleman in engaging him, by a colorable consultation with the client, or by going through the ritual of establishing a legitimate connection. As long as the attorney owes, or deems he owes, to the middleman any duty connected with the plaintiff's case so that he cannot extend undivided allegiance to the client, he remains agent of the middleman. If appellant, *bona fide,* had established with Mrs. Powell the relationship of attorney and client, wholly divorced from Donohue, the case would be different. But he did not. He considered Donohue as well as plaintiff his client in the case. He had a duty to Donohue to dispose of the money recovered, had he made recovery, in such a way as would enable Donohue to get his pay on the invalid contract. And with Griffith's claim of lien before him, he made no such natural inquiry of Mrs. Powell as whether Griffith had been paid or whether the lien was for the benefit of Donohue and represented compensation for a solicited claim. While appellant went through some of the forms of establishing the relationship of at-

torney and client with Mrs. Powell, the testimony does not indicate that, if she had told him Donohue had solicited the claim, he would have deemed himself so exclusively her attorney, free from obligation to Donohue, as to advise her that her contract with Donohue was void and she need pay nothing on the judgment thereunder. At most, he might have withdrawn from the case, but such action would have demonstrated superior allegiance to Donohue.

The burden of proof of right to fees for services is on the attorney claiming them. *Boyle* v. *Waters,* 206 Mich. 515; 6 C. J. p. 759. Appellant did not sustain the burden of proving an independent and *bona fide* relation of attorney and client with Mrs. Powell, freed from duty to Donohue and from the infirmities of Donohue's position and contract.

Appellant urges that even though the contract be void, he is entitled to recover on the *quantum meruit* under *McCurdy* v. *Dillon,* 135 Mich. 678, where such recovery was allowed for services performed under a contract for compensation in a divorce suit, void as against public policy. No such recovery can be had at bar because the services were performed under a contract wholly, not partly, void, in violation of a criminal statute (*Cashin* v. *Pliter,* 168 Mich. 386 [Ann. Cas. 1913C, 697]), designed, among other purposes, to prevent champerty and maladministration of justice. *Ingersoll* v. *Coal Creek Coal Co.,* 117 Tenn. 263 (98 S. W. 178, 9 L. R. A. [N. S.] 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829); *Gammons* v. *Johnson,* 76 Minn. 76 (78 N. W. 1035); *Gammons* v. *Gulbranson,* 78 Minn. 21 (80 N. W. 779).

It is also contended that appellant is not entitled to fees because he was a party to the illegal practice of the law by Donohue, a layman. It probably

would be difficult to find a plainer case of such illegal practice.

In a case in court, determination of the steps to be taken and control of procedure and proceedings to enforce the remedy are exclusive functions of an attorney at law, where a party does not appear in his own person. 6 C. J. p. 643. Donohue exercised such functions as well as performing other acts which are usually done by the attorney. No more than an enumeration of his acts is necessary.

Personally, or by his lay agents, Donohue assumed to Mrs. Powell to be an attorney; consulted her to ascertain the cause of action; decided when and how suit should be commenced; started suit by summons; determined the form of action; prepared the declaration; attached claim of lien for Griffith's services but for Donohue's benefit; kept control of the action through substitution of attorney in blank; negotiated settlement; authorized plaintiff to take judgment; and, had the court not prevented, would have taken fees out of the judgment, as he had often done in other cases. In fine, Donohue performed all the functions of an attorney in the case except those which he was obliged to commit to a licensed lawyer. The case is much stronger than the following, held illegal practice of law: *In re Otterness,* 181 Minn. 254 (232 N. W. 318, 73 A. L. R. 1319); *In re Eastern Idaho Loan & Trust Co.,* 49 Idaho, 280 (288 Pac. 157, 73 A. L. R. 1323); 73 A. L. R. 1319 *et seq.,* and note, 1327.

That Griffith was merely Donohue's employee is not disputed. While appellant attempted to preserve semblance of the proprieties, it would be a strain on credulity to doubt that he would have obeyed Donohue's order to amend the declaration, seek adjournment, refuse the compromise and go to

trial, or take other action, or, in the alternative, that he would have retired from the case. He received his authority to appear from Donohue, was accountable to him for the recovery, and could not but have recognized that Donohue was in charge.

Appellant's representation of Donohue was not only a breach of professional ethics and standards, of duty to the client, and in aid of violation of law, but was a fraud on the court, going directly to the integrity of the relationship between bench and bar and to the heart of the orderly administration of justice. To say that, although such misconduct may justify disbarment or contempt proceedings, the court must award compensation to an attorney for services tainted thereby would put the court in a position of approving or ignoring gross breach of duty to client and court. Something may be said in favor of denial of fees on the ground that plaintiff could not be forced to pay because appellant was not in fact her attorney. But we lay denial upon the broader ground that the judgment of the court will not be given in aid of or to encourage unprofessional conduct infringing the integrity of judicial proceedings. *Ingersoll* v. *Coal Creek Coal Co., supra; Gammons* v. *Johnson, supra; Gammons* v. *Gulbranson, supra; Fetters* v. *Wittmer Oil & Gas Properties,* 258 Mich. 310.

In fairness to both Griffith and appellant, it should be said that the briefs inform us that neither has had relations with Donohue since this controversy arose.

Judgment affirmed, with costs.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, WIEST, and BUTZEL, JJ., concurred.

DETROIT TRUST CO. *v.* DETROIT CITY SERVICE CO.

1. MORTGAGES—FIXTURES—CHATTELS—REPLACEMENTS.

   Under mortgage covering real estate and certain personal property used in ice business, and providing that chattels conveyed or intended to be conveyed were to be regarded as fixtures, *held*, that ammonia compressors, aerating equipment, boilers, motors and refrigerating units, freezing tanks, air compressors, condensers, engines, oil tanks and pumps, platform scales, scorching machines, and other machinery for manufacturing ice, are fixtures, as also are spare motors, parts, machinery, etc., which constitute replacements specially adapted to full enjoyment of realty.

2. SAME—CHATTELS—INTENT.

   In distinguishing between fixture and chattel, when neither is annexed to freehold, use, nature, and intention of parties must be considered.

3. SAME—PERSONAL PROPERTY—CORPORATIONS.

   As between ice company and its general creditors, horses, wagons, trucks, automobiles, and other movable property of such character that they could be moved from place to place without impairing their value or that of realty from which they are removed, and which are not covered as "fixtures" under mortgage, are to be regarded as chattels.

4. COURTS—STARE DECISIS—EQUITY.

   Rule of *stare decisis* generally determines, even though equitable considerations might prompt different result.

5. SAME—STATE COURTS—FEDERAL COURTS—STATUTES—CONSTRUCTION.

   State court is not bound by decision of Federal Supreme Court in construction of State statute.

6. CHATTEL MORTGAGES—FAILURE TO FILE—SUBSEQUENT CREDITORS WITHOUT NOTICE PROTECTED—STATUTES.

   Under 3 Comp. Laws 1929, § 13424, providing that failure to file chattel mortgage shall make it absolutely void as against creditors of mortgagor, and as against subsequent purchasers

or mortgagees in good faith, unless accompanied by immediate delivery followed by actual and continued change of possession of property mortgaged, only subsequent creditors without notice are protected.

7. SAME—NOTICE OF MORTGAGE.

Where second mortgage recited that it was subordinate to liens of first mortgage on both real and personal property, trustee under second mortgage and creditors extending credit after second mortgage was properly filed both as real estate and chattel mortgage may not avoid notice of first mortgage, although it was never properly filed as chattel mortgage.

8. SAME—RECORDING—CONSTRUCTIVE NOTICE.

While recording of real estate mortgage does not give notice of its chattel mortgage provisions, filing or recording of later mortgage in proper office where prior mortgage should have been filed or recorded does give constructive notice of prior instrument, if specific reference to it is made therein, not only of its existence, but also of provisions contained therein.

9. SAME—NOTICE—BILLS AND NOTES—NEGOTIABLE INSTRUMENTS.

Where original purchasers of so-called gold notes had notice of existence of prior unrecorded chattel mortgage, purchasers from them are chargeable with such notice if said notes are nonnegotiable.

10. BILLS AND NOTES—REFERENCE TO EXTRINSIC INSTRUMENT—CONDITIONAL PROMISE TO PAY.

Where language of notes necessitates that trust indenture be regarded as if it were incorporated into and were part thereof, and reference to extrinsic instrument is necessary to determine nature of promise, notes do not contain unconditional promise to pay, and are therefore nonnegotiable.

11. MORTGAGES—TRUST MORTGAGE—ASSIGNMENT OF RENTS AND PROFITS—STATUTES.

Where trust mortgage, after describing mortgaged property, recited, "together with all * * * tolls, rents, revenues, issues, income, product, and profits thereof," and in subsequent article provided for surrender to trustee, on default, of possession of all mortgaged property, etc., and stated that it should be lawful for trustee to receive rents, income, issues, and profits thereof, after notice given as required by statute, sufficient assignment of rents and profits as additional security in event

of default was accomplished, although specific language of statute was not used (3 Comp. Laws 1929, §§ 13498, 13499).

12. SAME—DEFAULT—NOTICE OF ASSIGNMENT OF RENTS—STATUTES.
Where trustee under trust mortgage filed proper notice of default and assignment of rents with register of deeds and served copy thereof on receivers for mortgagor, said service was sufficient to entitle trustee to rents and profits under 3 Comp. Laws 1929, § 13499.

13. SAME—NOTICE TO TENANTS—PAYMENT OF RENTS.
It was proper for tenants of mortgaged property, who had not received notice to pay rent to trustee under trust mortgage, to continue paying rent to receivers (3 Comp. Laws 1929, § 13499).

14. SAME—RIGHT OF TRUSTEE TO RENTS.
Where trustee under trust mortgage had served notice on receivers of assignment of rents under 3 Comp. Laws 1929, §§ 13498, 13499, it was entitled to all rents from property leased to others and paid to receivers, although notice had not been served on tenants, since service on them is required for their protection only.

15. SAME—PROFITS MADE BY RECEIVERS.
Trustee under trust mortgage was not entitled to all profits made by receivers of mortgagor through operation of mortgaged premises and business, although it was entitled to all "rents and profits" after notice to them of assignment of rents under 3 Comp. Laws 1929, §§ 13498, 13499.

16. SAME—COMMON LAW—USUFRUCT—PROFITS.
Under common law, word "profits," when used in connection with rents, meant usufruct of land.

17. SAME—ASSIGNMENT OF RENTS—CONSTRUCTION OF STATUTE.
In view of strict policy followed in this State that mortgagee may not divest mortgagor of possession until after title shall become absolute upon foreclosure of mortgage, statute giving mortgagee under trust mortgage additional remedy or security, in nature of assignment of rents, not allowed under common law, must be strictly construed (3 Comp. Laws 1929, §§ 13498, 13499).

18. SAME—TRUST MORTGAGES—PARTICIPATION IN DIVIDENDS.
Where, in addition to proceeds from sale of mortgaged assets, receivers accumulated large sum of money through operation

of business, which will be available to all creditors, trustee under first mortgage may prove its claim with interest up to date for filing claims by general creditors, and may participate in dividends paid to unsecured creditors, without deduction on account of its security.

19. SAME—DIVISION OF SURPLUS AFTER PAYING MORTGAGE CREDITORS.
Should there be any surplus, after payment of full amount due on first mortgage, plus interest up to date of payment, such surplus is to be pro rated among general creditors, exclusive of those claiming under first mortgage.

20. SAME—STRICT FORECLOSURE—QUASI-PUBLIC UTILITY.
Corporation operating ice manufacturing plant and supplying ice to large community is not *quasi*-public utility, and therefore in foreclosure of mortgage on its real property and fixtures, strict foreclosure should not have been ordered by court.

21. VENDOR AND PURCHASER—FORECLOSURE OF CONTRACT—RIGHT OF REDEMPTION.
There is no statutory right to redeem on foreclosure of land contract.

22. MORTGAGES—RIGHT TO REDEEM STATUTORY.
Right to redeem from mortgage foreclosure sale is statutory one that should be strictly protected except under unusual circumstances, and may neither be enlarged or abridged by courts.

23. SAME—FORECLOSURE—RIGHT TO USE BONDS IN PAYMENT.
Use of first mortgage bonds toward payment for mortgaged property on foreclosure sale, as provided in mortgage, was properly permitted, where sufficient cash was deposited to make necessary cash payments for expenses of foreclosure and *pro rata* distribution to nondepositors.

24. SAME—PAYMENT OF FORECLOSURE EXPENSES—AUDITING.
Expenses of foreclosure sale should be met out of proceeds of sale, and expense of audit should also be added to amount due under mortgage, while other expenses must be borne by receivers.

25. SAME—EXPENSE OF ACCOUNTING.
Expense of accounting, which was provided for in mortgage, should have been added to amount due thereunder, where it did not make transaction usurious.

26. SAME—SALE IN SEPARATE PARCELS—STATUTES.

3 Comp. Laws 1929, § 14627, contemplates sales of real estate, on foreclosure, in separate parcels when no intervening causes change nature of parcels, or when they are distinct and independent in description, occupancy, and use.

27. SAME—WHEN PROPERTY SOLD AS UNIT—GOOD WILL.

Where several plants of ice company were used as unit in serving large community, they were properly sold as unit, in mortgage foreclosure sale, especially where mortgaged good will went with mortgaged property, and to have sold separately would have disrupted business.

28. CHATTEL MORTGAGES—FORECLOSURE—RIGHT OF REDEMPTION—EQUITY.

Although there is no statutory right of redemption from sale of chattel mortgaged property, court may make such provision in exercise of its broad equity powers.

29. SAME—CHATTELS SOLD WITH REALTY—RIGHT OF REDEMPTION.

Where mortgaged personalty was sold in conjunction with mortgaged property of ice company on foreclosure sale, right of redemption is extended to good will and chattels, by order of court, so that entire plant may be redeemed as unit, provided fair rental be paid for use of said personalty during redemption period, plus sum sufficient to cover depreciation and loss.

30. RECEIVERS—CLOSING RECEIVERSHIP QUICKLY AS POSSIBLE FAVORED BY COURTS.

Policy of courts has always been to bring receivership to close as quickly as can be accomplished without injury to creditors.

31. MORTGAGES—FORECLOSURE—SALE OF EQUITY OF REDEMPTION.

Where it appears to be for best interest of all parties to sell equity of redemption, on mortgage foreclosure, trial court is authorized to make such sale, provided upset price, as determined by court after taking into account profits and expenses under receivership for redemption period, is bid.

32. SAME—SALE OF UNMORTGAGED PROPERTY.

If equity of redemption is sold, all other unmortgaged property should be offered for sale immediately, but if equity of redemption is not sold, then unmortgaged property should be sold at expiration of redemption period.

33. SAME—RIGHT OF BONDHOLDERS BIDDING TO TENDER BONDS—CASH DIVIDENDS.

Bondholders may tender bonds toward payment of amount bid for mortgaged property, equity of redemption, or unmortgaged property, but, as to latter two, they may bid only to extent that amount of bonds held by them shall bear to entire proved indebtedness of mortgagor; and they may also apply on such bid such sums as would be paid them as dividends on their claims from moneys in hands of receivers and to be received from sale of equity of redemption and unmortgaged property.

34. SAME—DUTY OF BONDHOLDERS BIDDING TO PAY PART IN CASH.

In bidding on mortgaged property bondholders must pay sufficient in cash to pay expenses of sale and to insure that bondholders not bidding shall receive in cash *pro rata* share of amount bid.

35. SAME—DETERMINING AMOUNT OF CASH DIVIDEND.

In determining amount of dividends to be paid fair sum should be estimated and deducted for fees of receiver, attorneys, and for all other lawful charges, and may be approximated, subject to final determination later.

36. SAME—BONDHOLDERS' RIGHTS IN CASH DIVIDEND.

Orders may be made so that bondholders, in making their bid, may have benefit of their proportion in large amount of cash to be distributed to creditors.

37. SAME—PROTECTION OF CREDITORS AND CLAIMANTS.

Provision should be made to insure that such privileges as are conceded to bondholders will interfere in no way with equitable cash distribution of dividends to which other creditors and claimants are entitled.

38. SAME—RIGHT OF CREDITORS TO APPLY CASH DIVIDENDS ON BIDS.

Creditors other than first mortgage bondholders, acting singly or in groups, may also, on application to court, use such dividends to which they may be entitled in payment for any property offered for sale, on terms similar to those allowed first mortgage bondholders.

Appeal from Wayne; Toms (Robert M.), J. Submitted October 7, 1932. (Docket No. 47, Calendar No. 36,734.) Decided March 1, 1933.

Bill by Detroit Trust Company, a Michigan corporation, as trustee, against Detroit City Service Company, its receivers, and others to foreclose a trust mortgage. Bill by Detroit Insurance Agency, a Michigan corporation, and another against Detroit City Service Company, for appointment of a receiver. Cross-bill by defendant Equitable & Central Trust Company, as trustee, for foreclosure of a second mortgage and assignment of rents and profits. Union Guardian Trust Company and others, note holders' protective committee, and White Star Refining Company and others intervened. From decree granting strict foreclosure, cross-plaintiff and interveners appeal. Modified and affirmed.

Dykema, Jones & Wheat, for plaintiff trust company.

Stevenson, Butzel, Eaman & Long (*Charles A. Wagner,* of counsel), for defendant Equitable & Central Trust Company.

John M. Chase, for interveners Union Guardian Trust Company and others.

Harold R. Martin, for interveners White Star Refining Company and others.

BUTZEL, J. In 1927, the Detroit City Service Company was incorporated under the laws of this State for the purpose of continuing the ice and fuel business formerly carried on by the General Necessities Corporation, whose plants, equipment, fixtures, good will, etc., it acquired. The General Necessities Corporation had manufactured and sold over 60 per cent. of the artificial ice purchased by the people of the city of Detroit and vicinity. It had owned a large number of plants at various points in or near

the city of Detroit, systematically located so that, with the use of horses and wagons or motor trucks, all consumers could be conveniently served from a neighboring plant. During the winter time a large portion of the transportation equipment had been employed in the fuel business. The plants were so coordinated that they constituted one large business, conducted principally from a single accounting and management office.

Owing to financial difficulties, the General Necessities Corporation threatened to default on $3,000,000 in bonds and $1,000,000 in notes, which had been underwritten and sold to the public through the assistance of Hoagland, Allum & Company and other investment bankers. In order to avert this default, the bankers formed the Detroit City Service Company, referred to herein as the "service company," which acquired the plants, machinery, fixtures, and other equipment of the General Necessities Corporation used in the ice and fuel business, as well as some real estate. At the same time the bankers organized the Detroit City Service Realty Company, which took over the larger part of the real estate of the General Necessities Corporation, unemployed in its business. The realty company also acquired two plants, which it rented to the service company. The realty company is not involved in the present litigation.

The General Necessities Corporation was the owner of all of the property it turned over to the service company, with the exception of a cold-storage plant which was being purchased on land contract, and on which there was still $400,000, or thereabouts, due at the time of its acquisition by the service company. This contract was subsequently abandoned.

The capital stock of the service company consisted of 25,000 shares of preferred stock, valued at $100 a

share, and 200,000 shares of no par value stock. Sixteen thousand shares of the preferred stock and all of the no par stock were subscribed for and issued. All of the common stock, with the exception of the few qualifying shares taken in the name of the directors, was subscribed for by William K. Hoagland, of the firm of Hoagland, Allum & Company. He also subscribed as trustee for all of the preferred stock that was issued. Hoagland became a director and the treasurer of the company, and appears to have been closely identified with the company's affairs from its very inception.

The articles of association of the service company placed the following valuations upon the assets it acquired:

Land, buildings and improvements, after deducting $400,000 due on the land contract	$ 3,891,836
Machinery, equipment, delivery equipment, supplies, furniture and fixtures, etc.	2,135,364
Commodities and inventories	300,000
Deferred discount on bonds, prepaid taxes and insurance, etc.	440,000
Investments in subsidiaries	500,000
Cash	100,000

In order to raise funds to purchase these assets and to continue the business, the service company executed a first and open end mortgage of $10,000,000 to the Union Trust Company, as trustee, to secure $10,000,000 of first mortgage six and one-half per cent. gold bonds, $3,000,000 of which were issued at once. Seven million dollars of additional bonds might be issued from time to time under conditions set forth in the indenture, upon the acquisition of other properties and filing of supplemental mortgages contemporaneously therewith, so as to bring

the new properties under the lien of the original indenture. The mortgage was dated July 1, 1927, and is referred to herein as the first mortgage. It covered the real estate, machinery, tools, implements and appliances, supplies, good will, etc., of the service company. The personal property is not described in great detail in the mortgage, but there is an omnibus clause covering all of the company's property, both real, personal, and mixed, and also all such property that might be acquired thereafter.

There was expressly excluded from the lien of the mortgage the accounts receivable, choses in action, inventory of merchandise, and capital stock of subsidiary or other corporations. As the inventory amounted to $300,000 at the time of the organization, it will be seen that the value of the unmortgaged property ran into a large figure. The mortgage also covered "tolls, rents, revenues, issues, income, product, and profits thereof." The mortgage further provided that the personal property and chattels conveyed or intended to be conveyed by or pursuant to the indenture should be real estate for all purposes of the indenture and held and deemed to be fixtures and appurtenances. They were not to be used or sold separately from the real estate except as otherwise provided in the instrument. The mortgage specifically permitted the sale of fixtures, equipment, machinery, apparatus, appliances, tools, implements, and delivery equipment that were worn out or unserviceable, antiquated, or unnecessary in the conduct of the business, but upon such sale they were to be replaced in due course with new fixtures, etc., which should forthwith become subject to the lien of the indenture.

The mortgage provided that, in the event of default, the trustee should be entitled to the possession of the mortgaged property and also to the rents, in-

come, issues, and profits, after giving the notice required by Act No. 228, Pub. Acts 1925 (3 Comp. Laws 1929, §§ 13498, 13499). It was further provided that, upon the occurrence of one or more events of default and the filing of a bill in equity or the commencement of other judicial proceedings, the trustee should be entitled, as a matter of right, to the appointment of a receiver or receivers of the mortgaged and pledged properties, and of the rents, income, issues, and profits thereof pending such proceedings, with such powers as the court making such appointment should confer.

The mortgage was duly executed and recorded as a real estate mortgage. It never has been filed as a chattel mortgage, though it contains a duly-executed affidavit, showing adequacy of security, etc., in the form required for the recording of chattel mortgages (3 Comp. Laws 1929, § 13424). The mortgage bears a certificate of the county treasurer showing that a $15,000 mortgage tax was paid in accordance with 1 Comp. Laws 1929, § 3642.

In January, 1928, the service company, in order to acquire the properties of the National Ice Company and the Detroit Consumers Company, issued $1,300,000 of first mortgage bonds under the $10,000,000 open end mortgage hereinbefore described. In October, 1928, an additional $260,000 in first mortgage bonds were issued to pay in part for the acquisition of properties of the Gaukler Ice & Fuel Company of Pontiac, Michigan. In both instances, supplemental mortgages were duly executed and properly recorded as real estate mortgages.

In addition to the first mortgage of $10,000,000, the company on its organization issued $1,250,000 of five-year six and one-half per cent. gold notes, dated July 1, 1927, and a year later, $700,000 of six and one-half per cent. gold notes, payable in four years.

Both note issues were secured by indentures running to the Union Trust Company, trustee.

On January 1, 1930, the company executed a second mortgage to the Guaranty Trust Company, as trustee, to secure $500,000 of bonds issued thereunder. The mortgage was recorded as a real estate mortgage and also properly filed as a chattel mortgage. It recites that it is junior, subject, subordinate, and subservient to the liens, etc., of the first mortgage, which it describes as being a mortgage on both the real and personal property.

The Detroit Trust Company became the successor-trustee to the Union Trust Company under the first mortgage and supplements thereto. The Equitable & Central Trust Company succeeded the Guaranty Trust Company as trustee under the second mortgage, and the Union Guardian Trust Company is the present trustee under the gold note indentures.

The service company was unable to meet its obligations. On January 16, 1931, the Detroit Insurance Agency filed a bill of complaint against the service company as a general creditor, alleging the latter's inability to meet the current requirements of its funded indebtedness. The bill alleged further that the service company was burdened with real estate which could not be disposed of on account of market conditions, and that it could not meet its many obligations. The plaintiff sought the appointment of a receiver. The service company, in its answer, admitted the allegations, and on January 16, 1931, the Union Guardian Trust Company and H. S. Oderman were appointed receivers, with power to continue, manage, operate, and conduct the business of the company. The order enjoined creditors from instituting suits or levying executions. On May 25, 1931, an order was entered requiring all creditors to file

claims with the receivers on or before September 14, 1931.

On June 25, 1931, the Consolidated Public Service Company, a corporation in which Hoagland and Allum held an interest, filed a petition to intervene. It alleged ownership of a majority of the common stock of the service company, set forth the past and present financial status of the service company, and asked for the appointment of a receiver. It prayed that the assets be marshaled and liquidated and the business wound up. The service company immediately filed an answer, in which it admitted the allegations of the petition of intervention, and prayed for the appointment of a receiver or a continuance of the receivership already existing. A new order was entered appointing the same receivers.

On June 27, 1931, the Detroit Trust Company, successor to the Union Trust Company as trustee under the first mortgage, instituted an independent suit asking for the foreclosure of the first mortgage and for the sale of all of the properties, except the accounts receivable, choses in action, inventory of merchandise, and capital stock of subsidiaries, all property excluded from the lien of the first mortgage. On the same date, the Detroit Trust Company served notice on the service company and the receiver declaring the principal of the first mortgage gold bonds due, together with all unpaid accrued interest, and demanding payment of all rents, income, issues, and profits of the mortgaged property and trust estates in accordance with Act No. 228, Pub. Acts 1925 (3 Comp. Laws 1929, §§ 13498, 13499). This notice was filed with the register of deeds for Wayne county, Michigan, on June 29, 1931. On July 3, 1931, the Detroit Trust Company, as trustee, filed a petition setting forth the equity receivership, praying for a consolidation of the two cases, and consenting that

the same receivers be appointed for the consolidated cases. An order was entered in accordance with the petition.

On July 10, 1931, the Detroit Trust Company, trustee, filed an amended bill, alleging that the ice and coal business of the company was of such a nature that it would sustain serious loss if the operations were even temporarily suspended; that the value of the assets depended upon the continuous operation of the company as a going concern; that the ice machinery was of such a nature that idleness would cause rapid depreciation; and that the company was a *quasi*-public utility. In addition to the relief prayed for in the preceding bill, it asked that all of the property of the service company, including its business and good will, be sold as a unit and as an operating and going concern. This bill joined the Guaranty Trust Company of Detroit, trustee under the second mortgage, as a party defendant. In accordance with another petition filed by the Detroit Trust Company, as trustee, an order was entered segregating and sequestering all of the tolls, earnings, revenues, rents, issues, profits, and income of the mortgaged property, together with all earnings prior and subsequent to the date of the order.

On October 24, 1931, the Equitable & Central Trust Company, as successor to the Guaranty Trust Company, trustee under the second mortgage, filed an answer and cross-bill. It admitted that the second mortgage was junior, subservient, and subordinate to the lien of the first mortgage, but denied that the Detroit Trust Company, as trustee under the first mortgage, was entitled to any lien on the personal property because of the failure to file the mortgage as a chattel mortgage. It further denied the right of the trustee to the rents, income, issues, and profits of the mortgaged property, because the mortgage and

its supplements contained no specific assignment of rents and profits, and because the rents, issues, and profits constituted merely a part of the mortgaged property, to which one claiming under the mortgage would not be entitled unless and until an absolute title vested following a foreclosure sale. It further denied that the Detroit City Service Company was a *quasi*-public utility, or that its property could be sold as a unit and as an operating concern under the first mortgage trustee's bill, because all of the property was not covered by the first mortgage, and because an equity of redemption is allowed under the laws of the State of Michigan. The cross-bill prayed for a foreclosure of the general mortgage. No testimony was taken on the cross-bill.

It is unnecessary to set forth the further proceedings in the cause, except as hereinafter referred to. Questions involving the rights and priorities of the first and second mortgagees, the Detroit Insurance Company *et al.*, the first plaintiffs in the equity suit, the White Star Refining Company *et al.*, intervening creditors, and the Union Guardian Trust Company, trustee, *et al.*, representing the note holders, are the principal issues in the case. Other pleadings will only be briefly referred to in discussing the various questions that are presented for review.

After a hearing at which the claims of all parties were fully presented, the trial judge entered a decree holding that all of the personal property, with the exception of the book accounts, inventory of merchandise, choses in action, and stocks in subsidiaries was subject to the first mortgage; that all the properties employed in the business constituted one plant or unit; that the company was a *quasi*-public corporation; that, under the assignment of rents and profits clause, the Detroit Trust Company, as trustee

for the first mortgage bondholders, was entitled to all of the rents and profits, including the earnings realized by the receivers as a result of their operation of the plants and conduct of the business; that the Detroit Trust Company, as plaintiff, was entitled to a foreclosure of the mortgage and a sale of the property without equity of redemption, referred to as strict foreclosure; that all the plants used solely in the ice and fuel business should be sold as a unit, and all the property not so used should be sold separately; that the cost of preparation of an audit, as ordered by the Detroit Trust Company, trustee, should only be allowed as a general claim; and that, on the foreclosure sale, first mortgage bonds and coupons appertaining thereto should be accepted, provided sufficient cash to meet certain expenses and costs were first paid. We shall discuss only those questions that have been raised on appeal or on suggestion of the court. All other questions will be considered as settled by the decree.

Character of mortgaged property. The question is first raised as to what property of the corporation constituted fixtures and came under the lien of the mortgage, if regarded solely as a real estate mortgage due to the failure to file as a chattel mortgage. There is no question but that the land and buildings would come thereunder. We need not consider the stock on hand, book accounts, choses in action and stocks in subsidiary corporations, all of which the mortgage expressly excludes by its very terms. The ammonia compressors, aerating equipment, boilers, motors and refrigerating units, freezing tanks, air compressors, condensers, engines, oil tanks and pumps, platform scales, scorching machines, and other machinery for manufacturing ice are fixtures. See *Dehring* v. *Beck,* 146 Mich. 706; *Lyle* v. *Palmer,*

42 Mich. 314; *Tyler* v. *Hayward,* 235 Mich. 674; *Peninsular Stove Co.* v. *Young,* 247 Mich. 580; *Kent Storage Co.* v. *Grand Rapids Lumber Co.,* 239 Mich. 161; *First Mortgage Bond Co.* v. *London,* 259 Mich. 688. We believe that this should also include spare motors, parts, machinery, equipment, etc., which constitute replacements specially adapted to the full enjoyment of the realty. See *Voorhis* v. *Freeman,* 2 Watts & Sergeant's Rep. (Pa.) 116.

In addition to the foregoing, however, there were horses, wagons, motor trucks, automobiles, office furniture, typewriters, adding machines, and other movable personal property, including portable ice storage houses which were moved from place to place. The latter were small sheds, somewhat smaller than voting booths, which were placed on property belonging to the company or leased from others, and from time to time filled with ice, as required, which was sold by employees placed in charge of these stations. They were set on the ground without any foundation and without any thought of permanency. In distinguishing between what is a fixture and what a chattel, when neither is annexed to the freehold, the use, nature, and intention of the parties must be considered. A carpet nailed to the floor of a house is a chattel, while a key to the house carried in one's vest pocket is a fixture. *Goodin* v. *Elleardsville Hall Ass'n,* 5 Mo. App. 289.

The intention of the parties in the instant case is evident. While it may be claimed that the attaching of the affidavit of adequacy, etc., to comply with 3 Comp. Laws 1929, § 13424, may not be conclusive as to the character of a large part of the movable property, the testimony shows beyond any question that the parties did not regard such property as fixtures. The mortgage was executed almost contemporaneously with the incorporation of the service company,

at a time when the officers of the company must have had in mind the character of the property and then purposely withheld the instrument from filing as a chattel mortgage so as not to impair the credit of the company.

Horses, wagons, trucks, automobiles, office furniture and equipment, and other movable property are of such a character that they can be transported from place to place without impairing their value, or that of the realty from which they are removed. The nature of a larger part of this property was such that it would be extremely difficult by any stretch of the imagination to classify such subjects as "fixtures." In coming to our conclusions, we need not consider the provision in the first mortgage declaring all of the personal property to be fixtures, inasmuch as the dispute arises solely between the service company and creditors other than the holders of bonds issued under the first mortgage. As to such creditors, we find all of the property not hereinbefore designated as fixtures to be chattels.

Our attention has been directed to a few cases in other jurisdictions holding otherwise. In *Bon Air Planting Co.* v. *Barringer,* 142 La. 60 (76 So. 234), the court went so far as to say that, under the Louisiana Code, 23 mules belonging to a sugar plantation formed part of the plantation and were fixtures, that the mules were "immovable by destination." We are not in accord with this view. In *Scudder* v. *Anderson,* 54 Mich. 122, the court said:

"We can conceive of no circumstances under which chairs, tables, movable desks, stoves, tools and ordinary vehicles could be classed as fixtures at all, and counsel disclaim any such idea. It would be possible for pipes, large bellows and perhaps fixed scales to be so treated if attached in such a manner

as to form part of the fixed property. But movable pipes, or anything else, which are in fact moved from time to time, and used for different purposes and in different places, could hardly be so considered.''

See, also, *Robertson* v. *Corsett,* 39 Mich. 777; *Wheeler* v. *Bedell,* 40 Mich. 693; *Burrill* v. *Wilcox Lumber Co.,* 65 Mich. 571; *Morris* v. *Alexander,* 208 Mich. 387, where garage appliances and tools were held to be chattels; *Union Trust Co.* v. *Marsh,* 255 Mich. 147, where linotype machines were held to be chattels. We believe that the movable personalty not hereinbefore designated as fixtures should be regarded as chattels. We shall not discuss the question any further, however, in view of our conclusions as to priorities.

Construction of 3 Comp. Laws 1929, § 13424. Although the first mortgage or deed of trust was duly executed, both as a real estate and chattel mortgage, and was represented to be a first lien on the property, it nevertheless was recorded only as a real estate mortgage. The secretary of the corporation, an attorney who represented the bankers and the trustee as well, expressly withheld the mortgage from record as a chattel mortgage under instructions from the bankers, in order to avoid an impairment of the credit of the company. The testimony indicates their belief that the real estate security was more than ample. The bondholders were in no way to blame for this failure on the part of the trustee to file the instrument as a chattel mortgage, and they had every reason to believe that the mortgage was a first mortgage on the personal property described therein. The trustee was absolved of the duty of looking after the recording or filing of the instrument by the terms of the mortgage. The question of the liability of the trust company for failure

to file the mortgage is not before us and need not now be considered.

We are confronted with this question: Did the failure to file the first mortgage with the proper authorities as a chattel mortgage make it void as to subsequent creditors who extended credit with notice? The law of Michigan has been in a state of confusion. The statute, 3 Comp. Laws 1929, § 13424, recites that failure to file a chattel mortgage shall make it "absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith," unless accompanied by immediate delivery followed by an actual and continued change of possession of the property mortgaged. The quoted words appear in their present form in section 10 of chapter 81 of the Revised Statutes of 1846. The chapter heading: "Of fraudulent conveyances and contracts relative to goods, chattels and things in action," indicates its purpose. Although the statute has been amended from time to time during the course of years, the phrase quoted remains unchanged, notwithstanding the fact that at times a construction has been placed upon the meaning of the statute different from that which a literal interpretation of the words might indicate.

The query eventually arose as to whether the unfiled mortgage was valid as to subsequent creditors with notice. The early case of *Cooper* v. *Brock,* 41 Mich. 488, held that such a mortgage was absolutely void, and that nothing short of a change of possession or filing, as the section required, could save it. In this case, however, the question of notice was not raised. A number of years later, the court, moved by more equitable considerations and an analysis of the purposes of the statute and the mischief it sought to overcome, followed the construction placed

on similar statutes in some other States, reversed the ruling in *Cooper* v. *Brock, supra,* and held that the mortgage was void only as to subsequent creditors without notice. See *Charles Root & Co.* v. *Harl,* 62 Mich. 420; *Brown* v. *Brabb,* 67 Mich. 17 (11 Am. St. Rep. 549); *Cutler* v. *Steele,* 85 Mich. 627; *First National Bank* v. *Guntermann,* 94 Mich. 125; *Littauer* v. *Houck,* 92 Mich. 162 (31 Am. St. Rep. 572); *Baker* v. *Parkhurst,* 119 Mich. 542; *Loeser* v. *Jorgenson,* 137 Mich. 220; *Heenan* v. *Forest City Paint & Varnish Co.,* 138 Mich. 548; *Sachs* v. *Norn,* 139 Mich. 357.

This latter construction of the law, however, was reversed in *People, for use of Esper,* v. *Burns,* 161 Mich. 169 (137 Am. St. Rep. 466), which definitely held that failure to file a chattel mortgage without a change of possession, etc., as provided by the statute, made it void as to all creditors. This case was followed and approved in *City Bank & Trust Co.* v. *Hurd,* 179 Mich. 454, but with some qualification, for the court said:

"In certain cases under the circumstances there shown, knowledge has been held to be of controlling importance and equivalent to recording. * * * The latest treatment of, and rulings by this court upon the subject is *People, for use of Esper,* v. *Burns,* 161 Mich. 169 (137 Am. St. Rep. 466), where it is held settled in this State that actual notice by a creditor of the existence of an unrecorded mortgage is not inevitably a sufficient substitute (to give it priority) for recording the same."

In *City Bank & Trust Co.* v. *Hurd, supra,* Hurd was an employee of the mortgagor, and although he denied knowledge of the fact that the unfiled mortgage covered after-acquired property, the court found that, even if he had such knowledge, the mort-

gage would be void as to him, due to the mortgagee's failure to file the instrument. Were it not for subsequent decisions of the Federal courts and our court, we would be bound by the rule laid down in *People, for use of Esper,* v. *Burns, supra,* and the rule would be productive of very inequitable results in the instant case. The rule of *stare decisis* generally determines, even though equitable considerations might prompt a different result.

Shortly after the decision in *People, for use of Esper,* v. *Burns, supra,* the United States Circuit Court of Appeals (6th Circuit) in *Re Huxoll,* 113 C. C. A. 637 (193 Fed. 851), held, in an opinion written by Judge Knappen, that:

"The words 'creditors of the mortgagor' are construed by the Supreme Court of Michigan to mean subsequent creditors in good faith and without notice of the mortgage. *Fearey* v. *Cummings,* 41 Mich. 376; *Charles Root & Co.* v. *Harl,* 62 Mich. 420; *Buhl Iron Works* v. *Teuton,* 67 Mich. 623; *Cutler* v. *Steele,* 85 Mich. 627; *First Natl. Bank* v. *Guntermann,* 94 Mich. 125, 126; *Baker* v. *Parkhurst,* 119 Mich. 542."

The learned judge did not overlook *People, for use of Esper,* v. *Burns, supra,* but referred to it in connection with another issue.

In re Huxoll, supra, was followed by *Detroit Trust Co.* v. *Pontiac Savings Bank,* 115 C. C. A. 631 (196 Fed. 29), shortly thereafter, and the court, in another opinion written by Judge Knappen, adopted the principle laid down in *Re Huxoll, supra,* and again stated that the words "creditors of the mortgagor" applied only to subsequent creditors in good faith and without notice of the mortgage. *Detroit Trust Co.* v. *Pontiac Savings Bank, supra,* was reviewed and affirmed in 237 U. S. 186 (35 Sup. Ct.

509), where the language limiting the operation of the statute to subsequent creditors without notice was quoted once more. Notwithstanding the profound respect we have for the opinions of the United States Supreme Court, we are not bound thereby in the construction of a Michigan statute. However, in *Peter Schuttler Co.* v. *Gunther,* 222 Mich. 430, we approved of the opinion of the United States Supreme Court, and quoted the excerpt therein relating to the application of the statute.

Counsel on both sides in the instant case criticize the various decisions cited insofar as they affect their claims adversely. They contend that the statements of the courts in these cases have been pure *dicta,* and unnecessary to a settlement of the issues involved. We shall not discuss these contentions. This court has adopted the rule laid down by the Supreme Court of the United States, as set forth but recently by our court, and holds that the statute protects only subsequent creditors without notice. Support for this rule may be found in decisions in some other jurisdictions. See *Dyer* v. *Thorstad,* 35 Minn. 534 (29 N. W. 345); *J. B. Kern & Son* v. *Wilson,* 82 Iowa, 407 (48 N. W. 919); *In re Ducker,* 133 Fed. 771; *Gill* v. *Griffith,* 2 Md. Ch. 270; *Tucker* v. *Tilton,* 55 N. H. 223.

Notice given by second mortgage. The Equitable & Central Trust Company, as successor of the Guaranty Trust Company, trustee under the second mortgage, has waived its rights to security under the second mortgage, and claims only those of a general creditor. The second mortgage, which was filed as a chattel mortgage, referred to the first mortgage to which it was subject, described it as covering both real and personal property, and gave the date of its execution and recording in the register of deeds' office, including the liber and page of the record.

While the trustee under the second mortgage may have believed it to its advantage to claim only as a general creditor and thus to attempt to avoid the first mortgage because it was not filed, nevertheless it still cannot avoid the notice of the first mortgage given in the second mortgage, nor can the unsecured creditors, all of whom appear to have extended credit after the second mortgage was properly filed.

While it is true that the recording of a real estate mortgage does not give notice of its chattel mortgage provisions (*Security Trust Co.* v. *Tuller,* 243 Mich. 570, 574), the filing or recording of a later mortgage in the proper office where the prior mortgage should have been filed or recorded does give constructive notice of the prior instrument, if specific reference to it is made therein. In *Fruth* v. *Bolt,* 39 S. D. 351 (164 N. W. 105), it was held:

"The reference contained in this mortgage to the first mortgage was sufficient to put a prudent person upon inquiry, and, had such inquiry been pursued with a reasonable degree of diligence, it would have been learned that the first mortgage debt had not been paid."

See *Taylor* v. *Mitchell,* 58 Kan. 194 (48 Pac. 859); *Ebling Brewing Co.* v. *Gennaro,* 189 App. Div. 782 (179 N. Y. Supp. 384). One may be held to notice, under these circumstances, not only of the existence of an unrecorded mortgage, but also of the provisions contained therein. *Guerin* v. *Sunburst Oil & Gas Co.,* 68 Mont. 365 (218 Pac. 949); *J. R. Crowe Coal & Mining Co.* v. *Atkinson,* 85 Kan. 357 (116 Pac. 499, Ann. Cas. 1912 D, 1196); *McPherson* v. *Rollins,* 107 N. Y. 316, 332 (14 N. E. 411, 1 Am. St. Rep. 826). That recording constitutes constructive notice, not only of the existence, but also of the contents of a

recorded instrument, was held by this court in *Lines* v. *Weaver,* 220 Mich. 244, where we declared:

"The contract and deed were of record and were constructive notice to Burrusch of all they contained. We must assume, therefore, that Burrusch had knowledge of whatever the papers contained."

Inasmuch as it is conceded that the lien of the first mortgage will result in an exhaustion of all the mortgaged assets of the service company, a determination of the relative rights and priorities of the second mortgagees over the general creditors, after the first mortgage has been satisfied, is unnecessary to the decision.

Negotiability of notes. The first series of notes, aggregating $1,250,000, was issued contemporaneously with the mortgage. The entire issue was purchased by the investment bankers, who also purchased $3,000,000 of the first mortgage bonds, as well as stock in the company. They had notice through full and complete knowledge of the chattel mortgage provisions of the first mortgage. One of these bankers not only was a director and treasurer of the service company, but was largely instrumental in keeping the indenture from being filed as a chattel mortgage.

The trial judge also held that the testimony conclusively showed that the Consolidated Service Company purchased the second note issue of $700,000 with notice of the chattel provisions of the first mortgage. The latter company clearly had notice of the mortgage through its affiliate, the Consolidated Public Service Company. The Consolidated Public Service Company furnished the manager and president of the Detroit City Service Company, but his salary was charged to Hoagland, Allum & Company. The minutes of the Detroit City Service Com-

pany refer to Messrs. Hoagland and Allum of the Consolidated Service Company. They further show that the Consolidated Public Service Company and the Consolidated Service Company were affiliated. The Detroit City Service Company was instructed to close the two accounts into one and the correspondence to the two companies went to one office. The trial judge properly found that to hold that the Consolidated Service Company did not have full knowledge of the affairs of the Detroit City Service Company would be doing violence to reason. Hoagland and Allum, who had full knowledge of the first mortgage covering chattels and real estate, were associated with both companies. There was no testimony whatever to rebut the almost conclusive showing that the two companies were closely united. It seems incredible that the Consolidated Service Company, with which Messrs. Hoagland and Allum were associated purchased $700,000 of notes of the Detroit City Service Company without the knowledge possessed by its parent and affiliated company, the Consolidated Public Service Company.

The query arises, then, whether the present holders of the two issues of notes which were originally purchased respectively by Hoagland, Allum & Company in association with other investment bankers, and by the Consolidated Service Company, with full knowledge of the chattel provisions of the unfiled first mortgage, are charged with the notice that the original purchasers had. They must be so charged if the notes are nonnegotiable. Each note contained the following clause:

"This note is one of a duly authorized issue of notes * * * issued under and all equally entitled to the benefit of a trust agreement * * * executed by the company to Union Trust Company, of Detroit, Michigan, as trustee. * * * For a descrip-

tion of the rights of the holders of the notes and the terms and conditions upon which the notes are issued, reference is made to the said trust agreement with like effect as though said trust agreement were recited in full herein."

This language differs from that in the debentures which were held to be negotiable in *Paepcke* v. *Paine,* 253 Mich. 636 (75 A. L. R. 1205), and *Merchants National Bank* v. *Detroit Trust Co.,* 258 Mich. 526, in that the instruments in those cases contained no specific direction that the trust indentures be completely incorporated therein, with like effect as though recited in full in the notes. As was stated in *Fidelity & Deposit Co.* v. *Andrews,* 244 Mich. 159:

"The mere fact that the bonds were secured by the deed did not change their character or affect their negotiability * * * They are deprived of negotiability because the deed is expressly made part of them. It is as though its contents were repeated in them."

The opinion referred to *King Cattle Co.* v. *Joseph,* 158 Minn. 481 (198 N. W. 798), wherein the words "and hereby reference is made to said indenture and the same made a part hereof, with the same effect as if herein fully set forth," rendered the instrument nonnegotiable.

In *Paepcke* v. *Paine, supra,* the bonds referred to the instrument securing them solely for the purpose of describing the security. In the instant case, however, the language of the notes necessitates that the trust indenture be regarded as if it were incorporated into and were a part of the notes. Reference to an extrinsic instrument is necessary to determine the nature of the promise. The notes do not contain an unconditional promise to pay, and are nonnegotiable.

Rents and profits. The first mortgage contained no clause specifically assigning the rents and profits in the exact language of the statute. After a description of the mortgaged property, there followed the words:

"Together with all * * * tolls, rents, revenues, issues, income, product, and profits thereof."

Article 10 of the mortgage indenture, entitled: "Remedies of trustees and bondholders upon default," provided for a surrender to the trustee, upon default, of possession of all mortgaged property, etc., and states that it shall be lawful for the trustee "to receive the rents, income, issues and profits thereof, after notice given as required by Act No. 228, Pub. Acts 1925" (3 Comp. Laws 1929, §§ 13498, 13499). We believe that this was sufficient to assign the rents and profits as additional security in the event of default. The trustee complied with the first section of the act.

Section 2 of the act (3 Comp. Laws 1929, § 13499) makes the assignment of rents good and valid against the mortgagor or mortgagors or those claiming under or through them from the date of the recording of the trust mortgage or deed of trust, but only makes it binding

"upon the occupiers of the premises from the date of the filing by the trustee or trustees in the office of the register of deeds for the county in which the property is located, of a notice of default in the terms and conditions of the trust mortgage or deed of trust and the service of a copy of such notice upon the occupiers of the mortgaged premises."

The trustee filed proper notice of default with the register of deeds and served a copy on the receivers. A small portion of the realty not used by the service company was rented to tenants, however, and they

were not served. We believe that service on the receivers, after the notice had been filed with the register of deeds, was sufficient. Service upon the occupiers of the premises is for their protection only, and, until receipt of such notice, it was proper for them to pay rent to the receivers. It was also proper for the trustee under the mortgage to serve notice on the receivers. The trustee is entitled to all rents from property leased to others and paid to the receivers, after service on them of a copy of the duly recorded assignment of rents under Act No. 228, Pub. Acts 1925 (3 Comp. Laws 1929, §§ 13498, 13499). This case is distinguishable from *Detroit Properties Corp.* v. *Detroit Hotel Co.,* 258 Mich. 156, 159, in which the receivers were also the "occupiers" and no notice of any kind was filed or served upon them.

The lower court, however, was in error in allowing the Detroit Trust Company, trustee, all of the profits made by the receivers through operation of the mortgaged premises and business. When relieved of the payment of interest and charges for depreciation, the operations of the receivers show a large profit. This was realized, however, partly through the use of inventory, receivables, and other elements that were unmortgaged, in combination with labor and management. We do not believe that the word "profits" as used in Act No. 228, *supra,* can be construed to cover business profits made by the receivers through possession and operation of the mortgaged property in the instant case. Under the common law, the word "profits" when used in connection with rents, meant the usufruct of the land. *Hazeltine* v. *Granger,* 44 Mich. 503. As defined by 3 Bouvier (Rawle's 3d Rev.), p. 2737:

"Under the term profit is comprehended the produce of the soil, whether it arise above or below the surface; as herbage, wood, turf, coals, minerals, stones; * * * also fish in a pond or running water."

In *Hitchcock* v. *Pratt,* 51 Mich. 263, the court implied that the phrase "rents and profits" did not include business profits. The question has seldom arisen, and no certain rules can be laid down based on decisions in other jurisdictions, particularly in view of the fact that, in Michigan, the principle that the mortgagee is not entitled to possession until after foreclosure and the expiration of the equity of redemption is applied more strictly than in many other jurisdictions. We do not believe that the word "profits" as used in Act No. 228, *supra,* means business profits arising out of the operation of mortgaged premises not rented to others but occupied and used by the mortgagor.

Act No. 228 is described in *Security Trust Co.* v. *Sloman,* 252 Mich. 266, as not perfectly drafted. The title refers to "rents and profits of property." Section 1 states that it shall be lawful to assign the rents and profits of the property mortgaged under a trust mortgage. Section 2, however, states that the assignment of rents and profits, when certain formalities are carried out, "shall be a good and valid assignment of rents." The omission of the words "and profits" after the phrase "good and valid assignment of rents" may have been due to an oversight. Appellants claim that the entire statute should be read together. We do not believe, however, that the statute was meant to include, under any circumstances, all profits made through the use of mortgaged buildings, fixtures, and chattels in combination with unmortgaged inventory, receiv-

ables, etc., all employed in a manufacturing and distributing business. The query is pertinently made as to what the result should have been had the business been operated by the receivers at a loss.

Act No. 228 gives the mortgagee an additional remedy or security not allowed under the common law, and in construing it the strict policy of our court in protecting the mortgagor must be kept in mind. The mortgagee may not divest the mortgagor of possession of the mortgaged premises until after the title shall become absolute upon foreclosure of the mortgage. *Wagar* v. *Stone,* 36 Mich. 364; *Hazeltine* v. *Granger, supra; Nusbaum* v. *Shapero,* 249 Mich. 252; *Union Trust Co.* v. *Charlotte General Electric Co.,* 152 Mich. 568; *Union Guardian Trust Co.* v. *Rau,* 255 Mich. 324; *White* v. *Fulton,* 260 Mich. 346. This principle has been upheld repeatedly, even notwithstanding a provision in the mortgage providing for the appointment of a receiver upon default. *Union Guardian Trust Co.* v. *Rau, supra.*

Distribution of dividends. In addition to the proceeds from the sale of the unmortgaged assets, a large sum of money accumulated by the receivers through operation of the business will be available for payment as dividends to all creditors. The trustee under the first mortgage may prove its claim with interest up to the date for filing claims by general creditors, and may participate in dividends paid to unsecured creditors, without any deduction on account of its security. This is in accordance with the English chancery rule which has been adopted by this court. See *In re E. Bement's Sons,* 150 Mich. 530, where the rule is stated as follows:

"The debtor may now receive out of the general assets no more than his proportional share. Until the debt is paid, in full, principal and interest, the

creditor is entitled to such dividends as may be declared upon the total of the debt as proved. It is entirely immaterial to the receiver in what manner proceeds of collateral are applied, to the point when the sum of the dividends and of collateral collected has extinguished the entire debt, principal and interest."

See, also, *Third National Bank of Detroit* v. *Haug,* 82 Mich. 607 (11 L. R. A. 327); *High* v. *Fifth National Bank of Grand Rapids,* 97 Mich. 502 (21 L. R. A. 822); *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131 (19 Sup. Ct. 360).

Appellants contend that we should follow the so-called bankruptcy rule instead, and only allow the first mortgage trustee the right to a pro rata participation in the fund for distribution to general creditors to the extent of the deficiency after application of the proceeds realized from the security. We find no reason to depart from the chancery rule that has been the law of this State.

There seems to be but little likelihood that the first mortgage creditors will realize a sufficient sum, from their share of the dividends to be paid to general creditors and from the proceeds of the foreclosure sale, to cover the amount due under the first mortgage. Should there be any surplus, however, after payment of the amount due on the first mortgage, plus interest up to the date of payment, such surplus shall be pro rated among the general creditors, exclusive of those claiming under the first mortgage.

Strict foreclosure. The trial court should not have ordered a foreclosure sale, by which an absolute title was to be given to the purchaser, without allowing the mortgagor a right of redemption and possession of the mortgaged property during the period fixed

by statute. This is often called strict foreclosure. It is true, as appellee contends, that strict foreclosure has been allowed in the case of railroad mortgages in this State, but this is by virtue of an exception made by statute. 2 Comp. Laws 1929, § 11150. As was stated in *Ten Eyck* v. *Railroad Co.,* 114 Mich. 494, this special provision "operates to except railroad mortgages from the general statute relating to the foreclosure of real-estate mortgages." Even if a different rule should apply to *quasi*-public utilities, as is claimed by appellee, it has been definitely held that a company operating an ice manufacturing and supply business in a large community is not included in this category. *New State Ice Co.* v. *Liebmann,* 285 U. S. 262 (52 Sup. Ct. 371).

Strict foreclosure was allowed in *National Bank of Commerce* v. *Corliss,* 217 Mich. 435, and an insolvent creamery company's property was sold without equity of redemption. The case did not involve the foreclosure of a mortgage but of a land contract. There is no statutory right to redeem on foreclosure of a land contract. *Drysdale* v. *P. J. Christy Land Co.,* 248 Mich. 184; *Heppner* v. *Smith,* 238 Mich. 245, 247. Likewise, in *Webber* v. *Genesee Circuit Judge,* 184 Mich. 112, the court ordered sale of an electric light company plant by a receiver, who had been appointed in foreclosure proceedings on a showing that the plant was being run at a large loss. The receiver also was unable to conduct the business at a profit. The bill was filed for the purpose of protecting the security, restraining waste, and foreclosing the mortgage. Loss of the franchise to furnish electricity to the city of Fenton was threatened if the company shut down its plant. The court permitted the sale after some hesitation, but stated that if a proposed offer of a third party to lease the prop-

erty were accepted, and secured by a proper guaranty bond approved by the trial judge in order to avert further losses, no sale should be ordered. In the instant case, the business is being continued without interruption, the property and good will preserved, taxes and insurance premiums paid, and a profit is being realized by the receiver. The right to redeem from a foreclosure sale is a statutory right that has been strictly protected except under the unusual circumstances arising in *Webber* v. *Genesee Circuit Judge, supra.* The right can neither be enlarged nor abridged by the courts. *Batty* v. *Snook,* 5 Mich. 231, 239; *Wood* v. *Button,* 205 Mich. 692, 703.

Payment in bonds. We find no merit in appellants' objections to the provisions in the decree permitting the use of first mortgage bonds and pertinent coupons towards payment for the mortgaged property on foreclosure sale, as provided in the mortgage. It would be inequitable to deny the right to use bonds, provided sufficient cash is deposited so as to make necessary cash payments for expenses of the foreclosure and *pro rata* distribution to nondepositors. The right to use bonds in this manner is well reasoned out in Tracy on Corporate Foreclosures, § 209.

Expenses of audit and sale. The expenses of the foreclosure sale should be met out of the proceeds of the sale. The expense of the audit should also be added to the amount due under the mortgage, while other expenses must be borne by the receivers. Under section 13 of article 4 of the indenture, the service company agreed to keep proper books of record and account, open to the inspection of the trustee at all times, and agreed that, upon the written request of the holders of not less than 25 per cent. of the principal amount of the bonds, the trustee would

have a right to have an accounting made at the expense of the corporation. Such an accounting was had at a total cost of $12,000. The trial judge refused to permit this expense to be added to the amount due under the mortgage, but permitted it to be filed as an unsecured claim. Inasmuch as the payment of such amount was a lawful charge provided for in the mortgage and did not have any tendency to make the transaction usurious, we cannot find any valid reason why it should not be included in the amount due under the mortgage.

Sale as a unit. No objection is made to the provisions in the decree ordering the sale of all of the plants as a unit, the vacant property to be sold in separate parcels. The business of the various plants, although situated in various sections of the city and surrounding suburbs, radiated from one central office. The plants were used and occupied by the service company in such a manner that, if they were sold separately, it would disrupt the business and bring a smaller price to the damage of both the mortgagor and the mortgagee. The mortgaged good will goes with the mortgaged property. 3 Comp. Laws 1929, § 14627, contemplates sales of real estate in separate parcels when no intervening causes change the nature of the parcels, or when they are distinct and independent in description, occupancy, and use. The plants and the garage property serving them are distinct neither in occupancy nor use, but together constitute one unit. See *Security Trust Co.* v. *Sloman, supra,* 270; *Grand River Avenue Christian Church* v. *Berkshire Life Ins. Co.,* 254 Mich. 480.

The decree also properly provides for the sale of the mortgaged personalty in conjunction with the property used in the business. This results in a rather anomalous situation in so far as the equity of

redemption is concerned. The real estate may be redeemed within six months following the foreclosure sale. There is no statutory right of redemption from the sale of chattel mortgage property, although this court may make such a provision in the exercise of its broad equity powers. In order that the receivers may have the benefit and use of such mortgaged property other than the real estate during the six months' period of redemption, and that the entire plant, good will, and chattels belonging to it may be redeemed as a unit, should the right of redemption be exercised, it is ordered that the right of redemption extend, therefore, to all the mortgaged property sold. The receivers shall, however, pay to the purchasers of the mortgaged property, for such period as the possession of the chattels is withheld from them, an amount to be determined by the trial judge to be a fair rental, plus an additional sum sufficient to cover the depreciation and loss of any mortgaged chattels so sold at the foreclosure sale.

Sale of equity of redemption. The court asked for briefs on the question of the sale of all of the assets by the receivers in their capacity as such under appointment in the equity case. The consolidation of the equity and foreclosure suits did not deprive the plaintiffs in each cause of their respective rights. As was said by Judge Taft in *Continental Trust Co.* v. *Railroad Co.*, 82 Fed. 642:

"Causes are consolidated only when they may proceed to judgment under one title without impeding or diminishing the remedial object and effect of the proceeding for each complainant."

It is apparent here that if all of the property could be sold at one time, so as to give to the purchasers of the business and the assets strictly belonging to it, an absolute title without delaying pos-

session during the six-months' period of redemption, it would be beneficial to all parties. The equity receivership, particularly in view of the allegations in the second bill of complaint, which were admitted in the answer of the service company, gave the receivers title to all the assets, subject to the liens. The lien created by the second mortgage, which is not being asserted, undoubtedly will be valueless after foreclosure sale under the first mortgage.

The appointment of receivers in the present case arose out of exceptional circumstances, as in *Edison* v. *Fleckenstein Pump Co.*, 249 Mich. 234, where an equity receivership was upheld. The large profit shown as a result of the operation of the receivers is less than the interest charges on the first mortgage. Depreciation and other charges have not been deducted. Upon reading the record and also considering business conditions, the depreciation of real estate values, curtailment of buying power, etc., it seems almost certain that the mortgaged property will not be sold at the foreclosure sale for the amount due on the first mortgage indebtedness. To delay possession during the six-months' period of redemption would tend to frighten away all bidders except first mortgage bondholders, and they would be apt to bid much less if reorganization is delayed.

If the equity of redemption is sold at once, the large expense of continuing the receivership can be eliminated. It has already been pending over two years. The policy of the courts has always been to bring a receivership to a close as quickly as it can be accomplished without injury to the creditors. The general creditors, however, cannot be deprived of the profits that may be made from the operation of the business during the six-months' period of redemption.

The trial court can determine the average profits made by the receivers during the months of 1931 and 1932 corresponding to the six months of the redemption period, and in this manner estimate with some fairness what the profit would be were the business continued by the receivers during the redemption period. From the profits so approximated, an amount should be estimated and deducted for the further expenses of the receivership and any other sums that must be paid from such profits before they become available for dividend purposes. The trial judge may also take into consideration any other facts that may raise or lower the probable profits. The net sum so approximated should be the minimum, or upset price, at which the equity of redemption should be sold immediately after the sale of the mortgaged property. If a bid is not received at least equal to such upset price, the sale of the equity should not be confirmed. If the equity of redemption is sold for at least the upset price, as so determined, then immediately thereafter all the other unmortgaged property shall be offered for sale. If the equity of redemption is not sold for at least the upset price, then the unmortgaged property should be sold at the expiration of the redemption period.

Bondholders bidding for the mortgaged property and/or the equity of redemption and/or the unmortgaged property may also tender their bonds towards payment of the amount bid, but, as to their bids for the equity of redemption and/or the unmortgaged property, only to the extent that the amount of the bonds held by such bondholders, or those making the bid in their behalf, shall bear to the entire proved indebtedness of the Detroit City Service Company. However, they may also, on proper application to the court, ascertain the approximate dividend to

which they will be entitled as creditors upon the distribution of the cash now in the hands of the receiver, and such additional sums available for dividends from the sale of the equity of redemption and the unmortgaged property, and they may apply such sums as would be paid as dividends on their claims towards the payment of any amounts bid at the sale of the mortgaged and/or unmortgaged properties. In bidding on the mortgaged property the bondholders shall pay sufficient in cash to pay the expenses of the sale and to insure that bondholders not bidding shall receive in cash a *pro rata* share of the amount bid.

In determining the amount of the dividends to be paid, a fair sum should be estimated and deducted for fees of the receiver, attorneys, and for all other lawful charges. These can be approximated, subject to final determination later. Further orders may be made so that the bondholders, in making their bid, may have the benefit of their proportion in the large amount of cash to be distributed to creditors. At all events, all necessary provisions shall be made to insure that such privileges as are conceded to bondholders will interfere in no way with an equitable cash distribution of the dividends to which other creditors and claimants are entitled. Any creditors, other than first mortgage bondholders, acting singly, or in groups, may also, upon application to the court, use such dividends to which they may be entitled in payment for any property offered for sale, on terms similar to those which have been allowed the first mortgage bondholders.

The decree of the lower court is affirmed as modified herein, with costs to appellants. The case is remanded to the trial court for the purpose of determining the respective amounts due, for the deter-

mination of the upset price to be bid for the equity of redemption, and for the entry of a decree in accordance with this opinion. The trial court may make such further provisions in the decree as are not inconsistent with this opinion, and also make other proper orders as may be necessary from time to time.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and WIEST, JJ., concurred.

MUELLER *v.* BANKERS TRUST CO. OF MUSKEGON.

1. VENDOR AND PURCHASER—ASSIGNMENTS—WAIVER—ESTOPPEL.
   Vendor, by accepting performance by vendee's assignee and deeding to assignee, recognized validity of assignment, and is thereafter estopped from questioning it.

2. COVENANTS—RUNNING WITH LAND—TEST.
   Test as to whether covenant runs with land or is merely personal, is whether covenant concerns thing granted and occupation or enjoyment of it, or is collateral and personal covenant not immediately concerning thing granted.

3. SAME—COVENANT TO BUILD BRIDGE RUNS WITH LAND.
   Covenant to build bridge related to essential to enjoyment and use of lots conveyed, entered materially into agreed consideration to be paid, was not collateral to or independent thereof, and therefore ran with land.

4. SAME—VENDOR AND PURCHASER—ASSIGNS.
   That covenant to build bridge was inserted in land contract after, instead of before, provision binding heirs and assigns of

parties, which was only place in contract available to put it, *held*, not to limit it to vendee only, but that it applies equally to assigns.

5. DEEDS—MERGER OF CONTRACT—EXCEPTION.

Generally, contract to convey land is merged in deed executed in performance of such contract, and deed operates as satisfaction and discharge of executory contract, but where contract contains stipulation of which conveyance is not performance, such stipulation survives and is not merged in deed.

6. SAME—COVENANTS—WHEN COVENANT NOT EXTINGUISHED BY DEED.

Covenant in contract for sale of lots to build bridge was collateral to contract for deed, and was obligation independent of conveyance of title, possession, quantity, and emblements, and therefore execution of deed did not extinguish said covenant, which was not incorporated in deed.

7. COVENANTS—TO BUILD BRIDGE—DISCHARGE OF COVENANT.

Construction of unsubstantial, flimsy bridge, which, within three years, was swept away by high water, *held*, not to discharge covenant in land contract to build bridge, which was essential to enjoyment and use of land, although covenant contained no specification that it should be suitable and have some degree of permanency.

8. SAME—BREACH OF COVENANT—DAMAGES.

Where purchaser of land was prevented from using it by vendor's breach of covenant to construct bridge, purchaser *held*, entitled to recover interest on purchase price plus taxes paid, as damages.

9. SAME—VALUE OF SHRUBBERY LOST.

Trees and shrubs planted on land which purchaser was prevented from using by vendor's breach of covenant to build bridge, *held*, not so connected with said covenant as to entitle purchaser to recover value of those that died as damages for said breach.

Appeal from Muskegon; Vanderwerp (John), J. Submitted January 10, 1933. (Docket No. 81, Calendar No. 36,984.) Decided March 1, 1933.

Assumpsit by Rose Mueller against Bankers Trust Company of Muskegon, trustee, for breach of

covenant to build bridge. Judgment for plaintiff. Defendant appeals. Reduced and affirmed.

Cross, Foote & Sessions, for plaintiff.

Arthur W. Penny, for defendant.

WIEST, J. A plat of land was so located that a bridge across a creek or the establishment of a way to a public road was essential, and defendant, vendor in a land contract dated June 18, 1926, covenanted with Joseph McDonald, the purchaser of two lots at the price of $2,000, as follows:

"It is understood and agreed that first party will either build a bridge across Green creek or will provide a right of way out to Memorial Drive."

The land contract was the usual printed short form, and the mentioned covenant was inserted after the clause binding the heirs, executors, administrators, and assigns of the parties. A bridge was built in 1926 and in use in March, 1927, when the vendee assigned the contract to plaintiff herein. June 24, 1927, plaintiff paid the balance due on the contract and received a warranty deed. In the spring of 1928 one approach to the bridge was washed out by high water, and in the spring of 1929 high water carried the bridge away. In April, 1931, plaintiffs brought this action to recover damages arising out of defendant's failure to construct a suitable bridge, and, upon trial before the court, was awarded $625, as interest on her investment for five years, $297.22, loss of expenditure on shrubbery and trees, and $131.16 for taxes paid. Defendant appealed.

The land contract was assigned by the vendee contrary to its provisions, and defendant urges want of privity. When defendant accepted performance

of the contract by the assignee and deeded to the assignee, it recognized the validity of the assignment and cannot now urge what it then waived. Did the covenant to build a bridge pass to plaintiff under the assignment of the contract? The answer depends upon whether the covenant ran with the land or was personal to the vendee. The bridge was located wholly apart from the lots, but the covenant related to an essential to enjoyment and use of the lots, and, therefore, entered materially into the agreed consideration to be paid. This benefit to the lots attached to the land, was not collateral to or independent thereof, and ran with the land.

In *Keogh* v. *Peck,* 316 Ill. 318 (147 N. E. 266, 38 A. L. R. 1151), the rule on this subject was stated as follows:

"The test as to whether a covenant runs with the land or is merely personal, is whether the covenant concerns the thing granted and the occupation or enjoyment of it, or is a collateral and personal covenant not immediately concerning the thing granted. If a covenant concerns the land and the enjoyment of it, its benefit or obligation passes with the ownership, but to have that effect the covenant must respect the thing granted or demised and the act to be done or permitted must concern the land or the estate conveyed. In order that a covenant may run with the land its performance or non-performance must affect the nature, quality or value of the property demised, independent of collateral circumstances, or must affect the mode of enjoyment."

The fact that the covenant was inserted in the contract after, instead of before, the provision binding the heirs and assigns of the parties is significant only of the fact that, in the printed form used, there was no other place to put it. There is no merit in

the claim that such place of the covenant in the contract limited it to the vendee and not as well to an assign.

When the executory contract merged in the deed, without equivalent covenant carried forward, was the land contract and all of its covenants at an end?

Defendant invokes the general rule, stated in *Blake-McFall Co.* v. *Wilson,* 98 Ore. 626 (193 Pac. 902, 14 A. L. R. 1275):

"Stated broadly, the general rule is that a contract to convey land is merged in a deed executed in performance of such contract and the deed operates as a satisfaction and discharge of the executory contract: 2 Devlin on Real Estate (3d Ed.), § 850a; 27 R. C. L. p. 529."

This general rule is well established. *Coleman* v. *Coleman,* 239 Mich. 139; *Crane* v. *Smith,* 243 Mich. 447; *Joseph* v. *Rottschafer,* 248 Mich. 606. But, as pointed out in *Blake-McFall Co.* v. *Wilson, supra*:

"There is a class of cases, however, where it is held that, if the preliminary contract contains a stipulation of which the conveyance is not a performance, such stipulation survives and is not merged in the deed: 27 R. C. L. p. 532; 2 Devlin on Real Estate (3d Ed.), § 850b. In other words, the deed effects a merger to the extent that it is contemplated that a deed shall be a performance of the contract."

In *Goodspeed* v. *Nichols,* 231 Mich. 308, we noted the general rule and the exception thereto, stating:

"As to plaintiff's claim of merger, it may be conceded that a deed made in full execution of a contract for the sale of land is presumed to merge the provisions of a preceding contract pursuant to which it is made, including all prior negotiations and agree-

ments leading up to execution of the deed, with the long recognized exception that—

"'Where, however, the deed constitutes only a part performance of the preceding contract, other distinct and unperformed provisions of the contract are not merged in it. And where a contract of sale provides for the performance of acts other than the conveyance, it remains in force as to such other acts until full performance.' 18 C. J. p. 271."

The covenant was collateral to the contract for the deed and an obligation independent of conveyance of title, possession, quantity, and emblements. The deed did not extinguish the covenant to build the bridge.

"Did the plaintiff, by accepting the deed, accept the bridge then built and in existence as sufficient?"

The trial judge found that the bridge was not such a bridge as the contract called for. The bridge was unsubstantial, approaches thereto were mere earth fill, the structure was but three feet above low water, rested upon piles driven down but a short distance, had no element of durability or desirability, and soon after the execution of the deed one approach washed away and left a space where row boats passed through, and the next year the whole flimsy structure, erected at a cost of $265, was swept away by high water. Surely the parties never would have agreed upon such a bridge, and we experience no hesitation in joining in the holding of the circuit judge. The covenant to build a bridge needed no specification that it should be suitable and have some degree of permanency. The plaintiff, by accepting the deed conveying title to the lots, did not thereby, without more, accept the bridge in fulfillment of the covenant.

Damages. Without establishing the rule of damages employed by the circuit judge, we think, under the circumstances, the defendant is in no position to complain. Plaintiff had planned to build on the premises and establish thereon a commercial tea garden, but, with access to the premises cut off, she was prevented from doing so.

Defendant received $2,000 for the lots. The lots, inclusive of $500 paid her assignor, have cost plaintiff $2,500, and the circuit judge awarded interest on that sum to plaintiff. Plaintiff has been out the use of that sum, but defendant has not had the use of more than the contract price of $2,000, and interest on that sum only was proper.

Shrubbery and trees were planted on the lots at the expense of $450, and two-thirds thereof died, and the court awarded $297.22, for loss of such expenditure. Trees and shrubs transplanted carried no guaranty of life, and we think this item was unconnected with the covenant to build the bridge and so problematical as to afford no element of damages.

Taxes paid, without use of the property because of no bridge, as covenanted, may be recovered.

We find no error in the case, except in the computation of damages. The case is remanded to the circuit court with direction to enter judgment for plaintiff in the sum of $631.16. No costs in this court to either party.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred.

SMITH *v.* SMITH.

1. PAYMENT—PLEADING.
   Payment, whether in whole or in part, is affirmative defense, which must be pleaded to be available.

2. SAME—BURDEN OF PROOF.
   Defendant pleading partial payment as defense has burden of proving it.

3. SAME—RECEIPT PRIMA FACIE EVIDENCE ONLY.
   Authentic receipt is only *prima facie* evidence of payment, and unauthenticated receipt is no evidence at all.

4. SAME—EVIDENCE—SUFFICIENCY.
   Where defendant offered in evidence receipt of partial payment found among her husband's papers, but of which she had no personal knowledge, and plaintiff denied giving receipt or receiving such payment, evidence *held*, insufficient to establish that said alleged payment was made.

Appeal from Ingham; Carr (Leland W.), J. Submitted January 19, 1933. (Docket No. 111, Calendar No. 37,004.) Decided March 1, 1933.

Bill by Augustus N. Smith against George H. and Ruth M. Smith to foreclose a real estate mortgage. Decree for plaintiff. Defendant Ruth M. Smith appeals. Affirmed.

John F. Berry, for plaintiff.

Clyde V. King and *Cummins & Cummins,* for defendant Ruth M. Smith.

WIEST, J. The bill herein was filed to foreclose a real estate mortgage for $3,000, given by defendants

to plaintiff in 1923. Defendant Ruth Smith appeared and asserted that $1,500 was paid on the mortgage December 18, 1926, and produced an alleged receipt to such effect, which she claimed to have found among her husband's papers after their separation. Whether such a payment was made was the issue in the circuit court. The circuit judge was unable to adjudge that the alleged payment was made, and defendant Ruth Smith reviews by appeal.

At the time the mortgage was given, defendants were husband and wife, but later they separated, Ruth filed a bill for divorce, and that case was heard just before this case, and is here for review by appeal of George Smith. George Smith is plaintiff's son. Payment, whether in whole or in part, is an affirmative defense. Court Rule No. 23 (1931). It must not only be pleaded (*Loomis* v. *Bound,* 251 Mich. 173), but the burden rests upon defendant to prove it. *LaPree* v. *DePew's Estate,* 219 Mich. 612. An authentic receipt is only *prima facie* evidence (*Brusseau* v. *Potter's Estate,* 217 Mich. 165), and an unauthenticated receipt is no evidence at all. Was authenticity of the receipt established? Defendant Ruth Smith knew nothing about it beyond finding it among her husband's papers. Plaintiff denied giving it or receiving such payment. Defendant George Smith was a witness, but his testimony was not helpful to either party.

Upon consideration of all the evidence, we are unable to find that the alleged payment was made.

The decree is affirmed, with costs.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred.

ERB-KIDDER CO. *v.* LEVY.

1. GARNISHMENT—WHEN DEBT GARNISHABLE—STATUTES.
   Statute permitting garnishment of "debts due or to become due" relates only to debts existing at time of garnishment and payable then or in future; if payment only is delayed, statute applies, otherwise not (3 Comp. Laws 1929, § 14858).

2. SAME—RIGHT OF PLAINTIFF IN GARNISHMENT SUIT.
   Right of plaintiff against garnishee, except there be fraud, is no more than right of principal debtor.

3. LANDLORD AND TENANT—WHEN RENT PAYABLE IN ADVANCE DUE.
   Where rent, under lease, is payable first day of each month, in advance, lessee has whole of first day of each month in which to make payment.

4. GARNISHMENT—RENT NOT GARNISHABLE BEFORE DUE.
   Rent, before it is due, is not subject to garnishment.

5. SAME—ABUSE OF PROCESS—SUCCESSIVE WRITS.
   It is perversion of civil process which cannot be sanctioned to tie up money in hands of garnishee by writ of garnishment or by successive writs, and then, without prosecution of writs employed for that purpose, to begin fresh suit by attaching accumulated fund.

Appeal from Oakland; Doty (Frank L.), J. Submitted January 25, 1933. (Docket No. 165, Calendar No. 36,679.) Decided March 1, 1933.

Garnishment proceedings by Erb-Kidder Company, a Michigan corporation, against Jacob J. Levy, principal defendant, and Kroger Grocery & Baking Company, a corporation, garnishee defendant, to reach monthly instalments of rent. On motion to quash by principal defendant. Motion denied. Principal defendant appeals. Reversed, without a new trial.

George A. Dondero and *Arthur E. Moore,* for plaintiff.

Harry J. Merritt, for principal defendant.

WIEST, J. Plaintiff sued defendant Jacob J. Levy and obtained a judgment in the circuit court.

December 30, 1930, plaintiff sued out a writ of garnishment against the Kroger Grocery & Baking Company, a tenant of Levy, to reach a monthly instalment of rent, payable in advance on January 1, 1931. January 30, 1931, a second writ of garnishment was sued out to reach the rent payable in advance on February 1st. February 4, 1931, defendant Levy moved to quash the writs alleging,

"That each of said writs of garnishment was served before there was any money due the principal defendant from the garnishee defendant, as is shown by the files and records in this cause,"

Also—

"That whatever moneys would be due from the said garnishee defendant to principal defendant would be by virtue of a written lease according to the terms of which the rent is payable on the first day of the month."

The record does not show the date of argument of the motion, but on March 10th the motion was denied, the court holding the writs valid under the provision of 3 Comp. Laws 1929, § 14858, permitting garnishment "of any debts due and to become due from such garnishee to the principal defendant." As pointed out later in this opinion, the motion should have been granted.

Notwithstanding the motion, plaintiff sued out still another writ of garnishment on February 20th, evidently to impound the rent due and payable, in advance, on March 1st. March 3, 1931, plaintiff

sued out a fourth writ of garnishment for the January, February, and March rents, theretofore impounded, and now contends that all the writs were valid, but, in any event, the writ of March 3d justified the court in entering judgment against the garnishee for the three months' rent. The first three writs were premature and wholly abortive, and the last writ was a perversion of civil process. At the date of the first writ the rent was not due, and, therefore, was not an existing debt due or to become due.

The mentioned statute permitting garnishment of "debts due or to become due from such garnishee to the principal defendant," relates only to debts existing at the time of garnishment and payable then or in the future. If the debt is then a fixed one, and payment only is delayed, the statute applies, otherwise not.

As said in *Malone* v. *Moore,* 204 Iowa, 625 (215 N. W. 625, 55 A. L. R. 356):

"Was there 'a debt *to become due,*' so that it could be reached by the judgment creditor? The garnishment statute clearly contemplates that a garnishee shall be held *only* in the event that, *at the time* of the garnishment, he is *then* owing something to the judgment creditor. It must be something *then* due or something *then* owing that is to become due in the future. In other words, in order to hold a garnishee under the statute, it must appear that there is a definite and fixed obligation to pay in any event. If such an obligation is shown, then the garnishee may be held, whether the 'debt' is 'due' or whether *only time* is wanting, to fix its maturity."

It is elementary law that the right of a plaintiff against the garnishee, except there be fraud, is no more than the right of the principal debtor. In the case at bar the lease provided that:

"If said premises shall be destroyed or made untenantable by fire or other unavoidable casualty, * * * this lease shall cease and no rent shall be charged during the time they shall not be tenantable."

In *Malone* v. *Moore, supra,* a decree required the payment of $500 alimony on the last day of every month. Writ of garnishment to impound a payment due on the last day of a month was sued out before the date of payment. The court held, quoting syllabus:

"The defendant in a decree for alimony (if such decree be assumed to create a 'debt') is not garnishable on an instalment which is unmatured on the date of the garnishment, and the maturity of which will be wholly defeated by the death of the plaintiff in alimony before the maturity date as provided by the decree."

The applicability of this holding to the case at bar is obvious.

Where rent, under a lease, is payable the first day of each month, in advance, the lessee has the whole of the first day of each month in which to make payment. *Sherlock* v. *Thayer,* 4 Mich. 355 (66 Am. Dec. 539); *Wolf* v. *Ranck,* 150 Iowa, 87 (129 N. W. 319, Ann. Cas. 1912 D, 386); 36 C. J. p. 385; 16 R. C. L. p. 930. Where rent is so payable, in advance, a distraint by the landlord on such day would constitute a trespass. *Dalton* v. *Laudahn,* 27 Mich. 529. Rent, before it is due, is not subject to garnishment.

In *Ordway Brothers & Co.* v. *Remington,* 12 R. I. 319 (34 Am. Rep. 646), it was held that rent payable on the first day of the month was not legally due, and consequently not subject to garnishment, until after midnight of that day.

In *Thorp* v. *Preston,* 42 Mich. 511, it was held, quoting syllabus:

"A tenant cannot be garnished for rent payable in the future, and not absolutely due at the time of garnishment."

It is true that at the time of that decision the garnishment statute read debts "due or to become due, absolutely and without depending on any contingency," and now reads "debts due and to become due," but, as we have pointed out, the statute still requires an *existing* debt, either due or to become due.

The first writ was void. The second writ was void as to future rent, and as to rents stopped by the first writ it was a perversion of civil process. The third was void for the same reason. The fourth writ was a clear perversion of civil process and cannot be sanctioned.

"It is a perversion of civil process which cannot be sanctioned to tie up money in the hands of a garnishee by a writ of garnishment or by successive writs, and then without prosecution of the writs employed for that purpose to begin a fresh suit by attaching the accumulated fund." 28 C. J. p. 218, citing *McNally* v. *Wilkinson,* 20 R. I. 315 (38 Atl. 1053).

In that case successive writs of garnishment were sued out, and the principal defendant moved that the garnishee be discharged but the motion was denied. The court stated:

"We think the ruling was erroneous. The evident purpose of the plaintiff in the proceedings recited, taken as a whole and unexplained, was by successive attachments to secure a sufficient amount in the hands of the garnishee to pay his claim in full, regardless of the legal rights of the defendant. And

while it was perfectly proper for the plaintiff to attach a sufficient amount to satisfy his claim on the first writ, either by successive attachments thereon, within the time allowed for the service and before the return day thereof, or by a writ of *mesne* process issued after the entry thereof in court (Gen. Laws R. I. cap. 252, § 17), yet it was an abuse of legal process to go as far as he could on the first writ and then, without entering that, to sue out another for the same cause of action, and attach the same or an additional amount to satisfy his claim. The law abhors a multiplicity of suits for the same cause of action. If the plaintiff could abandon his first suit in this way and commence a second, he could also abandon a second, a fourth, and so on indefinitely, to the great annoyance and vexation of the defendant and also of the garnishee. To use the process of the court to thus tie up money in the hands of a garnishee until the amount shall become large enough to satisfy the plaintiff's claim, and then, without entering the writ or writs employed for this purpose, to commence a fresh suit by attaching the fund thus accumulated, not only works a wrong upon the defendant, but is a perversion of civil process, and cannot therefore be sanctioned. The principle that even a valid and lawful act cannot be accomplished by unlawful means, and that wherever such means are resorted to the law will interpose to restore the party injured thereby to his rights, is a salutary and well-established doctrine of the law."

See, also, *Rustad* v. *Bishop,* 80 Minn. 497 (83 N. W. 449, 50 L. R. A. 168, 81 Am. St. Rep. 282).

The judgment against the garnishee defendant is reversed, without a new trial, and with costs to defendant Levy.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred.

KROGER GROCERY & BAKING CO. *v.* SECRETARY OF STATE.

LICENSES—REGISTRATION FEE—MALT PRODUCTS DEALER AND DISTRIBUTOR—STATUTES—CONSTRUCTION.

Corporation operating many retail stores which applied for registration as dealer in malt products and as distributor thereof under provisions of Act No. 100, Pub. Acts 1931, is required to pay single registration fee only in each instance as retail dealer and as distributor.

Mandamus by Kroger Grocery & Baking Company, an Ohio corporation, to compel Frank D. Fitzgerald, Secretary of State, to issue plaintiff certificates of registration as distributor and retailer of malt products under Act No. 100, Pub. Acts 1931. Submitted January 17, 1933. (Calendar No. 36,880.) Decided March 1, 1933.

Stevenson, Butzel, Eaman & Long (*John C. Bills* and *Charles F. Hemans,* of counsel), for plaintiff.

Patrick H. O'Brien, Attorney General, and *Walter A. Kirkby,* Assistant Attorney General, for defendant.

WIEST, J. Plaintiff corporation applied for registration as a dealer in malt products and as a distributor thereof under the provisions of Act No. 100, Pub. Acts 1931. Plaintiff operates many retail stores in this State and desires to sell at retail and distribute malt products. Defendant required a registration fee for each store. Thereupon plaintiff commenced this proceeding by writ of mandamus to test its right to a single registration as a dealer and

a single registration as a distributor. The issue calls for construction of the act.

The act is entitled:

"An act to impose a privilege tax upon the sale, gift, exchange, barter, or distribution of malt syrup, malt extract, liquid malt, or wort in this State and motor vehicles used or operated for such purpose; to provide for the registration of all persons engaged in the business of selling or manufacturing of malt syrup, malt extract, liquid malt, or wort in this State and a fee therefor; to provide for the collection of such tax and fee and the appropriation of the proceeds therefrom."

Applicable provisions of the act are as follows:

"No person shall engage in the business of selling at retail malt syrup, malt extract, liquid malt, or wort unless he is the holder of a certificate of registration so to do issued as herein provided, which is still in effect. Such certificate of registration shall be issued by the secretary of State upon the filing of a written application as hereinafter provided, accompanied by a registration fee of twenty-five dollars. No person shall engage in the business defined herein as that of distributor of said articles unless he is the holder of a certificate of registration so to do issued as herein provided which shall be in effect. Such certificate of registration shall be issued by the secretary of State upon the filing of a written application therefor, accompanied by a registration fee of one hundred dollars. * * * The secretary of State shall issue to each said person a certificate to be posted in each place of business showing that the registration fee above required has been paid and the date upon which the certificate of registration was issued, which certificate of registration shall expire and be of no force and effect one year from the date of its issuance."

Defendant contends that more than one place of sale or distribution, though operated by one person, requires registrations and certificates for each place because the certificate of registration must be posted in each place of business. Plaintiff contends, one person, one registration each as dealer and distributor, and several places of business qualified by posting duplicate certificates.

The statute requires a single registration by the person who engages in the business of retail dealer and a single registration by a distributor. Now, can it be held to require multiple registrations of one person in order to comply with the requirement of posting? The statute provides: "The word 'person' shall be construed to mean and include persons, firms, associations and corporations," and imposes a specific stamp tax upon sales. The tax upon sales is one for revenue. Registration of *persons* desiring to enjoy the privilege is required. Multiple registrations by the same person is not required by words nor by intendment. "Each person" applies to "one person" for the purposes of registry, and each place of business applies to one or more conducted by the registrant.

In *Cupp Grocery Co.* v. *Johnstown,* 288 Pa. 43 (135 Atl. 610), an ordinance provided that a license tax should be " 'levied annually upon all persons, firms, and corporations engaged in any trade, business,' etc., within the city," and the question was whether a separate tax on each store, operated by one owner, could be collected. The court stated:

"It is admitted by the learned city solicitor that it is not possible 'to place one's finger on actual words in the above act of assembly stating that a corporation, or an individual, carrying on a business

taxed under said act shall pay a license tax for the business transacted at each store,' but it is argued that it is reasonable to infer that such was the intention of the legislature.

"The rule, however, for the construction of the statute and ordinance in question upon this appeal is thus stated by Mr. Justice Walling in *Commonwealth* v. *Pennsylvania Water & Power Co.*, 271 Pa. 456, 458 (114 Atl. 489): 'The power to impose a tax is given by statute and an act relating thereto embraces such subjects only as are plainly within its terms. In other words, "A tax law cannot be extended by construction to things not described as the subject of taxation," *Boyd* v. *Hood*, 57 Pa. 98. To entitle the Commonwealth to the tax imposed, the words of the statute must be clear and unambiguous, *Commonwealth* v. *Brush, E. L. & P. Co.*, 204 Pa. 249, 252 (53 Atl. 1096); Endlich on the Interpretation of Statutes, p. 478, § 345.'

"The difficulty with the cases cited in behalf of appellant relating to the imposition of the mercantile license taxes is that these taxes are imposed under a system of statutes authorizing their imposition on each separate place of business carried on by the same person or corporation. * * *

"We agree with the court below that the cases construing our mercantile tax laws do not aid in the construction of the ordinance here involved, and we are of opinion that this ordinance provides primarily for a tax upon certain specified trades, businesses, callings and occupations, which tax is imposed upon all persons, firms, and corporations engaging therein. As applied to the facts in this case it is a general tax upon the designated business of engaging in the sale of groceries."

The registry fee is upon the person, and multiple registrations cannot be exacted. We hold that one registration by plaintiff, as a retail dealer, and one

registration by it as a distributor, with payment in each instance of a single fee, is all the law requires.

If necessary, the writ will issue. The question being a public one, there will be no costs.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred.

PEOPLE *v.* GUISE.

1. INDICTMENT AND INFORMATION — DUPLICITY — CRIMINAL LAW — NEW TRIAL.

   Objection that information is duplicitous may not be raised for first time in trial court by motion for new trial, and, when so attempted, may not be considered by Supreme Court.

2. CRIMINAL LAW—INDORSING NAMES ON INFORMATION.

   Trial court had power, on proper showing, to grant prosecutor leave to indorse two names on information after jury was impaneled and before testimony was taken (3 Comp. Laws 1929, § 17254).

3. APPEAL AND ERROR—NOTICE OF APPEAL—COURT RULES.

   Error not alleged in notice of appeal may not be considered by Supreme Court (Court Rule No. 59, § 3 [d], 1931).

4. CRIMINAL LAW—FALSE PRETENSES—EVIDENCE—PREVIOUS SIMILAR OFFENSE—INTENT.

   In prosecution for obtaining check by false pretenses, testimony as to defendant's participation in commission of similar previous offense was properly admitted for its bearing on question of intent in instant case.

5. SAME—DIRECTED VERDICT.

   In prosecution for obtaining check by false pretenses, motion for directed verdict of not guilty, *held*, properly denied, under evidence presenting issues of fact.

Appeal from Recorder's Court of Detroit; Brennan (John V.), J. Submitted January 12, 1933. (Docket No. 138, Calendar No. 36,382.) Decided March 1, 1933.

Albert Guise was convicted of obtaining a check by false pretenses. Affirmed.

Edward B. Benscoe (*Julius C. Pliskow,* of counsel), for appellant.

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

WIEST, J. Defendant was convicted of obtaining a check for $50 by means of false and fraudulent pretenses. The jury found that defendant, or some one acting in concert with him, called the office of the Chain Link Fence Company, over the telephone, and solicited one of the partners to subscribe $50 for advertising, to be inserted in a year book to be put out by the Detroit Republican Club, and soon thereafter defendant appeared, obtained the check for $50, payable to the Detroit Republican Club and the check was cashed at a bank under forged indorsement. No such year book was at that time contemplated by the club, and defendant, who was then an employee of the club, was well aware of the fact. The check was not turned in to the club. Many errors are assigned, but, under the record, few can be considered.

Error cannot be assigned upon testimony received at the trial without objection. An objection that the information is duplicitous cannot be raised for the first time in the circuit court by motion for new

trial, and, when so attempted, cannot be considered here.

Counsel for defendant, in his brief, states that the trial—

"was a rather loose trial which should entitle defendant to the benefit of all such objection and exception as under the record appears he might have asserted and which might have been saved by full and proper objection. We urge this particularly under 3 Comp. Laws 1929, § 17322."

That statute is a part of the criminal code, and reads:

"It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

While the section is new in the statute, the idea is old in practice and long known to judges and lawyers. It does not serve the purpose sought by counsel.

After impaneling the jury and before taking testimony, the prosecutor asked leave to indorse two names on the information. Leave was granted, and an adjournment offered and declined. The court had power, upon proper showing, to allow the indorsements. 3 Comp. Laws 1929, § 17254; *People* v. *Blue,* 255 Mich. 675. The point urged against the indorsements cannot be considered because not alleged as error in the notice of appeal. Court Rule No. 59, § 3 (d) (1931), requires a statement of grounds for reversal, and provides:

"No other grounds or reasons shall be considered on the appeal except those so stated."

See *Parker* v. *Kettinger,* 257 Mich. 385, 389. One purpose of the rule is to give information to the nonappealing party, requisite to preparation of a complete record relative to points for review. Had the error been so alleged, the prosecutor's attention would have been called to the need of a full record on the subject, inclusive of the showing made, if any.

We find in the record a waif styled "Assignments of error not set forth in notice of appeal," and alleging error in denying the motion for a new trial and in permitting the names to be indorsed on the information. Such assignments cannot be considered. The old practice required the assignments of error to accompany the proposed bill of exceptions and the new practice requires the claimed errors to be stated in the notice of appeal.

The court was not in error in admitting testimony relative to defendant's participation in the commission of a similar previous offense for the purpose of its bearing upon his particular intent in the instance on trial. The court, by instruction, limited consideration to such purpose. 3 Comp. Laws 1929, § 17320, so provides and the rule has been repeatedly announced by this court. *People* v. *Henssler,* 48 Mich. 49; *People* v. *Wakely,* 62 Mich. 297; *People* v. *Summers,* 115 Mich. 537; *People* v. *Rice,* 206 Mich. 644; *People* v. *Di Pietro,* 214 Mich. 507; *People* v. *Crawford,* 218 Mich. 125.

At the close of the proofs in behalf of the prosecution, defendant's counsel moved for a directed verdict of not guilty, on the ground that intent to defraud and fraud accomplished had not been shown. The information set up the check and charged that it was for the sum of $50, of the value of $50, and obtained by defendant from the maker by false representations, made with intent to cheat and defraud.

Representations, inducing the making of the check, were designedly false. Defendant called for and received the check and the fraudulent purpose was consummated. The criminal character of the act is determined by the means used in obtaining the check. *People* v. *Lennox,* 106 Mich. 625; *People* v. *Lintz,* 251 Mich. 367.

The evidence presented issues of fact, the instruction stated the issues, and the verdict was fully justified. We find no reversible error. Conviction affirmed.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred.

DAVIS *v.* LOUIS G. PALMER CO.

1. LANDLORD AND TENANT—BREACH OF LEASE—DAMAGES.
   Where lessee was in default in payment of rent, restitution awarded lessor in summary proceeding ended tenancy but did not preclude lessor's recovering damages subsequent to such lawful eviction.

2. SAME—STIPULATED DAMAGES—WAIVER—SUMMARY PROCEEDINGS.
   Where lease required lessee to deposit with lessor certain sum which was to be retained by lessor as damages in case of lessee's failure to perform, damages occasioned by lessee's breach was not waived nor right to retain said sum as stipulated damages precluded by lessor's bringing summary proceedings and obtaining judgment of restitution.

Appeal from Wayne; Marschner (Adolph F.), J. Submitted January 13, 1933. (Docket No. 150, Calendar No. 36,970.) Decided March 1, 1933.

Assumpsit by Lawrence Davis, doing business as Davis Motor Sales, against Louis G. Palmer Company, a Michigan corporation, to recover a deposit made under a lease. Judgment for plaintiff. Defendant appeals. Reversed, without a new trial.

Ben C. Hughes, for plaintiff.

Leonard F. Donaldson, for defendant.

WIEST, J. A five-year lease of certain premises, executed by defendant as lessor and plaintiff Davis and his then copartner Herman J. Teal, as lessees, contained the following agreement:

"To insure the faithful performance of the covenants herein contained, parties of the second part herewith deliver to the party of the first part the sum of $1,250, it being understood that in the event of any loss or damage arising out of the failure on the part of the parties of the second part to perform said covenants herein contained, said sum of $1,250 shall be retained by the party of the first part as damages, but it is expressly understood and agreed that acceptance of the above-named sum of $1,250 does not constitute a waiver by the party of the first part of its right to collect additional damages when such damages arising out of said failure or default on the part of the parties of the second part shall be in excess of the above-named sum of $1,250. In the event of the faithful performance of the covenants herein contained by said parties of the second part, said sum of $1,250 shall be applied as payment for the rent due for the last four and one-sixth months of the term of this lease."

Mr. Teal assigned his interest in the lease to Mr. Davis, and Mr. Davis, as lessee, made default in payment of the rent for one month, and the lessor gave notice to quit or pay the rent. This was in

accord with right reserved to the lessor in the lease. The rent not having been paid, the lessor brought a summary proceeding, was awarded restitution of the premises together with a finding of $600 rent due. Mr. Davis then brought this suit to recover the mentioned deposit, less the rent found due in the summary proceeding. Defendant contends that the right to damages survived forfeiture of the lease by notice and judgment for restitution of the premises. The trial judge awarded plaintiff a judgment for the sum in defendant's hands over and above the rent found due in the summary proceeding. The restitution awarded in the summary proceeding ended the tenancy of plaintiff, but did not preclude recovering damages subsequent to such lawful eviction.

In *Central Trust Co.* v. *Wolf,* 255 Mich. 8 (78 A. L. R. 843), we said:

"Generally, re-entry by the lessor and surrender by the lessee in obedience to writ of restitution precludes recovering damages subsequent to eviction. But the parties may contract that the provision of the lease for damages upon termination of the lease because of default of the lessee shall survive the restitution of the premises."

We there cited *Barrett* v. *Monro,* 69 Wash. 229 (124 Pac. 369, 40 L. R. A. [N. S.] 763), a case on all fours with the one at bar. There the lease was for a five-year term with rent payable monthly in advance. The lessee deposited with the lessors the sum of $1,200, relative to which the lease contained the following material stipulations:

"Party of the second part hereby agrees at the time of the execution of this lease to pay to the parties of the first part the sum of $1,200, which sum shall be held by the parties of the first part to

indemnify them against any loss or damage which they may sustain by reason of any violation on the part of the party of the second part of the terms, covenants, and agreements contained in this lease as liquidated damages.

"If said party of the second part faithfully performs and complies with all the conditions, stipulations and agreements contained in this lease on his part to be performed, then the parties of the first part agree to apply said $1,200 in payment of the monthly rental due for the last two months of the part of this lease."

Notice to pay the rent or surrender the premises was given. The default of the lessee continued. An action of unlawful detainer was brought and a writ of restitution obtained. Then the lessee brought suit to recover the $1,200. We quote from the opinion:

"Defendants as lessors asserted their right to retain the $1,200 in satisfaction of their liquidated damages, as agreed in the lease, while plaintiff insisted that the deposit was made as security for payment of rent only, and not to satisfy liquidated damages. * * *

"Respondent (lessee) contends that the deposit was to secure payment of the monthly instalments of rent as they matured; that appellants (lessors) themselves terminated the lease; that thereafter they were entitled to no rent; that they resumed possession; that they succeeded to the occupancy and use of the property; and that they cannot retain possession and appropriate the $1,200 as liquidated damages. * * *

"It was respondent's duty to make the stipulated monthly payments. Her failure constituted an unquestioned breach of the contract which subjected her to a termination of the lease and payment of the stipulated liquidated damages. When her breach

occurred, appellants were entitled to give the statutory notice to terminate the tenancy in the event of her continued default, and thereafter retain the deposit in satisfaction of their liquidated damages. They were not required to permit a continuance of the default, and thus increase their damages to such an extent that the liquidated sum would be insufficient to protect them. The contract has no such purpose in view. It is manifest that the parties agreed upon liquidated damages because their exact measurement could not be readily made. The sum agreed upon is not unreasonable, in view of the value and importance of the entire lease. The term had more than three years to run when respondent's default occurred. At the date of the lease and also at the date of respondent's breach, it was impossible to determine the exact damages appellants might thereafter sustain in loss of rentals, or by reason of their inability to secure another tenant for a portion of the term at as remunerative a rental. Realizing this difficulty of making an exact measurement of such damages, should a breach occur, and appreciating the fact that appellants might incur expense in recovering possession, in securing new tenants, in the possible necessity of making expensive changes or improvements as a condition precedent to obtaining a new tenant, and also in the possible depreciation of rental value, the parties agreed upon $1,200 as liquidated damages. * * *

"The fallacy of respondent's argument lies in her assumption that the $1,200 was advanced as security only. She ignores the probable contingency that a loss of the tenancy might cause damage to appellants difficult of ascertainment, whether termination of the tenancy resulted from a wrongful and voluntary surrender by respondent or from respondent's default in payment of rent, coupled with appellants' election to then terminate the lease. By exercising their election to terminate the lease, appellants did

not waive their right to retain the liquidated damages. The default which caused such termination originated with respondent. * * * Unquestionably it (the lease) would not have been made without the deposit of $1,200 coupled with the stipulation that it should be applied as liquidated damages in the event of the lessee's breach. Appellants were entitled to retain the $1,200 in satisfaction of their liquidated damages."

In the case at bar, the lessees operated an automobile sales establishment on premises adjoining the leased premises. Upon the leased premises were buildings and the lessor contemplated remodeling so as to have two stores on the ground floor and apartments above and had obtained money for financing such plan. The lessees desired the premises for parking automobiles and this necessitated removal of the buildings and leveling the land. This accounts for the deposit of $1,250. When, by default of the lessee Davis, the lessor had to retake possession, the premises were unfitted for rental except for the purposes for which they had been prepared, and, inasmuch as the lessee was conducting an automobile sales business on the adjoining property, there was small likelihood of rental by other parties, unless and until the premises were improved and made suitable for some other purpose. This damage occasioned by the breach of the lessee was not waived nor right to retention of the stipulated damages precluded by the summary proceeding.

The judgment is reversed, with costs, and without a new trial.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred.

GALER *v.* McAFEE.

1. MINES AND MINERALS—OIL AND GAS LEASE—FORFEITURE—STATUTES.

Lessors claiming forfeiture of oil and gas lease may proceed under either section of statute (3 Comp. Laws 1929, §§ 13506, 13507) providing different methods for terminating lease, without making demand for release.

2. SAME—DAMAGES—RELEASE—STATUTES.

In suit for cancellation of oil and gas lease, where lessee in default did not tender release of lease until after hearing of case, trial court properly awarded lessors $100 damages as provided for in statute (3 Comp. Laws 1929, § 13507).

3. PLEADING—AMENDMENTS—EQUITY—JUSTICE—STATUTES.

Under 3 Comp. Laws 1929, § 14144, court has power to grant plaintiffs leave to amend bill of complaint, even after hearing, in order to protect substantial rights of parties and secure ends of justice.

Appeal from Mecosta; Pugsley (Earl C.), J. Submitted January 5, 1933. (Docket No. 38, Calendar No. 36,889.) Decided March 1, 1933.

Bill by August Galer and another against Don G. McAfee for reformation or cancellation of an oil and gas lease. Decree for plaintiffs. Defendant appeals. Affirmed.

John E. Dumon, for plaintiffs.

Louis T. Herman (*Henry J. Blakely,* of counsel), for defendant.

BUTZEL, J. On April 27, 1928, August Galer and wife gave an oil and gas lease to certain lands in Mecosta county to one Lorenzo Mitchell. Plaintiffs claim that, without their knowledge and consent, the lease was materially altered after execution, either by Mitchell or by one I. H. Riebow. Mitchell assigned the lease to Don G. McAfee, defendant herein, and the assignment was recorded. The lease was for a term of five years, and provided that plaintiffs were to receive one-eighth of all oil produced and other considerations. It provided, however, for termination at the end of two years, unless lessee began drilling operations for gas and oil within that period. If drilling was not begun, the lease might be extended for 12-month periods upon payment of 25 cents a month for each acre of the property leased, payment to be made in advance on the first day of each month. Defendant did not begin operations as required, nor did he make any payments whatsoever.

On June 3, 1931, plaintiffs filed a bill for reformation or cancellation of the lease and such other relief to which they might be entitled. After the hearing of the case, but before decree, defendant duly recorded a release of all his right, title, and interest under the lease, and thus removed the cloud upon the premises, in accordance with plaintiff's bill of complaint. After the release was recorded by defendant, plaintiffs asked leave to amend their bill of complaint and prayed for recovery of $100 in liquidated damages as provided for under 3 Comp. Laws 1929, § 13507. The trial judge, holding that plaintiffs had waived reformation, granted leave to amend their bill, and assessed damages of $100 and costs against defendant as provided by statute.

Defendant contends, on appeal, that the judge erred in assessing the damages of $100; that in no event could it be exacted before plaintiffs made a demand for a release of the lease; and that the court should not have permitted plaintiffs to amend the bill of complaint after a release had been voluntarily filed by the defendant. Section 13506 provides a speedy method by which an oil and gas lease may be terminated of record without court procedure. Section 13507 provides a method in lieu of that described in section 13506, whereby suit may be brought to secure a release and $100 as damages, plus any additional damages which may be proved. The statute does not require that demand for a release be made before bringing suit for damages. A lessor, claiming forfeiture of a lease, may proceed under either section.

There are somewhat similar statutes in other States affecting oil and gas leases. The New Mexico, Oklahoma, Montana, Louisiana, and Kansas statutes are almost identical with sections 13506 and 13507, *supra,* except that the former contain specific provisions requiring a demand as a condition precedent to a suit. Decisions from those States, therefore, are not applicable.

Defendant claims that the proceeding is analogous to that of a replevin suit, where demand is sometimes necessary. In replevin suits, however, the original possession may be lawful and becomes unlawful only after possession is demanded. When oil and gas leases are involved, the provisions are plain in regard to what constitutes a forfeiture, and the statute does not provide for a demand before suit may be begun and statutory damages exacted. Inasmuch as the law of this State seems to be modeled after those of other States where such a demand is

necessary, we are led to the conclusion that the provision for a demand may have been purposely omitted.

When the present suit was begun, defendant had an opportunity to give a release. He knew that the suit was for the purpose of canceling the lease. He waited until after the hearing before executing such a release, and the trial judge was correct in assessing $100 in damages, in accordance with the statute.

Under 3 Comp. Laws 1929, § 14144, the court had the power to give plaintiffs leave to amend the bill of complaint, even after the hearing, in order to protect the substantial rights of the parties and to secure the ends of justice. *City Bank & Trust Co.* v. *Hurd,* 179 Mich. 454; *Hall* v. *Hall,* 172 Mich. 210.

The decree of the lower court is affirmed, with costs.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and WIEST, JJ., concurred.

SLATER *v.* FEDERAL LIFE INSURANCE CO.

INSURANCE—ACCIDENT INSURANCE—CONJECTURE—EVIDENCE—CAUSE OF ACCIDENT.

Where cause of accident resulting in death of assured rests in pure conjecture, and although there is possibility that he met his death by reason of cause insured against in policy, there is no evidence thereof, verdict in favor of plaintiff, in action on policy, was not warranted.

Appeal from Ionia; Hawley (Royal A.), J. Submitted January 6, 1933. (Docket No. 61, Calendar No. 36,891.) Decided March 1, 1933.

Assumpsit by Eva M. Slater, as beneficiary, against Federal Life Insurance Company, a foreign corporation, on a policy of life insurance. Judgment for plaintiff. Defendant appeals. Reversed, and judgment ordered entered for defendant.

F. C. Nichols (*George E. Nichols,* of counsel), for plaintiff.

Norris, McPherson, Harrington & Waer, for defendant.

BUTZEL, J. Eva M. Slater, plaintiff, is the beneficiary of a policy issued by the defendant, the Federal Life Insurance Company, to George Slater, now deceased. The policy was issued for an annual premium of $2. An indemnity provision, on which this action is based, provides:

"For loss of life, * * * sustained by the wrecking or disablement of any horse drawn or motor driven car or motorcycle in which the insured is riding or driving or by being accidentally thrown therefrom, including accidents causing death or disability sustained under the conditions specified in this part while using or operating farm wagons, mowers, binders, plows, and other farm machinery which is motor driven or horse drawn, the company will pay the sum of.....$2,000."

Plaintiff claims that assured met his death by being accidentally thrown from a horse-drawn farm wagon which he was using or operating.

At about two o'clock on the afternoon of December 2, 1931, assured was seen driving his team of

horses towards a woods not far from his home. The team was hitched to a farm wagon, equipped with a flat rack without sides or ends. The top of this rack was 38 inches from the ground. Assured had raised and trained his team, which was about 15 years old. The horses were extremely docile and quick to start and stop when spoken to, although decedent generally controlled them with the lines. The assured himself was six feet two and one-half inches tall, and evidently able-bodied. On the previous day and also during the forenoon of the day on which assured suffered his fatal injuries, he had been drawing buzz poles, small trees or poles which were to be sawed into smaller pieces for use as firewood. Within an hour after he had driven into the woods, he was heard calling, " 'Whoa!' as if he was in trouble of some kind." His brother-in-law, working about 40 rods away, heard him call, but made no attempt to ascertain what the trouble was. About 3 o'clock he was seen driving out of the woods on the same wagon, which was intact except that a small sliver had been broken off the right side of the flat rack. The wood indicated that the break had been recent, and the testimony shows that it had not been noticed previous to the accident. A search at the scene of the accident did not reveal the missing sliver, and it has never been found. No one was able to testify whether the break had occurred the day of the accident or previous thereto. The wagon was not otherwise wrecked or disabled.

A neighbor who saw assured driving out of the woods and assisted him to his home saw that he was in bad condition and unable to speak. His left eye was swollen and his face bleeding. He had a very severe skull fracture on the left side of his head. He died two days later without communicating to

anyone the manner in which he had sustained his injuries. There were no eyewitnesses to the accident. Plaintiff claims that assured sustained the skull fracture by being thrown from the wagon.

The following day a number of friends of deceased went to the scene of the accident and examined the premises. One of them testified that he followed the wagon tracks into the woods to the point at which they stopped. They showed that the wagon had been headed toward the northwest and backed up close to a pole of dead black ash. This pole was about 30 feet long, six inches at the butt and about three inches at the top, and very crooked. It was found lying on the ground to the right or east of the wagon track. This pole apparently had broken from its stump some time previous to the accident and had lodged in the crotch of an elm tree located some distance to the northwest. The butt of the pole had embedded itself some 8 or 10 inches in the soft earth, and the furrow in the ground indicated that the butt end must have plowed through the mucky soil for a distance of 12 or 15 feet before striking the roots which evidently halted it in its course. Marks near the butt of the pole indicated that a chain had been attached thereto, and blood on the rear axle of the wagon showed that the deceased must have unhooked the chain from the axle after being struck. Blood and hair were also found on the pole about six feet from the top, and it is evident that the pole fell in an unexpected manner and struck Slater on the head.

Contact of the wheels with a tree stump close to the right side of the wagon, or the sudden encounter of the heavy roots with the butt of the pole, or both, may have brought the wagon to a sudden stop and thrown Slater from his wagon, projecting the pole upon him as he fell feet first. The trial judge

adopted this theory, and rendered judgment in favor of the plaintiff.

It is claimed by appellee that the footprints indicate that deceased was thrown from the wagon and the pole struck him as he lit on his feet. Slater was hit on the left frontal portion of his skull. The pole was found to the right of the wagon and the most reasonable inference is that the pole must have swept from right to left towards the wagon. If the deceased was injured while on the wagon or immediately after he landed on the ground after being thrown, he would have been hit on the right side of the head instead of the left, unless we assume that, instead of facing his team, he was turned toward the rear of his wagon. This would be an unnatural inference. If the blow had come from the left, as assured was driving, it is claimed that there would have been signs where the pole hit the wagon, or it might very possibly have fallen upon him.

The pole was found two to six feet from the wagon track, and assured appears to have fallen close to but to the right of the pole, away from the wagon. How the assured was able to unfasten the chain and drive his team back to the road, after suffering his fatal injuries, is not disclosed by the record and is shrouded in mystery. It may be that a blood clot did not form at once. He did retain his mental faculties sufficiently to enable him to start for home, a docile team doing the rest.

Other theories as to how the accident occurred may be deduced from the facts. It seems quite probable, assuming the wagon had been halted by the stump or roots, that the footprints where deceased landed were caused by his jumping from the wagon, rather than by his being thrown therefrom. It seems also plausible that the decedent may have been directing his team from the ground after the

butt of the pole became caught. The testimony shows that the team was so docile that Slater could direct them by appropriate words.

There are at least four possible explanations of the accident: The assured might have been on the ground directing the team when the accident occurred; he might have been hit while on the wagon, and thus injured solely by the blow, and not as a result of being thrown from the wagon; he might have jumped from the wagon voluntarily and landed on his feet just as the descending pole contacted with his head; or he might have been injured in the manner found by the trial judge. A careful study of the record leaves us absolutely uncertain as to what may have been the actual cause of the accident, and leads us to the conclusion that the judgment was based solely on conjecture. We believe that the inference that deceased did not suffer his injuries by being thrown from the wagon is at least equally as tenable as that advanced by the trial judge. Unaided by the testimony of eyewitnesses or even helpful circumstantial evidence, his conclusion is the result of pure conjecture, and the evidence will not sustain the judgment. *Manning* v. *Railway Co.*, 105 Mich. 260; see, also, *Knapp* v. *Railway Co.*, 114 Mich. 199. Under the circumstances, we must conclude that the evidence does not show that assured met his death from or by reason of any cause insured against by the policy.

The judgment of the lower court is reversed, with costs, without new trial, and judgment entered for the defendant.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and WIEST, JJ., concurred.

ROSENTHAL *v.* AMERICAN CONSTRUCTION & REALTY CO.

1. VENDOR AND PURCHASER—FORFEITURE—ABROGATION OF CONTRACT RIGHTS.

   After notice of forfeiture of land contract and adjudication based thereon before circuit court commissioner, contract must be considered as entirely abrogated and all rights of respective parties thereunder terminated.

2. CONSTITUTIONAL LAW—JUDICIAL POWER VESTED IN COURTS.

   Constitution expressly vests judicial power in Supreme Court, circuit courts, probate courts, justices of peace, and such other courts as legislature may establish by general law (Const., art. 7, § 1).

3. COURT COMMISSIONERS—JURISDICTION—STATUTES.

   Jurisdiction in circuit court commissioner is limited to that conferred by legislature; being purely statutory (3 Comp. Laws 1929, § 14964 *et seq.*).

4. VENDOR AND PURCHASER—SUMMARY PROCEEDINGS—COURT COMMISSIONERS—JURISDICTION—RESCISSION.

   Where vendee holds over after breaching contract, circuit court commissioner may entertain jurisdiction of summary proceedings instituted by person entitled to possession (3 Comp. Laws 1929, § 14975), but he has no jurisdiction in cause of action by vendee electing to cancel or rescind because of vendor's breach of contract; jurisdiction in such case being in circuit court in chancery.

5. SAME—BREACH OF CONTRACT—DAMAGES—ACTION AT LAW.

   If vendee merely seeks damages for breach of land contract, his remedy is by action at law.

6. SAME—PLEADING—BREACH OF CONTRACT BY VENDOR AS DEFENSE—COURT COMMISSIONER—JURISDICTION.

   In summary proceedings before circuit court commissioner by vendor for possession after forfeiture, vendee may not plead in bar thereof breach of contract by vendor, since such issue is not within jurisdiction of circuit court commissioner, because he has no power to render money judgment in such

proceeding; and that vendor as well as vendee has breached executory land contract has no bearing on jurisdictional question.

McDONALD, C. J., and FEAD and WIEST, JJ., dissenting in part.

Appeal from Wayne; Gilbert (Parm C.), J., presiding. Submitted October 14, 1932. (Docket No. 98, Calendar No. 36,648.) Decided March 2, 1933. Rehearing denied April 21, 1933.

Assumpsit by Julius P. Rosenthal against American Construction & Realty Company, a Michigan corporation, to recover sums paid under a land contract after alleged rescission. From order of dismissal, plaintiff appeals. Affirmed.

Atlas & Solomon (*Samuel A. Kayne,* of counsel), for plaintiff.

Milton B. Safier, for defendant.

McDONALD, C. J. This is a suit at law after rescission to recover money paid on a land contract.

On May 27, 1924, the defendant sold certain real estate on two land contracts to Nathan P. Levin, who subsequently assigned his vendee's interest to the plaintiff, Rosenthal. The assignments were consented to by the vendor. Rosenthal made payments for a time, then defaulted. The defendant vendor served notice of intention to forfeit the contracts and later a declaration of forfeiture. Thereafter, summary proceedings for possession were begun and judgment for restitution was entered. After writs of restitution were issued, Rosenthal declared a rescission of the contracts for failure to install improvements in accordance with the provisions thereof and instituted the present suit. The defendant appeared, and, under Court Rule No. 18 (1931) filed a motion to dismiss supported by affidavit. The motion was granted, and the plaintiff has appealed.

The question raised by the motion to dismiss was whether the plaintiff could rescind for breach of provisions in the contracts and maintain a suit for damages after valid forfeiture and judgment in summary proceedings in which proceedings no defense of breach is made.

The plaintiff rescinded on the ground that defendant had breached the contract relative to instalment of certain improvements. If the defendant had breached the contracts he could not have maintained summary proceedings, for if there was a breach there was no cause for forfeiture and no right to possession. The breach was a proper defense in the action before the commissioner for possession. The plaintiff could not withhold that defense and subsequently use it as a ground for rescission. The validity of the forfeiture was established by the judgment in the summary proceedings. Thereafter, when he attempted to rescind, his interest in the contracts had been terminated. He had nothing to rescind. *Blazewicz* v. *Weberski,* 234 Mich. 431; *Augustyn* v. *Zawacki,* 250 Mich. 218; *Security Investment Co.* v. *Meister,* 214 Mich. 337.

The declaration contains a special count and the common counts in assumpsit. The plaintiff contends that on motion to dismiss it cannot be held that the common counts do not state a cause of action. There is no doubt as to that rule, but where the common counts rest upon the facts averred in the special count the rule does not apply. *Lightstone* v. *Fixel,* 227 Mich. 360.

In the instant case, the special count sets up the facts constituting the entire cause of action. The common counts rest on the same facts, which do not state a cause of action. The common counts were not required. The plaintiff does not claim anything beyond what appears in the special count. In these

circumstances, the rule that on motion to dismiss it cannot be held that the common counts do not state a cause of action does not apply.

The trial court was right in granting the motion to dismiss. The judgment is affirmed, with costs to defendant.

FEAD and WIEST, JJ., concurred with MCDONALD, C. J.

NORTH, J. (*concurring in affirmance*). While I concur in the result reached by Mr. Justice MCDONALD, I am not fully in accord with the statement of law as made by him and assigned in support of his conclusion. I think decision should rest on the proposition that, after notice of forfeiture and an adjudication based thereon before the circuit court commissioner, the contract must be considered as entirely abrogated and all rights of the respective parties thereunder terminated.

The portion of Justice MCDONALD's opinion to which attention should be challenged reads:

"If the defendant (vendor) had breached the contracts he could not have maintained summary proceedings, for if there was a breach there was no cause for forfeiture and no right to possession. The breach was a proper defense in the action before the commissioner for possession."

The exact question presented is this: Can the breach of an executory land contract by the vendor, not resulting in liquidated damages, be pleaded by the vendee as a defense in summary proceedings instituted before a circuit court commissioner to recover possession after forfeiture? Has a circuit court commissioner jurisdiction to hear and determine such issues?

The Constitution expressly vests the judicial power in the Supreme Court, circuit courts, probate

courts, justices of the peace, and such other courts of civil and criminal jurisdiction as the legislature may establish by general law (article 7, § 1). Acting under the above-noted constitutional authority the legislature created the judicial office of circuit court commissioner and vested it with limited judicial powers. The grant of such jurisdictional powers is covered in part by 3 Comp. Laws 1929, § 14964 *et seq.* The jurisdiction in a circuit court commissioner is limited to that conferred by the legislature. In summary proceedings, as in other proceedings before him, the commissioner's jurisdiction is purely statutory. Davis' Michigan Practice before Circuit Court Commissioners, § 22. Where the vendee under a land contract holds over after breaching the contract, by express statutory provision the circuit court commissioner may entertain jurisdiction of summary proceedings instituted by the vendor or the person entitled to possession.

"The person entitled to any premises may recover possession thereof in the manner hereinafter provided, in the following cases:

"(1) When any person shall hold over any lands or tenements, * * * contrary to the conditions or covenants of any executory contract for the purchase of lands or tenements." 3 Comp. Laws 1929, § 14975.

But the statute does not give the commissioner jurisdiction in a cause of action by the vendee who may have elected to cancel or rescind his contract with a vendor because of the latter's breach of the contract. Such a suit, usually involving an accounting, as well as cancellation, is within the jurisdiction of the circuit court in chancery. *Puziol* v. *Kastle,* 231 Mich. 100; *German Bundesheim Society* v. *Schmidt,* 242 Mich. 139. If the vendee merely seeks damages for breach of the contract, his rem-

edy is by a suit at law. Such an issue is not within the jurisdiction of a circuit court commissioner, because he has no power to render a money judgment in a summary proceeding. It follows that a cause of action of the above character cannot be pleaded by a defendant vendee in a summary proceeding before the commissioner as in bar of the proceedings instituted by the vendor for the sole purpose of securing possession. The fact that the vendor, as well as the vendee, has breached an executory land contract has no bearing upon the jurisdictional question. That is controlled by the statute. Such was the holding of Justice COOLEY in *McSloy* v. *Ryan,* 27 Mich. 110. The syllabus reads:

"In proceedings under this statute evidence of the landlord's breach of covenants to repair and make improvements, which are independent of the covenant to pay rent, is irrelevant; this proceeding is not one in which, even if the amount of the rent due be in issue, there can be any deduction of offsets, or by way of recoupment."

Again in *Fuller* v. *Metcalf,* 189 Mich. 520, it was held:

"A tenant cannot plead an independent set-off in defense of an action brought by the landlord to dispossess him for nonpayment of rent; and no presumption of law can arise against the tenant for failure to insist upon such set-off as against the rent when it falls due."

If we are to follow the above-noted decisions of this court, and respect the limited statutory jurisdiction of circuit court commissioners, I think it cannot be said: "The breach (by the vendor) was a proper defense in the action before the commissioner for possession."

CLARK, POTTER, SHARPE, and BUTZEL, JJ., concurred with NORTH, J.

ROSENTHAL *v.* AMERICAN CONSTRUCTION & REALTY CO.

1. GARNISHMENT—EFFECT OF COURT'S ORDER RELEASING GARNISHMENT PENDING APPEAL—MOOT QUESTION.

   Where order of trial court dismissing main suit has been affirmed by Supreme Court, question as to whether garnishment remained in effect pending appeal notwithstanding order of court releasing garnishment, is moot question.

2. CONTEMPT—REFUSAL TO OBEY ORDER RELEASING GARNISHMENT.

   Garnishee defendant's refusal to obey court's order to pay to principal defendant money held subject to garnishment pending appeal from order dismissing main suit is not punishable by contempt, since relation between principal defendant and garnishee defendant is that of debtor and creditor, and remedy, if any, is action at law by execution.

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted October 20, 1932. (Docket No. 168, Calendar No. 36,696.) Decided March 2, 1933.

Garnishment proceedings by Julius P. Rosenthal against American Construction & Realty Company, a Michigan corporation, principal defendant, and First Wayne National Bank of Detroit, garnishee defendant. From order fining garnishee defendant for contempt for failure to pay over money on release of garnishment, it appeals. Reversed.

Milton B. Safier, for principal defendant.

Henry F. Massnick (*Victor C. Swearingen,* of counsel), for garnishee defendant.

NORTH, J. After instituting the main suit, plaintiff garnisheed the First Wayne National Bank of

Detroit, which later disclosed indebtedness to the principal defendant in the sum of $4,035.80. Three days prior to this disclosure an order was entered in the circuit court granting defendant's motion to dismiss plaintiff's suit; but a stay of 20 days was ordered within which to appeal. During the stay period plaintiff perfected an appeal to this court from the order and judgment dismissing his suit. Decision on appeal resulted in affirmance of the judgment entered in the circuit court. *Rosenthal* v. *American Construction & Realty Co., ante,* 91. On the day following disclosure by the garnishee defendant, the principal defendant petitioned the circuit court for an order releasing the garnishment. This petition was not heard by the court until after the appeal to this court had been perfected. On the day of hearing the circuit judge ordered release of the garnishment, and further:

"That the garnishee defendant herein * * * do forthwith release the defendant's bank account garnisheed under said writ of garnishment and do forthwith release and surrender to the defendant at its request all sums of money and other property now held by the said garnishee defendant, * * * under the aforesaid writ of garnishment."

Notwithstanding this order of the court, the garnishee defendant refused to pay to the principal defendant the money of which it had disclosed possession. This evidently was because the garnishee defendant considered itself still contingently liable to plaintiff under the writ of garnishment, since the record disclosed an appeal from the order of dismissal of the main case. But there having been affirmance in this court and final dismissal of the main case (*Rosenthal* v. *American Construction & Realty Co., supra*), the ancillary garnishment pro-

ceeding is now also at an end; and the question raised by appellant herein as to whether the garnishment remained in effect pending the appeal is now moot. We forego discussion and decision because it is intimated in appellee's brief that dismissal of the garnishment was on other and justifiable grounds, such as were made the basis of dismissal of the garnishment proceedings in *Shank* v. *Lippman,* 258 Mich. 225.

But this record also discloses that the circuit judge imposed a fine of $100 upon the garnishee defendant for contempt in refusing to comply with the court's order that the garnishee defendant should "forthwith release and surrender to the defendant at its request all sums of money" held in the garnishment proceeding. From this judgment of the circuit court in the contempt proceeding the garnishee defendant has appealed. The point is made by appellant relative to paying to the principal defendant the money which appellant held as garnishee defendant, that the relation of the two parties was simply one of debtor and creditor and that the creditor (appellee) had a complete remedy at law and (if entitled to the money) could recover judgment and have execution therefor; and that therefore the circuit court was in error in attempting to coerce payment or delivery of the money by contempt proceedings. Appellant's position is sound in law.

"We have no difficulty in holding that the process of contempt to enforce civil remedies is one of those extreme resorts which cannot be justified if there is any other adequate remedy. * * * Payment of money can only be enforced by attachment 'where by law execution cannot be awarded for the collection of such sum.' " *Haines* v. *Haines,* 35 Mich. 138.

See, also, *North* v. *North,* 39 Mich. 67.

"Where collection of money due on contract between private parties can be enforced in simple action at law by execution, party may not be imprisoned for contempt for failure to pay it to clerk upon order of court (3 Comp. Laws 1915, § 12268, subd. 5 [3 Comp. Laws 1929, § 13910, subd. 5])." *Brownwell Corp.* v. *Ginsky* (syllabus), 247 Mich. 201, citing several other decisions of this court.

The order of the circuit court adjudging appellant guilty of contempt and imposing a fine is set aside. Costs to appellant.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, WIEST, and BUTZEL, JJ., concurred. FEAD, J, did not sit.

FISHER *v.* FISHER.

1. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—INFERENCES—STATUTES.

   To warrant exclusion of testimony as to matters equally within knowledge of deceased, under statute, disqualification must clearly appear and not be matter of inference (3 Comp. Laws 1929, § 14219).

2. SAME—INSURANCE—CHANGE OF BENEFICIARY.

   In suit by children to be declared beneficiaries under father's policy, where it appears that insured wrote to insurer to change beneficiary from wife, from whom he was separated, to plaintiffs, children by former marriage, but that change was not made because policy was not sent in, as required, testimony by one of plaintiffs as to conversation between him

and insured's wife, in insured's presence, relating to her refusal to surrender policy, in explanation as to why it was not sent in, *held*, properly admitted; statute prohibiting admission of testimony as to matters equally within knowledge of deceased not being applicable (3 Comp. Laws 1929, § 14219).

McDONALD, C. J., dissenting.

Appeal from Calhoun; Hatch (Blaine W.), J. Submitted November 2, 1932. (Docket No. 103, Calendar No. 36,704.) Decided March 2, 1933.

Bill by Edward J. Fisher and others against Caroline L. Fisher and Bankers Life Company, a corporation, to recover the proceeds of a life insurance policy. Cross-bill by defendant Fisher for declaration as beneficiary. Bill of interpleader by defendant corporation. Decree for plaintiffs. Defendant Fisher appeals. Affirmed.

Ronald M. Ryan and *Horace M. Mechem,* for plaintiffs.

Mustard, Mustard & Waterman, for defendant Fisher.

McDONALD, C. J. (*dissenting*). This bill was filed to recover the proceeds of a life insurance policy issued by the Bankers Life Company on the life of Robert G. Fisher, deceased, and payable to Caroline L. Fisher, his wife.

Mr. and Mrs. Fisher separated by mutual consent, and were living apart at the time of his death, but were not divorced. After their separation, Mr. Fisher attempted to change the beneficiary named in the policy to the plaintiffs, who are children by a former wife. In changing beneficiaries it was required that written notice from the insured be filed

in the home office of the company, accompanied by the policy for indorsement. The company received the written notice but not the policy. The change in beneficiaries was not made. On the death of the insured, the plaintiffs claimed the insurance as beneficiaries and brought suit to enforce their claim. The insurance company filed its answer and a bill of interpleader, paid the proceeds of the policy into court and was discharged.

The plaintiffs' bill was filed on the theory that the insured did all he could to secure a change in beneficiaries but was frustrated in his efforts by Caroline L. Fisher, the original beneficiary, who had possession of the policy and refused to deliver it to him. In answer, Mrs. Fisher says that the policy was given to her by the insured and that he never afterwards requested that she return it.

These allegations and denials by the parties present the only issue in the case. The trial court determined it against the defendant, and entered a decree in favor of the plaintiffs. The defendant has appealed.

1. As cause for appeal, the defendant contends that the trial court erred in receiving and considering as competent evidence a conversation between the insured, his son, Edward J. Fisher, one of the plaintiffs, and Caroline L. Fisher, the defendant, concerning the refusal of the defendant to surrender the insurance policy.

The question arose when Edward J. Fisher was testifying for the plaintiffs. On direct examination he was asked to relate a conversation he heard between Caroline L. Fisher and the insured in regard to the insurance policy. He answered:

"The only thing was, after we got the stuff loaded, he says, 'I will go in and get my papers.' Well, he

went in the house to get the papers and came on out and says, 'Well, she would not give me the insurance policy.' I says to her 'Why don't you give him what belongs to him and you leave him alone and he will leave you alone?' and she told me to mind my own damn business.''

This testimony was received over defendant's objection that it was prohibited by the statute concerning matters equally within the knowledge of the deceased (3 Comp. Laws 1929, § 14219).

The witness and Caroline L. Fisher, the defendant, were opposite parties in interest in this litigation. They were both assigns within the meaning of the statute. Both are protected parties and neither may testify to matters equally within the knowledge of the deceased who was their common assignor.

In Perkins, Evidence by Survivor, p. 117, § 85, the author says:

''Where, by the terms of the policy or certificate the assured has the right to change the beneficiary and has done so, the first-named beneficiary is not a competent witness against the second or last. * * * The question has generally arisen when the first-named beneficiary has attempted to testify. That such beneficiary is incompetent admits of no doubt. But the same rule must be applied to the second or last-named beneficiary should the occasion require it.''

The plaintiffs rely on *Wright* v. *Wilson,* 17 Mich. 192, as upholding the competency of this testimony. That case has no application. It arose under the original act (No. 125) of 1861, which did not protect the assigns of a deceased. It was not until the amendment (Act No. 155) of 1875, that protection was extended to heirs, assigns, devisees, and legatees.

2. It is contended that the trial court erred in refusing to receive in evidence a statement made by the insured, not in his wife's presence, that she had refused to surrender the policy.

The plaintiffs offered to prove by Carl A. Corey and W. R. Miller, who, as witnesses, signed the application for change of beneficiaries, that the insured stated to them he could not get his wife to surrender the policy. The court excluded the testimony on the ground that the statement was self-serving, made for his own benefit against the interest of the beneficiary who was not present, and therefore was inadmissible as evidence under the hearsay rule. The plaintiffs contend that the testimony was admissible for two reasons, first, because the statement was a declaration against the interest of the insured; and, second, that it was a part of the *res gestæ.*

The statement by the insured was not against his interest. It was in his favor and of the plaintiffs, his assigns; and against the interest of the defendant, an adverse party. That such a statement in favor of the party making it and adverse to the interest of another who is not present is inadmissible as evidence is too well understood to require citation of supporting authorities. It is mere hearsay unless it may be considered a part of the *res gestæ.*

To be a part of the *res gestæ* a declaration must be made contemporaneously with the main fact which in this case was the defendant's refusal to surrender the policy; or it must be so closely attached to the main fact as to derive some credit from it. If it is so detached from the fact in dispute that its credit depends entirely on the person who makes it, it is not a part of the *res gestæ.* If not

made contemporaneously with the main fact, it must be so near the time and circumstances that the mind of the declarant is yet actively influenced by it. It must be spontaneous and unreflecting. It has been said that it must be the "mind's impressions of immediate events and not a narrative of past happenings," "the facts talking through the party" and not the party "talking about the facts." See McKelvey on Evidence (Hornbook series), p. 405, § 214; Jones Commentaries on Evidence (Horwitz Ed.), pp. 352, 353; *Rogers* v. *Railway Co.*, 187 Mich. 490.

Measured by the tests applied by the courts and text-book writers, the statement in question was not a part of the *res gestæ*. It was not made contemporaneously with the main fact or so closely in connection therewith as to derive credit from it. It was a mere recital of what had previously taken place between him and the defendant, an abstract statement depending entirely for its truth on the credit of the party who made it. It was not a part of the *res gestæ*.

3. It is contended by the plaintiffs that, excluding the testimony of Edward J. Fisher and the two witnesses to the application for a change of beneficiaries, the facts and circumstances are sufficient to raise the presumption that defendant would not have surrendered the policy if she had been requested to do so; and that, therefore, the insured did all he could have done to secure the policy and present it to the company for indorsement of the change in beneficiaries.

The facts relied on to support this presumption are that insured and defendant had separated; that they had made a property settlement, and that the insured had "advertised her in the Moon-Journal." These facts are not sufficient to justify the presump-

tion that defendant, if requested, would not have surrendered the policy.

As such a presumption cannot be reasonably indulged in from the conceded facts, it is not necessary to consider its effect on the rights of the parties. The plaintiffs alleged that the policy could not be changed because of the wrongful act of the original beneficiary in refusing to surrender it on demand. The defendant made denial in her answer and cross-bill. The burden of proof was with the plaintiffs to prove the facts alleged. Eliminating the incompetent testimony, there is a total absence of such proof. We are therefore constrained to hold that, on this record, the original beneficiary, Caroline L. Fisher, is entitled to the proceeds of the policy.

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

SHARPE, J. It is conceded that the deceased, on July 8, 1931, executed, on a form furnished to him by the insurance company, an instrument for the purpose of changing the beneficiary named in his policy from Caroline Fisher (hereafter called the defendant) to Pearl Fisher, Myrtle Sanborn, Edward J. Fisher, and H. J. Fisher, and that this instrument was received by the company on July 30, 1931, and a notation made thereon, "Policy not received; file for any legal effect it may have."

In *John Hancock Mutual Life Ins. Co.* v. *Jedynak,* 250 Mich. 88, 90, it was said:

"It is well settled that if the insured wanted to change the beneficiaries and endeavored, in a writing signed by her, to accomplish such purpose, and was only prevented by the original beneficiary refusing to turn over the policy and the declination of the insurer to grant her written request without pro-

duction of the policy, a court of equity will accomplish the clear purpose of the insured and frustrate contrary designs."

Plaintiffs sought to prove that the defendant refused to turn over the policy to the deceased by the testimony of Edward J. Fisher, one of the beneficiaries named in the instrument sent to the insurance company. In my opinion, the trial court committed no error in admitting this testimony and in finding that the omission of the deceased to send the policy to the company was due to the refusal of defendant to deliver it to him. It is undisputed that the deceased and defendant were husband and wife and that they had separated. He went to his home to get his personal effects, and the question asked defendant by Edward, "Why don't you give him (his father) what belongs to him and you leave him alone and he will leave you alone?" and her answer thereto that he should mind his own business occurred at that time. While the deceased was then present and doubtless heard the question asked and the answer thereto, in my opinion the statute (3 Comp. Laws 1929, § 14219) did not render it inadmissible. This statute, which prevents opposite parties from testifying as to matters which, if true, were equally within the knowledge of the deceased, has been in force for many years in this State. It was considered by Justice CHRISTIANCY in *Wright* v. *Wilson,* 17 Mich. 192, 201 (decided in 1868). It was there said:

"But the principal object of this prohibition, we think, was to prevent a living party from obtaining an unequal advantage, from his own testimony, upon matters known only to himself and the deceased, or better known to them than to others, and of which the deceased party can, of course, no longer speak."

This statement was quoted with approval in *Downey* v. *Andrus,* 43 Mich. 65, 71. While the word "assigns" did not then appear in the law, its later inclusion cannot well be said to affect its purpose as therein stated.

Statutes enacted for the same purpose have been construed in a similar manner in other States. In *Wadsworth* v. *Heermans,* 85 N. Y. 639, 641, it was said that:

"The spirit and purpose of this provision of the code (section 829) is equality, to prevent undue advantage; and that purpose should be kept in view when border questions arise and lines of distinction are to be drawn."

In *First Nat'l Bank* v. *Warner,* 17 N. D. 76, 80 (114 N. W. 1085, 1086, 17 Ann. Cas. 213), it was said:

"The reason of the rule laid down in said section is to protect the estates of decedents from false testimony which attributes to a deceased party statements or acts concerning which he cannot testify by reason of his death. A transaction, as used in this section, means a transaction in which the decedent took part and was a party to and participated in."

It has also been said that "To warrant the exclusion, the disqualification must clearly appear and not be a matter of inference." 1 Abbott's Trial Evidence (4th Ed.), p. 114.

We have discovered no authority directly in point. The cases cited and relied on by defendant (*Wallace* v. *Fraternal Mystic Circle,* 127 Mich. 387; *Great Camp K. O. T. M.* v. *Savage,* 135 Mich. 459; *Shepard* v. *Shepard,* 164 Mich. 183; and *Perfect Cleaners & Dyers* v. *Kirschbaum,* 257 Mich. 430) all refer to statements made by deceased on which rights were sought to be founded. In this case no reliance is

placed upon any such statement. That which is relied upon to prove that defendant refused to deliver the policy to the deceased is her answer to a question put to her by Edward. While made in the presence of the deceased, I can see no reason for the application of the statute to its admission. The deceased, while present, took no part in the conversation. Its purpose was to account for the failure of the deceased to forward the policy to the company with his request for a change of beneficiary.

The decree is affirmed, with costs to appellees.

CLARK, POTTER, NORTH, WIEST, and BUTZEL, JJ., concurred with SHARPE, J. FEAD, J., did not sit.

In re WARREN'S ESTATE.

BROWNELL *v.* RODGER.

WILLS—CODICILS—CONSTRUCTION—RESIDUE.

Where third paragraph of will, relating to disposition of residue of estate, was later changed by codicil, making said paragraph "null and void and changing it as follows," construction of will by probate and circuit courts that said codicil is operative only as to any residue after bequests mentioned in paragraph two are wholly satisfied, *held*, correct.

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted November 1, 1932. (Docket No. 40, Calendar No. 36,714.) Decided March 2, 1933.

In the matter of the estate of Selina Rodger Warren. On petition of Mary B. Brownell and others against Annie C. Rodger for construction of a will. Judgment for plaintiffs. Defendant appealed to circuit court. Judgment affirmed. Defendant appeals. Affirmed.

George T. Cartwright, for plaintiffs.

Slyfield, Hartman, Mercer & Reitz, for defendant.

CLARK, J. In a contest between legatees, construction is sought of the will and codicil of Selina Rodger Warren:

"I, Selina Rodger Warren, of the city of Detroit, county of Wayne, State of Michigan, being of sound and disposing mind and memory, do hereby make, publish, and declare the following as and for my last will and testament, viz:

"First: I direct that all my just debts and funeral expenses be paid in full.

"Second: I give, devise and bequeath to the following-named persons the sum set opposite their names, to-wit:

"To my sister, Annie C. Rodger, $5,000;

"To my sister, Mary B. Brownell, $4,000;

"To my niece, Jessie B. Davis, $1,000;

"To Paul E. Davis, son of my said niece, $2,000;

"To Francis Mullen and John Mullen, grandsons of my late husband, $500 each;

"To my friend Henrietta Wood, of Detroit, Michigan, $500;

"To Mrs. Laura Ried, the wife of Robert Ried, San Marcos, Cuba, $1,000;

"To the First Baptist Church, of Detroit, Michigan, the sum of $500, with the request that the principal be kept intact and the income be used for the fellowship fund. I give the further sum of $500 to

the First Baptist Church with the request that it be added to its endowment fund.

"Third: All the rest, residue and remainder of my estate, of every character whatsoever, and wherever situated, I give, devise, and bequeath to the First Baptist Church, of Detroit, Michigan, the same and the proceeds thereof to be kept invested and re-invested from time to time and the income thereof to be devoted to the care and relief of old people of the Baptist denomination in the city of Detroit, preferably for the support of the Baptist Old Peoples Home if one is established. Should the First Baptist Church as such for any reason not be qualified by law to take and hold such residue as a trust fund for the purposes hereinbefore mentioned then I give, devise and bequeath said residue to the persons who shall at the time of my death be trustees of the First Baptist Church, they to take and hold said residue for the same purposes hereinbefore specified."

A few days later she herself made and executed the following codicil:

"In looking over the last third paragraph in my will made August 18, 1926, I realize it is too drastic, that in giving for one purpose more than I realized when signing so hereby make it null and void by changing it as follows:

"To my nephew Paul E. Davis' little daughter, $500, in trust to her father;

"To the Baptist Children's Home, $500;

"All my personal property to my sister, Annie C. Rodger.

"The remainder to be left in trust to my sister, Annie C. Rodger with the exception of family broach which I give to my sister Mary B. Brownell. The remainder to be given in trust to my sister Annie C. Rodger (as executor to be used for home and foreign missions or for anything that will further the work of the Kingdom)."

The question is:

"Does the codicil modify the will to the end that the bequests mentioned in the codicil, to-wit:

"To my nephew Paul E. Davis' little daughter, $500, in trust to her father;

"To the Baptist Children's Home, $500;

"All my personal property to my sister, Annie C. Rodger;

"The family broach to my sister Mary B. Brownell;

"stand on the same footing as the bequests mentioned in paragraph two of the will, or, does the codicil only modify and affect paragraph three of the will so that the codicil is operative only as to any residue remaining after the bequests mentioned in the second paragraph of the will are wholly satisfied?"

The decision of the probate court was,—

"That a proper construction of said will and codicil is that the codicil is operative only as to any residue remaining after the bequests mentioned in paragraph two are wholly satisfied."

The decision was affirmed in the circuit court, and Annie C. Rodger has appealed. There is contention over the language: "so hereby make it null and void by changing it." If all of paragraph three be null and void, it is nonexistent, and there is nothing to change. The words must be read together. Testatrix intended to set aside the distribution of the residue under the third paragraph and to provide a new and different distribution of such residue. She intended to make null and void former distribution under paragraph three and to effect change by a new and different distribution. And it appears from extrinsic evidence in aid of construction that to accept the construction urged by appellant, as

stated in the alternative of the question presented, would be to give to her the bulk of the estate, which it is clear testatrix did not intend. *Sondheim* v. *Fechenbach,* 137 Mich. 384.

Affirmed.

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

STRAUS *v.* BARBEE.

MORTGAGES—TRUST MORTGAGE—RECEIVERS—ASSIGNMENT OF RENTS AND PROFITS—PAYMENT OF TAXES—STATUTES.

Where trust mortgage, purporting to assign rents, issues, and profits as additional security, was executed prior to effective date of 3 Comp. Laws 1929, §§ 13498, 13499, court had no power to appoint receiver pending foreclosure of mortgage, and, therefore, although mortgagors consented to such appointment, that did not authorize court to order receiver to pay taxes out of rents and profits collected without consent of mortgagors. SHARPE and WIEST, JJ., dissenting.

Appeal from Wayne; Toms (Robert M.), J. Submitted October 12, 1932. (Docket No. 73, Calendar No. 36,786.) Decided March 2, 1933.

Bill by Melvin L. Straus and another, trustees, against E. L. Barbee and others to foreclose a trust mortgage and for appointment of a receiver. From order directing receiver to pay taxes, defendants appeal. Reversed.

Butzel, Levin & Winston and *Bulkley, Ledyard, Dickinson & Wright,* for plaintiffs.

Joslyn, Joslyn & Joslyn, for defendants.

POTTER, J. Prior to the effective date of Act No. 228, Pub. Acts 1925 (3 Comp. Laws 1929, §§ 13498, 13499), Meyer Levine and Aaron Witus, together with their respective wives, gave a trust mortgage on lands and premises in Detroit. The mortgage purported to assign the rents, issues, and profits of the mortgagors' property as additional security. Default occurred in the payments due on the mortgage, and foreclosure of the mortgage was commenced and a receiver appointed by the court to manage and control the mortgaged property, collect the rents, income, and profits, and account and dispose of them under the legal orders of the court. The parties to the suit consented to the appointment of a receiver. This consent conferred no additional jurisdiction upon the court, a judicial tribunal,—not an arbitrator. Jurisdiction arises from law, and not from consent of litigants. The receiver appointed qualified and acted, and June 2, 1932, had on hand $894.27, when the trial court made an order directing this money be used to pay taxes levied and assessed against the mortgaged real estate. From this order, defendant E. L. Barbee, the owner of the record title of the real estate, appeals. It is claimed E. L. Barbee is only the nominal holder of the title, and the real owner is someone else. We are not concerned with this. 3 Comp. Laws 1929, §§ 12969, 12971.

The mortgagors and subsequent holders of title under conveyances from them were and are entitled to the possession of the mortgaged property, and the rents, income, and profits thereof until fore-

closure sale and the expiration of the equity of redemption. *Wagar* v. *Stone,* 36 Mich. 364. The appointment by the court of a receiver, except under extraordinary circumstances, does not alter this rule. *Hazeltine* v. *Granger,* 44 Mich. 503. The court has no jurisdiction, power, or authority to order, direct, or decree a receiver appointed by the court to take possession of and collect and disburse the proceeds arising from the rents, income, and profits of the real estate mortgaged; to apply the proceeds thereof to the payment of preferred or other creditors. The taxes assessed against the mortgaged property may be a lien against it, but this gives the court no power or authority to direct the application of moneys arising from something not legally mortgaged, upon which the sovereignty has no lien, to the payment of taxes on the mortgaged property so as to relieve it, or the purchasers thereof at mortgage sale, from the lien of the taxes thereon, and thus wrongfully convert property not legally mortgaged to such payment. *Wagar* v. *Stone, supra; Hazeltine* v. *Granger, supra; Union Trust Co.* v. *Charlotte General Electric Co.,* 152 Mich. 568; *Union Guardian Trust Co.* v. *Rau,* 255 Mich. 324.

Decree reversed. Costs to appellant.

MCDONALD, C. J., and NORTH, J., concurred with POTTER, J.

FEAD, J. (*concurring in reversal*). I concur with Mr. Justice POTTER for the reason that the order appointing the receiver, to which defendants consented, did not authorize the receiver or the court to expend any of the rents and income of the property for payment of taxes. As the court could not appoint a receiver to collect rents and income and make expenditures therefrom without consent of

defendants, the order cannot be extended beyond its plain terms.

CLARK, J., concurred with FEAD, J.

WIEST, J. (*dissenting*). The court had jurisdiction of the parties. The mortgage assigned the rents. The parties consented to the appointment of a receiver. I think the decree should be affirmed. See *Nusbaum* v. *Shapero,* 249 Mich. 252.

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

OLIVER IRON MINING CO. *v.* PNEFF.

1. JUDGMENT—FRAUD—INJUNCTION—EQUITY.
   Fraud practiced in very matter of obtaining judgment is regarded as perpetrated upon court as well as upon injured party, and will warrant court of equity in enjoining judgment.

2. SAME—MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT.
   It was fraud and imposition on court for employee, who had been awarded compensation for total disability, to take judgment against his employer under 2 Comp. Laws 1929, § 8452, for period of 13 months when he worked and suffered no disability.

3. ESTOPPEL—MASTER AND SERVANT—FRAUDULENT JUDGMENT—INJUNCTION—WAIVER.
   Since law affords employer no opportunity to be heard in circuit court upon filing of certificate of award by employee and entry of judgment under 2 Comp. Laws 1929, § 8452, doctrines of waiver and estoppel have no application in suit by employer to enjoin levy under execution on ground that judgment was secured by fraud.

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PROPER PROCEDURE WHEN INJURED EMPLOYEE RETURNS TO WORK.
When employee, who had been awarded compensation for total disability, went back to work, employer should have asked department of labor and industry to stop compensation, but failure to do so offers no excuse to employee to perpetrate fraud and imposition on court by taking judgment under 2 Comp. Laws 1929, § 8452, for period of 13 months when he worked and suffered no disability.

5. APPEAL AND ERROR—JUDGMENT AFFIRMED CONDITIONALLY.
Judgment taken by employee against employer under 2 Comp. Laws 1929, § 8452, which fraudulently included compensation for period of 13 months when employee worked, is allowed to stand, on appeal, on condition that he remit excess amount.
POTTER and FEAD, JJ., dissenting.

Appeal from Gogebic; Driscoll (George O.), J. Submitted October 20, 1932. (Docket No. 165, Calendar No. 36,671.) Decided March 2, 1933.

Bill by Oliver Iron Mining Company, a Minnesota corporation, against William Pneff and another to enjoin levy under an execution. Bill dismissed. Plaintiff appeals. Affirmed conditionally.

Charles M. Humphrey and *Charles M. Humphrey, Jr.*, for plaintiff.

Frank E. Hook and *Alvin L. Rummel*, for defendants.

POTTER, J. (*dissenting*). Plaintiff alleges defendant Pneff was its employee, was a contract miner, and was injured in the course of his employment. Both plaintiff and defendant Pneff were subject to the workmen's compensation act (2 Comp. Laws 1929, § 8407 *et seq.*). After defendant Pneff's injury, an agreement was entered into whereby he was to receive $18 a week during the period of total dis-

ability. On October 15, 1930, it was reported to plaintiff, by the attending physician of defendant Pneff, that he was able to resume his former employment. He returned to work and continued to work until 1931, during which time plaintiff paid him $885.04. Defendant Pneff did not sign a settlement receipt and no steps were taken by plaintiff to stop compensation. Pneff subsequently obtained from the department of labor and industry a certified copy of its approval of the settlement made with defendant and recovered judgment in the circuit court for Gogebic county against plaintiff for $1,182. No credit was given for the amount which had been paid defendant for wages. After the recovery of this judgment execution was issued, whereupon plaintiff filed the bill in this case asking the levy under the execution be enjoined and the case be remanded to the department of labor and industry for further consideration. From a decree for defendants plaintiff appeals.

"Claimant is entitled to receive, and his employer is obligated to pay, no more and no less than the statute compensation. We are not called upon to decide whether an agreed but a too large or a too small compensation having been paid by agreement and the period of payment having ended and all payments having been made, by commutation or otherwise, either party may have recourse against the other by action of the industrial accident board or otherwise. But so long as the matter is depending before the board we are of opinion that in the due administration of the law it has power to so limit payments, by its orders, that the statute sum, no more, no less, shall be paid and received, and to make such an order as was made in this proceeding to bring about, so far as possible, such desired and lawful result." *Kirchner* v. *Michigan Sugar Co.*, 206 Mich. 459, 465.

The department of labor and industry has no power to grant a rehearing. *Martilla* v. *Quincy Mining Co.,* 221 Mich. 525 (30 A. L. R. 1249); *Luyk* v. *Hertel,* 242 Mich. 445; *Panozzo* v. *Ford Motor Co.,* 255 Mich. 149. The doctrine of *res judicata* is applicable to awards made by the department of labor and industry. *American Life Ins. Co.* v. *Balmer,* 238 Mich. 580. A court of equity may relieve against an award upon the ground of fraud. *Smith* v. *Port Huron Gas & Electric Co.,* 217 Mich. 519 (21 N. C. C. A. 401); *American Life Ins. Co.* v. *Balmer, supra; Panozzo* v. *Ford Motor Co., supra.*

"It is best, as a matter of public policy, that a judgment obtained in a court of law should stand, unless it is manifestly against conscience." *The Cleveland Iron Mining Co.* v. *Husby* (syllabus), 72 Mich. 61.

"Equity will not relieve a party against a judgment at law on the ground of its being contrary to justice, unless the defendant was ignorant of his defense pending the suit, or facts could not be received as a defense at law, or unless, without any neglect or default on his part, he was prevented by fraud or accident, or the act of the opposite party, from availing himself of his defense." *Gray* v. *Barton,* 62 Mich. 186, 196.

"The fraud which warrants equity in interfering with such a solemn thing as a judgment must be fraud in obtaining the judgment, and must be such as prevents the losing party from having an adversary trial of the issue." 5 Pomeroy, Equity Jurisprudence (4th Ed.), § 2077.

See, also, *Columbia Casualty Co.* v. *Klettke,* 259 Mich. 564.

The limitation in the statute to instances of fraud is plain. *Luyk* v. *Hertel, supra.* "Relief will in no case be granted where the loss of the remedy at law

was due to the party's own negligence or fault or that of his counsel." 34 C. J. p. 538.

This suit is a direct attack upon Pneff's judgment. In order to render a valid judgment the circuit court of Gogebic county must have had jurisdiction. Without jurisdiction, any judgment rendered was void. The circuit court exercises judicial power. No other power is, or may be, under the Constitution of this State, reposed in it. 2 Comp. Laws 1929, § 8452, provides the court "shall, without notice, render a judgment." Defendant recovered the judgment in question in accordance with the statute. No one may invoke the exercise of judicial power by a court except in accordance with the Constitution, which prescribes the fundamental procedural rule of due process of law, which makes notice and opportunity to be heard before judgment a prerequisite of judicial determination. No one is entitled to a judgment in a court of law without notice or summons, by which he is tendered his day in court with the right to frame an issue and be heard before judgment. *Rouse, Hazard & Co.* v. *Wayne Circuit Judge,* 104 Mich. 234 (27 L. R. A. 577, 53 Am. St. Rep. 457).

"Courts cannot function without the use of process. Unless waived by a general appearance or otherwise, and such waiver is permissible, process is necessary in order to acquire jurisdiction, proceed against a person named as a party defendant, call upon defendant to answer, warrant an adjudication by the court of the property rights of persons interested in the subject-matter of the controversy, authorize an order in summary proceedings *in personam* against a third person not a party to the suit, and to render a judgment valid and conclusive." 50 C. J. p. 446.

Though the statute provides for judgment without notice, the constitutional mandate of due process

of law establishes the rule there can be no judgment without notice. We do not hold 2 Comp. Laws 1929, § 8452, unconstitutional, but it must be construed and administered in recognition of the constitutional prerequisite of due process of law. The judgment involved was rendered without notice. The court was without jurisdiction. It may be set aside upon condition defendant enter its appearance in such cause.

"A court may of its own motion, even though the question is not raised by the pleadings or is not suggested by counsel, recognize the want of jurisdiction, and it is its duty to act accordingly." 15 C. J. p. 852.

See, also, *Allen* v. *Carpenter,* 15 Mich. 25; *Kirkwood* v. *Hoxie,* 95 Mich. 62 (35 Am. St. Rep. 549); *Hull* v. *Hull,* 149 Mich. 500; *Maslen* v. *Anderson,* 163 Mich. 477; *People* v. *Meloche,* 186 Mich. 536; *Carpenter* v. *Dennison,* 208 Mich. 441; *Attorney General, ex rel. Wolverine Fish Co.,* v. *Booth & Co.,* 143 Mich. 89; *Tromble* v. *Hoffman,* 130 Mich. 676; *Horton* v. *Howard,* 79 Mich. 642 (19 Am. St. Rep. 198); *Adams* v. *Hubbard,* 30 Mich. 104; *Attorney General, ex rel. Lockwood,* v. *Moliter,* 26 Mich. 444; *Farrand* v. *Bentley,* 6 Mich. 281; 17 Am. & Eng. Enc. Law (2d Ed.), p. 1060; *Mansfield, etc., R. Co.* v. *Swan,* 111 U. S. 379 (4 Sup. Ct. 510); *Morris* v. *Gilmer,* 129 U. S. 315 (9 Sup. Ct. 289).

Decree should be reversed, without costs. Decree should be entered for plaintiff.

FEAD, J., concurred with POTTER, J.

WIEST, J. I cannot concur in the opinion of Mr. Justice POTTER.

The award was for and during total disability. Defendant Pneff was not totally disabled during

the 13 months he worked for plaintiff and received $885.04 for his services. This, of course, he knew, and it was a fraud on his part and an imposition on the court to take judgment on the certificate for total disability during the 13 months he worked and suffered no such disability.

"Fraud practiced in the very matter of obtaining the judgment is regarded as perpetrated upon the court, as well as upon the injured party, and will warrant a court of equity in enjoining the judgment. This may, for example, consist in deceit and imposition practiced upon the court as a means of obtaining a judgment which otherwise would not be rendered." 34 C. J. p. 473.

The law affords the employer no opportunity to be heard in the circuit court upon filing the certificate and entry of judgment, and, therefore, the doctrines of waiver and estoppel have no application. Equity will not countenance the fraud and imposition here practiced by defendant Pneff, nor will it subject industry to such an arrant mulct.

It is true that when the employee went back to work the employer should have asked the department of labor and industry to stop compensation, but the failure to do so offers no excuse to the employee to perpetrate fraud and imposition.

If defendant Pneff, within 10 days, files a remittitur of $885.04 in the circuit court and has the sum certified to the sheriff in reduction of the amount of the execution, then the judgment and execution for the remaining amount may stand, otherwise the execution will stand recalled and the judgment permanently stayed.

Plaintiff herein will recover costs.

McDONALD, C. J., and CLARK, SHARPE, NORTH, and BUTZEL, JJ., concurred with WIEST, J.

REICHERT *v.* METROPOLITAN TRUST CO.

CORPORATIONS—TRUST COMPANY—ULTRA VIRES—PUBLIC POLICY—STATUTES.

It was beyond power of trust company organized under 2 Comp. Laws 1915, §§ 8044–8077, and against public policy, for it to engage in sale of continuous series of mortgage participations as regular business.

Certified questions from Wayne; Brennan (Vincent M.), J. Submitted October 18, 1932. (Calendar No. 36,758.) Decided March 2, 1933.

Receivership proceedings by Rudolph E. Reichert, State banking commissioner, against Metropolitan Trust Company, a Michigan corporation. Questions relative to preferences and distribution of assets certified to this court.

Kenneth M. Stevens, for Scott E. Lamb and Charles A. Smith, receivers of Metropolitan Trust Company.

Miller, Canfield, Paddock & Stone, for bondholders' protective committee.

Anderson, Wilcox, Lacy & Lawson (*C. J. Huddleston,* of counsel), for Highland Park Trust Company as successor-trustee of certain trusts.

Yerkes, Goddard & McClintock (*W. J. Powers* and *F. W. Donovan,* of counsel), for claimant Equitable Trust Company.

A. W. Sempliner (*Jason L. Honigman,* of counsel), *amicus curiæ.*

POTTER, J. This case having come on to be heard in the circuit court upon more than 70 petitions objecting to the allowance of several claims as common claims instead of as preferred claims and to the disallowance of claims on guaranteed bonds, was not passed upon or decided by the trial court, but questions were certified to this court under Court Rule No. 78 (1931), as follows:

Question No. 1:

Facts.

The Metropolitan Trust Company was incorporated on April 22, 1925, under the Trust Company Act No. 108, Pub. Acts 1889, as set forth in 2 Comp. Laws 1915, §§ 8044–8077. Article 3, of the articles of association, of the trust company, reads as follows:

"The purpose of the incorporation is in and by its corporate name, to take, receive and hold and repay and 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, including married women and minors, body or bodies corporate, or by any court, including the Federal courts in the State of Michigan, to administer, fulfill, and discharge the duties of such trust or trusts, for such remuneration as may be agreed on, to act as general agents or attorneys for the transaction of business, the management of estates, the collection of rents, interest, dividends, mortgages, bonds, bills, notes, and securities, for moneys; to act as agent for the purpose of issuing, negotiating, registering, transferring or countersigning the certificates of stock, bonds, or other obligations of any corporation, association, or mu-

nicipality, and to manage any sinking fund therefor on such terms as may be agreed upon, to accept and to execute the offices of executor, administrator, trustee, receiver, or assignee or guardian of any minor, incompetent person, lunatic, or any person subject to guardianship; 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; to take and receive from any individual or corporation on deposit for safekeeping and storage gold and silver plate, jewelry, money, stocks, securities and other valuable and personal property and to rent out the use of safes or other receptacles upon its premises upon such terms and for such compensation as may be agreed upon; to become sureties for administrators, guardians, or other trustees, or persons in cases where, by law or otherwise, one or more sureties are required; to guarantee or insure to grantees the validity of titles in real estate transfers, at a rate of compensation and upon such terms as may be agreed upon; to lease, purchase, hold and convey all such personal estate as may be necessary to carry on its business as well as such personal estate as it may deem necessary to acquire in the enforcement or settlement of any claims or demands arising out of its business transactions and to execute and issue in the transaction of its business all necessary receipts, certificates and contracts which shall be signed by such person or persons as may be designated by the by-laws of the corporation; to invest its capital stock in the manner provided by law; to lease, hold, purchase and convey real estate for the purposes and in the manner provided by section 10 of said act and to accept real and personal estate in trust, as in said section provided, and to do all other acts and things authorized by the said chapter, to be done by corporations organized under its pro-

visions, and all acts supplementary thereto or amendatory thereof."

The trust company loaned its general funds out to the public. Among the securities accepted under these loans were many mortgages upon real estate. Certain of these mortgages were sold by Metropolitan Trust Company, as an individual, to the Metropolitan Trust Company, as trustee, accepting in payment therefor from the said trustee certificates of participation in trust form issued by such trustee, and bearing the title "Metropolitan Trust Company guaranteed first mortgage six per cent. collateral bonds." The trust company then guaranteed the payment of and proceeded to sell these certificates of participation to the public. Four series of these guaranteed certificates, totaling $600,000 face value, were sold; series A, bearing six per cent. interest, being dated September 1, 1926, series B, bearing six per cent. interest, being dated May 1, 1927, series C, bearing five and one-half per cent. interest, being dated February 1, 1928, and series D, bearing five per cent. interest, being dated May 1, 1928, copies of these certificates are attached hereto and marked Exhibits A, B, C, and D, for further reference. Such "guaranteed first mortgage collateral bonds" were outstanding upon date of suspension of the trust company in the amount of $410,300. No payment under the guaranties was to be made until within 18 months after the respective due dates. The 18 months have not yet expired.

Validation certificates were obtained from the Michigan securities commission permitting the sale of these bonds.

There were five additional series of bonds issued, which were not guaranteed by the trust company.

Metropolitan Trust Company suspended business June 18, 1931; on June 20, 1931, a temporary receiver was appointed, and on July 16, 1931, permanent receivers were appointed.

No default of any kind had occurred on any of the guaranteed issues aforesaid prior to the appointment of permanent receivers. After the appointment of permanent receivers, Highland Park Trust Company was appointed successor-trustee to Metropolitan Trust Company and all of the mortgages securing said guaranteed participation issues were assigned to the successor-trustee, who has since administered the trust.

On August 4, 1931, an order was entered requiring claimants to prove their claims within four months from the date of said order and providing that no claims would be received after December 4, 1931. This time was subsequently further extended by a court order to January 4, 1932.

Holders of guaranteed bonds filed their proofs of claim for the full par value of their bonds. No default occurred on the part of the trust company in turning over all funds collected on the mortgages, but defaults have since occurred in the payment of the interest on such bonds and, in some instances, in the payment of the principal.

During the time that the company acted as trustee for these bond issues, it loaned or advanced out of its general funds, or commingled general and trust funds, $5,800.25 to itself as trustee for use in retiring $5,137.50 in principal of bonds and paying $662.75 in interest due on coupons. The retired bonds have been canceled and are in the possession of the receivers.

Subsequent to the appointment of the receivers, and before the appointment of a successor-trustee, they collected some funds from the underlying security of the bonds and offset this amount against the indebtedness of the trustee to the company. The receivers' right to such set-off has been contested. The successor-trustee has also contested the right of the receivers to recover from the successor-trustee the balance of this advance.

Questions of Law.

(a) Was the guaranty of Metropolitan Trust Company on such bonds *ultra vires?*

(b) If the foregoing question is answered in the affirmative, is the defense of *ultra vires* now available to the receivers as against the holders of the bonds upon which claims have been filed?

(c) If the foregoing questions are answered in the negative, can the holders of these bonds prove their claims as contingent claims in view of the fact that the 18-month period after default has not expired and the loss, if any, has not been yet determined?

(d) If question (c) is answered "yes," must the receivers delay the payment of any and all dividends until such time as there can be a final closing of the receivership estate?

(e) Where the trust company paid to some of the holders of bonds and/or coupons under guaranteed bonds series "A," "B," "C," and "D," principal and interest without respect to collections from mortgages securing same, said payments being made from general corporate bank accounts of said trust company and not from any segregated trust fund, were such payments in partial satisfaction of the liability of the said trust company as guarantor?

(f) If the answer to question (e) is "yes," would the trust company out of collections subsequently received by it as trustee from said mortgages constituting the *corpus* of such trust estates be entitled to repayment or set-off for moneys so advanced if such repayment or set-off preferred said trust company over holders of bonds and/or coupons who did not participate in the payments as made by the trust company?

(g) Would a successor-trustee be entitled to all collections made by the receivers of the trust company from mortgages constituting the *corpus* of

trust estates after June 18, 1931, without deductions for payments made to holders of bonds by the trust company prior to its closing?

Question No. 2:

Facts.

In the conduct of its business, Metropolitan Trust Company was custodian of various funds which it held in trust as receiver, trustee, or agent. Said funds so held were commingled with other trust funds and with the general funds of the company.

On the day the company suspended business, it had cash on hand outside checks and cash items in the amount of $4,022.94.

In its general banking accounts, it had $47,059.39, of which $45,966.09 was on deposit with the National Bank of Commerce of Detroit. The trust company owed this depositary $86,700.58. Promptly upon the closing of the company, the depositary set-off the $45,966.09 against the company's indebtedness. As a result, the total cash that came into the hands of the receivers totaled $5,116.24. All of the cash on deposit in these general banking accounts consisted of general funds of the company commingled with trust funds.

In addition thereto, the company had a separate bank account for estate balances in the sum of $17,444.88, which was not commingled with other general funds of the company. This latter amount came into the hands of the receivers merely for distribution to the beneficiaries or successor fiduciaries when they were appointed.

The total of the trust funds commingled was greatly in excess of the total amount of all deposits in banks, plus cash on hand, and it has been impossible to trace such trust funds so commingled.

The receivers disallowed all claims for preference made by such trust-fund claimants and allowed all such claims as common claims.

Questions of Law.

(a) Where trust funds have been commingled with other trust funds and with other general funds of the trust company, and where said trust funds cannot be traced into any specific tangible assets, and where the cash on hand and in banks on the date of suspension of business by the trust company is greater in amount than certain single trust funds so commingled but less in amount than other single trust funds or than the total of trust funds so commingled, can any or all of said trust funds be legally construed to be entitled to a preference over common claims?

(b) If the answer to question (a) is "yes," do such preferred trust claimants share *pro rata* in the cash on hand and in banks at the time of suspension?

(c) If the answer to question (b) is "yes," should the "cash on hand and in banks" be construed to include that amount set-off by the depositary against the company's debt to it?

(d) Did the depositary bank have the right to set-off against the indebtedness of the company to it funds on deposit consisting of commingled trust funds and general funds?

(e) If the answer to question (a) is "yes," then did the payment of interest by the trust company upon funds in certain trust accounts establish the character of claims to such funds as general claims, there having been no agreement made to the contrary?

The Metropolitan Trust Company was a Michigan corporation. It signed a guaranty contained in the bonds involved, designated as series A, B, and C, as follows:

"And said trust company hereby guarantees the payment of the principal of this bond as and when collected from the respective mortgagors, but in any event within 18 months after demand by the holder

made to the trust company on or subsequent to the due date of the principal of such bond, and the interest accruing thereon semi-annually from the date hereof, in lawful money of the United States of America of or equal to the present standard of weight and fineness, as set forth in this bond and the coupons annexed hereto."

The language of the guaranty used in bonds, series D, is:

"Said Metropolitan Trust Company hereby unconditionally guarantees the payment of the principal of this bond as and when collected from the respective mortgagors, but in any event within 18 months after demand by the holder made to the trust company on or subsequent to the due date of the principal of such bond, and the interest accruing thereon semi-annually from May 1, 1928, in lawful money of the United States of America of or equal to the present standard of weight and fineness."

Like other corporations, this trust company is a creature of law. It may lawfully exercise no power and authority except that given to it by law. There is nothing in either the charter of the corporation or the statute of its organization which gives it any express power or authority to guarantee the payment of notes, bonds, or other obligations. Its implied powers are limited to those necessary to enable it to exercise the powers delegated to it by its charter and the statute providing for its creation. 2 Fletcher, Cyclopedia of Corporations, p. 1814. It occupies a fiduciary relation to the beneficiaries of the several trusts lawfully reposed in it who are entitled to its protection. 2 Fletcher, Cyclopedia of Corporations, p. 1814. It has no right to speculate with the trust funds intrusted to its care.

This trust company, under the statutes of this State, had no right to imperil the trust funds sub-

mitted to its care by becoming surety (7 C. J. p. 808); and no right to guarantee the payment of the bonds of others. *Federal Land Bank of St. Paul* v. *Crookston Trust Co.,* 180 Minn. 319 (230 N. W. 797); *In re Bankers' Trust Co.,* 27 Fed. (2d) 912; *Ward* v. *Joslin,* 186 U. S. 142 (22 Sup. Ct. 807); 2 Fletcher, Cyclopedia of Corporations (Perm. Ed.), § 721.

It is claimed that if guaranteeing these bonds was *ultra vires,* the trust company, having obtained the money from their sale, is estopped from questioning the validity of its guaranty; that it cannot profit by its own wrong, and before repudiating such obligations it must put the bondholders *in statu quo.* It is claimed the receiver stands in the place of the trust company and is bound by these rules. If the receiver should satisfy the trust companies' alleged liability on the guaranties from its assets, there would be nothing left to satisfy its general creditors or its obligations to the beneficiaries of the trusts lawfully reposed in it. If the receiver pays the illegal obligations of the trust company, it cannot pay its legal obligations. Obligations arising from its illegal acts should not be preferred to those arising from its legal acts.

The trust company, not having authority to guarantee the payment of these bonds, such guaranty is not enforceable against the receiver of the trust company. Those dealing with the trust company are presumed to have had notice of its lack of powers to guarantee the payment of the bonds (*Farmers & Mechanics' Bank* v. *Troy City Bank,* 1 Doug. 457; *Knickerbocker* v. *Wilcox,* 83 Mich. 200 [21 Am. St. Rep. 595]); and consequently no estoppel arises against the receiver, upon such colorable contracts of guaranty.

It would be anomalous if the trust company, by violating the law, guaranteeing the payment of

bonds, engaging in hazardous speculation, with or without compensation, contrary to its charter, in violation of public policy, when such bonds were purchased by those charged with notice of the trust company's lack of power, could as against the creditors and beneficiaries of the lawful trusts reposed in and accepted by it, divert its funds from lawful corporate purposes to those unlawful and opposed to public policy.

"The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: the obligation of any one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law." *McCormick* v. *Market Bank*, 165 U. S. 538 (17 Sup. Ct. 433).

A trust company may not lawfully by indirection do what it is forbidden to do by its charter and the law of its creation.

In *Bowers* v. *Lawyers Mortgage Co.*, 285 U. S. 183 (52 Sup. Ct. 350), the business of the mortgage company was carried on as follows:

"Upon receiving an application for a loan it caused an appraisal of the proposed real estate security to be made and procured a title insurance company to survey the property, make a report as to title and insure the same. The borrower, having executed and delivered a bond and mortgage to respondent, received from it the amount specified therein less charges for title insurance, survey, disbursements and recording tax and less a lending fee

which included the charge for appraisal. Respondent sold the mortgage loans. On the sale of a bond and mortgage as a whole, it delivered an assignable contract called 'policy of mortgage guarantee' to the purchaser. On the sale of part of a loan, it issued a participation certificate assignable by indorsement and registration on respondent's books and containing substantially the same provisions as the policy. By every such policy or certificate the purchaser appointed respondent his agent to collect the principal and interest, and the latter agreed to keep the title guaranteed and the premises insured against fire and to require the owner to pay taxes, assessments, water rates and fire insurance premiums. Respondent guaranteed payment of principal, as and when collected but in any event within 18 months following written demand made after maturity, and payment of interest regularly at an agreed rate usually one-half of one per cent. less than that specified in the bond. Respondent kept the difference and called it 'premium.' Respondent also retained the interest accruing between the making of the loans and the sale of the securities. For renewals of loans it charged extension fees."

And the court held,

"the guaranties contained in the policies and participation certificates were in legal effect contracts of insurance."

In *United States* v. *Home Title Ins. Co.*, 285 U. S. 191 (52 Sup. Ct. 319), where a similar case was before the court, it was said:

"The guaranty of payment of the principal and interest of mortgage loans constitutes insurance."

A trust company, under the laws of this State, differs from an insurance company. Each is a creature of statute. One is under the supervision of the banking department, the other under the supervision

of the insurance department. We are unable to find the Metropolitan Trust Company had any power or authority, under the law of its creation, to guarantee the payment of bonds and mortgages delivered to the trust company, or any power or authority to guarantee the payment of participation certificates which were substantially similar to those issued by the Lawyers Mortgage Company involved in *Bowers* v. *Lawyers Mortgage Co., supra;* and *United States* v. *Home Title Ins. Co., supra.*

The receiver of the trust company represents all those legally interested in its assets as creditors. It is the duty of the receiver to administer the estate of such defunct trust company according to law, to protect its legal trusts from claimed liability upon illegal contracts.

Certified questions must be distinctly propounded (*Clark* v. *Dorr,* 5 Mich. 143); be strictly questions of law (*People* v. *Adwards,* 5 Mich. 22, 24; *Bagg* v. *City of Detroit,* 5 Mich. 66); not questions which involve or imply conclusions or judgment by the judges upon the weight or effect of testimony or facts adduced in the case. *Bagg* v. *City of Detroit, supra.* If the whole case, broken into parts, appears to have been certified, it will be dismissed. *Bagg* v. *City of Detroit, supra.* Questions may not be certified unless the judge below has well-founded doubts upon them, save when they are new or of public importance. *Bagg* v. *City of Detroit, supra.* Questions so broad and indefinite as to admit of different answers depending on the facts will not be considered. *Bell* v. *Wickham,* 255 Mich. 501. The rule does not contemplate this court shall be substituted as a trial court for the circuit court. *Bell* v. *Wickham, supra; English* v. *Fairchild,* 5 Mich. 141; *Clark* v. *Dorr, supra.* The answers given to certified questions "shall be

given in the ordinary form of opinions." Court Rule No. 78, § 3 (1931).

We are of opinion the guaranties in question were *ultra vires,* which defense is available to the receiver of the trust company, and no claimed liability based upon such guaranty may be recognized by or enforced against the receiver, under the facts here involved, either absolute or contingent. The trust company had a right to act as trustee in trust mortgages to secure bond issues, to receive money paid by mortgagors and disburse it to bondholders. It had no right to pay other funds to bondholders, not arising from payments on the mortgages, by reason of its guaranty, to the prejudice of other creditors. No preferences among bondholders secured by any mortgage may obtain. All bondholders are secured ratably without preference. A successor-trustee of bonds stands in the same position as the original trustee, and is entitled to collect and enforce the mortgages.

Trust funds not traceable, not capable of identification, mingled with general assets, lose their identity as such and become general claims. A depositary bank, having no knowledge of the character of funds deposited with it, may set off the credit of the depositing customer against its debt due from it to the depositary bank.

MCDONALD, C. J., concurred in the result.

BUTZEL, J. (*concurring in result*). The record shows that the trust company engaged actively in a mortgage business, loaning on mortgages and then selling a participating interest in these securities to the public. It did not sell these mortgages or beneficial interests therein for the purpose of raising necessary funds to conduct a trust business, but sold them outright as a part of a profit-making venture

by trading in these securities. Its guaranty, made as an inducement to effect such sales, was an exercise of a power extended neither by statute, charter, nor necessary implication. Were this an isolated case, where, in order to raise funds with which to carry on a trust business, a mortgage or participations in it had been sold accompanied by a guaranty, and the latter had been set up as a contingent liability in the company statement, there might be some merit in the assertion that this was merely a method by which the trust company exercised its express power to borrow money and issue notes accompanied by adequate security. The record, however, plainly shows that the trust company went much further and engaged in the sale of a continuous series of guaranteed mortgage participations as a regular business. It was beyond the power of the trust company, and against public policy, for an organization of this nature to engage in such a venture, and for this reason I concur in the result.

CLARK, SHARPE, NORTH, FEAD, and WIEST, JJ., concurred with BUTZEL, J.

PEOPLE *v.* KOLOWICH.

1. CRIMINAL LAW—MOTION TO QUASH INFORMATION—EVIDENCE—SUFFICIENCY.

   Motion to quash information charging defendant with embezzlement, felonious abstraction, and misapplication of bank funds, on ground that evidence taken on examination was insufficient to sustain charge, *held*, properly denied.

2. SAME—EMBEZZLEMENT—GREAT WEIGHT OF EVIDENCE.

In prosecution for embezzlement, felonious abstraction, and misapplication of bank funds, verdict of guilty *held*, not against great weight of evidence (3 Comp. Laws 1929, § 11963).

3. SAME — DEFRAUDING BANK — OVERDRAFTS—INTENT—STATUTES—MISDEMEANOR—FELONY.

One who with connivance of bank officer whom he has under his control secures possession of bank's funds by means of overdraft and converts them to his own use with intent to defraud bank, continuing such conduct over protracted period so as to secure possession of large amount of bank's funds, becomes guilty of offense other than misdemeanor defined as "overdraft" in banking law (3 Comp. Laws 1929, § 11932).

4. SAME—WHEN OVERDRAFT MORE SERIOUS OFFENSE THAN MISDEMEANOR.

Overdraft of itself may or may not be misdemeanor, and, under certain circumstances, said misdemeanor may become much more serious offense, as when committed with purpose of defrauding bank (3 Comp. Laws 1929, §§ 11932, 11963).

5. SAME—EVIDENCE—TESTIMONY AS TO OTHER ACTS—INTENT.

Where defendant charged with defrauding bank by means of overdrafts claimed absence of criminal intent as defense, it was proper to show his other transactions at that time, such as his buying of stocks and bonds, for purpose of showing his financial condition, reasons for making such withdrawals, and other facts bearing on his motive and intent.

6. INDICTMENT AND INFORMATION—JOINING COUNTS—EMBEZZLEMENT—DEFRAUDING BANK.

There was no error in joining embezzlement, abstraction, and misapplication of bank's funds, in same information, under three separate counts, where information follows language of statute apparently designed so that one count might be found to meet evidence presented (3 Comp. Laws 1929, § 11963).

7. CRIMINAL LAW — INFORMATION — JOINING COUNTS — HARMLESS ERROR.

Error, if any, in joining said three counts in one information, *held*, not prejudicial, where defendant was found guilty under all three and identical sentences imposed to run concurrently.

8. SAME—ELECTION OF COUNTS.

Election between counts may not be required on ground that distinct offenses are charged, where they are committed by same acts, at same time, and same testimony must be relied on for conviction.

9. SAME—INSTRUCTION—EMBEZZLEMENT—ABSTRACTION.

In said prosecution, evidence *held*, to require instruction to jury that defendant could not be held guilty of both embezzlement and abstraction, and that instruction to that effect should have been given.

10. SAME—EVIDENCE—WITNESSES—ASSUMPTION OF CONTROVERTED POINT.

Question which assumes existence of points in controversy not yet proved is absolutely improper.

11. SAME—EVIDENCE—IRRELEVANT TRANSACTIONS.

In said prosecution, testimony as to loans made by bank to defendant's friends and corporations in which he was interested, in regular course of business, should not be admitted unless it is shown that they were made in order to aid defendant directly or that said transactions otherwise throw light on his financial condition; but such loans irregularly made could be shown as tending to show defendant's control of bank's affairs.

12. SAME—ARGUMENT OF PROSECUTOR—MISCARRIAGE OF JUSTICE.

Reference by assistant prosecuting attorney, in his closing argument, to failure of another bank and conviction of its president, to which case wide publicity had been given, *held*, so prejudicial that court cannot say that it did not result in miscarriage of justice, although said remarks were in nature of reply to argument of defendant's attorney, and trial judge expressly instructed jury to disregard them (3 Comp. Laws 1929, §§ 15518, 17354).

CLARK, SHARPE, and NORTH, JJ., dissenting.

Appeal from Wayne; Ferguson (S. Homer), J. Submitted October 13, 1932. (Docket No. 196, Calendar No. 36,356.) Decided March 2, 1933.

George J. Kolowich was convicted of embezzlement, felonious abstraction, and misapplication of bank funds. Reversed, and new trial granted.

Payne & Payne (*Albert McClatchey,* of counsel), for appellant.

Paul W. Voorhies, Attorney General, *Harry S. Toy,* Prosecuting Attorney, *Duncan C. McCrea* and *Edmund E. Shepherd,* Assistants Prosecuting Attorney, for the people.

BUTZEL, J. George J. Kolowich, of Hamtramck, Michigan, was convicted of embezzlement and the felonious abstraction and misapplication of bank funds, as defined in section 66 of the general banking act (Act No. 66, Pub. Acts 1929; 3 Comp. Laws 1929, § 11963). The first count of the information charges that on the 15th day of May, 1930, defendant, as president, director, agent, servant, and employee of the State Bank of America of Hamtramck, Michigan, came into possession of $82,933.58 of the bank's moneys, and that he fraudulently and feloniously embezzled it, etc. The second count, substantially like the first count, charges that he abstracted the money. The third count charges him with misapplication of the funds. All of the counts charge that he disposed of and converted to his own use the personal property of the value stated, and that, without authority of the board of directors of the bank, he drew orders, bills of exchange, and drafts with intent to injure and defraud the bank, and that he made false entries in books, reports, and statements of the bank with intent to deceive his fellow officers of the bank and the State bank examiner.

It is claimed that defendant's motion to quash the information should have been granted because the evidence taken on the examination was insufficient to sustain the charge. The testimony on the hearing appears in the record and was sufficient to justify holding the defendant for trial. Defendant claims

further that he was entitled to a directed verdict, and that the verdict was against the great weight of the evidence. For this reason, it is necessary to detail some of the facts.

Defendant occupied a prominent position both in public life and in financial circles. He had been very successful in the years previous to 1929, and had amassed a considerable fortune, represented by real estate, land contracts, stocks, etc. He had been actively engaged in the banking and real estate business, and at one time he, with several others, owned a private bank in Hamtramck, known as the Merchants & Mechanics Bank, and herein referred to as the "private bank." His wife purchased the interests of those previously associated with him, so that he became virtually the sole owner and proprietor of the private bank, owing to the inability of a married woman to become a copartner of her husband. Just previous to its failure, the bank did a flourishing business and had many depositors, consisting principally of working men and trades people.

The State Bank of America of Hamtramck, Michigan, was incorporated under the State banking laws with a capital of $100,000. Defendant owned 650 shares and his brother Adolph 100, so that together they held 75 per cent. of the stock. The board of directors consisted of defendant, his brother, and four others, three of whom owned only 10 shares apiece, and one held 25. The bank was supposedly run under the direction of the board, officers, and loan committee, with usual powers. One Willard Babcock was a director and the cashier. He had been advanced to this position after a short period in a less important capacity. Defendant, who was responsible for his employment, turned over to him without consideration 10 shares of stock so as to

enable him to qualify as a director. Babcock testified that he never took instructions from any member of the board other than defendant while acting as cashier and director. They had frequent conferences, and, during the fiscal month in which defendant is alleged to have committed the crimes charged, Babcock saw defendant daily at his private bank, discussing with him the affairs of the State Bank of America.

The business of the private bank was conducted by defendant with the assistance of John W. Kempisty, acting as cashier and manager. There were also a number of tellers, bookkeepers, messengers, etc. The private bank deposited its funds with the State Bank of America, and also had a checking account with two Detroit banks. During the 30 days during which the alleged embezzlements, etc., took place, the private bank deposited over $500,000 with the State Bank of America, but its withdrawals far exceeded this amount. Defendant authorized Kempisty to sign drafts of the private bank on the State Bank of America. The drafts were printed with the words "President-Cashier" appearing below the line reserved for the signature. When Kempisty signed the drafts, the word "president" was stricken out. Due to his frequent absences from the private bank, Kempisty made a practice of signing blocks of 25 or more drafts in blank, leaving the spaces for the date, name of the payee, and amount, to be filled in by the tellers as funds were needed. When the demands of depositors were particularly heavy, and additional cash needed, the blank spaces in the drafts would be filled in by a teller and the drafts sent over to the State Bank of America, where they would be honored, and the cash brought back to the private bank.

During the 30 days following May 15, 1930, 11 drafts, signed by Kempisty and aggregating $82,933.58, were paid by the State Bank of America, though there were no funds to the credit of the private bank with which to pay them at the times they were presented. All of them, with the exception of one made payable to M. J. Meehan & Company, brokers, in the amount of $9,980, represented cash withdrawals by the private bank. During this 30-day period, there was a run on the private bank by its depositors, so that there was an immediate need of funds to prevent the closing of the bank's doors. Defendant claims that he had no idea of the extent of the overdrafts, that there was no intention on his part to overdraw his account, and that he always had good reason to believe that he would have no difficulty in making good any overdrafts; that he was not guilty of any crime, even though he may have committed a misdemeanor as defined in 3 Comp. Laws 1929, § 11932. This section provides that any officer or employee of a bank who knowingly, wilfully, and persistently overdraws his account shall be guilty of a misdemeanor.

There is competent testimony showing that when these overdrafts reached the State Bank of America, where they were paid under orders given by Babcock, they were carried as cash items in order to avoid the appearance of the overdrafts on the books. Babcock claims he was acting under the express instructions of the defendant. The State Bank of America's records were falsified so as to make it appear that the overdrafts were cash on hand, consisting of a large number of bills of particular denominations, never actually in the possession of the bank. Defendant had previously issued overdrafts but had always taken care of them. He claims he

did not know of the extent of the overdrafts until they had all been honored by the drawee bank. He alleges that he did not know of the practice of overdrawing. On June 16, 1930, when defendant's attention was called to the large amount of the overdrafts, he immediately attempted to secure a loan from a number of Detroit banks, where he had reason to believe that he had a large line of credit. The Detroit banks refused to come to his assistance, owing to the fact that his assets were not sufficiently liquid in nature. Without delay, he reported the condition of the bank and his overdrafts to the State banking commissioner. Defendant immediately turned over to the State Bank of America, with the consent of its board of directors, valuable real estate that apparently would have been more than ample security to protect the bank against loss had it not been for bankruptcy proceedings in which Kolowich and his private bank were involved, with a resultant setting aside of the preference. The State Bank of America went into the hands of a receiver, and the prosecution of defendant followed.

There are many facts that tend to show a lack of criminal intent on the part of defendant in the entire transaction. However, Babcock's testimony that he was acting only under the instructions and directions of defendant; that he saw defendant daily during the time the money was being taken from the bank; that overdrafts were carried as cash items in accordance with instructions received by Babcock from defendant and transmitted by him to the teller; that he told defendant that overdrafts were being carried as cash items; that, according to additional testimony, defendant was at the private bank at least four hours each day while the moneys were being withdrawn from the State Bank of America; that,

at the very time in question, defendant was making heavy withdrawals by issuing drafts on the drawee bank for the payment of stock and bonds in which he was dealing, as well as many other facts, tend to overcome defendant's claims. There was sufficient testimony to justify the verdict of the jury. It was not against the great weight of the evidence.

Numerous other errors are assigned. Defendant contends that, even looking at his conduct in the most unfavorable light, he was only guilty of overdrawing. Defendant's acts are repeatedly referred to by the prosecution as "overdrafts." There is no question that this terminology is correct. However, securing the funds by overdraft is only the means that defendant is charged with having used in committing a much more serious offense. One may be guilty of a lesser offense in committing a much more serious one. If one, with the connivance of a bank officer whom he has under his control, secures possession of the bank's funds by means of an overdraft and converts them to his own use with intent to defraud the bank, continuing such conduct over a protracted period so as to secure possession of a large amount of the bank funds, he becomes guilty of more than the misdemeanor defined by the banking law, 3 Comp. Laws 1929, § 11932. An overdraft of itself may or may not be a misdemeanor. An act apparently innocent on its face, or under certain circumstances a misdemeanor may become a much more serious offense when committed with the purpose of defrauding the bank. See *People* v. *Comstock,* 115 Mich. 305; *Brock* v. *United States,* 79 C. C. A. 121 (149 Fed. 173); *Breese* v. *United States,* 45 C. C. A. 535 (106 Fed. 680); *State* v. *Kortgaard,* 62 Minn. 7 (64 N. W. 51); *State* v. *Larson,* 123 Wash. 21 (211 Pac. 885); *State* v. *Kubli,* 118 Ore. 5 (244 Pac. 512); *State* v. *Owen,* 119 Ore. 15 (244 Pac. 516).

Over defendant's objections, the prosecution was permitted to show by the books of the private bank that, during the time the overdrafts were being issued, large sums were being paid for stocks and bonds by the private bank through checks or drafts drawn on the State Bank of America. Kempisty testified that the private bank was buying "quite a bit" from a firm of stock brokers, and one of the tellers of the private bank stated that large amounts of money were paid during the 30-day period to stock brokers for the purchase of stocks and bonds. While the law does not prohibit the purchase of stocks and bonds, nevertheless, when the owner of a private bank is engaged in purchasing stock and at the same time illegally taking the funds of another bank under his control, his general conduct in the course of his business becomes a matter of vital importance in so far as the determination of intent is concerned. Under section 27 of chapter 28 of the criminal code (3 Comp. Laws 1929, § 17320), it is provided:

"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."

When defendant is charged with defrauding the bank and he claims an absence of criminal intent as a defense, it becomes important to show defendant's

other transactions at the time, for the purpose of showing his financial condition, the reasons for making his withdrawals, and other facts, all as bearing on his motive and intent. See *People* v. *Armstrong,* 256 Mich. 191; *Dimmick* v. *United States,* 70 C. C. A. 141 (135 Fed. 257); *State* v. *Kubli, supra; People* v. *Rowland,* 12 Cal. App. 6 (106 Pac. 428); *Quertermous* v. *State,* 95 Ark. 48 (127 S. W. 951); *Ambrose* v. *United States,* 45 App. D. C. 112; *Camp* v. *State,* 31 Ga. App. 737 (122 S. E. 249); *State* v. *Lindstrom,* 180 Minn. 435 (231 N. W. 12).

Defendant contends that these three acts, embezzlement, abstraction, and misapplication, are entirely different crimes, so inconsistent in nature that they may not be joined in the same information. We can see no merit in this claim. The fact that the legislature named them in the same section of the statute, even in the same sentence, is strong indication that their inclusion was designed to prevent escape from just punishment through technical evasions based upon possible slight variations in the elements of these crimes. There was no error in drawing these counts so that one of them might be found to meet the evidence as presented. In *Jewett* v. *United States,* 41 C. C. A. 88 (100 Fed. 832, 53 L. R. A. 568), the court said:

"Nevertheless, while 'embezzlement' and 'misapplication' are not convertible terms, 'misapplication' is the broader, and covers 'embezzlement.' The statute, in this particular, is one of those frequently found in criminal legislation, as well as in other legislation and in private instruments, where there is first used a word of narrow application, and afterwards a broader one, and so continued until there is a certainty that the entire purpose sought to be accomplished is accomplished. It is not necessary,

under such circumstances, to apply the rule that every word in a statute must have its effect, to such an extent as to hold that the generic term is to be so peculiarly construed, contrary to its settled meaning, as to exclude from its scope the narrower word, which precedes it."

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

Defendant, however, claims that the prosecution should have made an election as to which count it relied upon. Where one is charged with several crimes very similar in character, each carrying the same punishment and calling for much the same testimony, it does not at all become necessary for the prosecution to make an election. *People* v. *McKinney,* 10 Mich. 54; *People* v. *Aikin,* 66 Mich. 460 (11 Am. St. Rep. 512); *People* v. *Dyer,* 79 Mich. 480; *People* v. *Warner,* 201 Mich. 547; *People* v. *Sachse,* 252 Mich. 275.

In *People* v. *Grabiec,* 210 Mich. 559, the court again approved of the rule which it quoted from *People* v. *Warner, supra,* as follows:

"Election between counts cannot be required on the ground that distinct offenses are charged, where they are committed by the same acts, at the same time, and the same testimony must be relied on for conviction."

The precise question as to whether the statute intended separate punishments for embezzlement, felonious abstraction, and misapplication arising out of the same transaction, is not properly before us. Under the facts in the case, there may be some

question as to whether defendant could be guilty of embezzlement and fraudulent abstraction in the same transaction. The court should have instructed the jury that the defendant could not be guilty of both embezzlement and abstraction under the evidence.

The prosecutor asked Babcock on redirect examination as follows:

"*Q.* You took your orders from Mr. Kolowich, didn't you?

"*A.* Yes, sir.

"*Q.* Did you ever try refusing one of these drafts when Kolowich told you to cash it?"

An objection to this question was overruled, and witness answered:

"I never tried it."

The question was absolutely improper, because it assumed points in controversy not yet proved. As the case must be tried again, we call attention to the error. See *People* v. *Lange,* 90 Mich. 454; *Branch* v. *Klatt,* 173 Mich. 31; *Nelson* v. *Hunter,* 140 N. C. 598 (53 S. E. 439); *White* v. *City of Boston,* 186 Mass. 65 (71 N. E. 75).

Error is further charged in admitting the testimony of the bank examiner showing loans made to defendant's wife, his friends, and corporations in which he was interested. No irregularity is shown as to most of these loans. They were well secured at the time the money was loaned, and were made long before May and June, 1930. Some of them were repaid. The tendency of such testimony in the present case would be to impress the jury with the fact that defendant had looted the bank. Almost all of these loans and the aggregate amount of them have no bearing upon the intent or motive for

the commission of the crimes charged. However, such loans as were irregularly made would tend to show defendant's control of the bank's affairs. On a retrial, testimony as to loans made in the regular course of business should not be admitted unless it is shown that the loans were made in order to aid defendant directly or that the transactions otherwise throw light upon defendant's financial condition.

In the closing argument, defendant's attorney, in addressing the jury, argued that Kolowich was the victim of the general business conditions that resulted in so many bank failures. The argument was possibly provocative in character, but the prosecution went far beyond any reasonable bounds in its reply. The assistant prosecutor, in his closing argument, said:

"I haven't much more to say to you. I ask you to do what you think is right in this case, but I ask you to remember that there are more ways than one for justice to work. I ask you to remember that those poor people out there who put their money in this bank have a right, the same as he has, in this country, and counsel may say it is conditions. Of course, it is conditions, I suppose he would also tell you that the Bob Allan transaction had nothing to do with the American State Bank failure."

A short time preceding defendant's trial, one Robert Allan had been convicted of felony in connection with the failure of the American State Bank, a very large banking institution in the city of Detroit. The trial, lasting several weeks, and the conviction itself, held the public interest. Complete accounts occupied the front pages of the newspapers, and the blame for the failure was attributed to the conduct of Allan, its president. The familiarity of the public

with the case is shown by the very language used by the prosecutor in reference to the failure and Allan's connection with it. He must have assumed that the jury, in common with the general public, knew about the failure and Allan's conviction. One natural inference would be that Allan's guilt indicated that of the defendant. The remarks were made without the opportunity of the trial judge to prevent them and he instructed the jury in no uncertain manner to disregard them.

The loss wrought by a bank failure is visited on its many innocent depositors, whose indignation and resentment justly follow. When, as has been brought to our attention, there have been so many bank failures during recent years, the entire public conscience is aroused. If the failures are due to the dishonest acts of bank officers, the zeal of the prosecutor in vigorously prosecuting the offenders, in line with his duties, is to be highly commended. However, with public indignation at its height, it still remains his duty to see that the constitutional right to a fair trial is afforded the accused. This duty is neglected when, in a trial of this kind, the prosecutor in his final address to the jury, calls its attention to a different bank failure, to the very recent trial of its president, and his conviction, attended by very great publicity, despite the fact that it is not in the remotest degree related to the case being tried. It was highly prejudicial in the instant case when the intent of defendant, a very close question, became the pivotal point in the case. It is true that the trial judge expressly instructed the jury to disregard the remarks, but the damage was done. An ink spot may be blotted out in part, but the stain still remains. We have at times refused to reverse cases on account of improper statements of counsel made

in the heat of argument, when the entire record shows that the result has not been affected thereby and that there has been no miscarriage of justice. 3 Comp. Laws 1929, § 15518. In the present case, however, the intent of defendant was the all important question for the jury to determine, and the verdict, based largely on the decision of an exceedingly close question, may well have been affected by the reference to the failure of another bank and the conviction of its president. The remarks were so highly prejudicial that we cannot say defendant had a fair trial.

In Michigan, it has been held that refusal by the trial court to sustain an objection to references to another unrelated crime constitutes reversible error, if such references tend to exert a prejudicial effect upon the jury. *People* v. *Nixon,* 243 Mich. 630. Cautionary instructions by the court may be insufficient to cure the damage done. *Burrows* v. *State,* 38 Ariz. 99 (297 Pac. 1029); *People* v. *McLaughlin,* 337 Ill. 259 (169 N. E. 206); *People* v. *Chrfrikas,* 295 Ill. 222 (129 N. E. 73). It is law in Michigan and most other jurisdictions that inflammatory remarks irrevelant to the issue may be so prejudicial that they cannot be cured by the instructions of the court to disregard them. *Solomon* v. *Stewart,* 184 Mich. 506 (Ann. Cas. 1917 A, 942); *Cluett* v. *Rosenthal,* 100 Mich. 193 (43 Am. St. Rep. 446); *Hillman* v. *Railway,* 137 Mich. 184; *Wells* v. *Moses,* 87 Minn. 432 (92 N. W. 334); *Dannals* v. *Sylvania Township,* 255 Pa. 156 (99 Atl. 475); *Bloodgood* v. *Whitney,* 200 App. Div. 56 (192 N. Y. Supp. 383); *Seaboard Air Line R.* v. *Smith,* 53 Fla. 375 (43 South. 235); *Ernst Zobel Co.* v. *Canals,* 188 App. Div. 231 (176 N. Y. Supp. 537); *Mittleman* v. *Bartikowsky,* 283 Pa. 485 (129 Atl. 566); *Robinson* v. *United States* (C. C.

A.), 32 Fed. (2d) 505 (66 A. L. R. 468). See, also, 78 A. L. R. 1438 for a complete annotation of this subject.

The conviction is set aside, and a new trial ordered.

McDONALD, C. J., and POTTER, FEAD, and WIEST, JJ., concurred with BUTZEL, J.

SHARPE, J. (*dissenting*). The remarks of one of the attorneys for the defendant, referred to by Mr. Justice BUTZEL, might well be set forth at greater length. He stressed the fact that the failure of the smaller banks, of which defendant's was said to be one, was brought about by the action of the larger banks. He stated that his own fortune of a million dollars had been wiped out and that of the assistant prosecuting attorney as well, and that carpenters, butchers, and others had "all been cleaned." In closing, he said:

"I hope when you come out of the jury room that you will face the situation as I want you to face it; open the doors wide, and let the whole world know that this system which has been built up so as to make slaves out of you and I, and so as to destroy what you have accumulated, is the cause of George Kolowich's failure."

The remarks of the assistant prosecutor, quoted in Mr. Justice BUTZEL's opinion, may well be said to have been in answer thereto.

This court has the right to assume that the jurors impaneled to try this case were men and women of intelligence. We also have the right to assume that each one of them knew about the Allan trial, that they had read about it in the daily papers, and had talked about it in their families and among their

friends, and knew that he had been convicted. The remark was unfortunate, and should not have been made. On objection by defendant's counsel, the trial court said to the jury:

"The court will instruct you, members of the jury, that that last remark you will entirely eradicate from your mind. We are trying but one person in this trial. You are not concerned with the trial of any other individual. You will eliminate that from your minds. You are not to be biased by it, or not be prejudiced by it, nor will it make you sympathetic. You are just to disregard it entirely."

I concur with Mr. Justice BUTZEL in holding that the trial was otherwise free from reversible error. But, in my opinion, it cannot be said that it affirmatively appears that "the error complained of has resulted in a miscarriage of justice." 3 Comp. Laws 1929, § 17354.

The judgment should be affirmed.

CLARK and NORTH, JJ., concurred with SHARPE, J.

WORSHAM *v.* McCALL.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—FORMER DECISION MODIFIED.

Former decision denying specific performance of agreement in land contract to gravel streets and lay sidewalks in whole subdivision, where defendant owned vendor's interest in only one lot, is modified, on rehearing, and permission given plaintiff to file bill for cancellation of contract and accounting against proper parties or to institute action at law to recover any damages plaintiff may have sustained.

Appeal from Oakland; Gillespie (Glenn C.), J. Submitted June 17, 1932. (Docket No. 25, Calendar No. 35,944.) Decided September 16, 1932. Submitted on rehearing February 3, 1933. Former opinion modified March 2, 1933.

Bill by Thomas S. Worsham against Anna McCall for specific performance of a land contract. Bill dismissed conditionally. Plaintiff appeals. Affirmed conditionally.

Lindley & Delaney, for plaintiff.

Edward J. Fallon (*Abraham Satovsky,* of counsel), for defendant.

ON REHEARING.

NORTH, J. This case is before us on rehearing. Former decision is reported in 259 Mich. 630. The sole relief sought by plaintiff in his bill of complaint is specific performance. For reasons stated in our former opinion plaintiff was not entitled to the relief prayed. However, upon further consideration incident to this rehearing, we are of the opinion that by affirming the decree entered in the circuit court dismissing the bill of complaint on condition defendant would lay a sidewalk and gravel the street in front of plaintiff's lot, an inequitable result was accomplished, unless plaintiff is granted the option of seeking relief in a proper proceeding. Plaintiff's contract provides for walks and graveled streets throughout the whole subdivision. To require him to accept less is to change the terms of his contract to his disadvantage. This the court does not have the power to do. In view of the complication resulting from a breach of the contract by each of the

parties to this suit, it was quite impossible to do exact equity in a suit for specific performance. The decree entered provided for as nearly an equitable disposition of the controversy as was possible in view of the specific remedy sought and the record presented.

Upon rehearing, plaintiff claims he is entitled to cancellation and an accounting. The record before us is not sufficiently full to render possible consideration of all questions pertinent to cancellation. Something akin to cancellation seems first to have been injected into the case by plaintiff incident to settling the decree in the circuit court. He then tendered a proposed decree which provided that he should assign his vendee's interest to defendant, and thereupon she should pay plaintiff all sums theretofore paid on the contract purchase price regardless of whether payments were made to defendant or her predecessors, and also regardless of whether they were made by plaintiff or the prior vendees through whom he holds. The circuit judge refused to enter the proposed decree; and, without amending his bill of complaint or amplifying the proof in the case, plaintiff appealed. As stated above, the record before us is not sufficient for an adjudication of the equities incident to cancellation and an accounting. Without definitely so holding, it may well be questioned whether the necessary parties defendant are before the court to enable plaintiff to secure a full accounting.

To avoid a possible inequitable result, plaintiff will be given the option of filing in the circuit court in chancery, within 30 days after decision herein, a bill for cancellation and accounting against proper parties defendant, or of instituting a suit at law to recover any damages he may have sustained. In default of plaintiff instituting either of such pro-

ceedings, a decree will be entered herein in accordance with the original opinion; but in the event plaintiff exercises the option of instituting further proceedings in the circuit court, a decree will be entered in the instant case dismissing plaintiff's bill of complaint, with costs of this court to appellee.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, FEAD, WIEST, and BUTZEL, JJ., concurred.

REICHERT *v.* STATE BANK OF BEAVERTON.

APPEAL OF FINCH.

BANKS AND BANKING—BANK COLLECTION CODE—COLLECTIONS ON LAND CONTRACT—PREFERRED CLAIM.

Under bank collection code (Act No. 240, Pub. Acts 1931, § 13, subd. 3), money collected by bank on land contract left with it by customer for collection and not paid over at time bank went into hands of receiver was properly disallowed as preferred claim against general assets of bank; purpose of act being to take care of checks and negotiable instruments in course of collection.

Appeal from Gladwin; Smith (Guy E.), J. Submitted January 19, 1933. (Docket No. 93, Calendar No. 36,859.) Decided March 2, 1933.

Receivership proceedings by Rudolph E. Reichert, State banking commissioner, against State Bank of Beaverton. On petition of Vern Finch for allowance of an item as a preferred claim against the cash assets. Petition denied. Petitioner appeals. Affirmed.

Neithercut & Neithercut, for appellant.

BUTZEL, J. Vern Finch, petitioner herein, deposited a land contract with the State Bank of Beaverton. The bank was to collect payments thereon and remit them to petitioner. On October 3, 1931, the bank collected $50, and on November 3, 1931, a like amount. On November 4, 1931, the bank sent petitioner a draft on a Bay City bank for $49.75, covering its first collection, minus fee. It also gave petitioner a cashier's check for $49.75 after the bank had been closed by the banking commissioner.

Neither the draft nor the cashier's check were paid, owing to the failure of the bank, and petitioner filed a petition in the pending case of *Reichert* v. *State Bank of Beaverton,* a Michigan banking corporation, and asked that the sum of $99.50 be allowed as a preferred claim against all the assets of the bank. The trial judge allowed such claim as a preferred claim against the cash assets of the bank as they existed at the date the receiver took possession, but not as against the other assets of the bank. Petitioner claims that he should have been allowed a preferred claim against all of the assets. It appears very doubtful whether there will be any cash assets, as of the date of the receivership, from which petitioner's claim can be paid.

Petitioner bases his claim entirely upon subparagraph (3) of § 13 of Act No. 240, Pub. Acts 1931. The trial judge filed no written opinion, and the attorney for the appellee has filed no brief. Act No. 240 is an act to expedite and simplify the collection and payment by banks of checks and other instruments for the payment of money. The title to the act, as well as its provisions, plainly indicate that it was enacted solely for the purpose of taking care of checks and negotiable instruments in transit

and in course of collection. We do not believe that it covers collections on a land contract. The act deals solely with banking paper, such as drafts, checks, and notes. The question arose in *Reichert* v. *Fidelity Bank & Trust Co.*, 261 Mich. 107, in which, on page 112, Act No. 240, *supra,* was referred to as the "bank collection code." The court held that it applied to funds coming into the actual possession of an insolvent bank by reason of its having acted incident to the collection or forwarding of commercial paper. We believe that the act permits of no other construction.

In *Reichert* v. *Fidelity Bank & Trust Co., supra,* we also stated as a general proposition that preferences and priorities should be avoided, except where distinctly provided for by law or by agreements and circumstances under which the insolvent received the particular funds. In the cited case, preference was denied as to funds that had been deposited for the sole purpose of meeting maturing mortgage bond and coupon payments when they became due. We believe that the land contract in the instant case occupies no more equitable position.

There may be some question as to whether appellant was entitled to a preference of any kind, inasmuch as the cash assets are less than the total of preferred claims, according to the record. However, as no objection has been made by appellee to the order permitting the preference out of cash assets, possibly due to the absence of any tangible sum, we need not further comment upon the question.

The order of the lower court denying preference as to the general assets is affirmed, without costs.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and WIEST, JJ., concurred.

In re WARMBIER'S ESTATE.

WARMBIER *v.* WARMBIER.

1. WILLS—CONSTRUCTION—AMBIGUITY—WHEN EXTRINSIC EVIDENCE ADMISSIBLE.

Where meaning of words in will is so plain that no uncertainty arises, extrinsic evidence is not admissible, but where there is obscurity or ambiguity in language, so that testator's intent becomes doubtful, extrinsic evidence is admissible to discover said intent.

2. SAME—ANNUITY—TOTAL SUM BEQUEATHED.

Provisions of will for "an annuity in the gross amount of $1,000 for each of said living beneficiaries, said annuity to be paid in monthly instalments over a period of five years," being ambiguous, extrinsic evidence was properly admitted to show that testator intended to provide total sum of $1,000 for each beneficiary named, said sum to be paid over period of five years in monthly payments.

Appeal from Wayne; Marschner (Adolph F.), J. Submitted January 13, 1933. (Docket No. 151, Calendar No. 37,039.) Decided March 2, 1933.

In the matter of the estate of Charles Warmbier, deceased. On petitions of Elizabeth M. Warmbier, as guardian, for payments alleged to be due under the will and of Charles Warmbier and another, executors, for construction of the will. From order of probate court for guardian, the executors appealed to the circuit court. Reversed. Guardian appeals. Affirmed.

John R. McInerney (*Peter P. Boyle,* of counsel), for appellants.

Miller, Canfield, Paddock & Stone, for appellees.

BUTZEL, J. The will of Charles Warmbier contains the following provisions:

"I hereby direct my executor to procure for Charlotte Warmbier and Betty Warmbier, daughters of my nephew, Charles Warmbier, and also for Pansy Thon, daughter of my niece, Elsie Thon Schulz, or for such of them as are living at the time of my decease, an annuity in the gross amount of $1,000 for each of said living beneficiaries, said annuity to be paid in monthly instalments over a period of five years, to be used, preferably, for the education of said annuitants. * * * And all duties and transfer charges and expenses which may be levied or incurred in connection with any annuities, bequests, legacies, or devises, contained in this, my will, shall be paid out of the *corpus* of my estate by my executor."

The sole question involved in the present case is whether the quoted clause provides for an annual payment of $1,000 a year to each of the annuitants during each year over the five-year period, or whether each is to receive the total sum of $1,000, payable in monthly instalments over a period of five years. Were not the word "annuity" limited by the words "in the gross amount of $1,000," appellants would be correct in invoking the rule that extrinsic evidence may not be introduced where the meaning of the words is so plain that no uncertainty arises. However, where there is any obscurity or ambiguity in the language, as in the present instance, so that the intent of the testator becomes doubtful, it is proper to permit extrinsic evidence to discover the testator's intent. *Sondheim* v. *Fechenbach,* 137 Mich. 384; *Van Gallow* v. *Brandt,* 168 Mich. 642; *Holmes* v. *Connell's Estate,* 207 Mich. 663. The testimony leaves no doubt whatsoever but that the testator only intended to give each of the annuitants

$1,000, payable over the term of five years. He had made a previous will, giving each of them the sum of $1,000, but he feared that they might spend this sum unwisely if it was given to them at one time. He did not desire that the amount of each legacy be increased in the present will, but that he did wish to have it paid in monthly instalments over a period of five years, is clear. The unfortunate language of those who assisted in the preparation of the will has led to the difficulty in interpretation. The trial judge correctly entered a judgment directing that the executors procure an annuity contract for the total sum of $1,000 for each of the beneficiaries named in the paragraph, such sum to be paid over a period of five years in monthly payments.

Judgment is affirmed, with costs to appellees.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and WIEST, JJ., concurred.

PEOPLE *v.* HOAGLIN.

1. CRIMINAL LAW—EVIDENCE—CONFESSIONS—FRAUD—COERCION.

In prosecution for failing to render reasonable assistance after automobile accident, defendant's signed statement, made next day after accident, was properly admitted over her objection that she should have had benefit of counsel when making it, in absence of showing of fraud or coercion; its value as evidence being for jury.

2. SAME—CONTINUANCE—ABSENT WITNESS—ABUSE OF DISCRETION—COURT RULE.

Court's refusal to grant defendant's motion to continue case, on ground of inability to subpœna witness, was not abuse of discretion, where affidavit annexed to motion did not show what efforts had been made to locate witness or what he would swear to were he present (Court Rule No. 36 [1931]).

3. SAME—UNFAVORABLE PUBLICITY.

Motion for continuance, based on claim that unfavorable publicity necessitated delay until public excitement died down, was properly denied, where no proof was offered to substantiate said claim.

4. SAME—ACCESSORY—TRIAL—INSTRUCTION—MOTOR VEHICLES.

Instruction that, in order to convict defendant charged with aiding and abetting violation of motor vehicle law (1 Comp. Laws 1929, § 4722), it would be necessary to convict defendant charged as principal, was correct, where latter, under statute, was only possible principal.

5. SAME—MOTOR VEHICLE ACCIDENT—DUTY TO RENDER ASSISTANCE—STATUTES.

Driver of automobile and passengers therein are not excused from rendering every possible assistance to pedestrian struck by car because they think him to be dead, rendering medical assistance futile, since it is not within their province to determine whether or not victim is dead, and even if he is, there is duty to care for remains (1 Comp. Laws 1929, § 4722).

6. SAME—DELEGATION OF DUTY.

Driver of automobile striking pedestrian did not perform statutory duty to render assistance by instructing passengers in car to go back and take care of victim and not leaving scene of accident until after receiving assurance that victim was dead, since responsibility may not be discharged by such delegation.

7. SAME—FAILURE TO STOP FELONY—FAILURE TO RENDER ASSISTANCE MISDEMEANOR—STATUTES.

Failure of automobile driver to stop, in event of accident involving injury or death to person, constitutes felony; but failure to render assistance to victim after stopping constitutes misdemeanor (1 Comp. Laws 1929, §§ 4722, 4745, 4748).

8. SAME—APPLICABLE PENALTY.

If any uncertainty develops as to which penal clause is applicable, accused is entitled to have lesser of two penalties administered.

9. SAME—ACCESSORY TO MISDEMEANOR.

It is proper to charge one aiding and abetting in commission of misdemeanor.

10. SAME—ACCESSORY TO MISDEMEANOR SUBJECT TO SAME PUNISHMENT AS PRINCIPAL.

Where principal is charged with misdemeanor, accessory charged with aiding and abetting in commission of same is subject to same punishment as principal, under common law as well as statute under which charge is laid (1 Comp. Laws 1929, § 17253).

11. SAME—ERRONEOUS SENTENCES.

Where offense of which defendants were convicted constitutes misdemeanor, but they were erroneously given punishment provided for felony, convictions are affirmed, on appeal, and case remanded to trial court for imposition of proper sentences (1 Comp. Laws 1929, §§ 4722, 4745, 4748).

Appeal from Calhoun; Hatch (Blaine W.), J. Submitted January 12, 1933. (Docket Nos. 157, 158, Calendar Nos. 36,266, 36,267.) Decided March 2, 1933.

Euretta Hoaglin and Sam Daleo were convicted of failing to render reasonable assistance after a motor vehicle accident. Convictions affirmed; remanded for proper sentence.

Adrian F. Cooper and *George H. De Mund,* for appellants.

Patrick H. O'Brien, Attorney General, *George Murphy,* Assistant Attorney General, *William J. Kearney,* Prosecuting Attorney, and *Horace M. Mechem,* Assistant Prosecuting Attorney, for the people.

BUTZEL, J. Defendant Euretta Hoaglin was charged with being the driver of a car involved in an accident resulting in injury and death to Charles Kreger, and with knowingly and wilfully failing to render him reasonable assistance, including the carrying of the deceased to a physician or surgeon for medical and surgical treatment, it being apparent that such treatment was necessary. Defendant Sam Daleo was charged with procuring, aiding, abetting, etc., in the commission of the crime, as defined in 1 Comp. Laws 1929, § 4722.

Upon the evening of October 6, 1931, defendant Hoaglin, 21 years of age, and in the 11th grade of the Albion high school, met a friend, Weltha Gettys, who was anxious to visit an injured brother at the Gettys home some distance from Albion. Miss Gettys made the acquaintance of one Jim Thompson as he was seated in the car of defendant Sam Daleo, and the latter agreed to transport the girls to the Gettys home in the country. Shortly after they started for their destination, Euretta was permitted to drive the car, Daleo seating himself beside her, while Miss Gettys and Thompson occupied the rear seat. Euretta drove the car at a rate between 40 and 45 miles an hour. At a point on the Duck Lake road about five miles from Albion, the car struck Kreger, who was walking in a northerly direction near the center of the hard-surfaced road. The car was brought to a stop and Daleo and Thompson went back to where Kreger was lying. Euretta remained seated in the car, and Miss Gettys stood outside, near the rear door. There were no eyewitnesses to the accident except the defendants and their companions. They testified that they stopped for some time, Weltha stating that it was from five to six minutes, and Euretta claiming it was "for

ages.'' A farmer living nearby stated he heard the crash, and that about 10 minutes elapsed before he heard the car start up again.

Daleo testified that after he and Thompson examined Kreger's body, as it lay in the highway, they carried it to the side of the road; that Thompson felt the injured man's wrist and detected no pulse; and that Daleo bent down and put his ear close to the body, but found no signs of life. They concluded that Kreger was dead, and left him lying at the side of the road with his head turned towards the gravel. The car itself was damaged and showed that there had been a very severe impact. The glass in the headlights was broken, and large dents appeared in the radiator and mud guards.

A hasty consultation was held by the occupants of the car, with the result that they determined to leave the scene of the accident as rapidly as the car would take them. They drove to the Gettys home and then to Eaton Rapids, where Daleo 'phoned his father for assistance, as they were having difficulty with the car. Daleo's father and brother drove to Eaton Rapids and towed the car back to Albion. Daleo made an effort to hide the car until it was repaired, and the girls were cautioned to keep quiet about the entire affair. If asked about the damage to the car, they were to attribute it to a collision with a truck near Dimondale.

The following morning the body was found, and an investigation followed immediately. The coroner testified that the body showed very severe injuries, including a fracture of the occipital bone of the skull. Sufficient facts were discovered to reveal the participants in the accident. An officer went to the school Euretta attended and brought her to the police station, where she voluntarily made and

signed a statement giving her version of the accident. Thompson disappeared immediately after the accident, and Daleo testified that he did not know where he had gone. Thompson was an acquaintance of Daleo, and conversed with him in the Italian language immediately after the accident.

Defendant Hoaglin was charged with the offense set forth in the information, which also charged Daleo with being the owner of the car and being then and there present at the time of the accident and having then and there procured, counseled, aided, and abetted defendant Hoaglin in the commission of the offense.

Numerous errors are claimed; many of them do not even merit discussion. The court properly admitted defendant Hoaglin's signed statement, made the day following the accident. He instructed the jury that, before giving it any consideration, they should determine that it was voluntary and not tainted with fraud, deceit, compulsion, etc. Defendant makes no claim that it had been obtained by actual coercion or fraud. She contends, however, that she should have had the benefit of counsel or friends at her side when she made and signed the statement. Her claim is insufficient to show either fraud or coercion. The statement was properly admitted, its value to be determined by the jury. *People* v. *Barker,* 60 Mich. 277 (1 Am. St. Rep. 501); *People* v. *Swetland,* 77 Mich. 53, 60; *People* v. *Biossat,* 206 Mich. 334; *People* v. *Johnson,* 215 Mich. 221; *People* v. *Treichel,* 229 Mich. 303; *People* v. *Greeson,* 230 Mich. 124.

There was no abuse of discretion by the court in its refusal to continue the case over the term on the motion of defendants, citing their inability to subpœna Thompson as a witness. Nine days elapsed

after the motion was made before the trial began. The affidavit annexed to the motion did not show what efforts had been made to locate the witness or what he would swear to were he present. Court Rule No. 36 (1931) was not complied with. *People* v. *Eamaus,* 207 Mich. 442; *People* v. *Burby,* 218 Mich. 46; *People* v. *Fillian,* 243 Mich. 28. The correctness of the court's decision is further shown by Daleo's own testimony that Thompson disappeared immediately after the accident and that he did not know what had become of him. The court also properly denied a continuance based on defendant's claim that unfavorable publicity necessitated a delay until public excitement had died down. No proof was offered by defendant to substantiate this claim.

The judge charged the jury that it would be necessary to convict defendant Hoaglin in order to find defendant Daleo guilty. Inasmuch as 1 Comp. Laws 1929, § 4722, applies to drivers only, the instruction was correct, as Miss Hoaglin was the only possible principal, and Daleo was charged with aiding and abetting. *State* v. *McFarland,* 158 Wash. 652 (291 Pac. 719). There is ample testimony to show that Daleo not only aided and abetted in everything that was done, but also that he took an active part in directing the actions of the parties after the accident.

It is further claimed that defendants were not guilty of any offense because they could not render reasonable assistance to Kreger, who was dead, and it would have been futile to take him to a physician or surgeon for medical and surgical treatment, inasmuch as it was apparent that such treatment was unnecessary. Aside from the cruel and inhuman manner in which Kreger's body was dragged across the highway and left exposed at the side of the road, it was not within the province of the driver or the

others to determine whether or not Kreger was dead at the time the body was abandoned. There may have been a spark of life remaining. Defendants are not physicians, and it was their duty to carry him to a physician or surgeon for medical and surgical inspection and treatment. Under a similar statute, it was held that, even assuming the immediate death of the victim, there still remained a duty to care for his remains. *People* v. *McKee,* 80 Cal. App. 200 (251 Pac. 675).

Defendant Hoaglin claims that she performed the statutory duty incumbent upon her by instructing Daleo and Thompson to go back and take care of the injured man. She did not leave the scene of the accident until after receiving their assurances that Kreger was dead. In *People* v. *Curtis,* 225 N. Y. 519 (122 N. E. 623), a prosecution brought under a similar statute, the defense was interposed that the defendant did not drive away until his companion had left the car, examined the injured party, and declared that he was all right. The court there held that his obligation could not be discharged by delegation to another party. Such a delegation of duty leaves defendant responsible for any dereliction on the part of those to whom she has intrusted the performance of her duties. The record in the present case shows that the defendants were principally interested in driving from the scene of the accident as rapidly as possible so as to avoid detection.

Defendant Hoaglin was sentenced to imprisonment for a term of one to five years, and defendant Daleo for not less nor more than five years. Some time after the sentence was rendered, and while the case was in process of being appealed to this court, the opinion of *People* v. *Thompson,* 259 Mich. 109, was handed down. In a manner deserving of the highest commendation, the prosecuting attorney, of

his own volition, has called the attention of the court to the question of whether the sentences imposed upon defendants are correct, in view of the provisions of 1 Comp. Laws 1929, §§ 4722, 4745, 4748, and their proper construction as set forth in *People* v. *Thompson, supra.*

Defendants were charged with a violation of that part of subdivision (c) of section 30 of the uniform motor vehicle act (1 Comp. Laws 1929, § 4722), requiring that the driver of a motor vehicle involved in an accident resulting in injury or death to any person "shall render to any person injured in such accident reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person." Section 4722, *supra,* provides as follows:

"Duty to stop and report in event of accident.

"(a) The driver of any vehicle involved in an accident resulting in injury or death of any person shall immediately stop such vehicle at the scene of such accident and any person violating this provision shall upon conviction be punished as provided in section fifty-six of this act.

"(b) The driver of any vehicle involved in an accident resulting in damage to property shall immediately stop such vehicle at the scene of such accident and any person violating this provision shall upon conviction be punished as provided in section fifty-three-a of this act.

"(c) The driver of any vehicle involved in any accident resulting in injury or death to any person or damage to property shall also give his name, address, and the registration number of his vehicle, also the name and address of the owner, and exhibit his operator's or chauffeur's license to the person

struck or the driver or occupants of any vehicle collided with and shall render to any person injured in such accident reasonable assistance including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person.

"(d) The driver of every motor vehicle involved in an accident resulting in a vehicle or vehicles becoming so disabled as to be incapable of being propelled in the usual manner, or resulting in personal injury or death of any person shall report such accident to the nearest or most convenient police station or police officer within forty-eight hours after such accident. The officer receiving such report shall forthwith forward the same to the commissioner of public safety on forms to be prescribed by him. Such report shall not be available for use in any court action, but it shall be for the purpose of furnishing statistical information as to the number and cause of accidents."

Section 56 of the motor vehicle act (1 Comp. Laws 1929, § 4748) is entitled: "Penalty for failure to stop in event of accident involving injury or death to a person." The section makes the violation of "section thirty of this act relative to the duty to stop," a felony. Section 53 of the same act (1 Comp. Laws 1929, § 4745) provides that any other violation, unless designated as a felony, constitutes a misdemeanor, the punishment of which, if a first offense, is a maximum term of 10 days of imprisonment in the county jail, or a fine of not more than $100. Defendants were not charged with a failure to stop. It is quite conclusive that they did stop. They, therefore, are charged with a failure to give assistance under subdivision (c), section 30, *supra*. This is a misdemeanor. *People* v. *Thompson, supra.*

The prosecuting attorney has attempted to tie up subdivision (a) with subdivision (c) of section 30, *supra.* He shows that, under the construction adopted in *People* v. *Thompson, supra,* if a driver does not stop after causing the slightest injury to another, he is guilty of a felony. If, however, the driver does stop, after causing a most severe injury which may prove fatal if the injured person is not cared for, and he refuses or neglects to give proper assistance, he is guilty of a misdemeanor only. No matter how necessary the change of statute law may be, it must be brought about by legislative enactment. Even assuming merit in the State's claim that section 56 applied to all of section 30, except section 30 (b), the legislative intent is not at all clear. If any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of two penalties administered. *People* v. *Lockhart,* 242 Mich. 491. The conviction was proper, but the sentences improper.

Defendant Daleo claims that inasmuch as defendant Hoaglin has only been found guilty of misdemeanor, he cannot be convicted of aiding and abetting in the violation of the statute, as charged in the indictment. It is proper to charge one with aiding and abetting in the commission of a misdemeanor. The rule is fully set forth in the learned opinion of Justice CHRISTIANCY, in *Shannon* v. *People,* 5 Mich. 71, on pages 86 and 87. See, also, *Commonwealth* v. *Stevens,* 10 Mass. 181; *United States* v. *Gooding,* 12 Wheat. (25 U. S.) 460; *Brannan* v. *State,* 43 Ga. App. 473 (159 S. E. 296); *United States* v. *Snyder,* 14 Fed. 554. It was proper, therefore, to charge Daleo with aiding and abetting in the commission of the misdemeanor, and, found guilty, he is subject to the same punishment as the principal under the

common law as well as under 3 Comp. Laws 1929, § 17253.

The judgments of conviction are affirmed, the sentences are set aside, and the cases remanded to the trial court for the imposition of new sentences.

McDONALD, C. J., and CLARK, SHARPE, and WIEST, JJ., concurred with BUTZEL, J. POTTER and FEAD, JJ., concurred in the result. NORTH, J., did not sit.

SLAVIN v. CITY OF DETROIT.

STANTON v. SAME.

1. MUNICIPAL CORPORATIONS—APPOINTMENT AND REMOVAL OF POLICEMEN AND FIREMEN—DETROIT CHARTER.

   While council of city of Detroit may indirectly control number of officers employed by limiting appropriation, right of appointment and removal, increase and decrease of forces, under city charter, remains in hands of police commissioner and board of fire commissioners, respectively.

2. SAME—CIVIL SERVICE PROVISIONS—REDUCTION OF FORCE.

   That appointments to fire department force of city of Detroit are regulated by civil service provisions in city charter, *held*, not to affect dismissals made for reasons of economy.

3. SAME—MANDAMUS—REINSTATEMENT.

   Members of police and fire departments of city of Detroit, who were relieved of duty by order of police commissioner and board of fire commissioners, respectively, in good faith and in interest of economy, are not entitled to writ of mandamus directing their reinstatement, on ground that city council had sole right to order their dismissal.

Appeal from Wayne; Warner (Glenn E.), J., presiding. Submitted January 25, 1933. (Calendar Nos. 36,908, 36,909.) Decided March 2, 1933.

Separate petitions by Stanley Slavin and others and Warren Stanton to compel the City of Detroit, its mayor, and officers, to reinstate plaintiffs as policemen and fireman, respectively. Writs denied. Plaintiffs appeal. Affirmed.

Augustus C. Troden, George A. Lumsden, and *George A. Porter,* for appellants.

Clarence E. Wilcox, Corporation Counsel, *Nathaniel E. Goldstick* and *Paul T. Dwyer,* Assistants Corporation Counsel, for appellees.

BUTZEL, J. Stanley Slavin, Steven J. Martek, and Harry E. Peterson, relators, appeal from an order denying a writ of mandamus directing the city of Detroit, Frank J. Murphy, its mayor, and James K. Watkins, its police commissioner, respondents, to reinstate relators as patrolmen on the police force. Relators were relieved from duty without pay, but not discharged, by virtue of an order issued by the police commissioner on March 8, 1932, stating that the police department had been ordered to effect a saving of $122,000 in operating expenses between March 8th and June 30, 1932, and that the only method of bringing this about was through a reduction of the personnel by releasing from duty men who had seen the shortest service in the department. In accordance with the order, 166 members of the force, including the relators, were relieved from active duty, without pay and until further notice.

No fault is found with the method in which relators were laid off, nor do they deny the necessity

for the savings the commissioner was ordered to make. They contend, however, that sufficient funds were provided by appropriation to pay the entire force up to June 30, 1932, and that it became the duty of the commissioner to use up the appropriation as made before instituting economies, and further, that the common council, the legislative body of the city of Detroit, had the sole right to order a decrease in the number of men employed on the police force.

The respondents show that the relators and others were relieved of duty without pay solely on account of a shortage of funds in the treasury of the city, and that, had they not been so relieved, there would not have been funds available with which to continue payment of the force that remained. Respondents seek, by motion, to amend the record by showing specifically very large delinquencies in the payment of city taxes. We need not consider this motion, for the fact that economies were necessary is not disputed. Relators also claim that they differ from ordinary employees of the city because of the fact that they are officers who have taken an official oath of office.

In a companion case, Warren Stanton, a city fireman, seeks reinstatement by the board of fire commissioners through similar proceedings. Relator was certified to the fire commissioners by the civil service commission of the city of Detroit. He and 124 other members of the fire department were laid off because of lack of funds at about the same time as the members of the police. The questions raised in both the policemen's and fireman's actions are similar. The cases were argued together, and this opinion applies to both cases, except as otherwise noted.

It is claimed that, under the charter provisions of the city of Detroit, neither the police commissioner nor the board of fire commissioners had a right to reduce their respective forces. Pertinent provisions of the Detroit city charter are as follows:

Title 4, chap. 21, § 5, subdivision (c) (referring to the police commissioner):

"May change the titles of police officers and employees under him, * * * designating such titles as he may see fit, creating whatever offices and positions he may deem necessary for the proper organization and conduct of the department."

Title 4, chap. 15, § 5 (referring to the board of fire commissioners):

"The board shall appoint a secretary, and in accordance with the provisions of this charter relative to civil service, a chief of the fire department, a fire marshal, and such other assistants and employees as may be necessary."

Under these provisions, the police commissioner may create whatever offices and positions he may deem necessary for the proper organization and conduct of the department, and the board of fire commissioners may appoint the fire chief, fire marshal, and such other assistants and employees as may be necessary. Plaintiffs contend, however, that the appointive power and the right to increase or decrease the personnel lies with the council because of its power to fix the budget and the appropriations each year. While it is true that the council may indirectly control the number of officers and employees by limiting the appropriation, the right of appointment and removal, increase and decrease of the forces, still remains in the hands of the police com-

missioner and the board of fire commissioners respectively.

It is undisputed that the "lay-off" was effected in good faith when it became obvious that the entire appropriations would not be available. Plaintiffs claim, however, that the power to reduce the respective forces was solely in the council, and that a resolution or an ordinance was essential in order to achieve the desired result. They rely upon an extremely brief opinion in *State, ex rel. Rowling,* v. *Mayor of Butte,* 43 Mont. 331 (117 Pac. 604), and on *Neumeyer* v. *Krakel,* 110 Ky. 624 (62 S. W. 518). In the latter case, in the decision of which the court divided, the charter differed materially from that of the city of Detroit. A specific number of policemen was provided by ordinance and the statute authorized the board of safety to increase its force only "provided the general council shall have previously made an appropriation for that express purpose." It was held that, under the particular provisions of that charter, the power was vested in the general council to regulate by ordinance the number of policemen, the officers to be appointed, and the salaries to be paid. Some support for plaintiffs' contentions may also be found in *Oldham* v. *Mayor and Aldermen of Birmingham,* 102 Ala. 357 (14 South 793); *State, ex rel. Miller,* v. *Baxter,* 171 Wis. 193 (176 N. W. 770); and *O'Neill* v. *Williams,* 53 Cal. App. 1 (199 Pac. 870). In all of these cases, it will be found that the charters differed from that of the city of Detroit, in which the power of appropriation affords the council its only means of control over the size of its police and fire personnel.

In *State, ex rel. McDermott,* v. *Wilkinson,* 88 Conn. 300 (90 Atl. 929), a dispute arose as to whether the power of appointment rested with the town meeting

or the selectmen. The act creating the board of selectmen directed them to organize and maintain a fire department and make necessary rules and regulations therefor. No specific provisions were made as to the personnel. It was held that—

"The imposition of this duty carried with it by necessary implication the power of selection of members of the department, in the absence of other provision therefor in the act."

The court further quoted from *State, ex rel. Reiley,* v. *Chatfield,* 71 Conn. 104 (40 Atl. 922):

"It is the common rule that where the power of appointment is conferred in general terms without restriction, the power of removal at discretion and at the will of appointing power is implied, and always exists unless restricted and limited by some other provision of law."

The Connecticut case seems to be directly in line with the facts in the present case, except that the language in the charter of the city of Detroit indicates quite definitely that the power of appointment or removal, increase and decrease, rests with the police and fire commissioners, inasmuch as they are given the authority to "create" and "employ" offices and officers as needed. In *Pendergast* v. *International Typographical Union of North America,* 261 Mich. 553, we held that—

"It would seem that the power to determine the number necessary carries with it the power to reduce the number when necessary."

It has generally been held that removals are justified for reasons of economy. *Venable* v. *Board of Police Commissioners,* 40 Ore. 458 (67 Pac. 203); *Matter of Lazenby* v. *Elmira Board of Police,* 76

App. Div. 171 (78 N. Y. Supp. 302), wherein it was held:

"The police force of the city of Elmira can only be paid by appropriations made by the common council of the city. For the year in which the discharge was attempted the appropriation for the police force was $29,000. To pay the police force as it stood at the time of the adoption of this resolution the sum of upwards of $33,000 was required. It became necessary to reduce that force. * * * The good faith of the police board in discharging Lazenby for purposes of economy is well sustained in the record."

To similar effect are *Lethbridge* v. *Mayor, etc., of New York,* 133 N. Y. 232 (30 N. E. 975); *Wyse* v. *Board of Police Commissioners,* 68 N. J. Law, 127 (52 Atl. 281).

In coming to our conclusion, we have not been unmindful of the fact that appointments to the fire department force are regulated by civil-service provisions in the charter, which, however, do not affect dismissals made for reasons of economy. See *Swantush* v. *City of Detroit,* 257 Mich. 389; *Owen* v. *City of Detroit,* 259 Mich. 176; *Durkin* v. *Newark Board of Fire Com'rs,* 89 N. J. Law, 468 (99 Atl. 432); *Essinger* v. *New Castle,* 275 Pa. 408 (119 Atl. 479). As to the location of the power of appointment and removal of firemen, see *Delaney* v. *Detroit Board of Fire Commissioners,* 244 Mich. 64.

The order of the lower court, denying relators' petitions for writs of mandamus, is affirmed, without costs.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and WIEST, JJ., concurred.

FEDERAL LAND BANK OF ST. PAUL *v.* EDWARDS.

1. MORTGAGES—SETTING ASIDE FORECLOSURE SALE—MISTAKE—EQUITY—JURISDICTION.

   Where mortgagee, without knowing that buildings on mortgaged property had burned, thus reducing its value much below amount of mortgage, at foreclosure sale bid amount of mortgage, court of equity has power to grant relief from said mistake by setting aside foreclosure sale.

2. SAME—JUDICIAL SALES—CAVEAT EMPTOR—INSURANCE.

   In suit by mortgagee to set aside foreclosure sale, on ground that it bid in property for amount of mortgage in ignorance of fact that buildings had previously burned, insurance company may not invoke doctrine of *caveat emptor*, since said doctrine, with reference to judicial sales, relates only to matters of title ascertainable by inspection of public records.

3. INSURANCE—FRAUDULENT CONCEALMENT—CANCELING POLICY.

   Where insurance company, on issuing policy, did not ask insured whether mortgage on insured property, of which it had knowledge, was being foreclosed, failure of insured to volunteer said information may not be made basis for canceling policy, on ground of fraudulent concealment.

Appeal from Montcalm; Hawley (Royal A.), J., presiding. Submitted January 19, 1933. (Docket No. 57, Calendar No. 36,846.) Decided March 2, 1933.

Bill by Federal Land Bank of St. Paul against Paul V. Edwards and others to set aside a foreclosure sale. Decree for plaintiff. Defendant Farmers' Mutual Fire Insurance Company of Ionia, Michigan, appeals. Affirmed.

Glenn D. Mathews, for appellant.

Fred R. Everett, for appellee.

WIEST, J. In November, 1919, defendants Edwards gave plaintiff a mortgage for $2,300, on their 40-acre farm in Montcalm county, and obligated themselves to keep the buildings thereon insured for the benefit of the mortgagee. In May, 1931, plaintiff commenced foreclosure of the mortgage by advertisement and fixed the sale for August 25, 1931. July 27, 1931, defendants Edwards applied to defendant insurance company for insurance on the buildings and personal property, and on August 17, 1931, they paid the premium and the policy was issued in the sum of $3,500, on the buildings, and $800 on personal property, and, with mortgage clause attached, sent by the insurance company to plaintiff at St. Paul, Minnesota. August 24, 1931, the buildings on the farm were destroyed by fire, leaving the farm worth about $1,000. The next morning sale on foreclosure was had, and, without knowledge of destruction of the buildings, the property was bid in by plaintiff mortgagee for the amount of the mortgage, and a sheriff's deed was delivered and recorded. October 2, 1931, plaintiff filed the bill herein to set the foreclosure sale aside and restore the mortgage because of its bid under a mistake of fact and of loss thereby. Defendants Edwards appeared and commendably made no objection to granting such equitable relief. The insurance company was made a nominal party defendant, and it appeared and opposed relief to plaintiff, and, by cross-bill, sought cancellation of the insurance, alleging fraudulent concealment of the foreclosure proceeding by defendants Edwards in making the application for the insurance and failure of plaintiff to give it notice of such increased hazard. The insurance company prosecutes this appeal from the decree in the circuit vacating the foreclosure sale

and sheriff's deed thereunder, restraining payment of the insurance to other than plaintiff, and dismissing the cross-bill of the insurance company. In this court the insurance company contests the right of plaintiff to the relief granted, and as well submits the matter in its cross-bill for adjudication.

It is of little concern, if any, to the insurance company whether the foreclosure sale be vacated or not, if it is liable on its policy. However, it insists upon consideration of its cross-bill, and as all parties in interest have presented their proofs, we will pass on the points raised.

First, the vacation of the foreclosure sale. If it is not vacated plaintiff will suffer loss and defendants Edwards will profit thereby. Defendants Edwards do not seek any such unconscionable advantage. The foreclosure sale was held the morning after the fire and in entire ignorance on the part of plaintiff's representatives of such loss of the buildings, and such ignorance was not by reason of want of ordinary diligence. The sale was not at the mortgaged premises in the township of Bushnell, but at the courthouse in the city of Stanton, as the law required. Plaintiff, by the foreclosure, has injured no one, and now only seeks to avert a loss occasioned by a mistake of fact and which, if denied, will accord others, who do not even ask it, an unconscionable advantage. Plaintiff, without blame, laboring under a mistake of fact, bid in the property at the mortgage sale in a manner wholly unintended had the truth been known, and it is no more than plain justice, in a case like this, where the court can restore the *status quo,* without detriment to any one, and no interests of third parties are involved, for equity to grant relief from such a unilateral mistake of fact. See *Peterson* v. *First National Bank of*

Ceylon, 162 Minn. 369 (203 N. W. 53, 42 A. L. R. 1185); *Root* v. *King,* 91 Mich. 488.

"A sale may be vacated at the instance of a party injured thereby on the ground of his surprise, that is, where he justifiably relies on the existence of a certain state of facts, * * * and is guilty of no negligence or lack of attention, but discovers, too late to protect his interests, contrary facts which, had he known them in time, would have materially affected his actions with reference to the sale." 42 C. J. p. 234.

If the sale is not vacated the loss of the buildings will fall upon plaintiff.

Defendant insurance company invokes the doctrine of *caveat emptor.* That doctrine, with reference to judicial sales, relates to matters of title ascertainable by inspection of public records. The doctrine has no applicability to any issue in this case.

Should the policy be canceled? The by-laws of the insurance company provided:

"The form of application for insurance to be signed by the applicant shall be prescribed by the secretary, which application shall make part of the contract of insurance, and be considered as a warranty of the truth of all the facts stated therein."

The form of application, prepared by the secretary and signed by the Edwards, contained no inquiry about foreclosure proceedings. The agent who procured the application testified that he did not ask whether the mortgage was in default or being foreclosed. The secretary of the insurance company testified that, had he known of the foreclosure proceeding, the policy would not have been issued, but, during his eight years with the company, he

said he had issued lots of policies for the company upon mortgaged property, "and during all this time I don't remember asking any of the applicants whether or not mortgages were being foreclosed on their farms." Fraudulent concealment of the foreclosure cannot be based on a failure of the insured to volunteer information not sought by the insurer. If considered material to the risk, the company was aware of need of information on the subject, and if a failure to inquire be considered no excuse for failure of a farmer to volunteer the information, and, if he does not so volunteer, he is guilty of a fraudulent concealment, then a new meaning is accorded such term.

But the insurance company claims that, even though the question was not asked about foreclosure, there was a duty upon the insured to disclose that fact under a clause in the application, reading:

"And the said applicant covenants and agrees that the foregoing is a just, full, and true exposition of all the facts and circumstances affecting the risk of the property insured."

The questions in the application prepared by the insurance company were all properly answered. No question relative to foreclosure of the mortgage was asked, and no representation on that subject was made. If the insurance company considered a mortgage foreclosure material to the risk they should have included a question as to such fact in the application. The insured may not be held to have fraudulently concealed a fact that the insurer never inquired about.

"And where the insurer propounds questions to the applicant, and he makes full and true answers, he is not answerable for an omission to mention the existence of other facts about which no inquiry is

made of him, though they may turn out to be material for the insurer to know in taking the risk." 14 R. C. L. p. 1024.

The insurer is assumed to know the extent of the information desired, and to seek it, and cannot avoid liability by claiming there was concealment of the fact of foreclosure when it did not ask about such a matter and called for no such information in its written application. There was no fraudulent concealment.

The mortgage clause, attached to the policy and sent by the insurance company to plaintiff, provided:

"Loss or damage, if any, under this policy, shall be payable to the Federal Land Bank of St. Paul, a body corporate, of St. Paul, Minn., as mortgagee, as its interest may appear, and this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or the owner of the within-described property, nor by any foreclosure or other proceedings or notice of sale relating to the property."

The insured never saw the policy, for as soon as they paid the premium, on August 17, 1931, the insurance company mailed the policy to the plaintiff. The insurance company had a sort of gentlemen's understanding with the Federal Land Bank, under which it received notice of foreclosure proceedings in cases involving its risks, and complains of want of such notice in this instance. The fire occurred seven days after the policy was mailed at Ionia to the mortgagee at St. Paul. Inasmuch as the policy provided that "foreclosure or other proceedings or notice of sale relating to the property" should not invalidate the insurance, we pass the complaint as of no importance.

We find no fraudulent concealment by the insured, and the cross-bill of the insurance company was properly dismissed.

The decree in the circuit court is affirmed, with costs against the insurance company.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred.

BJORKSTRAND *v.* KLAGSTAD.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEPARTMENT'S FINDING OF FACTS CONCLUSIVE IF SUPPORTED BY EVIDENCE.
   Under workmen's compensation act (2 Comp. Laws 1929, § 8451), Supreme Court must adopt findings of fact of department of labor and industry as conclusive, unless there is no competent evidence to sustain such findings; but court may determine whether there is any competent evidence to support such findings, or whether inferences drawn are properly deducible from testimony.

2. SAME—QUESTION OF DEPENDENCY ONE OF FACT.
   Questions of dependency, total or partial, are determined by department in accordance with facts at time of injury (2 Comp. Laws 1929, § 8422).

3. SAME—HUSBAND AND WIFE LIVING APART—"JUSTIFIABLE CAUSE."
   Words "justifiable cause," as used in workmen's compensation act (2 Comp. Laws 1929, § 8422 [a]), providing that wife shall be conclusively presumed to be wholly dependent on husband from whom, at time of his death, department shall find that she was living apart for justifiable cause, have same meaning given them in separation and divorce cases.

4. SAME—TOTAL DEPENDENCY—PRESUMPTIONS.
Finding of department that wife who continued to live in Finland after husband came to America was not living apart from him for "justifiable cause," and therefore was not entitled to conclusive presumption of total dependency, under 2 Comp. Laws 1929, § 8422 (a), *held*, proper.

5. SAME.
In view of wife's testimony that she supported herself and children in Finland before and after her husband's death in America, finding of department that she was not totally dependent on husband at time of his death, as matter of fact, *held*, correct.

6. SAME—PARTIAL DEPENDENCY—ANNUAL EARNINGS.
In absence of showing as to amount of annual earnings of deceased, award for partial dependency may not be made (2 Comp. Laws 1929, § 8421).

Appeal from Department of Labor and Industry. Submitted January 10, 1933. (Docket No. 83, Calendar No. 36,363.) Decided March 2, 1933.

Johanna Bjorkstrand presented her claim against M. Klagstad and J. Nord, employers, and State Accident Fund, insurer, for accidental injuries resulting in the death of her husband, Edward Bjorkstrand. From order denying compensation, plaintiff appeals. Affirmed.

Uno S. Heggblom, for plaintiff.

Roy Andrus, for defendants.

BUTZEL, J. Johanna Bjorkstrand, plaintiff and appellant, a resident of Finland, appeals from the department of labor and industry's order denying compensation. Appellant's husband, Edward Bjorkstrand, now deceased, left her and their two children in 1923 and came to this country in search of em-

ployment. On December 10, 1928, while employed by M. Klagstad and J. Nord in the lumber woods near Manistique, Michigan, he suffered a severe injury from which he died the following month. At the time he was hurt, he was receiving $12 per week and board, which was estimated to be the equivalent of an additional $6 per week.

The sole questions on appeal are whether plaintiff is entitled to the conclusive presumption of total dependency, or, if not, was she, as a matter of fact, totally dependent for support upon the earnings of decedent, and if not, was partial dependency proven to such an extent as to justify an award. The testimony of plaintiff was taken by deposition in Finland. Pertinent interrogatories and answers are as follows:

"*Q.* How have you and your children been supported since Edward Bjorkstrand left Finland and came to America?

"*A.* With different handworks.

"*Q.* To what extent (give dates and months) has Edward Bjorkstrand supported you and your children?

"*A.* Totally during the whole stay around 12.000 marks, viz. as previously stated 1.881:—, 1.881:—, 1.850:—, 1.900:—, 1.600:—, 1.400:— and in ordinary letters, lost, amounts such as 20, 15 and 5 dollars, total 40 dollars. * * *

"1. *Q.* Do you own your home?

"*A.* Yes.

"2. *Q.* Do you own any land?

"*A.* Yes, 0.0347 standards of land (Mantal) of the farm Bjorkbacka No. 3, in the village Jussila of the parish of Munsala. The property is charged with a debt of 12.000 marks.

"3. *Q.* What is your occupation?

"*A.* Farming.

"4. *Q.* How do you support yourself and your children since your husband died?

"*A.* By farming.

"5. *Q.* What work did you do before he died?

"*A.* Farming also.

"6. *Q.* Who helped support you and your children after your husband went to America?

"*A.* I myself, with my farming, assisted by the support I got from my husband in America.

"7. *Q.* What was the last date upon which your husband sent you any money; how much money was it; where was it sent from; how was it sent? If any letter accompanied it, present the letter to the court.

"*A.* As far as I can remember, I received in 1926, or possibly in 1927, in a registered letter from my husband in Manistique, Michigan, a sum of money which changed into Finnish currency, amounted to about 1.400:—, and just before Christmas, 1927, in an ordinary letter 800 marks. The letters have been lost.

"8. *Q.* State the number of times you received money from your husband during the last year of his life, from December 10, 1927, to December 9, 1928. Give the names of the places from which the money was sent and the dates and amounts of the several remittances. Give the court any and all letters you now have which contained such remittances.

"*A.* .....

"9. *Q.* If your answers are not in harmony with your affidavit of June 18, 1930, please explain fully.

"*A.* ....."

Plaintiff testified that she received from her husband an amount slightly in excess of 12.000 marks during the period of over five years after he came to this country. This included 800 marks received by her just before Christmas in 1927.* When asked

* A Finnish mark was worth slightly over 2½ cents in 1927.

specifically the number of times she received money during the last year of his life, and the dates and amounts of these remittances, she failed to give any response.

In accordance with 2 Comp. Laws 1929, § 8451, we must adopt the findings of fact of the department of labor and industry as conclusive, unless there is no competent evidence to sustain such findings. *Meyers* v. *Railroad Co.,* 199 Mich. 134; *Luyk* v. *Hertel,* 242 Mich. 445; *Solomon* v. *Railway,* 221 Mich. 599. We may, however, determine whether there is any competent evidence to support such findings, or whether the inferences drawn are properly deducible from the testimony. *Ginsberg* v. *Burroughs Adding Machine Co.,* 204 Mich. 130; *Kirkley* v. *General Baking Co.,* 217 Mich. 307.

Under section 8422, questions of dependency, total or partial, are determined by the department of labor and industry in accordance with the facts at the time of the injury. Subsection (a) of section 8422 provides that a wife shall be conclusively presumed to be wholly dependent upon a deceased husband with whom she lives at the time of his death, or from whom, at the time of his death, the department of labor and industry shall find that she was living apart for justifiable cause or because he had deserted her. It has been held repeatedly that the words "justifiable cause," as employed in the statute, have the meaning given them in separation and divorce cases. *Kirkley* v. *General Baking Co., supra; Martilla* v. *Quincy Mining Co.,* 221 Mich. 525, 529 (30 A. L. R. 1249). See, also, *Kalcic* v. *Newport Mining Co.,* 197 Mich. 364; *Fierro's Case,* 223 Mass. 378 (111 N. E. 957); *Weber's Case,* 224 Mass. 86 (112 N. E. 485). The department's finding that

appellant was not entitled to the conclusive presumption of total dependency was a proper one.

The department also found that appellant was not totally dependent as a matter of fact. The correctness of this ruling is shown by plaintiff's testimony that she supported herself with different handworks after her husband went to America; that she did farming to support herself and her children before and after her husband's death; and that the total amount she received from her husband in over five years amounted to 12.000 marks plus $40 in American money, or approximately $340, an average of little more than $60 per year.

Plaintiff claims that she received 800 marks ($20) just before Christmas in 1927, but her failure to answer the interrogatories propounded to her on the cross-examination as to this point caused the department to find proof lacking as to any payments during the year preceding the death of the decedent. There is no evidence of any kind showing the annual earnings of deceased. Partial dependency must be determined under section 5, part 2, of the compensation act (2 Comp. Laws 1929, § 8421). Without a showing as to the amount of annual earnings, an award cannot be made for partial dependency. *Eckman* v. *Davidson Ore Mining Co.*, 252 Mich. 73, 75.

The order of the department of labor and industry is affirmed.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and WIEST, JJ., concurred.

DEHAAN *v.* WINTER.

1. PHYSICIANS AND SURGEONS—MALPRACTICE—NEGLIGENCE—QUESTION FOR JURY.

   In action for malpractice in setting and treating plaintiff's broken leg, whether defendant was guilty of negligence *held*, question of fact, under conflicting evidence.

2. SAME—WEIGHT OF EVIDENCE—EXCESSIVE VERDICT.

   In said action, verdict for plaintiff *held*, not against weight of evidence or excessive.

3. WITNESSES—CREDIBILITY—CROSS-EXAMINATION—INTEREST OF WITNESS.

   For purpose of affecting credibility, witness may be cross-examined as to his interest in event of suit, including contribution to expense of it.

4. SAME—RELATION OF WITNESS TO PARTIES.

   Any relationship of witness to one or more of parties of such nature as to induce bias or prejudice, and which in fairness should be known to jury, may be brought out on cross-examination.

5. SAME—PHYSICIANS AND SURGEONS—EVIDENCE.

   Permitting cross-examination of medical witness, in malpractice case, to bring out fact that he and defendant belonged to State medical society, and that part of dues paid was used to defend malpractice actions against members, *held*, not error.

6. PHYSICIANS AND SURGEONS—WITNESSES—EVIDENCE.

   If medical witness refers to text-book as his authority, then book referred to may be used to contradict him.

7. SAME—EVIDENCE—HEARSAY.

   Hearsay testimony of written or spoken opinions of other persons, whom jury have no means of examining as to their learning, honesty, or sources of special knowledge, may not be used to discredit testimony of medical witness, who has not referred to said persons or quoted them as authority.

8. Appeal and Error—Cross-Examination—Physicians and Surgeons—Witnesses.

Where medical witness named no book, publication, or medical journal as basis of his opinion, it was reversible error to attempt to cross-examine him as to article in medical journal and create impression that he was not in accord with eminent medical opinion or authority, although objection to said questions was sustained.

Appeal from Allegan; Miles (Fred T.), J. Submitted January 10, 1933. (Docket No. 74, Calendar No. 36,979.) Decided March 2, 1933.

Case by Edward DeHaan against William G. Winter for malpractice. Verdict and judgment for plaintiff. Defendant appeals. Reversed, and new trial granted.

Leo W. Hoffman, Clare E. Hoffman, and *Paul E. Cholette,* for plaintiff.

Norris, McPherson, Harrington & Waer (*Herbert V. Barbour,* of counsel), for defendant.

Clark, J. On its former appearance here, this case, an action to recover damages for malpractice in setting and treating plaintiff's broken leg, was reversed and new trial granted. See 258 Mich. 293, where facts are stated. It has been tried again. Plaintiff had verdict and judgment. Defendant has appealed. There must be reversal. As new trial is granted, we consider questions likely to arise again.

The former opinion held, in effect, an issue of fact for the jury and granted new trial. On this record, not significantly different from the former record, there is, under the rule of law of the case and independently thereof, an issue of fact in respect of

defendant's negligence. The elements of negligence charged are:

"Failure to properly support plaintiff's leg after the cast was applied.

"Failure to use traction aside from that furnished by the cast.

"Failure to take X-ray pictures.

"Advising plaintiff to bear some weight on the leg after the cast was removed."

No evidence to make issue on the first element is urged by defendant. When plaintiff regained consciousness after taking a general anæsthetic and after open surgical operation to reduce fracture, he found a plaster of Paris cast on his leg, which cast he testified was warm. Another witness testified that the warmth indicated chemical activity—the setting process going on in the cast—the cast was still green. Defendant adduced testimony that the cast was then sufficiently hard. A pillow was placed under the foot or heel, but, as plaintiff testified, there was no support under the leg. Plaintiff urges this to be malpractice and a probable cause of the bowed and imperfect condition of the leg. The conflicting testimony made an issue of fact as the trial judge correctly held. The remaining elements of negligence were clearly made issues for the jury by the positive and conflicting evidence, chiefly medical testimony, adduced by both sides and nothing will be gained by review thereof.

On this record, the verdict is not against the great weight of the evidence, nor is it excessive.

On cross-examination of one of defendant's expert medical witnesses, both he and defendant being members of the State medical society, the following was permitted over objection:

"*Q.* You belong to the State medical society?
"*A.* Yes.
"*Q.* What are the dues per year, doctor? * * *
"*A.* I think $15; I am not sure. * * *
"*Q.* I will ask you this doctor: Is it not true that a certain proportion of your annual dues to the medical association go into the defense fund for cases, for the defense of cases like this?
"*A.* If I am not mistaken, I cannot be positive about it, I think a small portion of the dues go to the defense of malpractice suits for members.
"*Q.* And you contribute to that fund?
"*A.* Yes, that way; myself, I have no personal interest in that fund.
"*Q.* No, I mean it is part of your dues.
"*A.* Simply part of my dues."

For the purpose of affecting credibility of the witness, he may be cross-examined as to his interest in the event of suit, including contribution to the expense of it.

"Any relationship to one or more of the parties to the action of such a nature as to induce bias or prejudice, and which it may be said in fairness should be known to the jury, may be brought out,"—quoting from 5 Jones, Commentaries on Evidence (2d Ed.), p. 4617, citing *Totten* v. *Burhans,* 103 Mich. 6.

Some illustrative cases permitting cross-examination are: *State* v. *Cerar,* 60 Utah, 208 (207 Pac. 597), and *Patterson* v. *Commonwealth,* 139 Va. 589 (123 S. E. 657), a contribution to expense of suit; *People* v. *Jo Fong,* 59 Cal. App. 259 (210 Pac. 548), connection with the same Chinese tong; *Styles* v. *Village of Decatur,* 131 Mich. 443, interest as a taxpayer; *Shoemaker* v. *Bryant L. & S. Co.,* 27 Wash. 637 (68 Pac. 380), interest as stockholder.

Permitting the cross-examination was not error.

Cases involving the injecting of collateral matter designed to "advise the jury that the real defendant was an insurance company" (*Holman* v. *Cole,* 242 Mich. 402), are not in point.

A question arises upon cross-examination of one of defendant's expert medical witnesses. The rule as stated in the former opinion is (258 Mich. 299):

"If a medical witness refers to a text-book as his authority, then the book referred to may be used to contradict him. *Marshall* v. *Brown,* 50 Mich. 148; *People* v. *Millard,* 53 Mich. 63; *Hall* v. *Murdock,* 114 Mich. 233; *Foley* v. *Railway Co.,* 157 Mich. 67; *Sykes* v. *Village of Portland,* 193 Mich. 86; *People* v. *McKernan,* 236 Mich. 226."

And syllabus of *Sykes* v. *Village of Portland, supra:*

"The trial court committed reversible error, on cross-examination of one of the medical experts of defendant, in permitting counsel, on interrogating the witness, to show what certain medical authorities claimed and that the question was differently answered by others, as the testimony tended to interject the opinions of persons who were not witnesses in opposition to the opinions of some of the witnesses of defendants, who were charged with negligently maintaining light wires."

It is apparent counsel for plaintiff understood the rule. That the medical witness understood it fully is equally apparent. In lengthy and skilful cross-examination, counsel for plaintiff sought repeatedly to have the witness name some book, publication, or medical journal as entering into or forming a basis of his opinion, but the witness did not do it. Thus baffled, counsel for plaintiff asked questions, part of which we quote:

"*Q.* And isn't it true that in the Medical Journal of Michigan, 1931, he (Tibbals) contributed an article in which he stated that X-rays were required both before and after the treatment of fractures? * * *

"*Q.* And isn't it true that at those meetings and by their publications through its authorized officers, the State society has said that X-rays should be used both before and after the reduction of a fracture? * * *

"*Q.* Now Frederick Cotton acted, did he not, on a committee on fractures for the American College of Surgeons?

"*A.* I think so.

"*Q.* Made a report to that society, of which you are a member, didn't he?

"*A.* Yes, I think so.

"*Q.* And didn't he in that report recommend that plates be used in open work treatment of fractures of the leg below the knee?"

Objections were sustained properly. The reason for the ruling is that the attempt is to discredit the testimony of the witness by "hearsay testimony of the written or spoken opinions of other persons, whom the jury have no means of examining as to their learning, their honesty, or their sources of special knowledge" (*People* v. *Millard, supra,* 75), which attempt can be justified on neither principle nor difficulty of cross-examination. Although objections were sustained, the effect of the cross-examination is an impression that the opinion of the witness is not in accord with eminent medical opinion or authority, and the jury, we think, must have been so impressed. Indeed that was the aim of the cross-examination. This is reversible error.

Reversed, with costs. New trial granted.

McDonald, C. J., and Potter, Sharpe, North, Fead, Wiest, and Butzel, JJ., concurred.

PEOPLE *v.* HAGER.

1. BANKS AND BANKING—STATUTES—CONSTRUCTION—"MONEYS ADVANCED" DEFINED.

Words "moneys advanced," as used in statute limiting total liability of any person or corporation to bank, denote moneys paid which are to be repaid, and it is unimportant whether total primary liability is on renewal or original notes or both (3 Comp. Laws 1929, §§ 11922, 11947).

2. SAME—LIMITING LIABILITY—VIOLATION OF STATUTE.

As soon as bank cashier, who was also director, increased his borrowings from bank so that, to his knowledge, his total primary liability to bank was beyond 10 per cent. of its capital and surplus, statute was violated (3 Comp. Laws 1929, §§ 11922, 11947).

3. CRIMINAL LAW—CHANGE OF VENUE—APPOINTMENT OF JUDGE.

On change of venue, it was proper for State presiding circuit judge to designate circuit judge to preside at trial.

4. SAME—APPOINTMENT OF SPECIAL PROSECUTOR.

On change of venue from circuit court of Oscoda county to circuit court of Ogemaw county, it was proper, before changing venue, for circuit judge of Oscoda county to appoint special prosecuting attorney, where prosecuting attorney of Ogemaw county was disqualified (1 Comp. Laws 1929, § 1293, 3 Comp. Laws 1929, § 17125).

5. SAME—HARMLESS ERROR—MISCARRIAGE OF JUSTICE.

Where trial judge correctly instructed jury as to law, there was no dispute of fact, and jury returned only verdict compatible with their oaths, argument of special prosecutor, *held*, not to have produced prejudicial error.

Appeal from Ogemaw; Smith (Fred P.), J., presiding. Submitted January 12, 1933. (Docket No. 135, Calendar No. 36,330.) Decided March 2, 1933.

Stanley R. Hager was convicted of incurring liability to a bank in excess of amount permitted by 3 Comp. Laws 1929, § 11922. Affirmed.

Henry R. MacGillis, for appellant.

Patrick H. O'Brien, Attorney General, and *William T. Yeo,* Special Prosecuting Attorney, for the people.

CLARK, J. Defendant appeals from judgment upon conviction of violation of 3 Comp. Laws 1929, §§ 11922, 11947, providing in part:

"The total liabilities to any bank of any person or of any company, corporation, or firm for moneys advanced * * * shall at no time exceed one-tenth part of the amount of capital and surplus of such bank." 3 Comp. Laws 1929, § 11922.

"Every officer, clerk, agent, or employee of a bank who shall knowingly aid or assist in a violation of any of the provisions of this act, shall be deemed guilty of a felony, and upon conviction shall be punished," etc. 3 Comp. Laws 1929, § 11947.

From January 1, 1930, to July 5, 1930, the period covered by the information, defendant was cashier and director of Union State Bank of Mio. He was also bookkeeper, and knew the extent and amount of his primary liabilities to the bank. The capital and surplus of the bank was $24,725.

A chief contention of defendant is that a large part of his liability to the bank during the time in question was by renewal of notes, and that hence liability was not as of the time and for "moneys advanced."

Documentary evidence is that on December 31, 1929, defendant was liable to the bank as maker of note to it in the sum of $1,750. There is also evi-

dence of direct borrowing from the bank by defendant beginning in April, 1930, and continuing to July, 1930, by which defendant increased his liabilities to the bank to a total sum in excess of $5,000. Defendant testified that all or nearly all of his notes given during the period stated were renewals of former notes, but this question, if it were of any importance, might be decided against him on this record.

The purpose of the statute is to limit the amount which may be loaned or advanced to any person, corporation, etc. The words of the statute "moneys advanced" denote moneys paid which are to be repaid, 2 C. J. p. 32. All of the notes of defendant held by the bank represented moneys advanced by the bank and on which defendant was primarily liable, a liability within the statute. So it is not important whether defendant's total primary liabilities to the bank at the time in question were upon renewals of his note or notes or upon new borrowing with new or original notes, or upon both. It is important that the total of such liabilities be kept within the limit fixed by the statute. Assuming, as the record shows, that on or about January 1, 1930, defendant owed the bank on his note or notes less than $2,000, and was not offending, yet as soon as his additional notes and borrowings increased, to his knowledge, his total primary liabilities to the bank beyond 10 per cent. of capital and surplus, beyond $2,472.50, the statute was violated. On this interpretation of the statute, it is practically undisputed that defendant was offending as of the time fixed in the information. We find no error in this regard.

At the opening of the trial, defendant's counsel made what was termed a motion to quash. We pass technical objections and speak of two matters suggested. On defendant's motion, the venue was

changed from Oscoda circuit court, twenty-third circuit, to Ogemaw circuit court, thirty-fourth circuit. Defendant's counsel stated orally that Hon. Fred P. Smith, circuit judge of the twenty-sixth circuit, presided at the trial upon designation of the State presiding circuit judge. That was proper, if true. *People* v. *Phelps,* 261 Mich. 45. The prosecuting attorney of Oscoda county being disqualified, a special prosecuting attorney was appointed, before changing the venue, by the circuit court of the county of Oscoda. This is as it should be. 1 Comp. Laws 1929, § 1293; 3 Comp. Laws 1929, § 17125.

The trial judge having correctly instructed as to the law, and there being no dispute of fact worthy of notice, the jury returned the only verdict compatible with their oaths. In this situation argument of the special prosecutor can hardly be held to have produced prejudicial result. On full consideration, we find no reversible error.

Affirmed.

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

MATOSH *v.* METROPOLITAN TRUST CO.

1. MORTGAGES—PRIORITY—RECORDING—NOTICE.

Mortgage made and accepted with full knowledge of prior unrecorded mortgage is subordinate thereto, although it be first recorded.

2. SAME—ASSIGNMENTS—RECORDING.

Assignees of mortgage are bound by such notice as record afforded of another mortgage of prior date but subsequently recorded, of which their assignor had actual knowledge.

Appeal from Wayne; Runnels (Herbert W.), J., presiding. Submitted January 6, 1933. (Docket No. 63, Calendar No. 36,586.) Decided March 2, 1933.

Bill by John Matosh and another against Metropolitan Trust Company, a Michigan corporation, as trustee, and others to foreclose a mortgage and establish its priority over another mortgage. Decree for plaintiffs. Defendants appeal. Affirmed.

Wayne Van Osdol (*Kenneth D. McGregor,* of counsel), for plaintiffs.

Harry R. Keller (*Robert J. Hanley,* of counsel), for defendants.

CLARK, J. The bill was filed to foreclose a mortgage made by Schlee-Brock Aircraft Corporation to plaintiffs, and to establish its priority over a mortgage by same mortgagor to Johanna Janesick, and by her assigned to Emma Ohlsson and Gustave Carlson. From decree for plaintiffs, defendants have appealed.

Plaintiffs' mortgage was made April 14, 1930, and recorded May 28th following. The mortgage to Mrs. Janesick was made April 24, 1930, and recorded May 19th following. So it appears the second mortgage was recorded before the first mortgage to plaintiffs. On June 18, 1930, Mrs. Janesick assigned her mortgage to said Ohlsson and Carlson. A finding of the trial judge, fully sustained by the record, is that the Janesick mortgage was made and ac-

cepted with full knowledge of the then unrecorded mortgage to plaintiffs. *Loveland* v. *Bump,* 198 Mich. 564. When the assignment of the Janesick mortgage was made, both the mortgages had been recorded, and it appeared of record that plaintiffs' mortgage was prior in point of time by 10 days. The assignees are bound by the notice so afforded by the record. Mrs. Janesick is held to have had actual knowledge of plaintiffs' prior mortgage. The assignees are charged with the notice of record and cannot be held to be subsequent transferees without notice.

We quote syllabus of *VanAken* v. *Gleason,* 34 Mich. 477:

"The purchaser of a mortgage is held bound by such notice as the registry afforded of another mortgage of the same date, but subsequently recorded, of which his vendor had actual knowledge."

See *Fischer* v. *Lauhoff,* 222 Mich. 128; *Jackson City Bank* v. *Campbell,* 172 Mich. 541; 23 R. C. L. p. 194; *English* v. *Waples,* 13 Iowa, 57; *Daniel* v. *Tolon,* 53 Okla. 666 (157 Pac. 756, 4 A. L. R. 704); *Stianson* v. *Stianson,* 40 S. D. 322 (167 N. W. 237, 6 A. L. R. 280); *Stearns Lighting & Power Co.* v. *Central Trust Co.,* 139 C. C. A. 442 (223 Fed. 962).

Affirmed, with costs.

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

BURT *v.* DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

1. TRIAL—DIRECTED VERDICT.
   Verdict may not properly be directed where evidence presents issue of fact.

2. SAME—RESERVED MOTION TO DIRECT VERDICT.
   Decision of reserved motion to direct verdict is but decision as on motion to direct verdict.

3. RAILROADS—PUBLIC CROSSING—WARNING—STATUTES.
   Where path across railroad tracks is not public crossing, statute requiring signals for public crossing is not applicable, although pedestrians in considerable numbers use it as though it were public crossing (2 Comp. Laws 1929, § 11181).

4. TRIAL—NEGATIVE AS AGAINST POSITIVE TESTIMONY.
   In action by boy struck by train while crossing railroad tracks, purely negative testimony of not hearing bell ringing, as against positive testimony that it was ringing, raised no issue of fact.

5. RAILROADS—PATH ACROSS TRACKS—DUTY TO USE REASONABLE CARE—LICENSEES.
   Railroad company was bound to anticipate that persons might be on tracks at place commonly used as crossing by pedestrians, although it was not public crossing, and to operate its trains with reasonable care to avoid injury to such licensees.

6. SAME—PUSHING CARS ACROSS PATH WITHOUT LOOKOUT—NEGLIGENCE.
   In action by boy struck by train while crossing railroad tracks, testimony that at time of accident, long line of cars, without lookout, was being pushed across path where many persons were accustomed to cross tracks, *held*, to present issue of fact as to railroad company's negligence in that regard.

7. APPEAL AND ERROR—PLEADING—PROOF—LAST CLEAR CHANCE.
   Submitting case to jury on theory of last clear chance, which was without both pleading and proof, was reversible error.

8. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTION.

Where, under plaintiff's own somewhat contradictory testimony, question of his contributory negligence was for jury, it was reversible error to instruct jury that plaintiff, on his contention of facts, was not guilty of contributory negligence.

Appeal from Wayne; Toms (Robert M.), J. Submitted January 12, 1933. (Docket No. 121, Calendar No. 35,987.) Decided March 2, 1933.

Case by Lawless Burt, by his guardian, against Detroit, Grand Haven & Milwaukee Railway Company, a corporation, for personal injuries received while crossing defendant's tracks. Judgment for defendant notwithstanding verdict for plaintiff. Plaintiff appeals. Reversed, and new trial granted.

Edward N. Barnard, for plaintiff.

H. V. Spike, for defendant.

CLARK, J. Plaintiff, a boy eight years and four months old, possessed of all his faculties, bright and intelligent, familiar with the place and knowing the danger, attempted to cross the railroad tracks of defendant, and was struck and injured by a train.

The railroad tracks are on the line between the cities of Detroit and Hamtramck, and run north and south. Woodland street of Detroit ends at the right-of-way, and nearly opposite, and on the east side of the right-of-way, Woodland street of Hamtramck begins. The right-of-way occupied by several tracks between the two ends of the streets is right-of-way, not street. However, in this thickly populated district, pedestrians, for a long time, and in very considerable numbers, have crossed the tracks almost as though the streets were continuous. The record

is that defendant has passively suffered the practice, perhaps being powerless to prevent it.

In plaintiff's behalf there was some testimony that he and his younger sister were on their way to school at noon; that, leaving his sister on the west side of the right-of-way, he crossed to the east side to see if it was safe to cross; that a train passed; that, when about to return, he saw some cars to the south, did not notice that they were moving; that he started back, and when he reached the second or third tracks he saw the cars almost upon him; that he attempted to escape, fell, and the cars cut off a leg. There is some further testimony that the cars were being pushed ahead of the locomotive, 33 to 35 cars in the train with the locomotive near the middle of it, and that there was no lookout at the head of the train. There is a bit of testimony that the whistle was not sounded, and some purely negative testimony that the bell was not ringing. On the other hand, defendant had testimony of employees and convincing testimony from disinterested witnesses to the effect that the locomotive was at the head of the train and that the boy was beside the moving train attempting to hook cars, and that he thus fell and was injured. There was further testimony that the boy was injured by a certain car wheel well back in the train; that the bell was ringing and that proper lookout was kept. The declaration counts upon so-called ordinary negligence as distinguished from last clear chance. Plaintiff had verdict, and, upon decision of a reserved motion to direct, defendant had judgment. Plaintiff has appealed. Defendant has also assigned errors for consideration in case the order of the trial court of judgment notwithstanding the verdict be not sustained.

Although the motion is for judgment notwithstanding the verdict, not for new trial, one of the grounds is that the verdict is against the great weight of the evidence. Conceding that it should be so held, the matter cannot be here decisive. The weight of authority no doubt is that there is no object in permitting a jury to find a verdict which the court would set aside as soon as found. 38 Cyc. p. 1572. But this court, in common with courts of some other jurisdictions, adheres to the rule that a verdict cannot be directed properly where the evidence presents an issue of fact. *Charon* v. *George W. Roby Lumber Co.,* 66 Mich. 68; *Weyburn* v. *Kipp's Estate,* 63 Mich. 79, are but two of the many cases which might be cited. And the decision of the reserved motion to direct is but a decision as upon motion to direct. *Yacobian* v. *Vartanian,* 221 Mich. 25.

As the path across the tracks was not a public crossing, the statute (2 Comp. Laws 1929, § 11181), requiring signals for public crossings, is not applicable. *Lepard* v. *Railroad Co.,* 166 Mich. 373 (40 L. R. A. [N. S.] 1105); note: 66 A. L. R. 819.

The purely negative testimony of not hearing the bell ringing as against positive testimony that it was ringing raised no issue of fact. *Hinderer* v. *Railroad Co.,* 237 Mich. 232 (26 N. C. C. A. 871). But defendant was bound to anticipate that persons might be on the tracks at the place in question and that the train could not be operated upon the presumption that the tracks were clear. *Hoover* v. *Railway Co.,* 188 Mich. 313. It was its duty to operate its trains with reasonable care to avoid injury to such licensees. *Risbridger* v. *Railroad Co.,* 188 Mich. 672; *Huggett* v. *Erb,* 182 Mich. 524 (Ann. Cas. 1916 B, 352); *Doyle* v. *Portland R. L. & P. Co.,* 71 Ore. 576 (143 Pac. 623, 8 N. C. C. A. 146); *St. Louis*

& S. F. R. Co. v. *Jones,* 78 Okla. 204 (190 Pac. 385, 16 A. L. R. 1048); 52 C. J. p. 554.

Testimony in behalf of plaintiff that cars, perhaps 16 or more, without lookout, were pushed by the locomotive across the path where very many persons were accustomed to cross, as against evidence for defendant, made an issue of fact of defendant's negligence in that regard. *Smith* v. *Railroad Co.,* 136 Mich. 224; *Green* v. *Railway Co.,* 110 Mich. 648 (12 Am. Neg. Cas. 128).

It follows that judgment notwithstanding the verdict ought not to have been ordered.

Turning to defendant's assignments, we find reversible error in submitting to the jury a theory of recovery upon doctrine of last clear chance which was without both pleading and proof, as the trial judge states in an opinion filed.

It was also reversible error to instruct that plaintiff on his contention of facts was not guilty of contributory negligence, as that question, under plaintiff's own somewhat contradictory testimony as to looking and being watchful, was for the jury.

Other questions are not likely to arise again. Reversed, without costs. New trial granted.

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

CENTRAL TRUST CO. *v.* WOLF.

1. MORTGAGES—TRUST MORTGAGES—ASSIGNMENT OF RENTS AND PROFITS—STATUTES.

   Assignment of rents and profits of mortgaged property as further security may be in writing at or after execution of trust mortgage (3 Comp. Laws 1929, §§ 13498, 13499).

2. SAME—VALIDATING ASSIGNMENT OF RENTS AND PROFITS—RECEIVERS.

   Provision in trust mortgage, executed prior to effective date of 3 Comp. Laws 1929, §§ 13498, 13499, assigning rents and profits as further security, was validated by agreement extending time of payment and increasing amount of indebtedness, entered into subsequent to effective date of said statute, where by reference said provision was adopted and incorporated, and therefore, on default, receiver was properly appointed.

Appeal from Wayne; Miller (Guy A.), J. Submitted January 10, 1933. (Docket No. 76, Calendar No. 36,952.) Decided March 2, 1933.

Bill by Central Trust Company, a Michigan corporation, against Elias Wolf and others to foreclose a trust mortgage. On petition of plaintiff for appointment of a receiver. From order granting petition, defendant Wolf appeals. Affirmed.

Monaghan, Crowley, Reilley & Kellogg, for plaintiff.

Maxwell I. Silverstein and *Arthur H. Ratner,* for defendant Wolf.

CLARK, J. Under a bill for foreclosure of a mortgage to it as trustee, and securing an issue of bonds, plaintiff filed petition for appointment of receiver. From the order of appointment, defendant Elias Wolf, mortgagor, has appealed. The mortgage was given May 19, 1925, and before the effective date of

Act No. 228, Pub. Acts 1925 (3 Comp. Laws 1929, §§ 13498, 13499), authorizing assignment of rents and profits of property mortgaged to trustee as further security. The mortgage contains such assignment. In 1930, when the debt secured had been paid in part, an agreement was made between the parties extending time of payment and increasing amount of indebtedness secured. The agreement is quite complete, and while it does not repeat all the provisions of the mortgage, it does adopt and incorporate them by reference. The assignment may be in a writing at or after the execution of the mortgage. *Security Trust Co.* v. *Sloman,* 252 Mich. 266. If this provision with respect to rents and profits is valid, a receiver may be appointed. *Guaranty Trust Co.* v. *Feldman,* 247 Mich. 524.

We are in accord with the following opinion of the trial judge, finding a proper assignment and ordering appointment of receiver:

"I think that a fair reading of the documents, and particularly of the agreement of 1930, leads to the conclusion that under that agreement, based as it is upon an increase of the mortgage indebtedness, the parties contemplated that all possible security should be given. It appears to be a reasonable conclusion that they contemplated that all of the terms and provisions of the mortgage of 1925, including the assignment of rents as further security, were to be effective from and after 1930. This being the case, the situation is the same as though the latter agreement had in terms contained a new assignment of rents by way of security. Therefore, * * * there is reason for the appointment of a receiver."

Affirmed, with costs.

McDONALD, C. J., and POTTER, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred. SHARPE, J., did not sit.

McKINSTRY *v.* MATTHEWS.

1. APPEAL AND ERROR—DIRECTED VERDICT.
In reviewing judgment for defendant on directed verdict, evidence must be viewed in light most favorable to plaintiff.

2. PHYSICIANS AND SURGEONS—MALPRACTICE—QUESTION FOR JURY.
In action for malpractice, based on defendant's alleged negligence in failing to remove batting sponge after operation for removal of plaintiff's tonsils, evidence *held*, to present question for jury.

Appeal from Wayne; Richter (Theodore J.), J. Submitted January 5, 1933. (Docket No. 31, Calendar No. 36,799.) Decided March 2, 1933.

Case by Bernice L. McKinstry against Wallace R. Matthews for malpractice. Directed verdict and judgment for defendant. Plaintiff appeals. Reversed, and new trial ordered.

Longley, Bogle & Middleton, for plaintiff.

Brown, Stoneman, Lorenzo & Springstun, for defendant.

CLARK, J. On October 18, 1927, defendant, a physician and surgeon, removed plaintiff's tonsils. There was general anæsthetic. Because of the bleeding, small pieces of absorbent material, known as sponges, were used. The manner of use, as defendant testified, was to insert a sponge in a hemostat, apply it, and, when saturated, remove it, repeating the applications until bleeding had stopped sufficiently. Defendant testified the sponges were of

gauze, while plaintiff had testimony they were of batting, about one inch in length and of smaller diameter. After the operation, plaintiff had a severe cough, pain in the left chest, peculiar expectoration, and fever. Near January 1, 1928, she consulted another physician, who found lung abscess. Among other efforts to be cured, plaintiff went to a clinic in Philadelphia, where, by successive operations, a hole was burned with a cautery through the pleura and into the lower lobe of the lung for purpose of draining the abscess. On February 2, 1930, during a sort of lung hemorrhage, plaintiff coughed up a batting sponge. In the operation in Philadelphia, gauze was used, and if any batting was used in treatment to swab the wound and was left in the wound, it would normally be discharged by way of the wound, and would not be coughed up. In removing tonsils there is danger of foreign and infected matter getting into air passages of the lungs, especially by gasping and heavy breathing of patient, and a natural result thereof is lung abscess.

On motion, a verdict was directed for defendant, and, from judgment thereon, plaintiff has appealed.

On the question of whether verdict was properly directed against plaintiff, the evidence must be viewed in the light most favorable to her. The record is that plaintiff coughed from the lung or its passages, a batting sponge. How did it get into the lung? There is evidence negativing its getting there by way of the operation in Philadelphia, and a jury would be justified in so finding on this record, and a jury might find the remaining opportunity to be in the operation done by defendant. And this finding might have support in the element of time, for the lung abscess, a natural result of the entry of the foreign matter into the lung, followed defendant's oper-

ating. If this be the finding, then it should be noted that it is not a case where losing the sponge was observed and prompt and proper effort made toward correction, but a case where the sponge was lost unobserved and negligently, and it stands on a par, as regards negligence, with those cases where sponges have been left in incisions. The rule in such cases is stated in 21 R. C. L. p. 388:

"Probably the most common instance of malpractice which is brought into the courts arises out of surgical cases where the physician or attendant has left a sponge in the wound after the incision has been closed. That this is plainly negligence there is no doubt at all, and it matters not at all that many physicians testify that the best of surgeons sometimes leave a sponge or some other foreign substance in the bodies of their patients, for this is testimony merely to the effect that almost everyone is at times negligent. Whether the particular act was negligent is for the jury to decide after considering the circumstances of the case."

And see note 65 A. L. R. 1023.

The question of negligence was for the jury. As to opinion evidence, see *DeGroot* v. *Winter,* 261 Mich. 660.

Reversed, with costs to appellant. New trial granted.

McDonald, C. J., and Potter, Sharpe, North, Fead, Wiest, and Butzel, JJ., concurred.

SHERMAN *v.* WINKELMAN BROS. APPAREL, INC.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENTAL INJURY—POISON.

Finding of department of labor and industry that rash on plaintiff's body was caused by accident arising out of and in course of employment incidental to handling low-priced, dyed furs, *held*, supported by evidence.

2. SAME—FINDING OF DEPARTMENT CONCLUSIVE.

Finding of fact by department of labor and industry, supported by evidence, is conclusive on Supreme Court.

Appeal from Department of Labor and Industry. Submitted January 18, 1933. (Docket No. 26, Calendar No. 36,698.) Decided March 2, 1933.

Dorothy Sherman presented her claim against Winkelman Bros. Apparel, Inc., employer, and Home Indemnity Company of New York, insurer, for an alleged accidental injury received while in defendant's employ. Award to plaintiff. Defendants appeal. Affirmed.

Friedman, Meyers & Keys (*Aaron Weiswasser*, of counsel), for plaintiff.

Coulter & Hampton, for defendants.

CLARK, J. In this review as upon certiorari of an award of the commission of department of labor and industry, the question is, was there an accidental personal injury arising out of and in the course of the employment? Plaintiff, a saleslady of defendant employer, handled a shipment of low-priced, dyed

furs, having a bad odor. Shortly thereafter a rash broke out on different parts of her body. Plaintiff testified of the history and development of her ailment and of probable source of irritation. Physicians who examined and treated her testified from their own observations and knowledge and from the history supplied by plaintiff that in their opinion the irritation was caused by handling the furs. Other common causes of such an irritation were named and eliminated, leaving the reasonable inference of cause as stated, and this was the inference of the commission, a finding of fact, supported by evidence and conclusive on this court. See *Dove* v. *Alpena Hide & Leather Co.*, 198 Mich. 132; *Frankamp* v. *Fordney Hotel Co.*, 222 Mich. 525.

The contention of occupational disease calls for no discussion on this record.

Affirmed.

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

BAILEY *v.* BAILEY.

1. RECEIVERS—ESTOPPEL.

All parties of record, including bondholders, by participation in receivership proceeding for summer hotel property, are estopped to question validity of receivership, which was not auxiliary to any other action or proceeding.

2. SAME—ADMINISTRATION EXPENSES.

Bondholders, having availed themselves of possible advantage of receivership for summer hotel property in effort to save loss by keeping hotel going concern and in attempting to effect sale thereof, may not be heard to say that property is not chargeable with receiver's expenses and administration costs.

3. SAME—BENEFITS.

Administration expenses of receivers are incurred on theory that they benefit parties ultimately entitled to property.

4. SAME—ADMINISTRATION EXPENSES—SUMMER HOTEL.

Receiver's costs and expenses of administration in keeping summer hotel property going concern were properly allowed by court.

5. SAME—PRIVATE CORPORATIONS—PRESERVATION OF PROPERTY—LIENS—PRIORITY.

Although, generally, receiver's certificates may not be given priority in case of purely private corporation, yet receiver of private corporation may be authorized to issue receiver's certificates which displace prior liens, where it is necessary to raise money to preserve property.

6. SAME—OPERATING EXPENSES—PRIORITY.

Where court order authorizing receiver to borrow money and issue certificates therefor for purpose of saving loss by keeping summer hotel going concern was silent as to lien and priority over mortgage indebtedness, question of priority was left to be determined under law and facts, and in view of purpose for which money was raised and used.

7. SAME—INSURANCE—TAXES—CONTRACT PAYMENTS—PRESERVATION OF PROPERTY.

Payments by receiver of summer hotel property out of profits of operation for fire insurance, taxes, and satisfaction of title-retaining contracts on fixtures and equipment covered by mortgage on hotel property, *held*, properly given priority as expenses of preserving and protecting property.

8. SAME—AMOUNT OF FIRE INSURANCE CARRIED.

It was upon receiver to use his best judgment as to amount of fire insurance to be carried on summer hotel property which he was operating as going concern.

Appeal from Cheboygan; Sprague (Victor D.), J. Submitted January 9, 1933. (Docket No. 152, Calendar No. 36,615.) Decided March 2, 1933.

Bill by Martha Bailey against Etta Bailey for appointment of a receiver. William B. Heath was appointed receiver. William Childs and others intervened as a bondholders' protective committee. From order allowing receiver's account and establishing certain priorities, interveners appeal. Affirmed.

Milburn & Semmes (*Sigmund A. Robinson,* of counsel), for interveners.

James F. Shepherd and *George E. Nichols,* for receiver.

CLARK, J. Etta Bailey and John E. Bailey, her son, as E. R. Bailey & Son, owned and operated a summer hotel on Mullet Lake, in the county of Cheboygan. John E. Bailey died in October, 1930. His widow, the plaintiff, is a chief beneficiary under his will. During the season of 1930 the loss in conducting the hotel business was nearly $5,000. The property, then valued at $100,000, is mortgaged to Union Trust Company, trustee, to secure an issue of bonds in the sum of $37,500. Fire insurance premiums, taxes, and interest were unpaid. Sums were due on title-retaining contracts covering some fixtures or equipment of the hotel. There were liabilities to general creditors for nearly $15,000. The surviving partner was not able to manage the hotel. In December, 1930, plaintiff, the widow, filed this bill for appointment of receiver, naming Etta Bailey as defendant, apparently a friendly suit. Etta Bailey answered, admitting the bill and in effect consenting

to receivership. It is not disputed that before filing the bill the trustee was consulted and consented to and advised the receivership. William B. Heath was appointed receiver. In January, 1931, he prayed an order authorizing him to borrow money and to issue receiver's certificates in the sum of $5,000, to be first liens, subject only to prior valid liens. By order he was given authority to borrow the sum on receiver's certificates to pay taxes, insurance, expense, etc. The order is otherwise silent as to lien and priority. He borrowed $4,000 on such certificates, and used the money as ordered. At this point it appears that the bondholders under the trust mortgage became active, and were thereafter considered and treated as the mortgagees under the mortgage. General creditors proved their claims. All parties, it appears, desired the hotel to be operated during the season of 1931. The receiver refused unless the mortgagees would consent to his borrowing money and issuing certain receiver's certificates to be a first lien and prior to the mortgage and unless the possible loss of such operation be treated as an expense to be preferred over the mortgage. The mortgagees agreed with the receiver. Accordingly, and on petition and on showing the agreement, it was so ordered. The receiver issued certificates in the total sum of $2,125. The hotel was operated during the season of 1931, and a net profit of nearly $7,000 made. Certificates in the total sum of $5,125 were retired.

In and after 1931, due to collapse of real estate values, it was apparent there was nothing for general creditors, nothing for the Baileys, and insufficient to pay the mortgage debt. The mortgagees were given notice of the hearing, and were represented at hearing of the receiver's account and were

heard and made objections. Later they were permitted to intervene formally. An account of the costs and expenses of receiver's administration of sums paid in satisfaction of the title-retaining contracts, and of sums paid for taxes, insurance, etc., showed a deficiency of nearly $4,000, which was ordered paid and made a first lien over the mortgage. There has been no proceeding to foreclose the mortgage. It is a fair inference, at least, that mortgagees co-operated in an attempt to sell the property at receiver's sale, but bids were not acceptable. The mortgagees have appealed.

The receivership is not auxiliary to any other action or proceeding. It is the end and aim of this litigation. 53 C. J. p. 21. But all parties of record, by participation and conduct in the matter, are estopped to question validity, and no point in that regard is urged seriously. However, the character of the receivership is to be noted in respect of expenses of administration and of preserving assets.

We consider first administration expenses. If the mortgagees had kept out of this matter, except perhaps in respect of contest of the receiver's account, there might be force in their contention that they are liable for no part of the administration costs and expenses of the receivership. 53 C. J. p. 307. But, as stated, the bill was filed by consent. The mortgagees dealt with the receiver promptly and in an effort to save loss to themselves by keeping the hotel a going concern, and receivership was used in an attempt to effect sale of the property. As they availed themselves of any possible advantage of the receivership, they will not be heard to say that the property in the hands of the receiver is not chargeable with the receiver's expense and administration costs, even though it may result practically in a cor-

responding loss to them. Administration expenses are incurred on the theory that they benefit the parties ultimately entitled to the property. *Ciavatta* v. *Munn Realty Corp.*, 106 N. J. Eq. 21 (149 Atl. 809). From *Knickerbocker* v. *McKindley Coal & Mining Co.*, 172 Ill. 535 (50 N. E. 330, 64 Am. St. Rep. 54):

"When it becomes the duty of a court of equity to take property under its own charge, through a receiver, the property becomes chargeable with the necessary expenses incurred in taking care of and saving it, including the allowance to the receiver for his services. He is the officer and agent of the court, and not of the parties; and it is a right of the court, essential to its own efficiency in the protection of things so situated, to keep them under its control, until such expenses and allowances are paid or secured to be paid."

See, also, 53 C. J. pp. 301–307; 1 Clark on Receivers (2d Ed.), §§ 637, 639; 23 R. C. L. p. 139; *In re Smith Floral Co.*, 260 Mich. 299; *International Harvester Co.* v. *Union Irr. Co.*, 150 La. 405 (90 South. 741).

Costs and expenses of administration were allowed properly. Appellants argue:

"Distinction between power possessed by court of chancery to displace prior mortgage liens in case of receivership of railroad or public service corporation and that possessed in receivership of private corporation or individuals."

This is conceded. 23 R. C. L. p. 88.

Assuming a general rule that receiver's certificates cannot be given priority in case of a purely private corporation (40 A. L. R. 247), yet the exception to the rule is stated in note, 40 A. L. R. 251:

"According to the weight of authority the receiver of a private corporation may be authorized to issue

receivers' certificates which shall displace prior liens, where it is necessary to raise money to preserve the property."

And in *Lockport Felt Co.* v. *United Box, Board & Paper Co.*, 74 N. J. Eq. 686 (70 Atl. 980):

"The rule may be deduced that, in case of private corporations, the court may authorize its receiver to borrow money upon the faith and credit of all the property of the corporation, and authorize the issuing of securities which shall displace all prior liens and incumbrances, but only for one purpose, viz., the preservation of the property and the expenses of realizing upon it by a sale. This necessity should be imperative and paramount, and under no other circumstances can a court justify itself in attempting to undermine prior liens."

See, also, 1 Clark on Receivers (2d Ed.), § 640.

The remainder of the receiver's account was allowed as expenses of preserving and protecting the property, and we consider the matter in so far as it is questioned by brief, concluding in accordance with the exception to the rule, as above quoted, that expense, if of the particular character, was properly allowed and given priority.

Appellants contend that, as the hotel business was conducted by the receiver during the season of 1931 virtually under a contract with them by which they were responsible for loss, they should have profits applied to satisfy obligations of such operation, and this relates, as briefed, to remainder of receiver's certificates unpaid. Assuming the contention to be equitable, it does not affect the result. If the certificates of the second issue, $2,125, be regarded as paid, there would be $1,000 of the first issue unpaid. The order for such certificates did not expressly make them subject to prior liens. Had it been so

ordered, it may well be doubted that the court could by a subsequent order "confer upon the certificates gratuitously a priority of lien upon which they were neither originally authorized nor acquired." *Mercantile Trust Co.* v. *Railroad Co.*, 291 Fed. 462, 469. The order is silent except as stated in respect of priority. We think, therefore, the question of priority was left to be determined under the law and the facts, and in view of the purpose for which the money was raised and used. Acts of a receiver in preserving and protecting property are discussed in 1 Clark on Receivers (2d Ed.), § 378. Payments for fire insurance and of taxes were properly so classed. Satisfaction of the title-retaining contracts, by which property covered by the mortgage, as alleged in the bill of complaint and not denied, was saved and freed to the mortgagees is also within the class. One item of nearly $500 for increased fire insurance is criticized. Fire insurance was increased from $46,000 to $75,000. We find no opposition made by appellants to this item in the trial court. Nor are any facts developed in regard to it. It was upon the receiver to use his best judgment, and the court approved his action. On this bare record, we must decline to find the expense improper. No other matters demand discussion.

Affirmed, with costs.

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

CAMP *v.* GUARANTY TRUST CO.

1. DEEDS—DELIVERY—EVIDENCE—SUFFICIENCY.
   In suit by widow to set aside deed from husband to his mother, contradictory testimony as to husband's papers being left in hands of another, *held*, insufficient to establish delivery of said deed.

2. SAME—RECORDING AS PRESUMPTION OF DELIVERY.
   Recording of deed on advice of attorney, after death of grantor and grantee, rebuts any presumption of delivery which might arise from its recording.

3. SAME—DELIVERY—PARTING WITH DEED.
   To constitute delivery, grantor must have parted with deed to grantee and with right to retain it.

4. SAME—RECORDING BY GRANTOR.
   Even if grantor executed deed and placed it on record, that alone would not have constituted delivery.

5. SAME—DELIVERY—PRESENT INTEREST.
   To constitute valid delivery of deed, there must have been conveyance of present interest in land.

6. SAME—BURDEN OF PROOF.
   In suit to set aside deed placed on record after death of grantor and grantee, burden was not on plaintiff to prove nondelivery, but on defendants relying on deed to show its delivery.

Appeal from Wayne; Ferguson (S. Homer), J. Submitted January 11, 1933. (Docket No, 108, Calendar No. 36,627.) Decided March 2, 1933.

Bill by Bessie Camp against Guaranty Trust Company, a Michigan corporation, and others to set aside a deed. Decree for defendants. Plaintiff appeals. Reversed.

Louis Starfield Cohane, Regene Freund Cohane, and *Percival R. Piper,* for plaintiff.

J. Charles Wood (*Harry Holden MacCord,* of counsel), for defendant.

POTTER, J. This is a suit by Bessie Camp, widow of George Camp, deceased, to set aside a deed alleged to have been given by George Camp in his lifetime to his mother, Nettie Camp, for injunction against the Guaranty Trust Company, administrator of the estate of Nettie Camp, and against the heirs of Nettie Camp, deceased.

May 13, 1924, George Camp acquired the real estate in question by deed. May 12, 1927, it is claimed he executed the deed in question to Nettie Camp; June 16, 1928, George Camp married Bessie Camp, plaintiff herein. August 3, 1930, Nettie Camp died. August 6, 1930, George Camp died. August 12, 1930, the deed in question was delivered to the register of deeds of Wayne county for recording. The important question in this case is whether the deed in question was delivered to the grantee. Neither the plaintiff, widow of George Camp, deceased, nor the children of Nettie Camp, nor the wives of the male members of her children, would have been competent witnesses to any material fact bearing on the delivery of the deed, had appropriate objections been made thereto on the ground such testimony was equally within the knowledge of the deceased. No objection was made to the introduction of the testimony, and the opposite parties in this case, without objection, were examined and cross-examined. George Camp continued to occupy the premises after the execution of the deed. It is claimed he kept his papers in his desk. Clarence Camp says his mother had the deed and gave it to Obediah Camp to keep

for her. There is no proof that Nettie Camp directed the deed to be recorded. It was not recorded at her request or at her direction. It was recorded after the death of George Camp and the death of Nettie Camp, on the advice of an attorney. Nettie Camp and the balance of the Camp family did not like plaintiff, Bessie Camp. Sarah Badgett and Bessie Camp say that George Camp's papers were in a desk in the house where he lived. After his death the defendants had access to these papers. Sarah Badgett says that after George's death, Obediah Camp came to her and tried to get her to sign a statement that all of George's papers were left in his hands, but she refused. Treating this testimony as competent, it does not establish the delivery of the deed. It indicates the heirs of Nettie Camp were trying to bolster up a showing that the deed in question came lawfully into the possession of Obediah Camp, and negatives delivery rather than sustains it. It is not claimed there was any consideration paid by Nettie Camp for the deed. Its recording at the advice of an attorney after the death of both parties thereto, rebuts any presumption of delivery which might arise from its recording. To constitute delivery, George Camp must have parted with the deed to Nettie Camp and with the right to retain it. *Younge* v. *Guilbeau,* 3 Wall. (70 U. S.) 636; and even if he had executed it and placed it on record, that alone would not have constituted delivery.

"The execution and registration of a deed, and delivery of it to the register for that purpose, does not vest the title in the grantee." *Parmelee* v. *Simpson,* 5 Wall. (72 U. S.) 81.

To constitute a valid delivery, there must have been a conveyance of a present interest in the land. *Pollock* v. *McCarty,* 198 Mich. 66.

In *Barras* v. *Barras,* 192 Mich. 584, it is said:

"The burden of proving delivery by a preponderance of evidence, like proving any other act necessary to the effectiveness of a deed, is ordinarily upon the party relying upon the deed, and was upon the defendant in this case throughout the trial. *Manistee Natl. Bank* v. *Seymour,* 64 Mich. 59; *Brown* v. *King,* 5 Metc. (46 Mass.) 173, 181; *Boyd* v. *Slayback,* 63 Cal. 493, 494."

Instead of the burden being upon plaintiff to prove nondelivery of the deed, it was upon defendants to show its delivery. They have not done so. Decree reversed, with costs. Decree for plaintiff.

McDONALD, C. J., and CLARK, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

SZARKOWSKI *v.* PFISTER.

1. EXCHANGE OF PROPERTY—RESCISSION—FRAUD—OPINION—INTENT.
In suit to rescind contract for exchange of plaintiffs' city property for farm, false statements made by owners of farm as to its value and profit from operating it, made with knowledge of plaintiffs' ignorance of farming and farm values and for purpose of being relied upon, constituted fraud, although in form of opinion, and although plaintiffs saw farm before trade.

2. FRAUD—FALSE REPRESENTATIONS PROMISSORY IN CHARACTER.
Where fraud is committed partly by false promises and partly by false representations of fact, representations, though promissory in character, which are not made in good faith but as part of scheme to defraud, are fraudulent.

3. EXCHANGE OF PROPERTY—RESCISSION—STATU QUO.

Ordinarily, one who seeks to rescind contract must put opposite party in *statu quo;* but in cases where, acting in good faith, property has been so changed or lost that it cannot be restored in specie, rescission may nevertheless be granted, if its value is capable of ascertainment.

4. SAME—CUTTING WOOD.

Cutting 48 cords of wood from dead timber on farm did not preclude rescission of contract whereby farm was exchanged for city property, since value of wood was capable of ascertainment.

Appeal from Allegan; Miles (Fred T.), J. Submitted January 6, 1933. (Docket No. 65, Calendar No. 36,833.) Decided March 2, 1933.

Bill by Frank Szarkowski and another against Albin B. Pfister and another to rescind an exchange of real estate. Decree for plaintiffs. Defendants appeal. Affirmed.

Leo W. Hoffman and *Clare E. Hoffman* (*Carl E. Hoffman,* of counsel), for plaintiffs.

Frederick C. Cogshall, for defendants.

POTTER, J. October 21, 1931, plaintiffs filed a bill to rescind, on the ground of fraud, an exchange of real estate, and for other relief. Defendants deny the fraud charged. From a decree for plaintiffs, defendants appeal. Plaintiffs, prior to the exchange of the property involved, lived in Chicago where plaintiff Frank Szarkowski was a bricklayer. They owned a house and lot in Chicago subject to a mortgage of $2,000. This they exchanged for 60 acres of land in Allegan county, subject to a mortgage to the Federal Land Bank of $2,300, giving to defendants a second mortgage of $1,200, to boot. Plaintiffs de-

sired to sell their Chicago property. Eventually a real estate broker got in touch with them and with defendants, and negotiations for an exchange of their properties commenced. There is ample evidence to show defendants, and the broker acting for them, represented the fair market value of the farm in Allegan county to be $18,000; was good, productive soil, and defendants were doing a summer resort business which would be profitable; the grapes on the farm were a source of substantial income, and such farm was operated, and could be operated by plaintiffs, at a profit. A list of resorters was given by defendants to plaintiffs. It is claimed, and there is proof to show, the farm was worth between $3,500 and $4,000. The soil was mostly light sand, which, one witness testified, was alone worth but $5 an acre. The grapes and apples on the farm brought but $100. After plaintiffs took possession, they found the farm was leased to croppers who claimed and took their share of the products of the farm. Crops were poor and the resort business a magnified tale of prospective profits based upon nebulous hopes. Plaintiffs saw the farm before the trade was made, and it is claimed the representations made by defendants of its value were matters of opinion and cannot be made the basis of an action of fraud.

In *Pinch* v. *Hotaling,* 142 Mich. 521, 525, it is said:

"The contention made is that the statement of value was a mere matter of opinion, and cannot be made the basis of an action for fraud. This is a statement of the general rule, but the rule established by the weight of authority is that false statements of value intentionally made to one who is in ignorance of the quality and value, under circumstances indicating a purpose that such statements

are to be relied upon, and where the party to whom they are made has no opportunity to examine the property, may be treated as an affirmation of fact and fraudulent. See 14 Am. & Eng. Enc. Law (2d Ed.), p. 125; *Simar* v. *Canaday,* 53 N. Y. 298 (13 Am. Rep. 523); *Cressler* v. *Rees,* 27 Neb. 515 (43 N. W. 363, 20 Am. St. Rep. 691); *Hedin* v. *Minneapolis Medical & Surgical Institute,* 62 Minn. 146 (64 N. W. 158, 35 L. R. A. 417, 427 note, 54 Am. St. Rep. 628); *Collins* v. *Jackson,* 54 Mich. 186; *Maxted* v. *Fowler,* 94 Mich. 106, 109; 16 Cyc. p. 749."

Plaintiffs, who were Polish immigrants, without knowledge of the value of land in Allegan county, with no experience in farming, prone to rely upon statements made to them, stand on a different footing than they would if, from knowledge of farming in Allegan county and experience therewith, they had traded for land therein. Then their knowledge of the value of the land visited might estop them from claiming fraud; but plaintiffs were city dwellers, with no knowledge of the value of farms in Allegan county, no experience in farming there or elsewhere, with little knowledge of the American language, and the statements made to them by defendants were made with knowledge of plaintiffs' ignorance, for the purpose of being relied upon and with such expectation and such statements of value, though in the form of opinion, relied upon by plaintiffs to whom they were made, constitute actionable fraud. *Gothe* v. *Kakis,* 257 Mich. 364.

There was testimony of statements by defendants which they insist were promissory in character and cannot be made the basis of fraud. Where a fraud is committed partly by false promises and partly by false representations of fact, representations, though promissory in character, which are not made

in good faith but as a part of a scheme to defraud, are nevertheless fraudulent. *Becker* v. *Illinois Life Ins. Co.,* 227 Mich. 388; *City Investment Co.* v. *Zimni,* 255 Mich. 388; *Conger* v. *Thomas & Lane,* 258 Mich. 702; *Van Dellen* v. *Van Dellen,* 259 Mich. 275.

When plaintiffs discovered they had been defrauded, they tendered a deed of the premises to defendants. They were compelled to live upon the farm. They had no other place to live, and while living there 48 cords of wood were cut for them on shares by a third party from dead timber in the wood lot upon the premises. Defendants insist that this precludes their right to rescind.

Ordinarily, one who seeks to rescind a contract must put the opposite party in *statu quo;* but in cases where, acting in good faith, property has been so changed or lost that it cannot be restored in specie, and where its value is capable of being ascertained, a party entitled to may rescind a contract, although he cannot place the other party in *statu quo. Wright* v. *Dickinson,* 67 Mich. 580 (11 Am. St. Rep. 602); *Munzer* v. *Stern,* 105 Mich. 523 (29 L. R. A. 859, 55 Am. St. Rep. 468); *Zadel* v. *Simon,* 221 Mich. 180.

We find no error in the decree of the trial court, which is affirmed, with costs.

McDONALD, C. J., and CLARK, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

RANKE *v.* SLOAN.

MORTGAGES—LIABILITY OF GRANTEES.

Grantors, who were compelled to pay mortgage on property conveyed by them, may not recover personal judgment against grantees who took subject to said mortgage but did not assume it or agree to pay it.

Appeal from Wayne; Black (Edward D.), J., presiding. Submitted January 10, 1933. (Docket No. 89, Calendar No. 36,971.) Decided March 2, 1933. Rehearing denied April 21, 1933.

Action by Rudolph C. Ranke and another against Saul and Hattie Sloan to recover sums paid to discharge a mortgage on property conveyed to defendants subject to mortgage. Judgment for plaintiffs against defendant Saul Sloan. Plaintiffs and defendant Saul Sloan appeal. Reversed as to defendant Saul Sloan, affirmed as to defendant Hattie Sloan.

Clarence T. Wilson, for plaintiffs.

Irwin I. Cohn (*Edward H. Stein,* of counsel), for defendants.

POTTER, J. Plaintiffs, the owners of real estate in Detroit, sold and conveyed the same to defendants subject to two real estate mortgages. The deed conveying the premises from plaintiffs to defendants warranted the same to be free from all incumbrances whatever, except a certain real estate mortgage for $16,000 to the Midland Mutual Life Insur-

ance Company, and a second mortgage for $3,225 to Margaret E. Kuni, of record, and subject to paving assessments. Defendants did not make payments on the second mortgage as they accrued, and the holder thereof sued plaintiffs, who were compelled to pay it. Plaintiffs then sued defendants to recover the amount paid and interest thereon. From a judgment for plaintiffs against defendant Saul Sloan, plaintiffs appeal, claiming a judgment against both defendants, and defendant Saul Sloan appeals, claiming he is not liable. The declaration contains several counts, some of which are in assumpsit, and others in fraud. Defendants did not, in the deed accepted by them from plaintiffs, assume and agree to pay the mortgages or either of them, or any part thereof. Neither one nor both of them could be held liable for a deficiency in foreclosure proceedings of these mortgages under the rule established by 3 Comp. Laws 1929, § 14368; nor are either or both of them liable to a personal judgment for the amount plaintiffs were compelled to pay on the Kuni mortgage. Plaintiffs executed that mortgage and received the money on it. Payment of it was enforced against them. There was no assumption of that mortgage by defendants or either of them. There was no contract which could be made the basis of a judgment in assumpsit against defendants or either of them under the circumstances, and no basis for an action of fraud, which could be based only on defendants' promise to pay the mortgages when they intended not to pay them, thereby obtaining the property. *Laing* v. *McKee,* 13 Mich. 124 (87 Am. Dec. 738); *Wilson* v. *Eggleston,* 27 Mich. 257; *Munzer* v. *Stern,* 105 Mich. 523 (29 L. R. A. 859, 55 Am. St. Rep. 468). An essential element of actionable fraud, the promise to pay upon the part of defendants, is

lacking. There being no basis for a judgment either in assumpsit or for fraud, established against defendants or either of them, judgment is reversed as to defendant Saul Sloan, and affirmed as to defendant Hattie Sloan, with costs.

McDONALD, C. J., and CLARK, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

In re WIDENING OF SOUTH DIX AVENUE.

CITY OF DETROIT *v.* EMPIRE DEVELOPMENT CO.

1. EMINENT DOMAIN—JUDGMENT—RES JUDICATA—FEE—EASEMENT—HIGHWAYS AND STREETS.

   Verdict of condemnation and assessment of damages, in proceeding to condemn fee of land for water board site, where case was discontinued before confirmation of award, is not *res judicata* of proceeding to condemn easement for street purposes in same property.

2. SAME—EASEMENT FOR STREET.

   City has right to condemn easement in property for street purposes.

3. SAME—NECESSITY—APPEAL AND ERROR.

   Question of necessity, properly declared by city in proceeding to condemn easement for street purposes, may not be re-examined by Supreme Court on appeal.

4. SAME—JURY DETERMINES ISSUES—JUDGE ACTS IN ADVISORY CAPACITY.

   Condemnation proceedings are inquisitorial in their nature, and constitutional tribunal for determination of issues is jury; judge, after jury is impaneled, acting in advisory capacity merely.

Appeal from recorder's court of Detroit; Jeffries (Edward J.), J. Submitted January 13, 1933. (Docket No. 42, Calendar No. 36,526.) Decided March 2, 1933.

Condemnation proceedings by city of Detroit, a municipal corporation, against Empire Development Company, a Michigan corporation, for an easement for street purposes. From verdict and judgment rendered, defendant appeals. Affirmed.

John Atkinson, Assistant Corporation Counsel (*Clarence E. Wilcox,* Corporation Counsel, of counsel), for plaintiff.

Dennis Boyle, for defendant.

POTTER, J. Petition by the city of Detroit to condemn an easement in property for street purposes. From a judgment of condemnation fixing damages of appellant at $2,557.75, it appeals. The site of the property is the same involved in *City of Detroit* v. *Empire Development Co.,* 259 Mich. 524. In that case petition was filed to condemn the fee of the land in question for a water board site. There was verdict of condemnation and damages assessed at $87,500. After verdict and before confirmation of the award, the city discontinued the case. It then commenced this case. It is claimed that case constitutes former adjudication. In *City of Detroit* v. *Empire Development Co.,* 259 Mich. 524, the city sought to take the fee of the land. In this case it seeks an easement only. The city of Detroit, at the time this proceeding was instituted, was in possession of the premises. It acquired possession under an agreement with a land contract purchaser, made improvements upon the premises, the land contract

purchaser defaulted, and was ousted, and this ouster carried with it plaintiff's rights. The city then began the condemnation case cited above. Defendant claims the second proceeding is unconstitutional. *City of Detroit* v. *Empire Development Co.*, 259 Mich. 524, holds the former proceedings were discontinued and these proceedings begun by plaintiff in good faith, and this therefore cannot be regarded as a second experimental suit to acquire the land at a less figure than the award in the former proceeding. The same issue is not involved that was involved in the former suit, and the verdict in that case, not having been confirmed, is no bar to the proceedings here involved. The city has a right to condemn an easement in property for street purposes. The question of necessity, properly declared by the city and determined by the jury, cannot here be re-examined. Condemnation proceedings are inquisitorial in their nature. The constitutional tribunal for the determination of the issues is the jury; the judge, after the jury is impaneled, acting in an advisory capacity. The trial judge in the course of the trial said:

"I want the jury to understand that they are the sole judges of the law and the facts. You are *it*. This is a constitutional jury under the Constitution of the State of Michigan, which provides for 12 men to make this inquiry, and you are the judges of the law. What I say to you is of no more importance than what anybody else says to you. If you think what I say is all right, why all right, and if you don't think so, that is all right, too, the same as anybody else."

In his formal charge to the jury, he said:

"What I am saying to you, of course, you are not bound to accept. I am not charging you. I am act-

ing in the same capacity as counsel here. If what I said to you appeals to you, you have a right to accept it or any part of it that appeals to you. If I have said anything that does not appeal to you, then you have the right to reject it. You are not at all bound by what I say any more than you are by what counsel say. You are the judges of the law and the facts in the case."

We find no reversible error in the charge of the court or in the proceedings.

Judgment affirmed, with costs of this court to appellee.

McDONALD, C. J., and CLARK, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

ANDERSON *v.* SCHUST CO.

1. APPEAL AND ERROR—DIRECTED VERDICT.
   In reviewing judgment for defendant on directed verdict, testimony must be construed in its light most favorable to plaintiff.

2. MOTOR VEHICLES—LIABILITY OF OWNER—EXPRESS OR IMPLIED CONSENT—STATUTES.
   To render owner of motor vehicle liable for negligence of driver, vehicle must be driven with express or implied consent or knowledge of owner (1 Comp. Laws 1929, § 4648).

3. MASTER AND SERVANT—LIABILITY OF MASTER—SCOPE OF AUTHORITY—APPARENT SCOPE OF AUTHORITY.
   As between master and servant, master is liable for injury to servant only when latter acts within actual scope of his authority, but as between master and third persons injured by servant, master is liable when servant acts within apparent scope of his authority.

4. SAME—LIABILITY WHEN SERVANT ACTING CONTRARY TO INSTRUCTIONS.

Servant may be within scope of his employment even though conducting master's business in manner contrary to his instructions.

5. SAME—LIABILITY FOR POSITIVE WRONG INTENTIONALLY DONE BY SERVANT.

For positive wrong by servant beyond scope of master's business intentionally or recklessly done, master may not be held liable; such acts being personal torts of servant for which master is not responsible.

6. SAME—LIABILITY FROM EXCESS OF AUTHORITY OF SERVANT.

When wrong arises from excess of authority of servant in furthering master's interest, and master receives benefit, if any, of act, master is liable; liability not being dependent on limit of servant's authority.

7. SAME—WHEN MASTER'S CONSENT IMPLIED.

Where servant's act in driving automobile at time third person was injured was against master's instructions, master's assent may be implied only if servant was acting within apparent scope of his authority (1 Comp. Laws 1929, § 4648).

8. SAME—"SCOPE OF AUTHORITY" DEFINED.

"Within scope of employment" or "within scope of authority of master" means while engaging in master's service or being about master's business.

9. SAME—MOTOR VEHICLES—LIABILITY OF MASTER—STATUTES.

Where, at time third person was struck, automobile was being driven by servant for his own pleasure by consent of branch manager in violation of master's instructions that cars be used only in master's business, master is not liable; act of servant not being in service of master or furthering master's interest (1 Comp. Laws 1929, § 4648).

Appeal from Saginaw; Browne (Clarence M.), J. Submitted January 17, 1933. (Docket No. 47, Calendar No. 36,948.) Decided March 2, 1933. Rehearing denied May 16, 1933.

Case by Irene Anderson, administratrix of the estate of H. Firth Anderson, deceased, against the

Schust Company, a Michigan corporation, for personal injuries received in an automobile collision resulting in death of plaintiff's decedent, alleged to be due to defendant's negligence. Directed verdict and judgment for defendant. Plaintiff appeals. Affirmed.

O'Keefe & O'Keefe and *Victor C. Anderson,* for plaintiff.

Crane & Crane, L. J. Carey, George J. Cooper, and *Frank A. Rockwith,* for defendant.

POTTER, J. Plaintiff, administratrix of the estate of H. Firth Anderson, deceased, brought suit against the Schust Company to recover damages for the death of plaintiff's decedent. From a judgment for defendant, plaintiff appeals. Judgment having been directed for defendant by the trial court, the testimony introduced must be construed in its light most favorable to plaintiff.

The only question involved is whether such testimony was sufficient, in law, to make it incumbent upon the trial court to submit the case to the jury. Plaintiff says it was sufficient. Defendant claims it was insufficient. Defendant's car was being driven by Merle J. Bowman, who worked for defendant in Grand Rapids. Edward J. Rohring of Grand Rapids had charge of the Schust agency there. He had been instructed by defendant to use its cars only in the company's business. Rohring, then branch manager at Grand Rapids, told Bowman he could take the car on the occasion in question and drive to Pinconning. It was on this trip the accident occurred. The court found the clear, undisputed, and uncontradicted proof on the part of plaintiff showed the car of defendant was being driven at the time and place of the collision by Mr. Bowman, an employee

of defendant, for his own pleasure or business, and not in the business of defendant, nor within the scope of his employment as an employee of defendant. Though he was driving defendant's car with the express consent of Mr. Rohring, defendant's branch manager, it was against the positive orders and instructions of defendant to its branch manager Mr. Rohring, who violated such orders and instructions given him, in permitting Bowman to drive the car for his own pleasure and business; that Rohring as branch manager was not acting in the scope of his authority or in furtherance of the business of defendant in loaning defendant's car to Bowman, and therefore the car was not being driven with the consent of the defendant, either express or implied, and plaintiff could not recover.

It is conceded defendant cannot be held liable unless the motor vehicle driven by Bowman was driven with the express or implied consent or knowledge of defendant. 1 Comp. Laws 1929, § 4648. There is no claim the motor vehicle was being driven with the express consent or knowledge of defendant. The important question is whether it was being driven with its implied knowledge or consent.

As between the master and servant, the master is liable only when the servant acts within the actual scope of his authority, but as between defendant and third persons injured by the acts of the servant, defendant may be liable when the servant is acting within the apparent scope of his authority.

A servant may be within the scope of his employment even though conducting his master's business in a manner contrary to his instructions (*Loux* v. *Harris,* 226 Mich. 315); and therefore it is frequently held a defendant is liable for accidents caused by the operation of a motor vehicle used by

his servant in going to and from his work, upon the theory the servant is engaged in the master's business. The true rule is that for a positive wrong by a servant beyond the scope of the master's business intentionally or recklessly done, the master cannot be held liable. Such acts may constitute personal torts of the servant, but the master is not responsible. When, however, the wrong arises from an excess of authority, in furthering the master's interest, and the master receives the benefit of the act, if any, the master may be liable because liability does not depend upon the limit of the servant's authority. *Chicago & Northwestern R. Co.* v. *Bayfield,* 37 Mich. 205 (16 Am. Neg. Cas. 87). An assent may only be implied if Bowman's act was against the instructions of defendant and if Bowman was acting within the apparent scope of his authority.

Within the scope of employment or within the scope of the authority of the master means while engaging in the service of the master or being about the master's business. *Eberle Brewing Co.* v. *Briscoe Motor Co.,* 194 Mich. 140. There is no question but that Mr. Rohring had instructions the motor vehicles of defendant were to be used only in the business of the defendant, and were not to be used for private purposes. Mr. Bowman, after obtaining consent of Mr. Rohring, the branch manager of defendant at Grand Rapids, to use the motor vehicle in question to go to Pinconning to visit his father, was not acting within the scope of his employment in his master's business, was not engaged in the service of the defendant, but was engaged in his own personal business or pleasure. Defendant cannot be held liable for the acts of Mr. Bowman when engaged in pursuing his own business or pleasure. It can only be held liable for the acts of Mr. Bowman if

he was engaged in the service of the defendant furthering its interest or about its business when the accident occurred. Under the undisputed facts, Mr. Bowman was not so engaged at the time of the accident, and therefore cannot be held to have been operating defendant's motor vehicle with its implied knowledge or consent. We think the trial court correct in directing a verdict for defendant.

Judgment affirmed, with costs.

McDONALD, C. J., and CLARK, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

SEITZ *v.* BOLLES.

INSURANCE—INSURABLE INTEREST—HUSBAND AND WIFE—GARNISHMENT.

Where husband deeded lots to trust company, his wife purchased lot from trust company which he allegedly conveyed by mistake, built house thereon and sold property on contract, vendees insured house, loss, if any, payable to wife and vendees, as their interest might appear, husband had no insurable interest in said property, and therefore insurance money was not garnishable for his debt, although he signed proofs of loss at instance of insurance company to preclude his making any claim under policy.

Appeal from Monroe; Rathbun (G. Arthur), J., presiding. Submitted January 12, 1933. (Docket No. 129, Calendar No. 37,017.) Decided March 2, 1933.

Garnishment proceedings by Harry J. Seitz, receiver of Dansard State Bank, against William Bolles, principal defendant, and Fidelity & Guaranty Fire Corporation, a foreign corporation, garnishee defendant. Dorothy Bolles intervened as third-party claimant to the fund. Judgment for intervener. Plaintiff appeals. Affirmed.

Golden, Nadeau & Fallon, for plaintiff.

George S. Wright, for intervener.

POTTER, J. Plaintiff sued defendant William Bolles in assumpsit. A writ of garnishment issued to Fidelity & Guaranty Fire Corporation. It disclosed liability for loss under an insurance policy. Dorothy Bolles, wife of defendant William Bolles, intervened and claimed the fund in controversy. The trial court sustained her claim. Plaintiff appeals. Defendant William Bolles owned land in Monroe county. He desired to plat and sell it. To carry out his plan, the property was deeded to the Commerce Guardian Trust & Savings Bank of Toledo, Ohio, in trust. Subsequently a new trustee was appointed. Dorothy Bolles, wife of William Bolles, the principal defendant, bought a lot from the trust company and built a house thereon. She sold this house and lot on land contract to George D. and Jeanette T. Wuerfel. The Wuerfels defaulted in payments to be made on the contract. Notice of forfeiture of land contract was given. Before Dorothy Bolles recovered possession of the premises, the house burned. The land contract purchasers had insured the house and contents in Fidelity & Guaranty Fire Corporation, loss, if any, payable to Dorothy B. Bolles, George D. Wuerfel, and Jeanette Wuerfel, as their interest might appear. Defendant

William Bolles joined with the insured in making proof of loss under the policy. He verbally claimed the lot was deeded by him to the trust company by mistake. His signature was included on the proof of loss by the adjuster for the insurance company to shut him off from making any claim under the policy. After the adjustment, plaintiff sued William Bolles and garnisheed the insurance company. The trial court held the proceeds of the insurance policy belonged to Dorothy B. Bolles and George D. Wuerfel and Jeanette Wuerfel his wife, that William Bolles had no insurable interest in the property, and plaintiff was not entitled to recover in the garnishment proceedings. We think the trial court was correct.

Judgment affirmed, with costs.

McDONALD, C. J., and CLARK, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

LYON *v.* DENTON.

1. TAXATION—TAX HOMESTEAD DEED—VALIDITY.

   Tax homestead deed, regular on its face, and containing recitals showing full compliance with all legal requirements, executed in 1928, is not subject to attack on ground that statutory certificate of auditor general and director of conservation was not signed by latter until in 1927, and after his retirement from office, although deed to State was executed by auditor general in 1923 (1 Comp. Laws 1929, §§ 3520–3522, 3527, 3724).

2. CONSTITUTIONAL LAW—STATUTES—TAXATION—TAX HOMESTEAD DEED.

Statute providing for sale by State of lands bid off to it for delinquent taxes (1 Comp. Laws 1929, § 3520), where owner has neglected to pay his taxes for five years and has abandoned said land, *held*, not violative of due process clause of Federal Constitution (14th Amendment).

Appeal from Midland; Warner (Glenn E.), J., presiding. Submitted January 6, 1933. (Docket No. 66, Calendar No. 36,780.) Decided March 2, 1933. Rehearing denied May 16, 1933.

Ejectment by Leo Lyon against Charles Denton and another. Judgment for plaintiff. Defendants appeal. Affirmed.

Virgil W. McClintic (*O. L. Smith,* of counsel), for plaintiff.

Wilson & Hoffman and *O'Keefe & O'Keefe,* for defendants.

Patrick H. O'Brien, Attorney General, and *Walter A. Kirkby,* Assistant Attorney General, *amici curiæ.*

SHARPE, J. Plaintiff brought ejectment to recover the possession of land in the county of Midland for which he has a tax homestead deed, executed on May 14, 1928, and recorded on December 11th of that year. The defendant Charles Denton is the owner of this land, as appears in the regular chain of title thereto. May Denton is his wife. It is conceded that the records in the auditor general's department show that the provisions of 1 Comp. Laws 1929, §§ 3520–3522 (Act No. 206, Pub. Acts 1893, §§ 127, 127a, 128, as amended), under which such deed was issued, have been complied with. The defense is based upon the claim that the certificate of determination of the

auditor general and director of conservation, required by section 3520 to be made before the issue of such deed, was not signed by the director of conservation until after he had retired from that office on January 10, 1927. It is also urged that the amendment to the tax homestead law (Act No. 107, Pub. Acts 1899), hereafter referred to, is unconstitutional and void.

The trial court held that this act was constitutional. He also held that—

"The deed from the State to the plaintiff is regular in form; contains recitals showing full compliance with legal requirements, and is conclusive evidence of title in the grantee."

A judgment was entered for the plaintiff, from which the defendants have taken this appeal.

Section 3527, under which the plaintiff's deed was issued, provides:

"Such deed shall convey an absolute title to the lands sold, and shall be conclusive evidence of title in fee in the grantee. * * * And in all cases where the lands have been taken as a homestead as set forth in last foregoing proviso, all actions of ejectment or to recover possession of said lands or to set aside the title of such homesteader by any person, firm or corporation claiming the original or government title, shall be commenced within six months after this act shall take effect, and not afterwards."

The deed from the auditor general to the State of Michigan was executed on November 16, 1923, and recorded on January 7, 1924. 1 Comp. Laws 1929, § 3724, reads, in part, as follows:

"After the expiration of six months from and after the time when any deed made to the State under the provisions of section one hundred twenty-

seven of act two hundred six of the public acts of eighteen hundred ninety-three, being the general tax law, and acts amendatory thereto, shall have been recorded in the office of the register of deeds for the county in which the land so deeded shall be situated, the title of the State in and to the same shall be deemed to be absolute and complete, and no suit or proceeding shall thereafter be instituted by any person claiming through the original or government title to set aside, vacate or annul the said deed or the title derived thereunder."

This deed contains recitals of the facts which must exist under section 3520 to justify its execution. But counsel for the defendants insist that the recital of determination contained therein "is not true" because the signature of the director of conservation was not annexed thereto until after his retirement in January, 1927.

While it may well be said that there is conflict in the evidence as to when the determination was signed, we agree with the trial court that, if defendants' contention in this respect be sustained, it is not controlling of decision. Had examination been made of the records in May, 1928, when plaintiff secured his deed, a full compliance with all of the statutory requirements would have been revealed thereby. No imperfections appear on the face of his deed or of the deed to the State of Michigan. The statute under which plaintiff's deed was issued (section 3527) provides, as before stated:

"Such deed shall convey an absolute title to the lands sold, and shall be conclusive evidence of title in fee in the grantee."

This statute and those limiting the right to attack the validity of deeds issued by the auditor general to the State have been many times considered by this

court. In *Chiodo* v. *Williams,* 180 Mich. 367, the purchaser under a State tax deed sought to recover possession by a writ of assistance. The regularity of the tax proceedings was questioned by the original owner. The court said:

"The statute gave him six months after the deed to the State was recorded in Muskegon county to contest its validity. Having failed to question the proceedings within that time, he will now be precluded from doing so. Section 127, general tax law."

See, also, *Darrow* v. *Railway Co.,* 188 Mich. 664.

That plaintiff's deed was not subject to the attack made upon it has been many times decided. In *Grand Rapids Trust Co.* v. *Doctor,* 222 Mich. 248, 255, it was said:

"The deed from the land commissioner to Torrent was in full form with recitals showing compliance with the law. As such it could not be and was not questioned. When introduced in evidence, it not only made a *prima facie* case for plaintiff, but was, under the statute, conclusive evidence of title in fee in the grantee."

The earlier cases were reviewed at some length in the recent case of *Price* v. *Stark,* 259 Mich. 407. It was there said:

"These decisions seem conclusive that the rights of a former owner have been absolutely cut off by a deed from the State of State tax homestead lands where no attack is made upon it within six months after its execution."

Under section 127 of the general tax law (Act No. 206, Pub. Acts 1893), before delinquent lands could be deeded over to the State and become State tax

homestead lands, it must have appeared that they were "barren, swamp or worthless lands," and had been abandoned by the owner. This section was amended by Act No. 107, Pub. Acts 1899 (1 Comp. Laws 1929, § 3520). The first sentence thereof now reads as follows:

"Lands delinquent for taxes for any five years, where said lands have been sold and bid off to the State for the taxes of one or more of the said years, and then so held, and no application having been made to pay, purchase or redeem the said lands for said taxes and no action pending to set aside such taxes or to remove the cloud occasioned thereby, shall, within the meaning of this act, be deemed abandoned lands, unless such lands are actually occupied by the person having the record title thereto."

Counsel for defendants claim that this amendment "violates the Federal Constitution." While not so stated, we assume that the due process provision (14th Amendment) is referred to. The omission of the words "barren, swamp or worthless" from the finding required to be made does not, in our opinion, affect the constitutionality of the amendment. Such land, when deeded over to the State, is subject to sale, and is often purchased, as was that here involved. Unless needed as part of a reserve or for other special use, the State does not want the lands. If only those found to be "barren, swamp or worthless" are included, then but few, if any, descriptions would be sold. The purpose of this omission seems clearly to have been to enable the State, by proper proceedings, where the owner has neglected to pay his taxes for five years and has abandoned the land, to sell the same, but such sale may not be had at less than an appraised value which has been placed thereon. By such sale the State will not only secure

the payment of the whole or at least a part of the delinquent tax, but have a person in ownership thereof who will probably see that no such delinquency again occurs.

This case was tried by the court without a jury. Its findings of fact were justified by the evidence submitted, and its judgment, rendered in favor of plaintiff, is affirmed.

McDONALD, C. J., and CLARK, POTTER, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

REGAN *v.* CONSOLIDATED BAKERIES, INC.

1. CONTRACTS—EVIDENCE—SUFFICIENCY.
   Evidence *held*, sufficient to establish that defendant corporation, by its president, agreed to pay plaintiff certain sum of money for his services in securing investment of additional money in defendant, thus relieving it from financial embarrassment, and that said agreement was ratified by stockholders.

2. ESTOPPEL—EVIDENCE—SUFFICIENCY.
   Evidence *held*, insufficient to support claim that plaintiff is estopped from claiming agreed price for his services in securing investment of additional money in defendant corporation.

3. LICENSES—BLUE SKY LAW—SECURITIES.
   Agreement to pay plaintiff certain sum of money for his services in securing investment of additional money in defendant corporation, *held*, not in violation of blue sky law; plaintiff not being engaged in sale of securities within meaning of said statute, nor did he sell defendant's stock or securities, but he procured investment in property of defendant.

4. NEW TRIAL—WITNESSES—ABUSE OF DISCRETION.

Denial of motion for partial new trial, based on affidavits, was not abuse of discretion, where no sufficient showing was made as to why affiants were not called as witnesses on trial.

Appeal from Wayne; Parker (James S.), J., presiding. Submitted January 13, 1933. (Docket No. 9, Calendar No. 36,795.) Decided March 2, 1933. Submitted on rehearing June 6, 1933. Decided June 29, 1933.

Assumpsit by William Regan against Consolidated Bakeries, Inc., a Michigan corporation, for services rendered in the procurement of additional capital. Judgment for plaintiff. Defendant appeals. Affirmed.

McLeod, Fixel, Abbott & Fixel, for plaintiff.

Welsh, Bebout, Hill & Lee, for defendant.

SHARPE, J. The question first presented is whether the defendant corporation agreed to pay plaintiff the sum of $5,000 for his services in securing a man to make an investment in its company and relieve it from financial embarrassment. On trial without a jury, the court found that such agreement was made by the president of the defendant company. It also appears by a preponderance of the evidence that this agreement was ratified at a meeting of the stockholders at which all but two were present and proxies for these were in the possession of the secretary.

It is undisputed that at the solicitation of the plaintiff William T. Skrzycki became interested in the company and entered into a written agreement with it for the purchase of a part of its stock, whereby its financial difficulties were overcome. He is now a majority stockholder and in control of the com-

pany. It will serve no useful purpose to review the evidence submitted. It established the contract as claimed by plaintiff and performance on his part.

The defendant contends that plaintiff is estopped from recovering. This claim is based on the testimony of Skrzycki that in one of his conferences with the plaintiff before making his contract, the following conversation was had:

"I asked Mr. Regan, 'Now, who are you going to get any commission from, or what are you going to get? How are you going to get your pay for turning this deal?' I don't just remember. He said, 'It won't cost you a nickel.' Well, I said, 'You understand what I mean?' 'Yes,' he says, 'I do, it won't cost you a nickel.'

"*Q.* Was there any statement made at that time, that he was to get anything from the Consolidated Bakeries, or anybody else?

"*A.* No, not at that time. There was nothing said about him getting any money from the Consolidated Bakeries."

Plaintiff testified that at one time Skrzycki asked him, "What will you charge me for handling this for me?" and that he answered, "Bill, I won't charge you anything, because I am getting paid by the Consolidated Baking Company."

Walter W. Wray, an accountant employed by Skrzycki to audit the books of the company prior to his purchase, testified that he found no entry therein of any indebtedness to the plaintiff. At this time there was no indebtedness as he had not yet earned his commission.

Robert M. Kirby, who was employed by the company to audit its books after Skrzycki's purchase, testified that when doing so plaintiff asked him "whether any provision had been made for a pay-

ment of $5,000 to him,'' and that he answered ''there had not,'' and that he afterwards spoke to Skrzycki about it. The plaintiff admitted that he made this inquiry and testified that Skrzycki afterwards came to him and said:

'' 'Bill, you asked Mr. Kirby to put the $5,000 through the books, that you have got coming?' I said, 'Yes.' He said, 'You know I want to borrow some money and I want to show a good statement to the bank.' ''

Skrzycki admitted that he might have made such a statement. Alexander, the president of the company, testified that he told Skrzycki before his purchase that the company had agreed to pay plaintiff $5,000 for procuring additional capital. In view of this testimony, taken as a whole, the claim of estoppel is not well founded.

Defendant also urges that—

''The claim of the plaintiff was unenforceable as arising out of an alleged contract for the payment of commission for solicitation and inducement of the sale and purchase of corporate stock within the meaning of the 'blue sky law.' ''

The plaintiff was not engaged in the sale of securities as this term is used in that act (Act No. 220, Pub. Acts 1923 [2 Comp. Laws 1929, § 9769 *et seq.*]). Under his contract with the company he secured a man able and willing to make an investment in the property of the company. He had nothing to do with the sale of its stock or securities, and in no way violated the provisions of this act.

One of the questions involved is thus stated: ''Was defendant's motion for partial new trial properly heard and denied?''

The record discloses that such a motion was filed, based upon several affidavits annexed thereto. Two of these affidavits were made by stockholders of the company, and a third by a former stockholder. No sufficient excuse was offered why these affiants were not called as witnesses on the trial. We find no abuse of discretion on the part of the trial court in the denial of this motion.

The judgment is affirmed.

McDONALD, C. J., and CLARK, POTTER, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

ON REHEARING.

SHARPE, J. We have again given careful consideration to the facts presented by the record in this case and the argument of counsel based thereon. In our opinion the conclusion before reached (262 Mich. 249) is supported by the weight of the evidence and in accord with the law applicable thereto.

McDONALD, C. J., and CLARK, POTTER, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

CHENE *v.* CITY OF DETROIT.*

1. DEDICATION—COMMON-LAW DEDICATION.
   Dedication under statute is not necessary where facts are sufficient to establish dedication at common law.

2. SAME—WHAT CONSTITUTES COMMON-LAW DEDICATION.
   To create common-law dedication there must be intention on part of owner to dedicate lands to public use, and acceptance of such dedication by public authorities.

3. SAME—ACCEPTANCE—USER.
   Acceptance of dedication may be evidenced either by express declaration or by acts of user indicating intention to accept such property for public use or purpose to which owner has by declaration or acts set it apart.

* For opinion on rehearing, see 263 Mich. 512.

4. SAME—INTENTION—USER—ACCEPTANCE.
In suit to compel removal of obstructions from street, evidence *held*, sufficient to establish intention on part of owners to dedicate street for public use and its acceptance by user, constituting common-law dedication.

5. MUNICIPAL CORPORATIONS—HIGHWAYS AND STREETS—VACATING STREET—STATUTES.
Use of street for 10 years or more constitutes public highway (1 Comp. Laws 1929, § 3936), which abutting property owners or public authorities may not close, except in manner authorized by law.

6. SAME—VACATING STREET—REVIEW BY COURT—CITY CHARTER.
Whether city was justified in closing part of street is not subject to review in suit to compel removal of obstruction from street, where it appears that said action was taken under city charter and in accordance with law.

Appeal from Oakland; Gillespie (Glenn C.), J. Submitted January 12, 1933. (Docket No. 128, Calendar No. 36,990.) Decided March 2, 1933. Rehearing granted April 21, 1933.

Bill by Rose Allen Chene and others against City of Detroit, a municipal corporation, and others to compel removal of obstructions to a street and for nullification of street vacation proceedings. Decree for plaintiffs as to defendants City of Detroit and Zoological Park Commission, and bill dismissed as to City of Royal Oak. Defendants City of Detroit and Zoological Park Commission appeal. Affirmed.

Frank B. Ferguson, for plaintiffs.

Clarence E. Wilcox and *James R. Walsh* (*Howard F. Cline,* of counsel), for defendants.

SHARPE, J. The opinion filed by the trial judge so clearly states the facts in this case, and the law applicable thereto, that we adopt it as our own. It follows:

"Plaintiffs, owners of property in the Huntington Woods subdivision in the township of Royal Oak, filed this bill to compel the city of Detroit and the

zoological park commission to remove a fence erected in the middle of Huntington road. Plaintiffs also pray that certain proceedings taken by the city of Royal Oak to vacate a portion of the street be decreed null and void. The facts out of which the controversy arose are substantially as follows:

"In the spring of 1916 Charles W. Burton purchased 355.58 acres of land in Royal Oak township, under an agreement with one Follett, then manager of the Detroit zoological society, whose authority to act for and bind the society is conceded, that the south 100 acres would be deeded to the society and each would give a strip of land 30 feet wide along the boundary for the purpose of establishing a 60-foot highway. On April 28, 1916, Burton conveyed the 100-acre parcel to the zoological society, and within a short time thereafter conveyed the remainder to the Huntington Woods Company, of which he was president, and in which Follett was a stockholder and a director. The company thereupon caused the property to be platted as the Huntington Woods subdivision, and gave a bond to the township conditioned that it would improve the streets and build the sidewalks shown on the plat within a period of three years and the plat was thereupon duly accepted by the public authorities.

"Under the agreement between Follett and the Huntington Woods Company, a 60-foot street was laid out between the two properties known as Huntington road, commencing at Woodward avenue, and running in a westerly direction. The north 30 feet of the road was dedicated on the plat as a public street, but the south 30 feet, which was on the property theretofore deeded to the Detroit zoological society, was not dedicated. The society however erected a high, woven wire fence, attached to iron posts imbedded in concrete, set back 30 feet south of the center of the road as laid out on the plat, but never entered into any formal dedication of such land as a public highway, although there is no doubt

each party intended to set aside a 30-foot strip of land, making a 60-foot street some 4,400 feet long between the two properties. At the intersection of Ludlow street, where Huntington road leaves the property of the zoological society, the street is shown on the plat as having a width of 60 feet, which conforms to the width of the remainder of the streets.

"Both parties participated in the work and expense of grading and improving the street, and, some time during the year 1917 or 1918, in paving a 24-foot strip in the center with a hard surface material known as rubber stone. Several blocks west from what is now Woodward avenue, the street traversed a low, marshy strip of land, and during times of wet weather it was impassable, but this condition was remedied by the construction of a county drain some time about 1925. Before the construction of the drain automobiles frequently became mired in this portion of the street when attempting to cross the low ground. The street was used more or less by the public from the time the plat was recorded, and was extensively used by the authorities of the zoological park after title to the zoological park property was conveyed to the city of Detroit in 1923.

"Subsequent to 1921 there are many acts on the part of municipal authorities showing that the road was regarded as a public highway. From 1921 until the village of Huntington Woods was incorporated in 1926, taxes were levied by the township of Royal Oak upon the property in the subdivision for road repair purposes, and road work was performed by the township upon all of the roads in the subdivision. During the years 1925 to 1929 the city of Royal Oak performed work on the street. The village of Huntington Woods also performed work on the street at intervals between 1926 and 1929, plowed snow in the winter and placed calcium chloride, paid for by the zoological park commission, on the street in the summer with city equipment, and cut weeds and assumed to regulate traffic and parking thereon.

"When the zoological park was opened in the summer of 1928, the traffic on the road increased to such an extent that it was difficult for residents even to cross the street. Traffic officers of the village of Huntington Woods and the city of Royal Oak were stationed along the street and a plan was advanced to make it a one-way street towards Woodward avenue. To facilitate parking, the Detroit zoological park commission caused a strip of crushed stone to be spread immediately north of its fence and south of the improved portion of the road, erected a plank barrier to prevent cars from being driven into the fence, and placed parking signs at intervals instructing drivers to park their cars on the crushed stone.

"Traffic conditions thereafter became so bad that petitions were filed with the authorities of the city of Royal Oak and the village of Huntington Woods in the summer of 1928. In the fall of 1928 barriers were erected at each end of the road by the village of Huntington Woods. In the summer of 1929 the city of Royal Oak took proceedings to vacate the north 30 feet of the street for a distance of several blocks west from Woodward avenue, being all that portion of the platted street within the city limits. The Detroit zoological park commission in the spring of 1929 moved its fence north a distance of 30 feet, along its entire north line, so the fence now incloses the south half of the 24-foot strip of stone or macadam pavement. As a result of these actions the entire 60 feet of the former road for a distance of several blocks west of Woodward avenue is closed, and, for the remainder of the distance, only the former north half of the road, which includes only 12 feet of the former hard surface of the road, is open to use.

"After the property was platted many lots were sold and a number of pretentious homes erected, several of which front on Huntington road. The plats of the property which were shown to prospective purchasers show all roads upon the subdivision, including Huntington road, to be 60 feet wide. The

road was formerly a direct outlet to Woodward avenue for residents on the street, who are now obliged to detour through back roads, causing in some instances extra travel of approximately one-half mile.

"In my judgment there are at least two reasons why this court must hold that the city of Detroit had no right to obstruct a street of which the public had had the uninterrupted use for upwards of 14 years.

"1. The facts constitute a common-law dedication.

"It is unnecessary to refer to the many cases in which this question has been discussed, as the rule is well settled that a dedication under the statute is not necessary where the facts are sufficient to establish a dedication at common law. In order to create a common-law dedication, there must be, first, an intention on the part of the owner to dedicate lands or premises to a public use; and, second, such dedication must be accepted by the public authorities. The acceptance may be evidenced either by express declaration or by acts of user indicating an intention to accept such property for the public use or purpose to which the owner has by his declarations or acts set it apart.

"It appears from the foregoing statement of facts all of the elements necessary to constitute a common-law dedication are present. By mutual agreement between the owners of the abutting property, a 60-foot street was laid out, one-half of which was formally dedicated as a part of the Huntington Woods subdivision. As laid out, it formed the principal outlet to Woodward avenue for all of the lots in the southern portion of the subdivision. The zoological society erected a permanent fence along the south line, leaving a strip of land 60 feet wide which conformed to the platted property on the north. The street was graded and a strip in the center 24 feet wide paved. Trees were set out along the street line and sidewalks built along one side.

Lot lines and the lines of intersecting streets were fixed in accordance with the street lines. Surely in the face of this testimony, which is undisputed, it cannot be said there was no intention on the part of both the Huntington Woods Company and the Detroit zoological society to dedicate the street to public use.

"The evidence of acceptance by user is equally convincing. The street was in use by the public almost from the time it was laid out. It is true that prior to 1925, during the wet seasons of the year, a small section was in bad condition, and automobiles frequently became mired when attempting to use it, but it was in use nevertheless as a public thoroughfare. Taxes were assessed upon property in the road assessment district in which the street was located for the improvement of the street, and work was done upon it by the public authorities. Not only was road work done upon the street, but the public authorities placed calcium chloride upon it on occasions, cut weeds and removed snow therefrom during the winter. The street was patrolled by municipal authorities, who regulated traffic and parking thereon in the same manner as other streets in the subdivision. Until acute traffic problems were presented, through excessive use of the street by the public, it does not appear to have occurred to anyone that it was not open to public use.

"2. Use of the street for 10 years or more constitutes a public highway.

"The statute provides:

"'All highways * * * that shall have been used as such for ten years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used eight years or more, shall be deemed public highways.' 1 Comp. Laws 1929, § 3936.

"Here the road had been laid out, its boundaries plainly indicated, and a 24-foot pavement built in the center, which had been used by the public for more than 10 years. The statute clearly prevents

the abutting property owners or the public authorities from now closing the street except in the manner authorized by law.

"I have examined the files in the Wayne circuit court, where certain purchasers of lots brought suit against the Huntington Woods Company for rescission of their contracts on the ground that at the time of sale it was represented that Huntington road was a public street. The cases were heard by Judge Lamb, who came to the conclusion that the street was a public street, and dismissed the bills of complaint. While it is true his conclusions would not be binding in this action, the fact that another court has entered such a decree is at least entitled to respectful consideration.

"So far as the action taken by the city of Royal Oak to close the north half of the street for several blocks from Woodward avenue is concerned, its action appears to have been strictly in accordance with the city charter. Whether such action was justified is not a question for this court. So long as it appears that the public authorities acted in accordance with law, their actions are not subject to review by this court.

"A decree will be entered in accordance with the foregoing, restraining the defendants city of Detroit and the zoological park commission from blocking or obstructing the southerly 30 feet of Huntington drive as it existed prior to 1929. The bill will be dismissed as to defendant city of Royal Oak, without costs. Plaintiffs will recover taxable costs against the remaining defendants."

The decree entered pursuant thereto is affirmed, with costs to appellees.

McDONALD, C. J., and CLARK, POTTER, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

HOPKINS *v.* GRAND RAPIDS TRUST CO.

1. CONVERSION—RIGHT TO RECOVER SPECIFIC THING CONVERTED.
   In order to maintain action for conversion, plaintiff must show right to recover specific thing converted.

2. SAME—CHATTEL MORTGAGES—CONSENT—ESTOPPEL.
   Where mortgage note holders gave their consent to use of mortgaged property for purpose of its manufacture into products for sale, and it was so used, they thereby rendered its return to them impossible, barring their right to recover for its conversion.

Appeal from Kent; Brown (William B.), J. Submitted January 18, 1933. (Docket No. 23, Calendar No. 36,641.) Decided March 2, 1933.

Case by George B. Hopkins, trustee, against Grand Rapids Trust Company and Peter D. Kline for conversion of receivership assets. Directed verdict and judgment for plaintiff. Both parties appeal. Reversed, and judgment ordered entered for defendants.

Linsey, Shivel & Phelps, for plaintiff.

Norris, McPherson, Harrington & Waer, Warner, Norcross & Judd, and *Joseph Shulsky,* for defendants.

SHARPE, J. On May 15, 1927, the Bennett Brass Company, a corporation, with its office and principal place of business at Greenville, executed a mortgage, covering both real and personal property, to C. Sophus Johnson, of Grand Rapids, as trustee, to

secure the payment of certain notes to the amount of $75,000. The property mortgaged was described as follows:

"Lots 17, 18, 19, 20, and 21 of Edwards Third Addition to the city of Greenville, including all buildings now on or hereafter to be built thereon, machinery, equipment, and the merchandise inventory of raw materials and manufactured products, including any additions or substitutions of equipment and merchandise inventory and any and all future acquired property."

It was recorded as a real estate mortgage on July 20, 1927, and later filed as a chattel mortgage on August 5th of that year. On November 29, 1927, the defendant Grand Rapids Trust Company was appointed receiver for the Bennett Brass Company by the circuit court for the county of Montcalm, in chancery, and duly filed its acceptance and bond as such. The defendant Peter D. Kline, a vice-president of the company, acting for it, took possession of all of its assets. The inventory filed by him disclosed that the personal property covered by the chattel mortgage was of the value of $31,994.09.

It appears that at the time the mortgage was executed the brass company was indebted to certain banks in the sum of $37,500. These notes were guaranteed by seven directors of the company. They were renewed between the date of the mortgage and its record on August 5th, and were afterwards paid in full by them in January, 1928.

On April 27, 1928, Mr. Johnson, as trustee, called a meeting of these directors, who were also the holders of the notes secured by the mortgage, to consider the question of foreclosing the mortgage. He advised foreclosure. There was discussion, in which Mr. Kline, who was also present, at the request of

some of the note holders, took part and stated that in his opinion there was an opportunity to continue the receivership successfully. Mr. Johnson testified:

"And I said to him then, 'Mr. Kline, do you realize the inventory which you have filed'—I had some information about the inventory,—was around thirty-three or thirty-four thousand dollars worth of merchandise—'and that belongs to us, or to me as trustee for these note holders?' And he said 'Yes.' And if we foreclose on that and that we wanted to go ahead with that. He then stated to those present if we did not foreclose that they would see to it that we would—that we would be reimbursed, that is, that they would turn over to me as trustee, or to the bondholders when they were through operating the plant, merchandise or cash to its equivalent, to the personal property then on hand.

"*Q.* Of what value?

"*A.* It was property then on hand, which was around thirty-three or thirty-four thousand dollars.

"*Q.* What next took place?

"*A.* After Mr. Kline made that statement it was discussed, and I think I was still of the opinion we should still foreclose on that, because I was still being criticized by the different note holders because of nonpayment of the interest when I hadn't received any, and I told them I couldn't. I know Mr. Kline made the statement as—from the different people present we took a vote on it and I asked each one of the men present then, if we should foreclose or should go ahead under the proposition that Mr. Kline had made. We took a vote and I think it was unanimously agreed they could go ahead with it and use the materials under the proposition he had made."

His testimony as to what was then said by Mr. Kline is, in effect, corroborated by several of the note holders who were present.

Mr. Kline testified that he then stated that the "notes and the mortgage were not within the scope or jurisdiction of the receiver;" that he had promises of additional business, and that—

"I explained to them that with the results obtained up to that time, and with these additional possibilities, they might not desire to proceed with foreclosure, but specifically were they told by me, not once, but three or four different times, that we had no interest whatever in the matter of whether they proceeded with foreclosure or did not"—

and that the note holders present "decided the receiver had better continue on for a period, at least."

Mr. Kline also testified that the defendant trust company continued the business and advanced its own money at times to carry it on, but it was unsuccessful, and that, when its assets were finally disposed of, the personalty covered by the trust mortgage had been used up, and, on a sale had, the equity in the real estate and some of the equipment not covered by the mortgage were bid in by a representative of the trustee for the sum of one dollar, and that there was nothing left for creditors after paying the expenses of the administration by the receiver.

One June 23, 1930, Mr. Johnson resigned as trustee and the plaintiff, George B. Hopkins, was duly appointed his successor. This action was brought by him to recover the value of the personalty included in the mortgage, under the claim that it had been converted by the defendants to their own use.

At the conclusion of the evidence submitted by plaintiff, and also at the conclusion of all of the proofs, the defendants moved for a directed verdict. These motions were denied and a verdict directed

for plaintiff for the appraised value of the property mortgaged, less the amount of certain credits extended after the execution of the mortgage and before it was filed as a chattel mortgage, the balance, including interest, amounting to $27,629.85. Both parties have appealed from the judgment entered thereon, the plaintiff claiming that the court erred in reducing the damages to which he was entitled.

While the agreement claimed to have been made at the meeting held on April 27th is set forth in both counts of the declaration, plaintiff's right of recovery is based upon the conversion of the personal property included in the mortgage. On the argument for directed verdicts, the court said to plaintiff's counsel, "I understand the plaintiff is standing now squarely on that one count of conversion," to which counsel replied: "That was our motion, directed to that, if the court please." In the briefs filed, liability is predicated on conversion alone, so decision by us must rest thereon.

While there is dispute as to what was said at the meeting held on April 27th, it clearly appears that the note holders, against the advice of the trustee, consented that the receiver might use the personal property covered by the mortgage in an effort to relieve the company from its financial embarrassment. They were all stockholders, and, as such, interested financially in the accomplishment of this result. This property consisted largely of raw material and unfinished goods, and was used by the receiver in the manufacture of the products in the sale of which the company had been engaged. It could not thereafter be returned to the trustee in the condition in which it was when consent to its use was given. All that the note holders could have expected was the return

of an equivalent in property or payment therefor in money. The continuance of the business by the receiver resulted in losses, of which the note holders were informed, and it does not appear that they in any way remonstrated on account of the manner in which it was conducting the business.

In view of these facts, it seems clear that this action for conversion cannot be sustained.

"It is a well-settled rule that if the owner expressly or impliedly assents to, or ratifies, the taking, use, or disposition of his property, he cannot recover for a conversion thereof." 38 Cyc. p. 2009.

"Trover is the name of the action which lay, at common law, for the recovery of damages for the conversion of personal property, and the gist of the action is the disposing or assuming to dispose of another's goods without his authority." 26 R. C. L. p. 1098.

"Trover is not maintainable as for a conversion of money unless there is an obligation on defendant's part to return the specific money intrusted to his care." *Shrimpton & Sons* v. *Culver* (syllabus), 109 Mich. 577.

In *Globe & Rutgers Fire Ins. Co.* v. *Fisher,* 234 Mich. 258, it was sought to hold an insurance agent liable in such an action for the conversion of moneys collected by him as premiums and not accounted for. The court said:

"The action of trover (now trespass on the case for conversion) could be maintained where the plaintiff was lawfully entitled to the possession of the specific thing converted. The rights of the parties might or might not be evidenced by a contract; but if evidenced by a contract, the contract must establish

the right of the plaintiff to the possession of the specific thing converted in order to maintain the action.''

When the note holders gave their consent to the use of the mortgaged property by the receiver for the purpose of its manufacture into products for sale, they thereby rendered it impossible for a return of it to be made to them. When so used, its identity was at once destroyed and return of it could not be had if demand had been made therefor. Their assent to the disposition made of it by the receiver bars the right to recover for its conversion.

Counsel for plaintiff call attention to many cases, collected and referred to in *Baxter* v. *Woodward,* 191 Mich. 379 (Ann. Cas. 1918C, 946), wherein it is held that when a bailee, having authority to use a chattel in a particular way, uses it in a different way, or to a greater extent than authorized, such unauthorized use is a conversion thereof. These are not applicable to the facts here presented, as it appears that this personal property was used by the receiver in the manner in which it was intended to be used when consent to its use was given.

It follows that the judgment entered must be reversed and set aside, and the cause remanded to the trial court, with direction to enter a judgment for the defendants, with costs of both courts.

MCDONALD, C. J., and CLARK, POTTER, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

CLORE *v.* ZIMMERMAN.

CONTRACTS—BREACH OF CONTRACT.

In contractor's action against plastering company for breach of contract, finding of trial court that no binding contract existed, *held*, justified by record.

Appeal from Wayne; Dunham (Major L.), J., presiding. Submitted January 12, 1933. (Docket No. 147, Calendar No. 36,930.) Decided March 2, 1933.

Action by Frank X. Clore against Frank H. Zimmerman and another, doing business as Michigan Plastering Company, for breach of a contract for building construction work. Judgment for defendants. Plaintiff appeals. Affirmed.

Miller & Wilson (*George B. Murphy,* of counsel), for plaintiff.

Wm. Henry Gallagher (*William H. Kaplan,* of counsel), for defendants.

SHARPE, J. This case was tried by the court without a jury. Findings of fact were filed, from which it was concluded that plaintiff could not recover, and a judgment was entered for the defendants, from which the plaintiff has taken this appeal.

In 1926 the plaintiff was engaged in business in Detroit as a general contractor. He specialized in the erection of residences costing $50,000 and upwards. Learning that the plaintiff was intending to bid on the erection of a home for Andrew Wineman,

the defendants, on October 23, 1926, wrote plaintiff a letter stating that they had "figures for some of the other general contractors" on the cost of lathing and plastering this residence, and offered to do the same for the sum of $5,265.

On December 3, 1926, the plaintiff wrote defendants:

"*Re* Andrew Wineman residence. Gentlemen: This is to confirm our telephone conversation of December 2, 1926, and is your authority to proceed with any preliminary work that may be necessary pending signing of contract, which will be for the sum of $5,265."

There is some dispute about the conversation over the telephone referred to in this letter. The defendants claim that they at all times insisted that a contract must be executed before they would begin work. Frank H. Zimmerman, one of the defendants, testified:

"I called Mr. Clore on the telephone I believe the following day after I received this letter and I told him I had received this letter in accordance with our conversation of the day before, but that the fact that he has requested me to proceed with preliminary work was of no interest to me unless I had the assurance in a form of a contract of doing the entire job; we were not interested in putting hangers in maybe only to find out at a later date that the profitable end of the job, the lathing and plastering was awarded to one of our competitors; and unless he could favor us with formal contracts, the terms of which were subject to our mutual agreement, that I would not proceed with any preliminary work, which I did not."

Plaintiff denies that this conversation was had. The written contract was not sent to defendants

until February 5, 1927. On being asked the cause of this delay, plaintiff testified:

"Well, due to the fact, due to the fact that I had not the written contract ready to proceed with the job, I understood, as far as the contract was concerned, he understood the job was his and he was going ahead as soon as I got to it and any time between then and the time he would actually start work on the job would be ample time for the confirmation of the contract, or the execution of the contract."

This contract covers five pages of the printed record and contains provisions which the defendants might well have insisted should be agreed upon before the work was begun. On February 5, 1927, the defendants wrote plaintiff, declining to enter into the contract for the reason, among others, that the cost was figured in October—

"And in view of the fact that we had not received a contract on same it was impossible for us to protect ourselves on material as well as other portions of the work which we let out. We also understand that this operation will not be ready for a couple of months and in checking over our figures as of today we find it will be impossible for us to accept your contract for $5,265."

They further stated that their estimate of cost as of that day was in excess of the offer made by $1,000, and that they would enter into the contract "if signed within the next 10 days" for the price of $6,265.

Plaintiff thereafter let the contract to another party for the sum of $900 in excess of defendants' first offer, and this action is brought to recover that amount.

The trial court found that no binding contract existed. This finding was based on the telephone

conversation had and the delay in tendering the contract for execution. The defendants expected to sublet parts of the work, and the contention that the cost would vary as time elapsed, and that they could not safely do so until a written contract was entered into, seems established.

In our opinion, he reached the right conclusion. The judgment is affirmed.

McDONALD, C. J., and CLARK, POTTER, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

ATTORNEY GENERAL, *ex rel.* LUMLEY, *v.* SCHULZ.

1. HIGHWAYS AND STREETS—COUNTY ROAD COMMISSIONER—APPOINTMENT TO FILL VACANCY—STATUTES.

   Where county road commissioner died shortly before commencement of new term for which he had been elected, board of supervisors had power to fill such prospective vacancy for unexpired portion of term, and it was not required to reassemble after term began to fill it (1 Comp. Laws 1929, § 3983).

2. SAME—PUBLIC OFFICER—FILLING VACANCY.

   Board of supervisors, having appointed county road commissioner to fill vacancy caused by death of officer elected, was without power to appoint another to said office during unexpired portion of said term by declaring said office appointive instead of elective (Const., art. 8, §§ 7, 8; 1 Comp. Laws 1929, §§ 3981, 3983).

3. QUO WARRANTO—COUNTY ROAD COMMISSIONER—OUSTER.

   In *quo warranto* proceeding to test right to office of county road commissioner, officer appointed by board of supervisors to fill vacancy *held*, appointed for whole of unexpired term, and therefore is entitled to writ of ouster against another intruding into said office under appointment by board of supervisors for portion of same term (3 Comp. Laws 1929, § 15289).

Quo warranto by Paul W. Voorhies, Attorney General, on the relation of Harry W. V. Lumley, to oust Christian Schulz from the office of county road commissioner of Macomb county. Submitted January 18, 1933. (Docket No. 153, Calendar No. 36,968.) Judgment of ouster March 2, 1933.

Paul W. Voorhies, Attorney General, and *Alex. J. Groesbeck* and *William Van Dyke,* for plaintiff.

Bert V. Nunneley and *John H. Nunneley,* for defendant.

SHARPE, J. In this proceeding, the relator, Harry W. V. Lumley, by *quo warranto,* tests the right of the respondent, Christian Schulz, to hold the office of county road commissioner of the county of Macomb. This county adopted the county road system in 1912. The provisions of law relating thereto appear in 1 Comp. Laws 1929, § 3976 *et seq.* Section 3981 provides for the election of three commissioners. The boards of supervisors may make temporary appointments, but the appointees hold office only until the first day of January in the year in which the next regular session of the legislature is held, their successors having been elected at the general election preceding such session. A special election for that purpose may be called by the board of supervisors. These provisions apply to the first board elected or appointed after the system has been adopted. The election of commissioners in counties containing more than 12 surveyed townships is declared not to be mandatory, and the board of supervisors in any such county may, by a majority vote of its members-elect, appoint such commissioners.

In November, 1922, John R. Taylor was elected a commissioner. He was re-elected in November, 1928,

to serve for six years from and after January 1, 1929, but died on December 5th, without qualifying. At the December meeting of the board of supervisors, a resolution, pursuant to a request for applications theretofore made, was adopted on December 28, 1928, reading as follows:

"That the names of the applicants, who filed as candidates for the office of county road commissioner, which office is to be filled by this board on account of the vacancy in said office caused by the death of John R. Taylor, who was elected to the said office at the general election held November 6, 1928, for a term of six years commencing January 1, 1929, and ending December 31, 1934, be read and presented to the board."

The relator was an applicant for the position, and, on a vote taken therefor, was elected. He duly qualified as such, but, some uncertainty existing as to whether his appointment was only for the three remaining days of December, 1928, or for the term beginning on January 1, 1929, the board of supervisors, on January 10, 1929, adopted a resolution reading as follows:

"Move that we confirm our action taken December 28, 1928, and at this time appoint Harry W. V. Lumley to fill the vacancy of Macomb county road commissioner created by the death of John R. Taylor for the term of office from January 1, 1929, to December 31, 1934."

Lumley again qualified for the balance of the six-year term, and thereafter discharged the duties of said office. On May 19, 1932, the board of supervisors, in the exercise of the power which it claims is conferred upon it by section 3981, declared the office to be an appointive one, and, at a meeting held on October 10th of that year, appointed the respond-

ent as county road commissioner for the balance of the term ending December 31, 1934. He at once qualified and entered upon the duties of the office, and this proceeding, as before stated, is brought to test his right to hold the same.

It is urged by the respondent that the only vacancy existing on December 28th, when the resolution appointing relator was adopted, was for the three days between that date and December 31st, when Taylor's term to which he had been elected in 1922 would expire. But it was then apparent to the board of supervisors that, by reason of the death of Taylor, a vacancy would exist on January 1, 1929. In our opinion it was not required to reassemble on that day and fill such vacancy. It might anticipate the event and make provision therefor. It was advised by the prosecuting attorney that it had such power, and his opinion was fortified by a letter from the attorney general so holding. That it intended to fill the vacancy occurring on January 1st is apparent from the resolution adopted on January 10th confirming the action taken on December 28th.

In Mechem on Public Officers, § 133, it is said:

"A prospective appointment to fill an anticipated vacancy in a public office, made by the person or body which, *as then constituted,* is empowered to fill the vacancy when it arises, is, in the absence of express law forbidding it, a legal appointment, and vests title to the office in the appointee."

Supervisors in this State are elected in April of each year and hold office until their successors are elected and qualified.

Was such appointment terminated by the action of the board in declaring the office to be an appointive one and its appointment of respondent for the unexpired portion of the term?

The legislature, acting under the power conferred on it by the Constitution (Art. 8, §§ 7 and 8), provided that counties might adopt a county road system, and made provision for the election or appointment of commissioners.

Section 3983 reads, in part, as follows:

"In case a vacancy shall occur in the office of county road commissioner, the board of supervisors may appoint a commissioner to fill such vacancy, who shall hold office for the unexpired portion of the term in which the vacancy occurs. Each commissioner shall hold his office until his successor is elected and qualified."

In *Attorney General, ex rel. Owen,* v. *Joyce,* 233 Mich. 619, it was held that appointments to fill such vacancies should be made under this section, and not under section 5 of Act No. 199, Pub. Acts 1923 (1 Comp. Laws 1929, § 3369). There are provisions in the statute for the appointment of officials to fill vacancies in State, county, city and township offices. Sections 3365, 3369, 3370, 3381, 13530, 16370. Unless specially provided for therein (section 1130), the appointees hold during the unexpired portion of the term, except in the case of judicial officers, who hold only until their successors are elected and qualified.

Section 3983 specifically provides that the person appointed to fill a vacancy in the office of county road commissioner "shall hold office for the unexpired portion of the term in which the vacancy occurs." Mr. Lumley was appointed to fill such vacancy, and the action of the board in appointing Mr. Schulz was unauthorized.

In view of the conclusion reached, we are not called upon to decide whether section 3981 confers upon the board the power to take unto itself the appointment of commissioners after they have been

theretofore selected by election. There may be a question as to whether it was not intended thereby to permit the board, at the time the law became effective, to determine whether the commissioners should be elected or appointed, and whether the determination once made in this respect is not final. This question was not discussed by counsel, and what has been heretofore said may not be regarded as expressive of any opinion upon it.

On the record presented, we find that the respondent is guilty of intruding into and unlawfully holding the office of county road commissioner of the county of Macomb, and that, pursuant to the statute (3 Comp. Laws 1929, § 15289), he be ousted and altogether excluded from such office, and that relator do recover his costs against him.

McDONALD, C. J., and CLARK, POTTER, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

McAFEE *v.* BANKERS TRUST CO. OF MUSKEGON.

ELECTION OF REMEDY—ESTOPPEL—MISTAKE OF REMEDY—CONVERSION.

Where attachment proceeding brought by plaintiffs under mistaken theory that title to certain property was not in them was dismissed by them on stipulation, they were not thereby estopped from bringing action for conversion of same property against another party; there having been no election of remedy.

Appeal from Muskegon; Vanderwerp (John), J. Submitted January 6, 1933. (Docket No. 67, Calendar No. 36,988.) Decided March 2, 1933.

Case by Don G. McAfee and another against Bankers Trust Company of Muskegon and another for conversion of a quantity of steel casing. Verdict and judgment for plaintiffs. Defendant trust company appeals. Affirmed.

Cross, Foote & Sessions, for appellant.

McAllister & McAllister, for appellees.

North, J. This case was before us on a former appeal and is reported in 253 Mich. 685. Except as hereinafter noted, the facts and issues involved are there stated. Upon retrial in the circuit, plaintiffs had verdict. Judgment was entered thereon, from which defendant has appealed.

At the conclusion of the proofs, defendant moved for a directed verdict. Decision was withheld until hearing of defendant's motion for judgment *non obstante,* which was denied. In these motions defendant asserted that plaintiffs are estopped by election of remedies from recovering in this suit. This issue has been brought into the case by amendment to pleadings since the former review by this court.

Prior to commencing this suit, plaintiffs instituted an attachment proceeding in the district court of the United States for the western district of Michigan, southern division, against F. M. Gray, Jr., Inc., in which the recovery sought included money plaintiffs claim they had paid F. M. Gray, Jr., Inc., for the same casings which defendant herein is charged with having converted. Briefly, the Federal case

was instituted on the theory that title to these casings was not in plaintiffs, while the instant suit is necessarily grounded on the theory that plaintiffs were vested with title. Appellant asserts that the two positions are inconsistent, and by having instituted the first suit on the one theory plaintiffs are estopped from maintaining this suit on the other and inconsistent theory. This contention is not tenable. Upon stipulation the Federal suit was dismissed by plaintiffs. They recovered nothing by having instituted it. On the former appeal to this court there was final adjudication that title to these casings was in plaintiffs. It logically follows that the case in the Federal court was instituted on a mistaken theory; and, if prosecuted, it would necessarily have terminated adversely to plaintiffs. We are not confronted with a situation wherein plaintiffs had a choice and made an election of remedies. Instead they erroneously sought in the Federal court to exercise or enforce a right which they did not possess. Defendant herein was not a party to the Federal suit, and was in no way prejudiced thereby. Under the circumstances, it cannot successfully urge estoppel.

"There is a difference between an election of remedies and a mistake of remedy, and the law has not gone so far as to deprive parties of meritorious claims merely because of attempts to collect them by inappropriate actions, upon which recovery could not be had." *McLaughlin* v. *Austin,* 104 Mich. 489, 491.

"The fact that a party, through mistake, attempts to exercise a right to which he is not entitled, does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt." *William W. Bierce, Ltd.,* v. *Hutchins,* 205 U. S. 340, 347 (27 Sup. Ct. 524).

See, also, *Bryant* v. *Kenyon,* 123 Mich. 151; *Lewis J. Selznick Enterprises* v. *Harry I. Garson Productions,* 202 Mich. 111.

The judgment entered in the circuit court is affirmed, with costs to appellees.

McDONALD, C. J., and CLARK, POTTER, SHARPE, FEAD, WIEST, and BUTZEL, JJ., concurred.

SHEA *v.* SILLER.

1. CONTRACTS—CARE AND MAINTENANCE—CANCELLATION OF INSTRUMENTS—BURDEN OF PROOF.

   In suit to cancel, on ground of mental incompetency, contract for care and maintenance of plaintiff's aged decedent in consideration of his turning over to defendant certificate of deposit, burden of proof was on plaintiff.

2. SAME—MENTAL COMPETENCY—EVIDENCE—SUFFICIENCY.

   Finding of trial court that evidence was insufficient to establish decedent's mental incompetency, *held,* justified by record.

3. SAME—FRAUD—MERE OPPORTUNITY FOR FRAUD INSUFFICIENT.

   To justify cancellation of contract for care and maintenance of aged decedent, it is not sufficient merely to prove that there was opportunity to perpetrate fraud, or that decedent was of less than average mentality; nor is it of great importance that, as situation subsequently developed, contract seemingly worked more to advantage of one party than the other.

4. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED.

   In suit to cancel contract for care and maintenance of plaintiff's aged decedent, testimony of defendant's son was not barred as being equally within knowledge of deceased, on theory that son acted as defendant's agent (3 Comp. Laws 1929, § 14219).

5. SAME—CROSS-EXAMINATION—WAIVER.

Statutory bar, if any, to testimony by defendant's son, as being equally within knowledge of deceased, *held*, waived by plaintiff's cross-examination of said witness.

Appeal from Houghton; Stone (John G.), J. Submitted January 11, 1933. (Docket No. 96, Calendar No. 36,858.) Decided March 2, 1933.

Bill by Abbie Shea, as administratrix of the estate of Timothy Downey, deceased, against Edward F. Siller to set aside a contract for care and maintenance. Bill dismissed. Plaintiff appeals. Affirmed.

Galbraith & McCormack (*M. E. Louisell,* of counsel), for plaintiff.

B. H. T. Burritt, for defendant.

NORTH, J. Timothy Downey died February 19, 1929, being upwards of 70 years of age. On November 14, 1928, he entered into a contract with the defendant, Edward F. Siller, for his care and maintenance during the remainder of his life and for suitable burial. As a consideration for this undertaking on the part of the defendant, Downey turned over to him a certificate of deposit for $8,436.94 in the First National Bank of Hancock. Plaintiff, as administratrix of the estate of Timothy Downey, deceased, filed the bill of complaint herein and seeks cancellation of the Siller contract on the ground that Downey was mentally incompetent at the time of its consummation. An accounting is also sought. By decree in the circuit court plaintiff's bill of complaint was dismissed, and she has appealed. The outcome of this appeal is dependent upon a review of the issue of fact as to whether at the time of enter-

ing into the contract the deceased was mentally competent.

Timothy Downey was born in Ireland. He came to this country when comparatively young, and for some years worked in mines in the west; but for approximately 35 years preceding the fall of 1927 he worked as a general helper in foundries in northern Michigan. In the later years of his life he resided at a boarding house or hotel known as the Northwestern, at Hancock, Michigan. In habits and conduct he was peculiar. He seems to have mingled with his fellow workmen in a less degree than was common among the others. He was in the habit of talking or mumbling to himself, and while so talking or singing he would chuckle or laugh; and frequently made gestures with his hands, which at times were somewhat violent. He carried his noonday luncheon to work and was accustomed to eating apart from the other employees, although he sometimes associated with them after eating. Because of his attitude and unusual conduct, other employees teased and aggravated him, which at times led him to become somewhat violent. However, it does not appear from the record that he ever injured any one, but orders were given that no one should tease him while at work. He seems to have kept careful account of the time he worked and of the amount of wages due him. On one or two occasions he was successful in convincing his employer that he had been underpaid. He was very careful with his money, seems to have been a regular depositor at the First National Bank of Hancock, where he had both a savings account and a certificate of deposit. He left his employment at the factory in October, 1927, apparently on account of impaired health and advancing years; but he continued to room at the

hotel and to take his meals at the restaurant operated in connection therewith. He had few, if any, intimates, and rarely indulged in any considerable conversation; though he was inclined to talk in an intelligent manner with other employees at the foundry about the days he had spent in the West and concerning pioneers in the mining business of Montana. So far as others observed, he rarely read newspapers, books, or magazines.

Decedent seems to have had one rather close friend in the person of Henry O'Leary, who was in the habit of calling upon him quite frequently. On December 12, 1927, O'Leary went to Downey's room and found him apparently seriously ill. He was sitting or lying on a radiator with his coat collar turned up, although there was no heat in the radiator. Dr. LaBine, the county physician, was called and Downey was removed to the hospital, where he remained for nearly two months. Dr. LaBine testified that at this time Downey's feet were swollen, and he was suffering from decompensation of the heart. At the time of his removal to the hospital, Downey took with him a leather bag containing 11 bundles of United States currency rolled and tied with a cord, each containing $100, and also $50 in gold. The doctor and O'Leary had this money placed in safekeeping at the hospital. Upon Downey's release, the amount of his doctor's bill and hospital expenses was taken out of this money, and some used to buy him clothing. The doctor and O'Leary accompanied Downey to the bank, and practically all of the balance was placed in his savings account. While at the hospital, Downey inquired and was much concerned about the expenses being incurred, and complained because he was deprived of the possession of his money; though Dr. LaBine testified

that Downey did not utter a complete sentence during the whole time he was at the hospital. At the time the expense of his sickness was paid out of this money, Downey complained that the charge was "too much, too much." The testimony discloses that Downey was careless about his personal habits and appearance. His clothes were not clean, and some of the witnesses referred to him as wearing clothing that was dirty and filthy, and permitting his hair to grow excessively long. At the time he was taken to the hospital, O'Leary procured some necessary new garments for him and engaged a barber to shave Downey and cut his hair. When he was released from the hospital, February 6, 1928, he was completely outfitted with new clothes, shoes, underwear, shirt, and other necessities. He returned to the hotel to live as before; and his conduct relative to talking or mumbling to himself and singing in his native language, which seems not to have been understood by others, and at times of making strange and somewhat violent gestures, seems to have continued much as before. At times he was seen by the chambermaids in the corridor of the hotel, possibly on his way to the toilet, clad only in his undergarments. One of these hotel employees testified that Downey would mutter to himself while walking up and down the halls, and at times would stop and make the sign of the cross in front of or on the doors of some of the hotel rooms. One of these witnesses stated that in his muttering she heard Downey mention God, and that she thought he was repeating prayers. The testimony discloses that he was a Catholic, attended church, and observed the practices of his faith. Those who waited upon him in the restaurant testified that he generally knew what he wanted. That he ordered a variety of food either from the

menu card or on being told by the waitress what was being served; and that he never behaved in an unusual way or made any disturbance in the dining room. One waitress testified that while his clothing was dirty, "he was neat in a way" about his person.

While Downey was thus living at the hotel, it was purchased by the defendant, Edward F. Siller, who took possession and began operating it in January, 1928. There seems to have been no particular intimacy between Downey and Mr. Siller or the other members of the Siller family. Defendant's son Michael Siller testified that on an occasion, in November, 1928, Downey told him he would like to see the witness' father; that he wanted to talk with him about paying him a sum of money to furnish him with room, board, and the necessities of life as long as he lived and to provide for his burial. Following this request, and in response to it, both defendant and his son went to Downey's room, where Downey again stated to defendant substantially what he had previously said concerning the arrangement he wished to make for his future maintenance and burial. According to the testimony of defendant's son, Downey, upon being asked by defendant what he proposed to pay, told defendant he had a certificate of deposit which he produced and either showed to defendant or gave him the amount of it; and Downey stated he would give that amount; that he had another account at the bank but that he wished to keep that for himself. At this time, besides the certificate of deposit of $8,436.94, he had in a savings account upwards of $3,800. Following the conversation, defendant had an attorney prepare a contract, which was subsequently taken by defendant and his son to Downey's room. It was read over

to him and signed by him in the presence of Dr. Dura, who was a friend of the Siller family and at the time had stopped to call upon them. A little later defendant arranged with a justice of the peace named Little, who seems to have had experience in drafting deeds and contracts, to also come to the hotel and witness the instrument here in suit. Little testified that in compliance with this request he went to Downey's room, read the contract over to him, and asked: "Is that all right?" and deceased replied "Yes." Downey acknowledged his signature on the contract to Little, and thereupon the latter took the contract to defendant's office and subscribed his name thereto as a witness. Two weeks later the proceeds of Downey's certificate of deposit were transferred at the bank to a savings account in defendant's name. In connection with opening this savings account, a copy of the contract between Siller and deceased was filed with the bank. The account remained in this condition at the time of the trial.

As noted above, Downey died February 19, 1929, three months and five days after the contract was executed. Evidently his death from heart failure was hastened by excitement to which he was subjected incident to a fire that occurred in his room at the hotel. During the latter weeks of his life there was evidence of failing strength, and at times his meals were served to him in his room. Notwithstanding the provision in the contract that deceased was to be cared for by defendant, there is testimony that, subsequent to the consummation of the contract, deceased paid for such meals as he ate in the restaurant. Expenses of his burial were met by defendant.

It would serve no good purpose to attempt to embody in this already too lengthy recital of facts all the details in evidence bearing upon the competency or incompetency of deceased at the time he executed the contract. Some of the witnesses, in the opinion of the trial judge, were entitled to little credence. Some were materially interested in the outcome of the case; others were not. Some gave testimony of facts and circumstances constituting a reasonably sufficient foundation for an opinion testified to as to the competency or incompetency of deceased, but others expressed opinions for which but little justification appears in the testimony. After taking the testimony of these witnesses at length in open court and evidently giving it careful consideration, the trial judge came to the conclusion that Timothy Downey was mentally competent to consummate the contract here in suit. In this connection the trial judge said:

"There is no proof that any indisposition of Downey changed his mentality, or is there proof definite enough for the court to say that such indisposition occurred before the contract * * * was made. * * * The court is of the opinion that if the deceased, Timothy Downey, was mentally competent to understand the contract he made and entered into with the defendant, there can be no constructive fraud, as there was no evidence offered which shows, or tends to show, any deception or overreaching upon the part of the defendant. This leaves the only question in the case: Was the deceased, Timothy Downey, on the 14th day of November, 1928, mentally competent to dispose of a part of his property by the contract? * * * As stated, the record is barren of any evidence of actual fraud, undue influence, trickery, or dishonesty, or that the deceased

at the time he executed the contract was mentally incompetent. * * *

"There is no allegation in the bill that Siller did not perform the contract upon his part. If he (Downey) had the mental capacity to understand the effect of the contract he was legally competent to make it, notwithstanding the opinion of witnesses to the contrary, or to the effect that he could not understand, in their opinions, the legal phraseology of the contract. * * *

"The fact that Downey died after he had been boarded, lodged, and taken care of only three months and five days after the execution of the contract is not conclusive of the inadequacy of the consideration. The testimony is that he might have lived 10 years in the condition he was in when Mr. LaBine last saw him. It may well have been in the minds of the parties at the time they met in this contract that Downey might live for that length of time and might require much care, medical attention, and medicines when sick, together with any and all necessities when desired. * * * It is not the function of the court to make a new contract for the parties, or to set aside the present contract, if the minds of the parties met in agreement."

The opinion filed by the trial judge, covering 29 pages of the printed record, carefully reviews the details of the testimony. Upon full consideration of the record presented in this court, we are constrained to hold, as did the trial judge, that the plaintiff, upon whom rested the burden of proof, has not established her right to have the contract canceled. Helpful briefs have been filed by the respective counsel, and we have given careful consideration to each argument urged in support of their conflicting contentions. Among other things, appellant's brief stresses the following: That defendant did not testify; that he secured nonresident persons as witnesses to

the contract; that the execution of the contract was not revealed to Dr. LaBine, Mr. O'Leary, or any other person friendly to the deceased; that the contract did not detail the character of maintenance or the kind of burial to be provided for deceased; that there was no particular intimacy or long acquaintance existing between defendant and the deceased; that no security insuring performance of the contract by defendant was given to Mr. Downey; that deceased, being of a miserly inclination and having refused to extend needed help to his own brother, are circumstances highly inconsistent with his having made the contract at a time when he was mentally competent; that at the time of making the contract defendant knew Downey was afflicted with heart trouble, and that (according to one witness) the defendant himself had said Downey was "crazy." Testimony of the opposite purport was introduced by defendant. Disinterested persons who had an opportunity to observe the conduct of deceased rather intimately did not observe anything indicative of abnormal mentality. It is a fair inference from the record that Mr. Downey was either estranged from any relatives he may have had or that at least he had no interest in them or they in him. In the sense in which the expression is ordinarily used, he had no "natural objects of his bounty." Dr. LaBine, whose experience and professional ability is admitted by all, and who had an excellent opportunity to observe and pass upon Downey's mentality, upon examination by plaintiff's counsel, testified that his observations of Downey "made me feel that he was not fully competent to take care of himself." His testimony is not indicative of a very marked degree of incompetency. Downey's close

friend, Henry O'Leary, testifying for plaintiff, was asked:

"Would you say that at this time (the date of the contract) Mr. Downey had mental capacity to understand this contract that he made with Mr. Siller?

"*A.* I don't *think* he did."

Upon being further queried by counsel, the witness testified that he was "positive about that." But upon redirect examination, this witness further testified concerning Downey's condition at the time he was released from the hospital:

"He was physically well, and a great deal better than when he went to the hospital. When he come out he was physically in good shape, in my estimation.

"*Q.* What can you say about his mental condition?

"*A.* I couldn't say about that.

"*Q.* Did you ever see any difference in his mental condition during the last five or six years of his life?

"*A.* No, sir."

Plaintiff also produced as a witness Mr. Michael Shea, one of the officers of the First National Bank of Hancock. He testified that for 14 or 15 years Downey had come to the bank every two weeks to cash pay checks or make deposits; that on such occasions he observed deceased; and upon being asked whether he had any opinion as to whether deceased was mentally competent to enter into a contract concerning his money, the witness declined to express any belief or conviction of incompetency. It would not be helpful to review the testimony or the claims of respective counsel more in detail. Each case of this character must be determined in the light of the

facts established in that case. As noted before, the burden of proving incompetency was upon plaintiff. It is not sufficient merely to prove that there was opportunity to perpetrate a fraud, or that one of the parties to the contract was of less than average mentality. Nor is it of great importance that, as the situation subsequently developed, the contract seemingly worked more to the advantage of one of the parties than to the other. Had subsequent events taken a different course, an opposite result might have followed. The record before us is not such as justifies disturbing the determination of the trial judge on the issue of fact as to the mental competency of Timothy Downey at the time he executed the contract with defendant.

Appellant's brief presents the question as to whether there was error in the ruling of the trial court that the testimony of Michael Siller was not barred by the statute (3 Comp. Laws 1929, § 14219) as being equally within the knowledge of the deceased. This objection was urged on the ground that defendant's son acted as his agent, and therefore came within the terms of the statute. We think the trial judge was correct in holding that in the making of the controverted contract the testimony does not disclose that defendant's son acted as his agent; and further, that in any event the statutory bar was waived by cross-examination of this witness.

The decree entered in the circuit court is affirmed, with costs to appellee.

McDONALD, C. J., and CLARK, POTTER, SHARPE, FEAD, WIEST, and BUTZEL, JJ., concurred.

In re PETITION OF CHAFFEE.

1. RECEIVERS—POSSESSION OF RECEIVER IS THAT OF COURT—CONSENT OF COURT.

   When receiver has taken possession of property, such possession is that of court, and no proceeding may be taken which attacks or challenges such possession without court's permission.

2. SAME—ENFORCEMENT OF LIEN.

   In this State, consent of court in which receivership proceeding is pending is necessary to valid proceeding to enforce lien against property in receiver's possession.

3. MORTGAGES—FORECLOSURE BY ADVERTISEMENT—CONSENT OF COURT—RECEIVERS.

   That statutory foreclosure by advertisement is not strictly proceeding in court does not render it immune from judicial supervision in proper cases, such as foreclosure of mortgage on property in possession of receiver.

4. CONSTITUTIONAL LAW—RECEIVERS—CONSENT OF COURT—FORECLOSURE OF MORTGAGE—IMPAIRMENT OF CONTRACT.

   Requiring court's permission to foreclose mortgage on property in receiver's possession is not impairment of contractual right.

5. RECEIVERS—PURPOSE OF RECEIVERSHIP.

   Receiverships are designed to accomplish in orderly manner under supervision of court maximum benefits to all concerned.

6. MORTGAGES—FORECLOSURE—RECEIVERS—CONSENT OF COURT—CONTEMPT.

   Prosecuting statutory foreclosure of mortgage without court's consent against property in immediate possession and use of receivers, when it was fully known to mortgagee that receivership was pending, was contempt of court, warranting court, in exercise of its discretion, in decreeing foreclosure sale and sheriff's deed void and of no effect.

7. SAME—DISCRETION OF COURT.

   Where foreclosure of mortgage on property in receiver's possession was without court's consent, constituting contempt,

sheriff's deed is not necessarily void rather than voidable, but question of sustaining rights of receiver and dignity of court is largely within discretion of court in which receivership is pending.

Appeal from Kent; Brown (William B.), J. Submitted November 4, 1932. (Docket No. 224, Calendar No. 36,927.) Decided March 2, 1933.

In the matter of the petition of Burt K. Chaffee and others for the dissolution of Chaffee Brothers Furniture Company, a Michigan corporation. Miles A. Chaffee and another, receivers, filed petition to set aside mortgage foreclosure sale, where foreclosure proceedings were had without consent of court. Petition granted. Defendant appeals. Affirmed.

Fred P. Geib, for appellant.

Warner, Norcross & Judd and *Conrad E. Thornquist,* for appellees.

NORTH, J. On July 13, 1931, a decree of dissolution of the Chaffee Brothers Furniture Company was entered in the circuit court of Kent county. Receivers were appointed. At that time Chaffee Brothers Furniture Company was the owner in fee of a parcel of real estate subject to a $2,000 mortgage. The Otterbein Home, a division of the Church of the United Brethren of Dayton, Ohio, was the assignee of the mortgagee. There being default, foreclosure proceedings by advertisement were instituted under the statute (3 Comp. Laws 1929, § 14427) after the receivers went into possession and began using the mortgaged premises. The foreclo-

sure sale was made by the sheriff March 19, 1932, the mortgagee becoming the purchaser. Four months later the receivers filed the petition herein, by which they asked that the foreclosure proceedings be set aside and that the sheriff's deed given upon foreclosure be decreed "void and of no effect." The relief sought was granted on the ground that the attempted statutory foreclosure was null and void for the reason that it was consummated without the consent of the court in which the receivership was pending. The Otterbein Home, as purchaser, has appealed.

The question presented is whether this statutory foreclosure is null and void because permission to institute the foreclosure proceedings was not first obtained from the court in which the receivership was pending. On this question there is lack of harmony in decisions of various jurisdictions. In support of the rule that it is not necessary to obtain the consent of the receivership court is the case of *McKnight* v. *Brozich,* 164 Minn. 90 (204 N. W. 917, 43 A. L. R. 1352, and note). The opinion in the foregoing case contains numerous citations of authorities, also a somewhat detailed review of *Wiswall* v. *Sampson,* 14 How. (55 U. S.) 52, which case has many times been referred to as the leading authority holding that consent of the receivership court is a necessary prerequisite. However, in Michigan we are already committed to the view that, when a receiver has taken possession of property, such possession is that of the court itself, and no proceedings can be taken which attacks or challenges such possession without leave first obtained. Careful consideration is given to this phase of the law in Justice LONG'S opinion, found in *Campau* v. *Detroit Driving Club,* 130 Mich. 417, where many decisions are cited and quoted

somewhat at length. In an earlier decision of this court it is said:

"It is a general rule that property in custody of the law is not subject to attachment or garnishment. The law does not permit one court to assume control over the representative of another court, or the property confided to his charge. By this it is not meant that personal remedies against the individual may not be sought, but that any proceeding in the nature of an action *in rem,* whereby it is sought to reach the property which another court has taken possession of, is forbidden." *Hudson* v. *Saginaw Circuit Judge,* 114 Mich. 116 (47 L. R. A. 345, 68 Am. St. Rep. 465).

It will be noted that many decisions, especially such as those involving attempts to attach or garnishee property in the receiver's possession, arise out of litigation in which it is sought to gain a preference in the receivership property as against rights of other creditors of the same class. Obviously such preference should not be permitted. But it is urged that the rule of such cases should not prevent one who has an unquestioned paramount lien from asserting such right. The answer is that such a lienholder is not deprived of his priority of claim or of his security by the requirement that he shall not enforce it without first obtaining consent of the receivership court. This requirement is a matter of procedure; and has to do with the orderly management of receiverships. The holding that, under certain conditions; a lien claimant may not proceed to enforce his claim, as in cases of receivership or bankruptcy, without complying with or being subjected to certain procedural regulations, is no different than requiring service of process or publication of a notice of a foreclosure sale, etc. And for many years

it has been the rule in this State that the consent of the court in which the receivership is pending is necessary to a valid proceeding to enforce a lien.

"It has been held that property in the hands of a receiver is still subject to taxation, and it is competent to levy taxes against it; that the levy of taxes upon property in the hands of a receiver creates a lien, but that the taxes cannot be collected by a sale of the property under the tax laws; they can only be collected by the filing of an intervening petition praying for their payment. *In re Tyler,* 149 U. S. 164 (13 Sup. Ct. 785). The above case was cited and followed by the United States court for the district of South Dakota in *Ledoux* v. *LaBee,* 83 Fed. 761, and by the supreme court of Georgia in *Dysart* v. *Brown,* 100 Ga. 1 (26 S. E. 767). In *Virginia, T. & C. Steel & Iron Co.* v. *Bristol Land Co.,* 88 Fed. 134, tax sales to the State of real estate in the hands of a receiver were held void." *Campau* v. *Detroit Driving Club, supra.*

In *Prather Engineering Co.* v. *Railway,* 152 Mich. 582, the bill of complaint was filed to foreclose a mechanic's lien, and in affirming a decree dismissing the bill it was said:

"It has been held * * * that a receiver cannot be sued without leave of the appointing court (*People, ex rel. Tremper,* v. *Brooks,* 40 Mich. 333 [29 Am. Rep. 534]; *Citizens' Savings Bank* v. *Ingham Circuit Judge,* 98 Mich. 173). Whether leave to make the receiver a party is jurisdictional has never been expressly determined in this State."

In this connection, see, also, *In re Guaranty Indemnity Co.,* 256 Mich. 671.

Appellant seeks to avoid the rule adhered to in the foregoing cases by asserting that the right to foreclosure by advertisement is one given by the legisla-

ture, and therefore it cannot be abrogated or impaired by the court. But it must be assumed that, in providing statutory foreclosure, the legislature was fully cognizant of the inherent power of the court to intervene, as in a receivership, whenever the rights of others become involved. The mere fact that the statutory foreclosure is not strictly a proceeding in court does not immunize it from judicial supervision in proper cases. The result of such foreclosure if carried to an effective conclusion would be in the instant case to dispossess the receiver of property without the consent of the appointing court. But that is the very thing forbidden by law, on the ground that it would work an indignity to the authority of the court and prevent orderly procedure in the receivership.

Nor is there merit to appellant's contention that requiring permission to foreclose a mortgage is an impairment of a contractual right. In cases involving mortgage foreclosures or foreclosures of other vested liens, the contract rights of the lienholders to forthwith enforce their liens are no more sacred or important than the right of ordinary creditors to institute suit against the debtor, to attach his propery, to garnishee, or perhaps to institute suit to set aside a sale or other transaction on the ground of fraud. But each of these rights is held in abeyance during the receivership in so far as they affect the receiver's possession of property, unless the consent of the court is obtained. Receiverships are designed to accomplish in an orderly manner under supervision of the court the maximum degree of benefits to all concerned. In their operation they may effectuate a moratorium as to certain parties; but the matter of orderly procedure imposed is not an impairment of contractual rights. The lienholder is

not deprived of his lien; but he may not proceed in total disregard of the receivership court.

In the instant case the trial court saw fit to decree the statutory mortgage sale and the sheriff's deed "void and of no effect." This holding was on the ground that prosecuting the statutory foreclosure without the court's consent against the property "in the immediate possession and use of the receivers," when it was fully known to the mortgagee that the receivership was pending, was contempt of court. That the prosecution of the foreclosure was a contempt is clear, and we are not disposed to interfere with the court's decree voiding the foreclosure sale. However, decision here is not to be construed as holding that sales so made are necessarily void rather than voidable, or that the rights of the receiver and the dignity of the court could not have been fully sustained by enjoining the purchaser at the foreclosure sale from instituting proceedings to dispossess the receiver. These and other details, like the matter of granting permission to institute the suit, are to a large degree within the discretion of the court in which the receivership is pending.

The decree of the circuit court is affirmed, with costs to appellee.

McDONALD, C. J., and CLARK, POTTER, SHARPE, FEAD, WIEST, and BUTZEL, JJ., concurred.

GALLAGHER *v.* CITY OF DETROIT.

1. MUNICIPAL CORPORATIONS—HIGHWAYS AND STREETS—BOULEVARDS—EQUITY.

   Comparatively short section of long thoroughfare should not be held to be boulevard when major portion thereof confessedly is not boulevard, unless persuasive circumstances exist which amply justify such holding, and render contrary holding inequitable.

2. SAME—SPECIAL ASSESSMENTS—DETROIT CHARTER.

   Evidence showing that thoroughfare in subdivision in city of Detroit was designated boulevard on plat, that adjoining owner donated substantial amount of land on condition that it should be boulevard, that it was so developed by planting trees and shrubbery in strip in middle, and that it was known as boulevard and so designated on street signs, *held*, sufficient to establish that it is boulevard, expense of paving which is charge against city at large rather than against adjoining property owners, under city charter.

3. DEDICATION—HIGHWAYS AND STREETS—BOULEVARDS—EVIDENCE—MUNICIPAL CORPORATIONS.

   While recital in dedication of plat that "streets and alleys as shown in said plat" were dedicated to use of public is of evidentiary force in determining whether said thoroughfares should be streets rather than boulevards, it is not conclusive.

4. MUNICIPAL CORPORATIONS—HIGHWAYS AND STREETS—BOULEVARDS—SPECIAL ASSESSMENTS.

   City may not render adjacent property liable to assessment for street improvements by merely changing designation of boulevards to streets, but each case must be determined from its own facts.

Appeal from Wayne; Sample (George W.), J., presiding. Submitted January 13, 1933. (Docket No. 148, Calendar No. 36,981.) Decided March 2, 1933.

Bill by Michael James Gallagher, Roman Catholic Bishop, against the City of Detroit, a municipal corporation, and another to cancel a special paving assessment. Decree for plaintiff. Defendants appeal. Affirmed.

Walter Barlow (*Clarence E. Wilcox,* of counsel), for appellants.

Frank C. Cook and *John P. O'Hara* (*John Conway Cook,* of counsel), for appellee.

NORTH, J. Plaintiff by a bill in equity seeks cancellation of a special paving assessment levied against property located on the northeast corner of Grand River avenue and what is now denominated St. Mary's avenue in the city of Detroit. The assessment is for paving St. Mary's avenue adjacent to plaintiff's property. It is claimed that the property is not subject to this assessment because the thoroughfare as laid out and dedicated in Norwood subdivision was and is a boulevard both in law and in fact; and also because plaintiff's predecessor in title and in office donated a substantial amount of valuable land for street purposes in laying out St. Mary's boulevard through the Norwood subdivision with the express understanding and agreement that the thoroughfare should be a boulevard. Plaintiff had decree in the circuit court; and the question here for review on defendants' appeal is whether this thoroughfare now known as St. Mary's avenue as laid out in the Norwood subdivision is in fact and in law a boulevard. If it is, the expense of paving because of a charter provision is a charge against the city at large; but if it is not a boulevard plaintiff's property is subject to the assessment made for paving.

The plat of the Norwood subdivision was recorded July 24, 1916. The property was then located in Redford township, Wayne county. The subdivision was annexed to the city of Detroit in 1923. On the recorded plat this thoroughfare is denominated St. Mary's boulevard. It extends through the subdivision from Grand River avenue on the south to Fenkell avenue (formerly 12th street) on the north, a distance of approximately 2,003 feet. The southerly 799 feet of the boulevard is 80 feet in width, and the remaining portion 85 feet in width. Neither plaintiff herein nor plaintiff's predecessor had any interest in the laying out of Norwood subdivision, which lies to the west of St. Mary's boulevard, while plaintiff's property lies to the east. The year following the annexation of this subdivision, the defendant city by ordinance changed the name of this boulevard to St. Mary's avenue. The city also gave this name to the extensions of this thoroughfare both north and south of Norwood subdivision through upwards of 20 separate subdivisions extending substantially three and a half miles south of Grand River avenue to the city limits of Dearborn and about two and a half miles north to Pembroke avenue in the city of Detroit. The thoroughfare thus by ordinance denominated St. Mary's avenue had theretofore been known by various names in the various subdivisions in which it was laid out. In places the street jogs 90 feet or more, and also at four or five places the continuity of the street is broken by intervening parcels of unplatted land. The width of the street varies in different localities, but usually it is from 50 to 60 feet with the exception of Norwood subdivision, where, as noted, the southerly portion is 80 feet in width, and the northerly portion 85 feet. It appears that each of the plats through which this

street passes was recorded subsequent to the recording of the Norwood plat, at least this is true of most of them and of the plat lying next south and the one lying next north of the Norwood subdivision.

Without petition from plaintiff or property owners in the Norwood subdivision, the city of its own motion decided to pave St. Mary's avenue. The work was done in 1928. Outside of the Norwood subdivision the pavement on St. Mary's avenue was laid 30 feet in width, but inside the Norwood subdivision the pavement was 40 feet in width, and centrally located in the thoroughfare. In laying this pavement, the city removed the island or parkway and the trees and shrubbery that theretofore had been in the center of the street. The facts here are such that the claim could not plausibly be asserted that any portion of St. Mary's avenue outside of Norwood subdivision is a boulevard. Doubtless it is true that a comparatively short section of a long thoroughfare should not be held to be a boulevard when the major portion thereof confessedly is not a boulevard, unless persuasive circumstances exist which amply justify such holding. But when the facts render a contrary holding inequitable, there should be no hesitancy in making the determination accord with the factual situation. In *Campbell* v. *City of Detroit,* 259 Mich. 297, a section of Forrer avenue was held to be a boulevard, although the remainder of the thoroughfare, over seven miles long, was not a boulevard. In the instant case the facts are such that it would be highly inequitable, if not in violation of contract, to sustain the city's contention that this thoroughfare as laid out in the Norwood subdivision is not a boulevard.

As noted above, without being interested in the laying out of the subdivision, plaintiff's predecessor

donated from its property a valuable piece of land 40 feet wide and about 800 feet long to be included in this thoroughfare, but on the express condition that it should be known as St. Mary's boulevard, and "that driveways be cut through the park portion of said proposed boulevard and at such places as may be designated by this committee" which represented the donor. Prior to this donation plaintiff's predecessor for many years had occupied for church purposes the property now sought to be assessed. It is now occupied and used for church purposes and kindred activities. In addition to the church, there are located thereon a rectory, a convent, and a parochial school. The land which plaintiff's predecessor gave for this thoroughfare was not only valuable but was obviously well suited for the future activities of the church. After donation of this land, the plat on which this thoroughfare was laid out as a boulevard was approved by public authorities and became a matter of record. Plaintiff's predecessor joined in the dedication. Not only was the thoroughfare denominated a boulevard on the plat, but being 80 to 85 feet in width it was to some extent at least physically suited for a boulevard. It was so developed by grading and cinderizing the traveled portion of the street and by leaving an island in the center on which the trees remained and shrubbery was planted. It was known as a boulevard and was so designated by the street signs; and there is testimony that purchasers of property adjacent to it considered the thoroughfare a boulevard and were influenced thereby in purchasing.

Appellants stress the fact that the plat of the Norwood subdivision recites that the "streets and alleys as shown on said plat" were dedicated to the use of the public. It is urged that because of such dedica-

tion the thoroughfares should be held to be "streets" and not boulevards. The recital is of evidentiary force (*Barris* v. *City of Detroit,* 260 Mich. 622); but it is not conclusive. In this connection it may be noted it appears from the testimony that the recital of dedication was placed upon the record of the plat by the use of a rubber stamp furnished by the engineers or the Wayne county auditor's office. It was a stamp kept for such general use. This does not wholly nullify its evidentiary force, but it does bear upon the persuasiveness of the recital.

It is also stressed by appellants that this thoroughfare throughout its length of substantially six miles has now been by city ordinance denominated St. Mary's avenue; and the inadvisability of a thoroughfare being considered a boulevard in one small section and a street or avenue as to its decidedly major portion is pointed out. In a given case, these circumstances might be and usually would be very persuasive and possibly determinative; but in the instant case the record is such that it would be highly inequitable to hold that, notwithstanding plaintiff had donated and dedicated valuable property on the express condition that the thoroughfare for which it was to be used should be a boulevard and developed as such, it was none the less an ordinary street or avenue and plaintiff's property subject to assessments for improvements thereon. We think the facts disclosed by this record establish quite conclusively that, at the time of the annexation of the subdivision to the city of Detroit (November, 1923), this thoroughfare as it then existed in that subdivision was in fact and in law a boulevard. It was not only so called, but it had been so developed. Its physical conditions were such as constituted notice to the city at the time of annexation that it was a boulevard

rather than an ordinary street. It continued as such for six or seven years, and until the city changed it incident to paving. This court has repeatedly stated that, after annexation, a city may not render adjacent property liable to assessment for street improvements by merely changing the designation of boulevards to streets; and further, that each case must be determined from its own facts. *Campbell* v. *City of Detroit, supra.* Under the circumstances disclosed in this record, the decree entered in the circuit court holding that the portion of St. Mary's avenue in Norwood subdivision is in fact and law a boulevard must be sustained.

Some complaint is made by appellants as to the return of the circuit court commissioner before whom the testimony in this case was taken. The objection raised does not affect final decision herein, nor do we think it seriously concerns the common practice of taking testimony on reference before commissioners. This phase of the record is therefore passed without comment.

The decree entered in the circuit court is affirmed, with costs to appellee.

McDONALD, C. J., and CLARK, POTTER, SHARPE, FEAD, WIEST, and BUTZEL, JJ., concurred.

DETROIT FIDELITY & SURETY CO. *v.* BUSHMAN.

1. GARNISHMENT—MUST BE ON LAW SIDE.

Garnishment proceeding must be on law side of court regardless of whether principal defendant's liability has been determined by judgment at law or decree in equity (3 Comp. Laws 1929, § 14857 *et seq.*).

2. SAME—STATUTORY REMEDY.

Being statutory, garnishment proceeding must follow strictly statutory provisions.

Appeal from Wayne; Miller (Guy A.), J. Submitted January 17, 1933. (Calendar No. 36,866.) Decided March 2, 1933.

Garnishment by Detroit Fidelity & Surety Company, a Michigan corporation, against Franklin E. Bushman, principal defendant, and First Wayne National Bank of Detroit, garnishee defendant, on a money decree in equity case. Order denying motion to quash is reviewed on appeal by garnishee defendant. Reversed.

Friedman, Meyers & Keys (*Sylvan Rappaport,* of counsel), for plaintiff.

Leslie L. Alexander and *Howell S. White* (*Orville J. Thill,* of counsel), for garnishee defendant.

NORTH, J. The sole question here presented is, in an equity case wherein there is an unsatisfied balance due on a decree for a money debt, can a writ of garnishment issue thereon from the circuit court in chancery and a statutory garnishment proceeding be successfully maintained? In a garnishment proceeding so instituted the garnishee defendant's motion to quash the proceeding was denied in the circuit court, and it has appealed.

Appellee contends that a fair and reasonable construction of the garnishment statute (3 Comp. Laws 1929, § 14857 *et seq.*) leads to the conclusion that statutory garnishment proceedings may be instituted and maintained on the chancery side of the circuit court as well as on the law side. It must be conceded that

if certain phrases contained in the garnishment statute are considered wholly apart from the other portions of the statute, an inference may be drawn which supports appellee's contention. However, we think a fair construction of the statute, considered as a whole, especially in the light of the established practice in Michigan by which the distinction between law and equity is preserved, necessitates the conclusion that garnishment is a legal remedy and not an equitable one. The proceeding is purely statutory. Section 14867 of the statute provides that an affidavit for garnishment "shall be held and considered as a *declaration* by the plaintiff against the garnishee as defendant;" that admission in a disclosure "shall have the same effect of admissions in a *plea*;" that a statutory issue "shall be deemed framed;" and "judgment may be rendered against such garnishee defendant, as upon declaration and plea;" and trial by jury of the garnishment issue may be demanded by either party. Section 14871 provides:

"If by the *verdict* (not decree), the garnishee be found liable, as such, for an amount equal to or greater than the judgment and costs against the principal defendant, *judgment* shall pass only for the latter amount; in other cases it shall pass for the amount of liability ascertained by the verdict."

From the foregoing provisions of the statute, as well as from others which we forego quoting, it quite conclusively appears that the garnishment proceeding must be on the law side of the court regardless of whether the principal defendant's liability has been determined by a judgment at law or a decree in equity.

Being statutory, garnishment proceedings must follow strictly the statutory provisions. In *Kennedy* v. *McLellan*, 76 Mich. 598, this court said:

"It has been held so many times in this State that garnishee proceedings must follow the statutes strictly, and cannot be extended beyond the plain letter of them, that it is unnecessary to cite the numerous decisions so holding." Citing several cases.

An unsuccessful attempt to circumvent the lack of statutory authority to garnishee in an equitable proceeding seems to have been made in *Foster* v. *Kent Circuit Judge,* 116 Mich. 285; and in *Toth* v. *Toth,* 242 Mich. 23 (56 A. L. R. 839), we quoted approvingly:

" 'If the garnishment proceeding is based on a prior decree, rendered in a court of chancery, it is necessary to sue over in a court of law and to issue the garnishment writ in the county where the suit at law on the decree is commenced. The writ of garnishment cannot be sued out of a court of chancery; neither can it stand alone in a court of law, as above stated; and the two courts are distinct. While garnishment, in other words, may be based on an indebtedness on decree, it cannot be based on the decree itself.' 1 Stevens' Michigan Practice, p. 144."

A Federal decision involving the Michigan garnishment statute, which decision is in accord with our holding herein, will be found in *United States, ex rel. Mudsill Mining Co.,* v. *Swan,* 13 C. C. A. 77 (65 Fed. 647). The general holding on the question here involved has been thus stated:

"A proceeding sometimes called 'equitable garnishment' has long been known to equity practice, but in the absence of clear statutory sanction garnishment, properly so-called, cannot issue out of a court of chancery." 28 C. J. p. 20.

If, as appellee urges, garnishment should be available as a means of enforcing a money decree in

equity, and this without instituting proceedings on the law side of the court, it becomes a matter of legislative concern. The courts have no right to sanction garnishment proceedings in equity in view of the provisions of our statute which necessitate the conclusion that the statutory remedy in garnishment afforded by the legislature is confined to the law side of the court.

This appeal is in the nature of mandamus. The case is remanded to the circuit court with directions to vacate the order denying appellant's motion to dismiss the writ of garnishment and that an order be entered quashing the writ and dismissing the garnishment proceeding. If necessary the appropriate writ will issue. Costs to appellant.

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

PEOPLE *v.* LEWIS.

1. BANKS AND BANKING—LIMITING LIABILITY—STATUTES.

In prosecution for incurring excessive liability to bank in violation of statute, it was no defense that bank directors authorized and extended credit to defendant, where he did not comply with requirements of statute by showing that he was entitled to said credit (3 Comp. Laws 1929, §§ 11922, 11947).

2. SAME—CRIMINAL LAW—APPEAL AND ERROR.

Where amount owing to bank by defendant on notes of which he was maker was in excess of legal amount, inclusion of note on which he was indorser was not prejudicial error.

3. SAME—EXCESSIVE LIABILITY—NOTICE.
Amount owing to bank for cashing checks drawn on defendant's private bank should be included in determining whether he owed bank in excess of statutory amount, where he had knowledge of said custom (3 Comp. Laws 1929, §§ 11922, 11947).

4. SAME—PURPOSE OF STATUTE.
Purpose of statute limiting liability to bank is to safeguard bank's assets and prevent excessive amount of credit being extended to any one debtor (3 Comp. Laws 1929, §§ 11922, 11947).

5. SAME—CONTINUING OFFENSE.
Offense of incurring excessive liability to bank is continuing one, and as long as excessive loans exist, whether by renewal or otherwise, offending party may be prosecuted.

Appeal from Ogemaw; Smith (Fred P.), J., presiding. Submitted January 12, 1933. (Docket No. 136, Calendar No. 36,334.) Decided March 2, 1933.

Charles D. Lewis was convicted of incurring liability to a bank in excess of amount permitted by 3 Comp. Laws 1929, § 11922. Affirmed.

Henry R. MacGillis, for appellant.

Patrick H. O'Brien, Attorney General, and *William T. Yeo,* Special Prosecuting Attorney, for the people.

NORTH, J. This is an appeal by the defendant who was convicted of violating sections 25 and 50 of the general banking act, being 3 Comp. Laws 1929, §§ 11922, 11947. The pertinent provisions of the statute are:

"11922 * * * SEC. 25. The total liabilities to any bank of any person or of any company, corporation or firm for moneys advanced, * * * shall at no time exceed one-tenth part of the amount of cap-

ital and surplus of such bank: Provided, however, That by a two-thirds vote of directors, the liabilities to any bank of any person or company, or corporation or firm may be increased to a sum not exceeding one-fifth of the capital and surplus of the bank; *but such additional one-tenth of such capital and surplus shall not be loaned to any officer or director, * * * until such officer, (or) director, * * * furnishes collateral or indorsements satisfactory to the directors, or files with the bank a sworn statement of assets and liabilities showing a net worth of sufficient amount to be entitled to such credit.*"

"11947 * * * SEC. 50. Every officer, clerk, agent or employee of a bank who shall knowingly aid or assist in any violation of any of the provisions of this act, shall be deemed guilty of a felony." *

The information contains two counts. It charges that between January 1, 1930, and June 12, 1930, the defendant, being then and there president and a director of the Union State Bank of Mio, Michigan, a Michigan corporation with capital and surplus not exceeding $25,000, did knowingly and unlawfully incur liabilities to said bank in excess of $14,795 for moneys advanced and loaned to defendant from the funds of said bank, which said loans exceeded one-tenth of the capital and surplus of said bank. The second count is substantially the same except in that it charges defendant's loan exceeded one-fifth of the capital and surplus.

The undisputed proof discloses that within the period covered by the information defendant was indebted to the bank in the sum of $2,628.96, for which it held his promissory notes. This indebtedness alone exceeds the statutory limitation of one-tenth of the bank's capital and surplus. But appel-

* This section was repealed in 1931; see Act No. 328, Pub. Acts 1931, § 101, p. 641; § 567, p. 755.

lant urges that he might lawfully borrow in excess of the statutory limitation of one-tenth of the bank's capital and surplus because the bank directors authorized and extended to appellant credit to the amount of $3,500. The trial judge held against this contention, and we think properly so, for the reasons stated in the following portion of his charge to the jury:

"Now, gentlemen, he could not have that credit of $3,500 at this bank, because that would be in excess of one-tenth of the capital and surplus, and he would have to get credit by conforming to the provisions of the statute, which provide that the liability may exceed one-tenth by another one-tenth; but in order to do that he shall deposit additional collateral security with the bank, or file a sworn statement of his assets showing a worth which would entitle him to credit, or an increased liability of one-fifth of the amount of the capital. He did not do that."

In submitting to the jury the amount of defendant's indebtedness to the bank on promissory notes, a past-due note of $75 on which defendant was the indorser was included. Appellant asserts this as error, claiming that in determining whether the statutory provision has been exceeded only direct liabilities should be considered, not those of an indorser, which are secondary or contingent in character. Regardless of whether such liability is within the terms of the statute, we think the ruling was not prejudicial. Exclusive of this item, defendant's liability of $2,628.96 on three of his notes held by the bank exceeded one-tenth of its capital and surplus. This uncontroverted testimony alone is sufficient to sustain conviction.

Incident to the people's case under the second count, these further facts are pertinent: Appellant

owned and operated a private bank at Comins, Michigan, known as the Comins Bank of Charles D. Lewis. It became an established practice for the Union State Bank of Mio to cash checks drawn by depositors on the Comins Bank; and also for the Comins Bank to cash checks drawn against the Union State Bank by its depositors. As between the two banks, the balance resulting from these operations was debited or credited as the case might be. As the result of cashing checks drawn on defendant's private bank, a very substantial balance due the Union State Bank was being carried on its books. Complaint of this item was made by the banking commissioner, and on several occasions it was taken up with the directors of the Union State Bank. Appellant had knowledge of this situation; and he claims that he forbade the cashing of checks on his private bank at Comins by the officers of the Union State Bank. Notwithstanding this, the custom continued, and a balance due the Union State Bank accumulated to the amount of approximately $14,000. There can be no question that every time a check on appellant's private bank was cashed by the Union State Bank his liabilities to the latter bank were increased to the extent of the moneys so advanced for his benefit. Its repayment was a direct liability of appellant. The checks so cashed were not bills of exchange which came within the exception specified in section 11922. Appellant's contention to the contrary is not tenable, if for no other reason, because these checks were not drawn "against actually existing values" as expressly required by the statute.

The contention made in appellant's brief that there is no testimony in support of the finding by the jury that plaintiff had knowledge of the cashing of these checks by the Union State Bank cannot be

sustained. It is true there is testimony supporting appellant's contention; but it is also true that there is evidence of his knowledge of the complaints by the banking commissioner, and that this matter was taken up in his presence at meetings of the directors of the Union State Bank. The trial judge very carefully and explicitly instructed the jury that cashing these checks would not constitute an offense chargeable against appellant unless he had knowledge thereof. This instruction was repeated several times, and under the testimony as given no reasons appear for disturbing the determination of this issue of fact.

It is vigorously urged in behalf of appellant that his indebtedness to the Union State Bank evidenced by his three promissory notes aggregating $2,628.96 cannot be considered as in violation of the statutory limitation because each of these notes was given as a renewal of indebtedness which accrued to the bank prior to the period covered by the information. The evident purpose of the statutory limitation is to safeguard the assets of the bank and prevent an excessive amount of credit being extended to any one debtor. If credit is extended in violation of the statute the offense is of a continuing nature, and so long as the condition exists the offending parties may be prosecuted. In the instant case, whether by renewal or otherwise, the excessive loans to plaintiff continued in violation of the statute within the period covered by the information. But entirely apart from the loans evidenced by defendant's promissory notes, he became directly liable to the Union State Bank for moneys paid out by it on checks drawn against appellant doing business as the Comins Bank of Charles D. Lewis. On March 19, 1930, the amount of appellant's indebtedness resulting from

the payments of such checks was $2,086.65. Defendant's indebtedness of this character on May 17, 1930, had increased to $7,800.74, and on June 12, 1930, it amounted to approximately $11,000. This increase of appellant's indebtedness to the bank in excess of the statutory limitation all accrued within the period covered by the information. This unwarranted increase of defendant's indebtedness to the Union State Bank clearly constituted a violation of the statute. *People* v. *Hager, ante,* 198.

Other questions presented by this appeal have been considered, but such of them as merit review are presented and decided in *People* v. *Hager, supra.* Judgment affirmed.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, FEAD, WIEST, and BUTZEL, JJ., concurred.

TIMMER *v.* CRIMMINS.

1. CHATTEL MORTGAGES—CANCELLATION OF INSTRUMENTS—RENEWAL AFFIDAVIT—BANKRUPTCY—STATUTES.

   Corporation's trustee in bankruptcy is not entitled to cancellation of corporate chattel mortgage because first renewal affidavit did not comply with statute, where subsequent ones did, and no creditors represented by trustee claim as purchasers or mortgagees of mortgaged property or show that they have been prejudiced by said failure to comply with statute (3 Comp. Laws 1929, §§ 13427, 13428).

2. CORPORATIONS—EXPIRATION OF FRANCHISE—CHATTEL MORTGAGES—BANKRUPTCY—EQUITY.

   Corporation's trustee in bankruptcy is not entitled to cancellation of corporate chattel mortgage executed two years after expiration of corporate franchise and nearly three years before bankruptcy, where all parties acted in good faith, consideration went into corporation's business, and to grant cancellation would be highly inequitable.

3. SAME—CONSENT OF STOCKHOLDERS—SUBSTANTIAL COMPLIANCE SUFFICIENT.

   Purpose of statute requiring that corporate chattel mortgage must be authorized by holders of two-thirds of outstanding stock is at least primarily for benefit of stockholders, and where officers executing such mortgage held at least two-thirds of outstanding stock, there was substantial compliance with statute although no formal action of authorization was taken (2 Comp. Laws 1929, § 10012).

4. SAME—EFFECT OF FAILURE TO COMPLY WITH STATUTE.

   Relative to statutory provision requiring consent of holders of two-thirds of outstanding stock to be filed or recorded with corporate chattel mortgage, as between parties to mortgage, compliance therewith is not necessary to its validity.

5. SAME—STOCK AND STOCKHOLDERS—BANKRUPTCY.

   Since statutory provision requiring consent of holders of two-thirds of outstanding stock to execution of corporate chattel mortgage, and requiring filing or recording with mortgage certificate of such consent, is for benefit of stockholders, failure to comply therewith may not be urged by corporation's trustee in bankruptcy, who represents creditors only.

6. FRAUDULENT CONVEYANCES—CHATTEL MORTGAGES—NOTICE TO CREDITORS—STATUTES.

   Purpose of statute requiring notice to creditors of mortgage on stock of merchandise or fixtures is for protection of existing, not subsequent, creditors (2 Comp. Laws 1929, §§ 9548, 9549).

7. SAME—CONSTITUTIONAL LAW—EX POST FACTO LAW—IMPAIRMENT OF CONTRACT OBLIGATION.

   Statutory requirement that notice of mortgage on stock of merchandise or fixtures be given to creditors is not applicable to mortgage executed and delivered prior to effective date of said statute, but not filed until afterward, since to hold otherwise would render it operative *ex post facto*, and also impair contract obligation in violation of Constitution (article 2, § 9).

8. CHATTEL MORTGAGES—FORECLOSURE SALE—IRREGULARITIES.
Cancellation of chattel mortgage sale is not justified because of claimed irregularities, where it is not suggested that larger bid on resale could be secured, or that rights of creditors have been prejudiced thereby.

Appeal from Kent; Brown (William B.), J. Submitted January 10, 1933. (Docket No. 77, Calendar No. 36,991.) Decided March 2, 1933.

Bill by Fred G. Timmer, trustee in bankruptcy of Alton F. Petrie, individually and doing business as Pierson Elevator Company, against C. L. Crimmins and O'Donald State Bank to set aside two chattel mortgages. From decree for plaintiff as to one mortgage and for defendants as to the other, all parties appeal. Reversed, and bill dismissed.

Linsey, Shivel & Phelps, for plaintiff.

Travis, Merrick, Johnson & McCobb, for defendants.

NORTH, J. Plaintiff, trustee in involuntary bankruptcy of Alton F. Petrie, individually and doing business as the Pierson Elevator Company, filed this bill in the circuit court of Kent county for the purpose of securing cancellation of two chattel mortgages and setting aside the foreclosure sales of the property covered by the respective mortgages. One of these mortgages covered the merchandise, fixtures, and bills receivable of a general store owned and operated by Petrie; and the other covered elevator buildings (which stood on land leased of the Pennsylvania Railroad Company), equipment, stock, and bills and accounts receivable. Each mortgage covered subsequently-acquired stock, equipment,

bills receivable, etc. The circuit judge decreed the first of these mortgages valid and refused cancellation; but he held the other mortgage invalid, and as to it granted the relief sought. All parties have appealed.

Store Mortgage. The objections urged by plaintiff against the chattel mortgage on the general store, as set forth in the supplemental notice of appeal, are: (1) Failure to comply with the provisions of the statute (3 Comp. Laws 1929, §§ 13427, 13428) providing for filing annual renewal affidavits; and (2) that the sale to defendants on foreclosure was irregular.

If we assume, as asserted by plaintiff, that the filing of the first affidavit of renewal was not in exact accord with statutory requirements, the undisputed proof as to both the store mortgage and elevator mortgage is that there were properly filed affidavits of renewal for the year in which the bankruptcy proceeding was instituted and also for the preceding year. Further, 3 Comp. Laws 1929, § 13427, contains the following:

"Provided, that such affidavit being made and filed before any purchase of such mortgaged property shall be made, or other mortgage received or lien obtained thereon in good faith, shall be as valid to continue in effect such mortgage, as if the same were made and filed within the period as above provided."

There is no showing in this record that any of the creditors represented by the trustee in bankruptcy claim as purchasers or mortgagees of any of the mortgaged property, or that they have been prejudiced in any way by the alleged failure to file renewal affidavits. Plaintiff is not entitled to relief on the ground that the affidavits of renewal were not prop-

erly filed. The claim that the foreclosure sale under the store mortgage was irregular will be considered later in connection with the same claim as to the sale under the elevator mortgage. The circuit judge reached the right conclusion in holding that the chattel mortgage on Petrie's general store was valid.

Elevator Mortgage. This chattel mortgage given to defendants by the corporation was held invalid by the circuit judge on two grounds: First, that it was given after the expiration of the corporation's franchise, and, second, on the ground of noncompliance with the statute requiring consent of stockholders and the filing of evidence of such consent.

The 10-year period for which the Pierson Elevator Company was incorporated expired June 10, 1927. This chattel mortgage was given June 10, 1929. Neither the mortgagor nor the mortgagees were aware of this fact at the time the mortgage was given. Petrie first learned of it when so advised by the secretary of State, in April, 1931; and the mortgagees were not advised until after the bankruptcy proceedings were instituted January 18, 1932. After Petrie received the notice from the secretary of State, he seems to have assumed that he could rightfully carry on the business individually and continue the use of the corporate name; and as a matter of fact he did continue the elevator business in this manner up to the time he was forced into bankruptcy. Notwithstanding its charter expired June 10, 1927, the corporation filed its annual reports with the secretary of State and paid its annual fees in 1927, 1928, 1929, and 1930. The statute (2 Comp. Laws 1929, §§ 9971, 9975) automatically extends the franchise of the corporation for three years after expiration of its corporate term as fixed by its articles of association, within which extension period

application may be made for a renewal of the corporate charter and within which extension period the corporation may carry on such business as is incident to winding up its affairs. It was during this extension period and more than two and a half years before the bankruptcy proceeding that this chattel mortgage was given. No one questions that the parties to the transaction acted in good faith. Admittedly this mortgage was given to secure payment of then-existing indebtednesses of Petrie to defendants, to secure payment of future advancements, and also in connection with Petrie's contingent indebtedness to defendants as an indorser on notes which they had discounted for him. The mortgage was placed on record both with the township clerk and the register of deeds, and from year to year renewal affidavits were filed. Both Petrie and defendants at all times believed that to the extent of this mortgage defendants were secured creditors. Shortly before the bankruptcy proceeding defendants took possession of the chattel mortgaged property, advertised a chattel mortgage sale, bought the property at the sale for a bid of $6,000, and defendants have since continued in the possession and operation of the elevator business.

The attack of the trustee in bankruptcy upon this mortgage is not supported by any equitable considerations, but instead is based primarily upon alleged failure to comply strictly with statutory requirements. The actual controversy is between the unsecured creditors of Petrie who have filed claims in the bankruptcy proceeding and these defendants who in the regular course of business took this chattel mortgage long prior to the bankruptcy. The inequity of plaintiff's suit is all the more pronounced by reason of the fact that these defendants have not

filed claims in the bankruptcy court and probably could not do so at this late date. The result is that plaintiff by this suit in equity seeks to turn the mortgaged property over to Petrie's other creditors to the exclusion of defendants.

At the time of giving the mortgage, the mortgagor, Pierson Elevator Company, was actively carrying on its business in its corporate capacity. All who were dealing with it at that time seemed to have recognized it as a corporation. This was true of defendants. Even the State, by accepting the annual reports and fees, acknowledged the extension of the corporate franchise. As noted above, all the parties to the mortgage acted in good faith. The consideration for which the mortgage was given evidently went into the corporation's business, at least there is no showing to the contrary. Nor is there any showing that giving this mortgage was in any way a fraud upon any of the creditors whom plaintiff represents. Surely neither the corporation nor Petrie by whom it was controlled could successfully question the validity of this mortgage in a court of equity. Under the facts here involved, the trustee should be held to stand in the place of the mortgagor and not permitted to void the mortgage notwithstanding it was given after the expiration of the 10-year corporate period fixed in the articles of association. To hold otherwise would be highly inequitable.

The other ground upon which the circuit judge held the mortgage invalid was that its execution does not appear to have been authorized by the holders of two-thirds of the outstanding stock of the corporation, and that the certificate of such authorization was not filed with the mortgage. (See 2 Comp. Laws 1929, § 10012.) The corporation was controlled by Petrie. Both he and his wife were

stockholders and served as two of its three officers. He was president, she secretary-treasurer. The total outstanding stock was 2,000 shares. Of this Petrie alone held 1,625 shares, which was over 80 per cent. of the total. Both he and his wife signed this chattel mortgage in their official capacity. While there has been much difference of judicial opinion as to whether the above-cited statutory provision is for the benefit of stockholders or the benefit of creditors or for both (see *In re Progressive Wall Paper Corp.*, 230 Fed. 171 [37 Am. Bankruptcy Rep. 207]), we are committed to the holding that at least primarily the provision is for the benefit of stockholders, and if the stockholders who execute such a mortgage hold at least two-thirds of the outstanding stock there is substantial compliance with the statute.

"The purpose of the statute is to protect *stockholders.* * * * The mortgage was executed by the usual officers, the president and secretary of the Farrell Products Company, and carried their affidavits of authority. The claim that the mortgage was invalid was an affirmative defense. 14A C. J. p. 709; *Earle* v. *National Metallurgic Co.*, 77 N. J. Eq. 17 (76 Atl. 555). The defendants had the burden of proving that the persons executing the mortgage, Casey and Coble, were not the owners of two-thirds of the Farrell stock, either directly or through ownership of Tri-Plex shares." *Loupee* v. *Railroad Co.*, 243 Mich. 144, 149.

It may be added in this connection that Mr. Petrie testified:

"Prior to the time that this chattel mortgage was executed, all three officers of the corporation talked it over. I would not say it was a regular meeting; never put it in a minute book. I don't recall that it was ever reduced to writing anywhere."

Relative to this statutory provision requiring the consent of the stockholders to be filed or recorded with the chattel mortgage, in *Grand Victory Theatre* v. *Soloman,* 224 Mich. 451, Mr. Justice MCDONALD, after quoting 14A C. J. § 2663, p. 665, said:

"As between the parties to the mortgage, a compliance with this provision is not necessary to its validity."

Since the statutory provision requiring consent of two-thirds of the outstanding stock (except in cases of purchase-price mortgages) and requiring filing or recording with the mortgage a certificate of such consent is for the benefit of stockholders, failure to comply with the statute cannot be urged by plaintiff, who represents creditors only. In any event, the result sought by plaintiff, being based solely upon failure to comply with the statute, is one which, under the circumstances of this case, does not appeal to the conscience of a court in equity. From the foregoing, it follows that we are not in accord with the reasons assigned for holding in the circuit court that the corporate mortgage was invalid.

In addition to the above-considered objections, plaintiff also urges invalidity of this mortgage on the ground that it was given in violation of Act No. 200, Pub. Acts 1929 (2 Comp. Laws 1929, §§ 9548, 9549).* The purport of this act is indicated by the following:

"SECTION 1. Every mortgage or conveyance intended to operate as a mortgage of the whole or any part of a stock of merchandise or merchandise and fixtures, pertaining to the conducting of said business which shall hereafter be made without notice

* This act has been amended by Act No. 198, Pub. Acts 1931.

to the creditors of the mortgagor as herein provided, shall be void as against *said* creditors."

There are two reasons why plaintiff's contention cannot be sustained: First, it appears from the portion of the act above quoted that its purpose was the protection of creditors who were such at the time the mortgage was given, not subsequent creditors. We find no showing in this record that any of the creditors represented by plaintiff were such at the time the mortgage was given. A second reason which renders plaintiff's contention untenable is that Act No. 200 did not become effective until August 28, 1929. While this chattel mortgage was not filed until shortly subsequent to August 28, 1929, it was executed and delivered to defendants on June 10, 1929, which was several months prior to the effective date of the act. As between the mortgagor and the mortgagee, it was an existing contract as soon as consummated. Legislation which became effective at a later date could not invalidate this contract. To hold otherwise would be an attempt to render it operative *ex post facto,* and also as impairing a contract obligation in violation of the Constitution. Michigan Constitution, art. 2, § 9.

As to claimed irregularities incident to the chattel mortgage sale under the elevator mortgage and also the sale under the store mortgage, we find nothing in the record which would justify cancellation of such sales. Plaintiff makes no claims of actual prejudice to the rights of the creditors whom he represents. His complaint is that, by reason of defendants holding possession as purchasers at the chattel mortgage sales, plaintiff as trustee in bankruptcy was prevented from taking possession of the mortgaged property. But it is not even suggested

that a larger bid could be secured on resale. However, plaintiff asserts that since defendants bid $6,000 on the foreclosure of the elevator mortgage, and the mortgagor was then indebted to the bank for only $5,207.66, there should be an accounting to plaintiff for the balance. In so asserting, plaintiff overlooks the fact that the corporation's chattel mortgage not only secured its indebtedness to the bank but also to the defendant Crimmins. At the time of foreclosure the elevator company was not only indebted to the bank in the amount above noted, but also to Crimmins personally and for an amount much in excess of that for which plaintiff asks an accounting. A careful consideration of this record in connection with the questions raised brings us to the conclusion that the portion of the decree entered in the circuit court holding that the chattel mortgage given by the Pierson Elevator Company was invalid must be reversed.

A decree may be entered in this court dismissing plaintiff's bill of complaint, with costs of both courts.

McDONALD, C. J., and CLARK, POTTER, SHARPE, FEAD, WIEST, and BUTZEL, JJ., concurred.

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

PRINCIPAL AND SURETY—RIGHT OF MATERIALMAN TO SUE SURETY ON CONTRACTOR'S BOND TO PRIVATE OWNER.

In materialman's action against principal contractor and surety on its bond given to private owner as sole obligee, providing for performance and that principal "shall pay all persons who have contracts directly with" him for labor and materials, judgment of no cause of action against surety is affirmed, on appeal, by equally divided court.

Appeal from Wayne; Miller (Guy A.), J. Submitted October 20, 1932. (Docket No. 175, Calendar No. 36,632.) Decided March 3, 1933. Rehearing denied June 5, 1933.

Assumpsit by R. C. Mahon Company, a Michigan corporation, against R. S. Knapp Company, a Michigan corporation, as principal contractor, and Fidelity & Deposit Company of Maryland, a Maryland corporation, as surety, for balance due on a contract for furnishing steel. Judgment for plaintiff as to defendant contractor only. Plaintiff appeals. Affirmed by an equally divided court.

Wilkinson, Lowther & O'Connell, for plaintiff.

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

MCDONALD, C. J. (*for reversal*). This suit was brought to recover a balance of $4,415.70, due on a contract for furnishing structural steel in the erection of a private building in the city of Detroit. The

plaintiff's contract was with R. S. Knapp Company, the principal contractor. The Inter-City Trucking Service, Inc., is the owner of the building. The Fidelity & Deposit Company of Maryland is surety on the principal contractor's bond to the owner, who was named obligee. This suit is against the principal contractor and the surety. The issue was tried by the court without a jury. Judgment for cause was rendered against the contractor and for no cause as to the surety. The plaintiff has appealed.

The conditions of the bond are as follows:

"Now therefore, the condition of this obligation is such that if the principal shall faithfully perform the contract on his part, and satisfy all claims and demands, incurred for the same, and shall fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default, and shall pay all persons who have contracts directly with the principal for labor or materials, then this obligation shall be null and void; otherwise it shall remain in full force and effect."

The plaintiff bases its right to recover on the last condition of the bond, which provides that the principal shall pay all persons who have contracts directly with him for labor and materials. It contends that, though not expressly referred to by name as an obligee in the bond, the bond was given for its benefit as well as for the benefit of the owner, and that the language of the last condition imports a direct obligation on the part of the surety to pay for labor and materials. On these facts the plaintiff claims the right to maintain a suit in its own name against the surety.

The defendant contends that the only promise of the surety was to the obligee or owner; that the bond was not made for the benefit of the plaintiff; that he is not in privity with the surety, but merely a third party, a stranger to the contract, and therefore cannot maintain this action against the surety.

The early common law denied to a third party the right to maintain an action on a contract made for his benefit; but in modern American jurisprudence such right in proper circumstances is definitely recognized by an overwhelming weight of authority. The evolution of the law on the subject and its modern status is discussed at length in the annotation following the reported case of *Fidelity & Deposit Co.* v. *Rainer* (220 Ala. 262 [125 South. 55]), in 77 A. L. R. 13–20. On page 53, under the head "Bond of private contractor," it is said:

"The great weight of authority establishes the general rule that a person furnishing materials or labor may recover on a building contractor's bond to the owner, where it contains a condition for their benefit and is intended for their protection; although the owner is the only obligee named in the bond, and there is no express provision that it shall inure to the benefit of laborers or materialmen, or that they may avail themselves of the security thereof." Many cases are cited in support of the text on pages 54 and 55.

The general doctrine as to the right of a third party to enforce a contract made for his benefit is stated in 13 C. J., beginning on pages 705, 709, 711, as follows:

"Section 815. In most of the States the English doctrine that where a person makes a promise to another for the benefit of a third person the latter cannot maintain an action on it is not recognized to the

full extent, but it is held, subject to the qualifications hereafter stated, that the action may be maintained. This is now the prevailing doctrine in the United States."

"Section 817. In many of the cases the doctrine is stated broadly that a person may maintain an action on a promise made for his benefit, although not a party to the contract; but this statement of the doctrine is too broad. By the weight of authority the action cannot be maintained merely because the third person will be incidentally benefited by performance of the contract; he must be a party to the consideration, or the contract must have been entered into for his benefit, and he must have some legal or equitable interest in its performance."

"If the person for whose benefit a contract is made has either a legal or equitable interest in the performance of the contract, he need not necessarily be privy to the consideration. The name of the person to be benefited by the contract need not be given, if he is otherwise sufficiently described or designated. The fact that the particular person who is to benefit from the promise is not known when the promise is made is immaterial. He may be one of a class of persons if the class is sufficiently described or designated. And the fact that the person to whose benefit a promise may inure is uncertain at the time it is made, and that it is dependent on a contingency, will not deprive the person who afterward establishes his claim to be the beneficiary of the promise of the right to recover upon it."

The precise question involved in the instant case seems never to have been before the Supreme Court of Michigan, but the right in general of a third party to enforce a contract made for his benefit was considered in *Claxton* v. *Margolis,* 248 Mich. 199. The rule there stated by Mr. Justice SHARPE is that a third person may enforce a contract made for his

benefit if there is "some obligation or duty resting upon the promisor to the third person, giving him a legal or equitable claim to the benefit of the promise."

There is no doubt about the law. The question is whether it is applicable to the terms of the bond in question.

It will be noted that the bond contains five conditions. The first four are plainly obligations to the owner only. They are sufficient in themselves to indemnify him against every conceivable loss. It was not necessary to add the fifth condition for his protection, so it must have been intended for the benefit of the third persons, labor or materialmen, who had dealings with the principal contractor, for they are the persons mentioned. Its language imports that it was for their benefit. "And shall pay all persons who have contracts directly with the principal for labor or materials."

The plaintiff had a contract directly with the principal, and this condition in the bond was a guaranty by the surety that the principal would perform. The promise of the surety was a direct benefit to the plaintiff, and was evidently intended to be such, for it was made after the owner had been fully provided for. As to the owner, it was mere surplusage, for it added nothing to the promises in the preceding portion of the bond, all of which were for his benefit. If the fifth condition had been entirely omitted from the bond, the owner would have been as fully indemnified as he is with it in the bond. This condition is not surplusage or an accidental insertion by the party who drafted the bond. The bond is a standard form adopted by the American Institute of Architects and approved by the National Contractors' Organization. We may assume that it contains no sur-

plusage or meaningless matter. It was put in the bond for a purpose, and the purpose is obvious from the plain language used. It was intended as a guaranty by the surety that all persons dealing directly with the principal contractor would be paid for the materials they furnished or the labor they performed. It was a promise for their direct benefit. It was a guaranty for the benefit of a class, and plaintiff came within that class.

We think a proper construction of the bond shows that the intention of the parties as expressed in the fifth condition was not only to indemnify the owner but to guarantee payment to materialmen who dealt directly with the principal contractor.

Contractors' bonds, identically like this one, were similarly construed in *Byram Lumber & Supply Co.* v. *Page,* 109 Conn. 256 (146 Atl. 293); *Hartford Accident & Indemnity Co.* v. *Knox Net & Twine Co.,* 150 Md. 40 (132 Atl. 261); and on rehearing in *Fidelity & Deposit Co.* v. *Rainer,* 220 Ala. 262 (125 South. 55), reported also in 77 A. L. R. 13.

The plaintiff was a real party in interest, and had a right to bring suit in its own name. Judicature act (3 Comp. Laws 1929, § 14010).

"The provision of the judicature act referred to evidently intended to enlarge the remedy of a beneficiary in contracts so as to enable him to enforce his beneficial interest directly by suit in his own name." *Smith* v. *Oosting,* 230 Mich. 1.

See, also, *Getchell & Martin Lumber Co.* v. *Peterson & Sampson,* 124 Iowa, 599 (100 N. W. 550).

Other questions not discussed are considered as having no merit or are settled in cases cited.

The judgment should be reversed, and the cause remanded for entry of judgment against the surety for the undisputed balance on plaintiff's contract. The plaintiff should have costs.

CLARK, SHARPE, and WIEST, JJ., concurred with McDONALD, C. J.

FEAD, J. (*for affirmance*). In my opinion the judgment must be affirmed. The bond was not made for the benefit of plaintiff, nor was there any "obligation or duty resting upon the promisor to the third person, giving him a legal or equitable claim to the benefit of the promise." *Claxton* v. *Margolis,* 248 Mich. 199.

The bond provides that the principal and surety "are held and firmly bound unto Inter-City Trucking Service, Incorporated." It contains no provision for enforcement by anyone else. It was given for the benefit of the owner, to insure performance of the contract at the agreed cost. The instrument must be construed as a whole and in the light of the fact that persons furnishing labor and materials to the building have protection by way of mechanic's lien. If all persons who could have "claims and demands incurred for the same" may sue on the bond, their combined actions could exhaust it and leave the owner remediless. It is not a reasonable construction of the bond that it was intended to give contractors, materialmen, and laborers security, in addition to the right of lien, which could impair the purpose of the bond to protect the owner.

The contractor owed no legal or equitable duty or obligation to plaintiff in connection with the bond. Its obligation to plaintiff arose from and was measured by a separate and distinct contract between them. The security of plaintiff for payment rests upon the provisions of such separate contract together with the lien law.

POTTER, NORTH, and BUTZEL, JJ., concurred with FEAD, J.

BURK *v.* AMOS.

1. APPEAL AND ERROR—LEAVE TO APPEAL—DISMISSAL.
   Where no leave to appeal was applied for or granted, appeal would be dismissed, on motion therefor.

2. ATTORNEY AND CLIENT—ESTOPPEL—FRAUD—JUDGMENT.
   Approval of decree entered on defendant's default, and acceptance of benefits thereunder by defendant's attorney, *held*, to estop defendant from attacking it for want of service of process, where no claim is made of fraudulent conduct on part of defendant's attorney.
   POTTER, J., dissenting.

Appeal from Wayne; Moll (Lester S.), J. Submitted October 27, 1932. (Docket No. 51, Calendar No. 36,751.) Decided March 7, 1933.

Bill by Marion Burk against Robert H. Amos and another to foreclose a land contract and appoint a receiver. From order denying defendants' motion to set aside default, they appeal. Appeal dismissed.

Robert T. Speed, for plaintiff.

Barbour & Martin, for defendants.

SHARPE, J. The record does not disclose that the summons issued herein was served on the defendant Robert H. Amos. It does appear that a motion for the appointment of a receiver was made on November 8, 1930, and denied, conditionally, on November 11, 1930, and a petition to adjudge the defendants in contempt, heard and denied on December 6, 1930, and an order made appointing a receiver on December 11, 1930.

On January 5, 1931, an affidavit of plaintiff's attorney was filed, in which he stated:

"That on November 8, 1930, he was above the age of 21 years and of sound mind and discretion; that on said day he served a true copy of bill of complaint and application for appointment of receiver attached hereto, on Colin J. McRae, attorney, who voluntarily appeared for Robert H. Amos and Florence B. Amos, defendants herein, at Detroit, Michigan, by handing to said Colin J. McRae said true copy of said bill of complaint and application for appointment of receiver."

An order *pro confesso* was entered on that day and an affidavit of regularity on the following day. On January 9th defendants moved to set aside the default. This motion was based on the affidavit of their attorney, Colin J. McRae, in which he stated that his former appearance (a copy of which does not appear in the record) had been special and for the defendant Florence Amos alone, and denied that a copy of the bill of complaint and application for appointment of a receiver had been served on him, as averred in the affidavit of plaintiff's attorney above referred to. Attached to this petition was a copy of the joint answer of the defendants, verified by them. The docket entries show that this motion was dismissed on January 17th, but the order to that effect, which would doubtless disclose the reason therefor, is not in the record.

The docket entries also disclose that on January 17th the cause was heard "and decree for plaintiff ordered;" that on January 26th a "motion to set aside default of defendant granted, upon payment of $100 by January 28, 1931." Apparently this payment was not made, and on January 28th the decree

was signed and filed, and enrolled on February 20th. It recites:

"This cause having come on to be heard upon the pleadings and proofs taken therein in open court, and the court being advised in the premises, it is found that the allegations in the bill of complaint are true."

It fixed the amount due on the land contract, and ordered payment of the same. It further provided that the moneys paid to the clerk of the court by the receiver should be paid out by him—

"One-half to Abraham Slutsky and Samuel D. Frankel, attorneys for plaintiff herein, and one-half to Colin J. McRae, attorney for defendants herein."

Below the signature of the trial judge thereto appears the following:

"We hereby approve the above decree.

"ABRAHAM SLUTSKY,
"Attorney for plaintiff.
"COLIN J. MCRAE,
"Attorney for defendants,
"ROBERT H. AMOS and
"FLORENCE B. AMOS.
"February 20, 1931.

"Rec'd. of Thomas Farrell, county clerk, ck. $124.83.

"ABRAHAM SLUTSKY,
"Attorney for plaintiff.
"February 20, 1931.

"Rec'd. of Thomas Farrell, county clerk, ck. $124.84.

"COLIN J. MCRAE,
"Attorney for defendants."

On March 23, 1931, the defendants, appearing by their present attorneys, petitioned the court to set aside and vacate the decree for the reason that "no

service of process was ever made on the defendant, Robert H. Amos,'' and the court was without jurisdiction to render it. This petition was supported by the affidavit of Robert H. Amos, who deposed ''that no process was ever served upon him,'' and that ''he is informed that no appearance was ever entered in said cause for him.'' An affidavit of one of defendants' attorneys, verifying the docket entries in the case, was also attached. After a hearing thereon, an order was made denying the petition, on June 8, 1932. It is from this order that the defendants have taken this appeal.

No leave to appeal was applied for or granted. Under our holding in *Mack International Truck Corp.* v. *Palmer,* 259 Mich. 234, the appeal would have been dismissed had motion been made therefor.

But, without disposing of it for this reason, we may say that the approval of the decree and the acceptance of benefits under it by counsel for both defendants estop the defendant Robert H. Amos from attacking it where no claim is made of fraudulent conduct on the part of the attorney who assumed to act for him.

The appeal is dismissed, with costs to appellee.

MCDONALD, C. J., and CLARK, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred with SHARPE, J.

POTTER, J. (*dissenting*). I accept the statement of facts made by Mr. Justice SHARPE. No proper proof of service of the summons is on file in the office of the clerk of the court, and no summons was served upon the defendant Robert H. Amos. Decree was taken by default. The questions involved are fundamental. Jurisdiction is the power conferred upon a court for the public good, on account of the necessity of dispensing justice. This was the opinion of

Lord Coke, expressed in 10 Coke, 73a. Jurisdiction of a particular party or proceeding must affirmatively appear of record. From the record alone the court acquires jurisdiction, certainty in which record is necessary. This mandatory record is the warrant of certainty and the measure of authority of the court. It is the essential basis of due process of law. Jurisdiction is not ambulatory but fixed. What ought to be of record must be proved by the record and by the right record. The existence of a record is mandatory because essential in any government which makes even a pretense of protection of parties by the rules of former adjudication, prior acquittal, collateral attack, and due process of law. This essential record is, in our law, the basis of the vindication of constitutional guaranties. It is the permanent evidence of authorized judicial action; the repository of truth, whether of the present or of antiquity. These maxims are ancient and under constitutional government have been repeatedly restated and reaffirmed.

"A record is a memorial of a proceeding or act of a court of record, entered in a roll for its preservation; a memorial or history of judicial proceedings in a case, commencing with the writ or complaint and ending with the judgment. It is universally required that the higher or more important courts shall keep such records, the object being to secure an accurate memorial of all the proceedings in the case so that persons interested may ascertain the exact state thereof; and all orders of court not entered of record are extrajudicial and void." 15 C. J. p. 971.

In *Whirl* v. *Reiner,* 229 Mich. 114, judgment was entered by default against defendant, who moved to set it aside. The court found defendant was served with process, but said:

"There is no question but defendant was personally and lawfully served, but the difficulty is the files of the court on the day of default lacked the proper proof of it."

Why was defendant's default set aside? Because a mandatory record of service of process was a necessary prerequisite of jurisdiction, and no valid default could be entered without such record. The record of service was not on file. No calendar entry thereof appeared in the records and files of the court. This court, at that time, recognized the principles of law above stated, which lie at the foundation of regular judicial procedure.

In *Stanczuk* v. *Pfent,* 231 Mich. 689, it was said:

"Suit was commenced by declaration. There was judgment by default. More than six months after entry of default defendant moved to set it aside, showing, as we find, that at the time of entry of default there was not a return of service of the declaration, as the practice requires. 3 Comp. Laws 1915, § 12441. The motion by order was denied. Defendant brings error.

"In facts and in applicable law the case is like *Whirl* v. *Reiner,* 229 Mich. 114. The default was irregular, and, under the holding in the *Whirl Case,* ought to have been set aside. No other question merits discussion."

This case was followed by *Stanczuk* v. *Pfent,* 231 Mich. 691. The right to enter a default of defendant must be determined from the face of the record. *Westlawn Cemetery Ass'n* v. *Wayne Circuit Judge,* 238 Mich. 119. Before defendants' default could be entered, their appearance in the case must have affirmatively appeared of record. No valid default could be entered so long as that record was incomplete. It makes no difference whether defendants

were served with process or not. Though they were served with process, if the proof of service did not appear of record, no valid default could be entered. As said in *Rosen* v. *Wayne Circuit Judge,* 244 Mich. 397:

"The facts justifying the default should appear of record." Citing *Whirl* v. *Reiner, supra; Anderson* v. *Cole,* 114 Mich. 637; 1 Abbott's Cyc. Mich. Practice (2d Ed.), p. 479.

The record imports verity. It cannot be varied by parol evidence within the jurisdiction of the court, nor is it subject to collateral attack. 15 C. J. p. 979. And any other holding substitutes uncertainty for certainty, makes conclusive evidence questionable, and verity impeachable.

The judgment should be reversed, with costs.

SCHOOL DISTRICT OF CITY OF PONTIAC *v.* CITY OF PONTIAC.

1. CONSTITUTIONAL LAW—AMENDMENT—PUBLICATION—ELECTION.
   In determining what constitutes compliance with constitutional requirement as to publication of proposed amendment to Constitution, in submitting it to electors for adoption, purpose prompting inclusion of such amendment in Constitution is of prime importance (Const., art. 17, § 3).

2. SAME—WHEN OTHER PROVISIONS SHOULD BE PUBLISHED.
   In case proposed constitutional provision amends or replaces ("alters or abrogates") specific provision of Constitution, then such provision should be published along with proposed amendment, but other provisions which are still operative, though possibly they may need thereafter to be construed in conjunction with amending provision, need not necessarily be published (Const., art. 17, § 3).

3. TAXATION—INHERENT IN STATE GOVERNMENT.

General power of taxation has been and is inherent in State government.

4. CONSTITUTIONAL LAW—PUBLICATION OF OTHER PROVISIONS—AMENDMENT.

Amendment to Constitution by adding section 21 to article 10, limiting amount of taxes assessable against property in any one year to 15 mills, being new section which did not "alter or abrogate" any other provision of Constitution, publication of other provisions was not necessary in order to comply with Constitution in submitting it to electors for adoption (article 17, § 3).

5. SAME—AMENDMENT—REVISION.

Objection that adoption of said section 21, art. 10, should have been accomplished in manner provided in Constitution for revision (article 17, § 4) rather than that provided for amendment (article 17, § 3), *held*, without merit; said section having been legally adopted as amendment by way of addition to Constitution.

6. SAME—CONSTRUCTION—INTENT.

Object of construction, as applied to written Constitution, is to ascertain and give effect to intent of people in adopting it.

7. SAME—TAX LIMITATION AMENDMENT—CHARTERED MUNICIPALITIES EXEMPT FROM TAX-LIMITATION AMENDMENT.

Cities chartered as home-rule cities (Const., art. 8, §§ 20, 21; 1 Comp. Laws 1929, § 2228 *et seq.*), cities having special charters with tax limitation provision, and cities of fourth class and villages organized under Constitution, art. 8, § 21; 1 Comp. Laws 1929, § 1465 *et seq.*, having adopted their own tax limitation, are not subject to 15-mill property tax limitation provided for in amendment to Constitution (article 10, § 21), except that if any part of said 15 mills should be allocated to them by legislature, it must be included in total amount assessable for city or village purposes under charter limitation.

8. SAME—ASSESSMENT DISTRICTS SUBJECT TO TAX-LIMITATION AMENDMENT.

In assessment districts other than cities and villages having charter tax limitation, said amendment should be applied unless otherwise determined by requisite vote of electors as provided for in said amendment (Const., art. 10, § 21).

9. SAME—DUTY OF COURTS TO INTERPRET.
Constitutional duty of courts is to interpret and apply law, not to enact laws.

10. TAXATION—POWER VESTED IN LEGISLATURE TO ALLOCATE TAXES.
Determination of sources of tax revenue and apportionment of taxation require legislative action, and therefore court is not vested with power to allocate taxes raised under 15-mill tax limitation provided for in constitutional amendment (article 10, § 21).

11. SAME—MUNICIPAL CORPORATIONS—INJUNCTION—ALLOCATION.
In suit by school district to restrain city from adopting proposed budget for municipal purposes until legislature had taken action to allocate revenue derived from 15-mill property tax as limited by constitutional amendment (article 10, § 21), relief was properly denied, in absence of showing that city had in any way invaded school district's rights.

ON MOTION FOR REHEARING.

12. SAME—PARTICIPATION OF MUNICIPALITIES IN 15-MILL TAX IS LEGISLATIVE MATTER.
Municipalities having charter provision fixing maximum taxation limitation may participate in allocation of 15-mill tax assessable under constitutional amendment (article 10, § 21), but whether they shall so participate depends on whether any part is allocated to them by legislature; allocation being matter for legislative determination.

Appeal from Oakland; Gillespie (Glenn C.), J. Submitted March 1, 1933. (Docket No. 169, Calendar No. 37,147.) Decided March 14, 1933. Rehearing applied for March 21, 1933. Rehearing denied April 5, 1933.

Bill by School District of the City of Pontiac, a municipal corporation, against City of Pontiac, a municipal corporation, to restrain adoption of a proposed budget. County of Oakland and Attorney General intervened as defendants. Bill dismissed. Plaintiff, defendant, and intervening county appeal. Affirmed.

Andrew L. Moore and *James H. Lynch,* for plaintiff.

William A. Ewart, for defendant.

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

Patrick H. O'Brien, Attorney General, and *Francis K. Young,* for intervening Attorney General.

Clarence E. Wilcox, Corporation Counsel of the City of Detroit, *John H. Witherspoon,* Assistant Corporation Counsel, *John R. Rood, Miller, Canfield, Paddock & Stone,* and *A. M. Cummins, amici curiæ.*

NORTH, J. This appeal from a decree entered in the circuit court of Oakland county, in chancery, dismissing plaintiff's bill of complaint presents for review the following questions:

(1) Was section 21, article 10, legally adopted and made a part of the Michigan Constitution at the November, 1932, election?

(2) If legally adopted, what is its proper construction in the particulars hereinafter noted?

The amendment reads:

"Section 21. The total amount of taxes assessed against property for all purposes in any one year shall not exceed one and one-half per cent. of the assessed valuation of said property, except taxes levied for the payment of interest and principal on obligations heretofore incurred, which sums shall be separately assessed in all cases: *Provided,* That this limitation may be increased for a period of not to exceed five years at any one time, to not more than a total of five per cent. of the assessed valuation, by a two-thirds vote of the electors of any assessing

district, or when provided for by the charter of a municipal corporation: *Provided further,* That this limitation shall not apply to taxes levied in the year 1932."

The Constitution (article 17) provides how amendments may be originated and adopted. It can be amended only in the manner therein provided. *Scott* v. *Secretary of State,* 202 Mich. 629. Failure to comply with the requisite provisions would defeat the proposed amendment. 6 R. C. L. p. 31; *Simpson* v. *Hill,* 128 Okla. 269 (263 Pac. 635, 56 A. L. R. 706). The above-quoted amendment was proposed by the requisite number of qualified electors, submitted at the November, 1932, election, and received the necessary votes for its adoption. Validity of the amendment is challenged on the ground of failure of the secretary of State to comply with article 17, § 3, of the Constitution, which provides:

"All proposed amendments to the Constitution submitted to the electors shall be published in full, with any existing provisions of the Constitution which would be altered or abrogated thereby, and a copy thereof shall be posted at each registration and election place. Proposed amendments shall also be printed together with any other special questions to be submitted at such election in full on a single ballot separate from the ballot containing the names of candidates or nominees for public office."

The amendment was published in full with the following notice or comment:

"This is a new section to limit the amount of taxes assessed against property. This proposed amendment, if adopted, will limit the total amount of taxes assessed against property for all purposes in any one year (except 1932) to one and one-half per cent. of the assessed valuation, except taxes levied for

the payment of obligations already incurred; provided that said limitation may be increased for not to exceed five years at any one time to not more than five per cent. of the assessed valuation by a two-thirds vote of the electors of any assessing district or when provided for by the charter of a municipal corporation."

The exact objection urged is that this amendment alters or abrogates some 16 or 18 other provisions of the Constitution, and that failure to publish the "existing provisions of the Constitution which would be altered or abrogated" nullifies the attempted amendment. Some of the provisions as to which this argument is urged are: Article 8, §§ 20, 22–24, 26; article 10, §§ 1–3, 5, 10; article 11, §§ 9, 10, 14; article 15, § 2. We think this position is not tenable. The duty of submitting all proposed constitutional amendments initiated by the people is placed by the Constitution upon the secretary of State, article 17, § 2. Any provision as to such duty should, if possible, be so construed as to make the requisite course of conduct entirely clear and plain. Perplexities and uncertainties will be pitfalls for the officer charged with this duty regardless of a zealous and honest effort to fully comply with the law, and the officer's nonperformance might jeopardize and possibly nullify the effort of electors to amend the Constitution. The instant case affords an apt illustration of such difficulties. Here able counsel disagree which, if any, of the other 16 or 18 constitutional provisions are altered by the amendment. It may almost be said that no two agree that certain of these provisions are altered and others are not. How then could the secretary of State determine or be advised with any degree of certainty which of these other provisions of the Constitution he should publish? As hereinafter noted a more clear and definite

meaning than that asserted by appellants must be given to the constitutional provision last above quoted.

In determining what constitutes compliance with the constitutional requirement as to publication, a matter of prime importance is the purpose that prompted the people of the State of Michigan to include such a provision in the Constitution. All will agree that this was a means adopted by which it was believed the elector would be definitely advised as to the purpose of the proposed amendment and what provision of the constitutional law it modified or supplanted. Being so advised, the elector could intelligently determine whether his vote would be for adoption or rejection. But the ordinary elector, not being a constitutional lawyer, would be confused rather than helped by a publication of all the other constitutional provisions which were or might be directly or only remotely, and possibly only contingently, affected by the proposed amendment. We think the requirement in substance is this: That in case a proposed constitutional provision amends or replaces ("alters or abrogates") a specific provision of the Constitution, that such provision should be published along with the proposed amendment; that other provisions which are still operative, though possibly they may need thereafter to be construed in conjunction with the amending provision, need not necessarily be published.

This amendment is a wholly new and additional constitutional provision in this State. It is not a grant of power, but instead a constitutional limitation upon the exercise of the general power of taxation. Heretofore our Constitution contained no such general limitations. The general power of taxation has been and is inherent in State government.

1 Cooley on Taxation (4th Ed.), §§ 64, 102. Prior to this amendment, the extent to which the legislature might authorize the exercise of this power for public purposes was without general limitation, though there were numerous special limitations in the Constitution. This was clearly pointed out in the first sentence of the notice to the electors which was published with this proposed amendment. It read: "This is a *new section* to limit the amount of taxes assessed against property." Being a new section, which did not specifically and definitely "alter or abrogate" any other provision of the Constitution, it follows that there was no other provision of the Constitution to be published in order that there might be full compliance with article 17, § 3.

The validity of the 1932 amendment is further challenged on the ground that it is not an amendment, but instead it is so far reaching in its modification and restriction of governmental powers that it amounts to a revision of the State Constitution, and, not having been accomplished in the manner provided in the Constitution for revision (article 17, § 4), it is wholly ineffective and invalid. We are fully convinced that the adoption of this new limitation upon the power of taxation, under the construction hereinafter placed upon it, does not so interfere with or modify the operation of governmental agencies as to render it other than an amendment by way of an addition to the Constitution. As an amendment it was legally adopted and became a part of our fundamental law.

We are asked to construe in certain particulars this amendment to the Constitution. Unfortunately it is couched in language so ambiguous that able counsel after much study and reflection are far from being in accord as to its proper construction.

Even some of those who were instrumental incident to initiating the amendment seem to differ widely as to what was to be accomplished thereby. Because of such ambiguity, it becomes the duty of the court to construe the amendment as worded in the light of established rules for the construction of constitutional provisions. Much has already been written concerning proper rules for such construction. Extended review of these rules would not be particularly helpful. Fortunately the pertinent fundamental guides for such construction have been clearly and concisely stated in former decisions of this court:

"It is a maxim that the object of construction, as applied to a written Constitution, is to ultimately ascertain and give effect to the intent of the people in adopting it. * * *

"In construing constitutional provisions where the meaning may be questioned, the court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished." *Kearney* v. *Board of State Auditors,* 189 Mich. 666.

This appeal presents for determination the proper construction of the phrase *"or when provided for by the charter of a municipal corporation"* as embodied in the context of this amendment. The charter of the city of Pontiac adopted under the so-called home-rule act (1 Comp. Laws 1929, § 2228 *et seq.*), vested the city with power to levy annually a general tax upon real and personal property not exceeding two per cent. of the assessed valuation. The tax so authorized was for the sole use of the city. The question now presented is this: Does the 1932 constitutional amendment limit the annual tax assessment for State, county, school, and city purposes to one

and a half per cent. in the city of Pontiac (except taxes levied to meet existing indebtedness); or does the city, because of the exception contained in the above-quoted phrase, still have power to tax for municipal purposes to the maximum charter limitation of two per cent.? The city's contention as stated in its brief is:

"Under the proviso in this amendment the city of Pontiac is not limited to the one and one-half per cent., but the charter tax limitation of two per cent., in existence at the time this amendment was adopted, is in full force and effect. * * *

"The amendment should be interpreted so as to be agreeable to the already existing law of the Constitution of this State, granting home rule to cities and also such an interpretation should be given as will uphold the present charter provision of two per cent., which is a law approved by the defendant city."

The opposing contention is that, aside from taxation to meet indebtedness, the amendment limits taxation against property to one and one-half per cent. of assessed valuation notwithstanding charter provisions to the contrary, unless and until an increase not to exceed five per cent. of the assessed valuation is authorized by a vote of the electors or by a charter amendment adopted subsequent to the 1932 constitutional amendment.

Careful study of the amendment leads to these conclusions: Clearly the intent was to provide by the fundamental law of the State, which had not theretofore contained such provision, a general limitation upon the exercise of the taxing power of the State. The evil or abuse sought to be remedied was excessive taxation imposed by governmental agencies without the consent of those upon whom

the burden was placed. At the outset, the framers of the proposed amendment, and later the people who considered its adoption, were confronted with the legal proposition that contractual obligations could not be impaired, and therefore the general exception to the proposed limitation of taxation was made by excepting "taxes levied for the payment of interest and principal on obligations heretofore incurred." We are not here concerned with this particular limitation, except to note that in drafting the amendment, as well as in its adoption, the people were mindful of existing conditions and sought to so frame the amendment as to be in accord with such existing conditions. This led to embodying in the amendment the above-quoted provision as the first exception to its general limitation on taxation.

Reading further in the amendment, it clearly appears it also occurred to those interested in its framing and adoption that certain conditions might already exist or might thereafter arise in consequence of which the electors of any assessing district might conclude that the one and one-half per cent. constitutional limitation was unduly restrictive. Such a condition might have prevailed at the time of the adoption of the amendment in a school district which found itself confronted with the necessity of engaging in an extensive building program, or such a condition might come about in the district at any time in consequence of destruction of its buildings by fire or other disaster. Hence the provision in the amendment that the specified limit might be increased for a period not exceeding five years at any one time to the maximum limit of five per cent. of the assessed valuation by a two-thirds vote of the electors of the assessing district. This provision left in the possession of each assessing district power to provide for local needs for which the allocated portion

of the one and one half per cent. tax might be deemed to be inadequate; and such provision constituted a second exception to the general taxation limitation contained in the amendment.

This brings us to what a fair reading of the amendment indicates is a third exception to the general limitation of taxation, which exception the framers and adopters of this amendment seemingly deemed essential, and which we think gave rise to including in the amendment the words *"or when provided for by the charter of a municipal corporation."* At this point consideration was evidently given to the well-known fact that in comparatively recent years there had developed in this State the so-called "home-rule" feature of our government. Provision therefor was embodied in the Constitution of 1908 (article 8, §§ 20, 21). This was followed by the legislative enactment of the home-rule bill (act No. 279, Pub. Acts 1909 [1 Comp. Laws 1929, § 2228 *et seq.*]). In the meantime many cities in Michigan have been chartered under the above-cited constitutional provision and legislative enactment. Under the constitutional provision, by the home-rule act, it was sought fundamentally to place in the hands of the electors of the cities chartered thereunder increased power of local governmental control. To this purpose the home-rule act permitted a charter provision authorizing taxation for local municipal needs to the extent of two per cent. of the assessed valuation of taxable property (1 Comp. Laws 1929, § 2230). Whether the electors of a home-rule city would vest their city government with power to tax to the extent of one per cent. or to the extent of two per cent. was a matter of local determination. In the exercise of that power locally, the city of Pontiac embodied in its home-rule charter the two per cent. limitation. Its taxing agencies, the same as those

in other cities, were operating under and exercising this grant of power at the time the 1932 constitutional amendment was in the process of being formulated and adopted. Surely this important condition of State affairs was not overlooked in the framing and consideration of the amendment; and to us it seems that knowledge of these various charter provisions under the home-rule act called to the attention of the framers of this constitutional amendment that a third exception should be embodied therein as to the general limitation they proposed to put upon the exercise of the taxing power. Under constitutional provisions and within the specified limitations, this taxing power had already been delegated to various cities in Michigan; and, as noted above, this fact was well known. Surely it would be a strange governmental operation, wholly inconsistent with the ordinary methods of accomplishing that result (if not entirely without precedent) that the charters of the various cities of this State should be summarily amended by a constitutional provision which in spirit, if not in letter, was diametrically opposed to the recently developed policy of home-rule government in this State. This being true, we are fully convinced that the framers and adopters of this constitutional amendment found themselves confronted with a condition which prompted this third exception to the general limitation of the exercise of the taxing power in cities already constitutionally vested with the power to tax in excess of the proposed limitation. To meet this situation, the quoted phrase was embodied, and for that reason it should be held to mean that "this limitation may be increased" in the cities whose charters already empower them to levy a tax for municipal purposes in excess of the amount which the city might levy under the terms of the 1932 amendment. This con-

struction, we think, is in harmony with the spirit and purpose of the amendment, in that it applies the general limitation of one and one-half per cent. to all taxing districts except those wherein by local action a higher percentage of taxation for local needs is expressly authorized; and in these excepted districts the 1932 constitutional limitation is effective as to State, county, and school taxes. We have not overlooked the argument that the construction of this amendment above outlined does not fit perfectly into its phraseology. No plausible construction has been suggested which does not clash equally as much or even more or lead to governmental difficulties which strongly militate against such suggested construction. At the expense of repetition, we state again that (disregarding the exception of taxes levied for payment of debts), we think the amendment must be construed as though it read:

The total amount of taxes assessed against property for all purposes in any one year shall not exceed one and one-half per cent. of the assessed valuation of said property: *Provided,* That this limitation may be increased for a period of not to exceed five years at any one time to not more than a total of five per cent. of the assessed valuation, by a two-thirds vote of the electors of any assessing district, or (that this limitation may be increased) when provided for by the (present or future) charter of a municipal corporation.

In the foregoing, reference has been made to the so-called home-rule cities, but we think the same result would follow as to cities having special charters with like provisions as to the exercise of the power of taxation. The result of the above construction is that the 1932 amendment neither increased nor decreased the charter power of a city to levy taxes for its municipal purposes. If in the allocation of

general taxes assessed under the one and one-half per cent. constitutional provision a portion of the funds necessary to meet city expenses are to be raised, such amount must be included in the total amount assessed for city purposes in ascertaining whether the city tax exceeds the amount provided in the city's charter.

With villages and fourth-class cities much the same result follows from the foregoing construction of the 1932 amendment. By constitutional and statutory provisions (Constitution, article 8, § 21; 1 Comp. Laws 1929, § 1465 *et seq.*; § 1763 *et seq.*; § 1796 *et seq.*), these municipalities, much like home-rule cities, have been vested with power of regulating taxation within specified limitations. They possessed this power of local self-government prior to the 1932 constitutional amendment. By the exercise of this power incident to incorporation or subsequently by positive or negative action under the statutes, each has adopted its own limitation or regulation. The right to exercise this power of local self-government was not changed by the constitutional amendment. The electors of the respective villages and fourth-class cities still have the power, by virtue of and within the above noted constitutional and statutory provisions, to determine and fix the limits within which they may be subjected to taxation for local purposes.

In passing, it may also be stated we think there is much force in the argument set forth in the brief for the city of Pontiac that in the framing and adoption of this amendment there was in contemplation the fact that, outside of chartered cities, there was no general limitation upon the exercise of the power of taxation; and that in assessment districts other than cities the limitation in the amendment should

be applied unless otherwise determined by the requisite vote of the electors; but that in cities having a charter provision action of this character had already been taken by the local electors in adopting their various city charters, and therefore the action so taken should be respected by excepting such districts from the general limitation of one and one-half per cent. embodied in the amendment in so far as the power of taxation was exercised for the city's local needs.

This appeal also presents the question: Have courts the power to allocate property taxes raised under the one and one-half per cent. constitutional amendment? We think it self-evident that such power is not vested in the courts. The constitutional amendment contains no provision for a division of the total one and one-half per cent. taxes between the State, counties, cities, villages, townships, or school districts. Nor is there any statutory provision relative to such division or allocation. The constitutional duty of courts is to interpret and apply the law, not to enact laws. Taxation is a legislative power vested by the Constitution in the legislative branch of the State government. Determination of the sources of tax revenue and the apportionment of taxation require legislative action. 1 Cooley on Taxation (4th Ed.), §§ 64, 74; 2 Cooley on Taxation (4th Ed.), § 539. As noted, this amendment to the Constitution contains no provision for allocation of taxes. It is not self-executing. Constitutional provisions as to taxation generally are not self-executing; but require legislative action. 1 Cooley on Taxation (4th Ed.), § 132. The trial court correctly held it was not vested with power to allocate taxes raised under this one and one-half per cent. constitutional amendment. Legislative action is requisite.

The remaining question presented by this appeal is raised by the following assignment of error:

"The court erred in his findings upon which the decree was predicated that any home-rule city has the right to adopt a budget and appropriate a portion of the 15-mill tax revenue before the legislature has taken action to allocate to the respective units of government any share of such tax."

In the instant case the plaintiff school district sought to enjoin the city of Pontiac, in which the school district is principally located, from adopting a proposed budget for its municipal purposes. Plaintiff's contention is that the city had no right to proceed to the adoption of a budget before the legislature had taken action relative to allocation of the revenue derived from the one and one-half per cent. property tax. The trial judge denied the injunctive relief sought, and we think properly so, because plaintiff did not establish the essential fact that in making up its budget the city in any way invaded plaintiff's rights. As was held in the circuit, in the absence of statutory enactment allocating the tax raised under the one and one-half per cent. provision, the court was powerless to determine whether the defendant city in fixing its budget had exceeded its rights.

The decree dismissing the bill of complaint is affirmed.

The questions presented are of public importance, the State and the county of Oakland were permitted to intervene, and various parties have filed briefs *amici curiæ*. No costs will be awarded.

McDONALD, C. J., and CLARK, POTTER, SHARPE, FEAD, WIEST, and BUTZEL, JJ., concurred.

ON MOTION FOR REHEARING.

PER CURIAM. Plaintiff's motion for rehearing having been duly considered, it is ordered that said motion be and the same is hereby denied. In connection with such denial, the court reiterates its holding in the opinion already filed, that municipalities having a charter provision fixing a maximum taxation limitation may participate in the allocation of the 15-mill tax assessable under the 1932 constitutional amendment. This is a necessary inference from the following portion of our opinion:

"If in the allocation of general taxes assessed under the one and one-half per cent. constitutional provision a portion of the funds necessary to meet city expenses are to be raised, such amount must be included in the total amount assessed for city purposes in ascertaining whether the city tax exceeds the amount provided in the city's charter."

Whether or not a chartered municipality will receive any portion of the tax assessed under the 15-mill provision depends upon whether any part of the tax is allocated to such municipality. Allocation is a matter for legislative determination. No costs on this motion.

APRIL TERM, 1933.

KELLEY *v.* BROWN.

1. APPEAL AND ERROR—DIRECTED VERDICT.

   In reviewing judgment for defendants on directed verdict, in action for personal injuries, Supreme Court must disregard all testimony showing that plaintiff's injury might have been due to causes other than those alleged by plaintiff.

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEFENSES OF "ASSUMED RISK" AND "CONTRIBUTORY NEGLIGENCE."

   In action for personal injuries by employee against his employers who had not elected to come under workmen's compensation act, defenses of "assumed risk" and "contributory negligence" were not open to them; but employee still has burden of showing negligence on part of employers.

3. SAME—EXCEPTION TO RULE REQUIRING MASTER TO FURNISH SAFE TOOLS—PORTABLE LADDER.

   Small portable ladder or steps falls within "small tools or implements" exception to rule requiring master to inspect and provide his employees with safe tools, etc., with which to work.

4. SAME—DANGEROUS MACHINERY—NEGLIGENCE.

   It is only machinery and appliances which are recognized as in their nature dangerous to employees using them, or working in proximity to them, as to which employer owes duty to employee of looking out for his safety.

5. SAME—SMALL PORTABLE STEP-LADDER—NEGLIGENCE—DIRECTED VERDICT.

   In action by employee against his employers for personal injuries alleged to have been caused by defective condition of small portable step-ladder furnished by them for plaintiff's use, evidence *held*, insufficient to present issue for jury on question of defendant's negligence.

Appeal from Berrien; White (Charles E.), J. Submitted October 11, 1932. (Docket No. 68, Calendar No. 36,643.) Decided April 4, 1933.

Case by Frank Kelley against Ova D. Brown and another, copartners doing business as Brown Ice & Coal Company, for personal injuries received while in defendants' employ alleged to be due to defendants' negligence. Directed verdict and judgment for defendants. Plaintiff appeals. Affirmed.

Thomas N. Robinson, for plaintiff.

Gore & Harvey, for defendants.

BUTZEL, J. Plaintiff Frank Kelley had been employed for more than three and one-half years by defendants Ova D. Brown and Clarence C. Brown, copartners doing business as the Brown Ice & Coal Company of Benton Harbor, Michigan. On July 9, 1930, he and his son Zell were directed to fill the ice coolers in two meat markets. In order to fill coolers of this type, it was generally necessary to take along a small portable step-ladder or steps, so as to reach the opening in the upper part of the cooler, through which the ice was shoved. Defendants had two ladders for this purpose, and defendants' foreman directed plaintiff to take the larger one, the only one not then in use. This ladder was of a portable type, about 4 feet in height, made of 1 inch boards fastened together with nails, and had six steps or treads from 20 inches to 2 feet long and 10 inches wide. It tapered towards the top, on which there was a platform about 2 feet square. It weighed approximately 75 pounds. The treads were fastened with braces and nails but not with bolts.

Plaintiff and his son proceeded with the load of ice to Grand Crossing Market, where, after placing the ladder against the cooler, plaintiff ascended, entered the cooler, and then received and piled up the ice as Zell took it from the truck and brought it up the ladder to the opening. After Zell had made 11 or 12 trips up the steps, each time carrying heavy cakes of ice, plaintiff left the cooler to assist his son. He picked up a heavy block of ice, weighing approximately 100 pounds, and proceeded up the steps.

Plaintiff was not able to testify at the trial. His son stated that plaintiff had no difficulty in going up the steps, but that when he had one foot on the steps near the top and raised his other foot to reach the platform—

"the cake of ice touched the ceiling and during the time, not catching his balance and the ladder weaving, he lost his balance and fell back. I couldn't estimate the time between the time of his cake of ice touching the ceiling and before he fell, but it wasn't very long. I suppose when he touched the ceiling it might have jarred him somewhat and jarred the steps, too. The steps didn't break with him when he touched the ceiling. The steps would weave both ways, sideways. At that time they weaved probably an inch that way. They didn't go any other way."

It is claimed that plaintiff fell on his head, and that this caused his subsequent serious condition. There was no wound, gash, or mark showing a head injury. The son continued to use the steps in completing the delivery of the order, and went up and down the ladder eight or nine times after plaintiff had fallen. Plaintiff accompanied his son in delivering another order of ice, but did not do any work. According to the son's testimony, on their return to defendants' place of business, plaintiff complained of pain, but

made no report of the injury to defendants. After continuing to work for several days, he became very ill. Paralysis set in, and he was in very bad condition at the time of the trial.

As a verdict was directed for defendants, we must disregard all testimony showing that plaintiff's injury may have been due to other causes, as is intimated. Inasmuch as defendants did not elect to come under the workmen's compensation act (2 Comp. Laws 1929, § 8407 *et seq.*), the defenses of "assumed risk" and "contributory negligence" are not open to them. This does not, however, relieve the plaintiff from the burden of showing negligence on the part of defendants.

We agree with the circuit judge that there was no showing sufficient to submit the case to the jury. It is nowhere shown that defendants were negligent in any respect. It is claimed that the steps of the ladder became loose at times, and that it was necessary for the employees to make them secure by driving in the nails. The testimony indicates that the steps were in their ordinary condition the day of the accident. Plaintiff's son used them 11 or 12 times in carrying heavy loads up to the cooler. Plaintiff himself made one trip up and down the steps before he was hurt. His son made 8 or 9 trips after plaintiff's fall. It is admitted that plaintiff may have lost his balance, or at least partially so, by striking the block of ice against the ceiling. It is claimed, however, that one of the steps "weaved" or wobbled to a slight extent after plaintiff's cake of ice hit the ceiling, and in that manner he may have been thrown off his balance by this sway.

It is certain, nevertheless, that there was no break in the steps whatsoever, and if they were slightly

out of repair, they could have been readily repaired by plaintiff and his son. The testimony shows they had been repaired in the past by knocking in the nails with an ice tong. There is no testimony to show that the defective condition of the steps was ever brought to the attention of defendants. One of plaintiff's witnesses, on being called, contradicted his former testimony and claimed that he had mentioned the condition of the steps to plaintiff's foreman at some time previous to the accident. However, there is uncontradicted testimony that the steps were repaired at various times.

A small portable ladder or steps falls within the "small tools or implements" exception to the rule requiring the master to inspect and provide his employees with safe tools, etc., with which to work. The cases of *Menere* v. *Copper Range Consolidated Co.*, 169 Mich. 367, and *Nichols* v. *Railroad Co.*, 145 Mich. 643, are referred to, to show that a ladder is not a tool of the kind that comes within the "small tools and implements" exception. These cases involved long, stationary ladders, 16 to 35 feet in length and permanently fixed, which employees had to climb or descend regularly in the course of their employment. They are clearly outside of the "simple tool" classification, and the cases are not in point.

In the case of *Sheltrown* v. *Railroad Co.*, 245 Mich. 58, Mr. Justice SHARPE, speaking for the court, commented upon the fact that the doctrine that a master must furnish his servant with reasonably safe machinery and appliances to perform the work required of him, and also keep them in safe condition by inspection from time to time and by ordinary care and diligence in making repairs, is subject to an exception in the case of simple tools and appliances. Af-

ter referring to the cases of *Anderson* v. *Railroad Co.,* 107 Mich. 591 (16 Am. Neg. Cas. 98); *Wachsmuth* v. *Shaw Electric Crane Co.,* 118 Mich. 275, 279, and *Toth* v. *Osceola Mining Co.,* 180 Mich. 274, he cites with approval the statement made in *Lynn* v. *Glucose Sugar Refining Co.,* 128 Iowa, 501 (104 N. W. 577), in which the court said:

"It is only machinery and appliances which are recognized as in their nature dangerous to employees using them, or working in proximity to them, as to which the employer owes a duty to the employee of looking out for his safety."

Mr. Justice SHARPE further states:

"The decisions of other courts have been collected in the notes to 13 L. R. A. (N. S.) 679; 40 L. R. A. (N. S.) 832; 51 L. R. A. (N. S.) 337; and L. R. A. 1918D, 1141. What is, or is not, a simple tool under the rule stated, and the duty to inspect if it is not, depends much upon the use to which it is to be put by the employee. His age, his incapacity to appreciate danger, the nature of the employment, his familiarity with the work to be done, these and many other things may be considered in determining the obligation resting on the employer to make inspection. His nonliability in such cases rests upon the assumption that the employee is in as good, if not better, position to observe the defect as the employer. *Meyer* v. *Ladewig,* 130 Wis. 566 (110 N. W. 419, 13 L. R. A. [N. S.] 684). The test depends, not only on the simplicity of construction, but also somewhat on whether the tool is subjected to any other stress than the muscular effort of the person using it."

Notwithstanding some rulings in a few cases to the contrary, the great weight of authority is to the effect that a small portable stepladder is a simple tool or appliance. See *Smith* v. *Green Fuel Economizer Co.,* 123 App. Div. 672 (108 N. Y. Supp. 45); *Kelly* v.

National Starch Co., 142 App. Div. 286 (126 N. Y. Supp. 979); *Shute* v. *City of New York*, 149 App. Div. 758 (134 N. Y. Supp. 111); *Blundell* v. *William A. Miller Elevator Manfg. Co.*, 189 Mo. 552 (88 S. W. 103); *Sivley* v. *Nixon Mining Drill Co.*, 128 Tenn. 675 (164 S. W. 772, 51 L. R. A. [N. S.] 337); *Philip Carey Roofing & Manfg. Co.* v. *Black*, 129 Tenn. 30 (164 S. W. 1183, 51 L. R. A. [N. S.] 340); *Collins* v. *Western Electric Co.*, 178 Ill. App. 23; *Nosal* v. *International Harvester Co.*, 187 Ill. App. 411. *Contra*, *Puza* v. *C. Hennecke Co.*, 158 Wis. 482 (149 N. W. 223); *Laurel Mills* v. *Ward*, 134 Miss. 447 (99 South. 11); *Goebel* v. *Railway Co.* (Mo. App.), 241 S. W. 665.

The trial court was correct in finding that there was no negligence shown on the part of defendants. The judgment of the lower court is affirmed, with costs to defendants.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and WIEST, JJ., concurred.

DETROIT TRUST CO. *v.* GEORGE.

1. MORTGAGES—FORECLOSURE—REDEMPTION—GENERAL RULE—EXCEPTIONS.

   General rule that right to redeem from foreclosure at law is legal right created by statute, and may neither be enlarged nor abridged by courts, is subject to exception that equity may relieve in cases of fraud, accident, or mistake.

2. SAME—EXTENSION OF REDEMPTION PERIOD—EQUITY.

That condemnation proceedings are pending, in which large part of mortgaged property will be taken and consequent award of compensation made, *held*, insufficient to warrant equity court in granting extension of redemption period, in absence of fraud, accident, or mistake.

Appeal from Wayne; Jayne (Ira W.), J. Submitted December 16, 1932. (Docket No. 227, Calendar No. 36,322.) Decided April 4, 1933.

Bill by Detroit Trust Company, a Michigan corporation, trustee, against Edwin S. George and others to foreclose a trust mortgage. Motion of defendants Levey to extend period of redemption denied. Defendants Levey appeal. Affirmed.

Miller, Canfield, Paddock & Stone, for plaintiff.

McLeod, Fixel, Abbott & Fixel, for defendants Levey.

CLARK, J. Plaintiff, trustee in a mortgage securing an issue of bonds in the sum of $250,000, filed bill of foreclosure and had decree on January 6, 1931. At the sale the property was bid in by the trustee. The sale was confirmed. The date of expiration of the period for redemption was October 10, 1931.

For nearly four years there had been pending a proceeding in condemnation, involving this and many other parcels of land, by the city of Detroit, for the widening of Woodward avenue. Just before the expiring of the period of redemption, defendants filed motion to modify the decree by extending the period of redemption. The ground of the motion is an alleged prospect of completing the condemnation proceeding, in which a large part of the mortgaged

premises will be taken and a consequent award of compensation made. Defendants propose to use the amount of the award in reduction of the mortgage debt, and although there will be corresponding reduction in mortgage security, they express, without convincing particulars, hope, or perhaps belief, that they may raise sufficient funds to pay remainder of the mortgage debt. The time of such extension was not and could not be stated certainly. When the motion was made, it was not known when, if ever, funds would be available from the proceeding on condemnation. It is said in a brief that judgment in condemnation was entered on July 21, 1932, and awards may be paid on or before July 21, 1933.

The motion was denied. Defendants have appealed.

A general rule is stated in *Wood* v. *Button,* 205 Mich. 692, quoting syllabus:

"The right to redeem from a foreclosure at law is a legal right created by the statute, and can neither be enlarged nor abridged by the courts."

And see 42 C. J. p. 355.

This general rule is subject to exception. Equity may relieve in cases of fraud, accident, or mistake. *Palmer* v. *Palmer,* 194 Mich. 79; 42 C. J. p. 393, and cases cited. Here there was no fraud, no conduct on the part of the mortgagee to induce or persuade the owners not to redeem in time, and there was no accident, no mistake. Defendants merely try to keep open for a long and indefinite period the right to redeem and until the litigated matter, the condemnation proceeding, shall have been determined and on the outcome of such litigation the doubtful advantage of redeeming depends. The condemnation may produce some money, but it works a cor-

responding reduction in security. The circumstances give no ground in equity for enlarging the right to redeem.

In this view we need not discuss the contention that defendants with their petition seeking equitable relief make no proper offer or showing of willingness to do equity within *Tuller* v. *Detroit Trust Co.*, 259 Mich. 670.

Affirmed, with costs.

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

GRAND RAPIDS GRAVEL CO. *v.* WILLIAM J. BREEN GRAVEL CO.

HIGHWAYS AND STREETS—EASEMENTS—RIGHT TO CONSTRUCT UNDERPASS—INJUNCTION.

In suit by owner of fee of land in which public has easement for State trunkline highway purposes, to enjoin construction of underpass under said highway by gravel company to connect its property with railroad right of way, with consent of State highway commissioner, in order to facilitate loading of gravel on cars and thus remove menace to traffic from gravel trucks crossing said highway every few minutes, decree of court below dismissing said suit is affirmed, on appeal, by equally divided court (1 Comp. Laws 1929, § 4022).

Appeal from Kent; Perkins (Willis B.), J. Submitted October 25, 1932. (Docket No. 211, Calendar No. 36,580.) Decided April 4, 1933. Rehearing denied May 16, 1933.

Bill by Grand Rapids Gravel Company, a Michigan corporation, against William J. Breen Gravel Company, a Michigan corporation, and another to enjoin construction of an underpass under highway, in which public has easement and the fee is in plaintiff. Bill dismissed. Affirmed, by an equally divided court.

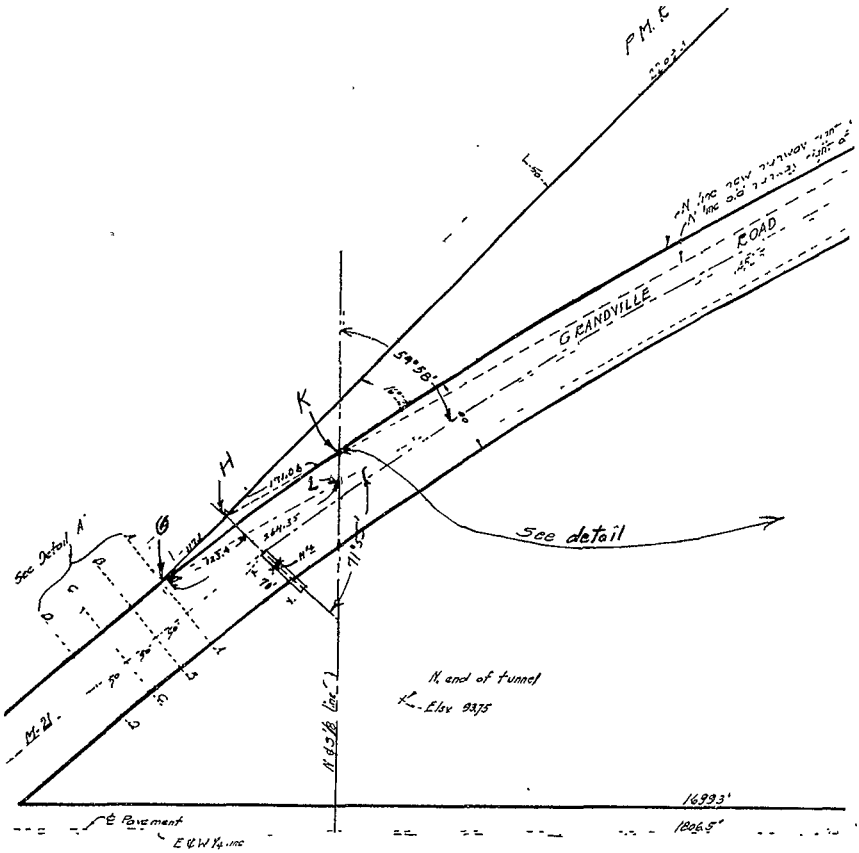
Norris, McPherson, Harrington & Waer, for plaintiff.

Linsey, Shivel & Phelps (*John H. Van Der Wal,* of counsel), for defendants.

CLARK, J. The facts are stated with reference to a drawing reproduced herewith. The upper black line marks the southern boundary of the Pere Marquette Railroad Company's right-of-way. The lower two black lines mark the margins of the present State trunkline highway, M–21, assuming it to be 100 feet in width. The triangular piece of land lying between the southern boundary of the railroad and the northern margin of the highway is owned by plaintiff, Grand Rapids Gravel Company. The present center line of M–21 is not exactly the center line of the highway as it was before being paved and improved. The portion, G. H. K., in the apex of plaintiff's triangular piece, was a part of the old highway and it is still highway.

Defendant William J. Breen Gravel Company owns land to the south of the highway. In its business of mining, selling, and shipping gravel, it desired to cross the highway to the railroad right-of-way so that it might there load gravel into cars. It appears that it applied to the State highway department for permission to make an overhead crossing.

The plaintiff was notified of hearing the application. Its president wrote the department objecting to an overhead crossing, and proposing an underground crossing instead. This was followed by an agree-



ment between defendant and the State highway commissioner permitting and providing for the construction of an underpass, 1 Comp. Laws 1929, § 4022. The underpass is from defendants' land to railroad

right-of-way, across the highway and within it, as indicated by the drawing on the map. Within the highway the underpass is underground and under the pavement, and presents no obstruction to use of the full surface of the highway. Plaintiff filed this bill against said defendant and the other defendant, the builder, to restrain construction. The underpass has been completed. The bill was dismissed. Plaintiff has appealed.

That the railroad company is in accord with the attempt to give it this business in the manner proposed is not questioned.

It is unnecessary to review cases showing that necessities of progress and change have subjected highways and streets to many public burdens and uses not contemplated in former times.

We need not consider an argued difference in rights of an adjoining or abutting proprietor where he has the fee and the public the perpetual easement of highway, and where the public has the fee and the proprietor an easement. Generally in the cases a difference is accepted or assumed, but there is respectable authority that the difference is not substantial. *Barney* v. *Keokuk,* 94 U. S. 324; 3 Dillon, Municipal Corporations (5th Ed.), § 1124.

Whether the fee of highway or street be in the adjoining proprietors or in the public, many privileges, sometimes treated as ripening into rights, have been suffered to be exercised by the adjoining proprietors, such as having steps, areaways, cellar ways, bay windows, hitching posts, carriage blocks, etc., in streets, and taking grasses or fruits, and planting trees, etc., in highways. Ordinarily and in practical experience, such sufferance will continue or it will fade or vanish according to the necessities of public use.

In *Opinion of the Justices,* 208 Mass. 603 (94 N. E. 849), a question was certified:

"Is it within the constitutional power of the legislature to enact a law conferring upon a city or town within this Commonwealth the power to grant permits or privileges to private individuals to erect structures which will bridge the public streets connecting premises owned on both sides of the street?"

And answered:

"Yes, if the private individuals own all the land upon or over which the structures are to be erected."

Yale University v. *New Haven,* 104 Conn. 610 (134 Atl. 268, 47 A. L. R. 667), is a leading case in which the right to bridge a highway is fully considered, with review of authorities. See, also, *Kellogg* v. *Cincinnati Traction Co.,* 80 Ohio St. 331 (88 N. E. 882, 23 L. R. A. [N. S.] 158, 17 Ann. Cas. 242). And in *People, ex rel. Mather,* v. *Marshall Field & Co.,* 266 Ill. 609 (107 N. E. 864, L. R. A. [N. S.] 1915F, 937, Ann. Cas. 1916B, 743), the defendant was permitted to construct and maintain, for the purpose of connecting its buildings on opposite sides of the street, large tunnels beneath the street.

In the case at bar, both adjoining proprietors on opposite sides of the highway may be said to favor, to consent to, the underpass, and the public, by the State highway commissioner, has consented. On the facts of this case, the matter would end here, but for the circumstance that plaintiff has the fee, subject to the perpetual easement of highway, of the tongue of land projecting into the highway and along the railroad right-of-way, and which tongue is crossed by the underpass, and, on this circumstance, the question is raised of the right to use the

highway, including the part of which plaintiff has the fee, for the underpass.

Defendant, adjoining owner, has right of access to the highway. *Eagle Township Highway Com'rs* v. *Ely,* 54 Mich. 173; 29 C. J. p. 547. So has the railroad company. While an adjoining owner may not be entitled to access at all points, but only, as against the public, to convenient and reasonable access, 2 Elliott, Roads and Streets (4th Ed.), § 882, no question of such right of access can arise here, for the public, by the State highway commissioner, has consented to access at the points in question.

Defendant, exercising its right of access and in the enjoyment of the railroad company's right of access, might carry its gravel by trucks or other vehicles across the highway and onto the railroad right-of-way. This, the evidence shows, would necessitate crossing the highway by truck every two and one-half minutes and would constitute a serious menace to traffic on this important trunkline highway. The highway is subject to the servitude at and on its surface. The burden upon plaintiff's servient estate would be no greater if the same use were below grade. Constructing the underpass would tend to make the highway safe and convenient and to facilitate travel, and its sanction here is therefore within the public right.

No doubt the highway authorities may construct in the highways barriers, signs, warnings, safety signals and devices, and this within the right of public use. The action of the State highway commissioner in permitting this underpass is sustainable for the same reason, and it is no invasion of plaintiff's servient estate in the highway. It is not for a private purpose. It is the control of adjoining proprietors' rights of access in the highway in the

interest of public safety and convenience, and it therefore is a public use of the highway.

Whether the State highway commissioner may require crossing at other than grade is a question not before the court, for here no more is involved than permission granted on application.

Whether the gravel be taken through the underpass by truck or other vehicle or conveyor is not important.

Affirmed, with costs.

POTTER, SHARPE, and BUTZEL, JJ., concurred with CLARK, J.

WIEST, J. (*for reversal*). I cannot concur in the opinion of Mr. Justice CLARK.

I speak of the Breen Gravel Company as defendant. 1 Compiled Laws 1929, § 4022, gives the State highway commissioner no power to authorize an underpass on one man's property for private use by another. Private interest is never a public requirement. Constructing a tunnel through land constitutes a taking. 1 Elliott, Roads and Streets (4th Ed.), § 228. It is settled law in this State, as stated in plaintiff's brief, that:

"The ownership of the fee of lands used for highway purposes remains in the owner of the property over which the way passes."

The owner of the fee title has a right to use it and to enjoy the profits of it, in any way not incompatible with the public enjoyment of the right of way. *Clark* v. *Dasso,* 34 Mich. 86; *Campau* v. *Konan,* 39 Mich. 362; *Stretch* v. *Village of Cassopolis,* 125 Mich. 167 (51 L. R. A. 345, 84 Am. St. Rep. 567); *Bolender* v. *Southern Michigan Telephone Co.,* 182 Mich. 646; *United States Gypsum Co.* v. *Christenson,* 226 Mich.

347. So well is this right established in this State that the county drain commissioner cannot construct a drain, in whole or in part, along the public highway, without a release of rights by abutting owners, and the statute expressly says that the owners of the land abutting on the side of the highway along which such drain is proposed to be laid shall be considered as still owning the fee of such land. 1 Comp. Laws 1929, § 4139. The underpass is an appropriation of plaintiff's soil and an additional burden thereon, and the owner of the fee is entitled to have the trespass enjoined. The defendant has established a private way under a public way. The public officer exceeded his powers in authorizing defendant to construct a private way within the limits of the highway, and this is no less true because the private way is beneath the public way. In no sense is the underpass for highway use within the scope of the easement vested in the public. It is an additional burden upon the land, imposed by public officials for purely private use by a stranger to the title.

As said in *Bradley* v. *Degnon Contracting Co.*, 224 N. Y. 60 (120 N. E. 89):

"To constitute a use public, it must be for the benefit and advantage of all the public and in which all have a right to share—a use which the public have a right to freely enter upon under terms common to all. Public use necessarily implies the right of use by the public. The character of the use, whether public or private, is determined by the extent of the right by the public to its use, and not by the extent to which that right is or may be exercised. If a person or corporation holds or possesses the use, the public must have the right to demand and compel access to or the enjoyment of it. The motive which led to the creation of the use is immaterial. * * *

"It was the private property of the defendants or one of them used exclusively for their private advantage and purposes. It is true its use facilitated and progressed the completion of a great public enterprise, but that fact, as we have already said, does not enter into the distinction between a public use and a private use. A lawful work cannot justify an unlawful expedient."

The underpass is for exclusive private use, and there existed no more authority for its construction on that portion of plaintiff's soil occupied by the public road than on any other portion thereof. Any incidental benefit to the public travel upon the surface highway cannot sustain violation of plaintiff's legal rights. This passageway dispossesses plaintiff *pro tanto.*

Real property consists of something more than mere surface rights; its meaning and the rights appertaining thereto are found in the ancient maxim: "*Cujus est solum, ejus est useque ad coelum et ad inferos.* The surface of the land is a guide but not the full measure, for, within reasonable limitations, land includes not only the surface but also the space above and the part beneath." *Butler* v. *Frontier Telephone Co.,* 186 N. Y. 486 (79 N. E. 716, 11 L. R. A. [N. S.] 920, 116 Am. St. Rep. 563, 9 Ann. Cas. 858).

It is clearly established in this State that the abutting proprietor holds title in fee to the center of the public highway, subject to the easement for highway purposes. Mr. Justice CLARK, in *United States Gypsum Co.* v. *Christenson, supra.* If the strip of the old road is ever abandoned, full possession will revert to plaintiff. Until abandoned, plaintiff's rights, except for public use and for highway purposes, remain intact and cannot be appropriated by defendant for private use or convenience.

There is no merit in the contention of defendant that the amount of damage for the injury inflicted is too small to confer equity jurisdiction. Unpermitted invasion of premises constitutes a trespass *quare clausum fregit.*

"In trespass *quare clausum fregit,* it is immaterial whether the *quantum* of harm suffered be great, little, or inappreciable." *Whittaker* v. *Stangvick,* 100 Minn. 386 (111 N. W. 295, 10 L. R. A. [N. S.] 921, 117 Am. St. Rep. 703, 10 Ann. Cas. 528).

It is the province of equity jurisdiction to prevent a trespass upon lands.

As stated in 29 C. J. p. 550:

"Subject only to the public easement, an abutting owner has all the usual rights and remedies of the owner of a freehold, including trespass, ejectment, waste, action for damages, injunction, or an action to remove an obstruction, or abate a nuisance."

The highway commissioner assumed the power to grant defendant the right to occupy space, for a private purpose, beneath the surface of plaintiff's land, and when defendant constructed the underpass there was a taking of plaintiff's land without compensation and without warrant of law. Under the law of this State, defendant could not acquire right to the underpass for its private purposes by condemnation. What it could not do by warrant of law, it is not permitted to do under assumption of power exercised by the State highway commissioner. The principle here involved is far-reaching. Cases may be found where an owner with land abutting both sides of the highway has been permitted to establish an underpass, but I have found no case authorizing such a way under circumstances such as in this case. The bill herein was filed during construction of the underpass, but defendant went on and completed the work.

The underpass violates plaintiff's rights of property, and maintenance thereof should be enjoined. The decree dismissing the bill should be reversed, with costs, and relief granted plaintiff.

McDONALD, C. J., and NORTH and FEAD, JJ., concurred with WIEST, J.

STOTT REALTY CO. *v.* ORLOFF.

1. CORPORATIONS—DISSOLUTION—WHEN EQUITY COURT MAY DISSOLVE CORPORATION.

   In certain exceptional cases, such as relieving from fraud or breach of trust, court of equity may, in its inherent power, wind up affairs of corporation as incident to adequate relief, but in absence of such exceptional circumstances, equity court, in its inherent power, may not dissolve corporation, wind up its affairs, and, for that purpose alone, sequester its property.

2. SAME—DISSOLUTION NOT TO BE LIGHTLY DECREED.

   Dissolution is not remedy to be lightly decreed; court having ample power in other ways to give relief for substantially all corporate ills.

3. SAME—COURT MAY PROTECT RIGHTS OF STOCKHOLDERS WITHOUT DISSOLUTION.

   Equity court may restrain or compel corporation and its officers to lawful conduct, and, ordinarily, protect stockholders in all their rights without dissolution.

4. SAME—TEST OF DISSOLUTION.

   Ultimate test of dissolution is that, with any other remedy, corporation cannot be made to function for purpose of its creation.

5. SAME—TEST OF FAILURE OF CORPORATE PURPOSE.

   Test of failure of corporate purpose is whether ruin will inevitably follow continuance of management.

6. SAME—MINORITY STOCKHOLDERS NOT ENTITLED TO DISSOLUTION IN ABSENCE OF FRAUD.

Where acts of majority stockholders needing correction, such as failure to hold stockholders' meetings, could be remedied by ordinary processes of court, and there is no showing of fraud, remedy of dissolution should not be granted at instance of minority stockholders.

7. SAME—SALARY OF PRESIDENT AS REASON FOR DISSOLUTION.

Minority stockholders are not entitled to remedy of dissolution because salary is paid to president, where it was regularly voted, and is not shown to be excessive.

8. SAME—CORPORATE LOANS AS REASON FOR DISSOLUTION.

Nor may dissolution be granted because of corporate loans to other corporations in which all parties are interested, where they were sanctioned by all parties.

9. SAME—INCOMPETENT MANAGEMENT—MISTAKES.

In suit by minority stockholders for dissolution of corporation, evidence *held*, insufficient to show that management by majority stockholders was incompetent, although mistakes may have been made, due to inability to foresee business depression.

10. SAME—RIGHTS OF MINORITY TO DETERMINE POLICIES.

It is not law that minority stockholders have right to determine policies of corporation, as against will of majority.

11. SAME.

That policies of minority stockholders did not prevail is no evidence of incompetent management on part of majority, especially where record indicates that said policies were more obstructive than constructive.

12. EVIDENCE—JUDICIAL NOTICE—ARCHITECT'S ESTIMATES.

It is common knowledge that building costs more than architect represents.

13. CORPORATIONS—DISSOLUTION—FAILURE OF CORPORATE PURPOSE.

Where record shows that corporation is going concern, that its business is profitable, and that its ruin or loss to stockholders is not inevitable, although it is in serious difficulties because of dissent of minority stockholders, corporate purpose has not failed, and minority stockholders are not entitled to remedy of dissolution.

Appeal from Wayne; Ferguson (S. Homer), J. Submitted October 31, 1932. (Docket No. 149, Calendar No. 36,829.) Decided April 4, 1933.

Bill by Stott Realty Company, a Michigan corporation, and others against Julia Stott Orloff and others for appointment of temporary receiver. Cross-bills by defendants against plaintiffs for dissolution of plaintiff corporation. Decree for cross-plaintiffs. Plaintiffs appeal. Reversed, and bill and cross-bills dismissed.

Friedman, Meyers & Keys, for plaintiff company.

Thomas A. E. Weadock, for plaintiff David E. Stott.

Henry C. Walters (*Walters, Carmichael & Head,* of counsel), for plaintiffs Bertha A. Stott and Ethel Stott Kingsley.

Lucking, Van Auken & Sprague, for plaintiff Eleanor M. Power.

Butzel, Levin & Winston and *Lightner, Hanley, Crawford & Dodd,* for defendant Orloff.

Edward N. Barnard, for defendant Arthur F. Stott.

FEAD, J. This is appeal from decree dissolving the Stott Realty Company, a corporation.

In 1916, David Stott died, leaving a large estate, including controlling interests in several corporations. Among them was the Stott Realty Company, his stock in which he left in trust for his four daughters, Bertha, Eleanor, Ethel, and Julia, and his three sons, David, Ernest, and Arthur. After a time, the trust was closed and the corporate shares divided

among the beneficiaries in practically equal amounts. They have all the stock except six shares belonging to Thomas Danahey, the general manager of the corporation.

The capital stock is $750,000. The corporation owns several business and office buildings, other real estate and land contracts. Rents constitute almost its whole income. At David Stott's death the assets were worth $2,000,000. In 1929 their value was $8,000,000 or over. The properties were substantially the same, but with some remodeling of buildings. The enhancement in worth was due largely to increase in real estate values in Detroit. Management conserving the estate was also a factor. Dividends of 16 per cent. annually have been paid regularly until 1929, when, after payment of eight per cent., further dividends were suspended because of business conditions. In 10 years, earnings increased $175,000 per year. The figures are not definite, but it appears that in 1929 the corporation earned about $100,000, and probably more in 1930.

In 1928, the corporation began the erection of the 35-story David Stott building. It cost $2,400,000. It was mortgaged for $1,300,000. About $725,000 of the cost was borrowed from the Detroit Savings Bank, $150,000 secured by mortgage on the Arcadia property, and the balance unsecured. In 1929 the Detroit Savings Bank called the loans, commenced suit, and garnisheed the tenants of the corporation.

On November 1st a meeting of the stockholders of the Stott Realty Company was called, and various proposals of financing the bank claims discussed. Because of the condition of the real estate market, a majority favored a mortgage upon the Rayl property, which had been authorized by the board of directors in August. Julia, Ernest, and Arthur

voted against a mortgage, thereby defeating it, because the statute requires approval of two-thirds of the stock. They presented no feasible plan of financing. November 29th, in the absence of Julia and Ernest, who were directors, but from whom the plan was concealed, the board of directors authorized commencement of this suit. The bill was for appointment of a temporary receiver, with hope of authority to execute a mortgage. Julia, Ernest, and Arthur filed cross-bills praying dissolution of the corporation. The court refused to appoint a temporary receiver.

The Detroit Savings Bank proceeded with its suits against the Stott Realty Company, finally had judgments and sold and bid in the Rayl property, worth $1,000,000, for $275,000; the Lincoln building, worth $650,000, for $140,000; the David Stott building, appraised at $1,000,000 over the mortgage, for $1; and the Arcadia property, worth $550,000 subject to the mortgage, for $135,000. The sales were had in March and July, 1930. The bank also foreclosed the Arcadia mortgage and bid in the property for $154,000 in April, 1930.

In January, 1931, the court appointed a temporary receiver to save the property sold on execution and mortgage sales. Ernest withdrew his cross-bill and expressed willingness to approve a mortgage. Negotiations for a mortgage loan were had but were not completed before expiration of the periods of redemption. David, Bertha, Eleanor, Ethel, and Ernest advanced $40,000 to secure from the bank an extension of 60 days to redeem. Julia and Arthur refused to pay or pledge their proportion of the cost of the option.

The mortgage was negotiated, and the property saved to the corporation. David, Bertha, Eleanor

and Ethel are comakers with the corporation on the notes for $750,000. Plaintiffs then asked leave to withdraw their bill of complaint and for discharge of the receiver. The court refused the prayer and proceeded to hearing on Julia's and Arthur's cross-bills for dissolution.

The testimony took a wide range, running back many years, and included the affairs of other corporations in which the parties were interested. The record contains 2,430 pages, but the briefs are exhaustive, counsel have made excellent digests of the testimony and logical division of the case into subjects, and have presented their contentions in a definite and readable form. We wish to express our appreciation of the briefs.

The record depicts a course of family controversy and dissension, beginning before the death of the father and continuing to the present, characterized by ill-will, accusations, recriminations, extensive and expensive litigation, and physical violence. So far as it affects the Stott Realty Company, much of the dissension has been between David E. Stott and Arthur, and has arisen out of David's desire to keep the corporation intact and rule it and Arthur's desire to divide it into individual ownership. In their differences, David usually has been supported by Bertha, Eleanor, and Ethel, Julia is often on the side of Arthur, and Ernest is rather independent.

Were the suit between David and Arthur personally, much of the testimony would merit discussion. But if it were all reviewed, the conclusion necessarily would be that neither has shown himself entitled to special consideration of a court of equity. The details of the disputes would serve no good purpose. Perhaps, however, it needs to be emphasized that the controversy is between majority and minority stockholders as to dissolution of the corporation, and

unapproved personal sins of contentious members are not to be visited upon their innocent associates nor used to destroy their property rights.

The applicable law of this State may be summed up in a quotation from the opinion of Mr. Justice CLARK in *Edison* v. *Fleckenstein Pump Co.*, 249 Mich. 234, in which the authorities are cited:

"There is no doubt that in certain exceptional cases, such as relieving from fraud, or breach of trust, a court of equity may in its inherent power wind up the affairs of a corporation as an incident to adequate relief. * * *

"But in the absence of all such exceptional circumstances the equity court, in its inherent power, may not dissolve a corporation, wind up its affairs, and, for that purpose alone, sequester corporate property."

Dissolution is not a remedy to be lightly decreed. The court has ample power in other ways to give relief for substantially all corporate ills. See *Turner* v. *Calumet & Hecla Mining Co.*, 187 Mich. 238. It may require an accounting for misappropriation of funds, secret profits, and the like. It may restrain or compel the corporation and its officers to lawful conduct, and, ordinarily, protect the stockholders in all their rights without dissolution. Dissolution is a last-resort remedy, to be applied when no other will give relief.

The ultimate test of dissolution is that, with any other remedy, the corporation cannot be made to function for the purpose of its creation. The test of failure of corporate purpose is whether ruin will inevitably follow continuance of the management. 43 A. L. R. 305, note.

Undoubtedly, the case presents some conduct by the majority stockholders for which a court of equity would provide a remedy, notably the failure to hold

stockholders' meetings in 1930 and 1931, prevented by the majority absenting themselves. Perhaps the court, on showing that the plan to institute this suit was concealed from some of the directors, would have dismissed the bill. It may be that some of David's conduct would warrant proceedings against him personally. But the record discloses no act of the majority which, needing correction, could not be remedied by the ordinary processes of the court. And there are outstanding facts, most of which are undisputed, which preclude the remedy of dissolution.

1. Dissolution is opposed by six stockholders owning over five-sevenths of the stock. It is asked by two stockholders. The contrast between them, in respect of their regard for the corporate good, does not incline a court of equity in favor of the minority. The minority complain of loans of $5,000 by the corporation to each of two of the majority, while each minority member owes the corporation over $100,000. The majority advanced $40,000 to save the corporate property from execution and mortgage sale. The minority refused to contribute, and would have permitted loss of most of the corporation property. To save the corporation for the benefit of the minority as well as themselves, four majority members obligated themselves personally for $750,000 on the corporation mortgage debt. The minority assumed nothing.

The majority oppose dissolution for the valid reasons that they consider the diversification of properties through corporate control more profitable and more likely to conserve the assets than individual ownership; and also because some of them feel unable or unwilling to manage separate properties. The minority are concerned with obtaining personal control and individual ownership.

In spite of all the family quarrels, the majority have shown no disposition to defraud the minority of their rights in the corporation. On the contrary, they have sought bases to buy the minority interests and have contracted with Julia for her stock. And Arthur attacked the contract as illegal in a suit decided in 261 Mich. 302.

2. It is not claimed that any member of the majority or any other officer or stockholder has misappropriated any property or funds of the corporation. The nearest to such claim is complaint of David Stott's salary of $6,000 per year as president, but it was regularly voted and has not been shown to be excessive. Complaint is also made of loans to other corporations in which all the parties are interested, but they were all sanctioned by all the parties.

3. The management has been selected and is supported by the majority of stockholders. It is not shown to be grossly incompetent, nor, indeed, incompetent at all.

The record of the corporation as to profits demonstrates competent management. Whether other persons could have produced more earnings over a period of years is not only not the test of competent management but must necessarily be largely or wholly speculative.

The specific instance of claimed incompetency which the minority stress is in the erection and financing of the David Stott Building. Because of the turn in business in 1929, the building may have been a mistake, although Danahey, whose ability and integrity are not questioned, denies it. In any event, it was no greater error than a multitude of shrewd business men made at the time. The testimony does not identify any person, anywhere, who sensed and appraised the coming depression and fully put his house in order.

It may have been a mistake to borrow $725,000 on short-time paper to complete the building, but, unless the management must be charged with knowledge that a depression was near, the loans were not out of proportion to the assets of the corporation. Moreover, it is common knowledge that a building costs more than the architect represents.

A striking feature of the case is that there is scant showing on the claim of incompetent management except through the opinion of minority members and on the ground that the policies of the minority did not prevail. Not only is it the law that the minority have not the right to determine policies as against the will of the majority, but the record indicates that the minority, in presenting policies, were more concerned with obstructing the will of the majority than they were in constructive regard for the corporation.

4. The corporate purpose has not failed. The Stott Realty Company is a going concern. When the cross-bills were filed, and afterwards, it was profitable. So far as the record shows, it is able to pay its current liabilities, at least as readily as most corporations. It has failed to perform only the one function of executing mortgages, and such failure has been temporary and due to the refusal of the minority to assent.

No one can surely prophesy what the present economic depression will bring to any concern. The corporation may lose all its property by foreclosure and execution. But "hard times" is not a cause for dissolution. And the view expressed by some of the witnesses seems sensible—that collective control of the properties by the corporation, so that one may aid another, is more likely to prevent ultimate loss than separate ownership of heavily-mortgaged par-

cels. In any event, ruin of the corporation or loss to the stockholders is not inevitable from the management of the corporation by the majority. If serious loss occurs, not due to the depression, the record indicates it is most likely to result from the dissension of the minority stockholders and unfounded litigation to be brought by them.

In our opinion, the case presents no right to the remedy of dissolution.

Decree will be reversed, and one will be entered dismissing the bill and cross-bills, providing for the discharge of the receiver, and remanding the case to the circuit court to settle accounts, with costs to plaintiffs against Arthur and Julia.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, and WIEST, JJ., concurred. BUTZEL, J., did not sit.

SCHOOL DISTRICT NO. 2 OF OTSEGO TWP. *v.* AMERICAN INSURANCE CO.

1. INSURANCE—FIRE WALLS—WHEN BUILDING CONSIDERED UNIT.

In case parts of buildings are separated and protected by fire walls, they are in some instances rated as separate risks, but in absence of fire wall separating units, common risk and coverage designation in policy should be applied to actual situation and single use of property.

2. SAME—RATING BY BUREAU—BUILDING INSURED AS UNIT.

Where rating bureau scheduled high school building, consisting of old part with slate roof and new part with composition roof, not separated by fire wall, as unit, in fixing premium rate, and insurance companies, members of said bureau, adopted said rating in their policies issued on said building, adjusters, after fire, properly held that all policies covered said building as unit and adjusted loss on said basis, although some policies described building insured as of slate roof construction, and others as of composition roof construction (3 Comp. Laws 1929, § 12272 *et seq.*).

Appeal from Allegan; Miles (Fred T.), J. Submitted January 12, 1933. (Docket No. 64, Calendar No. 36,893.) Decided April 4, 1933.

Bill by School District No. 2 of Otsego Township, Allegan county, a municipal corporation, against American Insurance Company, a foreign corporation, and other insurance companies for reformation of insurance policies, if necessary, and to compel insurers to pay their proportionate share of loss. From decree for plaintiff as to certain defendants, all parties appeal. Affirmed.

Leo W. Hoffman and *Clare E. Hoffman,* for plaintiff.

Mason, Alexander, McCaslin, Cholette & Mitts, for defendants American Insurance Company, Firemen's Insurance Company, Security Insurance Company, Girard Fire & Marine Insurance Company, and Northwestern National Insurance Company.

Smith, Searl & Strawhecker, for other defendants.

WIEST, J. Plaintiff school district had a high school building, and, early in 1924, completed an addition thereto. In January, 1931, fire destroyed

the old part of the building and damaged the new part. The total loss and damage amounted to $54,342.95, of which $3,448.90 was to the new part. The total insurance on the whole building was $91,000, and carried by 31 insurance companies. The insurance companies, outside of the five appealing defendants, paid $41,706.43, which constituted their proportionate shares, assuming that all insurance covered the entire building. Three of the appealing defendants claimed that their risks were on the new part of the building, and the other two claimed that their risks were on the old part only. This suit was brought on the equity side of the court for reformation of the contracts, if necessary, and to compel the five insurance companies to pay their proportionate shares of the total loss, under a construction that all of the policies covered the building as a whole, or, in the alternative, have a determination of the liability of the companies with recovery of the full loss. The court decreed reformation, and apportioned liability for the total loss. The five insurance companies, herein designated defendants, urge want of equity in the bill and contend against need of reformation.

We do not think reformation necessary in order to sustain the decree. It would entail useless expense to remit plaintiff to actions at law, and it was proper to bring all of the insurance companies before the court so they might be heard upon the questions affecting all of them, and, besides, we think the problems presented can all be solved upon the record made.

The old part of the school building was solid brick, two stories in height, with a slate roof. The new part was added to the old without a fire wall, with connection openings unprotected by fire doors, and

was also solid brick, two stories in height, but had a composition roof. We now state the coverage in each policy here involved:

Security Insurance Company:

"On the two-story composition roof solid brick school building, including foundations, * * * situated on North street between Allegan and Orleans streets, known as the gym building."

Firemen's Insurance Company:

"On the one-story gravel roof new brick school building and gymnasium school building, including foundations * * * situated on North street between Allegan and Orleans streets, city of Otsego, State of Michigan."

American Insurance Company, two policies:

(1) "Two-story composition roof solid brick school building, including foundations, * * * situated on North street between Allegan and Orleans streets (known as the high school building), city of Otsego, State of Michigan."

(2) "On the two-story composition brick school building including foundations * * * situated southwest corner of W. Allegan street and North street, city of Otsego, high school, State of Michigan."

Girard Fire & Marine Insurance Company:

"On a two-story slate roof, solid brick school building, including foundations, * * * situated on the south side of West Allegan street, high school, city of Otsego, State of Michigan."

Northwestern National Insurance Company:

"On the two-story and basement, slate roof brick high school building, including foundations * * * on the south side of West Allegan street."

Defendants Security Insurance Company, Firemen's Insurance Company, and American Insurance Company claim that their policies covered only the

addition, which had a composition or gravel roof, and defendants Girard Fire & Marine Insurance Company and Northwestern National Insurance Company claim that their policies covered only the original building, which had a slate roof.

The fire found and burned one building, having a single owner, and occupied solely for school purposes. One building, constructed in part at different times, is not divided into separate units by character of roofing or by designating the kind of roof on a part thereof. In case of a fire wall, parts of buildings so separated and protected are in some instances rated as separate risks, but in the absence of a fire wall separating the units a common risk and coverage designation in the policy should be applied to the actual situation and the single use of the property.

The policies in this suit were issued by insurance companies, members of and operating under a rating bureau authorized by statute (3 Comp. Laws 1929, § 12272 *et seq.*), and that bureau, by a previous survey, had scheduled the building as a two-story, brick high school and gymnasium, and fixed the premium rate thereon as a unit, and fixed no separate rate on the gymnasium section. Defendants, in their policies, adopted the rate so fixed, and sent the same to the audit department of the rating bureau to have them checked with the bureau regulations, inclusive of coverage and rate of premium charged. In adopting the rate fixed by the bureau defendants necessarily adopted the survey and scheduled basis for such rate. The statute (3 Comp. Laws 1929, § 12274) establishing fire insurance rating bureaus provides for voluntary membership therein and submission to rates fixed by the bureau for fire insurance upon surveyed and designated risks and estimated hazards; imposes a penalty upon any

bureau rater operating without a license; requires the bureau, in making rates, to—

"inspect every risk specifically rated by it upon schedule, and make a written survey of such risks which shall be filed as a permanent record in the office of such bureau." (3 Comp. Laws 1929, § 12279.)

This obviates the need of application for insurance in instances where the risk is specifically rated, for it furnishes the subject-matter of the risk and the rate for guidance and control of the insurer and protection of the insured.

As said in Richards, Law of Insurance (4th Ed.), p. 22:

"For use in the larger cities they (insurers) have prepared elaborate and accurate insurance maps and surveys showing the character of the risk involved in every building."

After the fire, two adjusters, one of whom duly represented the five defendants, met, determined the loss on the building as a unit, apportioned liability on such basis, and all of the insurers, except the five defendants, accepted the adjustment and paid their proportions. Such adjustment is quite persuasive of the idea that the contention now made is an afterthought. The adjusters necessarily determined the coverage. Without a fire wall and separate rating and with the rate exacted by the insurers as fixed by the bureau on the building as a whole, we think the policies covered the building as a unit, and the adjusters very properly so determined.

For the reasons stated, the decree in the circuit is affirmed, with costs to plaintiff.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred.

DAVIS *v.* DAVIS.

DIVORCE—SUPPORT OF CHILDREN—CHANGED CONDITIONS—AMENDING DECREE.

Where award to wife, in divorce decree, is insufficient, under changed conditions, to provide adequate support for herself and three children, although she was awarded valuable equities in real estate, court properly amended decree requiring husband to pay $15 per week toward support of children.

Appeal from Oakland; Gillespie (Glenn C.), J. Submitted January 11, 1933. (Docket No. 99, Calendar No. 36,910.) Decided April 4, 1933.

Divorce proceedings by Imogene Roberts Davis against Douglas M. Davis. On petition of plaintiff for amended decree providing for additional award for support of children. Decree for plaintiff. Defendant appeals. Affirmed.

Harold W. Dudley, for plaintiff.

Fildew & Degree, for defendant.

WIEST, J. This is an appeal by defendant from an amended decree requiring him to pay $15 per week toward the support of his three children, aged respectively 10, 12, and 14 years. The parties were divorced August 12, 1930, and plaintiff was awarded property for permanent alimony, dower rights, and support of the children, in accordance with an agreement found to be fair, and incorporated in the decree by reference. By that agreement, plaintiff was given valuable equities in real estate and as "perma-

nent alimony for the support and maintenance of herself and the support, maintenance, and education of said minor children," also in lieu of dower. The fairness of the agreement is not attacked, for plaintiff wants to keep all given her, but finds the income from the properties will not meet interest on incumbrances, pay the taxes, and afford support for herself and the children. The expensive residence of the parties, incumbered by a large mortgage, was given plaintiff in the settlement agreement, and, after the divorce, she traded this for a cheaper home, incumbered by a mortgage, and received $10,000 in cash, most of which was used to meet pressing obligations. Plaintiff also received the vendor's interest in two valuable land contracts, subject to a mortgage of $25,000. While the contracts are divisible, the mortgage is indivisible, and the mortgagee will not release the smaller parcel without a substantial payment on the mortgage, and plaintiff is unable to do this and realize on the smaller contract. The large contract is very valuable, and brings plaintiff $6,000 per year, but much of this is consumed by interest plaintiff must pay on the mortgage on such property. The equity plaintiff has in such property is valuable, and, if it could be sold, would afford adequate means of support for herself and children, but the settlement agreement provides:

"That she will not sell the above-described vendor's interest in the Kuhn contracts, so called, for a period of five years from the date hereof, provided, however, that she shall have the right to pledge the same for such sums as may be necessary for the support and maintenance of herself and her said children in order to tide over periods in said contracts when sums payable thereon are not sufficient for that purpose."

Under present conditions it will be difficult, if not impossible, to find any one willing to advance money on such a pledge subject to a mortgage of $25,000. This saves the plaintiff from an accusation that she desires to conserve the property to her own benefit, and, to that end, asks the court to be relieved from her obligation to support the children. If there were no restraint upon her right to sell her equity, we would require her to do so, and, out of the avails, support the children.

The parties evidently lived in an extravagant manner. Defendant, before the divorce, received a salary of $25,000 a year. The day following the signing of the decree defendant remarried, and is now living in Kentucky on a farm owned by his present wife, and is engaged, as a member of a corporation, in raising unsalable saddle horses. He claims to be without financial means. The children must be supported, and the court had adequate power to amend the decree to this end at any time. The award made will probably require plaintiff to readjust her style of living, and require defendant to spur himself to some financial effort.

Upon consideration of the record, we discover no reason for interfering with the order in the circuit. The amended decree is affirmed, with costs to plaintiff.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred

HEIDE *v.* SOCIETATEA ROMANA DE AJUTOR SI CULTURA BANATIANA.

1. CONTRACTS—MORTGAGES—MECHANICS' LIENS.
   Where agreement between contractors and owner providing for deeding of property to contractors for purpose of executing mortgage by them in order to raise money to complete buildings, and then redeeding to owner, was not carried out in terms, but owner gave mortgage direct, contractors were not harmed but rather benefited by said change.

2. MECHANICS' LIENS—MORTGAGES—CONTRACTORS' REMEDY.
   Agreement by contractors to accept note for any balance due, if property was deeded to them and they executed mortgage to raise money to complete building, *held,* not to remit them to said remedy, where no such mortgage was given or note tendered.

3. SAME—SUBROGATION—MORTGAGES.
   Where contractors were active in helping to secure loan to complete building and furnished mortgagee with sworn statement of amounts due under contract to subcontractors, materialmen, and laborers, mortgagee, as to sums paid by it and traced to construction of building, is subrogated to contractors' rights under mechanics' lien law.

4. SAME—PRIORITY OF LIEN—ESTOPPEL.
   Loss of otherwise priority may arise where contractors, in effect, by affirmative action, induce or procure mortgage to be given for their benefit and they participate in proceeds.

5. SAME.
   Contractors, by acting in concert with owner in securing loan to complete building, are not estopped from having mortgage lien limited in matter of priority to sums employed in construction or actually paid to them under building contract.

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted January 19, 1933. (Docket No. 156, Calendar No. 37,049.) Decided April 4, 1933. Rehearing denied June 5, 1933.

Bill by Michael J. Heide and another against Societatea Romana de Ajutor si Cultura Banatiana, a Michigan corporation, and Mystic Workers, an Illinois corporation, to foreclose a mechanic's lien. Cross-bill by defendant Mystic Workers to establish priority of a mortgage and to foreclose it. From decree rendered, plaintiffs and defendant Mystic Workers appeal. Modified and affirmed.

Frank Day Smith, for plaintiffs.

Joslyn, Joslyn & Joslyn, for defendant Mystic Workers.

WIEST, J. Plaintiffs, under contract executed October 25, 1928, constructed an assembly hall for defendant society, and filed the bill herein to foreclose a mechanic's lien. Defendant Mystic Workers filed a cross-bill to have a mortgage, executed by the society during the course of construction of the building, accorded priority over the lien. In May, 1929, and during the course of construction, the society ran out of funds, and it and plaintiffs were anxious to procure a loan upon the property in order to proceed with the work and pay subcontractors, materialmen, and laborers, as well as plaintiffs. Joint efforts along such line were made, but without success, and then it was agreed that if a loan could be obtained by plaintiffs the society would execute a deed to them and they would execute a mortgage to secure an issue of bonds and then reconvey the property to the society, subject to the mortgage. This agreement was in writing and provided, in part:

"That the parties hereto shall and will co-operate towards the raising of a mortgage on the land and building owned by the said party of the first part (the society) in a sum not exceeding $60,000, said

mortgage to be secured by a bond-issue mortgage so-called and promissory note.

"It is further agreed that in the event it becomes necessary to obtain the said mortgage upon the personal financial responsibility which the parties of the second part represent that they have rather than that of the party of the first part, then and in that event the said party of the first part agrees to convey by warranty deed subject to incumbrances of record all of their right, title, claim and interest in and to the said property to the said parties of the second part, and the said parties of the second part agree to reconvey in the same manner to the said party of the first part the same property so that the title may revest in said party of the first part immediately after the placing, filing and recording of the said mortgage. * * *

"It is further agreed that the said party of the first part shall under all conditions assume to pay and discharge the said mortgage indebtedness to be placed against the said property without contribution from the parties of the second part.

"It is further agreed and understood that the proceeds to be obtained from the placing of the said mortgage shall be used in the following order:

"1. To pay and discharge the cost of filing and recording and execution of the said bond-issue mortgage, including any bonus or commission.

"2. To pay and discharge all liens which may have been filed against the said property.

"3. To pay and discharge any taxes or incumbrances on record against the said property.

"4. To pay and discharge all claims for labor and material which may have been placed in the said building by a subcontractor of the parties of the second part.

"5. To pay the balance to the parties of the second part at the time of the receipt from them of a waiver and release in full and sworn statements setting

forth the true condition and showing that the said parties of the second part are entitled to such payment under the building contract.

"It is further agreed that after the payment to parties of the second part from the proceeds of said mortgage, if there is any balance due and payable to the said parties of the second part on account of the contract price, then and in that event said balance so payable to the parties of the second part shall be paid by a promissory note which shall be executed at the time of the completion and acceptance of the structure by the party of the first part and the architect, said promissory note to bear interest at the rate of 6 per cent. and shall be payable 90 days from the date of its execution; that at the expiration of the 90-day period upon the payment by the said party of the first part of 10 per cent. of the principal of said promissory note and interest same may be renewed for a further period of 90 days and that at the expiration of each 90-day period a 10 per cent. of the original amount shall be paid in addition to accrued interest until the said promissory note shall be paid in full in installments of 10 per cent. of the principal amount. * * *

"It is further agreed and understood that the party of the first part shall pay and discharge an indebtedness of $4,200 or thereabouts, which is due on the original indebtedness of $6,000 by way of loan obtained by said party of the first part from the Michigan Industrial Bank upon the indorsement or co-making of (by) said parties of the second part, it being understood that the party of the first part has received full credit for the said amount."

This agreement was not carried out according to its terms. However, the parties got in touch with the Mystic Workers and induced its representative in Detroit to take a mortgage for $50,000, executed by the society, and to advance money from time to

time thereunder to pay subcontractors, materialmen, and laborers as well as plaintiffs. Plaintiffs took an active part in inducing the Mystic Workers to take such mortgage and presented a sworn statement of the amount due under the contract. The mortgage was duly executed and various sums advanced for the purpose mentioned, upon orders signed by plaintiffs, the building was completed, and then plaintiffs filed a lien for the balance of the contract price and for extras. Plaintiffs' claim of lien was for the sum due them and excluded all sums paid subcontractors, materialmen, and laborers by the mortgagee.

In the circuit defendant Mystic Workers was considered the assignee of the lien rights of materialmen and laborers, whose claims were paid out of the mortgage loan, and was accorded priority over plaintiffs' lien for sums paid materialmen and laborers, and placed in subrogation to plaintiffs' lien as to all other sums paid under the mortgage, even though actually traced to construction purposes.

Plaintiffs appeal from the priority given for material and labor payments, claiming that liens therefor were not assigned by the materialmen and laborers to the mortgagee. The Mystic Workers also appealed, claiming right to priority to all sums paid out under the mortgage to or for the society, including a brokers' charge against the society, attorneys' fees, both for the attorney for the society and the attorneys for the mortgagee, and sums paid out to subcontractors, materialmen, laborers, and to plaintiffs under the construction contract. The mortgagee claims priority arising from waiver of lien by plaintiffs. Plaintiffs claim priority of the lien because the mortgage was subsequent to commencement of work under the building contract, and claim there was no waiver of lien by plaintiffs.

It is clear that plaintiffs were not only willing but were active in having the mortgage placed on the property so the work could go on, the bills be paid, and they could have some money for themselves. This is established by the mentioned agreement.

But it is contended, in behalf of plaintiff, that the agreement mentioned bonds, secured by a mortgage, and transfer of title to them for the purpose of executing such a mortgage, and the mortgage given was without bonds and given direct by the society, and, therefore, they are in no way estopped from having their lien accorded priority. This contention gives too much effect to the letter of the agreement and not enough to its purpose as ultimately accomplished. Plaintiffs were not at all concerned whether the mortgage secured a bond issue or not; they were concerned with having the society obtain a loan. Plaintiffs were benefited rather than harmed by the change from giving the mortgage themselves and in having the society give it.

The sworn statement of plaintiffs as to the sum due under the construction contract, and presented to the agent of the mortgagee by the attorney for the society and one of plaintiffs, induced the Mystic Workers to make the loan, and payments of the loan, by the agent of the mortgagee, to subcontractors, materialmen, and laborers, were made upon bills certified for such action by plaintiffs.

Counsel for plaintiffs cite 3 Comp. Laws 1929, § 13125:

"No lien provided for in this act shall be defeated or waived by the taking by the lien claimant, from any person, of any security for such debt, other than upon the real estate itself, in the absence of an express agreement that the taking of such security shall be a waiver of the lien."

No such question is here involved. The agreement by plaintiffs to accept a note for any balance due, if a mortgage was given by them, cannot be held to remit plaintiffs to that remedy, for no such mortgage was given and no note tendered.

We find no waiver of plaintiffs' lien, but do find subrogation thereof to sums paid by the mortgagee and traced to construction of the building. Loss of otherwise priority may arise where contractors, in effect, by affirmative action, induce or procure a mortgage to be given for their benefit and participate in the proceeds. This holding renders the claim of want of assignment of rights of subcontractors, materialmen, and laborers without merit.

The Mystic Workers ask too much. Waiver of priority has not estopped plaintiffs from having the mortgage lien limited in the matter of priority to sums employed in construction or actually paid to plaintiffs under the building contract. It should be kept in mind that the question of priority, here presented, involves only the rights of the principal contractors and the mortgagee, and not the rights of any subcontractors, materialmen, or laborers. Equitable considerations command that priority, within the scope we have mentioned, be accorded the mortgage lien. Plaintiffs were acting in concert with the society in procuring the loan, and it would be inequitable to now allow them to assert priority over the mortgage which they, in effect, procured to be made, and from which they received substantial benefits as planned.

The decree in the circuit found the amount due on the mortgage and the amount due plaintiffs under the contract and for extras, adjudged plaintiffs' lien had priority to that of the mortgage, except as to a former $4,000 mortgage, paid out of the Mystic

Workers' mortgage, and amounts paid to materialmen and laborers, and directed a sale with apportionment of the proceeds in conformity with the provisions of the decree.

The decree in the circuit court will be modified to accord with this opinion, and the case is remanded to the circuit court for ascertainment of the indicated items accorded priority, and settlement of decree. There will be no costs to either party in this court, for both appellants are partly in error in their claims.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred.

WILLIAMSON *v.* WILLIAMS.

1. BONDS—PUBLIC CONSTRUCTION CONTRACT—STATUTORY CONDITIONS READ INTO BOND.

   Where principal contractors under highway construction contract and their surety were aware of statutory obligation to furnish bond and purpose thereof, they are in no position to object to reading into bond every essential statutory condition (3 Comp. Laws 1929, §§ 13132, 13134).

2. SAME—STATUTORY BONDS.

   Where bond is given under authority of statute, that which is not expressed but should have been incorporated, is included in bond.

3. SAME—RIGHTS OF SUBCONTRACTORS' LABORERS—STATUTES.

   Principal contractors under highway construction contract and surety on their bond given pursuant to 3 Comp. Laws 1929, § 13134, are liable for labor performed for subcontractor of subcontractor, although liability under bond as written limited liability to indebtedness arising from principal contractors.

4. SAME.

Unpaid laborers and materialmen of subcontractor under highway construction contract are entitled to full benefit of statutory bond furnished by principal contractors, although subcontract price may be exceeded thereby (3 Comp. Laws 1929, §§ 13132, 13134).

5. SAME—AMOUNT DUE LABORERS NOT SUBJECT TO REDUCTION FOR UNPAID BOARD.

Board furnished to laborers of subcontractor by his wife, and not paid for, is due her from boarders, and does not at all figure in reduction of wages due laborers from subcontractor, in absence of any agreement to such effect.

6. APPEAL AND ERROR—FINDING OF COURT—SATISFACTION.

Where question of whether labor claim had been satisfied by written agreement, which does not so state, was in sharp dispute, finding of circuit judge of no such agreed satisfaction, having credible support, is not disturbed, on appeal.

Appeal from Newaygo; Pugsley (Earl C.), J. Submitted January 5, 1933. (Docket No. 36, Calendar No. 36,920.) Decided April 4, 1933.

Assumpsit by Gunnar Williamson against George Williams and others for labor performed for subcontractors under public work construction contract. Judgment for plaintiff. Defendants Pickett, Goodwin, and Michigan Surety Company appeal. Affirmed.

William J. Branstrom, Harry D. Reber, and *Shields, Silsbee, Ballard & Jennings,* for appellants.

A. S. Hinds, for appellee.

WIEST, J. A highway construction contract was let by the State highway commissioner to defendants Pickett & Goodwin Brothers; they sublet to Arthur Chaney, who sublet a part of his contract to Williams & Splitstone, copartners. Plaintiff and his assignors were laborers employed by Williams &

Splitstone, and this suit was brought against Pickett & Goodwin Brothers, original contractors, and the surety on their bond, to recover for labor performed for Williams & Splitstone. The principal contractors gave two bonds with defendant Michigan Surety Company surety; one called construction bond and the other lien bond, and each for $20,600. Plaintiff plants right to recover upon the following condition of the lien bond:

"Now, therefore, the condition of this obligation is such that if there shall be paid as the same may become due and payable all indebtedness which may arise from said contractor to a subcontractor, or to any person, firm or corporation on account of any labor, material, equipment rental, equipment depreciation or camp or equipment supplies furnished and actually used in the prosecution of said contract, or to any person entitled thereto under the provisions of the 'workmen's compensation act,' so-called, then this obligation to be void, otherwise to remain in full force and virtue."

Plaintiff had judgment against defendants Pickett & Goodwin Brothers, Michigan Surety Company, and Williams & Splitstone. Review, by appeal, is prosecuted by the principal contractors and the surety on their lien bond.

The question is whether labor employees of a subcontractor of a subcontractor can recover from the principal contractors and their surety.

This was a public work construction contract, and, to insure the payment by the principal contractors of subcontractors and laborers and for materials and certain supplies furnished and used, the law required the bond. 3 Comp. Laws 1929, §§ 13132, 13134. The principal contractors and the surety were aware of the statutory obligation, and they are

in no position to object to reading into the bond every essential statutory condition.

In *August* v. *Collins,* 260 Mich. 232, we quoted, with approval, the following terse statement of the well-established rule from *Chambers* v. *Cline* (syllabus), 60 W. Va. 588 (55 S. E. 999):

"Where a bond is given under the authority of a statute, that which is not expressed but should have been incorporated, is included in the bond."

Counsel for defendants concede that:

"If the bond had contained the condition specified in 3 Comp. Laws 1929, § 13134, we do not question but what liability for indebtedness arising to laborers employed by remote subcontractors would be imposed upon the principal."

They claim, however, that the bond, as executed, restricted liability to indebtedness arising from the principal contractor. The question is not new. It has been repeatedly passed upon by the courts, and the great weight of authority is to the effect that the provisions of the statute are read into the bond.

In *Guaranteed Gravel & Sand Co.* v. *Ætna Casualty & Surety Co.,* 174 Minn. 366 (219 N. W. 546), the point was presented that the bond and contract did not embrace all the terms and elements of the statute. The court stated (p. 375):

"But the parties intended to comply with the statute. The contract and bond were made in reference to the statute. The purpose of the parties being established to be the same as the purpose of the statute, the joint purpose cannot be defeated by a failure to write into the contract and bond one of the provisions of the statute whether such omission is due to the voluntary act of the parties or is attributable to their oversight or inadvertence. Under such circumstances the law imputes such provisions to the contract whether written therein or not. In such a

situation the contract is made in reference to the law which is read into the contract and out of which the liability arises. * * * The statute is a part of such contract whether embraced within the written language thereof or not; and its faithful performance means that the requirements of the law must be met."

In *Baumann* v. *City of West Allis,* 187 Wis. 506, 526 (204 N. W. 907), it was stated:

"It is the contention of appellants that the liability sought to be imposed by the statute does not arise unless the provision required by the statute is actually inserted in the contract. If this construction is correct, then the relief which the legislature attempted to afford subcontractors and materialmen is very much like sounding brass. The remedy which the legislature intended to extend may under such a construction be defeated if the parties to the contract do not insert the prescribed provision, and whether the remedy is available to subcontractors and materialmen depends not upon the law but upon the parties to the contract. If this be the proper construction of the law, then the statute might just as well not have been passed, because such was the law before. Such a statute will be construed in the light of the conditions and circumstances which gave rise to the law and to effectuate the purpose which the legislature sought to accomplish. Having discovered that purpose, the law should be construed to give effect thereto. We entertain no doubt that it was the purpose of the legislature to afford a remedy, in the nature of an action against the surety, to all subcontractors furnishing labor or material entering into the construction of public buildings and public works mentioned in the section of the statute. This purpose may not be defeated by the voluntary act or by the oversight of the parties in failing to insert such a provision in the contract. The law imputes such provision to the contract whether written therein or not."

In *Reiff* v. *Redfield School Board,* 126 Ark. 474, 478 (191 S. W. 16), it was said:

"In the absence of a statute the right to sue on a public contractor's bond given to the owner of the property for labor and material furnished is dependent entirely on the terms of the bond. Without some provision promising to pay the laborers and materialmen, an action cannot be maintained. * * * On the other hand where a bond is executed pursuant to the statute providing that a contractor's bond given thereunder for the faithful performance of public work shall inure to the benefit of those furnishing labor and materials, it is well settled that an action may be maintained thereon by one of such persons to recover for services rendered or material supplied in the fulfillment of the contract."

The statute (3 Comp. Laws 1929, § 13135), giving laborers the right to have recovery on the bond would be meaningless if statutory provisions did not enter the bond, whether so written in or not.

Counsel for defendants cite *Eau Claire-St. Louis Lumber Co.* v. *Banks,* 136 Mo. App. 44 (117 S. W. 611), in support of their contention. We cite *Fogarty* v. *Davis,* 305 Mo. 288, 293 (264 S. W. 879):

"The rule in this State is that in construing a statutory bond the provisions of the statutes must be read into it and construed as a part of it. 'When parties execute a statutory bond they are chargeable with notice of all provisions of the statute relating to their obligation, and those provisions are to be read into the bond as its terms and conditions. * * * These provisions are a part of the bond of which both principal and surety must take notice.'"

See, also, *Globe Indemnity Co.* v. *Barnes* (Tex. Com. of App.), 288 S. W. 121; *Trinity Portland Cement Co.* v. *Lion Bonding & Surety Co.* (Tex. Com. of App.), 229 S. W. 483; *Philip Carey Co.* v.

Maryland Casualty Co., 201 Iowa, 1063 (206 N. W. 808, 47 A. L. R. 495); *Multnomah County* v. *United States Fidelity & Guaranty Co.*, 92 Ore. 146 (180 Pac. 104).

Defendants contend that the original contractors and their surety are not "liable * * * for an amount in excess of the sum required from their subcontractor under the latter's contract with his subcontractor who employed the laborers." The subcontractor Chaney paid out an amount in excess of the sum he had contracted to pay his subcontractors Williams & Splitstone for the portion of his subcontract let to them. Defendants invoke 3 Comp. Laws 1929, § 13133.

This is not a suit by a subcontractor. If it were it would require an allegation and proof that he had paid to all parties the full sums due them for labor, contracted for by him.

We had occasion in *Davy Fuel & Supply Co.* v. *S. R. Ratcliffe Plastering Co.*, 260 Mich. 276, to construe this statute, and we held that it does not—

"restrict the rights of laborers and materialmen when asserted by themselves, but constitutes merely a limitation upon the recovery of the subcontractor, with special reference to his rights acquired by subrogation. This construction is made more plain by the language following which preserves the integrity of the contract as between the subcontractor and contractor, but forbids infringement of the statutory rights of laborers and materialmen by such contract."

We also there held that:

"All unpaid laborers and materialmen of a subcontractor on public buildings are entitled to full benefit of the bond furnished by the principal contractor, although the subcontract price may be exceeded thereby."

We agree with the trial judge that board furnished the laborers by Mrs. Caroline Williams, and not paid for, is due her from the boarders and does not at all figure in reduction of wages due the laborers from Williams & Splitstone, their employers. Mrs. Williams was the wife of George Williams, but the board she furnished was her own venture, and her husband could not, by book entry, deduct the board from wages of the employees of Williams & Splitstone, and, without payment of the board, release the obligation of the boarders to pay, or the right of Mrs. Williams to look to the boarders for pay in the absence of an agreement to such effect. We do not find such an agreement. The laborers were not working for a daily wage and board.

Oscar T. Splitstone, father of Joseph Splitstone and one of plaintiff's assignors, performed labor for Williams & Splitstone and was a surety on the bond given by Williams & Splitstone, as subcontractors, to Arthur Chaney, and it is claimed that when Williams & Splitstone failed in performance of their contract Mr. Chaney took charge, and, by a writing, released Oscar T. Splitstone as surety, and that satisfaction of his claim for labor was part of the consideration. The writing does not so state, the testimony on the question was in sharp dispute, the circuit judge found no such agreed satisfaction, and his finding, having credible support, we think it should stand.

Affirmed, with costs.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred.

VOGT *v.* GENERAL NECESSITIES CORPORATION.

1. TRUSTS—CORPORATIONS—BURDEN OF PROOF—RECEIVERS.
   President of insolvent corporation and others claiming that certain corporate fund in president's hands is trust fund for payment of particular corporate obligation, as against right of corporation's receivers to said fund, have burden of establishing facts impressing said fund with trust.

2. SAME—ESTABLISHING TRUST.
   Efforts of president of insolvent corporation to have its creditor discount obligation before maturity, and his declaration that he had money with which to make payment, *held*, insufficient to establish trust.

3. SAME—ACTION BY DIRECTORS NECESSARY TO ESTABLISH TRUST.
   Action by board of directors was necessary to accomplish allocation and severance of certain corporate fund and its segregation as then present devotion thereof to payment of particular corporate obligation, in order to impress said fund with trust.

4. SAME—EQUITABLE LIEN—EQUITABLE ASSIGNMENT.
   Representation by president of corporation that certain loan can or will be paid out of avails of sale of certain corporate property is insufficient to subject said avails, or any part thereof, to equitable lien or constitute equitable assignment.

Appeal from Wayne; Chenot (James E.), J. Submitted January 17, 1933. (Docket No. 12, Calendar No. 36,635.) Decided April 4, 1933. Rehearing denied June 5, 1933.

Receivership proceedings by Ben F. Vogt and others against General Necessities Corporation, a Michigan corporation. On petition of Union Guardian Trust Company and another, receivers, to declare David A. Brown in contempt for failure to turn over alleged corporate funds. Madison Investment Corporation, a Michigan corporation, in-

tervened as a third-party claimant to the fund. From decree for receivers, defendant Brown and intervener appeal. Affirmed.

Beaumont, Smith & Harris (*Thomas B. Moore* and *Richard W. Larwin,* of counsel), for receivers.

William Henry Gallagher, for defendant Brown.

Butzel, Levin & Winston (*Edward D. Quint* and *Carl L. Whitchurch,* of counsel), for intervener.

WIEST, J. This is a proceeding, in behalf of the receivers of the General Necessities Corporation, to recover moneys in the hands of defendant David A. Brown and claimed to belong to the corporation. Defendant David A. Brown was president of the General Necessities Corporation. In April, 1928, the Necessities Corporation borrowed $75,000 from the Madison Investment Corporation. Mr. Brown indorsed the notes given for this loan, and, as security, executed a trust mortgage to the Guardian Trust Company, covering real property owned by him. When the indebtedness was due, an extension of time and an increase of $25,000, for the benefit of Mr. Brown, was desired, and Mr. Brown again gave a mortgage on his property to secure the loan of $100,000, evidenced by a series of notes, payable over a period of one year. It is claimed that he did this under an agreement with the directors of the Necessities Corporation that the loan would be repaid out of a prospective sale of the ice cream plant, and the proceeds from such sale would be placed in his hands for that purpose. The ice cream plant of the Necessities Corporation was sold to the Borden Company, and the purchase price was paid in stock of the Borden Company, having a market value, it is

claimed, of $650,000. The Borden Company stock was placed in the hands of Mr. Brown, who pledged the same with a New York bank for a loan of $300,000 to the Necessities Corporation. Sales of the pledged stock were authorized and made, and the loan from the bank was finally satisfied. This left to the Necessities Corporation, out of the Borden Company stock, the sum of $56,378.26, and Mr. Brown received that sum from the New York bank on March 17, 1930, and claims right to hold the amount here involved for the purpose of paying the Madison Investment Corporation's loan to the Necessities Corporation, and relieve his property from the mortgage securing that loan, as well as his personal liability as an indorser of the notes evidencing the loan. Two of such notes of $4,000 each matured in March and April, 1930, and were paid out of the fund held by Mr. Brown.

April 28, 1930, receivers were appointed for the General Necessities Corporation, qualified as such, and, on April 30, 1930, demanded of Mr. Brown that he turn over to them, as such receivers, the money in his hands, derived from sale of the Borden Company stock. Mr. Brown refused to do so, and, September 23, 1930, on petition of the receivers, the court ordered Mr. Brown to show cause why he should not be adjudged guilty of contempt of court in not paying the money to the receivers, as previously ordered by the court. Thereupon the Madison Investment Corporation intervened and petitioned the court to adjudge the fund to be held in trust by Mr. Brown under an equitable lien for payment to it, and that it be so ordered paid. Mr. Brown, in answer to the order to show cause, set forth in substance what we have before stated, and admitted all claims set up in the petition of the

Madison Corporation. Defendant Brown prosecutes an appeal from a decree ordering him to pay the fund, now amounting to $40,608.36, to the receivers of the Necessities Corporation within a specified time or stand adjudged guilty of contempt. The Madison Investment Corporation prosecutes an appeal from the denial of its claim to the fund. The appeals have been consolidated and present the issues of whether the Necessities Corporation segregated the fund and placed it in the hands of Mr. Brown, as trustee, to pay on the corporate obligation to the Madison Corporation, or whether the fund is subject to an equitable lien in behalf of intervener.

It is contended by appellants that the agreement between Mr. Brown and the Necessities Corporation, to the effect that proceeds from sale of the ice cream plant would be applied in payment of the Madison Investment Corporation loan was established by the evidence, and the trial judge was in error in his finding to the contrary. Upon this issue all other questions hinge. No corporate action appears in the minutes of directors' meetings.

Until Mr. Brown learned of the proceeding for appointment of the receivers, the fund was on deposit in a New York bank to the credit of the Necessities Corporation and its withdrawal check. Upon learning of the proceeding for appointment of the receivers, Mr. Brown, from New York, telephoned the assistant treasurer of the Necessities Corporation to countersign two checks and mail them to him at the New York bank, stating that he wanted to pay the Madison Corporation. Mr. Brown filled out the checks to his own order and drew the money here involved. Up to that time there had been no segre-

gation of the funds for trust purposes, nor any recognition of such purpose, but rather the contrary.

It would seem that ordinary business acumen should have prompted some more permanent memorial of corporate action than mere memory of individuals. The burden of establishing facts impressing the fund with a trust was upon the claimants of such a result. Such a trust, in opposition to the otherwise clear right of the receivers, is not to be lightly inferred.

Mr. Brown had been liberal in pledging his personal liability in behalf of the corporation by indorsement of its paper and mortgaging his property for the same purpose, and he continued to do so over remonstrances of some of his business associates. Efforts by Mr. Brown to have the Madison Corporation discount the obligation of the Necessities Corporation before maturity, and his declaration that he had the money from sale of the Borden stock with which to make payment, did not establish a trust. The fund was on deposit as money of the corporation, and Mr. Brown could not constitute it a trust fund and make the Madison Corporation the beneficiary by any statements he might make. It required action by the board of directors of the Necessities Corporation to accomplish allocation and severance of this fund and its segregation as a then present devotion thereof to the payment of the obligation of the corporation to the Madison Corporation.

We are satisfied that at directors' meetings it was talked that, from the proceeds of the sale of the ice cream plant, the mortgage on the plant, taxes, pressing obligations, and the Madison loan could and should be paid, and that Mr. Brown, who dominated the board, should take the Borden stock and

pay all such obligations. But this was no more than ordinary corporate finance management, for such was the purpose in selling the ice cream plant.

The following quotations of testimony are from intervener's abstract. The secretary of the Necessities Corporation testified that:

"I had a memorandum of this (obligation to be paid out of the money from the Borden stock) along with the other resolutions and I spoke to Mr. Brown about incorporating that in the minutes. I said it would be a good thing to have it there as part of the transaction. He told me, however, to forget about that. That he preferred not to have it in the minutes, so I let it go."

Harry Z. Brown, a director, testified:

"It was agreed that David Brown was to keep the proceeds of the sale (Borden) in his possession. He was to set aside a certain portion of the stock to take care of the Madison loan. The purpose in setting aside a portion of the stock to pay the loan with was to assure Mr. Brown that the loan would be paid."

Mr. Nugent, assistant treasurer and accountant, and also director of the Necessities Corporation, testified:

"After it was figured out what this stock (Borden) would bring, Mr. Brown asked me for a detail of General Necessities liabilities. I do not recall having a detailed statement of liabilities at the meeting. I do not recall that there was a discussion of how the proceeds of the Borden stock would be used in the retirement of various of the company's obligations. I do not recall any detail like that. It might have been done without my carrying it in my mind. * * * I do not recall any understanding or agreement whereby the Madison loan was to

be repaid out of the proceeds of the sale of the ice cream plant, at any directors' meeting or outside of any directors' meeting."

Harry J. Redwood, also a director, testified:

"I was present in May, 1929, when the $100,000 loan was authorized. There was no arrangement, or agreement respecting that loan by me or anyone in my presence that is not recorded in the minutes of that meeting. * * *

"I recall the meeting of July 5, 1929. There was no discussion at that meeting that the proceeds from the sale of the Borden stock which we were to receive in payment of the ice cream plant was to be set aside or held in trust by David A. Brown for the repayment of himself because of his indorsement of the Madison loan or that the Madison loan was to be paid out of the proceeds of that stock."

On cross-examination he said:

"I would not undertake on my oath to say that my memory is right about Brown and others not having taken part in a discussion of where this money would go. There were discussions in which I took part as to where this money would go."

The testimony of Harry C. Haze, also a director, was of like import.

Counsel for the Madison Corporation claim that:

"When respondent (Brown), on behalf of General Necessities Corporation, agreed that intervener's loan would be repaid out of the proceeds of the contemplated sale of the ice cream plant, and that a portion of such proceeds would be set aside for that purpose, an interest vested in intervener in the proceeds of the sale of the plant. The lien attached to the proceeds when they came into existence. The interest of intervener in the fund was not dependent

on performance of the agreement by General Necessities Corporation to set aside a portion of the proceeds."

Mr. Brown, without corporate authorization, could not fasten an equitable lien upon corporate assets, present or prospective. We find nothing upon which to base an equitable lien. The case appears to have been an instance of a corporation in financial difficulty, and, to meet pressing obligations, sold its ice cream plant in order to obtain money to pay many of its past-due debts and to be prepared to pay as well its debt to the Madison Corporation when due. We are not willing to hold that a representation by the president of a corporation that a loan can or will be paid out of avails of a sale of corporate property subjects the avails, or any part thereof, to an equitable lien or constitutes an equitable assignment.

We are unable to find that the money, ordered paid to the receivers by Mr. Brown, was duly segregated by corporate action as a trust fund for payment of the corporate obligation to the Madison Investment Corporation.

Decree in the circuit is affirmed, with costs against both appealing defendants.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, and FEAD, JJ., concurred. BUTZEL, J., did not sit.

NESTLE *v.* FLEMING.

1. DISCOVERY—COURT RULE—DEPOSITIONS BEFORE TRIAL.
   Court Rule No. 41 (1931), permitting taking of depositions before trial, is extension of old practice of discovery, and party invoking rule must definitely state subjects of intended inquiry and thus show materiality and nature thereof, and may not, at examination, go beyond such specifications.

2. SAME—MOTION TO VACATE NOTICE—ISSUES.
   Right to take deposition under Court Rule No. 41 (1931) may be tested by motion to vacate notice, and issue then is whether reasons for notice and information sought disclose *bona fide* need in framing issue or preparing for trial.

3. SAME—GOOD FAITH IN INVOKING RULE ASSUMED—POSSIBILITY OF ABUSE INSUFFICIENT TO WARRANT INHIBITION OF RIGHT.
   Where declaration charges seduction and rape of 14-year old girl, averring place, but date of alleged intercourse is averred to have been one of three mentioned Saturdays, and defendant's attorneys, seeking information as to time, place, and circumstances of said alleged seduction, gave notice of taking girl's deposition under Court Rule No. 41 (1931), court must assume that right accorded by said rule is invoked in good faith, and may not anticipate abuse or hold that possibility of abuse warrants inhibition of said right.

Appeal from St. Clair; Robertson (William), J. Submitted February 28, 1933. (Calendar No. 37,064.) Decided April 4, 1933.

Case by Kent Nestle, as guardian of Altha Nestle, against William Fleming for seduction and rape. Motion to vacate defendant's notice of taking deposition denied. Plaintiff appeals, and seeks mandamus directing circuit court to vacate notice. Mandamus denied.

Stewart & Black, for plaintiff.

Walsh, Walsh & O'Sullivan, for defendant.

WIEST, J. Before pleading to a declaration, charging seduction and rape of a 14-year old girl, attorneys for defendant desired information as to the time, place, and circumstances of the alleged seduction and carnal knowledge, and to that end gave notice of taking the deposition of the girl under Court Rule No. 41 (1931). Counsel for plaintiff moved the circuit court to vacate the notice. The court denied the motion, and by this appeal plaintiff seeks our writ of mandamus directing the circuit court to vacate the notice.

Court Rule No. 41 (1931), so far as necessary to quote, provides:

"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, or any person who has verified a pleading of another party, which is material and necessary in the prosecution or defense of the action or suit."

Counsel for plaintiff insist that the information sought is not necessary in order for defendant to plead. The rule is an extension of the old practice of discovery. The party invoking the rule must definitely state the subject or subjects of intended inquiry and thus show the materiality and nature thereof, and may not, at the examination, go beyond such specifications.

Right to take the deposition can be tested by motion to vacate the notice. The issue then is whether the reasons for the notice and the information sought disclose a *bona fide* need in framing an issue

or preparing for trial. The examination must not be for the purpose of enabling one party to merely pry into the case of the other to learn its strength or weakness, but only to seek information essential to the framing of appropriate issues and preparation for trial thereof.

The date of the alleged carnal intercourse is averred to have been on one of three mentioned Saturdays. While right to maintain the action does not depend upon a particular date, so long as not barred by the statute of limitations (3 Comp. Laws 1929, § 13976), yet if the exact date is known to a certainty it should, in fairness, be disclosed.

The place is averred in the declaration but we cannot say that this bars examination under the rule. A disclosure of the circumstances of an alleged seduction will, of course, bear a direct relation to the issues at the trial.

We must assume that the right accorded by the rule is invoked in good faith, and we cannot anticipate an abuse nor hold that possibility of abuse warrants inhibition of the right.

The writ is denied, with costs.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred.

KAYE *v.* GERASIMOS.

1. LANDLORD AND TENANT—VENDOR AND PURCHASER—AGREEMENT TO PAY RENT.

   Where agreement for assignment of vendee's interest in land contract was executory, and in meantime purchaser agreed to pay monthly rental for use and occupation of premises, relation of landlord and tenant existed.

2. VENDOR AND PURCHASER—AGREEMENT TO PAY TAXES—TIME.

   Where agreement for assignment of vendee's interest in land contract obligated assignor to pay taxes then due, but fixed no time for said payment, purchaser could not set time, but could protect himself at time of tendering full performance of purchase price.

3. SAME—APPEAL AND ERROR—RECORD.

   Claim by purchaser of vendee's interest in land contract that vendee's nonpayment of tax then due may constitute default under said contract is not considered, on appeal, where contract is not in record, since court may not surmise its terms.

4. LANDLORD AND TENANT—SUMMARY PROCEEDING—REFUSAL TO PAY RENT.

   In summary proceeding by landlord after notice to quit or pay rent, judgment of restitution was properly rendered, where tenant refused to pay agreed rent.

Appeal from Wayne; Warner (Glenn E.), J., presiding. Submitted January 18, 1933. (Docket No. 94, Calendar No. 36,737.) Decided April 4, 1933.

Summary proceedings by Avedis Harold Kaye against Theodore Gerasimos to obtain possession of premises alleged to be held by defendant as tenant. Judgment for plaintiff. Defendant appealed to the circuit court. Judgment for plaintiff. Defendant appeals. Affirmed.

Theodore H. Yessayan, for plaintiff.

Charles C. Stewart, for defendant.

WIEST, J. Plaintiff brought a summary proceeding against defendant before a circuit court commissioner and obtained restitution of certain premises. Defendant appealed to the circuit court and now prosecutes an appeal to this court.

Plaintiff is vendee in a land contract, and defendant, desiring to purchase plaintiff's equity, the parties reached an agreement and reduced the same to writing, by which defendant was to pay $820 for the equity, make a down payment of $100, and the balance at $25 per week, and, when the full sum was paid, plaintiff should execute an assignment of the land contract. The agreement also obligated defendant to pay $55 per month for use and occupation of the premises pending the assignment, that being the amount plaintiff had to pay the vendor. Plaintiff agreed to pay the tax then due for 1931. Defendant made the down payment of $100, and also $60, one $25 payment, and one $55 payment, and then refused to pay any more until plaintiff paid the 1931 tax, amounting to $181. Thereupon plaintiff gave defendant notice to quit or pay the rent, and later commenced the summary proceeding.

Defendant contends that the default of plaintiff in paying the tax precludes him from prosecuting this suit, and also claims that there was no relation of landlord and tenant.

The agreement fixed no time for payment of the tax. It will be noted that the agreement for the assignment of the vendee's interest in the land contract was executory, and the monthly payment, for use and occupation of the premises, brought the

relation in the meantime of landlord and tenant. No time having been fixed for payment of the tax, defendant could not set a time, and could protect himself at the time of tendering full performance of the purchase price of the equity, but defendant urges that nonpayment of the tax may constitute a default by plaintiff under the land contract. That contract is not in the record, and we cannot surmise its terms.

The circuit judge tried to get the parties to exercise some degree of sense, and plaintiff was willing to pay the tax at once if defendant would make the past-due payments, but this defendant refused to do, and elected to stand on his legal rights. He cannot have the use and occupation of the premises without the monthly payments.

The judgment in the circuit court is affirmed, with costs to plaintiff.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred.

WARDOWSKI *v.* GUARDIAN TRUST CO. OF DETROIT.

1. CORPORATIONS—TRUSTS—CONTRACTS—ULTRA VIRES—VENDOR AND PURCHASER.

   Mistake of trust company in executing contract for purchase of land in its corporate capacity when it intended to purchase as trustee does not render said contract *ultra vires*.

2. SAME—EXTENT OF CORPORATE POWER—NOTICE—STATUTES.
   Extent of corporate power of trust company, being found in public law, trust company and those dealing with it must be held cognizant of its provisions with reference to whether particular transaction is *ultra vires.*

3. TRUSTS—CORPORATIONS—MISTAKE—VENDOR AND PURCHASER.
   Trust agreement between trust company and members of syndicate for whom it acted in executing land contract as vendee created valid trust as between them, although by mistake said contract was executed by it in its corporate capacity, and trust agreement was not executed until after execution of said contract by vendors.

4. CORPORATIONS—TRUSTS—FORECLOSURE—DEFENSE OF ULTRA VIRES—STATUTES.
   If contract to purchase land, executed by trust company in its corporate capacity when it intended to purchase as trustee, is *ultra vires,* said defense may not be made in suit by vendors to foreclose said contract (Act No. 327, Pub. Acts 1931).

5. SAME—DEFENSE OF ULTRA VIRES NOT VESTED RIGHT.
   Defense that contract executed by corporation is *ultra vires* is not vested right, and therefore legislature had right to take it away (Act No. 327, Pub. Acts 1931).

6. SAME—PUBLIC POLICY.
   Doctrine of *ultra vires* is intended to keep private corporations within their fixed powers, and State may, by statute, say when corporation may or may not plead its violation in release of contracts otherwise legitimate (Act No. 327, Pub. Acts 1931).

7. SAME—PLEADING.
   Defense of *ultra vires,* to be available, must be pleaded.

8. SAME—WHEN DEFENSE OF ULTRA VIRES PERMISSIBLE.
   Generally, defense of *ultra vires* should not be permitted to prevail when it will not advance justice, but only when imperative rule of public policy requires it.

9. REFORMATION OF INSTRUMENTS—LAND CONTRACTS—MUTUAL MISTAKE—TRUSTS—CORPORATIONS.
   Mistake of trust company in executing contract for purchase of land in its corporate capacity when it intended to purchase as trustee, not being mutual, reformation of contract to release it from obligation thereunder may not be had.

10. VENDOR AND PURCHASER—FORECLOSURE—TRUSTS—PRIVITY OF CONTRACT—DEFICIENCY DECREE.

Where trust company in its corporate capacity executed contract for purchase of land, and also executed trust agreement with members of syndicate for whom it acted, there was no privity of contract between vendors and members of syndicate, and therefore no deficiency decree may be had against them in suit to foreclose contract, although they may be held to respond to trust company.

11. LICENSES—SYNDICATES—BLUE SKY LAW—JOINT ADVENTURES.

It is not violation of blue sky law for several persons to join and furnish, proportionately, parts of purchase price of real property to be held for their benefit by trustee, but sales of units in such syndicate, after organization, may not be made without compliance with said law.

12. VENDOR AND PURCHASER—FORECLOSURE—JOINT ADVENTURES—DEFAULT—LIABILITY OF DEFAULTING MEMBER.

Member of syndicate executing trust agreement with trust company purchasing land on contract for benefit of said syndicate members was not discharged from liability thereunder by his default in making payment, in absence of action by syndicate members terminating his contract relations.

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted November 3, 1932. (Docket No. 174, Calendar No. 36,845.) Decided April 4, 1933.

Bill by Louis Wardowski and another against Guardian Trust Company of Detroit (now Union Guardian Trust Company), a Michigan corporation, and others to foreclose a land contract. Cross-bill by defendant trust company against plaintiff for reformation of the contract and against Wormer & Moore, a Michigan corporation, and others to determine rights and liabilities under a trust agreement respecting the vendee's interest in the land contract. Cross-bill by defendant James Vernor, Jr., to determine rights and liabilities under the above-mentioned instruments. From decree for plaintiffs

against defendant trust company and for defendant trust company against certain cross-defendants, defendant trust company and certain cross-defendants appeal. Affirmed.

Frank A. Martin and *Shapero & Shapero* (*Alex. J. Groesbeck,* of counsel), for plaintiffs.

Bulkley, Ledyard, Dickinson & Wright (*Selden S. Dickinson, Robert W. Conder,* and *Hal H. Smith,* of counsel), for defendant trust company.

Corliss, Leete & Moody (*Thomas T. Leete, Jr., Paul B. Moody,* and *Alexander P. Leete,* of counsel), for defendant James Vernor, Jr.

Miller, Canfield, Paddock & Stone, for defendant George W. Trendle.

Younglove & Chockley, for defendant Frederick M. Montefiore.

Monaghan, Crowley, Reilley & Kellogg (*Edward T. Kelley,* of counsel), for defendant Charles R. Murphy.

WIEST, J. This is a suit to foreclose a land contract, executed by plaintiffs as vendors and the Guardian Trust Company, trustee, as vendee, in which the vendee's interest therein and obligation thereunder has been assumed by the Union Guardian Trust Company, by merger of the Guardian Trust Company and the Union Trust Company under that name. Decree passed for plaintiffs, adjudging the sum of $115,934.25 due, and granting the trust company remedy against "syndicate members," hereinafter mentioned, for deficiency liability. The trust company denies liability of the Guardian Trust Company in its corporate capacity because the land

contract was executed by the Guardian Trust Company, as trustee, and plaintiffs were advised of the trust and the capacity in which the vendee acted by a copy of the trust agreement attached to the land contract at the time of its execution and delivery to plaintiffs, and contends that to hold it liable in its corporate capacity renders the contract one beyond its corporate powers, and, therefore, *ultra vires*. Plaintiffs insist upon the letter of the contract. The letter of the contract holds the vendee in its corporate capacity if the contract was not *ultra vires*.

The defendants Wormer & Moore, a corporation, Kenneth Moore Land Company, a corporation, Charles R. Murphy, Adolph Finsterwald, James Vernor, Jr., Frederick M. Montefiore, George W. Trendle, Lucien S. Moore, Jr., and Harold F. Wardwell, desired to purchase the property described in the land contract, and for that purpose executed a so-called syndicate agreement, under which the subscribers were to pay for specified interests in a set-up price for the land and have the title taken in the name of the Guardian Trust Company, as trustee, under a trust agreement. November 6, 1928, plaintiffs signed the land contract and gave it to the Guardian Trust Company for execution. November 20, 1928, the trust agreement between the syndicate members and the Guardian Trust Company was signed. The agreement recited that the Guardian Trust Company had entered into a land contract for the purchase of the premises. The trust company declared therein that it held all interest in the land contract in trust for the syndicate members, and the agreement defined the purpose. Thereupon the Guardian Trust Company executed the land contract, and attached thereto a copy of the trust agreement.

The trust company had an undoubted right to contract for the property in a trust capacity. It claims that it did so, and to hold it liable in its corporate capacity would render the contract *ultra vires*. It is manifest that the trust company intended to purchase as trustee, but, unfortunately, executed the contract without proper designation to that effect. The mistake was not mutual, and reformation cannot be decreed. The contract on its face binds the trust company in its corporate capacity. Does that fact render the contract *ultra vires?* The extent of the corporate power is found in the statute under which the trust company was organized, and, being a public law, plaintiffs and the trust company must be held cognizant of its provisions with reference to this transaction. We cannot hold the contract *ultra vires*.

The trust company was empowered to act as trustee. It could purchase real estate for trust purposes. It was not an *ultra vires* act for it to do so in this instance. The trust agreement came into existence after plaintiffs had signed the contract but before the trust company signed, and, as between the vendee and the syndicate members, the trust is valid. This being true, the trust company had power to make the purchase in its corporate capacity for the purposes of the trust. But if the land contract were *ultra vires* that defense cannot be made.

After the land contract was executed but before this suit was instituted, the legislature, by Act No. 327, Pub. Acts 1931, known as the "Michigan general corporation act," provided (section 11):

"The plea of *ultra vires* shall not be made by anyone except the corporation in an action between it and a director or officer thereof or a person having actual knowledge of the *ultra vires* act and ex-

cept by either party in an action between a shareholder and the corporation. The foregoing provision shall be construed as a limitation on the power of a corporation."

Just what is meant by a limitation on power is not clear, for an *ultra vires* act is one beyond corporate power. The act takes away the defense that a contract, such as we have here, is void if the corporation exceeded its power in entering into it.

But it is contended that the defense of *ultra vires* is a vested right and cannot be taken away by legislation subsequent to an *ultra vires* act. We cannot so hold. Public policy, as expressed by the legislature, forbids the plea of *ultra vires,* except in specified instances, of which this is not one. The doctrine of *ultra vires* is intended to keep private corporations within their fixed powers. If a corporation transcends its powers it constitutes a violation of its charter, and the State may, by statute, say when a corporation may and when it may not plead its violation in release of contracts otherwise legitimate.

The contract was one the trust company could unquestionably make in furtherance of its capacity to act as a trustee. It may have made an error, but this error did not at all release it from its obligation under the trust agreement to acquire the property for the benefit of the syndicate members. If the contract is held *ultra vires* then the purpose of the trust will be destroyed.

The trust company did not plead *ultra vires.* The defense of *ultra vires* must be pleaded, and may not be left as a resort against an adverse decision, for it is a general rule that it should not be permitted to prevail when it will not advance justice, but only where an imperative rule of public policy requires it.

The vendee asks for a reformation of the contract to the end that it stipulate noncorporate liability of the vendee. No mutual mistake authorizing reformation to such effect is shown. The mistake was on the part of the vendee in making the obligation of the contract its corporate obligation. Such error and the consequences thereof cannot be rendered nugatory by way of reformation. This leaves the question of whether the facts and circumstances within the knowledge of plaintiffs estopped them from insisting on the letter of the contract, and whether, in equity and good conscience, they should be required to recognize the trust capacity of the vendee and look for a deficiency, if any, only against the members of the syndicate for whom the vendee was in fact acting as trustee. The trust company contends that decree for deficiency should be against syndicate members only; all of them if jointly liable; individually if proportionately liable only. The trouble with this is the want of privity of contract between members of the syndicate and plaintiffs. It will be noted that the trust agreement was executed after plaintiffs had signed the land contract. True, the members of the syndicate authorized the trust company to act as trustee in their behalf, and, as between them and the trust company, they may, within the compass of their agreements, be held to respond to the trust company, but this response cannot be carried to the plaintiffs under the undertaking by the trustee in its corporate capacity. As between the trust company and members of the syndicate the addition of the word "trustee" to the corporate name in the land contract maintained privity with relation thereto but did not go beyond that and bring privity of contract between the syndicate members and plaintiffs. The

land contract obligation, as said before, was that of the trust company.

At an early date the law on this subject was clearly stated by Mr. Justice Story in *Duvall* v. *Craig,* 2 Wheat. (15 U. S.) 45:

"A trustee, * * * if he chooses to bind himself by a personal covenant, he is liable at law, for a breach thereof, in the same manner as any other person, although he describes himself as covenanting as trustee; for, in such case, the covenant binds him personally, and the addition of the words 'as trustee' is but matter of description to show the character in which he acts for his own protection, and in no degree affects the rights or remedies of the other party."

The syndicate members contend that the syndicate agreement was void under the so-called "blue sky law" (2 Comp. Laws 1929, § 9769 *et seq.*) and cite *Freeze* v. *Smith,* 254 Mich. 386. The decision in that case was bottomed upon a sale of a unit in the syndicate after formation thereof, and not on an agreement between organizers of a syndicate taking, proportionately, shares. It is not a violation of the "blue sky law" for several persons to join and furnish, proportionately, parts of the purchase price of real property to be held for their benefit by a trustee. Sales of units by such a syndicate, after organization, cannot be made without compliance with the "blue sky law." Under the facts in this case, the point is without merit. See *Lindemulder* v. *Shoup,* 258 Mich. 679.

Defendant Frederick M. Montefiore, one of the organizers of the syndicate, was discharged from liability by the decree in the circuit.

Having in mind concessions made by counsel in the circuit and the record relative to his default and action taken on the strength thereof, we approve of the holding.

Defendant Murphy signed the syndicate agreement, but claims release by his default in payment. The syndicate agreement provided:

"Among other provisions, it shall be provided in the trust agreement that if any of the syndicate holders fail to pay on demand his proportion of the cost, payments and liabilities thereunder at the time or times when called for by the trustee, the remaining syndicate holders may purchase the interest of such defaulting party for the sum which he has paid under said agreement exclusive of interest and such payments may be made on the same terms and at the same time as the defaulting party has made payments. Such purchase shall not be obligatory upon the other syndicate members, however, and if such right of purchase is not exercised and if the default continues for 60 days, then the interest of the defaulting party in said syndicate and property shall be terminated without notice and all payments which he has made thereon shall be declared forfeited as stipulated damages and shall accrue proportionately to the interests of the other members of the syndicate."

We cannot hold that default alone terminated Mr. Murphy's contract relations.

It will be noted that the quoted agreement called for a demand of payment, and continuing "default of such defaulting party" for a period of 60 days. If the venture had proved profitable, Mr. Murphy would have been in until put out. Under the strict terms of the contract the same rule applies now to his desire to escape liability.

The decree in the circuit court is affirmed, with costs.

SHARPE, J., concurred with WIEST, J. MCDONALD, C. J., and CLARK, POTTER, and NORTH, JJ., concurred in the result. FEAD and BUTZEL, JJ., did not sit.

SWEET *v.* SHREVE.

1. VENDOR AND PURCHASER—FRAUDULENT CONTRACT—CONSTRUCTIVE FRAUD.

   Generally, when vendor signs new contract, substituted for earlier agreement and differing materially in its terms through increasing price and down payment, though balance due and unpaid remains same, and new contract is used as device to defraud innocent third party, vendor is guilty of constructive fraud, regardless of innocence of his intentions.

2. LIMITATION OF ACTIONS—EXCHANGE OF PROPERTY—FRAUD—INJURY TO PERSON OR PROPERTY.

   Action for fraud in exchange of real estate is one for recovery of damages as result of fraudulent representations, and does not constitute one for injuries to person or property within meaning of 3 Comp. Laws 1929, § 13976, subd. 2, requiring action to be brought within three years.

3. SAME—GENERAL PROVISIONS OF LIMITATION STATUTE.

   Where damages claimed are not for injuries to specific property, subdivision 2 of 3 Comp. Laws 1929, § 13976, requiring action to be brought within three years, is not applicable, but action may be brought within six years under general provisions of said section.

Appeal from Kalamazoo; Simpson (John), J., presiding. Submitted January 12, 1933. (Docket No. 72, Calendar No. 36,957.) Decided April 4, 1933.

Case by Ralph W. Sweet and another against Fred E. Shreve and others for damages for fraud in the exchange of real estate. Verdict and judgment for plaintiffs against defendants Hoekstra and Richardson. Defendant Richardson appeals. Affirmed.

Leo W. Hoffman and *Clare E. Hoffman (Carl E. Hoffman,* of counsel), for plaintiffs.

Mason & Sharpe, for defendant Richardson.

BUTZEL, J. Fred E. and Anna Shreve entered into an executory contract for the purchase of property in Kalamazoo, used and occupied as a boarding house. The contract called for a total purchase price of $25,000, a down payment of $3,000, and monthly payments of $150, with interest at 7 per cent. Jerrie A. Richardson purchased the vendor's interest in this contract. In the course of the following year, the vendees fell approximately four months in arrears, and Richardson insisted that they either pay up or sell out and make a settlement.

The vendees thereupon enlisted the services of Samuel Hoekstra, a real estate dealer, who interested Ralph W. and Verna L. Sweet in the property by misrepresenting its value and earning power. Hoekstra told them that the property had been purchased for $32,000, and that a down payment of $10,000 had been made. Richardson, the vendor's assignor, helped to carry out the deception by signing a new contract in which $7,000 was added to both the purchase price and down payment. The Shreves thereupon traded their equity, represented as $10,000, for property belonging to the Sweets and consisting of a 40-acre farm, its stock and equipment, in Allegan county, an 80-acre farm in Barry county, and a cottage and two lots on West Lake in Kalamazoo county, subject to incumbrances on each parcel aggregating $2,700. The new contract ran directly from Richardson to the Sweets. Except for the padding of the purchase price and down payment and the insertion of a clause, at the request of Richardson, permitting him to place a mortgage on the property, the new contract did not differ substantially from the former one which had been surrendered by the Shreves. The new contract was signed by the Sweets before Richardson saw it. He had no

direct contact with them until some time later. The testimony bears out his claim that he was not guilty of any wrongful conduct except the constructive fraud which resulted from his signing the contract with padded amounts of purchase price and down payment. There is testimony that Richardson desired that a new contract be drawn, and he consented to a padding of the stated amounts. The record shows that, some time later, he expressed himself to the Sweets in no uncertain language about his foolishness in having signed the padded contract. He was guilty of a constructive fraud. As a rule, when a vendor signs a new contract, substituted for an earlier agreement and differing materially in its terms through increasing the price and down payment, though the balance due and unpaid remains the same, and the new contract is used as a device to defraud an innocent third party, the vendor is guilty of a constructive fraud, regardless of the innocence of his intentions. See *Hall-Doyle Equity Co.* v. *Crook,* 245 Mich. 24; *Holbrook* v. *Blick,* 256 Mich. 396.

The testimony is somewhat conflicting as to when the Sweets first discovered the fraud that was perpetrated upon them. There is but little doubt that the Sweets were deceived, that they paid for the property an amount far in excess of its real value, and that the contract, as exhibited to them, was largely instrumental in perpetration of the fraud. Richardson alone appeals from the judgment rendered against him and Hoekstra, the agent. In addition to other defenses, he claims that the action was outlawed because over three years elapsed since the fraud occurred. He contends that the action is one based on injury to property and must be brought within the three-year period prescribed by subsec-

tion 2 of 3 Comp. Laws 1929, § 13976. There is testimony to show that the fraud was not discovered until within a year and a half prior to the bringing of the suit.

Furthermore, we do not believe that the present action constitutes one for injuries to person or property. It is a suit brought for the recovery of damages caused plaintiffs as a result of fraudulent representations made by defendants. Previous Michigan decisions have assumed that actions for fraud are covered by the general six-year limitation in section 13976. See *Holman* v. *Moore,* 259 Mich. 63, 68; *Ramsey* v. *Child, Hulswit & Co.,* 198 Mich. 658, 667; *Armstrong* v. *Rachow,* 205 Mich. 168, 179. While there are some authorities in other jurisdictions to the contrary, and it may be claimed that the precise point here involved was not carefully considered in the cases cited, we believe the correct rule to be that, where the damages claimed are not for injuries to specific property, subsection 2 of 3 Comp. Laws 1929, § 13976, does not apply, but the action may be brought within the general six-year provisions in 3 Comp. Laws 1929, § 13976.

Objections made to the court's refusal to accept certain of defendants' requests to charge were without merit. Plaintiffs recovered a judgment for $7,300, which is affirmed, with costs to plaintiffs.

MCDONALD, C. J., and CLARK, POTTER, NORTH, FEAD, and WIEST, JJ., concurred. SHARPE, J., did not sit.

SMITH *v.* SMITH.

1. DIVORCE—CRUELTY—SUFFICIENCY OF EVIDENCE.
   In wife's suit for divorce on ground of cruelty, evidence *held*, sufficient to justify decree in plaintiff's favor.

2. SAME—ALIMONY—DIVISION OF PROPERTY.
   Divorce decree awarding wife custody of three children, giving her household goods and homestead burdened with $3,000 mortgage, changing ownership of oil station from tenancy by entireties to tenancy in common, and ordering husband to pay wife $1,500 and $30 per month toward support of children, leaving husband with small equity in another house and full ownership of another oil station, *held*, fair and proper, under evidence.

Appeal from Ingham; Carr (Leland W.), J. Submitted January 19, 1933. (Docket No. 159, Calendar No. 37,045.) Decided April 4, 1933.

Bill for divorce by Ruth M. Smith against George H. Smith. Cross-bill for divorce by defendant. Decree for plaintiff. Defendant appeals. Affirmed.

Cummins & Cummins and *Clyde V. King,* for plaintiff.

John F. Berry, for defendant.

BUTZEL, J. Ruth M. Smith filed a bill for absolute divorce from George H. Smith, on the ground of cruelty. He denied the charges, and in a cross-bill charged her with refusal to cohabit and failure to perform other marital duties. After taking considerable testimony, the judge rendered a decree in her favor.

The testimony established the baselessness of defendant's charges, except as to those actions of plaintiff that were justified by defendant's conduct. It showed that defendant remained away from plaintiff's bedside for the 36 hours following the birth of their youngest child, and then when he saw her he upbraided her for having the child; that he insisted upon keeping the radio going long after reasonable hours, when the plaintiff and the children were trying to rest, and that he had insisted that it be kept going even when he absented himself from home; that he constantly referred to her in an insulting manner; and that he was guilty of other acts of cruelty towards her and the children, the details of which it is unnecessary to discuss.

In the decree, the trial judge awarded plaintiff the custody of the children, aged 12, 11, and 7, respectively. He gave her the household goods and effects and also the homestead, burdened with a mortgage of $3,000 running to defendant's father. (See *Smith* v. *Smith, ante,* 60.) He also decreed that the tenancy by the entireties in an oil station property near East Lansing, Michigan, rented for $100 per month, should hereafter be a tenancy in common; that defendant further pay plaintiff $1,500, which, until paid, should be a first lien on defendant's interest as tenant in common of the oil station property. He further ordered defendant to pay $30 a month towards the support of the children. This left defendant with a small equity in another house in Lansing and the full ownership of another oil station property in the same city, not as valuable at the present time as the one in East Lansing.

We believe the decree is fair and proper and fully sustained by the evidence. In coming to this conclusion, we are not unmindful of the fact that plaintiff

has inherited from her father an 80-acre farm near Williamston, Michigan, as well as a small amount of personal property.

The decree is affirmed, with costs to plaintiff.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and WIEST, JJ., concurred.

LIVINGSTON *v.* SOUTHERN SURETY CO. OF NEW YORK.

1. CORPORATIONS—FOREIGN CORPORATION—RECEIVERS—DISSOLUTION—PROCESS.

   Order appointing receiver to take over assets of foreign corporation in this State was not nullity for want of process, where corporation had been dissolved and there was no one upon whom service could be made.

2. SAME—PRINCIPAL AND AGENT.

   When foreign corporation was dissolved, agency of its representative in this State ended.

3. RECEIVERS—EQUITY—JURISDICTION—JUDICIAL DISCRETION.

   Right of court of equity to appoint receiver *ex parte* is inherent part of its equity powers, and is entirely matter of judicial discretion.

4. SAME—INTERVENTION—STATUTES.

   By filing petition to intervene in proceedings for appointment of receiver, intervener submits himself to jurisdiction of court, and may not question validity of appointment; intervention being in subordination to and in recognition of propriety of main proceedings (3 Comp. Laws 1929, § 14019).

5. SAME—JUDGMENT CREDITOR'S BILL—JURISDICTION—FOREIGN CORPORATION—ASSETS.

Judgment creditor's bill filed in circuit court for appointment of receiver to take over assets of foreign corporation, alleging it to be insolvent and in hands of receiver in its home State, and that it had assets in State of Michigan, *held*, to confer jurisdiction on court and to present case for appointment of receiver.

6. SAME—LIENS—INSOLVENCY.

Where, in response to filing of judgment creditor's bill, receiver was appointed to take over assets of insolvent foreign corporation in this State, lien was created in favor of judgment creditor on debtor's property in this State.

7. SAME—DEBTOR'S PROPERTY IN CUSTODY OF COURT.

From time receiver was appointed to take over assets of insolvent foreign corporation in this State, in response to filing of judgment creditor's bill, property of debtor in this State was *in custodia legis*, and court had power to preserve it to satisfy said judgment.

8. SAME—COURTS—JURISDICTION.

Where, at time circuit court appointed receiver to take over assets of insolvent foreign corporation in this State, said assets were already in custody of circuit court of another county, order appointing said receiver was invalid.

Appeal from Ingham; Carr (Leland W.), J. Submitted January 18, 1933. (Docket No. 29, Calendar No. 36,890.) Decided April 4, 1933. Rehearing denied May 16, 1933.

Bill by Charles D. Livingston, commissioner of insurance, against Southern Surety Company of New York, a New York corporation, for appointment of receiver for Michigan assets. Equitable Trust Company, a Michigan corporation, receiver of defendant by appointment of Wayne circuit court, intervened. From order appointing a deputy commissioner of insurance as receiver, intervener appeals. Reversed, and order vacated.

Patrick H. O'Brien, Attorney General, *Sid A. Erwin* and *Charles F. Cummins,* Assistants Attorney General, and *Clark C. Coulter,* for plaintiff.

Wm. Henry Gallagher, for intervener.

McDONALD, C. J. On March 25, 1932, Bertha B. Cleavenger filed a judgment creditor's bill in the Wayne circuit court against the Southern Surety Company of New York, in which she alleged that the company was insolvent, and that, on application of the superintendent of insurance in the State of New York, a receiver had been appointed in that State to take over and administer its assets. She also alleged that the company had assets and property within the State of Michigan, and for the benefit of herself and other creditors prayed for the appointment of a receiver to take over such property and assets, to sell the same and apply the proceeds in satisfaction of her judgment. There was no service of process on the company, though it had maintained an agent in the city of Detroit for that purpose. On March 25, 1932, an *ex parte* order was entered in the Wayne circuit court appointing Charles F. Becker receiver. On March 26, 1932, Charles D. Livingston, insurance commissioner for the State of Michigan, filed a petition to intervene, and moved to vacate the order appointing Mr. Becker receiver. Before final action was had on his petition, Mr. Livingston filed a bill in the Ingham county circuit court for the appointment of a receiver, and in compliance therewith an order was entered appointing Ralph M. Wade receiver to take possession of the business and assets of the insolvent company within the State of Michigan for the purpose of administering and liquidating the same under direction of the commissioner of insur-

ance. Mr. Wade is a deputy commissioner. He qualified as receiver on the 29th day of March, 1932, and is in possession of the property and assets of the company. On the same day, but subsequent to the appointment and qualification of Mr. Wade, the Wayne circuit court in the suit of Bertha B. Cleavenger appointed the Equitable Trust Company of Detroit receiver in the place of Mr. Becker. The Equitable Trust Company promptly qualified, and thereupon filed a petition in the Ingham circuit court to vacate the appointment of Mr. Wade. From an order denying the prayer of its petition, the Equitable Trust Company is prosecuting this appeal.

The question is whether, in view of the proceedings in the Wayne circuit court, the circuit court of Ingham county had jurisdiction to appoint a receiver.

It is first claimed by the plaintiff that the action of the Wayne circuit court appointing a receiver was an absolute nullity because there was no service of process upon the surety company. This claim has no merit. The surety company was a foreign corporation, and there was no one upon whom service could be made. It is true that the company had maintained an agent in the city of Detroit for that purpose, but when the bill was filed in the Wayne circuit the company was not in existence. It had been dissolved by the New York court. With its dissolution passed the agency of its Detroit representative. *U. S. Truck Co.* v. *Pennsylvania Surety Corp.*, 259 Mich. 422.

But the right of a court of equity to appoint a receiver *ex parte* is an inherent part of its equity powers. It is entirely a matter of judicial discretion. *Tuller* v. *Wayne Circuit Judge*, 243 Mich. 239.

The right to appoint was not questioned in the Wayne circuit court suit. The day following the

appointment, the insurance commissioner of Michigan filed a petition to intervene. Intervention was granted. The statute (3 Comp. Laws 1929, § 14019), requires that the intervention "shall be in subordination to, and in recognition of, the propriety of the main proceedings." As was said by this court in *Michigan Trust Co.* v. *National Bank of Ionia,* 241 Mich. 146, "The intervener takes the case as he finds it." Having submitted himself by intervention to the jurisdiction of the court, he cannot question the validity of the appointment.

The Wayne circuit court had jurisdiction of the action. The bill presented a case for the appointment of a receiver. It alleged that the plaintiff was a judgment creditor, that the surety company was insolvent and in the hands of a receiver in New York State, and that it had property and assets within the State of Michigan. When the receiver was appointed, a lien was created in favor of the judgment creditor on the debtor's property in this State. *Saginaw County Savings Bank* v. *Duffield,* 157 Mich. 522 (133 Am. St. Rep. 354); *German American Seminary* v. *Saenger,* 66 Mich. 249; *Beith* v. *Porter,* 119 Mich. 365 (75 Am. St. Rep. 402).

The appointment of Mr. Becker, on March 25, 1932, by the Wayne circuit court, was valid. On March 29, 1932, the court vacated this order of appointment and appointed the Equitable Trust Company of Detroit. Mr. Becker was an officer of the court. From the moment of his appointment the property of the insolvent debtor in the State of Michigan was *in custodia legis,* and the court had the power to preserve it to satisfy the plaintiff's judgment.

So that when the circuit court of Ingham county subsequently appointed a receiver, the property in-

volved was in the custody of another court of competent jurisdiction, and was subject to the lien of the judgment creditor. The Ingham county circuit court was without jurisdiction, and its order appointing a receiver must be held to be invalid.

If the Michigan insurance commissioner has interests which he desires to protect, he may do so in the Wayne circuit court suit according to the practice indicated in *Michigan Trust Co.* v. *National Bank of Ionia, supra.*

A decree will be entered vacating the order of the Ingham county circuit court.

CLARK, POTTER, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

LEFAIVE *v.* ASSELIN.

1. PHYSICIANS AND SURGEONS—MALPRACTICE—EXPERT TESTIMONY—EVIDENCE AS TO GOOD PRACTICE.

   In action for malpractice, based on surgeon's failure to remove needle after performing operation for appendicitis, it was not necessary for plaintiff to show by expert witnesses that it was not good practice to sew up incision without removing needle.

2. SAME—SUFFICIENCY OF EVIDENCE—CONJECTURE—CONCESSION.

   In said action, finding of trial judge that defendant was negligent, *held,* not to rest on conjecture; especially in view of concession by defendant's attorney.

3. SAME—NEGLIGENCE—FAILURE TO REMOVE NEEDLE.

In absence of some explanation by surgeon, his sewing up incision, after performing operation, without removing needle, was negligence.

4. DAMAGES—REASSESSING DAMAGES—EXCESSIVE AWARD.

Where, in assessing damages for malpractice at $1,000, trial judge awarded less than plaintiff's pecuniary loss and allowed nothing for pain and suffering, there was no error in reassessing damages and awarding additional amount of $250; said judgment being reasonably modest and in line with evidence.

Appeal from Wayne; Marschner (Adolph F.), J. Submitted January 11, 1933. (Docket No. 102, Calendar No. 37,001.) Decided April 4, 1933.

Case by Harry J. LeFaive against John L. Asselin for malpractice. Judgment for plaintiff. Defendant appeals. Affirmed.

Sempliner, Dewey, Stanton & Bushnell, for plaintiff.

Brown, Stoneman, Lorenzo & Springstun, for defendant.

McDONALD, C. J. The defendant is a surgeon engaged in the practice of his profession in the city of Detroit. He operated on the plaintiff for appendicitis on the 8th day of August, 1928. For many months after the operation the plaintiff was troubled with a soreness and pain in his side. He consulted defendant, who gave him internal medicine, advised him to wear an abdominal belt, and have his tonsils removed. The condition of the plaintiff did not improve. He was unable to do the work at which he was employed prior to the operation. He went to Canada on a visit to his parents. While there, his condition having grown worse, he con-

sulted a physician, who took an X-ray, which revealed the presence of a curved surgical needle imbedded in the region about the appendectomy scar. The needle was removed on September 4, 1929, since which time the plaintiff has suffered no pain or discomfort. The plaintiff returned to the city of Detroit and brought this suit to recover damages for pain and suffering and loss of wages which he claims to have sustained by reason of the defendant's negligence in failing to remove the needle before he closed the incision which he made in performing the operation. The issue was tried by the court without a jury. At the close of the plaintiff's proofs, the defendant moved for a directed verdict on the ground that the plaintiff had not made a *prima facie* case of negligence. The motion was denied, and defendant rested without submitting any proofs. Judgment was entered in favor of plaintiff for $1,000. Subsequently, on motion of the plaintiff, there was a reassessment of the damages, and an amended judgment entered for $1,250.

The defendant filed a motion to vacate the judgment and for the entry of a judgment in his favor or for a new trial. On the denial of this motion he appealed.

It is urged as cause for appeal that the court erred in refusing to direct a verdict and enter judgment in favor of the defendant, on the ground that there was no evidence of negligence.

It is contended by the defendant that the conclusion of the trial court is based on conjectures and inferences; that there is no evidence as to how the needle got into the plaintiff's body; that there is no evidence by physicians or surgeons that defendant's acts were not in accordance with the recognized standards of practice by the profession, and that in

malpractice cases such evidence is necessary to establish negligence.

In the majority of such cases the professional standard of practice is necessarily involved and requires testimony of competent experts. But in this case there is no question of skill or judgment, no question of practice beyond the knowledge of laymen. So it was not necessary for the plaintiff to show that it was not good practice among surgeons in performing operations to sew up the incision without removing a needle or other surgical instruments. As said by Mr. Justice WIEST in *Ballance* v. *Dunnington,* 241 Mich. 383, 387 (57 A. L. R. 262), even the merest tyro would know this was improper.

The finding of the court as to when and how the needle got into the plaintiff's body does not rest on conjecture. On the trial, counsel for the defendant made the following concession:

"We can agree on the record that plaintiff's abdomen had not been operated on prior to the appendectomy by Dr. Asselin, and it is not our claim that the needle entered plaintiff's body from any other source."

Apart from this concession, the only possible inference from the proven facts is that the needle was left in the wound by the defendant. In the absence of some explanation by him, sewing up the incision without removing the needle was negligence. The trial court did not err in refusing to direct a verdict for the defendant, or to enter a judgment in his favor, or to grant a new trial on the ground that there was no evidence of negligence.

It is further contended by the defendant that the trial court erred in reassessing the damages and amending the judgment.

In his motion for reassessment of the damages, the plaintiff called the attention of the court to the

fact that the damages awarded were less than his pecuniary loss as shown by the evidence, and that no damages had been allowed for pain and suffering. On the hearing an additional amount of $250 was awarded. We think the amount of the judgment is reasonably modest and is in line with the evidence.

We find no error. The judgment is affirmed, with costs to the plaintiff.

CLARK, POTTER, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

BROSS *v.* CITY OF DETROIT.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—MUNICIPAL CORPORATIONS—WAIVER—PENSIONS—COMMON-LAW ACTION.

   Where injured city fireman waived provisions of workmen's compensation act for purpose of securing pension under city ordinance, he was bound by other provisions of said act, and could not maintain common-law action against city, since he was not entitled to both remedies (2 Comp. Laws 1929, §§ 8410, 8413, 8436).

2. SAME—RIGHT OF ACTION AGAINST THIRD PARTY.

   Nor could he maintain said action on theory that, said injuries having been caused by collision with street car, and that, in operating street railway system as private enterprise, which is function distinct from that in which he was employed, city was "some person other than the employer," within meaning of 2 Comp. Laws 1929, § 8454.

3. SAME—WORKMEN'S COMPENSATION ACT APPLIES TO CITY OPERATING STREET RAILWAY SYSTEM:

   Claim that where city is operating street railway system as private enterprise, workmen's compensation act has no application, *held*, without merit.

Appeal from Wayne; Moll (Lester S.), J. Submitted January 4, 1933. (Docket No. 4, Calendar No. 36,748.) Decided April 4, 1933.

Case by George Bross, city fireman, against City of Detroit, a municipal corporation, for personal injuries alleged to be due to negligence in operation of defendant's street railway. Directed verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Colombo, Colombo & Colombo, for plaintiff.

Raymond J. Kelly and *James S. Shields,* for defendant.

McDONALD, C. J. The plaintiff was injured in a collision between a hook and ladder truck which he was driving and a street car at the intersection of Harper and Concord avenues in the city of Detroit, Michigan. At the time of the accident he was an employee of the city fire department. The street railway system is owned and operated by the city. The injuries received by the plaintiff were permanent. He made application for retirement under the provisions of the city ordinance, and was retired on pension at half pay. The pension has since been paid regularly at a monthly rate of $105 and accepted by the plaintiff in lieu of compensation under the workmen's compensation statute (2 Comp. Laws 1929, § 8407 *et seq.*). Though receiving the pension, he claims the right to maintain this common-law action against his employer for damages. The trial court thought otherwise, and for that reason directed a verdict in favor of the defendant. The plaintiff has appealed.

Both parties were under the provisions of the compensation statute. As originally enacted, an

agreement by the employee to waive compensation was declared to be invalid. 2 Comp. Laws 1915, § 5450. Because he could not waive compensation, an employee of a city which had adopted a pension system might recover both compensation and pension for the same injury. To remedy this situation the legislature, by Act No. 173, Pub. Acts 1921, amended the law by adding a proviso in substance that the employee might waive his right to compensation and accept a pension in lieu thereof, but could not have both. 2 Comp. Laws 1929, §§ 8413, 8436.

The first theory advanced by the plaintiff is stated in his brief as follows:

"Plaintiff had the right to waive the provisions of the workmen's compensation act and accept a pension in lieu thereof. When he waived the provisions of said act he was no longer subject to any provision of said act. Having voluntarily placed himself beyond the workmen's compensation act, he had the same rights and privileges that any other person had, to wit, the right to sue the party responsible for the accident."

We cannot accept this theory as a basis of recovery. The plaintiff was bound by the provisions of the act. So was the city, his employer. When he waived his right to compensation for the purpose of securing a pension, he did not thereby release himself from other provisions of the act. Prior to accepting the pension, he had two remedies, each for the same wrong. He had a right to compensation or to a pension. He could not have both. He could not maintain a common-law action for damages against his employer, for his right to maintain such action was taken from him by the statute, 2 Comp. Laws 1929, § 8410. Having elected to be bound by the statute, he is not entitled to a remedy which it has abolished.

But the plaintiff claims if he is still bound by the provisions of the act he is entitled to maintain his suit at law under authority of 2 Comp. Laws 1929, § 8454, which reads:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in *some person other than the employer* to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the employer for compensation under this act, but not against both, and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commissioner of insurance, as the case may be, the liability of such other person."

It is contended by the plaintiff that, as the city of Detroit owned and operated its street railway system, the agency that caused his injury, which was a function distinct from that in which he was employed, the city was "some person other than the employer," within the meaning of the above-quoted provision of the statute.

No authorities are cited by the plaintiff to support this contention. It is too plainly untenable to require argument. Nor is there any merit to the claim that because the city was operating a street railway system as a private enterprise the workmen's compensation law has no application.

We find no error.

The judgment is affirmed, with costs to the defendant.

CLARK, POTTER, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

TOWNSHIP OF GROSSE ILE *v.* SAUNDERS.

1. TAXATION—EXEMPTIONS—MILITARY PURPOSES—ARMORIES—AVIATION BASE—ARMY AND NAVY.

Real and personal property occupied for military purposes by Michigan naval force as United States naval reserve aviation base, *held*, exempt from taxation under provisions of 1 Comp. Laws 1929, §§ 692, 3395, exempting "armories" from taxation.

2. SAME.

Where land was subject to taxation at time board of review held its final session, it was not exempt for that year, although negotiations for leasing it for military purposes were then pending and were afterward completed, rendering it exempt from taxation thereafter (1 Comp. Laws 1929, §§ 692, 3395).

3. SAME.

Land leased for military purposes at time board of review held its final session was not subject to assessment, and should have been stricken from roll.

POTTER, NORTH, and FEAD, JJ., dissenting.

Appeal from Michigan State Tax Commission. Submitted January 19, 1933. (Docket No. 145, Calendar No. 36,867.) Decided April 4, 1933.

Petition by Richard T. Brodhead, Commanding Officer of Michigan Naval Force, to exempt from taxation property in township of Grosse Ile leased for military purposes. Petition denied. Brodhead appealed to State Tax Commission. From order of Edwin F. Saunders, chairman of Michigan State Tax Commission, granting exemption, the township and M. S. Harlan, taxpayer, appeal. Modified and affirmed.

Beaumont, Smith & Harris (*M. S. Harlan,* of counsel), for township and Harlan.

Patrick H. O'Brien, Attorney General, *Vincent D. Gorman* and *Hugh E. Wilson,* Assistants Attorney General, for Saunders and Brodhead.

McDONALD, C. J. This is an appeal from an order of Edwin F. Saunders, chairman of the State tax commission, granting taxation exemption on certain lands in the township of Grosse Ile, Wayne county, Michigan.

The Michigan naval reserve airport is a unit of the United States naval reserve. The State of Michigan acquired a five-acre strip of land on the southern tip of Grosse Ile, on which it expended $100,000, and the Federal government expended $500,000 to establish and equip an airport, which, with land containing about 379 acres subsequently leased from the receiver of the Aircraft Corporation, a private organization, and the Curtis Wright Flying Service, Inc., is used by the Michigan naval force as a United States naval reserve aviation base.

With the exception of the five-acre parcel, these lands, buildings, and equipment were placed on the assessment roll for the year 1932 by the assessor of Grosse Ile township. Richard T. Brodhead, commanding officer of the Michigan naval force, protested the assessment before the township board of review, on the ground that the property was being used for military purposes and was not legally assessable under the laws of the State of Michigan; but the board held that it was not exempt, and refused to strike it from the assessment roll. On appeal to the Michigan State tax commission, an exemption was granted, and the plaintiffs appealed.

The question is whether the real and personal property in question occupied for military purposes as a United States naval reserve aviation base is exempt from taxation under the provisions of 1 Comp. Laws 1929, §§ 692, 3395.

Section 692 reads:

"Armories erected by counties, cities, private corporations, corporations composed of national guard companies or private individuals, and used by organizations of the permanent organized militia, shall be exempt from all taxes ordinary or extraordinary, whether levied by the State or by counties or municipalities the same as other State property is exempt."

Section 3395 reads:

"The following real property shall be exempt from taxation: * * * Tenth: All land dedicated to the public, and actually used as a park and any monument ground or any armory belonging to any military organization, and not used for gain or any other purposes."

It is the contention of the defendants that, upon leasing the properties in question, they became a part of the "armory" operated as the Michigan naval reserve aviation base for military purposes.

The stipulated facts show that the Michigan naval force is a unit of the United States naval reserve organized under the national defense act of 1925 (34 USCA, § 751 *et seq.*); that from the aviation bases established in various cities there operate 22 naval reserve squadrons, 15 naval squadrons, and 7 marine squadrons; that the Michigan base is responsible for the training squadron, a fighting squadron, and a service squadron, which are important units in our national defense; and that the lands in question are adaptable to such use and are

necessary to carry out the purposes for which the Michigan base was established.

There is no doubt that these lands are used for military purposes; but the plaintiffs claim that they are not armories within the meaning of 1 Comp. Laws 1929, § 692, and are, therefore, not exempt from taxation.

To give the word "armories" the narrow meaning contended for by the plaintiffs would defeat the purpose of the statute, which, as indicated by its title, was "To increase the efficiency of the military establishment of the State of Michigan." In its strict sense, an armory is a building where arms, ammunition, and instruments of war are stored, but in connection therewith it has been the custom to maintain grounds for drilling purposes and target practice. Such grounds are as much a part of the armory as the building itself. Together they constitute a military establishment. New inventions and modern methods have increased the use to which armories are adapted. They have increased the instruments of war and the military needs in the use of armories. It was the purpose of the legislature to exempt from taxation all such military establishments. The lands in question are a part of a military establishment, and as such were intended by the legislature to be included in "armories" as used in the statute. They are, therefore, exempt from taxation "the same as other State property is exempt."

But it is contended by the plaintiff that the lands were not exempt when the supervisor of Grosse Ile made the assessment and the board of review approved it. We think this contention is correct as to the Detroit Airport Corporation land. The lease of this land from the receiver was not approved by

the United States district court for the eastern district of Michigan, southern division, until July 15, 1932. Negotiations for the lease were pending when the board of review held its final session on June 14, 1932, but it had not been obtained when the board had power to strike the property from the assessment roll. It was subject to taxation for the 1932 taxes at that time, and though it became exempt thereafter, there was no one clothed with authority to correct the assessment roll. See *Iron Mountain Public Schools* v. *O'Connor,* 143 Mich. 35.

As to the land leased from the Curtis Wright Flying Service, Inc., by the defendants, the lease was obtained on May 25, 1932. The land was not subject to assessment at the time the board of review met, and should have been stricken from the roll.

The assessment against the Detroit Airport Corporation land for the 1932 taxes is approved. It should not have been stricken from the assessment roll. With this modification, the order of the State tax commission is affirmed. Other questions have been considered, but we do not deem it necessary to discuss them.

CLARK, SHARPE, WIEST, and BUTZEL, JJ., concurred with MCDONALD, C. J.

FEAD, J. *(dissenting).* The question of whether an airport, privately owned but used by the State military forces, should be exempted from taxation is for the legislature. The present inquiry is whether such an airport is an "armory erected" within the meaning of the exemption law, 1 Comp. Laws 1929, § 692.

It has long been the rule, often declared, that statutes exempting private property from taxation are to be strictly construed. As long ago as *Lefevre*

v. *Mayor, etc., of Detroit,* 2 Mich. 587, it was held that a statute exempting from taxation "all houses of public worship" did not exempt the grounds upon which the buildings stood. The rule requires statutory language, susceptible of different constructions, to be contracted to restrict exemption rather than expanded to permit it, and prohibits the construction claimed by defendants.

Moreover, the implications of the statute deny the exemption even though a broad presumption be indulged that the legislature intended the law to fit into future conditions produced by inventions in military science and not known when the law was enacted.

Section 692 is the last of four consecutive sections dealing with armories. The three preceding sections concern erection of armories by the State and in them "armory" and "erected" unmistakably are used with reference to the construction of buildings. The rule of context carries the same meaning into the last section.

The construction claimed would exempt areas for drill grounds, larger spaces for rifle ranges, broad acres for flying fields, and many miles for big gun practice. Yet the statute does not mention additional land, set its limits, nor authorize any person to measure it for exemption. The lack of specifications or limitations upon the extent of land included in the exemption demonstrates that the legislature considered that the term used, "armory erected," carries its own boundaries and needs no other limitation because its application to buildings only is clear. The power to exempt private property from taxation, embraced within the other construction, is so extraordinary and unrestrained as, of itself, to

deny such intention of the legislature in the absence of unequivocal statutory words of grant.

In my opinion, the land at bar is not exempt from taxation, and the order of the State tax commission should be set aside, and the officers of the township directed to proceed to the levy and collection of taxes on the premises. No costs will be awarded.

POTTER and NORTH, JJ., concurred with FEAD, J.

KARL *v.* NEW YORK CENTRAL RAILROAD CO.

1. TRIAL—RAILROADS—NEGLIGENCE—PROXIMATE CAUSE—INSTRUCTION—CONTRIBUTORY NEGLIGENCE.

   Where, in pedestrian's action against railroad company for personal injuries caused by crossing accident, question of plaintiff's contributory negligence was for jury, it was error for trial court to instruct jury that defendant was guilty of negligence, and that this negligence was proximate cause of accident.

2. APPEAL AND ERROR—CURING ERROR.

   Error in instructing jury that defendant's negligence was proximate cause of accident, *held*, not corrected by subsequent instruction that if plaintiff was guilty of contributory negligence she could not recover.

3. RAILROADS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT.

   Pedestrian who started to cross spur track crossing street while engine was standing, and who did not again look to see whether it started before she was struck and injured, was guilty of contributory negligence as matter of law, precluding recovery, although railroad company was negligent in starting engine without giving any warning signal.

   McDONALD, C. J., and CLARK and POTTER, JJ., dissenting.

Appeal from Monroe; Root (Jesse H.), J. Submitted January 13, 1933. (Docket No. 37, Calendar No. 36,939.) Decided April 4, 1933. Rehearing denied June 5, 1933. Motion to reconsider denied June 28, 1933.

Case by Dorothy Karl against New York Central Railroad Company, a corporation, for personal injuries alleged to be due to defendant's negligence at a street crossing. Verdict and judgment for plaintiff. Defendant appeals. Reversed, without a new trial.

Clarence P. Milligan (Samuel D. Frankel, of counsel), for plaintiff.

Thornton Dixon (John J. Danhof, of counsel), for defendant.

CLARK, J. *(dissenting).* At two o'clock in the afternoon of December 17, 1931, plaintiff, unmarried, age 21 years, left, with another young woman, her place of employment, Consolidated Paper Company's plant, in Monroe, and walked west on the sidewalk on the north side of First street. Just north of the street and parallel to it is a railroad siding. Leading from the siding in a southeasterly direction, and crossing the street, is a spur track. Plaintiff observed a moving locomotive and cars on the spur. When she reached the place where the sidewalk crossed the spur track, the locomotive was standing across the street facing southeast, and the end of the tender, a short distance, perhaps 10 or 15 feet from the sidewalk. Plaintiff saw it standing there. She proceeded to pass behind it on the sidewalk, and as she did so, the tender, because of the angle of the spur track, was behind her and out of her view. Without warning by trainman, switchman, bell, or otherwise, the locomotive backed sud-

denly and the end of the tender struck plaintiff, who fell and suffered serious injury, chiefly loss of an arm. Defendant put in no testimony, and at the conclusion of proof requested directed verdict, which was refused. Plaintiff had verdict and judgment for $30,000, which, on motion for new trial and by order and remittitur, was reduced to $15,000. Defendant has appealed.

The chief question is that plaintiff was guilty of contributory negligence as a matter of law.

The standard of conduct, adopted by this court in *Davis* v. *Railway Co.*, 241 Mich. 166, is:

"There is a standard of conduct, based on the rule of reasonable care, to which all drivers of motor vehicles must conform or bear the consequences. This standard is stated 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), and we quote therefrom:

" 'When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look.' "

It will be observed that this rule is especially applicable to care in respect of moving trains.

It is recognized that:

"Special conditions, however, may change the duty from a standard of conduct to an element of care to be weighed by a jury." *Ackerman* v. *Railroad Co.*, 249 Mich. 693.

And see *McPeake* v. *Railway Co.*, 242 Mich. 676.

To hold plaintiff guilty of contributory negligence as a matter of law is to hold that she was bound to

anticipate that the locomotive standing near the sidewalk would be backed suddenly and without warning of any kind. She was not so bound.

In *McWilliams* v. *Detroit Central Mills Co.*, 31 Mich. 274, it was held:

"The testimony indicates that he was crossing while the cars were standing still, and that they were suddenly started by the locomotive pushing against them to back them up. A passenger along the sidewalk of a public street has a right to expect some warning before any sudden movement of this kind, and there should be very plain proof of negligence to bind him under such circumstances."

And see *Davis* v. *Railroad Co.*, 142 Mich. 382 (19 Am. Neg. Rep. 325). The question of plaintiff's contributory negligence was for the jury.

Error is assigned on the following from the charge:

"The testimony in this case shows that as a matter of law that this defendant railroad company was guilty of negligence, and that this negligence was the proximate cause of this accident."

On the facts here the instruction that defendant was guilty of negligence was not improper. *Davis* v. *Railroad Co., supra.* The inadvertent statement that such negligence was the proximate cause of the accident was incorrect, as it would wholly exclude the question of plaintiff's contributory negligence, which question the trial judge, in other paragraphs of the charge, left to the jury. The record is that at the conclusion of the charge, counsel for plaintiff called attention to the inadvertence which the trial judge thereupon expressly corrected by further instruction. Considering the correction and the charge as a whole, we find no reversible error.

Lastly, the judgment is urged to be excessive. Plaintiff, at the threshold of life, expectancy of 41.53 years, earning from $13.50 to $15 per week, lost an arm. Pain, suffering, humiliation, and diminution in capacity and opportunity, need no discussion. A review of cases covering the question of excessiveness of verdict for loss of an arm will be found in L. R. A. 1915 F, p. 53. And see *Schnurr* v. *Railway,* 222 Mich. 591; *Cawood* v. *Earl Paige Co.,* 239 Mich. 485.

Under the authorities and on this record we agree with the trial court that judgment is not excessive. No other question requires discussion.

Judgment should be affirmed.

MCDONALD, C. J., and POTTER, J., concurred with CLARK, J.

WIEST, J. I find reversible error. The court instructed the jury:

"In other words, the testimony in this case shows that as a matter of law that this defendant railroad company was guilty of negligence, and that this negligence was the proximate cause of this accident, so we needn't spend any time upon that part of the case."

This was an instruction to find for plaintiff, and was not corrected by subsequent instruction that if plaintiff was guilty of contributory negligence she could not recover. Under the undisputed evidence defendant was entitled to a directed verdict. The court was in error in instructing the jury:

"I know of no rule of law, or statute of this State, that requires having a person look for any train at any given distance; they are bound to use reason-

able care before going upon any railroad track or endeavoring to cross the track."

This instruction was preceded, but not immediately, by the following:

"Her testimony is, as I have already given it to you, that she, when 15 feet east of the spur track, observed this engine standing upon the highway with the tender at least partly onto that part of the street lying between the pavement and sidewalk, and that she did not again look to see whether or not that engine had started up, or whether she was in a place of danger."

Under the circumstances, plaintiff was in a position and had opportunity to watch the movement of the engine, and it was her duty to maintain a watch of its progress as well as heed that of her own, and, had she done so, the accident would not have happened.

She was guilty of a want of ordinary care, and the accident happened by reason of the negligence of defendant and the contributory negligence of plaintiff. *Johnson* v. *Railroad Co.*, 246 Mich. 52.

The judgment is reversed, with costs to defendant, and without a new trial.

SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred with WIEST, J.

NORTHRUP *v.* JAY.

1. DISMISSAL AND NONSUIT.
   Dismissal of cause terminates all proceedings therein.

2. SAME.
   Dismissal without prejudice leaves parties as if no action had been instituted.

3. SAME—PRINCIPAL AND SURETY—DISCHARGE OF SURETY.
   Where replevin suit in which defendant had executed redelivery bond (3 Comp. Laws 1929, § 14823) was dismissed without prejudice as one in which no progress had been made for more than one year (3 Comp. Laws 1929, § 14253), surety was thereby discharged.

4. SAME—PRESUMPTION OF REGULARITY.
   Where replevin suit was dismissed without prejudice as one in which no progress had been made for more than one year (3 Comp. Laws 1929, § 14253), and plaintiff waited for nearly 21 months before seeking reinstatement, court properly assumed, under theory of presumption of regularity of action, that case was dismissed in accordance with statute and rule, in absence of showing to contrary.

Appeal from Wayne; Dehnke (Herman), J., presiding. Submitted January 17, 1933. (Docket No. 44, Calendar No. 36,649.) Decided April 4, 1933.

Replevin by Emily L. Northrup against William H. Jay, Detroit Fidelity & Surety Company, and others. Judgment for plaintiff against defendant Jay only. Plaintiff appeals. Affirmed.

Brown, Stoneman, Lorenzo & Springstun, for plaintiff.

Friedman, Meyers & Keys (Aaron Weiswasser, of counsel), for defendant Detroit Fidelity & Surety Company.

CLARK, J. On December 16, 1927, plaintiff brought replevin, and certain household furniture was taken on the writ. On December 22, 1927, defendant Jay executed a redelivery bond (3 Comp. Laws 1929, § 14823), with defendant Detroit Fidelity & Surety Company as surety. Declaration and plea were filed during the same month.

On February 3, 1930, the cause was dismissed without prejudice as one in which no progress had been made for more than one year. 3 Comp. Laws 1929, § 14253.

On November 21, 1931, plaintiff made motion to reinstate the cause, alleging inadvertence, and appealing to the grace of the court. A stipulation for reinstatement signed by counsel for plaintiff and counsel for defendants in the trial court (not present counsel) was filed. On and because of the stipulation the cause was reinstated.

In the period between dismissal and reinstatement, the surety, treating the matter as terminated, surrendered to its principal, defendant Jay, the collateral security it had taken when becoming surety. The trial court refused judgment against the surety. Plaintiff has appealed.

The dismissal of the cause "terminated all proceedings therein." *Miller* v. *Davis,* 241 Mich. 544; 18 C. J. p. 1207. "A dismissal without prejudice leaves the parties as if no action had been instituted." 8 Words and Phrases (1st Ser.), p. 7508, citing *Taylor* v. *Slater,* 21 R. I. 104 (41 Atl. 1001); *Scheinman* v. *Baker,* 250 Mich. 668; 54 C. J. p. 639.

Hence the surety here is discharged.

But plaintiff argues that the dismissal was without jurisdiction and void. The trial judge who ordered dismissal states that it was granted "in pursuance of the statute governing dismissal of 'no progress' cases," and in pursuance of a local court rule. Plaintiff recognized the dismissal as valid when petitioning for reinstatement. In any event, on this record, we are in accord with the following by the trial judge:

"You haven't established there was a lack of jurisdiction. There is no showing here there was no rule under which the case could be properly dismissed and I don't think I will trouble with this case any longer. * * * I am going to dismiss the case on the theory that the presumption * * * of regularity of action justifies the court in assuming that the case was dismissed in accordance with the rule."

As this disposes of the case, we need not consider the question that plaintiff is estopped, on this record, to ask judgment against the surety by reason of delay of nearly 21 months in seeking reinstatement; nor need we discuss asserted invalidity in order of reinstatement that signature of then counsel for defendant to the stipulation was unauthorized and made at a time when his client had secured return of his collateral and was not collectible.

Affirmed.

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

WARD *v.* VILLAGE OF BIRMINGHAM.

NEW TRIAL—GREAT WEIGHT OF EVIDENCE.

Where issue was close but simple, and verdict was evidently rendered upon comprehension of facts, motion for new trial, on ground that verdict was against great weight of evidence, was properly denied, although evidence was quite contradictory.

Appeal from Oakland; Gillespie (Glenn C.), J. Submitted January 4, 1933. (Docket No. 5, Calendar No. 36,886.) Decided April 4, 1933.

Assumpsit by William F. Ward, doing business as W. F. Ward Company, against Village of Birmingham, a municipal corporation, to recover balance due under a well-drilling contract. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

A. Floyd Blakeslee, for plaintiff.

Clare H. Ogden (*Pelton & McGee,* of counsel), for defendant.

CLARK, J. Plaintiff entered into a contract with defendant village to construct for it a well of certain dimension and capacity. He sued to recover on the theory that he had performed the contract. The defense is that he did not perform, chiefly in respect of filing bond and of capacity of well. The issue was submitted to a jury, who found for plaintiff. From judgment on verdict, defendant has appealed, contending that the verdict is against the great weight of the evidence, and that, therefore, the trial judge erred in denying a motion for new trial.

The issue is close but simple, and the evidence quite contradictory. We have no doubt the verdict was rendered upon comprehension of the facts. Nothing will be gained by stating them further. We are in accord with the trial judge.

Affirmed.

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

GOULD v. FIERO.

1. ADVERSE POSSESSION—BOUNDARIES.

Title by adverse possession was acquired where possession and occupation of city lot continued for more than statutory period, although boundary thus established is not true line according to plat.

2. SAME—EJECTMENT—DIRECTED VERDICT.

In ejectment to recover strip of land and to settle boundary between two city lots, where it appeared that defendants had had possession of said strip for more than statutory period, that line was marked by stakes, post, and trees, that they had occupied said strip as their own under claim of right, and had planted hedge thereon, they were entitled to directed verdict, on ground that they had title by adverse possession.

3. SAME—RUNNING OF STATUTE.

That some one occasionally ran over hedge on strip of land in dispute, or turned too short at street line, is not sufficient to raise issue of adverse possession.

Error to Jackson; Simpson (John), J. Submitted January 6, 1933. (Docket No. 45, Calendar No. 35,774.) Decided April 4, 1933.

Ejectment by John Gould and another against Leo J. Fiero and another to recover possession of narrow strip of land lying between parties' property. Verdict and judgment for plaintiffs. Defendants appeal. Reversed, and judgment ordered entered for defendants.

Frank L. Blackman, for plaintiffs.

Richard Price, for defendants.

CLARK, J. Plaintiffs brought ejectment to determine title to a narrow strip of land and to settle boundary, and had verdict and judgment, from which defendants have appealed.

Plaintiffs own lot 7, block 2, J. C. Wood's Addition to Jackson. Defendants own part of lot 6, adjoining on the north. The disputed strip lies between the two parcels and averages about one foot in width. The dispute was produced by survey of a lot south of plaintiffs' lot, by reason of which plaintiffs were asked to concede a different lot line on the south, which they did, and they in turn asked defendants to make like concession to them, which was refused. The jury found the surveyed line, according to a correct and original survey, to be as claimed by plaintiffs. The finding could not well have been otherwise. The resurvey involved an original monument, and its correctness is sustained by at least the great weight of the evidence.

Adverse possession was also submitted as an issue of fact. We think on this issue defendants were entitled to a directed verdict, as requested. Defendants had possession of the disputed strip for more than the statutory period before suit. The line was marked by stakes, a post, and by trees. Defendants' lot, including the strip, in early years was maintained at a different grade from that of the lot now

owned by plaintiffs. It was occupied by defendants by way of care usual to owners of lots. Later, and after the grade of the lot now owned by plaintiffs was raised, defendants planted a hedge along the line which was on the line of the disputed strip. Defendants cared for and maintained the hedge and cut grass. Defendants at all times here in question have used and occupied the strip as their own and under claim of right. Plaintiffs had a driveway south of the hedge. That someone occasionally ran over the hedge or turned too short at the street line is not sufficient to raise an issue of adverse possession.

In *Whitaker* v. *Shooting Club,* 102 Mich. 454, 459, the established rule of this court respecting adverse possession is stated:

"'It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as is consistent with the character of the premises in question.' *Murray* v. *Hudson,* 65 Mich. 670, 673."

The syllabus of *Foster* v. *Wagenaar,* 251 Mich. 370:

"Title by adverse possession was acquired where possession and occupation of city lot continued for more than statutory period, although boundary thus established is not true line according to plat."

Plaintiffs' contention that there could not be adverse possession because they did not have actual knowledge that the holding was adverse is answered by *Bird* v. *Stark,* 66 Mich. 654, quoting syllabus:

"Adverse possession for 15 years is a statutory bar, and needs no agreement; and actual knowledge of such adverse holding is not required when the circumstances are such that the contiguous holder ought to have such knowledge."

Although defendants may have been mistaken as to the true line, they took the disputed strip, believing it to be their own, and they have claimed and held it adversely for more than the statutory period, and hence have title to it by adverse possession. 2 C. J. p. 141; *Call* v. *O'Harrow,* 51 Mich. 98; *Vandenberg* v. *DeVries,* 220 Mich. 484; *Pugh* v. *Schindler,* 127 Mich. 191.

Reversed, with costs, and remanded for judgment for defendants.

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

O'DONNELL *v.* OLIVER IRON MINING CO.

1. EVIDENCE—HYPOTHETICAL QUESTIONS.
   Party propounding hypothetical question has duty of formulating proper one.

2. SAME—MAY NOT BE BASED ON CONTRADICTORY TESTIMONY.
   Hypothetical question which referred in general manner to very lengthy testimony of other witnesses, some of which was contradictory, was not proper question to submit.

3. WITNESSES—EXPERT TESTIMONY—HYPOTHETICAL QUESTIONS.
   Without proper hypothetical questions, in which all facts from which experts were to draw their conclusions were stated, it was error to interrogate expert witnesses.

4. EVIDENCE—MINES AND MINING—SUBSIDENCE—SURFACE SUPPORT—LATERAL SUPPORT—NEGLIGENCE.
   In action against mining company for damages to plaintiff's house, alleged to be due to subsidence, owing to defendant's failure to furnish lateral and subjacent support for surface

upon which said house stood, it was error to admit testimony as to breakage of water hydrant in vicinity of plaintiff's house without in any way connecting it with said alleged subsidence.

5. SAME.

It was also error to admit testimony as to subsidence in neighborhoods far removed from plaintiff's house without showing that conditions there may have been responsible for subsidence of plaintiff's property.

6. DAMAGES—PERMANENT DAMAGES—REPARABLE DAMAGES—MEASURE OF DAMAGES.

If injury to property caused by negligence is permanent or irreparable, measure of damages is difference in its market value before and after said injury, but if injury is reparable, and expense of making repairs is less than value of property, measure of damages is cost of making repairs.

Appeal from Gogebic; Driscoll (George O.), J. Submitted January 17, 1933. (Docket No. 7, Calendar No. 36,512.) Decided April 4, 1933.

Case by Thomas O'Donnell against Oliver Iron Mining Company, a corporation, for damages to plaintiff's dwelling alleged to be due to wrongful mining operations of defendant. Verdict and judgment for plaintiff. Defendant appeals. Reversed, and new trial granted.

Jones & Patek (*Norris, McPherson, Harrington & Waer,* of counsel), for plaintiff.

Charles M. Humphrey and *Charles M. Humphrey, Jr.* (*Elmer F. Blu,* of counsel), for defendant.

BUTZEL, J. In the years 1910 and 1911, Thomas O'Donnell, plaintiff, erected a two-story dwelling house on property he owned on the north side of Ayer street, at a point 200 feet west of Lake street,

in the city of Ironwood, Michigan. The dimensions of the house were 27 by 52 feet. It was of frame construction, with brick veneer up to the second floor, and a cellar underneath the house.

Ironwood is located in Gogebic county adjoining Iron county, Wisconsin, both of which contain very large deposits of iron ore. A large part of the city of Ironwood is built directly over mines owned and operated by defendant, Oliver Iron Mining Company. Plaintiff claims that, owing to defendant's failure to furnish sufficient lateral and subjacent support for the surface upon which his house stood, a serious subsidence resulted, and, as a consequence thereof, cracks appeared in the foundation, walls, and cellar of the house to such an extent that the property has been very badly damaged. Defendant contends that the cracks are in no way due to subsidence, but rather to the fact that the house was built upon what was formerly marshy ground, and that this fact, together with the poor quality of the materials used in the foundation, made it impossible for the building to withstand the very damaging climatic conditions of several preceding winters. It further claims that the mining operations did not affect any of the property in the immediate proximity of plaintiff's home and could not possibly have caused the damage claimed. The jury rendered a verdict of $8,500 in favor of plaintiff, and defendant appeals. We shall discuss only a few of the more serious errors alleged.

Plaintiff's attorneys first introduced the deposition of Donald E. Sutherland, defendant's assistant general superintendent, called as an adverse witness. They also cross-examined under the statute (3 Comp. Laws 1929, § 14220) Oscar E. Olson, defendant's chief engineer for the Ironwood district, principally

about conditions in and about Ironwood. The testimony of both witnesses is voluminous and covers 88 pages of the printed record. They described the general contour of the land in and about Ironwood, testifying that in certain portions thereof there had been subsidence to a greater or lesser extent. Sutherland, however, stated positively that it was impossible for defendant's mining operations to have caused any damage to plaintiff's property.

Plaintiff next took the stand and then called Joseph H. Rowell and James H. Goudie to give expert testimony. Considerable difficulty was encountered by plaintiff's attorneys in submitting a proper hypothetical question to witness Rowell. After being admonished by the court to frame a proper question, witness was permitted to answer the following question propounded by them:

"*Q.* As a mining engineer, have you sufficient information before you, from what you have seen, from your examination, and from the testimony that you have heard of Mr. O'Donnell, Mr. Olson and Mr. Sutherland, to be able to form an opinion as to the cause of the cracks in the O'Donnell basement and floor?"

Rowell also stated that his opinion was based partially on the testimony of Mr. Sutherland and Mr. Olson. Witness Goudie was also asked to give his opinion, based on his own observations and experience and on the testimony of Sutherland and Olson. Vigorous objections to this form of question were made by defendant's counsel, but the trial court overruled defendant's objections.

A proper hypothetical question should have been propounded to Rowell and Goudie, and it could not be dispensed with by referring in a general manner to the very lengthy testimony of other witnesses,

one of whom stated positively that the cracks were not due to defendant's mining operations. Inasmuch as there had been an earlier trial of the same cause, the plaintiff's attorneys had full notice and ample opportunity to formulate a proper question. The effect of the questions was to make the witness, and not the jury, pass upon the credibility and correctness of the previous testimony. There was much testimony from which conflicting inferences as to the facts might be drawn, even were it conceded that the testimony on its face was not contradictory. The fact that Olson and Sutherland both gave opinions in the course of their testimony made the expert testimony based upon their statements even more objectionable. We cannot tell what facts were made the basis of the experts' opinions, nor whether, in their formulation, there was an improper reliance placed on the opinions given by Olson and Sutherland. *People* v. *Aikin,* 66 Mich. 460 (11 Am. St. Rep. 512); *People* v. *Bowen,* 165 Mich. 231; *Dunagan* v. *Appalachian Power Co.* (C. C. A.), 33 Fed. (2d) 876 (68 A. L. R. 1393); *People* v. *McElvaine,* 121 N. Y. 250 (24 N. E. 465, 18 Am. St. Rep. 820); *People* v. *Le Doux,* 155 Cal. 535, 553 (102 Pac. 517).

It was error, under the circumstances, to interrogate the expert witnesses without proper hypothetical questions, in which all of the facts from which the experts were to draw their conclusions were stated. Our attention is called to some authority that permits the practice of permitting an expert to base his conclusions on the testimony of previous witnesses, but even this authority does not go so far as to permit such questions where the previous testimony has been long and involved and is somewhat contradictory. *Kempsey* v. *McGinnis,* 21 Mich. 123, 137.

Defendant objected to the admission of testimony to the effect that a water hydrant had broken in the vicinity of plaintiff's home. The cause of the break was not shown. Water hydrants have been known to break in cities far removed from mining operations. Such breaks have frequently been the result of electrolysis, frost, faulty construction, or causes other than subsidence. The judge permitted the testimony upon plaintiff's promise to connect it with other evidence showing a relationship to the subsidence. He neglected to do this, and defendant thereupon asked that the testimony in regard to the water hydrant be stricken. The trial judge's denial of this request was error. As the record stands, at most there was an unfounded inference that the break in the water hydrant was caused by subsidence. Plaintiff sought to strengthen his case by building one inference upon another inference which had no basis in the testimony. This was error. The testimony should have been either excluded, or, if admitted, stricken upon plaintiff's failure to connect it up with the other testimony in the case. *United States* v. *Ross,* 92 U. S. 281; *Swenson* v. *Erlandson,* 86 Minn. 263 (90 N. W. 534).

Testimony was also admitted, over objections of defendant, to show subsidence of soil in neighborhoods far removed from plaintiff's residence, at points where the excavations were far more extensive and located and conducted under conditions substantially lacking in similarity to those claimed responsible for the damage in the instant case. A large amount of this testimony related to operations over half a mile east of plaintiff's property, and there was no showing whatsoever that such operations could have caused any damage to plaintiff's property. When objection was made, plain-

tiff's counsel here again stated that the testimony would be connected up in the proper manner. The court permitted all of this testimony to stand, despite the fact that the alleged relevancy of the testimony was not shown, and charged the jury that it might consider conditions at and around the mines in determining whether plaintiff's property was damaged by defendant's mining operations. It was error to permit any testimony as to what took place in other parts of Ironwood or its vicinity without some showing that such conditions may have been responsible for the subsidence of plaintiff's property. The conditions under which the operations were being conducted to the east of the O'Donnell property were so dissimilar that evidence as to these operations and their effect could have no relevancy in this cause, and would only tend to mislead and confuse the jury. The rule is stated in 2 Jones, Commentaries on Evidence (2d Ed.), § 608, pp. 1124, 1125:

"In determining whether certain effects have been produced by the causes alleged it has frequently been held that the testimony need not be confined to the effect in the case upon trial, but that proof of the effect upon other property similarly situated may be received. * * * But it will be found that the cases admitting testimony of this character have all recognized the rule that substantial similarity of conditions must first be shown."

See *Emerson* v. *Lowell Gas Light Co.*, 3 Allen (85 Mass.), 410, 417; *Haynes* v. *Burlington*, 38 Vt. 350, 363; *Louisville Water Co.* v. *Weis*, 76 S. W. (Ky.) 356; *Hughes* v. *General Electric Light & Power Co.*, 107 Ky. 485 (54 S. W. 723).

As the case must go back for a new trial, on account of the errors pointed out, we also call atten-

tion to another alleged error. The court instructed the jury that, if it found that the injury to plaintiff's property was caused by defendant's negligence, the damages should represent the difference between the market value of the house at the date of the injury and that value it would have had if the property had remained undamaged. This is the measure of recovery only where the injury is permanent. No instruction was given as to what the measure of damages should be in case the jury found the injuries were reparable, nor did defendant make any showing as to the cost of full restoration and repair of the house. Apparently, plaintiff tried the case on the theory that the damage was permanent and irreparable. Nevertheless, if defendant shows that the property can be repaired and restored to the condition it would have been in had it not been damaged by the subsidence, and also gives proper testimony as to the cost of the repairs, the court should make it clear to the jury that the question as to the permanency of the damage, and, if reparable, the cost of repairs, is one of fact for them to decide, if they conclude that defendant was responsible for the damages. The correct rule is stated in *Berkey* v. *Berwind-White Coal Mining Co.*, 229 Pa. 417 (78 Atl. 1004), where the court said:

"The twelfth assignment relates to the measure of damages. The learned judge correctly disposed of the matter covered by this assignment. He distinctly told the jury that if the injury was reparable or curable with reasonable effort and expense less than the value of the property, the measure of damages was what it would cost to make the repairs. He further instructed them that there had been no proof offered by the plaintiff of what it would cost to make the repairs and 'if it is reparable, there being no proof of the cost of repair, you cannot allow

for it.' He also told the jury in answer to a point, and very properly so, that if the injury was permanent the measure of damages was the difference in the market value of the farm before and after the injury inflicted by the mining operations. The assignment is dismissed.''

See, also, *Ohio Collieries Co.* v. *Cocke,* 107 Ohio St. 238 (140 N. E. 356).

The judgment is reversed, with costs to defendant, and the case is remanded to the lower court for a new trial.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and WIEST, JJ., concurred.

CLARK *v.* ROEN.

1. SEDUCTION—DEFINITION.
   Definition of seduction is same in criminal and civil actions.

2. SAME—PROSECUTRIX IN CRIMINAL ACTION MUST BE UNMARRIED.
   Prosecutrix in criminal action for seduction must be unmarried (3 Comp. Laws 1929, § 16823).

3. SAME—PLEADING—AMENDMENT.
   In action for seduction, after plaintiff had answered few preliminary questions, court properly permitted amendment of declaration by addition of statement that plaintiff was unmarried woman.

4. DAMAGES—MENTAL SUFFERING—SEDUCTION.
   Damages in nature of pain, mental suffering, and humiliation resulting from seduction, being extremely difficult to evaluate, Supreme Court will not interfere with amount awarded unless it is so unreasonable and excessive as to shock conscience of court.

5. SAME—EXCESSIVE VERDICT—SEDUCTION—PAIN AND SUFFERING.
Verdict of $2,000 as damages for seduction cannot be said to be excessive, in view of plaintiff's humiliation, disgrace, pain, and suffering.

6. TRIAL—SEDUCTION—ORDER OF PROOF—REBUTTAL.
Where, in action for seduction, plaintiff's testimony was rather vague and indefinite, there was no abuse of discretion in permitting her to give rebuttal testimony which cleared up all doubts arising out of vagueness of her former testimony and established her right of recovery, where defendant was also given opportunity to introduce further testimony.

Appeal from Charlevoix; Gilbert (Parm C.), J. Submitted January 25, 1933. (Docket No. 166, Calendar No. 37,055.) Decided April 4, 1933.

Case by Florence Clark against John J. Roen for seduction. Judgment for plaintiff. Defendant appeals. Affirmed.

E. N. Clink (*C. M. Bice,* of counsel), for plaintiff.

Leon W. Miller, for defendant.

BUTZEL, J. Florence Clark recovered a judgment of $2,000 against John J. Roen, in an action for seduction. The declaration, as filed, did not allege that plaintiff was an unmarried woman. In *Greenman* v. *O'Rily,* 144 Mich. 534, 538 (115 Am. St. Rep. 466), we held that the definition of seduction is the same in criminal and civil actions. 3 Comp. Laws 1929, § 16823,* provides that the prosecutrix in a criminal action for seduction must be unmarried. After plaintiff, as the first witness in her behalf, had answered but a few preliminary questions, the court permitted the declaration to be amended by the addition of a statement that plaintiff was an unmarried woman. The amendment was proper. See *M. M. Gantz Co.* v. *Alexander,* 258 Mich. 695, 697.

* See Act No. 328, Pub. Acts 1931, § 532.

Defendant claims that the damages allowed plaintiff were excessive. She claims pain, suffering, humiliation, etc. It is extremely difficult to evaluate mental suffering and humiliation, and unless the damages suffered thereby were so unreasonably and excessively assessed as to shock the conscience of the court, we will not interfere. Damages in a case of this character cannot be figured with any degree of exactitude. The problem of measuring the recovery is somewhat similar to that in a negligence case, where we have frequently experienced difficulties in fixing the amount of damages by any rule of thumb. *Sebring* v. *Mawby*, 251 Mich. 628; *Palmer* v. *Security Trust Co.*, 242 Mich. 163 (60 A. L. R. 1392). There is no doubt but that plaintiff was entitled to more than nominal damages as contended for by defendant. Her humiliation and disgrace, pain and suffering, were of such a nature that we cannot say that the sum of $2,000 awarded her was excessive. See *Bennett* v. *Beam*, 42 Mich. 346, 351 (36 Am. Rep. 442).

It is claimed that the judgment is against the great weight of the testimony. This claim might appeal to us more strongly were we primarily a fact-finding body and possessed of the opportunity of seeing the witnesses. The trial judge expressed doubt at the conclusion of her testimony as to whether she had made out a *prima facie* case. Her testimony was neither clear nor definite, possibly due to the embarrassing and difficult position in which she was placed. She first alleged that the seduction had taken place in the year 1930, but later corrected the date by an assertion that it occurred in 1929. The court admonished her attorney, and stated that he was not making out a case.

Plaintiff was recalled to give rebuttal testimony, however, and at this time she cleared up all doubts

arising out of the vagueness of her entire testimony by making positive statements that established her right of recovery. There was no jury, and, although the testimony should have been introduced in proper order, we cannot hold that there was an abuse of discretion in permitting the testimony in rebuttal. *Meade* v. *Bowles,* 123 Mich. 696; *Harnau* v. *Haight,* 189 Mich. 600 (13 N. C. C. A. 566); *Gilchrist* v. *Mystic Workers of the World,* 196 Mich. 247. In permitting the testimony, the court intimated that he would give defendant full opportunity to introduce further testimony in reply if he desired. Defendant does not assert, as a ground for appeal, improper introduction of the rebuttal testimony, unless such an objection may be inferred from his general statement that the judgment is against the great weight of the testimony. After a very careful reading of the record, we are constrained to hold that the judgment is not against the great weight of the testimony. We have only considered the questions raised by appellant.

The judgment is affirmed, with costs to plaintiff.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and WIEST, JJ., concurred.

OTHOUDT *v.* ADDISON FUR CORP.

1. ANIMALS—LIENS—CARE AND KEEP—AGISTMENT—COMMON LAW.
   At common law, an agister who kept and cared for animals had no lien for their keep, in absence of special agreement, except where animal was trained for racing, and for medical treatment, etc., on theory that there was improvement of object bailed.

2. SAME—STATUTES.

3 Comp. Laws 1929, § 13194, providing for lien for keep of certain animals, does not apply to animals other than those described in section 13186.

3. SAME—CONTRACT FOR KEEP—LIENS—FOXES.

Contract for keep and care of foxes, providing that neither they nor their increase should be removed from ranch until ranching fees had been paid in full, and providing further that ranch owner had right to sell any of said foxes to pay said fees, *held,* to create lien.

4. LIENS—CONTRACTS.

Lien created by express or implied contract is enforceable.

5. ANIMALS—CARE AND KEEP—LIENS—IMPLIED CONTRACT.

Where contract for care and keep of foxes, and creating lien therefor, expired at end of year, and thereafter fox owners failed to remove foxes or pay fees, there was implied agreement on their part to pay fees on same terms as had previously been agreed upon, including lien therefor.

6. ESTOPPEL—ACQUIESCENCE—LIENS—ANIMALS—CARE AND KEEP.

Where owners of foxes allowed them to remain on ranch for several years after expiration of contract for their care and keep without paying therefor, their conduct amounted to acquiescence and implied consent to lien, and they are estopped from claiming otherwise.

7. CONVERSION—FOXES—ANIMALS—CARE AND KEEP—REFUSAL TO DELIVER.

Where owners of foxes allowed them to remain on ranch for several years after expiration of contract for their care and keep without paying therefor, and ranch owner never refused to give them up on payment of charges, there was no conversion.

Appeal from Jackson; Simpson (John), J. Submitted January 18, 1933. (Docket No. 39, Calendar No. 36,934.) Decided April 4, 1933.

Case by Charles V. Othoudt and another against Addison Fur Corporation, a Michigan corporation, for conversion of foxes. Judgment for defendant. Plaintiffs appeal. Affirmed.

J. Earle Brown (*Kenneth D. Wilkins* and *H. W. Glassen,* of counsel), for plaintiffs.

Burney E. Brower, for defendant.

BUTZEL, J. Charles V. Othoudt and E. Pearl Othoudt invested $4,000 in two pairs of silver black foxes, claimed to be of a particularly fine strain. It was expected that there would be a large profit made from their increase. Plaintiffs ranched the foxes at one of the fox farms of defendant Addison Fur Corporation. Two contracts were entered into, one referring to the increase from the foxes, and the other, dated October 1, 1927, referring to a ranching fee of $150 per year for each pair of foxes. The latter contract contained the following provisions:

"Neither said foxes nor the benefits accruing to second party under any pooling agreement shall be removed from said ranch until said ranching fees shall have been fully paid and satisfied and if said second party neglects or refuses to pay said ranching fees within 15 days after the same or any part thereof shall have become due, then in addition to its other remedies, said first party may offer said foxes and/or said benefits for sale (at either private or public sale) and may dispose of the same for the best price that may be secured, and deduct from the money so received the amount of such ranching fees and pay the remainder over to the second party or it may put such remainder to the account of said second party in any bank in the village of Evart or city of Jackson, Michigan.

"Said ranching fees shall not abate nor be diminished by virtue of the death and/or escape of said foxes and/or their offspring inasmuch as this contract is a part of and subject to the standard pooling agreement. * * *

"It is further agreed that this agreement shall expire on October 5, 1928, unless prior to October 1,

1928, a further written agreement for ranching after said expiration date is entered into."

Plaintiffs paid the ranching fee for the year ending October 1, 1928. In a letter dated November 13, 1928, urging plaintiffs to trade their foxes for shares of stock in National American Furs, Inc., defendant stated:

"RANCHING FEES DUE UP TO OCTOBER 1, 1928.

"That no exchange of foxes for stock can be completed nor can animals be removed from the ranches until all ranching fees due are paid."

Plaintiffs made no objection to this provision in the letter nor did they, prior to the commencement of the present proceedings, on September 15, 1931, demur or object in any manner to the demand for payment of the ranching fees as provided, or to the lien asserted by defendant on the foxes and their increase. The foxes required food, shelter, and care. Plaintiffs, by their own testimony, showed that their aim was to obtain a cash settlement for the foxes and their increase. They frankly stated that they wanted neither the foxes nor stock in the corporation, but desired a return of their money. The testimony further shows that defendant at no time refused to give up the foxes upon payment of the charges for their care. Plaintiffs brought the instant suit in trover for the value of the foxes. Defendant, in its answer, denied that it had ever refused to turn over the foxes to plaintiffs upon payment of the charges due for which it claimed a lien.

The trial judge held that defendant never claimed to own the foxes, but only sought payment for their keep, while plaintiffs desired that defendant take the foxes off their hands and pay for them; that under the most liberal construction of all of the testimony, plaintiffs had not established or main-

tained any conversion on the part of the defendant. The record fully sustains the judge's opinion. Plaintiffs appeal from a judgment of no cause of action.

Plaintiffs claim that defendant was not entitled to the lien which it was asserting, and, therefore, a demand for the return of the foxes was unnecessary to establish a conversion. At common law, an agister who kept and cared for animals of any kind had no lien for their keep, unless one was created by special agreement. There was a lien, however, when the animal was trained for racing, and for medical treatment, etc., on the theory that there was an improvement of the object bailed. But this did not extend to the ordinary expenses of keeping and feeding. *Towle* v. *Raymond,* 58 N. H. 64. Evidently there was no fox farm industry when 3 Comp. Laws 1929, § 13186, was first adopted, for it only entitled one to a lien for the care of horses, mules, neat cattle, or swine. 3 Comp. Laws 1929, § 13194, providing for a lien for additional expenses incurred in the keeping of property against which a lien has been properly asserted and remains unpaid, refers only to the lien theretofore provided for in section 13186, *supra,* although the statute refers to horses, cattle, sheep, swine or "other beasts." A careful analysis of the wording of section 13194, *supra,* shows that it does not apply to animals other than those described in section 13186, *supra.*

We believe, however, that in the present instance there was a lien created by special contract. A lien created by express or implied contract will be enforced. *Whitlock* v. *Heard,* 13 Ala. 776 (48 Am. Dec. 73); *McCoy* v. *Hock,* 37 Iowa, 436. The contract of October 1, 1927, distinctly provided for a lien, although it also stated that the agreement should expire within one year. Plaintiffs claim that all of the

terms of the contract became ineffective at the end of the year, and that, therefore, no lien continued in existence. The contract did expire at the end of the year to the extent that, after that time, the obligation to keep the foxes was no greater than that of plaintiffs to ranch the foxes with defendant. We believe, however, that there was an implied agreement on the part of the plaintiffs to pay for the ranching of the foxes on the same terms as had been previously agreed upon, including a lien for charges accruing while the foxes remained with defendant.

On November 13, 1926, shortly after the expiration of the year term, defendant notified plaintiffs that the animals could not be removed from the ranch until all ranching fees due were paid. Plaintiffs made no effort to claim their property, but continued to permit the foxes to remain in defendant's care for several more years. They knew that they were wild animals, which could not be set at large, but required care and attention at a large expense. Plaintiffs' conduct was such that it amounted to an acquiescence and implied consent to a lien, and they are now estopped from complaining. See *Schneider* v. *Dayton,* 111 Mich. 396. They are entitled to the foxes and their increase upon payment of the charges due. There was no conversion by defendant.

The testimony brought out the fact that defendant had thought it advisable and necessary to pelt some of the increase. The decision in this case is without prejudice to any claim that plaintiffs may have arising out of such pelting.

The judgment is affirmed, with costs to defendant.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and WIEST, JJ., concurred.

ARMADA STATE BANK *v.* UNION GUARDIAN TRUST CO.

1. MORTGAGES—DEFAULT—SINKING FUND—PREFERENCE.
   Where mortgagor in trust mortgage agreed to create sinking fund to retire bonds as they matured, and when bonds amounting to $6,000 matured and only $3,067.05 was in sinking fund, holder of $2,000 of said bonds was entitled to proportionate share thereof, although mortgage is now in default, and result will be to give preference to holders of said bonds.

2. SAME—NOTICE OF PREFERENCE.
   Where trust mortgage provided for payment of bonds out of sinking fund to be created for said purpose, in order of their maturing, purchasers of all of said bonds are chargeable with notice of preference thus provided for in mortgage.

3. SAME—INTERVENTION.
   Where holders of bonds maturing are entitled to sinking fund created for payment thereof, holder of part of said bonds, who was not party to suit for distribution of said fund, is permitted, by order of Supreme Court, to intervene and receive proportionate share of said fund.

Appeal from Wayne; Chenot (James E.), J. Submitted January 5, 1933. (Docket No. 33, Calendar No. 36,924.) Decided March 2, 1933.

Bill by Armada State Bank against Union Guardian Trust Company, a Michigan corporation, to compel *pro rata* distribution of a certain trust mortgage sinking fund. Decree for plaintiff. Defendant appeals. William T. Hatch, receiver of First National Bank of Dearborn, permitted to intervene in Supreme Court as party plaintiff. Affirmed, decree for intervener.

George H. Heideman, for plaintiff.

McLeod, Fixel, Abbott & Fixel, for intervener.

Bulkley, Ledyard, Dickinson & Wright (*Edward C. P. Davis* and *Glenn D. Curtis,* of counsel), for defendant.

SHARPE, J. The facts are stipulated. The defendant is trustee under a trust mortgage, dated August 1, 1927, given to secure an issue of first mortgage bonds, in the sum of $100,000. In it the mortgagor covenanted and agreed to deposit with the trustee semi-annually a sum sufficient to pay the interest on the bonds and the Federal income tax thereon, and—

"to deposit with the trustee on the 15th day of August, 1929, and on the 15th day of each and every calendar month thereafter, up to and including July 15, 1936, an amount equivalent to one-twelfth of the principal falling due the next succeeding principal payment date."

It was also said therein:

"The intent hereof is that 15 days before said respective interest, principal, and tax payments, said sinking funds deposited shall be sufficient to meet the respective interest, principal, and tax requirements in full, when due, with the exception of the principal requirement due August 1, 1937."

Bonds amounting to $6,000 matured on August 1, 1931. All interest thereon was paid. The plaintiff is the owner of three of these bonds, amounting to $2,000. There was at that time in the sinking fund created by the above provision the sum of $3,067.05. It demanded payment of its *pro rata* share of this amount from the trustee, and, on its refusal to do so, filed the bill of complaint herein to enforce such

payment, and had decree therefor, from which the defendant has taken this appeal.

In our opinion, but one construction can be placed upon the provisions in the mortgage above quoted. The mortgagor agreed to pay to the trustee, in annual instalments, a sufficient portion of the mortgage debt to retire the bonds which matured on August 1, 1931. Had he done so and had the $6,000 then been in the sinking fund in the hands of the trustee, the holders of these bonds would have been entitled to payment in full. The mortgagor did not fully comply with his agreement in this respect, but he did pay to the trustee the sum of $3,067.05 as part payment thereof, and this money was received by the trustee and placed in the sinking fund for that purpose. Clearly, the plaintiff is entitled to its *pro rata* share thereof.

The defendant urges that it will be inequitable to permit the holders of bonds which first matured to receive the money now in the sinking fund, when it appears that the mortgage is in default, and thus give a preference to one bond over another. All of the bonds were issued pursuant to the terms of the mortgage, and purchasers are chargeable with notice of the rights of those first maturing to the moneys paid into the sinking fund for their retirement. A preference was thus provided for in the instrument itself, and a court can but enforce it as written.

A similar question was presented to the district court of the southern district of New York in *Equitable Trust Co.* v. *Green Star Steamship Corp.*, 291 Fed. 650. In an exhaustive opinion Judge Hand discussed the question and arrived at the conclusion we have stated.

By an order entered in this court, William T. Hatch, receiver of the First National Bank of Dear-

born, a National banking corporation, was permitted to intervene. He is the holder as such receiver of certain of the bonds which matured on August 1, 1931, and is entitled to the same *pro rata* share of the sinking fund as is the plaintiff.

The decree of the trial court is affirmed as to the plaintiff, and a provision may be here added relative to the rights of the intervener as above stated. No costs will be allowed.

McDONALD, C. J., and CLARK, POTTER, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

NATIONAL DISCOUNT CORP. *v.* HASPER.

1. GUARANTY—ACCOMMODATION SURETY.

   Dealer who sold truck on conditional sales contract, discounted contract, and guaranteed its payment, is absolute guarantor, and not accommodation surety or guarantor.

2. SAME—REPOSSESSION—DELIVERY—NOTICE.

   Where dealer sold truck on conditional sales contract, discounted contract, and guaranteed its payment in case of purchaser's default, repossession, and return to him of truck, delivery of truck, after repossession, to garage where he was employed, and notice to him that it was held for his benefit, was sufficient delivery.

3. SAME—RESALE—IMPAIRMENT OF SECURITY—RELEASE.

   Dealer, who after truck was repossessed by purchaser of sales contract, agreed to its resale, was not thereby released from guaranty of payment of contract, except as to extent, if any, of impairment of his security by reason of departure from terms of resale to which he had agreed.

Appeal from Muskegon; Vanderwerp (John), J. Submitted January 17, 1933. (Docket No. 90, Calendar No. 36,861.) Decided April 4, 1933.

Assumpsit by National Discount Corporation, a corporation, against Cornelius Hasper, doing business as United Auto Company, on contract of guaranty. Judgment for defendant. Plaintiff appeals. Reversed.

Alexis J. Rogoski, for plaintiff.

Turner, Engle & Cochran, for defendant.

BUTZEL, J. Cornelius Hasper, defendant, while engaged in the automobile business in Muskegon, sold a truck for $376.40 on a conditional sales contract to one Lee. He discounted the contract with the National Discount Corporation, plaintiff herein. In assigning the contract, defendant gave a specific and absolute guaranty of future payments and stipulated that, in the event of default of the vendee, plaintiff was authorized to repossess and deliver the truck to defendant. Upon delivery, the latter agreed to pay immediately the full amount due, together with all expenses of repossession. The contract further provided that the guaranty should be a continuing one until all payments, terms, and conditions were fully paid and performed.

Lee, the original vendee under the contract, defaulted. Plaintiff repossessed the car, delivered it to a garage where defendant had been employed following discontinuance of his auto business, and demanded full payment of the balance. Defendant admitted that he was still bound, and, when a party by the name of Deeter became interested in the purchase of the truck through plaintiff's efforts, de-

fendant not only saw Deeter but agreed to contribute towards the expense of repairing the truck, so as to effect the sale. There is some dispute in the testimony as to whether defendant agreed to the terms on which Deeter was to purchase the car. Defendant admitted that he considered himself still bound to plaintiff and offered to assume $25 or $30 on the last payment due on the contract. There was $47.50 past due on the contract at the time of the Deeter transaction. Defendant claims that the following conversation took place between himself and plaintiff's manager:

"And I said that I was willing to assume $25 or $30 to apply on that last payment. And he said, 'What kind of terms can you make to this man, Deeter?' And I said, 'He is to bring the contract up to date.' And he said, 'If we can make a deal, he will make $20 now and $20 each week thereafter. He wanted to get out on the job in the morning and make the trip and wanted to get started.' "

Plaintiff's witnesses testified that the best terms they could get from Deeter were a down payment of $15 and $20 a week thereafter. Upon payment of $15, which was credited to defendant's account, Deeter took possession of the truck, but it broke down on the very first trip, and he refused to make the purchase, owing to its alleged defective condition. Deeter employed the car in the hauling of pulp wood, a use regarded as very wearing on a truck. It was finally returned to the garage where defendant worked.

Defendant claims that he was released from his guaranty by the attempted sale to Deeter. The trial judge held that plaintiff had failed to make out a case, had not sustained the burden of proof, and that defendant was released from the guaranty.

Defendant was not an accommodation surety or guarantor. *Rose* v. *Ramm,* 254 Mich. 259; *Grinnell Realty Co.* v. *General Casualty & Surety Co.,* 253 Mich. 16. He made an absolute and unconditional promise to pay the amount of the contract in event of default by the vendee. In consideration of it, he was paid the amount due thereunder, less the discount exacted by plaintiff. We need not discuss the question of novation, for the evidence discloses no intention to substitute Deeter for defendant as the party bound to perform. At most, it was an attempted sale. No written contract was executed, and the truck was returned to the garage at which defendant was employed. Defendant claims that the truck was never actually returned to his possession. The testimony shows conclusively that he was notified of its return and the fact that it was being held for his benefit.

The chief defense raised is that plaintiff misrepresented the terms of the sale, and that defendant would never have rented or sold the truck on a deal calling for such a small down payment, especially in view of the wearing use to which the truck was to be put. The most, then, defendant may claim is an impairment of the plaintiff's security, on account of which defendant might hold plaintiff responsible. Such an impairment does not release the guarantor from liability except to the extent that the security has been damaged. *Central State Bank* v. *Ford,* 181 Iowa, 319 (164 N. W. 754); *First International Bank* v. *Beiseker,* 43 N. D. 446 (175 N. W. 637).

Plaintiff made out a cause of action. If the judge should find on a new trial that the truck was damaged to the extent of more than $15 as a result of its use by Deeter, and that the attempted sale to Deeter on the terms stipulated was unauthorized, then de-

fendant would be entitled to a deduction from the total sum due plaintiff to the extent of any damage to the truck over and above the $15 already credited him.

The judgment of the lower court is reversed, with costs to plaintiff, and a new trial ordered.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and WIEST, JJ., concurred.

KRAFT *v.* PERE MARQUETTE RAILWAY CO.

1. RAILROADS—NEGLIGENCE—PRESUMPTIONS.

   Where train crew had plain view of track for nearly half mile, and failed to stop train in time to avoid striking automobile stalled on track, court may assume negligence on part of railroad company.

2. SAME—STALLED AUTOMOBILE—DUE CARE—ORDINARY PRUDENCE—CONTRIBUTORY NEGLIGENCE.

   Where automobile stalled on railroad tracks, due care required vigilance on part of driver while trying to start motor; ordinary prudence requiring her to maintain such watch as would enable her to escape before being struck by approaching train.

3. TRIAL—INSTRUCTION—CONTRIBUTORY NEGLIGENCE—RAILROADS.

   Instruction that it was duty of driver of automobile stalled on railroad track to look and see what was coming, if she could; that it was her duty to get automobile off track; and that if she did not continue to look up and down track, in her effort to get automobile off track, that would not be contributory negligence, in itself, *held*, erroneous.

4. RAILROADS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT.

Driver of automobile, with clear view of railroad track for nearly half mile, who looked and saw no approaching train when her automobile first stalled on track, but who did not look again until train was so close that she was unable to escape, was guilty of contributory negligence as matter of law, precluding recovery for injuries so received.

5. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—SUBSEQUENT NEGLIGENCE—PLEADING—ISSUES.

Where automobile driver, in action against railroad company for personal injuries received when her stalled automobile was struck by train, planted her case on negligence of defendant without any negligence on her part, subsequent negligence of defendant was not an issue.

Appeal from Bay; Houghton (Samuel G.), J. Submitted January 17, 1933. (Docket No. 18, Calendar No. 36,642.) Decided April 4, 1933. Rehearing denied May 16, 1933.

Case by Theressa Kraft against Pere Marquette Railway Company for personal injuries received at a street crossing. Verdict and judgment for plaintiff. Defendant appeals. Reversed, without a new trial.

Collins & Thompson, for plaintiff.

Clark & Henry (*W. K. Williams* and *John C. Shields,* of counsel), for defendant.

WIEST, J. May 7, 1929, about one o'clock in the afternoon, plaintiff's automobile stalled upon defendant's railroad track, at a street crossing in the city of Bay City, and, while she was trying to start the motor, a train came along, struck the automobile, and she received injuries. Defendant prosecutes an appeal from a judgment in favor of plaintiff, urging contributory negligence on the part of plaintiff as a matter of law. This opinion is based on the case presented by plaintiff.

At the point where the automobile stalled, there was a clear view of the railroad track for about a half mile. Plaintiff claims that she looked when her automobile stalled and there was no train in sight; that she then tried to start the motor, and when she looked again the train was so close that she had no time to get out of the automobile. The train must have traveled nearly a half mile between her first look and the second. The trainmen had an equal view, and, for the purposes of this decision, we may assume negligence on the part of defendant. This presents the question of plaintiff's contributory negligence.

The declaration averred due care on plaintiff's part and the duty of employees of defendant to have noticed her peril and have stopped the train. Due care required vigilance on the part of plaintiff while trying to start the motor. She knew she was in a place of danger if a train came along; she had time and opportunity to get to a place of safety, and, as long as she remained in the automobile, ordinary prudence required her to maintain such a watch as would enable her to escape. If the trainmen should have seen her peril she also should have sensed her peril, and availed herself of opportunity to avoid injury.

The court instructed the jury:

"I say to you it was her duty to look and see what was coming, if she could, and she claims she was there about a minute, and it was her duty to get that automobile off the railroad crossing, that was one of her paramount duties, to get it off the track, and it was her duty to do the things that were necessary, if possible, to get it off before the train came, and under her claim she endeavored to start the motor, but something happened, and she could not start it until the train was almost on her, and

then she claims she tried to get out, and she was injured, so I say, if she did that in that manner, stalled her motor there, it was her duty to do what she could reasonably to get it off, and if she did not continue to look up and down the track in her efforts to get the automobile off the track, that would not be contributory negligence, in itself, and she was doing what she was required to do to get it off the track. She was there just a short time."

This instruction was error.

Defendant's motion for a directed verdict on the ground "That plaintiff herself, as a matter of law, under the undisputed testimony, is guilty of contributory negligence," should have been granted.

Plaintiff planted her case on the negligence of defendant without any negligence on her part, and the doctrine of subsequent negligence was not an issue. See *Kerns* v. *Lewis,* 246 Mich. 423.

The judgment is reversed, with costs, and without a new trial.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred.

CONTINENTAL BANK & TRUST CO. OF NEW YORK *v.* DETROIT TRUST CO.

1. BILLS AND NOTES—BANKS AND BANKING—PRESENTMENT—REASONABLE TIME.

Check must be presented within reasonable time after it is received by depository bank.

2. SAME—PRESENTMENT NEXT DAY REASONABLE TIME—STATUTES.
Under Act No. 240, Pub. Acts 1931, § 6(b), reasonable time for presentment is "not later than the next business day following the day on which the item is received," where collecting bank and drawee bank are located in same city, and statute does not make negligence of bank depend on its failure to follow its usual custom of doing business.

3. SAME.
Where check was delivered to payee bank in morning, was deposited with collecting bank in same city next day, and was presented for clearance the following day, by which time drawer had been closed by banking commissioner, presentment was within reasonable time, under statute, although there was time to present it to drawee bank on day of delivery, and had this been done payment would have been made (Act No. 240, Pub. Acts 1931, § 6[b]).

4. SAME—SPEED IN PRESENTMENT NOT REQUIRED UNLESS REQUESTED.
Where trustee, although it had knowledge that it was in precarious financial condition, and was closed by banking commissioner following day, drew check for transference of trust fund and delivered it without requesting speed in its presentment, payee was under no obligation to act with greater promptness than was required by statute (Act No. 240, Pub. Acts 1931, § 6[b]).

Appeal from Wayne; Searl (Kelly S.), J., presiding. Submitted January 13, 1933. (Docket No. 155, Calendar No. 36,942.) Decided April 4, 1933.

Assumpsit by Continental Bank & Trust Company of New York, successor-trustee, against Detroit Trust Company, a Michigan corporation, for certain trust funds. Judgment for defendant. Plaintiff appeals. Affirmed.

Slyfield, Hartman, Mercer & Reitz, for plaintiff.

Miller, Canfield, Paddock & Stone, for defendant.

McDONALD, C. J. The Fidelity Bank & Trust Company of Detroit closed its doors against business on October 7, 1931, and was taken over by the banking

commissioner. It had been trustee for the Prudential Investors' Incorporation, which was engaged in the business of investing funds for parties with whom it had contracts for that purpose. These contract holders paid their money to the trustee, who invested it as directed by the Prudential corporation. In the course of business the Fidelity Bank & Trust Company, trustee, had in its hands trust funds amounting to $17,215.93. Having information that the trustee was not in a sound financial condition, the Prudential corporation directed it to deposit the money with the defendant, Detroit Trust Company, which it did, by check drawn on the National Bank of Commerce, Detroit, and received therefor two certificates of deposit equaling the amount of the check and payable to itself as trustee. This business was transacted about 10:30 o'clock in the forenoon of October 6, 1931. The Detroit Trust Company indorsed the check and deposited it with the First National Bank of Detroit for collection in the morning of October 7, 1931. The First National Bank presented it for payment to the National Bank of Commerce, the drawee, through the clearing house on October 8, 1931. In the meantime the Fidelity Bank & Trust Company had been closed by the banking commissioner and the drawee bank notified not to honor any of its checks. Payment was refused, and the check returned to the Detroit Trust Company. After the failure of the Fidelity Company, the Continental Bank & Trust Company of New York was appointed successor-trustee, and began this suit to recover the amount of the two certificates of deposit. The issue was tried by the court without a jury. Judgment was rendered in favor of the defendant. The plaintiff has appealed.

Many angles of this case are discussed in the briefs of counsel, but in the last analysis the issue

narrows down to the question whether the defendant exercised ordinary care in presenting the check in time for payment. A check must be presented within a reasonable time after it is received by the depository bank. A reasonable time for presentment is defined by statute, Act No. 240, Pub. Acts 1931, § 6 (b) as "not later than the next business day following the day on which the item is received." This statute was quoted and construed by Mr. Justice NORTH in *Bay City Bank* v. *Concordia Mutual Fire Ins. Co.*, 260 Mich. 611, which decision we think is a controlling precedent for the instant case. The material facts are substantially the same. In that case the business places of all the parties were in the same city. The check was delivered to the Bay City Bank on December 1, 1931, early enough for presentment to the drawee bank on that day or for deposit for collection with its collecting bank. It was not deposited with the collecting bank until December 2d, and was not presented for payment through the clearing house before the drawee bank failed and closed on December 3, 1931. If the Bay City Bank had acted promptly when it received the check it could have been cleared and paid on December 2d, while the drawee bank was still doing business. On these facts this court held there was due presentment.

In the instant case the business places of the parties were in the same city. The check was delivered on October 6, 1931, to the Detroit Trust Company in time for presentment to the drawee bank on that day or for deposit with its collecting bank. If the trust company had taken either course on that day the check would have been honored. Instead, the deposit was not made with the collecting bank until October 7, 1931, and did not get through the clearing house in time for presentment until October 8th,

after the drawer had failed and its checks were not collectible. Under authority of the *Bay City Bank Case,* we must hold that there was no negligent delay in presenting this check.

But counsel for the plaintiff claim a distinction between this case and the *Bay City Bank Case,* in that in the latter case the depository followed its regular custom of business in presenting the check, whereas in this case it did not do so. The statute of 1931 does not make negligence of a bank depend on its failure to follow its usual custom of doing business. Banks cannot always do so. In this case, it was the custom of the defendant to deposit its checks with the First National Bank for clearance twice daily, but there was testimony that at the time the check in question was received the trust company had an unusually large number of dividend checks, which clogged the business as customarily conducted. However, the fact that the company had two opportunities to deposit the check with its collecting bank on the day it was received is not so important as it would have been prior to the 1931 statute. Since the enactment of this statute, a bank acts with sufficient promptness if the check is deposited with its collecting bank not later than the next business day after it is received.

A further distinction claimed by the plaintiff is that in this case Mr. Browning, president of the Detroit Trust Company, knew that the drawer of the check, the Fidelity company, was in a precarious financial condition, and that it was his duty to hurry the check on for presentment. We see no merit in this contention. It will be noted that the bank upon which the check was drawn did not fail. It was solvent and had sufficient money with which to honor the check. It was the drawer that failed. It issued the check on October 6th, and was closed by the bank-

ing commissioner on the next day. It must have known that it was in a very precarious financial condition and might be closed at any time. With this knowledge of its condition it did not draw out the money and pay cash for the certificates of deposit, but adopted the more convenient way of paying by check. It made no request for speed in presenting the check for payment. In the absence of some instruction in that respect, the defendant company was under no obligation to act with greater promptness than was required by the statute. We think the trial court correctly decided the issue.

The judgment is affirmed, with costs to the defendant.

CLARK, POTTER, SHARPE, NORTH, WIEST, and BUTZEL, JJ., concurred. FEAD, J., did not sit.

LEENHEER *v.* LEENHEER.

1. DIVORCE—CUSTODY OF CHILDREN—WELFARE OF CHILDREN FIRST CONSIDERATION.

   In determining custody of children, where parents are divorced, welfare of children is of first consideration.

2. SAME—MODIFICATION OF DECREE.

   Wife's petition that divorce decree be modified so that custody of children be given to her instead of to husband was properly denied, where it appeared to be for best interest of children that custody be continued in him.

Appeal from Kent; Brown (William B.), J. Submitted February 3, 1933. (Docket No. 167, Calendar No. 36,882.) Decided April 4, 1933.

Divorce proceedings between Anna Leenheer and Leonard Leenheer. On petition of plaintiff for custody of children. Petition denied. Plaintiff appeals. Affirmed.

J. Claude Youdan, for plaintiff.

CLARK, J. In April, 1928, the parties were divorced, and the custody of their two children awarded to plaintiff, the mother. In May of 1928, because of conditions of the mother's home, the children were taken by probate court, juvenile division, as neglected children, and were placed in the home of a Mrs. Burts. Later the defendant and Mrs. Burts were married. The circuit court resumed jurisdiction of the children, and custody was given to the father. In September, 1931, plaintiff sought modification of decree so that she might have the custody, the children being 11 and 8 years, respectively. The petition was denied, and she has appealed.

Report of the prosecuting attorney recommends continuing in defendant the custody of the children. And this also appears to be the recommendation of the county agent. There is testimony on both sides to aid in finding the welfare of the children, which is of first consideration. *Thomas* v. *Thomas,* 247 Mich. 487. Nothing will be gained by further detail of facts of this misfortune.

On full consideration, we are in accord with the trial court.

Affirmed, and remanded. No costs.

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

SOULE *v.* GRIMSHAW.

1. LIMITATION OF ACTIONS—MOTOR VEHICLES—WRONG SIDE OF ROAD.
   1 Comp. Laws 1929, §§ 4231, 4232, requiring vehicles to turn to right on meeting, and limiting to one year time for commencement of action for recovery of damages arising out of automobile collision, where one vehicle was on wrong side of road, was impliedly repealed by uniform motor vehicle act (Act No. 318, Pub. Acts 1927 [1 Comp. Laws 1929, § 4693 *et seq.*]), and therefore general statute of limitations (3 Comp. Laws 1929, § 13976), providing limitation of three years, is applicable to such causes of action.
2. MOTOR VEHICLES—LAW OF ROAD—VEHICLES REQUIRED TO KEEP TO RIGHT.
   Under uniform motor vehicle act (Act No. 318, Pub. Acts 1927 [1 Comp. Laws 1929, § 4693 *et seq.*]), automobiles are required to keep to right, in driving on highway, except when passing another vehicle on overtaking it, and except when it is impracticable to travel on right side; and vehicles on meeting must pass to right.

Appeal from Bay; Houghton (Samuel G.), J. Submitted February 7, 1933. (Calendar No. 36,670.) Decided April 4, 1933.

Case by Catherine Soule against Albert Grimshaw for personal injuries sustained in a head-on motor vehicle collision. Motion to dismiss denied. Defendant appeals. Affirmed.

Carl H. Smith, for plaintiff.

Arthur J. Kinnane, for defendant.

CLARK, J. Defendant was permitted to appeal from denial of his motion to dismiss, the ground of

the motion being that the action was barred by a statute of limitations. 1 Comp. Laws 1929, § 4232. The action is for personal injuries in a collision of automobiles, averred to be due to negligence of defendant in failing to drive on the right side of the highway.

The question is: "Is 1 Comp. Laws 1929, § 4232, limiting to one year the time for commencement of actions for the recovery of damages arising out of automobile collisions, where one vehicle was on the wrong side of the road, impliedly repealed by the uniform motor vehicle act of 1927 (Act No. 318, Pub. Acts 1927 [1 Comp. Laws 1929, § 4693 *et seq.*])?"

1 Comp. Laws 1929, § 4231, part of the Revised Statutes of 1846, re-enacted by Act No. 283, Pub. Acts 1909, appearing in substance in Act No. 318, Pub. Acts 1909, motor vehicle law, and in Act No. 9, Pub. Acts 1919, was the well-known law of the road, requiring turning or driving to the right upon meeting, and otherwise permitting a driver to use any part of the traveled portion of the highway. The section 4232 provides a penalty for violation of this law of the road with limitation of action and also of action for damages with limitation of one year.

But the law of the road in respect of vehicles has been changed. It is no longer *turn to the right*. It is *keep to the right*. The uniform motor vehicle act (Act No. 318, Pub. Acts 1927, 1 Comp. Laws 1929, § 4703 *et seq.*) requires the vehicle to be driven "upon the right half of the highway" with two exceptions, (a) in overtaking and passing, and (b) where it is impracticable to travel on the right side; and the statute repeats that vehicles in meeting must pass to the right. Act No. 318, Pub. Acts 1927, made a new law of the road and repealed by implication, as to vehicles at least, the former law

of the road, section 4231, and with it, in that regard, section 4232, providing for penalty and damage.

The general statute of limitations, 3 Comp. Laws 1929, § 13976, providing a limitation of three years, is applicable.

Affirmed.

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

HIBBARD *v.* FINCH.

1. MECHANICS' LIENS—STATEMENT OF LIEN—TIME.

In suit to foreclose mechanic's lien, evidence *held*, to support finding of trial judge that statement of lien was not filed within statutory time (3 Comp. Laws 1929, § 13105).

2. APPEAL AND ERROR—JURISDICTION—JOINING CAUSES.

Where, on appeal from decree in suit to foreclose mechanic's lien and for accounting, both parties request, as in trial court, that accounting feature be retained, and no question of jurisdiction or of joining accounting with statutory foreclosure of mechanic's lien is presented, Supreme Court is not required to raise points.

3. SAME—ACCOUNTING—INCOMPLETE RECORD.

Where, on appeal from decree in suit for accounting, record is incomplete, rendering full accounting impossible, cause is remanded that full accounting may be had.

Appeal from Genesee; Sample (George W.), J., presiding. Submitted January 19, 1933. (Docket No. 126, Calendar No. 37,027.) Decided April 4, 1933.

Bill by Wellman Hibbard against Margaret R. Finch and Union & Industrial Trust & Savings Bank to foreclose a mechanic's lien and for an accounting. From decree dismissing foreclosure and granting accounting, plaintiff appeals. Affirmed as to foreclosure, reversed as to accounting, and remanded.

Carton & Gault, for plaintiff.

Brownell & Gault, for defendant.

CLARK, J. The bill prays foreclosure of a mechanic's lien and accounting. The defendants are the owner and her mortgagee. The trial judge found no valid lien, and decree was entered accordingly. The accounting feature of the bill was retained, and a certain sum found to be due plaintiff, principal contractor, from the owner, Margaret R. Finch, which was decreed to be paid. Defendant offered no testimony, the case being disposed of on motion at conclusion of plaintiff's proof, and he has appealed.

Plaintiff began erecting the dwelling house on or about June 1, 1927. Mrs. Finch moved into the house the following November. She claims an agreement to build and complete the house for $8,500. During the summer of 1927 plaintiff gave her a writing stating that he agreed to build at a fixed profit of $700, estimated cost to include profit, $8,500. A small amount of repair work was done in fall of 1929. On January 2, 1930, plaintiff put some counter-flashing

on the roof, total cost $1.75, $1 of which was for labor, which plaintiff, although otherwise indebted to his employee, was careful to pay him that day and by check. Within the statutory period of 60 days thereafter, plaintiff filed statement of lien, claiming $4,069.29. The trial judge was of the opinion that the furnishing of January 2, 1930, was not in good faith, not within the contract, but to gain ground for filing a statement of lien. Upon a review of the evidence, as stated, together with character of the work done and material furnished on January 2, 1930, the significant payment of the labor item, the lapse of time after the building was accepted by the owner, we are in accord with the conclusion of the trial judge that the statement of lien was not filed in time. 3 Comp. Laws 1929, § 13105.

Both sides request, as in the trial court, that the accounting feature be retained and accounting made. No question of jurisdiction; no question of joining accounting with statutory foreclosure of mechanic's lien, is presented. We are not required to raise the points. *Cummings* v. *Schreur,* 236 Mich. 628.

The writing given by plaintiff as stated does not fix a full contract price. It states rather an estimated price. We cannot find on this record a contract for a fixed price, nor should accounting be had on this incomplete record. The cause should be remanded that full accounting of the matter may be had.

Decree dismissing foreclosure bill is affirmed, and as to accounting reversed, and remanded, without costs.

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

DIBBLE *v.* HARROW.

1. VENDOR AND PURCHASER—DEFAULT—DECLARATION—PLEADING—VARIANCE.

   Where, in action for payments due on land contract, declaration recites that plaintiffs succeeded to interest of another, now deceased, by order of assignment of probate court, and affidavit contains like recital, statement that plaintiffs' interest is by inheritance is construed, on appeal, as meaning same as averment of declaration; no issue being created thereby.

2. SAME—VENDOR'S DEFAULT IN PAYING MORTGAGE—RULE APPLICABLE.

   Where vendee's failure to pay instalments due on land contract is responsible for vendors' failure to make payments due on mortgage, rule that vendor is not entitled to enforce contract while in default on mortgage is not applicable; especially where vendee has not paid his portion of mortgage debt assumed by him, and where contract permits him to make payments direct to mortgagee in event of vendors' failure to pay.

3. SAME—SUMMARY JUDGMENT.

   Vendors are entitled to summary judgment for past-due instalments on land contract, notwithstanding they are in default in making payments due on mortgage, where their default is caused by vendee's failure to pay, and latter has privilege of making payments direct to mortgagee.

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted January 10, 1933. (Docket No. 88, Calendar No. 36,567.) Decided April 4, 1933.

Assumpsit by Lois A. Dibble and another against Alfred T. Harrow for instalments due on a land contract. Summary judgment for plaintiffs. Defendant appeals. Affirmed.

Frank C. Cook and *John P. O'Hara* (*A. L. Baumann,* of counsel), for plaintiffs.

Wilkinson, Lowther & O'Connell, for defendant.

CLARK, J. Plaintiffs sued to recover instalments due on a land contract, and had summary judgment, from which defendant has appealed. The interest of plaintiffs is questioned. The declaration is that plaintiffs, who, with Euphemia Rennie, signed the contract as vendors, have succeeded to the interest of Mrs. Rennie, now deceased, by order of assignment of the probate court. An affidavit contains a like recital. In one instance plaintiffs' interest is stated to be by inheritance. But, on the record, this statement creates no issue, and it is here construed as meaning the same as the averment of the declaration.

Citing *Dirr* v. *Hitchman,* 260 Mich. 179, defendant contends that past-due instalments of the contract may not be recovered, as plaintiffs are in default in making payments on the mortgage of $8,000. Defendant purchased and took deed of an undivided one-fourth of the property, and in that connection assumed and agreed to pay one-fourth of the mortgage debt. The land contract for the undivided three-fourths was made on December 13, 1927. It is subsequent to the mortgage. The purchase price named in the land contract is $15,000, with $2,000 paid down, and remainder in monthly instalments of $130 each. Between June 12, 1930, and time of commencing suit, January 7, 1932, instalments accrued in the total of $2,440, for recovery of which this suit is brought. If this sum were paid, the remainder to become due on the contract would be largely in excess of the amount of the mortgage. The mortgagee is willing to extend time for an additional period of three years upon partial payment,

the amount of which is less than the total of sums past due and owed by defendant on the contract. Defendant has not paid his portion of the mortgage debt. The contract permits him to make payments direct to mortgagee in event of plaintiffs' failure to pay.

On the facts as stated, and as the record is that defendant purchaser is responsible for failure of plaintiffs in respect of the mortgage, the fact of mortgage is no defense to this action for purchase money. The case is not ruled by *Dirr* v. *Hitchman, supra,* but in principle by *Langley* v. *Kirker,* 247 Mich. 443, and *Heath* v. *Gloster,* 260 Mich. 85. See 39 Cyc. p. 1931. We find no error in ordering summary judgment.

Affirmed.

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

WEISS *v.* CROSSTOWN CORP.

CONTRACTS—BUILDING CONTRACTS—BREACH—IMPLIED CONTRACT TO PAY.

Contractor who started work on erecting houses by excavating basements and installing sewers without being authorized to do so by owner is not entitled to recover value of work done, in absence of express or implied contract to pay therefor.

Appeal from Wayne; Robertson (William), J., presiding. Submitted January 18, 1933. (Docket No. 123, Calendar No. 36,772.) Decided April 4, 1933.

Action by Joseph Weiss, doing business as Aviation Construction Company, against Crosstown Corporation, a Michigan corporation, for damages for breach of a building construction contract. Judgment for defendant. Plaintiff appeals. Affirmed.

Leon Dreifuss, for plaintiff.

Trowbridge, Lewis & Watkins (*Frederick C. Gielow,* of counsel), for defendant.

CLARK, J. Plaintiff has appealed from a judgment of no cause of action, in a trial without a jury, in a suit brought to recover damages claimed to be due on a contract to erect 16 houses.

Plaintiff was a builder. Defendant owned lots. There was discussion looking to building houses. Before any contract or agreement was made, plaintiff started work on erecting 16 houses by excavating basements and installing sewers. When defendant became aware of this, it ordered the unauthorized work stopped. Plaintiff was given a contract for eight houses. These were built and paid for. He was given a contract for two additional houses, which were built and paid for. It was agreed that upon sale of the houses work was to start on houses on remaining of the 16 lots. The houses were not sold. Plaintiff claims a contract covering the work done and not paid for. Defendant disputes this flatly. It is purely an issue of fact.

We are in accord with the finding and decision of the trial court. There was no express contract, and on the facts here none can be implied. *Spence* v. *Sturgis Steel Go-Cart Co.,* 217 Mich. 147.

Affirmed.

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

ROSENBLATT *v.* JOHN F. IVORY STORAGE CO., INC.

1. FRAUD—WAREHOUSEMEN—PLEADING—PROOF—QUESTION FOR JURY.
   Where, in action to recover damages for loss by fire of household goods stored in defendant's warehouse, averments in declaration that defendant falsely represented warehouse to be fireproof and that in reliance thereon plaintiffs entered into contract of storage were supported by evidence, question of fraud was issue of fact for jury.

2. EVIDENCE—ORAL TESTIMONY—FRAUD—VARYING TERMS OF WRITTEN CONTRACT—WAREHOUSEMEN.
   Although oral testimony was not admissible to vary terms of written contract, complete in itself, for storage of goods in warehouse, oral testimony was admissible to show that execution of said contract was induced by false representations that said warehouse was fireproof.

3. FRAUD—RIGHT OF ACTION—INSURANCE—WAREHOUSEMEN—PARTIES.
   In action for fraud in falsely representing that defendant's warehouse was fireproof, whereby plaintiffs were induced to store goods therein which were destroyed by fire, whether plaintiffs had fire insurance on said goods is of no importance, since right of action for said loss would nevertheless be in plaintiffs or their assignees.

4. SAME—PROXIMATE CAUSE.
   Where owners were induced by warehouseman to enter into contract for storage of goods on false representations that warehouse was fireproof, safety as against fire was in contemplation of parties, and therefore said fraud may be said to be proximate cause of loss by fire.

Appeal from Wayne; Richter (Theodore J.), J. Submitted January 11, 1933. (Docket No. 103, Calendar No. 37,002.) Decided April 4, 1933.

Action by David Rosenblatt and another against John F. Ivory Storage Company, Inc., a Michigan

corporation, for fraudulent representations made to induce execution of contract relating to storage of household goods. Judgment *non obstante veredicto* for defendant. Plaintiffs appeal. Reversed, and judgment ordered on verdict.

Francis Fitzgerald and *S. Reymont Paul,* for plaintiffs.

Pear & Beattie (*Donald K. Tyler,* of counsel), for defendant.

CLARK, J. This suit is brought to recover damages for loss by fire of household goods which plaintiffs had stored in defendant's warehouse.

A count of the declaration is in fraud, that defendant falsely represented the warehouse to be fireproof, and in reliance thereon plaintiffs entered into a contract of storage. The averments were supported by testimony.

The defense is a denial of such representation, and that obligations and rights were fixed by the warehouse receipt, the contract, which recited that there would be no liability for loss or damage by fire. The plaintiffs were advised by postcard that defendant did not insure goods in storage, and to procure insurance. The warehouse was not fireproof.

Plaintiffs had verdict, and on decision of a reserved motion to direct, judgment was ordered and entered for defendant. Plaintiffs' appeal challenges such order. Clearly the question of fraud was an issue of fact for the jury, and there is no evidence sufficient to raise question of waiver of the fraud. If it be conceded that the written contract was complete, and that oral testimony was not admissible to vary it, we have not touched the issue here, which is, that plaintiffs were induced to enter into the

contract by defendant's fraud, on which issue plaintiffs' evidence of false representation was admissible. Of such evidence it was said in a like case, *Fox* v. *John F. Ivory Storage Co., Inc.,* 261 Mich. 358:

"It was offered to show that plaintiff was induced to enter into the written contract because of the defendant's fraud in falsely representing that the warehouse was of fireproof construction. Believing that it was fireproof, he was willing to consent to all of the terms of the written contract and to take the risk of loss by fire."

Whether plaintiffs had fire insurance or not is of no importance here. Liability of defendant would not have been affected if plaintiffs had insured the property. Right of action for the loss would nevertheless be in plaintiffs or their assignees. As was said in the *Fox Case,* plaintiffs, relying on the representation, might take the risk of loss by fire. 17 C. J. p. 929.

The fraud, it is urged, was not the proximate cause of the loss, rather the fire, which was not occasioned by any fault of defendant, citing *McLane, Swift & Co.* v. *Botsford Elevator Co.,* 136 Mich. 664. In that case, oats were shipped by plaintiff to defendant to be clipped at its elevator and reshipped on the original bills of lading. While the oats were in defendant's elevator they were accidentally destroyed by fire. Assuming delay in reshipping, it was held that fire was the remote, not the proximate, cause of the loss.

But the case at bar has an important and distinguishing element—the loss grew out of the very subject-matter of the fraud, the misrepresentation that the building was fireproof. It was recognized by the parties that fire is an ordinary and frequent

agency of destruction, and safety as against it was within the contemplation of the parties. Because of this element, we think the cited case not controlling. Two cases illustrate the point:

In *Mortimer* v. *Otto,* 206 N. Y. 89 (99 N. E. 189, Ann. Cas. 1914A, 1121), defendants agreed to store household goods in a designated building, but in violation of that agreement stored the articles in another building which, with the articles, was destroyed by fire. In a holding favoring plaintiffs it was said:

"The plaintiff and her assignor were depositing their property with the defendants and a regard for its safety and security while in the keeping of the defendants was obviously within their contemplation and, it may justly be assumed, known to the defendants. For the purpose of making effective that regard, they, with the permission and concurrence of the defendants, selected the precise place of storing. Fire is an ordinary and frequent agency of destruction or injury, and safety as against it was in the contemplation of the parties when they agreed that the property should be stored in the specified room. Had the property been there stored, the plaintiff and her assignor would have assumed all the risks of injury to it except those ordinarily imposed by law upon the defendants as bailees. When, however, the property was burned in the building in which the defendants in fact placed it, the consequent loss and damage was that which the parties apprehended and sought to avoid through the agreement that the property should not be there, and the defendants must indemnify the plaintiff therefor."

In *The Normannia,* 62 Fed. 469, a passenger had purchased passage on defendant's ship, but had determined to forfeit it on subsequent outbreak of cholera, and was induced to take the passage on

false representation of defendant's agents that no steerage passengers would be carried. It was held he could recover damages resulting from the ship being in quarantine at destination because of cholera on board, and the court said:

"I do not think the mere circumstance that he would 'not have been on board' but for the false representations, would be sufficient to make the defendant liable for whatsoever might happen to the libelant's injury while on the ship on which the representations had induced him to embark, if the injury was not proximately related to, and did not naturally grow out of, the subject-matter of the misrepresentations. Had the libelant, in this instance, suffered no detention through cholera, or quarantine, but had been injured through a collision with another ship, or by some accident on the Normannia itself, in no way connected with the presence of steerage passengers, it surely would not have been claimed that the defendant, if not otherwise in fault, would have been responsible to the libelant for such damages, merely because steerage passengers were on board, and because the libelant would not have embarked on the Normannia had he known of their presence; since neither the cause of the injury nor the damage would, in the case supposed, have had any connection with the presence or the absence of steerage passengers."

The damages occasioned by the fire are proximately connected with and flowing from the fraud, were within the contemplation of the parties and a natural consequence of the wrongful act.

Reversed, with costs, and remanded for judgment on verdict.

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

McVANNEL *v.* PURE OIL CO.

1. TAXATION—TAX DEED—COMPLIANCE WITH STATUTE.
   In suit by owners of land under regular chain of title to set aside tax deed from State, it is incumbent on holders under said deed to show compliance with tax law in force at that time.

2. DESCENT AND DISTRIBUTION—TITLE TO LAND DESCENDS TO HEIRS.
   At death of ancestor, title to real estate descends to heirs, in absence of other disposition thereof.

3. TAXATION—TAX DEED—NOTICE OF REDEMPTION TO BE SERVED ON HEIRS OF DECEASED OWNER—STATUTES.
   Under Act No. 204, Pub. Acts 1899, purchasers under State tax deed were required, in case of death of owner, to serve notice of redemption, provided for in said statute, upon personal representative of deceased and upon his heirs.

4. SAME—STATUTORY PROCEEDINGS MUST BE STRICTLY FOLLOWED.
   Effect of proceedings under tax law, if valid, is to divest true owner of title to his property, and to vest same in holder of tax deed, and such proceedings must be closely scrutinized and strictly construed.

5. SAME—TAX DEED—FAILURE TO SERVE NOTICE ON HEIRS.
   Purchasers under State tax deed, who failed to serve notice of redemption upon heirs of deceased owner, not only cannot claim title under said tax deed, but are barred from asserting such title or claiming lien based thereon (1 Comp. Laws 1929, § 3466).

6. SAME—ADVERSE POSSESSION—BURDEN OF PROOF.
   Purchasers under State tax deed, who failed to comply with provisions of tax law, and who claim title by adverse possession, must establish such title independent of and contrary to provisions of said law (1 Comp. Laws 1929, § 3466).

7. ADVERSE POSSESSION—COLOR OF TITLE.
   Under law of this State, color of title is not necessarily basis of adverse possession, but one may claim and acquire title by adverse possession independent of color of title.

8. ESTOPPEL—TITLE TO LAND.
Title to land may not, under law of this State, rest on estoppel.

9. ADVERSE POSSESSION—UNOCCUPIED LAND—OCCASIONAL ENTRY.
Occasional or periodical entry upon unoccupied land does not constitute such actual possession as will ripen into title by adverse possession, but there must be such continuity of possession as will furnish cause of action for every day during whole period required to perfect title by adverse possession.

10. SAME—PAYMENT OF TAXES.
Evidence showing that grantees entered upon premises under void tax deed, that they cut brush, built shack, lived on premises for some time, left for several years, during which time shack disappeared, and that thereafter, for remainder of statutory period, when they visited premises for short time each year, they never lived in any house thereon, *held*, insufficient to establish title by adverse possession, although they paid taxes for whole of said time.

11. ESTOPPEL—TAXATION—TAX DEED—FAILURE TO PAY TAXES.
Owners of unoccupied land under regular chain of title are not estopped from asserting title as against purchasers under void tax deed, although they paid no taxes and made no move to assert title for more than 15 years.

12. TAXATION—SETTING ASIDE TAX DEED—PAYMENT OF TAXES—EQUITY—CONDITIONAL DECREE.
Owners of unoccupied land under regular chain of title, who made no claim thereto and paid no taxes for more than 15 years, were properly required, as reasonable condition to setting aside void tax deed and recovery of possession from grantees thereunder, to pay latter taxes paid, although provision of statute requiring owners to pay value of improvements is not applicable (3 Comp. Laws 1929, §§ 14946–14949).

Appeal from Midland; Warner (Glenn E.), J., presiding. Submitted January 10, 1933. (Docket No. 75, Calendar No. 36,857.) Decided April 4, 1933.

Bill by George H. McVannel and others against Pure Oil Company, an Ohio corporation, and others to set aside a deed and oil lease. Conditional decree for plaintiffs. Both parties appeal. Affirmed.

Wilson & Hoffman and *O'Keefe & O'Keefe,* for plaintiffs.

Virgil W. McClintic, for defendant Pure Oil Company.

Chester E. Morris, for defendants Harter.

POTTER, J. Plaintiffs filed their bill of complaint against defendants to set aside a deed from F. Roy Holmes and Cora A. Holmes, his wife, to Basil Harter and Ralph Harter, and an oil lease from Basil E. Harter and Hazel Harter his wife, and Ralph D. Harter to the Pure Oil Company; for a release of the interest of the Pure Oil Company of its claimed interest in the lands in question under its lease; to cancel and set aside its lease, and for other relief. Defendants answered, denying all the material allegations of plaintiffs' bill, alleging title, and rights in the Pure Oil Company under its lease, claimed to be valid; denying plaintiffs were entitled to the whole or any part of the relief prayed. From a conditional decree for plaintiffs, defendants appeal, and plaintiffs take a cross-appeal.

The controversy concerns the northeast quarter of the southwest quarter of section 6, township 14 north, range 2 west, in Midland county. Plaintiffs claim they are the owners of the regular or government chain of title to the real estate in question; defendants did not prove title by adverse possession, nor by virtue of State tax deeds passing under the sale of the lands for taxes and proceedings thereunder; and plaintiffs are not estopped to claim under the original government chain of title. The trial court imposed, as a condition to a decree for plaintiffs, they should repay the amount of the taxes on the premises paid by the adverse claimants, and decree was rendered for plaintiffs subject to this

condition. Defendants claim plaintiffs' right of action was barred by the statute of limitations (3 Comp. Laws 1929, § 13964), that they have title to the premises by adverse possession, and plaintiffs are estopped from asserting title against defendants.

Mahlon S. Miller, being the owner of this land, died August 11, 1902, leaving by his first wife five children, Celesta Miller Bailey, Elizabeth Miller Smith, Mary Miller Garner, Lemuel Miller, and Sylvester Miller; and by his second wife two children, Earl Miller and Myrtle Miller Kath. Some of these children died prior to the commencement of this suit. There is no dispute as to the heirship of their descendants. Plaintiffs claim title because they hold in privity with the title of Mahlon S. Miller, deceased. Defendants base their title on a tax deed from the State to F. Roy Holmes, dated October 19, 1907, recorded December 2, 1907, made in pursuance of the general tax law of 1897, as amended. Holmes deeded the property to Basil Harter and Ralph Harter May 9, 1914, which deed was recorded June 5, 1914. The rights of defendants being based upon this tax deed, it was incumbent upon them to show compliance with the tax law.

Defendants proved service of the tax notice prescribed by statute upon Mary Garner, Lemuel Miller, Elizabeth Miller Smith, Sylvester Miller, Earl Miller, and Joseph Evaland, as guardian of Myrtle Miller, and service by registered letter upon Robert S. Mitchell, mortgagee. No proof that service was made upon Celesta M. Bailey or upon her personal representative or heirs appears.

(1) Act No. 229, Pub. Acts 1897 (see 1 Comp. Laws 1929, § 3535), prohibited the issuance of writs of assistance or other process to purchasers under tax deed of land to place them in possession thereof until six months after the return of service of the

tax deed notice provided therein. If the owner of the original title after such service redeemed therefrom, he became entitled to a reconveyance in pursuance of the statute. This act was amended by Act No. 204, Pub. Acts 1899, to provide, in case the owner of the interest in the land was dead, for service upon the personal representative of the deceased person and upon his heirs. At the death of the ancestor, the title to real estate descends to heirs, in the absence of other disposition of the real estate, and service must have been made upon the heirs of Celesta Miller Bailey. The effect of proceedings under the tax law, if valid, is to divest the true owner of the title to his property, and to vest the same in the holder of the tax deed, and such proceedings must be closely scrutinized and strictly construed. The rule is well settled in this State that:

"The tax title holder cannot proceed by 'piecemeal' to cut off the right of redemption of each part owner. Until he has complied with the statute as to all, the right of redemption remains to all. It seems to me that this is the reasonable construction that is given to these statutes." *White* v. *Shaw,* 150 Mich. 270, 273.

Until this is done, the statute provides:

"The person or persons, claiming title under tax deed or certificate of purchase shall be forever barred from asserting such title or claiming a lien on the land by reason of such tax purchase." 1 Comp. Laws 1929, § 3466.

Defendants not only cannot claim title under the tax deed involved, but are barred from asserting such title or claiming a lien based thereon.

(2) Defendants claim title by adverse possession. If they establish title by adverse possession, such

title must be established independent of and contrary to the provisions of 1 Comp. Laws 1929, § 3466. Under the law of this State, color of title is not necessarily the basis of adverse possession. One may claim and acquire title by adverse possession independent of color of title. *Lawson* v. *Bishop,* 212 Mich. 691.

"The doctrine which sanctions the divestiture of the true owner by hostile occupancy is to be taken strictly, and the case is not to be made out by inference, but by clear and cogent proof." *Yelverton* v. *Steele,* 40 Mich. 538, cited in *Simons* v. *McCormick,* 202 Mich. 485.

"Adverse possession, to give title, must be an actual, continued, visible, notorious, distinct, and hostile possession, and a finding of adverse possession must set forth in explicit terms a state of facts that will satisfy the legal definition." *Paldi* v. *Paldi,* 95 Mich. 410, cited in *Simons* v. *McCormick, supra.*

"It is also well settled that the possession of an occupant is co-extensive with his claim and color of title. If in possession of a part under color of title to the whole tract, his constructive possession extends to the whole; if under color of title to an undivided interest, his constructive possession covers the whole to the extent of such interest; if without color of title, the possession is not extended by construction, beyond the boundaries of the occupied portion." *Campau* v. *Campau,* 44 Mich. 31.

"One claiming title by adverse possession but not holding under color of title acquires no title to any land except what is in his actual possession. There can be no constructive possession without color of title. It cannot be acquired by mere assertion of claim of title." 2 C. J. pp. 230, 231.

"The reason on which the rule is based is that when an entry is not under color of title there is no invasion or disseizin which notifies the true owner of a claim asserted by another person, or which gives him a right of action except as to the land actually occupied." 2 C. J. p. 232.

Mere occupancy of land is not sufficient to give title by adverse possession. *Bunce* v. *Bidwell,* 43 Mich. 542.

"A mere claim of title, no matter how long asserted, will not ripen into title." *Doctor* v. *Turner,* 251 Mich. 175.

"It is well settled that the constructive possession of land is in the holder of the record title." *Doctor* v. *Turner, supra.*

See, also, 3 Comp. Laws 1929, § 13967.

"It may well be conceded that paying taxes, or asserting title, or the common understanding in the neighborhood, or making surveys, or an occasional renting for trapping and shooting, is not sufficient to establish title by adverse possession." *Whitaker* v. *Erie Shooting Club,* 102 Mich. 454.

The Harters received deed to the property in 1914. The next year they entered upon the premises, cut some brush, and built a lean-to shack. They left the premises in the fall of 1915, and did not come back again until the summer of 1922. At that time the house was gone, and while they stayed there a short time they lived in a movable house built on a motor truck. They went back again on the premises, it is claimed, each year until 1928. The Harters lived in Galion, Ohio, and never lived upon the land in question in any house thereon at any time except in 1915.

The case is analogous to *Yelverton* v. *Hilliard,* 38 Mich. 355, where the land in controversy was uninclosed wood land, and the claimed owner gave per-

mission to another to enter upon and clear off and cultivate such portions of it as he chose, subject to the agreement that in case of sale the claimed owner would pay for the improvements, less the value of the use of the land; in pursuance of such agreement the timber on about one acre of the land was cut off and cleared and inclosed in a fence, plowed, planted to "bagas" which were harvested and removed in October or November following. No other use of the land was made until the conveyance to defendant January 4, 1866. It was said:

"The premises were vacant from the time Turner took off his little crop of turnips in October or November, 1865, to the entry of defendant in the succeeding January, and during this period there seems to have been no adverse possession and no obstacle to an entry by the plaintiff.

"The finding therefore not only fails to show 10 years' possession under the tax deeds next preceding the commencement of the action, but on the contrary shows affirmatively that the possession was for a shorter period."

The question of adverse possession of unoccupied land was considered in *Doctor* v. *Turner, supra,* from which the following may be deduced:

a. Constructive possession of land is in the holder of a record title;

b. A mere claim of title, no matter how long asserted, will not ripen into title;

c. Occasional or periodical entry upon land does not constitute actual possession;

d. In order to make good a claim of title by adverse holding, the true owner must have actual knowledge of the hostile claim; or,

e. The possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded

intentionally, and with the purpose to assert a claim of title adversely to his, so that if the true owner remains in ignorance it is his own fault;

f. There must be such continuity of possession as will furnish a cause of action for every day during the whole period required to perfect title by adverse possession;

g. The possession must be more than a possession which will enable a person on the ground of a possessory title to maintain trespass or ejectment against a stranger;

h. Occasional trespasses or acts of ownership do not constitute such continuous possession as will ripen into title by adverse possession, though extending over the statutory period;

i. Casual hay cutting, amounting to a little more than an annual trespass, is not sufficient to warn the owner of the record title of a claim of adverse possession.

Defendants failed to make out a case of title by adverse possession, and the trial court came to a correct conclusion in so finding.

(3) Defendants claim plaintiffs are estopped from asserting title to the premises in question.

"No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by some person thereunto by him lawfully authorized by writing." 3 Comp. Laws 1929, § 13411.

The title to land may not, under the law of this State, rest on estoppel.

"As our own cases settle this question, it is unnecessary to discuss at length cases from other States. There is a want of harmony upon the subject; but it is confidently believed that the doctrine contended for exists only where the courts have permitted the doctrine of estoppel to override the statute of frauds." *Nowlin Lumber Co.* v. *Wilson,* 119 Mich. 406.

"Unfortunately for defendant's contention, the statute of frauds prevents the passing of title to realty by parol, and this cannot be done any more under the guise of an estoppel, in the absence of fraud, and when the estoppel consists only of an implied assent, than by showing a direct parol contract." *Huyck* v. *Bailey,* 100 Mich. 223.

"It has been repeatedly held that interests in land cannot rest on estoppel alone. The statute of frauds forbids." *Wilson* v. *Railroad Co.,* 132 Mich. 469.

We are satisfied defendant has not made out a title to the premises in question either under its tax deed or by adverse possession, and plaintiffs are not estopped from asserting title to the premises.

(4) The decree of the trial court gave the lands to the plaintiffs on condition they pay defendants Basil Harter and Ralph Harter the sum of $564.13, taxes paid on the property, within 60 days from the date of the decree, and if such sum was not paid, the premises might be sold to satisfy that claim, which was made a lien upon the premises. From this part of the decree plaintiffs appeal. The court found the Harters had paid the taxes. They went into possession under a deed from Holmes. Holmes never acquired any title, and had none to convey to them.

"A party, therefore, who enters upon the possession of land under one, or a series of tax titles, should see to it that he has such a title as will war-

rant him in incurring the liabilities incident to that possession. In imposing this rule, the law only applies in his case the obligation, which is incumbent upon every other purchaser of land, to take care that he has a good title if he would derive benefit from it, or enjoyment under it." *Lacey* v. *Davis,* 4 Mich. 140 (66 Am. Dec. 524).

One in possession of land, claiming title, is bound to pay the taxes upon it. *Dubois* v. *Campau,* 24 Mich. 360, 368.

The ejectment statute provides, where defendant or defendants, or persons through whom he or they claim title, shall have been in the actual peaceable occupation of the premises recovered for six years before the commencement of the action or the same shall have been so occupied for a less time than six years under color of title and in good faith, the defendant shall be allowed compensation for the buildings and improvements on the premises placed thereon by them, though the plaintiff may recover, and, upon judgment being entered, the plaintiff may elect to abandon the premises to the defendant or pay for the value of the improvements found. 3 Comp. Laws 1929, §§ 14946–14949. These statutes are not applicable to cases like that here involved, though they may have influenced the trial court, whose decree seems to be based upon the rule that it might grant relief upon reasonable conditions. We are not, under the circumstances, disposed to modify that decree, which is affirmed, with costs.

McDONALD, C. J., and CLARK, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred with POTTER, J. WIEST, J., concurred in the result.

PEOPLE v. KOUKOL.

1. CRIMINAL LAW—INDORSING WITNESSES' NAMES ON INFORMATION—STATUTES.

   Right of defendant to know witnesses to be called against him is substantial one, and therefore statutory requirement that names of witnesses known to prosecutor be indorsed on information at time of filing should be faithfully observed, notwithstanding court has authority to indorse names of witnesses before or during trial (3 Comp. Laws 1929, § 17254).

2. SAME—OPPORTUNITY TO PREPARE FOR TRIAL.

   Although court has authority to indorse names of witnesses on information during trial, defendant is entitled to reasonable opportunity to prepare for trial.

3. SAME—WITNESSES—WAIVING IMMUNITY—CROSS-EXAMINATION—SELF-INCRIMINATION.

   Where, in prosecution for embezzlement, joint indictee with defendant turned State's evidence, was sworn and examined as witness for people, it was error for court to advise him, on cross-examination, that he had right to refuse to answer any question that might tend to incriminate him, since, under circumstances he had waived his immunity as coindictee and his constitutional privilege against self-incrimination, and was subject to same rules of cross-examination as any other witness.

4. WITNESSES — ACCOMPLICE — CROSS-EXAMINATION — STATE'S EVIDENCE.

   Same rule as to cross-examination applicable to defendant who takes witness stand in his own behalf applies to accomplice who turns State's evidence.

Appeal from Oakland; Gilbert (Parm C.), J., presiding. Submitted January 12, 1933. (Docket No. 132, Calendar No. 36,053.) Decided April 4, 1933.

Frank J. Koukol was convicted of embezzlement. Reversed, and new trial granted.

Preston Allen and *Charles E. Webster,* for appellant.

POTTER, J.. Defendant was indicted jointly with Fred J. Mertz, Lottie S. Thibos, and John H. Parsons for embezzlement; on trial convicted, and appeals. Having been indicted by a grand jury, the names of the witnesses were indorsed on the indictment, filed April 10, 1931. The case was brought on for trial May 11, 1931, at which time motion was made on behalf of the people to indorse the names of John H. Parsons, Lottie S. Thibos, and Fred J. Mertz on the indictment as witnesses. Defendant objected thereto, claimed surprise, and asked adjournment, claiming he had not had time to prepare for trial. A bill of particulars ordered by the court was not filed until the day of trial. Defendant's objections to the indorsement of these names on the information, and his request for a continuance, were overruled by the trial court, and the names of the witnesses indorsed. The names of other witnesses were indorsed against defendant's objection, on motion of the prosecuting attorney. The objections of defendant to this action by the trial court were also raised by motion for new trial made and denied.

In *People* v. *Hall,* 48 Mich. 482 (42 Am. Rep. 477), it is said:

"The court allowed the names of several witnesses to be added to the information during the trial, under objection, without any showing that they were not known earlier and in time to give defendant notice in season to anticipate their presence before trial. The statute is explicit that this shall be done before trial where witnesses are known. * * * This is not a mere formality; and wherever it has been provided for by statute it has been treated as a substantial right."

In *People* v. *Moran,* 48 Mich. 639, the prosecuting attorney indorsed the names of additional witnesses on the information when the case came on for trial without application to or permission from the trial court. For this error a judgment of conviction was reversed, and new trial granted.

The purpose of the rule is thus stated in *People* v. *Quick,* 58 Mich. 321:

"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. It is as important to impeach a rebutting witness as any other."

See, also, *People* v. *Howes,* 81 Mich. 396; *People* v. *Casey,* 124 Mich. 279.

Section 40, chap. 7, Act No. 175, Pub. Acts 1927, as amended by Act No. 24, Pub. Acts 1929 (3 Comp. Laws 1929, § 17254), provides:

"All information shall be filed during term in the court having jurisdiction of the offense specified therein, after the proper return is filed by the examining 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."

In *People* v. *Tamosaitis,* 244 Mich. 258, decided since the enactment of this statute, it was said:

"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."

In *People* v. *Smith*, 257 Mich. 319, involving a related offense, it was held error to swear Lottie Thibos as a rebutting witness without her name being indorsed on the information. Though the court had authority to indorse the names of these witnesses upon the information, defendant was entitled to a reasonable opportunity to prepare for trial.

The witness John H. Parsons, a joint indictee with defendant, turned State's evidence. His name was indorsed on the indictment filed against defendant against objection, and Parsons was sworn and examined as a witness for the people. When he was on the stand, on cross-examination, the trial court said:

"I suppose I should advise him and have the right to say to him that he is not obliged to convict himself of perjury in this case or say anything here that would convict him of perjury in some other trial. * * * I want you to testify according to your own wish and desire, but you have the right to know this, you are being asked a question now, * * * I will say in reference to that question, you are now asked whether or not you did perjure yourself before the grand jury; you are not obliged to answer that question here and now unless you wish to, providing you say your answer to that question might tend to incriminate you. In other words, you have the right here and now to refuse to answer any questions that would tend to incriminate yourself on any other offense, so you can answer that question or not now, as you see fit."

Whereupon the witness refused to answer further questions. This was prejudicial error.

"The credibility of an accomplice, like that of any other witness, is exclusively a question for the jury; and it is well settled that a jury may convict on such testimony alone without confirmation. There is no

good sense in always applying the same considerations in every case to every witness who may stand in the relation of *particeps criminis*. We think it is the duty of a judge to comment upon the nature of such testimony, as the circumstances of the case may require; to point out the various grounds of suspicion which may attach to it; to call their attention to the various temptations under which such witness may be placed, and the motives by which he may be actuated; and any other circumstances which go to discredit or confirm the witness, all of which must vary with the nature and circumstances of each particular case.'' *People* v. *Jenness,* 5 Mich. 305, 330.

The same rule was adhered to in *People* v. *Hare,* 57 Mich. 505, and *People* v. *Schweitzer,* 23 Mich. 301.

''The rule is well settled that the credibility of an accomplice, like that of any other witness, is exclusively a question for the jury, and that the jury may convict upon the testimony of an accomplice alone. But it has also been frequently stated that it is in many cases important that the court should comment upon the nature of such testimony, and point out the grounds of suspicion which may attach to it, calling the attention of the jury to the situation and the temptation under which such witnesses may be placed, and especially if there is testimony tending to show that they have been induced to take the stand in a particular case under a promise of immunity.'' *People* v. *Considine,* 105 Mich. 149, 163.

Where one under indictment takes the witness stand, he waives his constitutional privilege against self-incrimination, and is subject to the same rule of cross-examination as any other witness, and cannot shield himself from making a full and fair disclosure of all the facts of which he has knowledge upon the ground his answers may tend to incriminate him. *People* v. *Dupounce,* 133 Mich. 1 (103 Am. St. Rep. 435, 2 Ann. Cas. 246).

In *People* v. *Gray,* 135 Mich. 542, defendant was cross-examined, and testimony elicited tending to show he had been guilty of perjury. The testimony was objected to, and it was insisted the credibility of respondent as a witness in his own behalf could not be attacked by proving from his own lips on cross-examination that he had committed other offenses than that for which he was being tried, but it was held "that the respondent in a criminal case who becomes a witness in his own behalf is subject to all the rules of cross-examination to test veracity applicable to ordinary witnesses."

"An accomplice who consents to becoming a witness for the people on the trial of his associates for the offense charged, must disclose all he and his associates may have said or done in relation to such offense, and cannot be excused from testifying to statements made by him to his attorney, on the ground of their being privileged." *Alderman* v. *People* (syllabus), 4 Mich. 414 (69 Am. Dec. 321).

The same rule that applies to a defendant when he takes the witness stand in his own behalf applies to an accomplice who has turned State's evidence.

"It would certainly lead to most startling results if an accomplice, who has made out a clear showing of a prisoner's guilt, and has, in doing so, criminated himself to an equal degree, could refuse to have his veracity, or fairness, or bias, or corruption, tested by a cross-examination, and yet be allowed to stand before court and jury on the same footing with any other witness who has been perfectly candid, but who may have been convicted of a similar felony. It is perfectly evident that where a witness who has undertaken to give a full account of a transaction, and has not spared himself from conclusive accusation, then turns round and refuses to answer further, his motive must be something more than to save himself

from the criminal exposure, and it is of great importance to learn why such a course is adopted. If, in those cases where cross-examination is most desirable, to test the credit of a man who is seeking to save his own liberty, by swearing away that of another, it can be completely prevented at the option of the witness himself, it would be difficult to justify the rule which allows codefendants to be used by the prosecution at all, when they cannot be received for the defense. I cannot conceive that the law will tolerate such a state of things. When a man has voluntarily admitted his guilt, he has done all that he can to criminate himself, and his protection from further disclosure on the same subject is no protection whatever, because it cannot undo what makes the whole mischief. * * *

"The law does not endeavor to preserve any vain privileges, and such a privilege as would allow a witness to answer a principal criminating question, and refuse to answer as to its incidents, would be worse than vain; for, while it could not help the witness, it must inevitably injure the party, who is thus deprived of the power of cross-examination to test the credibility of a person who may, by avoiding it, indulge his vindictiveness or corrupt passions with impunity. * * *

"When accomplices are allowed to testify for the purpose of furnishing evidence against a prisoner, they not only know that they are expected to criminate themselves, but they do it with the prospect of an advantage, which, if not absolutely promised, is substantially pledged to them, if they make full disclosures. If they see fit to furnish criminating proof, there is every reason to compel them to submit to the fullest and most searching inquiry. They expressly waive their privilege by giving such proof, for they could not be sworn at all without their consent, while under a joint indictment; and, if not indicted, they could still refuse to furnish evidence of

joint misconduct. But there is neither reason nor show of authority which can, in any case, allow to them any privilege whatever, when they have gone so far already, as to any matters in which they and the prisoner on trial have been connected." *Foster* v. *People,* 18 Mich. 266, 273, 275, 276.

"When a codefendant in a criminal case turns State's evidence, and has attempted to convict others by proof also convicting himself, he has no right to claim any privilege concerning any of the facts bearing upon the issue. He has waived all privileges which would permit him to withhold anything." *Hamilton* v. *People,* 29 Mich. 173, 184.

"We are satisfied that in the case of one who has admitted his connection with a crime, testifying against another as his accomplice, not only the people, but the defense, are entitled to the whole story, and to all that the witness has said or done in relation to the offense up to the time of the giving of his testimony, including confidential communications to his attorney. As far as the crime in question is concerned, he has, by going upon the stand and acknowledging his participation in it, waived all privilege as regards it, as the reason of the privilege has been removed by his own act." *People* v. *Gallagher,* 75 Mich. 512, 516.

Defendant was entitled to searching cross-examination of the witness Parsons who by taking the witness stand and testifying for the people (a) waived his immunity as a coindictee, and (b) his constitutional privilege against self-incrimination. Other errors are assigned. They are not likely to arise on a new trial.

Conviction reversed. New trial granted.

McDONALD, C. J., and CLARK, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

FLEEGAR *v.* CONSUMERS POWER CO.

1. WITNESSES—EVIDENCE—OPPOSITE PARTY—IMPEACHMENT—STATUTES.

   Under statute, employee of opposite party may be called and cross-examined without party calling him being bound by his answers, or prevented from impeaching him (3 Comp. Laws 1929, § 14220).

2. EVIDENCE—OPPOSITE PARTY—WEIGHT OF EVIDENCE—WITNESSES—STATUTES.

   Testimony of witness called by opposite party under statute must be weighed and considered same as that of any other witness (3 Comp. Laws 1929, § 14220).

3. SAME—SUCH TESTIMONY BINDING IF NOT CONTRADICTED.

   Party calling as witness employee of opposite party is at liberty to contradict him, but is bound by his testimony except so far as it is contradicted (3 Comp. Laws 1929, § 14220).

4. GAS—EXPLOSIVES—DEGREE OF CARE REQUIRED—NEGLIGENCE.

   Since gas company is dealing with highly dangerous substance, it is bound to use degree of care commensurate with danger of its gas escaping and causing injury or damage to person or property of others.

5. SAME—CUSTOMER MAY USE GAS AS HE SEES FIT.

   Ordinarily, when gas is measured and delivered to customer, he may use it for such purposes as he sees fit.

6. SAME—CUSTOMER MUST KEEP OWN GAS PIPES IN REPAIR.

   Ordinarily, gas pipes and conduits in customer's building belong to him, are under his control, and it is his duty to keep them in repair.

7. SAME—COMPANY NOT LIABLE FOR CUSTOMER'S DEFECTIVE PIPES.

   Ordinarily, gas company which does not install pipes in customer's building has no control over them and is not responsible for their condition, maintenance, or defective installation, nor for injuries caused by gas escaping from leak therein, of which it has no knowledge.

8. SAME—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.
Person injured by escaping gas by reason of his own contributory negligence may not recover against gas company.

9. NEGLIGENCE—NOT PRESUMED.
Negligence may not be presumed, but must be affirmatively proved.

10. GAS—NEGLIGENCE—ESCAPING GAS—EVIDENCE—SUFFICIENCY.
In action by customer against gas company for injuries alleged to have been caused by escaping gas in plaintiff's house, defendant's negligence *held*, not established by preponderance of evidence.

Appeal from Genesee; Parker (James S.), J. Submitted January 19, 1933. (Docket No. 127, Calendar No. 36,978.) Decided April 4, 1933.

Case by Mabel E. Fleegar against Consumers Power Company, a corporation, for personal injuries alleged to have been caused by defendant's negligence. Judgment for plaintiff. Defendant appeals. Reversed, and new trial granted.

Doran & Pearson, for plaintiff.

Carton & Gault, for defendant.

POTTER, J. Plaintiff sued defendant to recover damages in the sum of $25,000 for defendant's negligence in carelessly and wilfully performing its work in making gas connections to paintiff's house, in this, that it sent an unskilled and incompetent workman to make the connection and turn on the gas; sent a man who failed to carefully perform the work, in that he failed to use reasonable precaution to ascertain whether the pipes and equipment used in conjunction with the gas on the premises were in proper condition to be used without injury to plaintiff; failed to keep the gas pipes used to supply gas

to plaintiff's house in reasonable and proper repair, and did not use that degree of care commensurate to the danger of escaping gas which it was its duty to avoid. Plaintiff alleges she was injured by being overcome or asphyxiated by escaping gas, became extremely nervous and run down, her heart was affected, she has frequent sinking or fainting spells, her eyesight has been seriously impaired, she has severe and painful headaches, and was compelled to be away from her business a great deal, causing irreparable loss of business, and has incurred expenses for nurses, doctors, and medicines.

Defendant denies due care on the part of plaintiff; admits it was requested to turn on gas at her premises, and did so; denies all negligence charged; denies plaintiff was injured by its negligent acts; alleges if she was injured it was not in any way due to defendant's negligence nor to escaping gas from defendant's pipes. The case was tried before the court without a jury. The trial court found the testimony showed by a preponderance there were leaky gas-jets on the second floor of plaintiff's house, and those leaky gas-jets furnished the gas which overcame plaintiff. This finding, if sustained at all by the declaration, must be by paragraph nine, which alleges defendant herein and its agent failed to ascertain and to use reasonable precaution to ascertain whether or not the pipes and equipment used in conjunction with the gas on the premises in question were in such condition that gas would flow into the same or through the same without injury to the person or persons occupying the premises. There was judgment for plaintiff for $6,879.50. A motion for a new trial was made on behalf of defendant, on the ground the findings of the trial court were against the great weight of the evidence, against the pre-

ponderance of the evidence, and the judgment was excessive. This motion was granted, unless plaintiff filed a remittitur within 10 days, which she elected to do, and the judgment stood at $5,879.50 and costs, from which judgment defendant appeals.

Appellant claims the judgment entered is erroneous, in that the court's findings were against the preponderance of the evidence, because plaintiff was guilty of negligence which was the proximate cause of her injury and of contributory negligence, and that the judgment, as entered, was excessive. Appellee accepts appellant's statement of the questions involved, but insists the judgment of the trial court be affirmed.

Plaintiff called Clayton Gahring, an employee of defendant, as a witness, under the statute, and he was fully examined as to what he did in turning on the gas at the premises. The statute, 3 Comp. Laws 1929, § 14220, provides:

"Hereafter in any suit or proceeding in any court of law or equity in this State, either party, if he shall call as a witness in his behalf, the opposite party, employee or agent of said opposite party, or any person who at the time of the happening of the transaction out of which such suit or proceeding grew, was an employee or agent of the opposite party, shall have the right to cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true."

Under the law as it existed prior to the enactment of this statute, one who placed a witness on the stand vouched for his credibility, was bound by his

answers, and barred from impeaching him. Under this statute, an employee of the opposite party may be called and cross-examined without the party calling him being bound by his answers, or prevented from impeaching him; but Gahring was a witness for the plaintiff, not for defendant (*Jones* v. *Railroad Co.,* 168 Mich. 1); and his testimony, being in the case, must be weighed and considered the same as that of any other witness (*City of Kalamazoo* v. *Standard Paper Co.,* 182 Mich. 476); and though plaintiff was at liberty to contradict his testimony (*Cook* v. *Railroad Co.,* 189 Mich. 456), she was bound thereby (*Aphoresmenos* v. *McIntosh,* 189 Mich. 680), except so far as such testimony was contradicted (*Swank* v. *Croff,* 245 Mich. 657).

Gahring testified to facts showing he complied with the rule established by the Michigan public utilities commission in testing the piping and appliances of defendant company; that he went further, and, after he turned on the meter, went through the house to see whether or not any of the gas jets were open, but none of them were open and the gas-pipe in the kitchen was capped. No one directly disputes this testimony. Plaintiff relies, to recover, upon the testimony of plaintiff, who testified she was familiar with the odor of illuminating gas and it was illuminating gas that overcame her; of Lillian Edgar, who said she was acquainted with the odor of illuminating gas, and the gas which overcame plaintiff smelled like illuminating gas, though she would not swear it was; Arthur Edgar, who was in the house afterward, who said he could detect the odor of illuminating gas; of Evelyn Lang, who cared for plaintiff after she was removed from the house to her home, and who said she was familiar with the odor of illuminating gas, could smell the odor on plaintiff's

breath as clearly as she could detect the odor of illuminating gas when standing over a gas stove with the gas turned on; of Peter Archambault, who removed plaintiff from the house, who said he was familiar with the odor of illuminating gas, and it was illuminating gas he smelled in the house; of Dr. Brasie, who said if one is overcome by illuminating gas, the odor may be detected on the breath; and this testimony, it is claimed, shows plaintiff was overcome by illuminating gas; that the gas escaped and was in the house, and the fact that it was there indicates it came there by reason of defendant's failure to inspect the pipes, openings, jets, and appliances in the house at the time it caused the gas to be turned on.

Defendant claims it complied with the rule established in this State through the Michigan public utilities commission, and hence is not liable. It claims it did more. It contends plaintiff and her companion were not overcome by illuminating gas from defendant's pipes, but by a super-heated hot air furnace, which had been lighted after it had been standing unused for some time in a cold house, the smoke flues of which were partially filled with soot, the furnace having been fired with coke, and to sustain this claim it contends the odor of illuminating gas is well understood and easily detected; that neither plaintiff nor her coworker, on the day in question, which was a cold, bright, winter day, when they entered the house from outdoors, discovered or recognized any odor of illuminating gas; that they went upstairs and began to work, and later detected an odor which "smelled like dust in the beginning." "It smelled like gas or a sort of dust smell. It penetrated my lungs, I knew that it was something on fire. * * *

I * * * first thought there might be something in the attic afire. * * * It might be smoke burning, you know, some place in the vicinity, in the attic." Mrs. Edgar, who was with plaintiff, says, "We thought it was dust * * * or something. * * * I could smell a funny odor." Mrs. Edgar says she was familiar with the smell of illuminating gas, and would not swear the odor was that of such gas. Defendant also relies upon the testimony of plaintiff's witness Gahring, defendant's employee, who testified that when he turned on the gas he not only complied with the rule established by the Michigan public utilities commission, but inspected the premises for gas openings and found them closed; and the testimony of Joseph C. Nichols, general foreman of the distributing department of defendant's gas works in Flint who, after the accident, as first aid man of defendant, went to plaintiff's home, and, after the doctor came, went to Mrs. Edgar's house, and from there to the scene of the accident, who says he detected no odor of illuminating gas in the house; that he searched all rooms, smelling, trying to detect some odor of gas, but he could not smell anything; and who says there was no odor of illuminating gas therein. He testified the gas pipe which came into the kitchen, which Archambault says was open, was closed, and which pipe Gahring, Davison, and Dr. Jefferson, as well as Nichols, say was closed; that on opening the furnace in the basement he could smell fumes, but not of illuminating gas; the testimony of Floyd Davison, shop foreman of defendant, who also visited the house in question and examined and tested the gas pipes, but discovered no defects therein, but did detect fumes from the furnace but not the odor of illuminating gas; of Dr.

Jefferson, who went to the house in the afternoon of the injury, examined the furnace, found the flues partially filled with soot, went through the rooms in the house, searched for gas leaks but could find none, and who concluded plaintiff's gassing was the result of carbon monoxide gas from the furnace; and it claims plaintiff's injury did not come from illuminating gas but from gas generated by the furnace; that even if illuminating gas escaped, it performed all and more than all its duty of inspection when the gas was turned on, and was not negligent. That if illuminating gas was escaping and present in the building when plaintiff and Mrs. Edgar entered it from the outside they should and would have detected its odor and presence, and if present in sufficient quantities to overcome plaintiff and her companion, they were guilty of contributory negligence in remaining in the house until they were overcome thereby, and under any circumstances, plaintiff is not entitled to recover; and in addition it claims that the amount of recovery was excessive.

A gas company, since it is dealing with a highly dangerous substance, is bound to use a degree of care commensurate with the danger of its gas escaping and causing injury or damage to the person or property of others. 29 A. L. R. 1250.

Defendant gas company, to ascertain the amount of gas delivered for which it is entitled to pay, installed a meter which belonged to it to measure such gas. When gas is measured and delivered to a customer, he ordinarily may use it for such purposes as he sees fit. The piping and conduits which he uses belong to him and are ordinarily under his control, and it is his duty to keep them in repair. Ordinarily, a gas company which does not install pipes in

the customers' building has no control over them and is not responsible for their condition, maintenance, or defective installation, nor for injuries caused by gas escaping from a leak therein, of which it has no knowledge. 25 A. L. R. 272. As in other negligence cases, if a person is injured by escaping gas by reason of his own contributory negligence, he cannot recover against the company. 25 A. L. R. 274. These principles are the bases of the rule promulgated by the Michigan public utilities commission, which provides:

"No utility shall establish gas service to any applicant until such utility has made a test of all supply piping and gas appliances by observing the meter when all appliances are shut off and gas pressure is on such piping and appliances, and finds that no gas passes the meter under such conditions. * * * Nothing in this rule shall be construed to make the utility liable for the installation, maintenance, or use of piping or appliances owned by the consumer beyond the making of the test above required, nor shall the utility be held liable for any continuing duty of inspection of piping or appliances."

There is no testimony to show, and no claim, any of the gas lines of defendant outside the house or between the meter in the basement and the main were defective, nor that illuminating gas escaped therefrom and penetrated plaintiff's house. It is clear if such gas was in the house it escaped, as found by the trial court, from the gas pipe or fixtures in the house.

If defendant was negligent, it must have failed to observe, for the protection of the interests of plaintiff, that degree of care, caution, and vigilance

which the circumstances justly demanded. *Brown* v. *Railway Co.,* 49 Mich. 153 (4 Am. Neg. Cas. 32). Negligence cannot be presumed, but must be affirmatively proved. *G. R. & I. R. Co.* v. *Judson,* 34 Mich. 506; *G. R. & I. R. Co.* v. *Huntley,* 38 Mich. 537 (31 Am. Rep. 321); *Brown* v. *Railway Co., supra.*

Did plaintiff establish negligence? She did not rest her case upon inferences which might be drawn from the claimed presence of illuminating gas in the house. She went further and affirmatively proved and established by her witness Gahring, who was not impeached except by Archambault, and who was corroborated by several other credible witnesses, not only that defendant complied with the rule established by the Michigan public utilities commission as to meter test but that it made an inspection of the piping and fixtures inside the house and found them closed. In view of plaintiff's showing by this witness whose testimony is not impeached, we cannot find plaintiff has established by a preponderance of evidence defendant was negligent.

Judgment reversed, with costs. New trial granted.

McDONALD, C. J., and CLARK, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

MICHIGAN TRUST CO. *v.* CITY OF GRAND RAPIDS.

1. TAXATION—COLLECTING OFFICERS MUST ACT WITHIN LAW.
   Tax exactions, property or excise, must rest on legislative enactments, and collecting officers may act only within express authority conferred by law.

2. STATUTES—CONSTRUCTION—TAXATION.
   Scope of tax laws may not be extended by implication or forced construction, and language, if dubious, is not resolved against taxpayer.

3. EXECUTORS AND ADMINISTRATORS—TITLE TO PERSONALTY.
   Title to personal property, on owner's death, passes to his executor or administrator on appointment.

4. DESCENT AND DISTRIBUTION—TITLE TO REALTY.
   Title to real estate, on owner's death, descends immediately to his heirs, subject to be divested for payment of decedent's debts.

5. EXECUTORS AND ADMINISTRATORS—TITLE TO PERSONALTY.
   Title to personal property of decedent vests in administrator or executor for purposes of administration, at conclusion of which balance remaining will be distributed.

6. SAME—TITLE TO PERSONALTY REMAINS IN ABEYANCE UNTIL ADMINISTRATION GRANTED.
   Title to personal property, on death of owner, remains in abeyance until administration is granted, and then vests, as of time of his death, in his executor or administrator.

7. TAXATION—TRUSTS—TITLE TO PERSONALTY.
   Personal property in hands of trustee is assessed to trustee and not to beneficiaries, because legal title is in trustee.

8. SAME—CHANGE OF OWNERSHIP—EXECUTORS AND ADMINISTRATORS.
   On death of owner of personal property there was change of ownership by reason of title thereto vesting in executor, and therefore, under statute, there was no authority for spreading taxes against said property not assessed in owner's lifetime (1 Comp. Laws 1929, § 3548).

9. SAME—RECOVERY OF TAXES PAID UNDER PROTEST.

Executor paying, under protest, taxes illegally assessed against personal property formerly owned by deceased, is entitled to recover same, in action therefor.

Appeal from Superior Court of Grand Rapids; Shaw (Arthur F.), J. Submitted January 18, 1933. (Docket No. 41, Calendar No. 36,933.) Decided April 4, 1933.

Assumpsit by Michigan Trust Company, individually and as executor of the last will of S. Porter Tuttle, deceased, against City of Grand Rapids to recover taxes paid under protest. The Board of Education of City of Grand Rapids, State of Michigan, and County of Kent intervened as defendants. Judgment for defendants. Plaintiff appeals. Reversed, and judgment ordered entered for plaintiff.

Butterfield, Keeney & Amberg and *Harry Shulsky,* for plaintiff.

Dale Souter, for defendant city.

Ganson Taggart, for intervening board of education.

Paul W. Voorhies, Attorney General, and *Hugh E. Wilson,* Assistant Attorney General, for intervening State.

Bartel J. Jonkman, Prosecuting Attorney, and *Fred N. Searl,* for intervening county.

POTTER, J. Plaintiff sued defendant to recover taxes paid under protest. From a judgment for defendant, plaintiff appeals. S. Porter Tuttle, a resident of Grand Rapids, died August 30, 1930. Plaintiff was appointed executor of his estate. In

1931 the State board of tax commissioners ordered the levy against plaintiff of taxes on personal property which had belonged to deceased, in its hands, claimed to have been omitted from the tax roll for previous years. Taxes aggregating $37,346.28 were assessed against plaintiff, paid by it under protest, and suit is brought to recover them back.

(1) "Tax exactions, property or excise, must rest upon legislative enactment, and collecting officers can only act within express authority conferred by law. Tax collectors must be able to point to such express authority so that it may be read when it is questioned in court. The scope of tax laws may not be extended by implication or forced construction. Such laws may be made plain, and the language thereof, if dubious, is not resolved against the taxpayer." *In re Dodge Brothers,* 241 Mich. 665.

(2) The right claimed by defendants to assess to plaintiff the tax in question, if it exists, must be found in 1 Comp. Laws 1929, § 3548, which provides for the reassessment of property, not assessed for previous years and which ought to have been assessed, for taxes.

This statute provides the omitted property reassessed (a) "shall be listed for taxation upon the next assessment roll that shall be made and shall be valued as all other property." (b) The tax "shall constitute a charge against the person and property and be collected as other taxes." (c) "In case of change in ownership of the property omitted, said taxes shall not be spread against said property prior to the last change of ownership."

(3) Was there a change of ownership of the personal property of S. Porter Tuttle upon his death and the appointment of plaintiff as executor of his will?

The title to personal property of decedent at his death passes to his executor or administrator upon appointment, and rests in them absolutely; but the title to real estate descends immediately to his heirs, subject to be divested for the payment of decedent's debts. *Palmer's Appeal,* 1 Doug. 422; *Powell* v. *Pennock,* 181 Mich. 588.

The title of an administrator or executor of a decedent to the personal property of deceased is so vested for the purposes of administration, at the conclusion of which the balance remaining will be distributed. *Palmer's Appeal, supra; Windoes* v. *Colwell,* 247 Mich. 372.

The title of personal property, upon the death of a decedent, remains in abeyance until administration is granted in his estate, and is then vested, as of the time of his death, in his executor or administrator. *Cullen* v. *O'Hara,* 4 Mich. 132.

The title to personal property does not pass to the next of kin. *Morton* v. *Preston,* 18 Mich. 60 (100 Am. Dec. 146). An executor or administrator appointed by the probate court is an officer of that court, who has title to the assets of the estate of deceased for the purpose of collecting and disbursing of the same for the benefit of creditors, the beneficiaries under the will, or the next of kin. *Gilkey* v. *Hamilton,* 22 Mich. 283. The legal estate in personal property upon the death of the owner thereof, vests absolutely in his executor or administrator. *Foote* v. *Foote,* 61 Mich. 181.

"It is well settled in this State that, on the decease of an intestate, the title to his personal effects remains in abeyance until the appointment of an administrator, and then vests in him, in trust, in his official capacity, as of the time of the intestate's death, and he is entitled to the possession of such

assets, and to manage the property for the purposes of his trust. *Palmer's Appeal,* 1 Doug. 422, 424; *Cullen* v. *O'Hara,* 4 Mich. 132; *Wales* v. *Newbould,* 9 Mich. 45, 83; *Morton* v. *Preston,* 18 Mich. 60 (100 Am. Dec. 146); *Gilkey* v. *Hamilton,* 22 Mich. 283; and *Albright* v. *Cobb,* 30 Mich. 355, 359." *Parks* v. *Crippin-Norris,* 101 Mich. 71, 77.

"The general rule is that title to personal property of a decedent, testate or intestate, vests in the personal representative until administration is completed and the estate is fully settled and distributed, or until he chooses or is forced to part with it earlier. 18 Cyc. p. 353, and cases cited. This rule had been recognized in this State and in intestate cases has always been followed. *Cullen* v. *O'Hara,* 4 Mich. 132, 138; *Miller* v. *Clark,* 56 Mich. 337, 341; *Parks* v. *Crippin-Norris,* 101 Mich. 71, 76, 77." *In re Reidy's Estate,* 164 Mich. 167.

" 'It is well settled in this State that, on the decease of an intestate, the title (legal title) to his personal effects remains in abeyance until the appointment of an administrator, and then vests in him, in trust, in his official capacity, as of the time of the intestate's death, and he is entitled to the possession of such assets, and to manage the property for the purposes of his trust.' *Parks* v. *Crippin-Norris,* 101 Mich. 71.

"See, also, *Cullen* v. *O'Hara,* 4 Mich. 132; *Palmer* v. *Palmer,* 55 Mich. 293; *Miller* v. *Clark,* 56 Mich. 337; *Morris* v. *Vyse,* 154 Mich. 253 (129 Am. St. Rep. 472); *In re Reidy's Estate,* 164 Mich. 167. And, except under special circumstances, such administrator, or other personal representative, as holder of the legal title, is alone authorized to bring an action for the recovery of a debt due to the estate. *Cullen* v. *O'Hara, supra; Gilkey* v. *Hamilton,* 22 Mich. 283; *Hollowell* v. *Cole,* 25 Mich. 345; *Parks* v. *Crippin-Norris, supra; Buchanan* v. *Buchanan,* 75 N. J. Eq. 274 (71 Atl. 745, 22 L. R. A. [N. S.] 454, 138 Am. St. Rep. 563, 20 Ann. Cas. 91)." *Brobst* v. *Brobst,* 190 Mich. 63.

The indebtedness of an heir to the estate of a deceased person may be set off by the administrator against his distributive share in the assets of the estate consisting of personal property and applied by the administrator in payment of the debt due the estate from the heir, but,

"The title to the real estate vests in the heir at the date of the death of the ancestor. Real estate is not assets in the hands of a personal representative, and, unless otherwise charged by the terms of a will, is subject only to the contingency of a sale of so much thereof as may be necessary to pay the debts of the estate in case there is not sufficient personal estate for that purpose. This statutory contingency is a modification of the common law, and no sale of real estate to pay debts of the estate could be made before this modification." *Marvin* v. *Bowlby,* 142 Mich. 245, 255 (4 L. R. A. [N. S.] 189, 113 Am. St. Rep. 574, 7 Ann. Cas. 559).

For the reason the legal title to personal property, upon the death of the ancestor and the appointment of an executor or administrator, passes as of the date of the death of the ancestor, to the executor or administrator and the heir indebted to such estate owes him, he may apply what the heir owes him in payment of what he owes the heir. While as to real estate, the title of which passes upon the death of the ancestor to the heir unless otherwise directed by will, no set-off is possible. 3 Comp. Laws 1929, § 14132. In addition to the general rule above stated, relating to set-off, 3 Comp. Laws 1929, § 14137, provides:

"In suits brought by executors and administrators, demands existing against their testators or intestates, and belonging to the defendant at the time of their death, may be set-off by the defendant in the same manner as if the action had been brought by and in the name of the deceased."

The right of set-off recognized by statute and by the decisions above mentioned, can exist only when the executor or administrator of the estate of the deceased has title to property.

During the lifetime of a person the title of his personal property rests in him. Upon his death he no longer can hold property. The legal title of personal property passes to his executor or administrator. They may sue for it, control it, and at the conclusion of administration use it for the purpose of paying the debts of heirs to the estate. Debts of the estate may be set off by persons to whom owing, in suits brought by executors and administrators against them. This would not be possible unless there was a change in ownership from decedent to the executor or administrator.

Defendant has recognized and acted upon this change in ownership. Prior to his death, personal property taxes were assessed against S. Porter Tuttle. Since his death and the appointment of the plaintiff as executor, personal property taxes against the estate of S. Porter Tuttle, deceased, are levied and assessed against plaintiff. Why? For the obvious reason that defendant recognizes there was a change of ownership at the death of Mr. Tuttle and the appointment of plaintiff by the probate court as executor of his will.

In *People* v. *Sears,* 344 Ill. 189 (176 N. E. 273), a question similar to that involved was before the court. The statute of Illinois provided for the reassessment of omitted taxes under substantially similar conditions that omitted taxes may be reassessed in this State. That act provided:

"No such charge for tax and interest for previous years, as provided for in the preceding section, shall be made against any property prior to the date of ownership of the person owning such property at the

time the liability for such omitted tax was first ascertained." (5 Smith-Hurd Illinois Stat., chap. 120, § 263.)

During Sears' lifetime none of the omitted property was assessed against him. He paid all taxes levied and assessed against his property. The property which was reassessed against him was property which after his death it was discovered had been omitted from the assessment roll in his lifetime. The court gave exhaustive consideration to this case. It was argued by eminent counsel. The court said:

"The liability of the owner of property for the payment of taxes is purely statutory. The law is well settled that the legislative power of a State to provide for the levy and collection of taxes is unlimited, except as restricted by the State and Federal Constitutions. (*Chambers* v. *People, ex rel. Fuller,* 113 Ill. 509.) The obligation of the citizen to pay taxes is purely a statutory creation, and taxes can be levied, assessed and collected only in the mode pointed out by express statute. (Cooley on Taxation [2d Ed.], p. 15.) The revenue act of 1872 provided for the assessment of real or personal property which had been omitted in the assessment of any year and the placing of it on the assessment and tax books."

The important question was whether or not there had been a change in ownership of the property. That is the important question here. The Illinois court said:

"At the death of Sears, in 1914, there was a change of ownership. His will gave all his property to his widow at the instant of his death, subject only to the payment of his debts. There was no tax debt at that time, because during his lifetime there had been no assessment for omitted taxes. After his death and the change of ownership to his widow any

charge against the property for taxes and interest for previous years was expressly prohibited by section 278. If there is any doubt whether the sections in question authorized a charge for taxes against the legatee on account of property omitted from assessment by a deceased owner and devised by him, the language of the statute cannot be extended beyond its clear import to make the property subject to the taxation. Such statutes imposing a tax, in case of doubt, are construed most strongly against the government and in favor of the citizen. (*Fidelity & Casualty Co.* v. *Board of Review,* 264 Ill. 11 [105 N. E. 704]; *People, ex rel. City of Chicago,* v. *Barrett,* 309 Ill. 53 [139 N. E. 903].) There could be no valid subsequent assessment, for the reason that the statute expressly prohibited an assessment after a change of ownership. While the executrix held the legal title the sole beneficial ownership was in the legatee or heir. If Sears had transferred all of his money and personal property to another in his lifetime there would have been a change of ownership, which under the express terms of section 278 would have prevented any charge against the property for taxes or interest of previous years. He did make a transfer by his will, which had the same effect at the moment of his death as a transfer by a grant and delivery of possession would have had in his lifetime. The fact that the new owner of his property was his widow made her position no different from that of a stranger, as no exceptions are made in section 278 to its general prohibition against the assessment of omitted property after a change of ownership."

The court held, under the provisions of the Illinois statute providing for the assessment of real or personal property omitted from taxation by decedent during his lifetime, there was no basis for an attempt of the board of review to assess the property omitted by Sears in his lifetime against Mrs. Sears,

either as his legatee or the executrix of his will. It is said:

"The moment he died her rights under his will attached. Her title was then vested, and no change in the law thereafter made could disturb such vested rights. *Rowlett* v. *Moore,* 252 Ill. 436 (96 N. E. 835, Ann. Cas. 1912D, 346). The title to all his property was vested in her, subject to his debts. Since there could be no tax without an assessment there was no debt, and since section 278 prohibited any assessment against the property prior to the date of her ownership, there never could be any assessment or any debt. 'The moment the testator or intestate dies, then the rights of the devisees or heirs attach at once, for the title is then already vested, and any change in the law after that could not affect such vested rights.' *Sturgis* v. *Ewing,* 18 Ill. 176. Mrs. Sears from the death of her husband was the sole and absolute beneficial owner of all the property which he owned at his death, subject only to the payment of his lawful debts. It was not within the power of the State thereafter, by mere legislation, to impose upon her any additional obligation or to create any charge against her property. To do so would be a taking of her property without due process of law. The legislature has the undoubted right to repeal all legislative acts which are not in the nature of contracts or private grants, but the repeal of a law cannot affect or impair rights which have been acquired under it. So of the adoption of a new law. It can have no retrospective operation so far as vested rights are concerned. Statutes are not to be given a retrospective operation except where it is manifest the legislature intended they should have such operation, and it is not competent even for the legislature to give such operation to an act where it will affect existing vested rights. *Dobbins* v. *First National Bank,* 112 Ill. 553.

"Since the statute at the time of the death of the decedent made no provision for the assessment after his death of personal property which he had owned but which had been omitted from assessment in his lifetime in various years, as claimed by the bill, the decree of the circuit court is without foundation in the law for its support."

(4) It is claimed that in insurance cases, change of interest of the insured does not affect liability on the policy. That depends on the terms of the policy, provision of the statute, and construction by the court.

In *Lappin* v. *Charter Oak Fire Ins. Co.,* 58 Barb. (N. Y.) 325, the policy of insurance contained a clause that it should be void, in case there was any change of title in the property insured, unless the consent indorsed upon the policy was obtained. While this policy was in force the insured died, and suit was brought by his administrator. It was said:

"It seems clear, therefore, that the policy of insurance by the most clear and explicit terms and provisions thereof, became void and ceased to have any binding force, upon the death of the assured, and the vesting of the title to the property insured in the heirs-at-law. That this was a change of title, from the assured to others, cannot be denied, and it brings the case within the express terms of the policy."

A similar question was before the supreme court of New York in *Hine* v. *Woolworth,* 93 N. Y. 75 (45 Am. Rep. 176). There, one Brouillet had an insurance policy which contained substantially the same provisions as involved in *Lappin* v. *Charter Oak Fire Ins. Co.,* above referred to. Brouillet died. After his death a loss occurred, and the insurance company defended upon the ground there had been a change of interest. The court said:

"When Brouillet died and the title to the property was transferred to his heirs there was such a change of interest as avoided the policy until the consent of the company should be obtained."

A case somewhat analogous was before the court in *Cook* v. *Kentucky Growers Ins. Co.,* 24 Ky. Law Rep. 1956 (72 S. W. 764). There a policy was issued to the insured. There was no provision in the policy that it was payable to his executors, administrators, or assigns. The defendant company was a mutual insurance company in which losses are liabilities of the members. Liability was mutual. Obligations reciprocal. The court held the insurance company was not liable for a loss which occurred after the death of the insured to his heirs, because such heirs were not liable for the premium; were not members of the company, and that mutuality, which lies at the basis of mutual insurance, having been destroyed, the company could not be held liable because the insured had ceased to be a member.

In *Gillon* v. *Northern Assurance Co.,* 127 Cal. 480 (59 Pac. 901), the real estate was, during the lifetime of the deceased, transferred by deed operative either upon the delivery of the deeds or at the death of the grantor. After the insurance was issued and the death of the insured, a fire occurred, and the court, in denying liability of the insurance company, said that though the deeds were executed to avoid the expense of probating the estate, "The conveyance of the buildings by the insured operated to transfer the title in the property to Gillon, either at the date of the deed or at the time of the grantor's death," and held the company was not liable upon the policy.

A similar question apparently was discussed by counsel in *Westchester Fire Ins. Co.* v. *Dodge,* 44 Mich. 420, where it is said:

"Whether the death of a person insured before a loss occurred would render void the policy, we are not called upon to determine in this case. By the terms of the policy the loss was made 'payable to Chester Downer of Sharon, Vermont, as his mortgage interest may appear,' and under such a provision the mortgagee could not be cut off from the protection which the policy afforded him, by the death of the person to whom the policy was issued."

The general rule is thus summed up in 4 Joyce on the Law of Insurance (2d Ed.), § 2289, p. 3908:

"If, however, a policy is conditioned to be void if the interest of the insured shall be changed in any manner, whether by act of the insured or by operation of the law, it has generally been held that the death of the insured will avoid the policy. So where a fire policy was conditioned to be void 'if, without the written consent of the company first had and obtained, the said property shall be sold or conveyed and the interest of the parties therein be changed in any manner, whether by the act of the parties or by operation of law, or the property shall become incumbered by mortgage, judgment, or otherwise,' and the insured died intestate as to all his property, it was held that the policy was void by change of interest. Where the policy is conditioned to be void 'in case of any sale, transfer, or change of title in the property insured,' it is held that the policy ceased to have any force upon the death of the insured, and the vesting of the title in his heirs-at-law."

(5) Personal property in the hands of a trustee is assessed to the trustee and not to the beneficiaries of the trust, for the reason the legal title is in the trustee and not in the beneficiaries of the trust. *City of Detroit* v. *Lewis,* 109 Mich. 155 (32 L. R. A. 439); 1 Perry on Trusts (7th Ed.), § 331; 1 Lewin on Trusts (13th Ed.), p. 236; Cooley on Taxation

(2d Ed.), p. 375; 25 Am. & Eng. Enc. Law (1st Ed.), p. 153; *Latrobe* v. *Mayor of Baltimore,* 19 Md. 13; *Dorr* v. *City of Boston,* 6 Gray (72 Mass.), 131; *Davis* v. *Macy,* 124 Mass. 193; *Smith* v. *Byers,* 43 Ga. 191; *Greene* v. *Mumford,* 4 R. I. 313; *Catlin* v. *Hull,* 21 Vt. 152; *People, ex rel. Western R. Co.,* v. *Assessors of Albany,* 40 N. Y. 154; *Lewis* v. *Chester Co.,* 60 Pa. 325.

(6) It seems clear upon principle and authority, that, upon the death of S. Porter Tuttle, and the appointment of plaintiff by the probate court as executor of his will, there was a change of ownership of the personal property in question. Before death it belonged to S. Porter Tuttle. By his death and the appointment by the probate court of plaintiff as executor, there was a change in ownership of such personal property from him, by death, his will operative at his death, and the appointment by the probate court of plaintiff as executor, from S. Porter Tuttle to plaintiff, and because of that change of ownership of the personal property, which had belonged to decedent in his lifetime, from him to plaintiff, the taxing power of defendant could not spread against plaintiff a tax "against said property prior to the last change of ownership," which is what was done. It follows that plaintiff is entitled to recover.

Judgment reversed, and judgment directed to be entered for plaintiff against defendant for the amount of taxes involved, with costs.

McDONALD, C. J., and CLARK, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

KABAKER *v.* VAN MAELE.

VENDOR AND PURCHASER—FORECLOSURE—DEFICIENCY DECREE—ASSUMPTION OF OBLIGATION TO PAY.

In suit to foreclose land contract, decree for deficiency against assignees of vendee's interest was properly denied, where they did not assume or agree to pay obligations of vendee, but, instead, covenanted to pay obligations of seller. SHARPE, FEAD, and BUTZEL, JJ., dissenting, on ground that there was mistake in using wrong form for assignment, and that assignees intended to assume and pay vendee's obligations.

Appeal from Wayne; Toms (Robert M.), J. Submitted January 18, 1933. (Docket No. 130, Calendar No. 37,032.) Decided April 4, 1933. Rehearing denied June 5, 1933.

Bill by David Kabaker against Albert Van Maele and another and Morris De Clark to foreclose a land contract and for deficiency. Decree for plaintiff for deficiency against defendant De Clark only. Plaintiff appeals. Affirmed.

Leo A. Coskey (*John Sklar,* of counsel), for plaintiff.

Leslie L. Alexander, for defendants Van Maele.

POTTER, J. Plaintiff, May 19, 1932, filed a bill against defendants to foreclose a land contract, and for deficiency. Plaintiff had decree of foreclosure and for deficiency against defendant De Clark. From the decree entered, plaintiff appeals, claiming a decree for deficiency against defendants Van Maele. October 1, 1924, William Endert and wife, owners of the property in question, sold it on land contract

to Sylvester Onyskow and Peter Soduski. April 22, 1926, Soduski assigned his interest in the contract to Sylvester Onyskow. June 8, 1926, Onyskow and wife assigned their interest in the contract to Albert Van Maele and Mary Van Maele, his wife. January 3, 1931, Van Maele and wife assigned their interest in the land contract to Morris De Clark. February 28, 1925, William Endert and wife sold their interest in the premises to plaintiff. Default having been made in the contract, plaintiff filed this bill.

The assignment from Onyskow and wife to Van Maele and wife was in writing. It assigns the contract:

"together with all sums due and to become due thereon and covenants that there is now owing thereon $10,816.95, with interest from May 28, 1926. Said assignee covenants to perform the obligations of the seller in said contract, the lands therein described having been this day conveyed to the assignee by deed of even date."

When Albert Van Maele and Mary Van Maele assigned the contract to defendant De Clark, the assignment recited there was "a balance owing upon said contract of $8,446.37, with interest from July 1, 1930, which said assignee and grantee assumes and agrees to pay."

The trial court found a decree providing for a deficiency against defendant De Clark. He has not appealed. No decree providing for a deficiency against defendants Van Maele was entered, for the obvious reason there was no assumption and agreement to pay upon their part.

Decree affirmed, with costs to appellees.

McDONALD, C. J., and CLARK, NORTH, and WIEST, JJ., concurred with POTTER, J.

FEAD, J. (*dissenting*). The peculiar nature of the language in the assignment was due to the parties mistakenly using a printed form for assignment of vendors' interest in land contract. The assignment demonstrates the clear purpose and covenant of the Van Maeles to assume and agree to pay the obligations of the Onyskows under the land contract, and the blunder in language is so evident as to correct itself. *Sloman* v. *Cutler,* 258 Mich. 372; *Smith* v. *Lloyd,* 29 Mich. 382.

Decree should be reversed as to defendants Van Maele and one entered against them for deficiency decree, with costs.

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

MACKENZIE *v.* UNION GUARDIAN TRUST CO.

1. EQUITY—JURISDICTION—WILLS — CONSTRUCTION — TRUSTS — PARTIES.

   Court of equity has jurisdiction to construe wills incidental to its general power over trusts and trust estates, and bill may be filed by anyone interested in determination of questions involved.

2. EXECUTORS AND ADMINISTRATORS—CONSTRUCTION OF WILL.

   Executor, in case he doubts his right to act, may apply to court of equity for construction of will.

3. EQUITY—EXECUTORS AND ADMINISTRATORS—TRUSTS—CONSTRUCTION OF WILL—ACCOUNTING.

   Granddaughter claiming grandfather's will created trust in her favor may maintain suit in equity for construction of will and for accounting, where executor denies trust and treats her as common legatee.

4. PARTIES—NECESSARY PARTIES.

Who are necessary parties in particular suit may depend upon allegations of bill of complaint and relief sought, and in some cases duty to join other parties may arise from relief sought by defendant.

5. SAME—MISJOINDER—NONJOINDER—STATUTES.

Statute providing that no action at law or in equity shall be defeated by nonjoinder or misjoinder of parties is remedial in character and is to be liberally construed (3 Comp. Laws 1929, § 14021).

6. SAME—NECESSARY PARTIES MAY BE JOINED—STATUTES.

Bill of complaint may not be dismissed because of nonjoinder of necessary parties; if other parties are necessary they may and should be joined (3 Comp. Laws 1929, § 14021).

7. EQUITY—JURISDICTION—DUTY OF COURT TO RETAIN JURISDICTION.

If, in suit in equity, trial court has jurisdiction on any well-settled ground of equity jurisdiction, it is its duty to retain case and grant complete relief.

8. TRUSTS—WHEN CREATED.

Trust is created when some estate, interest, or power in or affecting property of any description is vested in one person for benefit of another.

9. SAME—TESTAMENTARY TRUST—WILLS.

Provisions of grandfather's will bequeathing to granddaughter certain sum, which was to be kept invested as trust fund and one-fifth plus accumulations paid to her each year until whole amount was paid, *held*, to create trust in said fund in her favor.

10. EXECUTORS AND ADMINISTRATORS—CONSTRUCTION OF WILL—ALLOWANCE OF ACCOUNT—JUDGMENT—RES JUDICATA.

Allowance of annual account of executor or administrator is final and conclusive as to amount of money received by him and disbursements made by him, in absence of fraud or breach of trust, but has nothing to do with construction of will under which executor acts.

11. JUDGMENT—RES JUDICATA—ALLOWANCE OF ACCOUNT—PROBATE COURT—CONSTRUCTION OF WILL.

Generally, orders of probate court allowing annual accounts are final and conclusive as to all matters included therein, but they do not adjudicate what is not before court and not included in annual account, so that even allowance of final account may not amount to construction of will.

12. Same—Construction of Will—Distribution of Residue.
If, on conclusion of probate of estate, on allowance of administrator's final account, assignment of residue of estate is made in accordance with construction of will by probate court, then, court having to construe will in order to make proper order of distribution, such order, properly entered, is valid and binding as construction of will, if not appealed from.

13. Same—When Questions Adjudicated.
To constitute former adjudication of questions, it must appear that such questions were litigated as matter of fact, were submitted to and decided by jury, and were not collateral inquiries, but were crucial questions in former controversy.

14. Same—Questions Must be Considered and Passed Upon.
Adjudication in favor of claim will not be conclusive of minor issues on which right depends unless it appears not only that they were submitted to jury but were considered and passed upon by them.

15. Evidence—Parol Evidence—Judgment.
Parol evidence is admissible to ascertain whether given question in issue was litigated, submitted, and decided, and, possibly, in some cases, whether it was material.

16. Courts—Probate Court Derives Jurisdiction from Statute.
Probate court derives none of its jurisdiction or power from common law, but must find warrant for all of its doings in statute.

17. Judgment—Res Judicata—Executors and Administrators—Allowance of Final Account.
Allowance of annual or final account of executor or administrator is conclusive as to all matters which are before court and are adjudicated therein, but is not final or conclusive and does not constitute adjudication in matters which were not before court on accounting, and which were not considered or passed upon in allowing said account.

18. Same—Trusts—Testamentary Trust—Construction of Will.
Where there was nothing in annual accounts of executor which showed that it had converted trust estate provided for in will to be set up for testator's granddaughter, or that court construed or intended to construe said will so as to permit executor so to do, allowance of said accounts does not amount to former adjudication or construction of will.

19. TRUSTS—TESTAMENTARY TRUST—EXECUTORS AND ADMINISTRATORS—FAILURE TO QUALIFY AS TRUSTEE.

Where executor took possession of deceased's estate, but failed to comply with provisions of will setting up trust estate for testator's granddaughter, it is no defense, in suit by her against executor for construction of will and for accounting, that executor did not qualify as trustee.

20. EXECUTORS AND ADMINISTRATORS—WILLS—DEVASTAVIT.

Failure of executor to perform his duty, which results in loss to beneficiaries of will, amounts to *devastavit,* whether from fraud, conversion, negligence, or maladministration.

21. SAME—TRUSTS—TESTAMENTARY TRUST.

Failure of executor to set up trust fund for testator's granddaughter, as provided for in will, resulting in loss to her, amounts to *devastavit,* for which executor is liable.

22. SAME—DAMAGES—LOSS TO BENEFICIARY.

In suit by beneficiary under will against executor for construction of will and for accounting, precise sum which beneficiary should receive is what she has lost by executor's failure to properly administer estate.

23. TRUSTS—ACCOUNTING—MISTAKE—WHEN GOOD FAITH DEFENSE.

In suit against trustee for accounting, good faith is defense, where trustee, acting within limits of his powers, with proper prudence and diligence, commits mere mistakes or errors of judgment, but it is not defense where trustee disregards limits placed on his power by law or by trust instrument.

Appeal from Wayne; Kilpatrick (Arthur W.), J. Submitted January 4, 1933. (Docket No. 13, Calendar No. 36,850.) Decided April 4, 1933.

Bill by Ruth Day MacKenzie and another against Union Guardian Trust Company, a Michigan corporation, to construe a will, establish and enforce a trust, and for other relief. Decree for plaintiffs. Defendant appeals. Affirmed.

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

Bulkley, Ledyard, Dickinson & Wright (*Selden S. Dickinson* and *George Haggarty,* of counsel), for defendant.

Potter, J. Plaintiffs file a bill to construe the last will and testament of John C. Day, deceased; establish and enforce a trust alleged to be provided therein; for an accounting, to set up and establish such trust, cancel notes given to defendant for borrowed money, discharge a real estate mortgage securing the payment of such promissory notes, injunction, and other relief. From a decree for plaintiffs, defendant appeals.

Defendant denies all the material allegations of plaintiffs' bill of complaint, and joins to its answer a demurrer clause alleging plaintiffs are not in court with clean hands, and there is no equity on the face of the bill. Defendant and appellant claims the questions involved are:

First. Where, by will, a testator bequeathed the sum of $50,000 to be paid to a legatee in five annual instalments of $10,000 each, and directed the executor "to keep said trust fund invested so far as possible," was an intent manifested to prefer said legatee over other general legatees, so as to require the executor to establish a trust fund out of the first assets of the estate (which are insufficient to pay all legacies in full), and render it personally liable if it did not do so?

Second. Did the allowance of three annual accounts of the executor by the probate court, after proper statutory notice, in each of which accounts the treatment of all legatees on a parity was reported, adjudicate the propriety of such treatment?

Third. Did the defendant assume the duties of a testamentary trustee, and in law accept the trustee-

ship, despite the fact that it did not qualify as a testamentary trustee, and did treat the plaintiff as a common legatee?

Fourth. Are the proceedings here brought jurisdictionally defective by reason of the failure of the plaintiffs to join as parties hereto the other legatees and devisees named in the will?

Plaintiffs make a counter-statement of questions involved, as follows:

First. Does the language of the "third" paragraph of the will fulfill the requirements of a valid testamentary declaration of trust?

Second. Was it the duty of the defendant and appellant, as testamentary trustee, to obtain possession of the trust *res* as soon as possible, and then establish and administer the trust in accordance with the testator's directions?

Third. Was it the duty of the defendant and appellant, as executor, to undertake and complete the administration of the estate as expeditiously as possible?

Fourth. Would the property in the estate have been more than sufficient for all purposes had the appellant, in its dual capacity of executor and trustee, acted with the diligence required of it by law?

Fifth. Can the defendant and appellant avoid all liability for its failure to perform its duties as testamentary trustee by a showing that it has never formally qualified as such?

Sixth. Are the orders entered by the probate court for the county of Wayne, allowing the annual accounts filed by the defendant and appellant as executor, *res judicata* of the propriety of its conduct in failing to establish and administer the trust as directed by the testator's will?

John C. Day died testate November 28, 1927, leaving one direct descendant, Ruth Day MacKenzie, a granddaughter, one of plaintiffs. John C. Day had a substantial estate. By the third paragraph of his will he provided:

"I give and bequeath to my granddaughter, Ruth Day MacKenzie, the sum of $50,000, to be paid to her by my executor hereinafter named, as follows: $10,000 per annum, the first payment to be made one year from the date of my death. I direct my said executor to keep said trust fund invested so far as possible, and to allow the income therefrom to accumulate and to become part of the principal of said fund. In the event of the death of my said granddaughter before said fund is exhausted, I direct that said payments be made to her child or children, and upon the death of said child or children before said fund is exhausted or in the event such children predecease their mother, the balance of said fund shall become part of the residue of my estate to be disposed of as directed in paragraph six hereof."

Paragraph 7 of the last will and testament of John C. Day, deceased, provided:

"I hereby name and appoint the Union Trust Company, of Detroit, Michigan, to be the executor of this will, and request that no bond be required of it as such executor, and I hereby revoke all former wills by me made. It is my wish that my executor consult with my wife during the administration of my estate and that her wishes be carried out as far as possible."

This will was admitted to probate in Wayne county January 4, 1928, and administration of said estate granted to the Union Trust Company. An inventory of the property of the estate was made and an appraisal filed indicating a value of $469,368.33 as of the date of the death of the deceased.

Subsequently there was a consolidation of the Union Trust Company and Guardian Trust Company into the Union Guardian Trust Company, defendant herein.

In the first and final accounts of defendant as special administrator, and first account as executor, of the will of John C. Day, deceased, filed November 30, 1928, defendant alleged it had paid all of the debts of said deceased and expenses of administration to date; had delivered the household furniture and effects to Ruth Fay Boomer Day, widow; paid to the widow the sum of $35,000 in accordance with the second paragraph of the will of deceased; that it has not carried out the balance of the provisions of the second, third, fourth, and fifth paragraphs of the will of said deceased in relation to legacies. Its account showed it paid to Ruth B. Day, assignee, the sum of $1,171.57. This account was allowed by the probate court January 3, 1929, and defendant, as special administrator, was discharged; the final account of the defendant as special administrator standing as its first account as executor.

The second account of defendant as executor was filed January 10, 1930. In it, it alleged it has made substantial payments on account of the legacies bequeathed under the last will and testament of deceased; that it had not been able to complete the administration of said estate and pay the legacies in full, inasmuch as it was necessary to reduce certain assets to cash, which, up to that time, it had not been able to do; that it was making every effort to dispose of the balance of the personal property for the purpose of paying the legacies in full. This account was allowed by the probate court February 13, 1930.

December 13, 1930, defendant filed its third annual account. In it, it alleged it has made substantial

payments on account of the legacies bequeathed under the last will and testament of deceased; had not been able to complete the administration of said estate and pay the legacies in full, inasmuch as it was necessary to reduce certain assets to cash, which it had not been able to do. That it was making every effort to dispose of sufficient property for the purpose of paying the legacies in full. This account was heard and allowed January 15, 1931.

The bill of complaint herein was filed January 16, 1932, and January 19, 1932, an amended bill of complaint was filed, after which defendant filed its fourth annual account as executor of the will of deceased, in which it alleged it had delivered specific household furniture and effects to Ruth F. Day Chandler, in accordance with the provisions of the second paragraph of the will of said deceased; that approximately 40 per cent. had been paid on account of the cash legacies bequeathed under the third, fourth, and fifth paragraphs of the last will and testament of deceased; that it had made a *pro rata* distribution of each dollar distributed, one-third to Ruth F. Day Chandler on account of the one-third personal property bequeathed to her under the second paragraph of the will, and two-thirds *pro rata* on account of the cash legacies bequeathed under the third, fourth, and fifth paragraphs of the will, as modified by the codicil.

Many other things were set up by the petition for the allowance of defendant's account. It was represented that some one of the following courses would have to be pursued in connection with this estate:

a. Sell remaining assets at public auction sale, if possible.

b. Legatees and devisees advance funds for the purpose of preserving the assets until sales can be made.

c. Cash legatees and residuary legatees and devisees agree to a division of the properties in payment of the legacies.

Further showing was made that a copy of this account had been mailed to the last known address of each of the cash legatees and devisees and residuary legatees and devisees of the will.

The elaborate showing made in defendant's petition for allowance of its fourth annual account was probably the result of the institution of suit by plaintiff.

The case was tried and an able opinion filed by the trial court June 4, 1932, finding:

"1. That it was the intention of the testator to provide a trust fund as so expressed in paragraph three of the will.

"2. That at the time of the probate of the will, there were ample funds in the estate out of which such trust fund could have been carved.

"3. That the intention of the testator in relation to the trust fund should have been carried out with reasonable diligence.

"4. That the proceedings in probate court were not *res judicata*.

"5. That the failure of defendant to formally accept the trusteeship did not, under the circumstances, defeat the coming into being of the trusteeship, defendant having entered upon its duties as such, even though it did not follow the expressed wish of the testator.

"6. That the instant proceedings are not jurisdictionally defective for failure to join all other legatees."

June 29, 1932, decree was entered substantially in accordance with the prayer of the bill.

A court of equity has jurisdiction to construe wills incidental to its general power over trusts and trust

estates. 40 Cyc. p. 1838. A bill may be filed by anyone interested in the determination of the questions involved. 40 Cyc. p. 1848.

"It is by reason of the jurisdiction of courts of chancery over trusts that courts having equitable powers, as an incident of that jurisdiction, take cognizance of and pass upon the interpretation of wills. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, nor when only legal rights are in controversy. It is when the court is moved on behalf of an executor, trustee, or *cestui que trust,* and to insure a correct administration of the power conferred by a will, that jurisdiction is had to give a construction to a doubtful or disputed clause in a will. The jurisdiction is incidental to that over trusts." 3 Pomeroy's Equity Jurisprudence, § 1156.

This court has long recognized the right of an executor, in case he doubted his right to act, to apply to a court of equity for the construction of the will.

"If the executor was at all uncertain whether the testator meant to have the mortgage paid out of this legacy, his plain duty was to have filed his bill for a construction of the will. If the executor refused to pay the legacy, and there was a contention as to the true intent and meaning of the will, a court of equity should have been appealed to for a settlement of that question." *Byrne* v. *Hume,* 84 Mich. 185.

In *Dean* v. *Mumford,* 102 Mich. 510, it is said:

"A preliminary question is raised as to the jurisdiction, it being claimed by defendants that, except at the suit of a trustee or *cestui que trust* who asks a direction as to the execution of a trust, a court of chancery has no jurisdiction to construe a will or declare any or all of its provisions invalid. But, however this may be, the executors have answered in this case, and in terms submitted the question of the

construction of the will to the court. As it is undoubted that they might have invoked the jurisdiction of the court for that purpose by a bill, we think that, they having submitted the question, the court may properly maintain jurisdiction."

In *Bowers* v. *Smith,* 10 Paige Ch. (N. Y.), 193, it is held (quoting from syllabus):

"An executor takes the legal estate in the personal property of the testator as trustee for the legatees or next of kin, and the court of chancery having general jurisdiction in cases of trusts, any person having an interest in such property, either as a legatee or distributee of the decedent, may file a bill in that court, against the executor, to have the construction of the will settled, or to have the question as to the validity of any of its provisions determined, so far as concerns the interest of the complainant in the property; and to have a decree against such executor for such parts or portions of the property as he is legally and equitably entitled to receive."

In *Dudley* v. *Gates,* 124 Mich. 440, it is said of the construction of a will:

"If its provisions are of doubtful meaning, either the executor, legatee, or heir should apply to a court of chancery for their construction. *Byrne* v. *Hume,* 84 Mich. 185, 191. This has been the universal practice in this State, and is also the rule in other courts. 1 Woerner, Administration, § 222; *Hawes* v. *Humphrey,* 9 Pick. (26 Mass.) 350, 361 (20 Am. Dec. 481); *In re John's Will,* 30 Ore. 494 (47 Pac. 341, 36 L. R. A. 242); *Hegarty's Appeal,* 75 Pa. 503."

There is no doubt of the right of plaintiffs to maintain this suit to settle the construction of the will of deceased.

It is claimed necessary parties are not before the court. Who are necessary parties in a particular

suit may depend upon the allegations of the bill of complaint, and the relief sought. In some cases the duty to join other parties may arise from the relief sought by defendant.

3 Comp. Laws 1929, § 14021, provides:

"No action at law or in equity shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added and parties misjoined may be dropped, by order of the court, at any stage of the cause, as the ends of justice may require."

This statute, broad and comprehensive in its terms, is remedial in character and liberally construed. *Gillen* v. *Wakefield State Bank,* 246 Mich. 158; *Windoes* v. *Colwell,* 247 Mich. 372. The bill of complaint may not be dismissed because of the nonjoinder of necessary parties. If other parties are necessary they may and should be joined.

If the trial court had jurisdiction upon any well-settled ground of equity jurisdiction it was its duty to retain the case and grant complete relief.

"When any matter becomes involved in a chancery suit, the necessities of justice and equity require that all persons and all things concerned in the controversy shall be brought before the court to have their respective interests charged or protected, and to end the controversy once for all." *Brown* v. *Kalamazoo Circuit Judge,* 75 Mich. 274, 280 (5 L. R. A. 226, 13 Am. St. Rep. 438).

"It is not, in general, within the province of courts of chancery to retain jurisdiction and grant relief, where the party has a clear, certain and adequate remedy at law. But it has often been held, and in New York and some of the other States it is regarded as a settled rule, that where a court of chancery has gained jurisdiction of a cause for any purpose of relief, it will retain it, for the purpose of

giving full relief." *Whipple* v. *Farrar,* 3 Mich. 436, 447 (64 Am. Dec. 99).

Since the decision in *Whipple* v. *Farrar, supra,* above cited, the rule that a court of equity having obtained jurisdiction upon any well-settled ground of equity will retain it to grant complete relief has become firmly established in the jurisprudence of this State. *Miller* v. *Stepper,* 32 Mich. 194; *Wallace* v. *Wallace,* 63 Mich. 326; *Drayton* v. *Chandler,* 93 Mich. 383; *Chase* v. *Boughton,* 93 Mich. 285; *George* v. *Wyandotte Electric Light Co.,* 105 Mich. 1; *Hall* v. *Nester,* 122 Mich. 141; *Scripps* v. *Sweeney,* 160 Mich. 148; *Culver* v. *Avery,* 161 Mich. 322; *Nelson* v. *Gibe,* 162 Mich. 410; *Allen* v. *Heft,* 200 Mich. 593.

Does the will of deceased create a trust? One definition of a trustee is:

"A person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another." 1 Perry on Trusts (7th Ed.), § 1.

A trust is:

"An obligation upon a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence." 1 Perry on Trusts (7th Ed.), § 2.

"A trust is in the nature of a deposition by which a proprietor transfers to another the property of the subject intrusted, not that it should remain with him, but that it should be applied to certain uses for the behoof of a third party." 1 Perry on Trusts (7th Ed.), § 2.

Sir Edward Coke's definition of a "use" has been adopted as an accurate legal description and definition of a "trust." In his words applied to a use,

"A trust is a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which *cestui que trust* has no remedy but by subpœna in chancery." 1 Perry on Trusts (7th Ed.), § 13.

"The doctrines of trusts are equally applicable to real and personal estate, and the same rules will govern trusts in both kinds of property." 1 Perry on Trusts (7th Ed.), § 16.

Applying the definitions of a trust to the language of the will in question, it seems clear that the testator intended to make a bequest to plaintiff of $50,000, which $50,000 was to be kept invested, as a trust fund, so far as possible. That the income from this fund or the balance thereof which had not been paid over to the plaintiff in accordance with the terms of the will was to be added to the principal on hand, and from this $50,000 and the accumulations thereon plaintiff was to be paid the sum of $10,000, plus the accumulations on such trust fund as remained in the hands of the executor one year from the date of the death of the deceased, and that these $10,000 annual payments, plus the accumulations upon the amount of the trust fund remaining in the hands of the executor, were to be made each year until the whole amount of the principal of said $50,000 fund plus the accumulations thereon were paid to her.

It is strenuously insisted in the allowance of these annual accounts the probate court construed the will of testator and this constitutes an adjudication of plaintiffs' rights in the case at bar. In *Raseman* v. *Raseman,* 234 Mich. 237, it was said:

"The allowance of the annual accounts of testamentary trustees on notice is made by statute final and binding upon all parties in interest except for

fraudulent concealment or fraudulent misrepresentation."

This holding is a mere restatement of the provisions of 3 Comp. Laws 1929, § 15900, which provides:

"The decree of the court having jurisdiction allowing any account of a trustee shall, except in cases of fraudulent concealment or fraudulent misrepresentation on the part of the trustee, be final and conclusive against all persons interested in such account and legally competent at the date of such decree, and against all other persons who are or may become interested therein, although unborn, unascertained or legally incompetent to act in their own behalf, if their general guardian or guardian *ad litem* has, after having been duly appointed, assented to such account, or has been heard thereon, or been notified of the hearing thereon; but such decree may be appealed from in the manner provided in the next section of this chapter."

The rule as to the binding force and effect of the accounts of executors and administrators is entirely different. 3 Comp. Laws 1929, § 15922, provides:

"Every executor and administrator shall at the end of one year from the time of his appointment, and at least once in each year thereafter during the continuance of the administration, and at such other times as he may be directed by the probate judge, make and file in the probate court an accurate account of all moneys and other properties in his hands, as such executor or administrator, and of any expenditures and disbursements thereof; in case any such executor or administrator shall fail to make and file his account as herein provided, it shall be the duty of the probate judge to require and notify him so to do."

By 3 Comp. Laws 1929, § 15567, an executor must give a bond "to render a true and just account of his

administration to the probate court within one year, and at any other time when required by such court."

3 Comp. Laws 1929, § 15923, provides for giving notice of hearing and examining an executor's account; and by section 15924 if the executor's account is not satisfactory to the probate court, he may be removed and some other suitable person appointed in his place. By section 15925 an executor may be liable on his bond for damages which may accrue by reason of his failure to account. Section 15927 provides that before an executor's account may be allowed, notice shall be given to all persons interested; but there is nothing in the statute relating to the allowance of accounts of executors and administrators making their allowance an adjudication of the terms of the will of deceased.

The allowance of an annual account of an executor or administrator is final and conclusive as to the amount of money received by him and the disbursements made by him, in the absence of fraud or breach of trust; but this has nothing to do with the construction of the will under which an executor acts. Annual accounts are final and conclusive against the executor, in the absence of fraud and mistake, as to receipts and disbursements where properly allowed after due notice.

Such annual accounts make it incumbent upon the executor to account for the inventoried value of the property received, and this may be shown by the receipt of an equivalent cash value, or by showing the property is worthless, has been destroyed by accident, without the fault of the executor, belonged to some other person, or upon a fair sale brought less than the appraised value thereof.

The rule is general that orders of the probate court allowing annual accounts are final and conclu-

sive as to all matters included therein, but they do not adjudicate what is not before the court and not included in the annual account. Their allowance is binding as to what is included therein, but is not binding as to what is not included. The allowance of a final account of an executor may be conclusive as to receipts and disbursements, but even the allowance of a final account may not amount to a construction of the will.

If, however, upon the conclusion of the probate of the estate of a testator, upon the allowance of the administrator's final account, the assignment of the residue of the property of the estate is made in accordance with the construction of the will of the deceased by the probate court, then, under such circumstances, the court having to construe the will in order to make a proper order of distribution, such order of distribution properly entered is valid and binding as a construction of the will, if not appealed from. *Dudley* v. *Gates,* 124 Mich. 440.

In *Cromwell* v. *County of Sac,* 94 U. S. 351, suit had been brought by one Smith against the county to recover judgment for the amount of coupons on bonds issued by defendant. The coupons belonging to plaintiff Cromwell were among those sued upon. There was judgment for defendant. Plaintiff then brought suit against the county to recover on the bonds to which the coupons, the validity of which had been adjudicated in the *Smith Case,* belonged. It was claimed the suit in the *Smith Case* constituted former adjudication in the *Cromwell Case.* The court said:

"There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between

the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * *

"Where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined."

In *Jacobson* v. *Miller,* 41 Mich. 90, the rule of *Cromwell* v. *County of Sac* was quoted and approved. The general principles of former adjudication were again extensively considered in *Bond* v. *Markstrum,* 102 Mich. 11, where the rule of *Cromwell* v. *County of Sac* and *Jacobson* v. *Miller* were again reaffirmed.

In *Bond* v. *Markstrum* it is said (p. 16):

"A former adjudication of the right of action, where the court had jurisdiction of the subject-matter and of the parties, is unquestionably a bar to an action for the same debt or claim, and is conclusive where the same subject-matter is sought to be again litigated, no matter how, between the same parties. In such case it is no answer to say, 'There were questions which were not raised or litigated.' "

But when a suit is sought to be maintained or defeated by showing former adjudication of questions upon which it depends, it must appear such questions

were litigated as a matter of fact, were submitted to and decided by the jury, and were not collateral inquiries, but crucial questions in the other controversy. An adjudication in favor of a claim will not be conclusive of the minor issues on which the right depends unless it appears not only that they were submitted to the jury but were considered and passed upon by them. According to the great weight of authority parol evidence is admissible to ascertain whether a given question in issue was litigated, submitted, and decided, and possibly in some cases whether it was material.

In *LeRoy* v. *Collins,* 165 Mich. 380, it is said:

"The first essential of the rule of *res judicata* is the identity of the matter in issue. The 'matter in issue' is defined to be 'that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings.' See Chand on *Res Judicata,* p. 35. If the same subject-matter comes in question in a second action in a court of last resort, it is bound by its own former decision. Bigelow on Estoppel (1st Ed.), p. 16.

" 'A matter or question, either of law or fact, is *res judicata,* or set at rest, as to adverse parties and their respective privies, if it was a material issue in the proceeding, directly involved, and not merely incidentally cognizable nor collaterally in question, and was adjudicated after a contest, by a final judgment on the merits.' 1 Van Fleet's Former Adjudication, p. 2."

"The probate court derives none of its jurisdiction or power from the common law, but must find the warrant for all of its doings in the statute. Its jurisdiction, powers, and duties are prescribed by law. * * *

"The probate court possesses the power to adjudicate and settle, by the decree it may make, an administrator's account; but after the merits have been thus passed upon, and the final adjudication put in the form of a decree, we find no authority given to

the probate court to review such decree, or to set the same aside." *Grady* v. *Hughes,* 64 Mich. 540, 545.

"There is nothing appearing in the probate proceedings to put in question the jurisdiction of the probate court to make the order on the accounting, and to include all that was in fact included. This being so, the attempt is now made to attack this judgment collaterally on the merits. This it was held in *Clark* v. *Fredenburg,* 43 Mich. 263, cannot be done." *Holden* v. *Lathrop,* 65 Mich. 652.

Clark v. *Fredenburg, supra,* involved a final account of an executor. Its allowance by the probate court was held to be conclusive.

Shurte v. *Fletcher,* 111 Mich. 84, holds an order of the probate court refusing to probate an estate because of a prior agreement in writing not *res judicata* of the terms of the contract. "There was nothing in the pleadings to indicate that the probate judge was called upon to construe the effect of the alleged settlement."

In re Doyle's Estate, 147 Mich. 544, holds the entry of an order settling and allowing the final account of the administrator and allowing his discharge "was not an adjudication by the court determining who was entitled to this estate and assigning the residue to such persons."

"The order of the probate court allowing the first account, being unappealed from, is conclusive upon appellant." *Nowland* v. *Rice's Estate,* 138 Mich. 146.

In *Calhoun* v. *Cracknell,* 202 Mich. 430, it is said:

"Under the statute cited, the probate court is invested with power, and, at the time of the disposition of the estate, has jurisdiction to construe a will and make disposition accordingly."

In *Thompson* v. *Thompson,* 229 Mich. 526, 531, it is said:

"The order on final settlement is the culmination of the entire procedure. The *corpus* of the estate is affected thereby. To make such order, the will must be construed and the rights of parties in the estate not disposed of by the will must be determined. It is an expression of the judgment of the court as to all matters properly included or necessarily involved therein. It may not be in accordance with the correct construction of the will or of applicable statutes, and yet it must be held to be binding and conclusive on all persons interested, if the notice of hearing required by the statute has been given."

In *Re Rahn,* 241 Mich. 29, it was held the allowance of the annual account of an executor was not *res judicata,* where there was fraud, and the court quoted *Raseman* v. *Raseman,* 234 Mich. 237, which did not involve the account of an executor but of a testamentary trustee, as to whom the allowance of an annual account is by statute made binding and conclusive, but which statute does not apply to the final account of an executor.

In *Riebow* v. *Ensch,* 220 Mich. 450, 454, it is said:

"The probate court in the course of the administration of estates has power to construe a will and the construction placed upon a will in the exercise of such jurisdiction is *res judicata* unless an appeal is taken."

In *Creek* v. *Laski,* 248 Mich. 425, 430 (65 A. L. R. 1113), it is said:

"A judgment is not *res judicata* unless the identical matter in issue in the subsequent proceeding was determined by the former adjudication." Citing *Murphy Chair Co.* v. *American Radiator Co.,* 172 Mich. 14.

In *Harvey* v. *Security Trust Co.,* 242 Mich. 284, it is said:

"The probate court, by its order assigning residue to the trustee, recognized the existence of a valid trust and that the estate was to be disposed of according to the will 'so far as such will may operate upon it.' * * * The order of the probate court is in effect that the provision of the will is valid. The question has been adjudicated by the court of competent jurisdiction. Such adjudication may not be ignored. Nor is it open to collateral attack."

Morton v. *Johnston,* 124 Mich. 561, holds (quoting from syllabus):

"Items allowed to an administrator on a partial account, after notice to persons interested as required by 3 Comp. Laws 1897, § 9441, are not open to attack in the final accounting, except on the ground of fraud unknown at the time of allowance."

In *Porter* v. *Long,* 124 Mich. 584, it was held (quoting from syllabus):

"On a bill to compel an accounting by defendant in the respective capacities of surviving partner and executor of his partner's will, moneys wrongfully withheld by him from the estate as compensation for managing the firm business, which have never entered into his annual accounts as executor, should be charged against him, though such annual accounts have been duly approved by the probate court."

In *Re Ward's Estate,* 152 Mich. 218, 240, where an item in the executor's first annual account was appealed from, it was said:

"The second annual account involved only the new items not included in the first account and the adjudication thereon only affected such items. The order allowing the second account was conclusive as to the additional items included therein, provided

there was no fraud, omission of credit, or concealment of the true state of the account, in which event the finding could be challenged upon a subsequent accounting."

In *Powell* v. *Pennock,* 181 Mich. 588:

"The final account of the administrator did not mention the property involved in this litigation, and can only be binding and conclusive as to the matters therein contained."

The rule to be deduced from the authorities is that an annual or a final account of an executor or administrator is conclusive as to all matters which are before the court and are adjudicated in its allowance, but the order of allowance is not final or conclusive and does not constitute an adjudication in matters which were not before it upon the accounting and which were not considered by the court or passed upon in allowing the account of the executor of the estate.

There is nothing in the annual accounts of defendant, heard and allowed before the bill in this case was filed, which showed defendant had converted the trust estate provided to be set up for plaintiff Ruth Day MacKenzie, or that the probate court construed or intended to construe the will of deceased so as to permit defendant so to do. The allowance of these annual accounts does not amount to a former adjudication or a construction of the will involved adverse to plaintiffs' claims.

Defendant failed to comply with the will of testator. It was its duty as executor to comply therewith so far as possible; cause the $50,000 trust fund to be set up and invested within the period of one year. It is claimed defendant may not be held liable as a trustee because it never qualified as such; that

the office of executor and trustee are separate and distinct, and defendant may not be held liable as a trustee when it did not act as such. *Gibney* v. *Allen,* 156 Mich. 301. That defendant did not qualify as trustee is no defense. It did act as executor. What plaintiffs complain of is the failure of defendant as executor to carry out the terms of the will of deceased; accept the trust created by the will or ask the court to appoint a trustee to carry out its provisions; keeping the money in its hands belonging to such trust, which should have been created and administered as such, as executor; converting it to the use of, and attempting to administer it as a part of, the general estate of deceased, in violation of the terms of the will, in fraud of plaintiff's rights and to her injury and damage. It makes no difference, under the facts, whether defendant is treated as executor or trustee. It was the duty of defendant to carry out the terms of the will, properly collect the assets of the estate, cause such trust to be set up, and to turn the sum of $50,000 bequeathed to plaintiff over to it, in trust, to be invested and the principal and accumulations thereon paid to plaintiff as provided in the will, and defendant is liable to plaintiff for not so doing.

These principles have been repeatedly asserted, affirmed, and enforced. *Jewett* v. *Schmidt,* 83 App. Div. 276 (82 N. Y. Supp. 49); *M'Gachen* v. *Dew,* 15 Beavan, 84 (51 Eng. Repr. 468); *Grove* v. *Price,* 26 Beavan, 103 (53 Eng. Repr. 836); *Pomroy* v. *Lewis,* 14 R. I. 349; *Campbell* v. *Clough,* 71 N. H. 181 (51 Atl. 668); *Bean* v. *Commonwealth,* 186 Mass. 348 (71 N. E. 784); *Caney* v. *Bond,* 6 Beavan, 486 (49 Eng. Repr. 914); *Pinkerton* v. *Sargent,* 112 Mass. 110; *Waring* v. *Darnall,* 10 G. & J. (Md.) 127; *Neff's Appeal,* 57 Pa. 91; *Cross* v. *Petree,* 10

B. Mon. (49 Ky.) 413; 28 Halsbury's Laws of England, pp. 117–139. The defendant as executor is liable as for a conversion of the interest of plaintiff in the trust fund provided for by the will of the testator (*In re Ryer,* 94 App. Div. 449 [88 N. Y. Supp. 52]), and liable for all breaches of the ordinary trusts which arise from its office as executor (*In re Marsden,* L. R. 26 Ch. D. 783). The failure of an executor to perform his duty, which results in loss to the beneficiaries of the will of the testator, amounts to a *devastavit,* whether from fraud, conversion, negligence, or maladministration. Bacon's Abridgment, title, Executors. The failure of the defendant as executor of the estate of deceased to set up the trust fund provided in the will of deceased amounts to a *devastavit.* 14 Halsbury's Law of England, p. 316. The precise sum plaintiff should receive and which defendant should pay is what the former has lost by the failure of the latter to properly administer the estate of deceased. *Perrin* v. *Lepper,* 72 Mich. 454.

Good faith is a defense, where a trustee, acting within the limits of his powers with proper prudence and diligence, commits mere mistakes or errors of judgment, but is not a defense where a trustee disregards the limits placed upon his power by law or by the trust instrument. *Gibney* v. *Allen, supra;* 28 Am. & Eng. Enc. Law (2d Ed.), p. 1063.

We find no reason to disturb the decree of the trial court, which is affirmed, with costs.

McDONALD, C. J., and CLARK, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

BARBER *v.* KOLOWICH.

1. EVIDENCE—BANKS AND BANKING—FINANCIAL STATEMENT.
   Director of bank organized under State law is chargeable with knowledge thereof, and must be presumed to have made his financial statement to said bank, from which he borrowed money, for purpose of complying with law (3 Comp. Laws 1929, § 11922).

2. FRAUDULENT CONVEYANCES—"CREDITOR"—RECEIVERS.
   Receiver of insolvent bank who had obtained judgment against director illegally borrowing money from bank, was "creditor" within meaning of fraudulent conveyances act (3 Comp. Laws 1929, § 13392).

3. SAME—HUSBAND AND WIFE—CREDITORS' SUITS.
   In judgment creditor's suit, conveyances whereby insolvent husband caused title to his real estate to be placed in himself and wife as tenants by entireties were properly held to be in fraud of creditors, in absence of showing that wife was creditor he had right to prefer, or that there was antecedent debt which constituted consideration for said deeds (3 Comp. Laws 1929, §§ 13394, 13400).

Appeal from Wayne; Gillespie (Glenn C.), J., presiding. Submitted February 10, 1933. (Docket No. 162, Calendar No. 36,744.) Decided April 4, 1933.

Bill in aid of execution by Everett W. Barber, receiver of State Bank of America, against Adolph Kolowich and others. Decree for plaintiff. Defendants appeal. Affirmed.

James R. Neill and *Neill E. Graham,* for plaintiff.

John A. Hamilton, for defendants.

POTTER, J. Plaintiff recovered judgment against defendant Adolph Kolowich, November 29, 1930, for $19,608 and $22 costs; caused an execution to be issued which was returned unsatisfied, whereupon a second execution was issued and levied upon the real estate here involved. Plaintiff then filed a bill in aid of execution, it being claimed that deeds from Adolph Kolowich to Irvin Kolowich and from Irvin Kolowich to Adolph Kolowich and Katie Kolowich, his wife, amounted to fraudulent conveyances of such real estate. There was decree for plaintiff. Defendants appeal.

Adolph Kolowich, at the time he originally borrowed the money from the State Bank of America, of which plaintiff is receiver, and for which he recovered judgment, was a director and vice-president of such bank. March 8, 1919, before any suspicion arose as to the insolvency of the State Bank of America, defendant Adolph Kolowich and wife, Katie Kolowich, acquired the real estate in question from John Jaskulski, which deed was not recorded until January 13, 1922. On February 2, 1924, Adolph Kolowich and Katie Kolowich, his wife, deeded the premises in question to Joanna Kolowich, and she deeded them to Adolph Kolowich. Title of record was vested in Adolph Kolowich from February 7, 1924, until July 30, 1930, when the deeds of January 16, 1930, were recorded. Defendant Adolph Kolowich made to the State Bank of America a statement of his financial condition as of August 18, 1925, in which he listed total assets of $333,450, stating, however, that real estate owned jointly with his wife made up $232,500 of this property. In the statement of real estate filed with the bank, the property in question was listed at $75,000. In his statement to the bank, defendant Adolph Kolowich agreed to notify the bank promptly of

any material change in his financial condition. No further statement seems to have been filed with the bank. His son, George Kolowich, became president of the bank. December 31, 1926, defendant Adolph Kolowich borrowed from the State Bank of America $24,000 upon his promissory note. The capital stock of the bank, at the time this loan was made, was $100,000, and the amount borrowed was greater than defendant Adolph Kolowich was entitled to under the banking law, except upon an approval by a two-thirds vote of the directors of the bank, and then only when defendant furnished collateral or indorsement satisfactory to the directors, "or files with the bank a sworn statement of assets and liabilities showing a net worth of sufficient amount to be entitled to such credit." 3 Comp. Laws 1929, § 11922.

The State Bank of America, organized under the State banking law, was under State supervision, and defendant Adolph Kolowich, as a director of that bank, is charged with knowledge of the law under which it was created, and must be presumed to have made the financial statement in question for the purpose of complying with the banking law. Defendant Adolph Kolowich also owned 100 shares of stock in the State Bank of America, which was valued at $12,000. January 16, 1930, Adolph Kolowich and wife, Katie Kolowich, deeded the land in question to Irvin Kolowich, and he redeeded it to Adolph Kolowich and Katie Kolowich, his wife, by deed recorded July 30, 1930, some time after the State Bank of America closed. At the time the deeds attacked in this case were made, defendant Adolph Kolowich owed the bank more than $19,000, and had $10,000 in par amount of the stock of the bank upon which he was liable to an assessment in the sum of $10,000 in case it became insolvent. The

bank examiner visited the bank on January 30, 1930, and shortly thereafter the bank was closed and a receiver appointed. The defendant claims this real estate, which was originally acquired by Adolph Kolowich and wife in 1919, was acquired as a result of the joint efforts of Adolph Kolowich and wife, Katie Kolowich; that the same was deeded, so far as the interest of Katie Kolowich is concerned, by the deeds of 1924 to him to enable him to qualify upon a bond, and with the express agreement and understanding the property was to be deeded back, so as to place the title in defendant Adolph Kolowich and wife, Katie Kolowich, as tenants by the entirety. There is no evidence in the case to indicate what bond defendant Adolph Kolowich signed or was to sign; no proof that if he signed a bond his liability thereon had ceased; nothing to show his wife, Katie Kolowich, was a creditor whom he had a right to prefer; and no proof of any antecedent debt owed by him to her. Plaintiff, under the law of this State, was clearly a creditor (3 Comp. Laws 1929, § 13392); and defendant Adolph Kolowich, at the time of the levy of the execution to aid which this bill is filed, was insolvent. 3 Comp. Laws 1929, § 13393. There is no proof defendant Adolph Kolowich owed his wife, Katie Kolowich, an antecedent debt which constituted the consideration for the deeds attacked. 3 Comp. Laws 1929, § 13394. The conveyances in question must be held to be fraudulent as to plaintiff, who has a right to have them set aside to the extent necessary to satisfy his claim. 3 Comp. Laws 1929, § 13400.

We agree with the conclusions of the trial court, whose decree is affirmed, with costs.

McDONALD, C. J., and CLARK, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

FORTNEY *v.* TOPE.

1. PARTITION—GOOD-FAITH PURCHASERS OF LAND.
   In suit for partition of 40 acres of land by parties claiming to own undivided one-third interest, record *held,* to sustain finding of trial court that plaintiffs were good-faith purchasers of said interest (3 Comp. Laws 1929, § 14995 *et seq.*).

2. SAME—MINES AND MINERALS—OIL AND GAS LAND.
   Where it is known that land bears oil and gas, following similar rule applicable to solid minerals, it is generally held that there can be no partition of land by metes and bounds, but that partition must be made by sale and division of proceeds.

3. SAME—METES AND BOUNDS—SALE AND DIVISION OF PROCEEDS.
   Where land lies in oil and gas field, and, although there are no wells on it, there are producing wells within 330 to 500 feet of it, and therefore partition by metes and bounds would be liable to result in great injustice, partition is denied, and, instead, land is ordered sold and proceeds divided (3 Comp. Laws 1929, § 14996).
   POTTER, J., dissenting in part.

Appeal from Midland; Hart (Ray), J. Submitted January 6, 1933. (Docket No. 62, Calendar No. 36,918.) Decided April 4, 1933.

Bill by Delbert Fortney and others against Robert L. Tope and others for partition of realty. Cross-bill by defendants against plaintiffs and others to quiet title. Decree for plaintiffs. Defendants appeal. Affirmed in part, reversed in part, and remanded.

Arthur W. Penny, for plaintiffs.

Charles H. Goggin and *James E. Ryan,* for defendants.

SHARPE, J. The bill of complaint in this case was filed to secure the partition of 40 acres of land in the county of Midland under 3 Comp. Laws 1929, § 14995 *et seq.* Plaintiffs claim that they together own an undivided one-third interest therein, and that the defendants own the other two-thirds. The defendants deny that plaintiffs have any interest therein, and by cross-bill seek to have the conveyances under which plaintiffs claim declared void and removed as a cloud upon their title.

The records in the office of the register of deeds disclose that the title rested in Samuel I. Harrison on March 27, 1902.

Plaintiffs' Record Title.

Deed, Samuel I. Harrison and wife to David E. Harrison, undivided one-half interest, dated March 27, 1902, recorded February 12, 1903.

Assignment of residue of David E. Harrison estate to Regina K. Harrison, his widow, and children, Don E. and Hazel O., recorded November 24, 1928.

Don E. Harrison to E. E. Robinson, quitclaim, dated August 22, 1931, recorded August 25, 1931.

E. E. Robinson to G. M. Porter, quitclaim, dated September 17, 1931, recorded September 26, 1931.

Hazel O. Strong, *née* Harrison, to G. M. Porter, quitclaim, dated August 22, 1931, recorded September 3, 1931.

G. M. Porter and wife to Delbert Fortney, warranty deed of undivided one-third interest, dated September 17, 1931, recorded September 26, 1931.

Defendants' Record Title.

Samuel I. Harrison and wife to Regina K. Harrison, the wife of his brother David, quitclaim of en-

tire 40, dated July 31, 1905, recorded October 12, 1905.

Regina K. Harrison to P. J. Gruber, warranty deed, dated October 19, 1911, recorded March 18, 1912.

P. J. Gruber and wife to William H. Yats and Millie Yats, his wife, warranty deed, dated January 12, 1915, recorded January 13, 1915.

William H. and Millie Yats to Joseph Grover, warranty deed, dated October 29, 1915, recorded November 11, 1915.

Myra and Marion Grover, as sole heirs-at-law of Joseph Grover, to Robert L. Tope, defendant, quitclaim, dated August 17, 1931, recorded August 19, 1931.

After submission of the proofs, the trial court found that plaintiffs collectively were the owners of a one-third interest in said land, and that the defendants were the owners of the remaining two-thirds. He further found that partition between the plaintiffs and defendants should be had "by metes and bounds;" the plaintiffs' one-third to be set apart "in square form." The decree entered pursuant to such finding provided:

"That partition of said premises shall be made in kind by commissioners hereafter appointed by this court pursuant to the statute in such case made and provided, said commissioners allotting to said plaintiffs, quality and quantity relatively considered, one-third of said land, said commissioners designating the parcel so allotted to said plaintiffs by permanent monuments pursuant to the statute, and if found equitable and practical, such commissioners shall parcel out such parcel passing to said plaintiffs in square form and make report to this court of their findings and doings in the premises pursuant to the statute in such case made and provided."

The defendants by cross-bill prayed that Eunice E. Robinson, G. M. Porter, and H. J. Mulder be made parties plaintiff and that they and the plaintiffs be decreed to be liable to the defendants for their "unlawful and fraudulent acts" in hindering and delaying the defendants in the development of their property. An order was entered making these parties plaintiffs, and an answer to the cross-bill was filed by them and the other plaintiffs. In its decree the court dismissed the cross-bill. The defendants have appealed.

By deed from Samuel I. Harrison, his brother David acquired a one-half interest in this land in 1902, and his wife, Regina K., by deed acquired the other one-half interest in 1905, and they were the owners thereof as tenants in common until 1911, when Regina, by warranty deed, conveyed the entire interest therein to Gruber, although she then owned but a one-half interest.

Defendants' counsel seem to concede that under the record of conveyances the plaintiffs are the owners of an undivided one-third interest in this land. They state the question involved in this respect to be: Were the plaintiffs—

"or any of them, *bona fide* purchasers and legal owners of a one-third interest, as tenants in common, in the 40 acres in question?"

They rely on the rule of law as stated in 39 Cyc. p. 1687:

"The essential elements of a '*bona fide* purchase' of land are: (1) The payment of a valuable consideration; (2) good faith and absence of purpose to take an unfair advantage of third persons; and (3) absence of notice, actual or constructive, of outstanding rights of others."

And in 20 R. C. L. p. 346:

"Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. This, in effect, means that notice of facts which would lead an ordinarily prudent man to make an examination which, if made, would disclose the existence of other facts is sufficient notice of such other facts. A person has no right to shut his eyes or his ears to avoid information, and then say that he had no notice; he does wrong not to heed the 'signs and signals' seen by him. It will not do to remain wilfully ignorant of a thing readily ascertainable."

It appears that in the spring of 1931 oil was discovered on property about a mile and a half distant from this 40, and there was much activity in securing titles to, or leases of, nearby lands. The plaintiff Fortney and the defendants Tope and Talbot were interested. Fortney was then acting as superintendent for the Columbia Oil & Gas Company. He testified that on September 12, 1931, he met G. M. Porter in the office of the register of deeds in Midland and had some talk about the one-third interest Porter claimed to have in this 40 acres; that as a result thereof a written agreement was prepared and executed wherein he agreed to pay Porter $1,500 therefor; that Porter agreed "to furnish a merchantable abstract certified to date, including tax statements of said premises;" that he at that time gave Porter his check for $100 and $300 in cash; that Porter furnished him an abstract of title to the 40 acres certified to September 16th; that he took it to Carl Holbrook, an attorney at Clare, and on September 21st received a written opinion from him

thereon, and that he later got a warranty deed from Porter and paid him the balance due therefor. There was objection to the written opinion of Mr. Holbrook as to the title, but it was received in evidence. He stated therein that Porter and E. E. Robinson each owned an undivided one-sixth interest in the property, and that Tope apparently owned the balance thereof. The deed from Robinson to Porter had not then been recorded.

Defendants rely on the fact that the deeds recorded as shown by the abstract which purported to convey the entire title for so many years "should have attracted the attention and aroused the suspicion" of the purchasers of this undivided interest. Had not the abstract shown that the grantor, Samuel I. Harrison, under whose title all parties claim, himself created a divided interest in the land by his conveyance of an undivided half thereof to his brother on March 27, 1902, and thereafter but quitclaimed his interest therein to his brother's wife on July 31, 1905, a different question would be presented. There are, we think, few persons unfamiliar with abstracts of land who are willing to rely on their own judgment as to the sufficiency of a vendor's title thereto. They very properly submit the abstract to an attorney, and, if prudent, do just as Fortney did, require a written opinion thereon. Mr. Holbrook had practiced law at Clare for 10 years, during most of which time he had been prosecuting attorney of the county. His integrity is not questioned. He had the abstract in his hands for several days, and testified that in his judgment the report made to Fortney was justified by the entries thereon.

This 40 acres was wild and uncultivated. There was no one living on it. It apparently had little

value until land in the vicinity began producing oil. Taxes for the years 1919 to 1924 had become delinquent, and sale had therefor in 1929. It appears that Mr. Tope had secured a conveyance from the purchaser, paying him $1,250 therefor. No reliance is placed upon the effect of this deed. He also paid the heirs of Joseph Grover $100 for their interests in the property. It also appears that he had secured an abstract of title to the land, but it does not appear that he submitted it to an attorney for an opinion thereon. Had he done so, it seems probable that a doubt would have been expressed as to whether the quitclaim from the Grover heirs conveyed the entire interest in the land, as it assumed to do.

Much parol evidence was submitted, but so far as it bears upon the issue under consideration it was so contradictory as to have but little weight. In our opinion the record sustains the finding of the trial court "that the plaintiffs were good-faith purchasers in the land in question."

This suit was brought for partition. 3 Comp. Laws 1929, § 14996, reads, in part, as follows:

"Any one or more of the persons so holding lands, may institute a suit in the circuit court for the county in which the lands lie, by a bill in equity, for a division, or partition thereof, according to the respective rights of the parties interested therein, and for the sale of such premises, if it shall appear that the partition thereof cannot be made without great prejudice to the owners."

Defendants insist that partition will result in "great prejudice to the owners," and in this we think they are right. It is apparent that this land is valuable for oil and gas; that the surface rights are of little value compared therewith. Mr. Fort-

ney, one of the plaintiffs, testified that in his judgment the 40 acres were worth $20,000. He also testified that, at the time of the hearing, in August, 1932, there were three producing wells near this land; two of them distant about 330 feet and the other about 500 feet.

In Mills & Willingham, Law of Oil & Gas, p. 272, it is said:

"Where it is known that the land bears oil and gas, following a similar rule applicable to solid minerals, it is generally held that there can be no partition of the land by metes and bounds; that partition must be made by sale and division of the proceeds. And the same rule has been applied to partition of oil and gas leases."

The rule thus stated is supported by decisions of the courts in States where the question has been presented. See *Gulf Refining Co.* v. *Hayne,* 138 La. 555 (70 South. 509, L. R. A. 1916 D, 1147, Ann. Cas. 1917 D, 130); *Hall* v. *Vernon,* 47 W. Va. 295 (34 S. E. 764, 49 L. R. A. 464, 81 Am. St. Rep. 791); *Preston* v. *White,* 57 W. Va. 278 (50 S. E. 236); *Dangerfield* v. *Caldwell,* 81 C. C. A. 400 (151 Fed. 554).

The injustice of a partition by metes and bounds is well stated in *Gulf Refining Co.* v. *Hayne, supra* (p. 561):

"It might be a most serious loss to one or more of the co-owners to divide a piece of oil land into three parts, and award one part to each owner. A lot without oil under the surface falling to one co-owner would work incalculable damage to him to whom it was awarded, due entirely to the consequence of dividing the land. The courts cannot compel such a division or partition."

Plaintiffs' objection to a sale rests largely upon the claim that they are without funds to protect

their interests, and defendants "doubtless would procure the interests of the plaintiffs at a mere pittance." But a much greater injustice might be done if the parcel allotted to them be found to have no oil thereon and the remainder be productive. This 40 acres lies in the oil and gas field of that part of the State, and it seems clear that on a sale buyers will be present and the plaintiffs be assured of a reasonable price for their interest in the property.

The decree adjudging the plaintiffs to be the owners of an undivided one-third interest in the land is affirmed. The provision for its partition is reversed, and one may be here entered providing for a sale and remand to the circuit court to make provision therefor. No costs will be allowed.

MCDONALD, C. J., and CLARK, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred with SHARPE, J.

POTTER, J. (*dissenting in part*). I find no fault with the statement of facts made by Mr. Justice SHARPE. I am not in accord with his opinion as to the necessity of selling the land. The record indicates, in the opinion of one of the plaintiffs, the land in question is in an oil field. There are no wells on the land in question. No well or wells thereon have ever been attempted. The rule in relation to partition of land of this kind is different from that applying to land upon which there are wells.

"There is no doubt that an action of partition lies to divide undeveloped and supposable oil or gas lands, just as it does in case of lands containing solid minerals; for it cannot be known, owing to the peculiar character of gas or oil as a mineral whether the land to be divided is actual gas or oil lands; and to refuse partition on the theory that it may be, would be for the court to enter upon the domain of

mere speculation or supposability." 2 Willis' Thornton, Oil & Gas, § 437, p. 744.

The same rule is recognized in 47 C. J. p. 292, and by the court in *Rainey* v. *H. C. Frick Coke Co.*, 73 Fed. 389, where partition was granted, the court saying:

"The subtile character of the subterranean elements in question are always, in mining operations, elements of more or less uncertainty and possible danger, and we avoid all risk of doing harm to the land we have undertaken to partition by staying the hand of all parties until we have finished our duty in the premises."

In *Woods* v. *Rolls* (Tex. Civ. App.), 268 S. W. 988, partition of the premises was granted and an appeal taken. In sustaining the right of plaintiffs to partition and denying sale, it was held they were entitled to it—

"Especially in view of the fact that the record shows that no drilling has been done upon the land to develop oil and gas, and therefore it cannot be determined whether or not such minerals can be found thereon; or whether or not one portion of the land is richer than the other portions in such materials. A more difficult question would arise if a part of the land had already been drilled and oil and gas in paying quantities had been discovered."

The same rule has been applied to the partition of a leasehold interest in lands suspected to have oil and gas thereon. *Black* v. *Sylvania Producing Co.*, 105 Ohio St. 346 (137 N. E. 904). The question of the partition of suspected oil and gas lands was before the court in *Henderson* v. *Chesley* (Tex. Civ. App.), 273 S. W. 299, in which case the rule of *Woods* v. *Rolls, supra,* was approved, and the court quoted with approval from Thornton on Oil & Gas the language above. The rule laid down by Thorn-

ton in relation to oil and gas is applicable to mines which, when open, are in their nature indivisible, and partition may only be made by ordering a sale of the mines and dividing the proceeds.

"These were instances where the mines had been opened. Where the mine has not been opened, the right to partition of land having upon it solid minerals has been recognized; and it will be decreed, unless the mineral is so situated that a probably fair division of it cannot be made by dividing the surface of the land. All things being equal, as between a partition and a sale, a partition will be decreed." 2 Willis' Thornton, Oil & Gas, § 436, p. 742.

This is the rule of *Hughes* v. *Devlin,* 23 Cal. 501; *Rainey* v. *H. C. Frick Coke Co., supra; Wilson* v. *Bogle,* 95 Tenn. 290 (32 S. W. 386, 49 Am. St. Rep. 929); *Conant* v. *Smith,* 1 Aikens (Vt.), 67 (15 Am. Dec. 669); *Kemble* v. *Kemble,* 44 N. J. Eq. 454 (11 Atl. 733); *Ames* v. *Ames,* 160 Ill. 599 (43 N. E. 592), which cases are cited with approval in *Henderson* v. *Chesley, supra,* which quoted with approval 2 Willis' Thornton, Oil & Gas, § 436, p. 742.

"Partition of oil, gas, and mineral lands which have not been explored or developed may ordinarily be made by dividing the surface, it being assumed, in the absence of any contrary showing, that each portion of the land contains an equal amount." 47 C. J. p. 501.

"Where there is no convincing reason for supposing the land to be oil-bearing, there is no reason apparent why the oil and gas rights thereof should not be partitioned by metes and bounds, or why the lease thereon should not be divided between the owners upon an acreage basis." Mills & Willingham, Law of Oil & Gas, p. 272.

The great weight of authority sustains the rule contended for. There is nothing in the statute in

this State changing the rule. In *Benedict* v. *Torrent,* 83 Mich. 181 (11 L. R. A. 278, 21 Am. St. Rep. 589), this court said:

"If the lands can be divided, this must be done. No authority to sell when partition can be had is given. The law, common and statutory, has always most carefully protected the owners of land in their right to preserve and enjoy it as they desire. This is an inherent right of which they can only be deprived on the ground of public necessity, by sale upon execution, and in certain cases of partition. This partition statute further provides that if the commissioners report that the lands held in common cannot be divided without great prejudice to the owners, and if the court shall be satisfied that such report is just and correct, it may then order a sale; but if any portion of the lands can be divided without great prejudice to the owners, it must be partitioned, and only those portions sold which cannot be divided. * * * It is not sufficient under this statute that the lands cannot be divided without prejudice. Great prejudice must exist in order to warrant a sale. It is therefore entirely clear that the only decree which the court could render in partition proceedings would be a division of these lands as an entirety between the tenants in common, because no difficulty whatever exists in effecting a division."

This rule is applicable to the case in question. A forced sale deprives the party opposed thereto of his property, in kind, which he may desire to retain.

The rule is:

1. Oil, gas, and mineral *producing* lands may not ordinarily be partitioned in kind, for the reason that inequitable results may follow, and that equality which lies at the foundation of equity be disturbed.

2. The law deals with realities, not with speculative supposibilities. A mere suspicion that land, from its location, may contain oil or gas, constitutes no legal or equitable excuse for ordering a sale thereof; the presumption of oil or gas existing in proportion to acreage prevailing in the absence of exploration or development and a partition in kind being the rule.

3. Much of the agricultural land of Michigan is under lease for oil and gas. It would contravene the established policy of the State to hold such lands could not be partitioned in kind but must be sold because someone suspected oil or gas to exist thereon and procured and paid for a lease thereof.

The decree of the trial court should be affirmed, with costs, without modification.

AUTOMOBILE INSURANCE CO. OF HARTFORD, CONN., *v.* COCHRAN.

CARRIERS—TRUCKING COMPANY—LIABILITY FOR DAMAGE TO GOODS IN TRANSIT.

Judgment against trucking company for damage to goods in transit, based on finding that it was doing business as common carrier, is reversed, on appeal, where it appears that it was not common carrier.

Appeal from Superior Court of Grand Rapids; Verdier (Leonard D.), J., presiding. Submitted January 11, 1933. (Docket No. 92, Calendar No. 36,994.) Decided April 4, 1933. Rehearing denied May 16, 1933.

Action by Automobile Insurance Company of Hartford, Connecticut, as assignee, against Fred Cochran, doing business as City Transfer & Storage Company, for damage to a load of freight alleged to have been carried by defendant as a common carrier. Judgment for plaintiff. Defendant appeals. Reversed, and judgment ordered entered for defendant.

Travis, Merrick, Johnson & McCobb, for plaintiff.

Mason, Alexander, McCaslin, Cholette & Mitts, for defendant.

SHARPE, J. William A. Schlientz, Jr., engaged in business as a common carrier at Grand Rapids, under the name of Verkler Motor Express, secured an order for the shipment of goods from the Grand Rapids Store Equipment Corporation to Kresge's store at Harvey, Illinois. These goods (counters and store equipment) were shipped under a uniform bill of lading; the rates being fixed by the official classification "made by the committee on railroads of the United States." The Verkler Motor Express did not have sufficient equipment to handle the shipment, and Harry Willard, its traffic representative, got into communication with Lee D. Laraway, the office manager of Fred Cochran, doing business as City Transfer & Storage Company, the defendant, and asked if his company would take a load of the counters to Chicago for the Verkler company. Laraway fixed the price for the service at $50, and this was assented to by Willard.

Willard later informed Laraway that the load was ready to move, and Laraway sent a truck, consisting of a tractor and a long body trailer, to the

warehouse of the equipment company for loading. Harold Beunk was in charge thereof. Willard assisted Beunk in the loading, and Beunk claims he protested against the putting of a third tier of crates on the truck, but was assured by Willard that it was all right to do so. Willard indicated to Beunk the best route to take to reach Chicago. Beunk drove the truck back to defendant's yards, and, being unable to make the trip himself, called another employee, Clarence Barrett, to do so.

While *en route* the truck tipped over, and the goods were damaged to the extent of $1,277.40. The Verkler company carried insurance on goods thus transported with the plaintiff company. It paid the loss to the equipment company, and secured a release to the Verkler company therefor and also a subrogation receipt for all rights of recovery against the defendant on account of said loss. It thereupon brought this action, and, on trial by the court without a jury, was awarded a judgment for the amount above stated, from which the defendant seeks review by appeal.

The liability of the defendant was predicated upon the fact that it was engaged in business as a common carrier. The trial court so found. In this the defendant claims he was in error. Plaintiff's counsel rely on the testimony of Mr. Laraway to support this finding.

He testified on direct examination:

"The company maintains storage of goods at their place, and a trucking business. The larger part of it is trucking. At the time of the accident they had eight trucks, all owned by the company.

"The company did not maintain any definite route between any definite points; they did not op-

erate trucks at that time on any set schedule; they did not advertise or hold out to the public that they operated trucks between definite points at definite times. They obtained their business by people calling the company and asking them to do certain jobs. The terms under which each particular job was done would be arranged at the time that the parties called, and if they got together, then they would do the job. Each trip would be a trip that they would figure on with the party calling. If it were not for the party calling and requesting them to make the trip the trucks would not have been making the trip.

"They did not take all of the jobs that were presented. It would depend more or less on the price and whether or not we would be able to handle it. * * * It has never been our custom in making a trip to Kalamazoo, Chicago, or any other place, to solicit business at the other end of return freight. The price for making these trips in hauling goods for definite parties was arranged at the city before we left on the trip, and was arranged for the whole trip, and when goods were to be returned arrangements were made to include the goods to be returned. In one load we would never carry goods for more than one person. On some occasions when we were making a trip for one person to a certain point if another person had goods coming back from that point we would make arrangements to bring the goods back with the other person."

And on cross-examination:

"*Q.* You were in the general trucking and hauling business?

"*A.* Yes, sir.

"*The Court:* *Q.* Did you do business for anybody that applied, as long as you could agree on the terms?

"*A.* Yes.

"*Q.* And as long as you had trucks to handle them?

"*A.* If we got a call to make a trip and the price could be agreed upon.

"*Q.* You would do it for anybody that terms were satisfactory?

"*A.* Yes, sir.

"*Mr. Riddering:* *Q.* And you would drive anywhere within reason that the company wanted you to drive, would you?

"*A.* Yes, sir.

"*Q.* You had no limits as to distance?

"*A.* No.

"*Q.* Nor routes?

"*A.* No.

"*Q.* But any person who would call you and pay the price you asked to get their goods carried by you?

"*A.* In case we had the equipment.

"*Q.* If you had the equipment available at that time?

"*A.* Yes, sir.

"*Q.* It wouldn't make any difference to you whether or not you had ever carried any goods for this particular person or knew that he was a good risk so far as payment was concerned?

"*A.* We would make the trip.

"*Q.* You would make the trip?

"*A.* Yes, sir.

"*Q.* A perfect stranger might come in and if he would offer you payment in advance you would carry the load?

"*A.* Yes, sir.

"*Q.* So that as far as you had facilities and as long as you had trucks that were not on the road, you were ready to carry for anyone who could pay your price?

"*A.* Yes, sir."

A somewhat similar question was presented in *Re Border Cities Trucking Co.,* 261 Mich. 385, and in *Re Columbian Storage, etc., Co.,* 261 Mich. 390. In the first of these cases, the statute (Act No. 312, Pub. Acts 1931), providing for the classification and regulation of carriers for hire, was construed and the distinction between a public carrier and a private carrier pointed out. It was there said of an applicant for a permit as a private carrier:

"He has and exercises the right to take what freight he chooses. His business is upon the principle of profit to himself, not upon obligation to the public as a public carrier. * * * He has preserved his right to discriminate."

In *Michigan Public Utilities Co.* v. *Duke,* 266 U. S. 570 (45 Sup. Ct. 191, 36 A. L. R. 1105), the court said:

"One bound to furnish transportation to the public as a common carrier must serve all, up to the capacity of his facilities, without discrimination and for reasonable pay."

The distinction is pointed out in 4 R. C. L. pp. 549, 550, as follows:

"The authorities recognize two classes of carriers, *viz.,* private carriers and common carriers. All persons who undertake for hire, to carry the goods of another, belong to one or the other of these classes. * * * The former are not bound to carry for any reason unless they enter into a special agreement to do so. The latter are bound to carry for all who offer such goods as they are accustomed to carry and tender reasonable compensation for carrying them; and if they refuse to perform their obligation in this respect, they are liable to respond in damages."

While some confusion may have arisen in the discussion of this question in certain of our cases, owing to the language used not being strictly confined to the facts presented, it seems clear that the defendant at the time of the transaction in question was not engaged in business as a common carrier.

The judgment is reversed and set aside, and the cause remanded, with directions to enter a judgment for the defendant, with costs of both courts.

McDONALD, C. J., and CLARK, POTTER, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

EDISON *v.* KEENE.

1. COURTS—NEGLIGENCE—CONFLICT OF LAW—LAW GOVERNING.
   Generally, where action for damages is brought in State other than that in which accident happened, matters relating to right of action are governed by laws of State where accident happened, and matters relating purely to remedy by laws of State where action is brought.

2. STATUTES—CONSTRUCTION—STATUTE OF FOREIGN STATE.
   Supreme Court will construe statute of another State as it would like statute of its own State, in absence of construction thereof by Supreme Court of said other State.

3. MOTOR VEHICLES—NEGLIGENCE—PARKING ON PAVEMENT—EMERGENCY—CONSTRUCTION OF STATUTE.
   Where truck driver stopped on pavement in Indiana to render assistance to driver of disabled truck ahead of him, there was emergency within meaning of statute prohibiting parking on pavement except in case of emergency, and therefore he was not liable to driver of automobile colliding with rear of truck (3 Burns Ann. Indiana Statutes 1926, § 10150; 1 Comp. Laws [Mich.] 1929, §§ 4693, 4718).

Appeal from Kent; Brown (William B.), J. Submitted January 17, 1933. (Docket No. 87, Calendar No. 36,709.) Decided April 4, 1933.

Case by A. St. Clair Edison against Clinton Keene and others for personal injuries received in a motor vehicle accident alleged to be due to defendants' negligence. Directed verdict and judgment for defendants. Plaintiff appeals. Affirmed.

Linsey, Shivel & Phelps, for plaintiff.

Mason, Alexander, McCaslin & Cholette, for defendants.

SHARPE, J. The defendant Wilson was the owner of two trucks, which were engaged in hauling freight from Chicago to Grand Rapids for the defendant Nixon on February 3, 1930. The rear truck was driven by the defendant Keene. When near the city of Gary, Indiana, and at about 10 o'clock at night, the forward truck, driven by Wilson, became somewhat disabled and the lights on it went out. Keene stopped his truck behind it and went forward to aid in its repair. His truck was fully equipped with rear lights, as provided by the laws of Indiana. While he was so working, he heard a crash and discovered that a car, owned and driven by the plaintiff, had collided with the rear end of the truck he had been driving.

3 Burns Ann. Indiana Statutes 1926, § 10150, reads as follows:

"It shall be unlawful for any person to park a motor vehicle or motor bicycle or to leave any such motor vehicle or motor bicycle, without an attendant, on the traveled portion of any highway outside the corporate limits of any city or town, except in case of an emergency."

The negligence on the part of the defendants rests upon the claim that their truck was parked on the pavement in violation of this statute. In disposing of it, the trial court said:

"Mr. Keene, after stopping his truck on the right-hand side of the road at the rear of Mr. Wilson's truck, went up to help Mr. Wilson repair his truck. I would call that just an emergency on the highway, that one automobilist, if he knows enough about doing the repairs, and wants to render a service to the other man, it is a service he has a right to render to the other fellow there who is in trouble, if he sees to it that the rear end of his own vehicle or car is properly protected by lights."

The collision having occurred in the State of Indiana, the general rule is that all matters relating to the right of action are governed by the laws of that State, and all matters relating purely to the remedy to the laws of the State in which the action is brought. Our attention has not been called to any decision of the Supreme Court of Indiana in which a construction has been placed upon the language of this statute. We therefore construe it as we would a like statute in this State. 59 C. J. p. 946.

The Michigan act regulating the operation of vehicles on highways (1 Comp. Laws 1929, § 4693 *et seq.*) contains the following provision:

Section 4718. "It shall be unlawful to park a vehicle on the beaten track or paved surface of any highway outside the limits of any village or city."

In section 4693, "parking" is defined as—

"Standing a vehicle, whether occupied or not, upon a highway, when not loading or unloading except when making necessary repairs."

In *Sahms* v. *Marcus,* 239 Mich. 682, 685, it was said:

"There is a difference between stopping and parking. The general purpose of the statute appears to be aimed at dead vehicles, *i. e.,* vehicles that are unable to move under their own power and are left standing on the pavement. It is also aimed at live vehicles that are able to move under their own power but are left standing on the pavement without watchman or caretaker, and also to vehicles that are able to move but are standing on the pavement to serve some purpose of the occupant or occupants. We think the idea of the legislature was to keep the improved highways open for travel and free from nonmoving vehicles. This purpose would not prohibit a temporary stop for a necessary reason. See 1 Blashfield's Cyclopedia of Automobile Law, p. 558."

While our statute makes no provision for an emergency, it has been construed as though it so provided. In *Bowmaster* v. *William H. DePree Co.,* 258 Mich. 538, the defendant had stopped his car upon the pavement, and upon the wrong side of the highway, to render assistance to the driver of a disabled car which was in the ditch. Mr. Justice MCDONALD, speaking for the court, said:

"It is true that their obstruction of the road set in motion a series of events that culminated in the accident; but, under the circumstances, the act of obstruction was not in itself negligence. They were rendering assistance to a fellow autoist whose car had skidded from the road into a ditch. They were lawfully using the highway. 42 C. J. p. 1041."

In 3–4 Huddy on Automobile Law (9th Ed.), p. 104, the writer says:

"Under the automobile statutes the term 'park' has been defined by the courts as meaning, in sub-

stance, the voluntary act of leaving a car on the main-traveled portion of the highway when not in use. It means something more than a mere temporary or momentary stoppage on the road for a necessary purpose."

Keene was in the employ of the defendant Wilson, and when he overtook the truck driven by Wilson and found that it was disabled, that its lights were out, it was his duty to assist in its repair. He saw to it that the lights on the rear of his truck were all lit, in compliance with the requirements of the Indiana statute. Owing to the banks of snow on the side of the highway, he had no opportunity to remove his truck off the pavement. Under these circumstances, we find no error in the holding of the trial court that the driver of the truck was not guilty of a violation of the Indiana statute.

Counsel for the plaintiff rely on the decision in *Camp* v. *Wilson,* 258 Mich. 38, but it will be observed that the negligent act there complained of was the absence of a tail light on the disabled truck.

The trial court was also of the opinion that the injury plaintiff sustained was due to the negligent manner in which he drove his car after discovering the lights on the rear of the truck, but, in view of the conclusion above reached, decision thereon is unnecessary.

The judgment is affirmed.

MCDONALD, C. J., and CLARK, POTTER, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

PERKINS *v.* GREAT CENTRAL TRANSPORT CORP.

1. COURTS—TORTS—LAW GOVERNING—CONFLICT OF LAW.

Where action is brought in one jurisdiction for tort committed in another, general rule is that all matters relating to right of action are governed by *lex loci*, and all matters relating purely to remedy by *lex fori*.

2. SAME—LAW OF FOREIGN STATE—SUBSEQUENT AMENDMENT OF STATUTE.

In considering case involving law of State of Ohio, holdings in syllabi, which state holding of Ohio Supreme Court rather than opinions, must be considered in light of facts presented, such as subsequent amendment of statute.

3. STATUTES—CONSTRUCTION—CONSTRUING STATUTE OF FOREIGN STATE.

Where foreign statute has not been construed in State of enactment, courts of State where cause is on trial will construe it as they would like statute of their own State.

4. MOTOR VEHICLES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT—STATUTES.

Where, in action for death of automobile driver caused by collision in nighttime with rear of truck standing on pavement in Ohio, under law of that State or of this State decedent must be held guilty of contributory negligence as matter of law, in that he was driving at greater rate of speed than would permit him to stop within assured clear distance ahead, verdict should have been directed in favor of defendants (Throckmorton's 1930 Ann. Code Ohio, § 12603; 1 Comp. Laws 1929 [Mich.], § 4697).

Appeal from Wayne; Campbell (Allan), J. Submitted January 19, 1933. (Docket No. 124, Calendar No. 36,925.) Decided April 4, 1933.

Case by Audrey Perkins, administratrix of the estate of Banner Perkins, deceased, against Great

Central Transport Corporation, a Michigan corporation, and another for personal injuries resulting in the death of plaintiff's decedent alleged to be due to defendants' negligence. Verdict and judgment for plaintiff. Defendants appeal. Reversed, and judgment ordered entered for defendants.

Walter M. Nelson, for plaintiff.

Kerr, Lacey & Scroggie, for defendants.

SHARPE, J. The plaintiff and her husband, Banner Perkins, were traveling in a northerly direction from Bowling Green towards the city of Toledo, in the State of Ohio, in the evening of February 5, 1930, in a Nash car, owned by her but driven by her husband. At about 9:30 o'clock their car collided with the rear of a truck standing on the highway, owned by the defendant corporation and driven by the defendant Roberts, and Mr. Perkins sustained injuries resulting in his death the following day. She brings this action as administratrix of his estate to recover the damages incident thereto. On trial before the court and a jury she had verdict and judgment for $9,950, from which the defendants have taken this appeal.

Among the errors complained of is the refusal of the court to direct a verdict for the defendants and its denial of defendants' motion for judgment *non obstante veredicto,* both based on the claim that no negligence on the part of the defendants was shown and that the deceased was guilty of contributory negligence.

The testimony of plaintiff may be summarized as follows:

She and her husband were driving north on Dixie highway about five miles from Bowling Green. The

road was paved 16 or 17 feet in width. They had their headlights on. It was a very misty night and extremely cold.

"There wasn't exactly snow; there had been snow previously. But you would go along all right for a while, and then you would sort of come on ice, and then you could drive a little ways again and it was sort of patchy."

There was a shoulder on the right-hand side about two feet wide. They were traveling about 25 miles per hour. When about 30 feet from the truck, plaintiff saw—

"apparently a black object, but I could not discern what it was, or I could not have said at the time what it was."

It was in their path, all "four wheels on the pavement."

Plaintiff's husband—

"put on the brakes on the car, and sort of jerked, and then it started to slide, so he took hold of the wheel, so far as he could, so he turned it to the right, and he reached down with his left hand and pulled on the emergency brake. * * * The car slid right into the truck. * * * The side I was sitting on turned full around, and I was thrown from the car. * * * He took to the ditch and then turned to the right."

The car struck the corner of the truck "toward the center of the road." It turned part way around. She got up and went to the car. Her husband was "sitting in the car." There was nobody in the cab of the truck. There was no light on the rear of the truck. "I screamed for help," and some people across the road came with a lantern. Motorists came along, and her husband was taken out and to a farm-

house. He was conscious and able to walk. He was afterwards taken to a hospital and treated by doctors, but died the next morning.

On cross-examination she said that they were both familiar with the highway; that they could see about 30 feet ahead of their car; that they had not used their windshield wiper. "You could not see their lights plainly"—of the oncoming traffic. "They gave a funny dazzling sort of a light. * * * My husband has stopped his car within 10 feet."

"*Q.* Did you see any lights at all?
"*A.* No, I did not see any lights."

A car could have passed the truck as it stood there.

The plaintiff was the only eyewitness to the collision. It thus appears by the undisputed testimony that the deceased was driving the car along a slippery road at the rate of about 25 miles per hour in the nighttime, and that the truck standing therein could not be seen by him, owing to the darkness and the atmospheric conditions, until he had reached a point in the highway about 30 feet from it. At the rate of speed he was traveling, the car would cover this distance in less than one second of time, and it appears that there was plenty of room for him to have passed the truck had he seen it in time to do so. These facts being undisputed, had the collision occurred in this State, it would have been the duty of the trial court to have granted defendants' motion for a directed verdict on the ground of the contributory negligence of the deceased. *Humphrey* v. *County of Wayne,* 257 Mich. 398, and cases therein cited.

The collision occurred in the State of Ohio.

"Where an action is brought in one jurisdiction for a tort committed in another, the general rule is that all matters relating to the right of action are governed by the *lex loci delicti,* and all matters re-

lating purely to the remedy by the *lex fori.*" 5 R. C. L. p. 1036.

Counsel for the plaintiff contends, and the trial court after lengthy argument concluded, that, under the law of that State as construed by its appellate court, the question of contributory negligence must be submitted to and passed upon by the jury. It was asserted by plaintiff's counsel, and conceded by defendants' counsel, that under the law in that State the syllabi state the holdings of the court rather than the opinions.

The case most strongly relied on is *Tresise* v. *Ashdown,* 118 Ohio St. 307 (160 N. E. 898, 58 A. L. R. 1476), the first syllabus of which reads as follows:

"In an action to recover damages for injuries claimed to have been sustained by the driver of a motor vehicle resulting from a collision with another motor vehicle parked at the right side of the highway at night with no light in the rear or other warning thereof, an instruction to the jury, that operation of such motor vehicle at such a rate of speed that the driver cannot stop within the distance that an obstruction in the highway could be seen by his own headlights constitutes negligence *per se,* is erroneous."

This holding must be considered in the light of the facts there presented. The defendant left his car parked at the curb of a street in the city of Cleveland after dark and without the light in front or rear thereof required by an ordinance of the city. There was no eyewitness to the collision caused by the motorcycle, on which the deceased was riding, running into it. He was instantly killed. A provision of the ordinance required motorcycles to have a lamp thereon showing a white light visible within a

reasonable distance in the direction towards which it is proceeding. The trial court instructed the jury that it was the duty of the deceased to keep his motorcycle "under such control that the car could be stopped within the range of the light produced from the light thereon," and "to operate his car at such rate of speed that if there was an obstruction in the road or street that he could stop within the distance that the obstruction could be seen from the light on his machine."

The appellate court held that this instruction was erroneous; that the "conduct of a driver of a motor vehicle which is not shown to have been in violation of law or ordinance should not be declared to be negligence *per se,* but that each such case must be considered in the light of its facts and circumstances, and the usual tests applied to determine whether there was a failure to exercise ordinary care in the operation of such motor vehicle."

In *Cleveland, etc., R. Co.* v. *Lee,* 111 Ohio St. 391 (145 N. E. 843), the second paragraph of the syllabus reads:

"In an action involving the negligence of the defendant and contributory negligence of the plaintiff when, giving to every portion of the plaintiff's evidence the most favorable interpretation in favor of the absence of negligence on his part, such evidence under such interpretation is susceptible of no other reasonable inference than that of negligence on his part, directly contributing to his injury, the question of contributory negligence ceases to be a question of fact for the determination of the jury, but, for the purposes of the case, becomes an uncontroverted fact for a declaration by the court of the law applicable thereto. It is the duty of the court in such case to direct a verdict."

There was a similar holding in *Buell* v. *Railroad Co.*, 114 Ohio St. 40 (150 N. E. 422). The first section of the syllabus reads:

"Where, in an action for negligence, a motion is made for directed verdict in defendant's favor at the close of plaintiff's evidence on the ground that plaintiff's evidence raises a presumption of contributory negligence, the issue raised by such motion requires that plaintiff's evidence be given the most favorable interpretation, and, if such evidence under such interpretation is susceptible of no other reasonable inference than that of negligence on his part directly contributing to the injury, and defendant's conduct is not shown to be wilful or malicious, and plaintiff is not aided by any other evidence in the case, it becomes the duty of the court to direct a verdict."

Throckmorton's 1930 Annotated Code of Ohio (Baldwin's Rev.), § 12603, was put in evidence. It reads in part as follows:

"No person shall operate a motor vehicle in and upon the public roads and highways at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface and width of the road or highway and of any other conditions then existing, and no person shall drive any motor vehicle in and upon any public road or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead."

It was insisted that the holding in *Tresise* v. *Ashdown, supra,* was applicable thereto. But the attention of the court was not called to the fact that the provision that the speed of a motor vehicle shall not be greater than will permit the driver to bring it to a stop within the assured clear distance ahead was inserted in this statute by an amendment enacted in

1929 (113 Ohio Laws, p. 283), and after the above case was decided. It may also be noted that the court in that case rested decision on the fact that the driver of the motorcycle was not violating any law or ordinance at the time of the collision.

It does not appear that section 12603 as amended has received a construction by the Supreme Court of Ohio.

"Where a foreign statute has not been construed in the State of enactment, the courts of the State where the cause is on trial will construe it as they would a like statute of their own State." 59 C. J. p. 946.

This court has, as before stated, many times placed its construction upon similar language in our statute (1 Comp. Laws 1929, § 4697).

Upon this record, if the negligence of the defendant be conceded, and if the law of either the State of Ohio or of this State relating to the duties of drivers of automobiles upon the highways at night be applied to the facts here presented, and as but one conclusion can be drawn from them, it must be held as a matter of law that the deceased was guilty of negligence contributing to his injury and death, and that a verdict should have been directed in favor of the defendants.

The judgment entered is reversed and set aside, with costs, and the cause remanded to the trial court, with direction to enter a judgment for the defendants.

MCDONALD, C. J., and CLARK, POTTER, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

SCHWANNECKE *v.* GENESEE COAL & ICE CO.

1. TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION.
   Corporation engaged in selling coal and ice has right to use said words in its assumed name, and to compete with others engaged in same business in same city.

2. EVIDENCE—JUDICIAL NOTICE—TELEPHONES AND TELEGRAPHS.
   In suit by coal dealer to enjoin use by rival dealer of assumed name so similar to plaintiff's as to lead to alleged confusion and unfair competition, court may take judicial notice that many orders would be given over telephone, and that similarity of names might lead to confusion and placing orders with defendant which were intended for plaintiff, who had been in business for long time.

3. TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—CONFUSION.
   Where coal dealer for many years had been doing business under assumed name of Genesee Coal Company, it was unfair competition for rival dealer in same city to assume name of Genesee Ice & Fuel Company.

Appeal from Saginaw; Martin (William H.), J. Submitted February 21, 1933. (Docket No. 168, Calendar No. 37,096.) Decided April 4, 1933.

Bill by Henry W. Schwannecke, doing business as Genesee Coal Company, against Genesee Coal & Ice Company, a Michigan corporation, to enjoin the use of its corporate name or the assumed name "Genesee Ice & Fuel Company," in the city and county of Saginaw. Decree for plaintiff. Defendant appeals. Affirmed.

Cook & Cook, for plaintiff.

Wilson & Hoffman, for defendant.

SHARPE, J. There seems to be no dispute about the facts in this case. The plaintiff for more than 27 years has been engaged in the business of selling coal and other fuel in the city of Saginaw under the assumed name of "Genesee Coal Company." The defendant, Genesee Coal & Ice Company, a corporation, was organized in 1929 under the laws of this State, with its principal place of business at the city of Flint, and was there engaged in the business indicated by its title.

In the spring of 1932 the defendant secured property in the city of Saginaw, and constructed a plant thereon. The plaintiff, when informed that defendant proposed to conduct its business in Saginaw under its corporate name, notified it that he objected to its so doing. Defendant admits that by reason thereof it caused a certificate of its doing business under the assumed name of the "Genesee Ice & Fuel Company" to be filed in the office of the county clerk of the county of Saginaw, and thereafter conducted its business under that name.

On filing his bill, plaintiff moved for a temporary injunction restraining the defendant from the use of its corporate name or its assumed name in the conduct of its business in Saginaw. In its answer defendant denies that plaintiff is entitled to the relief sought. Some admissions were apparently made in open court and consent given that a final decision be rendered. The trial court said:

"The questions in this case are: Is the assumed name of defendant corporation so similar to that of plaintiff as to mislead the public; so similar, in fact, as to lead a person of ordinary intelligence to believe he was dealing with plaintiff; so similar in effect as

to cause confusion, consequential in amount; and does the use of the name Genesee Ice & Fuel Company by the defendant result in unfair competition and loss to the plaintiff by reason thereof?

"The court determines these questions in the affirmative."

The defendant certainly had the right to use the words "ice" and "fuel" in its assumed name. It thereby informed the people of the city of Saginaw and surrounding territory that it was engaged in the sale of these products, and it had the right to compete with the plaintiff in that business.

The question here presented is whether the defendant by using the word "Genesee" in its assumed name thereby became engaged in unfair competition with plaintiff. It is a fact of which we may take judicial notice that many of the orders for coal would be given over the telephone, and, if a person who had been theretofore dealing with the plaintiff and knew that it had long been engaged in business as the "Genesee Coal Company," desired to make such a purchase and consulted the directory for the purpose of doing so and found therein the name "Genesee Ice & Fuel Company," he might well assume that in placing an order therefor he was dealing with the plaintiff.

"It is the words of a name which the eye first catches or rests upon which fix it in our minds." *Grand Rapids Furniture Co.* v. *Grand Rapids Furniture Shops,* 221 Mich. 548, 552.

If, as the defendant conceded, the use of its corporate name, "Genesee Coal & Ice Company," was likely to be misleading and calculated to confuse the public, the change made to "Genesee Ice & Fuel Company" did not remove the similarity complained of.

There have been many cases in this and other courts in which a somewhat similar question was presented. They were reviewed at some length by Mr. Justice STEERE in *Clipper Belt Lacer Co.* v. *Detroit Belt Lacer Co.,* 223 Mich. 399. He quoted with approval the following:

"Unfair competition ordinarily consists in the simulation by one person, for the purpose of deceiving the public, of the name, symbols, or devices employed by a business rival, or the substitution of the goods or wares of one person for those of another, thus falsely inducing the purchase of his wares and thereby obtaining for himself the benefits properly belonging to his competitor. The rule is generally recognized that no one shall by imitation or unfair device induce the public to believe that the goods he offers for sale are the goods of another, and thereby appropriate to himself the value of the reputation which the other has acquired for his own product or merchandise." 26 R. C. L. p. 875.

"The fundamental rule has been that no man has a right to palm off his own goods as the goods of a rival trader, and 'he cannot, therefore,' in the language of Lord Langdale in *Perry* v. *Truefitt* (6 Beavan, 66, 73 [49 Eng. Repr. 749]), 'be allowed to use names, marks, letters, or other *indicia,* by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.' Referring to the above, Lord Herschell, in *Reddaway* v. *Banham* (21 App. Cas. 199, 209), said: 'It is, in my opinion, this fundamental rule which governs all cases.'

" 'Irrespective of the technical question of trademark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe he is buying those of the plaintiffs. Rival manufacturers may lawfully compete for the patronage of the public in

the quality and price of their goods, in the beauty and tastefulness of their inclosed packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals.'" Nims on Unfair Competition (2d Ed.), p. 12; (3d Ed.), p. 16.

In *McLean* v. *Fleming,* 96 U. S. 245, where the question of a trade-mark was involved, the court said (p. 255):

"Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right to redress, if he has been guilty of no laches."

In *Coats* v. *Merrick Thread Co.,* 149 U. S. 562, 566 (13 Sup. Ct. 966), it was said:

"Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their enclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals."

See, also, *Grand Rapids Furniture Co.* v. *Grand Rapids Furniture Shops, supra,* and *Sweet Sixteen Shops* v. *Goodman,* 243 Mich. 72.

In discussing a similar question in *Good Housekeeping Shop* v. *Smitter,* 254 Mich. 592, 596, it was said:

"Each case is determined upon its own facts and relief is based upon the principles of common business integrity."

We therefore refrain from citing or considering the many cases decided by this court in which a somewhat similar question was involved. We have here a plaintiff who has been engaged in the coal business on Genesee street in the city of Saginaw for 27 years. The defendant desires to compete with him therein, as it has a right to do. It conceded that the use of its corporate name would doubtless lead to confusion and result in unfair competition. It therefore assumed the name "Genesee Ice & Fuel Company." It needed not the word "Genesee" in its name to inform the people of the city of Saginaw and surrounding territory that it was engaged in the ice and fuel business. It seems apparent that its purpose and design in the use of this name was to secure to itself a part of the business theretofore enjoyed by the plaintiff, and, in the language above quoted, "they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals."

The decree is affirmed, with costs to appellee.

McDONALD, C. J., and CLARK, POTTER, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

BOYLE v. PREKETES.

1. APPEAL AND ERROR—DIRECTED VERDICT.

In reviewing judgment for defendant on directed verdict, Supreme Court must construe testimony most favorably to plaintiff.

2. NEGLIGENCE—DIFFERENT FLOOR LEVELS—STEPS—WARNING.

If store building was properly lighted, proprietors were not required to give warning of steps connecting different floor levels, since steps themselves constituted effective warning.

3. SAME—CONTRIBUTORY NEGLIGENCE—DISTRACTING CUSTOMER'S ATTENTION.

That merchandise was attractively displayed, distracting customer's attention, would not lessen degree of care she is required to exercise to guard against falling down steps connecting different floor levels.

4. SAME—CONCEALED DANGER.

In action for injuries received by customer in falling down steps connecting different floor levels in defendants' store, allegation of declaration that said steps constituted "concealed danger," *held,* not sustained by testimony.

5. SAME—LIGHTING STEPS.

Holding of trial court that steps connecting different floor levels, down which customer fell, were adequately lighted, *held,* justified by record.

6. SAME—FALLING DOWN STAIRS.

Falling down stairs, where mishap is not imputed to unknown or concealed defects, belongs to that class of ordinary accidents which ought to be imputed to carelessness or misfortune of sufferer.

7. SAME—STORE BUILDINGS—DIFFERENT FLOOR LEVELS.

That store building has different floor levels connected by steps does not constitute negligent construction, unless by its character, location, or surrounding conditions, reasonably prudent person would not be likely to expect steps or to see them.

Appeal from Washtenaw; Sample (George W.), J. Submitted January 6, 1933. (Docket No. 49, Calendar No. 36,812.) Decided April 4, 1933.

Case by Edith M. Boyle against Charles Preketes and others for personal injuries sustained while on defendants' premises as a customer and alleged to have been due to "concealed dangers." Directed

verdict and judgment for defendants. Plaintiff appeals. Affirmed.

Burke & Burke, for plaintiff.

Vandeveer & Vandeveer, for defendants.

NORTH, J. The defendants conduct a candy store and restaurant in the city of Ann Arbor. Plaintiff, 64 years of age, with a lady companion entered defendants' place of business about noon on the 29th of August, 1931, for the purpose of securing their noonday lunch. The premises occupied by defendants' business consisted of what was formerly two store rooms of about equal width, the dividing partition having been removed. There was an entrance at the front of each store. Plaintiff and her companion entered at the more southerly door. Immediately at their right as they entered was a soda fountain, and to their left a show case extending along the dividing line between the two store rooms. At the rear of each room were booths equipped for serving defendants' customers. Approximately 30 feet from the entrance was a space left open between the show case nearer the front and the booths at the rear as a passageway from one part of the store to the other. There was a difference in floor levels, the floor of the northerly portion being lower than the floor of the part through which plaintiff entered. In the passageway, which was five feet wide, a step was constructed of ample width and of a height which substantially divided in equal proportions the difference in the levels of the two floors. The riser of the lower step was 6¾ inches, and the other 5⅜ inches. Plaintiff and her companion decided to go to the northerly portion of the restaurant, and when doing so plaintiff failed to see the steps,

fell, and was rather severely injured. She brought this suit for damages, and at the conclusion of her proofs the circuit judge directed the jury to render a verdict in favor of the defendants. From the judgment entered on the verdict, plaintiff has appealed.

It is appellant's claim that the record presented an issue of fact for determination of the jury both as to defendants' negligence and as to the contributory negligence of plaintiff. In reviewing the question presented, we must construe the testimony most favorably to appellant. The negligence charged to defendants is their failure to maintain sufficient notice or warnings to apprise their customers of the difference in the floor levels in the two portions of their premises; and the failure to maintain sufficient artificial lighting to properly illuminate the passageway and the steps; and also:

"It became the further duty of the defendants not to maintain attractive show-cases so displaying the goods, wares, and merchandise on sale by the defendants in such a manner as to distract the attention of customers rightfully on said premises at the points where said premises became more dangerous by reason of steps and changes in floor levels."

If defendants' premises were properly lighted, they were not required to post warnings of the steps between the two portions of their place of business. If the place was sufficiently lighted the steps themselves constituted as effective notice to defendants' customers as it was possible to give.

Touching plaintiff's claim that her attention was distracted by the display of defendants' wares, it may be said that there was nothing unusual as to the manner or character of the display. We find nothing in this record which would justify the claim,

at least made inferentially in behalf of appellant, that the display of the merchandise here kept for sale because of its attractive nature can be held to lessen the degree of care which plaintiff was required to exercise for her own safety.

Also, construing the record most favorably to the appellant, there is no testimony which tends to sustain the allegation of the declaration that these steps constituted "concealed dangers." The undisputed testimony discloses that the floor was of inlaid tile with a pronounced border near the northerly side of the room, where plaintiff first entered, and extending across the approach to the steps. In effect this border plainly marked what may be referred to as the upper step or tread. The edge of each tread is plainly marked by a dark strip of cork, which is in decided contrast with the white tile used in the general construction of the balance of the treads and the floor. Neither the adjacent show case at plaintiff's left nor the booths at her right in any way obstructed her range of vision. As she turned to her left towards the steps she must have passed over at least six feet of level floor before reaching the first descent. Unless there was inadequate light, the undisputed facts foreclose any question of a "concealed danger."

The remaining question is whether the trial court was justified in holding as a matter of law that these steps were adequately lighted. A careful review of the record brings the conclusion that he was. The real cause of this accident is disclosed by plaintiff's testimony on direct examination:

"I didn't see the steps, and in some manner I over-stepped and that was all there was, and I was gone. * * * I fell. * * * I found myself on the floor. * * * I did not see no steps.

(Cross-examination)

"*Q.* You say that at the time that you were looking at a show-case?

"*A.* Yes, sir. * * *

"*Q.* You would be walking from the south toward the north?

"*A.* Yes, sir.

"*Q.* But as you were walking from the south toward the north, you were looking to the left, that would be toward the front of the store, which would be west, wouldn't it?

"*A.* I think so.

"*Q.* And looking at the display of goods in the show-case?

"*A.* Yes, sir.

"*Q.* And as you walked along, suddenly, as you say, you stepped into space, lost your balance, and fell?

"*A.* Yes, sir."

Briefly, the undisputed record is that at the time of the accident the restaurant was electrically lighted by eight drop lights of 200 watts each, four 100-watt lights along the center beam between the two rooms, and also bracket or side wall lamps. Two of the 200-watt lamps were suspended from points of best advantage for lighting the steps on which plaintiff fell. That the store in general was adequately lighted is conclusively established by plaintiff's own testimony. Her eyesight was good, and repeatedly she testified that she looked at and saw defendants' general display of merchandise; and that as soon as she entered the store she looked across the room a distance of 30 feet or more and ascertained where the customers were located at the various places of serving, and as the result of such observation she and her companion decided they would go to the northerly side to be served. From plaintiff's own

testimony, as well as from other uncontradicted testimony, it conclusively appears that the illumination was such that plaintiff could have seen the steps had she looked. There is no credible testimony that defendants were guilty of negligence in failing to properly light their place of business.

"It has long since been recognized that falling downstairs, where the mishap was not imputed to unknown or concealed defects, belongs to that class of ordinary accidents which ought to be imputed to the carelessness or misfortune of the sufferer." *Davis* v. *Buss Machine Works,* 169 Mich. 498, 500.

While not on all fours, this case falls within the scope of our decisions reported in *Larned* v. *Vanderlinde,* 165 Mich. 464; *Brown* v. *Berles,* 234 Mich. 353; *Shorkey* v. *Great A. & P. Tea Co.,* 259 Mich. 450; and *Garrett* v. *W. S. Butterfield Theatres, Inc.,* 261 Mich. 262.

The syllabus of the *Shorkey Case, supra,* reads as follows:

"Storekeeper is not insurer of safety of customers, but it is his duty to use reasonable care to provide reasonably safe place for them on his premises."

The following from the *Garrett Case, supra,* is quite applicable to the instant case:

"Different floor levels in private and public buildings, connected by steps, are so common that the possibility of their presence is anticipated by prudent persons. The construction is not negligent unless, by its character, location, or surrounding conditions, a reasonably prudent person would not be likely to expect a step or see it. * * * The situation contained no element of a trap. A reasonably prudent person, watching where he is going,

would have seen the step. Defendant is not under legal duty to prevent careless persons from hurting themselves. We think defendant was not guilty of negligence."

Judgment of the circuit court is affirmed, with costs to appellees.

McDONALD, C. J., and CLARK, POTTER, SHARPE, FEAD, WIEST, and BUTZEL, JJ., concurred.

KARASEK *v.* PEOPLES STATE TRUST & SAVINGS BANK.

1. JUDGMENT—SETTING ASIDE DEFAULT JUDGMENT—PROCESS—FRAUD—BURDEN OF PROOF.

   In suit to set aside default judgment in law case, plaintiff's claim that defendants' attorney by fraud and misrepresentation prevented plaintiffs from entering their appearance, and also that no service was had on one of plaintiffs, *held*, to present issues of fact, with burden of proof on plaintiffs.

2. SAME—FRAUD—SUFFICIENCY OF PROOF.

   Finding of trial court that service was had on both plaintiffs, and that claimed fraud and misrepresentation, preventing them from entering their appearance and resulting in default judgment, had not been established by sufficient proof, *held*, justified by record.

3. SAME—IRREGULARITY—DEFAULT JUDGMENT—STATUTES.

   Discrepancy between wording of declaration as filed and that of copy served on one of defendants, arising from erroneous reference in original declaration to one defendant as wife instead of mother of other defendant, was immaterial irregularity or defect which does not invalidate default judgment (3 Comp. Laws 1929, § 14148).

Appeal from Wayne; Spier (James E.), J., presiding. Submitted January 5, 1933. (Docket No. 34, Calendar No. 36,792.) Decided April 4, 1933.

Bill by Edward and Josephine Karasek against Peoples State Trust & Savings Bank of Pontiac and another to set aside a default judgment in a law case. Bill dismissed. Plaintiffs appeal. Affirmed.

Joseph A. Bloom (*Leslie D. Bloom,* of counsel), for plaintiffs.

Lovett & Orr, for defendants.

NORTH, J. Plaintiffs by their bill of complaint sought in the circuit court to have set aside and held for naught their default and a judgment against them entered in a case at law wherein the defendant savings bank was plaintiff and plaintiffs herein were defendants. The relief sought was denied, and from the decree dismissing plaintiffs' bill of complaint they have appealed.

It is claimed by the defendant bank that plaintiffs herein as defendants in the law case were each served with a copy of the declaration and rule to plead. Service of the declaration upon him is admitted by Edward Karasek; but he claims to have been misled and deceived, shortly after service upon him, by the attorney who represented the plaintiff in the law case, and that in consequence of such deception, he, Karasek, paid no attention to the service made upon him. In substance, and as stated in appellants' brief, it is Karasek's claim that the attorney for the plaintiff in the law case, after hearing Karasek's contention as to the matter involved, advised Karasek "that he had a good and meritorious defense, was not liable, and to forget about the

case.'' Mrs. Josephine Karasek, Edward's mother, denies that any service whatever was made upon her. These claims presented issues of fact as to which there was a direct conflict in the testimony offered in behalf of the respective parties on the hearing of this case. The burden of proof was upon plaintiffs. At the conclusion of the hearing the circuit judge said:

''In this case the court is satisfied that service of process was made upon both the plaintiffs, Edward Karasek and Josephine Karasek, as returned by the deputy sheriff; and the court further feels that there has not been sufficient proof of any fraud or misrepresentation preventing plaintiffs from entering their appearance or protecting their rights.''

A careful review of this record satisfies us that the circuit judge reached the right conclusion.

Appellants also stress the claim that there was a discrepancy between the wording of the declaration as filed and that of the copy served upon one of the defendants in the law case. This discrepancy, which we think is insignificant and immaterial, arose from an erroneous reference in the original declaration to the defendant Josephine Karasek as the wife of Edward Karasek. Instead, she was Edward's mother. In the copy of the declaration served on one of the defendants in the law case a line was drawn through the two words ''his wife.'' The deputy sheriff testified that in the copy which he served on Josephine ''there were no alterations;'' but he made his return of service ''of a true copy'' on a copy of the declaration from which the two words ''his wife'' had been stricken. We omit further details, because, under the circumstances here presented, it conclusively appears that no one was deceived or in any way misled by the erroneous reference to

Josephine Karasek as Edward's wife instead of as his mother. At most it was an immaterial irregularity or defect which does not invalidate the judgment.

"When a verdict shall have been rendered in any cause, the judgment thereon shall not be stayed, nor shall any judgment upon confession, or default, be reversed, impaired, or in any way affected by reason of the following imperfections, omissions, defects, matters or things, or any of them, in the pleadings, process, record or proceedings, namely: * * * (3) For any variance between the original writ, bill, plaint and declaration, or between either of them." 3 Comp. Laws 1929, § 14148.

The decree entered in the circuit court in chancery is affirmed, with costs to appellees.

McDONALD, C. J., and CLARK, POTTER, SHARPE, FEAD, WIEST, and BUTZEL, JJ., concurred.

SMITH *v.* WASSINK.

1. APPEAL AND ERROR—DENIAL OF MOTION FOR DIRECTED VERDICT.
   In deciding whether trial court was in error in denying appellants' motion for directed verdict as well as their motion for judgment *non obstante*, Supreme Court must accept testimony which is most favorable to appellee.

2. MOTOR VEHICLES—CONTRIBUTORY NEGLIGENCE—RIGHT OF WAY—DUTY TO LOOK.
   Notwithstanding automobile driver approaching intersection has right of way, he may not proceed heedlessly and without tak-

ing any precaution for safety of himself and others riding in his automobile, and if he does he is guilty of negligence as matter of law (1 Comp. Laws 1929, § 4712).

3. SAME—PROXIMATE CAUSE—IMPUTABLE NEGLIGENCE.

Negligence of automobile driver in failing to look to left or to take proper precaution before proceeding to cross intersection was proximate cause of collision with another car approaching from left, and said negligence, being imputable to passenger, bars recovery for latter's injury received in said collision.

Appeal from Ingham; Collingwood (Charles B.), J. Submitted January 17, 1933. (Docket No. 1, Calendar No. 36,855.) Decided April 4, 1933.

Case by Ray Smith against Lynes Wassink and another, doing business as Lansing Motor Sales, for personal injuries received in an automobile accident alleged to be due to defendants' negligence. Verdict and judgment for plaintiff. Defendants appeal. Reversed, and judgment ordered entered for defendants.

Pierce & Planck, for plaintiff.

Kelley, Sessions, Warner & Eger and *Harry F. Hittle,* for defendants.

NORTH, J. This suit arises out of a collision between two automobiles at the intersection of Pine and Genesee streets in the city of Lansing. On trial before a jury, plaintiff had verdict and judgment, and defendants have appealed. The sole question presented is appellants' claim that the driver of the automobile in which plaintiff was riding was guilty of contributory negligence which was imputable to plaintiff, and, therefore, defendants' motion for a directed verdict, as well as their motion for judgment *non obstante,* should have been granted.

At the time of the accident, the car in which plaintiff was riding was proceeding northerly on Pine street, and defendants' car easterly on Genesee street. The one on Pine street was going at a speed of approximately 20 miles an hour. There is considerable testimony that the other car was going at substantially the same rate, though inference may be justified that it was going at a higher rate of speed. Neither slackened its pace any appreciable time before the collision, which occurred just as the car in which plaintiff was riding was crossing the center line of Genesee street. This car did not change its course prior to the impact; but immediately before the collision defendants' car veered somewhat northerly in an evident attempt to avoid the accident. The collision occurred during daylight hours, but neither driver seems to have seen the other automobile until practically at the point of impact. As they approached the intersection, each car was traveling on the right-hand side of the street, and each street was 30 feet from curb to curb. When the automobile in which plaintiff was riding reached a point about 37 feet south of the southerly curb of Genesee street, the driver had an unobstructed view westerly on Genesee street beyond the point from which defendants' car was approaching. As the car on Pine street was crossing the walk on the south side of Genesee street, defendants' car was approximately eight feet west of the walk on the west side of Pine street. There were side curtains on the car in which plaintiff was riding, and apparently its driver did not see defendants' car approaching from his left until another man riding in his car said "Watch out," and at that time it was too late to avoid the accident.

Appellee stresses the fact that the collision occurred north of the center line of Genesee street and east of the center line of Pine street, *i. e.*, in the northeast portion of the intersection. This is disputed by defendants' testimony, but in deciding the question presented by this appeal, the testimony must be accepted which is most favorable to appellee. Defendants' automobile struck the one in which plaintiff was riding on the left front wheel and fender. The only fair inference that can be drawn from the testimony is that at the instant of collision the forward portion of the car in which plaintiff was riding was just northerly of the center line of Genesee street, that the slight swerving of defendants' car to the left was in an effort to avoid the accident, and that had their car proceeded in a straight course the only difference would have been that it would have struck the other machine in the rear portion rather than in the forward portion. Appellee urges that the instant case falls squarely within *Harris* v. *Bernstein*, 204 Mich. 685, and *Grodi* v. *Mierow*, 244 Mich. 511, where the issue of contributory negligence was held to have been a question of fact for the jury. In each of those cases the question of contributory negligence was close. It should be noted that in each of them the defendants' machines were being driven on the wrong side of the street, continued that course, and the accident occurred wholly in territory where the defendants did not have a right to be with their machines. That is not true in the instant case. And each of the above-cited cases is distinguishable in that there was testimony from which it might fairly be inferred that the driver of the plaintiff's machine, when entering the intersection, made an observation as to approaching vehicles and thereupon reasonably as-

sumed that it was safe to proceed in advance of the defendants' oncoming automobile. We cannot agree with appellee's contention that in this case "the sole and proximate cause of the collision" was the invasion by the defendants of a portion of the intersection where they did not have a right to be. Instead, we think this record conclusively discloses negligence on the part of the driver of the car in which plaintiff was riding. Unfortunately, this accident resulted in the driver's death. The conclusion seems unescapable that either he made no observation whatever for an approaching vehicle from his left as he entered this intersection, or if he did observe the other automobile just about to enter the intersection (and at an excessive rate of speed as appellee's brief asserts) he was guilty of negligence in proceeding to cross the intersection.

Careful consideration of this record necessitates the conclusion that if the driver of plaintiff's car, as he approached this intersection, had used reasonable care in making an observation to the west, from which direction defendants' car was approaching, he would have discovered the impending danger and have been able to have avoided the accident. While the two machines were not exactly equally distant from the center of the intersecting streets, they were approaching it simultaneously and each proceeding at least at approximately the maximum legal rate of speed. The view was unobstructed, road conditions good, and no traffic complications. As before stated, the unescapable conclusion is that the driver of plaintiff's car entered this intersection without looking for a vehicle approaching from his left, or that he looked and proceeded negligently. Notwithstanding he had the right of way (1 Comp. Laws 1929, § 4712), he was not entitled to proceed

heedlessly and without taking any precaution for the safety of himself and others riding in his automobile. *Kerr* v. *Hayes,* 250 Mich. 19. He was guilty of negligence which was a proximate cause of the accident, and this negligence on the part of the driver of the automobile in which plaintiff was riding is imputable to him. The instant case is controlled by our recent decisions in *Smith* v. *Ormiston,* 242 Mich. 600; *Kerr* v. *Hayes, supra; Zuidema* v. *Bekkering,* 256 Mich. 327; *Kok* v. *Lattin,* 261 Mich. 362.

The verdict and judgment entered in the circuit court will be vacated, and the case remanded, with direction to enter judgment *non obstante* for defendants. Costs to appellants.

McDONALD, C. J., and CLARK, POTTER, SHARPE, FEAD, WIEST, and BUTZEL, JJ., concurred.

VAN DYKE *v.* KNOLL.

1. TRIAL—VOIR DIRE EXAMINATION—INSURANCE—MOTOR VEHICLES.
   In action for personal injuries received in collision with automobile, plaintiff's counsel may make proper inquiry of jurors on their *voir dire* examination as to their connection with insurance company, if made in good faith.

2. EVIDENCE—MOTOR VEHICLES—INSURANCE—NEGLIGENCE—PROXIMATE CAUSE.
   In action for personal injuries received in collision with automobile, testimony by plaintiff that, on following day, driver stated that he was insured, was inadmissible, since it was not admission of liability, nor did it bear on question of negligence, which was proximate cause of said injuries.

3. APPEAL AND ERROR—MOTOR VEHICLES—INSURANCE—LIABILITY.
Error in admitting testimony by plaintiff, in action against automobile owner, that driver, on following day, stated that he was insured, *held*, prejudicial, in view of comment by trial judge that if said testimony had any bearing on question of liability it was competent.

4. TRIAL—WITNESSES—CROSS-EXAMINATION—MOTOR VEHICLES—ARGUMENT OF COUNSEL.
In action against automobile owner for injuries caused by collision with bobsled, cross-examination of defendant's witnesses, which, in connection with argument by plaintiff's counsel, carried impression that accident would not have happened if automobile had not been driven across ice path and into certain driveway, was prejudicial error, where undisputed testimony shows that accident did not happen when car was being driven into or backed out of said driveway.

5. NEGLIGENCE—MUNICIPAL CORPORATIONS—COASTING ON PUBLIC STREET—REASONABLE CARE.
Where municipal authorities permit coasting on public street, but do not close it to vehicular traffic, those using it are bound to exercise reasonable care commensurate with known use thereof.

Appeal from Kent; Brown (William B.) J. Submitted January 13, 1933. (Docket No. 58, Calendar No. 36,974.) Decided April 4, 1933.

Case by Joan Van Dyke against Martin E. Knoll and another for personal injuries received in a collision with defendants' automobile alleged to be due to defendants' negligence. Verdict and judgment for plaintiff. Defendants appeal. Reversed, and new trial granted.

Travis, Merrick, Johnson & McCobb (*Laurent K. Varnum,* of counsel), for plaintiff.

Rodgers & Dunn, for defendants.

NORTH, J. Plaintiff, a young lady 21 years of age, while coasting on a bobsled on Naylor street in the city of Grand Rapids, came in contact with an automobile owned by the defendant Martin E. Knoll, but at the time in charge of his son, Allen Knoll. Upon trial by jury, plaintiff had verdict and judgment. The defendants have appealed.

Naylor street extends in an easterly and westerly direction, and between its intersection with Grandville street and its intersection with Century avenue, a block east of Grandville, there is a downgrade in an easterly direction. The municipal authorities permitted coasting on this section of Naylor street. For this purpose an icy strip about 3 feet in width and about 8 feet from the southerly curb and 13 feet from the northerly curb was formed by sprinkling the snow which had fallen upon this portion of the street. On either side of the ice slide or ice track, as it was called, there was loose snow. The park department of the city of Grand Rapids placed a barrier across the south half of Naylor street at Grandville and the north half at Century avenue about eight feet long, with a lantern hung thereon and a sign reading "Caution, Coasting Allowed." But the street was not closed to vehicular traffic. On the evening of the accident, about eight o'clock, the defendant Allen Knoll drove his father's automobile into the driveway adjacent to the Becker home, where he and a young man companion were calling relative to some matter of business. This driveway is on the southerly side of Naylor street and 150 feet easterly from the top of the hill on which plaintiff was coasting. Having finished his call at the Becker home, Allen Knoll and his companion returned to the automobile, backed the car out of the driveway across the iced track on which

the bobs coasted, and continued in a northwesterly direction until the left rear wheel was against the northerly curb of Naylor street. Plaintiff's proof was to the effect that the bobsled on which she was riding was on its way down hill about 125 feet from the Becker driveway when the Knoll automobile was backed into the street. Defendants' witnesses testified that when the automobile was backed into the street the bobsled was not approaching from the top of the hill; and defendants' witnesses further testified that after stopping the automobile at the northerly curb of the street it was not moved again until after the accident. But plaintiff's witnesses testified that while the car was standing against the curb it was entirely clear of the strip used for coasting, and that as the bobsled approached the point where the automobile had crossed the coasting strip the car started forward a distance of one to three feet. There is some variance as to whether the bobsled pursued a straight course along the icy track or whether as it approached the point of the accident it veered slightly. In any event the sled itself did not come in contact with the automobile, but it did go within such proximity that plaintiff's left limb came in contact with some portion of the auto and with such force that the sled left the icy slide and overturned. None of the other occupants of the sled were injured, but plaintiff received a cut on her left leg below the knee, her ankle was sprained and bruised and one of her arms somewhat injured. The defendants deny being guilty of the negligence charged against them, which in effect was that defendant Allen Knoll drove said automobile into and against the bobsled upon which plaintiff was riding.

Appellants assert that prejudicial error resulted from repeated inquiries by plaintiff's counsel dur-

ing the *voir dire* examination of the jurors as to their being interested in or having stock in an insurance company. Proper practice in this particular has been so recently indicated by decisions of this court that we deem further discussion unnecessary. *Holman* v. *Cole,* 242 Mich. 402; *Palazzolo* v. *Sackett,* 245 Mich. 97; *Harker* v. *Bushouse,* 254 Mich. 187. On this record we are not prepared to say that these inquiries of the jurors were not made in good faith. As a basis of challenging jurors, plaintiff's counsel was entitled to make proper inquiry in this field. But later, plaintiff, as a witness in her own behalf, upon being asked by her counsel what Allen Knoll said to her the day following the accident, replied:

"*A.* He said he was covered with insurance.

"*Plaintiff's counsel:* No, you can't say that.

"*Mr. Rodgers:* Counsel drew that out deliberately, and I renew my motion for a mistrial on the previous ground and—

"*The Court:* She would be entitled to testify to it. What is the idea of being afraid of anything like that? She is entitled to say what he said about the accident. * * * What he said is perfectly competent. * * * When a man has an accident, anything said about, concerning, or pertaining to the accident, after the accident, is admissible, no matter what subject he may refer to if it has any bearing on the accident itself, or the cause of the accident; perfectly admissible.

"*Q. (Plaintiff's counsel):* Just go ahead and tell what he said.

"*A.* He said he was covered with insurance, and he would see the insurance company about it.

"*Mr. Rodgers:* I again ask that that be stricken out and again ask for a mistrial.

"*The Court:* If it has any bearing upon the question of liability it is perfectly competent. It is for

the jury to say. The motion for mistrial is without foundation, and denied."

The statement, if made by Allen Knoll, was not an admission of liability, nor did it bear at all upon the question of his having been guilty of negligence, which was a proximate cause of plaintiff's injuries. It was not relevant or competent testimony as to any issue before the jury. It was unquestionably prejudicial, especially so in view of the understanding the jurors must have had from the trial court's statement:

"If it has any bearing upon the question of liability it is perfectly competent. It is for the jury to say."

Error is assigned upon the cross-examination of defendant Allen Knoll and of Dwight Lamoreaux, who accompanied Knoll at the time of the accident; and error is also assigned upon the subsequent use made of this testimony by plaintiff's counsel in arguing the case before the jury. In part, the cross-examination of Allen Knoll was as follows:

"*Q.* And if you had parked your car at the curb on the north side of Naylor street, it wouldn't have been necessary for you to cross that ice path at all?

"*Mr. Rodgers:* I object to that, incompetent and immaterial. There is no obligation for him to park his car on the north side.

"*The Court:* Well, he may answer. * * *

"*A.* Yes and no on that question. It would be very dangerous leaving a car out there, but it could be left there.

"*Q.* You could have parked a car on the left side?

"*A.* I could have, but it would have been a dangerous thing to do. * * *

"*Q.* And there was nothing to prevent you from parking at the north curb, was there?

"*A.* No.

"*Q.* And if you had parked there, you would not have had to drive your car across this ice path where the children were sliding down, would you?

"*Mr. Rodgers:* Same objection.

"*The Court:* He may answer. * * *

"*A.* No, sir."

There was cross-examination of defendants' witness Dwight Lamoreaux of like character. Defendants' counsel moved to strike this testimony and stated to the court that there was no allegation of negligence based on failure to park the car in the street instead of in the driveway of the Becker home, and that there was no obligation resting on the driver of the automobile to do so. The objections made were overruled and the motion to strike denied. Before the jury, plaintiff's counsel argued that the automobile should have been parked at the curb opposite the Becker driveway and by so doing "avoid any possibility of an accident." Objection was urged to the argument and the court requested to instruct the jury to disregard it, this on the ground that the manner or place of parking the car was not alleged as negligence. The trial court disposed of defendants' objection and requests as follows:

"The jury has heard the testimony, and if the argument is not helpful in weighing and determining the testimony and determining the question of negligence, then they will disregard it. If it is helpful, they can use it for what it is worth."

The cross-examination was improper and the use made of the testimony thus gotten into the record by plaintiff's counsel was clearly prejudicial. This is

especially true in view of the undisputed testimony that the accident did not occur when the automobile was being driven into or when it was being backed out of the driveway. If the driver was guilty of any negligence it was in driving the automobile forward after he had backed it across the street to the north curb. Conclusively driving into or backing out of the driveway was not the proximate cause of the accident. As stated in appellee's brief:

"In short, the only disputed question of fact in the case was whether defendants' car moved forward from its position against the curb."

Error is also assigned on the charge to the jury. In part the court charged:

"So, in this case, after the bob started from the top of the hill, if the slide was clear when they started, the testimony was they could not stop the bob going down the slide, and the law does not require that it shall stop; and anybody down the hill, it is their duty not to get in the way of that bob, because the bob cannot be stopped."

Appellants' objection is thus stated:

"Our criticism here is that this instruction stated the mutual rights and responsibilities of the plaintiff and defendant more favorably to plaintiff than the law permits."

Without holding that the case should be reversed on that account, we may note that the "duty not to get in the way" of those coasting down the hill was not (as the jury might have understood) an absolute duty. Instead, others using the street were bound to exercise reasonable care, such care as was commensurate with the known use that was being made of that portion of the street where coasting was permitted.

For the reasons above stated, the judgment entered in the circuit court will be set aside, and a new trial ordered. Costs to appellants.

McDONALD, C. J., and CLARK, POTTER, SHARPE, FEAD, WIEST, and BUTZEL, JJ., concurred.

MULLEN *v.* VAN BUREN CONSOLIDATED SCHOOL DISTRICT.

1. SCHOOLS AND SCHOOL DISTRICTS—TEACHER'S CONTRACT—BREACH OF CONTRACT—STATUTES.

   Where school superintendent submitted list of teachers, including plaintiff, whom he recommended for employment, and said recommendation was approved by resolution of school board, but plaintiff's contract was never signed by any member of said board, there was no contract, and therefore no recovery could be had for breach thereof (2 Comp. Laws 1929, § 7156 [q]).

2. SAME—ESTOPPEL.

   Where school teacher's contract was never signed by any member of school board, and no services were ever rendered thereunder, she is not entitled to recover on ground of estoppel, although superintendent's recommendation that she be employed was approved by resolution of said board.

Appeal from Wayne; Reid (Neil E.), J., presiding. Submitted January 25, 1933. (Docket No. 163, Calendar No. 36,574.) Decided April 4, 1933.

Assumpsit by Inga Mullen against Van Buren Consolidated School District, a municipal corporation, for breach of contract. Judgment for plaintiff. Defendant appeals. Reversed.

Peter P. Boyle, for plaintiff.

Elton R. Nellis, for defendant.

NORTH, J. Plaintiff, a school teacher, brought suit in assumpsit against the defendant district for breach of contract. She had judgment, and defendant has appealed.

Plaintiff was in defendant's employ as a school teacher during the year 1930–1931. Incident to employing teachers for the school year of 1931–1932, defendant's superintendent submitted a list of teachers, including plaintiff, whom he recommended, which recommendation was approved by resolution of the school board in February, 1931. On the 10th of April the superintendent delivered to plaintiff for her signature duplicates of a proposed contract. They had not been executed by any member of the school board. Plaintiff retained the duplicates until May 15, 1931, on which date she returned them to the superintendent properly executed by herself. The proposed contract was for plaintiff's services for 10 months beginning September 1, 1931, at $160 per month. Nothing further was done relative to the consummation of this contract; and under date of July 25, 1931, the school superintendent by letter advised plaintiff that her contract had not been signed by the school board. The letter in part reads:

"*Dear Miss Mullen:*

"Am sorry that you did not obtain final information as to your contract before leaving in June. In talking your attitude over with members of the school board, they have a pretty definite opinion that you should not return. Your contracts have not been signed by the board."

It is plaintiff's claim that after receipt of the above notice she offered to carry out her contract of

employment, but the school board refused to permit her to do so. A contract had been entered into for the services of another teacher in the place of plaintiff.

Notwithstanding plaintiff claims estoppel on the ground that the conduct of the school board prevented her from securing employment elsewhere, we think the outcome of this case is conclusively controlled by the statute. In part it reads:

"SEC. 26. The board of education shall have the following powers and duties: * * *

"(q) To hire and contract with such legally qualified teachers as may be required, and all contracts shall be in writing and signed by a majority of the board in behalf of the district." 2 Comp. Laws 1929, § 7156.

As noted above, the alleged contract for the breach of which this action is brought was not executed by any member of the school board. The statutory provision is clear and controlling in the instant case. Because of this provision it must be held that plaintiff did not at any time have a contract with the defendant for the year 1931–1932.

Plaintiff seeks to recover upon the ground of estoppel, and in that connection relies upon *McLaughlin* v. *Board of Education,* 255 Mich. 667. The distinction between the instant case and the cited case is clear. In the latter the plaintiff had a contract signed by three members of the school board, and he entered upon the discharge of his duties and performed services under the contract. In the instant case the contractual relation between the parties was never consummated, and no claim is made that any services were rendered thereunder. Further, it was held in the *McLaughlin Case, supra,* that the above-quoted section of the statute does not apply

to a contract for the services of a superintendent, but "applies only to teachers' contracts."

Under the facts here presented, plaintiff's claim of a right of recovery on the ground of estoppel cannot be sustained. Decision is controlled by *Langston* v. *School District,* 121 Mich. 654; *Hutchins* v. *School District,* 128 Mich. 177.

The judgment for plaintiff entered in the circuit, where there was trial before the court without a jury, will be vacated, and judgment entered for defendant. Costs to appellant.

McDONALD, C. J., and CLARK, POTTER, SHARPE, FEAD, WIEST, and BUTZEL, JJ., concurred.

TIO *v.* MOLTER.

1. MOTOR VEHICLES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT.

   In action by pedestrian for injuries received when he was struck by defendant's automobile, trial court was in error in holding that plaintiff was free from contributory negligence, where there was evidence to sustain defendant's theory that plaintiff turned to his left and stepped immediately in front of automobile at point of accident.

2. SAME.

   If pedestrian stepped in front of automobile, it could not be held as matter of law that he was free from contributory negligence and that driver of automobile was guilty of negligence.

3. SAME.

   Pedestrian about to cross pavement is bound to use care that an ordinarily prudent person would under like circumstances, in regard to making observation as to approaching vehicles.

4. SAME—QUESTION FOR JURY.

In pedestrian's action against driver of automobile, evidence *held*, to present issue of fact on questions of driver's negligence and plaintiff's contributory negligence.

Appeal from Berrien; White (Charles E.), J. Submitted January 11, 1933. (Docket No. 110, Calendar No. 37,006.) Decided April 4, 1933.

Case by Frank Tio against Jacob Molter for personal injuries received when struck by defendant's automobile. Verdict and judgment for plaintiff. Defendant appeals. Reversed, and new trial granted.

John J. Sterling (*Webster Sterling,* of counsel), for plaintiff.

Gore & Harvey, for defendant.

NORTH, J. This suit arises from an automobile accident in which plaintiff was struck and injured by an automobile owned by defendant. On trial by jury, plaintiff had verdict and judgment. Defendant has appealed. The questions presented are whether the trial judge was in error in holding as a matter of law that defendant was guilty of negligence and plaintiff was free from contributory negligence; and also whether the verdict of the jury was against the great weight of evidence on the issue of plaintiff having executed a valid release.

Plaintiff, a man 73 years of age, resided in the village of Millburg. The main thoroughfare is the Territorial road, which extends in an easterly and westerly direction through the village. The paved surface is 30 feet in width, with a dirt shoulder on the southerly side. A north and south road, herein

called the Watervliet road, intersects the main highway. About 14 or 16 rods westerly from this intersection, and on the southerly side of the main thoroughfare, is a pool room which plaintiff visited on the evening of the accident. He left this pool room at approximately nine o'clock and started to walk to his home, which was northerly from the intersection of these two highways. Plaintiff claims that he started easterly from the pool room walking along the dirt shoulder six or seven feet from the southerly edge of the pavement, and when about half way to the intersection of the highways he was knocked down by defendant's automobile and seriously injured. Defendant's son George, who was about 15 years of age, was driving the machine at the time. The street was lighted by ordinary electric bulbs of 75 to 100 watts each. One of these was located at the intersection of the highways and another somewhat westerly from the point of accident.

Defendant's son testified that previous to the accident he had had experience in driving automobiles over a period of five or six years, and that the model T Ford involved in this accident at the time was in good condition as to brakes and lights. Starting near the pool room, defendant's son claims that he drove in an easterly direction on the southerly half of the paved portion of the main street, planning to turn in a northerly direction at the intersection with the Watervliet road; that the lights on his machine were burning, and that he was proceeding at a speed of about 10 miles per hour, watching ahead, and all of a sudden he heard a bump, stopped the automobile immediately, backed up six or eight feet, and saw a man lying on the pavement in front of his car. Upon getting out of the automobile he found that the injured man was Mr. Tio. The driver of the

automobile testified that notwithstanding he was watching ahead, he saw no one in the path of his car before the accident. No warning was given by the approaching automobile. At least four people who were in the immediate vicinity of the place of the accident were almost instantly upon the scene. All of these people, as well as defendant's son, testified that immediately following the accident plaintiff was lying on the paved portion of the road three to five feet north of the southerly edge of the pavement. He was unconscious, his head was lying to the east, his feet six or eight feet from the automobile standing on the pavement. At the time of the accident the pavement was dry and seems to have been free from other traffic. Plaintiff claimed he was struck while walking south of the pavement on the dirt shoulder; but defendant claimed plaintiff was struck while on the pavement.

With the record substantially as indicated above, the court at the conclusion of the proofs instructed the jury that defendant was guilty of negligence as a matter of law. The court's position on this phase of the case appears from the following extract from the charge to the jury:

"Now, from a legal standpoint, as to the liability of the defendant, I don't think it makes any difference, for this reason, if the driver of the car did leave the pavement he was guilty of negligence in so doing. If, on the other hand, he struck the plaintiff while the plaintiff was walking along the paved portion of the highway, then in that event the defendant or driver of defendant's car was negligent in not seeing the plaintiff, because the law provides that one driving an automobile must at all times have it under such control that he can stop it within the range of his vision."

At the close of the proofs defendant's counsel moved for a directed verdict on the ground that there was no proof of negligence chargeable to defendant, and because "the evidence in the case conclusively establishes the fact that plaintiff himself was guilty of contributory negligence." Neither the question of defendant's negligence nor plaintiff's contributory negligence was submitted to the jury. The court determined each of these issues as a matter of law in favor of plaintiff.

There was a direct conflict in the testimony as to the facts and circumstances under which this accident happened. The jury could not determine the issue of defendant's negligence or of plaintiff's contributory negligence without determining from the testimony the circumstances under which plaintiff was injured. If, as claimed by plaintiff, he was struck while walking along the dirt shoulder some six or seven feet from the southerly edge of the pavement, the facts which constituted defendant's negligence of necessity were very different than they must have been if plaintiff was upon the pavement when struck, as the defendant claims, and as the testimony offered in his behalf quite convincingly indicated. Likewise, the question as to whether plaintiff was guilty of contributory negligence would be very different in the one instance than in the other. At the time of arguing the motion for a directed verdict, the following colloquy occurred between the court and plaintiff's counsel:

"*The Court:* * * * suppose the jury finds against him (plaintiff) on that point, and finds he was walking on the pavement, wasn't it the duty of the driver of the car to see him and have his car under such control—

"*Mr. Harvey:* I am not sure he was on the pavement.

"*The Court:* He must have been walking on the pavement according to your theory.

"*Mr. Harvey:* He could have stepped onto the pavement.

"*The Court:* No evidence that he did. * * *

"*Mr. Harvey:* Suppose he stepped suddenly in front of that car?

"*The Court:* I cannot conclude that. The evidence is that—

"*Mr. Harvey:* You cannot conclude that he didn't.

"*The Court:* Yes, he was there and he was struck by this car. I think I will have to charge the jury upon that question and leave the sole question of whether or not he (plaintiff) intelligently entered into that agreement (the release) at that time.

"*Mr. Harvey:* I think that will be gross error if the court does."

It is plain from the above that defendant's counsel was urging upon the court the necessity of submitting to the jury as a question of fact whether or not from the testimony as a whole it did not appear that plaintiff had turned to his left to cross the pavement in a northerly direction and in doing so had unexpectedly stepped in front of the approaching automobile. We think the trial court was in error in holding there was no testimony tending to sustain this theory of the accident. The driver of defendant's car testified that the lights were in first-class condition and that he was looking straight ahead as he approached the point of accident and that he saw no one on the pavement. Even plaintiff testified he was not upon the pavement. But there is ample proof to justify the conclusion that plaintiff was upon the pavement when he was struck by the automobile. If the jury believed the driver's testimony, almost of necessity it would have found that the

reason the driver of the car did not see any one ahead of it as he approached the point of the accident was because the injured person stepped upon the pavement at the point of the accident immediately in front of the automobile. If the accident happened in this manner, it could not be held as a matter of law that the driver of the automobile was guilty of negligence or that plaintiff was free from contributory negligence. The law is well settled that under such circumstances the plaintiff would have been guilty of contributory negligence if he attempted to cross the pavement without making any observation as to approaching vehicles. He was bound to use the care that an ordinarily prudent person would have used under like circumstances. *Neeb* v. *Jacobson,* 245 Mich. 678; *Billingsley* v. *Gulick,* 252 Mich. 235. Assuming that plaintiff was walking in an easterly direction upon the southerly part of the paved portion of the highway, which he had a right to do, he was bound to exercise reasonable care for his own safety.

"Pedestrians in a public highway have a right to assume that the driver of an automobile will use ordinary care for their protection, but they may not rest content on that assumption and take no care for their own safety." *People* v. *Campbell* (syllabus), 237 Mich. 424.

"One traveling along or crossing a street or highway is not necessarily required to look back for the approach of vehicles; if struck by an auto coming behind him, his negligence presents a jury question." 5–6 Huddy Encyclopedia of Auto Law (9th Ed.), § 84, citing many cases.

"A pedestrian, equally with the operator of an automobile, has the right to be on and to use the

traveled part of the highway, and is not restricted to crossings at street intersections or sidewalks, but may proceed along the street. * * * (But) one who uses the roadway for sidewalk purposes without taking any precautions for his own safety though he can see the lights of an automobile which strike him long before it reaches him, is guilty of contributory negligence barring recovery for the injury received." 2 Blashfield Cyclopedia of Auto Law, chap. 49, § 20, citing *Willis* v. *Harby,* 159 App. Div. 94 (144 N. Y. Supp. 154.)

The judgment entered must be reversed on the ground that the record presented an issue of fact for the jury on the question of the negligence of the driver of the automobile and also the question of plaintiff's contributory negligence.

Appellant's contention that the verdict of the jury as to the validity of the receipt or release executed by appellee was against the great weight of evidence is without merit.

The judgment entered in the circuit court is set aside, and the case remanded for retrial. Costs to appellant.

McDONALD, C. J., and CLARK, POTTER, SHARPE, FEAD, WIEST, and BUTZEL, JJ., concurred.

ROY *v.* CHEVROLET MOTOR CAR CO.

STAFY *v.* SAME.

1. NUISANCE—INJUNCTION—EQUITY.
   In suit by property owners to enjoin alleged nuisance resulting from use of steam hammers in automobile factory, causing noise and vibration, and from smoke, monoxide gas, and noxious odors, injunction was properly denied, where to have granted it would have been highly inequitable, resulting in far greater injury to defendant than that of which plaintiffs complain.

2. INJUNCTION—DISCRETION OF COURT—ARBITRARY ACTION.
   Granting injunctive relief is within sound discretion of court, and decision must not be arbitrary, but must be based on facts of particular case.

3. EQUITY—INJUNCTION—ADEQUATE REMEDY AT LAW.
   Strict legal right, if incompatible with equities of case, does not necessarily entitle one to equitable redress, especially if injured party has reasonably clear and adequate remedy at law.

4. SAME—MULTIPLICITY OF SUITS.
   Avoiding multiplicity of suits is not conclusive reason for intervention of equity.

Appeal from Wayne; Webster (Arthur), J. Submitted January 19, 1933. (Docket No. 122, Calendar No. 36,082.) Decided April 4, 1933.

Separate bills by John Roy and others and Stanley Stafy and others against Chevrolet Motor Car Company, a division of General Motors Corporation, a Delaware corporation, to restrain the continuance of an alleged nuisance. Cases consolidated for hearing. Bills dismissed. Plaintiffs appeal. Affirmed.

Leon Dreifuss, for plaintiffs.

Stevenson, Butzel, Eaman & Long, for defendant.

NORTH, J. In these two suits, submitted and considered as one, plaintiffs seek to have defendant restrained from continuing an alleged nuisance. In each case the circuit judge decreed dismissal of the bill of complaint without prejudice to the recovery in suits at law of such damages, if any, as plaintiffs have sustained. Plaintiffs have appealed.

Plaintiffs, upwards of 40 in number, allege that they own and occupy homes located on the easterly side of St. Aubin avenue and on Lumpkin avenue which parallels St. Aubin and is one block to the east, in the city of Hamtramck. St. Aubin avenue extends along the easterly side of defendant's property, which consists of a large manufacturing site occupied by tracks, buildings, etc., where defendant employed ten or twelve thousand men. Since 1917 defendant has continued to develop and enlarge its manufacturing plant. In 1928 it began to occupy and use a large building it had just previously constructed on the westerly side of St. Aubin avenue opposite the properties of some of the plaintiffs. In this building, which stands approximately 200 feet west of the center line of St. Aubin avenue, is located defendant's forge plant, where it operates both day and night powerful steam hammers. In addition to other machines of like character, it here uses five 12,000-pound hammers in forging crank shafts. When in operation each of these machines has a striking force of 120,000 pounds. These five hammers are installed on a concrete mat or foundation 160 feet by 32 feet and 6 feet 6 inches deep. The operation of these huge machines produces noise and vibrations. Defendant, in ways which need not

be detailed, attempted to overcome this objectionable feature. Finally, prompted at least in part by a desire to protect neighborhood property, defendant erected another building between its forge plant and St. Aubin avenue. This new building, used by defendant for tempering springs and known as its spring plant, was of extra height and otherwise constructed in such a manner as would protect neighboring property from the noise and vibrations attending operation of defendant's steam hammers, or at least would reduce these features of defendant's operations to a minimum. This spring plant is adjacent to and extends along St. Aubin avenue approximately 640 feet, and is 137 feet wide.

Plaintiffs' original bills of complaint were filed before construction of the defendant's spring plant; and plaintiffs therein allege that the noise and vibrations caused by the operation of defendant's steam hammers constitute a nuisance, that it has resulted in serious physical damage to plaintiffs' buildings, has rendered them untenantable, has impaired the health of the occupants, has deprived them of sleep, and otherwise damaged them both in person and in property. In supplemental bills of complaint filed since the construction of defendants' spring plant, the plaintiffs allege that defendant operates approximately 22 fuel-oil burning furnaces which throw off monoxide gas, a blue smoke, and noxious odors, and that because of such gas, smoke, and odors, and also because of the noise from these oil burners operating practically 24 hours of each working day, the living conditions in plaintiffs' homes are greatly impaired, in that they are not able to open windows for ventilation, to sleep at night, or to dry clothes out of doors.

The voluminous testimony taken in the circuit court is in direct and emphatic conflict as to the

extent plaintiffs' rights are invaded, if at all, in the manner alleged. The circuit judge, who visited the premises while defendant's plant was in operation, reviewed the testimony carefully and in his opinion filed in the cause clearly intimates that in his judgment plaintiffs' claims are exaggerations, and that the vibrations of which plaintiffs complain "are not sufficient to amount to a serious inconvenience;" and he also found that plaintiffs had not established their claim of an alleged nuisance resulting from the use of the oil burners in defendant's spring plant. The circuit judge came to the conclusion that, notwithstanding the various grievances alleged by plaintiffs, they were not entitled to injunctive relief, and that, under the circumstances of the case, if plaintiffs have in fact sustained damage in the manner alleged, they have an adequate remedy in an action at law. On this appeal the issue is whether on the record presented the circuit judge reached the right conclusion.

These further facts are pertinent: At the time plaintiffs filed their bills of complaint and for a number of years prior thereto, the locality in which they resided was far from being a strictly residential district. Instead, it might properly be denominated "a heavy industrial district," and at least to some degree there existed the attendant disadvantages of smoke, noise, vibrations, and odors. Further, both the Michigan Central Railroad and the Grand Trunk Railroad pass through the locality and make it especially desirable as a location for manufacturing enterprises requiring shipping facilities. These two railways cross at a point commonly known as Milwaukee Junction, which is but a short distance from the homes of plaintiffs. As was natural, this district developed industrially rather than

as residential. In a comparatively small area, approximately 200,000 men were employed in manufacturing plants there located. Further, it seems undisputed in this record that use of defendant's steam hammers in the manner in which they were operated is essential to defendant's business. Plaintiffs do not seek relief on the theory that these machines are improperly installed, carelessly operated, or that conditions could be improved by any reasonable means other than those already resorted to by defendant, except it is urged in behalf of plaintiffs that this phase of defendant's activities might be located and carried on by defendant at a point more remote from plaintiffs' dwellings. However, it is self-evident that this would necessitate the abandoning of a portion of defendant's plant constructed especially for this phase of its work and at a cost of approximately $1,850,000. But aside from this, it does not satisfactorily appear from the record that an attempt to remove its forge plant to some other part of defendant's manufacturing site would wholly obviate the conditions of which plaintiffs complain, if such conditions are as bad as plaintiffs contend. Nor does it appear that such an attempt at removal would not result in merely transferring the alleged nuisance from plaintiffs' properties to those of others residing in this locality.

For the purpose of decision here, we may assume (without so adjudicating) that plaintiffs' rights to some extent have been invaded in the manner alleged in the bills of complaint; yet in view of the record presented we are forced to the conclusion that it would be highly inequitable to grant the injunctive relief sought by plaintiffs. The damage to defendant and to its employees would be far greater than that of which plaintiffs complain. They have

observed for years the development of defendant's plant at an expenditure of millions of dollars; and it was self-evident to all that the growth of this and other industrial plants in the locality would continue to render it less and less desirable as a residential district. To summarily interfere with carrying on an essential phase of defendant's manufacturing activities would be to do an injustice rather than to mete out equity. Granting injunctive relief is within the sound discretion of the court. The exercise of such discretionary power must not be arbitrary. Decision must be based upon the facts of the particular case. A strict legal right, if incompatible with the equities of the case, does not necessarily entitle one to equitable redress. Especially is this true if the injured party has a reasonably clear and adequate remedy at law. Avoiding multiplicity of suits is not a conclusive reason for intervention of equity. In the instant case literal application may well be made of the following statement by Chief Justice GRAVES, in *Fox* v. *Holcomb*, 32 Mich. 494:

"So far as we can judge from the record, a mode of redress so radical would operate against the interests of all parties and eventuate not only in great public inconvenience, but with a pecuniary severity upon the interests of the defendants entirely disproportionate to the nature and extent of the grievance of complainant Fox. Strict legal right, in contradistinction to what is equitable, is not a necessary criterion of equitable redress. A court of equity always endeavors to shape its administration of relief in such way as to avoid oppression or the entailment of consequences of unnecessary rigor."

The applicability of the rule of granting or withholding equitable relief has been announced and fol-

lowed repeatedly by this court. *Hall* v. *Rood,* 40 Mich. 46 (29 Am. Rep. 528); *City of Big Rapids* v. *Comstock,* 65 Mich. 78; *Potter* v. *Railway,* 83 Mich. 285 (10 L. R. A. 176); *Mackenzie* v. *Frank M. Pauli Co.,* 207 Mich. 456 (6 A. L. R. 1305); *Monroe Carp Pond Co.* v. *River Raisin Paper Co.,* 240 Mich. 279; *Adams* v. *Kalamazoo Ice & Fuel Co.,* 245 Mich. 261. Many other cognate cases might be cited. The general proposition is thus stated in 1 High on Injunctions (4th Ed.), § 740, p. 703:

"And in granting injunctions against nuisances, as in other cases of relief by injunction, the court may properly be guided by the consideration of the relative convenience and inconvenience of the parties; and if it appears that the benefit resulting to the plaintiff from the granting of the writ will be slight as compared with the injury to the defendant, the relief may be denied and the plaintiff left to the pursuit of his remedy at law."

In accord with the law as announced in the above cited authorities, on the record here presented, we are fully satisfied that the circuit judge reached the right conclusion.

The decree entered in the circuit court is affirmed, with costs to appellee.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, and WIEST, JJ., concurred. BUTZEL, J., did not sit.

KIMBER *v.* EDING.

1. MOTOR VEHICLES—ASSIGNMENT OF CERTIFICATE OF TITLE—"OWNER"—STATUTES.

   Title to motor vehicle passes from seller to purchaser when former delivers to latter assignment of certificate of title, and not before, and therefore purchaser who has not received assignment of certificate of title is not "owner," although he may be in possession of car (1 Comp. Laws 1929, § 4660).

2. SAME—RIGHT OF ACTION AGAINST "OWNER"—STATUTES.

   1 Comp. Laws 1929, § 4648, conferring right of action against "owner" of motor vehicle, is not in conflict with section 4660, which prescribes how and when purchaser becomes "owner."

3. SAME—NEGLIGENCE—LIABILITY OF PURCHASER—STATUTES.

   Dealer who took in second-hand automobile as part of purchase price of new one, but who had not received assignment of certificate of title at time it was involved in accident while being driven by employee, was not "owner," and therefore was not liable under statute for driver's negligence (1 Comp. Laws 1929, §§ 4648, 4660).

4. SAME—TRIAL—NEGLIGENCE—DIRECTED VERDICT.

   Court's holding that there was insufficient evidence to take to jury issue as to whether automobile dealer was negligent in allowing his employee to drive automobile, knowing that he was reckless driver, *held,* correct.

5. APPEAL AND ERROR—ASSIGNMENTS OF ERROR.

   Complaint that plaintiff was not permitted to make certain proof is not reviewable, where error is not assigned thereon, and record does not show offer of said proof.

Appeal from Allegan; Miles (Fred T.), J. Submitted January 11, 1933. (Docket No. 112, Calendar No. 36,847.) Decided April 4, 1933.

Case by Dorothy Kimber, by next friend, against Jacob Eding and Harry Brower for personal injuries inflicted by automobile driven by Brower and alleged to be owned by Eding. Verdict for plaintiff against both defendants. Judgment for plain-

tiff against Brower, for defendant Eding *non obstante veredicto*. Plaintiff appeals. Affirmed.

Leo W. Hoffman and *Clare E. Hoffman* (*Carl E. Hoffman,* of counsel), for plaintiff.

Diekema, Cross & Ten Cate, for defendant Eding.

FEAD, J. Plaintiff had verdict against both defendants for injuries caused by negligent operation of an automobile by Brower. On motion, judgment *non obstante* was entered for Eding.

Eding conducts a Ford sales agency at Hamilton. Harry Vredeveld, a mail carrier, had an agreement with Eding by which, upon payment of $100 and purchasing a tire, he traded his car for a new one about every six months. December 4th, Vredeveld took his car to Eding's garage, left it, and received a new car in exchange. Eding was not present when he came in. Someone about the garage procured the license plates for the new car at Allegan. Vredeveld said Eding came in and gave him the plates. Vredeveld did not pay the $100 until some days later, and did not assign the certificate of title to his old car to Eding until December 16th. The evening of the 4th, Brower took the car and injured plaintiff. He was not upon any business of Eding at the time. Plaintiff's parents testified that Eding said he owned the car and had permitted Brower to take it.

The question is whether Eding was "owner" of the car driven by Brower before he received assignment of the certificate of title (1 Comp. Laws 1929, § 4660 [Act No. 46, Pub. Acts 1921], as amended, Act No. 65, Pub. Acts 1931), and therefore is liable for Brower's negligence under 1 Comp. Laws 1929, § 4648 (Act No. 302, Pub. Acts 1915, as amended).

Under section 3 of the 1921 act (1 Comp. Laws 1929, § 4660), this court consistently has held, in cases involving actions for negligent injuries as well as controversies between the immediate parties to a sale, that title to a motor vehicle passes from seller to purchaser when the former delivers to the latter assignment of certificate of title, and not before. *Endres* v. *Mara-Rickenbacker,* 243 Mich. 5; *Ittleson* v. *Hagan,* 245 Mich. 56; *Bos* v. *Holleman De Weerd Auto Co.,* 246 Mich. 578; *Kelly* v. *Lofts,* 253 Mich. 552; *Scarborough* v. *Detroit Operating Co.,* 256 Mich. 173; *Kruse* v. *Carey,* 259 Mich. 157; *Schomberg* v. *Bayly,* 259 Mich. 135.

Plaintiff contends these cases are not applicable, because their effect would be that the failure to observe section 4660 in making the sale would deprive plaintiff of rights of action against Eding, reserved or granted by section 4648.

Section 4648 provides: "Nothing herein contained shall be construed to abridge the right" of action for damages resulting from violation of the act. It does not restrict other legislation. It reserves to an injured person his common-law remedies for negligence. It grants a new right of action against the "owner" of a motor vehicle driven with his consent, regardless of such common-law elements as personal negligence or the relation of master and servant. The act does not set up the conditions of vesting of title on sale. Transfer of ownership from seller to purchaser was governed by the general law of sales.

Section 3 of the 1921 act (1 Comp. Laws 1929, § 4660) changes the law of sales as applied to motor vehicles. It has no effect upon the common-law or statutory rights of action reserved or granted by section 4648, except as it declares the conditions of ownership and transfer of title on sale. Conse-

quently, there is no conflict between section 4648 and section 4660 and the decisions thereunder. Section 4648 confers a remedy against the "owner" without prescribing when a purchaser becomes the "owner" on sale. Section 4660 supplements section 4648 in this respect by providing how and when a purchaser becomes "owner."

Both acts provide that the term "owner" shall include any person renting or having exclusive use of a motor vehicle for more than 30 days. Plaintiff contends the transaction may be viewed as a conditional sale with exclusive right of use of the car in Eding, and, therefore, within the definition of "owner" in both acts. If it may be so viewed, the conditional sale was void, and no title passed to Eding before transfer of certificate. *Scarborough* v. *Detroit Operating Co., supra.*

In harmony with the cases cited above, we hold that Eding was not the owner of the car at the time of the injury to plaintiff, and, therefore, was not subject to the statutory liability.

At the trial, plaintiff was permitted to amend her declaration to charge Eding with negligence in allowing Brower to use the car, knowing he was a reckless driver. The court held there was not sufficient evidence to submit the issue to the jury. The court was right. Plaintiff now complains that she was not permitted to make the proof. The complaint is not included in the assignment of errors, and we find in the record no offer of proof of such liability other than demand for right to engage upon a line of examination of witness in the hope of discovering evidence. For both reasons, the complaint must be held ineffective.

Judgment affirmed, with costs.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, WIEST, and BUTZEL, JJ., concurred.

COPEMAN *v.* TAKKEN.

1. VENDOR AND PURCHASER—ASSIGNMENTS—PRIVITY OF CONTRACT—LIABILITY TO PERFORM.

Where assignees of vendee's interest entered into contract with purchasers of vendor's interest in land contract, making permanent amendment thereto, privity between them was established thereby, and each became bound to other to perform.

2. APPEAL AND ERROR—ONE DEFENDANT MAY APPEAL.

One defendant may appeal for his own benefit without others joining.

3. JUSTICES OF PEACE—APPEAL BOND NECESSARY.

Proper bond is essential to appeal from justice's court (3 Comp. Laws 1929, § 16225).

4. SAME—APPEAL AND ERROR—PARTY NEITHER APPELLANT NOR APPELLEE NOT PARTY ON APPEAL.

Where, in action in common pleas court against husband and wife, judgment was rendered against him and in favor of wife, from which judgment he alone appealed, and wife was not named as appellee in appeal bond, which ran to plaintiffs only, she was not party in circuit court, and therefore judgment against her was unauthorized (3 Comp. Laws 1929, § 16225).

Appeal from Wayne; Boomhower (Xenophon A.), J., presiding. Submitted January 10, 1933. (Docket No. 79, Calendar No. 36,862.) Decided April 4, 1933.

Assumpsit in common pleas court of Detroit by Eber N. Copeman and another against Joseph E. and Germaine Takken on a written contract. Judgment for plaintiffs against defendant Joseph E. Takken only. Defendant Joseph E. Takken appealed to circuit court. Judgment for plaintiffs

against both defendants. Defendants appeal. Affirmed as to defendant Joseph E. Takken and reversed as to Germaine Takken.

Pheney & Pheney, for plaintiffs.

Anderson, Wilcox, Lacy & Lawson (*Earl L. Shimer,* of counsel), for defendants.

FEAD, J. In 1925 Lars Andersen and wife sold premises to Frank Kloka and wife on land contract. Plaintiffs acquired the vendor's interest. In 1927 Kloka became in default and plaintiffs commenced summary proceedings for possession. While the proceedings were pending, defendants purchased the Kloka interest and took an assignment. The assignment was not produced, and we do not know its terms. Defendants paid plaintiffs the sum due to date, the summary proceedings were dismissed, and defendants were put into possession by Kloka. They made the contract payments for about four years, when, after some discussion about defendants making substantial payments in excess of the sums required, the parties executed a written instrument as follows:

"This contract made this 6th day of January, 1931, is for the purpose of amending a certain land contract, now held between both parties hereto by assignment.

"Eber N. Copeman and Nellie E. Copeman, his wife, hereinafter known as parties of the first part, are assignees of the original sellers' (Lars Andersen and Christine, his wife) interests, and Joseph E. Takken and Germaine Takken, his wife, hereinafter known as parties of the second part, are assignees of the original purchasers' (Frank Kloka and Anna Kloka, his wife) interests, in a certain land contract dated September 17, 1925, which provides for the sale of lot (description of property).

"In consideration of the parties of the second part, making various payments in excess of the required minimum monthly payment of $158 on the attached land contract; the parties of the first part agree to lower the specified minimum monthly payment of $158 whenever the parties of the second part desire, provided that at no time shall the equal minimum monthly payments including interest be lowered below an amount which if continued would operate so as to extend the date the final payment would fall due under the original attached contract which is mutually agreed to be the 17th day of April, 1937."

Defendants made some payments thereafter, but no excess payments. They became in default, plaintiffs brought this action at law to recover payments due, and had judgment.

Defendants deny liability at law on the ground that there is no privity of contract between them and plaintiffs. *Tapert* v. *Schultz,* 252 Mich. 39. Plaintiffs claim privity of contract was established by the agreement of January 6th, although it does not expressly provide that defendants agree to pay the purchase price.

Recourse need not be had to extraneous circumstances, because the agreement is clear. As between the parties, it establishes not only that they own respectively the original contract interests in the land, but also that the contract itself is held by them alone. They agree that their ownership of both land and contract is so exclusive and complete that they may change the terms of purchase without reference to the original parties. The agreement secures to defendants a privilege not granted by the original contract and coextensive with its life, whether used or not. In securing this privilege, defendants stepped out of the character of mere as-

signees of Kloka, obtaining personal grace from plaintiffs, and assumed the role of parties to the original contract because the privilege was agreed by way of permanent amendment to the contract itself. In other words, the parties contracted with each other that they were the present parties vendors and vendees in the original contract, and agreed, as such, to permanent amendment of it. Privity between them was established thereby, and each became bound to the other to perform the contract.

The suit was brought originally in the court of common pleas, where judgment was rendered for plaintiffs against Joseph E. Takken, but against plaintiffs and in favor of Mrs. Takken of no cause of action. Plaintiffs did not appeal, nor did Mrs. Takken. In his notice of appeal, Takken recited the whole judgment. Plaintiffs contend the recital operated as an appeal from the entire judgment, and made Mrs. Takken a party in circuit court. Plaintiffs recovered against both defendants.

One defendant may appeal for his own benefit without others joining. *People, ex rel. Keal,* v. *Wayne Circuit Judge,* 36 Mich. 331. A proper bond is an essential to appeal from justice's court. The appeal bond was executed only by Takken and his surety and in the interests of Takken alone. So Mrs. Takken was not an appellant. *Jopp* v. *Kegel,* 83 Mich. 50. The bond ran to plaintiffs only. So Mrs. Takken was not an appellee. 3 Comp. Laws 1929, § 16225.

Judgment against Takken will be affirmed, with costs, and against Mrs. Takken will be reversed, with costs.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, WIEST, and BUTZEL, JJ., concurred.

PROBST *v.* JONES.

BANKRUPTCY—DISCHARGE OF BANKRUPT—WILFUL AND MALICIOUS INJURY TO PROPERTY—RELEASE.

Debtor who gave creditor deed to real estate as security for loan and then sold it to *bona fide* purchaser before deed was recorded, thus destroying creditor's security, was guilty of wilful and malicious injury to creditor's property within meaning of exception in section 17 of bankruptcy act (11 USCA, § 35), and therefore judgment obtained by creditor on said cause of action was not released by debtor's discharge in bankruptcy.

Appeal from Wayne; Dingeman (Harry J.), J. Submitted January 25, 1933. (Docket No. 164, Calendar No. 37,086.) Decided April 4, 1933.

Action by Egidius E. Probst against John F. Jones for malicious destruction of property. Judgment for plaintiff. On petition of defendant to vacate judgment because of defendant's discharge in bankruptcy. Petition denied. Defendant appeals. Affirmed.

Howard A. Donnelly (*Harold G. Groewn,* of counsel), for plaintiff.

John W. L. Hicks (*Lowery B. Hicks,* of counsel), for defendant.

FEAD, J. For some years, and many times, defendant had borrowed money from plaintiff and paid him two per cent. interest per month. In 1928 they settled accounts and determined that defendant owed plaintiff $1,500. Plaintiff loaned him an-

other $1,000 and took his demand note for $2,500 and a warranty deed of certain premises as security. The deed was not recorded, whether at plaintiff's suggestion or not is in dispute. Some eight months later defendant sold the premises to a *bona fide* purchaser for value and without notice of plaintiff's deed (mortgage).

Plaintiff brought suit against defendant and had judgment for $2,812.50 on April 14, 1932. Besides the common counts, the declaration contained a special count setting up the facts of the loan, security, and sale, and charged wilful and malicious destruction of plaintiff's security. Defendant pleaded the general issue, with notice of payment in full. Defendant's claim was that, deducting the interest as usury, he had paid all the principal advanced by plaintiff in the course of their many transactions, and he sold the premises in good faith, as he owed plaintiff nothing.

In announcing decision, the court found defendant liable on the special count, and the judgment entered was in tort, not assumpsit. Body execution was issued against defendant, served, and he has been languishing in jail ever since.

After judgment, defendant filed voluntary petition in bankruptcy and scheduled the judgment as a claim. Defendant was discharged September 19, 1932. He then petitioned the circuit court to vacate the judgment and proceedings thereunder and discharge him from custody, on the ground that the judgment was released by the discharge in bankruptcy. The court denied the petition, and defendant has appealed.

The issue concerns the following provision of section 17 of the bankruptcy act, 42 U. S. Stat. at Large, p. 354 (11 USCA, § 35):

"Debts not affected by a discharge.—A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * are liabilities for * * * wilful and malicious injuries to the person or property of another."

Injuries within the meaning of the exception are not confined to physical damage or destruction. Wilful and malicious conversion is an injury to property within the meaning of the present law, and liability therefor is not released by the discharge. The exception has been held to cover conversion of motor vehicles (*In re Brier,* 3 Fed. [2d] 709; *In re Franks,* 49 Fed. [2d] 389); collections on accounts assigned as security (*Baker* v. *Bryant Fertilizer Co.* [C. C. A.], 271 Fed. 473); and sales of corporate stock (*McIntyre* v. *Kavanaugh,* 242 U. S. 138 [37 Sup. Ct. 38]). These cases dispose of any confusion which may have existed by reason of *In re Toklas Bros.,* 201 Fed. 377, and *Crawford* v. *Burke,* 195 U. S. 176 (25 Sup. Ct. 9).

Nor need the property be tangible and physical. Injury to personal or property rights is within the exception. Thus, a judgment for damages for criminal conversation is not released, because the cause of action is a violation of marital rights of the husband in the person of the wife, to the exclusion of all others, and is a wilful and malicious injury to the person and property of the husband within the meaning of the exception in the statute. *Tinker* v. *Colwell,* 193 U. S. 473, 481, 485 (24 Sup. Ct. 505).

"Malice" means "a wrongful act, done intentionally, without just cause or excuse." *Tinker* v. *Colwell, supra,* 486; *Nunn* v. *Drieborg,* 235 Mich. 383, 386.

The testimony supports the conclusion of the court that defendant did not act in good faith, but

was guilty of at least legal malice in selling the property upon which plaintiff had security. Under the above authorities, the destruction of plaintiff's security by such sale was an injury to property within the exception of the statute, and defendant was not released from liability by discharge in bankruptcy.

Order affirmed, with costs.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, WIEST, and BUTZEL, JJ., concurred.

WHITAKER v. EMPIRE MUTUAL FIRE INSURANCE CO.

1. INSURANCE—MUTUAL INSURANCE COMPANY—ADVANCES—STATUTES—RECEIVERS—MORTGAGES.

   Where evidence shows that note and mortgage were deposited with mutual insurance company to make good deficit caused by bank failures, they are assets of company, and therefore maker is not entitled to their discharge by company's receiver (3 Comp. Laws 1929, §§ 12662, 12664).

2. SAME—UNEARNED PREMIUM RESERVE—RECEIVERS—MORTGAGES—DISCHARGE.

   Where note and mortgage were deposited with mutual insurance company as unearned premium reserve, maker is entitled to their discharge by company's receiver after all unearned premiums have been paid in full (3 Comp. Laws 1929, §§ 12662, 12664).

Appeal from Genesee; Gadola (Paul V.), J. Submitted January 18, 1933. (Docket No. 50, Calendar No. 36,940.) Decided April 4, 1933.

Bill by Lettie B. Whitaker against Empire Mutual Fire Insurance Company of Michigan to discharge two notes and mortgages. Decree for plaintiff as to both notes and mortgages. Defendant appeals. Affirmed as to one note and mortgage, reversed as to other.

Guy W. Selby, for plaintiff.

Kelley, Sessions, Warner & Eger, for defendant.

FEAD, J. Plaintiff had decree compelling defendant and its receiver to discharge and deliver to her two notes and real estate mortgages.

Defendant was organized in October, 1925, all policies were canceled as of May 1, 1931, unearned premiums returned to policyholders, and a receiver appointed in December, 1931. Plaintiff's son, Arthur, was secretary of the company during its whole life.

December 11, 1926, plaintiff executed and deposited with defendant a note for $3,000, secured by mortgage, under an agreement which provided that defendant should pay her interest at seven per cent. per annum, and—

"Said deposit to be considered as capital stock in the above-named company and such principal and interest as specified to be repaid from the surplus earnings of said Empire Mutual Fire Insurance Company."

December 26, 1928, plaintiff executed and deposited with defendant another note and mortgage, for $10,000, under similar agreement, except that the words "an unearned premium reserve" appeared in it in place of "capital stock." The deposit was made in accordance with 3 Comp. Laws 1929, § 12664:

"Any director, officer, or member of any such company, or any other person, may advance to such company any sum or sums of money necessary for the purpose of its business or to enable it to comply with any of the requirements of the law, and such moneys and such interest thereon as may have been agreed upon, not exceeding seven per cent. per annum, shall not be a liability or claim against the company or any of its assets, except as herein provided, and shall be repaid only out of the surplus earnings of such company. No commission nor promotion expenses shall be paid in connection with the advance of any such money to the company and the amount of such advance shall be reported in each annual statement."

The company had no "capital stock." What, then, was the purpose of the first note and mortgage?

Arthur Whitaker testified that they were deposited to guarantee the unearned premiums. He pointed to no writing, bookkeeping entry, or official report to substantiate the claim. The contemporaneous evidence, in the form of correspondence with the insurance commissioner, is to the contrary. The commissioner had called attention to the fact that the admitted assets of the company were inadequate. The deficit had been occasioned by failure of banks in which defendant's funds were deposited. Whitaker, on the day of plaintiff's execution of the note and mortgage, reported to the commissioner that the officers and directors had arranged for deposit of mortgages and cash to the credit of the company to take care of the deficit caused by the bank failures. It is clear that the deposit was made to the general assets.

The books were not produced, but it may be assumed that, as liabilities, the company carried sepa-

rately certain reserve accounts required by 3 Comp. Laws 1929, § 12662. There was no showing that any of the assets were earmarked to specific liability accounts. The fact that the deposits were partly in cash negatives the idea of a special appropriation to a particular fund. "Capital stock" evidently was used in the sense of general assets or working capital.

The case presents no equities in favor of plaintiff. If the deficit had not been cured by voluntary contributions, it would have been chargeable to the then policyholders. Present policyholders, becoming members upon the basis that the note and mortgage were assets of the company, should not be charged with the deficit.

The $3,000 note and mortgage are assets of defendant, and the decree will be reversed as to them.

The $10,000 note and mortgage occupy a different position. The circumstances of their deposit were not shown. The agreement of deposit is not ambiguous. By its express terms they were deposited as unearned premium reserve. The unearned premiums have been paid in full. They now secure nothing. The court cannot remake the contract. Plaintiff is entitled to discharge of this note and mortgage.

The decree will be modified accordingly, without costs.

MCDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, WIEST, and BUTZEL, JJ., concurred.

DETROIT FIDELITY & SURETY CO. *v.* SCHINAGEL.

1. GARNISHMENT—LIABILITY OF GARNISHEE DEFENDANT.
   From time of service of writ of garnishment, garnishee defendant was liable to plaintiff to "amount" or value of bank stock it held, and was forbidden to part with it, and principal defendant was not entitled to possession or benefit from said stock until plaintiff's claim was satisfied (3 Comp. Laws 1929, §§ 14857, 14858).

2. SAME—SUBSTITUTED PROPERTY IN HANDS OF GARNISHEE.
   Where garnishee defendant permitted principal defendant to substitute certificate of deposit for bank stock in its hands at time of service of writ, judgment in garnishment should run for value of said certificate, although stock for which said bank stock was converted is now worth much less than value of certificate (3 Comp. Laws 1929, §§ 14857, 14858).

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted January 18, 1933. (Docket No. 55, Calendar No. 36,693.) Decided April 4, 1933.

Garnishment proceedings by Detroit Fidelity & Surety Company, a Michigan corporation, against Leo Schinagel, principal defendant, and United States Fidelity & Guaranty Company, a Maryland corporation, garnishee defendant. William Tann, receiver of principal defendant intervened. From judgment for plaintiff against garnishee defendant, intervener appeals. Affirmed.

Monaghan, Crowley, Reilley & Kellogg (*Edward T. Kelley,* of counsel), for plaintiff.

John McNeil Burns (*Cyril E. Bailey,* of counsel), for principal defendant and intervener.

FEAD, J. January 12, 1929, garnishee defendant filed disclosure and plaintiff made demand for trial of the statutory issue. May 22, 1930, intervener was appointed receiver of the principal defendant. February 15, 1932, on stipulation, garnishee filed an amended disclosure. In both disclosures garnishee stated that it held a certificate of deposit for $1,000 and a certificate for 20 shares of Bank of Detroit stock, as collateral to indemnify it as surety on an appeal bond of defendant. Judgment for plaintiff in the principal suit was entered March 1, 1932, for $6,947.

The question is, For what property or amount should judgment in garnishment run? The difficulty arises from the fact that on or about September 13, 1929, defendant desired to withdraw the Bank of Detroit stock from the custody of garnishee; it was done, and a certificate of deposit for $5,500 was substituted therefor as representing the then fair value of the stock. When the writ of garnishment was served, the stock was worth $4,660. After being withdrawn by defendant, it was converted into stock of the Union Guardian Group, which, at the time of the hearing of the garnishee issue, was worth about $840.

The court entered judgment against garnishee for the certificates of $1,000 and $5,500.

Intervener contends that the $5,500 certificate of deposit is not subject to the proceedings because it was not held by the garnishee when the writ was served; that the court should proceed as though garnishee still holds the bank stock; that the liability is to be determined under the practice applicable when the garnishee has possession of the property and refuses to deliver it for levy (3 Comp. Laws

1929, §§ 14875, 14879); and final judgment should be for approximately $840.

The contention requires the trial court not merely to indulge the fiction, but to find as a fact, contrary to the undisputed evidence and the concessions, that garnishee still holds the bank stock, and to pursue a circuitous and vain procedure to charge it with liability. A court cannot be expected to conceive such imagining nor search for ways to enable parties guilty of irregular action to erase their intentional acts and escape their effect. The only excuse for such procedure could be the protection of the rights of an innocent party.

From the time of the service of the writ, the garnishee was liable to the plaintiff to the "amount" (value) of the bank stock, and was forbidden to part with it. 3 Comp. Laws 1929, §§ 14857, 14858. Defendant was entitled to no possession of or benefit from the stock until plaintiff's claim was satisfied. The effect of the exchange was not to put new money of defendant into the hands of the garnishee after service of writ, but to substitute the certificate of deposit for the stock certificate with the same status in relation to the garnishment. The effect followed the exchange from the agreement of the parties and also from the obligations of the garnishee in the absence of agreement.

Plaintiff is content with the situation, both as to substitution of property and amount. So we need not determine its rights and remedies in case it were dissatisfied with the situation created by defendant and garnishee.

The question here involved does not seem to have been passed upon by the courts, but in *Thayer* v. *Partridge,* 47 Vt. 423, the garnishees were charged

with the proceeds of property sold by them; the court apparently deeming the liability so obvious as not to require demonstration.

Judgment affirmed, with costs.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, WIEST, and BUTZEL, JJ., concurred.

DIRR *v.* ADLER.

FRAUD—FALSE PROMISES—FALSE REPRESENTATIONS—RESCISSION—ACCOUNTING.

In suit for rescission of contract for sale of apartment house, where evidence shows that purchasers, partly by false promises and partly by false representations, deceived seller into believing that they were assuming mortgage indebtedness and relieving her of liability thereon, but papers executed did not so provide, she was entitled to decree for rescission and for accounting for rents collected.

Appeal from Wayne; Simpson (John), J., presiding. Submitted January 11, 1933. (Docket No. 97, Calendar No. 36,928.) Decided April 4, 1933.

Bill by Caroline K. Dirr against Sanford Adler and others for rescission of contract for sale of an interest in land, on ground of fraud. Decree for plaintiff. Defendants appeal. Affirmed.

David I. Hubar (*Milton M. Maddin,* of counsel), for appellants.

FEAD, J. This is a suit for rescission. Plaintiff had decree. Plaintiff owned a 12-family apartment in Detroit, which she had purchased for $100,000 in 1919 and afterward mortgaged for $60,000, of which $54,500 remains unpaid. She paid the mortgage instalments until October, 1931, when she was able to pay only the interest. There was talk of foreclosure and plaintiff wanted to sell the property. She answered an advertisement of defendants, who were in the business of dealing in real estate, and, after some negotiations which she claims began with her offer to sell for $10,000 and defendants say commenced with $2,500, she agreed to sell for $1,000. She claims that an essential of the transaction was that defendants were to pay taxes and instalment due, put the mortgage in good standing, and assume its payment so she would be relieved of liability.

The parties met in the office of defendants' attorney to close the deal. Because of the decision in *American Trust Co.* v. *Casselman,* 248 Mich. 76 (which afterward was abrogated on rehearing), defendants' attorney had prepared and presented to plaintiff an agreement that in event of foreclosure she would not take action for appointment of a receiver. Plaintiff claims she did not understand the instrument, that the attorney said it was a mere formality, and so she signed it. He also prepared a quitclaim deed, which she executed. It did not contain an undertaking that defendants assumed and agreed to pay the mortgage.

Defendants took possession; plaintiff still occupying one of the apartments. Defendants had some negotiations for a second mortgage and also with the mortgagee regarding the delinquency, but nothing came of them. They did not pay the taxes or sums due on the mortgage. Upon plaintiff's inquiry

regarding the situation, they said they had assumed nothing and were under no obligations to pay taxes or mortgage. On February 16, 1932, plaintiff filed this bill for rescission.

The testimony was in direct conflict, and the chancellor had a distinct advantage in being able to view the witnesses, because their credibility is a controlling consideration. The testimony justifies the findings of the court, which we set up in part:

"In the opinion of the court, the entire transaction shows that the minds of these parties never really met when the quitclaim deed and exhibit one (agreement regarding receivership) were drawn, that Mrs. Dirr was expecting and anticipating that the defendants were going to assume the mortgage and pay up the past-due indebtedness, while the defendants, through their actions and manipulations, did not intend so to do at that time, but were merely getting her equity of redemption to get possession of the premises and never intended to assume the mortgage or pay up the past-due indebtedness, but were just getting the building to get what money they could out of the same.

"The defendants raise the question that there is no fraud in this transaction, and all that they promised to do were mere representations of future promises. The court does not so view the situation, but as stated in *Becker* v. *Illinois Life Ins. Co.*, 227 Mich. 388, at page 392, the first part thereof, this case at hand is applicable to the wording as follows: 'Representations though promissory in character but which are made in bad faith and as a part of a scheme to defraud, or where the fraud is partly by false promises and partly by false representations of facts,' a rescission of a contract may be had.

"Also *Schupp* v. *Davey Tree Expert Co.*, 235 Mich. 268; *Baas* v. *Zinke,* 218 Mich. 552; *Meade* v. *Brown,* 218 Mich. 556.

"I think this case falls within the line of cases set out in the *Meade* v. *Brown Case*.

"It is further objected that any prior promises were merged into the written agreement, but I think the plaintiff in this case had a right to go into the entire transaction and show that the minds of the parties never met and that she has been tricked out of her property."

The combination of fraud and mistake so found warrants rescission under the authorities cited.

Decree affirmed, and cause remanded for accounting of rents provided therein. As plaintiff filed no brief, she will not have costs in this court.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, WIEST, and BUTZEL, JJ., concurred.

FIRST NATIONAL BANK & TRUST CO. OF ANN ARBOR *v.* WUERTH.

1. BILLS AND NOTES—HOLDER IN DUE COURSE.
   Payee of notes may be holder in due course or its equivalent.

2. SAME—FRAUD—BAD FAITH—NOTICE OF FRAUD.
   Where, in action on note by bank, defense was that defendants were induced to indorse note and afterward to execute new note by false representations made in presence of bank's president, to prevent recovery, he must have had actual knowledge of fraud or knowledge of such facts as constituted bank's act of taking note bad faith (2 Comp. Laws 1929, § 9305).

3. SAME—NOTICE OF FRAUD—SUFFICIENCY OF EVIDENCE.
   Defendant's claim that bank's president must have known of falsity of representations made in his presence which induced them to sign note as indorsers and later to execute new note, *held*, not justified by record (2 Comp. Laws 1929, § 9305).

4. SAME—FRAUD—RATIFICATION.

Where bank's president, in taking note payable to bank, had no knowledge of alleged fraud inducing its execution, bank did not ratify and adopt said fraud by bringing action after it had knowledge thereof.

Appeal from Washtenaw; Sample (George W.), J. Submitted January 13, 1933. (Docket No. 95, Calendar No. 36,884.) Decided April 4, 1933.

Assumpsit by First National Bank & Trust Company of Ann Arbor against J. Fred Wuerth, William W. Baumgartner, and Edward F. Conlin on two promissory notes. Directed verdict for plaintiff against defendant Conlin, verdict and judgment for defendants Wuerth and Baumgartner. Plaintiff appeals. Reversed, and judgment ordered entered for plaintiff.

Arthur Brown (*Frank B. DeVine* and *Stivers & Hooper,* of counsel), for plaintiff.

Andrew J. Sawyer and *Jacob F. Fahrner,* for defendants Wuerth and Baumgartner.

FEAD, J. The suit is on two promissory notes. After appearance and plea by defendants, plaintiff had summary judgment. The judgment was set aside on the application of defendants Wuerth and Conlin, and Wuerth and Baumgartner filed amended pleas and notices, claiming fraud in securing their signatures. On trial, verdict was directed against defendant Conlin, and the jury found in favor of the other defendants. Plaintiff's motions for directed verdict and judgment *non obstante* were denied.

Plaintiff contends (1) it was entitled to direction of verdict and judgment *non obstante,* and (2) the verdict was against the great weight of the evidence.

The second contention would be plainly tenable if the first were not determinative.

In 1930 John Lundgren, substantially sole owner of the Ann Arbor Floral Company, and defendant Baumgartner, a realtor, entered upon a project to organize a new corporation, the Huron Holding Company, to take over the business of the floral company and to sell stock to the public. They engaged defendant Conlin, an attorney, to incorporate the company and secure permission from the State securities commission to sell stock. Lundgren gave information regarding the business to both Baumgartner and Conlin. They prepared a financial statement, including profit and loss account and inventory and appraisal, showing earnings for 1929 of $22,000, assets of $260,000, and liabilities of $104,000, the significant item of the latter being accounts payable of $6,300. It listed obligations to Frank Stivers of $23,000.

Frank Stivers, an attorney and a director of plaintiff bank, became interested in the floral company upon its organization in 1922, but had sold his stock to Lundgren in 1926. However, he held two chattel mortgages for $13,000 on the property, and was a creditor of both the company and Lundgren for considerable sums, directly and as indorser.

Baumgartner approached Wuerth, a wealthy man of varied business experience, to interest him in the project. Wuerth said he was not interested, because he recently had sold a large clothing establishment, did not want to engage in business, and desired to take a trip to Europe. However, he talked with Baumgartner and Conlin several times, and approved the Huron Holding Company plan except that he did not care to have stock sold to the public, as he would rather furnish or procure the

desired money himself. He learned that Stivers, as a creditor, would not sanction the project unless the obligations to him were taken care of. Stivers had expressed his proposition to Conlin, Conlin told Wuerth, and the latter wanted a statement in writing from Stivers. Stivers wrote a letter to Wuerth on May 20th and delivered it to Conlin, in which he stated that payment of the obligations of the floral company to the Interstate Credit Company, Ltd., which he represented, could be deferred to November 1st, and that he would continue to indorse renewal notes of the floral company until the same time in case Lundgren's note for $13,734.75 to plaintiff should be indorsed by Wuerth and accepted by the bank and the proceeds applied to pay Lundgren's obligations to Stivers, the credit company, and notes to plaintiff, upon which Stivers was indorser.

Conlin delivered the letter to Wuerth with a copy of the financial statement and other documents, making a remark which counsel intimates caused Wuerth to think that the whole had come from Stivers. Wuerth looked them over, and noticed the claimed earnings and accounts payable and total obligations, but said he was satisfied that the statements were incorrect. The next day the three defendants, Lundgren and Stivers met in Conlin's office. Defendants claim George E. Paul, president of plaintiff bank, was also present. We will assume he was, although he and others deny it. Wuerth testified he was still uninterested in the proposition, although it is evident the only purpose of the meeting was to arrange affairs until he could return from Europe. Stivers made it plain to defendants that he was anxious to get his obligations to the bank reduced, and said the bank would be lenient in the way of renewals of the Lundgren note in order to

aid the floral company, to which Paul acquiesced. Paul took no other part in the discussion except that Wuerth, late in his testimony, said Paul stated that he wanted Stivers' obligations reduced and it would be a good thing. Counsel contend Wuerth meant that Paul meant the floral company was a good thing, but, if so, Wuerth did not rely at all on Paul's opinion.

The only fraud claimed is that Stivers said to defendants that the floral company was a wonderful proposition, that it had only $6,300 accounts payable and had made a profit of over $20,000 the preceding year. Wuerth and Baumgartner testified that they relied solely upon Stivers' oral statement so made and not at all upon their own investigation, upon any of the financial statements, upon what others told them, nor anything else. Instead of a profit, there had been a loss the preceding year, and accounts payable were in excess of $30,000.

Wuerth and Stivers arranged that Stivers should pay the taxes and accounts payable out of collections during Wuerth's absence. Thereupon Paul went out, returned with a note, which Lundgren signed as maker and defendants as indorsers. The bank disposed of the proceeds by applying them to Lundgren's and Stivers' notes held by it, discharging them and returning them to the makers, in accordance with Stivers' letter to Wuerth and the agreement of the parties.

Defendants executed the note to obtain an interest in the floral company, and on the same day they took part in a meeting of the stockholders and became directors and officers. Lundgren was the manager. Wuerth left for Europe June 26th and returned September 21st. Shortly thereafter he and Baumgartner made an investigation, discovered that things were not well with the floral company,

and, on October 3d, Lundgren was deposed as manager and Wuerth was put in full control. Some time before October 25th a new 90-day note was given in renewal of the first, which had expired September 20th. Lundgren was not a party to the new note, but defendants executed as makers. Wuerth and Baumgartner said they had not discovered the falsity of Stivers' representations at that time.

October 20th defendants borrowed $500 from plaintiff on their own note and used the proceeds to pay labor for the floral company. One hundred dollars was paid on this note a few days later. Defendants said they had not yet discovered the falsity of Stivers' representations. November 13th a receiver was appointed for the floral company, and later it became a bankrupt.

Defendants do not charge plaintiff with knowledge of Stivers' fraud on the ground that he was director of the bank. They recognize the rule that, as Stivers was acting in his personal interest, the bank was not responsible for his acts or knowledge. They charge knowledge of fraud on the part of the bank on the ground that Paul knew of the fraud and participated in it. Accepting the finding that Paul was present and heard the statements, the question is whether he is charged with knowledge of their falsity.

Although payee of the notes, plaintiff could be a holder in due course or its equivalent. *Price* v. *Klett,* 255 Mich. 354. To prevent recovery, the bank (Paul) must have had actual knowledge of the fraud or knowledge of such facts as constituted the act of taking the note bad faith (*Lincoln Investment Co.* v. *Metros,* 257 Mich. 215; *Merchants National Bank* v. *Detroit Trust Co.,* 258 Mich. 526; 2 Comp. Laws 1929, § 9305); such as facts which would operate

to create a belief in his mind that there was fraud. *Title & Trust Co.* v. *Jaster,* 241 Mich. 416, 419.

The record contains nearly 2,000 pages. We assume that defendants have collected in their briefs all facts which indicate Paul's knowledge of the fraud. The briefs fail to reveal any statement of facts or testimony which defendants claim show that Paul knew the falsity of Stivers' representations or was chargeable with the knowledge except the assertion that he must haye known it from the records of the bank. They argue that the bank records show that the floral company was in a hopeless condition financially; that the bank held its notes for large sums upon which nothing had been paid for several years; that the notes had not been met except by renewals; that loans were made only when indorsed by responsible parties, like Stivers; and that without indorsers it had no credit at the bank. Aside from the fact that the argument consists of conclusions, and does not demonstrate Paul's knowledge of the falsity of the specific representations upon which defendants testified they relied, it is not justified by the testimony.

Paul became connected with the bank on March 31st, less than two months before the note was given. He had spent his time getting acquainted with customers. He knew the floral company only in a general way, as a borrower and depositor. He knew nothing of the details of its business. He came into conference, if he was there, interested merely in getting Stivers' obligations to the bank reduced. The adjustment of the various obligations was a primary purpose of the meeting, and it was openly discussed. At the conference Paul met men of affairs, known to each other but comparative strangers to him, two of them lawyers, armed with financial statements which they discussed, considering a busi-

ness proposition. The situation contained nothing which would raise a suspicion of fraud.

Had he consulted the records of the bank, as disclosed by the testimony here, he would have found the floral company had a small but active checking account, and that it owed notes indorsed by Stivers or Lundgren or both in varying amounts, ranging between $6,600 and $10,200 in 1929 and 1930, the loan account disclosing many substantial and small payments, renewals, and new loans. Neither the circumstances under which the note was given nor the bank records would impute to Paul the knowledge, belief, or even suspicion that the claimed fraudulent statements of Stivers, upon which defendants said they relied, were not true. See *World Manfg. Co.* v. *Hamilton-Kenwood Cycle Co.*, 123 Mich. 620. We find in the record no basis for a claim that plaintiff (Paul) acted in bad faith in taking the note.

The balance of the $500 note is recoverable by plaintiff on the same finding, although, regardless of fraud, plaintiff was entitled to a judgment thereon.

Defendants also contend that, as plaintiff knew of the fraud before bringing suit, it ratified and adopted the fraud by bringing suit, and, therefore, cannot recover. The rule counsel evidently have in mind would be applicable had Paul acted without authority in taking the note and had he known of the fraud so that the bank, by adopting his acts, would have been chargeable with his knowledge. It is not applicable here.

Judgment reversed, and cause remanded for entry of judgment in favor of plaintiff and against defendants for the balance on both notes, with costs.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, WIEST, and BUTZEL, JJ., concurred.

WILCOX *v.* BOARD OF COMMISSIONERS OF SINKING FUND OF CITY OF DETROIT.

1. TAXATION—LIMITATION—CONSTITUTIONAL LAW—CONSTRUCTION OF CONSTITUTIONAL AMENDMENT—EXISTING DEBT.

   Constitutional amendment limiting total amount of taxes assessable against property in any one year to one and one-half per cent., except in certain cases, purposes to avoid impairment of contracts and to preserve all existing legislative power to levy taxes on property to pay existing debts, so that, except for requirement of separate assessment, it does not repeal or modify any statutes governing method of liquidation of obligations theretofore incurred, nor restrict legislature in future enactment of laws for their orderly payment (Const. art. 10, § 21).

2. SAME—REFINANCING EXISTING DEBT.

   Constitutional amendment does not prohibit refunding or refinancing any claim which was legal obligation of public body when amendment limiting tax rate became effective, since it is within exception therein provided for (Const. art. 10, § 21).

3. SAME—REFUNDING BONDS—EXISTING DEBT.

   Direct refunding bonds issued in lieu of and exchanged for prior bonds in same principal amount are continuance of obligation and therefore within exception in constitutional amendment (Const. art. 10, § 21).

4. SAME—NEW BONDS TO PAY EXISTING BONDS.

   Also, within said exception, are new bonds sold to pay existing bonds, to principal amount so paid, where proceeds are actually used for that purpose (Const. art. 10, § 21).

5. SAME—RENEWAL NOTES—EXISTING DEBT.

   Renewal of notes or evidence of indebtedness theretofore issued upon faith of delinquent taxes, if, and so far as, by law, they are general obligations of public body, also come within said exception (Const. art. 10, § 21).

6. SAME—IN REFINANCING EXISTING DEBT PRINCIPAL MAY NOT BE INCREASED—MUNICIPAL CORPORATIONS.

Power of legislature, including present laws, to permit levy of taxes on property to pay prior obligations extends to amount of principal sum outstanding when amendment took effect, but such principal sum may not be increased by sale of new bonds or exchange of refunding bonds at less than par, so that, if exigency of refinancing requires issue of obligations at discount, difference must be absorbed by municipality under its other powers (Const. art. 10, § 21).

7. SAME—DIFFERENT INTEREST RATE MAY BE PROVIDED.

Said exception in constitutional amendment also covers interest on outstanding obligations, but does not confine interest to existing rate, so that new evidences of indebtedness to continue existing obligations may, if necessary, provide different interest rate (Const. art. 10, § 21).

8. SAME—POWER OF MUNICIPAL CORPORATIONS VOTING INCREASE OF TAX RATE—CHARTERS.

Where municipality or district increases basic rate of one and one-half per cent. by charter or vote under proviso in constitutional amendment, exception therein will not apply, and such municipality or district could not levy taxes on property to pay prior obligations in addition to charter or voted rate, unless charter or voted increase so provides (Const. art. 10, § 21).

9. ACTION—DECLARATORY JUDGMENT—CONSTITUTIONAL LAW—PARTIES—TAXATION.

In proceeding for declaratory judgment upon construction of constitutional amendment limiting tax rate, purely local questions which are dependent upon special circumstances, in which people of respective municipalities are interested but not parties, are not considered by Supreme Court, but are left to direct proceeding in which interested persons may be heard (Const. art. 10, § 21).

10. TAXATION—LIMITATION—CONSTITUTIONAL LAW—"ELECTORS"—ELECTIONS—MUNICIPAL CORPORATIONS.

Word "electors" as used in constitutional amendment providing that tax limitation therein provided for may be increased by two-thirds vote of "electors," *held,* to mean those voting on question rather than those qualified to vote thereon (Const. art. 10, § 21).

Appeal from Wayne; Keidan (Harry B.), J. Submitted March 1, 1933. (Calendar No. 37,237.) Decided April 21, 1933. Rehearing denied June 29, 1933.

Petition by Clarence E. Wilcox, as taxpayer and corporation counsel of the City of Detroit, and others against Board of Commissioners of Sinking Fund of the City of Detroit, a municipal corporation, and others for a declaration of rights construing amendment to Constitution (art. 10, § 21). City of Muskegon and others intervened as plaintiffs. Frederick A. Wayne and others intervened as defendants. From judgment rendered, defendants and intervening defendants appeal. Declaratory judgment rendered.

Clarence E. Wilcox, John H. Witherspoon, and *Raymond J. Kelly,* for plaintiffs.

Miller, Canfield, Paddock & Stone, for intervener Public Schools of City of Muskegon.

FEAD, J. This is a petition for declaratory judgment upon construction of the constitutional amendment, article 10, § 21. Some of the questions were decided in *School District of the City of Pontiac* v. *City of Pontiac, ante,* 338. This case is concerned with the exception as to prior obligations and increase of the limitation by vote of the electors.

"SEC. 21. The total amount of taxes assessed against property for all purposes in any one year shall not exceed one and one-half per cent. of the assessed valuation of said property, except taxes levied for the payment of interest and principal on obligations heretofore incurred, which sums shall be separately assessed in all cases: *Provided,* that this limitation may be increased for a period of not

to exceed five years at any one time, to not more than a total of five per cent. of the assessed valuation, by a two-thirds vote of the electors of any assessing district, or when provided for by the charter of a municipal corporation: *Provided further,* that this limitation shall not apply to taxes levied in the year 1932."

The amendment unmistakably demonstrates a purpose to avoid impairment of contracts and to preserve all existing legislative power to levy taxes on property to pay existing debts. This continues in force, until changed by law, present authority in public bodies to spread taxes for such purpose.

Except for the requirement of separate assessment, the amendment does not repeal or modify any statutes governing the method of liquidation of "obligations heretofore incurred" nor restrict the legislature in the future enactment of laws for their orderly payment. Refunding or refinancing is not prohibited, expressly or by implication. Consequently, the important question in all instances is whether a claim was a legal obligation of the public body when the amendment became effective. If it was, it is within the exception and may be paid by tax on property in such manner as may be permitted by law.

Direct refunding bonds issued in lieu of and exchanged for prior bonds in the same principal amount are a continuance of the obligation and within the exception.

Of the same effect are new bonds sold to pay existing bonds, the proceeds of which are actually used for that purpose, to the principal amount so paid.

Also within the exception are the renewal of notes or evidences of indebtedness before issued upon the

faith of delinquent taxes, if and so far as, by law, they were also general obligations of the public body.

The power of the legislature, including present laws, to permit the levy of taxes on property to pay prior obligations, extends to the amount of the principal sum outstanding when the amendment took effect. Such principal sum cannot be increased by the sale of new bonds or exchange of refunding bonds at less than par. If the exigency of refinancing requires the issue of obligations at a discount, the difference must be absorbed by the municipality under its other powers, if any.

The exception also covers interest on outstanding obligations, but it does not confine such interest to the existing rate. If, then, issue of new evidences of indebtedness to continue existing obligations requires a different rate of interest, the amendment does not prohibit the levy of such rate on property.

It will be noted that the exception in the amendment permitting separate levy for payment of prior obligations applies only when the basic rate of one and one-half per cent. is exclusively operative. Where a municipality or district has increased or shall increase the basic rate of one and one-half per cent. by charter or vote under the proviso, the exception will not apply, and such municipality or district could not levy taxes on property to pay prior obligations in addition to the charter or voted rate, unless the charter or voted increase so provides.

Several other questions have been presented, which, however, are dependent upon special circumstances, and are purely local. For example, it appears that bonds had been voted before the amendment took effect but their sale and delivery had not been completed. The instances range from the mere voting of bonds to a binding contract of sale await-

ing only the printing of bonds for consummation. The Public Schools of the City of Muskegon, intervener, claims to be a chartered municipal corporation within the meaning of the amendment and entitled to the same powers declared in such corporations in the *Pontiac Case* because it was organized under a special statute. The people of the respective municipalities are interested in these questions. They are not parties to this proceeding. The questions are not within the purview of the case before us and must be left to a direct proceeding in which interested persons have an opportunity to be heard.

In the clause, "this limitation may be increased * * * by a two-thirds vote of the electors of any assessing district," does "electors" mean all the electors of the district, the registered electors, or the electors voting on the proposition to increase the rate?

In all other instances in which questions are submitted to the people under the Constitution the result is determined by the qualified electors voting on the proposition. For example, the adoption of a law by initiative or referendum (article 5, § 1); adoption of local or special acts (article 5, § 30); organization of new counties (article 8, § 2); franchises to public utilities (article 8, § 25); adoption of county road system (article 8, § 26); organization of metropolitan districts (article 8, § 31); adoption of amendments to the Constitution (article 17, § 1); calling constitutional convention and adoption of Constitution (article 17, § 4). Uniformity of construction would impel a like rule on this amendment.

Ordinarily, the fact that different language is here used than elsewhere in the Constitution would prompt a different construction, because it would indicate a different intention. But this amendment is so generally confusing and careless of language

that difference in words has no force of indication that a different rule was intended.

The provision is purely a local-option law, and it is contrary to our system of government to count electors on a question who are not sufficiently interested to vote.

There are practical difficulties to another construction. There is no public record of all the electors of any taxing district, nor means of ascertaining them except by census, which would be costly, subject to interested manipulation, and certainly inaccurate. Registration of electors could not have been intended as test of the vote, because in some assessing districts, as school districts, there is no registration of electors. We hold that "electors" means those voting on the question.

To avoid misunderstanding, it is noted that we do not pass upon the effect of the amendment to article 3, § 4, contemporaneously adopted, in determining "electors" in the amendment at bar, because the question has not been presented.

Declaratory judgment may be entered in accordance with this opinion.

McDONALD, C. J., and CLARK, POTTER, SHARPE, NORTH, WIEST, and BUTZEL, JJ., concurred.

ON MOTION FOR REHEARING.

PER CURIAM. Plaintiffs move for a rehearing on the ground that Act No. 273, Pub. Acts 1925, as amended by Act No. 28, Pub. Acts 1929 (1 Comp. Laws 1929, § 2694), renders part of the opinion filed in this cause erroneous. The statute was not called to the attention of the court, involved in the issue, nor passed upon. Consideration of its effect upon the property taxing power of a city must be left to a proper case.

Rehearing denied.

GREENBERG *v.* CHAMBERS.

1. EQUITY—CROSS-BILL.
   Generally, cross-bill should be filed at time of answer if it is part of defense.

2. SAME—WHEN CROSS-BILL MAY BE FILED.
   Cross-bill may be filed, on leave of court, even after hearing, and in some cases final decree may be set aside and leave to file cross-bill granted.

3. SAME—DISCRETION OF COURT.
   After case has been heard, leave to file cross-bill may be granted or denied in discretion of trial court.

4. APPEAL AND ERROR—REVIEW OF DISCRETIONARY MATTERS—ABUSE OF DISCRETION.
   Supreme Court will not review matters discretionary with trial court unless trial court's discretion is abused.

5. SAME—DENIAL OF LEAVE TO FILE CROSS-BILL.
   Denial of motion for leave to file cross-bill, after case had been heard and decree ordered by trial court, is affirmed, on appeal, where no abuse of discretion is shown.

Appeal from Wayne; Houghton (Samuel G.), J., presiding. Submitted January 5, 1933. (Docket No. 32, Calendar No. 36,906.) Decided April 21, 1933.

Bill by Harry M. Greenberg against Edward Leroy Chambers and others to execute a chattel mortgage as security for payment of rent under a lease, and for other relief. On motion of substituted attorneys to reopen proof and file cross-bill. From

order denying motion, defendant Chambers appeals. Affirmed.

Wm. Henry Gallagher, for plaintiff.

Leonard H. Muller and *J. Leon Katz,* for defendant Chambers.

POTTER, J. October 6, 1931, plaintiff filed a bill to compel defendant Edward Leroy Chambers to execute a chattel mortgage in the sum of $7,000, as security for the payment of rent claimed to be due on a lease of real estate, to be placed on the personal property in the demised premises; to require defendant Winifred McDonald to give a written release of any and all interest which she had or claimed to have in such personal property; to decree that Chambers pay the amount due plaintiff and to perform the lease entered into by him; to permit plaintiff to hold the sum of $1,650 deposited with him by defendant Chambers as security, and apply the same on the indebtedness of Chambers to plaintiff, and, in default thereof, that plaintiff have his rights established by decree; for injunction against defendants Chambers, McDonald, and Crowley, Milner & Company, or their assigns, for foreclosure of the lease held by Chambers, and for other relief.

The case was heard, and March 22, 1932, decree ordered by the trial court. July 16, 1932, there was substitution of attorneys and a motion made by such substituted attorneys to reopen the proof and for leave to file a cross-bill. This motion was heard August 4, 1932, denied by the trial court, and on the next day final decree was entered. August 6, 1932, a formal order was entered denying defendants'

motion to file a cross-bill, whereupon defendants appealed from the order of the trial court denying their motion for leave to file a cross-bill and reopen the proofs before the entry of decree.

The rule is that in general a cross-bill should be filed at the time of the answer if it is a part of the defense, and the old rule in England was that it should be filed before publication, which would be substantially in this State before the closing of the testimony. *Monmouth Co. Mutual Fire Ins. Co.* v. *Hutchinson,* 21 N. J. Eq. 107; 5 Enc. Plead. & Prac. pp. 653–665.

The testimony was closed and the trial court had announced its decision, though no formal decree had been entered, when there was substitution of attorneys and motion for leave to file a cross-bill.

"A cross-bill will not be permitted to be filed when there has been unreasonable delay." *Howison* v. *Ruprecht,* 121 Ill. App. 5.

"Where a defendant desires to file a cross-bill in a chancery proceeding he should act with due diligence and file the same without unreasonable delay, with a view to having it heard with the original bill." *Kelsey* v. *Clausen,* 257 Ill. 402 (100 N. E. 984).

"The court will not suspend the hearing of the original cause on account of a cross-bill, when that cross-bill has been filed at an unreasonable period." *Baker* v. *Oil Tract Co.,* 7 W. Va. 454.

"It is proper to say, that we do not approve of the practice of filing a cross-bill after the original suit has been heard and its merits passed on." *Bronson* v. *Railroad Co.,* 2 Black (67 U. S.), 524.

"When a cross-bill is necessary to the complete determination of the matters already in litigation,

the court may permit one to be filed at any time before the hearing. To grant or to refuse permission to file a cross-bill is largely in the discretion of the court. *Morgan's, etc., Co.* v. *Railway Co.,* 137 U. S. 171 (11 Sup. Ct. 61). The courts generally disapprove of the filing of a cross-bill after the original suit has been heard and the merits have been passed on." *Huff* v. *Bidwell,* 81 C. C. A. 43 (151 Fed. 563).

The authorities all recognize that a cross-bill may be filed, upon leave of the court first obtained, even after hearing. In some cases, after the entry of final decree, such decree may be set aside and leave to file a cross-bill granted. It is equally well settled that after a case has been heard, leave to file a cross-bill may be granted or denied in the discretion of the trial court. This court will not review matters discretionary with the trial court. It may act if the trial court's discretion is abused. We find no abuse of discretion in this case.

Decree affirmed, with costs.

McDONALD, C. J., and CLARK, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

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ABANDONED LANDS—See CONSTITUTIONAL LAW (2).

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ABSENT WITNESS—See CRIMINAL LAW (16).

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ACCEPTANCE—See ATTORNEY AND CLIENT (10); DEDICATION (2–4).

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ACQUIESCENCE—See ESTOPPEL (3).

ACTION.

In proceeding for declaratory judgment upon construction of constitutional amendment limiting tax rate, purely local questions which are dependent upon special circumstances, in which people of respective municipalities are interested but not parties, are not considered by Supreme Court, but are left to direct proceeding in which interested persons may be heard (Const. art. 10, § 21). *Wilcox* v. *Board of Commissioners of Sinking Fund of City of Detroit*, 700.

See ADVERSE POSSESSION (5); BANKRUPTCY; BILLS AND NOTES (9).

ACTION AT LAW—See CONTEMPT; CONVERSION (1); VENDOR AND PURCHASER (5, 7).

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ADMINISTRATIVE EXPENSES—See RECEIVERS (3–5).

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ADVERSE POSSESSION.

1. Title by adverse possession was acquired where possession and occupation of city lot continued for more than statutory period, although boundary thus established is not true line according to plat. *Gould* v. *Fiero*, 467.
2. In ejectment to recover strip of land and to settle boundary between two city lots, where it appeared that defendants had had possession of said strip for more than statutory period, that line was marked by stakes, post, and trees, that they had occupied said strip as their own under claim of right, and had planted hedge thereon, they were entitled to directed verdict, on ground that they had title by adverse possession. *Id.*
3. That some one occasionally ran over hedge on strip of land in dispute, or turned too short at street line, is not sufficient to raise issue of adverse possession. *Id.*
4. Under law of this State, color of title is not necessarily basis of adverse possession, but one may claim and acquire title by adverse possession independent of color of title. *McVannel* v. *Pure Oil Co.*, 518.
5. Occasional or periodical entry upon unoccupied land does not constitute such actual possession as will ripen into title by adverse possession, but there must be such continuity of possession as will furnish cause of action for every day during whole period required to perfect title by adverse possession. *Id.* 519.
6. Evidence showing that grantees entered upon premises under void tax deed, that they cut brush, built shack, lived on premises for some time, left for several years, during which time shack disappeared, and that thereafter, for remainder of statutory period, when they visited premises for short time each year, they never lived in any house thereon, *held*, insufficient to establish title by adverse possession, although they paid taxes for whole of said time. *Id.*

See TAXATION (13).

ADVICE OF ATTORNEY—See DEEDS (4).

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ANIMALS.

1. At common law, an agister who kept and cared for animals had no lien for their keep, in absence of special agreement, except where animal was trained for racing, and for medical treatment, etc., on theory that there was improvement of object bailed. *Othoudt* v. *Addison Fur Corp.*, 481.
2. 3 Comp. Laws 1929, § 13194, providing for lien for keep of certain animals, does not apply to animals other than those described in section 13186. *Id.* 482.
3. Contract for keep and care of foxes, providing that neither they nor their increase should be removed from ranch until ranching fees had been paid in full, and providing further that ranch owner had right to sell any of said foxes to pay said fees, *held*, to create lien. *Id.*
4. Where contract for care and keep of foxes, and creating lien therefor, expired at end of year, and thereafter fox owners failed to remove foxes or pay fees, there was implied agreement on their part to pay fees on same terms as had previously been agreed upon, including lien therefor. *Id.*

See CONVERSION (3); ESTOPPEL (3).

ANNUAL ACCOUNT—See EXECUTORS AND ADMINISTRATORS (5); JUDGMENT (3, 7, 8).

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APARTMENT HOUSE—See FRAUD (5).

APPARENT SCOPE OF AUTHORITY—See MASTER AND SERVANT (10, 14).

APPEAL AND ERROR.

1. Error not alleged in notice of appeal may not be considered by Supreme Court (Court Rule No. 59, § 3 [d], 1931). *People* v. *Guise*, 72.
2. Judgment taken by employee against employer under 2 Comp. Laws 1929, § 8452, which fraudulently included compensation for period of 13 months when employee worked, is allowed to stand, on appeal, on condition that he remit excess amount. *Oliver Iron Mining Co.* v. *Pneff*, 117.
3. Where medical witness named no book, publication, or medical journal as basis of his opinion, it was reversible error to attempt to cross-examine him as to article in medical journal and create impression that he was not in accord with eminent medical opinion or authority, although objection to said questions was sustained. *DeHaan* v. *Winter*, 193.
4. Submitting case to jury on theory of last clear chance, which was without both pleading and proof, was reversible error. *Burt* v. *Detroit, Grand Haven & Milwaukee Railway Co.*, 204.
5. Where, under plaintiff's own somewhat contradictory testimony, question of his contributory negligence was for jury, it was reversible error to instruct jury that plaintiff, on his contention of facts, was not guilty of contributory negligence. *Id.* 205.
6. In reviewing judgment for defendant on directed verdict, evidence must be viewed in light most favorable to plaintiff. *McKinstry* v. *Matthews*, 211.
7. In reviewing judgment for defendant on directed verdict, testimony must be construed in its light most favorable to plaintiff. *Anderson* v. *Schust Co.*, 236.
8. Where no leave to appeal was applied for or granted, appeal would be dismissed, on motion therefor. *Burk* v. *Amos*, 332.
9. In reviewing judgment for defendants on directed verdict, in action for personal injuries, Supreme Court must disregard all testimony showing that plaintiff's injury might have been due to causes other than those alleged by plaintiff. *Kelley* v. *Brown*, 356.
10. Where question of whether labor claim had been satisfied by written agreement, which does not so state, was in sharp dispute, finding of circuit judge of no such agreed satisfaction, having credible support, is not disturbed, on appeal. *Williamson* v. *Williams*, 402.
11. Error in instructing jury that defendant's negligence was proximate cause of accident, *held*, not corrected by subsequent instruction that if plaintiff was guilty of contributory negligence she could not recover. *Karl* v. *New York Central Railroad Co.*, 457.
12. Where, on appeal from decree in suit to foreclose mechanic's lien and for accounting, both parties request, as in trial court,

APPEAL AND ERROR—Continued.

that accounting feature be retained, and no question of jurisdiction or of joining accounting with statutory foreclosure of mechanic's lien is presented, Supreme Court is not required to raise points. *Hibbard* v. *Finch*, 506.

13. Where, on appeal from decree in suit for accounting, record is incomplete, rendering full accounting impossible, cause is remanded that full accounting may be had. *Id.*

14. In reviewing judgment for defendant on directed verdict, Supreme Court must construe testimony most favorably to plaintiff. *Boyle* v. *Prekctes*, 629.

15. In deciding whether trial court was in error in denying appellants' motion for directed verdict as well as their motion for judgment *non obstante*, Supreme Court must accept testimony which is most favorable to appellee. *Smith* v. *Wassink*, 639.

16. Error in admitting testimony by plaintiff, in action against automobile owner, that driver, on following day, stated that he was insured, *held*, prejudicial, in view of comment by trial judge that if said testimony had any bearing on question of liability it was competent. *Van Dyke* v. *Knoll*, 645.

17. Complaint that plaintiff was not permitted to make certain proof is not reviewable, where error is not assigned thereon, and record does not show offer of said proof. *Kimber* v. *Eding*, 670.

18. One defendant may appeal for his own benefit without others joining. *Copeman* v. *Takken*, 674.

19. Supreme Court will not review matters discretionary with trial court unless trial court's discretion is abused. *Greenberg* v. *Chambers*, 706.

20. Denial of motion for leave to file cross-bill, after case had been heard and decree ordered by trial court, is affirmed, on appeal, where no abuse of discretion is shown. *Id.*

See BANKS AND BANKING (5); CONTEMPT; CRIMINAL LAW (28, 31); DAMAGES (3); EMINENT DOMAIN (3); GARNISHMENT (5); JUSTICES OF PEACE; VENDOR AND PURCHASER (9).

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ASSURED CLEAR DISTANCE AHEAD—See MOTOR VEHICLES (4).

ATTACHMENT—See ELECTION OF REMEDY; GARNISHMENT (4).

ATTORNEY AND CLIENT.

1. Rights and duties arising out of relationship of attorney and client are not measured by yardstick of commercial or trade transactions, but relation is purely personal, lawyer owes to client undivided allegiance, and there is no place in relationship for its establishment by middleman having interest in *res* or control of procedure. *Hightower* v. *Detroit Edison Co.*, 1.

2. If relationship of attorney and client is established or initiated by middleman, attorney is so far agent of middleman as to be chargeable with knowledge of all arrangements under which middleman assumes to act, and if he acts under void contract, attorney may acquire no rights thereunder. *Id.*

3. Attorney, who was engaged by middleman to prosecute personal injury claim secured by solicitation in violation of Act No. 328, Pub. Acts 1931, § 410, was properly denied lien on judgment obtained in said case, since contract was illegal. *Id.* 2.

ATTORNEY AND CLIENT—Continued.

4. Attorney, who was engaged by middleman to prosecute personal injury claim secured by solicitation in violation of statute, did not establish *bona fide* relationship of attorney and client by having personal consultation with client, where he continued to recognize fact that he owed some duty to middleman, and therefore is not entitled to recover fair value of work done independent of lien on judgment obtained. *Id.*
5. Burden of proof of right to fees for services is on attorney claiming them. *Id.*
6. No recovery on *quantum meruit* may be had for services performed by attorney under contract which was wholly void because in violation of criminal statute designed, among other purposes, to prevent champerty and maladministration of justice (Act No. 328, Pub. Acts 1931, § 410). *Id.*
7. In case in court, determination of steps to be taken and control of procedure and proceedings to enforce remedy are exclusive functions of attorney at law, where party does not appear in his own person, so that layman who exercises such functions, as well as performing other acts which are usually done by attorney, is engaged in illegal practice of law. *Id.*
8. Attorney's representation in court of one engaged in illegal practice of law was not only breach of professional ethics and standards, of duty to client, and in violation of law, but was also fraud on court, going directly to integrity of relationship between bench and bar and to heart of orderly administration of justice. *Id.*
9. Judgment of court will not be given in aid of or to encourage unprofessional conduct infringing integrity of judicial proceedings, and therefore will not award fees to attorney for services rendered under illegal contract in case which amounted to fraud on court. *Id.*
10. Approval of decree entered on defendant's default, and acceptance of benefits thereunder by defendant's attorney, *held*, to estop defendant from attacking it for want of service of process, where no claim is made of fraudulent conduct on part of defendant's attorney. *Burk* v. *Amos*, 332.

See CHAMPERTY AND MAINTENANCE; CRIMINAL LAW (15); DEEDS (4); JUDGMENT (9); PHYSICIANS AND SURGEONS (7); TRIAL (7, 8).

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BAILMENTS—See ANIMALS (1).

BANK COLLECTION CODE—See BANKS AND BANKING (1); BILLS AND NOTES (3–5).

BANK FAILURE—See CRIMINAL LAW (14).

BANKING COMMISSIONER—See BILLS AND NOTES (4, 5).

BANKRUPTCY.

Debtor who gave creditor deed to real estate as security for loan and then sold it to *bona fide* purchaser before deed was recorded, thus destroying creditor's security, was guilty of wilful and malicious injury to creditor's property within meaning of exception in section 17 of bankruptcy act (11 USCA, § 35), and therefore judgment obtained by creditor on said cause of action was not released by debtor's discharge in bankruptcy. *Probst* v. *Jones*, 678.

See CHATTEL MORTGAGES (7); CORPORATIONS (2, 5).

BANKS AND BANKING.

1. Under bank collection code (Act No. 240, Pub. Acts 1931, § 13, subd. 3), money collected by bank on land contract left with it by customer for collection and not paid over at time bank went into hands of receiver was properly disallowed as preferred claim against general assets of bank; purpose of act being to take care of checks and negotiable instruments in course of collection. *Reichert* v. *State Bank of Beaverton*, 157.
2. Words "moneys advanced," as used in statute limiting total liability of any person or corporation to bank, denote moneys paid which are to be repaid, and it is unimportant whether total primary liability is on renewal or original notes or both (3 Comp. Laws 1929, §§ 11922, 11947). *People* v. *Hager*, 198.
3. As soon as bank cashier, who was also director, increased his borrowings from bank so that, to his knowledge, his total primary liability to bank was beyond 10 per cent. of its capital and surplus, statute was violated (3 Comp. Laws 1929, §§ 11922, 11947). *Id.*
4. In prosecution for incurring excessive liability to bank in violation of statute, it was no defense that bank directors authorized and extended credit to defendant, where he did not comply with requirements of statute by showing that he was entitled to said credit (3 Comp. Laws 1929, §§ 11922, 11947). *People* v. *Lewis*, 308.
5. Where amount owing to bank by defendant on notes of which he was maker was in excess of legal amount, inclusion of note on which he was indorser was not prejudicial error. *Id.*
6. Amount owing to bank for cashing checks drawn on defendant's private bank should be included in determining whether he owed bank in excess of statutory amount, where he had

BANKS AND BANKING—Continued.

knowledge of said custom (3 Comp. Laws 1929, §§ 11922, 11947). *Id.* 309.

7. Purpose of statute limiting liability to bank is to safeguard bank's assets and prevent excessive amount of credit being extended to any one debtor (3 Comp. Laws 1929, §§ 11922, 11947). *Id.*

8. Offense of incurring excessive liability to bank is continuing one, and as long as excessive loans exist, whether by renewal or otherwise, offending party may be prosecuted. *Id.*

See BILLS AND NOTES (2–9); CRIMINAL LAW (4–8, 13, 14); EVIDENCE (10); FRAUDULENT CONVEYANCES (3); GARNISHMENT (8, 9); INDICTMENT AND INFORMATION (2); INSURANCE (6).

BELL—See TRIAL (3).

BENEFITS—See MASTER AND SERVANT (13); RECEIVERS (4).

BIAS—See WITNESSES (4).

BILLS AND NOTES.

1. Where language of notes necessitates that trust indenture be regarded as if it were incorporated into and were part thereof, and reference to extrinsic instrument is necessary to determine nature of promise, notes do not contain unconditional promise to pay, and are therefore nonnegotiable. *Detroit Trust Co.* v. *Detroit City Service Co.*, 15.

2. Check must be presented within reasonable time after it is received by depository bank. *Continental Bank & Trust Co. of New York* v. *Detroit Trust Co.*, 497.

3. Under Act No. 240, Pub. Acts 1931, § 6(b), reasonable time for presentment is "not later than the next business day following the day on which the item is received," where collecting bank and drawee bank are located in same city, and statute does not make negligence of bank depend on its failure to follow its usual custom of doing business. *Id.* 498.

4. Where check was delivered to payee bank in morning, was deposited with collecting bank in same city next day, and was presented for clearance the following day, by which time drawer had been closed by banking commissioner, presentment was within reasonable time, under statute, although there was time to present it to drawee bank on day of delivery, and had this been done payment would have been made (Act No. 240, Pub. Acts 1931, § 6[b]). *Id.*

5. Where trustee, although it had knowledge that it was in precarious financial condition, and was closed by banking commissioner following day, drew check for transference of trust fund and delivered it without requesting speed in its presentment, payee was under no obligation to act with greater promptness than was required by statute (Act No. 240, Pub. Acts 1931, § 6[b]). *Id.*

BILLS AND NOTES—Continued.

6. Payee of notes may be holder in due course or its equivalent. *First National Bank & Trust Co. of Ann Arbor* v. *Wuerth*, 691.
7. Where, in action on note by bank, defense was that defendants were induced to indorse note and afterward to execute new note by false representations made in presence of bank's president, to prevent recovery, he must have had actual knowledge of fraud or knowledge of such facts as constituted bank's act of taking note bad faith (2 Comp. Laws 1929, § 9305). *Id.*
8. Defendants' claim that bank's president must have known of falsity of representations made in his presence which induced them to sign note as indorsers and later to execute new note, *held*, not justified by record (2 Comp. Laws 1929, § 9305). *Id.*
9. Where bank's president, in taking note payable to bank, had no knowledge of alleged fraud inducing its execution, bank did not ratify and adopt said fraud by bringing action after it had knowledge thereof. *Id.* 692.

See BANKS AND BANKING (2, 5); CHATTEL MORTGAGES (4); CONVERSION (2); INSURANCE (6, 7); MECHANICS' LIENS (1); TAXATION (23).

BLANK FORMS—See VENDOR AND PURCHASER (16).

BLUE SKY LAW—See LICENSES (2, 3).

BOARD AND ROOM—See BONDS (5).

BOARD OF REVIEW—See TAXATION (7, 8).

BOBSLED—See TRIAL (8).

BOILERS—See MORTGAGES (1).

BONDHOLDERS—See MORTGAGES (15, 22, 23, 25–27, 41, 43); RECEIVERS (2, 3).

BONDS.

1. Where principal contractors under highway construction contract and their surety were aware of statutory obligation to furnish bond and purpose thereof, they are in no position to object to reading into bond every essential statutory condition (3 Comp. Laws 1929, §§ 13132, 13134). *Williamson* v. *Williams*, 401.
2. Where bond is given under authority of statute, that which is not expressed but should have been incorporated, is included in bond. *Id.*
3. Principal contractors under highway construction contract and surety on their bond given pursuant to 3 Comp. Laws 1929, § 13134, are liable for labor performed for subcontractor of subcontractor, although liability under bond as written limited liability to indebtedness arising from principal contractors. *Id.*

BONDS—Continued.

4. Unpaid laborers and materialmen of subcontractor under highway construction contract are entitled to full benefit of statutory bond furnished by principal contractors, although subcontract price may be exceeded thereby (3 Comp. Laws 1929, §§ 13132, 13134). *Id.* 402.

5. Board furnished to laborers of subcontractor by his wife, and not paid for, is due her from boarders, and does not at all figure in reduction of wages due laborers from subcontractor, in absence of any agreement to such effect. *Id.*

See CRIMINAL LAW (8); DISMISSAL AND NONSUIT (3); JUSTICES OF PEACE; MORTGAGES (15, 22, 41–43); PRINCIPAL AND SURETY; TAXATION (21, 22, 24).

BOULEVARDS—See DEDICATION (5); MUNICIPAL CORPORATIONS (6–8).

BOUNDARIES—See ADVERSE POSSESSION (1, 2).

BRANCH MANAGER—See MASTER AND SERVANT (16).

BREACH OF CONTRACT—See CONTRACTS (2, 7); COVENANTS (5, 6); LANDLORD AND TENANT (2, 3); SCHOOLS AND SCHOOL DISTRICTS (1); VENDOR AND PURCHASER (4–6).

BREACH OF TRUST—See CORPORATIONS (6); EXECUTORS AND ADMINISTRATORS (5).

BRIDGES—See COVENANTS (2–6); DEEDS (2).

BROKEN LEG—See PHYSICIANS AND SURGEONS (1).

BUDGET—See TAXATION (4).

BUILDING CONTRACT—See CONTRACTS (7).

BUILDING INSURED AS UNIT—See INSURANCE (4, 5).

BULK MORTGAGES—See FRAUDULENT CONVEYANCES (1, 2).

BURDEN OF PROOF—See ATTORNEY AND CLIENT (5); CONTRACTS (3); DEEDS (8); JUDGMENT (9); MASTER AND SERVANT (17); PAYMENT (2); TAXATION (9, 13); TRUSTS (1).

BUSINESS DEPRESSION—See CORPORATIONS (14).

CANCELLATION OF INSTRUMENTS—See CHATTEL MORTGAGES (7, 8); CONTRACTS (3, 5); CORPORATIONS (2); FRAUD (5); INSURANCE (2); MINES AND MINERALS (2); VENDOR AND PURCHASER (4, 7); WITNESSES (6).

CAPITAL—See BANKS AND BANKING (3).

CARE AND KEEP—See ANIMALS; CONVERSION (3); ESTOPPEL (3).

CARE AND MAINTENANCE—See CONTRACTS (3).

CARRIERS.

Judgment against trucking company for damage to goods in transit, based on finding that it was doing business as common carrier, is reversed, on appeal, where it appears that it was not common carrier. *Automobile Insurance Co. of Hartford, Conn.*, v. *Cochran*, 605.

CASH BID—See MORTGAGES (15, 22, 23).

CASH DIVIDENDS—See MORTGAGES (22–27).

CASHIER—See BANKS AND BANKING (3).

CAUSE OF ACCIDENT—See INSURANCE (1).

CAVEAT EMPTOR—See MORTGAGES (30).

CERTIFICATE OF DEPOSIT—See CONTRACTS (3); GARNISHMENT (9).

CERTIFICATE OF TITLE—See MOTOR VEHICLES (11, 13).

CHAIN OF TITLE—See ESTOPPEL (5); TAXATION (9, 14).

CHAMPERTY AND MAINTENANCE.

1. Purpose of Act No. 328, Pub. Acts 1931, § 410, prohibiting solicitation of personal injury claims, is to discourage practice commonly known as "ambulance chasing," with its attendant evils. *Hightower* v. *Detroit Edison Co.*, 1.
2. Soliciting great-aunt for grandniece's personal injury claim is "indirect" solicitation within condemnation of statute (Act No. 328, Pub. Acts 1931, § 410), regardless of their legal status, where great-aunt had control of person and cause of action of grandniece, and therefore contract between solicitor and great-aunt, who was later legally appointed to represent grandniece, is void. *Id.*

See ATTORNEY AND CLIENT (3, 6).

CHANGED CONDITION—See DIVORCE (1).

CHANGE OF BENEFICIARY—See WITNESSES (2).

CHANGE OF OWNERSHIP—See TAXATION (17).

CHANGE OF VENUE—See CRIMINAL LAW (26, 27).

CHARTER—See CONSTITUTIONAL LAW (9); MUNICIPAL CORPORATIONS (1, 2); TAXATION (5, 26).

CHATTEL MORTGAGES.

1. Under 3 Comp. Laws 1929, § 13424, providing that failure to file chattel mortgage shall make it absolutely void as against creditors of mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless accompanied by immediate delivery followed by actual and continued change of

CHATTEL MORTGAGES—Continued.

possession of property mortgaged, only subsequent creditors without notice are protected. *Detroit Trust Co.* v. *Detroit City Service Co.*, 14.

2. Where second mortgage recited that it was subordinate to liens of first mortgage on both real and personal property, trustee under second mortgage and creditors extending credit after second mortgage was properly filed both as real estate and chattel mortgage may not avoid notice of first mortgage, although it was never properly filed as chattel mortgage. *Id.* 15.
3. While recording of real estate mortgage does not give notice of its chattel mortgage provisions, filing or recording of later mortgage in proper office where prior mortgage should have been filed or recorded does give constructive notice of prior instrument, if specific reference to it is made therein, not only of its existence, but also of provisions contained therein. *Id.*
4. Where original purchasers of so-called gold notes had notice of existence of prior unrecorded chattel mortgage, purchasers from them are chargeable with such notice if said notes are nonnegotiable. *Id.*
5. Although there is no statutory right of redemption from sale of chattel mortgaged property, court may make such provision in exercise of its broad equity powers. *Id.* 18.
6. Where mortgaged personalty was sold in conjunction with mortgaged property of ice company on foreclosure sale, right of redemption is extended to good will and chattels, by order of court, so that entire plant may be redeemed as unit, provided fair rental be paid for use of said personalty during redemption period, plus sum sufficient to cover depreciation and loss. *Id.*
7. Corporation's trustee in bankruptcy is not entitled to cancellation of corporate chattel mortgage because first renewal affidavit did not comply with statute, where subsequent ones did, and no creditors represented by trustee claim as purchasers or mortgagees of mortgaged property or show that they have been prejudiced by said failure to comply with statute (3 Comp. Laws 1929, §§ 13427, 13428). *Timmer* v. *Crimmins*, 314.
8. Cancellation of chattel mortgage sale is not justified because of claimed irregularities, where it is not suggested that larger bid on resale could be secured, or that rights of creditors have been prejudiced thereby. *Id.* 316.

See CONVERSION (2); CORPORATIONS (2–5); FRAUDULENT CONVEYANCES (1, 2).

CHATTELS—See CHATTEL MORTGAGES (6); MORTGAGES (1–3).

CHECKS—See BANKS AND BANKING (1, 6); BILLS AND NOTES (2–5); CRIMINAL LAW (2, 3).

CIRCUIT COURT COMMISSIONERS.

Jurisdiction in circuit court commissioner is limited to that conferred by legislature; being purely statutory (3 Comp. Laws 1929, § 14964 *et seq.*). *Rosenthal* v. *American Construction & Realty Co.*, 91.

See VENDOR AND PURCHASER (3, 4, 6).

CIRCUIT COURTS—See CONSTITUTIONAL LAW (1); WILLS (1).

CITIES—See MUNICIPAL CORPORATIONS.

CITY LOT—See ADVERSE POSSESSION (1, 2).

CIVIL SERVICE—See MUNICIPAL CORPORATIONS (2).

CLEARANCE—See BILLS AND NOTES (4).

COAL DEALER—See EVIDENCE (11); TRADE-MARKS AND TRADE-NAMES.

COASTING ON PUBLIC STREET—See NEGLIGENCE (9); TRIAL (8).

CODICILS—See WILLS (1).

COERCION—See CRIMINAL LAW (15).

COLLATERAL COVENANT—See COVENANTS (1, 2).

COLLATERAL MATTERS—See JUDGMENT (5).

COLLECTIONS ON LAND CONTRACT—See BANKS AND BANKING (1).

COLOR OF TITLE—See ADVERSE POSSESSION (4).

COMMENT OF COURT—See APPEAL AND ERROR (16).

COMMON CARRIERS—See CARRIERS.

COMMON LAW—See ANIMALS (1); COURTS (3); CRIMINAL LAW (24); MORTGAGES (9, 10).

COMMON-LAW ACTION—See MASTER AND SERVANT (21).

COMMON-LAW DEDICATION—See DEDICATION (1, 2, 4).

COMMON PLEAS COURT—See JUSTICES OF PEACE (2).

COMPRESSORS—See MORTGAGES (1).

CONCEALED DANGER—See NEGLIGENCE (5, 7).

CONDEMNATION PROCEEDINGS—See EMINENT DOMAIN.

CONDENSERS—See MORTGAGES (1).

CONDITIONAL DECREE—See TAXATION (14).

CONDITIONAL PROMISE TO PAY—See BILLS AND NOTES (1).

CONDITIONAL SALES CONTRACT—See GUARANTY.

CONFESSIONS—See CRIMINAL LAW (15).

CONFIRMATION—See EMINENT DOMAIN (1).

CONFLICT OF LAW—See COURTS (4, 5).

CONFUSION—See TRADE-MARKS AND TRADE-NAMES (2).

CONJECTURE—See INSURANCE (1); PHYSICIANS AND SURGEONS (7).

CONSENT—See CONVERSION (2); CORPORATIONS (3–5); ESTOPPEL (3); HIGHWAYS AND STREETS (3); MASTER AND SERVANT (14, 16); MORTGAGES (28); MOTOR VEHICLES (1).

CONSENT OF COURT—See CONSTITUTIONAL LAW (3); MORTGAGES (36–38); RECEIVERS (10, 11).

CONSIDERATION—See CONTRACTS (3); CORPORATIONS (2); COVENANTS (2); FRAUDULENT CONVEYANCES (4).

CONSTITUTIONAL LAW.

1. Constitution expressly vests judicial power in Supreme Court, circuit courts, probate courts, justices of peace, and such other courts as legislature may establish by general law (Const., art. 7, § 1). *Rosenthal* v. *American Construction & Realty Co.*, 91.
2. Statute providing for sale by State of lands bid off to it for delinquent taxes (1 Comp. Laws 1929, § 3520), where owner has neglected to pay his taxes for five years and has abandoned said land, *held*, not violative of due process clause of Federal Constitution (14th Amendment). *Lyon* v. *Denton*, 244.
3. Requiring court's permission to foreclose mortgage on property in receiver's possession is not impairment of contractual right. *In re Petition of Chaffee*, 291.
4. In determining what constitutes compliance with constitutional requirement as to publication of proposed amendment to Constitution, in submitting it to electors for adoption, purpose prompting inclusion of such amendment in Constitution is of prime importance (Const., art. 17, § 3). *School District of City of Pontiac* v. *City of Pontiac*, 338.
5. In case proposed constitutional provision amends or replaces ("alters or abrogates") specific provision of Constitution, then such provision should be published along with proposed amendment, but other provisions which are still operative, though possibly they may need thereafter to be construed in conjunction with amending provision, need not necessarily be published (Const., art. 17, § 3). *Id.*
6. Amendment to Constitution by adding section 21 to article 10, limiting amount of taxes assessable against property in any one year to 15 mills, being new section which did not "alter or abrogate" any other provision of Constitution, publication

CONSTITUTIONAL LAW—Continued.

of other provisions was not necessary in order to comply with Constitution in submitting it to electors for adoption (article 17, § 3). *Id.* 339.

7. Objection that adoption of said section 21, art. 10, should have been accomplished in manner provided in Constitution for revision (article 17, § 4) rather than that provided for amendment (article 17, § 3), *held*, without merit; said section having been legally adopted as amendment by way of addition to Constitution. *Id.*

8. Object of construction as applied to written Constitution, is to ascertain and give effect to intent of people in adopting it. *Id.*

9. Cities chartered as home-rule cities (Const., art. 8, §§ 20, 21; 1 Comp. Laws 1929, § 2228 *et seq.*), cities having special charters with tax limitation provision, and cities of fourth class and villages organized under Constitution, art. 8, § 21; 1 Comp. Laws 1929, § 1465 *et seq.*, having adopted their own tax limitation, are not subject to 15-mill property tax limitation provided for in amendment to Constitution (article 10, § 21), except that if any part of said 15 mills should be allocated to them by legislature, it must be included in total amount assessable for city or village purposes under charter limitation. *Id.*

10. In assessment districts other than cities and villages having charter tax limitation, said amendment should be applied unless otherwise determined by requisite vote of electors as provided for in said amendment (Const., art. 10, § 21). *Id.*

11. Constitutional duty of courts is to interpret and apply law, not to enact laws. *Id.* 340.

See ACTION; CRIMINAL LAW (31); FRAUDULENT CONVEYANCES (2); HIGHWAYS AND STREETS (2); TAXATION (3–5, 19–27).

CONSTRUCTION OF CONSTITUTION—See CONSTITUTIONAL LAW (5, 8); TAXATION (19).

CONSTRUCTION OF STATUTE—See BANKS AND BANKING (2); COURTS (2); LICENSES (1); MASTER AND SERVANT (4); MORTGAGES (10); MOTOR VEHICLES (3); PARTIES (2); STATUTES; TAXATION (11).

CONSTRUCTION OF WILL—See EQUITY (1, 2); EXECUTORS AND ADMINISTRATORS (4, 5, 8); JUDGMENT (3, 4, 8); TRUSTS (7, 8); WILLS.

CONSTRUCTIVE FRAUD—See VENDOR AND PURCHASER (12).

CONSTRUCTIVE NOTICE—See CHATTEL MORTGAGES (3).

CONTEMPT.

Garnishee defendant's refusal to obey court's order to pay to principal defendant money held subject to garnishment pending appeal from order dismissing main suit is not punishable

CONTEMPT—Continued.

by contempt, since relation between principal defendant and garnishee defendant is that of debtor and creditor, and remedy, if any, is action at law by execution. *Rosenthal* v. *American Construction & Realty Co.*, 97.

See MORTGAGES (37, 38).

CONTINUANCE—See CRIMINAL LAW (16, 17).

CONTINUING OFFENSE—See BANKS AND BANKING (8).

CONTINUITY—See ADVERSE POSSESSION (5).

CONTRACTS.

1. Evidence *held*, sufficient to establish that defendant corporation, by its president, agreed to pay plaintiff certain sum of money for his services in securing investment of additional money in defendant, thus relieving it from financial embarrassment, and that said agreement was ratified by stockholders. *Regan* v. *Consolidated Bakeries, Inc.*, 249.
2. In contractor's action against plastering company for breach of contract, finding of trial court that no binding contract existed, *held*, justified by record. *Clore* v. *Zimmerman*, 268.
3. In suit to cancel, on ground of mental incompetency, contract for care and maintenance of plaintiff's aged decedent in consideration of his turning over to defendant certificate of deposit, burden of proof was on plaintiff. *Shea* v. *Siller*, 279.
4. Finding of trial court that evidence was insufficient to establish decedent's mental incompetency, *held*, justified by record. *Id.*
5. To justify cancellation of contract for care and maintenance of aged decedent, it is not sufficient merely to prove that there was opportunity to perpetrate fraud, or that decedent was of less than average mentality; nor is it of great importance that, as situation subsequently developed, contract seemingly worked more to advantage of one party than the other. *Id.*
6. Where agreement between contractors and owner providing for deeding of property to contractors for purpose of executing mortgage by them in order to raise money to complete buildings, and then redeeding to owner, was not carried out in terms, but owner gave mortgage direct, contractors were not harmed but rather benefited by said change. *Heide* v. *Societatea Romana De Ajutor Si Cultura Banatiana*, 394.
7. Contractor who started work on erecting houses by excavating basements and installing sewers without being authorized to do so by owner is not entitled to recover value of work done, in absence of express or implied contract to pay therefor. *Weiss* v. *Crosstown Corp.*, 511.

See ANIMALS (1, 3, 4); ATTORNEY AND CLIENT (2, 3, 6, 9); CHAMPERTY AND MAINTENANCE (2); CONSTITUTIONAL LAW (3); CONVERSION (3); CORPORATIONS (18, 20–22); DEEDS (1, 2); ESTOPPEL (3); EVIDENCE (6); EXCHANGE OF PROP-

CONTRACTS—Continued.

ERTY; FRAUD (2, 4, 5); FRAUDULENT CONVEYANCES (2); GUARANTY; INSURANCE (3); LIENS; MECHANICS' LIENS (1–4); MORTGAGES (34); PRINCIPAL AND SURETY; RECEIVERS (8); REFORMATION OF INSTRUMENTS; SCHOOLS AND SCHOOL DISTRICTS; TAXATION (19); TRUSTS (5); VENDOR AND PURCHASER (3–7); WITNESSES (6).

CONTRIBUTORY NEGLIGENCE—See APPEAL AND ERROR (5, 11); GAS (5); MASTER AND SERVANT (17); MOTOR VEHICLES (4–10); NEGLIGENCE (1, 4, 7); RAILROADS (4, 6, 7); TRIAL (4, 6).

CONVERSION.

1. In order to maintain action for conversion, plaintiff must show right to recover specific thing converted. *Hopkins* v. *Grand Rapids Trust Co.*, 261.
2. Where mortgage note holders gave their consent to use of mortgaged property for purpose of its manufacture into products for sale, and it was so used, they thereby rendered its return to them impossible, barring their right to recover for its conversion. *Id.*
3. Where owners of foxes allowed them to remain on ranch for several years after expiration of contract for their care and keep without paying therefor, and ranch owner never refused to give them up on payment of charges, there was no conversion. *Othoudt* v. *Addison Fur Corp.*, 482.

See CRIMINAL LAW (6); ELECTION OF REMEDY; EXECUTORS AND ADMINISTRATORS (6).

CORPORATIONS.

1. It was beyond power of trust company organized under 2 Comp. Laws 1915, §§ 8044–8077, and against public policy, for it to engage in sale of continuous series of mortgage participations as regular business. *Reichert* v. *Metropolitan Trust Co.*, 123.
2. Corporation's trustee in bankruptcy is not entitled to cancellation of corporate chattel mortgage executed two years after expiration of corporate franchise and nearly three years before bankruptcy, where all parties acted in good faith, consideration went into corporation's business, and to grant cancellation would be highly inequitable. *Timmer* v. *Crimmins*, 315.
3. Purpose of statute requiring that corporate chattel mortgage must be authorized by holders of two-thirds of outstanding stock is at least primarily for benefit of stockholders, and where officers executing such mortgage held at least two-thirds of outstanding stock, there was substantial compliance with statute although no formal action of authorization was taken (2 Comp. Laws 1929, § 10012). *Id.*
4. Relative to statutory provision requiring consent of holders of two-thirds of outstanding stock to be filed or recorded with corporate chattel mortgage, as between parties to mortgage, compliance therewith is not necessary to its validity. *Id.*

CORPORATIONS—Continued.

5. Since statutory provision requiring consent of holders of two-thirds of outstanding stock to execution of corporate chattel mortgage, and requiring filing or recording with mortgage certificate of such consent, is for benefit of stockholders, failure to comply therewith may not be urged by corporation's trustee in bankruptcy, who represents creditors only. *Id.*

6. In certain exceptional cases, such as relieving from fraud or breach of trust, court of equity may, in its inherent power, wind up affairs of corporation as incident to adequate relief, but in absence of such exceptional circumstances, equity court, in its inherent power, may not dissolve corporation, wind up its affairs, and, for that purpose alone, sequester its property. *Stott Realty Co.* v. *Orloff*, 375.

7. Dissolution is not remedy to be lightly decreed; court having ample power in other ways to give relief for substantially all corporate ills. *Id.*

8. Equity court may restrain or compel corporation and its officers to lawful conduct, and, ordinarily, protect stockholders in all their rights without dissolution. *Id.*

9. Ultimate test of dissolution is that, with any other remedy, corporation cannot be made to function for purpose of its creation. *Id.*

10. Test of failure of corporate purpose is whether ruin will inevitably follow continuance of management. *Id.*

11. Where acts of majority stockholders needing correction, such as failure to hold stockholders' meetings, could be remedied by ordinary processes of court, and there is no showing of fraud, remedy of dissolution should not be granted at instance of minority stockholders. *Id.* 376.

12. Minority stockholders are not entitled to remedy of dissolution because salary is paid to president, where it was regularly voted, and is not shown to be excessive. *Id.*

13. Nor may dissolution be granted because of corporate loans to other corporations in which all parties are interested, where they were sanctioned by all parties. *Id.*

14. In suit by minority stockholders for dissolution of corporation, evidence *held*, insufficient to show that management by majority stockholders was incompetent, although mistakes may have been made, due to inability to foresee business depression. *Id.*

15. It is not law that minority stockholders have right to determine policies of corporation, as against will of majority. *Id.*

16. That policies of minority stockholders did not prevail is no evidence of incompetent management on part of majority, especially where record indicates that said policies were more obstructive than constructive. *Id.*

17. Where record shows that corporation is going concern, that its business is profitable, and that its ruin or loss to stockholders is not inevitable, although it is in serious difficulties because

CORPORATIONS—Continued.

of dissent of minority stockholders, corporate purpose has not failed, and minority stockholders are not entitled to remedy of dissolution. *Id.*

18. Mistake of trust company in executing contract for purchase of land in its corporate capacity when it intended to purchase as trustee does not render said contract *ultra vires*. *Wardowski* v. *Guardian Trust Co. of Detroit*, 422.

19. Extent of corporate power of trust company, being found in public law, trust company and those dealing with it must be held cognizant of its provisions with reference to whether particular transaction is *ultra vires*. *Id.* 423.

20. If contract to purchase land, executed by trust company in its corporate capacity when it intended to purchase as trustee, is *ultra vires*, said defense may not be made in suit by vendors to foreclose said contract (Act No. 327, Pub. Acts 1931). *Id.*

21. Defense that contract executed by corporation is *ultra vires* is not vested right, and therefore legislature had right to take it away (Act No. 327, Pub. Acts 1931). *Id.*

22. Doctrine of *ultra vires* is intended to keep private corporations within their fixed powers, and State may, by statute, say when corporation may or may not plead its violation in release of contracts otherwise legitimate (Act No. 327, Pub. Acts 1931). *Id.*

23. Defense of *ultra vires*, to be available, must be pleaded. *Id.*

24. Generally, defense of *ultra vires* should not be permitted to prevail when it will not advance justice, but only when imperative rule of public policy requires it. *Id.*

25. Order appointing receiver to take over assets of foreign corporation in this State was not nullity for want of process, where corporation had been dissolved and there was no one upon whom service could be made. *Livingston* v. *Southern Surety Co. of New York*, 438.

26. When foreign corporation was dissolved, agency of its representative in this State ended. *Id.*

See BANKS AND BANKING (2); CHATTEL MORTGAGES (7); CONTRACTS (1); CRIMINAL LAW (13); ESTOPPEL (2); LICENSES (1, 2); MORTGAGES (3); RECEIVERS (15–17); REFORMATION OF INSTRUMENTS; TRADE-MARKS AND TRADE-NAMES; TRUSTS (1–5); VENDOR AND PURCHASER (10).

COUNTY ROAD COMMISSIONER—See HIGHWAYS AND STREETS (1, 2); QUO WARRANTO.

COURT RULES—See APPEAL AND ERROR (1); CRIMINAL LAW (16); DISCOVERY; DISMISSAL AND NONSUIT (4).

COURTS.

1. Rule of *stare decisis* generally determines, even though equitable considerations might prompt different result. *Detroit Trust Co.* v. *Detroit City Service Co.*, 14.

COURTS—Continued.

2. State court is not bound by decision of Federal Supreme Court in construction of State statute. *Id.*
3. Probate court derives none of its jurisdiction or power from common law, but must find warrant for all of its doings in statute. *MacKenzie* v. *Union Guardian Trust Co.*, 565.
4. Generally, where action for damages is brought in State other than that in which accident happened, matters relating to right of action are governed by laws of State where accident happened, and matters relating purely to remedy by laws of State where action is brought. *Edison* v. *Keene*, 611.
5. Where action is brought in one jurisdiction for tort committed in another, general rule is that all matters relating to right of action are governed by *lex loci*, and all matters relating purely to remedy by *lex fori*. *Perkins* v. *Great Central Transport Corp.*, 616.
6. In considering case involving law of State of Ohio, holdings in syllabi, which state holding of Ohio Supreme Court rather than opinions, must be considered in light of facts presented, such as subsequent amendment of statute. *Id.*

See ATTORNEY AND CLIENT (8, 9); CONSTITUTIONAL LAW (1, 11); MORTGAGES (14, 20, 28, 38); RECEIVERS (1, 10, 17, 18).

COVENANTS.

1. Test as to whether covenant runs with land or is merely personal, is whether covenant concerns thing granted and occupation or enjoyment of it, or is collateral and personal covenant not immediately concerning thing granted. *Mueller* v. *Bankers Trust Co. of Muskegon*, 53.
2. Covenant to build bridge related to essential to enjoyment and use of lots conveyed, entered materially into agreed consideration to be paid, was not collateral to or independent thereof, and therefore ran with land. *Id.*
3. That covenant to build bridge was inserted in land contract after, instead of before, provision binding heirs and assigns of parties, which was only place in contract available to put it, *held*, not to limit it to vendee only, but that it applies equally to assigns. *Id.*
4. Construction of unsubstantial, flimsy bridge, which, within three years, was swept away by high water, *held*, not to discharge covenant in land contract to build bridge, which was essential to enjoyment and use of land, although covenant contained no specification that it should be suitable and have some degree of permanency. *Id.* 54.
5. Where purchaser of land was prevented from using it by vendor's breach of covenant to construct bridge, purchaser *held*, entitled to recover interest on purchase price plus taxes paid, as damages. *Id.*
6. Trees and shrubs planted on land which purchaser was prevented from using by vendor's breach of covenant to build

COVENANTS—Continued.

bridge, *held*, not so connected with said covenant as to entitle purchaser to recover value of those that died as damages for said breach. *Id.*

See DEEDS (2).

CREDIBILITY OF WITNESS—See WITNESSES (3, 4).

CREDIT—See BANKS AND BANKING (4, 7).

CREDITORS—See BANKRUPTCY; CHATTEL MORTGAGES (1, 2, 7, 8); CONTEMPT; CORPORATIONS (5); FRAUDULENT CONVEYANCES; MORTGAGES (3, 11, 12, 25–27); RECEIVERS (1, 15–17); TRUSTS (2).

CREDITORS' SUITS—See FRAUDULENT CONVEYANCES (4).

CRIMINAL LAW.

1. Trial court had power, on proper showing, to grant prosecutor leave to indorse two names on information after jury was impaneled and before testimony was taken (3 Comp. Laws 1929, § 17254). *People* v. *Guise*, 72.
2. In prosecution for obtaining check by false pretenses, testimony as to defendant's participation in commission of similar previous offense was properly admitted for its bearing on question of intent in instant case. *Id.*
3. In prosecution for obtaining check by false pretenses, motion for directed verdict of not guilty, *held*, properly denied, under evidence presenting issues of fact. *Id.*
4. Motion to quash information charging defendant with embezzlement, felonious abstraction, and misapplication of bank funds, on ground that evidence taken on examination was insufficient to sustain charge, *held*, properly denied. *People* v. *Kolowich*, 137.
5. In prosecution for embezzlement, felonious abstraction, and misapplication of bank funds, verdict of guilty *held*, not against great weight of evidence (3 Comp. Laws 1929, § 11963). *Id.* 138.
6. One who with connivance of bank officer whom he has under his control secures possession of bank's funds by means of overdraft and converts them to his own use with intent to defraud bank, continuing such conduct over protracted period so as to secure possession of large amount of bank's funds, becomes guilty of offense other than misdemeanor defined as "overdraft" in banking law (3 Comp. Laws 1929, § 11932). *Id.*
7. Overdraft of itself may or may not be misdemeanor, and, under certain circumstances, said misdemeanor may become much more serious offense, as when committed with purpose of defrauding bank (3 Comp. Laws 1929, §§ 11932, 11963). *Id.*
8. Where defendant charged with defrauding bank by means of overdrafts claimed absence of criminal intent as defense, it was proper to show his other transactions at that time, such

CRIMINAL LAW—Continued.

as his buying of stocks and bonds, for purpose of showing his financial condition, reasons for making such withdrawals, and other facts bearing on his motive and intent. *Id.*

9. Error, if any, in joining said three counts in one information, *held*, not prejudicial, where defendant was found guilty under all three and identical sentences imposed to run concurrently. *Id.*

10. Election between counts may not be required on ground that distinct offenses are charged, where they are committed by same acts, at same time, and same testimony must be relied on for conviction. *Id.* 139.

11. In said prosecution, evidence *held*, to require instruction to jury that defendant could not be held guilty of both embezzlement and abstraction, and that instruction to that effect should have been given. *Id.*

12. Question which assumes existence of points in controversy not yet proved is absolutely improper. *Id.*

13. In said prosecution, testimony as to loans made by bank to defendant's friends and corporations in which he was interested, in regular course of business, should not be admitted unless it is shown that they were made in order to aid defendant directly or that said transactions otherwise throw light on his financial condition; but such loans irregularly made could be shown as tending to show defendant's control of bank's affairs. *Id.*

14. Reference by assistant prosecuting attorney, in his closing argument, to failure of another bank and conviction of its president, to which case wide publicity had been given, *held*, so prejudicial that court cannot say that it did not result in miscarriage of justice, although said remarks were in nature of reply to argument of defendant's attorney, and trial judge expressly instructed jury to disregard them (3 Comp. Laws 1929, §§ 15518, 17354). *Id.*

15. In prosecution for failing to render reasonable assistance after automobile accident, defendant's signed statement, made next day after accident, was properly admitted over her objection that she should have had benefit of counsel when making it, in absence of showing of fraud or coercion; its value as evidence being for jury. *People* v. *Hoaglin*, 162.

16. Court's refusal to grant defendant's motion to continue case, on ground of inability to subpœna witness, was not abuse of discretion, where affidavit annexed to motion did not show what efforts had been made to locate witness or what he would swear to were he present (Court Rule No. 36 [1931]). *Id.* 163.

17. Motion for continuance, based on claim that unfavorable publicity necessitated delay until public excitement died down, was properly denied, where no proof was offered to substantiate said claim. *Id.*

18. Instruction that, in order to convict defendant charged with aiding and abetting violation of motor vehicle law (1 Comp.

CRIMINAL LAW—Continued.

Laws 1929, § 4722), it would be necessary to convict defendant charged as principal, was correct, where latter, under statute, was only possible principal. *Id.*

19. Driver of automobile and passengers therein are not excused from rendering every possible assistance to pedestrian struck by car because they think him to be dead, rendering medical assistance futile, since it is not within their province to determine whether or not victim is dead, and even if he is, there is duty to care for remains (1 Comp. Laws 1929, § 4722). *Id.*

20. Driver of automobile striking pedestrian did not perform statutory duty to render assistance by instructing passengers in car to go back and take care of victim and not leaving scene of accident until after receiving assurance that victim was dead, since responsibility may not be discharged by such delegation. *Id.*

21. Failure of automobile driver to stop, in event of accident involving injury or death to person, constitutes felony; but failure to render assistance to victim after stopping constitutes misdemeanor (1 Comp. Laws 1929, §§ 4722, 4745, 4748). *Id.*

22. If any uncertainty develops as to which penal clause is applicable, accused is entitled to have lesser of two penalties administered. *Id.* 164.

23. It is proper to charge one aiding and abetting in commission of misdemeanor. *Id.*

24. Where principal is charged with misdemeanor, accessory charged with aiding and abetting in commission of same is subject to same punishment as principal, under common law as well as statute under which charge is laid (1 Comp. Laws 1929, § 17253). *Id.*

25. Where offense of which defendants were convicted constitutes misdemeanor, but they were erroneously given punishment provided for felony, convictions are affirmed, on appeal, and case remanded to trial court for imposition of proper sentences (1 Comp. Laws 1929, §§ 4722, 4745, 4748). *Id.*

26. On change of venue, it was proper for State presiding circuit judge to designate circuit judge to preside at trial. *People* v. *Hager*, 198.

27. On change of venue from circuit court of Oscoda county to circuit court of Ogemaw county, it was proper, before changing venue, for circuit judge of Oscoda county to appoint special prosecuting attorney, where prosecuting attorney of Ogemaw county was disqualified (1 Comp. Laws 1929, § 1293, 3 Comp. Laws 1929, § 17125). *Id.*

28. Where trial judge correctly instructed jury as to law, there was no dispute of fact, and jury returned only verdict compatible with their oaths, argument of special prosecutor, *held*, not to have produced prejudicial error. *Id.*

29. Right of defendant to know witnesses to be called against him is substantial one, and therefore statutory requirement that

CRIMINAL LAW—Continued.

names of witnesses known to prosecutor be indorsed on information at time of filing should be faithfully observed, notwithstanding court has authority to indorse names of witnesses before or during trial (3 Comp. Laws 1929, § 17254). *People* v. *Kowkol*, 529.

30. Although court has authority to indorse names of witnesses on information during trial, defendant is entitled to reasonable opportunity to prepare for trial. *Id.*

31. Where, in prosecution for embezzlement, joint indictee with defendant turned State's evidence, was sworn and examined as witness for people, it was error for court to advise him, on cross-examination, that he had right to refuse to answer any question that might tend to incriminate him, since, under circumstances he had waived his immunity as coindictee and his constitutional privilege against self-incrimination, and was subject to same rules of cross-examination as any other witness. *Id.*

See ATTORNEY AND CLIENT (6); BANKS AND BANKING (2–8); INDICTMENT AND INFORMATION (1); SEDUCTION (1, 2); STATUTES (1).

CROSS-BILL—See APPEAL AND ERROR (20); EQUITY (6–8).

CROSS-EXAMINATION—See APPEAL AND ERROR (3); CRIMINAL LAW (31); TRIAL (8); WITNESSES (3–5, 7, 9, 10).

CRUELTY—See DIVORCE (2).

CURING ERROR—See APPEAL AND ERROR (11).

CUSTODY OF CHILDREN—See DIVORCE (3–5).

CUSTODY OF COURT—See RECEIVERS (17, 18).

CUSTOMS AND USAGES—See BANKS AND BANKING (6); BILLS AND NOTES (3).

CUTTING WOOD—See EXCHANGE OF PROPERTY (3).

DAMAGES.

1. Where, in assessing damages for malpractice at $1,000, trial judge awarded less than plaintiff's pecuniary loss and allowed nothing for pain and suffering, there was no error in reassessing damages and awarding additional amount of $250; said judgment being reasonably modest and in line with evidence. *LeFaive* v. *Asselin*, 444.

2. If injury to property caused by negligence is permanent or irreparable, measure of damages is difference in its market value before and after said injury, but if injury is reparable, and expense of making repairs is less than value of property, measure of damages is cost of making repairs. *O'Donnell* v. *Oliver Iron Mining Co.*, 471.

3. Damages in nature of pain, mental suffering, and humiliation resulting from seduction, being extremely difficult to evaluate,

DAMAGES—Continued.

Supreme Court will not interfere with amount awarded unless it is so unreasonable and excessive as to shock conscience of court. *Clark* v. *Roen*, 478.

4. Verdict of $2,000 as damages for seduction cannot be said to be excessive, in view of plaintiff's humiliation, disgrace, pain, and suffering. *Id.* 479.

See CARRIERS; COVENANTS (5, 6); EMINENT DOMAIN (1); EXECUTORS AND ADMINISTRATORS (8); LANDLORD AND TENANT (2, 3); LIMITATION OF ACTIONS; MINES AND MINERALS (2); VENDOR AND PURCHASER (5).

DANGEROUS MACHINERY—See MASTER AND SERVANT (19).

DANGEROUS SUBSTANCE—See GAS (1).

DEATH—See CRIMINAL LAW (19–21); DEEDS (4, 8); DESCENT AND DISTRIBUTION (1, 2); EXECUTORS AND ADMINISTRATORS (1, 3); HIGHWAYS AND STREETS (1, 2); INSURANCE (1); MASTER AND SERVANT (4, 6); MOTOR VEHICLES (4); TAXATION (10, 17).

DEBTS—See DESCENT AND DISTRIBUTION (2); GARNISHMENT (1).

DECLARATION—See DISCOVERY (3); FRAUD (2); JUDGMENT (11); NEGLIGENCE (5); VENDOR AND PURCHASER (13).

DECLARATORY JUDGMENT—See ACTION.

DEDICATION.

1. Dedication under statute is not necessary where facts are sufficient to establish dedication at common law. *Chene* v. *City of Detroit*, 253.
2. To create common-law dedication there must be intention on part of owner to dedicate lands to public use, and acceptance of such dedication by public authorities. *Id.*
3. Acceptance of dedication may be evidenced either by express declaration or by acts of user indicating intention to accept such property for public use or purpose to which owner has by declaration or acts set it apart. *Id.*
4. In suit to compel removal of obstructions from street, evidence *held*, sufficient to establish intention on part of owners to dedicate street for public use and its acceptance by user, constituting common-law dedication. *Id.* 254.
5. While recital in dedication of plat that "streets and alleys as shown in said plat" were dedicated to use of public is of evidentiary force in determining whether said thoroughfares should be streets rather than boulevards, it is not conclusive. *Gallagher* v. *City of Detroit*, 298.

DEEDS.

1. Generally, contract to convey land is merged in deed executed in performance of such contract, and deed operates as satisfaction and discharge of executory contract, but where con-

DEEDS—Continued.

tract contains stipulation of which conveyance is not performance, such stipulation survives and is not merged in deed. *Mueller* v. *Bankers Trust Co. of Muskegon*, 54.

2. Covenant in contract for sale of lots to build bridge was collateral to contract for deed, and was obligation independent of conveyance of title, possession, quantity, and emblements, and therefore execution of deed did not extinguish said covenant, which was not incorporated in deed. *Id.*
3. In suit by widow to set aside deed from husband to his mother, contradictory testimony as to husband's papers being left in hands of another, *held*, insufficient to establish delivery of said deed. *Camp* v. *Guaranty Trust Co.*, 223.
4. Recording of deed on advice of attorney, after death of grantor and grantee, rebuts any presumption of delivery which might arise from its recording. *Id.*
5. To constitute delivery, grantor must have parted with deed to grantee and with right to retain it. *Id.*
6. Even if grantor executed deed and placed it on record, that alone would not have constituted delivery. *Id.*
7. To constitute valid delivery of deed, there must have been conveyance of present interest in land. *Id.*
8. In suit to set aside deed placed on record after death of grantor and grantee, burden was not on plaintiff to prove non-delivery, but on defendants relying on deed to show its delivery. *Id.*

See BANKRUPTCY; CONTRACTS (6); FRAUDULENT CONVEYANCES (4); INSURANCE (2); MECHANICS' LIENS (1); TAXATION (1, 9–14).

DEFAULT—See GUARANTY (2); LANDLORD AND TENANT (2, 3); MINES AND MINERALS (2); MORTGAGES (4, 5, 34, 41); VENDOR AND PURCHASER (2, 9, 11, 14, 15).

DEFAULT JUDGMENT—See ATTORNEY AND CLIENT (10); JUDGMENT (9–11).

DEFENSES—See BANKS AND BANKING (4); BILLS AND NOTES (7); CORPORATIONS (20–24); CRIMINAL LAW (8); EQUITY (6); MASTER AND SERVANT (17); PAYMENT (1, 2); TRUSTS (8, 9); VENDOR AND PURCHASER (6).

DEFICIENCY DECREE—See VENDOR AND PURCHASER (10, 16).

DEFINITION—See SEDUCTION (1).

DEFRAUDING BANK—See CRIMINAL LAW (6, 7); INDICTMENT AND INFORMATION (2).

DELEGATION OF DUTY—See CRIMINAL LAW (20).

DELINQUENT TAXES—See TAXATION (23).

DELIVERY—See BILLS AND NOTES (4, 5); CHATTEL MORTGAGES (1); DEEDS (3–8); FRAUDULENT CONVEYANCES (2); GUARANTY (2).

DEMAND—See MINES AND MINERALS (1).

DEPENDENCY—See MASTER AND SERVANT (3).

DEPOSIT—See LANDLORD AND TENANT (3).

DEPOSITIONS BEFORE TRIAL—See DISCOVERY.

DEPRECIATION—See CHATTEL MORTGAGES (6).

DESCENT AND DISTRIBUTION.

1. At death of ancestor, title to real estate descends to heirs, in absence of other disposition thereof. *McVannel* v. *Pure Oil Co.*, 518.
2. Title to real estate, on owner's death, descends immediately to his heirs, subject to be divested for payment of decedent's debts. *Michigan Trust Co.* v. *City of Grand Rapids*, 547.

DETROIT CHARTER—See MUNICIPAL CORPORATIONS (1, 2, 7).

DEVASTAVIT—See EXECUTORS AND ADMINISTRATORS (6, 7).

DIRECTED VERDICT—See ADVERSE POSSESSION (2); APPEAL AND ERROR (6, 7, 9, 14, 15); CRIMINAL LAW (3); MASTER AND SERVANT (20); MOTOR VEHICLES (4, 7, 8, 14); RAILROADS (4, 7); TRIAL (1, 2).

DIRECTOR OF CONSERVATION—See TAXATION (1).

DIRECTORS—See BANKS AND BANKING (3, 4); EVIDENCE (10); FRAUDULENT CONVEYANCES (3); TRUSTS (3).

DISABILITY—See JUDGMENT (2); MASTER AND SERVANT (1).

DISABLED TRUCK—See MOTOR VEHICLES (3).

DISCHARGE—See BANKRUPTCY; COVENANTS (4); DEEDS (1); DISMISSAL AND NONSUIT (3); INSURANCE (6, 7); VENDOR AND PURCHASER (11).

DISCOUNT—See TAXATION (24); TRUSTS (2).

DISCOVERY.

1. Court Rule No. 41 (1931), permitting taking of depositions before trial, is extension of old practice of discovery, and party invoking rule must definitely state subjects of intended inquiry and thus show materiality and nature thereof, and may not, at examination, go beyond such specifications. *Nestle* v. *Fleming*, 417.
2. Right to take deposition under Court Rule No. 41 (1931) may be tested by motion to vacate notice, and issue then is whether reasons for notice and information sought disclose *bona fide* need in framing issue or preparing for trial. *Id.*

DISCOVERY—Continued.

3. Where declaration charges seduction and rape of 14-year old girl, averring place, but date of alleged intercourse is averred to have been one of three mentioned Saturdays, and defendant's attorneys, seeking information as to time, place, and circumstances of said alleged seduction, gave notice of taking girl's deposition under Court Rule No. 41 (1931), court must assume that right accorded by said rule is invoked in good faith, and may not anticipate abuse or hold that possibility of abuse warrants inhibition of said right. *Id.*

DISCRETION OF COURT—See CRIMINAL LAW (16); EQUITY (8); INJUNCTION; MORTGAGES (37, 38); RECEIVERS (13).

DISGRACE—See DAMAGES (4).

DISMISSAL AND NONSUIT.

1. Dismissal of cause terminates all proceedings therein. *Northrup* v. *Jay,* 463.
2. Dismissal without prejudice leaves parties as if no action had been instituted. *Id.*
3. Where replevin suit in which defendant had executed redelivery bond (3 Comp. Laws 1929, § 14823) was dismissed without prejudice as one in which no progress had been made for more than one year (3 Comp. Laws 1929, § 14253), surety was thereby discharged. *Id.*
4. Where replevin suit was dismissed without prejudice as one in which no progress had been made for more than one year (3 Comp. Laws 1929, § 14253), and plaintiff waited for nearly 21 months before seeking reinstatement, court properly assumed, under theory of presumption of regularity of action, that case was dismissed in accordance with statute and rule, in absence of showing to contrary. *Id.*

See APPEAL AND ERROR (8); ELECTION OF REMEDY; PARTIES (3).

DISQUALIFICATION—See CRIMINAL LAW (27).

DISSOLUTION—See CORPORATIONS (6–14, 17, 25, 26).

DISTRACTING CUSTOMER'S ATTENTION—See NEGLIGENCE (4).

DIVIDENDS—See MORTGAGES (11, 22, 24, 26, 27).

DIVISION OF PROPERTY—See DIVORCE (3).

DIVORCE.

1. Where award to wife, in divorce decree, is insufficient, under changed conditions, to provide adequate support for herself and three children, although she was awarded valuable equities in real estate, court properly amended decree requiring husband to pay $15 per week toward support of children. *Davis* v. *Davis,* 391.

DIVORCE—Continued.

2. In wife's suit for divorce on ground of cruelty, evidence *held*, sufficient to justify decree in plaintiff's favor. *Smith* v. *Smith*, 436.

3. Divorce decree awarding wife custody of three children, giving her household goods and homestead burdened with $3,000 mortgage, changing ownership of oil station from tenancy by entireties to tenancy in common, and ordering husband to pay wife $1,500 and $30 per month toward support of children, leaving husband with small equity in another house and full ownership of another oil station, *held*, fair and proper, under evidence. *Id.*

4. In determining custody of children, where parents are divorced, welfare of children is of first consideration. *Leenheer* v. *Leenheer*, 502.

5. Wife's petition that divorce decree be modified so that custody of children be given to her instead of to husband was properly denied, where it appeared to be for best interest of children that custody be continued in him. *Id.*

See MASTER AND SERVANT (4).

DRIVEWAY—See TRIAL (8).

DUE CARE—See RAILROADS (6).

DUE PROCESS—See CONSTITUTIONAL LAW (2).

DUPLICITY—See INDICTMENT AND INFORMATION (1).

DYED FURS—See MASTER AND SERVANT (8).

EARNINGS—See MASTER AND SERVANT (7).

EASEMENTS—See EMINENT DOMAIN (1–3); HIGHWAYS AND STREETS (3).

EJECTMENT—See ADVERSE POSSESSION (2).

ELECTION OF COUNTS—See CRIMINAL LAW (10).

ELECTION OF REMEDY.

Where attachment proceeding brought by plaintiffs under mistaken theory that title to certain property was not in them was dismissed by them on stipulation, they were not thereby estopped from bringing action for conversion of same property against another party; there having been no election of remedy. *McAfee* v. *Bankers Trust Co. of Muskegon*, 276.

ELECTIONS—See CONSTITUTIONAL LAW (4, 6, 10); TAXATION (27).

ELECTORS—See TAXATION (27).

EMBEZZLEMENT—See CRIMINAL LAW (4, 5, 11, 31); INDICTMENT AND INFORMATION (2).

EMBLEMENTS—See DEEDS (2).

EMERGENCY—See MOTOR VEHICLES (3).

EMINENT DOMAIN.

1. Verdict of condemnation and assessment of damages, in proceeding to condemn fee of land for water board site, where case was discontinued before confirmation of award, is not *res judicata* of proceeding to condemn easement for street purposes in same property. *In re Widening of South Dix Avenue,* 233.
2. City has right to condemn easement in property for street purposes. *Id.*
3. Question of necessity, properly declared by city in proceeding to condemn easement for street purposes, may not be reexamined by Supreme Court on appeal. *Id.*
4. Condemnation proceedings are inquisitorial in their nature, and constitutional tribunal for determination of issues is jury; judge, after jury is impaneled, acting in advisory capacity merely. *Id.*

See MORTGAGES (40).

EQUALLY DIVIDED COURT—See HIGHWAYS AND STREETS (3); PRINCIPAL AND SURETY.

EQUIPMENT—See RECEIVERS (8).

EQUITABLE ASSIGNMENT—See TRUSTS (4).

EQUITABLE LIEN—See TRUSTS (4).

EQUITY.

1. Court of equity has jurisdiction to construe wills incidental to its general power over trusts and trust estates, and bill may be filed by anyone interested in determination of questions involved. *MacKenzie* v. *Union Guardian Trust Co.,* 563.
2. Granddaughter claiming grandfather's will created trust in her favor may maintain suit in equity for construction of will and for accounting, where executor denies trust and treats her as common legatee. *Id.*
3. If, in suit in equity, trial court has jurisdiction on any well-settled ground of equity jurisdiction, it is its duty to retain case and grant complete relief. *Id.* 564.
4. Strict legal right, if incompatible with equities of case, does not necessarily entitle one to equitable redress, especially if injured party has reasonably clear and adequate remedy at law. *Roy* v. *Chevrolet Motor Car Co.,* 663.
5. Avoiding multiplicity of suits is not conclusive reason for intervention of equity. *Id.*
6. Generally, cross-bill should be filed at time of answer if it is part of defense. *Greenberg* v. *Chambers,* 706.
7. Cross-bill may be filed, on leave of court, even after hearing, and in some cases final decree may be set aside and leave to file cross-bill granted. *Id.*

EQUITY—Continued.

8. After case has been heard, leave to file cross-bill may be granted or denied in discretion of trial court. *Id.*

See CHATTEL MORTGAGES (5); CORPORATIONS (2, 6–8); COURTS (1); EXECUTORS AND ADMINISTRATORS (4); GARNISHMENT (6); INJUNCTION; JUDGMENT (1); MORTGAGES (29, 39, 40); MUNICIPAL CORPORATIONS (6); NUISANCE; PLEADING; RECEIVERS (13); TAXATION (14); VENDOR AND PURCHASER (4, 7).

EQUITY OF REDEMPTION—See MORTGAGES (20).

ESTATES BY ENTIRETY—See DIVORCE (3); FRAUDULENT CONVEYANCES (4).

ESTATES IN COMMON—See DIVORCE (3); PARTITION (1).

ESTOPPEL.

1. Since law affords employer no opportunity to be heard in circuit court upon filing of certificate of award by employee and entry of judgment under 2 Comp. Laws 1929, § 8452, doctrines of waiver and estoppel have no application in suit by employer to enjoin levy under execution on ground that judgment was secured by fraud. *Oliver Iron Mining Co.* v. *Pneff*, 116.
2. Evidence *held*, insufficient to support claim that plaintiff is estopped from claiming agreed price for his services in securing investment of additional money in defendant corporation. *Regan* v. *Consolidated Bakeries, Inc.*, 249.
3. Where owners of foxes allowed them to remain on ranch for several years after expiration of contract for their care and keep without paying therefor, their conduct amounted to acquiescence and implied consent to lien, and they are estopped from claiming otherwise. *Othoudt* v. *Addison Fur Corp.*, 482.
4. Title to land may not, under law of this State, rest on estoppel. *McVannel* v. *Pure Oil Co.*, 519.
5. Owners of unoccupied land under regular chain of title are not estopped from asserting title as against purchasers under void tax deed, although they paid no taxes and made no move to assert title for more than 15 years. *Id.*

See ATTORNEY AND CLIENT (10); CONVERSION (2); ELECTION OF REMEDY; MECHANICS' LIENS (3, 4); RECEIVERS (2); SCHOOLS AND SCHOOL DISTRICTS (2); VENDOR AND PURCHASER (2); WITNESSES (7).

ETHICS—See ATTORNEY AND CLIENT (8).

EVIDENCE.

1. It is common knowledge that building costs more than architect represents. *Stott Realty Co.* v. *Orloff*, 376.
2. Party propounding hypothetical question has duty of formulating proper one. *O'Donnell* v. *Oliver Iron Mining Co.*, 470.

EVIDENCE—Continued.

3. Hypothetical question which referred in general manner to very lengthy testimony of other witnesses, some of which was contradictory, was not proper question to submit. *Id.*

4. In action against mining company for damages to plaintiff's house, alleged to be due to subsidence, owing to defendant's failure to furnish lateral and subjacent support for surface upon which said house stood, it was error to admit testimony as to breakage of water hydrant in vicinity of plaintiff's house without in any way connecting it with said alleged subsidence. *Id.*

5. It was also error to admit testimony as to subsidence in neighborhoods far removed from plaintiff's house without showing that conditions there may have been responsible for subsidence of plaintiff's property. *Id.* 471.

6. Although oral testimony was not admissible to vary terms of written contract, complete in itself, for storage of goods in warehouse, oral testimony was admissible to show that execution of said contract was induced by false representations that said warehouse was fireproof. *Rosenblatt* v. *John F. Ivory Storage Co., Inc.*, 513.

7. Testimony of witness called by opposite party under statute must be weighed and considered same as that of any other witness (3 Comp. Laws 1929, § 14220). *Fleegar* v. *Consumers Power Co.*, 537.

8. Party calling as witness employee of opposite party is at liberty to contradict him, but is bound by his testimony except so far as it is contradicted (3 Comp. Laws 1929, § 14220). *Id.*

9. Parol evidence is admissible to ascertain whether given question in issue was litigated, submitted, and decided, and, possibly, in some cases, whether it was material. *MacKenzie* v. *Union Guardian Trust Co.*, 565.

10. Director of bank organized under State law is chargeable with knowledge thereof, and must be presumed to have made his financial statement to said bank, from which he borrowed money, for purpose of complying with law (3 Comp. Laws 1929, § 11922). *Barber* v. *Kolowich*, 589.

11. In suit by coal dealer to enjoin use by rival dealer of assumed name so similar to plaintiff's as to lead to alleged confusion and unfair competition, court may take judicial notice that many orders would be given over telephone, and that similarity of names might lead to confusion and placing orders with defendant which were intended for plaintiff, who had been in business for long time. *Schwannecke* v. *Genesee Coal & Ice Co.*, 624.

12. In action for personal injuries received in collision with automobile, testimony by plaintiff that, on following day, driver stated that he was insured, was inadmissible, since it was not

EVIDENCE—Continued.

admission of liability, nor did it bear on question of negligence, which was proximate cause of said injuries. *Van Dyke* v. *Knoll*, 644.

See ADVERSE POSSESSION (6); APPEAL AND ERROR (4–7, 9, 14–17); BILLS AND NOTES (8); CONTRACTS (1, 4); CORPORATIONS (14, 16); CRIMINAL LAW (1–5, 8, 10–13, 15, 17, 31); DAMAGES (1); DEDICATION (3–5); DEEDS (3); DIVORCE (2, 3); ESTOPPEL (2); FRAUD (2, 5); GAS (6); INDICTMENT AND INFORMATION (2); INSURANCE (1, 6); JUDGMENT (9, 10); MASTER AND SERVANT (2, 6, 8, 9, 20); MECHANICS' LIENS (5); MOTOR VEHICLES (7, 10, 14); MUNICIPAL CORPORATIONS (7); NEGLIGENCE (2, 5); NEW TRIAL (2); PAYMENT (3, 4); PHYSICIANS AND SURGEONS (1–7); TRIAL (1, 3, 5, 8); TRUSTS (2); WILLS (2, 3); WITNESSES (2, 5–7, 10).

EXAMINATION—See CRIMINAL LAW (4).

EXCAVATION—See CONTRACTS (7).

EXCESSIVE DAMAGES—See DAMAGES (1, 3, 4); PHYSICIANS AND SURGEONS (2).

EXCESSIVE JUDGMENT—See APPEAL AND ERROR (2).

EXCESSIVE LIABILITY—See BANKS AND BANKING (3–8).

EXCESS OF AUTHORITY—See MASTER AND SERVANT (13).

EXCHANGE OF PROPERTY.

1. In suit to rescind contract for exchange of plaintiffs' city property for farm, false statements made by owners of farm as to its value and profit from operating it, made with knowledge of plaintiffs' ignorance of farming and farm values and for purpose of being relied upon, constituted fraud, although in form of opinion, and although plaintiffs saw farm before trade. *Szarkowski* v. *Pfister*, 226.
2. Ordinarily, one who seeks to rescind contract must put opposite party in *statu quo;* but in cases where, acting in good faith, property has been so changed or lost that it cannot be restored in specie, rescission may nevertheless be granted, if its value is capable of ascertainment. *Id.* 227.
3. Cutting 48 cords of wood from dead timber on farm did not preclude rescission of contract whereby farm was exchanged for city property, since value of wood was capable of ascertainment. *Id.*

See LIMITATION OF ACTIONS (1).

EXECUTION—See CONTEMPT; ESTOPPEL (1).

EXECUTORS AND ADMINISTRATORS.

1. Title to personal property, on owner's death, passes to his executor or administrator on appointment. *Michigan Trust Co.* v. *City of Grand Rapids*, 547.

EXECUTORS AND ADMINISTRATORS—Continued.

2. Title to personal property of decedent vests in administrator or executor for purposes of administration, at conclusion of which balance remaining will be distributed. *Id.*
3. Title to personal property, on death of owner, remains in abeyance until administration is granted, and then vests, as of time of his death, in his executor or administrator. *Id.*
4. Executor, in case he doubts his right to act, may apply to court of equity for construction of will. *MacKenzie* v. *Union Guardian Trust Co.*, 563.
5. Allowance of annual account of executor or administrator is final and conclusive as to amount of money received by him and disbursements made by him, in absence of fraud or breach of trust, but has nothing to do with construction of will under which executor acts. *Id.* 564.
6. Failure of executor to perform his duty, which results in loss to beneficiaries of will, amounts to *devastavit*, whether from fraud, conversion, negligence, or maladministration. *Id.* 566.
7. Failure of executor to set up trust fund for testator's granddaughter, as provided for in will, resulting in loss to her, amounts to *devastavit*, for which executor is liable. *Id.*
8. In suit by beneficiary under will against executor for construction of will and for accounting, precise sum which beneficiary should receive is what she has lost by executor's failure to properly administer estate. *Id.*

See EQUITY (2); JUDGMENT (4, 7, 8); TAXATION (17, 18); TRUSTS (8).

EXECUTORY CONTRACTS—See DEEDS (1); VENDOR AND PURCHASER (6).

EXEMPTIONS—See TAXATION (6–8).

EXISTING DEBT—See TAXATION (19, 21, 23).

EX PARTE PROCEEDINGS—See RECEIVERS (13).

EXPENSES—See RECEIVERS (3–5, 8); WITNESSES (3).

EXPERT TESTIMONY—See APPEAL AND ERROR (3); EVIDENCE (2, 3); PHYSICIANS AND SURGEONS (3, 6); WITNESSES (8).

EXPIRATION OF FRANCHISE—See CORPORATIONS (2).

EXPLOSIVES—See GAS (1).

EX POST FACTO LAW—See FRAUDULENT CONVEYANCES (2).

EXTENSION OF MORTGAGES—See MORTGAGES (34, 40).

EXTINGUISHMENT OF COVENANT—See DEEDS (2).

FALSE PRETENSES—See CRIMINAL LAW (2, 3).

FALSE PROMISES AND REPRESENTATIONS—See EVIDENCE (6); EXCHANGE OF PROPERTY (1); FRAUD; JUDGMENT (9, 10).

FARMS—See EXCHANGE OF PROPERTY (1, 3).

FEDERAL COURTS—See COURTS (2).

FEES—See ANIMALS (3, 4); ATTORNEY AND CLIENT (3–6, 9); LICENSES (1); MORTGAGES (24).

FEE TITLE—See EMINENT DOMAIN (1).

FELONIOUS ABSTRACTION OF BANK FUNDS—See CRIMINAL LAW (4, 5, 11); INDICTMENT AND INFORMATION (2).

FELONY—See CRIMINAL LAW (6, 21, 25).

FINAL ACCOUNT—See JUDGMENT (3, 4, 7).

FINANCIAL STATEMENT—See EVIDENCE (10).

FINDING OF COURT—See APPEAL AND ERROR (10); CARRIERS; CONTRACTS (2, 4); JUDGMENT (10); PARTITION (1); PHYSICIANS AND SURGEONS (7).

FINDING OF FACT—See MASTER AND SERVANT (2, 6, 9); MECHANICS' LIENS (5).

FIRE INSURANCE—See FRAUD (3); INSURANCE (4, 5).

FIREMEN—See MASTER AND SERVANT (21); MUNICIPAL CORPORATIONS (1–3).

FIRES—See FRAUD (2, 4); MORTGAGES (29, 30).

FIRE WALLS—See INSURANCE (4, 5).

FIXTURES—See FRAUDULENT CONVEYANCES (1, 2); MORTGAGES (1–3, 13); RECEIVERS (8).

FLOOR LEVELS—See NEGLIGENCE (3–6, 8).

FORECLOSURE—See APPEAL AND ERROR (12); CHATTEL MORTGAGES (5, 6, 8); CONSTITUTIONAL LAW (3); CORPORATIONS (20); INSURANCE (2); MECHANICS' LIENS (5); MORTGAGES (10–24, 26–28, 39); VENDOR AND PURCHASER (1, 10, 16).

FORECLOSURE BY ADVERTISEMENT—See MORTGAGES (36–38).

FOREIGN CORPORATION—See CORPORATIONS (25, 26); RECEIVERS (15–18).

FORFEITURE—See MINES AND MINERALS (1); VENDOR AND PURCHASER (3, 6).

FOURTH-CLASS CITIES—See CONSTITUTIONAL LAW (9).

FOXES—See ANIMALS (3, 4); CONVERSION (3); ESTOPPEL (3).

FRAUD.

1. Where fraud is committed partly by false promises and partly by false representations of fact, representations, though promissory in character, which are not made in good faith but as part of scheme to defraud, are fraudulent. *Szarkowski* v. *Pfister*, 226.

FRAUD—Continued.

2. Where, in action to recover damages for loss by fire of household goods stored in defendant's warehouse, averments in declaration that defendant falsely represented warehouse to be fireproof and that in reliance thereon plaintiffs entered into contract of storage were supported by evidence, question of fraud was issue of fact for jury. *Rosenblatt* v. *John F. Ivory Storage Co., Inc.*, 513.
3. In action for fraud in falsely representing that defendant's warehouse was fireproof, whereby plaintiffs were induced to store goods therein which were destroyed by fire, whether plaintiffs had fire insurance on said goods is of no importance, since right of action for said loss would nevertheless be in plaintiffs or their assignees. *Id.*
4. Where owners were induced by warehouseman to enter into contract for storage of goods on false representations that warehouse was fireproof, safety as against fire was in contemplation of parties, and therefore said fraud may be said to be proximate cause of loss by fire. *Id.*
5. In suit for rescission of contract for sale of apartment house, where evidence shows that purchasers, partly by false promises and partly by false representations, deceived seller into believing that they were assuming mortgage indebtedness and relieving her of liability thereon, but papers executed did not so provide, she was entitled to decree for rescission and for accounting for rents collected. *Dirr* v. *Adler*, 688.

See APPEAL AND ERROR (2); ATTORNEY AND CLIENT (8–10); BILLS AND NOTES (7–9); CONTRACTS (5); CORPORATIONS (6, 11); CRIMINAL LAW (15); ESTOPPEL (1); EVIDENCE (6); EXCHANGE OF PROPERTY (1); EXECUTORS AND ADMINISTRATORS (5, 6); GARNISHMENT (2); JUDGMENT (1, 2, 9, 10); LIMITATION OF ACTIONS (1); MASTER AND SERVANT (1); MORTGAGES (39, 40); VENDOR AND PURCHASER (12).

FRAUDULENT CONCEALMENT—See INSURANCE (2).

FRAUDULENT CONVEYANCES.

1. Purpose of statute requiring notice to creditors of mortgage on stock of merchandise or fixtures is for protection of existing, not subsequent, creditors (2 Comp. Laws 1929, §§ 9548, 9549). *Timmer* v. *Crimmins*, 315.
2. Statutory requirement that notice of mortgage on stock of merchandise or fixtures be given to creditors is not applicable to mortgage executed and delivered prior to effective date of said statute, but not filed until afterward, since to hold otherwise would render it operative *ex post facto*, and also impair contract obligation in violation of Constitution (article 2, § 9). *Id.*
3. Receiver of insolvent bank who had obtained judgment against director illegally borrowing money from bank, was "creditor" within meaning of fraudulent conveyances act (3 Comp. Laws 1929, § 13392). *Barber* v. *Kolowich*, 589.

FRAUDULENT CONVEYANCES—Continued.

4. In judgment creditor's suit, conveyances whereby insolvent husband caused title to his real estate to be placed in himself and wife as tenants by entireties were properly held to be in fraud of creditors, in absence of showing that wife was creditor he had right to prefer, or that there was antecedent debt which constituted consideration for said deeds (3 Comp. Laws 1929, §§ 13394, 13400). *Id.*

FREEZING TANKS—See MORTGAGES (1).

GARNISHMENT.

1. Statute permitting garnishment of "debts due or to become due" relates only to debts existing at time of garnishment and payable then or in future; if payment only is delayed, statute applies, otherwise not (3 Comp. Laws 1929, § 14858). *Erb-Kidder Co.* v. *Levy*, 62.
2. Right of plaintiff against garnishee, except there be fraud, is no more than right of principal debtor. *Id.*
3. Rent, before it is due, is not subject to garnishment. *Id.*
4. It is perversion of civil process which cannot be sanctioned to tie up money in hands of garnishee by writ of garnishment or by successive writs, and then, without prosecution of writs employed for that purpose, to begin fresh suit by attaching accumulated fund. *Id.*
5. Where order of trial court dismissing main suit has been affirmed by Supreme Court, question as to whether garnishment remained in effect pending appeal notwithstanding order of court releasing garnishment, is moot question. *Rosenthal* v. *American Construction & Realty Co.*, 97.
6. Garnishment proceeding must be on law side of court regardless of whether principal defendant's liability has been determined by judgment at law or decree in equity (3 Comp. Laws 1929, § 14857 *et seq.*). *Detroit Fidelity & Surety Co.* v. *Bushman*, 304.
7. Being statutory, garnishment proceeding must follow strictly statutory provisions. *Id.* 305.
8. From time of service of writ of garnishment, garnishee defendant was liable to plaintiff to "amount" or value of bank stock it held, and was forbidden to part with it, and principal defendant was not entitled to possession or benefit from said stock until plaintiff's claim was satisfied (3 Comp. Laws 1929, §§ 14857, 14858). *Detroit Fidelity & Surety Co.* v. *Schinagel*, 685.
9. Where garnishee defendant permitted principal defendant to substitute certificate of deposit for bank stock in its hands at time of service of writ, judgment in garnishment should run for value of said certificate, although stock for which said bank stock was converted is now worth much less than value of certificate (3 Comp. Laws 1929, §§ 14857, 14858). *Id.*

See CONTEMPT; INSURANCE (3).

GAS.

1. Since gas company is dealing with highly dangerous substance, it is bound to use degree of care commensurate with danger of its gas escaping and causing injury or damage to person or property of others. *Fleegar* v. *Consumers Power Co.*, 537.
2. Ordinarily, when gas is measured and delivered to customer, he may use it for such purposes as he sees fit. *Id.*
3. Ordinarily, gas pipes and conduits in customer's building belong to him, are under his control, and it is his duty to keep them in repair. *Id.*
4. Ordinarily, gas company which does not install pipes in customer's building has no control over them and is not responsible for their condition, maintenance, or defective installation, nor for injuries caused by gas escaping from leak therein, of which it has no knowledge. *Id.*
5. Person injured by escaping gas by reason of his own contributory negligence may not recover against gas company. *Id.* 538.
6. In action by customer against gas company for injuries alleged to have been caused by escaping gas in plaintiff's house, defendant's negligence *held*, not established by preponderance of evidence. *Id.*

GENERAL CREDITORS—See MORTGAGES (3, 11, 12).

GOING CONCERN—See CORPORATIONS (17); RECEIVERS (3, 5, 9).

GOLD NOTES—See CHATTEL MORTGAGES (4).

GOOD FAITH—See ATTORNEY AND CLIENT (4); CHATTEL MORTGAGES (1); CORPORATIONS (2); DISCOVERY (2, 3); EXCHANGE OF PROPERTY (2); FRAUD (1); MUNICIPAL CORPORATIONS (3); PARTITION (1); TRIAL (7); TRUSTS (9).

GOOD PRACTICE—See PHYSICIANS AND SURGEONS (6).

GOODS IN TRANSIT—See CARRIERS.

GOOD WILL—See CHATTEL MORTGAGES (6); MORTGAGES (19).

GRANDDAUGHTER—See EQUITY (2); EXECUTORS AND ADMINISTRATORS (7); JUDGMENT (8); TRUSTS (7, 8).

GRANDNIECE—See CHAMPERTY AND MAINTENANCE (2).

GRAVELING STREETS—See VENDOR AND PURCHASER (7).

GREAT-AUNT—See CHAMPERTY AND MAINTENANCE (2).

GREAT WEIGHT OF EVIDENCE—See CRIMINAL LAW (5); NEW TRIAL (2).

GUARANTY.

1. Dealer who sold truck on conditional sales contract, discounted contract, and guaranteed its payment, is absolute guarantor, and not accommodation surety or guarantor. *National Discount Corp.* v. *Hasper*, 490.
2. Where dealer sold truck on conditional sales contract, discounted contract, and guaranteed its payment in case of purchaser's default, repossession, and return to him of truck, delivery of truck, after repossession, to garage where he was employed, and notice to him that it was held for his benefit, was sufficient delivery. *Id.*
3. Dealer, who after truck was repossessed by purchaser of sales contract, agreed to its resale, was not thereby released from guaranty of payment of contract, except as to extent, if any, of impairment of his security by reason of departure from terms of resale to which he had agreed. *Id.*

HARMLESS ERROR—See CRIMINAL LAW (9, 28).

HEARING—See EQUITY (7, 8); MINES AND MINERALS (2).

HEARSAY—See PHYSICIANS AND SURGEONS (4).

HEDGE—See ADVERSE POSSESSION (2, 3).

HEIRS—See COVENANTS (3); DESCENT AND DISTRIBUTION (1, 2); TAXATION (10, 12).

HIGHWAYS AND STREETS.

1. Where county road commissioner died shortly before commencement of new term for which he had been elected, board of supervisors had power to fill such prospective vacancy for unexpired portion of term, and it was not required to reassemble after term began to fill it (1 Comp. Laws 1929, § 3983). *Attorney General, ex rel. Lumley*, v. *Schulz*, 271.
2. Board of supervisors, having appointed county road commissioner to fill vacancy caused by death of officer elected, was without power to appoint another to said office during unexpired portion of said term by declaring said office appointive instead of elective (Const., art. 8, §§ 7, 8; 1 Comp. Laws 1929, §§ 3981, 3983). *Id.*
3. In suit by owner of fee of land in which public has easement for State trunkline highway purposes, to enjoin construction of underpass under said highway by gravel company to connect its property with railroad right of way, with consent of State highway commissioner, in order to facilitate loading of gravel on cars and thus remove menace to traffic from gravel trucks crossing said highway every few minutes, decree of court below dismissing said suit is affirmed, on appeal, by equally divided court (1 Comp. Laws 1929, § 4022). *Grand Rapids Gravel Co.* v. *William J. Breen Gravel Co.*, 365.

See BONDS (1, 3, 4); DEDICATION (4, 5); EMINENT DOMAIN (1–3); MUNICIPAL CORPORATIONS (4–8); NEGLIGENCE (9); VENDOR AND PURCHASER (7).

HOLDER IN DUE COURSE—See BILLS AND NOTES (6).

HOME-RULE CITIES—See CONSTITUTIONAL LAW (9).

HOMESTEAD—See DIVORCE (3); TAXATION (1).

HORSES—See MORTGAGES (3).

HOTEL—See RECEIVERS (2, 3, 5, 7–9).

HOUSEHOLD GOODS—See DIVORCE (3).

HUMILIATION—See DAMAGES (3, 4).

HUSBAND AND WIFE—See DEEDS (3); DIVORCE; FRAUDULENT CONVEYANCES (4); INSURANCE (3); JUSTICES OF PEACE (2); MASTER AND SERVANT (4–6); PAYMENT (4); WITNESSES (2).

HYDRANT—See EVIDENCE (4).

HYPOTHETICAL QUESTIONS—See EVIDENCE (2, 3); WITNESSES (8).

ICE BUSINESS—See CHATTEL MORTGAGES (6); MORTGAGES (1, 3, 13, 19); TRADE-MARKS AND TRADE-NAMES (1).

ICE PATH—See TRIAL (8).

ILLEGAL CONTRACT—See ATTORNEY AND CLIENT (9).

ILLEGAL PRACTICE OF LAW—See ATTORNEY AND CLIENT (7, 8).

IMMUNITY—See CRIMINAL LAW (31).

IMPAIRMENT OF CONTRACT—See CONSTITUTIONAL LAW (3); FRAUDULENT CONVEYANCES (2); TAXATION (19).

IMPAIRMENT OF SECURITY—See GUARANTY (3).

IMPEACHMENT—See WITNESSES (10).

IMPLIED CONSENT—See MASTER AND SERVANT (14); MOTOR VEHICLES (1).

IMPLIED CONTRACTS—See ANIMALS (4); CONTRACTS (7); ESTOPPEL (3); LIENS.

IMPROVEMENTS—See ANIMALS (1); TAXATION (14).

IMPUTABLE NEGLIGENCE—See MOTOR VEHICLES (6).

INCOME—See MORTGAGES (4).

INCOMPETENT MANAGEMENT—See CORPORATIONS (14, 16).

INCOMPLETE RECORD—See APPEAL AND ERROR (13).

INCORPORATION BY REFERENCE—See BILLS AND NOTES (1); MORTGAGES (34).

INCREASE—See ANIMALS (3).

INCREASING TAX RATE—See TAXATION (26).

INDEPENDENT COVENANTS—See COVENANTS (2); DEEDS (2).

INDICTMENT AND INFORMATION.

1. Objection that information is duplicitous may not be raised for first time in trial court by motion for new trial, and, when so attempted, may not be considered by Supreme Court. *People* v. *Guise*, 72.

2. There was no error in joining embezzlement, abstraction, and misapplication of bank's funds in same information, under three separate counts, where information follows language of statute apparently designed so that one count might be found to meet evidence presented (3 Comp. Laws 1929, § 11963). *People* v. *Kolowich*, 138.

See CRIMINAL LAW (1, 4, 9, 10, 29, 30).

INDIRECT SOLICITATION—See CHAMPERTY AND MAINTENANCE (2).

INDORSEMENTS—See BANKS AND BANKING (5); BILLS AND NOTES (7, 8).

INDORSING NAMES ON INFORMATION—See CRIMINAL LAW (1, 29, 30).

INDUCEMENTS—See BILLS AND NOTES (7–9).

INFANTS—See RAILROADS (3); TRIAL (3).

INFERENCES—See MASTER AND SERVANT (2); WITNESSES (1).

INJUNCTION.

Granting injunctive relief is within sound discretion of court, and decision must not be arbitrary, but must be based on facts of particular case. *Roy* v. *Chevrolet Motor Car Co.*, 663.

See ESTOPPEL (1); EVIDENCE (11); HIGHWAYS AND STREETS (3); JUDGMENT (1); NUISANCE; TAXATION (4).

INJURY TO PERSON OR PROPERTY—See CRIMINAL LAW (21); DAMAGES (2); LIMITATION OF ACTIONS (1, 2).

INSOLVENCY—See RECEIVERS (16).

INSPECTION—See MASTER AND SERVANT (18); MORTGAGES (30).

INSTRUCTIONS—See APPEAL AND ERROR (5, 11); CRIMINAL LAW (11, 14, 18, 28); MASTER AND SERVANT (11, 14, 16); TRIAL (4, 6).

INSURANCE.

1. Where cause of accident resulting in death of assured rests in pure conjecture, and although there is possibility that he met his death by reason of cause insured against in policy, there is no evidence thereof, verdict in favor of plaintiff, in action on policy, was not warranted. *Slater* v. *Federal Life Insurance Co.*, 85.

INSURANCE—Continued.

2. Where insurance company, on issuing policy, did not ask insured whether mortgage on insured property, of which it had knowledge, was being foreclosed, failure of insured to volunteer said information may not be made basis for canceling policy, on ground of fraudulent concealment. *Federal Land Bank of St. Paul* v. *Edwards,* 180.
3. Where husband deeded lots to trust company, his wife purchased lot from trust company which he allegedly conveyed by mistake, built house thereon and sold property on contract, vendees insured house, loss, if any, payable to wife and vendees, as their interest might appear, husband had no insurable interest in said property, and therefore insurance money was not garnishable for his debt, although he signed proofs of loss at instance of insurance company to preclude his making any claim under policy. *Seitz* v. *Bolles,* 241.
4. In case parts of buildings are separated and protected by fire walls, they are in some instances rated as separate risks, but in absence of fire wall separating units, common risk and coverage designation in policy should be applied to actual situation and single use of property. *School District No. 2 of Otsego Twp.* v. *American Insurance Co.,* 385.
5. Where rating bureau scheduled high school building, consisting of old part with slate roof and new part with composition roof, not separated by fire wall, as unit, in fixing premium rate, and insurance companies, members of said bureau, adopted said rating in their policies issued on said building, adjusters, after fire, properly held that all policies covered said building as unit and adjusted loss on said basis, although some policies described building insured as of slate roof construction, and others as of composition roof construction (3 Comp. Laws 1929, § 12272 *et seq.*). *Id.* 386.
6. Where evidence shows that note and mortgage were deposited with mutual insurance company to make good deficit caused by bank failures, they are assets of company, and therefore maker is not entitled to their discharge by company's receiver (3 Comp. Laws 1929, §§ 12662, 12664). *Whitaker* v. *Empire Mutual Fire Insurance Co.,* 681.
7. Where note and mortgage were deposited with mutual insurance company as unearned premium reserve, maker is entitled to their discharge by company's receiver after all unearned premiums have been paid in full (3 Comp. Laws 1929, §§ 12662, 12664). *Id.*

See APPEAL AND ERROR (16); EVIDENCE (12); FRAUD (3); MORTGAGES (30); RECEIVERS (8, 9); TRIAL (7); WITNESSES (2).

INTENT—See CONSTITUTIONAL LAW (8); CRIMINAL LAW (2, 6, 8); DEDICATION (2–4); EXCHANGE OF PROPERTY (1); JUDGMENT (8); MORTGAGES (2); STATUTES (1); VENDOR AND PURCHASER (12); WILLS (2, 3).

INTEREST—See COURTS (5); MORTGAGES (11, 12); TAXATION (25).

INTEREST OF WITNESS—See WITNESSES (3).

INTERSECTION OF HIGHWAYS—See MOTOR VEHICLES (5, 6).

INTERVENTION—See MORTGAGES (43); RECEIVERS (14).

INVESTMENT—See CONTRACTS (1); ESTOPPEL (2); LICENSES (2); TRUSTS (7).

IRREGULARITY—See CHATTEL MORTGAGES (8); JUDGMENT (11).

IRRELEVANT TRANSACTIONS—See CRIMINAL LAW (13).

IRREPARABLE DAMAGES—See DAMAGES (2).

ISSUES—See CRIMINAL LAW (3); DISCOVERY (2); JUDGMENT (9); MASTER AND SERVANT (20); MOTOR VEHICLES (10); NEGLIGENCE (1); TRIAL (1, 3).

JOINDER OF CAUSES—See APPEAL AND ERROR (12).

JOINDER OF COUNTS—See CRIMINAL LAW (9); INDICTMENT AND INFORMATION (2).

JOINDER OF PARTIES—See APPEAL AND ERROR (18); PARTIES.

JOINT ADVENTURES—See LICENSES (3); VENDOR AND PURCHASER (11).

JUDGES—See CRIMINAL LAW (26, 27); EMINENT DOMAIN (4).

JUDGMENT.

1. Fraud practiced in very matter of obtaining judgment is regarded as perpetrated upon court as well as upon injured party, and will warrant court of equity in enjoining judgment. *Oliver Iron Mining Co.* v. *Pneff*, 116.
2. It was fraud and imposition on court for employee, who had been awarded compensation for total disability, to take judgment against his employer under 2 Comp. Laws 1929, § 8452, for period of 13 months when he worked and suffered no disability. *Id.*
3. Generally, orders of probate court allowing annual accounts are final and conclusive as to all matters included therein, but they do not adjudicate what is not before court and not included in annual account, so that even allowance of final account may not amount to construction of will. *MacKenzie* v. *Union Guardian Trust Co.*, 564.
4. If, on conclusion of probate of estate, on allowance of administrator's final account, assignment of residue of estate is made in accordance with construction of will by probate court, then, court having to construe will in order to make proper order of distribution, such order, properly entered, is valid and binding as construction of will, if not appealed from. *Id.* 565.
5. To constitute former adjudication of questions, it must appear that such questions were litigated as matter of fact, were submitted to and decided by jury, and were not collateral inquiries, but were crucial questions in former controversy. *Id.*

JUDGMENT—Continued.

6. Adjudication in favor of claim will not be conclusive of minor issues on which right depends unless it appears not only that they were submitted to jury but were considered and passed upon by them. *Id.*

7. Allowance of annual or final account of executor or administrator is conclusive as to all matters which are before court and are adjudicated therein, but is not final or conclusive and does not constitute adjudication in matters which were not before court on accounting, and which were not considered or passed upon in allowing said account. *Id.*

8. Where there was nothing in annual accounts of executor which showed that it had converted trust estate provided for in will to be set up for testator's granddaughter, or that court construed or intended to construe said will so as to permit executor so to do, allowance of said accounts does not amount to former adjudication or construction of will. *Id.*

9. In suit to set aside default judgment in law case, plaintiff's claim that defendants' attorney by fraud and misrepresentation prevented plaintiffs from entering their appearance, and also that no service was had on one of plaintiffs, *held*, to present issues of fact, with burden of proof on plaintiffs. *Karasek* v. *Peoples State Trust & Savings Bank*, 636.

10. Finding of trial court that service was had on both plaintiffs, and that claimed fraud and misrepresentation, preventing them from entering their appearance and resulting in default judgment, had not been established by sufficient proof, *held*, justified by record. *Id.*

11. Discrepancy between wording of declaration as filed and that of copy served on one of defendants, arising from erroneous reference in original declaration to one defendant as wife instead of mother of other defendant, was immaterial irregularity or defect which does not invalidate default judgment (3 Comp. Laws 1929, § 14148). *Id.*

See APPEAL AND ERROR (2, 15, 20); ATTORNEY AND CLIENT (3, 4, 9, 10); BANKRUPTCY; CARRIERS; EMINENT DOMAIN (1); ESTOPPEL (1); EVIDENCE (9); EXECUTORS AND ADMINISTRATORS (5); LANDLORD AND TENANT (3, 5); MASTER AND SERVANT (1); MORTGAGES (35); VENDOR AND PURCHASER (6).

JUDGMENT CREDITOR'S SUIT—See FRAUDULENT CONVEYANCES (4); RECEIVERS (15–17).

JUDICIAL NOTICE—See EVIDENCE (1, 11).

JUDICIAL POWER—See CONSTITUTIONAL LAW (1); MORTGAGES (36); PLEADING; TAXATION (3).

JUDICIAL SALES—See MORTGAGES (30).

JURISDICTION—See APPEAL AND ERROR (12); CIRCUIT COURT COMMISSIONERS; COURTS (3, 5); EQUITY (1, 3); MORTGAGES (29); RECEIVERS (13–15, 18); VENDOR AND PURCHASER (4, 6).

JURY—See CRIMINAL LAW (1, 11, 15, 28); EMINENT DOMAIN (4); JUDGMENT (5, 6); MASTER AND SERVANT (20); TRIAL (7).

JUSTICE—See PLEADING.

JUSTICES OF PEACE.

1. Proper bond is essential to appeal from justice's court (3 Comp. Laws 1929, § 16225). *Copeman* v. *Takken*, 674.
2. Where, in action in common pleas court against husband and wife, judgment was rendered against him and in favor of wife, from which judgment he alone appealed, and wife was not named as appellee in appeal bond, which ran to plaintiffs only, she was not party in circuit court, and therefore judgment against her was unauthorized (3 Comp. Laws 1929, § 16225). *Id.*

See CONSTITUTIONAL LAW (1).

JUSTIFIABLE CAUSE—See MASTER AND SERVANT (4, 5).

LABOR CLAIM—See APPEAL AND ERROR (10); BONDS (3–5).

LADDER—See MASTER AND SERVANT (18, 20).

LAND CONTRACTS—See BANKS AND BANKING (1); CORPORATIONS (18, 20); COVENANTS (3, 4); DEEDS (1, 2); LANDLORD AND TENANT (4); REFORMATION OF INSTRUMENTS; TRUSTS (5); VENDOR AND PURCHASER.

LANDLORD AND TENANT.

1. Where rent, under lease, is payable first day of each month, in advance, lessee has whole of first day of each month in which to make payment. *Erb-Kidder Co.* v. *Levy*, 62.
2. Where lessee was in default in payment of rent, restitution awarded lessor in summary proceeding ended tenancy but did not preclude lessor's recovering damages subsequent to such lawful eviction. *Davis* v. *Louis G. Palmer Co.*, 76.
3. Where lease required lessee to deposit with lessor certain sum which was to be retained by lessor as damages in case of lessee's failure to perform, damages occasioned by lessee's breach was not waived nor right to retain said sum as stipulated damages precluded by lessor's bringing summary proceedings and obtaining judgment of restitution. *Id.*
4. Where agreement for assignment of vendee's interest in land contract was executory, and in meantime purchaser agreed to pay monthly rental for use and occupation of premises, relation of landlord and tenant existed. *Kaye* v. *Gerasimos*, 420.
5. In summary proceeding by landlord after notice to quit or pay rent, judgment of restitution was properly rendered, where tenant refused to pay agreed rent. *Id.*

See MINES AND MINERALS; MORTGAGES (6, 7); TAXATION (7, 8).

LAST CLEAR CHANCE—See APPEAL AND ERROR (4).

LATERAL SUPPORT—See EVIDENCE (4).

LAW ACTION—See CONTEMPT; CONVERSION (1); VENDOR AND PURCHASER (5, 7).

LAW OF FOREIGN STATE—See COURTS (6).

LAW OF ROAD—See MOTOR VEHICLES (2).

LAW SIDE—See GARNISHMENT (6).

LEAVE TO APPEAL—See APPEAL AND ERROR (8).

LEAVE TO FILE CROSS-BILL—See EQUITY (7, 8).

LEGATEE—See EQUITY (2).

LEGISLATURE—See CIRCUIT COURT COMMISSIONERS; CONSTITUTIONAL LAW (1); CORPORATIONS (21); TAXATION (3–5).

LICENSEES—See RAILROADS (2).

LICENSES.

1. Corporation operating many retail stores which applied for registration as dealer in malt products and as distributor thereof under provisions of Act No. 100, Pub. Acts 1931, is required to pay single registration fee only in each instance as retail dealer and as distributor. *Kroger Grocery & Baking Co.* v. *Secretary of State,* 68.
2. Agreement to pay plaintiff certain sum of money for his services in securing investment of additional money in defendant corporation, *held,* not in violation of blue sky law; plaintiff not being engaged in sale of securities within meaning of said statute, nor did he sell defendant's stock or securities, but he procured investment in property of defendant. *Regan* v. *Consolidated Bakeries, Inc.,* 249.
3. It is not violation of blue sky law for several persons to join and furnish, proportionately, parts of purchase price of real property to be held for their benefit by trustee, but sales of units in such syndicate, after organization, may not be made without compliance with said law. *Wardowski* v. *Guardian Trust Co. of Detroit,* 424.

LIENS.

Lien created by express or implied contract is enforceable. *Othoudt* v. *Addison Fur Corp.,* 482.

See ANIMALS; ATTORNEY AND CLIENT (3, 4); ESTOPPEL (3); RECEIVERS (6, 7, 11, 16); TAXATION (12); TRUSTS (4).

LIGHTING STEPS—See NEGLIGENCE (3, 6).

LIMITATION OF ACTIONS.

1. Action for fraud in exchange of real estate is one for recovery of damages as result of fraudulent representations, and does not constitute one for injuries to person or property within meaning of 3 Comp. Laws 1929, § 13976, subd. 2, requiring action to be brought within three years. *Sweet* v. *Shreve,* 432.

LIMITATION OF ACTIONS—Continued.

2. Where damages claimed are not for injuries to specific property, subdivision 2 of 3 Comp. Laws 1929, § 13976, requiring action to be brought within three years, is not applicable, but action may be brought within six years under general provisions of said section. *Id.*

3. 1 Comp. Laws 1929, §§ 4231, 4232, requiring vehicles to turn to right on meeting, and limiting to one year time for commencement of action for recovery of damages arising out of automobile collision, where one vehicle was on wrong side of road, was impliedly repealed by uniform motor vehicle act (Act No. 318, Pub. Acts 1927 [1 Comp. Laws 1929, § 4693 *et seq.*]), and therefore general statute of limitations (3 Comp. Laws 1929, § 13976), providing limitation of three years, is applicable to such causes of action. *Soule* v. *Grimshaw*, 504.

See ADVERSE POSSESSION (1, 2).

LIMITATION OF TAX RATE—See TAXATION (19, 20, 27).

LOANS—See CORPORATIONS (13); CRIMINAL LAW (13); MECHANICS' LIENS (2, 4); TRUSTS (4).

LOCAL QUESTION—See ACTION.

LOOKOUT—See RAILROADS (3).

MACHINERY—See MASTER AND SERVANT (19).

MALADMINISTRATION—See EXECUTORS AND ADMINISTRATORS (6).

MALPRACTICE—See DAMAGES (1); PHYSICIANS AND SURGEONS (1, 5–8); WITNESSES (5).

MALT PRODUCTS—See LICENSES (1).

MANDAMUS—See MUNICIPAL CORPORATIONS (3).

MARKET VALUE—See DAMAGES (2).

MASTER AND SERVANT.

1. When employee, who had been awarded compensation for total disability, went back to work, employer should have asked department of labor and industry to stop compensation, but failure to do so offers no excuse to employee to perpetrate fraud and imposition on court by taking judgment under 2 Comp. Laws 1929, § 8452, for period of 13 months when he worked and suffered no disability. *Oliver Iron Mining Co.* v. *Pneff*, 117.

2. Under workmen's compensation act (2 Comp. Laws 1929, § 8451), Supreme Court must adopt findings of fact of department of labor and industry as conclusive, unless there is no competent evidence to sustain such findings; but court may determine whether there is any competent evidence to support such findings, or whether inferences drawn are properly deducible from testimony. *Bjorkstrand* v. *Klagstad*, 186.

MASTER AND SERVANT—Continued.

3. Questions of dependency, total or partial, are determined by department in accordance with facts at time of injury (2 Comp. Laws 1929, § 8422). *Id.*
4. Words "justifiable cause," as used in workmen's compensation act (2 Comp. Laws 1929, § 8422 [a]), providing that wife shall be conclusively presumed to be wholly dependent on husband from whom, at time of his death, department shall find that she was living apart for justifiable cause, have same meaning given them in separation and divorce cases. *Id.*
5. Finding of department that wife who continued to live in Finland after husband came to America was not living apart from him for "justifiable cause," and therefore was not entitled to conclusive presumption of total dependency, under 2 Comp. Laws 1929, § 8422 (a), *held*, proper. *Id.* 187.
6. In view of wife's testimony that she supported herself and children in Finland before and after her husband's death in America, finding of department that she was not totally dependent on husband at time of his death, as matter of fact, *held*, correct. *Id.*
7. In absence of showing as to amount of annual earnings of deceased, award for partial dependency may not be made (2 Comp. Laws 1929, § 8421). *Id.*
8. Finding of department of labor and industry that rash on plaintiff's body was caused by accident arising out of and in course of employment incidental to handling low-priced, dyed furs, *held*, supported by evidence. *Sherman* v. *Winkelman Bros. Apparel, Inc.*, 214.
9. Finding of fact by department of labor and industry, supported by evidence, is conclusive on Supreme Court. *Id.*
10. As between master and servant, master is liable for injury to servant only when latter acts within actual scope of his authority, but as between master and third persons injured by servant, master is liable when servant acts within apparent scope of his authority. *Anderson* v. *Schust Co.*, 236.
11. Servant may be within scope of his employment even though conducting master's business in manner contrary to his instructions. *Id.* 237.
12. For positive wrong by servant beyond scope of master's business intentionally or recklessly done, master may not be held liable; such acts being personal torts of servant for which master is not responsible. *Id.*
13. When wrong arises from excess of authority of servant in furthering master's interest, and master receives benefit, if any, of act, master is liable; liability not being dependent on limit of servant's authority. *Id.*
14. Where servant's act in driving automobile at time third person was injured was against master's instructions, master's assent may be implied only if servant was acting within apparent scope of his authority (1 Comp. Laws 1929, § 4648). *Id.*

MASTER AND SERVANT—Continued.

15. "Within scope of employment" or "within scope of authority of master" means while engaging in master's service or being about master's business. *Id.*

16. Where, at time third person was struck, automobile was being driven by servant for his own pleasure by consent of branch manager in violation of master's instructions that cars be used only in master's business, master is not liable; act of servant not being in service of master or furthering master's interest (1 Comp. Laws 1929, § 4648). *Id.*

17. In action for personal injuries by employee against his employers who had not elected to come under workmen's compensation act, defenses of "assumed risk" and "contributory negligence" were not open to them; but employee still has burden of showing negligence on part of employers. *Kelley* v. *Brown*, 356.

18. Small portable ladder or steps falls within "small tools or implements" exception to rule requiring master to inspect and provide his employees with safe tools, etc., with which to work. *Id.*

19. It is only machinery and appliances which are recognized as in their nature dangerous to employees using them, or working in proximity to them, as to which employer owes duty to employee of looking out for his safety. *Id.*

20. In action by employee against his employers for personal injuries alleged to have been caused by defective condition of small portable step-ladder furnished by them for plaintiff's use, evidence *held*, insufficient to present issue for jury on question of defendant's negligence. *Id.*

21. Where injured city fireman waived provisions of workmen's compensation act for purpose of securing pension under city ordinance, he was bound by other provisions of said act, and could not maintain common-law action against city, since he was not entitled to both remedies (2 Comp. Laws 1929, §§ 8410, 8413, 8436). *Bross* v. *City of Detroit*, 447.

22. Nor could he maintain said action on theory that, said injuries having been caused by collision with street car, and that, in operating street railway system as private enterprise, which is function distinct from that in which he was employed, city was "some person other than the employer," within meaning of 2 Comp. Laws 1929, § 8454. *Id.*

23. Claim that where city is operating street railway system as private enterprise, workmen's compensation act has no application, *held*, without merit. *Id.*

See APPEAL AND ERROR (2); ESTOPPEL (1); EVIDENCE (8); JUDGMENT (2); MOTOR VEHICLES (13, 14); WITNESSES (10).

MATERIALMEN—See BONDS (4); MECHANICS' LIENS (2); PRINCIPAL AND SURETY.

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—See WITNESSES (1, 2, 6, 7).

MEASURE OF DAMAGES—See DAMAGES (2).

MECHANICS' LIENS.

1. Agreement by contractors to accept note for any balance due, if property was deeded to them and they executed mortgage to raise money to complete building, *held,* not to remit them to said remedy, where no such mortgage was given or note tendered. *Heide* v. *Societatea Romana De Ajutor Si Cultura Banatiana,* 394.
2. Where contractors were active in helping to secure loan to complete building and furnished mortgagee with sworn statement of amounts due under contract to subcontractors, materialmen, and laborers, mortgagee, as to sums paid by it and traced to construction of building, is subrogated to contractors' rights under mechanics' lien law. *Id.*
3. Loss of otherwise priority may arise where contractors, in effect, by affirmative action, induce or procure mortgage to be given for their benefit and they participate in proceeds. *Id.*
4. Contractors, by acting in concert with owner in securing loan to complete building, are not estopped from having mortgage lien limited in matter of priority to sums employed in construction or actually paid to them under building contract. *Id.*
5. In suit to foreclose mechanic's lien, evidence *held,* to support finding of trial judge that statement of lien was not filed within statutory time (3 Comp. Laws 1929, § 13105). *Hibbard* v. *Finch,* 506.

See APPEAL AND ERROR (12).

MEDICAL TREATMENT—See ANIMALS (1); CRIMINAL LAW (19).

MEDICAL WITNESS—See APPEAL AND ERROR (3); PHYSICIANS AND SURGEONS (3, 4); WITNESSES (5).

MENTAL COMPETENCY—See CONTRACTS (3–5).

MENTAL SUFFERING—See DAMAGES (3).

MERGER—See DEEDS (1, 2).

METES AND BOUNDS—See PARTITION (2, 3).

MIDDLEMAN—See ATTORNEY AND CLIENT (1–4).

MILITARY PURPOSES—See TAXATION (6–8).

MINES AND MINERALS.

1. Lessors claiming forfeiture of oil and gas lease may proceed under either section of statute (3 Comp. Laws 1929, §§ 13506, 13507) providing different methods for terminating lease, without making demand for release. *Galer* v. *McAfee,* 82.
2. In suit for cancellation of oil and gas lease, where lessee in default did not tender release of lease until after hearing of case, trial court properly awarded lessors $100 damages as provided for in statute (3 Comp. Laws 1929, § 13507). *Id.*

See EVIDENCE (4, 5); PARTITION (2, 3).

MINORITY STOCKHOLDERS—See CORPORATIONS (11, 12, 14–17).

MISAPPLICATION OF BANK FUNDS—See CRIMINAL LAW (4, 5); INDICTMENT AND INFORMATION (2).

MISCARRIAGE OF JUSTICE—See CRIMINAL LAW (14, 28).

MISDEMEANOR—See CRIMINAL LAW (6, 7, 21, 23, 24, 25).

MISJOINDER—See PARTIES (2).

MISTAKE—See CORPORATIONS (14, 18); ELECTION OF REMEDY; INSURANCE (3); MORTGAGES (29, 39, 40); REFORMATION OF INSTRUMENTS; TRUSTS (5, 9); VENDOR AND PURCHASER (16).

MODIFICATION OF DECREE—See DIVORCE (1, 5).

MONEYS ADVANCED—See BANKS AND BANKING (2).

MONOXIDE GAS—See NUISANCE.

MOOT QUESTION—See GARNISHMENT (5).

MORTGAGES.

1. Under mortgage covering real estate and certain personal property used in ice business, and providing that chattels conveyed or intended to be conveyed were to be regarded as fixtures, *held*, that ammonia compressors, aerating equipment, boilers, motors and refrigerating units, freezing tanks, air compressors, condensers, engines, oil tanks and pumps, platform scales, scorching machines, and other machinery for manufacturing ice are fixtures, as also are spare motors, parts, machinery, etc., which constitute replacements specially adapted to full enjoyment of realty. *Detroit Trust Co.* v. *Detroit City Service Co.*, 14.
2. In distinguishing between fixture and chattel, when neither is annexed to freehold, use, nature, and intention of parties must be considered. *Id.*
3. As between ice company and its general creditors, horses, wagons, trucks, automobiles, and other movable property of such character that they could be moved from place to place without impairing their value or that of realty from which they are removed, and which are not covered as "fixtures" under mortgage, are to be regarded as chattels. *Id.*
4. Where trust mortgage, after describing mortgaged property, recited, "together with all * * * tolls, rents, revenues, issues, income, product, and profits thereof," and in subsequent article provided for surrender to trustee, on default, of possession of all mortgaged property, etc., and stated that it should be lawful for trustee to receive rents, income, issues, and profits thereof, after notice given as required by statute, sufficient assignment of rents and profits as additional security in event of default was accomplished, although specific language of statute was not used (3 Comp. Laws 1929, §§ 13498, 13499). *Id.* 15.

MORTGAGES—Continued.

5. Where trustee under trust mortgage filed proper notice of default and assignment of rents with register of deeds and served copy thereof on receivers for mortgagor, said service was sufficient to entitle trustee to rents and profits under 3 Comp. Laws 1929, § 13499. *Id.* 16.

6. It was proper for tenants of mortgaged property, who had not received notice to pay rent to trustee under trust mortgage, to continue paying rent to receivers (3 Comp. Laws 1929, § 13499). *Id.*

7. Where trustee under trust mortgage had served notice on receivers of assignment of rents under 3 Comp. Laws 1929, §§ 13498, 13499, it was entitled to all rents from property leased to others and paid to receivers, although notice had not been served on tenants, since service on them is required for their protection only. *Id.*

8. Trustee under trust mortgage was not entitled to all profits made by receivers of mortgagor through operation of mortgaged premises and business, although it was entitled to all "rents and profits" after notice to them of assignment of rents under 3 Comp. Laws 1929, §§ 13498, 13499. *Id.*

9. Under common law, word "profits," when used in connection with rents, meant usufruct of land. *Id.*

10. In view of strict policy followed in this State that mortgagee may not divest mortgagor of possession until after title shall become absolute upon foreclosure of mortgage, statute giving mortgagee under trust mortgage additional remedy or security, in nature of assignment of rents, not allowed under common law, must be strictly construed. *Id.*

11. Where, in addition to proceeds from sale of mortgaged assets, receivers accumulated large sum of money through operation of business, which will be available to all creditors, trustee under first mortgage may prove its claim with interest up to date for filing claims by general creditors, and may participate in dividends paid to unsecured creditors, without deduction on account of its security. *Id.*

12. Should there be any surplus, after payment of full amount due on first mortgage, plus interest up to date of payment, such surplus is to be pro rated among general creditors, exclusive of those claiming under first mortgage. *Id.* 17.

13. Corporation operating ice manufacturing plant and supplying ice to large community is not *quasi*-public utility, and therefore in foreclosure of mortgage on its real property and fixtures, strict foreclosure should not have been ordered by court. *Id.*

14. Right to redeem from mortgage foreclosure sale is statutory one that should be strictly protected except under unusual circumstances, and may neither be enlarged or abridged by courts. *Id.*

15. Use of first mortgage bonds toward payment for mortgaged property on foreclosure sale, as provided in mortgage, was

MORTGAGES—Continued.

properly permitted, where sufficient cash was deposited to make necessary cash payments for expenses of foreclosure and *pro rata* distribution to nondepositors. *Id.*

16. Expenses of foreclosure sale should be met out of proceeds of sale, and expense of audit should also be added to amount due under mortgage, while other expenses must be borne by receivers. *Id.*

17. Expense of accounting, which was provided for in mortgage, should have been added to amount due thereunder, where it did not make transaction usurious. *Id.*

18. 3 Comp. Laws 1929, § 14627, contemplates sales of real estate, on foreclosure, in separate parcels when no intervening causes change nature of parcels, or when they are distinct and independent in description, occupancy, and use. *Id.* 18.

19. Where several plants of ice company were used as unit in serving large community, they were properly sold as unit, in mortgage foreclosure sale, especially where mortgaged good will went with mortgaged property, and to have sold separately would have disrupted business. *Id.*

20. Where it appears to be for best interest of all parties to sell equity of redemption, on mortgage foreclosure, trial court is authorized to make such sale, provided upset price, as determined by court after taking into account profits and expenses under receivership for redemption period, is bid. *Id.*

21. If equity of redemption is sold, all other unmortgaged property should be offered for sale immediately, but if equity of redemption is not sold, then unmortgaged property should be sold at expiration of redemption period. *Id.*

22. Bondholders may tender bonds toward payment of amount bid for mortgaged property, equity of redemption, or unmortgaged property, but, as to latter two, they may bid only to extent that amount of bonds held by them shall bear to entire proved indebtedness of mortgagor; and they may also apply on such bid such sums as would be paid them as dividends on their claims from moneys in hands of receivers and to be received from sale of equity of redemption and unmortgaged property. *Id.* 19.

23. In bidding on mortgaged property bondholders must pay sufficient in cash to pay expenses of sale and to insure that bondholders not bidding shall receive in cash *pro rata* share of amount bid. *Id.*

24. In determining amount of dividends to be paid fair sum should be estimated and deducted for fees of receiver, attorneys, and for all other lawful charges, and may be approximated, subject to final determination later. *Id.*

25. Orders may be made so that bondholders, in making their bid, may have benefit of their proportion in large amount of cash to be distributed to creditors. *Id.*

26. Provision should be made to insure that such privileges as are conceded to bondholders will interfere in no way with

MORTGAGES—Continued.

equitable cash distribution of dividends to which other creditors and claimants are entitled. *Id.*

27. Creditors other than first mortgage bondholders, acting singly or in groups, may also, on application to court, use such dividends to which they may be entitled in payment for any property offered for sale, on terms similar to those allowed first mortgage bondholders. *Id.*

28. Where trust mortgage, purporting to assign rents, issues, and profits as additional security, was executed prior to effective date of 3 Comp. Laws 1929, §§ 13498, 13499, court had no power to appoint receiver pending foreclosure of mortgage, and, therefore, although mortgagors consented to such appointment, that did not authorize court to order receiver to pay taxes out of rents and profits collected without consent of mortgagors. *Straus* v. *Barbee*, 113.

29. Where mortgagee, without knowing that buildings on mortgaged property had burned, thus reducing its value much below amount of mortgage, at foreclosure sale bid amount of mortgage, court of equity has power to grant relief from said mistake by setting aside foreclosure sale. *Federal Land Bank of St. Paul* v. *Edwards*, 180.

30. In suit by mortgagee to set aside foreclosure sale, on ground that it bid in property for amount of mortgage in ignorance of fact that buildings had previously burned, insurance company may not invoke doctrine of *caveat emptor*, since said doctrine, with reference to judicial sales, relates only to matters of title ascertainable by inspection of public records. *Id.*

31. Mortgage made and accepted with full knowledge of prior unrecorded mortgage is subordinate thereto, although it be first recorded. *Matosh* v. *Metropolitan Trust Co.*, 201.

32. Assignees of mortgage are bound by such notice as record afforded of another mortgage of prior date but subsequently recorded, of which their assignor had actual knowledge. *Id.* 202.

33. Assignment of rents and profits of mortgaged property as further security may be in writing at or after execution of trust mortgage (3 Comp. Laws 1929, §§ 13498, 13499). *Central Trust Co.* v. *Wolf*, 209.

34. Provision in trust mortgage, executed prior to effective date of 3 Comp. Laws 1929, §§ 13498, 13499, assigning rents and profits as further security, was validated by agreement extending time of payment and increasing amount of indebtedness, entered into subsequent to effective date of said statute, where by reference said provision was adopted and incorporated, and therefore, on default, receiver was properly appointed. *Id.*

35. Grantors, who were compelled to pay mortgage on property conveyed by them, may not recover personal judgment against grantees who took subject to said mortgage but did not assume it or agree to pay it. *Ranke* v. *Sloan*, 231.

MORTGAGES—Continued.

36. That statutory foreclosure by advertisement is not strictly proceeding in court does not render it immune from judicial supervision in proper cases, such as foreclosure of mortgage on property in possession of receiver. *In re Petition of Chaffee,* 291.

37. Prosecuting statutory foreclosure of mortgage without court's consent against property in immediate possession and use of receivers, when it was fully known to mortgagee that receivership was pending, was contempt of court, warranting court, in exercise of its discretion, in decreeing foreclosure sale and sheriff's deed void and of no effect. *Id.*

38. Where foreclosure of mortgage on property in receiver's possession was without court's consent, constituting contempt, sheriff's deed is not necessarily void rather than voidable, but question of sustaining rights of receiver and dignity of court is largely within discretion of court in which receivership is pending. *Id.*

39. General rule that right to redeem from foreclosure at law is legal right created by statute, and may neither be enlarged nor abridged by courts, is subject to exception that equity may relieve in cases of fraud, accident, or mistake. *Detroit Trust Co.* v. *George,* 362.

40. That condemnation proceedings are pending, in which large part of mortgaged property will be taken and consequent award of compensation made, *held,* insufficient to warrant equity court in granting extension of redemption period, in absence of fraud, accident, or mistake. *Id.* 363.

41. Where mortgagor in trust mortgage agreed to create sinking fund to retire bonds as they matured, and when bonds amounting to $6,000 matured and only $3,067.05 was in sinking fund, holder of $2,000 of said bonds was entitled to proportionate share thereof, although mortgage is now in default, and result will be to give preference to holders of said bonds. *Armada State Bank* v. *Union Guardian Trust Co.,* 487.

42. Where trust mortgage provided for payment of bonds out of sinking fund to be created for said purpose, in order of their maturing, purchasers of all of said bonds are chargeable with notice of preference thus provided for in mortgage. *Id.*

43. Where holders of bonds maturing are entitled to sinking fund created for payment thereof, holder of part of said bonds, who was not party to suit for distribution of said fund, is permitted, by order of Supreme Court, to intervene and receive proportionate share of said fund. *Id.*

See CHATTEL MORTGAGES (2, 3); CONSTITUTIONAL LAW (3); CONTRACTS (6); CONVERSION (2); CORPORATIONS (1); DIVORCE (3); FRAUD (5); INSURANCE (2, 6, 7); MECHANICS' LIENS (1–4); RECEIVERS (7, 8); VENDOR AND PURCHASER (14, 15).

MOTHER—See DEEDS (3).

MOTION TO QUASH—See CRIMINAL LAW (4).

MOTORS—See MORTGAGES (1).

MOTOR VEHICLES.

1. To render owner of motor vehicle liable for negligence of driver, vehicle must be driven with express or implied consent or knowledge of owner (1 Comp. Laws 1929, § 4648). *Anderson* v. *Schust Co.*, 236.
2. Under uniform motor vehicle act (Act No. 318, Pub. Acts 1927 [1 Comp. Laws 1929, § 4693 *et seq.*]), automobiles are required to keep to right, in driving on highway, except when passing another vehicle on overtaking it, and except when it is impracticable to travel on right side; and vehicles on meeting must pass to right. *Soule* v. *Grimshaw*, 504.
3. Where truck driver stopped on pavement in Indiana to render assistance to driver of disabled truck ahead of him, there was emergency within meaning of statute prohibiting parking on pavement except in case of emergency, and therefore he was not liable to driver of automobile colliding with rear of truck (3 Burns Ann. Indiana Statutes 1926, § 10150; 1 Comp. Laws [Mich.] 1929, §§ 4693, 4718). *Edison* v. *Keene*, 611.
4. Where, in action for death of automobile driver caused by collision in nighttime with rear of truck standing on pavement in Ohio, under law of that State or of this State decedent must be held guilty of contributory negligence as matter of law, in that he was driving at greater rate of speed than would permit him to stop within assured clear distance ahead, verdict should have been directed in favor of defendants (Throckmorton's 1930 Ann. Code Ohio, § 12603; 1 Comp. Laws 1929 [Mich.], § 4697). *Perkins* v. *Great Central Transport Corp.*, 616.
5. Notwithstanding automobile driver approaching intersection has right of way, he may not proceed heedlessly and without taking any precaution for safety of himself and others riding in his automobile, and if he does he is guilty of negligence as matter of law (1 Comp. Laws 1929, § 4712). *Smith* v. *Wassink*, 639.
6. Negligence of automobile driver in failing to look to left or to take proper precaution before proceeding to cross intersection was proximate cause of collision with another car approaching from left, and said negligence, being imputable to passenger, bars recovery for latter's injury received in said collision. *Id.* 640.
7. In action by pedestrian for injuries received when he was struck by defendant's automobile, trial court was in error in holding that plaintiff was free from contributory negligence, where there was evidence to sustain defendant's theory that plaintiff turned to his left and stepped immediately in front of automobile at point of accident. *Tio* v. *Molter*, 655.
8. If pedestrian stepped in front of automobile, it could not be held as matter of law that he was free from contributory negligence and that driver of automobile was guilty of negligence. *Id.*

MOTOR VEHICLES—Continued.

9. Pedestrian about to cross pavement is bound to use care that an ordinarily prudent person would under like circumstances, in regard to making observation as to approaching vehicles. *Id.*

10. In pedestrian's action against driver of automobile, evidence *held*, to present issues of fact on questions of driver's negligence and plaintiff's contributory negligence. *Id.* 656.

11. Title to motor vehicle passes from seller to purchaser when former delivers to latter assignment of certificate of title, and not before, and therefore purchaser who has not received assignment of certificate of title is not "owner," although he may be in possession of car (1 Comp. Laws 1929, § 4660). *Kimber* v. *Eding*, 670.

12. 1 Comp. Laws 1929, § 4648, conferring right of action against "owner" of motor vehicle, is not in conflict with section 4660, which prescribes how and when purchaser becomes "owner." *Id.*

13. Dealer who took in second-hand automobile as part of purchase price of new one, but who had not received assignment of certificate of title at time it was involved in accident while being driven by employee, was not "owner," and therefore was not liable under statute for driver's negligence (1 Comp. Laws 1929, §§ 4648, 4660). *Id.*

14. Court's holding that there was insufficient evidence to take to jury issue as to whether automobile dealer was negligent in allowing his employee to drive automobile, knowing that he was reckless driver, *held*, correct. *Id.*

See APPEAL AND ERROR (16); CRIMINAL LAW (15, 18–21); EVIDENCE (12); GUARANTY; LIMITATION OF ACTIONS (3); MASTER AND SERVANT (14, 16); MORTGAGES (3); NEGLIGENCE (1, 9); RAILROADS (5–7); TRIAL (6–8).

MULTIPLICITY OF SUITS—See EQUITY (5).

MUNICIPAL CORPORATIONS.

1. While council of city of Detroit may indirectly control number of officers employed by limiting appropriation, right of appointment and removal, increase and decrease of forces, under city charter, remains in hands of police commissioner and board of fire commissioners, respectively. *Slavin* v. *City of Detroit*, 173.

2. That appointments to fire department force of city of Detroit are regulated by civil service provisions in city charter, *held*, not to affect dismissals made for reasons of economy. *Id.*

3. Members of police and fire departments of city of Detroit, who were relieved of duty by order of police commissioner and board of fire commissioners, respectively, in good faith and in interest of economy, are not entitled to writ of mandamus directing their reinstatement, on ground that city council had sole right to order their dismissal. *Id.*

MUNICIPAL CORPORATIONS—Continued.

4. Use of street for 10 years or more constitutes public highway (1 Comp. Laws 1929, § 3936), which abutting property owners or public authorities may not close, except in manner authorized by law. *Chene* v. *City of Detroit*, 254.
5. Whether city was justified in closing part of street is not subject to review in suit to compel removal of obstruction from street, where it appears that said action was taken under city charter and in accordance with law. *Id.*
6. Comparatively short section of long thoroughfare should not be held to be boulevard when major portion thereof confessedly is not boulevard, unless persuasive circumstances exist which amply justify such holding, and render contrary holding inequitable. *Gallagher* v. *City of Detroit*, 298.
7. Evidence showing that thoroughfare in subdivision in city of Detroit was designated boulevard on plat, that adjoining owner donated substantial amount of land on condition that it should be boulevard, that it was so developed by planting trees and shrubbery in strip in middle, and that it was known as boulevard and so designated on street signs, *held*, sufficient to establish that it is boulevard, expense of paving which is charge against city at large rather than against adjoining property owners, under city charter. *Id.*
8. City may not render adjacent property liable to assessment for street improvements by merely changing designation of boulevards to streets, but each case must be determined from its own facts. *Id.*

See ACTION; CONSTITUTIONAL LAW (9, 10); DEDICATION (2, 5); EMINENT DOMAIN (2, 3); MASTER AND SERVANT (21–23); NEGLIGENCE (9); TAXATION (4, 5, 24, 26).

MUTUAL INSURANCE COMPANY—See INSURANCE (6).

MUTUAL MISTAKE—See REFORMATION OF INSTRUMENTS.

NECESSARY PARTIES—See PARTIES (1, 3).

NECESSITY—See EMINENT DOMAIN (3).

NEEDLE—See PHYSICIANS AND SURGEONS (6, 8).

NEGATIVE TESTIMONY—See TRIAL (3).

NEGLIGENCE.

1. Where automobile driver, in action against railroad company for personal injuries received when her stalled automobile was struck by train, planted her case on negligence of defendant without any negligence on her part, subsequent negligence of defendant was not an issue. *Kraft* v. *Pere Marquette Railway Co.*, 495.
2. Negligence may not be presumed, but must be affirmatively proved. *Fleegar* v. *Consumers Power Co.*, 538.

NEGLIGENCE—Continued.

3. If store building was properly lighted, proprietors were not required to give warning of steps connecting different floor levels, since steps themselves constituted effective warning. *Boyle* v. *Prekctes,* 630.

4. That merchandise was attractively displayed, distracting customer's attention, would not lessen degree of care she is required to exercise to guard against falling down steps connecting different floor levels. *Id.*

5. In action for injuries received by customer in falling down steps connecting different floor levels in defendants' store, allegation of declaration that said steps constituted "concealed danger," *held,* not sustained by testimony. *Id.*

6. Holding of trial court that steps connecting different floor levels, down which customer fell, were adequately lighted, *held,* justified by record. *Id.*

7. Falling down stairs, where mishap is not imputed to unknown or concealed defects, belongs to that class of ordinary accidents which ought to be imputed to carelessness or misfortune of sufferer. *Id.*

8. That store building has different floor levels connected by steps does not constitute negligent construction, unless by its character, location, or surrounding conditions, reasonably prudent person would not be likely to expect steps or to see them. *Id.*

9. Where municipal authorities permit coasting on public street, but do not close it to vehicular traffic, those using it are bound to exercise reasonable care commensurate with known use thereof. *Van Dyke* v. *Knoll,* 645.

See APPEAL AND ERROR (11); BILLS AND NOTES (3); DAMAGES (2); EVIDENCE (4, 5, 12); EXECUTORS AND ADMINISTRATORS (6); GAS (1, 3–6); MASTER AND SERVANT (17–20); MOTOR VEHICLES (1, 3–10, 13, 14); PHYSICIANS AND SURGEONS (1, 5, 7, 8); RAILROADS (2–7); TRIAL (4).

NEGOTIABLE INSTRUMENTS—See BANKS AND BANKING (1); BILLS AND NOTES (1); CHATTEL MORTGAGES (4).

NEW BONDS TO PAY EXISTING DEBT—See TAXATION (22).

NEW CONTRACT—See VENDOR AND PURCHASER (12).

NEW TRIAL.

1. Denial of motion for partial new trial, based on affidavits, was not abuse of discretion, where no sufficient showing was made as to why affiants were not called as witnesses on trial. *Regan* v. *Consolidated Bakeries, Inc.,* 250.

2. Where issue was close but simple, and verdict was evidently rendered upon comprehension of facts, motion for new trial, on ground that verdict was against great weight of evidence, was properly denied, although evidence was quite contradictory. *Ward* v. *Village of Birmingham,* 466.

See INDICTMENT AND INFORMATION (1).

NOISE—See NUISANCE.

NONJOINDER—See PARTIES (2, 3).

NOTICE—See APPEAL AND ERROR (1); ATTORNEY AND CLIENT (2); BANKS AND BANKING (6); BILLS AND NOTES (7–9); CHATTEL MORTGAGES (4–8); CORPORATIONS (19); DISCOVERY (2, 3); FRAUDULENT CONVEYANCES (1, 2); GUARANTY (2); LANDLORD AND TENANT (5); MORTGAGES (4–7, 30–32, 42); TAXATION (10, 12); VENDOR AND PURCHASER (3).

NOXIOUS ODORS—See NUISANCE.

NUISANCE.

In suit by property owners to enjoin alleged nuisance resulting from use of steam hammers in automobile factory, causing noise and vibration, and from smoke, monoxide gas, and noxious odors, injunction was properly denied, where to have granted it would have been highly inequitable, resulting in far greater injury to defendant than that of which plaintiffs complain. *Roy* v. *Chevrolet Motor Car Co.*, 663.

OBSTRUCTION IN STREET—See DEDICATION (4); MUNICIPAL CORPORATIONS (5).

OCCASIONAL ENTRY—See ADVERSE POSSESSION (5).

OCCUPATION—See ADVERSE POSSESSION (1, 2, 5).

OIL AND GAS LAND—See PARTITION (2, 3).

OIL AND GAS LEASE—See MINES AND MINERALS.

OIL STATION—See DIVORCE (3).

OIL TANKS—See MORTGAGES (1).

ONE DEFENDANT MAY APPEAL—See APPEAL AND ERROR (18).

OPERATING EXPENSES—See RECEIVERS (8).

OPINION—See APPEAL AND ERROR (3); COURTS (6); EXCHANGE OF PROPERTY (1); PHYSICIANS AND SURGEONS (4).

OPPORTUNITY FOR FRAUD—See CONTRACTS (5).

OPPOSITE PARTY—See EVIDENCE (7, 8); WITNESSES (6, 7, 10).

ORAL TESTIMONY—See EVIDENCE (6).

ORDER OF PROOF—See TRIAL (5).

ORDINARY PRUDENCE—See RAILROADS (6).

OTHER ACTS—See CRIMINAL LAW (8).

OUSTER—See QUO WARRANTO.

OVERDRAFTS—See CRIMINAL LAW (6–8).

OWNER—See MOTOR VEHICLES (1, 11–13).

PAIN AND SUFFERING—See DAMAGES (1, 3, 4).

PARENT AND CHILD—See DIVORCE; WITNESSES (2, 7).

PARKING ON PAVEMENT—See MOTOR VEHICLES (3, 4).

PAROL EVIDENCE—See EVIDENCE (6, 9).

PARTIAL DEPENDENCY—See MASTER AND SERVANT (7).

PARTIAL PAYMENT—See PAYMENT (1, 2, 4).

PARTICIPATION IN DIVIDENDS—See MORTGAGES (11).

PARTIES.

1. Who are necessary parties in particular suit may depend upon allegations of bill of complaint and relief sought, and in some cases duty to join other parties may arise from relief sought by defendant. *MacKenzie* v. *Union Guardian Trust Co.*, 564.
2. Statute providing that no action at law or in equity shall be defeated by nonjoinder or misjoinder of parties is remedial in character and is to be liberally construed (3 Comp. Laws 1929, § 14021). *Id.*
3. Bill of complaint may not be dismissed because of nonjoinder of necessary parties; if other parties are necessary they may and should be joined (3 Comp. Laws 1929, § 14021). *Id.*

See ACTION; EQUITY (1); FRAUD (3); JUSTICES OF PEACE (2); VENDOR AND PURCHASER (7).

PARTITION.

1. In suit for partition of 40 acres of land by parties claiming to own undivided one-third interest, record *held*, to sustain finding of trial court that plaintiffs were good-faith purchasers of said interest (3 Comp. Laws 1929, § 14995 *et seq.*). *Fortney* v. *Tope*, 593.
2. Where it is known that land bears oil and gas, following similar rule applicable to solid minerals, it is generally held that there can be no partition of land by metes and bounds, but that partition must be made by sale and division of proceeds. *Id.*
3. Where land lies in oil and gas field, and, although there are no wells on it, there are producing wells within 330 to 500 feet of it, and therefore partition by metes and bounds would be liable to result in great injustice, partition is denied, and, instead, land is ordered sold and proceeds divided (3 Comp. Laws 1929, § 14996). *Id.*

PATH ACROSS TRACKS—See RAILROADS (1–3).

PAVING EXPENSES—See MUNICIPAL CORPORATIONS (7).

PAYEE—See BILLS AND NOTES (6).

PAYMENT.

1. Payment, whether in whole or in part, is affirmative defense, which must be pleaded to be available. *Smith* v. *Smith*, 60.
2. Defendant pleading partial payment as defense has burden of proving it. *Id.*
3. Authentic receipt is only *prima facie* evidence of payment, and unauthenticated receipt is no evidence at all. *Id.*
4. Where defendant offered in evidence receipt of partial payment found among her husband's papers, but of which she had no personal knowledge, and plaintiff denied giving receipt or receiving such payment, evidence *held*, insufficient to establish that said alleged payment was made. *Id.*

See BILLS AND NOTES (4); CONVERSION (3); DESCENT AND DISTRIBUTION (2); ESTOPPEL (3); GARNISHMENT (1); GUARANTY; LANDLORD AND TENANT (1, 2); MORTGAGES (6, 12, 15, 22, 27, 34); VENDOR AND PURCHASER (13).

PAYMENT OF TAXES—See ADVERSE POSSESSION (6); MORTGAGES (28); TAXATION (14, 18, 19).

PEDESTRIANS—See CRIMINAL LAW (19, 20); MOTOR VEHICLES (7–10); RAILROADS (1, 2, 4); TRIAL (4).

PENALTY—See CRIMINAL LAW (22, 24, 25).

PENSIONS—See MASTER AND SERVANT (21).

PERFORMANCE—See VENDOR AND PURCHASER (2, 8).

PERMANENT DAMAGES—See DAMAGES (2).

PERSONAL COVENANT—See COVENANTS (1).

PERSONAL INJURIES—See APPEAL AND ERROR (9); ATTORNEY AND CLIENT (3, 4); CHAMPERTY AND MAINTENANCE; EVIDENCE (12); GAS (6); LIMITATION OF ACTIONS; MASTER AND SERVANT (17, 20–22); MOTOR VEHICLES (6, 7); NEGLIGENCE (1, 5); RAILROADS (7); TRIAL (4, 7, 8).

PERSONAL PROPERTY—See EXECUTORS AND ADMINISTRATORS (1–3); MORTGAGES (1, 3); TAXATION (6, 16–18).

PERSONAL REPRESENTATIVE—See TAXATION (10).

PHYSICIANS AND SURGEONS.

1. In action for malpractice in setting and treating plaintiff's broken leg, whether defendant was guilty of negligence *held*, question of fact, under conflicting evidence. *DeHaan* v. *Winter*, 192.
2. In said action, verdict for plaintiff *held*, not against weight of evidence or excessive. *Id.*
3. If medical witness refers to text-book as his authority, then book referred to may be used to contradict him. *Id.*
4. Hearsay testimony of written or spoken opinions of other persons, whom jury have no means of examining as to their learn-

PHYSICIANS AND SURGEONS—Continued.

ing, honesty or source of special knowledge, may not be used to discredit testimony of medical witness, who has not referred to said persons or quoted them as authority. *Id.*

5. In action for malpractice, based on defendant's alleged negligence in failing to remove batting sponge after operation for removal of plaintiff's tonsils, evidence *held,* to present question for jury. *McKinstry* v. *Matthews,* 211.
6. In action for malpractice, based on surgeon's failure to remove needle after performing operation for appendicitis, it was not necessary for plaintiff to show by expert witnesses that it was not good practice to sew up incision without removing needle. *LeFaive* v. *Asselin,* 443.
7. In said action, finding of trial judge that defendant was negligent, *held,* not to rest on conjecture; especially in view of concession by defendant's attorney. *Id.*
8. In absence of some explanation by surgeon, his sewing up incision, after performing operation, without removing needle, was negligence. *Id.* 444.

See APPEAL AND ERROR (3); DAMAGES (1); WITNESSES (5).

PIPES—See GAS (3, 4).

PLATS—See ADVERSE POSSESSION (1); DEDICATION (5); MUNICIPAL CORPORATIONS (7).

PLEADING.

Under 3 Comp. Laws 1929, § 14144, court has power to grant plaintiffs leave to amend bill of complaint, even after hearing, in order to protect substantial rights of parties and secure ends of justice. *Galer* v. *McAfee,* 82.

See APPEAL AND ERROR (4, 20); CORPORATIONS (23); EQUITY (6, 7); FRAUD (2); JUDGMENT (11); NEGLIGENCE (1, 5); PARTIES (1, 3); PAYMENT (1); SEDUCTION (3); TRUSTS (8); VENDOR AND PURCHASER (6, 13).

POISON—See MASTER AND SERVANT (8).

POLICEMEN—See MUNICIPAL CORPORATIONS (1, 3).

PORTABLE STEP-LADDER—See MASTER AND SERVANT (18, 20).

POSSESSION—See ADVERSE POSSESSION (1, 2, 5); CHATTEL MORTGAGES (1); CONSTITUTIONAL LAW (3); DEEDS (2); MORTGAGES (10, 36–38); RECEIVERS (10); TAXATION (14).

POST—See ADVERSE POSSESSION (2).

PRACTICE OF LAW—See ATTORNEY AND CLIENT (7).

PREFERENCE—See FRAUDULENT CONVEYANCES (4); MORTGAGES (41–43).

PREFERRED CLAIM—See BANKS AND BANKING (1).

PREJUDICIAL ERROR—See APPEAL AND ERROR (16); CRIMINAL LAW (9, 14, 28); TRIAL (8).

PREMIUM RESERVE—See INSURANCE (7).

PREPONDERANCE OF EVIDENCE—See GAS (6).

PRESENT INTEREST—See DEEDS (7).

PRESENTMENT—See BILLS AND NOTES (2–5).

PRESERVATION OF PROPERTY—See RECEIVERS (6, 8, 9, 17).

PRESIDENT—See BILLS AND NOTES (7–9); CONTRACTS (1); CORPORATIONS (12); CRIMINAL LAW (14); TRUSTS (1, 2, 4).

PRESIDING CIRCUIT JUDGE—See CRIMINAL LAW (26).

PRESUMPTIONS—See DEEDS (4); DISMISSAL AND NONSUIT (4); EVIDENCE (10); MASTER AND SERVANT (5); NEGLIGENCE (2).

PREVIOUS SIMILAR OFFENSES—See CRIMINAL LAW (2).

PRIMA FACIE EVIDENCE—See PAYMENT (3).

PRINCIPAL AND AGENT—See ATTORNEY AND CLIENT (2); CORPORATIONS (26); WITNESSES (6).

PRINCIPAL AND SURETY.

In materialman's action against principal contractor and surety on its bond given to private owner as sole obligee, providing for performance and that principal "shall pay all persons who have contracts directly with" him for labor and materials, judgment of no cause of action against surety is affirmed, on appeal, by equally divided court. *R. C. Mahon Co.* v. *R. S. Knapp Co.*, 325.

See BONDS (1); DISMISSAL AND NONSUIT (3); GUARANTY (1).

PRIORITY—See MECHANICS' LIENS (3, 4); MORTGAGES (31, 32); RECEIVERS (6–8).

PRIVATE BANKS—See BANKS AND BANKING (6).

PRIVATE CORPORATIONS—See RECEIVERS (6).

PRIVITY OF CONTRACT—See VENDOR AND PURCHASER (10, 17).

PROBATE COURTS—See CONSTITUTIONAL LAW (1); COURTS (3); JUDGMENT (3, 4); VENDOR AND PURCHASER (13); WILLS (1).

PROCESS—See ATTORNEY AND CLIENT (10); CORPORATIONS (11, 26); GARNISHMENT (4); JUDGMENT (9).

PROFESSIONAL ETHICS—See ATTORNEY AND CLIENT (8).

PROFITS—See EXCHANGE OF PROPERTY (1); MORTGAGES (4, 5, 8, 9, 20, 28, 33, 34).

PROOFS OF LOSS—See INSURANCE (3).

PROPERTY—See CONSTITUTIONAL LAW (6).

PROSECUTING ATTORNEY—See CRIMINAL LAW (14, 27–29).

PROTESTED TAXES—See TAXATION (18).

PROXIMATE CAUSE—See APPEAL AND ERROR (9, 11); EVIDENCE (12); FRAUD (4); MOTOR VEHICLES (6); TRIAL (4).

PUBLICATION—See CONSTITUTIONAL LAW (4–6).

PUBLIC CONSTRUCTION CONTRACT—See BONDS (1).

PUBLIC CROSSING—See RAILROADS (1, 2).

PUBLICITY—See CRIMINAL LAW (17).

PUBLIC OFFICER—See HIGHWAYS AND STREETS (2); QUO WARRANTO.

PUBLIC POLICY—See CORPORATIONS (1, 22, 24).

PUBLIC RECORDS—See MORTGAGES (30).

PUMPS—See MORTGAGES (1).

QUANTUM MERUIT—See ATTORNEY AND CLIENT (6).

QUASI-PUBLIC UTILITY—See MORTGAGES (13).

QUESTION FOR JURY—See APPEAL AND ERROR (3–5); CRIMINAL LAW (3); FRAUD (2); JUDGMENT (5, 6); MASTER AND SERVANT (20); MOTOR VEHICLES (10, 14); PHYSICIANS AND SURGEONS (1, 5); TRIAL (4).

QUESTION OF FACT—See RAILROADS (3).

QUESTIONS REVIEWABLE—See ACTION; APPEAL AND ERROR (1, 12, 17, 19); EMINENT DOMAIN (3); MASTER AND SERVANT (2, 9).

QUO WARRANTO.

In *quo warranto* proceeding to test right to office of county road commissioner, officer appointed by board of supervisors to fill vacancy *held*, appointed for whole of unexpired term, and therefore is entitled to writ of ouster against another intruding into said office under appointment by board of supervisors for portion of same term (3 Comp. Laws 1929, § 15289). *Attorney General, ex rel. Lumley*, v. *Schulz*, 271.

RACING—See ANIMALS (1).

RAILROADS.

1. Where path across railroad tracks is not public crossing, statute requiring signals for public crossing is not applicable, although pedestrians in considerable numbers use it as though it were public crossing (2 Comp. Laws 1929, § 11181). *Burt* v. *Detroit, Grand Haven & Milwaukee Railway Co.*, 204.

RAILROADS—Continued.

2. Railroad company was bound to anticipate that persons might be on tracks at place commonly used as crossing by pedestrians, although it was not public crossing, and to operate its trains with reasonable care to avoid injury to such licensees. *Id.*

3. In action by boy struck by train while crossing railroad tracks, testimony that at time of accident, long line of cars, without lookout, was being pushed across path where many persons were accustomed to cross tracks, *held*, to present issue of fact as to railroad company's negligence in that regard. *Id.*

4. Pedestrian who started to cross spur track crossing street while engine was standing, and who did not again look to see whether it started before she was struck and injured, was guilty of contributory negligence as matter of law, precluding recovery, although railroad company was negligent in starting engine without giving any warning signal. *Karl* v. *New York Central Railroad Co.*, 457.

5. Where train crew had plain view of track for nearly half mile, and failed to stop train in time to avoid striking automobile stalled on track, court may assume negligence on part of railroad company. *Kraft* v. *Pere Marquette Railway Co.*, 494.

6. Where automobile stalled on railroad tracks, due care required vigilance on part of driver while trying to start motor; ordinary prudence requiring her to maintain such watch as would enable her to escape before being struck by approaching train. *Id.*

7. Driver of automobile, with clear view of railroad track for nearly half mile, who looked and saw no approaching train when her automobile first stalled on track, but who did not look again until train was so close that she was unable to escape, was guilty of contributory negligence as matter of law, precluding recovery for injuries so received. *Id.* 495.

See HIGHWAYS AND STREETS (3); NEGLIGENCE (1); TRIAL (3, 4, 6).

RANCH—See ANIMALS (3).

RAPE—See DISCOVERY (3).

RATIFICATION—See BILLS AND NOTES (9); CONTRACTS (1).

RATING BY BUREAU—See INSURANCE (5).

REAL ESTATE—See BANKRUPTCY.

REAR-END COLLISION—See MOTOR VEHICLES (3, 4).

REASONABLE ASSISTANCE AFTER ACCIDENT—See CRIMINAL LAW (15, 19).

REASONABLE TIME—See BILLS AND NOTES (2–5).

REASSESSING DAMAGES—See DAMAGES (1).

REBUTTAL—See TRIAL (5).

RECEIPT AS EVIDENCE—See PAYMENT (3, 4).

RECEIVERS.

1. Policy of courts has always been to bring receivership to close as quickly as can be accomplished without injury to creditors. *Detroit Trust Co.* v. *Detroit City Service Co.*, 18.

2. All parties of record, including bondholders, by participation in receivership proceeding for summer hotel property, are estopped to question validity of receivership, which was not auxiliary to any other action or proceeding. *Bailey* v. *Bailey*, 215.

3. Bondholders, having availed themselves of possible advantage of receivership for summer hotel property in effort to save loss by keeping hotel going concern and in attempting to effect sale thereof, may not be heard to say that property is not chargeable with receiver's expenses and administration costs. *Id.* 216.

4. Administration expenses of receivers are incurred on theory that they benefit parties ultimately entitled to property. *Id.*

5. Receiver's costs and expenses of administration in keeping summer hotel property going concern were properly allowed by court. *Id.*

6. Although, generally, receiver's certificates may not be given priority in case of purely private corporation, yet receiver of private corporation may be authorized to issue receiver's certificates which displace prior liens, where it is necessary to raise money to preserve property. *Id.*

7. Where court order authorizing receiver to borrow money and issue certificates therefor for purpose of saving loss by keeping summer hotel going concern was silent as to lien and priority over mortgage indebtedness, question of priority was left to be determined under law and facts, and in view of purpose for which money was raised and used. *Id.*

8. Payments by receiver of summer hotel property out of profits of operation for fire insurance, taxes, and satisfaction of title-retaining contracts on fixtures and equipment covered by mortgage on hotel property, *held*, properly given priority as expenses of preserving and protecting property. *Id.*

9. It was upon receiver to use his best judgment as to amount of fire insurance to be carried on summer hotel property which he was operating as going concern. *Id.*

10. When receiver has taken possession of property, such possession is that of court, and no proceeding may be taken which attacks or challenges such possession without court's permission. *In re Petition of Chaffee*, 291.

11. In this State, consent of court in which receivership proceeding is pending is necessary to valid proceeding to enforce lien against property in receiver's possession. *Id.*

RECEIVERS—Continued.

12. Receiverships are designed to accomplish in orderly manner under supervision of court maximum benefits to all concerned. *Id.*

13. Right of court of equity to appoint receiver *ex parte* is inherent part of its equity powers, and is entirely matter of judicial discretion. *Livingston* v. *Southern Surety Co. of New York,* 438.

14. By filing petition to intervene in proceedings for appointment of receiver, intervener submits himself to jurisdiction of court, and may not question validity of appointment; intervention being in subordination to and in recognition of propriety of main proceedings (3 Comp. Laws 1929, § 14019). *Id.*

15. Judgment creditor's bill filed in circuit court for appointment of receiver to take over assets of foreign corporation, alleging it to be insolvent and in hands of receiver in its home State, and that it had assets in State of Michigan, *held,* to confer jurisdiction on court and to present case for appointment of receiver. *Id.* 439.

16. Where, in response to filing of judgment creditor's bill, receiver was appointed to take over assets of insolvent foreign corporation in this State, lien was created in favor of judgment creditor on debtor's property in this State. *Id.*

17. From time receiver was appointed to take over assets of insolvent foreign corporation in this State, in response to filing of judgment creditor's bill, property of debtor in this State was *in custodia legis,* and court had power to preserve it to satisfy said judgment. *Id.*

18. Where, at time circuit court appointed receiver to take over assets of insolvent foreign corporation in this State, said assets were already in custody of circuit court of another county, order appointing said receiver was invalid. *Id.*

See BANKS AND BANKING (1); CONSTITUTIONAL LAW (3); CORPORATIONS (25); FRAUDULENT CONVEYANCES (3); INSURANCE (6, 7); MORTGAGES (5–8, 11, 16, 20, 24, 28, 34, 36–38); TRUSTS (1).

RECORD—See APPEAL AND ERROR (13, 17); BANKRUPTCY; BILLS AND NOTES (8); CONTRACTS (2, 4); JUDGMENT (10); NEGLIGENCE (6); VENDOR AND PURCHASER (9).

RECORDING—See CHATTEL MORTGAGES (1–4); CORPORATIONS (4, 5); DEEDS (4, 6); MORTGAGES (30–32).

REDELIVERY BOND—See DISMISSAL AND NONSUIT (3).

REDEMPTION—See CHATTEL MORTGAGES (5, 6); MORTGAGES (14, 20–22, 39, 40); TAXATION (10, 12); VENDOR AND PURCHASER (1).

REFERENCE TO EXTRINSIC INSTRUMENT—See BILLS AND NOTES (1); CHATTEL MORTGAGES (3).

REFINANCING EXISTING DEBT—See TAXATION (20, 24, 25).

REFORMATION OF INSTRUMENTS.

Mistake of trust company in executing contract for purchase of land in its corporate capacity when it intended to purchase as trustee, not being mutual, reformation of contract to release it from obligation thereunder may not be had. *Wardowski* v. *Guardian Trust Co. of Detroit*, 423.

REFRIGERATION EQUIPMENT—See MORTGAGES (1).

REFUNDING BONDS—See TAXATION (20, 21, 24).

REFUSAL TO DELIVER—See CONVERSION (3).

REFUSAL TO PAY RENT—See LANDLORD AND TENANT (5).

REGISTER OF DEEDS—See MORTGAGES (5).

REGISTRATION FEE—See LICENSES (1).

REGULARITY—See DISMISSAL AND NONSUIT (4).

REHEARING—See VENDOR AND PURCHASER (7).

REINSTATEMENT OF OFFICERS—See MUNICIPAL CORPORATIONS (3).

RELEASE—See BANKRUPTCY; CORPORATIONS (22); GARNISHMENT (5); GUARANTY (3); MINES AND MINERALS; REFORMATION OF INSTRUMENTS.

REMEDY—See CONTEMPT; CORPORATIONS (6, 7, 9, 11, 12, 17); COURTS (4, 5); ELECTION OF REMEDY; MASTER AND SERVANT (21); MECHANICS' LIENS (1); MINES AND MINERALS (1); MORTGAGES (10).

REMITTITUR—See APPEAL AND ERROR (2).

REMOVAL OF OFFICERS—See MUNICIPAL CORPORATIONS (1–3).

RENEWALS—See BANKS AND BANKING (2, 8); CHATTEL MORTGAGES (7); TAXATION (23).

RENT—See FRAUD (5); GARNISHMENT (3); LANDLORD AND TENANT (1, 2, 4, 5); MORTGAGES (4–10, 28, 33, 34).

REPAIRS—See GAS (3).

REPARABLE DAMAGES—See DAMAGES (2).

REPLACEMENT—See MORTGAGES (1).

REPLEVIN—See DISMISSAL AND NONSUIT (3, 4).

REPOSSESSION—See GUARANTY (2, 3).

RESALE—See CHATTEL MORTGAGES (8); GUARANTY (3).

RESCISSION—See EXCHANGE OF PROPERTY; FRAUD (5); VENDOR AND PURCHASER (4).

RESIDUE—See JUDGMENT (4); WILLS (1).

RES JUDICATA—See EMINENT DOMAIN (1); EXECUTORS AND ADMINISTRATORS (5); JUDGMENT (3, 5–8).

RESTITUTION—See LANDLORD AND TENANT (2, 3, 5).

REVISION—See CONSTITUTIONAL LAW (7).

RIGHT OF ACTION—See COURTS (4, 5); FRAUD (3); MOTOR VEHICLES (12); PRINCIPAL AND SURETY.

RIGHT OF WAY—See MOTOR VEHICLES (5).

ROOFS—See INSURANCE (5).

RUNNING OF STATUTE—See ADVERSE POSSESSION (1–3).

RUNNING WITH LAND—See COVENANTS (1, 2).

SAFE TOOLS—See MASTER AND SERVANT (18).

SALARY OF PRESIDENT—See CORPORATIONS (12).

SALES—See MORTGAGES (16, 18–22); PARTITION (2, 3); RECEIVERS (3).

SATISFACTION—See APPEAL AND ERROR (10); DEEDS (1).

SCALES—See MORTGAGES (1).

SCHOOLS AND SCHOOL DISTRICTS.

1. Where school superintendent submitted list of teachers, including plaintiff, whom he recommended for employment, and said recommendation was approved by resolution of school board, but plaintiff's contract was never signed by any member of said board, there was no contract, and therefore no recovery could be had for breach thereof (2 Comp. Laws 1929, § 7156 [q]). *Mullen* v. *Van Buren Consolidated School District*, 652.
2. Where school teacher's contract was never signed by any member of school board, and no services were ever rendered thereunder, she is not entitled to recover on ground of estoppel, although superintendent's recommendation that she be employed was approved by resolution of said board. *Id.*

See TAXATION (4).

SCOPE OF AUTHORITY—See MASTER AND SERVANT (10–12, 14, 15).

SCORCHING MACHINES—See MORTGAGES (1).

SECURITIES—See BANKRUPTCY; LICENSES (2); MORTGAGES (4, 10, 11, 28, 33, 34).

SEDUCTION.

1. Definition of seduction is same in criminal and civil actions. *Clark* v. *Roen*, 478.

SEDUCTION—Continued.

2. Prosecutrix in criminal action for seduction must be unmarried (3 Comp. Laws 1929, § 16823). *Id.*
3. In action for seduction, after plaintiff had answered few preliminary questions, court properly permitted amendment of declaration by addition of statement that plaintiff was unmarried woman. *Id.*

See DAMAGES (3, 4); DISCOVERY (3); TRIAL (5).

SELF-INCRIMINATION—See CRIMINAL LAW (31).

SENTENCE—See CRIMINAL LAW (9, 25).

SEQUESTRATION—See CORPORATIONS (6).

SETTING ASIDE DECREE—See EQUITY (7).

SETTING ASIDE DEFAULT JUDGMENT—See JUDGMENT (9).

SETTING ASIDE FORECLOSURE—See CHATTEL MORTGAGES (8); MORTGAGES (29, 30).

SETTING ASIDE TAX DEED—See TAXATION (9, 14).

SEWERS—See CONTRACTS (7).

SHACK—See ADVERSE POSSESSION (6).

SHRUBBERY—See COVENANTS (6); MUNICIPAL CORPORATIONS (7).

SIDEWALKS—See VENDOR AND PURCHASER (7).

SIGNALS—See RAILROADS (1, 4).

SIMILAR NAMES—See EVIDENCE (11).

SIMILAR OFFENSE—See CRIMINAL LAW (2).

SINKING FUND—See MORTGAGES (41–43).

SMOKE—See NUISANCE.

SOLICITING PERSONAL INJURY CLAIMS—See ATTORNEY AND CLIENT (4, 6); CHAMPERTY AND MAINTENANCE.

SPARE PARTS—See MORTGAGES (1).

SPECIAL ASSESSMENTS—See MUNICIPAL CORPORATIONS (7, 8).

SPECIAL PROSECUTOR—See CRIMINAL LAW (27, 28).

SPECIFIC PERFORMANCE—See VENDOR AND PURCHASER (7).

SPONGE—See PHYSICIANS AND SURGEONS (5).

SPUR TRACK—See RAILROADS (4).

STAIRS—See NEGLIGENCE (3–8).

STAKES—See ADVERSE POSSESSION (2).

STALLED AUTOMOBILE—See NEGLIGENCE (1); RAILROADS (5–7); TRIAL (6).

STARE DECISIS—See COURTS (1, 2).

STATE COURTS—See COURTS (2).

STATEMENT OF LIEN—See MECHANICS' LIENS (2, 5).

STATE'S EVIDENCE—See CRIMINAL LAW (31); WITNESSES (9).

STATES—See TAXATION (2).

STATU QUO—See EXCHANGE OF PROPERTY (2, 3).

STATUTE OF FOREIGN STATE—See MOTOR VEHICLES (3, 4); STATUTES (3, 4).

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES.

1. Rule of strict construction confines offense to words of statute, but it permits words not only to be read naturally but to be given meaning in harmony with purpose and intent of law as far as may be done without distortion of language. *Hightower* v. *Detroit Edison Co.*, 1.
2. Scope of tax laws may not be extended by implication or forced construction, and language, if dubious, is not resolved against taxpayer. *Michigan Trust Co.* v. *City of Grand Rapids*, 547.
3. Supreme Court will construe statute of another State as it would like statute of its own State, in absence of construction thereof by Supreme Court of said other State. *Edison* v. *Keene*, 611.
4. Where foreign statute has not been construed in State of enactment, courts of State where cause is on trial will construe it as they would like statute of their own State. *Perkins* v. *Great Central Transport Corp.*, 616.

See ANIMALS (2); APPEAL AND ERROR (2); ATTORNEY AND CLIENT (3, 4, 6); BANKS AND BANKING (1–4, 6, 7); BILLS AND NOTES (3–5, 7, 8); BONDS (1–4); CHAMPERTY AND MAINTENANCE; CHATTEL MORTGAGES (1, 7); CIRCUIT COURT COMMISSIONERS; CONSTITUTIONAL LAW (1, 2, 9); CORPORATIONS (1, 3–5, 19–22); COURTS (2, 3, 6); CRIMINAL LAW (1, 5–7, 14, 18–22, 24, 25, 27, 29); DEDICATION (1); DISMISSAL AND NONSUIT (3, 4); ESTOPPEL (1); EVIDENCE (7, 8, 10); FRAUDULENT CONVEYANCES (1–4); GARNISHMENT (1, 6–8, 9); HIGHWAYS AND STREETS (1–3); INDICTMENT AND INFORMATION (2); INSURANCE (5–7); JUDGMENT (2, 11); JUSTICES OF PEACE; LICENSES (1, 2); LIMITATION OF ACTIONS; MASTER AND SERVANT (1–5, 7, 14, 16, 21, 22); MECHANICS' LIENS (5); MINES AND MINERALS; MORTGAGES (4–8, 10, 14, 18, 28, 33, 34); MOTOR VEHICLES (1–5, 11–13); MUNICIPAL CORPORATIONS (4); PARTIES (2, 3); PARTITION (1, 3); PLEADING; QUO WARRANTO; RAILROADS (1); RECEIVERS (14); SCHOOLS AND SCHOOL DISTRICTS (1); SEDUCTION (2); TAXATION (1, 6, 7, 9–15, 17, 19); VENDOR AND PURCHASER (1, 4); WITNESSES (1, 2, 6, 7, 10).

STEAM HAMMERS—See NUISANCE.

STEPCHILDREN—See WITNESSES (2).

STEPS—See NEGLIGENCE (3–8).

STIPULATED DAMAGES—See LANDLORD AND TENANT (3).

STIPULATION—See DEEDS (1); ELECTION OF REMEDY.

STOCK AND STOCKHOLDERS—See CONTRACTS (1); CORPORATIONS (3–5, 8, 11, 12, 14–17); CRIMINAL LAW (8); GARNISHMENT (8, 9); LICENSES (2).

STORE BUILDING—See NEGLIGENCE (8).

STREET CROSSING—See RAILROADS (4).

STREET RAILWAYS—See MASTER AND SERVANT (22, 23).

STRICT FORECLOSURE—See MORTGAGES (13).

SUBCONTRACTORS—See BONDS (3–5); MECHANICS' LIENS (2).

SUBJACENT SUPPORT—See EVIDENCE (4).

SUBPŒNAS—See CRIMINAL LAW (16).

SUBROGATION—See MECHANICS' LIENS (2).

SUBSEQUENT CREDITORS—See CHATTEL MORTGAGES (1).

SUBSEQUENT NEGLIGENCE—See NEGLIGENCE (1).

SUBSIDENCE—See EVIDENCE (4, 5).

SUBSTANTIAL COMPLIANCE WITH STATUTE—See CORPORATIONS (3).

SUBSTITUTED PROPERTY IN HANDS OF GARNISHEE—See GARNISHMENT (9).

SUCCESSIVE WRITS—See GARNISHMENT (4).

SUMMARY JUDGMENT—See VENDOR AND PURCHASER (15).

SUMMARY PROCEEDINGS—See LANDLORD AND TENANT (2, 3, 5); VENDOR AND PURCHASER (4, 6).

SUMMER HOTEL—See RECEIVERS (2, 3, 5, 7–9).

SUPERVISORS, BOARD OF—See HIGHWAYS AND STREETS (1); QUO WARRANTO.

SUPPORT OF CHILDREN—See DIVORCE (1, 3).

SUPREME COURT—See CONSTITUTIONAL LAW (1).

SURETY—See PRINCIPAL AND SURETY.

SURFACE SUPPORT—See EVIDENCE (4, 5).

SURPLUS—See BANKS AND BANKING (3); MORTGAGES (12).

SWORN STATEMENT—See MECHANICS' LIENS (2, 5).

SYLLABI—See COURTS (6).

SYNDICATES—See LICENSES (3); TRUSTS (5); VENDOR AND PURCHASER (10, 11).

TAXATION.

1. Tax homestead deed, regular on its face, and containing recitals showing full compliance with all legal requirements, executed in 1928, is not subject to attack on ground that statutory certificate of auditor general and director of conservation was not signed by latter until in 1927, and after his retirement from office, although deed to State was executed by auditor general in 1923 (1 Comp. Laws 1929, §§ 3520–3522, 3527, 3724). *Lyon* v. *Denton*, 243.
2. General power of taxation has been and is inherent in State government. *School District of City of Pontiac* v. *City of Pontiac*, 339.
3. Determination of sources of tax revenue and apportionment of taxation require legislative action, and therefore court is not vested with power to allocate taxes raised under 15-mill tax limitation provided for in constitutional amendment (article 10, § 21). *Id.* 340.
4. In suit by school district to restrain city from adopting proposed budget for municipal purposes until legislature had taken action to allocate revenue derived from 15-mill property tax as limited by constitutional amendment (article 10, § 21), relief was properly denied, in absence of showing that city had in any way invaded school district's rights. *Id.*
5. Municipalities having charter provision fixing maximum taxation limitation may participate in allocation of 15-mill tax assessable under constitutional amendment (article 10, § 21), but whether they shall so participate depends on whether any part is allocated to them by legislature; allocation being matter for legislative determination. *Id.*
6. Real and personal property occupied for military purposes by Michigan naval force as United States naval reserve aviation base, *held*, exempt from taxation under provisions of 1 Comp. Laws 1929, §§ 692, 3395, exempting "armories" from taxation. *Township of Grosse Ile* v. *Saunders*, 451.
7. Where land was subject to taxation at time board of review held its final session, it was not exempt for that year, although negotiations for leasing it for military purposes were then pending and were afterwards completed, rendering it exempt from taxation thereafter (1 Comp. Laws 1929, §§ 692, 3395). *Id.*
8. Land leased for military purposes at time board of review held its final session was not subject to assessment, and should have been stricken from roll. *Id.*

TAXATION—Continued.

9. In suit by owners of land under regular chain of title to set aside tax deed from State, it is incumbent on holders under said deed to show compliance with tax law in force at that time. *McVannel* v. *Pure Oil Co.*, 518.

10. Under Act No. 204, Pub. Acts 1899, purchasers under State tax deed were required, in case of death of owner, to serve notice of redemption, provided for in said statute, upon personal representative of deceased and upon his heirs. *Id.*

11. Effect of proceedings under tax law, if valid, is to divest true owner of title to his property, and to vest same in holder of tax deed, and such proceedings must be closely scrutinized and strictly construed. *Id.*

12. Purchasers under State tax deed, who failed to serve notice of redemption upon heirs of deceased owner, not only cannot claim title under said tax deed, but are barred from asserting such title or claiming lien based thereon (1 Comp. Laws 1929, § 3466). *Id.*

13. Purchasers under State tax deed, who failed to comply with provisions of tax law, and who claim title by adverse possession, must establish such title independent of and contrary to provisions of said law (1 Comp. Laws 1929, § 3466). *Id.*

14. Owners of unoccupied land under regular chain of title, who made no claim thereto and paid no taxes for more than 15 years, were properly required, as reasonable condition to setting aside void tax deed and recovery of possession from grantees thereunder, to pay latter taxes paid, although provision of statute requiring owners to pay value of improvements is not applicable (3 Comp. Laws 1929, §§ 14946–14949). *Id.* 519.

15. Tax exactions, property or excise, must rest on legislative enactments, and collecting officers may act only within express authority conferred by law. *Michigan Trust Co.* v. *City of Grand Rapids*, 547.

16. Personal property in hands of trustee is assessed to trustee and not to beneficiaries, because legal title is in trustee. *Id.*

17. On death of owner of personal property there was change of ownership by reason of title thereto vesting in executor, and therefore, under statute, there was no authority for spreading taxes against said property not assessed in owner's lifetime (1 Comp. Laws 1929, § 3548). *Id.*

18. Executor paying, under protest, taxes illegally assessed against personal property formerly owned by deceased, is entitled to recover same, in action therefor. *Id.* 548.

19. Constitutional amendment limiting total amount of taxes assessable against property in any one year to one and one-half per cent., except in certain cases, purposes to avoid impairment of contracts and to preserve all existing legislative power to levy taxes on property to pay existing debts, so that, except for requirement of separate assessment, it does not repeal or modify any statutes governing method of liquidation

TAXATION—Continued.

of obligations theretofore incurred, nor restrict legislature in future enactment of laws for their orderly payment (Const. art. 10, § 21). *Wilcox* v. *Board of Commissioners of Sinking Fund of City of Detroit*, 699.

20. Constitutional amendment does not prohibit refunding or refinancing any claim which was legal obligation of public body when amendment limiting tax rate became effective, since it is within exception therein provided for (Const. art. 10, § 21). *Id.*

21. Direct refunding bonds issued in lieu of and exchanged for prior bonds in same principal amount are continuance of obligation and therefore within exception in constitutional amendment (Const. art. 10, § 21). *Id.*

22. Also, within said exception, are new bonds sold to pay existing bonds, to principal amount so paid, where proceeds are actually used for that purpose (Const. art. 10, § 21). *Id.*

23. Renewal of notes or evidence of indebtedness theretofore issued upon faith of delinquent taxes, if, and so far as, by law, they are general obligations of public body, also come within said exception (Const. art. 10, § 21). *Id.*

24. Power of legislature, including present laws, to permit levy of taxes on property to pay prior obligations extends to amount of principal sum outstanding when amendment took effect, but such principal sum may not be increased by sale of new bonds or exchange of refunding bonds at less than par, so that, if exigency of refinancing requires issue of obligations at discount, difference must be absorbed by municipality under its other powers (Const. art. 10, § 21). *Id.* 700.

25. Said exception in constitutional amendment also covers interest on outstanding obligations, but does not confine interest to existing rate, so that new evidences of indebtedness to continue existing obligations may, if necessary, provide different interest rate (Const. art. 10, § 21). *Id.*

26. Where municipality or district increases basic rate of one and one-half per cent. by charter or vote under proviso in constitutional amendment, exception therein will not apply, and such municipality or district could not levy taxes on property to pay prior obligations in addition to charter or voted rate, unless charter or voted increase so provides (Const. art. 10, § 21). *Id.*

27. Word "electors" as used in constitutional amendment providing that tax limitation therein provided for may be increased by two-thirds vote of "electors," *held*, to mean those voting on question rather than those qualified to vote thereon (Const. art. 10, § 21). *Id.*

See ACTION; ADVERSE POSSESSION (6); CONSTITUTIONAL LAW (2, 6, 9, 10); ESTOPPEL (5); STATUTES (2).

TAX DEED—See ESTOPPEL (5); TAXATION (1, 9–14).

TAXES—See COVENANTS (5); RECEIVERS (8); VENDOR AND PURCHASER (8, 9).

TAX HOMESTEAD DEED—See CONSTITUTIONAL LAW (2); TAXATION (1).

TAX-LIMITATION AMENDMENT—See CONSTITUTIONAL LAW (6, 7, 9, 10); TAXATION (3–5, 19–27).

TEACHER'S CONTRACT—See SCHOOLS AND SCHOOL DISTRICTS.

TELEPHONES AND TELEGRAPHS—See EVIDENCE (11).

TENANCY BY ENTIRETIES—See DIVORCE (3); FRAUDULENT CONVEYANCES (4).

TENANCY IN COMMON—See DIVORCE (3); PARTITION (1).

TENDER—See MECHANICS' LIENS (1); MINES AND MINERALS (2); VENDOR AND PURCHASER (8).

TESTAMENTARY TRUST—See EXECUTORS AND ADMINISTRATORS (7); JUDGMENT (8); TRUSTS (7, 8).

TEXT BOOKS—See PHYSICIANS AND SURGEONS (3).

THEORY OF CASE—See ANIMALS (1); APPEAL AND ERROR (4); ELECTION OF REMEDY; WITNESSES (6).

TIMBER—See EXCHANGE OF PROPERTY (3).

TIME—See MECHANICS' LIENS (5); VENDOR AND PURCHASER (8).

TITLE-RETAINING CONTRACTS—See RECEIVERS (8).

TITLE TO LAND—See ADVERSE POSSESSION (1, 2, 4–6); DEEDS (2); DESCENT AND DISTRIBUTION; ESTOPPEL (4); FRAUDULENT CONVEYANCES (4); MORTGAGES (10, 30); TAXATION (11–13).

TITLE TO PERSONALTY—See ELECTION OF REMEDY; EXECUTORS AND ADMINISTRATORS (1–3); MOTOR VEHICLES (11, 13); TAXATION (16, 17).

TONSILECTOMY—See PHYSICIANS AND SURGEONS (5).

TOOLS—See MASTER AND SERVANT (18).

TORTS—See BANKRUPTCY; COURTS (5); MASTER AND SERVANT (12).

TOTAL DEPENDENCY—See MASTER AND SERVANT (5, 6).

TRADE-MARKS AND TRADE-NAMES.

1. Corporation engaged in selling coal and ice has right to use said words in its assumed name, and to compete with others engaged in same business in same city. *Schwannecke* v. *Genesee Coal & Ice Co.*, 624.
2. Where coal dealer for many years had been doing business under assumed name of Genesee Coal Company, it was unfair competition for rival dealer in same city to assume name of Genesee Ice & Fuel Company. *Id.*

See EVIDENCE (11).

TRAINING—See ANIMALS (1).

TREES—See ADVERSE POSSESSION (2); COVENANTS (6); MUNICIPAL CORPORATIONS (7).

TRIAL.

1. Verdict may not properly be directed where evidence presents issue of fact. *Burt* v. *Detroit, Grand Haven & Milwaukee Railway Co.*, 204.
2. Decision of reserved motion to direct verdict is but decision as on motion to direct verdict. *Id.*
3. In action by boy struck by train while crossing railroad tracks, purely negative testimony of not hearing bell ringing, as against positive testimony that it was ringing, raised no issue of fact. *Id.*
4. Where, in pedestrian's action against railroad company for personal injuries caused by crossing accident, question of plaintiff's contributory negligence was for jury, it was error for trial court to instruct jury that defendant was guilty of negligence, and that this negligence was proximate cause of accident. *Karl* v. *New York Central Railroad Co.*, 457.
5. Where, in action for seduction, plaintiff's testimony was rather vague and indefinite, there was no abuse of discretion in permitting her to give rebuttal testimony which cleared up all doubts arising out of vagueness of her former testimony and established her right of recovery, where defendant was also given opportunity to introduce further testimony. *Clark* v. *Roen*, 479.
6. Instruction that it was duty of driver of automobile stalled on railroad track to look and see what was coming, if she could; that it was her duty to get automobile off track; and that if she did not continue to look up and down track, in her effort to get automobile off track, that would not be contributory negligence, in itself, *held*, erroneous. *Kraft* v. *Pere Marquette Railway Co.*, 494.
7. In action for personal injuries received in collision with automobile, plaintiff's counsel may make proper inquiry of jurors on their *voir dire* examination as to their connection with insurance company, if made in good faith. *Van Dyke* v. *Knoll*, 644.
8. In action against automobile owner for injuries caused by collision with bobsled, cross-examination of defendant's wit-

TRIAL—Continued.

nesses, which, in connection with argument by plaintiff's counsel, carried impression that accident would not have happened if automobile had not been driven across ice path and into certain driveway, was prejudicial error, where undisputed testimony shows that accident did not happen when car was being driven into or backed out of said driveway. *Id.* 645.

See APPEAL AND ERROR (11); CRIMINAL LAW (12, 14, 18, 30); DISCOVERY (2); MOTOR VEHICLES (14).

TRUCKING COMPANY—See CARRIERS.

TRUNK LINE HIGHWAYS—See HIGHWAYS AND STREETS (3).

TRUST COMPANY—See CORPORATIONS (1, 18–20); INSURANCE (3); REFORMATION OF INSTRUMENTS; VENDOR AND PURCHASER (10, 11).

TRUST MORTGAGE—See MORTGAGES (4, 6–8, 10, 11, 28, 33, 34, 41, 42).

TRUSTEE IN BANKRUPTCY—See CHATTEL MORTGAGES (7); CORPORATIONS (5).

TRUSTS.

1. President of insolvent corporation and others claiming that certain corporate fund in president's hands is trust fund for payment of particular corporate obligation, as against right of corporation's receivers to said fund, have burden of establishing facts impressing said fund with trust. *Vogt* v. *General Necessities Corporation*, 409.
2. Efforts of president of insolvent corporation to have its creditor discount obligation before maturity, and his declaration that he had money with which to make payment, *held*, insufficient to establish trust. *Id.*
3. Action by board of directors was necessary to accomplish allocation and severance of certain corporate fund and its segregation as then present devotion thereof to payment of particular corporate obligation, in order to impress said fund with trust. *Id.*
4. Representation by president of corporation that certain loan can or will be paid out of avails of sale of certain corporate property is insufficient to subject said avails, or any part thereof, to equitable lien or constitute equitable assignment. *Id.*
5. Trust agreement between trust company and members of syndicate for whom it acted in executing land contract as vendee created valid trust as between them, although by mistake said contract was executed by it in its corporate capacity, and trust agreement was not executed until after execution of said contract by vendors. *Wardowski* v. *Guardian Trust Co. of Detroit*, 423.
6. Trust is created when some estate, interest, or power in or affecting property of any description is vested in one person for benefit of another. *MacKenzie* v. *Union Guardian Trust Co.*, 564.

TRUSTS—Continued.

7. Provisions of grandfather's will bequeathing to granddaughter certain sum, which was to be kept invested as trust fund and one-fifth plus accumulations paid to her each year until whole amount was paid, *held*, to create trust in said fund in her favor. *Id.*
8. Where executor took possession of deceased's estate, but failed to comply with provisions of will setting up trust estate for testator's granddaughter, it is no defense, in suit by her against executor for construction of will and for accounting, that executor did not qualify as trustee. *Id.* 566.
9. In suit against trustee for accounting, good faith is defense, where trustee, acting within limits of his powers, with proper prudence and diligence, commits mere mistakes or errors of judgment, but it is not defense where trustee disregards limits placed on his power by law or by trust instrument. *Id.*

See BILLS AND NOTES (1, 5); CORPORATIONS (18–20); EQUITY (1, 2); EXECUTORS AND ADMINISTRATORS (5, 7); JUDGMENT (8); LICENSES (3); REFORMATION OF INSTRUMENTS; TAXATION (16); VENDOR AND PURCHASER (10, 11).

ULTRA VIRES—See CORPORATIONS (1, 18–24).

UNDERPASS—See HIGHWAYS AND STREETS (3).

UNEARNED PREMIUM RESERVE—See INSURANCE (7).

UNFAIR COMPETITION—See EVIDENCE (11); TRADE-MARKS AND TRADE-NAMES.

UNMARRIED WOMAN—See SEDUCTION (2, 3).

UNOCCUPIED LAND—See ADVERSE POSSESSION (5); ESTOPPEL (5); TAXATION (14).

UNPROFESSIONAL CONDUCT—See ATTORNEY AND CLIENT (8, 9).

USER—See DEDICATION (3, 4).

USUFRUCT—See MORTGAGES (9).

USURY—See MORTGAGES (17).

VACANCIES IN OFFICE—See HIGHWAYS AND STREETS (1, 2); QUO WARRANTO.

VACATING STREET—See MUNICIPAL CORPORATIONS (4, 5).

VALUE—See ATTORNEY AND CLIENT (4); DAMAGES (2); EXCHANGE OF PROPERTY.

VARIANCE—See VENDOR AND PURCHASER (13).

VARYING TERMS OF WRITTEN CONTRACTS—See EVIDENCE (6).

VENDOR AND PURCHASER.

1. There is no statutory right to redeem on foreclosure of land contract. *Detroit Trust Co.* v. *Detroit City Service Co.*, 17.
2. Vendor, by accepting performance by vendee's assignee and deeding to assignee, recognized validity of assignment, and is thereafter estopped from questioning it. *Mueller* v. *Bankers Trust Co. of Muskegon*, 53.
3. After notice of forfeiture of land contract and adjudication based thereon before circuit court commissioner, contract must be considered as entirely abrogated and all rights of respective parties thereunder terminated. *Rosenthal* v. *American Construction & Realty Co.*, 91.
4. Where vendee holds over after breaching contract, circuit court commissioner may entertain jurisdiction of summary proceedings instituted by person entitled to possession (3 Comp. Laws 1929, § 14975), but he has no jurisdiction in cause of action by vendee electing to cancel or rescind because of vendor's breach of contract; jurisdiction in such case being in circuit court in chancery. *Id.*
5. If vendee merely seeks damages for breach of land contract, his remedy is by action at law. *Id.*
6. In summary proceedings before circuit court commissioner by vendor for possession after forfeiture, vendee may not plead in bar thereof breach of contract by vendor, since such issue is not within jurisdiction of circuit court commissioner, because he has no power to render money judgment in such proceeding; and that vendor as well as vendee has breached executory land contract has no bearing on jurisdictional question. *Id.*
7. Former decision denying specific performance of agreement in land contract to gravel streets and lay sidewalks in whole subdivision, where defendant owned vendor's interest in only one lot, is modified, on rehearing, and permission given plaintiff to file bill for cancellation of contract and accounting against proper parties or to institute action at law to recover any damages plaintiff may have sustained. *Worsham* v. *McCall*, 154.
8. Where agreement for assignment of vendee's interest in land contract obligated assignor to pay taxes then due, but fixed no time for said payment, purchaser could not set time, but could protect himself at time of tendering full performance of purchase price. *Kaye* v. *Gerasimos*, 420.
9. Claim by purchaser of vendee's interest in land contract that vendee's nonpayment of tax then due may constitute default under said contract is not considered, on appeal, where contract is not in record, since court may not surmise its terms. *Id.*
10. Where trust company in its corporate capacity executed contract for purchase of land, and also executed trust agreement with members of syndicate for whom it acted, there was no privity of contract between vendors and members of syndicate, and therefore no deficiency decree may be had against them in suit to foreclose contract, although they may be held

VENDOR AND PURCHASER—Continued.

to respond to trust company. *Wardowski* v. *Guardian Trust Co. of Detroit,* 424.

11. Member of syndicate executing trust agreement with trust company purchasing land on contract for benefit of said syndicate members was not discharged from liability thereunder by his default in making payment, in absence of action by syndicate members terminating his contract relations. *Id.*

12. Generally, when vendor signs new contract, substituted for earlier agreement and differing materially in its terms through increasing price and down payment, though balance due and unpaid remains same, and new contract is used as device to defraud innocent third party, vendor is guilty of constructive fraud, regardless of innocence of his intentions. *Sweet* v. *Shreve,* 432.

13. Where, in action for payments due on land contract, declaration recites that plaintiffs succeeded to interest of another, now deceased, by order of assignment of probate court, and affidavit contains like recital, statement that plaintiffs' interest is by inheritance is construed, on appeal, as meaning same as averment of declaration; no issue being created thereby. *Dibble* v. *Harrow,* 509.

14. Where vendee's failure to pay instalments due on land contract is responsible for vendors' failure to make payments due on mortgage, rule that vendor is not entitled to enforce contract while in default on mortgage is not applicable; especially where vendee has not paid his portion of mortgage debt assumed by him, and where contract permits him to make payments direct to mortgagee in event of vendors' failure to pay. *Id.*

15. Vendors are entitled to summary judgment for past-due instalments on land contract, notwithstanding they are in default in making payments due on mortgage, where their default is caused by vendee's failure to pay, and latter has privilege of making payments direct to mortgagee. *Id.*

16. In suit to foreclose land contract, decree for deficiency against assignees of vendee's interest was properly denied, where they did not assume or agree to pay obligations of vendee, but, instead, covenanted to pay obligations of seller. SHARPE, FEAD, and BUTZEL, JJ., dissenting, on ground that there was mistake in using wrong form for assignment, and that assignees intended to assume and pay vendee's obligations. *Kabaker* v. *Van Maele,* 561.

17. Where assignees of vendee's interest entered into contract with purchasers of vendor's interest in land contract, making permanent amendment thereto, privity between them was established thereby, and each became bound to other to perform. *Copeman* v. *Talcken,* 674.

See CORPORATIONS (18, 20); COVENANTS (3, 5, 6); DEEDS (1, 2); FRAUD (5); INSURANCE (3); LANDLORD AND TENANT (4); TRUSTS (5).

VENUE—See CRIMINAL LAW (26, 27).

VESTED RIGHT—See CORPORATIONS (21).

VIBRATION—See NUISANCE.

VILLAGES—See CONSTITUTIONAL LAW (9, 10); MUNICIPAL CORPORATIONS.

VOID CONTRACT—See ATTORNEY AND CLIENT (2).

VOIR DIRE EXAMINATION—See TRIAL (7).

WAGONS—See MORTGAGES (3).

WAIVER—See CRIMINAL LAW (31); ESTOPPEL (1); LANDLORD AND TENANT (3); MASTER AND SERVANT (21); WITNESSES (7).

WAREHOUSEMEN—See EVIDENCE (6); FRAUD (2–4).

WARNING—See NEGLIGENCE (3); RAILROADS (1, 4); TRIAL (3).

WATER BOARD SITE—See EMINENT DOMAIN (1).

WATER HYDRANT—See EVIDENCE (4).

WEIGHT OF EVIDENCE—See CRIMINAL LAW (5); EVIDENCE (7); NEW TRIAL (2); PHYSICIANS AND SURGEONS (2).

WELFARE OF CHILDREN—See DIVORCE (4, 5).

WILFUL AND MALICIOUS INJURY TO PROPERTY—See BANKRUPTCY.

WILLS.

1. Where third paragraph of will, relating to disposition of residue of estate, was later changed by codicil, making said paragraph "null and void and changing it as follows," construction of will by probate and circuit courts that said codicil is operative only as to any residue after bequests mentioned in paragraph two are wholly satisfied, *held*, correct. *In re Warren's Estate*, 109.
2. Where meaning of words in will is so plain that no uncertainty arises, extrinsic evidence is not admissible, but where there is obscurity or ambiguity in language, so that testator's intent becomes doubtful, extrinsic evidence is admissible to discover said intent. *In re Warmbier's Estate*, 160.
3. Provisions of will for "an annuity in the gross amount of $1,000 for each of said living beneficiaries, said annuity to be paid in monthly instalments over a period of five years," being ambiguous, extrinsic evidence was properly admitted to show that testator intended to provide total sum of $1,000 for each beneficiary named, said sum to be paid over period of five years in monthly payments. *Id.*

See EQUITY (1, 2); EXECUTORS AND ADMINISTRATORS (4–8); JUDGMENT (3, 4, 8); TRUSTS (7–9).

WINDING UP AFFAIRS—See CORPORATIONS (6).

WITNESSES.

1. To warrant exclusion of testimony as to matters equally within knowledge of deceased, under statute, disqualification must clearly appear and not be matter of inference (3 Comp. Laws 1929, § 14219). *Fisher* v. *Fisher,* 100.
2. In suit by children to be declared beneficiaries under father's policy, where it appears that insured wrote to insurer to change beneficiary from wife, from whom he was separated, to plaintiffs, children by former marriage, but that change was not made because policy was not sent in, as required, testimony by one of plaintiffs as to conversation between him and insured's wife, in insured's presence, relating to her refusal to surrender policy, in explanation as to why it was not sent in, *held,* properly admitted; statute prohibiting admission of testimony as to matters equally within knowledge of deceased not being applicable (3 Comp. Laws 1929, § 14219). *Id.*
3. For purpose of affecting credibility, witness may be cross-examined as to his interest in event of suit, including contribution to expense of it. *DeHaan* v. *Winter,* 192.
4. Any relationship of witness to one or more of parties of such nature as to induce bias or prejudice, and which in fairness should be known to jury, may be brought out on cross-examination. *Id.*
5. Permitting cross-examination of medical witness, in malpractice case, to bring out fact that he and defendant belonged to State medical society, and that part of dues paid was used to defend malpractice actions against members, *held,* not error. *Id.*
6. In suit to cancel contract for care and maintenance of plaintiff's aged decedent, testimony of defendant's son was not barred as being equally within knowledge of deceased, on theory that son acted as defendant's agent (3 Comp. Laws 1929, § 14219). *Shea* v. *Siller,* 279.
7. Statutory bar, if any, to testimony by defendant's son, as being equally within knowledge of deceased, *held,* waived by plaintiff's cross-examination of said witness. *Id.* 280.
8. Without proper hypothetical questions, in which all facts from which experts were to draw their conclusions were stated, it was error to interrogate expert witnesses. *O'Donnell* v. *Oliver Iron Mining Co.,* 470.
9. Same rule as to cross-examination applicable to defendant who takes witness stand in his own behalf applies to accomplice who turns State's evidence. *People* v. *Koukol,* 529.
10. Under statute, employee of opposite party may be called and cross-examined without party calling him being bound by his answers, or prevented from impeaching him (3 Comp. Laws 1929, § 14220). *Fleegar* v. *Consumers Power Co.,* 537.

See APPEAL AND ERROR (3); CRIMINAL LAW (12, 16, 29–31); EVIDENCE (2, 3, 7, 8); NEW TRIAL (1); PHYSICIANS AND SURGEONS (3); TRIAL (8).

WORDS AND PHRASES—See BANKS AND BANKING (2); CRIMINAL LAW (6); MASTER AND SERVANT (15); MORTGAGES (3, 9); MOTOR VEHICLES (11); TAXATION (27).

WORK AND LABOR—See CONTRACTS (7).

WORKMEN'S COMPENSATION—See APPEAL AND ERROR (2); JUDGMENT (2); MASTER AND SERVANT (1–9, 17, 21–23).

WRONG SIDE OF ROAD—See LIMITATION OF ACTIONS (3); MOTOR VEHICLES (2).