# MICHIGAN REPORTS

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CASES DECIDED

IN THE

# SUPREME COURT

OF

# MICHIGAN

FROM

SEPTEMBER 16 to DECEMBER 6, 1932

RICHARD W. COOPER
STATE REPORTER

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CALLAGHAN AND COMPANY
1933

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JAN 5 1934

# SUPREME COURT.

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CHIEF JUSTICE.

| | TERM EXPIRES |
|---|---|
| GEORGE M. CLARK, BAD AXE, . . . . | Dec. 31, 1933 |

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ASSOCIATE JUSTICES.

| | |
|---|---|
| JOHN S. McDONALD, GRAND RAPIDS, . . . | Dec. 31, 1933 |
| 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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CLERK—JAY MERTZ, LANSING.
CRIER—DON M. CHILDS, LANSING.

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ATTORNEY GENERAL—PAUL W. VOORHIES, DETROIT.

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| | | |
|---|---|---|
| 1. | GUY M. CHESTER, | HILLSDALE. |
| 2. | CHARLES E. WHITE, | NILES. |
| 3. | CLYDE I. WEBSTER,<br>HARRY J. DINGEMAN,<br>ADOLPH F. MARSCHNER,<br>IRA W. JAYNE,<br>ARTHUR WEBSTER,<br>JOSEPH A. MOYNIHAN,<br>THEODORE J. RICHTER,<br>VINCENT M. BRENNAN,<br>DE WITT H. MERRIAM,<br>GUY A. MILLER,<br>ORMOND F. HUNT,<br>HARRY B. KEIDAN,<br>ROBERT M. TOMS,<br>HOMER FERGUSON,<br>LESTER S. MOLL,<br>ALLAN CAMPBELL,<br>JAMES E. CHENOT,<br>ARTHUR W. KILPATRICK,[1]<br>THOMAS J. MURPHY,[2] | DETROIT. |
| 4. | BENJAMIN WILLIAMS,<br>JOHN SIMPSON, | JACKSON. |
| 5. | RUSSELL R. McPEEK, | CHARLOTTE. |
| 6. | GLENN C. GILLESPIE,<br>FRANK L. COVERT,<br>FRANK L. DOTY, | PONTIAC. |
| 7. | EDWARD D. BLACK,<br>PAUL V. GADOLA,<br>JAMES S. PARKER, | FLINT. |
| 8. | ROYAL A. HAWLEY, | IONIA. |
| 9. | GEORGE V. WEIMER, | KALAMAZOO. |
| 10. | WILLIAM H. MARTIN,<br>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,[2] | STURGIS. |
| 16. | NEIL E. REID,<br>JAMES E. SPIER, | MT. CLEMENS. |
| 17. | WILLIS B. PERKINS,<br>WILLIAM B. BROWN,<br>LEONARD D. VERDIER,[2] | GRAND RAPIDS. |

[1] To November 8, 1932.
[2] Elected November 8, 1932.

| | | |
|---|---|---|
| 18. | SAMUEL G. HOUGHTON, | BAY CITY. |
| 19. | HAL L. CUTLER, | LUTHER. |
| 20. | FRED T. MILES, | HOLLAND. |
| 21. | RAY HART, | MIDLAND. |
| 22. | GEORGE W. SAMPLE, | ANN ARBOR. |
| 23. | HERMAN DEHNKE, | HARRISVILLE. |
| 24. | XENOPHON A. BOOMHOWER, | BAD AXE. |
| 25. | FRANK A. BELL, | NEGAUNEE. |
| 26. | FRED P. SMITH, | ALPENA. |
| 27. | EARL C. PUGSLEY, | HART. |
| 28. | FRED S. LAMB, | CADILLAC. |
| 29. | KELLY S. SEARL, | ST. JOHNS. |
| 30. | LELAND W. CARR,<br>CHARLES B. COLLINGWOOD, | LANSING. |
| 31. | FRED W. GEORGE,<br>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. |

## MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT.

EDWARD J. JEFFRIES,

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

ARTHUR E. GORDON.[1]

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

SUPERIOR COURT OF GRAND RAPIDS, ARTHUR F. SHAW,[2] THADDEUS B. TAYLOR.[1]

1 Elected November 8, 1932.
2 To November 8, 1932.

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|---|---|
| Alcona | 23 |
| Alger | 11 |
| Allegan | 20 |
| Alpena | 26 |
| Antrim | 13 |
| Arenac | 34 |
| Baraga | 12 |
| Barry | 5 |
| Bay | 18 |
| Benzie | 28 |
| Berrien | 2 |
| Branch | 15 |
| Calhoun | 37 |
| Cass | 36 |
| Charlevoix | 13 |
| Cheboygan | 33 |
| Chippewa | 11 |
| Clare | 21 |
| Clinton | 29 |
| Crawford | 34 |
| Delta | 25 |
| Dickinson | 25 |
| Eaton | 5 |
| Emmet | 33 |
| Genesee | 7 |
| Gladwin | 34 |
| Gogebic | 32 |
| Grand Traverse | 13 |
| Gratiot | 29 |
| Hillsdale | 1 |
| Houghton | 12 |
| Huron | 24 |
| Ingham | 30 |
| Ionia | 8 |
| Iosco | 23 |
| Iron | 25 |
| Isabella | 21 |
| Jackson | 4 |
| Kalamazoo | 9 |
| Kalkaska | 28 |
| Kent | 17 |
| Keweenaw | 12 |

| COUNTIES. | CIRCUITS. |
|---|---|
| Lake | 19 |
| Lapeer | 40 |
| Leelanau | 13 |
| Lenawee | 39 |
| Livingston | 35 |
| Luce | 11 |
| Mackinac | 33 |
| Macomb | 16 |
| Manistee | 19 |
| Marquette | 25 |
| Mason | 19 |
| Mecosta | 27 |
| Menominee | 25 |
| Midland | 21 |
| Missaukee | 28 |
| Monroe | 38 |
| Montcalm | 8 |
| Montmorency | 26 |
| Muskegon | 14 |
| Newaygo | 27 |
| Oakland | 6 |
| Oceana | 27 |
| Ogemaw | 34 |
| Ontonagon | 32 |
| Osceola | 19 |
| Oscoda | 23 |
| Otsego | 34 |
| Ottawa | 20 |
| Presque Isle | 26 |
| Roscommon | 34 |
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# JUNE TERM, 1932.*

PEOPLE *v.* BOLDUC.

CRIMINAL LAW—EVIDENCE OF OTHER OFFENSE—INTENT—MOTIVE—STATUTES—APPEAL AND ERROR.

In prosecution for assault with intent to do great bodily harm less than murder, growing out of gun fight engaged in by defendant and others with officers, testimony that defendant admitted, when arrested in another State with others for carrying concealed weapons, that gun found belonged to him, was not admissible, since it had no relation to crime charged, nor was it competent as bearing on his intent or motive, under 3 Comp. Laws 1929, § 17320; but it was not prejudicial of itself, and therefore its admission is not reversible error, in absence of showing of actual prejudice.

Appeal from Lenawee; Rathbun (George A.), J. Submitted June 16, 1932. (Docket No. 151, Calendar No. 35,755.) Decided September 16, 1932.

Herbert Bolduc, Virgil Bolduc, and James Cox were convicted of assault with intent to do great bodily harm less than murder. Affirmed.

*Clark & Bean,* for appellants.

*Paul W. Voorhies,* Attorney General, and *Major Bird,* Prosecuting Attorney, for the people.

FEAD, J. December 30, 1929, defendants and two others were transporting liquors on the highway and engaged in a gun fight with officers. Defendants review conviction for assault with intent to do great bodily harm less than the crime of murder.

* Continued from Vol. 259.

On evidence of other crimes to show intent and motive, see annotation in 62 L. R. A. 194 *et seq.*

Defendants allege 13 errors, in the admission of testimony or the asking of questions, all on the ground of prejudice. The record does not contain the whole of the evidence, and we cannot say that prejudice was affirmatively shown.

With the exception of one, the claimed errors are so evidently without merit as to need no discussion.

Defendant Cox was arrested in Indianapolis at a time when he and two others were under charge of carrying weapons. A witness was permitted to testify that the other two were discharged when Cox stated that the gun belonged to him. The testimony had no relation to the crime here charged, nor was it competent as bearing on Cox's intent or motive, under 3 Comp. Laws 1929, § 17320. However, the testimony was not prejudicial of itself nor did the record demonstrate actual prejudice.

Judgment affirmed.

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

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RELIABLE STORES CORP. *v.* CITY OF DETROIT.

1. TAXATION—COMMON-LAW RULE—SITUS OF INTANGIBLE PROPERTY—DOMICILE.

   Common-law rule that intangible property must follow domicile of owner, unless separated from it by positive law, is applicable in Michigan in applying tax laws.

2. SAME—INTANGIBLE ASSETS OF FOREIGN CORPORATIONS NOT ASSESSABLE IN MICHIGAN.

   Intangible assets of foreign corporation are assessable only at its domicile, and therefore are not assessable in Michigan under general tax laws, although corporation is doing business in this State.

---

As to situs of intangible property for purpose of taxation, see annotation in L. R. A. 1915C, 914.

Appeal from Wayne; Hart (Ray), J., presiding. Submitted June 21, 1932. (Docket No. 95, Calendar No. 36,594.) Decided September 16, 1932.

Assumpsit by Reliable Stores Corporation, a Maryland corporation, against City of Detroit, a municipal corporation, to recover taxes paid under protest on intangible property. Judgment for defendant. Plaintiff appeals. Reversed, and judgment ordered entered for plaintiff.

*Levin, Levin & Dill* (*Theodore Levin* and *Butzel, Levin & Winston,* of counsel), for plaintiff.

*Walter Barlow* (*Clarence E. Wilcox,* of counsel), for defendant.

FEAD, J. Plaintiff, a Maryland corporation, owning and operating chain stores in several States but not in Maryland, sells merchandise on the instalment plan. The major part of the assets of its Detroit store consists of customers' accounts receivable, for goods sold at such store. In 1927 and 1929 the city of Detroit levied taxes against plaintiff on such accounts. The taxes were paid under protest, and this action is to recover them. Defendant had judgment.

Counsel recognize that plaintiff is a nonresident of this State (*Larson* v. *Dubuque Fire & Marine Ins. Co.,* 238 Mich. 366), and that the customers' accounts are intangible property. Plaintiff contends its intangibles are assessable only at its domicile, *i. e.,* in the State of its charter. Defendant contends they have a "business situs" in this State, apart from plaintiff's domicile, for taxation purposes.

Consistently since *Howell* v. *Village of Cassopolis,* 35 Mich. 471, this court has maintained, in the application of tax laws, the doctrine of the common-law

that "intangible property * * * must always follow the domicile (of the owner), unless separated from it by positive law."

In *Village of Howell* v. *Gordon,* 127 Mich. 517, and *Baars* v. *City of Grand Rapids,* 129 Mich. 572, where a nonresident loaned money in this State as a business, through a local agent who retained custody of the securities, it was held that, under the general tax laws, the credits were not taxable in this State as:

"The statute plainly recognizes the usual rule that credits are to be assessed at the domicile of the owner, and does not attempt to tax those belonging to nonresidents. Such credits have no *situs* in this State." *Howell* v. *Gordon, supra.*

The relevant tax laws then in force were identical with the present laws.

In three late cases involving computation of the privilege tax of corporations, this court recognized the existence of the doctrine of "business situs" of property apart from the domicile of the owner, declared it inoperative in this State in the absence of statute, and reiterated and applied the common-law rule. *In re Pantlind Hotel Co.,* 232 Mich. 330 (49 A. L. R. 1291); *In re Truscon Steel Co.,* 246 Mich. 174, and *In re Dodge Brothers,* 241 Mich. 665. In the latter case the court disposed of the contention of this defendant by the following language:

"In this jurisdiction the court has adhered to the common-law rule of situs of domicile. * * *

"Credits, by way of deposits in banks, upon accounts receivable, and payments to be received on land contracts, are all intangible assets and situs thereof is the domicile of the owner, unless fixed elsewhere by some positive law. Situs of domicile, with reference to intangibles, is not at all affected by the mere place of business, for the law, short of

statute to a different end, does not admit of a so-called business situs changing or interfering with the situs of domicile. *In re Pantlind Hotel Co., supra.* This is but saying that common-law situs governs unless modified or abrogated by statute."

While these cases involved privilege taxes, not general taxes, they are in point because the court rested decision upon the situs of intangible property for tax purposes, under a statute which provided for computation of privilege taxes upon the proportion of the corporate property "owned and used in Michigan," excluding property "located without the State of Michigan" and property "exclusively used in interstate commerce."

Confronted by this line of decisions, involving both general and privilege taxes, it would be no less than usurpation of legislative power for this court to adopt and apply the doctrine of business situs to intangible property for the purpose of taxation. Moreover, if it had the disposition to do so, it would be restrained by the fact that the legislature, taking notice of the repeated decisions that the doctrine could be accepted in this State only by legislative enactment, by Act No. 175, Pub. Acts 1929, amended the statute (2 Comp. Laws 1929, § 10143) governing privilege taxes of corporations and provided a business situs for intangible property "irrespective of the domicile of the corporation," but made no such change in the general tax laws. The court must assume that the legislature intended that the common-law rule of domiciliary situs continues to govern general taxation of property.

Judgment reversed, and cause remanded for entry of judgment for plaintiff, with costs.

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

HAIGHT *v.* SALTER.

1. VENDOR AND PURCHASER—WHEN VENDEE ENTITLED TO DEED.
If conveyance is to be made upon payment, purchaser is entitled to conveyance as soon as purchase price is paid or tendered, or, in case of payment in instalments, upon payment or tender of last instalment.

2. SAME—VENDOR ENTITLED TO REASONABLE TIME ONLY TO CONVEY.
That person lawfully may contract to sell real estate which he does not own does not extend contract time for delivery of deed, but he must take steps to acquire title in anticipation of his duty to deliver, and is entitled only to reasonable time to execute proper conveyance.

3. SAME—FAILURE TO CONVEY—RESCISSION.
Where vendee, after making final payment on land contract, gave vendors 10 days' time in which to make conveyance, and vendors failed to do so, vendee was entitled to rescind and recover purchase price, and he was not bound to accept deed tendered after suit was begun.

Appeal from Wayne; Rathbun (George A.), J., presiding. Submitted June 10, 1932. (Docket No. 73, Calendar No. 36,495.) Decided September 16, 1932.

Assumpsit by John W. Haight against Frank S. Salter and another for recovery of sums paid on a land contract. Judgment for defendants. Plaintiff appeals. Reversed, and judgment ordered entered for plaintiff.

*Augustus C. Troden,* for plaintiff.

*Bulkley, Ledyard, Dickinson & Wright* (*Edgar C. Howbert* and *Robert W. Conder,* of counsel), for defendants.

FEAD, J. Plaintiff was vendee, by assignment, of land contract dated January 30, 1924, executed by defendants as vendors, and in which they represented that they owned the land. In fact, they were contract purchasers from Coe, who had mortgaged the premises to Smitherman.

The contract required the vendors to execute and deliver to the vendee a warranty deed, free from incumbrances except those arising from vendee's acts or default, on receiving payment in full and surrender of the contract.

The contract payments of $7 per month were made with unusual, although not strict, regularity, only one payment not being made on the precise due date in the last two years and over of the life of the contract. It was fully paid November 6, 1930, to defendants' agent, and with it written demand for deed was made.

Plaintiff claims he telephoned defendants' office in December and was promised a deed in a short time. February 25, 1931, he called at defendants' office, tendered the contract, and demanded a deed. The employee in charge said no application for a deed had reached the files, a new one was executed, and plaintiff granted defendants 10 days for delivery. By registered letter of the same date he made formal demand for deed within 10 days. On March 11th, he called again and talked with defendant Salter, who wanted further time for delivery, which plaintiff refused to grant, but tendered his contract and demanded return of his money. On the same day, plaintiff wrote defendants, declaring the contract breached, and making demand for his money within 48 hours.

March 20, 1931, he commenced this suit to recover the purchase price he had paid. Defendants had judgment on trial before the court.

Defendants' excuse for failure to deliver the deed revolves around the facts that Coe had title; that Smitherman, the mortgagee, had died in 1929 and his estate was in probate; and that Smitherman's sole heir had lately died and probate of his estate had just begun. Defendants said they were willing to pay the $100 necessary to release the premises from the mortgage, but because of the deaths there was no one to execute the release. May 21, 1931, after suit was begun, Coe conveyed to defendants, and they prepared and tendered a deed to plaintiff, which was refused. September 19th, the mortgage lien was released by the executor of the Smitherman estate.

Defendants rely on *Cossett* v. *O'Riley,* 160 Mich. 101, which involved the right of a vendor who had tendered a deed to correct defects in the title as soon as they were pointed out by vendee. Obviously, the case is not in point, as we are here confronted by the refusal or inability of vendors to execute a deed at the time provided in the contract.

"If the conveyance is to be made upon payment the purchaser is entitled to a conveyance as soon as the purchase-price is paid or tendered, or in case of payment in instalments upon payment or tender of the last instalment." 39 Cyc. p. 1327.

The fact that a person lawfully may contract to sell real estate which he does not own does not extend the contract time for delivery of a deed. He must take steps to acquire title in anticipation of his duty to deliver. After payment of the contract price, the vendor is not entitled to time to make title. He is entitled only to a reasonable time to execute the proper conveyance. 39 Cyc. p. 1326 *et seq.;* 27 R. C. L. 524. This duty and right of vendor may be modified by circumstances, but there are none at bar to change the terms of the contract.

Defendants represented themselves to be the owners of the property. The payments were made with such regularity that they were in duty bound to anticipate final payment and prepare for the delivery of the deed. The 10 days granted by plaintiff were ample to enable vendors to make conveyance. They not having done so, plaintiff was entitled to rescind and to recover the purchase price.

Aside from the strict legal duty, defendants did not make a showing of reasonable diligence in attempting to deliver a deed. A discharge of the mortgage could have been obtained from the executor of the mortgagee's estate. 3 Comp. Laws 1929, §§ 13318, 15664, 15665. They did not show tender of the amount due nor demand for release within 10-day period allowed by plaintiff. Their offer to give plaintiff a guaranty that deed would be forthcoming was of no consequence. Plaintiff was not obliged to accept a departure from the contract.

Judgment will be reversed, and the cause remanded for entry of judgment in favor of plaintiff, with costs of both courts.

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

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GRUSIECKI *v.* JAGLAY.

1. NEGLIGENCE—FAILURE TO TAKE CARE OF LAW SUIT.

Where defendant undertook to take care of summary proceeding case against plaintiff, but failed to ascertain that judgment had been entered or to notify plaintiff thereof or to advise him of his rights of appeal and redemption, especially on being informed that plaintiff had money available to redeem, defendant was guilty of negligence rendering him liable for resultant damages.

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On use of check stubs to refresh memory, see annotation in 68 A. L. R. 694.

2. SAME—EVIDENCE—QUESTION FOR JURY.

In action for damages for defendant's alleged negligence in failing to properly take care of summary proceeding case against plaintiff after agreeing to do so, evidence *held*, sufficient to present issues of fact for jury on all elements of liability.

3. EVIDENCE—UNPROVEN COPY INADMISSIBLE—DISCRETION OF COURT.

Admission in evidence of copy of bill of complaint claimed to have been filed by plaintiff in another suit was properly refused, where it was not proved or admitted to be true, and no offer or attempt to identify it was made except by reading it to plaintiff before jury, nor did court abuse its discretion in prohibiting its reading before jury.

4. SAME—CHECKS—REFRESHING WITNESS' MEMORY.

Where witness testified that certain checks, offered in evidence, refreshed her recollection, they were properly refused admission.

5. COSTS—FAILURE TO FILE BRIEF.

Appellee, having filed no brief before decision of case on appeal, is not allowed costs therefor.

Appeal from Wayne; Gilbert (Parm C.), J., presiding. Submitted June 8, 1932. (Docket No. 48, Calendar No. 36,347.) Decided September 16, 1932.

Case by Stanislaw Grusiecki against Joseph S. Jaglay for damages caused by defendant's alleged negligence in representing plaintiff in summary proceedings. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

*Ira F. Morgan,* for appellant.

FEAD, J. May 26, 1926, plaintiff was in arrears in payments on a land contract. His vendors commenced summary proceedings to recover possession. Plaintiff consulted defendant, who is an insurance agent and notary public and had once examined an

abstract for him. He claims defendant agreed to take care of the case for him, and, for doing so, he paid him a fee of $25. Defendant arranged with the attorney for vendors for adjournment of proceedings from June 16th to June 23d, and again to June 30th. On the latter date judgment of restitution was entered.

Plaintiff brought this suit for damages on the ground of negligence. The negligence claimed was that defendant, being charged with the conduct of the case, did not inform plaintiff of the entry of judgment nor tell him he had five days to appeal therefrom or 30 days to redeem. Plaintiff had verdict of a jury and judgment.

Defendant claimed that his agreement with plaintiff was to secure delay in the proceedings to give plaintiff an opportunity to obtain money to put the land contract in good standing; that he failed to obtain the money; and, before the judgment, plaintiff took back his papers from defendant and all relations between them ceased.

Plaintiff claimed that their relations did not terminate until about the first of August; that he frequently called on defendant in regard to the matter; that he obtained the necessary money in July to pay all sums due on the contract, and so informed defendant, who told him it was too late; that he could and would have redeemed had he known he still had an opportunity; and, by reason of defendant's failure to inform him of the judgment and his rights, he lost the premises.

It is not claimed that defendant did not know the law relative to appeal and redemption. If their relations had not been severed, defendant's failure to ascertain the entry of judgment, to notify plaintiff of the fact, and to advise him of his rights of

appeal and redemption, especially upon being informed that plaintiff had the money available to redeem, was negligence. The court so charged the jury, no error is laid on the charge, and counsel for defendant does not deny the rule. The testimony of the parties presented issues of fact for the jury on all elements of liability.

Defendant claims error in the court refusing to admit in evidence a copy of a bill of complaint, which he claims was filed by plaintiff with reference to the transaction, and to cross-examine plaintiff thereon to show statements inconsistent with his testimony. Plaintiff denied signing a bill of complaint, the copy was not proved or admitted to be true, nor did defendant offer or attempt to identify it except by reading it to plaintiff before the jury. Admission of the instrument in evidence was properly refused, and the court did not abuse its discretion in prohibiting its reading before the jury. At all events, the copy is not in the record, and we cannot say the action of the court was prejudicial.

Defendant alleges error in the court refusing to admit in evidence checks which a witness testified refreshed her recollection. The fact that they refreshed her recollection rendered them inadmissible.

The other points presented are without merit and need no discussion.

Judgment affirmed, with costs. Appellee will have no costs for brief, as none was filed by him before decision.

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

*In re* WELLMAN'S ESTATE.

APPEAL AND ERROR—CONFESSION OF ERROR.

Where, on appeal, appellee confesses error, judgment is reversed.

Appeal from St. Clair; Robertson (William), J. Submitted June 16, 1932. (Docket No. 41, Calendar No. 36,548.) Decided September 16, 1932.

Joseph Wellman filed a claim in the probate court against the estate of Thomas Wellman, deceased. From allowance of the claim, Catherine A. Wellman, administratrix of the estate, appealed to the circuit court. Judgment for plaintiff. Defendant appeals. Reversed.

*Sullivan & Sullivan*, for appellant.

*Cady & Pepper*, for appellee.

PER CURIAM. Claimant had judgment on a promissory note barred by the statute of limitations. He has formally confessed error, and the judgment is reversed, with costs.

DAVIDSON *v.* MIDWEST COMMERCIAL CREDIT CO.

1. CONVERSION—DEMAND—TENDER.
   Where, in action for conversion of truck, evidence was sufficient to justify finding that defendant's taking was tortious, demand for possession by plaintiff was not necessary prerequisite to bringing action.

2. SAME—IDLE CEREMONY NOT REQUIRED.
   Where defendant, by selling truck, was guilty of actual conversion, and demand for possession would have been idle, no demand was required before bringing action for conversion.

Appeal from Wayne; Smith (Guy E.), J., presiding. Submitted June 7, 1932. (Docket No. 19, Calendar No. 35,701.) Decided September 16, 1932.

Case in common pleas court by Charles V. Davidson against Midwest Commercial Credit Company, a Delaware corporation, for conversion of a motor truck. Verdict and judgment for plaintiff. Defendant appealed to the circuit court. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

*Bernstein & Bernstein,* for plaintiff.

*Wynn, Zinn & Freimuth,* for defendant.

FEAD, J. Plaintiff had judgment for conversion of a truck. Defendant claims it was entitled to directed verdict for plaintiff's failure to make demand and tender before suit.

In March, 1930, plaintiff traded a Dodge truck to defendant for a Reo tractor and a Reo truck, executing to it separate notes and chattel mortgages for the respective balances of purchase price. Monthly

payments on the Reo truck were $110.77, beginning April 29th. The truck needed repairs, and it was agreed that plaintiff should have them made and the cost be credited on the first payments due. Whether this meant the first payments for the truck or included also the tractor debt is not clear. Plaintiff paid about $275 for repairs.

May 21st, without notice to or demand on plaintiff or inquiry as to repair bill, defendant repossessed the truck from plaintiff's employee, against his protest and will and under circumstances warranting the conclusion that it was by force. June 13th, it sold the truck on foreclosure for less than the mortgage amount.

The testimony would not justify a ruling, as a matter of law, that plaintiff owed the obligation to report the repair bill to defendant before the first payment on the truck note was due or that such report was a requisite to credit thereon. Construing the testimony most favorably to plaintiff, the jury could find that the first payment on the truck had been made by the repair bill, that defendant had seized the truck before default of plaintiff, and that, as such seizure was without demand for possession or inquiry and by force, defendant did not act in good faith, and the taking was tortious. Hence no demand for possession was necessary as a preliminary to suit. Moreover, defendant, by selling the truck, was guilty of actual conversion, and demand and tender would have been idle. Under the testimony, defendant was not entitled to a directed verdict.

Judgment is affirmed, with costs.

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

LESTER *v.* AUTO HAULAWAY CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE OF ACCEPTANCE OR WITHDRAWAL.

   Notice to employee of employer's acceptance of provisions of workmen's compensation act, actual or by posting, is not essential factor of operation under said act or withdrawal therefrom.

2. SAME—WHEN EMPLOYEE DEEMED TO HAVE ACCEPTED ACT.

   Employee is deemed to have accepted workmen's compensation act if at time of accident employer charged with liability therefor is subject to provisions of act, whether employee has actual notice thereof or not, and employee shall not have given employer written notice of rejection (2 Comp. Laws 1929, § 8414).

3. SAME—REVOCATION OF ACCEPTANCE—NOTICE TO EMPLOYEE OF REVOCATION UNNECESSARY.

   Where employer's acceptance of provisions of workmen's compensation act was revoked by department of labor and industry because of employer's failure to secure insurance, it was not under said act, and therefore employee is not entitled to compensation thereunder for injury received during revocation period, although no notice of revocation was given to employees (2 Comp. Laws 1929, § 8412).

Appeal from Department of Labor and Industry. Submitted June 9, 1932. (Docket No. 61, Calendar No. 36,435.) Decided September 16, 1932.

Helen G. Lester presented her claim for compensation against Auto Haulaway Company, Inc., employer, and General Indemnity Corporation, insurer, for an accidental injury. From order denying compensation, plaintiff appeals. Affirmed.

*Harold S. Knight,* for plaintiff.

*Mason, Alexander & McCaslin* and *E. Dean Alexander,* for defendants.

FEAD, J. Defendant employer, Auto Haulaway Company, operated under the workmen's compensation law (2 Comp. Laws 1929, § 8407 *et seq.*) from March 22, 1929. March 1, 1930, its insurer gave notice of desire to terminate the insurance. The department of labor and industry, after notice to defendant employer to secure other insurance or show cause, revoked defendant's acceptance of the act as of March 11th. June 5th, defendant employer executed a new acceptance of the act with defendant insurance company as its insurer, and it was approved by the department June 6th.

From March, 1929, to and including June 3, 1930, notices of acceptance of the act remained posted in defendant employer's shop and no notices of revocation or withdrawal were posted at any time.

Plaintiff, an employee of defendant employer continuously from March, 1929, to June 3, 1930, on the later date sustained an accidental injury arising out of and in the course of her employment.

Plaintiff's claim for compensation was denied by the department on the ground that it had no jurisdiction to pass upon it because the parties were not subject to the act on the day of the injury, June 3d.

Plaintiff cites *Bayon* v. *Beckley,* 89 Conn. 154 (93 Atl. 139); *Avre* v. *Sexton,* 110 Neb. 149 (193 N. W. 342); *Van Gorkom* v. *O'Connell,* 201 Iowa, 52 (206 N. W. 637), of interest but not in point. In those States, the employer automatically comes under the compensation law. An essential of rejection of the Connecticut act is stipulation in the contract of employment or personal notice to the employee, and of the other acts is posting notices of rejection. While differently expressed in the different statutes, the effect of failure to carry insurance is that the employer shall be liable to common-law action for in-

juries in the same manner as if he had rejected the act.

The courts were confronted by the propositions (1) that the employer is bound by the act unless he gives notice to the employees to the contrary, actual or by posting, and (2) that failure to carry insurance is visited by the penalty of common-law liability. Stressing the unfairness of permitting the employer to reject the act by mere failure to carry insurance and without notice to the employee, the courts found a way to save both provisions of the statutes by holding that failure to insure made no change in the status of the employer in the respect of his being subject to the act, but merely added to his liability by giving the employee the option of proceeding for compensation or suit for damages.

Our statute proceeds from a different basis, and, of course, must be construed according to its terms.

An employer does not become subject to our compensation act until he files with the department of labor and industry a written statement that he "accepts" the provisions of the act and until the department approves the method of payment of compensation proposed, *i. e.*, insurance, or that the employer may carry his own risk on showing of financial responsibility. 2 Comp. Laws 1929, §§ 8412, 8460. Once operating under the act, the employer so continues from year to year unless, 30 days before the end of the year, he files notice of withdrawal.

Notice to the employee has not the jurisdictional force given it in the above States. The employer is required to post notices of his election to accept the act within 10 days after approval of his election by the department. 2 Comp. Laws 1929, § 8412. The law does not directly command him to post notice of withdrawal, although it contemplates such notice, because it provides that the department shall require

him to do so. But notice to the employee, actual or by posting, is not an essential factor of operation under or withdrawal from the act because the law not only does not declare that the failure to give notice shall affect the relationship or rights of the parties, but, on the contrary, provides, 2 Comp. Laws 1929, § 8443:

"Upon the filing of a statement of election by an employer to become subject to the provisions of this act, the board shall forthwith cause such notice of the fact to be given by requiring said employer to post such notice as hereinbefore provided; and the board shall likewise cause notice to be given of the filing of any withdrawal of such election; but notwithstanding the failure to give, or the insufficiency of, any such notice, knowledge of all filed statements of election and notices of withdrawal of election, and of the time of the filing of the same, shall conclusively be imputed to all employees."

The filing, not the posting, is the jurisdictional act.

An employee is deemed to have accepted the act if at the time of the accident "the employer charged with such liability is subject to the provisions of this act, whether the employee has actual notice thereof or not," and the employee shall not have given the employer written notice of rejection. 2 Comp. Laws 1929, § 8414.

Prior to 1929, an employer, having accepted the act, remained under it until his voluntary withdrawal. The difficulty in this case arises out of an amendment of 1929 to section 8412.

"The acceptance of any employer, after due notice and hearing, may be revoked by the commission (department of labor and industry) for a failure to keep in force insurance in cases where insurance is ordered or for a violation of any of the provisions of this act."

This is the whole of the amendment. No other changes were made to provide that notice of revocation should or should not be posted nor that revocation should or should not subject the employer to common-law damages or to continue his liability for compensation. The whole effect of the amendment must be found in its terms.

Nowhere else does the act indicate that an employer or employee may be partly within and partly without its operation, or that the employer be subject to liability for compensation or common-law damages at option of the employee. Nor does the amendment carry such construction.

Revocation is cancellation. "Acceptance" of the act by the employer, approved by the department, is an indispensable requisite to his operating under it. In using the language that the employer's "acceptance" may be revoked, without declaring a different effect, the legislature obviously intended that his status as an operator under the act should be canceled by revocation. This leaves the employer neither entitled to the benefits nor subject to the liability of the compensation law. As the employee is not under the act unless the employer is, revocation results in relegating each to his common-law status.

We recognize the unfairness of an employer being able to change an employee's status and rights by his own default and without notice to the employee, but the remedy must be found in the legislature and in administration of the power of revocation by the department.

Affirmed.

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

TRASK *v.* NORELL.

1. APPEAL AND ERROR—NOTICE OF APPEAL—PAYMENT OF STENOGRAPHER'S CHARGES—COURT RULES.

   Notice of appeal, when served on circuit court stenographer, constitutes order to him for transcript of testimony specified in it, and it is his duty to furnish said transcript unless, within ten days after receiving such order, he files and serves on appellant demand for prepayment or security for his charges, and appellant fails to comply therewith (Court Rule No. 64, §§ 1, 4).

2. SAME—JURISDICTION TO DISMISS APPEAL.

   Circuit court has no jurisdiction to dismiss appeal for failure of appellant to prepay or secure payment of stenographer's charges for transcript of testimony unless provisions of Court Rule No. 64, §§ 1, 4, have been strictly followed.

Appeal from Macomb; Reid (Neil E.), J. Submitted June 7, 1932. (Calendar No. 36,537.) Decided September 16, 1932.

Action by Walter Trask, as special administrator, against Olle Norell. From order dismissing appeal, plaintiff appeals. Reversed, and appeal reinstated.

*Harry J. Lippman,* for plaintiff.

FEAD, J. This is appeal (mandamus) to set aside an order dismissing an appeal for failure of appellant to prepay or secure payment of the court stenographer's fees for transcript of testimony demanded in the notice of appeal.

The notice of appeal, when served on the stenographer, constitutes an order to him for transcript of testimony specified in it. Court Rule No. 64, § 1. It

is his duty to furnish the transcript unless, within 10 days after receiving such order, he files and serves on appellant demand for prepayment or security for his charges. If he so makes demand and the appellant does not comply within 10 days, the circuit court may dismiss the appeal. Court Rule No. 64, § 4.

Except as expressly provided in the rule, the circuit court has no jurisdiction to dismiss an appeal to the Supreme Court. *Hoffman* v. *Security Trust Co.*, 256 Mich. 383.

The rule admits of no equivocation, as to form of demand or time of proceeding. It does not constitute the court a general collecting agency. Unless its terms are strictly followed, the circuit court has no jurisdiction to dismiss.

The notice of appeal was served May 28th. No demand for charges was filed by the stenographer until June 12th. We need not consider the objections to the form of demand made on counsel for appellant nor to the form of filing. That the demand was not filed in time was sufficient to prevent vesting in the circuit court of jurisdiction to dismiss.

The order will be set aside, and the appeal reinstated, with costs to appellant.

CLARK, C. J., and MCDONALD, SHARPE, NORTH, WIEST, and BUTZEL, JJ., concurred with FEAD, J. POTTER, J., concurred in the result.

KEELER *v.* RICHARDS STORAGE CORP.

1. MORTGAGES—LIABILITY OF MORTGAGOR'S GRANTEE FOR DEFICIENCY DECREE—PAROL AGREEMENT.

   If grantee, as part of consideration for purchase of premises, agrees to assume and pay outstanding mortgage, deficiency decree on foreclosure may run against him, although his agreement was in parol.

2. SAME—SUFFICIENCY OF EVIDENCE.

   On foreclosure of mortgage, evidence *held*, sufficient to justify conclusion of trial court that grantee, as part of consideration in purchase of premises, assumed and agreed to pay mortgage thereon, rendering defendant corporation, which merged with said grantee and stands in its place, liable for deficiency decree.

Appeal from Kalamazoo; Weimer (George V.), J. Submitted June 25, 1932. (Docket No. 173, Calendar No. 36,463.) Decided September 16, 1932.

Bill by Isaac S. Keeler, trustee, against Richards Storage Corporation, a Michigan corporation, as assignee, to foreclose a mortgage and obtain a deficiency decree. Decree for plaintiff. Defendant appeals. Affirmed.

*Butterfield, Keeney & Amberg,* for plaintiff.

*Roger I. Wykes* and *Lloyd E. Cooper,* for defendant.

FEAD, J. April 6, 1925, Hanselman Candy Company (dissolved 1929) and A. R. Walker Candy Corporation (bankrupt 1928 and dissolved 1929) mort-

gaged certain premises to the Michigan Trust Company, trustee, which assigned the mortgage to plaintiff July 17, 1929.

May 25, 1925, Hanselman Candy Company conveyed the premises to Walker Storage Company for recited consideration of $1 and other valuable consideration, with warranty against incumbrances, "excepting a certain mortgage in the sum of $40,000 made and executed to the Michigan Trust Company," and covenant to defend "against all lawful claims whatsoever, except said mortgage."

From hearsay testimony admitted without objection, it appears that the Walker Candy Corporation had purchased the Hanselman Candy Company, which accounts for both executing the mortgage and only the latter executing the deed.

December 22, 1925, Walker Storage Company was consolidated with defendant Richards Storage Corporation. The latter carried the mortgage on its books as an obligation, paid annual interest, and $6,000 of the principal in annual instalments of $2,000. On November 1, 1928, it executed to the Michigan Trust Company, trustee, a second mortgage, in which it agreed to pay the first mortgage.

Instalments of principal, interest, and taxes being in default, plaintiff commenced this suit for foreclosure of the mortgage, praying personal deficiency decree against defendant, on the claim that the Walker Storage Company, on purchasing the premises, orally agreed to assume and pay the mortgage. It is conceded that defendant stands in the place of and is liable for deficiency if the Walker Storage Company would be liable.

If a grantee, as part of the consideration for the purchase of premises, agrees to assume and pay an outstanding mortgage, deficiency decree on foreclo-

sure may run against him, although his agreement was in parol. *Swarthout* v. *Shields,* 185 Mich. 427; *Mowry* v. *Mowry,* 137 Mich. 277; *Duncan* v. *Kirker,* 252 Mich. 353.

G. A. Richards, president of defendant, was the only witness called to testify to the purchase of the premises. He was called by plaintiff and was not examined by defendant. He did not go into details, but stated that negotiations for the sale were conducted on behalf of both seller and purchaser by Mr. Walker; that Richards actively participated in them; that both were stockholders of the Walker Storage Company; that Richards was not interested in the candy company; and that, "We agreed to pay $40,000 in cash, some stock, * * * and assume the mortgage. We took it subject to that mortgage." While Mr. Richards' testimony was not as complete and definite as it could have been, it must be viewed as a declaration against interest, he did not claim that he misspoke or misunderstood the meaning of the words he used, did not attempt to retract them, nor deny that the Walker Storage Company had assumed and agreed to pay the mortgage. Defendant's subsequent conduct, in the manner it carried the transaction on its books, in making subsequent payments on the mortgage, and by the covenants in the second mortgage, support the conclusion which ordinarily would be gathered from Mr. Richards' testimony, that, as part of the consideration, the Walker Storage Company had assumed the mortgage. We think the court was justified in so holding.

Decree for foreclosure and personal deficiency against defendant affirmed, with costs.

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

SIRIANNI *v.* DEVANEY.

TRUSTS—FRAUD—RESULTING TRUST—BURDEN OF PROOF.

Wife, who waited eight years and until after husband's death before asserting that he had fraudulently taken title in his own name to home purchased with her money, *held*, not to have sustained burden of proof that he held title in trust for her, where, in meantime, they had been divorced, property settlement had been had without reference to property in question, inference is strong that she knew how title stood, and evidence preponderates that defendant, to whom husband deeded, advanced substantial sum of money and assumed mortgage without knowledge of wife's claim (3 Comp. Laws 1929, §§ 12975, 12976).

Appeal from Gogebic; Driscoll (George O.), J. Submitted June 15, 1932. (Docket No. 163, Calendar No. 36,494.) Decided September 16, 1932.

Bill by Maria Antoinette Sirianni against Signe V. Devaney to set aside a deed to real estate. Decree for plaintiff. Defendant appeals. Reversed, and bill dismissed.

*Jones & Patek,* for plaintiff.

*Edward W. Massie,* for defendant.

FEAD, J. Plaintiff was the wife of Dr. Sirianni, who was a wanderer, who moved his family to many places, and was not provident. Plaintiff's father furnished her with considerable sums of money throughout her married life.

In 1918 plaintiff purchased real estate in Hurley, Wisconsin, with moneys furnished by her father. In 1920, this property was sold, and Sirianni in-

vested part of the proceeds in a home in Ironwood, Michigan, the premises at bar. He took title in his own name. Plaintiff gave him power of attorney. He mortgaged the property for $1,500. Plaintiff claimed it was agreed title should be taken in her name, and that for several years afterward she did not know the deed ran to her husband.

Plaintiff and her husband parted in 1923, and, in March, 1924, she obtained a divorce in Wisconsin, by default and upon service by publication. The decree relieved plaintiff's separate property of her husband's right by curtesy and awarded their joint property to her. No reference was made to the Ironwood premises. There were two children, whose custody was awarded to plaintiff, but one of them, Cornelia, remained with her father until his death. Shortly after the decree, plaintiff revoked the power of attorney.

Sirianni wandered about, remarried, and finally went to Iron Mountain. In January, 1926, defendant entered his family as a domestic. Her husband had died, his property was sold, and in August she had over $2,200 in a bank. August 23d, Sirianni, defendant, and Cornelia, the latter then 12 years of age, drove from Iron Mountain to Ironwood, where Sirianni executed to defendant a deed of the Ironwood property, subject to the $1,500 mortgage, and defendant claims she paid him $2,200. Her bank book shows withdrawal of that amount at that time. She said she understood that the conveyance was in the nature of a mortgage, as it was arranged that she should sell the property, pay the outstanding incumbrance, retain her own advance with six per cent. interest, and hold the balance for Cornelia. The deed to defendant describes Sirianni as "a divorced man, now single." The scrivener said he

did this without suggestion from anyone, and defendant said she did not notice it. If it had any significance in showing fraud, the fraud would appear to have been directed against Sirianni's second wife rather than plaintiff.

Shortly afterward, Sirianni moved to Mississippi, where he died March 1, 1927. Cornelia returned to her mother at her father's death.

Plaintiff testified that Cornelia told her at once that the conveyance to defendant was fraudulent and related to her the circumstances under which it had been given. Cornelia testified that, on the trip to Ironwood, she fell asleep, awoke and heard her father and defendant talking about a "fake" sale, to be made for the purpose of preventing plaintiff taking any interest in the property; that defendant was to take title, and if Sirianni died first she was to give the home to Cornelia, and if defendant died first he would take care of her daughter; that her father told her he was afraid plaintiff might get the house and he did not want her to have it; that in the scrivener's office, defendant gave her father a roll of money and when they left he returned it to her. The scrivener and defendant denied that Cornelia was in the office at the time of the conveyance.

The present action was begun October 7, 1929, to set aside the deed to defendant upon the ground that Sirianni had purchased the property with plaintiff's money, had taken title without her knowledge and consent and in fraud of her rights, and, therefore, held it in trust for her, 3 Comp. Laws 1929, § 12975; and that defendant was not a purchaser for a valuable consideration and without notice of such trust, 3 Comp. Laws 1929, § 12976. Plaintiff had decree.

The question is purely one of fact. As the trial court had the advantage of seeing the witnesses and

expressed himself as favorably impressed with Cornelia's intelligence and veracity, it is with hesitancy that we feel compelled to disagree with his findings.

Plaintiff's testimony was not impressive in general or in detail. To illustrate, she stated that after the divorce she sought everywhere for Cornelia, whose custody had been awarded to her; that shortly before the day of the conveyance she received information that her husband was to go to Ironwood to make the conveyance; that she went from Gary, Indiana, to Ironwood, and, from across the street, saw Cornelia enter the scrivener's office with Sirianni and defendant; and she returned to Gary without attempting even to speak to her daughter. This testimony was a patent attempt to corroborate Cornelia's claim that she was in the scrivener's office at the time of the conveyance.

In October, 1927, shortly after Sirianni's death, plaintiff filed a verified bill in Gogebic county against this defendant and the mortgagee, in which she alleged that during the time plaintiff resided with him as his wife he owned the property at bar; that it had been purchased with the proceeds of the sale of her Hurley premises; that title was taken in Sirianni's name; that Sirianni died leaving as his widows plaintiff and a woman unknown to her; that, by his death, she became seized of one-third of the premises as dower; that defendant remained seized of the other two-thirds; that the whole was subject to the outstanding $1,500 mortgage; that she and defendant were tenants in common; and she prayed for partition of the premises as between her and defendant. She did not claim fraud nor breach of trust in Sirianni taking title in himself nor ask that the deed to defendant be set aside.

Before filing such bill, so plaintiff testified, Cornelia had told her the details of the conveyance to

defendant and she said she related them to her attorneys in Wisconsin, who were in charge of the suit through local counsel. Conceding that clients are not always responsible for misunderstandings of attorneys, it is hardly credible that a lawyer, with such a state of facts told him as Cornelia is said to have related to plaintiff, would file a bill seeking merely assignment of dower and fail to allege fraud or trust title. The suit was dismissed, and the present action then begun.

It is undisputed that as early as 1920 Sirianni told plaintiff's father that he had taken title in his own name. The record is not clear as to whether plaintiff was present at the time. However, had she understood that the title to the Ironwood property was in her name it seems unreasonable that she would not so have alleged in her suit for divorce or otherwise have taken action to gain possession; that she waited a matter of seven years, until her husband's death made it impossible to impeach her testimony as to the understanding between them, before making claim to interest in the premises; that, with full information as to the manner in which the conveyance to defendant was made, plaintiff made claim only of dower, thereby recognizing Sirianni's ownership; that she waited an additional two years before making claim of title by fraud and trust; and she offers no fair explanation for her delay. Her whole testimony compels the impression that her claim of fraud was conceived after she discovered that her claim of dower was unfounded.

The testimony of Cornelia, given four years after the conveyance, as to the details of a business transaction which occurred when she was 12 years old, is unusual in its accurate pertinence to the legal points here involved, as, for instance, the showing of fraud as against plaintiff rather than as against Sirianni's

second wife and return to defendant by Sirianni of the consideration for the conveyance.

Sirianni's financial character and conduct were such that it would not have been an improbable thing for him to endeavor to get possession of defendant's money. Nor would it be unnatural that he desired to save the residue of the property for Cornelia because it was purchased with her mother's money. The record does not indicate that Sirianni had any reason to apprehend that plaintiff had or would make claim to the property. He had had title for six years. Plaintiff's father knew Sirianni had title. It is not an unfair inference that plaintiff also knew it. Two years had passed since the divorce, and plaintiff had made no claim of ownership.

It is a demonstrated fact that defendant drew $2,200 from her bank the day of conveyance. Except for Cornelia's testimony, the record does not indicate that Sirianni gave the money back to defendant. Nor is it otherwise shown that she ever again had possession of the money.

Upon the whole record, we think it clear that, if there was fraud in the transaction, it was directed against Sirianni's second wife and not against plaintiff; that the evidence preponderates in favor of defendant's loan of the money to Sirianni without notice that plaintiff made claim to the premises; and that plaintiff has not sustained the burden of proof that Sirianni held title in trust for her.

Sirianni's widow and heirs were not made parties to the suit. Consequently, the claim of plaintiff or defendant to ultimate title or lien cannot be here determined.

Decree reversed, and bill dismissed.

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

BRESNAHAN *v.* HICKS.

1. VENDOR AND PURCHASER—FORFEITURE CONSTITUTES VENDEE TENANT AT WILL.

   Under provision in land contract that, on vendee's default and notice of forfeiture, vendor might treat vendee as tenant holding over without permission and take immediate possession, forfeiture of contract constituted vendee tenant at will.

2. WASTE—LIABILITY OF TENANT AT WILL IS AT COMMON LAW.

   Where forfeiture ended contract relation and vendee became tenant at will, his liability, if any, for waste thereafter occurring is at common law and is not to be measured by any provision of contract.

3. SAME—COMMISSIVE WASTE.

   Commissive waste by tenant contemplates participation, at least to some extent, by him.

4. SAME—PERMISSIVE WASTE.

   Permissive waste by tenant requires showing that it was allowed by him or was proximate result of want of reasonable care on his part.

5. SAME—THEFT OF FIXTURES—PROXIMATE CAUSE.

   Tenant's leaving house unlocked may not be said to be proximate cause of theft of fixtures by one who entered at night, during tenant's absence.

6. SAME—TENANT NOT LIABLE FOR STOLEN FIXTURES.

   Tenant at will is not liable to respond in damages for fixtures taken and carried away by thief who entered at night in tenant's absence, although door of house was left unlocked, in absence of showing that tenant participated in theft or that it was allowed by him.

Appeal from Wayne; Miller (Guy A.), J. Submitted June 16, 1932. (Docket No. 29, Calendar No. 36,046.) Decided September 16, 1932. Rehearing denied December 6, 1932.

Case in common pleas court by Jeremiah Bresnahan and another against John W. L. Hicks as assignee of purchaser under a land contract for waste upon premises after forfeiture. Judgment for plaintiffs. Defendant appealed to circuit court. Judgment for plaintiffs. Defendant appeals. Reversed.

*D. B. Richardson,* for plaintiffs.

*John W. L. Hicks* (*Lowery B. Hicks,* of counsel), for defendant.

WIEST, J. This is review, by case-made, of an action to recover damages for alleged waste committed by an assignee of a vendee of a forfeited land contract. The land contract contained a covenant obligating the vendee and his assigns to keep the premises in as good condition as at the date thereof. The vendee assigned the contract to defendant, who assumed and agreed to pay the balance due thereon. Defendant entered into possession of the premises, made several payments on the contract, and then, for his default, plaintiffs gave notice of forfeiture, brought a summary proceeding to obtain possession, and obtained judgment of restitution without contest, defendant being willing to surrender possession. Defendant started to remove his effects, and, while doing so, the house was entered at night by a thief and certain fixtures were carried away.

This suit was brought to recover damages occasioned by such theft of fixtures on the theory that defendant was guilty of permissive waste in leaving the house unlocked.

The land contract provided that, in case of default and notice of forfeiture, the vendor might "treat the purchaser as his tenant holding over without permission, and may take immediate possession of

the premises and the purchaser and each and every other occupant remove and put out."

At the time of the theft defendant was a tenant holding over without permission and under obligation to surrender possession free from injury occasioned by commissive or permissive waste. This does not hold defendant to performance of the contract after forfeiture, but only makes him amenable under the relation brought about by the forfeiture. Forfeiture of the contract constituted defendant a tenant at will.

The action is at common law and not by virtue of statute. The circuit judge so held, and, in an opinion, stated the following reasons for entering judgment against defendant:

"The original contract imposes the duty upon the vendee of keeping the premises in like condition as when taken. When the original contract was entered into, the articles mentioned were upon the premises.

"It therefore became the duty of the vendee under the terms of the contract itself, to keep them there. Under the testimony in the case, these articles disappeared before the time when the vendor reassumed possession. I think that the duty of the vendee under the contract was to preserve the premises in their original condition, minus ordinary wear and tear, until he had turned it over to the vendor or at least given the vendor a fair and reasonable opportunity to take possession. The failure to keep effective watch and ward over the premises held under a contract of purchase, which failure results in the theft of articles of value which go with the premises, in my judgment amounts to a permissive waste."

There is force in defendant's contention that he was not a tenant until forfeiture ended the contract relation, and his liability for waste, if any, is not to

be measured by any provision of the forfeited, and, therefore, ended contract.

Defendant's liability, if any, for waste must be based upon his status at the time of the alleged waste. Defendant confessed error in removing some fixtures and returned the articles. He broke a door mirror, but whether this was before or after forfeiture of the contract does not appear. If it was before forfeiture, then the action, if any, for such damage, would be upon the covenant in the contract.

This brings us to the question of whether defendant, as a tenant at will, is liable to respond in damages for fixtures taken and carried away by a thief. We cannot hold such to be commissive or permissive waste. Certainly it was not commissive waste, for such contemplates participation, at least to some extent, by the tenant, and no such claim is made. Permissive waste, at least, requires a showing that it was allowed by the tenant or was the proximate result of want of reasonable care on his part.

In *Rogers* v. *Atlantic, Gulf & Pacific Co.*, 213 N. Y. 246 (107 N. E. 661, L. R. A. 1916 A, 787, Ann. Cas. 1916 C, 877), it was said:

"In the popular sense, any injury may be waste, but it is not waste in the legal sense, unless caused in such manner as to be within the legal definition of either commissive or permissive waste. * * *

"In no case in this State, or anywhere for that matter as far as our research goes, has a tenant been held liable as for permissive waste for the negligent acts of strangers."

The theft was by one who entered the house, and, even if defendant left the house unlocked, it cannot be held that it was the proximate cause of the theft.

The rule on the subject is found in *Winfree* v. *Jones,* 104 Va. 39 (51 S. E. 153, 1 L. R. A. [N. S.]

201). There an action was brought against a tenant to recover damages for having—

"as alleged, negligently permitted a certain house to be burned while it was in his possession as tenant to the plaintiff, by abandoning it and leaving it unlocked so that it was wrongfully entered, burned, and destroyed."

The court stated:

"It is proper to say that the record furnishes no pretense or suggestion that the defendant had anything to do with the burning of the building other than the alleged negligence of leaving the door unlocked. * * * So that the case presented by the plaintiff is that it was negligent in the defendant to leave the upstairs door of the house unlocked when he abandoned it on the 8th or 9th of December, 1901, thereby making it possible for any one to enter the house and set it on fire, and that for such negligence the defendant must respond in damages for the loss of the house by fire on the 30th or 31st of December, 1901.

"In considering the liability of the defendant under the circumstances mentioned, the question arises upon the threshold of that inquiry, was the act of the defendant in leaving the door of the house unlocked on the 9th of December the proximate cause of the fire which destroyed the house on the 30th of that month?"

The court, after citing authority, further stated:

"The case at bar comes clearly within the influence of the principles to which we have adverted, and when they are applied to the facts here shown it would seem to be manifest that the alleged negligence and the damage complained of are not sufficiently conjoined to support the plaintiff's action. To the credit of the civilization in which we live it

cannot be maintained that the natural and expected result of leaving the upstairs door of an empty house unlocked is, that some one who has no legal right there will enter the house and burn it. * * *

"The house was entered and burned by some one unknown to the plaintiff three weeks after it was vacated, a result which cannot be said to have followed the act of alleged negligence, in the usual, ordinary, and experienced course of events. On the contrary, such a result could not reasonably have been anticipated or expected. * * *

"Considerations of fairness and justice require that no one should be held liable for the consequence of an act innocent in itself, and committed without mischievous intent, which, by the concurrence of some event that could not reasonably have been anticipated, has produced hurtful consequences to another. * * *

"In the case at bar, however, the question is so entirely free from doubt that the court can, as a matter of law, declare that the negligence alleged was not the proximate cause of the injury, reparation for which is here sought in damages."

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

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

ELY *v.* DEWEY.

EQUITY—LIENS—CONCURRENT JURISDICTION—PROBATE COURTS—ADEQUATE REMEDY AT LAW.

Where probate court, awarding certain amount to guardian on filing final account, did not constitute said award lien upon interest of ward in real estate sold on contract, circuit court has no power to impress equitable lien under its reserved concurrent jurisdiction under 3 Comp. Laws 1929, § 15519, since said remedy is now beyond power of probate court to grant; guardian having adequate remedy at law.

Appeal from Oakland; Gillespie (Glenn C.), J. Submitted June 8, 1932. (Docket No. 50, Calendar No. 36,530.) Decided September 16, 1932.

Bill by May Ely against Alphonzo Dewey and another to impress an equitable lien on a vendor's interest in land. Bill dismissed. Plaintiff appeals. Affirmed.

*Wm. S. McNair* and *N. Calvin Bigelow,* for plaintiff.

*Brown, Stoneman, Lorenzo & Springstun,* for defendant Dewey.

WIEST, J. Defendant Dewey is a brother of plaintiff, and, for several years before he became 21 years of age, he lived with and was supported by plaintiff, who was guardian of his person and his estate of 50 acres of land. After defendant Dewey reached his majority, plaintiff filed her account as guardian, and was awarded the sum of $6,492.50. Previous to the allowance, defendant Dewey sold the property on land contract to defendant Stormfeltz-Loveley Company, upon which contract a large amount

is to fall due in the future. The probate court did not constitute the award a lien upon the interest of defendant Dewey in the land contract.

The bill of complaint was filed for the purpose of impressing an equitable lien upon defendant Dewey's vendor's interest in the real estate. The circuit judge dismissed the bill, stating:

"The final order of the probate court does not give plaintiff a lien upon the real estate. This is sometimes done in the settlement of estates, but where it is omitted, I have been unable to discover any authority which places such a demand upon any different footing than any obligation to pay money. Neither the bill nor the testimony discloses that plaintiff does not have an adequate remedy at law. So far as I am able to discover she is in the same position as any other creditor of Dewey. She can commence action on the law side of the court and reduce her claim to judgment and levy upon Dewey's interest in the property or in the contract."

Plaintiff reviews by appeal. Plaintiff has an adequate remedy at law, but contends that what the probate court might have done by way of subjecting defendant's estate to a lien the court of chancery has the power to do under its reserved concurrent jurisdiction, as stated in 3 Comp. Laws 1929, § 15519.

To now do what plaintiff asks, and what the probate court did not do, would not come at all within the concurrent jurisdiction reserved by the mentioned statute, but constitute a remedy beyond the power of the probate court to now grant, and, therefore, beyond the concurrent jurisdiction of the circuit court.

The decree dismissing the bill is affirmed, with costs to defendant Dewey.

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

*In re* REYCRAFT'S ESTATE.

1. WILLS—ATTESTING WITNESSES MAY SIGN AT DIFFERENT TIMES.
Under 3 Comp. Laws 1929, § 13482, requiring two attesting witnesses to will, they must sign in presence of testator, but may do so at different times.

2. SAME—LAPSE OF 32 MONTHS BETWEEN ATTESTING SIGNATURES NOT FATAL.
Where testator complied with statutory requirements, will is not defeated by lapse of 32 months between attesting signatures; it not having been in any respect changed after first witness attested it (3 Comp. Laws 1929, § 13482).

3. SAME—LAST WILL REVOKES FORMER.
Where two inconsistent wills purport to dispose of entire estate, last will, if properly executed, of necessity revokes previous will, although containing no revocation clause (3 Comp. Laws 1929, § 13486).

4. SAME—RESIDUE OF ESTATE.
That testator disposed of residue of his estate in first, instead of last, clause of will, is of no moment.

Appeal from Emmet; Sprague (Victor D.), J. Submitted June 10, 1932. (Docket No. 74, Calendar No. 36,491.) Decided September 16, 1932.

Charles J. Gray and Ella Beattie each presented a will of John J. Reycraft, deceased, for probate, and each filed objections to probate of will presented by the other. D. Herbert Reycraft also filed objections to will presented by proponent Beattie. From orders allowing will presented by proponent Gray and disallowing will presented by proponent Beattie, the latter appeals. Affirmed.

On implied revocation of will by later will, see annotation in 51 A. L. R. 652.

*James F. Shepherd* (*Sherman T. Handy* and *L. J. Reycraft,* of counsel), for appellant.

*B. H. Halstead* and *Leon W. Miller,* for appellees.

WIEST, J. Dr. John J. Reycraft, late of Petoskey, executed a will in due form in December, 1925, in which, after making several specific bequests, he gave Ella Beattie the residue of his estate. In April, 1928, he prepared, in his own writing, another will, signed it, and at that time had one attesting witness also sign, and, 32 months later, had another attesting witness sign. The later will did not contain words expressly revoking the former.

Dr. Reycraft died January 29, 1931. Both wills were found in his office safe in an envelope marked in pencil "Will." The second will was presented for probate by the executor nominated therein, and allowed, and this is an appeal by Ella Beattie, residuary legatee in the first will, from such probate and the disallowance of the first will.

Was the last will properly attested by subscribing witnesses? The statute, 3 Comp. Laws 1929, § 13482, requires two attesting witnesses, and they must sign in the presence of the testator but may do so at different times. *In re Thomas' Estate,* 243 Mich. 566.

Appellant contends, however, that the lapse of 32 months between attesting signatures should not be countenanced. No authority to such effect is cited. An interval of four months between attesting signatures has been sanctioned. *Woodcock* v. *McDonald,* 30 Ala. 411. On this subject see 1 Page, Wills (2d Ed.), § 342. The act of the testator in complying with the statutory validating requirement controls, and, in the absence of statutory regulation, is not defeated by lapse of time between attesting

signatures. The instrument, not having been in any respect changed after the first witness attested it, was legal upon the attestation by the second witness.

In view of this holding, it is contended by appellant that the second will contains no revocation of the first will, and does not make complete disposition of the estate by residuary clause, and, therefore, the first will should be allowed and the estate administered in accord with the first will, except as modified by the second.

We think the following clause in the second will disposed of the residue of the estate. It reads:

"If I die I want my property to be divided giving D. H. Reycraft the remaining portion after Miss Jessie Fairchild, Mrs. L. M. Bellant and Miss Schneider are allowed each one-twelfth of the Perry Hotel income."

We agree with the following statement of the circuit judge:

"Dr. Reycraft was not a literary stylist. His composition, the last will, lacks punctuative and paragraphical structure. But it is couched in simple language and plainly expresses the intention of the testator, to give the residue of his estate to D. H. Reycraft after the several devises and bequests and charges against the estate have been cared for. And in these provisions of the last will the whole of the estate of the testator has been disposed of."

Two inconsistent wills, each purporting to dispose of an entire estate, cannot both be admitted to probate. In such case the last will, if properly executed, of necessity revokes the previous will. The statute provides for revocation by subsequent will. 3 Comp. Laws 1929, § 13486.

The fact that testator disposed of the residue of his estate in the first, instead of the last, clause of the will is of no moment.

The judgment is affirmed, with costs against appellant.

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

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## CAMPBELL *v.* RUKAMP.

1. CORPORATIONS—PROPOSED CORPORATION MAY NOT EXERCISE CORPORATE POWERS.

   Proposed association, which never reached the stage of being *de jure* or *de facto* corporation, may not exercise any corporate powers, assert corporate rights, or assume corporate liabilities.

2. SAME—WHEN PROMOTERS LIABLE.

   Individual assuming to act as corporation and contracting as such, where there is no corporation either *de jure* or *de facto*, is individually liable, and liability also attaches to all stockholders or members of said nonexisting corporation who expressly or impliedly authorize such contracts.

3. PARTNERSHIP—CORPORATIONS—WHEN PROMOTERS LIABLE AS PARTNERS.

   Persons who subscribed for stock and advanced money to transact business before incorporation are liable, as partners, to creditors, although not sustaining the relation of partners between themselves.

4. SAME—WHEN NO LIABILITY ATTACHES.

   Corporation subscribing for stock in proposed corporation which was never incorporated, but advancing no money, is not liable as partner to creditors of proposed corporation.

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On partnership liability of stockholders in case of defective or illegal incorporation, see annotation in 17 L. R. A. 549, 554; L. R. A. 1916C, 196.

Appeal from Genesee; Gadola (Paul V.), J. Submitted June 14, 1932. (Docket No. 124, Calendar No. 36,583.) Decided September 16, 1932.

Bill by Archie R. Campbell and others against Cornelius A. Rukamp, Associated Foundry & Machine Company, and Alex Olafsson to determine rights under a stock subscription agreement and enjoin foreclosure of a chattel mortgage. Cross-bill by defendant Olafsson to foreclose chattel mortgage and hold plaintiffs liable. Decree for plaintiffs. Defendant Olafsson appeals. Reversed, except as to plaintiff Flint Scrap Iron & Metal Company.

*Lebster & Weiss,* for plaintiffs.

*Philip Elliott* and *Charles D. Beagle* (*C. J. Lynch,* of counsel), for defendant Olafsson.

WIEST, J. Defendant Rukamp, as promoter, proposed the organization of a corporation to be known as the Associated Foundry & Machine Company. Plaintiffs subscribed for stock therein. Rukamp, in the name of the proposed corporation, purchased the equipment and plant of the Industrial Foundry & Brass Works, assumed the obligation of that company to the Commercial State & Savings Bank of Fenton, and gave a chattel mortgage in the name of the proposed corporation to defendant Olafsson, as trustee, to secure payment of the assumed obligation. The proposed corporation was never organized; articles of incorporation were not signed, nor were meetings of the stockholders held. Olafsson gave notice of sale under the chattel mortgage, together with notice of intention to hold the subscribers to the capital stock of the proposed corporation liable

as copartners for any deficiency. Plaintiffs, stock subscribers, thereupon filed the bill herein to have their rights determined, and, upon hearing, the court held them not liable as partners. Defendant Olafsson appealed.

There was no corporation, either *de jure* or *de facto*. The purchase contract, under which the equipment of the Industrial Foundry & Brass Works was acquired and its obligation assumed, stated that:

"This agreement to be binding when ratified by the Associated Foundry & Machine (Company) at a meeting of the board of directors of said company."

Rukamp took possession of the purchased equipment and operated a foundry business, expecting to develop that business to the point that, when it was turned in to the proposed corporation, its value as an asset would be materially increased and the subscribers to stock, who had paid one-half of the face value thereof to enable the purchase to be made, or the foundry operated, would be entitled to their full stock without paying anything more.

The course pursued by the subscribers was unusual and best explained by the promoter as follows:

"I was the original promoter of this company. The plaintiffs had quite a friendly spirit toward me, and advanced me money in connection with it. I had a verbal agreement with them that I was to go ahead with the business and later buy a lot of property and they were to put $500 in and get stock to the amount of $1,000, we had a verbal agreement to that effect. By reason of their putting up the money they were to get that amount of stock, because of the increased assets, and any profit on that increase would go to them, and we were holding ourselves out as the Associated Foundry & Machine Company, and they were in it with me at that time."

The business was carried on under the name of the Associated Foundry & Machine Company. This proposed association, never having reached the stage of being a *de jure* or *de facto* corporation, could not exercise any corporate powers, assert corporate rights, or assume corporate liabilities.

The law is well settled that:

"If a single individual assumes to act as a corporation and to contract as such, where there is no corporation either *de jure* or *de facto*, he will be individually liable on the contract; and individual liability will also attach to all of the stockholders or members of a pretended but nonexisting corporation on contracts entered into in its name if they have expressly or impliedly authorized the contract." 14 C. J. p. 200.

Mechem, Elements of Partnership (2d Ed.), § 29, states the rule applicable here:

"Promoters of corporations are not, as such, partners. Though engaged in endeavoring to secure the organization of a company to carry on business for pecuniary profit, their immediate object is not the transaction of business for mutual gain, and they do not fall within the definition or the purposes of partnership.

"Nevertheless, if they carry on a business as incident to the organization, or if they launch and conduct the business before the corporation is organized, or if they conduct the business without ever bringing even a *de facto* corporation into existence, they will usually be liable as partners."

Had the proposed corporation been duly organized and the mentioned purchase contract ratified, then plaintiffs could not be held as partners, but, without incorporation, under the circumstances we have mentioned, the plaintiffs, who subscribed for

stock and advanced money to transact business before incorporation, are liable, as partners, to creditors, although not sustaining the relation of partners between themselves.

The Flint Scrap Iron & Metal Company subscribed for stock, but advanced no money, and is not held to have become a partner.

The decree in the circuit court is reversed, except as to the Flint Scrap Iron & Metal Company, and a decree will be entered in this court under the cross-bill of defendant Olafsson, holding the other plaintiffs liable, as partners, for any deficiency upon foreclosure of the mentioned chattel mortgage.

Defendant Olafsson will recover costs against the plaintiffs adjudged liable, and the Flint Scrap Iron & Metal Company will recover its costs against defendant Olafsson.

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

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GRAURE v. DETROIT LUMBER CO.

1. JUDGMENT—EQUITY—PERJURY.

Court of equity may not entertain bill to vacate judgment at law on ground that false testimony was given in trial.

2. SAME—APPEAL AND ERROR.

Court of equity will not retry suit at law in which judgment has been rendered and time for review by appeal has elapsed.

On perjury as ground for relief against judgment, see annotation in 10 L. R. A. (N. S.) 216; 23 L. R. A. (N. S.) 564; 25 L. R. A. (N. S.) 574; L. R. A. 1916B, 890.

Appeal from Wayne; Dingeman (Harry J.), J. Submitted June 17, 1932. (Docket No. 36, Calendar No. 36,065.) Decided September 16, 1932.

Bill by John Graure against Detroit Lumber Company, a Michigan corporation, to vacate a judgment in an action at law. Bill dismissed. Plaintiff appeals. Affirmed.

*William Look,* for plaintiff.

*Milburn & Semmes,* for defendant.

WIEST, J. This is a bill in equity to vacate judgments, alleged to be wrong in fact and fraudulent. The bill was dismissed, and plaintiff reviews by appeal.

Defendant sued plaintiff in the court of common pleas. Plaintiff appeared in person and contested. Judgment passed against him for $144.42 and costs. Conceiving himself aggrieved, he filed an affidavit and bond on appeal. The appeal proved abortive for failure to comply with the then Circuit Court Rule No. 11, requiring notice. Plaintiff herein then moved for leave to perfect a delayed appeal. This was denied. Application for review in this court was also denied. Summary judgment was entered against plaintiff and the surety on the appeal bond. No review was prosecuted, but the bill herein was filed.

Plaintiff alleges that the judgments are wrong in fact and constitute a fraud from which he ought to be relieved in equity. He does not expressly allege perjured testimony in the suits at law, but, even had he done so, it would be of no avail.

It is settled law in this jurisdiction that a court of equity may not entertain a bill to vacate a judg-

ment at law on the ground that false testimony was given in the trial. *Miller* v. *Morse,* 23 Mich. 365; *Gray* v. *Barton,* 62 Mich. 186; *Steele* v. *Culver,* 157 Mich. 344 (23 L. R. A. [N. S.] 564); *Becker* v. *Welch,* 206 Mich. 613; *Bassett* v. *Trinity Building Co.,* 254 Mich. 207.

The court of equity will not retry a suit at law in which a judgment has been rendered and time for review by appeal has elapsed.

The decree, dismissing the bill, is affirmed, with costs to defendant.

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

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REICHERT *v.* AMERICAN STATE SAVINGS BANK.

TRUSTS—BANKS AND BANKING—SCHOOL FUNDS ILLEGALLY DEPOSITED PREFERRED CLAIM.

Where bank was informally designated as depository of school funds by some officers of school district, but no vote was had or record made, and treasurer deposited school money therein without exacting statutory bond, deposit was unlawful and constitutes preferred claim against bank's receiver (2 Comp. Laws 1929, §§ 7112, 7113).

Appeal from Ingham; Carr (Leland W.), J. Submitted June 15, 1932. (Docket No. 139, Calendar No. 36,618.) Decided September 16, 1932.

Receivership proceedings by Rudolph E. Reichert, State banking commissioner, against American

As to claim of preference of trust deposit out of funds of insolvent bank, see annotation in 1 L. R. A. (N. S.) 252.

State Savings Bank. On petition of School District No. 7, Lansing township, Ingham county, and others to establish preferred claims. From order denying preference to School District No. 7, it appeals. Reversed.

*Cummins & Cummins,* for appellant.

*Kelley, Sessions, Warner & Eger,* for receiver.

WIEST, J. The treasurer of School District No. 7, Lansing township, Ingham county, deposited school money in the American State Savings Bank of Lansing, without the security required by 2 Comp. Laws 1929, §§ 7112, 7113.

This is an appeal by the school district from an adjudication that school money so on deposit in the bank at the time a receiver was appointed is not a preferred claim.

The depository was informally designated by some of the school officers, but no vote was had or record made. The treasurer, under mandate of the statute, should have exacted a bond but failed to do so.

Counsel for plaintiff cite *Reichert* v. *United Savings Bank,* 255 Mich. 685. There, as here, the deposit was unlawful, and preference was adjudged.

Counsel for defendant cite *Reichert* v. *Berkley State Bank,* 257 Mich. 202. There the deposit was lawful, but not withdrawn when the security lapsed.

In the opinion in the latter case it was stated:

"The funds were lawfully deposited. * * * Cases involving unlawful deposits have no application."

Without bond the deposits were unlawful and constitute a preferred claim.

The decree in the circuit court is reversed, and a decree will be entered in this court in accord with this opinion, with costs to appellant.

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

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SCHNEIDER *v.* BRIGGS MANFG. CO.

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—DIRECTED VERDICT.
   In action for malicious prosecution, where facts relative to probable cause are undisputed, question of probable cause is one of law.

2. SAME—BURDEN OF PROOF.
   In action for malicious prosecution, burden is on plaintiff to show want of probable cause.

3. SAME—JUDGMENT NON OBSTANTE VEREDICTO.
   Where, in action for malicious prosecution, plaintiff failed to meet burden of proof to show want of probable cause, trial court properly directed judgment *non obstante veredicto* for defendants.

Appeal from Wayne; Webster (Clyde I.), J. Submitted June 22, 1932. (Docket No. 170, Calendar No. 35,158.) Decided September 16, 1932.

Case by Joseph Schneider against Briggs Manufacturing Company and another for alleged malicious prosecution. Judgment *non obstante veredicto* for defendants. Plaintiff appeals. Affirmed.

*Clarence G. Hill* (*Welsh, Bebout, Hill & Lee,* of counsel), for plaintiff.

*Connolly & Henderson* (*Beaumont, Smith & Harris* and *Percy J. Donovan,* of counsel), for defendants.

WIEST, J. This is an action to recover damages for two alleged malicious prosecutions. Upon trial by jury plaintiff had verdict, but, notwithstanding, the court entered judgments for defendants.

Upon complaint, signed by defendant Carter, who was superintendent for defendant company, plaintiff was arrested for receiving a stolen bolt cutter, valued at $8, and was acquitted. By subsequent complaint, also signed by Carter, he was arrested for receiving other property stolen from the defendant company, and was acquitted. Plaintiff operated a repair garage near the plant of the Briggs Company. He had formerly been an employee of the Briggs Company, and was aware of the fact that the tools of that company carried identification marks.

The trial judge held that plaintiff failed to establish want of probable cause. The undisputed testimony shows that defendant Carter had probable cause for making the complaints, and laid fully and fairly the information he had before the prosecuting attorney who authorized the warrants to issue. A brief recital will suffice.

Carter was personally informed, by one having had view thereof, that tools of the Briggs Company were in plaintiff's repair shop. He reported the information to the police for investigation. The police visited plaintiff's shop and carried certain suspected tools to Carter's office, where a company employee identified them by marks or recorded numbers. The

party who took the bolt cutter to plaintiff's shop informed Carter that he surreptitiously removed it from the Briggs Company's plant, and another person informed Carter that plaintiff said to him it would never do to leave the identification marks on the cutter, and, in his presence, took the tool and ground off the marks. An employee of the Briggs Company informed Carter that he stole an electric drill from the factory and traded it to plaintiff for an old automobile, and later, when he warned plaintiff not to leave it in sight, plaintiff said that he had removed the marks and was going to paint it over so it would never be recognized. This information and more was laid before the prosecuting attorney by Carter before warrants were authorized.

The question is not whether the information upon which Carter acted was true, but whether Carter was so informed, and, relying thereon, in good faith and exercising reasonable prudence, made the complaints. That Carter was so informed is uncontradicted.

When the facts relative to probable cause are undisputed, the question of probable cause is one of law. The burden was on plaintiff to show want of probable cause, and this was not met by testimony that Carter was misinformed. Defendants proved ample probable cause, and all other questions are of no moment.

The judgment is affirmed, with costs to defendants.

CLARK, C. J., and McDONALD, POTTER, SHARPE, NORTH, and FEAD, JJ., concurred. BUTZEL, J., did not sit.

BROWN *v.* VIDRO.

1. COUNTIES—COUNTY TREASURER NOT ENTITLED TO INTEREST ON UNCLAIMED MONEY—STATUTES.

   Where unclaimed money was deposited by administrator with county treasurer under 3 Comp. Laws 1929, § 15759 *et seq.*, treasurer is not entitled to retain interest received thereon, but is limited to statutory fee.

2. SAME—COUNTY NOT ENTITLED TO INTEREST ON UNCLAIMED MONEY.

   Nor does said interest belong to county, in absence of express statutory provision to contrary.

Appeal from Kent; Perkins (Willis B.), J. Submitted July 5, 1932. (Docket No. 174, Calendar No. 36,647.) Decided September 16, 1932.

Assumpsit by George C. Brown, administrator of the estate of Robert Conrad, deceased, against Thomas Vidro, Kent county treasurer, to recover interest on unclaimed money deposited with defendant pursuant to 3 Comp. Laws 1929, § 15759 *et seq.* Judgment for plaintiff. Defendant appeals. Affirmed.

*George C. Brown,* for plaintiff.

*Bartel J. Jonkman,* for defendant.

WIEST, J. This is case-made from the Kent circuit, and presents the question of right of the treasurer of Kent county to retain interest received upon funds deposited by order of the probate court under the provisions of 3 Comp. Laws 1929, § 15759 *et seq.*

The statute relates to estates of deceased persons, and, to enable closing probate thereof and to protect the rights of heirs, legatees, and claimants whose whereabouts cannot be ascertained, makes it the duty of the probate court to order the executor or administrator to deposit with the county treasurer money belonging to such persons.

The county treasurer is required to receive the money, give bond to the judge of probate, maintain the same in a separate fund, render an annual account, and pay out the fund under order of the probate court, and, for care thereof, a fee is fixed by the statute.

In the case at bar the treasurer received moneys, and, when ordered by the probate court to pay out the same, retained not only the statutory fee but as well the interest received upon deposit thereof.

Defendant prosecutes review of a holding that the interest actually received constitutes a part of the corpus of the fund and may not be withheld.

We agree with the following statement made by the circuit judge:

"The funds being private and not public, the county treasurer, by force of the exigencies of the situation, is made its custodian. He is, in fact, the trustee of such funds and must account to the beneficiary thereof, not only for the corpus of such funds, but for all increment thereto by way of interest less the statutory compensation provided for his service."

The statute arose from a need in closing estates. Similar legislation exists in the State of Illinois. The fund is held, awaiting call or order.

The statutory fee for the holding excludes, by necessary implication, any other recompense.

Defendant's contention that the interest belongs to the county, in the absence of an express statutory provision to the contrary, is without merit.

Evidently, because of its permanence, the office of county treasurer was selected as custodian of unclaimed moneys in the hands of executors and administrators. To such extent the county treasurer is constituted an administrative officer in probate proceedings, and the county treasurer can no more withhold interest actually earned upon the fund than could an executor or administrator.

The judgment is affirmed, with costs to plaintiff.

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

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MOORE *v.* UNITED STATES TRUCK CO.

1. NEGLIGENCE—IMPUTED NEGLIGENCE—GUEST PASSENGER—STATUTES.

   Guest act has not abrogated rule that automobile driver's negligence is imputable to guest, barring recovery against owner of truck with which automobile collided (1 Comp. Laws 1929, § 4648).

2. MOTOR VEHICLES—NEGLIGENCE—FAILURE TO HAVE REAR LIGHT.

   Owner of truck was guilty of negligence in leaving stalled truck and trailers on highway without rear warning light; and said negligence is not excused by fact that highway had row of arc lights in its center.

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As to driving automobile at speed which prevents stopping within length of vision as negligence, see annotation in 44 A. L. R. 1403; 58 A. L. R. 1493.

On contributory negligence of guest injured while riding in automobile, see annotation in 61 A. L. R. 1261; 65 A. L. R. 956.

As to stopping on highway without lights, see annotation in 24 A. L. R. 510; 47 A. L. R. 706; 62 A. L. R. 972.

3. SAME—EXCESSIVE SPEED.

Automobile driver was guilty of negligence in driving at speed of 35 miles per hour back of another automobile and within four or five feet thereof on a misty night, with view ahead cut off, resulting in collision with truck stalled on highway; and said negligence is not excused by failure to have rear light on truck.

4. SAME—GUEST PASSENGER—GROSS NEGLIGENCE.

Guest passenger may not recover from host for personal injuries resulting from automobile collision, unless host was guilty of gross negligence, or wanton and wilful misconduct (1 Comp. Laws 1929, § 4648).

5. SAME—IMPUTABLE NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

Guest passenger is not entitled to recover against owner of truck with which automobile in which she was riding collided, where her host was guilty of contributory negligence, since his negligence is imputable to her.

Appeal from St. Clair; George (Fred W.), J. Submitted June 15, 1932. (Docket No. 169, Calendar No. 36,299.) Decided September 16, 1932. Rehearing denied December 6, 1932.

Case by Marion D. Moore against U. S. Truck Company, Inc., a Michigan corporation, for personal injuries received in an automobile accident alleged to have been due to defendant's negligence. Verdict and judgment for plaintiff. Defendant appeals. Reversed.

*Baird, Watson & McColl,* for plaintiff.

*Evelyn A. Greene* (*Cady & Pepper,* of counsel), for defendant.

WIEST, J. Plaintiff, while riding in an automobile driven by Hilton Moran, was injured in a rear-end collision with a stalled truck with trailers standing upon a highway. She brought suit against Moran and the owner of the truck, charging Moran with

gross and wanton and wilful negligence in operating his car, and the truck company with negligence in parking the truck upon the highway without a rear light. The accident happened about 10 o'clock at night.

At the close of plaintiff's proofs the court held that no case had been made against Moran under the guest act (1 Comp. Laws 1929, § 4648), but let the case proceed against the owner of the truck, and plaintiff had verdict and judgment.

The guest act has not abrogated the rule that Moran's negligence is imputable to plaintiff, and bars recovery against the truck company. However, plaintiff proceeded against the truck company on the theory that Moran was guilty of no negligence.

The pavement, at the point of accident, for southbound traffic, was 40 feet wide and had four lanes, so-called. The truck with two trailers was headed south and stalled in going up a hill in the second lane from the west side of the pavement and partly over the side of the third lane. The night was misty. Moran was going south and approached the rear of the stalled truck and trailers at a speed of about 35 miles per hour. While so driving, another car went by and in front of him and almost instantly cut out to avoid the truck. This car, when in front, was only four or five feet from Moran's car, and effectually cut off his view of the road ahead, and when that car swerved to avoid the truck, Moran discovered the truck about 15 feet ahead of him and attempted to turn out but his car skidded against the rear trailer.

The defendant truck company was guilty of negligence in leaving its truck and trailers upon the highway without a rear warning light. Moran was also guilty of contributory negligence in driving without a view of the highway ahead of him. The duty of

so driving as to have assurance of safety ahead is imposed by the law of the road and exacts no higher degree of care than that of the common dictates of prudence. We have repeatedly stated the rule applicable to this case. *Holsaple* v. *Menominee Sup'ts of Poor,* 232 Mich. 603; *Lett* v. *Summerfield & Hecht,* 239 Mich. 699; *Haney* v. *Troost,* 242 Mich. 693; *Wilkins* v. *Bradford,* 247 Mich. 157; *Bielecki* v. *United Trucking Service,* 247 Mich. 661.

The highway had a row of arc lights in its center, but that did not excuse the failure of defendant truck company to have a rear light. Had there been such a light it is possible that Moran would have seen it before the stranger cut in and prevented all view of the road ahead, but this did not excuse Moran and place the blame wholly upon the defendant truck company, for Moran's duty to exercise care was manifested by the very fact that his view ahead was prevented, and it was negligence, contributing to the collision, for Moran to drive at the speed of about 35 miles per hour, back of another automobile and within four or five feet thereof on a misty night, with all view ahead cut off.

Plaintiff, in her declaration against Moran, aptly stated his negligence as follows:

"Failing to exercise due care and caution and to keep proper lookout.

"Failing to have his car under such control as to enable him to stop within the assured clear distance ahead.

"Failing to have his car under such control as to enable him to stop within the range of his lights."

The proofs established such negligence, but no recovery was had against Moran because plaintiff was his guest, and the court, without passing upon the question of whether Moran was guilty of ordinary

negligence, held that he was not guilty of gross, wilful, or wanton negligence. Plaintiff could not recover against Moran unless he was guilty of gross negligence, or wanton and wilful misconduct. *Finkler* v. *Zimmer,* 258 Mich. 336; *Bobich* v. *Rogers,* 258 Mich. 343.

Plaintiff could not recover against the truck company if Moran was guilty of ordinary negligence contributing toward the accident. The last-mentioned bar is raised by the doctrine of imputed negligence. *Sellon* v. *Tanner,* 252 Mich. 231.

The rule of proximate cause, in case of an injury occasioned by the concurrent negligence of two or more defendants, as stated in *Reed* v. *Ogden & Moffett,* 252 Mich. 362, and *Camp* v. *Wilson,* 258 Mich. 38, is of no avail to plaintiff, for her case fails if the negligence of Moran was a contributing cause to the accident.

The motion of defendant truck company for a directed verdict and/or its motion for judgment notwithstanding the verdict should have been granted.

The judgment is reversed, without a new trial, with costs to defendant truck company.

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

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## HAWGOOD *v.* HOWARD'S ESTATE.

1. WILLS—DELAYED APPEAL FROM PROBATE COURT—ABUSE OF DISCRETION.

   Denial of petition for delayed appeal from order of probate court admitting will to probate must stand unless there was abuse of discretion.

2. SAME—NOTICE—DELAYED APPEAL—FOREIGN HEIRS.
Want of notice of probate proceeding furnished foreign heirs with good excuse for not appealing within statutory period, but required prompt use thereof to be of avail (3 Comp. Laws 1929, §§ 15603, 15969).

3. SAME—INEXCUSABLE DELAY.
Where foreign heirs did not apply for leave to appeal from probate court within three months after notice of proceeding therein, they are not entitled to delayed appeal under 3 Comp. Laws 1929, § 15971.

4. SAME—ILLNESS OF ATTORNEY AS EXCUSE FOR DELAY.
Illness of one of attorneys for period of eight weeks is no excuse for delay of six months in appealing from probate court.

5. SAME—SEARCH FOR EVIDENCE AS EXCUSE FOR DELAY.
Want of diligence in appealing from probate court is not excused by time taken in search for evidence tending to show meritorious cause for contest.

6. SAME—WHEN DELAYED APPEAL ALLOWABLE.
Where, on face of record, probate court had jurisdiction, delayed appeal may only be allowed in case it is established that justice requires revision of case (3 Comp. Laws 1929, § 15969).

7. SAME—WHEN DELAYED APPEAL PROPERLY DENIED.
Where showing was insufficient to establish that justice requires revision of case, and there was inexcusable delay in appealing from probate court, delayed appeal was properly denied (3 Comp. Laws 1929, § 15969).

Appeal from Wayne; Moynihan (Joseph A.), J. Submitted June 7, 1932. (Calendar No. 36,350.) Decided September 16, 1932.

On petition of Henry Hawgood and others, foreign heirs, for delayed appeal from order of probate court admitting to probate the will of George W. Howard (Hawgood), deceased. Plaintiffs appeal from order of denial. Affirmed.

*Frederick W. Bauer* and *Frank A. Martin,* for appellants.

*Abbott & Coulter, McLeod, Fixel, Abbott & Fixel, Renaud & Coash,* and *James A. Henderson,* for appellee.

WIEST, J. This is an appeal, in the nature of mandamus, to vacate an order in the circuit court denying an application for a delayed appeal from the probate court and direction to the circuit judge to allow the appeal.

Plaintiffs, by motion, ask that defendant's brief be stricken from the files for failure to serve notice of appearance under Court Rule No. 62. We decline to deprive ourselves of help furnished by defendant's brief. The motion is denied, but without costs.

In the circuit court plaintiffs, on November 12, 1931, petitioned for leave to appeal from an order of the probate court, entered December 10, 1930, admitting to probate the will of George W. Howard, deceased. Petitioners are residents of Canada, and heirs-at-law of the testator, and were not given notice of the proceeding in the probate court and did not learn of testator's death and probate of the will until May, 1931, at which time they employed an attorney to look after their interests. The attorney was taken sick, was ill eight weeks, and engaged an associate to help make an investigation. The petition for leave to appeal was denied, and such denial must stand unless there was an abuse of discretion.

The heirs-at-law complain of want of notice. The statute (3 Comp. Laws 1929, § 15603) in force at the time the will was filed for probate, provided:

"Whenever it shall appear upon application to any probate court * * * to prove the will of any deceased person, that the heirs-at-law of said deceased, or any of them, are residents of a foreign country, it shall be the duty of the judge of such probate

court to notify the consul of such foreign nation in the city of New York, or the consul, vice-consul, or consular agent, resident in this State, if there be one of such foreign nation, of the pending of, and the day appointed for hearing such application."

The record does not show, but we assume from statements in the briefs, that the petition for probate of the will was filed by Hannah Elizabeth June, former housekeeper for testator and principal beneficiary under the will. This petition did not inform the court of the heirs-at-law in Canada. Notice, in due form, was given to all persons mentioned in the petition, and jurisdiction of the probate court was exercised in accord with the statutory provisions applicable to the petition filed, and it is not enough now to show that, had the petition been different, then the invoked provision of the statute would have been applicable. Want of notice furnished plaintiffs with a good excuse for not appealing within the time allowed by statute, but required prompt use thereof to be of avail.

Plaintiffs also invoke 3 Comp. Laws 1929, § 15969, which provides:

"If any person aggrieved by any act of the judge of probate * * * shall from any cause, without default on his part, have omitted to claim or prosecute his appeal according to law, the circuit court, if it shall appear that justice requires a revision of the case, may, on the petition of the party aggrieved, and upon such terms as it shall deem reasonable, allow an appeal to be taken and prosecuted with the same effect as if it had been done seasonably."

Defendant claims that plaintiffs have not made a showing that justice requires a revision of the case, citing *McKay* v. *Macomb Circuit Judge,* 222 Mich. 244, and, besides, claims that the debts of the de-

ceased were paid before the application for appeal was filed, and, therefore, under 3 Comp. Laws 1929, § 15970, and our holding in *Re Quinlan's Estate,* 250 Mich. 684, application for the delayed appeal could not be entertained.

To this plaintiffs call attention to 3 Comp. Laws 1929, § 15971, which provides:

"If the petitioner shall be without the United States at the time of passing the decree or order, or making the determination, he may file his petition within three months after his return, provided it be done within two years after the act complained of; but no such petition shall be allowed after the payment of the debts of the estate and the distribution thereof to the parties entitled thereto by due course of law,"—

and aver there has been no distribution of the estate.

The contention of defendant that the last-mentioned statute

"has no application whatsoever, to the case at bar, as it clearly refers to a petitioner who, at the time of the entry of the order complained of, had previously left the United States and subsequently returned and who, after his return, and within three months thereafter, filed his petition,"—

and inasmuch as the petitioners here are residents of Canada and there is no showing that they had ever been in the United States previous to 1931. This contention overlooks the holding of this court in *Re Alston's Estate,* 229 Mich. 478, that aliens are not deprived of the benefit of this statute. This statute does not help plaintiffs, for they did not apply for leave to appeal within three months after full knowledge of the action had in the probate court.

Illness of one of the attorneys for a period of eight weeks is no excuse for the delay of six months. *In re Bright's Estate,* 157 Mich. 220. Neither is want of diligence excused by time taken in a search for evidence tending to show a meritorious cause for contest.

Upon the face of the record the probate court had jurisdiction and the appeal, if any, can only be allowed in case it is established that justice requires a revision of the case.

This brings us to consideration of the showing made by plaintiffs in support of a contest. An affiant stated that, for a number of years prior to 1918, testator indulged in the drinking of intoxicating liquors to a considerable degree, and after 1918 his indulgence greatly increased, and he noticed that testator was forgetful, subject to lapses of memory, and at times was irrational and would forget at times that deponent, who was a tenant, had paid his rent, and sometimes failed to recognize deponent when they met on the street or elsewhere, and would tell deponent not to bother him because he did not want to talk, and, on numerous occasions, testator was abusive to Hannah Elizabeth June, and after the year 1920 he attempted to attack Mrs. Ernest Collough, and had to be restrained by deponent, and afterwards stated he had no recollection whatsoever of the attempted attack, and there was something wrong with his head because he suffered unbearable pains therein at times.

The will was executed February 25, 1920, and the codicil on October 30, 1930. The showing falls far short of providing an issue for a jury.

It is not shown that testator was laboring under any mental incompetency or undue influence at the time he executed the will and codicil.

We cannot say that justice requires a revision of the case, and, for this reason, and because of inexcusable delay, the order denying leave to appeal is affirmed, with costs against plaintiffs.

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

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HARVEY *v.* STEWART.

1. PLEADING—AMENDMENT—ANSWER.
   Under Court Rule No. 26, answer, not having been amended after amendment of declaration, remained in effect as to amended declaration.

2. APPEARANCE—IRREGULARITIES WAIVED—JURISDICTION.
   Jurisdictional irregularities are waived by general appearance and pleading to merits of case.

3. SAME—JURISDICTION OF PERSON—WAIVER.
   Where defendants entered appearance and pleaded general issue, they waived question of court's jurisdiction, and therefore dismissal of case on ground that neither party was resident of county in which action was brought was error.

Appeal from Oakland; Doty (Frank L.), J. Submitted June 7, 1932. (Docket No. 22, Calendar No. 36,182.) Decided September 16, 1932.

Case by Grace Harvey against Ralph Stewart, Jack Campbell, and Chrysler Corporation, a foreign

corporation, for personal injuries sustained in an automobile accident. From order of dismissal as to defendants Stewart and Chrysler Corporation, plaintiff appeals. Reversed, and remanded.

*R. M. Van Dyne,* for plaintiff.

*Robert E. Plunkett,* for defendant Stewart.

*Frederick J. Ward,* for defendant Chrysler Corporation.

BUTZEL, J. Grace Harvey, plaintiff, was a resident of Flint, in Genesee county, at the time she brought the instant suit in Oakland county against Jack Campbell, Ralph Stewart, and the Chrysler Corporation, defendants. She seeks to recover damages for injuries she claims to have sustained in a collision in which the car she was riding in was struck both by the Oldsmobile car driven by Campbell and the Dodge car belonging to Chrysler Corporation and driven by Stewart. The accident happened in Oakland county, of which she claims Campbell is a resident. In an amended declaration she claims the negligent operations of both the Oldsmobile and Dodge cars were co-operating and concurrent acts. Campbell was never served with the process. Stewart, a resident of Wayne county, and the Chrysler Corporation were both served in Wayne county. They entered their appearances and pleaded the general issue. After the filing of the amended declaration, they moved to dismiss, claiming that plaintiff was a resident of Flint, Stewart of New York State, and the Chrysler Corporation a foreign corporation, that the latter two were served with process in Wayne county, and that none of the parties, either plaintiff or defendants, are residents

of Oakland county, that there was no joint liability on the part of defendants, and therefore the court had no jurisdiction.

It is conceded that plaintiff is now a resident of Flint, but in the affidavit filed in opposition to the motion to dismiss, it is claimed that she was a non-resident of the State of Michigan at the time of the accident. Other questions of jurisdiction are also raised. Service was not obtained upon Campbell, and an order was entered dismissing the cause of action as to him. The trial judge also granted the motion to dismiss as to the other two defendants, and plaintiff appeals from this order.

Defendants Stewart and Chrysler Corporation appeared and answered the declaration by pleading the general issue. Under Court Rule No. 26, the answer, not having been amended, remained in effect as to the amended declaration. It has been held in similar cases that jurisdictional irregularities are waived by general appearance and pleading to the merits of a case. *Hempel* v. *Bay Circuit Judge,* 222 Mich. 553, 559; *Croff* v. *DeVries,* 253 Mich. 180.

The order dismissing the case against Stewart and the Chrysler Corporation is herewith reversed, with costs to plaintiff, and the case remanded for further proceedings.

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

COOKLIN *v.* COOKLIN.

1. MORTGAGES—GIFTS.
   Mortgage may be subject-matter of gift.

2. SAME—PROMISE TO PAY.
   It is not necessary that mortgage be accompanied by note, where mortgage contains promise to pay.

Appeal from Tuscola; Smith (Henry H.), J. Submitted June 10, 1932. (Docket No. 77, Calendar No. 36,482.) Decided September 16, 1932.

Bill by Fred Cooklin against Mildred Cooklin to set aside a mortgage. Decree for plaintiff. Defendant appeals. Reversed, and bill dismissed.

*Roland O. Kern,* for plaintiff.

*Herbert W. Smith,* for defendant.

BUTZEL, J. Fred Cooklin, plaintiff, an aged gentleman, gave his granddaughter Mildred, defendant herein, a mortgage of $1,000 on his farm. He did so out of respect to the wishes of his wife who had died previous to giving the mortgage. He was fond of defendant and did not want his son, defendant's father, to share in the property. Subsequently, plaintiff changed his mind and wanted a return of the gift or have the mortgage transferred to other property, inasmuch as he had sold the property upon which the mortgage had been given. He brought suit, and the trial judge gave him a decree

setting aside the mortgage. The case was tried before the decision in *Goethe* v. *Gmelin,* 256 Mich. 112, was handed down. In the latter case, we held that a mortage might be the subject-matter of a gift. He further claimed that the mortgage was not accompanied by a note. The following provision in the mortgage is sufficient to establish a promise to pay:

"Provided always, and these presents are upon this express condition, that if the said party of the first part, his heirs or assigns, shall and do well and truly pay, or cause to be paid to the said party of the second part the sum of one thousand dollars on or before the date of the death of the first party, with interest at the rate of six per cent. per annum from and after the date of the death of said first party payable annually thereafter, then these presents shall cease, and be null and void. But in case of nonpayment of the said sum of one thousand dollars or of the interest thereof, or any part of said principal or interest, at the time, in the manner, and at the place above limited and specified for the payment hereof, then and in such case," etc.

It is not necessary that a mortgage be accompanied by a note, provided the mortgage itself contains a promise to pay.

The decree of the lower court is reversed, with costs to defendant, and one may be entered dismissing the bill of complaint.

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

## McDOUGALL *v.* HENDERSON.

1. HUSBAND AND WIFE—COMMON-LAW DISABILITY OF WIFE—JOINT TENANTS—STATUTES.

   By Act No. 158, Pub. Acts 1917 (3 Comp. Laws 1929, §§ 13062–13067), common-law disability of married woman to make and enter into written instrument with her husband as joint tenants of real estate was removed.

2. SAME—LIABILITY OF WIFE AS SURVIVOR FOR JOINT OBLIGATION.

   Where wife is survivor of husband, judgment against her arising out of joint obligation entered into by them as joint tenants of real estate may be satisfied only out of property to which she became entitled as survivor of herself and husband (3 Comp. Laws 1929, § 13064).

Appeal from Lapeer; Smith (Henry H.), J. Submitted June 17, 1932. (Docket No. 27, Calendar No. 36,379.) Decided September 16, 1932.

Assumpsit by Randolph McDougall and another against Hannah A. Henderson and others for instalments due under a land contract. Judgment for plaintiff. Defendant Henderson appeals. Remanded.

*Geo. W. Des Jardins,* for plaintiffs.

*Kelley, Sessions, Warner & Eger,* for defendant Henderson.

BUTZEL, J. Randolph McDougall and Alice McDougall, his wife, as vendors, entered into a written executory contract for the sale of real estate to William W. Henderson and Hannah A. Henderson, his wife, and Robert J. Merrill and Teresa Merrill, his wife, as vendees. Payments were duly made and

possession of the premises delivered to vendees. Mr. Henderson subsequently died, and Mrs. Henderson, as survivor of herself and her husband as joint tenants, continued in possession of the premises with the Merrills. She made a number of payments on the contract, but later both she and the Merrills defaulted. Thereupon vendors, as plaintiffs, brought suit to recover the payments that were then due and unpaid, and judgment was rendered against Mrs. Henderson and Robert J. Merrill for $1,783.39, the amount due. Mrs. Henderson is sole appellant. The question presented is whether judgment containing no restriction may be rendered against her to be satisfied out of her separate estate irrespective of whether she acquired the property levied or to be levied upon by right of survivorship or not.

It is claimed that the contract was a voidable one, and that, by making payments on the contract and remaining in possession, and writing a letter inclosing a payment on the contract, all subsequent to her husband's death, she affirmed the contract as her own and became liable for the indebtedness. By Act No. 158, Pub. Acts 1917 (3 Comp. Laws 1929, §§ 13062–13067), the common-law disability of a married woman to make and enter into a written instrument with her husband as joint tenants of real estate was removed. Under section 13064, *supra,* an estate owned by them as tenants by entirety, or the real estate acquired by either as survivor of the other, shall be liable to seizure and sale on execution in satisfaction of any judgment recovered against them or their survivor upon a written instrument entered into by them jointly. In case the wife is the survivor of the husband, a judgment against her arising out of the joint obligation may be satisfied only out of the property that she became entitled to

as survivor of herself and husband. Section 13065 further provides that an appropriate recital shall be made in the judgment showing it is rendered on such joint obligation, and such recital shall be indorsed upon any writ of execution or other process on account of said judgment, etc.

The case is remanded to the trial court with instructions to make proper recital in the entry of the judgment so as to show that it was rendered on an obligation entered into by husband and wife, and that it only may be enforced against property which appellant acquired by right of survivorship of herself and husband. Appellant will recover costs.

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

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LAU v. PONTIAC COMMERCIAL & SAVINGS BANK.

1. LIMITATION OF ACTIONS—PLEADING—AMENDMENT—DISCRETION OF COURT.

   Permitting defendants to amend their answer by also pleading statute of limitations is within discretion of trial judge.

2. SAME—WAIVER.

   Failure of defendants to raise question of statute of limitations within 15 days after receiving bill of complaint did not constitute waiver of said defense.

3. SAME—MORTGAGES—FORECLOSURE.

   Where it is contended that mortgage foreclosed over five years ago was nullity because given on property not belonging to mortgagors, suit to set aside mortgage is not barred by 3 Comp. Laws 1929, § 13964.

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On allowing amendments as within the discretion of the court, see annotation in 3 L. R. A. (N. S.) 264; 33 L. R. A. (N. S.) 196; 47 L. R. A. (N. S.) 932.

Appeal from Oakland; Simpson (John), J., presiding. Submitted June 8, 1932. (Docket No. 51, Calendar No. 36,528.) Decided September 16, 1932.

Bill in aid of execution by Frank H. Lau, receiver of Detroit, Pontiac & Owosso Railway Company, a Michigan corporation, and Detroit Construction Company, Ltd., a partnership association limited, against Pontiac Commercial & Savings Bank and another. Bill dismissed. Plaintiff appeals. Reversed, and remanded for trial on merits.

*Fox & Severance,* for plaintiff.

*Patterson & Patterson,* for defendants.

BUTZEL, J. Frank H. Lau, receiver of Detroit, Pontiac & Owosso Railway Company, a corporation, and of Detroit Construction Company, Ltd., a partnership association, on October 4, 1930, filed a bill of complaint against the Pontiac Commercial & Savings Bank and Hugh A. McPherson, receiver. Plaintiff alleges that the railway and construction companies between the years 1911 and 1917 planned and took steps to build a railway that was to run from Pontiac to Owosso, Michigan, and for that purpose acquired for terminal purposes approximately 5½ acres in Waterford township, Oakland county, Michigan. The railroad was never built, the company abandoned the project and ceased to do business but without any dissolution proceedings. A balance of $1,300 of a $2,500 judgment against the railway and construction companies remained unpaid, and plaintiff was appointed receiver. He claims that the 5½ acres were purchased with the funds of the railway, but that the title, however, was taken in the name of George F. Brondige, who sub-

sequently deeded the property subject to the $600 mortgage to Z. Lau, the bookkeeper and stenographer of the railway company and daughter of Oliver H. Lau, as promoter; that subsequently she mortgaged the property to secure a note of $10,000 given by herself and her brother Percy M. Lau to defendant bank, whose president, Cramer Smith, it is claimed, knew the property had been purchased with the funds of the railway company and belonged to it; that this mortgage was paid, but another of like amount and for similar purpose was given the bank on May 12, 1921; that this latter mortgage was foreclosed and a sheriff's deed given to the bank on February 21, 1923; that the property was subdivided into 18 lots on August 12, 1924, and that part of them have been sold. Plaintiff seeks to reach the lots remaining unsold and the proceeds from those sold. Defendants deny the important allegations in plaintiff's bill and also claim laches on the part of plaintiff and the railway and construction companies.

At the trial, the trial judge permitted defendants to amend their answer by also pleading the statute of limitations. This was wholly within the discretion of the trial judge. *Grant* v. *National Manufacturer & Plating Co.,* 258 Mich. 453. Nor was the failure to raise the question of limitations within 15 days after receiving the bill of complaint a waiver of this defense. Court Rule No. 27, § 6; *L. J. Mueller Furnace Co.* v. *Wayne Circuit Judge,* 226 Mich. 672. The trial judge held that, inasmuch as over five years had elapsed since the foreclosure of the mortgage, plaintiff was barred by 3 Comp. Laws 1929, § 13964, from asserting its claims against defendants. This statute does not apply in the instant case. There is no claim of irregularity in the foreclosure proceedings. It is contended that the mort-

gage was given on property not belonging to the mortgagors, and therefore was a nullity. Were defendant's contentions correct, one could be divested of his title by failure to act within five years after foreclosure of a mortgage given by a stranger to the title. The five-year statute of limitations, section 13964, *supra,* was for the purpose of setting at rest the validity of the foreclosure proceedings. See *Showers* v. *Robinson,* 43 Mich. 502; *Donovan* v. *Ward,* 100 Mich. 601. The defendants, however, claim that the statute of limitations and the defense of laches apply to plaintiff's other claims. This we cannot determine on the pleadings and without any testimony.

The decree of the lower court dismissing the bill of complaint is reversed, with costs to plaintiff, and the case remanded for a hearing on the merits.

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

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MCCLURE *v.* WIMMER.

CONTRACTS—BREACH—DAMAGES—EVIDENCE—SUFFICIENCY.

In action for breach of contract to repair boiler, evidence *held,* sufficient to sustain judgment for plaintiff.

Appeal from Wayne; Doty (Frank L.), J., presiding. Submitted July 15, 1932. (Docket No. 130, Calendar No. 36,315.) Decided September 16, 1932.

Assumpsit by George I. McClure against Frank G. Wimmer, doing business as Michigan Boiler & Sheet Iron Works, for breach of contract to repair boiler. Judgment for plaintiff. Defendant appeals. Affirmed.

*C. Upton Shreve,* for plaintiff.

*Robinson & Jones,* for defendant.

BUTZEL, J. Defendant Frank G. Wimmer agreed for the sum of $121 to make repairs to the boiler of George I. McClure, plaintiff, as ordered by the boiler inspector of the city of Detroit, whose written report stated that he was to make further inspection when the repairs had been completed. Defendant after examination of the report gave plaintiff his business card with the following agreement written on it:

"Referring to stay rods, we will put in two new rods and weld holes as per boiler inspector order all to be O. K. by boiler inspector."

A boilermaker employed by defendant, after making an ineffectual attempt to weld the cracks, finally cut a hole in the boiler. Plaintiff was obliged to hire others to repair the boiler and claims to have expended $1,392.03 for this purpose. He brought suit against defendant for breach of contract.

The case was tried without a jury 11 years after the controversy arose, and the testimony is not in as satisfactory a form as it might have been had there not been the long delay. The judge rendered judgment in favor of plaintiff for $750. Defendant's contract was complete in itself. He agreed to repair the boiler in a manner so as to meet the approval of the boiler inspector for $121. On account of his

failure to make the repairs, plaintiff was put to a large expense. There is sufficient competent evidence to sustain the amount of the judgment, and it is not against the great weight of the evidence as claimed by defendant.

Judgment is affirmed, with costs to plaintiff.

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

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BOARD OF SUPERVISORS OF JACKSON COUNTY *v.* DICKER.

1. COUNTIES—COUNTY TREASURER—RETENTION OF FEES BY SALARIED OFFICER—STATUTES—ESTOPPEL.

   Where board of supervisors voted to place county treasurer on straight salary basis and all fees to belong to county, neither audit of treasurer's report, which showed retention by him of certain fees, nor advice of members of board or of auditor general's staff that he was entitled to retain said fees, can annul said action of board (1 Comp. Laws 1929, § 1346).

2. SAME—EFFECT OF SETTLEMENT WITH COUNTY.

   Settlements with county are *prima facie* evidence of state of accounts between treasurer and county, but are not conclusive, and may be impeached.

3. SAME—RETENTION OF FEES BY SALARIED OFFICER.

   County treasurer, placed on straight salary basis, is not entitled to retain fees because of settlements with county showing retention of said fees; especially where retention of fees is punishable as misdemeanor (1 Comp. Laws 1929, §§ 1346, 1353).

4. SAME—ADDITIONAL DUTIES—COMPENSATION.
   County treasurer placed on straight salary basis is not entitled to increased compensation or to retain fees collected because of addition of new duties for benefit of county (1 Comp. Laws 1929, § 5261).

5. CONSTITUTIONAL LAW—FEES OF PUBLIC OFFICERS—STATUTES.
   Fees of public officers are strictly regulated by statute, and are not open to equitable considerations by courts nor to discretionary action of officers.

6. STATUTES—CONSTITUTIONAL LAW—TITLE OF ACT.
   Statute providing for payment of salary to county officers is not unconstitutional as embracing more than one subject, nor because its objects are not fully set forth in title (1 Comp. Laws 1929, § 1346).

7. COUNTIES—STATUTES—REPEAL—FEES OF PUBLIC OFFICERS.
   Failure of statute providing for payment of salary to county officers and payment of all fees to county to repeal former acts providing for retention of fees by officers does not render said statute inoperative, since there are certain counties expressly excluded from its operation as well as others not taking advantage thereof (1 Comp. Laws 1929, § 1346).

8. MANDAMUS—COUNTIES—PAYMENT OF FEES.
   Mandamus will issue requiring county treasurer to pay to county all fees collected and retained by him subsequent to adoption of resolution by board of supervisors placing him on straight salary basis (1 Comp. Laws 1929, § 1346).

Certiorari to Jackson; Hatch (Blaine W.), J., presiding. Submitted June 14, 1932. (Calendar No. 35,342.) Decided September 16, 1932.

Mandamus by board of supervisors of Jackson county to compel James B. Dicker, Jackson county treasurer, to pay over fees alleged to have been unlawfully withheld. From judgment rendered, both parties bring certiorari. Writ granted.

*H. D. Boardman,* Prosecuting Attorney, for plaintiff.

*Whiting, Kleinstiver & Aubrey,* for defendant.

BUTZEL, J. The purpose of Act No. 237, Pub. Acts 1919, as amended by Act No. 193, Pub. Acts 1921 (1 Comp. Laws 1929, § 1346), as clearly set forth in its title, is to authorize the "payment of salaries" for county officers "in lieu of fees." It empowers the board of supervisors of each county to establish and pay salaries to certain officers, including the treasurer, and provides that such compensation "shall be compensation in full for all services performed by such" officers; that such officers shall collect and make itemized statements of all fees collected by them and pay them over to the treasurer for the benefit of the county. It makes the failure by county officers to comply with the provisions of the law a misdemeanor, punishable by fine or imprisonment, or both. The act expressly does not apply to counties with a population of over 125,000, nor to those operating under any local or special act. Jackson county does not come within these exceptions.

Previous to 1923, the treasurer of Jackson county received a salary of $1,600 per year and also retained certain fees to which he was entitled under the existing laws. From the amount received by him he, however, was obliged to pay his deputy, clerk, and other expenses. Plaintiff, the board of supervisors of Jackson county, met in 1922. Its salary committee, as shown by the official record, reported that it had carefully considered the question of compensation of county officers and had visited neighboring counties, where officers received a straight salary, and recommended similar action by Jackson county. It urged that all fees of every kind and nature that its officers then received for services of any kind as officers of the county be turned over

to the county treasurer, and that no fees be retained by such officers. The plaintiff, on October 20, 1922, following the recommendations of the report, adopted a resolution placing the treasurer and other officers of the county on a straight salary basis. It required that they collect and turn over to the county treasurer all legal fees collected by them, and appertaining to their offices, and that these amounts be placed in the general fund of the county. The salary of the county treasurer was raised to $3,200 per year, the salaries of his deputy and clerk and other county officers were also fixed to be paid by the county. For nine years previous to 1923 defendant, James B. Dicker, had been continuously treasurer or deputy treasurer of the county. With full knowledge of the action of plaintiff, he accepted the position of county treasurer in 1923, and has continued to hold that position. During the period from 1923 to 1929, defendant has received his salary and in addition thereto has collected and retained fees in the aggregate sum of $7,260.40, representing fees for certification of taxes on deeds, tax histories, and for reporting unlicensed dogs. Plaintiff has brought mandamus proceedings to compel the payment of the amount of these fees, claiming they are unlawfully withheld by defendant. The circuit judge held that, inasmuch as defendant's accounts had been audited for the years 1923 to 1927, plaintiff was precluded from recovering the fees for those years, but that he had no right to the fees amounting to $4,483.46 retained by him for the years 1927, 1928, and 1929. Both parties have brought certiorari, plaintiff claiming the fees for all the years, and defendant contending the court was in error in holding him liable at all. There is no dispute as to the amounts, nor is defendant charged with fraud or deception. In as-

serting a lawful right to retain the fees, he claims that in 1923, when the question arose, he was advised by counsel that he had the right to retain the fees; that his reports from year to year, showing the receipt and retention of the fees, was duly received by defendant, that the fact that he was retaining the fees was taken into consideration in 1924 when an increase in salary was denied by the salary committee; that his accounts showing retention of fees for the years from 1923 to 1926, both inclusive, were audited by plaintiff's auditing committee, that his reports were received and audited by the auditor general's department, and that he was advised by someone in that department of his right to retain the fees. We do not believe that the audits, or any advice or direction from any members of plaintiff's board or of the auditor general's staff can annul a legislative mandate duly adopted by plaintiff. The law is clear and provides that the salary shall be full compensation and that the fees belong to the county.

In *Pray* v. *Ticknor,* 253 Mich. 460, Washtenaw county was operating under Act No. 480, Local Acts 1907, whose provision for salary and collection of fees is similar to the public acts of 1919 and 1921. The court said that:

"The power conferred upon the board of supervisors of Washtenaw county was limited to fixing a salary in lieu of fees, and that the board did not have the power, as plaintiff contends, to grant him a salary of $2,100 per year and the right to retain all fees collected in his office."

Settlements with the county are *prima facie* evidence of the state of accounts between treasurer and county, but are not conclusive, and may be impeached. *Montmorency County* v. *Putnam,* 122 Mich. 581. The act (1 Comp. Laws 1929, § 1353)

provides for penal action, with fine or imprisonment or both, in case any officer fails to comply with the provisions of the 1919 act, as amended by the 1921 act. It would be anomalous to say that the treasurer is liable to criminal punishment, and yet may retain the fees collected because of a settlement.

The fee for reporting unlicensed dogs is provided for in 1 Comp. Laws 1929, § 5261, and was enacted in 1925. It makes it incumbent upon the county treasurer to furnish a list of unlicensed dogs to the sheriff and to the prosecuting attorney for appropriate action. He must also send a copy of the list to the commissioner of agriculture, but this may be regarded simply as an incidental duty involving little, if any, extra work. Were the making of the list not primarily a duty for the benefit of the county, the case of *Groesbeck* v. *Auditor General;* 216 Mich. 243 (21 A. L. R. 249), relied upon by defendant, would be pertinent. The treasurer in a salary county is paid a fixed salary to compensate him for the duties of his office, and the addition of some new duty does not alter or increase his right to compensation any more than a decrease in duties would entitle the county to diminish the salary during his term of office. See *Backus* v. *Wayne County Treasurer,* 99 Mich. 218. The case of *Bay County* v. *Marvin,* 247 Mich. 529, is readily distinguishable from the one at bar, for the treasurer is performing a service for the county, and the sending of a copy of the report to the State department of agriculture entails but a negligible amount of work on his part. This differs greatly from the case of *Bay County* v. *Marvin, supra,* where the sheriff was not performing acts for the State by virtue of his capacity as a State employee, but was performing acts for the Federal government by virtue of a separate contract.

The amendment of 1921, 1 Comp. Laws 1929, § 1347, provides that these salaried officers shall collect and make itemized statements of "all fees required by law" for service of process and of "all other fees collected by them," and that all these fees shall be paid over to the treasurer clearly for the benefit of the county, as shown in 1 Comp. Laws 1929, § 1349. Fees of public officers are strictly regulated by statute, and are not open to equitable considerations by the courts nor to the discretionary action of officers. *United States* v. *Shields,* 153 U. S. 88 (14 Sup. Ct. 735); *United States* v. *Van Duzee,* 185 U. S. 278 (22 Sup. Ct. 648).

Defendant, in contending that Act No. 237, Pub. Acts 1919, as amended by Act No. 193, Pub. Acts 1921, is unconstitutional, claims that it embraces more than one subject; its objects are not fully set forth in the title; that it fails to repeal former acts providing for retention of fees by county officers. The act embraces but one subject in providing a fixed salary instead of the retention of fees as compensation to officers in certain counties, and excepting others from the provisions of the act. The title clearly states the purpose of the act. Former acts providing for retention of fees are purposely not repealed so that they may still apply to counties expressly excluded from the provisions of the act, as amended, as well as those in which the board of supervisors have not taken advantage of the act. Under article 8, § 9, of the Constitution of the State, plaintiff had the exclusive power to fix the compensation of county officers not otherwise provided for by law. Section 8 of the same article confers upon the plaintiff such powers of a local legislative and administrative character, not inconsistent with the provisions of the Constitution, as it may deem proper. The case of *Vetter* v. *Fowler,* 167 Mich. 499,

on which defendant relies, would be pertinent and controlling in the present case were it not for the subsequent enactment of Act No. 237, Pub. Acts 1919, as amended by Act No. 193, Pub. Acts 1921, which gives plaintiff the power it theretofore lacked. Other questions not raised in the lower court will not be considered. Defendant is required to turn over to plaintiff the entire sum claimed, and the case is remanded to the lower court, where mandamus will issue as prayed for by plaintiff, who will also recover costs.

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

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HEATH *v.* GLOSTER.

1. VENDOR AND PURCHASER—DEFAULT—FORFEITURE.
That vendor was indebted to vendee for costs taxed in vendor's unsuccessful suit to forfeit contract would not excuse vendee from paying balance due on contract.

2. SAME—VENDOR'S DEFAULT IN MORTGAGE PAYMENTS.
Rule that vendor is precluded from forfeiting land contract when he is in default in making payments on mortgage is not applicable where vendee's default in making payments is responsible for vendor's default; and especially where vendee had right to make payment on mortgage and receive credit therefor on contract.

Appeal from Wayne; Chenot (James E.), J. Submitted June 7, 1932. (Docket No. 8, Calendar No. 36,486.) Decided September 16, 1932. Rehearing denied January 25, 1933.

Summary proceedings by Charles C. Heath against Joanna Gloster to recover possession of real

estate sold under land contract. Judgment for plaintiff. Defendant appeals. Affirmed. Petition for rehearing denied, see 261 Mich. 552.

*George B. Murphy,* for plaintiff.

*J. Gilbert Quail,* for defendant.

BUTZEL, J. On April 23, 1928, Joanna Gloster, defendant, as vendee, purchased a house and lot in Detroit from Joseph P. Manning, assignor of Charles S. Heath, plaintiff. The contract provided for a purchase price of $6,000, with a down payment of $650, $100 payable on June 1, 1928, and a balance of $5,250 in monthly instalments of $50, including interest at 6 per cent. per annum. Defendant agreed to pay the taxes on the property. The contract permitted vendor to mortgage the property and in the event of his default in meeting the mortgage obligations, vendee might make the payments and apply them on the contract. In addition to the down payment of $650, defendant paid $195.72 on principal and interest up to November 28, 1928, since which date she has made no payments whatsoever. Forfeiture was attempted by vendor, and in a suit in Wayne circuit court, the chancellor decreed that the defendant was entitled to a credit of $1,036.66 on purchase price on account of damages defendant had suffered owing to defects in the house and failure of the building to conform with the building code. This reduced the balance on the contract to $4,542.74, with interest paid to September 29, 1930, and it was decreed that the contract be reinstated as of that date. The decree is silent as to the taxes that became due between the dates of the contract and the decree, but this does not become important inasmuch as in the judgment in the present case defendant was not charged with the amount of the taxes. After the reinstatement of the contract as of September 29,

1930, vendee made no further payments, either on principal or interest or for taxes or insurance. She, however, continued to occupy the premises. Notice of forfeiture was served on her on February 19, 1931, when four instalments of $50 each were past due. Defendant denies plaintiff's right to recover, first on the ground that $154.10 costs taxed in the first suit were due her from plaintiff or his assignor at the time she was served with notice of forfeiture. This would not excuse her from paying the balance of $200 that was due. Notwithstanding her refusal to make payments to plaintiff, she brought garnishment proceedings to recover $154.10 due her for costs, and, after collecting it, she made no offer to make payments under the contract. In the instant case, defendant forced plaintiff to wholly unnecessary litigation in this court, and in 256 Mich. 291, 293, we not only held that defendant was required to pay the taxable costs, but also an additional $100 for vexatious appeal.

Defendant further relies on the claim that the mortgage was placed upon the premises by vendor, and that on account of the latter's failure to pay taxes and the amounts that became due on the mortgage for principal and interest, the mortgagee instituted foreclosure proceedings so that a mortgage sale took place on February 16, 1931, three days prior to the notice of forfeiture relied upon by plaintiff; that the latter would not be able to give good title on account of his default in meeting the obligations under the mortgage and the mortgage sale that followed, and that, therefore, defendant was excused from making any further payments. Plaintiff, however, claims that his failure to make the mortgage payments was on account of defendant's continued defaults, and at the trial of the case he testified that he told defendant the reason he could not keep up

his mortgage payments was on account of her default in making payments to him. The equity of redemption did not expire until February 16, 1932. Plaintiff further offered at the trial of the case that he would see to it that the "property was put in good standing," if defendant would pay up the past-due amounts.

Plaintiff recovered judgment of restitution before the circuit court commissioner, who found $200 and costs to be due. At the time that the trial of the appeal was reached in the circuit court, where the case was heard without a jury, the court found $750 and costs to be due. On reading the record, we are impressed with the fact that defendant showed no disposition whatsoever to make payments on the contract, but rather to retain possession and cause plaintiff as much trouble and expense as she could, in order to regain possession. She had the right to make payments on the mortgage if she did not care to pay plaintiff. There was no tender of payments on her part, and the court properly gave judgment of restitution.

The rule that a vendor is precluded from forfeiting a land contract when he himself is in default in making payments on the mortgage is not applicable under the present circumstances. The defendant is largely responsible for vendor's defaults, and could have protected herself under the contract. The rule cannot be invoked in the present case for the purpose of escaping payment and at the same time retaining possession of the property. See *Daly* v. *Kramer,* 235 Mich. 581; *Langley* v. *Kirker,* 247 Mich. 443, 445.

The judgment is affirmed, with costs to plaintiff.

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

PERE MARQUETTE RAILWAY CO. *v.* SIEGLE.

WATERS AND WATERCOURSES—MANIPULATION OF DAM—RIGHT TO HARVEST ICE.

While lessee of land under mill pond is not entitled to have dam, owned by others, operated for its benefit, it is entitled to have it operated reasonably, so as not to interfere with formation or harvesting of ice.

Appeal from Clare; Hart (Ray), J. Submitted June 15, 1932. (Docket No. 39, Calendar No. 36,414.) Decided September 16, 1932. Rehearing denied January 25, 1933.

Bill by Pere Marquette Railway Company against Fred Siegle and another to enjoin manipulation of certain dam flash-boards to prevent formation of ice. Cross-bill by defendants to enjoin harvesting of ice by plaintiff. Decree for defendants on cross-bill. Plaintiff appeals. Reversed, and decree for plaintiff ordered.

*John C. Shields* and *Arthur W. Penny,* for plaintiff.

*Charles H. Goggin, Paul R. Cash,* and *Robert H. Baker,* for defendants.

BUTZEL, J. Tobacco river and Littlefield creek flow over a large part of the north half of the southeast quarter of section 26, in township 17 north, of range 5 west, near Farwell, Clare county, Michigan. The lands, together with those adjoining, belonged to Edmund Hall in the year 1870, when he built a dam with a head of 9 feet of water across the

On liability of owner of flowage rights for drawing off water, preventing the harvesting of ice by the owner of the property overflowed, see annotation in 13 A. L. R. 932; 29 A. L. R. 1325.

Tobacco river for logging purposes. The water flowing over the lands forms a mill pond. Three or four years after Hall built the dam, George L. Hitchcock built the present dam for a grist mill some 40 or 50 feet from the site of the original Hall dam which had been washed out. The dam is located near the northeast corner of the southwest quarter, while the mill nearby is located in the northwest corner of the southeast quarter, all of the southeast quarter of section 26. The property northeast of the dam, including the major portion of the land inundated by the mill pond, was acquired from Hall by Josiah L. Littlefield, grantor of plaintiff, Pere Marquette Railway Company. Littlefield and Hitchcock used the mill pond, the former for floating and storing logs, and afterwards for the harvesting of ice, and the latter for the grist mill. In 1901, the property over which the mill pond flowed as well as that adjacent thereto was divided on a map by drawing a diagonal line across the mill pond. Alice Hitchcock, who subsequently became Mrs. Fuller, and became the owner of the grist mill property, took or was apportioned approximately the two acres of submerged land south of the diagonal line, while Littlefield retained record title to the property north of the line. In 1915, Mrs. Fuller and husband mortgaged the lands and "grist mill property situate thereon," all south of the diagonal line, to the Farwell State Savings Bank. A number of years previous to 1918, Fuller and Littlefield derived a small amount for the privilege of cutting and removing ice from the pond from a third party who erected an ice house on the property. The village of Farwell has secured its water supply from the pond since 1880. On October 24, 1918, plaintiff entered into a written lease with Fuller and Littlefield

under which it secured the right to remove ice from the pond. The lease is duly recorded, and provides for a term of three years and two successive renewals of 10 years each. The lease was renewed at the end of three years. Plaintiff purchased property a short distance north of the mill and erected a large ice house at considerable cost.

Littlefield, who is 86 years of age and one of the original settlers in the vicinity of Farwell, is a man of highest probity and president of the Farwell Savings Bank. In 1925 and 1926, the bank acquired title from Mr. and Mrs. Fuller by deeds. In 1927, the bank interested defendants in the purchase of the mill. The cashier of the bank prior to the sale to defendants told them that Littlefield had rights in the flowage. Plaintiff's lease was on record and its ice house was of such large proportions that defendants must have seen it and known its purpose. With notice of these facts, defendants entered into an agreement to purchase the property for $10,000 on land contract and have paid in part for it. The contract is silent as to flowage rights, and it is not only significant but fatal to defendants' claims that, within a week after the execution of the land contract, they made a written lease with Littlefield and wife for the flowage rights to the extent of maintaining a head of water at such level as might be held by the present dam, and that "in no case shall the water be held higher than above specified." A rental of $50 per year, specified in the lease, was paid by defendants for two years, and then they abandoned the lease and refused to make further payments. They claim that the flowage rights went with the dam, and that they could tack on the rights of the previous owners so as to create a perfect right by prescription. They further claim that the pur-

chase of the mill necessarily included flowage rights. Plaintiff purchased Littlefield's rights in the lease and the property submerged by the pond with the exception of the two acres, or thereabouts, adjoining the mill and north of the diagonal line, which is included in defendants' contract of purchase. The water of the pond and the tributary streams has been low for the past two years owing to a drought. This undoubtedly, as the trial judge found, is a contributing cause of the present litigation. In 1930, defendants brought suit to enjoin plaintiff from taking ice from the two acres of the pond covered by the contract. Although this suit was discontinued, plaintiff quite pertinently contends that it indicates that defendants recognized that they only had exclusive rights in the pond to the extent of the two acres set forth in the land contract. In February, 1931, defendants manipulated the flash boards of the dam in a manner so as to prevent the formation of ice, and plaintiff was only able to harvest a very small amount of ice. Plaintiff brought this suit to enjoin defendants from manipulating the flash-boards of the dam or doing any other acts so as to prevent the ice from forming. Defendants in a cross-bill sought to enjoin plaintiff from cutting ice so as to disturb the flowage of water over the dam. The lower court rendered a decree in favor of defendants as cross-plaintiffs.

Many cases are cited, but none of them present the present state of facts. The issue has been limited by the abandonment of any claims on the part of plaintiff to the flowage rights except in so far as to retain the full and complete right to harvest ice, during the brief ice-forming period of the year, without any interference on the part of defendants so as to prevent the formation or harvesting of the

ice. There is no question but that defendants are not required to operate the dam for plaintiff's benefit. *Goodrich* v. *McMillan,* 217 Mich. 630 (26 A. L. R. 801). But as long as it is maintained, it must be controlled so as not to interfere with plaintiff's ice. The facts clearly show a priority in favor of plaintiff and the reciprocal subordination of defendants' rights to those of plaintiff to the extent that the ice may be formed and harvested by plaintiff without any improper interference on defendants' part. Under the circumstances, plaintiff has the right to have the owner of the dam manipulate it reasonably so as not to interfere with the formation or harvesting of the ice. Although no evidence was introduced to show that the flash-boards were maliciously or unnecessarily raised or lowered, we are impressed with the principles laid down in *Taft* v. *Bridgeton Worsted Co.,* 237 Mass. 385 (130 N. E. 48, 13 A. L. R. 928); also (same case) 246 Mass. 444 (141 N. E. 119, 29 A. L. R. 1319).

The decree of the lower court is reversed, with costs, and one may be entered in favor of plaintiff in accordance with this opinion.

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

PEOPLE *v.* KRAMER.

CRIMINAL LAW—MOTION TO SUPPRESS EVIDENCE—SEARCHES AND SEIZURES—INTOXICATING LIQUOR.

Denial of defendant's motion to suppress evidence against him on charge of illegal possession of intoxicating liquor, where he did not comply with 3 Comp. Laws 1929, § 17288, disposed of question, and he was not entitled to second hearing on same matter on trial, or to have jury determine admissibility of said evidence.

Appeal from Ionia; Hawley (Royal A.), J. Submitted June 16, 1932. (Docket No. 156, Calendar No. 36,577.) Decided September 16, 1932.

Carl Kramer was convicted of illegal possession of intoxicating liquor, which was also charged as fourth felony. Affirmed.

*Louis T. Herman,* for appellant.

*Paul W. Voorhies,* Attorney General, and *Frank C. Miller,* Prosecuting Attorney, for the people.

BUTZEL, J. Carl Kramer was charged with having in his possession 510 quarts of home brew beer, 25 gallons of home brew mash in the making, and several dozen empty beer bottles, used for bottling beer, contrary to the provisions of 2 Comp. Laws 1929, § 9139. The offense was also charged as a fourth offense under 3 Comp. Laws 1929, §§ 17338–17340. Respondent had been previously convicted

As to admissibility of evidence obtained by illegal search and seizure, see annotation in 24 A. L. R. 1408; 32 A. L. R. 408; 41 A. L. R. 1145; 52 A. L. R. 477.

and sentenced, twice for violations of the prohibition law and once for resisting an officer. The sole claim of error alleged is that the trial judge denied respondent the right to have the jury determine whether the affidavit on which the search warrant was issued was false in fact. Respondent claims that the beer, mash, and bottles were "planted" in his home by the officers, and that it was for the jury to determine whether this claim is true or not. Respondent made a verbal motion to suppress the evidence. He did not comply with 3 Comp. Laws 1929, § 17288. The court denied the motion. This disposed of the question. At the trial he sought to prove that the affidavit upon which the search warrant was issued was false. This was equivalent to presenting his motion again and having the jury pass upon it. *People* v. *Cech,* 236 Mich. 75; *People* v. *Burt,* 236 Mich. 62. He is not entitled to a second hearing on the same matter, or to have the jury determine the admissibility of evidence. *People* v. *Lenic,* 255 Mich. 29; *People* v. *Nutter,* 255 Mich. 207. The court properly denied respondent's second motion, and the judgment is affirmed.

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

PEOPLE *v.* GIBBONS.

1. INDICTMENT AND INFORMATION—RAPE.
   One charged with rape may be convicted of assault with intent to commit rape, assault and battery, or simple assault.

2. SAME—AMENDMENT TO CORRECT DEFECT MAY NOT CHARGE MORE SERIOUS OFFENSE—STATUTES.
   Although 3 Comp. Laws 1929, § 17290, permits amendment of information in respect to defects, imperfections, or omissions in form or substance or of any variance with evidence, it does not permit amendment of information after trial has begun so as to charge different crime, punishable with more severe penalty.

3. SAME—ATTEMPT TO RAPE—ASSAULT WITH INTENT TO RAPE.
   It was reversible error, after trial had begun, to permit information charging attempt to rape (3 Comp. Laws 1929, § 17342) to be amended so as to charge assault with intent to commit rape, for which more severe penalty is provided (3 Comp. Laws 1929, § 16728).

Appeal from Oakland; Gillespie (Glenn C.), J. Submitted April 14, 1932. (Docket No. 163, Calendar No. 35,907.) Decided September 16, 1932.

John A. Gibbons was convicted of assault with intent to commit rape. Reversed.

*Rodney Baxter,* for appellant.

*Paul W. Voorhies,* Attorney General, *Clarence L. Smith,* Prosecuting Attorney, and *Edward J. Fallon,* Assistant Prosecuting Attorney (*H. B. Selden,* of counsel), for the people.

BUTZEL, J. John A. Gibbons appeals from a judgment of conviction of assault with intent to commit

rape. As only questions of law are raised, it is unnecessary to review the facts. The original information charged that "John A. Gibbons attempted to rape and ravish Lillian Bennett." At the trial, prior to the introduction of any evidence, and in the absence of the jury, respondent's attorney moved to quash the information on the ground that the testimony at the examination before the justice showed an attempt to seduce and not to rape. Thereupon the prosecuting attorney was permitted to amend the information so as to charge "assault with intent to commit rape." Respondent's attorney stated that he was willing to admit, for the purpose of argument, that the testimony at the examination did show the elements of assault with intent to rape, to some extent, but that the information could not be amended so as to charge a different crime. The court held that the "kindred" offenses were so "similar" that he would permit the amendment. He also refused to grant respondent a continuance.

It is claimed that the court erred in permitting the amendment and refusing to grant an adjournment, and also that there should have been a new arraignment and examination under the amended information. The charge in the original information was worded in accordance with the abbreviated forms in subsection headed "Attempt" under 3 Comp. Laws 1929, § 17258. It was in proper form. No bill of particulars was requested by respondent. Respondent claimed that an attempt to commit rape is a common-law misdemeanor and not a statutory offense. 3 Comp. Laws 1929, § 17342, distinctly provides a punishment for every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the per-

petration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt. The punishment for attempting to commit rape under 3 Comp. Laws 1929, § 17342, subd. 2, is for a term of not over five years; that for assault with intent to commit rape is for a term of not over 10 years (3 Comp. Laws 1929, § 16728). One charged with rape may be convicted of assault with intent to commit rape, assault and battery, or simple assault. *People* v. *Eddy,* 252 Mich. 340, 348.

It is claimed, however, that assault with intent to commit rape is a different crime entirely from an attempt to commit rape, and that the information charging one crime cannot be amended so as to charge an entirely different crime. The distinction between the two crimes is pointed out in *People* v. *Gardner,* 98 Cal. 127 (32 Pac. 880); *Ex Parte Stahlnaker,* 93 Kan. 622 (144 Pac. 832); *Payne* v. *Commonwealth,* 33 Ky. Law Rep. 229 (110 S. W. 311); *Miller* v. *State,* 84 Tex. Cr. R. 168 (206 S. W. 524); *Ross* v. *State,* 16 Wyo. 285 (93 Pac. 299, 94 Pac. 217); *Bowmer* v. *State,* 157 Tenn. 124 (6 S. W. [2d] 326); *Fox* v. *State,* 34 Ohio St. 377. Also see *Hogan* v. *State,* 50 Fla. 86 (39 South. 464, 7 Ann. Cas. 139). On the other hand, the following cases hold that the two crimes are similar: *Rookey* v. *State,* 70 Conn. 104 (38 Atl. 911); *Johnson* v. *State,* 14 Ga. 55; *Lewis* v. *State,* 35 Ala. 380; *State* v. *Smith,* 80 Mo. 516; *State* v. *Frazier,* 53 Kan. 87 (36 Pac. 58, 42 Am. St. Rep. 274). An attempt to commit rape is usually accompanied with an assault, though cases may arise where there is no assault. It is also true that the statute makes an assault with attempt to commit rape a more serious offense with a more severe punishment. Were the two crimes not so similar,

we would have no hesitancy in stating that the amendment permitted by the court was improper. The question arises as to whether the information was properly amended under 3 Comp. Laws 1929, § 17290, which states that the court may at any time before, during, or after the trial, amend the information in respect to any defect, imperfection, or omission in form or substance or of any variance with the evidence. It further provides that no action of the court in refusing a continuance or postponement under this section shall be reviewable except after motion to and refusal by the court to grant a new trial therefor, and no writ of error or other appeal based upon such action of the court shall be sustained, nor reversal had, unless, from the consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted. While the statute, being part of code of criminal procedure of 1927, was adopted to eliminate some of the technicalities which have surrounded the practice of criminal law, it does not permit the amendment of an information after trial has been begun so as to charge the accused with a different crime, punishable with a more severe penalty. There is no proper information charging defendant with the crime of assault with intent to commit rape. For this reason the judgment of conviction is reversed.

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

LENNON *v.* TERRALL.

ADJOINING LANDOWNERS—TREES ON BOUNDARY COMMON PROPERTY.

Tree on boundary line of adjoining lots is common property of both owners, and neither has right to cut, injure, or destroy it without consent of other.

Appeal from Kent; Perkins (Willis B.), J. Submitted June 8, 1932. (Docket No. 56, Calendar No. 36,568.) Decided September 16, 1932.

Bill by Grace Lennon against Charles F. Terrall to enjoin destruction of a tree on their common lot line. Decree for plaintiff. Defendant appeals. Affirmed.

*Cornelius Hoffius,* for plaintiff.

*Fred C. Temple,* for defendant.

CLARK, C. J. The parties are adjoining lot owners. A large tree stands on the line dividing the lots. Defendant began to take it down. After he had taken off some limbs he was restrained at the suit of plaintiff, who prayed permanent injunction and damages. Plaintiff had decree. Defendant has appealed.

Every question presented by appellant assumes the body or trunk of the tree to be on his land, and his case is briefed on that assumption. The record is wholly to the effect that the trunk of the tree is on the line, so the questions call for no discussion.

As to property rights in trees on or overhanging boundary line, see annotation in 21 L. R. A. 729; 46 L. R. A. (N. S.) 3.

On rights and remedies in case of encroachment of trees, shrubbery or other vegetation across boundary line, see annotation in 76 A. L. R. 1111.

This tree is the common property of both parties and neither has the right to cut, injure, or destroy it without consent of the other. 1 C. J. p. 1233.

Decree affirmed. Costs to appellee.

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

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WILLETT v. SMITH.

1. MOTOR VEHICLES—GUEST PASSENGER ACT—GROSS NEGLIGENCE—WILFUL AND WANTON MISCONDUCT.

While attempting to drive automobile without sufficient acquaintance and experience with method of control may constitute negligence, it is not "gross negligence or wilful and wanton misconduct," within meaning of guest passenger act (1 Comp. Laws 1929, § 4648), and therefore recovery may not be had from host for personal injuries to gratuitous passenger caused by automobile going into ditch.

2. SAME—ELEMENTS NECESSARY TO CONSTITUTE WILFULNESS OR WANTONNESS.

Elements necessary to characterize injury to guest passenger as being wantonly or wilfully inflicted, within meaning of 1 Comp. Laws 1929, § 4648, are: (1) knowledge of situation requiring exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid resulting harm by ordinary care and diligence in use of means at hand; (3) omission to use such care and diligence to avoid threatened danger, when to ordinary mind it must be apparent that result is likely to prove disastrous to another.

Appeal from Bay; Houghton (Samuel G.), J. Submitted June 14, 1932. (Docket No. 107, Calendar No. 36,183.) Decided September 16, 1932.

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As to liability of owner or operator of automobile for injury to guest, see annotation in 20 A. L. R. 1014; 26 A. L. R. 1425; 40 A. L. R. 1338; 47 A. L. R. 327; 51 A. L. R. 581.

On another's negligence as no excuse for wilful or wanton injury, see annotation in 69 L. R. A. 516.

Case by June Willett, by next friend, against Clarence C. Smith for personal injuries sustained while a guest passenger in defendant's automobile. Judgment *non obstante veredicto* for defendant. Plaintiff appeals. Affirmed.

*Crane & Crane* (*Carl H. Smith,* of counsel), for plaintiff.

*Collins & Thompson* (*Wm. C. Searl,* of counsel), for defendant.

CLARK, C. J. Plaintiff, a child of seven years, sues by her next friend for damages for personal injuries suffered in an accident while she was a gratuitous guest in the automobile of defendant Smith. Judgment for defendant, notwithstanding the verdict, was entered by order of the court, and this presents the only question in the case, appealed by plaintiff, which is: Was there any evidence of so-called gross negligence or of wilfulness or wantonness of defendant to permit recovery under the guest statute, 1 Comp. Laws 1929, § 4648 (Act No. 19, Pub. Acts 1929), no recovery being permitted by the statute for ordinary negligence, so-called. The statute:

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

In the car were plaintiff, her mother, and Mrs. Smith (wife of defendant) with her two young children.

Mrs. Willett, an experienced driver, drove the car from Bay City to near Whittemore, where she and Mrs. Smith exchanged places. Mrs. Smith was experienced in driving her husband's model T Ford, but had driven the car she then had, his model A Ford, but a few times. She drove the car, using the hand throttle, and at a speed of near 25 to 30 miles per hour. She had gone but a short distance, perhaps 20 rods, when apparently she lost her head and lost control of the car; Mrs. Willett grabbed the wheel, told Mrs. Smith to let up on power; the car swayed and went into a ditch. Permitting the car to sway and to go into the ditch, and not then stopping it can hardly be said to be negligence under the circumstances, especially where the driver had lost her head and had lost control. Rather it is a consequence of the prior negligence, if such it be, in attempting to drive without sufficient acquaintance with the method of control of the car and without sufficient experience in driving a car of standard control as distinguished from type of control on the model T. If negligence of Mrs. Smith be conceded, still, under the guest statute, there can be no recovery unless she be guilty of "gross negligence or wilful and wanton misconduct."

Clearly, there was no so-called gross negligence, there being no antecedent negligence of plaintiff, and defendant's negligence, if any, not being subsequent.

As to meaning of the term gross negligence, as here used, see *Bobich* v. *Rogers,* 258 Mich. 343; *Union Trust Co.* v. *Railway Co.,* 239 Mich. 97 (66 A. L. R. 1515); *Finkler* v. *Zimmer,* 258 Mich. 336.

So the inquiry is whether there was wilfulness or wantonness.

According to a note, 69 L. R. A. 516, and text, 20 R. C. L. p. 145, quoted and approved a number of times by this court, the elements necessary to characterize the injury in the case at bar as wantonly or wilfully inflicted are:

"(1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another."

It is necessary to speak of the third element only. It was not apparent to either of these ladies that Mrs. Smith's driving was likely to prove disastrous to the child or children of either of them, or to themselves. Mrs. Smith would not invite disaster to herself, her neighbor or child, and, above all, to her own infant children. Her conduct at most was mere negligence, clearly not wilfulness or wantonness. *Boyle* v. *Moseley,* 258 Mich. 347; *Naudzius* v. *Lahr,* 253 Mich. 216 (74 A. L. R. 1189, 30 N. C. C. A. 179); *Gibbard* v. *Cursan,* 225 Mich. 311.

Under the law there is no escape from approval of the decision of the trial judge.

Affirmed.

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

RORKE *v.* LADUKE.

1. MORTGAGES—POSSESSION OF PAPERS BY MORTGAGOR—EVIDENCE—PRESUMPTION OF PAYMENT.

   Possession of note and mortgage by one standing as mortgagor creates very strong presumption that they were paid, and said presumption could only be displaced or repelled by very clear proof that debt was still owing.

2. SAME—DISCHARGE—PAYMENT.

   In suit to have mortgage discharged on ground that debt secured thereby has been paid, evidence *held*, to warrant decree in favor of plaintiffs.

Appeal from Monroe; Rathbun (George A.), J., presiding. Submitted June 7, 1932. (Docket No. 9, Calendar No. 36,471.) Decided September 16, 1932.

Bill by Bernard Rorke and another against Paul LaDuke and another to discharge a mortgage. Bill dismissed. Plaintiffs appeal. Reversed.

*Golden & Kelley,* for plaintiffs.

*William F. Haas,* for defendants.

CLARK, C. J. The bill, praying discharge of mortgage on the alleged ground that debt secured has been paid, was dismissed, and plaintiffs have appealed.

Commire, fee owner, mortgaged the land to defendants in March, 1918, to secure a note of $500. Interest was paid in 1919. Nothing more was paid to defendants, nor does it appear that payment was sought. In September, 1919, Commire conveyed to Krug, subject to the mortgage.

In September, 1919, defendant Paul LaDuke borrowed $500 from one Oerther, giving his note therefor and pledging as collateral security the Commire note and mortgage, but no formal assignment appears to have been made. LaDuke's note was satisfied, but, he testified, he did not have return of the pledged collateral. Krug died in March, 1927. The executrix of his will found the mortgage and note in question among his papers. The explanation, according to testimony adduced by plaintiffs, of Krug's having possession of the note and mortgage, is that he got them from Oerther, by paying the mortgage debt. No discharge of mortgage, or receipt of payment was produced. The executrix conveyed to plaintiffs, who later brought suit.

The possession of the papers by Krug, who stood as mortgagor, "created a very strong presumption that they were paid, and this presumption could only be displaced or repelled by very clear proof that the debt was still owing," quoting from *Ormsby* v. *Barr,* 21 Mich. 474, 481.

A circumstance significant in plaintiffs' favor is that defendants from and after 1919 received neither principal nor interest on the mortgage debt, and it does not appear that they ever sought to collect, and they asserted no claim of anything due until after Krug and Oerther were dead. A further circumstance is that defendants never had the mortgage and note after they were given to Oerther.

Plaintiffs also had testimony that Krug got the papers from Oerther, which must be the fact, and that he paid the mortgage debt to Oerther.

A circumstance in favor of defendants is that no assignment of mortgage to Oerther was shown or produced and that no discharge of mortgage was found. No satisfactory explanation is given of why the collateral was not returned when Oerther re-

ceived satisfaction of the LaDuke note. We think the most probable explanation is that the debt to Oerther was satisfied of the collateral by Krug's paying the mortgage debt to Oerther, who then returned LaDuke's note, and this finds support not only in the circumstances but in testimony that LaDuke referred an inquirer to Oerther for information concerning the mortgage.

The trial judge was impressed by the testimony of defendant Paul LaDuke. With due regard to the advantage of the trial judge in seeing and hearing the witnesses, we are constrained to hold defendants' conduct throughout this period of years not consistent with obligation to them under the mortgage. The testimony of Krug's paying the mortgage debt, his having the papers in his possession, and defendants taking nothing on the debt and making no effort to do so for a long period of years lead to conclusion that plaintiffs should prevail. The case is not without difficulty, but we think the evidence preponderates in favor of plaintiffs.

Reversed, with costs. Plaintiffs may have decree.

MCDONALD, POTTER, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

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PASIECZNY *v.* BONKOWSKI.

1. LANDLORD AND TENANT—TENANT HOLDING OVER LIABLE FOR DAMAGES.

Tenant who retained possession of store building after expiration of his lease for purpose of advertising his new location is liable to respond in damages to landlord.

As to measure of damages for tenant's failure to surrender possession of rented premises, see annotation in 39 A. L. R. 386.

2. SAME—MEASURE OF DAMAGES FOR HOLDING OVER—SPECIAL DAMAGES.

Although, generally, measure of damages for tenant's retaining possession of premises after expiration of lease is reasonable rental for time possession is retained, yet, in proper case, landlord may be entitled to special damages suffered by reason of tenant's failure to surrender premises, independent of rental value.

3. SAME—WHEN LANDLORD ENTITLED TO SPECIAL DAMAGES.

Where tenant retained possession after expiration of his lease, for purpose of advertising his new location, although notified that premises had been leased to new tenant, and landlord was compelled to bring summary proceedings to obtain possession, he is entitled to recover special damages in action therefor.

Appeal from Wayne; Boomhower (Xenophon A.), J., presiding. Submitted June 9, 1932. (Docket No. 63, Calendar No. 36,485.) Decided September 16, 1932.

Case by Ignacy Pasieczny against Vincent V. Bonkowski for damages for refusal to surrender premises upon termination of tenancy. Judgment for plaintiff. Defendant appeals. Affirmed.

*A. Tom Pasieczny* and *M. William Kashmerick,* for plaintiff.

*Arthur J. Adams* and *K. D. Gredzinski,* for defendant.

CLARK, C. J. Plaintiff was landlord and defendant tenant under a lease of a store building in Detroit for a term of years, expiring on October 31, 1926. On August 22, 1926, defendant wrote plaintiff that he had bought a building nearby and would remain as his tenant two or three months. Plaintiff notified defendant that he must surrender possession of the premises on or before November 1, 1926,

at expiration of the lease. Defendant conducted a drug store. Plaintiff entered into a new lease with other tenants to use the building for a drug store for a term of years beginning November 1, 1926. Defendant vacated the building for store purposes in September, 1926, but refused to surrender possession, and placed a number of locks on the door and used the windows for advertising his new location. Plaintiff was compelled to institute summary proceedings to obtain possession. Defendant held over without right and against plaintiff's rights. We approve the finding of the trial judge, quoting in part:

"And defendant deliberately kept plaintiff out of possession of his store building after being informed that plaintiff had leased for a period of five years commencing on November 1, 1926, without any right on the part of the defendant, * * * and * * * without right on his part, retained possession of plaintiff's building for the purpose of keeping plaintiff's lessees away from the immediate vicinity as long as possible, and in order to advertise his own business. By so doing, he damaged the plaintiff and should respond therefor."

Plaintiff had judgment in this action in case for damages in a trial without a jury. Defendant has appealed.

The statement of facts disposes of questions raised on the facts, leaving a contention respecting damages, defendant urging that the measure of damages is reasonable rental value for the time the tenant retained possession. True, that is stated to be the general rule. See note 39 A. L. R. 387, in which Michigan cases are cited. But it is also settled that:

"Independently of the damages which are based upon the reasonable rental value of the premises,

the landlord may be entitled, in proper cases, to special damages that he has suffered by reason of the tenant's failure to surrender the premises,"

quoting from note 39 A. L. R. 392, citing Michigan cases, including *Hitchcock* v. *Pratt,* 51 Mich. 263, which case is there reported as holding:

"Where the items of an affirmed judgment were made up of rental value of a store, * * * loss of profits by reason of plaintiff having been prevented from moving into it, increased expense by reason of having had to move into another place temporarily, injury to stock from the extra moving operation and from the unfitness of the temporary place for storage purposes, and expense of the proceedings to get possession of the store, the court held that the item of loss of profits was properly allowed, and overruled a contention that the statute (permitting treble damages) contemplated merely the common-law action of trespass for mesne profits, in which nothing would be recoverable except the damage caused by waste, or some sort of special injury to the premises, the use or rental value, and the costs incurred in recovering possession."

See 2 Tiffany, Landlord and Tenant, p. 1495.

This case is one involving special damages and does not fall under the general rule. The case as briefed calls for no discussion of the items of damages entering into judgment.

We find no error. Affirmed.

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

## SHEPHERD *v.* JENSEN.

ADOPTION—CONSENT—COERCION—DURESS—SUFFICIENCY OF EVIDENCE.

Suit by natural mother to set aside adoption proceeding on ground that her consent to adoption was obtained by threats, coercion, and duress of her former husband, was properly dismissed, where complaint was not established by evidence.

Appeal from Genesee; Gadola (Paul V.), J. Submitted June 7, 1932. (Docket No. 23, Calendar No. 36,510.) Decided September 16, 1932.

Bill by Berneda Shepherd against Carl Jensen and Anna Jensen to set aside adoption proceedings on the ground of coercion. Bill dismissed. Plaintiff appeals. Affirmed.

*Andrew J. Transue,* for plaintiff.

*Wilson & Hoffman,* for defendants.

CLARK, C. J. A daughter was born to John Cudney and Berneda Cudney, his wife, on April 14, 1926. On December 7, 1926, proceedings for adoption and change of name of the child were had in the probate court of the county, pursuant to 3 Comp. Laws 1929, § 15951. A guardian *ad litem* was appointed for Mrs. Cudney, who was not then of full age. The parents and the guardian *ad litem* duly consented to the adoption, and the proper statutory instrument was executed by defendants, the adoptive parents. Due investigation and report being made, the probate court made due order of adoption, 3 Comp. Laws 1929, § 15955, containing a finding of genuine-

ness of consent of the natural parents, and the other usual findings of good moral character of the adoptive parents, the suitableness of the home, and respecting the welfare of the child. The defendants took, kept, and cared for the child. Mrs. Cudney, divorced from Cudney, married again, and she, as Berneda Shepherd, on May 13, 1931, filed this bill to set aside the adoption proceeding, the only allegation of the bill, meriting mention and supported by proof, being that her consent was due to threats, coercion, and duress of her former husband.

The bill was dismissed. Plaintiff has appealed.

If plaintiff's complaint is not in fact established, then there is, on this record, no infirmity in the proceeding, and the decree is right. So other questions may be passed. Plaintiff's testimony as against her former husband has some support, but the circumstances of her going to the probate court room with Mrs. Jensen, one of the defendants, and not in company of her husband, of absence of complaint by plaintiff until long after the fact and when her circumstances had changed, together with the testimony of other witnesses, including the judge of probate, lead to accord with the trial judge in deciding the issue of fact against plaintiff.

No other question need be discussed.

Affirmed, with costs.

MCDONALD, POTTER, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

GALARNO *v.* GREAT ATLANTIC & PACIFIC TEA CO.

NEGLIGENCE—STOREKEEPER'S LIABILITY FOR OILY FLOOR.

In action for personal injuries to customer resulting from fall on floor of defendant's store, alleged to have been caused by its oily and greasy condition, rendering it unsafe, evidence of accumulation of oil on floor where plaintiff fell, causing unusual condition, *held*, evidence of negligence, sustaining verdict for plaintiff.

Appeal from Bay; Houghton (Samuel G.), J. Submitted June 10, 1932. (Docket No. 78, Calendar No. 36,517.) Decided September 16, 1932.

Case by Grace A. Galarno against the Great Atlantic & Pacific Tea Company, a New Jersey corporation, for personal injuries alleged to have been sustained because of the unsafe condition of defendant's premises. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

*Albert W. Black* (*J. L. McCormick,* of counsel), for plaintiff.

*Clark & Henry* and *Charles R. Fox,* for defendant.

CLARK, C. J. Plaintiff, a customer in one of defendant's stores in Bay City, slipped on the floor, fell, and was injured. Her averment of negligence against defendant is that the floor was oily, greasy, and unsafe. The jury found the fall occasioned by the oily condition of the floor. Plaintiff testified that an employee of defendant was oiling the floor while she was in the store, and, as indicating an

On duty of store or shopkeeper toward customer as to condition of premises, see annotation in 21 L. R. A. (N. S.) 456; L. R. A. 1915F, 572; 33 A. L. R. 181; 43 A. L. R. 866; 46 A. L. R. 1111; 58 A. L. R. 136.

accumulation of oil where she fell, testified that her dress, underclothing, and stockings were ruined by the oil. She had verdict and judgment. Defendant has appealed.

The verdict is not against the great weight of the evidence. Defendant's employees denied that the floor ever had been oiled, and denied that it was oily, as stated by plaintiff. Plaintiff had corroborating testimony of the floor being oily. The question was for the jury and its verdict must stand.

Whether it is proper to oil a floor during business hours and while the store is open to customers, we need express no opinion. Conceding that it is not negligence *per se* to have an oiled floor in a store (*Narregang* v. *Great Atlantic & Pacific Tea Co.*, 224 Mich. 179) or to apply oil to a floor if it is done in a proper manner so it is not in different condition from that usual with oiled floors, there is evidence here of an unusual condition, such an accumulation of oil where plaintiff fell as to ruin not only her outer garments but her underclothing as well. This is evidence of negligence, and sustains the verdict.

Authorities on the question are reviewed in note 58 A. L. R. 142. See, also, *Bowden* v. *S. H. Kress & Co.*, 198 N. C. 559 (152 S. E. 625); *Benesch & Sons* v. *Ferkler*, 153 Md. 680 (139 Atl. 557); *Parker* v. *Great Atlantic & Pacific Tea Co.*, 201 N. C. 691 (161 S. E. 209).

There is no reversible error. Affirmed.

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

DETROIT FIDELITY & SURETY CO. *v.* BUSHMAN.

1. VENDOR AND PURCHASER—KNOWLEDGE OF DEFECT IN TITLE—WAIVER.
   Defect in vendor's title, of which vendee has knowledge, is waived by entering into contract of purchase.
2. SAME—RESCISSION—DEFECTIVE TITLE.
   Vendee is not entitled to rescind, before time vendor is bound to convey, for reason that vendor has defective title.
3. SALES—MORTGAGE ON PERSONALTY NOT DEFECT IN TITLE—RESCISSION.
   Mortgage on personalty, of which vendee had knowledge, and which may be removed by payment of sum due, is not defect in title entitling vendee to rescind.

Appeal from Wayne; Ferguson (Homer), J. Submitted July 16, 1932. (Docket No. 113, Calendar No. 36,605.) Decided September 16, 1932.

Bill by Detroit Fidelity & Surety Company, a Michigan corporation, against Franklin E. Bushman to foreclose a land contract. Decree for plaintiff. Defendant appeals. Affirmed.

*Friedman, Meyers & Keys,* for plaintiff.

*Wilkinson, Lowther & O'Connell,* for defendant.

CLARK, C. J. From decree of foreclosure of land contract defendant has appealed.

On June 15, 1920, the parties entered into an agreement by which defendant was engaged as loan agent of plaintiff for a period of years, and it is alleged in the bill of complaint and not specifically denied by answer that by and through said agreement defendant personally guaranteed all loans made by plaintiff through him, and further agreed

to relieve plaintiff of any real estate taken upon foreclosure of any such loan and to pay therefor.

A loan was made through defendant secured by mortgage on real and personal property, the Clifford hotel in Detroit. The mortgage was foreclosed and plaintiff thereby acquired title. It then called upon defendant to make good his agreement and was refused. Suit for specific performance followed, which was settled and compromised by defendant's becoming purchaser in a land contract of the realty and with accompanying agreement to transfer the personalty upon payment of the full price named in the contract. The agreement as to personalty excepts an alleged chattel mortgage claim of Albert Pick & Co. Defendant made some payments on the contract and defaulted.

With the answer to the bill to foreclose is a cross-bill for rescission on an alleged defect in title to real estate and on defect in title to personalty, the claim arising by the chattel mortgage. The allegation of defect in title to real estate is wholly without merit. Neither is there merit in the contention respecting defect in title to personalty. Defendant had knowledge of it. The agreement speaks of it.

It is said by the trial judge:

"In the case in question, it is not a question as to the title of the personal property, but only a mortgage upon the same which can be removed by the payment of the sum found to be due and which mortgage is now in litigation"—(citing *Daly* v. *Kramer*, 235 Mich. 581, and *Langley* v. *Kirker*, 247 Mich. 443).

And:

"As to the question of knowledge of defect in title at the time of purchase, one waives any objection thereto by entering into the contract of purchase."

And quoting from *Silfver* v. *Daenzer,* 167 Mich. 362:

"The purchaser of land under a contract is not entitled to rescind before the time when the vendor is bound to convey for the reason that vendor has a defective title. * * * It is sufficient 'that the contract is made by the vendor in good faith, and that he has such an interest in the subject-matter of the contract, or is so situated with reference thereto, that he can convey a good title at the proper time.' "

See, also, *Heath* v. *Gloster, ante,* 85.

Affirmed. Costs to appellee.

MCDONALD, POTTER, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

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PEOPLE *v.* JOHNSON.

1. PROSTITUTION—"PROCURING" INMATE FOR HOUSE OF PROSTITUTION.

   Female who came to house of prostitution, was taken in by owner, and there remained, was "procured" within meaning of statute penalizing procurement of female inmate for house of prostitution (3 Comp. Laws 1929, § 16862).

2. SAME—EVIDENCE.

   In prosecution for procuring female inmate for house of prostitution, evidence of arrest and conviction of prostitute from said house, and that female inmate committed act of prostitution therein, was properly received (3 Comp. Laws 1929, § 16862).

3. JUSTICES OF PEACE—EVIDENCE—PROOF OF PROCEEDINGS.

   Proceedings before justice may be proved by his oath (3 Comp. Laws 1929, § 14185).

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On right to impeach one's own witness, see annotation in 21 L. R. A. 418; 74 A. L. R. 1042.

4. CRIMINAL LAW—PROOF OF CONVICTION BY JUSTICE.
Proof of judgment and conviction of prostitute by oath of justice of peace, who produced minutes thereof as full and complete as entries on his docket are required to be, *held*, not error, although his docket was not written up; statute as to docket entries being directory merely (3 Comp. Laws 1929, §§ 14185, 16273, 17427).

5. SAME—INSTRUCTIONS—COMMENT ON EVIDENCE.
Charge to jury that there were certain items before them in proofs that tended to indicate guilt of defendant, and that it was for jury to take all testimony and determine whether defendant was guilty or not, *held*, not incorrect under 3 Comp. Laws 1929, § 17322; issue of fact being submitted to jury for their sole determination.

6. WITNESSES—CRIMINAL LAW—CROSS-EXAMINATION OF UNWILLING WITNESS.
Cross-examination, under guidance of trial judge, of female inmate, in prosecution for procuring her for house of prostitution, *held*, not prejudicial.

Appeal from Grand Traverse; Gilbert (Parm C.), J. Submitted June 16, 1932. (Docket No. 171, Calendar No. 36,271.) Decided September 16, 1932.

Ruth Johnson was convicted of procuring a female inmate for a house of prostitution. Affirmed.

*F. E. Wetmore,* for appellant.

*Paul W. Voorhies,* Attorney General, and *Sherman L. Eaton,* Prosecuting Attorney, for the people.

CLARK, C. J. Defendant, charged with procuring a female inmate for a house of prostitution (3 Comp. Laws 1929, § 16862), was convicted and sentenced, and has appealed.

The evidence is that the female came to defendant's house and was taken in by defendant and there remained.

The word procure, as used in the statute, means to acquire or to get. The female here was procured or acquired or gotten within the meaning of the statute. To show the procuring the female as an "inmate for a house of prostitution," evidence was properly received of arrest and conviction of a prostitute from the house (50 C. J. p. 813), and that a female inmate committed an act of prostitution in the house.

To show such conviction of a prostitute on June 22, 1931, the justice of the peace was called, on October 20, 1931, and testified and produced his docket, and it appeared that the entries (3 Comp. Laws 1929, §§ 17427, 16273) had not been made, rather that the minutes of the judgment and conviction, etc., had been written on a blank space on the face of the complaint and over the justice's signature on the complaint. There is no explanation of the justice's failure to write up his docket from the memorandum made and the papers filed during the period of nearly four months. There is no dispute of the fact of conviction and judgment as stated. Proceedings before a justice may be proved by his oath. 3 Comp. Laws 1929, § 14185.

The statute as to docket entries is directory, merely (*Hickey* v. *Hinsdale,* 8 Mich. 267 [77 Am. Dec. 450]), under which case we hold no error in permitting proof of judgment by oath of the justice, who produced his minutes of the trial, which were as full and complete as the entries on the docket were required to be. *Saunders* v. *Tioga Manfg. Co.,* 27 Mich. 520. A case for the jury was made under the statute.

In his charge the trial judge said:

"There are certain items before you in the proofs that tend to indicate the guilt of this woman, and it

is for you to take all this testimony and determine whether she is guilty or not."

The statement was not incorrect, and it was within the province of the trial judge, under 3 Comp. Laws 1929, § 17322, and *People* v. *Lintz,* 244 Mich. 603, the issue of fact being submitted to the jury for their sole determination. *Lovejoy* v. *United States,* 128 U. S. 171 (9 Sup. Ct. 57), cited in the *Lintz Case.*

Under guidance of the trial judge, there was no prejudicial error in cross-examination by the prosecuting attorney of the female inmate, an unwilling witness whom he called to the stand, and the matter calls for no discussion.

We find no reversible error. Affirmed.

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

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JOHNSON *v.* BANGS-McCUTCHEON, INC.

1. VENDOR AND PURCHASER—FORECLOSURE—DEFICIENCY DECREE AGAINST ASSIGNEES.

   Vendor, in foreclosure of land contract in equity, is entitled to decree for deficiency against vendee's assignees who in writing assumed contract.

2. SAME—FRAUD IN ASSIGNMENT.

   Where, in foreclosure of land contract, assignees filed no cross-bill for rescission and sought no affirmative relief, allegations of fraud in their answer may not be considered.

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On foreclosure by vendor of land contract as affected by assignment of contract, see annotation in 77 A. L. R. 291.

Appeal from Genesee; Gadola (Paul V.), J. Submitted June 22, 1932. (Docket No. 140, Calendar No. 36,519.) Decided September 16, 1932.

Bill by Fred Johnson and another against Bangs-McCutcheon, Inc., a Michigan corporation, and others to foreclose a land contract. Decree for plaintiffs. Defendants Huber and others appeal. Affirmed.

*Neithercut & Neithercut,* for plaintiffs.

*John Hal Engel,* for defendants Huber, Brown, and Engel.

CLARK, C. J. The defendants to this bill to foreclose a land contract are the vendee and its assignees. Plaintiffs had decree. Defendants, assignees, have appealed.

The right of a vendor, in foreclosure of a land contract in equity, to have decree for deficiency against vendee's assignees, who, in writing, have assumed the contract, is discussed and settled in *Barnard* v. *Huff,* 252 Mich. 258 (77 A. L. R. 259); *Peoples Savings Bank* v. *Geistert,* 253 Mich. 694; *Hamburger* v. *Russell,* 255 Mich. 696.

The defendants, assignees of vendee, asserted, by answer alone, fraud in the assignment to them. No rescission of such assignment had been effected. Such assignees here filed no cross-bill, sought no affirmative relief. Hence, no consideration can be given to their allegations of fraud.

Other points are attempted, but they call for no discussion.

Affirmed, with costs.

MCDONALD, POTTER, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

*In re* GARDNER.

1. HABEAS CORPUS—APPEAL AND ERROR—QUESTIONS REVIEWABLE.
   Questions reviewable by writ of error may not be reviewed in *habeas corpus* proceeding.

2. SAME—JUDGMENT.
   In *habeas corpus* proceeding, court deals only with radical defects rendering proceeding or judgment absolutely void.

3. SAME—CERTIORARI.
   In *habeas corpus* proceeding, writ of certiorari is ancillary merely, and used to supply material for intelligent decision of alleged radical defects in judgment.

4. CRIMINAL LAW—HABITUAL CRIMINAL—PLEA OF GUILTY RENDERED TRIAL UNNECESSARY.
   Where accused stood convicted of charge of breaking and entering, and prosecuting attorney filed information accusing him of several certain and specified previous convictions (3 Comp. Laws 1929, § 17341), to which accused pleaded guilty, no trial was necessary, and he was properly sentenced as third offender (3 Comp. Laws 1929, § 17339).

*Habeas corpus* proceedings by Robert Gardner, with accompanying certiorari to Joseph A. Moynihan, Wayne circuit judge, to obtain release from branch of State prison at Marquette. Submitted June 14, 1932. (Calendar No. 36,453.) Writs dismissed September 16, 1932.

*Robert Gardner, in pro. per.*

*Paul W. Voorhies,* Attorney General, *Harry S. Toy,* Prosecuting Attorney, and *Edmund E. Shepherd,* Assistant Prosecuting Attorney, for the people.

CLARK, C. J. This is *habeas corpus* and accompanying certiorari to inquire into the detention of peti-

As to pleas and admissions of habitual criminals, see annotation in 34 L. R. A. 405; 48 L. R. A. (N. S.) 206.

tioner, Robert Gardner, in the State penitentiary at Marquette, under sentence pronounced on October 7, 1930, of not less than 15 years nor more than 30 years. From the judgment petitioner took no appeal.

It is recognized that the judgment, not having been reviewed on error (3 Comp. Laws 1929, §§ 17357, 17358), petitioner may not present questions so reviewable. On *habeas corpus* we deal "only with radical defects rendering a proceeding or judgment absolutely void." *In re Palm,* 255 Mich. 632. The writ of certiorari is ancillary, merely, and used to supply material for intelligent decision of such alleged "radical defects."

It is urged that the trial court had no jurisdiction to sentence petitioner as an habitual criminal without giving him a trial therefor.

Defendant stood convicted of a charge of breaking and entering in the nighttime with intent to commit larceny (3 Comp. Laws 1929, § 16948). Thereupon, the prosecuting attorney, agreeable to 3 Comp. Laws 1929, § 17341, filed an information in the cause accusing petitioner of several certain and specified previous convictions. Brought to the bar of court to plead thereto, petitioner admitted the truth of the accusation, admitted his guilt thereof. He was sentenced accordingly as a third offender. 3 Comp. Laws 1929, § 17339.

Petitioner having pleaded guilty to the supplemental information, no trial thereon was required. We have examined the mass of matter, largely irrelevant, presented by petitioner as a brief, and find no other question meriting discussion.

Writs dismissed.

MCDONALD, POTTER, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

DETROIT, WYANDOTTE & TRENTON TRANSIT CO. *v.* CITY OF DETROIT.

1. CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—MOTOR VEHICLES—REGULATION—HIGHWAYS AND STREETS.

   State having "occupied field" of regulating operation of interurban motor vehicles by enactment of Acts Nos. 212, 312, Pub. Acts 1931, authority of city over said carriers is withdrawn except such as is strictly referable to reasonable control over its streets or as is reserved to it by law (Const., art. 8, § 28).

2. SAME—ORDINANCES—CITY MAY NOT PROHIBIT OPERATION OF INTERURBAN JITNEYS.

   Under city's constitutional right to reasonable control of its streets, it may regulate method of operation on city streets of interurban jitneys not doing local business, but it may not by ordinance prohibit their operation thereon, since it would thereby invade jurisdiction of State.

3. SAME—FAILURE TO HAVE STATE PERMIT AS AFFECTING VALIDITY OF ORDINANCE.

   That owners of interurban motor jitneys have no permit from State does not validate city ordinance prohibiting their operation on city streets, since penalty for illegal operation is part of control and jurisdiction taken by State (Acts Nos. 212, 312, Pub. Acts 1931), and court may not assume that law will be violated.

Appeal from Wayne; Gillespie (Glenn C.), J., presiding. Submitted October 13, 1931. (Docket No. 96, Calendar No. 35,488.) Decided October 3, 1932.

Bill by Detroit, Wyandotte & Trenton Transit Company, a Michigan corporation, and others against the City of Detroit, a municipal corporation, to enjoin enforcement of ordinance prohibiting operation of interurban jitneys on Detroit streets. Bill dismissed. Plaintiffs appeal. Reversed.

*Edward N. Barnard*, for plaintiffs.

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As to regulation of jitney busses, see annotation in L. R. A. 1915F, 840; L. R. A. 1916B, 1156; L. R. A. 1918B, 912; L. R. A. 1918F, 475.

*Clarence E. Wilcox* and *Clarence E. Page,* for defendant.

FEAD, J. Plaintiffs appeal from a decree declaring valid the following ordinance of the city of Detroit and dismissing bill of complaint filed to restrain its enforcement against them:

"SECTION 1. No person, firm, copartnership or corporation shall operate or cause to be operated upon any street, avenue, boulevard or other public place within the limits of the city of Detroit any jitney, so-called, whether said jitney operates wholly within the city limits of Detroit or from some point within the city limits of Detroit to some point outside of Detroit, or, from some point outside of Detroit to some point within the city limits of Detroit, or otherwise.

"SEC. 2. For the purpose of this ordinance a jitney shall be defined to mean any motor-propelled vehicle designed to carry not to exceed seven persons (other than a taxicab or public vehicle which is hired by the hour) which is operated on the streets, avenues, boulevards or other public places of the city of Detroit, as a public carrier affording service similar to that of a city, suburban or interurban street railway, for the service of which fares are charged or collected or received."

For seven years prior to the adoption of the ordinance, plaintiffs operated about 100 jitneys, on a three-minute service, in transporting passengers for hire between points in Detroit and certain neighboring cities. They had a terminus in the downtown district of Detroit but did no local business in the city. They took on and discharged passengers at any desired street crossing. Their route was on Fort street, a busy thoroughfare, also substantially served by motor busses and by street railway, which extended to some of the cities served by plaintiffs.

The case was heard before the enactment of Acts Nos. 212 and 312, Pub. Acts 1931. As it involves an important public question, this court requested briefs upon the effect of State statutes in order that the present validity of the ordinance and the propriety of an injunction might be determined. This raised issues not presented to, or passed upon by, the circuit judge.

The city claims power to adopt the ordinance under the Constitution, article 8, § 28:

"No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships."

It is conceded that plaintiffs operated public utilities. But they did not need a franchise from the city because they did not use the streets for wires, poles, pipes, tracks or conduits, nor transact a local business. The first part of the section confers no authority to prohibit operation of plaintiffs' vehicles on the street.

The power to adopt the ordinance, if any, must be found in the right of the city to reasonable control of its streets.

This provision was vigorously debated in the Constitutional Convention. Until late in the deliberations the word "reasonable" did not appear in the section. The delegates feared that, as submitted,

the right would be construed to deprive the State of control of highways in municipalities. Debates, Constitutional Convention, pp. 1405, 1408. In the Address to the People, submitting the proposed Constitution for adoption, the debates and purpose of the word "reasonable" were summed up:

"The word 'reasonable' was inserted to place a limitation upon the authority cities, villages and townships may exercise over the streets, alleys, highways and public places within their corporate limits. And it was pointed out in the debates that without the word 'reasonable' or a similar qualification the section would practically deprive the State itself of authority over its highways and public places." P. 1433.

The city stresses language in *Melconian* v. *City of Grand Rapids,* 218 Mich. 397, and *Red Star Motor Drivers' Ass'n* v. *City of Detroit,* 234 Mich. 398, to the effect that a city may prohibit the use of its streets for gain. The language must be read in connection with the fact that the cases involved carriers doing a local business and concerned regulatory, not prohibitory, ordinances. The question of the effect of State statutes upon local powers did not arise. It was presented later in *Red Star Motor Drivers' Ass'n* v. *City of Detroit,* 244 Mich. 480, where it was held, on the authority of *Red Star Motor Drivers' Ass'n* v. *Michigan Public Utilities Commission,* 235 Mich. 85 (P. U. R. 1926 E, 411), that the statute regulating motor vehicles was not applicable to the situation. The cases, therefore, do not apply where the State has assumed control over carriers.

By Acts Nos. 212 and 312, Pub. Acts 1931, the State has taken jurisdiction of all carriers of persons or property for hire over the highways and has put them under supervision of the Michigan public

utilities commission. The broad definitions in section 1 and the exceptions enumerated in section 18 of Act No. 212 and section 13 of Act No. 312 leave no doubt that plaintiffs are subject to the acts. The issue calls for application of the doctrine of "occupation of a field" of legislation by the superior power. See *Chicago & N. W. R. Co.* v. *Michigan Public Utilities Commission,* 233 Mich. 676; *Napier* v. *Railroad Co.,* 272 U. S. 605 (47 Sup. Ct. 207).

The legislative authority cannot infringe upon the constitutional right of the city to reasonable control of its streets. *Highway Motorbus Co.* v. *City of Lansing,* 238 Mich. 146; *North Star Line, Inc.,* v. *City of Grand Rapids,* 259 Mich. 654. Nor do Acts Nos. 212 and 312 purport to do so. On the contrary, section 17 of Act No. 212 and section 12 of Act No. 312, expressly preserve such local control. But the enactment of the statutes had the effect of withdrawing from the city all authority over carriers covered by them, except such power as is strictly referable to reasonable control of the streets or as is reserved to it by law. In the *North Star Case,* Mr. Justice NORTH said:

"The State having acted, it must be assumed, and this record discloses, that it has undertaken to and does occupy the whole field relative to regulating motor vehicles as common carriers on the highways of the State, subject only to the constitutional limitation or reservation above quoted. In testing the validity of the ordinance under consideration it must therefore be ascertained whether the city has exceeded the power reserved to it by the constitutional provision and to what extent, if at all, the defendant city by enacting the ordinance has invaded the field of control of motor vehicle carriers already undertaken by the State."

It is apparent that an ordinance prohibiting the operation of specified kinds of motor vehicles on city streets, the carriers not doing a local business, *prima facie* is an invasion of the State's jurisdiction over them and is invalid.

It is attempted, however, to justify the prohibition as reasonable control upon the ground that jitneys have no fixed terminals, but stop at any corner to receive and discharge passengers, dart in and out of the traffic, have their routes over busy thoroughfares already served by street cars and busses, and through numbers and methods of operation cause congestion and constitute a menace to traffic.

Methods of operation undoubtedly may become the subject of reasonable regulation by the city. But the number and kind of carriers for hire permitted to engage in nonlocal business are matters upon which the State has taken jurisdiction and are beyond city veto. Nor does the ordinance purport to make numbers or method of operation a test of prohibition. It bars all jitneys, although only one be operated, in an exceptional manner and under State permit. As framed, it bears no relation to the constitutional right of reasonable control of streets, invades the jurisdiction of the State, and is invalid as against carriers doing no local business.

The fact that plaintiffs have not a permit from the State to operate does not validate the ordinance. The penalty for illegal operation is part of the control and jurisdiction taken by the State. We can not assume that plaintiffs will violate the law.

Decree will be reversed, and injunction issued, if necessary, but without costs.

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

## DEADWYLER *v.* CONSOLIDATED PAPER CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—JUDGMENT.

   Order of deputy commissioner denying employee's petition for further compensation for injury to hand, which was sole issue presented, was adjudication thereof, and, where not appealed from, department of labor and industry had no authority to declare said order nullity.

2. SAME—AMENDMENT OF PETITION NECESSARY TO ENLARGE ISSUE—NOTICE.

   To enlarge issue presented by employee's petition for further compensation for injury to hand, amendment to petition, at least, is required, with notice to employer and opportunity to make denial thereof.

3. SAME—EMPLOYER NOT REQUIRED TO ANSWER ISSUE VOLUNTEERED BY DEPUTY COMMISSIONER.

   Where employee's petition for further compensation for injury to hand was not amended, employer was not required to submit to issue volunteered by deputy commissioner, but was entitled to determination of issue presented in first instance by official not engaged in procuring evidence to be submitted to himself.

4. SAME—PROCEDURE—DEPUTY COMMISSIONER MAY NOT INJECT NEW ISSUE.

   While strict rules of court procedure may not be applicable to proceedings under workmen's compensation act, deputy commissioner may not decide issue injected on his own motion, and in support of which he takes part in procuring evidence.

5. SAME—PROPER PETITION JURISDICTIONAL.

   Proper petition for award under workmen's compensation act is jurisdictional.

6. SAME—JUDGMENT—ORDER UNAPPEALED FROM ENDED JURISDICTION.

   Where only petition filed for award under workmen's compensation act was denied and no appeal taken, jurisdiction was ended, and therefore award on another issue, injected by deputy commissioner, may not be upheld.

7. APPEAL AND ERROR—EXPURGATION OF BRIEF.
Motion to strike impertinent statements and unfounded accusations made in brief of counsel, where unopposed, is granted, with costs.

Appeal from Department of Labor and Industry. Submitted June 7, 1932. (Docket No. 21, Calendar No. 36,332.) Decided October 3, 1932.

Wilbur Deadwyler presented his claim against Consolidated Paper Company for an accidental injury sustained while in defendant's employ. On petition for further compensation, petition was denied, but award was granted on issue injected by deputy commissioner. Defendant appeals. Reversed.

*Robert J. Willis,* for plaintiff.

*Golden, Nadeau & Fallon,* for defendant.

WIEST, J. On January 9, 1930, plaintiff, while in the employ of defendant, received an injury to his left hand. He received compensation for a few weeks and then returned to his former employment and wage. May 12, 1930, he met with another accident, which fractured ribs. Report of this accident was filed June 16, 1930. Compensation was agreed upon, approved, paid, and final receipt, signed by plaintiff, was filed July 3, 1930. No approval of the receipt appears. December 15, 1930, plaintiff filed an application for further compensation for the injury to his hand. January 27, 1931, this petition was denied, and no appeal taken. March 3, 1931, plaintiff filed another petition for further compensation for injury to his hand and stated therein:

"Your petitioner therefore prays that your honorable commission set this petition for hearing before a commissioner or deputy commissioner so

that your petitioner may present proof in support of his claim and that he be granted such relief as he is entitled to under the workmen's compensation law of Michigan (2 Comp. Laws 1929, § 8407 *et seq.*)."

Further compensation for the injury to the hand was again denied, but, without any petition therefor or issue joined thereon, compensation was awarded on account of the injuries to his ribs on May 12th. Upon appeal by defendant, this award of compensation was affirmed, and, without appeal by plaintiff, the denial of compensation for the hand declared a nullity. Defendant prosecutes review.

It was found by the deputy commissioner, and affirmed by the board, that the injury to plaintiff's ribs induced a flare up of dormant tuberculosis.

The deputy commissioner denied an award upon the only issue presented by plaintiff's petition. The award made on account of the injury of May 12th was upon an issue raised by the commissioner, without any amendment to the petition, and was supported, if at all, by medical witnesses selected by the commissioner and present, without pay, at his request.

Upon appeal from the award of compensation under such injected issue, the commission not only sustained the award, but held that denial of an award, under the only petition filed by the plaintiff, was a nullity. Such denial of the petition before the deputy commissioner was not a nullity but an adjudication upon the sole issue presented by plaintiff, and the holding of the deputy was not before the commission for review by appeal of plaintiff or defendant. The declaration by the commission that the order denying compensation for injury to the hand was a nullity was itself a nullity.

But it is said that defendant did not counter the petition, as filed by plaintiff, by formal denial, and

this permitted enlargement of the issue. If the issue was to be enlarged, an amendment to the petition, at least, was required with notice to defendant and opportunity to make denial thereof. There is no merit in such claim, because no award was made upon plaintiff's petition as filed, and at no time was the petition amended to include the claim upon which the award of compensation was made, and, of course, there could be no formal denial without a formal allegation of liability.

Defendant was entitled to a hearing, after notice of a petition made by plaintiff, and was not required to submit to an issue volunteered by the deputy commissioner, and was in any event entitled to a determination of issues of fact, in the first instance, by an official not engaged in procuring evidence to be submitted to himself.

While strict rules of court procedure may not be applicable to proceedings under the workmen's compensation law, no deputy commissioner may decide an issue injected on his own motion, and in support of which he takes part in procuring evidence.

A proper petition is jurisdictional, and, under the petition filed by plaintiff, no such award as made can be upheld. The only petition filed was denied, and plaintiff prosecuted no appeal. Such denial ended jurisdiction.

Impertinent statements and unfounded accusations are made in the brief of counsel for plaintiff, and defendant moves that such matters be struck out. The motion is unopposed and is granted, with costs of the motion to defendant. The brief, with such expurgation, may remain on file.

The award is vacated, with costs to defendant.

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

WILSON *v.* LINGON.

1. CONTRACTS—RESCISSION.
   Rescission is remedy properly restricted to cancellation of contracts involving mutual obligations.

2. SAME—SPECIFIC PERFORMANCE.
   Generally, where specific performance would be refused, rescission will be decreed, though rescission is more nearly matter of right than specific performance.

3. VENDOR AND PURCHASER—RESCISSION.
   Failure of vendor to perform his contract is ground for rescission by vendee.

4. SAME—DEFAULT BY VENDORS—OPTION TO VENDEES TO MAKE MORTGAGE PAYMENTS NOT MANDATORY.
   Where land contract provided that vendors should meet payments of principal and interest on mortgage on premises as they matured, default on their part to make such payments gave vendees right to rescind; and it is immaterial that vendees had right, under contract, to make such payments and receive credit therefor on contract.

5. SAME.
   Option to vendees to make payments on vendors' mortgage and receive credit therefor on contract does not impair obligation of vendors' contractual obligation to pay.

6. SAME—VENDORS' OBLIGATION TO MAKE MORTGAGE PAYMENTS MANDATORY.
   Provision in contract that vendors should meet payments of principal and interest on mortgage on premises as they matured is mandatory, although contract gave vendees right to make said payments and receive credit therefor on contract.

7. SAME—VENDEES' OPTIONAL REMEDY NOT EXCLUSIVE—RESCISSION.
   Option to vendees to make payments on mortgage which vendors were obligated to pay, and receive credit therefor on contract, is not mandatory, but permissive; and is not exclusive remedy

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On right to rescind or abandon contract because of other party's default, see annotation in 30 L. R. A. 64.

to which vendees are by contract restricted, but on vendors' default vendees have right to rescind, provided said default was not caused by vendees' default.

8. SAME—DEFAULT BY VENDORS—VENDEES NOT UNDER OBLIGATION TO PAY.

That vendees, on discovering that vendors were in default in making payments due on mortgage, elected to rescind, did not make it incumbent on vendees to pay additional money to vendors which they might not be able to recover.

Appeal from Wayne; Richter (Theodore J.), J. Submitted January 29, 1932. (Docket No. 223, Calendar No. 36,087.) Decided October 3, 1932. Rehearing denied December 6, 1932.

Bill by William H. Wilson and another against George C. Lingon and others to rescind a land contract. Decree for defendants. Plaintiffs appeal. Reversed and remanded.

*Denby, Kennedy & Kennedy,* for plaintiffs.

*Maurice Dreifuss,* for defendants.

POTTER, J. Plaintiffs are brother and sister. Defendants Lingon are husband and wife. Prior to entering into the contract which is made the basis of this litigation, plaintiff William H. Wilson had a vendee's interest as beneficiary of a trust of which his sister, Priscilla E. Wilson, was trustee in lots 129 and 130, Pontchartrain Heights Subdivision of part of fractional section 28, town 2 south, range 11 east, commonly known as 7021 Elmhurst avenue, Detroit, Michigan, consisting of the land and a three-story brick building thereon containing 13 apartments with a basement, and garages in the rear. William H. Wilson was also the owner in fee simple of Lot No. 132 of Paterson's Acre Garden Farms Subdivision, Taylor township, Wayne county,

and plaintiff Ida M. Warner owned the south half of lot No. 182 and all of lot No. 183, Meadow Park Addition to the village of Royal Oak, Oakland county, Michigan. Defendants Lingon were the owners of lots 45, 46, 47, and 48, Burns Subdivision of part of lot 70, lying north of Dix Road of subdivision of private claim 60, Detroit, Wayne county, Michigan, subject to a trust mortgage in the sum of approximately $90,000 of unpaid principal and interest given to secure a bond issue and held by the Guaranty Trust Company of Detroit, dated December 1, 1925. Defendants Lingon also owed on the Burns Subdivision property $2,290.31 city taxes for 1928, $590.86 State and county taxes, $861.20 for special assessments, a total of $3,742.37 of taxes and assessments, and also $1,285 of unpaid premium for fire insurance. Plaintiffs purchased the Burns Subdivision property, above described, of defendants Lingon June 27, 1929, for $1 and other valuable considerations, namely, the transfer of plaintiffs' interests in the lands and premises above described to the defendants Lingon, and the agreement to pay $115,000 balance, to be payable in instalments of not less than $1,050, July 15, 1929, and a like amount on the 15th day of each and every month thereafter. By the contract of purchase plaintiffs agreed to assume $1,210.43 due to the General Motors Acceptance Corporation for frigidaires. The contract provided that if default was made by the purchaser in the payment of any tax, assessment, or insurance premium, the seller could pay such tax, assessment, or premium, and the sum paid therefor should be a further lien on the land payable by the purchaser to the seller forthwith with interest at seven per cent. The contract further provided:

"If the title of the seller is evidenced by land contract or now or hereafter incumbered by mortgage, the seller shall meet the payments of principal and interest thereon as they mature and produce evidence thereof to the purchaser on demand and in default the purchaser may pay the same, which payments shall be credited on the sums matured or first maturing hereon with interest at seven per cent. per annum."

The bill of complaint asks a rescission and cancellation of this contract. It alleges it was defendant Lingon's duty to pay the taxes and assessments upon the property, and the contract provided plaintiffs should have possession so long as they were not in default. It alleges that at the time of the trade plaintiff Wilson owed $600 to the Kelvinator Detroit Company for refrigeration equipment in his apartment and defendants Lingon owed about $1,300 to the General Motors Acceptance Corporation for refrigeration equipment in their apartment; that it was agreed each party was to pay the balance due upon the refrigeration equipment in the property which they received; that plaintiffs had paid $600 on the refrigeration equipment in the property which they received by the contract and defendants Lingon had paid nothing; that plaintiffs had paid $1,285 of insurance premiums for insurance on the property received; had rebuilt two furnaces therein and repaired other furnaces; that they had redecorated 11 of the apartments; that they had also, upon taking possession of the property, paid to defendants Lingon $500 to adjust some unsettled accounts and had paid a $400 real estate commission; that after plaintiffs had been in possession for some time, they first learned defendants Lingon were in arrears in the payments due upon the trust mortgage in the sum

of $8,350; that plaintiffs were told by the trust company under the trust mortgage the past-due payments due thereon, together with the past-due taxes, must be paid promptly or it would exercise its rights under the trust mortgage and take possession of the real estate and collect the rent, income, and profits therefrom. Plaintiffs claim they could not safely pay the taxes due upon the premises acquired by them, or make any further payments upon the contract because it was likely to be taken from them by the mortgagee under the trust mortgage by reason of defendants Lingons' default, and the trust company did, on May 21, 1930, take possession of the real estate purchased by plaintiffs and serve notice upon the tenants occupying the same to pay the rent to the trust company, and thereafter the plaintiffs could not collect any rent therefrom. Plaintiffs claim they were evicted by the trust company under the mortgage by reason of the wrongful acts and default of the mortgagors, defendants Lingon, the trust company taking possession of the premises and collecting the rents, income, and profits therefrom. Plaintiffs prayed for a rescission of the contract, accounting, and lien upon the defendants Lingons' premises for the amount of the payments made by them, for a temporary and permanent receiver, and for a temporary and permanent injunction restraining defendants Lingon from transferring or incumbering the property traded to them, and for other relief. From a decree for defendants, plaintiffs appeal.

It was stipulated defendant Costas, to whom defendants Lingon had conveyed part of the property received from plaintiffs, would abide any decree entered in favor of either plaintiffs or defendants. Vendors' title was subject to real estate mortgage

of $100,000 upon which approximately $90,000 was due. Plaintiffs, upon discovering defendants Lingon were in default in the payments due upon this mortgage to the extent of $8,350 and their rights as vendees were thereby likely to be at once jeopardized and ultimately lost, refused to make further payments to vendors unless vendors complied with the covenants in the contract, and made the payments due upon the real estate mortgage, together with interest thereon. The contract provided:

"That if the title of the seller is * * * incumbered by mortgage, the seller shall meet the payments of principal and interest thereon as they mature and produce evidence thereof to the purchaser on demand."

Defendants being unable to make such payments and relieve themselves of default and plaintiffs of the danger of immediate loss of their vendees' interest, plaintiffs elected to rescind the contract, to recover the property conveyed by them to defendants, offering to convey back to defendants the property which they had purchased on land contract and received from them. This they had a right to do.

Rescission is a remedy properly restricted to the cancellation of contracts involving mutual obligations. Black on Rescission and Cancellation (2d Ed.), § 3. In general, where specific performance would be refused, rescission will be decreed (*Kirby* v. *Harrison,* 2 Ohio St. 326 [59 Am. Dec. 677]), though rescission is more nearly a matter of right than specific performance. Black on Rescission and Cancellation (2d Ed.), § 12. Failure of the vendor to perform his contract is a ground for rescission by the vendee. *Skillern's Exrs.* v. *May's Exrs.,* 4 Cranch (8 U. S.), 137. Plaintiffs' right to rescind was perfect. *Seymour* v. *Detroit Copper & Brass*

*Rolling Mills,* 56 Mich. 117; *City of Grand Haven* v. *Grand Haven Waterworks Co.,* 99 Mich. 106. If defendants were asking specific performance, then performance on their part would be a condition precedent. Plaintiffs ask rescission for the failure of defendants to perform their covenant to meet the payments of principal and interest on the mortgage on the premises as they matured. Defendants were in default. As a part of the contract they agreed to meet the payments on the mortgage thereon. There was a failure on their part to perform. It is immaterial that plaintiffs, by the payment of a sum substantially in excess of the amount agreed to be paid, could have protected themselves from mortgage foreclosure resulting as a consequence of defendants' failure to perform. Plaintiffs were under no obligation to carry out and perform a contract which they did not enter into. Why insert a provision in the contract that the seller meet the payments of principal and interest on the mortgage on the premises as they matured if the only remedy of vendee was to meet the payments of principal and interest himself and apply the amount paid in reduction of the contract price? Vendors will not voluntarily pay out money when it is immaterial whether they pay or not. Why insert this clause in the contract at all if it is not to be recognized and enforced? An option to vendees does not impair the obligation of vendors' contractual obligation to pay. When defendants defaulted in the terms of the contract, plaintiffs at once had a right of action. The court cannot make a new contract for the parties. The contract was mandatory in its requirement defendants should meet the payments due and to grow due on the mortgage. Plaintiffs were, by the contract, given the right to pay on the mortgage. This right was not mandatory but permissive. It was not

an exclusive remedy to which plaintiffs were by contract restricted. The parties did not provide defendants should make the payments on the mortgage and at the same time leave it optional whether they should make them or not. In *Ong* v. *Campbell,* 6 Watts (Pa.), 392, the court, by Chief Justice Gibson, held that a vendor, who had covenanted to make payments on a mortgage, was not entitled to specific performance of a contract of sale when he had not done so. By the same reasoning, failure of a vendor to make payments on a mortgage on premises sold gives the vendee a right to rescind, because vendee may rescind for a breach of contract by vendor.

Defendants are bound by the written contract and their covenant to pay the amount due and to grow due upon the mortgage. This default upon the part of vendors was not due to vendees' failure to make the payments falling due after they discovered this default. Vendors' default had occurred before plaintiffs' discovery and failure to pay. That plaintiffs, upon discovery of the extent of defendants' default upon the mortgage, elected to rescind, did not make it incumbent upon plaintiffs to pay additional money to defendants which they might not be able to recover. Under the facts, plaintiffs are entitled to a decree. In coming to this conclusion we do not pass upon a case where the vendee owed an amount in excess of that due from the vendor on the mortgage and the default of the vendor was due to that of the vendee. The decree of the trial court will be reversed, with costs, and a decree of rescission entered and the cause remanded to the trial court for an accounting between the parties; plaintiffs to have a lien for the amount due them, as prayed.

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

MORTGAGE & CONTRACT CO. *v.* LINENBERG.

1. VENDOR AND PURCHASER—LAND CONTRACTS—FORECLOSURE—PARTIES—MORTGAGES.

   In proceedings to foreclose land contract, vendee, who entered into said contract to purchase the property for others, is not entitled to have them held as vendees and she treated as their mortgagee; rule that deed given as security is mortgage having no application to issues presented in instant case.

2. SAME.

   Where vendee's son and wife were not parties to land contract, although vendee was purchasing property for them, vendor was under no obligation to make them parties to foreclosure proceedings.

3. GUARANTY—VENDOR AND PURCHASER—NOTICE OF VENDEE'S DEFAULT AS CONDITION PRECEDENT TO FORECLOSURE SUIT.

   Where there was no provision in land contract for notice of default before foreclosure suit or before acceleration, and no such provision in contract guaranteeing vendee's payment by vendor, who assigned her interest, guarantor was not entitled to notice of default as condition precedent to instituting foreclosure proceedings.

4. SAME—WANT OF NOTICE OF DEFAULT—DAMAGES—BURDEN OF PROOF.

   In proceedings to foreclose land contract and hold guarantor liable for balance due under acceleration clause, burden was on guarantor to show loss, if any, caused by lack of notice of vendee's default.

5. SAME—EFFECT OF FAILURE TO GIVE TIMELY NOTICE OF DEFAULT.

   Failure to give guarantor timely notice does not wholly vitiate contract of guaranty, but only releases guarantor who has been damaged by lack of notice *pro tanto*.

6. SAME—STARTING FORECLOSURE SUIT SUFFICIENT NOTICE OF DEFAULT.

   Starting suit to foreclose land contract and serving process on guarantor of vendee's payments as party defendant is

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On necessity of notice of default to bind guarantor, see annotation in 20 L. R. A. 257, 264.

sufficient notice of vendee's default to obviate necessity of further notice.

7. SAME—GUARANTOR'S LIABILITY UNDER ACCELERATION CLAUSE.
Provision in land contract that payments thereunder would be accelerated if proceedings were taken to enforce it in equity after default by vendee is binding on vendor who assigned her interest and guaranteed vendee's payments, and therefore she is liable in foreclosure suit to which she was made party for payments due under acceleration clause as well as for past-due payments, notwithstanding want of notice of vendee's default, in absence of showing that she was damaged thereby.

8. SAME.
Enforcing liability of vendee's guarantor under acceleration clause in land contract in no way changes terms of contract of guaranty, since acceleration clause is part and parcel of original contract.

9. SAME—LITIGATION BY GUARANTORS TO ESCAPE LIABILITY NOT ENCOURAGED.
Litigation by which guarantors seek to escape terms of their plain and positive contracts of guaranty, by means of which contracts they have negotiated guaranteed obligations for valuable consideration, ought not to be encouraged.
McDONALD, SHARPE, and WIEST, JJ., dissenting in part.

Appeal from Wayne; Cutler (Hal L.), J. Submitted January 6, 1932. (Docket No. 36, Calendar No. 35,808.) Decided October 3, 1932.

Bill by Mortgage & Contract Company against Pauline A. Linenberg and Josephine M. Obenauer to foreclose a land contract and for a deficiency decree. Cross-bill by defendant Linenberg against plaintiff and others to declare an equitable lien. Cross-bill by defendant Obenauer against defendant Linenberg for money decree. From decree rendered, defendants appeal. Affirmed.

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

*Peck & Armstrong,* for defendant Linenberg.

*Arthur E. Brown,* for defendant Obenauer.

WIEST, J. (*dissenting*). Josephine M. Obenauer owned certain premises. Arthur H. Linenberg and his wife, Cora, desired the premises for their home, but were unable to make the payment required for purchase on land contract. Pauline A. Linenberg, mother of Arthur, entered into a land contract under which she became the purchaser. The contract provided for monthly payments and contained an acceleration clause. Josephine M. Obenauer conveyed the premises and assigned the land contract to plaintiff company with the following guaranty:

"I hereby guarantee that the vendee therein named or her assignees will faithfully perform said contract and make all payments which fall due therein."

Default in payments was made, acceleration exercised, and the bill herein was filed to foreclose the land contract and obtain a decree for deficiency, if any, against both Pauline A. Linenberg and Josephine M. Obenauer.

Defendant Pauline A. Linenberg, by answer and cross-bill, brought in Arthur and Cora Linenberg and asked for a decree holding that Arthur and Cora were the vendees in fact and that she have an equitable lien on the property for the money she had paid the vendor.

Josephine M. Obenauer, by answer, denied liability under the guaranty for more than the monthly payments in default, pleaded misjoinder of parties, and, by cross-bill, prayed relief against Pauline

A. Linenberg for any sum required of her under the guaranty.

The court found the amount due on the land contract as accelerated, and adjudged Pauline A. Linenberg liable as vendee and Josephine M. Obenauer liable as guarantor for the full amount thereof, decreed sale of the property, and provided that if any part of the deficiency was collected from Josephine M. Obenauer she should be entitled to "an assignment from the plaintiff of a like portion of said deficiency judgment as against defendant Pauline A. Linenberg and defendant Josephine M. Obenauer shall have execution thereof against defendant Pauline A. Linenberg."

Josephine M. Obenauer and Pauline A. Linenberg both review by appeal.

In behalf of Mrs. Linenberg we are urged to hold that her son and his wife are the vendees in the land contract and she stands in the relation of their mortgagee. Cases holding that a deed given as security is a mortgage as between parties have no application to any issue here presented. The relation of mortgagor and mortgagee between the Linenbergs might be declared without at all affecting Mrs. Linenberg's liability to plaintiff.

Arthur and Cora Linenberg were in possession of the premises, and Mrs. Linenberg claims they should have been made parties to the foreclosure. They were brought before the court by Mrs. Linenberg under her cross-bill. They were not parties to the land contract, and plaintiff was under no obligation to make them parties in the original bill.

The guaranty of Josephine M. Obenauer cannot be extended beyond its plain terms. The land contract called for monthly payments of not less than $75, and required full performance within 10 years

from and after the first day of June, 1926. The bill herein was filed March 1, 1930, and the decree was entered March 13, 1931.

The proofs in this case were taken before a circuit court commissioner and the decree was entered upon the findings of fact by the commissioner and approval of his conclusions of law.

The commissioner in his report stated:

"I find that on January 25, 1928, plaintiff sent a letter to defendant Josephine M. Obenauer advising her that Pauline A. Linenberg was then in default under the said land contract, and calling the attention of said Josephine M. Obenauer to her guaranty thereof. I further find that the contract became in default as set forth in the bill of complaint on or about May 10, 1929, and has remained in default ever since, but that the plaintiff, the Mortgage & Contract Company, the present holder of the title and vendor's interest in said land contract, did not give any additional notice to defendant Josephine M. Obenauer hereunder, of such default until on or about the time of the commencing of this action to establish the vendor's lien in the same."

We do not find any subsequent notice of default.

In his conclusions of law the commissioner stated:

"I further find that the plaintiff was not obliged to give Josephine M. Obenauer any notice of the default of said vendee."

The undertaking by the guarantor was subsequent to the contract fixing the obligation of the vendee and founded upon a separate consideration. The obligation of the vendee to pay was not the primary obligation of the guarantor. Her obligation was collateral to and contingent upon default in payment by the vendee, and, being secondary, she was en-

titled to notice of default and an opportunity to protect herself by payment.

In the language of Mr. Justice Story in *Douglass* v. *Reynolds,* 7 Pet. (32 U. S.) 113:

"By the very terms of this guaranty, as well as by the general principles of law, the guarantors are only collaterally liable, upon the failure of the principal debtor to pay the debt. A demand upon him, and a failure on his part to perform his engagements, are indispensable to constitute a *casus fœderis.*"

Defendant Obenauer was entitled to notice of default before the suit against her. *Palmer* v. *Schrage,* 258 Mich. 560.

When a payment became due under the land contract, and the vendee was in default, the plaintiff had the option to call upon Mrs. Obenauer for payment thereof or to take proceedings in equity to enforce the contract, and, if it exercised the latter, then, according to the terms of the land contract, it might declare the entire amount owing thereon to be due from and payable by the vendee, for such is the land contract provision. The remedy against the guarantor, however, would arise only after notice of default on the part of the vendee and demand upon her for payment.

Defendant Obenauer is in a court of equity and must abide equitable relief.

If defendant Obenauer pays all sums now in default within 20 days after this opinion is filed the decree should be reversed, with costs to her. Otherwise the decree should stand affirmed, with costs to plaintiff.

MCDONALD and SHARPE, JJ., concurred with WIEST, J.

NORTH, J. I am in accord with the opinion of Mr. Justice WIEST except that portion wherein he holds that Mrs. Obenauer's guaranty of payment does not apply to the amount due plaintiff under the acceleration clause of the contract being foreclosed. In that holding I cannot concur. While a former notice of the vendee's default had been given to Mrs. Obenauer by plaintiff, the record does not show that she was given notice of the defaults which led to this foreclosure. My Brother's decision is based, as he states, upon the proposition that:

"Defendant Obenauer was entitled to notice of default before the suit against her." Citing *Palmer* v. *Schrage,* 258 Mich. 560.

There is no provision in this land contract for notice of default before suit or before acceleration, nor is there any such provision in Mrs. Obenauer's guaranty of payment. And I find no authority for holding that in such case either the vendee or the vendee's guarantor is entitled to notice as a condition precedent to instituting foreclosure proceedings. The case of *Palmer* v. *Schrage,* cited in my Brother's opinion, does not so hold. Instead, we there held, quoting syllabus:

"Guarantors of payments on land contract are liable notwithstanding want of prompt notice of vendee's default, in absence of showing that they were damaged by delay in giving said notice."

In the instant case Mrs. Obenauer does not make the claim, nor could she do so under this record, that she was damaged in consequence of plaintiff not having given her notice of the vendee's default in making the monthly payments between May 10, 1929, and March 1, 1930, when the bill of complaint herein was filed, or May 19, 1930, when the bill was amended, or even as late as May 26, 1930, when

process was served on Mrs. Obenauer. There is no persuasive testimony in this record as to the extent, if at all, that this property depreciated in value during that period, or that Mrs. Obenauer could have saved herself from loss had she been notified of the vendee's default more promptly than she was by the bringing of this suit against her. The burden was on Mrs. Obenauer to show her loss, if any, was caused by lack of notice.

"In action on contract guaranteeing vendees' payments on land contract, defense of delay in giving defendants notice of vendees' default is affirmative defense, and therefore burden of establishing their damage, if any, is upon defendants." *Palmer* v. *Schrage* (syllabus), *supra.*

It scarcely seems necessary to refer again to our recent decision in the *Palmer Case,* where the authorities are cited holding that failure to give a guarantor timely notice does not wholly vitiate the contract of guaranty, but only releases a guarantor who has been damaged by lack of notice *pro tanto.* In the instant case it is not claimed in behalf of Mrs. Obenauer that since there was lack of notice she should be released *pro tanto* because of proof of resultant damage to her; and no authority is cited in her brief, nor have I found any elsewhere, holding that (in the absence of an express provision therefor) notice of default is a prerequisite to a suit to enforce a contract of guaranty. Instead, the law in guaranty cases seems to be that notice is not a prerequisite to bringing suit; instead, it is a requisite to keeping the guaranty in full force in those cases where failure to give notice results in loss or damage to the guarantor. Surely starting a foreclosure suit and service of process on the guarantor as a party defendant is sufficient notice of the vendee's default to obviate necessity of a further notice.

My Brother's quotation from *Douglass* v. *Reynolds,* 7 Pet. (32 U. S.) 113, is not relevant. It is not at all to the point that notice to a guarantor of his principal's default is a prerequisite to bringing suit against the guarantor, which is the controlling proposition in Justice WIEST's opinion. Instead, the quotation is to the effect that "guarantors are only collaterally liable," and that a demand upon the guarantor's principal (in this case the vendee) and his failure to perform his contract engagements, "was indispensable to constitute a *casus fœderis.*" Neither of these statements is in conflict with the proposition to which we are writing, namely, that under the facts in this case it was not a condition precedent to bringing suit that plaintiff should notify the guarantor of her principal's default.

Further, casual reference to this contract discloses that it could not be held that notice of default was a condition precedent to acceleration by the vendor. Instead, it is provided in the contract that the payments thereunder are accelerated "if proceedings are taken to enforce the contract in equity after default by the purchaser." Giving notice of default would not have accelerated the payments, because, as appears from the above-quoted portion of the contract, it is provided that "proceedings * * * in equity" are the means by which acceleration is effected. Mrs. Obenauer bound herself by this provision of the contract when in her guaranty of payment, which was a part of her assignment of the contract to plaintiff, she stipulated:

"And I hereby guarantee that the vendee therein named or her assignees will faithfully perform said contract and make all the payments which fall due therein."

It would seem rather illogical to hold, as does my Brother's opinion, that, notwithstanding she was not given notice before suit of the vendee's defaults, Mrs. Obenauer is liable to plaintiff under the above-quoted guaranty of payment for the amounts past due and unpaid under the provisions of the contract for payment of monthly instalments and for payment of taxes; and at the same time to hold that because of failure to give such notice she is not liable to plaintiff for the payment due under the acceleration clause of the same contract. If notice is a prerequisite to suit on the one phase of this contract, it would seem it should also be held to be a prerequisite to suit on the other. There is no proof nor is the claim made in behalf of Mrs. Obenauer that she will be more burdened by compliance with her obligation under the acceleration clause than by paying under the instalment provisions of the contract. And it may well be questioned whether she could be heard in making such a claim because the plaintiff has the right to terminate its contract relations with a defaulting vendee who has not "faithfully performed said contract" as Mrs. Obenauer guaranteed. It is asserted in Mrs. Obenauer's brief that to hold this guaranty applicable to the acceleration clause "is to require this defendant to answer on an entirely different liability than the one which she signed." But in this connection it should be noted we have held that enforcing liability under an acceleration clause in no way changes the terms of the contract. *Union Trust Co.* v. *Detroit Motor Co.*, 117 Mich. 631. The acceleration clause is part and parcel of the original contract.

When Mrs. Obenauer sold this contract to plaintiff she knew that she passed to it the right to declare the full unpaid portion of the contract due

forthwith upon default in the payment of one or more of the instalments by vendee. This is the right that plaintiff exercised, and thereupon under the terms of the contract the whole of the unpaid portion of the purchase price became due and payable; and Mrs. Obenauer's guaranty that the vendee would "faithfully perform said contract" included payment under this acceleration clause just as much as it included payment of the monthly instalments. One was just as clearly included in the land contract as the other and just as essential to its "faithful performance." Both were plainly covered by Mrs. Obenauer's guaranty. And in passing it may be noted that the undisputed testimony is that plaintiff would not have purchased this contract without this guaranty of Mrs. Obenauer. Plaintiff not only purchased the vendor's interest in the contract, but it also purchased the vendor's guaranty of payment; and Mrs. Obenauer, having guaranteed that the vendee in the contract "would faithfully perform said contract," should be held bound by the plain terms of her guaranty, which included performance or payment of the contract under the acceleration clause in case plaintiff so elected upon the default of the vendee. If Mrs. Obenauer desired notice of the vendee's default as a condition precedent to her being held liable under the acceleration clause or as a condition precedent to suit on her guaranty it should have been so provided in the contract of guaranty itself. Litigation by which guarantors seek to escape the terms of their plain and positive contracts of guaranty, by means of which contracts they have negotiated the guaranteed obligations for a valuable consideration, ought not to be encouraged. The court has no right or power to modify this contract for Mrs. Obenauer's benefit

and against the interest of plaintiff by holding it does not apply to the acceleration clause.

The decree of the circuit court is affirmed, with costs to appellee.

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

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JASSY *v.* MARCINIAK.

1. CHATTEL MORTGAGES—ASSIGNMENTS—RIGHTS OF ASSIGNEE.
   Assignment of chattel mortgage and debt which it secures will generally invest assignee with all rights and powers which were possessed by mortgagee, and assignee stands in same position as to mortgagor, or his donee, as did mortgagee, and same rights and obligations exist between them.

2. BILLS AND NOTES—NOTICE OF DISHONOR—WAIVER—CHATTEL MORTGAGES.
   Where mortgagee sold chattel mortgage, indorsing promissory notes given by mortgagor, and thereafter disclaimed any interest in said mortgage or notes, no right to presentment, demand, or notice of dishonor was thereby waived.

3. CHATTEL MORTGAGES—ASSIGNMENTS—RIGHT OF ASSIGNEE TO JUDGMENT FOR DEFICIENCY AGAINST ASSIGNOR.
   Purchaser of chattel mortgage and notes given in connection therewith is not entitled to judgment for deficiency against mortgagee, in absence of any promise other than indorsement of notes, where notice of dishonor was neither given nor waived.

Appeal from Wayne; Boomhower (Xenophon A.), J., presiding. Submitted April 7, 1932. (Docket No. 38, Calendar No. 35,754.) Decided October 3, 1932.

Assumpsit by Henry Jassy against Antonina Marciniak as indorser of promissory notes and as-

signor of chattel mortgage for deficiency. Judgment for plaintiff. Defendant appeals. Reversed.

*Leon Dreifuss,* for plaintiff.

*Anthony Nelson,* for defendant.

POTTER, J. Plaintiff sued defendant to recover judgment for the amount of deficiency arising from the failure of chattel mortgaged property to bring at foreclosure sale the amount of the chattel mortgage claim. The declaration also contained a count in tort, but the case was not presented to the trial court upon that theory, but upon the right to recover the amount due upon the promissory notes involved.

Defendant sold to one Krause certain personal property for $1,650, taking in part payment therefor a chattel mortgage to secure the payment of 50 promissory notes of $25 each. Defendant sold plaintiff the chattel mortgage and notes and indorsed the notes when she assigned the chattel mortgage. Default was made in the payment of the notes whose payment was secured by the chattel mortgage in question; the chattel mortgage foreclosed; the property sold for less than the amount due, and thus a deficiency accrued, to recover which plaintiff below sought judgment; no contention being made to the trial court he was entitled to a judgment on the count for tort. From a judgment for plaintiff, defendant appeals.

Appellant claims there was an absolute sale of the chattel mortgage and notes to plaintiff, and defendant is not liable.

"An assignment of a chattel mortgage and the debt which it secures will generally invest the assignee with all the rights and powers which were possessed by the mortgagee, and he stands in the same position as to the mortgagor, or a donee of the

mortgagor, as did the mortgagee, and the same rights and obligations exist between them." 11 C. J. p. 666.

Defendant indorsed the several promissory notes, at the time the chattel mortgage was assigned to plaintiff, by writing her name on the back thereof. There was no formal waiver of presentment, demand, and notice of dishonor. Plaintiff says none was necessary. He claims defendant waived them. This claimed waiver of defendant of presentment, demand, and notice of dishonor is based upon the testimony of Angelo Di Pietro, who said:

"I have worked for Mr. Jassy about a year. I had something to do with Mrs. Marciniak. I was sent over there several times to collect and to give notice that we could not collect from Krause. She said that she was not interested any more and that she had sold it again she would not take the place back or pay the notes. That is all I know. I went there several times to collect. I don't know anything about the chattel mortgage, I was just sent over there to collect. After I could not collect from Krause they sent me over to Mrs. Marciniak. She said she would not pay it. Once they gave me a letter and she told me she was sick at that time but that she would talk it over with her attorney and come over to the office in a day or two. She never came that I know of."

There is no evidence plaintiff was deceived, misled, or lulled into a sense of security by defendant. Plaintiff had no promise but the original indorsement. Defendant waived no rights. *Mellen-Wright Lumber Co.* v. *McNett,* 242 Mich. 369. Judgment reversed, with costs. Remanded, with direction to enter judgment for defendant.

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

KIRBY *v.* MEYERING LAND CO.

1. EASEMENTS—INJUNCTION—BREACH OF COVENANT—CONSTRUCTION OF DEED.

Right of lot purchaser to enjoin erection of clubhouse on certain lake front lots, reserved by owers for benefit of all lot purchasers, as infringement of easement, rests wholly on terms of deed, and not on early promises or expressions of intention not incorporated in deed.

2. SAME—EASEMENT GRANTED MAY NOT BE CONSTRUED AS DIFFERENT EASEMENT.

Deed must be construed as it reads, and easement granted by it may not be construed to create another or different easement for benefit of grantees.

3. SAME—RIGHT OF WAY.

Grant in deed to lot purchaser of "perpetual use * * * in passing to and from" lake and river, in common with all other lot owners, is grant of way or right of passage over said tract, and does not include other use.

4. SAME—INJUNCTION.

Lot purchaser granted right of way or passage over certain lots reserved for benefit of all lot purchasers is not entitled to enjoin erection of clubhouse on said lots, where his right of way to lake for full width of his lot is not obstructed thereby, and clubhouse is for benefit of all lot owners.

POTTER, J., dissenting.

Appeal from Oakland; Gillespie (Glenn C.), J. Submitted April 20, 1932. (Docket No. 172, Calendar No. 36,025.) Decided October 3, 1932.

Bill by William E. Kirby and another against Meyering Land Company, a Michigan corporation, and others to enjoin trespass on real estate. Bill dismissed. Plaintiffs appeal. Affirmed.

*George B. Hartrick,* for plaintiffs.

*Andrew L. Moore,* for defendants.

POTTER, J. (*dissenting*). September 20, 1929, plaintiffs filed their bill of complaint against defendants to restrain trespass, remove permanent and temporary buildings alleged to constitute a trespass, and for other relief. From a decree for defendants, plaintiffs appeal. July 23, 1923, plaintiffs applied to purchase Lot No. 44 of Beachland subdivision in the township of West Bloomfield, Oakland county, Michigan.

March 20, 1924, plaintiff William E. Kirby bought of Fred S. Welch, trustee, on land contract:

"Lot 44 of Beachland subdivision, according to the plat thereof as recorded in register of deeds' office for Oakland county, Michigan: Also the perpetual use of lots 13, 31, 32, 33, 34, and 106 of said Beachland subdivision in common with the owners and occupants of all the other lots in said subdivision in passing to and from Cass lake, Sylvan lake and Clinton river; also lots 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39 and 40, also No. 38 subjected to the restrictions in a deed recorded in liber 355, page 65. For the sum of $1,800."

November 26, 1928, the Meyering Land Company of Detroit, a corporation, deeded to plaintiff William E. Kirby and Ethel M. Kirby, his wife, the following:

"Lot number 44 of Beachland subdivision, according to a plat thereof as recorded in register of deed's office for Oakland county, Michigan, in liber 22 of plats on page 3; also the perpetual use of lots 13, 31, 32, 33, 34, 106, 24, 25, 26, 27, 28, 29, 30, 35, 36, 37, 38, 39 and 40, in common with the owners and occupants

of all the other lots in said subdivision in passing to and from Cass lake, Sylvan lake and Clinton river.

"Subject, however, to the following building and other restrictions and which attach to and run with the land:

"(1) Upon all lots of said Beachland subdivision running to Cass lake, Sylvan lake and Clinton river, except lots 38, 39 and 40, no part of any building, located thereon shall be within 40 feet of the water's edge and upon all other lots no part of any building shall be within 25 feet of the street line in front of said lot.

"(2) All buildings erected or located on lots 41–52, inclusive, shall face upon Cass lake drive.

"(3) All buildings erected and located on lots 53–93, both inclusive, shall face upon Beachland boulevard.

"(4) All buildings erected or located on lots 94–99, both inclusive, shall face upon Sylvan avenue.

"(5) All buildings erected or located on lots 1–40, inclusive, shall face upon Cass lake or Clinton river as the case may be.

"(6) All buildings erected or located on lots 100–121, inclusive, shall face upon Sylvan lake.

"(7) No fence shall be constructed on any lot unless the same comply fully with each and all of the specifications:

"(a) It shall not be more than 36 inches in height above the ground;

"(b) It shall be composed of either wooden lattice work or structural ornamental metal;

"(c) It shall be at all times kept in good repair and properly painted.

"(8) No more than one building shall be erected on any lot, nor shall any building be erected thereon, any part of which shall be within 10 feet of the side-line of the lot on which the same is located. Boat-houses shall be deemed to be within the term (building). All garages must be erected as a part of or

immediately adjoining the house on the lot. No old building shall be moved onto any lot, nor shall any cottage or dwelling be erected on any lot whose cost shall be less than $2,500, nor shall any store or other salesrooms, or place for the transaction of business, be erected or maintained on any lot excepting those lots which may be reserved by the owner of the subdivision for business purposes.

"(9) No lots shall be sold, or rented to, or occupied by any persons of Jewish or Negro descent."

The lot purchased and acquired by plaintiffs in pursuance of this deed faces Cass lake drive, which is 50 feet wide, and between plaintiffs' lot 44 and Cass lake lie lots 36 and 37. On lots 36 and 37 defendants have erected a signboard 50.7 feet long and 10 feet wide, the top of which is 12 feet 2 inches above the ground. This sets back from Cass lake drive approximately 60 feet. Defendants have also caused to be erected what is designated as the Cass-Sylvan Lakes Beach Clubhouse, a frame building approximately 76.3 feet long and 35 feet in width. This building stands on lots 32, 33, and 34, approximately 80 feet back from Cass Lake drive and between that and Cass lake. East and south of this clubhouse is a pump house 20 x 24 feet, which stands on lot 34. Plaintiffs claim the erection and maintenance of the signboard, above described, and this clubhouse and pump house constitutes trespass upon their rights to the property on which they stand, and file this bill of complaint to abate them.

Plaintiffs' rights depend upon their deed. No principle is more sacred than that a man shall be compelled to perform his contract. *Leech* v. *Schweder,* 9 Ch. App. Cas. 463. Said Sir George Jessel:

"It is clearly established by authority that there is sufficient to justify the court interfering if there

has been a breach of the covenant. It is not for the court, but the plaintiffs, to estimate the amount of damage that arises from the injury inflicted upon them. The moment the court finds that there has been a breach of the covenant, that is an injury, and the court has no right to measure it, and no right to refuse to the plaintiff the specific performance of his contract." *Leech* v. *Schweder, supra,* 468, note.

"If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere by injunction." *Tipping* v. *Eckersley,* 2 Kay & Johns. 264, 270 (69 Eng. Repr. 779).

"It is therefore, in my opinion, a matter of no moment in this case, that the plaintiffs have given no evidence of any actual damage done to them. * * * Having established that the acts of the defendants are a violation of the contract entered into between them and the plaintiffs, and a violation of the act of parliament passed to carry such contract into effect, the plaintiffs are entitled to call upon this court to protect them in the enjoyment of that right which they have so purchased, and this court is bound to preserve it from being broken in upon." *Dickenson* v. *The Grand Junction Canal Co.,* 15 Beav. 260, 271 (51 Eng. Repr. 538).

"I am of opinion that the plaintiff, because he has not complained of certain breaches of covenant, which, in my opinion, have inflicted no injury upon him, has not thereby debarred himself from complaining of a breach which does affect the value of his property." *Western* v. *MacDermot,* L. R. 1 Eq. Cas. 499, 508.

"It has been suggested that there has been such an acquiescence on the part of the plaintiff as entirely bars his right. But, as I have observed during

the argument, in order that the defendant should succeed in that contention, the burden of which, of course, rests on him, he must show such a course of acquiescence as forever to preclude the plaintiff from insisting on his right under the agreement." *Evans* v. *Davis,* L. R. 10 Ch. Div. 747, 764.

The grant is not of a mere right of passage limited or to be limited and defined by the court as in ordinary easement cases. It is a grant of a perpetual use —a grant of an interest in and title in common with the owners and occupants of all the other lots in the subdivision to the 19 lots named—in passing to Cass lake, Sylvan lake and Clinton river. If a mere right of way or easement to reach the waters of Cass lake, Sylvan lake and Clinton river was intended, it would not have been necessary to name the 19 different lots mentioned in the deed. An examination of the deed, the restrictions contained therein, the lots named to which building restrictions were applied, the character of the land as then platted, the representations made by the owners through their selling agents to plaintiffs as to what was to be done with the land, the advertising matter issued with the approval of the owners of the property, the circular reading, "Private Park—Cass lake frontage reserved for use of lot owners," the provisions of the deed that the above nine restrictions and conditions are not only binding on the parties thereto, but are made for the benefit of and may be enforced by any of the owners of the land in said subdivision, indicate that it was originally intended the lots specified were not to be built upon. The correspondence of the defendant Meyering Land Company, which acquired this property, indicates it understood the purchasers of the lots had rights which they could not, without violating their contracts, infringe upon.

July 12, 1925, Meyering Land Company sent plaintiff W. E. Kirby a letter of conveyance to be executed which recited that:

"In order to release from operation and effect that portion of the restrictions and conditions contained in contract for the purchase by the undersigned of lot in Beachland subdivision * * * such restrictions pertaining to the perpetual use in common with other lot owners in said subdivision of lots * * * consideration of the sum of one dollar and other considerations, the receipt whereof is hereby acknowledged, the undersigned does by these presents grant, bargain, sell, remise and release and forever quitclaim unto the Meyering Land Company or to its assigns, all those pieces and parcels of land situate in the said county of Oakland, State of Michigan, and more particularly described as lots."

July 21, 1925, it wrote to him it intended to build a clubhouse and improve these lots, representing: "This will in no way detract from your lot but it should increase its value very materially."

August 1, 1925, it wrote him that on June 12th,

"We wrote you regarding our plans for the development of a tract of land in our Beachland subdivision. We inclosed a release which we requested that you sign and return to us which gave us the privilege to improve this property according to the plans which we mentioned in this letter."

October 29, 1925, and November 5, 1925, it wrote him about *his club* which it had erected upon land where it knew it had no business to erect it. July 10, 1926, it wrote him:

"It (was) necessary to secure from various former purchasers of Beachland subdivision a release of their interest in the lots in question."

It inclosed, under date of July 10, 1926, a release for execution by plaintiffs which contained the language:

"In consideration of the sum of one dollar and other valuable consideration, the receipt whereof is hereby acknowledged, I, the undersigned, hereby release and quitclaim to the Meyering Land Company any and all interest pertaining to the use in common with other lot owners in and to lots No. 24 to No. 40 or any part thereof, of Beachland subdivision, Oakland county, Michigan, according to the plat thereof as recorded in said Oakland county records."

If defendants were right in this, if they had not sold the property in pursuance of a plan which contemplated these lots were to be a private park to be used in common by all the lot owners, they would not have taken the trouble to have had this correspondence or made the many requests for quitclaim deeds. It was not necessary for plaintiffs to quitclaim what they did not own. Defendants understood plaintiffs had rights which it was necessary to secure, and these are substantially what plaintiffs seek to protect.

In *Hills* v. *Miller,* 3 Paige's Ch. (N. Y.) 254 (24 Am. Dec. 218), plaintiff purchased a lot facing a triangular piece of land which it was agreed should be public property. Subsequently the triangular piece was quitclaimed to the trustees of a church who threatened to build upon it. Plaintiffs sought an injunction. The chancellor said (p. 256):

"It was an easement or privilege annexed to those lands; and if he had reconveyed the whole of the land to Bostwick, his right to recover for a breach of the condition of the bond would have become extinct. (3 Kent's Commentaries, 449, Erskine's Principles of the Law of Scotland, 218, 227.) The right thus

granted was the servitude *non officiendi luminibus vel prospectui* of the Roman law, or the right of the owner of the lands to which it is appurtenant to restrain the owner of the servient tenement from making any erection thereon which may injure the light or prospect of the dominant tenement, or any part thereof. Rights of this description, denominated predial servitudes in the civil law, and by our law termed easements, are attached to the estate, and not to the person of the owner of the dominant tenement; and they follow that estate into the hands of the assignee thereof. So, on the other hand, they are a charge upon the estate or property of the servient tenement, and follow it into the hands of any person to whom such tenement or any part thereof is subsequently conveyed."

In *Hayes* v. *Railroad Co.*, 51 N. J. Eq. 345, it is held that contracts like that here involved will be enforced whether denominated covenants, conditions, reservations, exceptions, or restrictions, whether running with the land or not. The question is (p. 349):

"Not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract."

As pointed out by Chief Justice Beasley in *Brewer* v. *Marshall,* 4 C. E. Gr. (19 N. J. Eq.) 537, 543 (97 Am. Dec. 679):

"It will be found, upon examination, that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another, from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land."

It is claimed plaintiffs knew defendants had violated the terms of the contract of purchase when

they accepted the deed, and, having knowledge the rights in dispute were incumbered when they accepted their deed, cannot now be heard to complain. No parol proof is admissible in an action upon covenants to show an existing incumbrance was to be regarded as no incumbrance. It is as usual, and certainly as competent, to covenant against known as unknown incumbrances or defects in title. The purchaser is not called upon to exercise diligence, but has a right to rely upon the covenants of the deed. That a purchaser has notice of an incumbrance is frequently the very reason for taking a covenant within the scope of which the incumbrance is included. *Edwards* v. *Clark,* 83 Mich. 246 (10 L. R. A. 659); *Lavey* v. *Graessle,* 245 Mich. 681 (64 A. L. R. 1477).

One who purchases land facing on a public square laid out and established is entitled to an injunction to restrain the erection of private buildings thereon (*Rutherford* v. *Taylor,* 38 Mo. 315); or the inclosure of any part of it (*Wheeler* v. *Bedford,* 54 Conn. 244 [7 Atl. 22]); or the diversion of its use to other purposes (*Village of Princeville* v. *Auten,* 77 Ill. 325). One who has purchased land facing on a courthouse square is entitled to an injunction to restrain the erection of a jail thereon. *County of Harris* v. *Taylor,* 58 Tex. 690. One who has purchased land facing a public park is entitled to an injunction to restrain incumbering the same with buildings. *City of Chicago* v. *Ward,* 169 Ill. 392 (48 N. E. 927, 38 L. R. A. 849, 61 Am. St. Rep. 185).

"When privileges of a public nature are also beneficial to private property, as in the case of land upon a public square, the enjoyment of them will be protected from encroachments by injunction." Joyce on Injunctions, § 1024.

"Story in his work on Equity Jurisprudence, § 927, in describing the cases where injunctions will be granted, among other things says: 'Where privileges of a public nature and yet beneficial to private estates, are secured to the proprietors contiguous to public squares, or other places dedicated to public uses, the due enjoyment of them will be protected against encroachments by injunction.'" *Wheeler* v. *Bedford, supra.*

"Every man has a right to the enjoyment of his property undisturbed by another, and to be protected in that enjoyment; and, what one may consider of little value, another may esteem very highly. The court will not, in cases of this kind, be governed by dollars and cents alone, but will inquire whether the injury is of such a nature that it can reasonably be supposed to lessen materially the enjoyment of property by its owner." *White* v. *Forbes,* Walk. Ch. (Mich.) 112.

The property of plaintiffs is resort property. Beachland subdivision was laid out as resort property contiguous to Cass lake.

"These lakes and ponds are scattered over almost all parts of the State; they impart to the landscape the charm of picturesque scenery; their banks are often selected as favorite sites for residence, and command a high price; these considerations entered into the original purchase from the government, and every subsequent purchase. Much, and in many cases most, of the value of these locations, and of the residences upon them, consists in the beauty of the prospect which the lakes afford." *Rice* v. *Ruddiman,* 10 Mich. 125.

In cases like that involved here,

"The great weight of the authorities supports the doctrine that in such case mere delay and acquies-

cence will not defeat the remedy, unless it has continued so long as to defeat the right itself." *Longton* v. *Stedman,* 182 Mich. 405, 415.

We may not balance the expense of defendants against the violation of plaintiffs' rights.

"The fact that it would be of great expense to the defendants compared with the injury to complainants, therefore, does not appear and is of no consequence, if it were true. The restrictions in the deeds have been violated. The amount of damages complainants have suffered is wholly immaterial. Such restrictions will be enforced." *Longton* v. *Stedman, supra,* 414.

Nor is plaintiff compelled to seek a remedy in an action at law.

"The violation of complainants' rights by the erection of a permanent structure obstructing an easement and right of way created by deed will be relieved by injunction in a court of equity." *Longton* v. *Stedman, supra,* 414.

Defendants made the contract, deeded the property, and accepted the money therefor; then violated the contract, infringed upon the rights conveyed, and deliberately breached the covenants of their own deed. Their acts were high-handed, illegal, and void as against plaintiffs' rights. Decree should be reversed, with costs, and decree entered for plaintiffs.

FEAD, J. The owner's claimed expressions of intention, representations, or promises that the lake front lots would be improved as a park, that no buildings would be erected on them, that plaintiffs' view of the lake would be unobstructed and their summer home quiet and peaceful, undisturbed by the nocturnal revelry of a clubhouse and the parking of many cars, made to plaintiffs when they bought,

were not incorporated in the deed. In October, 1925, plaintiffs knew they had been breached by the completion of the clubhouse. They did not rescind, claim fraud, nor make objection. They paid the balance of the purchase price, about two-thirds, during the next three years, and obtained a deed in 1928. Controversy regarding the form of the deed was settled by plaintiffs obtaining the kind they demanded. No request was made that the early promises be incorporated in it. This is not a suit for reformation nor rescission. Plaintiffs' right to relief rests wholly upon the terms of the deed, not at all upon the early promises.

The deed must be construed as it reads. The easement granted by it cannot create another or different easement for the benefit of plaintiffs. 9 R. C. L. pp. 784, 785.

The deed does not expressly prohibit buildings on the lake lots. On the contrary it contemplates buildings by providing:

"All buildings erected or located on lots 1–40, inclusive, shall face upon Cass lake or Clinton river as the case may be."

The lake front lots, 24 to 40, inclusive, constitute a single piece of land between the road and the lake, although, having been platted, it was necessary to describe them as lots. The grant is of "perpetual use * * * in passing to and from" the lake and river, in common with all other owners. If, as needs be, the irrelevant early promises are excluded from consideration, it seems obvious that the grant was of way or right of passage over the tract and does not include other use.

"The grantor of the easement of a right of way may use the way in any manner he sees fit, provided he does not unreasonably interfere with the gran-

tee's reasonable use in passing to and fro. The owner of the right of way has the right to a reasonably unobstructed passage at all times, and also such rights as are incident or necessary to the enjoyment of such right of passage." *Murphy Chair Co.* v. *American Radiator Co.*, 172 Mich. 14.

See, also, *Grinnell Bros.* v. *Brown,* 205 Mich. 134, 138.

"A grant or reservation of an easement in general terms is limited to a use such as is reasonably necessary and convenient, and as little burdensome to the servient estate as possible for the use contemplated. In other words, an unlimited conveyance of an easement is in law a grant of unlimited reasonable use." 9 R. C. L. p. 787.

Does the grant mean that plaintiffs have wholly unobstructed right of way or passage over every inch of every lot described? If so, the grantor could not plant a tree, provide playground equipment for children, construct bathing or boating facilities, or build anything which would require the grantees to turn aside in passing to the lake. The alternative is that the grant be construed reasonably. The space for passage to the lake is unobstructed in front of plaintiffs' lot for its whole width of 50 feet, and, in addition, for about 75 feet on one side and 200 feet on the other. The lots upon which the clubhouse is built have ample space, both in front and rear, to permit passage. The clubhouse is for the benefit of all lot owners and is not such a private appropriation of the lots on which it is located as restricts passage over the unoccupied portion of them. The clubhouse does not require plaintiffs to turn aside from a straight course to reach any part of the lake or river as much as would a park, beautified with lawns, fountains, gardens, bushes, and trees, or as would an ordinary resort development, with the

paraphernalia for the amusement of adults and children.

Unless the construction first mentioned be adopted, or it be held that plaintiff's right of way created other easements, and, in my opinion, neither is tenable, the clubhouse does not violate the grant because it does not interfere with a reasonable way or passage between plaintiffs' lot and the lake or river.

In circuit court it was agreed that the signboard should be removed, and it was eliminated from the case.

Decree is affirmed, with costs.

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

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PEOPLE *v.* LUMMIS.

CRIMINAL LAW—STATUTORY RAPE—FAILURE TO SHOW SPECIFIC ACT.

Conviction of statutory rape, alleged to have been committed on or about certain date, is affirmed, on appeal, where there was evidence of repeated acts of intercourse before and at about date alleged, although no specific act of intercourse was pointed out or segregated by prosecution, on which conviction was had.

POTTER, NORTH, and FEAD, JJ., dissenting.

Appeal from Kalamazoo; Weimer (George V.), J. Submitted April 14, 1932. (Docket No. 167, Calendar No. 36,115.) Decided October 3, 1932.

Barclay Pat Lummis was convicted of statutory rape. Affirmed.

*W. J. Barnard,* for appellant.

*Paul W. Voorhies,* Attorney General, and *Edward A. Bilitzke,* Assistant Attorney General, for the people.

SHARPE, J. Defendant here seeks review of his conviction on the charge of having committed the crime of rape upon the person of Lucile Button, a female child of the age of 14 years. The young girl's mother was the wife of the defendant. The offense was alleged to have been committed on or about the first day of February, 1931.

1. It is urged that no "specific act of intercourse" was "pointed out or segregated" on which conviction might be had. Lucile testified:

"About the first of February last I was living on Harrison street and I had intercourse with my stepfather.

"*Q.* How many times?

"*Mr. Barnard:* I object to that until they first show what act they rely upon, if the court please.
* * *

"*Mr. Larmonth:* I am getting at that, about the first of February. That is when we allege the offense was committed.

"*Mr. Barnard:* Do I understand, Mr. Attorney General, that you are relying on an act that took place in this case, that is what you predicate your action on, as occurring on or about the 1st of February, 1931?

"*Mr. Larmonth:* Yes.

"*Mr. Barnard:* All right.

"Along about that time I had intercourse with my stepfather, yes; and had intercourse with him during the month of January, 1931."

She also testified that the offense was committed in a room in the defendant's house and during the

absence of her mother. The court in his instructions to the jury said:

"The State does not attempt to fix the exact, precise date and the State is not required to fix the exact calendar date; but the State is required to rely upon some one transaction for a conviction. * * *

"The theory and claim of the State in this case is, that this offense was committed repeatedly in the same place, the same room, the same house, at about the same hour of the day, and without giving or attempting to give you any particular—especially particular details as to the particular transaction or occasion on which the State relies for a conviction, it is left to you to say whether or not on or about the 1st of February, in this room, in that home where these parties lived, this respondent and his stepdaughter, the girl Lucile, had sexual relations, and whether or not at that time she was under 16."

We find no error in the admission of this proof or in the charge of the court in this respect. 3 Comp. Laws 1929, § 17265; *People* v. *Schultz,* 238 Mich. 15.

2. When the prosecution had rested, defendant's attorney asked that Alice Walsh and Arthur Webster, whose names were indorsed on the information as witnesses, be produced. Mrs. Walsh was then called. A controversy arose as to whether defendant's counsel had the right to cross-examine her. The court ruled that he had. The question then arose as to whether he would be bound by her answers, and the court, without expressly ruling thereon, intimated that he would. Counsel then declined to ask the witness any questions. No claim is made that these were *res gestæ* witnesses. The prosecution stated that they might be used in rebuttal.

The statute requires the prosecuting attorney to indorse on the information "the names of the wit-

nesses known to him at the time of filing the same." 3 Comp. Laws 1929, § 17254. No duty is imposed upon him to indorse thereon the names of witnesses which he may find it necessary to call in rebuttal. On application he may have such names indorsed when he seeks to call them. *People* v. *Tamosaitis,* 244 Mich. 258. If, however, he does indorse the name of a person not a *res gestæ* witness, he must have him in court, but need not call him as a witness. *People* v. *Whittemore,* 230 Mich. 435.

"The fact that the name of a witness is indorsed on the information, does not of itself involve any necessary obligation to do any more than have the witness in court ready to be examined." *Wellar* v. *People,* 30 Mich. 16, 22.

See, also, *People* v. *Henshaw,* 52 Mich. 564.

A defendant has the right to rely on the fact that such a witness will be present. If his counsel announces that he desires to examine him, the prosecution should call him to the stand, thus evidencing the fact that he has performed his duty in that respect. By doing so, he does not make him a witness for the people. The defendant is under no obligation to examine him, but, if he chooses to do so, he becomes his witness. The general rule seems to be that he may cross-examine him, but, in doing so, he makes him his own witness. 1 Wharton's Criminal Evidence (10th Ed.), p. 942; 16 C. J. p. 846.

3. A young girl, 13 years of age, named Anna Surdick, was called as a witness for the defendant. She stated that she knew Lucile and had some talk with her in April last. She was then asked:

"*Q.* I will ask you this: Did she say to you that she hated her father and mother and she wished her mother would die?

"*A.* She didn't say anything about her father.
"*Q.* What did she say about her mother?
"*A.* She said she wished her mother would die because she was so mean to her."

Error is assigned upon the action of the court in striking out this testimony. Lucile had not been interrogated about this conversation. The question was not asked for the purpose of impeachment, and it and the answer thereto were properly stricken from the record.

4. Defendant called as a witness a neighbor, who testified that Lucile's general reputation for truth and veracity in the neighborhood in which she resided was bad. On cross-examination, counsel was permitted to interrogate her about statements made to her by Lucile's grandfather and grandmother that she was truthful. A person's reputation for truth and veracity is dependent upon the voice of the community in which he or she lives.

"An impeaching witness may be cross-examined fully as to the extent and source of his knowledge respecting the general reputation of another witness. And great latitude is to be allowed in the cross-examination as to this point." 28 R. C. L. p. 631, and cases cited.

We find no error in that here permitted or in the cross-examination of other witnesses along similar lines.

5. The information contained a count for taking indecent liberties. Error is assigned upon its withdrawal from consideration by the jury. There is no merit in this contention. *People* v. *Eddy,* 252 Mich. 340.

The other errors relied upon have received due consideration. Further discussion seems unneces-

sary. In our opinion the defendant had a fair and impartial trial, and the verdict rendered is supported by the evidence.

The judgment is affirmed.

CLARK, C. J., concurred with SHARPE, J.

WIEST, J. (*concurring in result*). I concur in the affirmance, but do not accept the holding relative to cross-examination of a witness indorsed on the information in behalf of the prosecution.

The ruling at the trial required defendant to vouch for the credibility of the witness if cross-examined. But it is said that the witness was for the purpose of rebuttal only. When the name of a witness is indorsed on the information and the witness is present at the trial and called by the prosecution at the demand of the defendant there is no shifting from that of a witness for the prosecution to that of requiring defendant to cross-examine at the peril of being bound by what the witness says.

The ruling was erroneous, but I cannot find that it resulted in a miscarriage of justice.

MCDONALD and BUTZEL, JJ., concurred with WIEST, J.

NORTH, J. (*dissenting*). Under the record presented on this appeal, it appears to me the conviction of defendant should be set aside and retrial ordered.

Defendant's counsel timely urged before the trial court that it was essential to a fair trial of the defendant that the prosecuting attorney should designate "the particular act or transaction" upon which the prosecution relied; and "the court should not permit the jury to speculate and say at some time, somewhere, that this respondent had had intercourse

with the prosecutrix." In this connection the circuit judge said:

"I had always supposed that a man being placed on trial for crime would be entitled to have it made perfectly clear to him, either by a bill of particulars or at least by evidence on trial, as to the exact time and place it is claimed he committed the crime upon which the prosecution relied for a conviction.

"I realize that the people are not held to exact proof of the precise date alleged, but the people are bound at some time, before or in the trial, to indicate the transaction, to select one particular transaction. * * *

"I have been almost constantly engaged in the trial of criminal cases in this court these many years, and this is the first case that has ever come to my notice within my experience in which the prosecution did not point out the occasion, the transaction, something peculiar, something that would fix it and give it individuality."

Immediately following the above remarks of the court the assistant attorney general in charge of the prosecution said:

"I think, your honor, the little girl has fixed it some time along the latter part of January or fore part of February, just as near as she could. * * * Here is an occurrence that has been going on for two years. It had got to be a habit, if her testimony is true. There would be nothing to fix in her mind any one particular act."

Unquestionably the foregoing statements of the trial judge were in accord with the established law of this jurisdiction. It is not necessary to prove the exact day or date, but the particular act of sexual intercourse relied upon by the prosecution must in some manner be identified. Notwithstanding this well-settled rule of law, the prosecution did not make

a definite election of a specific offense for which the defendant was being prosecuted, except to state that it was an act which occurred "on or about the first of February, 1931." The case went to the jury under the charge of the court wherein it was correctly stated:

"The State does not attempt to fix the exact, precise date, and the State is not required to fix the exact calendar date, but the State is required to rely upon some one transaction for a conviction. * * * Any man accused of crime is entitled to be advised as to the nature of the accusation, of the time and place that the act is claimed to have been committed, so that if he has a defense he may prepare to meet such accusation."

But immediately preceding the above-quoted portion of the charge, the court had said to the jury:

"It is the claim of the people, the prosecution, that this was one of the last acts or possibly the last act of that sort of a large—long series of sexual acts between these same parties during the period of two years and upwards."

And the circuit judge in this connection also charged:

"The theory and claim of the State in this case is, that this offense was committed repeatedly in the same place, the same room, the same house, at about the same hour of the day, *and without giving or attempting to give you any particular—especially particular details as to the particular transaction or occasion on which the State relies for a conviction, it is left to you* to say whether or not on or about the 1st of February, in this room, in that home where these parties lived, this respondent and his stepdaughter, the girl Lucile, had sexual relations, and whether or not at that time she was under 16."

That the defendant was prejudiced by having his case thus submitted to the jury cannot be doubted, in view of the character of the testimony of the prosecutrix, which in part was as follows:

"I first had intercourse with my stepfather two or three years ago. * * * I claim from that time on up to the first of February we had intercourse once or twice a week; and the only time we had intercourse was in the house in the bedroom upstairs, about seven o'clock in the morning, * * * when I was going to school it was before I went to school and I went to school right along. * * * I don't remember what day in February it was I had intercourse with my stepfather. I don't know whether it was about the first of February—what day of the week it was. It was on a school day before I went to school."

The record is barren of any testimony except that of the prosecutrix tending to identify the act of intercourse relied upon by the prosecution. In this case wherein the prosecution was claiming there were numerous acts of sexual intercourse within a few weeks either prior to or subsequent to February 1, 1931, the manner in which the case was submitted to the jury made it possible, and even probable, that defendant was convicted without the jurors being able to agree upon any particular or specific occasion on which the offense charged was committed. Under the record we are constrained to hold there was prejudicial error.

Consideration of numerous other reasons assigned in support of the appeal has not disclosed reversible error; but for the reason above noted the conviction should be set aside and a new trial granted.

POTTER and FEAD, JJ., concurred with NORTH, J.

## DIRR *v.* HITCHMAN.

1. APPEAL AND ERROR—APPEAL DE NOVO—VENDOR AND PURCHASER—EQUITY.

   On appeal from decree in suit to foreclose land contract, Supreme Court hears case *de novo*, and each party should be required to do equity, but in determining their respective equitable rights, court is bound by specific terms of their contract.

2. VENDOR AND PURCHASER—DEFAULT BY VENDOR.

   Where vendor agreed to make semi-annual payments on mortgage and pay principal at maturity, but failed to do so, rights of vendee are in jeopardy, and said default is not obviated by fact that mortgagee has neither instituted nor threatened foreclosure.

3. SAME—OPTION TO VENDEE TO PAY MORTGAGE IMPOSES NO OBLIGATION TO DO SO.

   Provision in land contract that, if vendor defaults in payments due on mortgage, vendee may pay same, or, in case of foreclosure, may incumber land by mortgage, is optional merely, and does not impose upon him obligation or duty to do so.

4. SAME—FORECLOSURE—DEFAULT BY VENDOR—ESTOPPEL.

   That vendee continued to make payments on his contract after vendor defaulted in making payments on mortgage would not estop vendee from asserting his contract rights to have said mortgage paid or renewed, in suit by vendor to foreclose contract, especially in view of fact that vendor continued in default, and that vendee was advised thereof only short time before suit.

5. SAME—FORECLOSURE—EQUITY.

   Vendor, who was first in default in making payments on mortgage, is not entitled to foreclose contract until mortgage is paid or renewed and opportunity given vendee to pay amount decreed to be due.

Appeal from Wayne; Cutler (Hal L.), J., presiding. Submitted April 7, 1932. (Docket No. 52, Calendar No. 36,383.) Decided October 3, 1932.

Bill by Caroline K. Dirr against Thomas Hitchman to foreclose a land contract. Decree for plaintiff. Defendant appeals. Reversed conditionally.

*Kurth, Kurth & Cline,* for plaintiff.

*Albert McClatchey* and *James R. Garber,* for defendant.

NORTH, J. This is an appeal by the defendant from a decree foreclosing a land contract in which he is the vendee.

On September 8, 1927, plaintiff entered into a land contract with defendant to sell the property described therein and located in the city of Detroit for $22,500. There was a down payment of $2,500, the balance being payable in monthly instalments of $160 each. At the time the contract of sale was consummated the property was subject to a mortgage in the original amount of $12,000, on the principal of which $200 has been paid. The mortgage provided for semi-annual payments of not less than $200, the whole amount being due and payable October 30, 1928. Plaintiff paid the interest on the mortgage as it fell due, but made only the one payment of $200 on the principal, leaving at the time she filed her bill of complaint herein a balance past due and unpaid on the principal of the mortgage of $11,800.

The defendant made each of the contract monthly payments to and including December 8, 1930. Shortly prior to that date he learned that plaintiff had not paid the mortgage against the property and that she had not made the semi-annual payments of principal. He brought this to the attention of plaintiff's husband, who seems to have acted as her agent. As noted above, plaintiff kept up the payments of inter-

est on the past-due mortgage; but she neither paid nor secured an extension for payment of the principal. Assigning plaintiff's failure to pay the mortgage in accordance with its terms as his reasons for so doing, defendant defaulted in payment of five monthly instalments on his contract; the last of these fell due May 8, 1931. Plaintiff thereupon declared the full amount of the contract due and payable under an acceleration clause, and filed this bill of foreclosure.

Defendant answered and filed a cross-bill asking cancellation of the land contract and an accounting for the amounts he had paid thereon less fair rental value. His claim for such relief is based on the ground that plaintiff first breached the land contract in the manner herein indicated, and that she could not foreclose because she was not in a position to convey title in accordance with the provisions of the land contract. There was reference to a circuit court commissioner for proofs and findings and upon the record made the circuit judge entered a decree of foreclosure.

As noted above, the mortgage was outstanding against the property when the contract in suit was consummated; and defendant had knowledge or notice thereof. The contract gave the plaintiff the right to mortgage the property for "not more than the balance owing hereon at the time such mortgage is executed nor more than 50 per cent. of the purchase money paid and to be paid under this contract." The contract further provided:

"That if the title of the seller is evidenced by land contract or now or hereafter incumbered by mortgage, the seller shall meet the payments of principal and interest thereon as they mature and produce evidence thereof to the purchaser on demand and in

default the purchaser may pay the same, which payments shall be credited on the sums first maturing hereon with interest at seven per cent. per annum and in event proceedings are commenced to enforce the payment of such * * * mortgage because of the seller's default the purchaser may at any time thereafter while such proceedings are pending incumber said land by mortgage securing such sum as can be obtained upon such terms as may be required and with the proceeds pay and discharge such mortgage * * * and any mortgage so given shall be a first lien upon the land superior to the rights of the seller therein and thereafter the purchaser shall pay the principal and interest on such mortgage so given as they mature, which payments shall be credited on the sums matured or first maturing hereon, and when the sum owing hereon is reduced to the amount owing upon such mortgage or owing to any mortgage executed under either of the powers in this contract contained, a conveyance shall be made in the form above provided with a covenant by the grantee to assume and pay the same."

Defendant's claim for cancellation and accounting is grounded on the above-quoted provision that in event of the contract property being subject to a mortgage the seller *shall* meet the payments of principal and interest thereon as they mature. We are hearing this case *de novo*. Each of the parties is in court seeking equity, and hence each should be required to do equity. But, in determining the equitable rights of the respective parties, the court is bound by the specific terms of their contract. By its terms this contract clearly places upon plaintiff the obligation of meeting the payments of principal and interest as they mature on the mortgage which she gave upon the property. This she did not do. She not only defaulted in making semi-annual pay-

ments "of not less than $200" due on the principal, but she also defaulted in paying the balance of the principal at maturity, October 30, 1928. This default is not obviated by the fact that the mortgagee has neither instituted nor threatened foreclosure, but instead has carried the mortgage without any definite extension of the time of maturity. As long as plaintiff is in default on her mortgage defendant's rights under the contract are in jeopardy because they may be cut off by foreclosure of the mortgage at any time the mortgagee elects so to do. The only way the defendant could protect himself would be to pay the mortgage; but in so doing his payment or payments would be very much accelerated. The effect would be the substituting of a new and very different contract and much more burdensome to the defendant than the one under which he purchased the property. Neither plaintiff nor the court has the right to substitute another and different contract than that entered into by the parties.

The situation as between these parties is not altered by the provisions in the contract that if the vendor defaults in payments due on the mortgage "the purchaser *may* pay the same," or in case of foreclosure "the purchaser *may* * * * incumber said land by mortgage." The fair construction of this contract forces the conclusion that the use of the word *may* gives the vendee the option of doing as provided in the contract, but it does not impose upon him the obligation or duty to do so. On the contrary, the contract does specifically provide that the vendor "*shall*" meet the payments under the mortgage as they mature. Under the above construction of the contract it follows that the plaintiff was first in default and has continued to be in default. Notwithstanding defendant continued to make contract

payments for some months after plaintiff's default under the mortgage, we find nothing in the record which would estop defendant from asserting his contract rights in this suit wherein plaintiff attempts to foreclose, especially in view of the fact that plaintiff continued to be in default and that defendant was advised thereof but shortly before suit.

Under this record, the decree of foreclosure must be set aside. In order that the equities of the respective parties may be protected, plaintiff will be given 90 days after the filing of this opinion within which to pay or renew the mortgage on the property in accordance with the terms of the contract between these parties. In the event of her so doing, she may take a decree of foreclosure with the provision that defendant may have 60 days after decree within which to pay the amount decreed to be due. If the defendant redeems, neither party will have costs of either court; but in event defendant does not redeem plaintiff will have costs of both courts. In the event plaintiff fails to pay or renew the mortgage indebtedness as above provided, the defendant may have a decree of cancellation, and the case will be referred to the circuit court for an accounting between the parties.

Defendant will then have costs of both courts.

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

## DEXTER THEATRE CO. *v.* LESHER.

1. GARNISHMENT—PROCESS—SERVICE ON MANAGER OR EMPLOYEE IN CHARGE GOOD.
   If summons in garnishment issued against theatre corporation was served on manager or employee in charge of theatre at time service was had, service was good and commanded attention (3 Comp. Laws 1929, §§ 16009, 16204).

2. SAME—SERVICE ON PROPER PERSON.
   Evidence *held*, sufficient to show that summons in garnishment issued against theatre corporation was served on proper person.

3. SAME—SUFFICIENCY OF MILEAGE FEE.
   Having made no objection to sufficiency of mileage fee tendered with service of summons in garnishment proceeding, defendant may not, after judgment, urge that it was insufficient.

Appeal from Wayne; Browne (Clarence M.), J., presiding. Submitted April 8, 1932. (Docket No. 71, Calendar No. 36,342.) Decided October 3, 1932.

Bill by Dexter Theatre Company, a Michigan corporation, against Charles D. Lesher and others to set aside a judgment against plaintiff as garnishee defendant on the ground of defective service of process. Bill dismissed. Plaintiff appeals. Affirmed.

*Reuben Levin,* for plaintiff.

*Lindley & Delaney,* for defendants.

WIEST, J. This is an appeal by plaintiff from a decree dismissing its bill of complaint, filed to set aside a judgment rendered against it in the court of common pleas for the city of Detroit. A summons in garnishment was issued against plaintiff

corporation, and returned: "served * * * on Dexter Theatre Co. a Mich. corporation the garnishee within named, on the 13th day of March, 1930 by delivering a copy thereof to Miller manager in charge of Dexter Theatre." The garnishee did not appear or file disclosure, and judgment was entered against it under 3 Comp. Laws 1929, § 16206. Execution thereon was issued, and, under stress of levy, the amount of the judgment was paid to an officer and by him paid into court and the judgment thereby satisfied, but, before the money was turned over to the judgment creditor, the bill herein was filed and payment enjoined.

It is contended that it would be useless for the court of equity to void such a satisfied judgment, citing *Drolshagen* v. *Drolshagen,* 230 Mich. 444.

Whether the rule of the *Drolshagen Case* applies we need not decide, for we think the decree right under the evidence.

If Miller was manager, or an employee in charge of the theatre at the time of service of the writ, the service was good and commanded attention.

Miller claims that the writ was offered him but he declined to receive it and it fell to the floor, together with the money fee tendered. Miller informed an officer of the corporation that service of process upon him was attempted and of his claimed frustration of service. What became of the process left on the floor is unexplained, except by a witness who claimed he saw it in the possession of plaintiff's attorney.

The statute, 3 Comp. Laws 1929, § 16204, provides that writs of garnishment in justice's court against a corporation shall be served under "the provisions of law regulating service of summons from justice court upon such corporations in other cases."

3 Comp. Laws 1929, § 16009, relates to service of such process, and provides:

"Process against a corporation, partnership association, or unincorporated voluntary association may be served upon any officer, director or agent thereof, or by leaving same at the office of such corporation, partnership association, or unincorporated voluntary association, with any person in charge thereof, and upon the return of such service being made, such corporation shall be deemed to be in court and the like proceedings, as near as may be, shall be thereupon had as in cases of suits between individuals."

The officer testified that he went to the Dexter Theatre to serve the process, found the office on the second floor closed, and went to the box office where tickets were sold, and asked the cashier if there was anybody in charge of the office that could receive process, and the cashier asked, "What have you got?" and he said "I have a garnishee summons," and was informed that "Mr. Miller is here and he is the manager—he may accept service," and the cashier sent a man to find Mr. Miller, and when Mr. Miller came the officer asked him if he was manager, and received the reply that he was, and then stated to Mr. Miller, "I have a garnishee to serve upon the corporation," and handed him the paper and gave him 50 cents; that Mr. Miller read the paper, did not like it, and started to call the officer names and said he did not want it, and the witness just left it with him and walked away.

Plaintiff claims that Miller was in charge of the ushers and was not manager.

John L. Brown, vice-president of the corporation, testified that Mr. Miller was in the employ of the company as head usher, and was asked: "In case

anything came up, your father or brother wasn't there, would he be the person in charge at that time?'' and answered, ''Well, if neither of them were there I would assume so.''

Whether Harry Brown, general manager of the company, was at the place of business at the time of the service of the process is not made certain by plaintiff's evidence.

It is unnecessary to review the testimony at length. It is sufficient to say that, under the testimony, the service was upon a proper person.

Plaintiff also contends that the service was bad because the fee tendered was insufficient. Having made no objection to the mileage fee at the time of service, defendant (plaintiff herein) may not, after judgment, urge the point.

The decree is affirmed, with costs to defendant.

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

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## HARTLE *v.* KEEFER'S ESTATE.

1. HUSBAND AND WIFE—CLAIM FOR ROOM AND BOARD FURNISHED BOARDER IN HUSBAND'S HOME BELONGS TO HIM.

   Where home in which husband and wife lived together belonged to him, was furnished by him, and he furnished board, claim for room and board of boarder, if any, belonged to husband, unless assigned by him.

2. WITNESSES—ESTATES OF DECEDENTS—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED.

In wife's claim against estate of her deceased step-father for room and board, she and her husband are incompetent to testify as to matters equally within knowledge of deceased which are relied on to establish claim; as to said claim husband being "assignor" (3 Comp. Laws 1929, § 14219).

3. PARENT AND CHILD—GRATUITOUS SERVICES—PRESUMPTIONS—ESTATES OF DECEDENTS.

Furnishing room and board by step-daughter to step-father is presumed to be gratuitous, in absence of evidence of contract to pay therefor, where she had lived with him as his daughter, and after her marriage he lived with her and her husband in home provided by husband.

4. APPEAL AND ERROR—PARENT AND CHILD—CLAIM FOR ROOM AND BOARD.

Findings of trial court in passing on disputed questions of fact and denying step-daughter's claim against estate of deceased step-father for room and board are affirmed, on appeal.

Appeal from Ionia; Hawley (Royal A.), J. Submitted August 3, 1932. (Docket No. 93, Calendar No. 36,479.) Decided October 3, 1932.

Rena Hartle presented a claim in the probate court against the estate of Adelbert Keefer, deceased, for room and board. Claim disallowed. Plaintiff appealed to circuit court. Judgment for defendant. Plaintiff appeals. Affirmed.

*Hayden, Hubbard & Rathbun* (*Dwight L. Wilson,* of counsel), for plaintiff.

*Watt & Colwell,* for defendant.

POTTER, J. Plaintiff presented in the probate court of Ionia county a claim against the estate of Adelbert Keefer, deceased, in the sum of $5,720 for room and board from June 1, 1913, to January 1,

1925, with certain exceptions in time for which no charge was made. The claim was disallowed by commissioners on claims appointed by the probate court, and an appeal taken to the circuit court where the case was tried without a jury. Judgment for defendant. Plaintiff appeals.

Deceased, in his lifetime, was the husband of plaintiff's mother, plaintiff being a step-daughter of deceased. During the lifetime of plaintiff's mother, plaintiff lived in the home of Adelbert Keefer, where she received her board, clothing, and schooling, being treated by him as his own child. Plaintiff's mother died in 1912, and in 1913 plaintiff married her first husband, Bernard Hartle, whereupon Adelbert Keefer roomed and boarded with them much if not all of the time covered by the claim of plaintiff. Plaintiff claims the court erred in excluding the testimony of Rena Hartle, the plaintiff, and that of her former husband, Bernard Hartle, as to matters equally within the knowledge of the deceased.

3 Comp. Laws 1929, § 13057, provides:

"The real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled by gift, grant, inheritance, devise or in any other manner, shall be and remain the estate and property of such female."

In *Tillman* v. *Shackleton,* 15 Mich. 447 (93 Am. Dec. 198), a majority of the court, against the dissent of Chief Justice MARTIN, held a married woman with her husband's consent might run a rooming and boarding house and become liable for furniture purchased therefor. And in *West* v. *Laraway,* 28 Mich. 464, 470, it was said:

"The whole purpose of our present system was to remove the wife's disabilities in regard to prop-

erty, and put her as to that upon the same footing as if she were unmarried. She contracts on that footing when she contracts at all and she disposes of her property on the same basis."

In 1911 the rule applicable to property of a married woman was extended to cover her personal services. 3 Comp. Laws 1929, § 13061, provides:

"Each and every married woman in the State of Michigan shall be absolutely entitled to have, hold, own, retain and enjoy any and all earnings acquired by any such married woman as the result of her personal efforts."

During the time the claim here involved, if any, accrued, plaintiff was a married woman living with her husband in a home belonging to him, furnished by him, and if boarded in the home, deceased partook of board furnished by plaintiff's husband. The court has long recognized a distinction between claims accruing to the wife where she was engaged in her own business involving her own property, and claims arising from personal services rendered by a wife which under the statute belonged to her; and claims for room and board like that here involved.

In *Slack* v. *Norton,* 111 Mich. 213, the wife ran a boarding house. Her husband was a traveling salesman. She was the head of the household, engaged in business in her own behalf. Her husband had nothing to do with furnishing the house, board, or provisions, or doing the work in connection therewith. The court, following *Tillman* v. *Shackleton, supra,* and *West* v. *Laraway, supra,* held:

"The husband did not stand towards the wife as an assignor of the claim and therefore was not prohibited by the statute from testifying to any arrangement which the wife made with the deceased for his board and care."

In *Ashley* v. *Smith's Estate,* 152 Mich. 197, the claim presented by the wife was for personal services rendered by her. The question there involved was the right of the wife to make a contract for personal services with the consent of her husband. The claim in no way involved the recovery by plaintiff for property or rights originally belonging to the husband. It is said:

"It was maintained by defendant that, being a married woman, she could have no such claim, for the reason that her husband was entitled to her services, and she could not make a contract on her behalf without his consent. He was called to prove such consent and testified to his consent to his wife that she might make arrangement with her father and mother for caring for them."

This case, like *Slack* v. *Norton,* did not involve the question of board, but solely the question of personal services. It did not involve the recovery by plaintiff for property originally belonging to her husband. It did not involve the question of the transfer of a right in property from the husband to the wife. It involved only the right of the wife to recover for her own personal services rendered with her husband's consent.

*In re De Spelder's Estate,* 181 Mich. 153, involved a claim for washing, care, and nursing. It was a claim for personal services rendered by the wife. It was presented by the wife for services which belonged to the wife and which she could sue and recover for. She did not stand in the position of an assignee. Her husband did not stand in the position of an assignor. It is said (p. 159):

"He consented to the arrangement and told his wife she might have the fruits of her labor in that regard."

The court quoted with approval and emphasized the distinction pointed out in *Slack* v. *Norton,* between that case and the case of *Stackable* v. *Stackable's Estate,* 65 Mich. 515.

In *Wisniewski* v. *Wisniewski's Estate,* 254 Mich. 663, the decisive question here did not arise. That case involved personal services of the wife, which by existing statute and judicial decisions are her property—not originally the property of the husband of which the wife was assignee. It is said:

"Defendant also invokes the rule that household or home-rendered services of the wife belong to the husband, and *the claim here made is for services* rendered in home, and therefore, in law, the claim is that of the husband."

It was held the husband was competent to testify. No cases are cited. The statute (3 Comp. Laws 1929, § 14219) is mentioned. The holding was in accordance with the rule established by this court and recognized by 3 Comp. Laws 1929, § 13061. *Slack* v. *Norton, supra; Ashley* v. *Smith's Estate, supra; In re De Spelder's Estate, supra; In re Day's Estate,* 197 Mich. 604, but the claim here involved is expressly stated to be one for board, as to which plaintiff's husband was not a competent witness. *Stackable* v. *Stackable's Estate, supra; Finn* v. *Sowders' Estate,* 139 Mich. 623; *In re Day's Estate, supra.*

*Stackable* v. *Stackable's Estate, supra,* involved the question whether a husband could testify in support of his wife's claim against the estate of a deceased person for board. It is there said:

"In regard to the board, it was shown that William was the head of the house, but he claims he gave the board to his wife, and that it was always understood that she should receive the pay for it. His testimony as to the time the deceased boarded

at his house, and the amount to be paid for the same, was objected to, as coming within the statute as amended in 1885 (Act No. 139, Pub. Acts 1885). The court held that he could not be considered as 'assignor' under this statute.

"The object of the amendment evidently was to prevent the common practice of a claimant against an estate assigning his claim to another, and thereby becoming eligible as a witness, and defeating the spirit and intent of the statute as it stood before such amendment. See How. Stat. § 7545.

"It is clear that, without some assignment, this claim for board would belong to the husband, and not to the wife. He was the head of the household and furnished the family supplies. There had to be some agreement on his part with his wife that she should receive the pay for the board. The statute is aimed at an assignment before the death of the party against whom the claim exists, as well as to one after his death.

"We do not think he was a competent witness in relation to the items for board."

In *Finn* v. *Sowders' Estate, supra,* Christie Finn, a granddaughter of deceased, presented a claim against his estate for board, cleaning, nursing, and care. The husband, as in this case, furnished the house and supplied the table. His testimony was received by the trial court. It was said:

"Under the circumstances of this case, the testimony of claimant's husband to facts equally within the knowledge of the deceased should have been excluded, under 3 Comp. Laws (1897), § 10212, as amended by Act No. 30, Pub. Acts 1903. This case is not distinguishable from *Stackable* v. *Stackable's Estate,* 65 Mich. 515."

In *Re Day's Estate, supra,* the wife presented a claim for board, care, and incidental expenses

against the estate of the deceased. The items were separate. Objection was raised to the testimony of her husband as to the items of board. It was held:

"It is settled by authority that as to that part of the claim represented by plaintiff's services, * * * her husband would be a competent witness under the statute to testify in her behalf. This is upon the ground that as to her services he is not an assignor. *Ashley* v. *Smith's Estate,* 152 Mich. 197; *In re De Spelder's Estate,* 181 Mich. 153. But as to that part of the claim which is represented by the board a different rule appears to have been laid down. * * * *Stackable* v. *Stackable's Estate,* 65 Mich. 515. * * * The rule being established we must hold in the present case that the testimony of the husband concerning the board was incompetent."

The claim for board and room, if any, here involved belonged originally to the husband. He either assigned that claim to his wife or he did not. If he assigned it, he is incompetent to testify to matters equally within the knowledge of the deceased, because he is an assignor. If he did not assign the claim, and there is no proof in this case that he did, such claim, if any, still belongs to him and plaintiff cannot recover. The trial court was right in excluding the testimony of plaintiff and her former husband as to matters equally within the knowledge of the deceased.

Eliminating the testimony of plaintiff and that of her husband, the testimony fairly shows that, by reason of his relationship with the plaintiff, deceased expected to leave some of his property to her by will, but, becoming displeased with her conduct, he revoked the will which he had made. Complaint is made of the language of the trial court in which he

characterized the services rendered by the stepdaughter as gratuitous.

"This class of claims should not be encouraged by the courts. Indeed, it is the duty of the courts to protect decedent estates from them, and to require some substantial proof establishing them before allowing juries to speculate as to the existence of the contract necessary to support them." *Wright* v. *Senn's Estate,* 85 Mich. 191.

"We have had frequent occasion to deal with cases of this kind, and it has often been said that it is the duty of courts to protect decedents' estates from claims of the character of this; and, while the rule in this State does not require that there shall be an express contract in terms, it does require that there shall be at least an implied contract, and that there shall be enough in the record to overcome the presumption arising from the family relation." *Decker* v. *Kanous' Estate,* 129 Mich. 146.

"The law will not imply from the discharge by a child of a purely filial duty an obligation of the parent to pay for the service. And, when the family relation exists, much which is done for and furnished to a member of the family by another or by other members is presumed to be gratuitously done or furnished. It is the relation, and the presumption arising therefrom, which is held to negative the existence of an implied contract to pay for what is accepted." *Weessies* v. *Van Dyke's Estate,* 159 Mich. 180.

As said in *Wright* v. *Senn's Estate, supra:*

"Care of an aged and infirm father by a daughter is usually dictated by the better instincts of a common humanity, and is so rarely bestowed upon contract that no implied contract can be predicated

upon its bestowal or receipt. The law will not associate with the discharge of a purely filial duty an implied obligation to pay for the same."

We find no error in the court's statement.

In this case there is no proof the deceased ever promised plaintiff to pay for his room and board; ever promised plaintiff's husband he would pay for his room and board; that plaintiff kept an account against deceased or said anything to him in his lifetime about paying for his room or board or made any demand upon him for any payment. No proof to show that he unequivocally expected to pay for his room or board or that the plaintiff or her husband rendered the service in reliance upon any promise made by deceased in his lifetime they would be compensated. There is some testimony which was admissible as tending to support the claim made by plaintiff. There is testimony which fairly tends to rebut the same. The trial court passed upon these disputed questions of fact so far as they are sustained by competent testimony, and we are not disposed to interfere with the finding of the trial court thereon.

Judgment affirmed, with costs.

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

VOIGT *v.* REMICK.

1. CORPORATIONS—CONTRACTUAL RELATION WITH STOCKHOLDER.
   Relation between corporation and its stockholders is contractual in its nature.

2. SAME—COMMON-LAW POWER TO SELL PROPERTY.
   At common law, neither directors of corporation nor majority of its stockholders had right, power, or authority to sell and convey all property of going and prosperous corporation capable of achieving objects of its creation, as against objections of single stockholder.

3. SAME—CHARTER IS CONSTITUTION.
   Charter of corporation is its constitution, prescribing duties of stockholders and directors in exercise of power therein conferred upon them.

4. SAME—ACTS OF MAJORITY OF STOCKHOLDERS ACTING WITHIN CHARTER BINDING.
   Majority of stockholders is sovereign when they act within limits of their charter, but when they transcend scope of their corporate powers and authority their acts are not binding.

5. SAME—RIGHT OF DIRECTORS TO SELL OUT BUSINESS.
   General doctrine that board of directors of corporation may not sell out its business and property and defeat object of its organization without consent of stockholders has no application in case where, in charter creating it, such power has been conferred on directors.

6. SAME—CREATIONS OF STATUTE.
   Corporations are creations of statute, having right to exercise powers and privileges conferred on them by law, and stockholders therein have only those rights fixed and defined by statute.

7. SAME—STOCKHOLDERS AGREE THAT INVESTMENT BE HANDLED BY COMPANY SUBJECT TO LAW.
   Those who become stockholders in private corporation become such upon agreement and contract that their investment therein may be handled subject to exercise of any and all powers conferred upon corporation by law.

8. SAME—DIRECTORS OCCUPY FIDUCIARY RELATION.
   Corporate directors occupy fiduciary relation to stockholders, and are forbidden to act where duty is opposed to interest, fidelity to cupidity, integrity to personal gain.

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As to contracts between corporations having common directors or officers, see annotation in 33 L. R. A. 788.

9. SAME—MAJORITY MAY NOT MANIPULATE STOCK TO DISADVANTAGE OF MINORITY.

Majority of stockholders of corporation, by consolidation agreement or otherwise, may not manipulate its assets so as to destroy equality of right among stockholders, or in any manner which is unequal, unfair, or inequitable, oppressive, discriminatory, or illegal, deprive minority stockholders from having same rights as others.

10. SAME—VALIDITY OF CHARTER PROVISION FOR INTERLOCKING DIRECTORATES—FRAUD.

That charter provided against voiding transactions entered into between corporations with interlocking directorates does not render it void, but it is duty of court to scrutinize deal accomplished between corporations represented in whole or in part by same directors with care, and, if fraud is found, to properly protect interests of those injuriously affected.

11. SAME — CONSOLIDATION AGREEMENT — INTERLOCKING DIRECTORATES.

Consolidation agreement is neither void nor voidable at election of any stockholder merely because directors making or controlling agreement are common directors of both consolidating companies.

12. SAME—EQUITABLE RELIEF AGAINST MERGER PROPERLY DENIED IN ABSENCE OF FRAUD.

Stockholder attacking merger of corporation with another was properly denied equitable relief, in absence of evidence of fraud, although merger may have been error in judgment on part of board of directors.

Appeal from Wayne; Searl (Kelly S.), J., presiding. Submitted June 9, 1932. (Docket No. 59, Calendar No. 36,220.) Decided October 3, 1932. Rehearing denied December 6, 1932. Motion for reconsideration granted January 3, 1933. Denied January 25, 1933.

Bill by Augusta L. Voigt against Jerome H. Remick and others, directors of the Detroit Creamery Company, to enjoin transfer of certain corporate property. Bill dismissed. Plaintiff appeals. Affirmed.

*Frank C. Sibley* (*L. Frank McKnight,* of counsel), for plaintiff.

*Stevenson, Butzel, Eaman & Long,* for defendants.

POTTER, J. Plaintiff, claiming to be the owner of 10,000 shares of the capital stock of the Detroit Creamery Company of the value of $450,000, brought suit to enjoin defendants from holding a meeting February 6, 1930, or at any other time, from transacting any business or taking any forward steps in the affairs of the corporation on February 6, 1930, or at any time thereafter, for an order directing the Detroit Creamery Realty Company, in case the court should permit such meeting, to issue to plaintiff, prior to such meeting, 10,000 shares of capital stock of the Detroit Creamery Realty Company, and permit her to vote and participate in the business of such meeting. She asked that the articles of incorporation of the Detroit Creamery Realty Company be declared null and void and canceled; the Detroit Creamery Company and National Dairy Products Corporation come to an account as to the disposition of $577,554.86 and $2,000,000 set aside at the annual meeting of February 7, 1929, not paid in dividends, that defendants be restrained from selling, assigning, or in any manner altering the assets and affairs of said corporation until her status therein and in the Detroit Creamery Company and National Dairy Products Corporation was determined; that the court set aside and cancel article 9 of the articles of incorporation of the Detroit Creamery Realty Company relative to mortgaging the corporate property without consent of the stockholders; that all contracts existing or to be made wherein any director was personally interested be invalidated and held for naught; that defendants be restrained from con-

tracting and taking any personal benefits, not allowed stockholders, in making contracts for said corporation, with other corporations, and all parts of article 9 be held void where the same violates the fiduciary relation and duty of directors to stockholders; that the National Dairy Products Corporation be prohibited from voting as a stockholder its 755,487 shares of capital stock and upwards in either the Detroit Creamery Company or the Detroit Creamery Realty Company, and for other relief.

Plaintiff files this bill as a minority stockholder, complaining of the acts of the majority. She alleges the Detroit Creamery Company, December 23, 1929, reduced its capital stock from 1,200,000 shares of the par value of $10 a share, to 768,401 shares without par value; that the amended articles of association provide the total amount of stock with the nominal or par value subscribed and paid in is 768,401 shares, having an aggregate value of $4,419,559.86; that of the total value of such shares, $3,842,005 was capital and $577,554.86 was surplus available which surplus earnings might be properly applied according to the statements contained in the amended articles of association; that on or about February 7, 1929, the stockholders of the Detroit Creamery Company held a meeting and by resolution voted to segregate the real estate holdings of the Detroit Creamery Company and thereafter another corporation, known as the Detroit Creamery Realty Company was organized under the laws of the State of Michigan, all of which plaintiff opposed; that in accordance with such resolution of the Detroit Creamery Company, certain stockholders named as defendants combined, confederated, and maliciously united in the voting power of their several shares of stock, and against her consent, and in accordance with their resolution

July 10, 1929, organized the Detroit Creamery Realty Company to purchase, lease, or in any manner acquire, and own land and real estate improved and unimproved of every kind and description, and to sell, dispose of, lease, convey, and mortgage such property or any part thereof; to manage, control, operate, develop, improve, subdivide, build upon such real estate property and to engage generally in the real estate business, and to do any and all such other acts and things as were necessary, incidental, convenient, or ancillary to any of the enumerated purposes calculated directly or indirectly to promote the interests of the corporation; that the articles of association of the Detroit Creamery Realty Company provided for a total capital stock of 800,000 shares of no par value; that the articles show the amount subscribed is 768,401 shares, and the amount paid in is $3,161,050; that the subscription for the capital stock of said Detroit Creamery Realty Company was made by the Detroit Creamery Company by its sale and transfer to the Detroit Creamery Realty Company of the real estate formerly owned by it.

Article 9 of the articles of association of the Detroit Creamery Realty Company provides:

"General authority is hereby conferred upon the board of directors to at any time, or times, mortgage all or any part of the property of the corporation, without first obtaining the consent of the stockholders or any part thereof.

"No contract, or other transaction between the corporation or any other corporation or firm shall be affected or invalidated by the fact that any one or more of the directors of this corporation is or are interested in, or is a member, director or officer, or are members, directors, or officers of such other corporation or firm, and any director or directors individual-

ly or jointly may be a party or parties to or may be interested in any contract or transaction of this corporation, or in which this corporation is interested; and no contract, act or transaction of this corporation with any person or persons, corporations or firms shall be affected or invalidated by the fact that any director or directors of this corporation is a party or are parties to or interested in such contract, act or transaction or in any way connected with such person or persons, corporations, firms or association and each and every person who may become a director of this corporation is hereby relieved from any liability that might otherwise exist from contracting with the corporation for and on account of himself or any corporation, firm or association in which he may be in any wise interested."

Plaintiff alleges this provision of the articles of association of the Detroit Creamery Realty Company is an overt attempt on the part of the officers thereof to exploit plaintiff and other stockholders of the Detroit Creamery Company and to cheat, wrong, defraud and mislead them, and to force them to relinquish their rights and obey their demands for an unlawful purpose. She also alleges defendants entered into a contract with the National Dairy Products Corporation whereby the National Dairy Products Corporation agreed to acquire all the shares of stock of the Detroit Creamery Company in exchange for shares of the common stock of the National Dairy Products Corporation upon the basis of one share of National Dairy Products Corporation for each two and one-half shares of the Detroit Creamery Company; that by such agreement the Union Trust Company was made a depositary to effect the exchange of stock of the Detroit Creamery Company and the National Dairy Products Corporation. The bill alleges the provisions of this agree-

ment providing for the exchange of the stock of the Detroit Creamery Company for the stock of the National Dairy Products Corporation, which stock was to be transferred after the segregation of the real estate of the Detroit Creamery Company and its sale and transfer to the Detroit Creamery Realty Company. Plaintiff alleges that by reason of the manipulation of the stock and assets of the Detroit Creamery Company, the value of her holdings therein have been impaired; that all of the action taken by the defendants was taken against her objection and without her acquiescence therein. She complains that defendants have not furnished her with information in relation to the transactions in which she was interested and charges that the acts and conduct of defendants were in fraud of her rights.

The defendants answer admitting the transfer of the real estate of the Detroit Creamery Company to the Detroit Creamery Realty Company, which had been organized substantially as indicated by plaintiff's bill of complaint; they deny any fraud or misconduct, allege they are willing plaintiff should have the same rights in the stock and assets of the Detroit Creamery Company and the property for which the same was exchanged as they themselves have. There was, at the time the National Dairy Products Corporation agreed to take over the stock of the Detroit Creamery Company, an agreement whereby certain active officers of the Detroit Creamery Company were to continue in the employ of the National Dairy Products Corporation at an increased salary. Considerable testimony was taken, at the conclusion of which the trial judge filed an opinion and a decree was entered dismissing the plaintiff's bill of complaint. From this decree plaintiff appeals.

The relation between a corporation and its stockholders is contractual in its nature. *Livingston* v.

*Lynch,* 4 Johns. Ch. (N. Y.) 573. At common law, neither the directors of a corporation nor a majority of its stockholders had the right, power, or authority to sell and convey all the property of a going and prosperous corporation capable of achieving the objects of its creation as against the objections of a single stockholder. *Forrester* v. *Boston, etc., Mining Co.,* 21 Mont. 544 (55 Pac. 229, 353); *Bulkley* v. *Big Muddy Iron Co.,* 7 Mo. App. 589; *Price* v. *Holcomb,* 89 Iowa, 123 (56 N. W. 407); *City of St. Louis* v. *St. Louis Gaslight Co.,* 70 Mo. 69; *Byrne* v. *Schuyler Elec. Manfg. Co.,* 65 Conn. 336 (31 Atl. 833, 28 L. R. A. 304); *Tillis* v. *Brown,* 154 Ala. 403 (45 South. 589); *Kean* v. *Johnson,* 1 Stockt. Ch. A. (9 N. J. Eq.) 401; *Smith* v. *Stone,* 21 Wyo. 62 (128 Pac. 612); *Taylor* v. *Earle,* 8 Hun (N. Y.), 1; *Abbot* v. *American Hard Rubber Co.,* 33 Barb. (N. Y.) 578.

The charter of a corporation is its constitution. It prescribes the duties of stockholders and directors within the limits of the charter in the exercise of the power conferred upon them. A majority of the stockholders is sovereign when they act within the limits of their charter, but when they transcend the scope of their corporate powers and authority, their acts are not binding. *Langolf* v. *Seiberlitch,* 2 Pars. Eq. Cas. (Pa.) 65. A sale of the corporate property of a private corporation, though authorized by a majority of the stockholders, which in effect operated to discontinue the corporate enterprise and thwart the purposes of the creation of the corporation, against the objections of a single stockholder, at common law, impaired the contractual obligation lying at the foundation of corporate organization and was *ultra vires.*

"The general doctrine that a board of directors of a corporation cannot sell out its business and

property and defeat the object of its organization without the consent of the stockholders, may be conceded, but it has no application in a case where in the charter creating it such power has been conferred on the directors." *City of St. Louis* v. *St. Louis Gaslight Co., supra.*

Corporations are creations of statute, having the right to exercise the powers and privileges conferred upon them by law. Stockholders therein have only those rights fixed and defined by statute. Those who become stockholders in a private corporation become such upon the agreement and contract that their investment therein may be handled subject to the exercise of any and all powers conferred upon the corporation by law. What powers may the directors of a private corporation, organized under the laws of the State of Michigan, exercise?

2 Comp. Laws 1929, § 9961, provides:

"Subject to the laws of this State and of the United States with respect to monopolies and illegal restraints of trade, any corporation may, at any meeting of its board of directors, sell, lease or exchange all of its property and assets, including its good will and its corporate franchises, upon such terms and conditions and for such consideration, which may be in whole or in part shares of stock in, and/or other securities, of, any other corporation or corporations, as its board of directors shall deem expedient and for the best interests of the corporation, when and as authorized by the affirmative vote of the holders of two-thirds of the stock issued and outstanding having voting power given at a stockholders' meeting duly called for that purpose, or when authorized by the written consent of the holders of two-thirds of the voting stock issued and outstanding: *Provided, however,* That the articles of association may require the vote or written consent

of the holders of a larger proportion of the stock issued and outstanding. Notice of such sale shall be filed with the secretary of State within thirty days thereafter, and such corporation shall thereupon be deemed to have surrendered its corporate rights, and shall transact no further business excepting such as may be necessary to wind up its corporate affairs."

2 Comp. Laws 1929, § 9962, provides:

"Subject to the limitations of the laws of this State and of the United States with respect to monopolies and illegal restraints of trade, any two or more corporations organized under this or any general law of this State, or which may be created under the laws of any State or country, may, by a vote of two-thirds of the legally issued voting capital stock of each of said corporations, at any meeting of stockholders duly called to consider the question of such consolidations, notice of which meeting shall be sent by registered mail, postage prepaid, to each stockholder at least thirty days previous to said meeting, agree to unite and consolidate the said corporations. At such meeting the terms upon which the consolidation shall be effected, the valuation of the several properties, and the number of shares of stock in the consolidated corporation to which the stockholders in each of the constituent corporations may be entitled, shall be determined and spread at length upon the records of each of the constituent corporations."

2 Comp. Laws 1929, § 10172, provides:

"*The People of the State of Michigan enact,* That any corporation formed under any general law of this State may at any general or special meeting of its stockholders, with the consent of three-fourths of its capital stock, sell and convey all its property and franchises, rights and privileges or any portion of its real property or franchises to any other cor-

poration formed under the same or any similar law for corporate purposes of the same character. No such meeting of stockholders of any corporation shall be legal or valid, or the proceedings thereof of any force or effect unless the directors or other officers or parties calling the same shall cause a notice of the time, place and object of holding the same to be published in accordance with the provisions of the law or laws of this State under which such corporation is organized: *Provided,* That nothing herein contained shall be construed as authorizing any railroad corporation to consolidate its stock, property, or franchises with any other railroad corporation owning a parallel or competing line."

2 Comp. Laws 1929, § 10173, provides:

"Any number of persons desiring to purchase the property, franchises, rights and privileges, of any existing corporation may organize a corporation under the law under which said corporation is formed, or any similar law, and in accordance with its requirements and provisions, and the corporation so organized or any corporation already organized under such law shall have power to purchase the property, franchise, rights and privileges of any such existing corporation: *Provided,* That nothing herein contained shall release in whole or in part said selling corporation from any and all of its liabilities previously contracted: *Provided further,* That the provisions of this act shall not apply to corporations organized or existing under an act, entitled 'An act to revise the laws providing for the incorporation of companies for mining, smelting and manufacturing iron, copper, silver, mineral coal and other ores, minerals, and to fix the duties and liabilities of such corporations,' approved May eleventh, eighteen hundred and seventy-seven."

The corporation involved here had the right, power and authority conferred upon it by the statutes

above quoted to do what it did do. To divide its property; to sell a part of it to another foreign corporation engaged in the same business and to take therefrom payment therefor in the corporate stock of the purchasing corporation. Members of the defendant corporation had the right, power, and authority to organize the Detroit Creamery Realty Company and to purchase and acquire on behalf of the stockholders of the Detroit Creamery Realty Company the real estate which was conveyed to it by the Detroit Creamery Company. The Detroit Creamery Company, when its directors were authorized by the statutory number of stockholders therein, had the right, power, and authority to transfer a part of its real estate to the Detroit Creamery Realty Company.

Of course, in the exercise of all these powers upon the part of the Detroit Creamery Company, the officers and directors thereof and of the Detroit Creamery Realty Company were and are subject to the general principle that the corporate stock of none of such companies may be manipulated to the detriment of minority stockholders. A part of the stockholders of the corporations involved have no right to manipulate the stock and property under their management and control in violation of the trust reposed in them as stockholders, so that they acquire either an undue advantage or such stock and property on terms other and different from that accorded to minority stockholders who may not have agreed with their plan of management and control. The general rule governing the rights of minority stockholders is stated in 14A C. J. pp. 1061, 1062.

The rights of stockholders in cases where corporations are consolidated was considered in *Turner* v. *Calumet & Hecla Mining Co.*, 187 Mich. 238, where it

was held on the authority of *Clute* v. *Barron,* 2 Mich. 192, in accordance with the general rule, that corporate directors occupy a fiduciary relation to stockholders, are forbidden to act where duty is opposed to interest, fidelity to cupidity, integrity to personal gain. A majority of the stockholders of a corporation, by consolidation agreement or otherwise, may not manipulate its assets so as to destroy the equality of right among stockholders, or in any manner which is unequal, unfair, inequitable, oppressive, discriminatory, or illegal, deprive minority stockholders from having the same rights as others. Such inequality may be the basis of equitable interposition, but interlocking directorates are not forbidden, and the fact that article 9 of the charter of the Detroit Creamery Realty Company provided against voiding transactions entered into between corporations with interlocking directorates does not render such article 9 void, though it is the duty of the court to scrutinize a deal accomplished between corporations represented in whole or in part by the same directors with care, and, if fraud is found, to properly protect the interests of those injuriously affected. *Beidenkopf* v. *Des Moines Life Ins. Co.,* 160 Iowa, 629 (142 N. W. 434, 46 L. R. A. [N. S.] 290). The consolidation agreement is not either absolutely void or voidable at the election of any stockholder merely for the reason that the directors making or controlling the agreement were the common directors of both the consolidating companies. *Colgate* v. *U. S. Leather Co.,* 73 N. J. Eq. 72 (67 Atl. 657).

Article 9 above quoted is not void at the instance of a single stockholder. The trial court found:

"There is no evidence in this case of any contracts between the two corporations, and no evidence that the so-called merger was brought about for fraud-

ulent purposes, but it appears to be a plain, every-day business deal, which at the time it was made was by the board of directors and the officers of the Detroit Creamery Company believed to be in the interests of the stockholders of that company. These men might have erred in judgment, and it is possible that the Detroit Creamery Company and all its stockholders would have been better off had this so-called merger never taken place, but that is not a matter for the court. This is a chancery case, in which the plaintiff asks for equitable relief, and, unless I can find some fraud on which to base such relief, I cannot require an accounting on the part of the defendants. I am unable to find such fraud, and therefore plaintiff must fail."

We think the trial court arrived at a correct conclusion. Its decree is affirmed, with costs.

CLARK, C. J., and SHARPE, NORTH, and FEAD, JJ., concurred with POTTER, J. MCDONALD, WIEST, and BUTZEL, JJ., concurred in the result.

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## BOYLEN v. BERKEY & GAY FURNITURE CO.

1. NEGLIGENCE—RAILROAD BRAKEMAN SWITCHING CARS ON PRIVATE PROPERTY IS INVITEE.

   Brakeman on private premises for purpose of switching cars is invitee.

2. SAME—DUTY OF OWNER OF PREMISES.

   It is duty of owners of premises to use such reasonable care as ordinarily prudent person would exercise to avoid injuring employees of railroad company engaged in switching cars thereon.

3. SAME—BRAKEMAN BOUND TO ANTICIPATE CONDITIONS.

Brakeman having knowledge that premises he was entering for purpose of switching cars was used for manufacturing purposes was bound thereby to anticipate that premises might be used for any and all purposes consistent with advancement of said manufacturing interests, including presence of trucks and structures necessary in loading and unloading freight from railroad cars.

4. SAME—BURDEN OF PROOF—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT.

Brakeman is not entitled to recover for personal injuries received by coming in contact with loaded truck while engaged in switching cars on private premises, where he failed to sustain burden of proving defendants' negligence, that he did not assume risk, or that he was free from contributory negligence.

Appeal from Kent; Perkins (Willis B.), J. Submitted June 17, 1932. (Docket No. 103, Calendar No. 36,600.) Decided October 3, 1932. Rehearing denied December 6, 1932.

Case by Thomas P. Boylen against Berkey & Gay Furniture Company, a corporation, and another for personal injuries alleged to be due to defendants' negligence. Verdict and judgment for plaintiff. Defendants appeal. Reversed.

*Cornelius Hoffius,* for plaintiff.

*Dunham, Taylor & Allaben,* for defendants.

POTTER, J. Plaintiff, employed by the Grand Trunk Railroad Company as a switchman, on March 10, 1931, was injured while engaged in switching cars on defendants' premises. At the time of the injury he was hanging on the outside of a freight car on the ladder and stooped down to uncouple cars. The car on which he was riding passed a loaded furniture truck belonging to defendants

standing near the switch track, and plaintiff was severely injured by striking this truck. He brought suit against defendants and recovered judgment, from which defendants appeal, claiming plaintiff was guilty of contributory negligence, defendants were not guilty of negligence, there was error in injecting the subject of insurance into the case, and in overruling defendants' motion for a new trial.

Plaintiff was an invitee upon the premises of defendants. *Smith* v. *New England Cotton Yarn Co.,* 225 Mass. 287 (114 N. E. 353); *Montevallo Mining Co.* v. *Little,* 208 Ala. 131 (93 South. 873); *Smith* v. *Newark Ice & Cold Storage Co.,* 8 Ohio Dec. 283; *Fry* v. *Hillan* (Tex. Civ. App.), 37 S. W. 359; 45 C. J. p. 819. It was the duty of defendants to use such reasonable care as an ordinarily prudent person would exercise to avoid injuring employees of the railroad company engaged in switching cars.

Many cases have arisen elsewhere involving injuries to railroad employees by coming in contact with objects too near the track, such as cattle-chutes, *Allen* v. *Railway Co.,* 57 Iowa, 623 (11 N. W. 614); cattle-guards, *Murphy* v. *Railroad Co.,* 115 Mo. 111 (21 S. W. 862); clearance posts between the main track and the switch track, *Scidmore* v. *Railway Co.,* 89 Wis. 188 (61 N. W. 765); coal sheds, *Chicago & A. R. Co.* v. *Stevens,* 189 Ill. 226 (59 N. E. 577); derricks, *Gates* v. *Railway Co.,* 2 S. D. 422 (50 N. W. 907); girders between the pillars of an elevated railroad structure, *Sullivan* v. *Railroad Co.,* 19 App. Div. 195 (45 N. Y. Supp. 1083); lumber piles, *Bessex* v. *Railway Co.,* 45 Wis. 477; mail cranes, *Malott* v. *Laufman,* 89 Ill. App. 178; *Sisco* v. *Railway Co.,* 145 N. Y. 296 (39 N. E. 958); overhead wires, *Stoltenberg* v. *Railroad Co.,* 165 Pa. 377 (30 Atl. 980); projecting rocks, *Wintuska's Admr.*

v. *Railroad Co.,* 14 Ky. Law Rep. 579 (20 S. W. 819); projecting roofs, *Quinn* v. *Railroad Co.,* 175 Mass. 150 (55 N. E. 891); signal posts, *Johnson* v. *Railway Co.,* 43 Minn. 53 (44 N. W. 884); station limit boards, *Central Trust Co.* v. *Railway Co.,* 73 Fed. 661; stone piles, *Donahue* v. *Railroad,* 178 Mass. 251 (59 N. E. 663); station stands, *Bonner & Eddy* v. *La None,* 80 Tex. 117 (15 S. W. 803); switch targets, *Pidcock* v. *Railway Co.,* 5 Utah, 612 (19 Pac. 191, 1 L. R. A. 131); telegraph poles, *Crandall* v. *Railroad Co.,* 19 R. I. 594 (35 Atl. 307); projecting timbers, *Hughes* v. *Railroad Co.,* 91 Ky. 526 (16 S. W. 275); trees, *Pittsburgh, etc., R. Co.* v. *Parish,* 28 Ind. App. 189 (62 N. E. 514, 91 Am. St. Rep. 120); water tanks, *Davis* v. *Railroad Co.,* 21 S. C. 93; water spouts, *Northern Pacific R. Co.* v. *Perry,* 54 C. C. A. 65 (116 Fed. 609).

Similar questions have been before the Michigan court. In *Illick* v. *Railroad Co.,* 67 Mich. 632, plaintiff, a switchman of defendant railroad company, was killed by striking a bridge. The space between the side of the bridge and the ladder on the car where the brakeman was riding, was two feet and three inches. The court said:

"The danger in going up the ladder at that place was before him, and was as plain to his observation as to any person connected with the train, or whose duty it was to run upon the road. It was not his duty, on the signal for brakes, to go up the ladder when the service was fraught with such danger. * * * The duties of his employment did not require him to go upon the box car until he had passed the bridge. It did, however, require him to observe and take knowledge of the danger, if any, in crossing the bridge, if such knowledge could be obtained by his own observation. * * * It is well settled that the employed assumes all the risks and perils usu-

ally incident to the employment, and that included in such risks and perils are those which it is a part of the duty of the employed to take knowledge of by observation. * * * It was not only the duty of the brakeman to know of the dangers at this bridge, but it appears from the conductor's testimony that he had previously had warning to be careful."

In *Ramsay* v. *C. K. Eddy & Sons,* 123 Mich. 158, plaintiff, a brakeman on a freight train, sued to recover damages for being injured while engaged in switching cars in defendant's yards by coming in contact with the boards projecting from a lumber pile adjacent to the track. Plaintiff had charge of the train. The court said:

"He possessed all his faculties, and was an experienced switchman. It was broad daylight; and the evidence is conclusive that, had he looked, he could have seen that it was dangerous to ride on the ladder by these boards. They were eight feet from the ground. The lumber had been piled in this position for more than a year prior to the accident, and cars had been hauled there many times. The railroad company had given the defendant no notice that the piles were in dangerous proximity to the railroad tracks. * * * The danger was just as apparent to him as it could have been to anybody else. There was no question of fact for the jury to determine."

In *Carr* v. *Railway Co.,* 152 Mich. 138, plaintiff, a brakeman, was injured while in the performance of his duty by coming in contact with a cattle chute 3 feet, 11 inches from the nearest rail. It is said:

"It conclusively appears from the testimony that plaintiff's train had passed this chute some 10 or 12 different times, in the daytime, when there was nothing to interfere with his seeing it if he looked

in its direction; that he had done work on the siding at different times, and, on the morning of the accident, the train had set off four stock cars, which they picked up on their return at night; that he understood that it was his duty to familiarize himself with the location of permanent structures on side tracks; that plaintiff knew such structures were located on the outside of the side track, and that if he had endeavored at any time to ascertain what structures were located along this siding he could easily have ascertained the location of this cattle chute. The defendants had a right to rely on plaintiff's using due diligence to familiarize himself with the location of all of the permanent structures along this siding, and, in our opinion, the evidence is conclusive that, if he had used such diligence, he must have discovered the cattle chute and its location upon a curve."

In *Leary* v. *Houghton County Traction Co.*, 171 Mich. 365 (45 L. R. A. [N. S.] 359), plaintiff was a conductor on defendant's motor car. He went on top of the car to repair a trolley rope and started to come down by way of the step provided by defendant for that purpose. The step on the rear end of the car was not there and instead of landing upon it he fell to the ground and was severely injured. It is said:

"He, however, knew when he was about to undertake this ascent that he must come down from the car, and chose this way of coming down, without making any observation or taking any notice of the condition of this appliance by which he undertook to come down, when the defect complained of was open, obvious, and apparent, and required only the most ordinary observation and notice in order to give him full knowledge of its condition. The discovery of this defect required nothing in the way

of what may be called an inspection, but was obvious to ordinary observation, or even the most casual observation."

In *Phelps* v. *Railway Co.,* 122 Mich. 171 (7 Am. Neg. Rep. 72), plaintiff, employed by defendant as a brakeman, was injured by striking a fish house, built near defendant's tracks, while engaged in switching cars. He stood on the lower step of the ladder on the car, held on to it with his left hand and with the other took hold of a lever at the end or corner of the car for the purpose of uncoupling the cars. When the cars were in motion he attempted to uncouple them and his body came in contact with the fish chute and he was forced between it and the car and seriously injured. The court quoted with approval the rule as laid down in 3 Elliott on Railroads (2d Ed.), §§ 1290 and 1269, and held that the plaintiff assumed the risk. A rehearing was granted in this case, whereupon the court, by unanimous opinion, said:

"The rule is very different than where such obstruction abuts upon a side track. Such conveniences near side tracks, or abutting on them, are usually necessary for the conduct of railroad business, and, in making up trains, brakemen and switchmen must be on the lookout for them; while, where they abut on the main track, and not in yards where trains are usually made up, servants of railroads may expect that such obstacles will not be placed in so close proximity to the track as to make them dangerous."

Plaintiff claims it was the duty of defendants, after giving orders to the railroad company to switch their cars, to keep the tracks and sides of the tracks clear from all obstructions that might in

any way interfere with the duty of the railroad company and its employees in the performance of their duties, and to take notice of and watch for the coming in of the switch engine and crew, to perform work in its plant, and to keep the tracks and the sides of the tracks clear from all obstructions interfering with the removal of cars and with the employees of the railroad company in doing their work. Plaintiff charges defendants were negligent because, having ordered the railroad company to switch cars, they failed to keep watch and look out for the switch engine and crew, in order to be ready for them and have the tracks and sides along the tracks free and clear from obstructions; that defendants failed to have the tracks and sides thereof free and clear from factory trucks, and defendants failed to properly guard the tracks and sides along a spur track and extra switch so as to keep it free and clear from obstructions both on the tracks and along the sides thereof, in order that the train crew might have a safe place in which to perform its work; and by reason of defendants' negligence plaintiff was injured.

The yards of defendants are fenced. There is a gate where the switch tracks enter defendants' yards. This gate is kept locked. The lock provided is one which may be opened by the switching crew with a switch key. On the day in question, the railroad employees unlocked the gate and entered the yards of defendants for the purpose of switching cars. Defendants owned the premises in question and they had a right to use and occupy them in any and every way reasonably necessary and convenient to advantageously adapt them to their own use, benefit, and profit. Plaintiff knew when the gate was unlocked and the engine pushed through he was

entering private property devoted to the purposes of manufacturing. He was bound by such knowledge to anticipate the premises might be used for any and all purposes consistent with the advancement of defendants' manufacturing interests. He knew the rule applicable to structures adjoining a main line track of railroad was different from that applied to structures adjoining switch tracks on private property. There is no question in this case but there was ample clearance between the railroad car in question and defendants' truck, which was standing near the track, and ample clearance for a man riding on the ladder at the side of the railroad car to pass this truck if he was engaged in riding in the ordinary manner.

In order for plaintiff to recover, he must show defendants were reasonably bound to anticipate he might be riding upon the side of the railroad car on the ladder, and would be engaged in uncoupling the car on the switch track so as to be likely to be injured by coming in contact with the furniture truck sitting near the railroad track. The basis of plaintiff's right to recover must be defendants' negligence. That is, he must show defendants failed to exercise due care in that it did something which a reasonably prudent man would not have done under the circumstances, or defendants failed to do something which a reasonably and ordinarily prudent man would have done under the circumstances. As applied to the facts in this case, the plaintiff was bound to anticipate such trucks and structures incident to the operation of the manufacturing business of defendants as were usually necessary in the loading and unloading of freight from the railroad company's cars.

There was no proof in this case except that arising from the ownership of the premises that the

furniture truck in question was left in the location where it was found by defendants' employees, no proof it was not left in that position by employees of the railroad company. There was no proof defendants had any knowledge of the dangerous location of such truck in proximity to the railroad track, and no proof defendants had been guilty of negligence in not removing the truck after they had knowledge of its dangerous location, no proof that they had been guilty of negligence in failing to warn the plaintiff and other employees of the railroad company of its dangerous location. 3 Elliott on Railroads (2d Ed.), § 1269. We are constrained to hold, in view of the law as previously laid down by this court, plaintiff has not sustained the burden of proving either defendants' negligence, that he did not assume the risk, or that he was free from contributory negligence himself.

Judgment reversed, with costs. Cause remanded, with direction to enter judgment for defendants.

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

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SCHAEFER *v.* EAST & WEST INSURANCE CO.

1. INSURANCE—KNOWLEDGE OF AGENT.

   Insurance company is *held*, to have all the knowledge possessed by its agent as to insurable nature of property described in policy.

2. SAME—FAILURE OF AGENT TO INDORSE INCUMBRANCE ON POLICY—ESTOPPEL.

   Where insured disclosed to insurer's agent that there was small incumbrance against insured property, and was informed that

As to contract of fire insurance, see annotation in 11 L. R. A. 340.

it need not be referred to in policy, although policy provided otherwise, insurer is estopped from claiming that policy was void from its issuance by reason of its agent's failure to make said indorsement.

Appeal from Berrien; White (Charles E.), J. Submitted June 8, 1932. (Docket No. 57, Calendar No. 36,297.) Decided October 3, 1932.

Assumpsit by Fred Schaefer against East & West Insurance Company of New Haven, Connecticut, on a fire insurance policy. Judgment for plaintiff. Defendant appeals. Affirmed.

*Clarence E. Butler,* for plaintiff.

*Mason, Alexander, McCaslin, Cholette & Mitts,* for defendant.

SHARPE, J. On July 1, 1929, the defendant insured certain household goods belonging to plaintiff for the term of three years against loss by fire in the sum of $1,500. Their value was said to be $2,100. It is undisputed that these goods were consumed by fire on December 31, 1930. In this action, brought to recover such loss, tried by the court without a jury, plaintiff had judgment for $1,500. Defendant seeks review thereof by appeal.

Indorsed upon the policy was the following provision:

"Unless otherwise provided in writing by agreement added hereto this company shall not be liable for loss or damage to any property insured hereunder while incumbered by a chattel mortgage, and during the time of such incumbrance this company shall be liable only for loss or damage to any other property insured hereunder."

Plaintiff's counsel conceded that at the time the policy was issued the property insured was incumbered by a chattel mortgage in the sum of $150. There was no indorsement relating to such incumbrance on the policy.

Charles T. Prillwitz was the agent of the defendant company at the city of Benton Harbor. The policy in question was signed by the president and secretary of the defendant company and countersigned by him and delivered to the plaintiff. No written application was made therefor.

Raymond B. Platt was in charge of the office when plaintiff sought insurance. He testified that plaintiff informed him that he "owed some on his furniture" and that "we never put anything on the policy to that effect because it wasn't our custom to; at least it wasn't Mr. Prillwitz' custom;" that he afterwards talked with Prillwitz in regard to it and "he said as far as he knew there was no form to fill out on that."

Prillwitz testified that "As long as I was writing insurance I never put indorsements on for household goods," and that he paid no attention to small mortgages.

The trial court placed decision upon the provision of Act No. 264, Pub. Acts 1921, in force at the time the policy was written. We feel impelled to decide the case upon other ground.

The claim of the defendant is thus stated by its counsel:

"The defendant did not claim a forfeiture of the policy for the alleged breach because of the incumbrance and made no attempt to declare the policy void, but merely claimed that the policy did not cover the property incumbered, said property being excluded under the terms of the policy."

As the policy covered no other property, the effect of so holding would be to decide that no policy of insurance was issued to the plaintiff and nothing of value passed to him at the time he paid the premium therefor. In our opinion, when the defendant appointed Prillwitz its agent at Benton Harbor, intrusted him with its policies executed by its president and secretary and authorized him to fill in the necessary blanks, countersign and deliver the policies, and accept the premiums fixed by it therefor, it should be held to have all the knowledge possessed by its agent as to the insurable nature of the property described in the policy.

The distinction between an agent of an insurance company and a solicitor is clearly pointed out in the statute, 3 Comp. Laws 1929, § 12337:

"An agent is hereby defined as a person, firm or corporation acting under written authority from any insurance company to solicit insurance and/or write and countersign policies of insurance and collect premiums therefor. A solicitor is hereby defined as any person acting under express authority from an agent, having authority to appoint solicitors, to solicit insurance for such agent, but without the power or authority to issue or countersign policies or otherwise bind any company of which such agent may be the duly authorized representative."

The authority vested in Prillwitz by the defendant as its agent is not disclosed. It was doubtless that usually conferred. The provision in the policy above quoted did not appear upon its face. It was one of many others, covering 13 pages in the printed record, to which reference was made on the first page of the policy.

While the plaintiff is chargeable with knowledge of the provisions of the policy, and but for the in-

formation furnished to the agent at the time of its issue might be precluded from recovery thereon, the unfairness of so holding, in view of the facts presented, is apparent. He disclosed the nature of the small incumbrance on the property, and was informed that it need not be referred to in the policy.

In *Miotke* v. *Milwaukee Mechanics' Ins. Co.,* 113 Mich. 166, Mr. Justice HOOKER, speaking for the court, said:

"Fair dealing dictates that the agent should see that the information required, and which is necessary to determine whether the policy is valid or not, should appear on the face of the papers. Neither he nor the home office should accept such documents and the consideration, relying upon the right to treat the policy as void if it shall later be discovered that a quibble can be raised over some condition in the policy. And there is nothing unjust in holding that such conduct justifies the inference that the insurer was content to waive the condition, and treat the policy as a contract to insure the interest which the applicant actually had. See *Sibley* v. *Prescott Ins. Co.,* 57 Mich. 14; *Castner* v. *Farmers' Mutual Fire Ins. Co.,* 46 Mich. 15, 18; *O'Brien* v. *Ohio Ins. Co.,* 52 Mich. 131, 135; *Guest* v. *New Hampshire Fire Ins. Co.,* 66 Mich. 98; *Hoose* v. *Prescott Ins. Co.,* 84 Mich. 309, 321 (11 L. R. A. 340)."

In the last case cited it was said (p. 323):

"We do not think that it would carry out the intention of the parties, or be a fair and just construction of this instrument, to hold that when it was issued and accepted by the assured, and the premium paid, it was void from that moment because it did not contain the indorsements required above."

We have not overlooked the cases cited by defendant's counsel (*Olney* v. *German Ins. Co.*, 88 Mich. 94 [13 L. R. A. 684, 26 Am. St. Rep. 281]; *Meech* v. *Citizens' Ins. Co.*, 147 Mich. 343; *Patrons' Mutual Fire Ins. Co.* v. *Pagenkoff*, 213 Mich. 157) holding that under such a provision the existence of an incumbrance on the property unknown to the insurer avoided it, but in our opinion they are not controlling on the facts here presented.

For the reason stated, the judgment is affirmed.

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

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*In re* METTE'S ESTATE.

KONKEL *v.* METTE.

1. WILLS—PUBLICATION DEFINED.

Publication signifies act of declaring or making known to witnesses that testator understands and intends instrument subscribed by him to be his last will and testament; but unless required by statute publication of will is unnecessary.

2. SAME—INSTRUCTION—PUBLICATION.

In will contest case, it was error for trial court to instruct jury that witness must have been informed that document to which he signed his name as witness was will in order to render it valid, since publication is not required by statute in this State to give will effect.

3. SAME—MENTAL COMPETENCY—QUESTION FOR JURY.

Evidence, *held*, to present question for jury as to mental competency of testator.

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As to publication of will, see annotation in 8 L. R. A. 825.

On testator's mental capacity as question for jury, see annotation in 39 L. R. A. 324.

4. WITNESSES—ATTORNEYS PARTICIPATING AS WITNESSES NOT COMMENDED.

Practice of attorneys of record for respective parties in participating as leading witnesses on issues involved is not to be commended.

Appeal from Wayne; Hunt (Ormond F.), J. Submitted June 21, 1932. (Docket No. 81, Calendar No. 36,488.) Decided October 3, 1932.

Joseph Mette presented for probate the last will and testament of Frank Mette, deceased. Over objections of Margaret Konkel, it was admitted to probate. Contestant appeals. Verdict and judgment for contestant. Proponents appeal. Reversed, and new trial granted.

*Henry P. Fisher, Ray V. Richards,* and *Frank A. Martin,* for appellants.

*Lucking, Van Auken & Sprague* (*Fred J. Schumann* and *Harold W. Hanlon,* of counsel), for appellee.

SHARPE, J. Frank Mette died on September 16, 1930. His last will and testament, executed on September 11th of that year, after a contest thereon by Margaret Konkel, was admitted to probate by the probate court for the county of Wayne. The contestant is the daughter of the deceased, and 25 years of age. Her father and mother were divorced when she was five years old, and she did not see him thereafter for seven years, and after that time but occasionally.

The reasons assigned for the contest here relied on are in brief: 1st, that the deceased was not mentally competent to execute a will; 2d, that it was not executed in conformity with law. On ap-

peal to the circuit court and trial by a jury, the will was disallowed. From the order so entered, the proponents have taken this appeal.

In the will, after providing for the payment of his debts and funeral expenses, he devised and bequeathed the residue of his estate to his daughter, Margaret, the contestant, his brothers, Joseph, Henry, Albert, and August, his half-brother, Anthony, his half-sisters, Elizabeth Miller and Theresa Durkee, and the pastor of St. David's Catholic Church, located on Outer Drive, Detroit, share and share alike. The fourth paragraph thereof reads as follows:

"I am not unmindful of the children of my deceased half-brother, John Mette, but I feel that they have been sufficiently provided for by whatever inheritance they received from the said John Mette."

The will was executed under the following circumstances: The deceased was admitted to the Receiving Hospital in Detroit on August 23, 1930. His name, address, and the nature of his employment were recorded. He stated that his nearest relative was Margaret Mette Konkel, the contestant herein. He was then of the age of 47 years, and lived alone. His brother Joseph first learned of his illness on August 25th, and went to the hospital to see him. When visiting him again on September 10th, deceased requested him to get an attorney to draw his will. Joseph called upon an attorney, Henry P. Fisher, and he telephoned his partner, Ray V. Richards, who was then at his home, and he went to the hospital and informed the deceased of the purpose of his visit. Mr. Richards testified that deceased then stated that the value of his property was around $12,000 to $14,000 (it was afterwards inventoried at $10,982.04, and its net value about

$7,500), and that he gave him full particulars as to the manner in which he desired his property to be distributed; that he wanted the Union Guardian Trust Company to act as his executor; that he made a written memorandum of the instructions so given him, had the will prepared pursuant thereto, and took it to the hospital the next morning for execution; that he read it to the deceased and then handed it to him, and that he looked it over and expressed his satisfaction with it; that at that time an interne at the hospital, Dr. Cooper, came to the bedside of the deceased and asked him how he felt; that he answered, "I feel pretty good, only this right leg is a little swollen," and showed it to the doctor; that he then introduced himself to the doctor and said, "I am an attorney and I have got Mr. Mette's will," and also said, "Do you think Mr. Mette is all right to sign a will?" and that the doctor answered, "Yes, as well as anybody else would be;" that he then asked him if he would act as a witness, and he said he would; that he then said to the deceased, "This is your will, is it?" and he replied, "Yes, it is; it is just what I want in my will;" that deceased, sitting up in his bed, signed his name to the instrument and the doctor and he signed as witnesses thereto, and that he at that time had no acquaintance with any of the parties named as beneficiaries in the will.

Dr. Cooper, who also signed as a witness to the signature of the deceased, testified as a witness in the probate court. He was at that time an interne, and not admitted to practice medicine. His deposition was taken and received in evidence in the circuit court. In it he stated (referring to deceased) that "the primary trouble was his heart disease * * * resulting in edema, or the fluid in the blood,

and the fluid in the blood, which flowed from the blood itself out into the tissues was all dammed back into the tissues;" that "along with that he had kidney disease, evidenced by his urinary findings," and further said that his condition was what is commonly called dropsy; that it "affects the brain as well as any other tissues, * * * producing cloudiness." He stated that it was his "impression," based on his observation, that while in the hospital the deceased "was either in one of these periods of disorientation, or in one of the intermittent periods of more or less cloudiness," and that, as he recalled it, there was no time that he "could say that his mind was perfectly normal." He admitted that he signed his name as a witness at the request of Mr. Richards, but stated that he was not informed that it was the will of the deceased; that Richards did not sign his name as a witness in his presence, and that it was his "impression" that the deceased "did not have mental capacity at that time to execute any document, any legal document." Under cross-examination he admitted that in the probate court, on being asked concerning statements somewhat contradictory to those in his deposition, he many times answered, "I don't remember," and on one occasion refused to answer "on account of incriminating previous testimony." He further testified:

"*Q.* Are you in the habit, doctor, of signing all papers as a witness, signing any old paper that is handed to you?

"*A.* We have been over at the hospital, signing witness' signatures.

"*Q.* You would not sign anything knowingly where the person was insane, would you?

"*A.* Why, certainly, if he could write his name, I would witness his signature.

"*Q.* It would not make any difference to you if he was insane or not?

"*A.* Not knowing the case at all, no."

The trial court instructed the jury, in effect, that Dr. Cooper must have been informed that the document to which he signed his name as a witness was the will of the deceased in order to render it valid.

"Publication signifies the act of declaring or making known to the witnesses that the testator understands and intends the instrument subscribed by him to be his last will and testament. Unless required by statute publication of a will is unnecessary." 40 Cyc. pp. 1116, 1117.

In *Damley* v. *Jefferson,* 150 Mich. 590, 593 (121 Am. St. Rep. 640, 13 Ann. Cas. 242), it was said:

"Our statute does not specify publication as a requisite to the validity of a will."

And in *Re Kennedy's Estate,* 159 Mich. 548, 558 (28 L. R. A. [N. S.] 417, 134 Am. St. Rep. 743, 18 Ann. Cas. 892):

"No publication of the instrument is required in this State to give it effect, but the execution of an instrument in testamentary form with the statutory formalities completes the testamentary act."

There was error in this instruction as given, and, as the jury may have based their verdict upon it, reversal must be had for this reason.

In view of the testimony of Dr. Cooper, it cannot be said that the question of the mental incompetency of the deceased should not have been submitted to the jury. On motion for a new trial, alleging that the verdict in this respect was against the great weight of the evidence, the trial judge said:

"The court frankly states that he believes that the weight of the testimony was with the proponent," but he was—"not disposed * * * to interpose his judgment arbitrarily against the finding of the jury."

A careful reading of the record discloses that the verdict can best be accounted for by the fact that Mr. Richards appeared as a witness and as one of the attorneys for the proponents and cross-examined Dr. Cooper. He had practiced his profession for about 15 years. His integrity was not questioned, and yet such conduct on his part may have had its influence with the jury in determining the weight to be given to his testimony.

In *Re Lewandowski's Estate,* 236 Mich. 136, 146, the following from *Jacobs* v. *Weissinger,* 211 Mich. 47, 49, was quoted with approval:

"It is, we think, to be regretted that an attorney of record in the case should find it necessary to support the contention he is bound to make with his own testimony. It is a practice not to be commended, and, while such testimony is competent, its consideration by the court is always a matter of embarrassment, because it is difficult to distinguish between the zeal of the advocate and the fairness and impartiality of a disinterested witness. The practice has received judicial attention in many cases and has found scant approval."

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

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

## AUGUST *v.* COLLINS.

1. PRINCIPAL AND SURETY—NOT NECESSARY TO ATTACH COPY OF BOND—COURT RULES.

   In action on bond given on appeal from judgment of restitution, it was not necessary, under former Circuit Court Rule No. 21, § 6, to attach copy of bond to declaration as exhibit.

2. SAME—SUFFICIENCY OF DECLARATION—AMENDMENT.

   Where, in action on bond given on appeal from judgment of restitution, it clearly appeared from declaration that plaintiffs' claim for damages was based on rental value of premises, declaration stated cause of action not barred by statute of limitations, and therefore amendment thereof claiming rental value of premises during time defendants unlawfully retained possession was not barred (3 Comp. Laws 1929, §§ 14118, 14144).

3. SAME—FAILURE TO ALLEGE THAT PLAINTIFF OBTAINED RESTITUTION—VOLUNTARY SURRENDER.

   Recovery on appeal bond may be had, notwithstanding failure of declaration to allege that plaintiff obtained restitution, where it appears from record that writ of restitution issued was not executed because there was voluntary surrender of possession.

4. SAME—STATUTORY BOND—FAILURE TO NAME WIFE AS OBLIGEE.

   Where husband and wife as plaintiffs in summary proceedings before circuit court commissioner obtained judgment of restitution, bond given by defendants pursuant to 3 Comp. Laws 1929, § 14987, to stay proceedings thereon inured to wife as well as husband, although, through inadvertence of defendants' attorney, husband was only obligee named therein.

5. SAME—WHAT INCLUDED IN STATUTORY BOND.

   Where bond is given under authority of statute, that which is not expressed but should have been incorporated, is included in bond.

6. SAME—UNINTENTIONAL OMISSION OF STATUTORY REQUIREMENT. Unintentional omission from bond, given on appeal from judgment of restitution, of words "or the rental value thereof," insertion of which is required by statute, in no way changes obligation of sureties thereunder (3 Comp. Laws 1929, § 14987).

Appeal from Wayne; Merriam (DeWitt H.), J. Submitted June 16, 1932. (Docket No. 7, Calendar No. 35,885.) Decided October 3, 1932.

Assumpsit by Isaac August and another against James J. Collins and others on an appeal bond. From order granting motion to dismiss, plaintiffs appeal. Reversed, and remanded.

*Samuel Shimans,* for plaintiffs.

*McLeod, Fixel, Abbott & Fixel,* for defendant Cohane.

*Charles F. Meyler,* for defendant Smilay.

SHARPE, J. Plaintiffs took proceedings under section 14795 *et seq.,* 3 Comp. Laws 1929, before a circuit court commissioner to recover possession of certain real estate in the city of Detroit, which they had contracted to sell to the defendant Collins, for his failure to make the payments provided for therein, and obtained a judgment of restitution on August 2, 1923. The Barnard Toy Company, to which Collins had assigned his contract, was made a party thereto. An appeal therefrom was taken by the defendants therein to the circuit court, where a judgment of restitution was entered on April 22, 1924, and a finding made that there was due plaintiffs the sum of $8,655, and that they were entitled to recover $56.65, costs of suit. On appeal to this

court, submitted on June 23, 1927, and decided on July 29th of the same year, this judgment was affirmed. *August* v. *Collins,* 240 Mich. 23.

On taking the appeal to the circuit court, the defendants, pursuant to section 14987, executed a bond, with themselves as principals and the defendants Smilansky and Cohane as sureties, in the sum of $20,000, conditioned that the principals therein—

"shall prosecute said appeal with all due diligence to a decision in said circuit court, and if a judgment shall be rendered against him in said court, shall pay the amount of said judgment, including the costs of said appeal, and in case the said appeal shall be dismissed, if the said Barnard Toy Co., a Michigan corporation, and J. J. Collins shall pay the costs of said appeal, then this obligation to be void, otherwise to remain in full force and virtue."

It also contained the following:

"The further condition of this obligation is such, that in case the said Isaac August shall obtain restitution of the premises described in this complaint in this suit, if the said Barnard Toy Co., a Michigan corporation, and J. J. Collins shall forthwith pay all the rent due or to become due this complainant for the premises above described up to the time said complainant shall obtain restitution thereof, then this obligation to be void, otherwise to remain in full force and virtue."

Isaac August, alone, was named as the obligee therein. It does not appear that any bond was filed on appeal to this court.

On September 20, 1924, plaintiffs brought this action to recover upon the appeal bond. In their declaration first filed, on November 11, 1924, they alleged the execution of the contract, attaching a copy thereto; its assignment to the Barnard Toy

Company; the default in making payment thereunder; its forfeiture; the proceedings before the circuit court commissioner and the recovery of judgment of restitution; the appeal of the defendants to the circuit court and the filing of the bond sued upon (numbered 24,934); the trial in the circuit court on April 22, 1924, wherein plaintiffs recovered; that a writ of restitution was duly issued "on or about the 20th day of May, 1924;" that the defendants were in possession to the exclusion of plaintiffs until the first day of August, 1924, a period of 14 months; that plaintiffs have sustained damages for the loss of 14 months' rent at $1,000 per month; mortgage tax paid, $405, and costs $56.65.

In proceedings thereafter had, in which the default of some of the defendants was set aside, the plaintiffs were, by order of the court, permitted to file an amended declaration. They did so on January 11, 1928. A copy of the bond was annexed thereto and claim made that under it the plaintiffs were entitled to the rental value of the premises during the time the defendants unlawfully retained possession thereof.

The case came on for hearing before the court without a jury on April 29, 1931, and, on plaintiffs' motion, the claim for rent was changed to expire on July 1, 1924, instead of October 1, 1924, as stated in the amended declaration. After much argument and colloquy of counsel as to the sufficiency of the declaration, the matter was taken under advisement by the court.

On May 18, 1931, the defendants filed a motion to dismiss, for the reason that the declaration first filed did not state a cause of action, and that, as amended, it states a new and separate cause of action, and, as such, is barred by the statute of limi-

tations. Other questions were raised which will be hereafter referred to. This motion was granted, and the cause dismissed, from which the plaintiffs have taken this appeal.

Although stated somewhat imperfectly, we think the original declaration stated a cause of action. The form of the bond on such an appeal is prescribed by the statute (section 14987). Under the Circuit Court Rule then in force (No. 21, § 6), it was not necessary to attach a copy thereof to the declaration as an exhibit. While the claim for damages is not stated to be the rental value of the premises, it clearly appears that plaintiffs' claim is founded thereon.

Section 14118, 3 Comp. Laws 1929, reads as follows:

"In the actions which are in this act retained, the forms of declaration now in common use may be employed; but no declaration shall be deemed insufficient which shall contain such information as shall reasonably inform the defendant of the nature of the case he is called upon to defend."

Section 14144 reads:

"The court in which any action or proceedings shall be pending, shall have power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment or decree rendered therein. The court at every stage of the action or proceedings shall disregard any error or defect in the proceedings, which do not affect the substantial rights of the parties."

Under these provisions the common-law rules relating to pleadings have been applied with much less strictness. Counsel for the defendants rely on

*Delashman* v. *Berry,* 21 Mich. 516, in which it was held that a declaration in such a case must allege that the plaintiff obtained restitution of the premises. The rule thus stated was commented on, somewhat unfavorably, although not overruled, in *Holcomb* v. *Bonnell,* 32 Mich. 6, and in *Estey Manfg. Co.* v. *Runnels,* 67 Mich. 310. In a later case (*Grashaw* v. *Wilson,* 123 Mich. 364), it appeared that no writ of restitution was issued, but that there had been a voluntary surrender of possession, and recovery on the appeal bond was permitted. No proofs were submitted in this case, but from the statements of counsel which appear in the record it would seem that the writ of restitution issued was not executed for a similar reason.

As before stated, but one of the plaintiffs, Isaac August, was named as obligee in the bond. It was prepared by the attorney for the defendants, and through inadvertence the name of the other plaintiff was omitted. It was filed to stay proceedings upon the judgment rendered by the commissioner pursuant to the statute. While Ida August was not named as obligee therein, it inured to her benefit and may be enforced by her as well as by her husband. *Board of Education* v. *Grant,* 107 Mich. 151; *City of Alpena* v. *Title Guaranty, etc., Co.,* 158 Mich. 678; *City of Grand Rapids* v. *Krakowski,* 207 Mich. 483; *Vosburgh* v. *Middleditch,* 214 Mich. 489.

In the preparation of the bond the attorney for the defendants no doubt unintentionally omitted to insert therein the words "or the rental value thereof," as required by the statute. Its omission in no way changes the obligation of the sureties thereunder.

"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.'' *Chambers* v. *Cline* (syllabus), 60 W. Va. 588 (55 S. E. 999).

The purpose of the statutory requirement that a bond shall be given on such an appeal is to protect the plaintiff from loss due to the defendant's right to the use of the property pending decision thereon. This the defendants undertook to do by the execution of the bond in question. A fair consideration of the declaration first filed informed the defendants that, by reason of the result of the appeal taken by them, the plaintiffs had sustained damages by being deprived of the possession of the property for the term of 14 months. The amended declaration but tends to clarify the allegations in that first filed, and does not state a new cause of action.

The order of dismissal is reversed and set aside, with costs to appellants, and the cause remanded to the trial court for further proceedings.

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

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WHITE CHAPEL MEMORIAL ASS'N *v.* WILLSON.

1. TAXATION—EXEMPTIONS—CEMETERIES—''INCLOSED''—STATUTES.
Land inclosed on three sides by fence, and on fourth side partly by fence and balance by hedges and small trees, was ''inclosed'' within meaning of 2 Comp. Laws 1929, § 10447, exempting from taxation lands inclosed and set apart for cemetery purposes.

2. SAME—INTEREST IN LAND—EXEMPTIONS.

Where cemetery association, as assignee of vendees' interest in land contract, had received deed to part of land dedicated as cemetery at time road and drain taxes were assessed thereon, and thereafter acquired title to balance, said association *held*, to have such interest in said land at time suits were commenced as entitled it to seek relief from liens created by said assessments.

3. CEMETERIES—APPROVAL OF PLAT—TOWNSHIP BOARD OF HEALTH.

Requirement that cemetery plat must be approved by township board of health (1 Comp. Laws 1929, § 2656) is met by approval by township board, because said board acts as board of health (2 Comp. Laws 1929, § 6475).

4. SAME—TOWNSHIP BOARD—PRESUMPTIONS.

Meeting of township board at which cemetery plat was approved will be presumed to have been regularly called, although only three members were present.

5. CORPORATIONS—REPORTS—CEMETERY ASSOCIATION—COMPLIANCE WITH STATUTES—RIGHT TO RELIEF FROM TAX LIENS.

Failure of incorporated cemetery association to file corporation reports required by 2 Comp. Laws 1929, § 10123, does not bar its right to relief from tax liens created by unwarranted assessments against cemetery for road and drain taxes, where it has complied with provisions of Act No. 22, Pub. Acts 1932, waiving compliance with former statute.

Appeal from Oakland; Gillespie (Glenn C.), J. Submitted June 10, 1932. (Docket Nos. 82–85, Calendar Nos. 36,158–36,161.) Decided October 3, 1932.

Two bills by White Chapel Memorial Association, a Michigan corporation, against Albert W. Willson, Oakland county treasurer, and others to set aside certain special assessments for county road and drain purposes for the years 1927 and 1928. Two petitions by Oramel B. Fuller, auditor general, for the sale of lands for taxes above referred to. Cases heard together. From decree for defendants sustaining assessment of tax, plaintiff appeals. Reversed.

*Lucking, Van Auken & Sprague* (*Pelton & McGee* and *Fred J. Schumann,* of counsel), for plaintiff.

*George A. Cram,* for defendants county treasurer and drain commissioner and township treasurer.

*James H. Lynch,* for defendant board of county road commissioners.

SHARPE, J. On July 9, 1925, Albert F. Pearce and his wife executed an option to sell 80 acres of land in the county of Oakland to C. J. Sanger and P. B. Raymond for the sum of $89,000. This option was exercised on August 5, 1925, and a contract of sale executed. The intent of the vendees was to use the land for cemetery purposes. A plat thereof was prepared, in which Pearce and his wife and Sanger and Raymond joined, dedicating its use to such purposes, the same to be known as "White Chapel Memorial Association." This plat was presented to and accepted by the township board of the township in which the land was situate on July 22, 1925. It appears, however, that but three of the members of the board were present at this meeting.

On August 18, 1925, Sanger and Raymond assigned their interest in the land contract to the plaintiff, White Chapel Memorial Association, which had been theretofore incorporated under the provisions of Act No. 12, Pub. Acts 1869 (2 Comp. Laws 1929, § 10440 *et seq.*). Between that date and May 9, 1927, the association received deeds of about 41 acres of this land, and the title to the balance was thereafter acquired.

After securing the contract for the purchase of the property, the board of directors of plaintiff adopted a resolution approving the plat and thereafter proceeded to landscape and develop the prop-

erty, and at the time of the hearing there were many burials thereon.

The question presented in these cases is whether this land was liable to a Covert road tax levied thereon for the years 1927 and 1928, and a drain tax for the year 1927. The assessment roll for the drain tax was confirmed on May 9, 1927, and that of the road tax on July 25th of that year.

Section 8 of the act under which plaintiff was incorporated (section 10447) provides:

"All the lands of said corporation inclosed and set apart for cemetery purposes, and all rights of burial therein, shall be wholly exempt from taxation of any kind whatsoever."

The trial court, without consideration of the other questions presented, found that the land was "not inclosed by a cemetery fence until after the date when the special assessments became a lien," and entered a decree in each of the cases denying the plaintiff the relief prayed for. The plaintiff has appealed therefrom.

Clarence J. Sanger, one of the promoters of the enterprise, and the president of the plaintiff association at the time of the hearing, testified:

"*Q.* * * * Now, on May 9, 1927, what operations had been started and were going on in your park or your cemetery?

"*A.* The drainage system had been completed, the underground sprinkling system was well under construction, the driveways were fully graded and I think construction under way on the driveways, I mean laying of the concrete, the entire park was being scalped, I mean by that, top black dirt was being taken off and piled up and the subsoil being shifted to conform to the grades that we had laid out for our driveways; material was being shipped

in for the entrance portals and foundation being installed for the entrance portals at about that time also.

"*Q.* This operation you have spoken of as scalping, is that in connection with landscaping?

"*A.* In connection with the landscaping.

"*Q.* Of the cemetery?

"*A.* Yes, sir.

"*Q.* Was the park inclosed at that time?

"*A.* Park was inclosed at that time; it was inclosed with a fence on three sides, partly on the fourth side and then there were raw hedges and small trees the balance.

"*The Court:* Is that a fence that had been built by the Memorial Park Association?

"*A.* No, sir, park fence hadn't been put yet at that time.

"*Q.* But it was completely inclosed at that time and used for cemetery purposes?

"*Mr. Lynch:* Object to that, that is assuming, that is a conclusion.

"*Mr. Schumann:* That is not a conclusion to say it was completely inclosed.

"*Mr. Lynch:* Why didn't you stop there?

"*Q.* When was the date when you installed the fence that is around the cemetery at the present time?

"*A.* I think that was in the, along late in the summer or early fall; that was started late in the summer or early fall of 1927, I am not positive regarding that date."

It was upon this testimony that the finding was based.

The word "enclose" or "inclose" is defined in Webster's New International Dictionary as "To surround; to encompass; to bound, fence, or hem in, on all sides." When this word was used in the act of 1869, its meaning was doubtless more extended

than at the present time when the rights of ownership and use of property are less dependent upon the use of fences to inclose it, if a claim of ownership or use is otherwise clearly indicated. This is somewhat evidenced by the language of the general tax law (1 Comp. Laws 1929, § 3395), which exempted from taxation—

"All lands used exclusively as burial grounds, and the rights of burial therein, and the tombs and monuments therein, while reserved and in use for that purpose: *Provided,* That the stock of any corporation owning such burial grounds shall not be exempt."

A quite similar provision appeared in section 3 of Act No. 9, Pub. Acts 1882.

In *Kimball & Fink* v. *Carter,* 95 Va. 77, 85 (27 S. E. 823, 38 L. R. A. 570), in which an action was brought against a railroad company under a statute which required its right of way through inclosed lands to be fenced, it was said:

"Inclosed lands, therefore, are lands surrounded by a fence; and a fence is a visible or tangible obstruction, which may be a hedge, ditch, wall, or a frame of wood, or any line of obstacle interposed between two portions of land so as to part off and shut in the land, and set it off as private property."

In *Avery* v. *Forest Lawn Cemetery Co.,* 127 Mich. 125, 129, the section of the cemetery act and of the general tax law were both cited, and the court said:

"It is the settled policy of this State, in common with the universal sentiment of mankind, to preserve and maintain the burial places of the dead. The legislature has, by express enactment, prohibited the sale, except for burial purposes, or mortgaging, of lands set apart for cemetery purposes.

It has also in express terms provided for the exemption from levy and sale on execution, or upon any other final process of a court, of all cemeteries, etc., while in use as repositories of the dead. This was within the power of the legislature to do, and so careful has the legislature been to preserve such properties for burial purposes that it has also in express terms taken it out of the power of the court of chancery to decree satisfaction of any judgment out of such exempt property."

In *Woodmere Cemetery Ass'n* v. *City of Detroit,* 192 Mich. 553, the liability of the plaintiff, organized under the same act as this plaintiff, to pay a special assessment was presented. The boundaries on three sides of the land in question were said to be streets, and "its western boundary is a creek, which has an irregular course, generally from north to south." While the court divided on the right to sequester the funds of the plaintiff to pay the tax, all were agreed that the lands, being devoted to cemetery purposes, could not be sold for the purpose of collecting the special assessment.

Placing a reasonable and fair construction upon the answer of Mr. Sanger to the question put to him:

"Park was inclosed at that time; it was inclosed with a fence on three sides, partly on the fourth side, and then there were raw hedges and small trees the balance,"—

in our opinion it must be held that this land was "inclosed" within the meaning of that word as used in the statute at the time the taxes were levied against it in 1927, and that the lien created by the tax levied thereon for that year and the year 1928 should be removed therefrom.

Additional questions are raised by counsel for the county treasurer and drain commissioner:

1. It is claimed that the plaintiff was not the owner of the land at the time the assessments were made. Reference has been made to the dates and instruments under which it acquired title. It had such an interest at the time the bills were filed as entitled it to seek relief from the liens created by the assessments.

2. It is urged that under the statute (1 Comp. Laws 1929, § 2656) a cemetery plat must be approved by the township board of health, and that the action taken by the township board was inoperative and void. It is also urged that the action thus taken was invalid because but three members of the board were present. The township board acts as a board of health (2 Comp. Laws 1929, § 6475). Its meeting will be presumed to have been regularly called. *Boyce* v. *Auditor General,* 90 Mich. 314.

3. It is also insisted that the failure of the plaintiff to file the reports required by section 10123, 2 Comp. Laws 1929, bars its right to relief. There is evidence that its reports as made were rejected by the secretary of State. The uncertainty in the law resulted in the passage of Act No. 22, Pub. Acts 1932, under which all forfeitures by reason thereof were waived upon compliance with the provisions thereof, and this it appears that plaintiff has done.

It follows that the plaintiff was entitled to relief in each of these cases as prayed for in its bills of complaint, and decrees therefor may be entered in this court. As the questions presented were of a public nature, we do not think that any costs should be allowed.

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

## McMAHON *v.* HOLLAND.

1. HUSBAND AND WIFE—BANK DEPOSITS IN JOINT NAMES—STATUTES.
   Bank deposits in joint names of husband and wife are not subject to provisions of 3 Comp. Laws 1929, § 13071, subjecting evidences of indebtedness therein named to same restrictions, etc., as are incident to joint ownership of real estate by husband and wife, under theory that said deposits are included in words "other evidences of indebtedness."

2. SAME—INFERENCES OF OWNERSHIP.
   In absence of evidence as to ownership of money deposited in bank in joint names of husband and wife, no inference may be drawn that it was property of husband (3 Comp. Laws 1929, § 12061 *et seq.*)

3. SAME—CERTIFICATE OF DEPOSIT—TRUSTS.
   Where money deposited in bank in joint names of husband and wife was withdrawn by her and certificate of deposit therefor issued to her, said certificate was not impressed with trust in favor of husband, but, on wife's death, belonged to her estate.

Appeal from St. Clair; George (Fred W.), J. Submitted June 15, 1932. (Docket No. 168, Calendar No. 36,623.) Decided October 3, 1932.

Bill by James E. McMahon against Annie Rudge Holland and another to impress a trust upon a certificate of deposit. Bill dismissed. Plaintiff appeals. Affirmed.

*Walsh, Walsh & O'Sullivan,* for plaintiff.

*Alex Moore* (*Stewart & Black,* of counsel), for defendants.

Sharpe, J. This case was submitted in the trial court upon an "agreed statement of facts," which, so far as material to the issue here presented, we summarize as follows:

The plaintiff and Mary Rudge were married in 1922. Each then had some individual property. They lived together until the death of Mrs. McMahon on April 14, 1931. Mr. McMahon was a railroad conductor during that time, earning approximately $240 per month. On September 14, 1927, an account was opened by them in the United States Savings Bank in Port Huron by the deposit of $100 therein. At the top of the bank ledger was written: "Mr. or Mrs. James E. McMahon, 914 Michigan street." On the signature card left with the bank appeared the words, "Mary R. McMahon or J. E. McMahon 915 Michigan St." Deposits were made from time to time, usually in amounts of about $100 or less, aggregating in all about $3,000. In March, 1928, there was, however, a deposit of $500 and a withdrawal of $646. Other withdrawals were somewhat frequent, and in amounts varying from $5 to $200. The record does not disclose by whom the deposits or withdrawals were made.

In November of 1929, Mrs. McMahon became ill, and continued so until the time of her death. A part of the time she was bedridden, and was attended and nursed by her sister, Mrs. Holland, and other nurses employed for that purpose.

On July 5, 1930, Mrs. Holland presented to the bank an order for the payment of $1,000 (the balance then being $1,026.92), signed by Mrs. McMahon, and the bank issued to Mrs. McMahon a certificate of deposit, payable to her personally, therefor. This certificate was afterwards surrendered and a new one issued to her, which included the interest, in the

sum of $1,020. It was in her possession at the time of her decease, was inventoried as a part of her estate, and is now in the hands of the defendant First National Trust & Savings Bank, the administrator of her estate.

These facts are set up in the bill of complaint, and the court is asked to impress a trust in favor of the plaintiff upon this certificate of deposit and order it transferred and delivered to him. His claim thereto is based upon the provision in Act No. 212, Pub. Acts 1927 (3 Comp. Laws 1929, § 13071). This act is entitled:

"An act to provide for the joint ownership by husband and wife in joint tenancy of certain classes of personal property with right of survivorship."

It consists of but one section, reading as follows:

"All bonds, certificates of stock, mortgages, promissory notes, debentures, or other evidences of indebtedness hereafter made payable to persons who are husband and wife, or made payable to them as indorsees or assignees, or otherwise, shall be held by such husband and wife in joint tenancy unless otherwise therein expressly provided, in the same manner and subject to the same restrictions, consequences and conditions as are incident to the ownership of real estate held jointly by husband and wife under the laws of this State, with full right of ownership by survivorship in case of the death of either."

In our opinion this statute does not apply to a bank deposit such as was here made. The legislature had theretofore passed an act (Act No. 248, Pub. Acts 1909, 3 Comp. Laws 1929, § 12061 *et seq.*) in relation to deposits in banks and trust companies in the name of more than one person. Had it been intended that Act No. 212 should include deposits in

banks, they would doubtless have been mentioned. They are not included in the words, "other evidences of indebtedness," used therein.

The record discloses no information as to the deposits made. During at least a part of the time this account was kept in the United States Savings Bank, these parties kept a deposit in another bank in that city. No inference can be drawn that the moneys so deposited were the property of the plaintiff. Under the arrangement made with the bank, either the plaintiff or the deceased was entitled to withdraw the same at any time. This $1,000 was withdrawn by the deceased. The bank was relieved of liability by accepting her check therefor and the issuance of the certificate of deposit to her. Had the account been kept "in form to be paid to either or the survivor of them," as provided for in section 12063, a different question would be presented. On this record it cannot be held that the certificate received by her was impressed with a trust in favor of the plaintiff, or that he is entitled to have the same delivered to him.

The conclusion reached renders it unnecessary to discuss the other questions presented.

The decree dismissing the bill of complaint is affirmed, with costs to appellees.

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

L. W. KINNEAR, INC., *v.* CITY OF LINCOLN PARK.

1. MUNICIPAL CORPORATIONS—LIABILITY OF CITY UNDER SEWER CONTRACT—ESTOPPEL.

Where city was named as one of parties to sewer contract, received benefits thereof, and during course of construction and subsequent thereto it acted as though it were party to contract, it is estopped thereby from afterward denying liability thereunder, although contract was signed by owners of subdivision and city did not sign it.

2. SAME—TRIAL—ISSUES OF FACT—DIRECTED VERDICT.

Where, in action by contractor on sewer contract, there was conflicting testimony on material issues of fact presented upon question as to whether collapse of part of sewer was due to faulty design or improper plans and specifications, for which city was responsible, or to improper installation or poor workmanship, for which contractor was responsible, trial court was in error in directing verdict which in effect was holding of law that contractor was chargeable with responsibility for loss.

3. SAME—WAIVER.

Trial court's refusal to submit to jury as issues of fact whether city had accepted work done on sewer by contractor and was thereby foreclosed from questioning performance of contract in accordance with its terms, or whether city waived provision of contract that there should be no claim for extras unless ordered in writing by engineer, *held*, correct, in view of express terms of contract.

4. SAME—SEWER CONTRACT—COST OF REPAIRS.

Contractor's claim that use by city of cement tubing instead of cement blocks in repairing sewer prevents city from recovering cost of repairs, on ground that method of making repairs was not that specified in contract, *held*, without merit, where undisputed testimony shows that cost of repairs would have been greater had cement blocks been used instead of cement pipes.

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On estoppel of public corporation to deny validity of contract, see annotation in L. R. A. 1915A, 990, 1002.

Appeal from Wayne; Pugsley (Earl C.), J., presiding. Submitted June 22, 1932. (Docket No. 172, Calendar No. 36,249.) Decided October 3, 1932. Rehearing denied December 6, 1932.

Assumpsit by L. W. Kinnear, Incorporated, a Michigan corporation, against City of Lincoln Park and others on a sewer construction contract. From directed verdict and judgment for plaintiff for part of its claim, plaintiff and defendant city appeal. Reversed and new trial granted.

*Robert J. Hanley* and *John G. Dunn,* for plaintiff.

*Larry S. Davidow,* for defendant city.

*Robert M. Brownson* and *Kenneth Murray,* for defendants Wallace & Richardson.

NORTH, J. In August, 1926, plaintiff, a Michigan corporation, entered into a contract with defendants for the construction of 15,000 feet of lateral and trunk line sewer. Claiming performance of its contract, plaintiff brought this suit to recover a claimed unpaid balance on the contract price of $5,938.20; also to recover $9,854.74 which plaintiff claims is due it because defendant changed the method of operation in constructing the sewer from that contemplated when the contract was signed to a more expensive method of installation claimed to have been ordered by defendants' engineer; and to recover the further sum of $2,114.58 for repairs which plaintiff claims it made to the sewer subsequent to its completion.

The defense urged is that plaintiff did not perform its contract and that it refused to complete the sewer in accordance with the contract and specifications; that its work was not performed in a thorough

and workmanlike manner and in accordance with the plans and specifications. Defendants urge that, because of plaintiff's failure to properly perform its contract, expenses were incurred in repairing and replacing portions of the sewer incident to which $5,974.54 was expended. This was pleaded as a set-off, and affirmative judgment asked.

At the close of the proofs verdict for plaintiff was directed in the sum of $1,857, with costs to be taxed. In arriving at this result the circuit judge disallowed plaintiff's claim of $9,854.74 for extra expenses of construction, and also disallowed the $2,114.58 for repairs, and deducted from the $5,938.20, which plaintiff claimed as the balance of the contract price, the amount the court found defendants had paid for repairs and to complete construction in accordance with the terms of the contract. This left a net balance, which, with accrued interest, totaled $1,857, for which verdict for plaintiff was directed. Plaintiff and the defendant city of Lincoln Park have appealed.

The city urges as a defense that it is not a party to the contract and is not bound thereby. The defendants Harvey B. Wallace and Henry Richardson were the owners of the subdivision in which the sewer was constructed. The written contract for the work was signed by them, but not by the city. However, the contract as drafted names the city of Lincoln Park and Wallace & Richardson as parties of the first part; and attached to the contract are specifications in which the city is referred to as the "first party." The trial judge held that because the city had received the benefits of this sewer construction, and during the course of construction assumed and acted as though it were a party to the contract, as well as since the construction, that the city is estopped from denying liability.

The city did not specifically deny by its plea or by its notice of special defenses that it was a party to the contract. On the contrary, in defendants' notice of special defenses, it is alleged:

"Said defendants will show * * * that on the 12th day of August, 1926, the said plaintiff entered into a certain written contract with said defendants, a copy of which is attached hereto."

The bond accepted incident to the construction of this sewer ran to the city of Lincoln Park, as well as to the defendants Wallace & Richardson. Unquestionably Mr. Pate, who as engineer supervised and controlled this sewer construction, represented both the city and Wallace & Richardson; and when the question arose of changing from segment block to the use of concrete pipe, Mr. Pate testified: "I told him (plaintiff's president) I would take the matter up with the committee;" and that he did so. Even after plaintiff had discontinued work on this sewer and on August 1, 1927, the city council unanimously passed a resolution notifying plaintiff and its surety:

"To start work on the repairing and completion of sewers * * * covered by the contract in which the city of Lincoln Park and Wallace & Richardson are parties of the first part."

The city owns the sewer constructed under this contract, it has used it, had it repaired and seems to have taken it fully under city control. Defendants' witness, city engineer Pate, on direct examination, testified that the sewer here in suit "completed a sanitary trunk line system of Lincoln Park." The city under its charter had power to contract for the construction of sewers, and even though this power was irregularly exercised it is nonetheless obligated. The city's contention that it

cannot be estopped from disavowing liability on the ground that the contract was not consummated in accordance with the charter provision is without merit.

"Where the power exists in a municipal corporation to bind itself, where the contract is *intra vires*, it will be bound even though it may have proceeded irregularly and in disregard of directory provisions as to the exercise of its power." *Commercial State Bank of Shepherd* v. *School District* (syllabus), 225 Mich. 656.

"A municipality cannot retain the benefits of a contract which has been fully performed by the other party, and which is neither *malum prohibitum* nor *malum in se*, and at the same time deny the validity of the contract because of defects in the manner of its execution." *Coit* v. *City of Grand Rapids* (syllabus), 115 Mich. 493.

See, also, *Carey* v. *City of East Saginaw*, 79 Mich. 73.

The circuit judge was right in holding that the city will not now be heard to disavow liability under the contract, or at least liability under the common counts in plaintiff's declaration, if any such liability is established by the proofs in the case.

Before stating or considering the various grounds of plaintiff's appeal, it will be helpful to note certain important provisions of the contract. Plaintiff agreed to furnish all the materials, tools, and labor necessary to complete on or before November 15, 1926, in every detail the construction of this sewer "to the satisfaction and acceptance of the party of the first part by its engineer, Edwin H. Pate, all according to plans and specifications." The contract further provides:

"It is expressly understood and agreed that the entire work shall be done in a thorough, workman-

like manner under the direction of the engineer. All loss or damage arising out of the nature of the work or any detention or other unforeseen obstruction or difficulties which may be encountered in the prosecution of the work or from any action of the elements shall be borne by the contractor. * * *

"Any unsatisfactory work that may be discovered before the work is finally completed and accepted shall be corrected by the second party. * * * Any inspection or passing by an inspector does not relieve the contractor from any obligation in this respect.

"No claim for extra work shall be allowed, made or entertained unless such work shall have been ordered in writing by the engineer.

"Said first party or its engineer shall have the right to make any alterations in extent, dimensions, form or plans of work, either before or after commencement of the work. If such alterations diminish the quantity of the work, the price will be diminished proportionately and if the work is increased, the price will be increased proportionately. * * *

"Any doubt as to the meaning of this contract, specifications or drawings shall be interpreted by the engineer, who shall have the right to correct any error or omission necessary to the fulfillment of their evident intention.

"And, it is further understood and agreed that the first party, its engineer or authorized agent, shall have the right to suspend the operation of this contract and to annul the same whenever the second party shall fail to prosecute the work with satisfactory progress or to comply with all and singular the terms and stipulations as herein set forth."

The specifications attached to the contract contain the following:

"*Trenching:* The trench for the sewer shall be dug so as to conform to the grades and lines given

by the engineer. The bottom of the trench shall be cut so as to fit the outside of the sewer up to the point where the arch begins in solid ground, but in quicksand or treacherous ground, the trench shall be excavated to such a depth below the grade line and width along the sides of the sewer as the engineer may direct, and the portion so excavated shall be filled up to the grade line and along the sides of the sewer with broken stone or concrete, as the engineer may direct. * * *

"In case the ground is deemed unfit for foundation by the engineer, a six-inch concrete foundation or other suitable foundation shall be placed under and, if necessary, around the sewer as may be directed by the engineer. * * *

"*Segment block sewer:* Where sewers are constructed of this material they shall * * * be laid and shall conform to the maker's specifications. Where deemed necessary by the engineer, a covering of concrete shall be placed around the sewer. * * *

"The decision of the engineer on all matters connected with the various works shall be final and conclusive whether as to the measurement of the work, quantity and quality and other matters and things which may be in dispute. * * *

"The payment of these estimates, however, does not imply that any portion of the work is accepted. * * *

"Bidders are invited to examine the plans to make their own estimates of the quantities of the work to be done, also to examine the location of the works and judge for themselves of all circumstances affecting the cost of the work and the time required for its completion."

In the course of the performance of plaintiff's contract rainy weather seriously interfered with the work due to the fact that the yellow clay soil with a substrata of plastic blue clay rendered construc-

tion precarious after excessive rainfall. At first plaintiff was able to use a trench machine which made a narrow excavation with straight sides. Later conditions necessitated the use of a pull-shovel which excavated a somewhat wider trench. Between November 11th and December 7th conditions encountered were such because of rainy weather and the clay soil that a dragline machine which excavated a V-shaped cut was used. About 810 feet of sewer was laid in this manner. The type of sewer installed was the so-called egg-shaped, constructed in segments composed of cement blocks. Before formal acceptance of the completed sewer certain portions collapsed. On three occasions plaintiff repaired the collapsed portions; but refused to make further repairs. Each collapse occurred in the section where the drag-line machine was used and where the cement blocks were laid by experts sent to the job by the manufacturer of the blocks.

Plaintiff claims that the collapse of the different portions of its sewer was not the result of its being improperly installed, as defendants assert; but, instead, that it was due to the use of an improper type and design of sewer unsuited for use under existing conditions, and to defects in the plans and specifications and in the method of construction required by defendants' engineer. On this phase of the case plaintiff says an issue of fact for the jury was presented, and that the trial court erred in holding as a matter of law that the collapse of the sewer was due to poor workmanship, or at least to conditions and circumstances which under the terms of the contract rendered plaintiff responsible for the loss. In this connection plaintiff asserts that by the contract defendants specified the design and type of the

sewer to be constructed. The portion involved in this suit was to be egg-shaped and constructed of 30-inch segment blocks. Plaintiff's position is that since defendants designated in the contract the type and design of the sewer, they thereby warranted the type and design as being adequate and suitable for the proposed use under the existing conditions, and if (as plaintiff claims and some testimony tends to show) the collapse of the sewer resulted "from the design, type and specifications" of the sewer, then the loss must be borne by defendants. Plaintiff cites and relies upon: *United States* v. *Spearin,* 248 U. S. 132 (39 Sup. Ct. 59); *Bush* v. *Jones,* 75 C. C. A. 582, 144 Fed. 942 (6 L. R. A. [N. S.] 774); *MacKnight Flintic Stone Co.* v. *Mayor, etc., of New York,* 160 N. Y. 72 (54 N. E. 661); *Filbert* v. *Philadelphia,* 181 Pa. 530 (37 Atl. 545); *Bentley* v. *State,* 73 Wis. 416 (41 N. W. 338); *Passaic Valley Sewerage Com'rs* v. *Tierney* (C. C. A.), 1 Fed. (2d) 304; *Schliess* v. *City of Grand Rapids,* 131 Mich. 52; *Porath* v. *Village of Highland Park,* 211 Mich. 475; *Friederick* v. *Redwood County,* 153 Minn. 450 (190 N. W. 801); and other like decisions. If plaintiff is right as to the facts, we think it is right as to the law.

The record discloses other controverted issues of fact that are material. Defendants' claim that the unfavorable weather and soil conditions were encountered because of plaintiff's negligent delay in prosecuting the work, and that it is admitted the type of sewer specified is proper for installation under favorable conditions, and in fact that it can be used under the conditions here encountered if the sewer is properly constructed. On the other hand, plaintiff asserts as a fact that the delay was caused by the order of defendants' agent to suspend work

due to the unfavorable conditions and the danger of collapse of the sewer; and that later plaintiff was ordered by defendants' engineer to proceed with the work as per contract notwithstanding plaintiff wanted to await more favorable conditions and proposed to substitute concrete tubes in the place of the segment block construction. Here another material controverted issue of fact arises from defendants' claim that the engineer did not unqualifiedly direct plaintiff to proceed with the work or require plaintiff to continue to use segment blocks, but, instead, that the engineer referred the matter to "the committee," and while it was being considered, plaintiff decided it was to its financial advantage to proceed with segment block construction. As to its being possible to construct the segment block sewer under existing unfavorable conditions, Mr. Kinnear testified:

"*Q.* Is it a dry weather operation to lay segment block?

"*A.* Yes, sir.

"*Q.* Is it possibly conceivable to lay it in wet weather, with water dripping down on the joints?

"*A.* No; the water has a chance to wash it out and undermine it in any way."

To the contrary, one of defendants' witnesses, Mr. Delano, testified that a satisfactory sewer could be constructed of segment blocks "laid in this kind of soil, under similar weather conditions. * * * As good a sewer * * * as a pipe sewer."

There was conflicting testimony on each of these phases of the case. Thus it appears that material issues of fact were presented bearing upon the question as to whether the collapse of the sewer was due to faulty design or improper plans and specifications for which defendants were responsible, or to im-

proper installation or poor workmanship which rendered plaintiff responsible. We think the circuit judge was in error in directing a verdict, which, in effect, was a holding of law that the plaintiff was chargeable with the loss.

Since there must be retrial, we may add that under this record, especially in view of the express terms of the contract, the trial court correctly refused to submit to the jury as an issue of fact whether the city had accepted the work done by plaintiff and was thereby foreclosed from questioning performance of the contract in accordance with its terms, or that the city waived the provision of the contract that there should be no claim for extras unless ordered in writing by the engineer. Nor do we think there is merit in plaintiff's claim that since cement tubing instead of cement blocks was used in repairing the sewer, notwithstanding the right may be otherwise established, the defendants cannot be allowed the cost of such repairs as a set-off to plaintiff's claim on the ground that the method of construction in making the repairs was not that specified in the contract. The undisputed testimony is that the cost of repair would have been much greater with segment block construction than with the use of concrete sewer pipes.

It is not probable that other questions presented on this appeal will arise incident to retrial. The judgment entered in the circuit court is reversed, and a new trial ordered. Costs of this court to plaintiff.

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

DIAMANT v. KEANE, HIGBIE & CO.

1. BILLS AND NOTES—LIABILITY OF INDORSER TO MAKER FOR LOSS. Stock brokerage firm named as payee in check which it indorsed and passed on to another brokerage firm through latter's misrepresentation is liable to maker for loss sustained, although it never received any of money, never had unconditional possession of check, and maker was stranger to it (2 Comp. Laws 1929, § 9314).

2. SAME—INDORSER MAY NOT DENY DELIVERY TO HIM. Payee who receives and indorses check and thereafter passes it to another may not be heard to say that check was not delivered to him (2 Comp. Laws 1929, § 9314).

Appeal from Wayne; Webster (Clyde I.), J. Submitted June 10, 1932. (Docket No. 72, Calendar No. 36,374.) Decided October 3, 1932.

Assumpsit by Nicholas S. Diamant against Keane, Higbie & Company, a Michigan corporation, as indorser of plaintiff's check. Judgment for defendant. Plaintiff appeals. Reversed, and judgment ordered entered for plaintiff.

*G. Leslie Field* and *E. Reed Hunt* (*John M. Chase,* of counsel), for plaintiff.

*Carey, Armstrong, Weadock & Essery* (*J. Thomas Smith,* of counsel), for defendant.

NORTH, J. The single question of law presented for determination in this case is:

"Is the payee of a check liable to the maker thereof, who is a stranger to him, when the payee,

without communicating with the maker and without authority from him, indorses the check to a third person who procures the indorsement by misrepresentation and cashes the check?''

Plaintiff purchased on margin through one Thomas J. Leach, 100 shares of stock of the Riverside Forge Company at a total cost of $3,540 including commission. Leach was a salesman of Richman Phipps & Company. The company confirmed the purchase. Thereafter Leach informed plaintiff that he would be required to pay $1,100 for carrying this stock on margin. Plaintiff claims he had some doubt of either the integrity or the financial responsibility of Richman Phipps & Company, and in consequence thereof he arranged through Leach to have the account incident to this stock transaction carried by another brokerage firm, Keane, Higbie & Company, defendant herein. Without communicating in any way with defendant, plaintiff made his check for $1,100 payable to defendant and delivered it to Leach with instructions to turn the check over to defendant so that plaintiff's account could be carried by defendant on margin. It is a fair inference from the record that Leach failed to follow plaintiff's instructions, and instead delivered the check to Mr. Richman Phipps. The latter presented the check to Mr. McNabb, secretary and treasurer of Keane, Higbie & Company, and requested the indorsement of the check by the payee. Richman Phipps at that time falsely represented to Mr. McNabb that plaintiff had inadvertently made the check payable to Keane, Higbie & Company instead of to Richman Phipps & Company. The confirmation of this sale of stock by the latter company was shown to Mr. McNabb. An attempt was made by Mr. McNabb to call plaintiff on the telephone to

verify the story of Mr. Richman Phipps. Unfortunately it developed that plaintiff was out of the city and Mr. McNabb did not get into communication with him. Observing that the check was certified, and evidently believing the facts to be as stated by Richman Phipps, the check was indorsed without recourse by the defendant. It was cashed by Richman Phipps & Company, which shortly thereafter became a bankrupt. Upon being advised of the indorsement of his check by defendant, plaintiff demanded payment, and later brought this suit. The declaration contains a special count in assumpsit and also the common counts. After hearing the case without a jury, the circuit judge entered judgment for defendant, and plaintiff has appealed.

The circuit judge based his finding for defendant upon his determination that plaintiff's negligence was the proximate cause of the loss for which he seeks to recover. We quote the circuit judge's finding in part:

"He (plaintiff) gave this check to a man that he mistrusted and only purchased the stock to get rid of him. While all of those things could happen and still the defendant be liable under these cases (*Sims* v. *U. S. Trust Co.*, 103 N. Y. 472 [9 N. E. 605]; *Bristol Knife Co.* v. *First National Bank*, 41 Conn. 421 [19 Am. Rep. 517]; *Bowles Co.* v. *Clark*, 59 Wash. 336 [109 Pac. 812, 31 L. R. A. (N. S.) 613]), I think that this case at bar should be decided by the facts that took place after the check was given and after it was signed by the defendant, and I believe that that is the test. * * * Now, when it comes to the defendant, he has an obligation to the maker notwithstanding that he has had no contractual relations with him whatsoever and is a perfect stranger; just the same when he puts his signature on the back of the check and thus makes it possible

for the check to be cashed, I think beyond all question he is liable. But the other legal proposition I think comes in there, and it must be the proximate cause or direct cause, his act must be the act which causes the loss, and if the plaintiff's conduct is such that he either is doing something or failing to do something, in either event is the real cause of the loss, notwithstanding the indorsement, then I think under those circumstances that the defendant is not liable. * * * The plaintiff then (after issuing the check) sits still and does nothing, does not inquire whether the check was deposited, does not make any offer to follow it up for a period of one month. For almost one month, there was no loss, there was no damage to the plaintiff, because any time during that period the plaintiff could have gone down and paid the balance and received his stock, could have gone down and found out that the check was not deposited with Keane, Higbie but was deposited with the other concern, could have changed his mind, closed his account and received his money less only what was the difference between the value of the stock at the time he purchased it, whenever he closed his account. *The loss really comes about because of his* (plaintiff's) *failure to do anything after the check was indorsed.*"

While the effort of the circuit judge to shape the law to the equities of the case as he viewed them may be commendable, we cannot overlook the importance of an established principle of the law of negotiable instruments, or depart from principles which make for safety in the field of commercial activity. Surely there was nothing unusual in plaintiff's making his check payable to the broker with whom he wished to carry the account, nor was plaintiff negligent in placing this check in the hands of the stock salesman with directions to deliver it to the defendant broker. We cannot agree with the

circuit judge in holding that one who so uses his check must within a reasonable time resort to some follow-up investigation for the purpose of ascertaining if there may not have been a misappropriation of the proceeds of the check. It would be an undue hardship to impose such a rule of law upon the users of commercial paper in the business world. The following cases hold that when the payee indorses and delivers the check to a third party such payee must account for the proceeds, at least to the extent that the one who signs the check is damaged thereby. *Sims* v. *U. S. Trust Co.,* 103 N. Y. 472 (9 N. E. 605); *Bristol Knife Co.* v. *First National Bank,* 41 Conn. 421 (19 Am. Rep. 517); *Bowles Co.* v. *Clark,* 59 Wash. 336 (109 Pac. 812, 31 L. R. A. [N. S.] 613). In the last case it is said, quoting syllabus:

"The payee of a check drawn by a stranger to him is not a purchaser of the check nor a holder in due course, and if he receives it he is bound to account to the drawer upon demand."

Defendant stresses the claim that it did not receive any of plaintiff's money and in fact never had unconditional possession of plaintiff's check. But we think defendant's indorsement, which not only enabled another to cash plaintiff's check but was placed thereon for that express purpose, renders it liable the same as though defendant had obtained the proceeds of the check. This phase of the case is not unlike that in *Earle* v. *Whiting,* 196 Mass. 371 (82 N. E. 32).

"While the general rule is that this action (for money had and received) lies only where money has been received by defendant, the action may nevertheless be sustained where no money has actually

passed, but something has been received as money." 41 C. J. p. 31. See, also, 2 R. C. L. p. 782.

A payee who receives and indorses a check and thereafter passes it to another cannot be heard to say that the check was not delivered to him. The negotiable instruments law of Michigan provides:

"Every person negotiating an instrument by delivery or by a qualified indorsement warrants:

"Second, That he has a good title to it;

"Fourth, That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless." 2 Comp. Laws 1929, § 9314.

Stripped of all details, this record discloses that by indorsing plaintiff's check defendant enabled Richman Phipps & Co. to obtain without right plaintiff's money; and plaintiff may therefore look to defendant for the loss sustained. Notwithstanding defendant's contention to the contrary, we think the amount of plaintiff's loss or damage is clearly established as being the amount of the check and accrued interest from the date of indorsement. Because security incident to the use of commercial paper requires adherence to the rule of the cases first above cited, we are constrained to reverse the judgment entered in the circuit court. It is so ordered, and the case remanded with instruction to enter judgment in accordance herewith. Plaintiff will have costs of both courts.

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

## WHITE *v.* CITY OF GRAND RAPIDS.

1. MUNICIPAL CORPORATIONS—GRAND RAPIDS CHARTER—AUTHORITY OF CITY COMMISSION TO LEASE ELECTRIC LIGHTING PLANT.

   Grand Rapids city commission has power to contract to lease its electric lighting plant to private corporation for period of three years, with option of renewal for like period or to sell to lessee if electors so determine, notwithstanding neither authority to consummate contract nor ratification thereof was obtained by vote of electors (1 Comp. Laws 1929, § 2235; Grand Rapids Charter, tit. 8, § 27).

2. SAME—LEASE NOT FRANCHISE.

   Contract by which Grand Rapids city commission agreed to lease its electric lighting plant to private corporation for period of three years, with option of renewal for like period or to sell to lessee if electors so determine, is not grant in nature of franchise requiring its submission to vote of electors, but is contract in nature of lease, and such rights as lessee may exercise in streets or public places are merely incident to exercise of its right as lessee (Const., art. 8, §§ 20, 25; Grand Rapids Charter, tit. 8, § 1).

3. SAME—DISTINCTION BETWEEN LEASE AND FRANCHISE.

   There is distinction between lease and franchise; lease being contract for possession and profits of property in consideration of rent, and franchise being special privilege granted by government.

4. SAME—FRAUD—SUFFICIENCY OF PROOF.

   Claim that contract in nature of lease of electric lighting plant executed by Grand Rapids city commission to private corporation perpetrates fraud upon said city and its taxpayers, *held,* not sustained by proofs.

5. SAME—EXERCISE OF DISCRETION BY CITY OFFICIALS NOT REVIEWABLE.

   Exercise of discretion vested in city officials, acting within scope of their power, is not reviewable by courts.

6. SAME—LEASE OF ELECTRIC LIGHTING PLANT NOT REVIEWABLE.
Contract executed by Grand Rapids city commission, leasing to private corporation city's electric lighting plant, which was within power of commission to make, is not reviewable by court, whether bargain thus made was good or bad.

Appeal from Superior Court of Grand Rapids; Verdier (Leonard D.), J. Submitted June 22, 1932. (Docket No. 38, Calendar No. 36,490.) Decided October 3, 1932.

Bill by James H. White and others against City of Grand Rapids, a municipal corporation, to declare void a lease of the municipal electric lighting plant. Bill dismissed. Plaintiffs appeal. Affirmed.

*Wicks, Fuller & Starr,* for plaintiffs.

*Dale Souter* and *Robert S. Tubbs,* for defendant city and others.

*Travis, Merrick, Johnson & McCobb,* for defendant Consumers Power Company.

NORTH, J. From 1897 to 1931 the city of Grand Rapids owned and operated a municipal electric lighting plant. The question arose as to whether the city could not secure the electricity needed by it from the Consumers Power Company at a less cost than it was being produced by the municipality. After some investigation the city acting through its commission entered into a contract with the power company, which contract is designated exhibit 1 in this record. The main provisions in this contract are thus outlined in the opinion of the trial judge:

"This contract provides that the city lease its plant for a term of three years from and after

June 1, 1931, at an annual rental of $86,409 per year, payable semi-annually. The rental is made up of interest and 4 per cent. depreciation on the value of the property, $900,000, and the amount of taxes which the company would be required to pay if it, instead of the city, owned the property. The right is reserved to the city to renew the lease at the end of the three years and for additional three-year periods, not exceeding seven in number. The contract also contains an agreement that the company will purchase the plant at $900,000 less an amount equal to 4 per cent. per annum for the period during which the lease and any renewals thereof have been in effect, at any time the city may desire to sell and when a sale has been approved by the electors as required by law. At the time the contract was made much of the city's lighting system being inadequate, obsolete and inefficient, the company was obligated to make certain replacements, renewals and additions at its own expense, and to do the same during the continuation of the lease, but only to the extent necessary to maintain the property in first-class operating condition; with the safeguard that no unusual or extraordinary replacements or renewals should be made without specific authorization by the city. All property replaced or renewed is required to be turned over to the city for its disposal; replacements and renewals made and paid for by the company, to be the property of the company, but to be purchased by the city at the termination of the contract at cost less 4 per cent. depreciation per annum for the time it has been in service, in case sale of the plant to the company is not made. The rates to be paid the company for street lighting service are the standard rates for such service on file with the Michigan public utilities commission with the proviso that the city shall have the advantage of any lower rates that during the term of the contract may be filed with and approved by said commission."

Plaintiffs filed this bill of complaint for the purpose of restraining the city and the power company from carrying out the terms of this contract. The relief sought was denied in the superior court of Grand Rapids, and plaintiffs have appealed.

We think it clear that so far as the city has undertaken to bind itself by exhibit 1, it is nothing more than a three-year lease of its municipal lighting plant, with the optional right of renewal for successive periods of three years each and the further option (if the electors of the city decide so to do) of selling the municipal plant to the defendant power company on terms expressed in the contract. As stated by the trial judge:

"It is the specified intent of this contract merely to lease for a trial period so that there may be an actual demonstration of the advisability of a sale."

The first question presented is the right or power of the city to lease its plant. The Grand Rapids city charter was framed under the Michigan home-rule act (1 Comp. Laws 1929, § 2228 *et seq.*), which authorized embodying in city charters the provision:

"For the maintenance, development, operation, *leasing* and disposal of its property subject to any restrictions placed thereupon by law." 1 Comp. Laws 1929, § 2235.

And title 8, § 27, of the city charter reads:

"The city of Grand Rapids shall have and it is hereby given the right and power to acquire, construct, own, operate and maintain * * * waterworks, electric light works, * * * and, to maintain and operate the same or *to lease* the same or any part thereof, to other corporations, or individuals for the purpose of maintenance and operation."

But appellants assert that this power is vested in the electors, not in the city commission. The claim is that since the policy of municipal ownership and operation was initiated by direct action of the electors such policy cannot be changed or abandoned except by like action of the electors. We fail to find from this record that there has been direct action by the electors as to a municipal electric plant except the 1897 ratification of a $125,000 bond issue for the "purpose of purchasing or constructing and operating and maintaining an electric or other lighting plant, for the purpose of supplying the city of Grand Rapids with proper lights." Appellees are not contending that the municipal plant could be sold without approval of the electors; but they urge, and we think correctly, that the provision in this contract for an initial lease of three years and optional power in the city to renew for like periods and the further option to sell at a price specified, if the electors so determine, is not a violation of or inconsistent with the 1897 plan adopted for ownership, operation, and maintenance of a municipal electric plant. Under this contract the city surely continues to own its electric plant. And through its lessee, it also continues to operate and maintain it. The change effected is that the city has now contracted (as its charter provides it may) with the power company to operate the plant for the city and keep it in repair, instead of contracting with or employing individuals to do so. That the city retains at least a large measure of control, notwithstanding its contract with the power company, is clearly indicated by the following provision of exhibit 1:

"It is understood and agreed by the parties hereto that the company shall not make any unnecessary

replacements and renewals to said property, but that only such replacements and renewals shall be made, from time to time, as are required to maintain the property in first-class operating condition and as are essential for the furnishing of proper, adequate and efficient service. If the company deems it advisable to make any unusual or extraordinary replacements or renewals, at any time, the same must be specifically authorized by the city."

We fail to find such a departure from a policy of municipal ownership, adopted by the electors, even if its approval of the 1897 bond issue is so construed, as renders the contract, exhibit 1, invalid or beyond the power of the city commission to consummate, notwithstanding neither authority to consummate the contract nor ratification thereof was obtained by a vote of the electors. This holding is also justified by the record, from which it clearly appears that by the method adopted the city commission is making a good-faith effort to ascertain whether it will be more economical to purchase electric current from the power company or to continue to operate its plant as in former years. In this particular the instant case is clearly distinguishable from *George* v. *Wyandotte Electric Light Co.*, 105 Mich. 1.

Appellants further claim that under this contract the power company is in effect operating under a right of franchise in violation of law because the company's right to so operate has not been submitted to a vote of the electors as required by constitutional (Michigan Constitution, article 8, §§ 20, 25) and charter provisions (title 8, § 1). In this connection, the power company, which for years prior to the consummation of exhibit 1 had been furnishing electric light and power to private con-

sumers in Grand Rapids, claims that it has a general franchise covering its operations in that city. Testimony was given to that effect and the record seems to contain no evidence contravening this claim. Also see *City of Grand Rapids* v. *Consumers Power Co.*, 218 Mich. 414. But entirely aside from the above considerations, we are of the opinion that the fair and reasonable construction of exhibit 1 is that at most it is only a contract in the nature of a lease under which the Consumers Power Company is to operate the city's electric light plant for a period of three years, with optional provisions to the city to continue such operation for successive periods of three years each, and with a further option for the sale of the plant to the Consumers Power Company if the Grand Rapids electors so determine. Under exhibit 1 the power company acquired no vested rights except those of a lessee for the first three-year term. If it extends the scope of the present municipal plant, the city has the option of taking over such additions, extensions, improvements, or replacements at cost less depreciation. Such rights as the power company may exercise in the streets or public places in the city or such local business as it may transact therein are merely incidents to the exercise of its rights as lessee under exhibit 1.

"There is a distinction between a lease and a franchise, a lease being a contract for the possession and profits of property in consideration of a rent, and a franchise being a special privilege, granted by the government." 26 C. J. p. 1018.

See, also, *City of New York* v. *Interborough Rapid Transit Co.*, 53 Misc. Rep. 126 (104 N. Y. Supp. 157); *City of Des Moines* v. *Welsbach Street Lighting Co.*, 110 C. C. A. 540 (188 Fed. 906); *Northern*

*States Power Co.* v. *City of Granite Falls,* 186 Minn. 209 (242 N. W. 714).

While one can readily conceive of a bad-faith attempt being made by this or a similar method to evade the requirements of the law relative to securing a franchise, we are not here concerned with such an issue, because, as hereinafter noted, such a claim is not sustained by this record. Our conclusion is that consummation of the contract, exhibit 1, did not amount to granting a franchise to the power company and that it was not necessary that a franchise should be granted to it to enable it to operate as a lessee under this contract.

Appellants have also stressed the claim that this contract, exhibit 1, operates as and perpetrates a fraud upon the city of Grand Rapids and upon its taxpayers and electors. Again careful consideration of this record convinces us that appellants' claim along this line is without merit. In disposing of this phase of the case we content ourselves with quoting with approval the following from the opinion of the trial judge:

"We come now to the final claim: that this contract operates as a fraud upon the taxpayers of the city. Plaintiffs assert more than they prove, that the city commission was duped into agreeing to pay the power company for light furnished the standard street lighting rates on file with the Michigan public utilities commission, that said standard rates are based on the theory that the utility permitted to use them is, itself, the owner of the plant, and that the rate structure, therefore, includes interest on invested capital, depreciation, taxes and profits as well as cost of current and distribution; that consequently such rates are exorbitant when applied to this situation where the company has no invested capital in and no ownership of the plant.

"Plaintiffs forget that the rental charged by the city is made up of a charge for interest on the value of the plant (invested capital), depreciation and taxes which the company would be required to pay if it owned the property. Plaintiffs also overlook the clause in the contract which grants to the city any advantage of any lowering of rates that may be approved by the Michigan public utilities commission. But the main thing plaintiffs forget is the principle of law so often approved by our Supreme Court, that the discretion vested in city officials is not subject to review by the courts. If they transcend their power, the courts may interfere. But if, acting within the scope of their power, they make mistakes, it is not the business of a court to amend or correct their errors.

"It is my conclusion that the city commission had the power to make this contract. Whether they made a good bargain, or a bad one, is none of the court's business. But if the careful estimates of comparative costs between municipal operation and private operation are even approximately correct, it is probable that the contract is quite advantageous to the city."

The decree entered in the trial court is affirmed, with costs to appellees.

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

DAVY FUEL & SUPPLY CO. *v.* S. R. RATCLIFFE PLASTERING CO.

1. MUNICIPAL CORPORATIONS—CONTRACTOR'S STATUTORY BOND—CONSTRUCTION OF STATUTE.
   In construing statute providing for protection of subcontractors, their laborers, and materialmen under statutory bond of contractor erecting public building, language should be read in harmony with history and purport of act and in connection with context (3 Comp. Laws 1929, § 13133).

2. SAME—RIGHTS OF SUBCONTRACTOR'S LABORERS AND MATERIALMEN.
   Statutory rights of subcontractor's laborers and materialmen under contractor's statutory bond, *held*, not decreased by change in statute extending protection of said bond to subcontractors, but limitation is placed upon recovery of subcontractor, with special reference to his rights acquired by subrogation (3 Comp. Laws 1929, § 13133).

3. SAME—STATUTORY BOND LAW AND LIEN LAW DIFFERENT.
   Statute providing for protection of subcontractors, their laborers, and materialmen under contractor's statutory bond is not lien law, but rights under respective acts and procedure to establish and enforce them are essentially different.

4. SAME—RIGHTS OF SUBCONTRACTOR'S LABORERS AND MATERIALMEN.
   Unpaid laborers and materialmen of subcontractor on public buildings are entitled to full benefit of contractor's statutory bond, although subcontract price may be exceeded thereby (3 Comp. Laws 1929, § 13133).

Appeal from Wayne; Houghton (Samuel G.), J., presiding. Submitted June 14, 1932. (Docket No. 138, Calendar No. 36,617.) Decided October 3, 1932.

Assumpsit by Davy Fuel & Supply Company, a Michigan corporation, against S. R. Ratcliffe Plas-

tering Company, a Michigan corporation, and others for materials used in the construction of a public building. Summary judgment for plaintiff. Defendants appeal. Affirmed.

*Wilkinson, Lowther & O'Connell,* for plaintiff.

*Bryant, Lincoln, Miller & Bevan,* for defendants.

FEAD, J. Plaintiff furnished materials to S. R. Ratcliffe Plastering Company, subcontractor, for use in constructing a building for the city of Detroit. The suit is to recover for the materials and was brought against the subcontractor, the principal contractor, and surety on the contractor's bond for construction of a public building. 3 Comp. Laws 1929, § 13132 *et seq.* Plaintiff had summary judgment.

Defendant contractor, Bryant & Detwiler Company, claims it lawfully paid the subcontractor certain sums, expended money in completing the subcontract after the subcontractor had abandoned it, and owes only a small balance on the subcontract, which should be apportioned among several unpaid materialmen. Defendant's contention is that a subcontractor and his laborers and materialmen cannot recover on the bond more than the subcontract price, under section 2 of the act, quoted in essentials below with the language relied upon italicized.

Section 2 provides that the subcontractor shall serve upon the public board a written notice that he relies upon the security of the bond and—

"whenever this shall have been done, the said subcontractor shall be entitled, subject to the rights of the persons with whom he has contracted for labor, materials or supplies to the benefit of the security given by the principal contractor, and to be sub-

rogated to the liens of the persons who have performed labor or furnished materials or supplies for such building, repairs or ornamentation, whom he shall have actually paid, *but the subcontractor and the persons who shall have performed labor or furnished materials or supplies to him shall not in the aggregate be entitled to receive larger sums that (than) may be required from the principal contractor under his contract with the subcontractor,* nor shall this act be construed to change in any way the contract which may have been made between the principal contractor and the subcontractor, except when such contract shall attempt to relieve the principal contractor as against the demands of those performing labor or furnishing materials or supplies to the subcontractor."

Defendant's construction of the section would afford a contractor an opportunity, by connivance with irresponsible subcontractors at low prices, to defraud laborers and materialmen, and should not be adopted unless necessary. Of course, the usual rule of construction should be applied, that the language relied upon be read in harmony with the history and purport of the act and in connection with the context.

The original act, 3 Comp. Laws 1897, § 10743, did not protect subcontractors but did extend full benefit of the security to their laborers and materialmen. The essential change made in the enactment of the present law of 1905, 3 Comp. Laws 1915, § 14827 *et seq.,* was in extending protection of the bond to subcontractors and providing the machinery therefor. This was done by the enactment of a new section 2 to declare the rights of subcontractors and by a few necessary changes elsewhere. Otherwise the plan of the original law, in substantially the same language, was continued in the new act

and all the other provisions of the latter, the title, requirement for bond, conditions of the bond, and remedy for enforcement, can be read to no other purpose than that laborers and materialmen of subcontractors have full recourse to the security for their claims, regardless of the contract and state of accounts between contractor and subcontractor. Nor is there provision in the law for apportioning the security, if inadequate to pay claims in full, among laborers and materialmen of the subcontractor or of the contractor. The remedy is by suit at law on the bond, and recovery is individual. The nature of the change does not indicate an intention of the legislature to decrease the protection theretofore extended to the subcontractor's laborers and materialmen.

Amendments were made in 1925 and 1927, but they provide only for notice of claims by subcontractors and materialmen and have no effect upon the question at bar.

Analyzed in accordance with its purpose to extend the benefit of the security to the subcontractors, section 2 is not out of harmony with the rest of the act.

It first declares the subcontractor's right to the benefit of the bond but that it is subject to the rights of his laborers and materialmen. The statutory rights of the latter remain paramount to and are not to be affected by the privilege given the subcontractor. It next provides that he may be subrogated to the liens(?) of his laborers and materialmen whom he has paid. If the statute stopped there, it would afford ground for the construction that the subcontractor could collect a larger amount than his contract price in case he should pay such larger amount to laborers and materialmen and be subro-

gated to their rights. A limit upon the right of action of a subcontractor was necessary and it was established by the limitation in the remainder of the section, beginning with the qualifying word "but." Upon ordinary use of language, the immediately following qualifying clauses are not to be taken as statements of rights of persons generally but merely as limiting the rights granted in the preceding clause or clauses to which they are attached and which they qualify. So, the italicized language does not refer to or 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.

As often has been mentioned by the courts, there is an analogy between the act at bar and the mechanics' lien law. The analogy, however, is in their common purpose to furnish security to laborers and materialmen on buildings. It does not extend to their provisions. The act at bar is not a lien law. The rights under the respective acts and the procedure to establish and enforce them are essentially different. Each statute must be construed according to its terms. There is no warrant for adopting defendant's contention that the provisions of one law may be translated to the other, or that they must be construed to attain equality of result.

In our opinion, all unpaid laborers and materialmen of a subcontractor on public buildings are en-

titled to full benefit of the bond furnished by the principal contractor, although the subcontract price may be exceeded thereby.

Judgment affirmed, with costs.

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

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## HARTMAN *v.* EDWARDS.

1. TAXATION—WITHDRAWAL FROM SALE OF STATE TAX LANDS—STATUTES.

   Amendment to statute providing for withdrawal from sale of lands bid off to State for taxes after they had become five years delinquent is not automatic in operation, but requires affirmative action by auditor general to withdraw lands from sale (Act No. 155, Pub. Acts 1927).

2. SAME—WHEN STATE TAX LANDS SUBJECT TO PURCHASE—STATUTES.

   Auditor general has authority to accept applications to purchase lands bid off to State for taxes at any time before proceeding for examination for classifying them as State tax homestead lands were commenced; "pending" being construed as "during" (Act No. 155, Pub. Acts 1927).

3. SAME—STATE TAX HOMESTEAD LANDS—LIMITATION OF ACTIONS.

   Determination of auditor general and director of conservation that lands bid off to State for taxes are proper to be classified as State tax homestead lands is conclusive unless suit is brought within six months to set it aside, if precedent proceedings are not jurisdictionally defective (1 Comp. Laws 1929, §§ 3520, 3724).

4. SAME—STATUTES.

Effect of statute making determination that lands bid off to State for taxes are proper to be classified as State tax homestead lands conclusive unless suit is brought within six months to set it aside applies to indirect as well as direct attack upon determination (1 Comp. Laws 1929, §§ 3520, 3724).

5. SAME—STATUTES OF REPOSE.

Statutes making determination that lands should be classified as State tax homestead lands conclusive unless suit is brought within six months to set it aside are statutes of repose (1 Comp. Laws 1929, §§ 3520, 3724).

6. SAME—STATE TAX HOMESTEAD LANDS.

Where application to purchase State tax lands was canceled by auditor general, cancellation acquiesced in, and money returned, and record showed no other application to purchase at time determination was made classifying said lands as State tax homestead lands, there was jurisdiction to so determine.

7. SAME—EXPIRATION OF REDEMPTION PERIOD.

Lands are subject to State tax homestead law if period of redemption has expired on one or more sales (1 Comp. Laws 1929, § 3520 *et seq.;* Act No. 155, Pub. Acts 1927).

8. SAME—STATE TAX HOMESTEAD LANDS.

Error in report and deed that proceedings determining that lands conveyed were State tax homestead lands were taken under certain statute, and making no reference to amendment thereto, *held,* inconsequential, where amendment made no change in jurisdiction and proceedings, and determination and deed were made in accordance with law (1 Comp. Laws 1929, § 3520 *et seq.;* Act No. 155, Pub. Acts 1927).

Appeal from Houghton; Stone (John G.), J. Submitted June 22, 1932. (Docket No. 158, Calendar No. 36,493.) Decided October 3, 1932.

Bill by Gus T. Hartman against Richard M. Edwards and others to quiet title to real estate. Cross-bill by Richard M. Edwards and others

against Oramel B. Fuller, auditor general, and others to set aside deeds to and from State. Bill dismissed. Decree for cross-plaintiffs. Defendant auditor general and another appeal. Reversed, and cross-bill dismissed.

*Paul W. Voorhies,* Attorney General, and *Hugh E. Wilson,* Assistant Attorney General, for appellants.

*Myron J. Sherwood,* for appellees.

FEAD, J. Plaintiff Hartman filed bill to quiet title to city lots purchased by him from the State under the tax homestead law, 1 Comp. Laws 1929, § 3520 *et seq.* Cross-plaintiffs Edwards owned an interest in the original title, and, on the claim that the proceedings to convey the property by the auditor general to the State and by the department of conservation to plaintiff were without jurisdiction and void, filed cross-bill making the auditor general and director of conservation parties. The court entered decree dismissing plaintiff's bill, setting aside the deed from the auditor general to the State and the deed from the director of conservation to plaintiff, ordered the lands returned to the records of the auditor general as State tax lands and gave cross-plaintiffs leave to purchase. The State officers have appealed.

The premises were held by the State as State tax lands for the taxes of 1924 and 1925, as State bid for 1926, and as delinquent for 1927 and 1928. In October, 1929, cross-plaintiffs, through their agent, Van Orden, whose agency, however, was undisclosed, made application to purchase the lands and paid the auditor general the required amount of $2,600.73. The auditor general accepted the application, made

proper book entries of sale to Van Orden, and executed appropriate tax deed, receipts, and certificates. He did not deliver them because on December 5th the attorney general advised him that, under Act No. 155, Pub. Acts 1927, he had no authority to sell lands for taxes after they had become five years delinquent. He destroyed the instruments, canceled the book entries, and sent check for the purchase price to Van Orden on December 9th, stating that the lands "have been withdrawn from sale under the provisions of Act No. 155, Pub. Acts 1927." December 12th, Van Orden acknowledged receipt of the check, pointed out that it did not include an excess amount he had remitted, and asked correction of the check and early return to him. Correction was made, and the money accepted by Van Orden without protest.

Before withdrawal, proceedings had been begun to classify the lots as State tax homestead lands. November 25th the proper county clerk made certificate of no suit pending. November 26th an examiner made report of nonoccupancy. December 14th the auditor general made certificate that the lands were delinquent for taxes, as provided by statute, and that no application had been made to pay, purchase, or redeem. On the same day the auditor general and director of conservation made determination, "under the provisions of section 127 of Act No. 206, Pub. Acts 1893, as amended by Act No. 107, Pub. Acts 1899," and made the report provided by statute, including in it the statement, not expressly required by law, that no application had been made to pay the taxes or to purchase or redeem the lands. On the same day the auditor general deeded the lands to the State. The deed was recorded January 11, 1930. June 25, 1930, the depart-

ment of conservation deeded them to plaintiff, and the deed was recorded June 27th.

This suit was begun November 20, 1930, and the answer and cross-bill filed February 17, 1931.

Cross-plaintiffs contend the proceedings to determine and convey the premises as tax homestead lands were void because application to purchase had been made before the proceedings were commenced. The State claims that Act No. 155, Pub. Acts 1927, divested the auditor general of authority to accept an application to purchase after it appeared upon his records that the taxes were five years delinquent; and that, on such delinquency, the lands were automatically withdrawn from sale.

Act No. 155, which was given immediate effect, introduced into the law the language in controversy here:

"Said lands shall be withdrawn from sale by the auditor general pending such examination and the determination hereinafter referred to."

The amendment is fairly susceptible of the construction given it by the State. But there is a combination of considerations affecting it which, in our opinion, renders another construction more reasonable.

The State's construction is not made imperative by the language of the act. "Pending" may mean "during the time intervening before; awaiting; until;" or "during." 48 C. J. p. 782.

Prior to the amendment, application to purchase had been accepted at any stage of the tax homestead proceedings, before execution of the deed, and the proceedings then dismissed. It seems that if, overnight, the legislature intended to change this long-established law and practice so radically as the

State contends, it would have used language clearly evidencing such intention.

The State's construction generally, if not always, would result in financial loss to the State, through sale of homestead lands at less than the amount of delinquent taxes, as occurred at bar. It would deprive municipalities of taxes justly due them and the State of moneys raised for general expenses, to the benefit of special State departmental purposes. It would violate the spirit of the tax law, which is to levy and collect taxes, not to appropriate lands, the homestead provisions being merely last resort remedies to be applied when collection of taxes by sale or otherwise fails.

Moreover, appropriate changes were not made in the statute by Act No. 155 to provide proper administration of the amendment as construed by the State.

The amendment was not automatic in operation although mandatory in terms. It required affirmative action by the auditor general to withdraw lands from sale. But it did not provide the evidence upon which he could withdraw nor outline his procedure in possible situations.

In addition to delinquency, it must appear that no action is pending in circuit court to set aside the taxes or remove the tax cloud on the title in order to subject lands to the act. A record of the pendency of suits is not required to be kept by the auditor general. He must obtain information elsewhere from which "it shall appear that no action is pending." A certificate of the county clerk is made the evidence to support the final determination. The statute does not provide the evidence of "no action" upon which the auditor general shall act in making an order of withdrawal. Nor does it

purport to give him authority to decide the fact of whether an action is pending. Consequently there is no method provided by which, under the State's construction of the amendment, the auditor general, with assurance of legality, either could withdraw lands from sale or accept an application to purchase after the beginning of five years' delinquency.

In the ordinary course of departmental routine, it is inevitable that a considerable time must elapse, as to some lands, between the moment of five years' delinquency and the examination. The situation as to the essentials of tax homestead lands may change during the period between delinquency and examination, by occupancy or abandonment of lands, suits begun or dismissed, or applications to pay, purchase or redeem made, rejected or withdrawn, so that at times the lands may, and at other times may not, be subject to the act. It does not seem reasonable that the legislature intended to provide a period of abatement during which the State could not accept taxes by means of sale, even upon lands which then were not subject to conversion into homestead lands and which might never be.

These untoward results are avoided if the amendment be read in connection with the context and the policy of the tax law, without regard to what is said to have been the real, though unexpressed, intention of the legislature. The section provides both the essentials and the machinery for converting tax lands into State tax homestead lands. By requiring action of the auditor general to withdraw lands from sale and by its position in the procedural part of the section, the amendment is tied to the mechanics of the conversion and would naturally come into operation when the proceedings for conversion are begun by the ordering of examination. We think

"pending" should be construed as "during," and that the auditor general had authority to accept applications to purchase at any time before proceedings for examination were commenced.

Are cross-plaintiffs barred from recovery by the six months' statute of limitations contained in section 127 of the tax law, 1 Comp. Laws 1929, § 3520, and in section 3724?

Under section 127, the determination of the auditor general and director of conservation that lands are proper to be classified as State tax homestead lands is conclusive unless suit is brought within six months to set it aside, if the precedent proceedings are not jurisdictionally defective. *Downer* v. *Richardson,* 148 Mich. 596; *Griffin* v. *Kennedy,* 148 Mich. 583; *Jackson, etc., R. Co.* v. *Solomon Lumber Co.,* 146 Mich. 204; *Semer* v. *Auditor General,* 133 Mich. 569; *Beuthien* v. *Dillon,* 160 Mich. 396; *Price* v. *Stark,* 259 Mich. 407. The effect of the statute is not to be defeated by the form of action, but it applies to an indirect as well as a direct attack upon the determination. *Jackson, etc., R. Co.* v. *Solomon Lumber Co., supra.*

Under section 3724 it is held that a deed to the State, fair on its face, is conclusive of the title after six months, although it was executed by mistake and contrary to a finding that the premises were occupied (*Darrow* v. *Railway Co.,* 188 Mich. 664), and although nonoccupancy is a requisite to classification as tax homestead lands. *Meagher* v. *Dumas,* 143 Mich. 639.

These acts are statutes of repose and are to be so applied. In fact, because absolute title to the lands is vested in the State on State bid and expiration of the period of redemption (*Griffin* v. *Kennedy, supra*), section 127 provides a period for attacking the determination by way of grace rather than by

the divesting of right or title through lapse of time. *Downer* v. *Richardson, supra,* 602.

There is no claim that the tax proceedings are not valid. The questions at bar are confined strictly to the homestead proceedings.

The principal complaint made of the proceedings for determination is with respect of the application to purchase, the cancellation of which is claimed to have been unlawful. The statute makes the records of the auditor general the evidence of want of application, as a basis for the determination. At the time the determination was made, the application of cross-plaintiffs' agent had been canceled, the money returned, and, apparently, he had acquiesced in the withdrawal from sale. Consequently, the record showed no application to purchase at the time of determination and there was jurisdiction to proceed.

Had cross-plaintiffs or their agent then made claim that the record was incorrect and that the application to purchase was valid and in force, the auditor general and director of conservation, under their powers and duties to determine "what lands so examined come within the provisions of this section," could have passed upon the claim. Had the ruling been adverse to cross-plaintiffs, they would have been required to bring suit within six months to set aside the determination. By inaction, they can gain no greater rights than if they had asserted their claims seasonably. They cannot claim ignorance of reason for rejecting their application (if, indeed, that would aid them), because the auditor general notified their agent of the authority for his action.

Cross-plaintiffs further contend that there was no jurisdiction to make the determination because the period of redemption from the 1926 taxes had not

expired. The contention contended for would practically nullify the statute, because, if the State buys each year, there would always be an unexpired period of redemption. Upon the plain language and meaning of the statute the lands are subject to the act if the period of redemption has expired on one or more sales.

Complaint is made that the proceedings were recited in the report and deed to have been taken under section 127, Act No. 206, Pub. Acts 1893, as amended by Act No. 107, Pub. Acts 1899, no reference being made to Act No. 155, Pub. Acts 1927. The latter made no change in the jurisdiction or proceedings, and cross-plaintiffs were not injured by the oversight. The determination and the deed were made in accordance with law and the error was inconsequential.

Plaintiff has not appealed, the issue here being between cross-plaintiffs and the State. The decree will be reversed as to relief granted against the State, and cross-plaintiffs' cross-bill against the auditor general and director of conservation will be dismissed. Serious public questions being involved, no costs will be awarded.

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

## SLOAN *v.* CHARLEVOIX STATE SAVINGS BANK.

1. ACTION—MORAL OBLIGATION AFFORDS NO REMEDY AT LAW.
   Moral obligation alone affords no remedy at law.

2. CONTRACTS—BREACH OF COVENANT—MORAL OBLIGATION.
   Where bank sold insurance business because it was *ultra vires* for it to conduct it, and agreed to give moral support to continuance of said business, it was not actionable breach of said contract for bank's officers to engage in competing business.

3. SAME—COVENANT NOT TO RE-ENGAGE IN BUSINESS—BANKS AND BANKING.
   Sale of insurance business by bank and agreement not to re-engage in said business, without restraint upon and agreement thereto by its officers, did not preclude officers from conducting competing business.

Appeal from Charlevoix; Gilbert (Parm C.), J. Submitted June 17, 1932. (Docket No. 71, Calendar No. 36,151.) Decided October 3, 1932.

Assumpsit by Isabelle M. Sloan, doing business as Charlevoix Insurance Agency, as assignee, against Charlevoix State Savings Bank and others for breach of a contract not to re-engage in insurance business. Directed verdict and judgment for defendants. Plaintiff appeals. Affirmed.

*J. M. Harris* (*Howard L. Campbell,* of counsel), for plaintiff.

*Lisle Shanahan* (*Walter M. Nelson,* of counsel), for defendants.

WIEST, J. This is an action at law to recover damages, alleged to have been occasioned plaintiff

On moral obligation as consideration for an express promise, see annotation in 53 L. R. A. 353; 26 L. R. A. (N. S.) 520; 17 A. L. R. 1302; 25 A. L. R. 635.

by defendants engaging in a competing business contrary to contract. Plaintiff appeals from a directed verdict and judgment for defendants.

The Charlevoix Abstract & Engineering Company was a corporation, and, among its activities, it carried on the business of an insurance agency. November 10, 1921, it purchased from the Charlevoix State Savings Bank and Archie L. Livingston, agent and cashier, the good will and support of the agency owned by the bank, together with all records and business which was acquired from the Myrtie Young & Son agency, and the vendors agreed to give moral support to the continuance of the business.

October 6, 1921, the Charlevoix State Savings Bank, by bill of sale, acquired "All the good will and expirations of all the insurance companies represented by the Myrtie Young & Son, Inc." inclusive of an agreement by the vendors "to refrain from engaging in the insurance business in Charlevoix county for the period of 10 years from date of sale."

April 23, 1928, the Charlevoix Abstract & Engineering Company sold and assigned to plaintiff the insurance business purchased by it from the Charlevoix State Savings Bank and Archie L. Livingston, together with the good will acquired from the Charlevoix State Savings Bank and Archie L. Livingston, as transferred to it by bill of sale dated November 10, 1921. The writing further stated:

"And also, we further sell, assign and transfer to the said Isabelle M. Sloan for said consideration any claims or right of action at law or in chancery that may now exist in our favor for any defeasance or default or failure to perform the said agreement contained in said bill of sale and sold and conveyed to us by the said Charlevoix State Savings Bank and Archie L. Livingston by said bill of sale."

In the first count of the declaration plaintiff averred breach of the contract by defendants and assignment of right of action to her. The second count averred a consummated conspiracy by all of defendants to divert insurance business contrary to the contract. The third count was for money had and received.

By answer defendant bank set up that it was *ultra vires* for the bank to operate an insurance agency, and it only did so from October 6, 1921, when it acquired the Young agency, to November 10, 1921, when the bank sold the agency to the abstract company and that such sale was not a restraint upon individual officers or stockholders of the bank; that the restraint, in any event, not being limited as to time, became null and void after a period of three years.

Defendant Gerald W. Richardson, by answer, admitted that he had established an insurance agency, and, at his request, solicitors' licenses had been issued to Walter S. Richardson and Archie L. Livingston, as his agents. At the time of the sale by the bank to plaintiff's assignor, Gerald W. Richardson was a minor and not an officer of the bank, and since reaching full age he has not ratified the contract made by the bank. The answer also denied the charge of conspiracy.

The circuit judge was of the opinion that the contract between the bank and the abstract company did not restrain the bank officers or stockholders from operating an insurance agency.

Walter S. Richardson, as president and manager of the bank, negotiated the contract with the abstract company. The bank sold the insurance agency because it was *ultra vires* for the bank to engage

in such activity, and it did not re-engage in such business.

But plaintiff claims that officers of the bank are engaged in such business and are bound by the covenants of the bank, express or implied, in the sale by the bank to the abstract company. Reliance is also placed upon the covenant of the bank to accord the continuation of the business its moral support.

We will first consider the last point. Concede that the bank did not accord the business its moral support by reason of its officers being engaged in like business, can such breach be construed as in violation of contract duty? It was an unfortunate phrase to employ, for a moral obligation alone affords no remedy at law. In order to find an actionable breach of the contract in this respect we must first find a legal obligation. To warrant recovery of damages, under this theory, we would have to construe the promise of the vendors to accord continuance of the business their moral support a contract on the part of the bank and all of its officers to forever refrain from again engaging in a like business. To so hold would remake the contract and turn moral support, which might be no more than friendliness, into a legal obligation to refrain from like or similar business. The defendant bank is a legal entity. As such, when it sold the insurance agency to the abstract company, it was estopped from destroying what it transferred or depreciating what it sold. *Colton* v. *Duvall,* 254 Mich. 346. But the bank, as a legal entity, has not been guilty of violation of the covenant for it has not re-engaged in the insurance agency business.

This brings us to the question of whether the covenant of the bank restrained the bank officers from operating an insurance agency. Officers of the

bank are conducting or interested in a competing business. Sale of the business and good will by the bank, without restraint upon and agreed to by the officers thereof, did not preclude the officers from starting and conducting a competing business. *Hall Manfg. Co.* v. *Western Steel & Iron Works,* 142 C. C. A. 220 (227 Fed. 588, L. R. A. 1916C, 620).

Plaintiff made no case of breach of contract and established no conspiracy to evade the contract restraint. This renders it unnecessary to consider other questions presented by defendants.

The judgment is affirmed, with costs to defendants.

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

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WYMA *v.* VAN ANROOY.

1. MOTOR VEHICLES—GUEST PASSENGER ACT—NEGLIGENCE—WANTONNESS—WILFULNESS.

   Failure of automobile driver, in attempting to pass automobile going in same direction, to give due heed to oncoming automobile or to situation in which it would place him, may constitute negligence, but it is wanting in wilfulness or wantonness within meaning of guest passenger act (1 Comp. Laws 1929, § 4648).

2. SAME—FAILURE TO STOP AT SCENE OF ACCIDENT.

   As regards liability of automobile driver under guest passenger act, gross negligence or wilful and wanton misconduct must arise out of operation of car, and does not arise out of failure to stop at scene of accident, as required by statute (1 Comp. Laws 1929, §§ 4648, 4722).

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On liability of operator of automobile for injury to guest, see annotation in 20 A. L. R. 1014; 26 A. L. R. 1425; 40 A. L. R. 1338; 47 A. L. R. 327; 51 A. L. R. 581; 61 A. L. R. 1252; 65 A. L. R. 952.

Appeal from Allegan; Miles (Fred T.), J. Submitted June 8, 1932. (Docket No. 34, Calendar No. 36,540.) Decided October 3, 1932. Rehearing denied December 6, 1932.

Case by Mary Wyma, administratrix of the estate of George Wyma, deceased, against Abraham Van Anrooy for personal injuries resulting in death of plaintiff's decedent received while a passenger in defendant's automobile. Verdict and judgment for plaintiff. Defendant appeals. Reversed without a new trial.

*Diekema, Cross & Ten Cate,* for plaintiff.

*Mason, Alexander, McCaslin, Cholette & Mitts,* for defendant.

WIEST, J. The 4th day of December, 1930, plaintiff's decedent was a guest, riding in an automobile driven by defendant. Defendant, in an endeavor to pass an automobile going in the same direction, collided with an approaching automobile, and, in a collision with still another automobile, plaintiff's decedent received fatal injuries. This suit was brought under the guest act (1 Comp. Laws 1929, § 4648) to recover damages. Plaintiff claims that the accident was caused by the gross negligence and wilful and wanton misconduct of defendant. Plaintiff had verdict and judgment, and defendant prosecutes this review.

Plaintiff's decedent, defendant, and others were interested in having a State cemented highway pass their premises, and, at the time of the accident, were returning to their homes from a trip to Lansing, where they had interviewed the State highway commissioner. On this account defendant contends that plaintiff's decedent and himself were engaged in a joint venture or enterprise.

Plaintiff made no case under the guest act, and we need not determine whether mutual interest in securing a public improvement and efforts in behalf of private desire incident thereto constitute a joint adventure or enterprise.

The testimony most favorable to plaintiff's case shows that defendant, in attempting to pass the automobile ahead of him, did not give due heed to the oncoming automobile and the situation in which it would place him. This was misjudgment or, possibly, judgment so carelessly exercised as to constitute negligence, but was wanting in wilfulness or wantonness.

It is claimed that, after the first collision, defendant increased the speed of his car, turned it to the wrong side of the road and collided with the other car, and plaintiff charges defendant with an attempt to escape from the place of the first accident, contrary to the provisions of the statute (1 Comp. Laws 1929, § 4722), requiring him to stop, and, therefore, he was guilty of gross negligence and wilful and wanton misconduct.

After the first collision defendant's car started for the ditch at the right-hand side of the road and he righted it and then the car went to the left side of the road and to the second collision.

It is claimed by plaintiff that the second collision was at a distance of about 400 feet from the first one.

The question is whether defendant was guilty of negligence amounting to wilfulness or wantonness in his driving after the first collision, and such issue is not to be solved by consideration or application of the mentioned statute. Gross negligence or wilful and wanton misconduct must arise out of the operation of the car. What was not gross negli-

gence or wanton or wilful misconduct before passage of the mentioned statute is not made so by the statute. Gross negligence or wilful and wanton misconduct does or does not exist independent of the requirement to stop at the scene of an accident.

In *Finkler* v. *Zimmer,* 258 Mich. 336, and *Bobich* v. *Rogers,* 258 Mich. 343, we pointed out the distinction between negligence and wilful and wanton misconduct. In the *Bobich Case* we also stated that violation of the statute regulating the speed of an automobile in a residential section does not constitute gross negligence or wilful and wanton misconduct requisite to maintenance of an action under the guest act.

We mention, but do not place decision upon, the testimony of another occupant of defendant's car that plaintiff's decedent, riding on the front seat, said to defendant, "It is clear; the way is clear; you can easy make it," and after they got by, plaintiff's decedent grabbed for the wheel and thereafter the car started across the road and struck the other car.

We may assume, as claimed by plaintiff, that at the time of the first collision defendant was driving at a speed of 65 miles per hour, that he straightened out the course of his car after the collision and then crossed to the wrong side of the road to the second collision, but, from such assumption, it does not follow that he wilfully and wantonly ran to the second collision. It is not enough, under the guest act, that defendant was careless, and, by the exercise of forethought, could have stopped his car, or, by more careful operation, have avoided the second collision.

The proofs, at the most, established negligence on the part of the defendant, but did not establish

the fact that the accident was occasioned by the wilful and wanton misconduct of defendant.

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

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

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*In re* DISSOLUTION OF HENRY SMITH FLORAL CO.

1. RECEIVERS—COMPENSATION OF RECEIVER AND ATTORNEYS CONSTITUTES FIRST LIEN.
   Compensation of receiver and his attorneys is out of funds or property *in custodia legis*, and no lien authorized by court on funds or property has priority of such court administrative costs.

2. SAME—RECEIVER'S CERTIFICATES.
   Fees of receiver and his attorney are court expenses of receivership, and have priority of first lien receiver's certificates.

3. SAME—COMPENSATION OF COUNSEL ASSISTING ATTORNEYS ALLOWABLE UNDER EXCEPTIONAL CIRCUMSTANCES.
   Court properly allowed compensation to counsel assisting attorneys appointed for receiver, where said aid was rendered with knowledge of court, and circumstance is exceptional.

4. SAME—COMPENSATION OF RECEIVER.
   That receiver drew certain sum weekly, not fixed by court, would not bar him from receiving additional sum, or prevent court from awarding adequate pay for services rendered.

5. SAME—CANCELLATION OF RECEIVER'S CERTIFICATES.
   Receiver's certificates, constituting first lien, given to dealer furnishing supplies, with understanding that holder would join in reorganization, were properly canceled when he refused to do so, thus relegating claim to class where it belonged.

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As to priority of receivers' certificates of indebtedness, see annotation in 9 L. R. A. 143; 2 L. R. A. (N. S.) 1052; 24 A. L. R. 1177.

6. SAME—FIDUCIARY RELATIONS—COMMISSIONS ON SALES TO RECEIVER.

First lien receivership certificates, issued for purchase of goods, which were transferred by seller to member of unsecured creditors' committee, acting in fiduciary capacity, as commission in effecting sale, were properly canceled.

7. SAME—LIENS FOR MATERIALS AND RENT.

Obligations of receiver for material, supplies, and rent, in carrying on business pending second sale, are given parity with first certificates.

Appeal from Kent; Dunham (Major L.), J. Submitted June 10, 1932. (Docket No. 97, Calendar No. 36,598.) Decided October 3, 1932.

Dissolution proceedings of the Henry Smith Floral Company, a Michigan corporation. On petition of receiver for determination and allowance of fees and expenses of receivership. From order made, granting priorities, certain claimants appeal. Modified and affirmed.

*Warner, Norcross & Judd* and *Travis, Merrick, Johnson & McCobb,* for receiver.

*Norris, McPherson, Harrington & Waer,* for appellees, labor claimants.

*Fred P. Geib,* for appellant Smith.

*William J. Landman* and *Will W. Reller* (*C. Hoffius* and *Lloyd E. Cooper,* of counsel), for other appellants.

WIEST, J. The Henry Smith Floral Company, a corporation, gave a trust mortgage to secure an issue of bonds. Default in payment was made and foreclosure proceedings in equity commenced. Directors of the corporation filed dissolution proceed-

ings and a receiver was appointed, with power to operate the business as a going concern. The receiver petitioned the court for leave to issue certificates in order to carry on such operation pending sale. The court, by order, granted leave and constituted such certificates a "first lien upon all of the property and assets of said Henry Smith Floral Company, in the hands of the court and its said receiver, prior to the present existing lien of bondholders and prior to any and all claims of unsecured creditors and stockholders," and authorized the receiver to execute an indenture securing the certificates and covering all the assets and to constitute a first lien. The receiver executed the indenture and issued certificates, some at face value and others at an authorized discount.

The court made an order for sale of the property. Sale was reported and refused confirmation. This rendered another sale necessary, and the court fixed the receiver's compensation and that of the receiver's counsel, and gave the same priority over the lien accorded the receiver's certificates.

Appellants, other than Henry Smith, claim that the receiver's certificates, issued under order and indenture, constitute "a first lien on all of said assets prior to existing liens or incumbrances, and prior to any and all claims of creditors, whether secured or unsecured," with priority over compensation to the receiver, the attorneys, and any unpaid obligations of the receiver, except taxes. This construction is too narrow. The receiver acts as the arm of the court and the court retained power to compensate its officer and his legal advisors.

Counsel state:

"There may be a general impression that the necessary and proper compensation of a receiver

and his attorneys is a part of the cost of receivership and entitled to priority over receiver's certificates. That may be a general rule, but when the orders and decrees of the court, the mortgage given under them, the certificates themselves, and the decree in the case, establish the certificates as a first lien, the general rule does not apply, and this is especially true where, as in the instant case, the receiver's attorneys draw the mortgage and certificates * * * and represent that the certificates are absolutely a first lien on all the property, * * * and that the payment of them is sure."

The compensation of a receiver and his attorneys is out of funds or property *in custodia legis,* and no lien, authorized by the court, on the funds or property has priority of such court administrative costs. The lien, granted holders of the receiver's certificates, was not superior to such administrative costs. Administrative costs are not at all of the nature of a lien, and a first lien on assets has no priority of such court costs and expenses. *Bauer* v. *Wilkes-Barre Light Co.,* 274 Pa. 165 (117 Atl. 920, 24 A. L. R. 1171). The order, authorizing certificates to be a first lien, did not prevent the court from first paying the costs of the receivership. *Pusey & Jones* v. *Pennsylvania Paper Mills,* 173 Fed. 634; *Central Trust Co.* v. *H. B. Mehring Co.,* 154 Md. 477 (141 Atl. 111). The fees of the receiver and the attorney for him are court expenses of the receivership and have priority of first lien receiver's certificates. 2 Tardy's Smith on Receivers (2d Ed.), § 577.

Cases cited and others have been examined, and, in relation to receiver's certificates (when permissible, in instances of private corporations), we find the general rule to be that the compensation of

the receiver and his counsel are part of court administrative costs and entitled to priority over receiver's certificates constituted a first lien on assets.

Fraudulent representations to the contrary by the receiver or his counsel, in order to induce a purchase of such certificates, might, of course, occasion subordination. But such is not this case.

It is urged that the receiver's certificates should be given priority over fees of attorneys, not previously authorized by court order to be employed. A law firm acted as counsel for the law firm appointed attorneys for the receiver, and the court awarded such counsel compensation for services rendered. It must be an exceptional instance to warrant such a practice. Attorneys appointed for a receiver are supposed to render all needed legal services and possess no power to employ counsel at additional expense. The instant case is exceptional. The counsel aiding the attorneys appointed for the receiver were attorneys for the trustee in the mortgage securing bondholders, and had filed a bill to foreclose such mortgage before the court took over the whole matter under the proceeding to dissolve the corporation. Aid and assistance between such counsel and the attorney for the receiver in conserving the assets was proper, and the services rendered the receiver, in the handling of the many questions presented, all came to the knowledge of the court, were helpful and the court could, and did accept the services and of right awarded compensation therefor as an administrative cost.

Complaint is made of the compensation awarded the receiver. During the period of his activities the receiver drew $75 per week. Such weekly sum was not fixed by the court, but this did not bar the receiver from having adequate compensation or pre-

vent the court from awarding its officer pay for services rendered.

Losses arising out of the operation of the business by the receiver are now observable, but the receiver acted under court orders and an expected, but unrealized plan of reorganization, rendered futile, however, by some nonconsenting creditors, and the endeavor to maintain the business as a going concern was justified. The court did not visit the receiver with the severity of afterthought, but treated him with due consideration, having in mind the forethought which all parties, including the court, exercised, but which has proved unfortunate. We discover no reason for disturbing the compensation awarded the receiver.

In operating the business, under order of the court, the receiver employed laborers, the court cut their pay 40 per cent., and accorded the remainder priority over the receiver's certificates and other operating expenses, but inferior to the receiver's compensation and that of his counsel. The laborers have not appealed, but the landlord of the store, occupied by the receiver, and a coal dealer furnishing fuel to the receiver, and others furnishing supplies to the receiver, contend that the rent, fuel, and supplies should be given at least equal preference.

The coal dealer furnished supplies to the receiver, and advanced money to enable the receiver to carry on operations, and received certificates. Some certificates, so given for fuel, were canceled by the court because given with the understanding that the holder would join in a reorganization and of subsequent refusal to do so. A preference insisted upon, under such circumstances, was unfair to other like creditors, and the court very properly canceled such

certificates and relegated such part of the claim to the class where it of right belonged.

After the unconfirmed sale, it was deemed necessary to maintain the business as a going concern until another sale could be had, and it was essential, in order to do so, to accord some protection to persons extending credit to the receiver in the interim. To this end the court decreed that rent of the store building, occupied by the receiver, after November 1, 1931, and down to the time of the future sale, so far as unpaid, "together with other necessary operating expenses of said business accruing subsequent to November 1, 1931, shall be a first lien upon the proceeds of any such sale and shall be paid to the respective parties entitled thereto before any other distribution should be made of such proceeds."

The court, exercising discretion, ordered the receiver to operate the business as a going concern, pending the sale, and this was for the benefit of certificate holders as well as other creditors. The power of the receiver to issue obligations for supplies and other essentials, in order to comply with the order, followed of necessity as well as by court order, and the certificate holders, in such case, may not insist that the obligations of the receiver essential to such operation shall not be at least on a parity with their lien. Without such parity in this case there could have been no operation by the receiver.

Appellant Henry Smith, claiming rent, except for the order of November 18, 1931, giving him preference after the first of that month, would have to stand as a general creditor. What we have said with reference to that order of the court applies to the claim for rent, and for that reason the order is approved.

The circuit judge stated:

"The testimony further reveals that $900 of the receivership certificates were issued to Grand Rapids By-Products in exchange for a purchase by the receiver of certain steam boilers. That Chester W. Rankin, one of the members of the unsecured creditors' protective committee brought the parties together and recommended the purchase of the boilers to the receiver. That he later, and after the issuance of the receivership certificates and without the knowledge of the receiver and while he was acting in a fiduciary capacity, representing as one of the committee, unsecured creditors, he accepted $200, par value of the receivership certificates as a commission or favor in effecting sale of these boilers. This clearly he could not do while acting in such capacity, and the court finds that as to such $200 receivership certificates, the same shall be ordered returned to the receiver and canceled in the hands of the trustee."

We approve of the finding.

The court decreed that obligations of the receiver, in carrying on the business pending the second sale, should constitute a first lien. We modify this lien for material, supplies, and rent, and place the lien in the class of, and on a parity with, the first certificates.

So modified, the orders and decrees are affirmed, with costs, against appellants.

McDONALD, POTTER, SHARPE, NORTH, FEAD, and BUTZEL, JJ., concurred. CLARK, C. J., did not sit.

NATIONAL BOND & INVESTMENT CO. *v.* UNION INVESTMENT CO.

1. CHATTEL MORTGAGES—CONDITIONAL SALES CONTRACT.
   Where dealer sold automobile covered by floor-plan mortgage on conditional sale contract, title so retained remained subject to mortgage.

2. SAME—SALES.
   Where dealer sold automobile covered by recorded floor-plan mortgage on conditional sale contract, and then assigned said contract, assignee thereof acquired no rights beyond those of mortgagor, which remained subject to mortgage.

Appeal from Wayne; Campbell (Allan), J. Submitted June 7, 1932. (Docket No. 4, Calendar No. 35,613.) Decided October 3, 1932.

Two cases of replevin in common pleas court by National Bond & Investment Company, a Delaware corporation, as chattel mortgagor's assignee, against Union Investment Company, a Michigan corporation, mortgagee, for possession of repossessed automobiles. Judgments for plaintiff. Defendant appealed to circuit court. Cases consolidated for hearing. Judgments for plaintiff. Defendant appeals. Reversed, and judgments ordered entered for defendant.

*David I. Hubar* and *John W. Creekmur,* for plaintiff.

*Butzel, Levin & Winston* (*Morris W. Stein,* of counsel), for defendant.

WIEST, J. Defendant, a finance corporation, furnished a dealer with automobiles on the floor plan, so-called, and accepted and duly recorded a chattel mortgage on each car. The dealer sold one of the mortgaged automobiles to Vaughn Harrison under a conditional sales contract and note and then assigned the contract and note to plaintiff. Defendant seized the automobile under its chattel mortgage, and plaintiff replevined and had judgment. Defendant reviews by appeal, presenting the issue of right of priority between the two finance corporations. Rights of the purchaser of the car from the dealer are not here in issue or presented.

It is stipulated that:

"The term floor-plan mortgage as used herein means a mortgage given by an automobile dealer to a finance company or some other person, to secure the repayment of money loaned to, or advanced for said dealer, to enable him to keep a stock of cars on hand. The floor-plan mortgage covers cars kept on the sales-room floor of the dealer for the purpose of exhibition and sale at retail to his customers in the usual course of the dealer's business. The mortgagor named in a floor-plan mortgage retains possession of the mortgaged property and has a right to keep it on his sales-room floor and to exhibit such property and to make sales thereof, but it is understood between the mortgagor and the mortgagee named in such mortgages that the mortgagor shall pay off and discharge the floor-plan lien on each car at or before the time of the sale thereof."

Plaintiff contends that, by filing the mortgage in the office of the register of deeds, in addition to filing it with the city clerk, the mortgagee thereby gave notice that it operated as a mortgage upon property for resale at retail.

The statute, 3 Comp. Laws 1929, § 13424, after providing for filing in a municipal office, provides:

"That when such mortgage or other conveyance intended to operate as a mortgage is given upon a stock of merchandise or merchandise and fixtures or any part thereof purchased for sale at retail then such instrument or a true copy thereof * * * shall also be filed in the office of the register of deeds of the county where the goods and chattels are located."

We need but say that, under the conditional sales contract, the mortgagor retained title to the car. Such title, so retained, remained subject to the mortgage. Plaintiff, under the assignment of the conditional sales contract, acquired no rights beyond those of the mortgagor, its assignor. The assignment of the conditional sales contract was subject to the rights of the purchaser, Harrison, but such rights, if any, did not pass to plaintiff. Plaintiff acquired only the rights of its assignor, the mortgagor, and such rights are subject to the mortgage lien.

Two cases, with identical issues, are here presented, and this opinion also decides the other case of *The National Bond & Investment Co.* v. *Union Investment Co.*

The judgments are reversed, with costs, and the cases remanded to the circuit court with direction to enter judgments for defendant.

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

PALMER NATIONAL BANK *v.* VAN DOREN.

1. HUSBAND AND WIFE—BILLS AND NOTES—CONTRACTS.
   Note executed and delivered in Illinois to bank by married woman domiciled in Michigan as surety for brother's indebtedness, and renewals thereof subsequently executed in Michigan and mailed to bank, *held*, Illinois contract; renewal note being continuation of original note.

2. SAME—CAPACITY OF MARRIED WOMAN TO CONTRACT—GOVERNING LAW—CONFLICT OF LAWS.
   Law of place of contracting controls on question of capacity of married woman to contract.

3. SAME—VALID FOREIGN CONTRACT ENFORCEABLE IN MICHIGAN.
   Note and renewals thereof executed by married woman domiciled in Michigan as surety for brother's indebtedness, constituting Illinois contract and valid in that State, is enforceable in Michigan.

4. EVIDENCE—PAROL TESTIMONY.
   In action on promissory note given by married woman as surety for brother's indebtedness, maker could not show by parol testimony contemporaneous agreement varying terms of note.

5. BILLS AND NOTES—ACCOMMODATION NOTE—HUSBAND AND WIFE.
   Note executed by married woman as surety for brother's indebtedness to bank was accommodation note as between her and brother, but not as between her and bank (2 Comp. Laws 1929, §§ 9274, 9278).

Appeal from Wayne; Brown (William B.), J., presiding. Submitted June 9, 1932. (Docket No. 5, Calendar No. 36,426.) Decided October 3, 1932.

Assumpsit by Palmer National Bank against Verla E. Van Doren on a promissory note. Judgment for plaintiff. Defendant appeals. Affirmed.

On conflict of laws as to capacity of married woman to contract, see annotation in 57 L. R. A. 513; 26 L. R. A. (N. S.) 764; L. R. A. 1916A, 1055; 18 A. L. R. 1516; 71 A. L. R. 744.

*Clark, Klein, Ferris & Cook* (*Sydney A. Jacobs* and *Joseph H. Parsons,* of counsel), for plaintiff.

*Edmund M. Sloman* (*Arthur H. Ratner,* of counsel), for defendant.

BUTZEL, J. In 1925, George M. McCray owed the Palmer National Bank of Danville, Illinois, approximately $53,000, which included $2,400 due for interest and $7,400 representing his liability on indorsements of certain notes made by residents of Canada and discounted at the bank. The bank informed McCray that the bank examiner had objected to the Canadian notes, which had been due for over a year. When the bank insisted upon the payments, McCray invoked the aid of his sister, Verla E. Van Doren, a married woman, defendant herein. She resided in Michigan, and, in response to her brother's request, went to Danville, Illinois, for the very purpose of assisting him. After a conference with the bank officials, who told her of the order of the bank examiner, she gave plaintiff her note for $9,800. Thereupon McCray's liability on the Canadian notes was discharged, and the notes were placed in an envelope, upon which defendant's name was written, and left with plaintiff for collection, the payments made thereon to be applied on defendant's note. Defendant claims that, when she signed the note for $9,800, she was assured by plaintiff's president, who died prior to the trial, that she would not be called upon to pay the note, that it was simply being substituted for the Canadian notes in order to satisfy the bank examiner. We are not impressed with this claim, for, as the trial judge found, even if this were true and the testimony admissible, it would constitute an attempt to work a fraud upon the bank examiner.

Defendant returned to Michigan and mailed several renewals of her note to the bank. Several payments made on the Canadian notes were applied on defendant's obligation. The last renewal note for $9,082.75, dated April 1, 1927, at Danville, Illinois, became due October 1, 1927, at plaintiff bank. The renewal notes were prepared by plaintiff bank and mailed to defendant in Michigan. It is conceded that the amount of the note is correct, that defendant is a married woman and a resident of Michigan, and that under the laws of Illinois, a married woman may become a surety. When the $9,800 note was discounted by the bank, $7,337.59 was used to take up the Canadian notes, and the balance of $2,462.41 was credited by the plaintiff to the account of defendant's brother, George McCray, and used almost entirely to pay up the past-due interest owed by him to plaintiff. On defendant's refusal to meet the last renewal note, suit was brought by plaintiff in the Wayne circuit court. Defendant claims that plaintiff cannot recover because defendant is a married woman, and under the laws of Michigan cannot be held liable as a surety. She claims that the contract was made in Michigan, and that, therefore, the law of this State is applicable as the *lex loci contractus,* that in any event the *lex fori* is applicable in the present case, and that the public policy of Michigan is opposed to holding a woman responsible on a contract of suretyship, no matter where made. She further contends that plaintiff cannot recover because the note is an accommodation paper given for the benefit of the bank without consideration to plaintiff.

The contract is an Illinois contract. The law of the place of making, "or place of performance," rather than the law of the domicile of a married

woman, governs as to her capacity to contract. A renewal note is regarded as a continuation of the original note. *Molsons Bank* v. *Berman,* 224 Mich. 606 (35 A. L. R. 1289); *New Jersey Title G. & T. Co.* v. *McGrath,* 246 Mich. 553, 562. In *John A. Tolman Co.* v. *Reed,* 115 Mich. 71, we held a contract of guaranty dated in Illinois, signed in Michigan, and mailed to the guarantee in Illinois, where payments, if any, were to be made, was an Illinois contract. See Proposed Final Draft No. 2, § 336, and comment B thereunder of the American Law Institute Restatement of the Conflict of Laws. The law of the place of contracting controls on the question of the capacity of the parties to contract. *Bissell* v. *Lewis,* 4 Mich. 450; *Wheeler* v. *Constantine,* 39 Mich. 62 (33 Am. Rep. 355); *State Bank of Eldorado* v. *Maxson,* 123 Mich. 250 (81 Am. St. Rep. 196); *Millar* v. *Hilton,* 189 Mich. 635; *John A. Tolman Co.* v. *Reed, supra; Amos* v. *Walter N. Kelley Co.,* 240 Mich. 257; *Buckeye Commercial Savings Bank* v. *Protogere,* 250 Mich. 652.

The question whether the courts of this State will enforce a contract of suretyship made in a foreign State by a married woman and a resident of Michigan, when such foreign State permits a married woman to become surety, is one of first impression in this State. It has been frequently passed upon, however, by Federal courts and tribunals in many other States. Defendant relies on the case of *Union Trust Co.* v. *Grosman,* 245 U. S. 412 (38 Sup. Ct. 147), and decisions in a very few other States. The case of *Union Trust Co.* v. *Grosman, supra,* is against the great weight of authority in this country. See 18 Columbia Law Review, p. 482; 27 Yale Law Review, p. 816; Goodrich on Conflict of Laws, p. 217. In *Millar* v. *Hilton, supra,* liability was en-

forced against a married woman domiciled in Michigan on a note executed by her in Ontario as surety for her husband at a time when her domicile was in Ontario. In that case Mr. Justice STEERE stated:

"It is also well settled in this State, in harmony with the prevailing rule elsewhere, that foreign contracts, when the subject of litigation in this jurisdiction, are to be given effect, interpreted, and the contractual rights of the contending parties determined according to appropriate statutes and decisions of the territory where the contract was entered into, unless by some provision of the contract it is manifest the parties have otherwise intended and agreed. *Douglass* v. *Paine,* 141 Mich. 485. The promissory note upon which the action is based is clearly a foreign contract without qualification, intended to be performed where made. It was negotiated, dated, signed, indorsed, delivered, and made payable in Toronto, Ontario, where all parties in interest then resided. It was not paid there or elsewhere. Actions upon commercial paper are transitory, and the creditor may pursue and sue the debtor in any State where his person or property can be found; but the contractual rights of the parties are tested by the law of the place of contract, as before stated."

The facts in this case differ somewhat from those in the instant case, in that defendant was domiciled in Ontario when the contract was made.

In *Thompson* v. *Taylor,* 66 N. J. Law, 253, 258 (49 Atl. 544, 54 L. R. A. 585, 88 Am. St. Rep. 485), the court said:

"The distinction between regulative legislation and the adoption of a principle of public law is too important to be lost sight of. To declare, as the common law did, that the welfare of society required that wives be incapable of making contracts, is an

illustration of the adoption of a principle which, so long as it was adhered to, constituted a rule of public policy. When, however, civilized States became satisfied that the welfare of society was not best served by the maintenance of this principle, it was abandoned, by the recognition of its opposite, viz., that married women possessed capacity to contract. * * * (Quoting from an earlier New Jersey case.)

" 'There can be no question but that the contract was valid by the law of Illinois. It is, therefore, the duty of the courts of this State to recognize and enforce it, unless it appears injurious to the interests of the State or of our citizens. But nothing approaching this result can be deduced solely from the fact that the foreign State confers upon a married woman the power to make a contract of suretyship. * * * Whatever may be our opinion of the policy of legislation beyond our State, we are bound by the principles of comity to recognize its validity, unless it clearly contravenes the principles of public morality, or attacks the interests of the body of the citizens of our State.' "

The whole question is so ably presented in *International Harvester Co.* v. *McAdam,* 142 Wis. 114 (124 N. W. 1042, 26 L. R. A. [N. S.] 774, 20 Ann. Cas. 614), that we have quoted the following excerpt from it:

"A contract under the foregoing is not, necessarily, contrary to the public policy of a State, merely because it could not validly have been made there, nor is it one to which comity will not be extended, merely because the making of such contracts in the place of the forum is prohibited, general statements to the contrary notwithstanding. In *Milliken* v. *Pratt,* 125 Mass. 374 (28 Am. Rep. 241), the court remarked substantially, even a contract expressly prohibited by the statutes of the State in which the suit is brought, if not in itself immoral (the term 'immoral' being used in the broadest sense), is not, necessarily, nor usually, deemed so invalid that the comity of the State, as administered by its courts, will refuse to entertain an action under all circumstances to enforce it. There must be something inherently bad about it, something shocking to one's

sense of what is right as measured by moral standards, in the judgment of the courts, something pernicious and injurious to the public welfare. In Greenhood on Public Policy, at page 46, cited by counsel, the following rule is deduced from the authorities cited:

> " 'When a contract is valid under the public policy of the State where made, it will be enforced in another State, although the same would, by the statute laws of the latter State, be void, unless its enforcement would exhibit to the citizens of the State an example pernicious and detestable.'

"It will occur to one, on a moment's reflection, that the last foregoing rule could not be otherwise, else the doctrine that a contract valid at the place where made is valid and, generally speaking, enforceable everywhere, would be wholly nullified as to foreign contracts which would not be valid if made in the place enforcement is sought. The rule would be useless since, in every case of such a contract, it would never be enforceable except in the place where made. The correctness of the rule and the absurdity of the idea that every contract which, if made in the jurisdiction of the forum, would not be valid, cannot be enforced there, are so clear. * * * If there is any ground for saying that they are inherently harmful, it is referable, solely, to the ancient common-law rule of disability, the reason whereof reaching to the present, is but little more than a shadow, a rule which, in great part, was changed by legislation long ago. That such contracts are not to be regarded as inherently harmful, is evidenced by the fact that they are permitted by the written law of a large portion of the States and in most others legislation in that direction is progressive. It is further evidenced by the fact that they are recognized as not inherently bad by substantially all the courts of this country. The exceptions are not significant. This court, except as restrained by principle and the great weight of authority, is free to take its own stand, to declare for

this State what shall be, in the particular situation, its public policy, till the source for written law shall have acted in the matter. The court cannot say that such contracts are against public policy merely because they have not the sanction of the common law as we have seen. * * * How can the court say that it should be so classed, that it should be located within the broadest possible boundaries of the immoral, the inherently bad? Nearly all the common-law disabilities of women to contract have been removed. They can acquire and enjoy property and make all contracts necessary or convenient in that regard. They can, in equity, charge their property substantially at will. There is little left of a business nature which men can do that they cannot do. They have nearly all the rights of men, and some besides, and on all sides are making pressing claims with distinguished support for what is yet withheld not very firmly nor perhaps very logically. How can the ordinary business contract in question, so common among men of ordinary perceptions, be said to be contrary to any policy of this State heretofore, or which should now be, adjudged bad in the interest of good morals?"

To like effect are: *Law* v. *Smith,* 68 N. J. Eq. 81 (59 Atl. 327); *Bowles* v. *Field,* 83 Fed. 886; *Milliken* v. *Pratt,* 125 Mass. 374 (28 Am. Rep. 241); *Brigham* v. *Gilmartin,* 58 N. H. 346; *R. S. Barbee & Co.* v. *Bevins, Hopkins & Co.,* 176 Ky. 113 (195 S. W. 154); *Meier & Frank Co.* v. *Bruce,* 30 Idaho, 732 (168 Pac. 5); *C. I. T. Corp.* v. *Sanderson,* 43 Fed. (2d) 985.

Defendant could not show by parol testimony a contemporaneous agreement varying the terms of the note. *Anderson* v. *Engard,* 236 Mich. 221. The note was an accommodation note as between defendant and her brother, George M. McCray, and was not such as between the bank and defendant under

the negotiable instruments law. See 2 Comp. Laws 1929, §§ 9274, 9278.

The court properly found defendant liable for the amount of the note, together with interest, in the amount of $12,051.55. The judgment is affirmed, with costs to plaintiff.

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

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VISCH *v.* CITY OF GRAND RAPIDS.

REWARDS—MUNICIPAL CORPORATIONS—VIOLATION OF STATE LAW.

City may lawfully offer reward for information leading to apprehension and conviction of violators of State law within city boundaries.

Appeal from Superior Court of Grand Rapids; Verdier (Leonard D.), J. Submitted June 10, 1932. (Docket No. 105, Calendar No. 36,538.) Decided October 3, 1932.

Assumpsit by Harry Visch against City of Grand Rapids, a municipal corporation, for reward offered by city commission for capture of robbers. Judgment for plaintiff. Defendant appeals. Affirmed.

*Leo W. Walsh,* for plaintiff.

*Dale Souter* and *Robert S. Tubbs,* for defendant.

BUTZEL, J. Following an epidemic of grocery store and oil station robberies and the failure of the police to apprehend the robbers, the city commission of Grand Rapids adopted a resolution offering a reward of $100 for information leading to the apprehension and conviction of any person committing a robbery while armed with a gun within the city of Grand Rapids. Harry Visch, plaintiff, who is not a police officer, gave information leading to the apprehension and conviction of a robber. He brought suit to recover the $100 reward, and the city appeals from the judgment rendered in his favor.

The sole question presented on appeal is whether the offer of a reward by a city, for information leading to the apprehension and conviction of violators of a State law within the city boundaries, is an *ultra vires* act. The judge in his findings stated that, in Kent county, in which Grand Rapids is located, most of the work of enforcing the State law is divided. The police department assumes the responsibility of enforcing the law and apprehending those who break it in the city, and the sheriff and his force confine their efforts largely to the county territory outside the city. A gradual division of authority between them has developed until a situation has arisen where, in practical effect, the city has become the agent of the State, on whom rests almost entirely the duty of enforcing the State laws within the limits of the city. In the provisions of the city charter, the city commission is vested with power to pass all ordinances and regulations of every character to secure the public health, safety, welfare, convenience, and for promoting the prosperity, welfare, and happiness of the citizens and taxpayers (Grand Rapids city charter, title 5, § 2).

It has been quite generally held in other jurisdictions that a municipal corporation may offer rewards for the apprehension and conviction of offenders against local regulations, but not of violators of the general criminal laws of the State, even though such infractions be committed within the city limits. See 1 McQuillin, Municipal Corporations (2d Ed.), § 403; *Hagan* v. *Black,* 159 Tenn. 290 (17 S. W. [2d] 908); *Barrett* v. *City of Atlanta,* 145 Ga. 678 (89 S. E. 781); *Felker* v. *Board of Com'rs of Elk County,* 70 Kan. 96 (78 Pac. 167, 3 Ann. Cas. 156). It will be noted, however, that the cases denying the city the right to offer a reward for apprehension of violators of the State law are largely based on decisions rendered in earlier days when cities were small and sparsely inhabited. The classic case, often referred to, is that of *Baker* v. *City of Washington,* 7 D. C. 134, where it was held that defendant had no authority to offer a reward of $20,000 for the capture of the slayer of President Lincoln. See, also, *City of Winchester* v. *Redmond,* 93 Va. 711 (25 S. E. 1001, 57 Am. St. Rep. 822). The cases are referred to in *People, ex rel. Attorney General,* v. *Village of Holly,* 119 Mich. 637 (44 L. R. A. 677, 75 Am. St. Rep. 435), where it was held that an incorporated village, under its power to provide for the safety and general welfare of its inhabitants, had the right to offer a reward for the conviction of persons who set fire to buildings within the city limits. To like effect are *Brown* v. *Bradlee,* 156 Mass. 28 (30 N. E. 85, 15 L. R. A. 509, 32 Am. St. Rep. 430); *Shaub* v. *Lancaster City,* 156 Pa. 362 (26 Atl. 1067, 21 L. R. A. 691); *Choice* v. *City of Dallas* (Tex. Civ. App.), 210 S. W. 753. On the other hand, it was held in *Day* v. *Otis,* 90 Mass. 477, that the city had no power to offer a reward for the arrest

of murderers. Adhering to the reasoning in *People* v. *Holly, supra,* we believe that it becomes a necessary and a proper function for the city to offer rewards for the apprehension of criminals other than those guilty of arson. Notwithstanding the fact that the sheriff of the county and the State police are charged with the duty of apprehending violators of the State law, nevertheless, the burden and expense rests almost wholly upon the city. A very large proportion of the amount collected for city taxes must be devoted to the maintenance of a very large police force, whose officers are largely engaged in apprehending those guilty of State felonies. The problem of crime is different from that of former years. Congestion, well-paved streets, dark alleys, wide areas, together with multiple apartment and office buildings, all afford criminals opportunities to make a quick escape and to hide within the very confines of the city. The numerous acts of banditry make it necessary for the city to maintain the expense of extra lighting at nighttime and a very large force of patrolmen and detectives. It becomes necessary to maintain a large pension fund in many cities to care for police officers or their dependents, when such officers are killed or maimed in the course of duty. Not infrequently innocent bystanders are killed or severely injured in city streets while crimes are being committed or efforts made to capture the offenders. A resident of a city and the victim of a crime does not ask whether there has been a violation of a State or municipal regulation. He looks to and depends for his protection almost entirely upon the city police department, maintained at a very large cost to the local taxpayers. According to No. 12 of the Wickersham Report (National Commission of Law Observance and Enforcement),

p. 327, the cost of operating the police department of Grand Rapids in one year was $381,278. The armed robberies in Grand Rapids during 1931 totaled 127, while in Detroit during the same period 1,588 were committed (Uniform Crime Reports for the Department of Justice, Washington, Vol. 2, No. 12, p. 16).

Following the reasoning in *People* v. *Holly, supra,* we are led to the conclusion that the offering of the reward by the city was proper, and the judgment should be affirmed, with costs to plaintiff.

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

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WILLIAMS *v.* WOOD.

1. NEGLIGENCE—INJURIES FROM OUTDOOR SPORTS—GENERAL RULE AS TO RECOVERY.

   Generally, recovery for injury resulting from accident attendant on outdoor sport may be had only if injury is result of negligence that could and should have been avoided by use of ordinary care.

2. SAME—INJURY TO FISHERMAN'S GUIDE FROM CASTING—QUESTION FOR JURY.

   Negligence of fisherman, in boat with guide, in making cast which hooked guide in eye, should have been submitted to jury, where evidence was sufficient to present question upon which reasonable minds might differ.

3. SAME—PRESUMPTION—EVIDENCE.

   Presumption of negligence may arise from competent evidence,

4. EVIDENCE—ADMISSIONS.

Testimony as to admission by fisherman, which he denied, that he was in fault in making cast which hooked guide in eye, *held*, admissible for what it was worth.

5. NEGLIGENCE—INJURY TO FISHERMAN'S GUIDE—ASSUMPTION OF RISK.

Guide hooked in eye by fisherman while casting may recover therefor only if fisherman was negligent, and although guide did not assume risks of dangerous occupation, he knew that accidents frequently occur, and therefore did not need to be specially warned of danger.

Appeal from Kent; Perkins (Willis B.), J. Submitted June 22, 1932. (Docket No. 128, Calendar No. 36,613.) Decided October 3, 1932.

Case by Louis Williams against Frank F. Wood for personal injuries alleged to have been caused by defendant's negligence while fishing. Directed verdict and judgment for defendant. Plaintiff appeals. Reversed, and new trial granted.

*Joseph R. Gillard* (*George S. Baldwin*, of counsel), for plaintiff.

*Clare J. Hall*, for defendant.

BUTZEL, J. Louis Williams of Evart, Michigan, plaintiff, was engaged to work about the cabins and to act as a fisherman's guide by his fellow townsman, Spencer Postal, at the latter's fishing and hunting camp located in the vicinity of a number of small lakes in northern Ontario, not far from the Canadian Soo. Plaintiff was 21 years of age, six feet four inches in height. Fishermen who went to Postal's camp employed and paid the guides furnished them. On June 11, 1930, defendant, Frank F. Wood, and a companion, both experienced fisher-

men, employed plaintiff to guide and row a boat near the shore of Devil's lake. While fishing, defendant sat in the bow, his companion in the stern and plaintiff in the middle of the boat, about five or six feet away from defendant. Plaintiff, with his back towards defendant, rowed the boat parallel with and not far from the shore, towards which the two fishermen cast at right angles to the boat.

Instead of using his own rod, defendant borrowed from Postal a steel one, about 5 feet in length. It was equipped with a reel, around which 25 to 30 yards of line were wound, and at the end of the line, in the order named, were a sinker, a one-inch copper leader, a spinner, consisting of a metal rod on which two spoons were attached, and a trout hook baited with an angleworm. The length of the tackle from the end of the hook to the farthest end of the sinker, when pulled taut to the end of the pole, according to defendant's testimony, is 10 to 15 inches. The reel is operated with the thumb used as a brake. When the cast is made, the thumb is loosened, the line runs speedily out, and when the line reaches the spot aimed at by the fisherman, he pushes his thumb against the reel and the lure drops into the water. When casting, a good fisherman keeps his eye on the spot at which he is aiming.

After the party had been fishing for less than an hour, during which defendant had no success, while his companion caught two speckled trout, defendant attempted another cast. In so doing, the tip of his rod first struck plaintiff on the side of the head and instantly thereafter the hook penetrated his eye, causing such severe injuries that the eye had to be removed from its socket. After the hook struck plaintiff, the rod was dropped down to the side of the boat. Only about four feet of line had been unwound and the cast did not leave the confines of

the boat. It is conceded that there was no back lash, no sudden movement of the boat, nor is it claimed that the line had become tangled or snarled.

Plaintiff attributes the accident wholly to defendant's negligence. The latter admits that it would have been dangerous to make a side cast with defendant in the middle of the boat. He claims that the very fact that plaintiff was hooked in the eye indicates that he made an overhand cast, and that the injury was due to an accident for which he should not be held liable in damages. It appears to be conceded that if the accident had been caused by a sudden movement of the boat or a back lash, and the cast had been overhand, plaintiff would not be entitled to recover. Plaintiff claimed that the accident was due to a side cast, but admitted that he was unable to see how the cast was made, as his back was turned toward defendant. He claims, however, that even if it had been an overhand cast, it was so negligently made by defendant, an experienced fisherman, as to render him liable for the untoward results. Plaintiff claimed, and defendant, called as an adverse witness under the statute (3 Comp. Laws 1929, § 14220), denied, that, immediately after the accident, defendant said: "It was my fault I hooked you," and that it would not have happened had he used his own pole. An Ontario lawyer testified that under the laws of the province, defendant cannot raise a defense under any theory of assumption of risk by the plaintiff.

At the close of plaintiff's proofs, the trial judge directed a verdict for defendant, holding that, in any event, the cause of the accident could only be determined by pure conjecture, and that the circumstances made it extremely improbable that the cast was a side one.

A number of questions are raised on appeal. The case presents an unusual state of facts. The testimony is very meager, and neither from the briefs nor a diligent search on our part have we been able to find any case involving similar factual set-up. Analogous ones are referred to. The golf cases are not helpful, for both players, caddies, and spectators, knowing that balls are apt to go wayward on the wide expanse of a golf links, can and should be on guard so as to avoid being struck by a ball or a club. The facts in the cases differ and in some of them golfers have been held liable. In *Cleghorn* v. *Oldham,* 43 Times L. R. 465, and *Castle* v. *St. Augustine's Links, Ltd.,* 38 Times L. R. 615, the duty is imposed upon players to use care with regard to the safety of others about them. Also see *Schlenger* v. *Weinberg,* 107 N. J. Law, 130 (150 Atl. 434, 69 A. L. R. 738); *Biskup* v. *Hoffman,* 220 Mo. App. 542 (287 S. W. 865). These cases impose a duty upon the golfer to call out a warning to those on the links in the direction of his intended shot, or in the actual course of the ball. In the instant case, such a warning would have been useless, for plaintiff, with his back towards defendant, could not watch him cast. The liability of a golfer for poor shots is discussed in "Legal Questions Relating to Golfing and Golf Courses," 31 Scottish Law Review, 194. It has been held repeatedly that a golfer is not liable for making a poor shot, and that persons playing the game take all the usual risks that attend it. See *Stober* v. *Embry,* 243 Ky. 117 (47 S. W. [2d] 921); *Benjamin* v. *Nernberg,* 102 Pa. Sup. Ct. 471 (157 Atl. 10). In *Everett* v. *Goodwin,* 201 N. C. 734 (161 S. E. 316), it was held that where the evidence was conflicting and there was testimony that the player had failed to shout "fore," negligence was a jury question.

The baseball cases hold, as a rule, that a player cannot be held liable to a spectator struck by a foul ball. *Brisson* v. *Minneapolis B. & A. Ass'n,* 185 Minn. 507 (240 N. W. 903). In *Ingerson* v. *Shattuck School,* 185 Minn. 16 (239 N. W. 667), defendant was absolved from liability for injuries suffered from a collision with two football players who rolled off the field while engaged in a hard tackle.

The hunting cases also, while claimed to be analogous, are not pertinent to the facts in the case, for the law exacts a much greater degree of care from persons using firearms. See *Chaddock* v. *Tabor,* 115 Mich. 27; *Bahel* v. *Manning,* 112 Mich. 24 (36 L. R. A. 523, 67 Am. St. Rep. 381), and also the cases collected and annotated in 53 A. L. R. 1205.

The nearest approach to the instant case is that of *Toca* v. *Rojas,* 152 La. 317 (93 South. 108). The court was divided as to whether there was a showing of negligence. The prevailing opinion held that there was grave doubt whether it was the hook of defendant's son that caused the injury, and there was no proof of negligence on his part. The facts in the case are so dissimilar from those in the instant case that it is not helpful to us.

The general rule that may be deduced from the cases hereinbefore cited is that certain risks of accident attend all outdoor sports and recovery may be had only if an injury is the result of negligence that could and should have been avoided by the use of ordinary care. It seems to be conceded by both parties in the instant case that, if defendant made a side cast within the small confines of a rowboat, resulting in an injury to plaintiff, the latter should recover. We believe that there was at least a sufficient showing upon which reasonable minds might differ as to whether defendant was negligent in making the cast. The case, therefore, should have been

submitted to the jury for determination. The trial judge, in directing a verdict, stated that the rule of law is:

"That where an inference can be drawn that would make an act an innocent one, and that inference is as reasonable as an inference drawn from the same facts which would create a liability, that no liability exists. In other words, cases are tried upon reasonable certainties and not upon pure speculation and inferences drawn."

The foregoing statement appears in a *dictum* in *Knapp* v. *Railway Co.,* 114 Mich. 199, where intestate received injuries when coupling a freight train at a street crossing. Plaintiff claimed that deceased caught his foot in the planking between the plank and the rail, and defendant contended that deceased stumbled against the ends of the planking and was carried forward by the cars and then hurled under the train, and that, in any event, the cause of the accident was conjectural. The court, however, refused to direct a verdict. The *dictum* quoted does not support the contention that, when there are two probable causes, the case must be taken from the jury when there is a much stronger probability supported by competent testimony that the cause relied upon by the plaintiff was responsible for the accident.

In *Manning* v. *Railway Co.,* 105 Mich. 260, where the mutilated body of plaintiff's intestate, a brakeman, was found near the right of way, it was claimed that, while leaning from the side of a car, he was struck by a tree close to the tracks. There was also a possibility that he had fallen from the car. However, there was no direct evidence whatsoever as to how the accident occurred. Inasmuch as the cause of death was purely conjectural, the direction of a

verdict for defendant in the lower court was upheld by this court, notwithstanding a very vigorous dissenting opinion by Mr. Justice MONTGOMERY.

In *Alexander* v. *City of Big Rapids,* 70 Mich. 224, we held:

"If it was left 'very doubtful' what caused the injury upon the proofs, certainly, then the case was one for the jury upon its facts, and should not have been taken from them upon that point. No one witnessed the accident, and the testimony was somewhat circumstantial upon that question."

In *McDonnell* v. *Central Drug Co.,* 160 Mich. 455, where the cause of the accident was far more uncertain than in the present case, we held it improper to direct a verdict on the ground that the cause was conjectural. To like effect are: *Adams* v. *Iron Cliffs Co.,* 78 Mich. 271 (18 Am. St. Rep. 441); *Wendt* v. *Village of Richmond,* 164 Mich. 173. A presumption of negligence may arise from competent evidence. See *McLean* v. *Railroad Co.,* 137 Mich. 482 (17 Am. Neg. Rep. 76); *O'Neill* v. *James,* 138 Mich. 567 (68 L. R. A. 342, 110 Am. St. Rep. 321, 5 Ann. Cas. 177, 17 Am. Neg. Rep. 561); *Fuller* v. *Magatti,* 231 Mich. 213; *Bacon* v. *Snashall,* 238 Mich. 457; *Eaton* v. *Consumers Power Co.,* 256 Mich. 549; *Peterson* v. *Cleary,* 257 Mich. 640; *Oleksza* v. *Nolan,* 258 Mich. 240.

In the present case, plaintiff's claim is strengthened by the fact that he apparently was hit on the side of the head by the tip of the pole. We do not agree with the trial court that it was improbable under the circumstances that plaintiff was hit by the tip of the rod in the course of an improper side cast, for when we take into consideration the fact that it was a five-foot pole with 10 to 15 inches of tackle hanging from it, that defendant very likely

extended his arm to make the cast, and that some of the line may have been unreeled, it would be possible for the tip of the pole to strike plaintiff. Moreover, the undisputed testimony, as distinguished from the inferences the trial court drew, shows that plaintiff was hit on the side of the head by the tip of the pole before the hook entered his eye. The question as to whether the cast was negligently made raises a question of fact that should have been submitted to the jury. As the case is being remanded for a new trial, we might add that the claimed admission on the part of defendant was not improperly received for whatever it was worth. *Simonson* v. *Huff*, 124 Wash. 549 (215 Pac. 49); *Kentucky Distilleries & W. Co.* v. *Wells' Guardian*, 149 Ky. 275 (148 S. W. 375). Notwithstanding the fact that, under the Ontario law, plaintiff did not assume the risks of a dangerous occupation, he well knew that accidents frequently occur to fishermen, and did not need to be especially warned of the dangers. He can recover only if defendant was negligent in making the cast. *Rudd* v. *Bell*, 13 Ont. Rep. 47; *Shendra* v. *Railway Co.*, 21 Man. L. R. 622.

Under the circumstances, we believe that the question should have been submitted to the jury.

The judgment of the lower court is reversed, with costs to plaintiff, and the case remanded for a new trial.

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

HORBAL *v.* ST. JOHN'S GREEK CATHOLIC CHURCH.

1. MORTGAGES—FORECLOSURE—JUDGMENT—RES JUDICATA.
   Decree determining validity of first mortgage on church property, from which no appeal was taken, is *res judicata* in subsequent suit to foreclose second mortgage.

2. RELIGIOUS SOCIETIES—AUTHORITY TO MORTGAGE PROPERTY.
   Where by-laws of church society, an ecclesiastical corporation, do not confer any power on parishioners to mortgage its property, mortgage authorized by parish meeting and signed by proper officers is void for want of authorization by board of trustees (2 Comp. Laws 1929, §§ 10112, 10115).

3. SAME—SPECIAL PARISH MEETING—PURPOSE MUST BE STATED IN NOTICE.
   Failure of by-laws of church society to require specifically that purpose of special parish meeting must be stated in notice does not obviate necessity of such statement.

4. SAME—MORTGAGES—ESTOPPEL.
   Where all parishioners were not present at special meeting authorizing execution of mortgage on church property to certain members as security for money advanced by them, church is not estopped from denying validity of said mortgage on ground that it was not authorized by board of trustees, even if all trustees were present.

5. SAME—ACTION BY BOARD OF TRUSTEES NECESSARY.
   Where act may be performed only in pursuance of resolution or authority of board of trustees, it can only bind church corporation when board has acted thereon at legal meeting as board.

6. SAME—INNOCENT PURCHASERS.
   Church members, taking mortgage on church property for antecedent debts, were or should have been familiar with all preceding transactions, and therefore may not claim status of innocent purchaser.

7. PARTIES—TRUSTEE PROPERLY MADE PARTY TO MORTGAGE FORECLOSURE.
   Trustee refusing to act in interest of his *cestuis* in foreclosure of mortgage on church property was properly made party defendant.

Appeal from Wayne; Runnels (Herbert W.), J., presiding. Submitted June 14, 1932. (Docket No. 125, Calendar No. 36,476.) Decided October 3, 1932.

Bill by Anthony Horbal and another, individually and as trustees, against St. John's Greek Catholic Church of Detroit, Michigan, an ecclesiastical corporation, and others to foreclose a mortgage and for other relief. Cross-bill by defendant church against plaintiffs and others to set aside the mortgage and for other relief. Decree for plaintiffs. Defendant church appeals. Reversed, and decree entered for appellant.

*John Panchuk,* for plaintiffs.

*Cyrowski & Cyrowski,* for defendant church.

BUTZEL, J. St. John's Greek Catholic Church of Detroit, Michigan, an ecclesiastical corporation consecrated to religious purposes, defendant herein, has been engaged in litigation during a continuous period of 10 years. A brief reference to some of the litigation is necessary. The chief causes of the factionalism and schism within the church are fully set forth in the cases of *Komarynski* v. *Popovich,* 218 Mich. 481, and 232 Mich. 88, to which reference is made for the facts leading up to the instant case. In the case of *St. John's Greek Catholic Church of Detroit* v. *Commonwealth Federal Savings Bank of Detroit* (No. 147,826, Wayne circuit court in chancery), the liability of defendant to the banking corporation under a mortgage was redetermined and thereafter in case No. 160,099 in the Wayne circuit court in chancery, it was adjudged and decreed that Walter M. Nelson be subrogated to the rights of the bank under the mortgage, constituting a lien on

five lots on Cicotte avenue, Detroit, and the church building thereon. Nelson duly assigned his rights in the mortgage claim and lien to Max Chuchman and Michael Baran. The decree in case No. 160,099, *supra,* was entered on the 12th day of November, 1928, has not been appealed from, and is valid and binding upon the church. The sum of $2,065 with interest from November 12, 1928, remains due, in accordance with the decree, as a first lien on the church property. A number of smaller judgments rendered in the court of common pleas and one in circuit court are also involved in the instant case. The trial court in the instant case held that these judgments were improperly rendered. Since they have been set aside, they need not be further considered. Any other litigation in which the church was interested is not pertinent to the present issues.

Much money was advanced by members of the church to defray its regular expenses as well as to protect its interest in the litigation. The church owed sundry amounts to these members. A special meeting of the parishioners was held at the church house on October 21, 1927, in accordance with the following notice printed on postal cards in Ukrainian:

"Respected parishioner:

"You are notified that on Friday, 21st day of October, a special meeting will be held in the Parish Hall at 3464 Cicotte avenue. Kindly come to the meeting because the matter is very important. At 7 o'clock in the evening. Please bring this card along with you which will certify that you are a member of the parish.

"Respectfully,
(Signed) "ANTHONY HORBAL,
"Secretary."

In a stipulation filed in the instant case, it is agreed that the meeting was a friendly one, and that harmony prevailed. It appears now, however, that it may have been only a temporary armistice. A resolution was passed at the meeting authorizing defendant's officers to execute a mortgage on the church property to secure the payment of a note in the sum of $9,664.82, representing the sums due to various members of the church who had advanced moneys to it. In order to facilitate liquidation, the creditors entered into a trust instrument whereby they appointed Anthony Horbal, John Komarynski, and Alex Zdankewich to act as trustees for them and to take the mortgage security from the church corporation, with authority to collect and apportion the proceeds among them. The latter was a second mortgage subject to the first lien hereinbefore mentioned. Default having been made, Anthony Horbal and John Komarynski, individually and as trustees, filed the bill in the instant case to foreclose the mortgages, and asked that the property be sold to satisfy the two liens and the judgments to which we have referred. The defendant in its answer claims that the first mortgage was improperly authorized by a vote of the parties who were not regular members of the church, that the mortgage to the trustees was an *ultra vires* act of the corporation and represents an amount far in excess of the actual sum due the creditors secured thereby, and that the judgments were likewise irregular. The circuit judge in the instant case properly found that the first mortgage under the Nelson decree was duly assigned to Chuchman and Baran. Even were there any merit to defendant's contention, the decree in case No. 160,099, *supra,* has become *res judicata.* It is also unnecessary to consider the validity of the judgments which the trial judge found were improp-

erly taken and which have since been set aside. We do not believe, however, that the trial judge was correct in finding that the mortgage given to the trustees was a valid lien. He also found that the amounts claimed were due and owing to the various creditors for whom plaintiffs are acting as trustees. The testimony offered by defendant to show that such amounts were incorrect is so meager that, were it not that the mortgage must be set aside, defendant would be foreclosed from questioning the correctness of these amounts. The only question we believe it is necessary to determine at the present time is whether the execution of the mortgage was properly authorized.

Section 10112, 2 Comp. Laws 1929, provides that the by-laws of ecclesiastical corporations may prescribe:

"The manner and condition under which property, both real and personal, may be acquired, held and disposed of."

Section 10115, 2 Comp. Laws 1929, provides that an ecclesiastical corporation may mortgage and incumber its real estate,

"*Provided,* That the right to sell, convey or mortgage such real property shall be subject to such restrictions and conditions as may be prescribed by the rules of discipline, articles or by-laws pertaining to each such corporation."

The by-laws of defendant are, unfortunately, silent in regard to any provision regarding the authority to execute mortgages. We quote the only provisions in any way relating to the subject.

Article 5, § 2. "The board of trustees shall meet monthly or as often as necessary and shall conduct

the business of the church by a majority vote of those present."

Article 7, § 2. "All deeds of conveyance, mortgages, bills of sale and all other contracts shall be signed by the president, secretary and treasurer."

Article 8, § 1. "The regular monthly meetings and special meetings shall be called by the president or by any three members of the board of trustees upon giving at least seven days' notice thereof to the trustees."

Article 8, § 2. "Annual meetings shall be held in the city of Detroit, Michigan, in the month of April, on such a day and in such place as shall be designated by the board of trustees and announced by the pastor of the church."

Article 8, § 3. "One-third of all the male members of the church, of legal age, shall constitute the quorum for the transaction of business and election of officers."

Except for the annual meeting of the parishioners, provided for in section 2 of article 8, there seems to be no other provision for holding parish meetings. Clearly, the language of section 1 of this article refers only to meetings of trustees and precludes the possibility that it could refer to parish meetings, inasmuch as it only provides for notice to the trustees and impliedly refers to the trustees' meetings provided for in article 5, § 2. The by-laws do not confer on the parishioners any power with respect to mortgaging the property of the corporation, nor is there any provision for such a special meeting as was held on October 21, 1927. At most, the meeting was a meeting of the parish and not of the trustees. The mortgage, although signed by the proper officers, was not authorized by the board of trustees, and appears to be a nullity for that reason.

It is apparent from the notice of the meeting hereinbefore set forth that no reference of any kind was

made to the fact that it was to be held for the purpose of mortgaging the church property. While it asked the members to come to the meeting, as "the matter is very important," yet, because of the continuous difficulties in which the church was involved, we can readily see that there were so many "important matters" constantly demanding the attention of the parishioners that the notice itself gave no indication of the object of the meeting. A statement of the purpose of a special meeting in the notice thereof is usually required by the by-laws, but an express provision to that effect is not necessary. Notice of such meetings must generally contain a statement of the purpose, especially when business of an unusual nature is to be transacted. The failure of the by-laws to require specifically that the purpose of a special meeting must be stated in the notice does not obviate the necessity of such statement. 5 Fletcher, Cyclopedia of Corporations (Perm. Ed.), p. 49. The modern trend of authority is that the purpose of such a meeting must be stated. *Des Moines Life & Annuity Co.* v. *Midland Ins. Co.*, 6 Fed. (2d) 228; *Bagley* v. *Reno Oil Co.*, 201 Pa. 78 (50 Atl. 760, 56 L. R. A. 184); *Johnson* v. *Tribune-Herald Co.*, 155 Ga. 204 (116 S. E. 810).

At common law it was required that notice of meetings for any special and exceptional purpose state the object of the call. *Tuttle* v. *Railroad Co.*, 35 Mich. 247. Some decisions hold that there is less formality required in calling meetings of ecclesiastical corporations than of those formed for business purposes. See *Hubbard* v. *German Catholic Congregation*, 34 Iowa, 31; *Applequist* v. *Swedish Evangelical Lutheran G. Church*, 154 Wash. 351 (282 Pac. 224). However, even had the notice been regular, the query arises whether, under the statutes and by-laws quoted, the power to give the

mortgage was not vested solely in the trustees acting in such capacity.

A somewhat similar question arose in *People's Bank* v. *St. Anthony's R. C. Church,* 109 N. Y. 512 (17 N. E. 408), defendant claiming that notes supposedly made by the church were not signed by the authority of the trustees. In sustaining this contention, the court said:

"It is elementary that the powers vested in a corporation aggregate, having a board of trustees, reside, for all purposes of practical administration, in the board as the governing body. The corporation being a legal entity merely, can only act through instrumentalities and by delegation. The statutes creating it may describe its mode of action, and when the methods and agencies by which it may act are designated, that designation operates as a limitation and excludes other modes of action. The general powers of religious corporations are enumerated in the fourth section of the act of 1813. They are in form conferred upon the trustees. The section authorizes and empowers the 'trustees' to exercise the powers specified, and by the closing paragraph empowers them to regulate and order 'all other matters and things relating to the temporal concerns and revenues of such church.' The trustees of the defendant were, therefore, the only legal representatives of the corporation in exercising its corporate franchises and powers. Whatever powers were conferred on the corporation may be exercised in its behalf by the trustees. They, acting as a board, can make or authorize acts binding on the corporation, and they alone. Their sanction or authority is essential to a valid corporate act. The qualification that the collective authority of the trustees acting as a board is essential in order to bind the corporation by the action of its trustees, is a recognized doctrine of the law of corporations.

The trustees of a corporation have no separate or individual authority to bind the corporation, and this although the majority or the whole number, acting singly and not collectively as a board, should assent to the particular transaction."

In accord: *Columbia Bank* v. *Gospel Tabernacle Church,* 127 N. Y. 361 (28 N. E. 29). In *Cammeyer* v. *United German Lutheran Churches,* 2 Sandf. Ch. (N. Y.) 186, 228, the opinion states:

"I am perfectly satisfied that there was *no corporate act* of the defendants in relation to the building of St. Matthew's. The resolutions * * * were the acts of a conference of the United Churches, * * * which, by their ordinances then in force, consisted of the minister, three elders and six deacons, convened in a mass meeting with the nine trustees. The trustees did not act as such in a conference meeting. * * *

"The fact that a majority of the trustees were present, acting as a council, does not make the resolutions of the council the act of the board of trustees."

The claim is made that, if all parishioners and trustees were present at the meeting, the defendant should be estopped from denying the validity of the authorization of the mortgage. The testimony shows that many of the parishioners were absent from the meeting of October 21, 1927. It was claimed that 115 notices were mailed. One witness testified that 20 parishioners were present, while another places the number at 100. There is no claim that all of them were present. Under the particular circumstances, estoppel should not be raised against defendant when the action did not meet with the consent of all of its parishioners.

It is further claimed, however, that all the trustees were present at the parish meeting, and, therefore, defendant is estopped on this account from denying the validity of the mortgage, since it was authorized by the trustees. It has been held repeatedly that where an act may be performed only in pursuance of a resolution or authority of the board of directors, it can only bind the corporation when the board has acted thereon at a legal meeting as a board. *Cammeyer* v. *United German Lutheran Churches, supra; Conro* v. *Port Henry Iron Co.,* 12 Barb. (N. Y.) 27, 63. In *Landers* v. *Frank Street M. E. Church,* 114 N. Y. 626 (21 N. E. 420), in a suit on a salary claim by a minister, it was shown that the salary had not been fixed by the majority of the members and a majority of the trustees of the church as required by law. It was held that:

"The action of those who were trustees was not official, but personal in its character. Where the exercise of corporate acts is vested in a select body, an act done by the persons composing that body, in a meeting of all the corporators, is not a valid corporate act."

Inasmuch as there was no separate meeting of the board of trustees, in which authority was given to execute the mortgage, we must hold it invalid. It must be borne in mind that the mortgage was taken for antecedent debts by parties who were or should have been familiar with all of the transactions preceding the giving of the mortgage, and they cannot, therefore, claim the status of an innocent purchaser.

The further claim is made that Alex Zdankewich, one of the trustees, who was made a codefendant in the instant case, refused to act with the trustees in protecting the interests of his *cestuis*. It was proper for plaintiffs to make him party defendant. *Caylor*

v. *Cooper,* 165 Fed. 757, 762; *Dahl* v. *Levenberg,* 172 App. Div. 919 (157 N. Y. Supp. 14).

Under the circumstances, we must hold that the mortgage was not properly authorized, and, for that reason, null and void. It is set aside in accordance with the prayer of defendant's cross-bill, and a decree may be entered accordingly. Defendant will recover costs.

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

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GRAND RAPIDS TRUST CO. *v.* VON ZELLEN.

1. MORTGAGES—FORECLOSURE—STATUTES—CONSTRUCTION.
   Sections 14588, 14620, 3 Comp. Laws 1929, referring to sales in pursuance of court decrees, must be read together, since one supplements the other, and, where inconsistent, provisions of former section are impliedly repealed by latter.

2. SAME—ADJOURNED SALE—COMPLIANCE WITH STATUTE.
   Where circuit court commissioner posted notice of adjournment of foreclosure sale for six days at place where sale was to be had, but failed to make public declaration thereof at time and place previously appointed for sale, said attempted adjournment was invalid, and court properly refused to confirm sale made on adjourned day (3 Comp. Laws 1929, § 14588, 14620).

3. SAME—CONFIRMATION OF SALE—EVIDENCE.
   Where foreclosure sale on adjourned day was void because of invalid adjournment, purchaser had sold portion of said land to State for highway purposes, and at time of hearing to confirm sale State had paved it, offer to show interests of State and circumstances of sale was properly refused, since foreclosure sale had not been confirmed, and State got no title.

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As to sufficiency of notice of postponement of judicial sale, see annotation in L. R. A. 1915B, 640.

Appeal from Baraga; Stone (John G.), J. Submitted June 9, 1932. (Docket No. 60, Calendar No. 36,554.) Decided October 3, 1932. Rehearing denied December 6, 1932.

Mortgage foreclosure proceedings by the Grand Rapids Trust Company, as trustee, against John O. Von Zellen and others. From orders denying confirmation of sale on foreclosure and setting the sale aside, plaintiff appeals. Affirmed.

*Miller, Eldredge & Eldredge* and *Knappen, Uhl, Bryant & Snow,* for plaintiff.

*Matt Peura* (*Walter M. Nelson,* of counsel), for defendants.

McDONALD, J. This is an appeal from an order of the circuit court denying confirmation of the sale of lands under a decree of foreclosure in chancery.

Pursuant to the decree, proper steps were taken by the circuit court commissioner of Baraga county to sell the lands in question on April 2, 1929, at the courthouse in the village of L'Anse. On March 25, 1929, the commissioner knew he would be absent from his county on the date of sale. On that day, March 25th, he posted a notice at the door of the courthouse announcing the adjournment of the sale until April 8, 1929. On the adjourned date he conducted the sale and the lands were bid in by the plaintiff. On the hearing of an order *nisi* to confirm the sale, confirmation was refused by the court on the ground that the adjournment was invalid. Thereupon an order was entered setting aside the sale and directing the commissioner to resell pursuant to the decree. From this order the plaintiff has appealed.

In considering the validity of the adjournment, reference must be made to the applicable portions of sections 14620 and 14588, 3 Comp. Laws 1929. Section 14620 provides:

"The sheriff or other officer making such sale shall have power to adjourn the same from time to time, for a reasonable cause and if such adjournment be for more than one week he shall give notice thereof in the newspaper in which the original notice was printed, and immediately following the same, and shall continue a publication of such notices during the time for which such sale shall be adjourned, but shall not be required to post any notice of such adjourned sale except at the place where said sale is to be made."

Section 14588 provides:

"If, at the time appointed for the sale of any real or personal property on execution, the officer shall deem it expedient, and for the interest of all persons concerned, to postpone the sale for want of purchasers or other sufficient cause, he may postpone the same from time to time until the sale shall be completed; and in every such case he shall make public declaration thereof at the time and place previously appointed for the sale, and if such postponement be for a longer time than twenty-four hours, notice thereof shall be given in the same manner as the original notice of such sale is required to be given."

By statute, section 14686, 3 Comp. Laws 1929, sales of real estate in pursuance of a decree of the court are conducted in the same way as sales on execution.

It is the plaintiff's contention that in adjourning the sale for less than one week the commissioner followed the method provided in section 14620, and

did all the statute required him to do by posting a notice at the place of sale announcing an adjournment. Section 14620 makes no provision whatever for notice by posting or publication when the adjournment is for not more than one week. Section 14588 states what shall be done when such an adjournment is taken, but the plaintiff claims that section was repealed by section 14620. We do not believe so. Section 14588 was enacted in 1846 and was still in effect when 14620 was enacted in 1885. It will be observed that the latter statute provides no complete plan as to adjournments; for it makes no provision whatever for adjournments of one week or less. In not doing so it is fair to infer that the legislature intended such adjournments should be governed by the existing law found in section 14588. In some respects the two sections are inconsistent. Where not inconsistent both statutes are in force and effect. Where inconsistent it must be held that the inconsistent provisions of the prior statute were impliedly repealed by section 14620. But the provision in section 14588 relative to public declaration of the adjournment by the sheriff or commissioner at the time and place previously appointed for the sale is not inconsistent with anything in section 14620, because section 14620 is entirely silent on the subject. We must read the two sections together. One supplements the other. So considering them, it plainly appears that the only requirement in adjourning a sale of real estate for not more than one week is that the officer shall be present at the time and place previously appointed for the sale and there publicly announce the adjournment. Nothing further is required unless the adjournment is for a longer time than one week. In the instant case it was for six days. We are not here concerned with applicable provisions of the

statute governing adjournments for a longer period; but, to avoid further misunderstanding, it may be well to say that in all cases public declaration at the time and place appointed for the sale must be made by the circuit court commissioner. Of course that cannot be done if he is absent from his county at the time set for the sale, but the statute, 3 Comp. Laws 1929, § 13715, provides for such a contingency. In this case the circuit court commissioner did not follow any of the applicable provisions of the statutes. His attempted adjournment was invalid and the court was right in refusing to confirm the sale.

After the foreclosure sale, the plaintiff sold a portion of the land to the State of Michigan for highway purposes. At the time of the hearing the State had completed a paved road over the part which it had purchased. The plaintiff offered to show the interests of the State and the circumstances of the sale, but the court refused to receive the evidence. The court was right. The sale was not confirmed. The State got no title.

The order setting aside the sale is affirmed, and the cause remanded for resale pursuant to the decree. The defendant will have costs.

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

WHITE *v.* FULTON.

1. CHATTEL MORTGAGES—FORECLOSURE—RECEIVERS.
   On foreclosure of chattel mortgage covering stock, implements, etc., on large farm, evidence *held*, to show no emergency justifying appointment of receiver to sell same.

2. MORTGAGES—FORECLOSURE—CARE OF ORCHARD—RECEIVERS.
   On foreclosure of mortgage on large farm, care and maintenance of large orchard, *held*, not to warrant appointment of receiver.

3. SAME—PRINCIPAL AND AGENT—ACCOUNTING.
   Where owner of farm held son out as having almost unlimited authority, son had apparent authority to make agreement engaging mortgagee to manage orchard at owner's expense, and therefore on foreclosure of mortgage accounting under said agreement was properly allowed.

Appeal from Antrim; Gilbert (Parm C.), J. Submitted June 15, 1932. (Docket No. 144, Calendar No. 36,484.) Decided October 3, 1932.

Bill by Lysle H. White against George D. Fulton, Rebecca Winner, and Cecil A. Winner to foreclose a purchase-money mortgage, appointment of a receiver, and for an accounting. Decree for plaintiff. Defendant Rebecca Winner appeals. Modified, and affirmed.

*J. M. Harris,* for plaintiff.

*John G. Anderson* and *F. E. Wetmore,* for defendant Rebecca Winner.

CLARK, C. J. Defendants have appealed from decree of foreclosure of mortgage of $50,000 covering a farm of 3,600 acres in Antrim county, and also covering stock, implements, etc., on the farm.

On right of mortgagor to appointment of receiver, see annotation in 26 A. L. R. 33; 36 A. L. R. 609; 55 A. L. R. 533.

There is no question on the foreclosure itself, but incidental questions are raised.

1. *Receiver.* The court appointed a receiver to sell the personal property, to take charge of the farm, to care for a large orchard thereon, and to market produce. With respect to the foreclosure of a chattel mortgage, it is said in 11 C. J. p. 726:

"A receiver will not be appointed pending a suit to foreclose, where the mortgagee has an adequate remedy at law, or where it is not apparent that the rights of any person in interest are in jeopardy, because the appointment of a receiver is an extraordinary remedy, to be resorted to only in cases of emergency."

A review of the facts shows no emergency justifying a receiver to sell the personal property. The situation disclosed is that usually found by chattel mortgagees who would foreclose a mortgage on farm chattels. Approval of receivership here would make precedent for like appointment in most of such cases, hence we must decline approval.

Receivership of the farm is sought to be justified on the ground of husbandry, chiefly, the care and maintenance of the farm orchard. This might be urged in the foreclosure of any farm mortgage. There is always the question of good husbandry, the care of soil, orchard, buildings, etc., in effect, the preservation of security. The difference is not in principle, but in degree, this being an unusually large farm.

Under 3 Comp. Laws 1929, § 14956, and following *Hazeltine* v. *Granger,* 44 Mich. 503, as was said in *Nusbaum* v. *Shapero,* 249 Mich. 252, where the matter was discussed fully:

"The law is well settled in this State that, as a rule, a mortgagee may not divest the mortgagor of

possession of mortgaged premises until the title thereto shall have become absolute upon foreclosure of the mortgage."

We have held quite consistently that in cases such as this a mortgage cannot be so enforced in equity as to deprive the mortgagor of possession until title upon foreclosure shall have become absolute.

Accordingly, the decree must be modified to eliminate receivership.

2. *Accounting.* With foreclosure an accounting was had under an agreement between plaintiff and defendant Rebecca Winner, the owner, by Cecil Winner, her son, by which plaintiff was engaged to manage the orchard and to market certain products, this to be at expense of said defendant, who was to have benefit of all gain. There was no gain. There was large loss. Accounting under the agreement is resisted on the ground that defendant Cecil Winner had no authority to make the agreement. While defendant Rebecca Winner owned the farm, the farm stationery named both as owners. Mrs. Winner in many ways and over a period of time held her son out as having almost unlimited authority. He had apparent authority to make the agreement in question, as the trial judge rightly held.

No question is presented on this record of the correctness of the account. The decision of the trial court therefore is sustained.

3. The list of chattels found by the trial court to be covered by the chattel mortgage is criticized. The record is meager in this regard and error is not made to appear.

No other matter calls for discussion.

The decree, so modified, is affirmed, with costs to appellants. Cause remanded.

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

VOGT *v.* GENERAL NECESSITIES CORPORATION.

SLOMAN-POLK CO. *v.* GROSS.

1. RECEIVERS—ALLOWANCE FOR RENT.
   Where there was no evidence of reasonable rental value of premises occupied by lessee's receivers, court properly allowed rent at rates stipulated in lease.

2. SAME—PAYMENT OF TAXES AND WATER CHARGES.
   Where lease required payment of taxes as additional rent, and taxes became due and payable while lessee's receivers were occupying premises, court should have included them and also water charges for time receivers were in occupancy in allowance for rent.

Appeal from Wayne; Chenot (James E.), J. Submitted June 14, 1932. (Docket No. 110, Calendar No. 36,604.) Decided October 3, 1932.

In receivership proceedings by Ben T. Vogt and others against General Necessities Corporation, a Michigan corporation. On petition of Sloman-Polk Company, a Michigan corporation, to intervene and sue Nathan M. Gross and another, receivers, for sums due under a lease. From order made, intervener appeals. Modified and affirmed.

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

*Beaumont, Smith & Harris* (*Thomas B. Moore* and *Lewis S. Robinson,* of counsel), for receivers.

MCDONALD, J. The Union Guardian Trust Company and Nathan M. Gross are receivers of the

General Necessities Corporation. The Sloman-Polk Company is the lessor in a 99-year lease of certain premises in the city of Detroit. The General Necessities Corporation was the lessee by assignment. The receivers were appointed April 28, 1930. They took possession of the leased property and occupied it until October 1, 1930. A quarterly payment of rent under the lease became due May 1, 1930. By order of the court on petition of the receivers, they were authorized to pay the rent for that quarter in the amount specified by the lease. On August 1, 1930, another quarterly payment became due. It was not paid, the lessor intervened and petitioned the court to compel payment of rent, taxes, and water charges pursuant to the terms of the lease for the time the premises were occupied by the receivers. On the hearing the court entered an order requiring the receivers to pay a reasonable rent for the time of their occupancy, but denied the right of the lessor to recover the taxes and water charges. From this order the lessor has appealed.

It is the lessor's contention on appeal, first, that the receivers adopted the lease and assumed liability for the rent, taxes, and water charges according to its terms; and second, if they did not adopt the lease, their liability is measured by its provisions for the time of their actual occupancy of the premises, which includes rent, taxes, and water charges in the amount specified.

It is the contention of the receivers that they did not adopt the lease and that their liability is limited to a reasonable rental of the premises for the time they occupied them.

Whether or not the lease was adopted by the receivers is not a material question in this case because the lessor demanded and accepted a surrender of the premises on October 1, 1930; and, because,

in determining the amount of rent which the receivers should pay, the trial court allowed it at the sum stipulated in the lease. When the receivers surrendered possession of the premises, rent for the months of August and September was due and unpaid. By the terms of the lease the lessor was entitled to a rental of $1,000 a month. The court allowed $2,000 rent for the two months the receivers were in arrears. As this was at the rate stipulated in the lease and as there was no evidence of reasonable rental, neither party has ground to complain of the allowance.

As to the taxes, the lease provided that they should be paid by the lessee. They constituted a part of the rent as appears by the following language of the lease:

"The intent hereof being to insure to said lessors a net rental hereunder, not chargeable with any burdens by way of taxes, or otherwise, resulting in the diminution of the same."

It was clearly the intention of the parties to treat the taxes as additional rent to be paid as such by the lessee. On July 15, 1930, during the occupancy of the receivers, city taxes amounting to $8,131.81 became due and were payable by the lessee within 30 days of the due date. They were not paid by the receivers. The lessor was compelled to pay them in order to protect its property. As the receivers and their insolvent were in actual occupancy when the taxes for the year 1930 became due, they should be required to pay them.

The receivers concede that they should pay the water charges for the time of their occupancy, amounting to $89.45. The decree of the trial court should have included an allowance of these charges. It should also have included an allowance for the

taxes for the year 1930, together with the rental which was properly allowed at $2,000.

A decree will be entered in this court in accordance with this opinion. The lessor will have costs.

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

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## CONNOLLY *v.* PEOPLES STATE BANK.

1. CORPORATIONS—UNIFORM STOCK TRANSFER ACT—STOCK INDORSED IN BLANK—PLEDGES—NOTICE.

   Stock certificates indorsed in blank by owner, and fraudulently pledged to bank by brokers who held it as collateral, may not be reclaimed where bank was without notice of any facts making it wrongful (2 Comp. Laws 1929, §§ 9524–9526).

2. SAME—NOTICE—GOOD-FAITH PLEDGEE.

   Evidence *held*, insufficient to show that bank had knowledge of facts sufficient to place it on inquiry to ascertain ownership of stock fraudulently pledged to it by broker.

3. SAME—PURCHASER NOT BOUND TO INQUIRE OF FORMER OWNER.

   Purchaser of stock certificates made negotiable by signature in blank of person to whom issued owes no duty to such person to inquire into title of party in possession.

4. SAME—GOOD-FAITH PLEDGEE.

   Bank acting honestly in taking as pledge stock certificates indorsed in blank was good-faith pledgee (2 Comp. Laws 1929, §§ 9524–9526).

5. RECEIVERS—PLEDGES—FRAUD.

   Stock brokers' receiver has no interest in stock put up with them as collateral, and by them fraudulently pledged to bank, where their debt was paid in full.

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As to certificates of stock indorsed in blank, see annotation in 29 L. R. A. (N. S.) 254.

Appeal from Wayne; Root (Jesse H.), J., presiding. Submitted June 17, 1932. (Docket No. 33, Calendar No. 36,074.) Decided October 3, 1932.

Bill by May C. Connolly and William F. Connolly against Peoples State Bank and Hobart B. Hoyt, receiver of Hamlin, Kay & Nathan, a Michigan corporation, to recover certain certificates of stock. Bill dismissed as to defendant bank. Plaintiffs and defendant receiver appeal. Affirmed.

*Beaumont, Smith & Harris,* for plaintiffs.

*Lightner, Hanley, Crawford & Dodd* (*Thomas G. Long,* of counsel), for defendant bank.

MCDONALD, J. This bill was filed to recover from the defendant Peoples State Bank 4,000 shares of the common stock of the Briggs Manufacturing Company which is held by the bank as security for a loan to the brokerage house of Hamlin, Kay & Nathan, the title to which is in the plaintiff William F. Connolly.

The plaintiffs are husband and wife. Mrs. Connolly was a customer of Hamlin, Kay & Nathan. She bought stocks, many of them on margin. In 1925, she owed the brokers $290,027.75, and they held stocks collateral to her account the market value of which at that time was $322,450. By a decline in the market these stocks depreciated in value to such an extent that further security was requested. William F. Connolly was not a customer of the brokerage house, but, to assist his wife in strengthening her account, he deposited four certificates of 1,000 shares each of Briggs Manufacturing common stock indorsed by him in blank. The brokers immediately pledged it with other stock

to the bank to secure an existing indebtedness and a new loan. There was no agreement or understanding with either Mr. or Mrs. Connolly that the stock might be pledged. Two years later Mrs. Connolly paid up, closed her account, and demanded a return of the Briggs stock. With this demand the brokers were unable to comply because they still owed the bank, and the stock was held as security therefor. This suit was then brought to recover the stock on the theory that it was wrongfully pledged by the brokerage company, that the bank had knowledge of facts and circumstances showing that it belonged to William F. Connolly, and that the brokers were without authority to pledge it; that therefore the bank was not a good-faith pledgee.

The bank denies that it had knowledge of Mr. Connolly's ownership of the stock or of the conditions under which it was pledged to Hamlin, Kay & Nathan; denies that there were attending facts and circumstances sufficient to put it on inquiry; and asserts that it accepted the stock for a consideration and therefore was a good-faith pledgee for value.

On the hearing the trial court held that the bank was an innocent pledgee for value, and that the plaintiffs were not entitled to a return of the stock free from its lien.

About the time of the commencement of this suit Hamlin, Kay & Nathan became insolvent, and defendant Hobart B. Hoyt was appointed receiver. He claims an interest in the Briggs stock. On this claim the court held that Hamlin, Kay & Nathan were guilty of fraud, and that the receiver had no interest in the stock.

From the decree entered the plaintiffs and the receiver have appealed.

In disposing of this issue, the only question for our consideration is whether the defendant bank was a good-faith pledgee for value. The certificates of stock indorsed in blank by Mr. Connolly, the owner, and transferred to the bank, though without authority, by Hamlin, Kay & Nathan, cannot be reclaimed if the transfer was for value and without notice of any facts making it wrongful. Uniform stock transfer act, 2 Comp. Laws 1929, §§ 9524–9526.

It is not claimed that the bank had actual knowledge of the conditions under which the stock was pledged to Hamlin, Kay & Nathan by the plaintiffs or of its ownership by Mr. Connolly, but it is claimed that there were facts known sufficient to put it on inquiry. These facts are that the bank knew Hamlin, Kay & Nathan were brokers; that they bought stock on margins for customers; that though they carried but a small bank account, they were heavy borrowers and deposited a large amount of stock certificates as collateral to their loans; that they pledged stock that did not belong to them; and that the certificates in question showed on their face that they belonged to Mr. Connolly. It is claimed that these facts taken together were sufficient to place the bank on inquiry to ascertain the ownership of the stock and the right of the brokers to pledge it.

We cannot agree with the plaintiffs that these facts were sufficient notice to the bank that the transfer was wrongful. The Peoples State Bank is one of the largest banking institutions in the city of Detroit. It does a large commercial business. It had been loaning money on collateral to Hamlin, Kay & Nathan for a considerable time before the transaction in question. Nothing had occurred to excite suspicion that they were not men of the high-

est integrity. They were so regarded by the plaintiffs. Mr. Connolly knew them and apparently had sufficient confidence in them to invest them with the title of his stock without an agreement as to how it should be held. Mrs. Connolly had satisfactorily transacted a large volume of business with them until this controversy which arose long after they had pledged the stock in suit to the bank. There was nothing in their previous dealings with the bank which would cause it to question their right to repledge the plaintiffs' stock. The stock was rightfully in their possession in negotiable form. Mr. Connolly had indorsed the certificates in blank, thus investing the brokers with the "indicia of ownership" and the right to pass title by delivery. In this form they were accepted by the bank as collateral in the regular course of business. In these circumstances there was no obligation on the part of the bank to make inquiry as to the actual ownership of the stock or the legal right of the brokers to pledge it.

In *Peckinpaugh* v. *H. W. Noble & Co.*, 238 Mich. 464, 469–471 (52 A. L. R. 941), this court said:

"The purchaser of certificates of stock, made negotiable by signature in blank of the person to whom issued, owes no duty to such person to inquire into the title of the party in possession. * * *

"In the eye of the law an indorsement in blank of a stock certificate is not a mere inquisitive bit of evidence calling for investigation of rights remaining with the indorser. * * *

"Upon indorsement in blank by the owner, a stock certificate becomes a 'courier without luggage whose countenance is its passport.' "

The facts relied on by the plaintiffs, if known to the bank, gave it no reason to believe that the

brokers in rightful possession of certificates of stock indorsed in blank were not the owners thereof. There was no fact sufficient to create suspicion that the interest of the brokers was other than appeared on the face of the certificates.

"The doctrine of suspicion impugning rights of a possessor of indorsed certificates until the contrary is made to appear, would not only unduly retard negotiability demanded in the commercial world, but, in all except extremely rare instances, be considered a gratuitous insult." *Peckinpaugh* v. *H. W. Noble & Co., supra,* 470.

The record leaves no doubt that in this transaction the bank acted honestly, and that is all the law requires to constitute good faith. Therefore it must be held to have been an innocent pledgee for value.

The claim of the receiver as to an interest in the stock is wholly without merit and requires no discussion.

The decree is affirmed, with costs to the defendant.

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

*In re* HARRIS' ESTATE.

MORRIS *v.* KAPPEL.

1. EVIDENCE—EXPERT TESTIMONY—OPINIONS OF EXPERTS.
   Expert opinions, when properly admitted, are competent evidence.

2. WILLS—EVIDENCE—COMPETENT EXPERT TESTIMONY IMPROPERLY REJECTED.
   Competent testimony by handwriting experts that in their opinion signature to will was forgery disputed testimony of witnesses to will, raising issue of fact, and therefore trial court was in error in rejecting said expert testimony and directing judgment *non obstante veredicto* for proponent.

Appeal from Wayne; Miller (Guy A.), J. Submitted June 7, 1932. (Docket No. 10, Calendar No. 35,698.) Decided October 3, 1932.

George Morris presented the last will of Frank R. Harris, deceased, for probate. Lauramaye Harris Kappel and another filed petition to vacate order admitting it to probate. Upon certification to the circuit court, proponent had judgment *non obstante veredicto*. Contestants appeal. Reversed, and judgment ordered entered for contestants.

*Ernest P. La Joie* and *John W. L. Hicks* (*Charles C. Stewart,* of counsel), for proponent.

*George B. Murphy* and *Frederick Miller,* for contestants.

On value and weight of expert testimony as to handwriting, see annotation in 62 L. R. A. 871; 64 L. R. A. 317; L. R. A. 1918D, 642.

McDONALD, J. This is a contest involving the validity of the will of Frank R. Harris, deceased. The issue is whether the will was a forgery. The case has been tried twice. On the first trial the jury found that the will was not the will of Frank R. Harris. From the judgment entered the proponent appealed to this court, and in 247 Mich. 690, the judgment was reversed and a new trial ordered. Mr. Hicks, an attorney, and Glen R. Young, a physician, were witnesses to the will. They testified to its execution in the office of Mr. Hicks. On this, the second trial, their reputation for truth and veracity was challenged by the testimony of two witnesses, Mr. Lovett and Mr. Jennings. At the conclusion of all the proofs, the trial court on its own motion directed the jury to find a special verdict in the form of three questions submitted in writing. The questions and answers by the jury are as follows:

"1. Did Frank R. Harris sign this will?

"*A.* No.

"2. Does the testimony of Mr. Lovett establish that Mr. Hicks' reputation for truth and veracity in the community is bad?

"*A.* No.

"3. Does the testimony of Mr. Jennings establish that Dr. Young's reputation in the community for truth and veracity is bad?

"*A.* No."

When these answers were returned by the jury each of the parties moved for a judgment on the verdict. The court denied contestants' motion and entered a judgment sustaining the will *non obstante veredicto*. The contestants have appealed.

In entering judgment for the proponent notwithstanding the verdict of the jury that the will was a forgery, the trial court gave his reasons at length,

in which he arrived at the conclusion that there was no competent evidence to dispute Hicks and Young as to the execution of the will, and that therefore there was no question of fact for the jury. He reached this conclusion by discarding the testimony of the two handwriting experts who testified that the signature to the will was a forgery. He was wrong in rejecting their testimony. It was competent. It was properly admitted and bore directly on the only question in issue. It disputed the testimony of the two witnesses, Hicks and Young, and thus made a question of fact for the jury.

In refusing to consider the opinions of handwriting experts as competent evidence, the trial court says he followed the decision of this court on the former appeal, reported in 247 Mich. 690. In that case we did not hold that such evidence was not competent. We held that it had been erroneously admitted; that therefore it could not be considered, and without it there was no question of fact for the jury. In the instant case it was properly admitted and made the issue of fact as to the genuineness of the testator's signature.

In disregarding the expert testimony the trial court fell into error by following literally an isolated statement in our opinion on the former appeal. The writer of the opinion had been discussing expert opinions which were merely conclusions of the witnesses erroneously admitted in evidence. He said they were not to be considered and concluded with the statement that,

"The opinions of experts are of no weight when contrary to sworn testimony as to facts."

Standing alone this statement is wrong. But when read in connection with all that was said on the subject, particularly with the whole paragraph

of which it is a part, it is very plain that the court referred only to expert opinions that were mere conclusions. If it was not so intended the statement would be inconsistent with the entire argument of the opinion. This court has always held that expert opinions, when properly admitted, are competent evidence, and it did not intend to lay down a different rule in the opinion on the former appeal. One who follows an isolated statement and fails to consider an opinion in its entirety is apt to get on the wrong trail. That is what happened in this case.

The contestants were entitled to a judgment on the answer by the jury to the first question submitted by the court. The proponent has not appealed.

The cause will be remanded for the entry of a judgment disallowing the will. The contestants will have costs.

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

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CENTRAL STATE BANK *v.* ZELLI.

1. BILLS AND NOTES—FRAUD—HOLDER IN DUE COURSE—BURDEN OF PROOF.

Where payee shows that he was tricked into indorsing checks, and that they were taken from him without his knowledge, burden shifts to holder to show that he acquired title as holder in due course (2 Comp. Laws 1929, § 9308).

2. SAME—HOLDER IN DUE COURSE.

Evidence *held*, insufficient to sustain burden of proof that holder of checks was holder in due course.

Appeal from Jackson; Williams (Benjamin), J. Submitted June 15, 1932. (Docket No. 159, Calendar No. 35,980.) Decided October 3, 1932.

Bill of interpleader by Central State Bank, a Michigan corporation, against S. Zelli and Vasil Dioss to determine ownership of fund represented by cashier's checks. Decree for defendant Dioss. Defendant Zelli appeals. Affirmed.

*M. F. Badgley*, for defendant Zelli.

*Harry E. Barnard*, for defendant Dioss.

NORTH, J. This is a bill of interpleader filed to secure an adjudication as to which of the two defendants is entitled to the proceeds of two cashier's checks, each in the sum of $900. Each of the defendants appeared, each filed an answer and cross-bill claiming the fund. The defendant Vasil Dioss had a decree in the circuit court, from which defendant S. Zelli has appealed.

In September, 1927, defendant Dioss, preparatory to a trip to Europe, purchased from plaintiff bank the two cashier's checks, each payable on demand to himself. His ultimate European destination was Macedonia, where his family resided. For a number of years he had worked as a cook and waiter in a restaurant in Jackson, Michigan; and, as the facts hereinafter recited disclose, he appears to have been somewhat inexperienced in the ways of the world. En route Dioss stopped in Paris. He still had in his possession the two checks and a considerable

sum of money. He there made the acquaintance of two men with whom he visited various places of interest and amusement. Evidently they learned that Dioss had the checks in his possession. They induced Dioss to indorse these checks, and by means of a trick, the details of which need not be recited, they obtained possession of the checks without Dioss' knowledge just as he was about to leave Paris in continuation of his journey. The other defendant, S. Zelli, at the time was operating a restaurant in Paris. He claims he cashed these two checks for one S. Norman, whom he had known for eight or ten years as a dealer in antiques and an American citizen who stopped at the Grand Hotel at Paris. Zelli's testimony was taken by deposition, wherein he states that on several occasions he had cashed checks for Norman, that he considered him a man of means, honorable, and that he was a customer of Zelli's restaurant. Zelli claims that Norman indorsed the two checks in the restaurant about 11:30 p. m. on a holiday when all banking institutions were closed; that he (Zelli) cashed the checks for Norman, paying therefor in French francs the face value, less exchange. In this connection it is Zelli's claim that he took these checks in good faith, without notice of any infirmity therein or of any defect in the title of Norman, and also without any detailed information as to how or under what circumstances the latter obtained them. Zelli had never seen Dioss, and had no knowledge whatever concerning him, but Zelli was informed by Norman that Dioss indorsed the papers in his (Norman's) presence. Zelli forwarded the checks for collection, but in the meantime payment had been stopped by Dioss.

The circuit judge filed in this case a very full and helpful opinion. We quote it in part:

"The court is satisfied from the testimony, and therefore finds that Dioss, the original payee in the cashier's checks never intentionally delivered the same to anyone after indorsing them; that the two purported friends he met in Paris were confidence men, intent on fleecing Dioss; that they secured his indorsement of the checks by duress; and that after such indorsement, they stole the checks from his person.

"This is a sufficient showing under section 61, Michigan negotiable instruments law (2 Comp. Laws 1929, § 9308), to shift the burden to the holder, Zelli, 'To prove that he or some person under whom he claims acquired title as a holder in due course.' See, also, *Horrigan* v. *Wyman,* 90 Mich. 121, which holds:

> " 'After proof by the maker that a promissory note sued upon by an alleged innocent holder was fraudulently obtained of the payee by a prior transferee, the burden of proof is upon the plaintiff to show that he is a *bona fide* holder for value.' * * *

"As to the 3d and 4th requisites (2 Comp. Laws 1929, § 9301) of good faith and lack of notice of defect of title, it is necessary to consider all of the facts and circumstances surrounding the transaction in question, to weigh the testimony of Zelli carefully, and to determine what if any inferences are to be drawn from all the attending circumstances.

"Let us consider Zelli's version of the transaction. In the court's experience, it would seem a highly unusual and unreasonable proceeding to suggest to a restaurant keeper at almost midnight on a holiday, even though he were an acquaintance, that he cash for you two drafts aggregating $1,800 with no explanation whatever, so far as the testimony discloses, as to why *both* drafts should be cashed in a manner so out of line with ordinary business practice. Why would Norman, if a man of means, go

to a restaurant keeper for financial accommodation rather than the hotel where he lived, and why did he need $1,800 all at once and in such a hurry? Consider whether Zelli's story is reasonable and probable as to having readily available in his restaurant at the time claimed the sum of $1,800 in currency; whether if he did have and withdrew it from the safe or cash drawer, some other person, cashier or custodian would not have been cognizant of such withdrawal, the amount thereof, how the bookkeeping was handled with reference to the transaction; who was present, if anyone, or no one, what was actually said by the parties and whether or not such a person as S. Norman ever existed or in fact indorsed the checks.

"The information on these and similar questions that may readily occur to the seeker after the real facts is all within the knowledge of Zelli, if his story is the whole truth, yet he produces no witness except himself, gives only the barest details, and much of his evidence consists of categorical answers to interrogatories which are highly suggestive and obviously framed to bring the case within the letter of our negotiable instruments act. * * *

"At the risk of repetition, the court, from a purely practical standpoint, cannot conceive of himself or any ordinary business man, either asking to have checks of such a large amount cashed under such peculiar circumstances or on the other hand, of being willing to cash checks of such amount and under like circumstances, if so requested to do.

"The court finds that all these suspicious circumstances, when taken together, give character and color to the question under inquiry to such an extent that the court is not convinced by the evidence that Zelli acted in good faith in the transaction, and believes moreover that reasonable men might well take the same view of the entire situation."

Consideration of this record fully satisfies us that the determination of the circuit judge of the issue

of fact presented was correct. The testimony is not satisfying that appellant acted in good faith. The following cases present somewhat similar issues, though of course the facts differ: *Goodrich* v. *McDonald,* 77 Mich. 486; *Republic National Bank* v. *Bobo,* 227 Mich. 6.

"It is not the mere denial of knowledge by the plaintiff that entitles him to an instruction in his favor on such an issue. But the circumstances under which he took the note, and which he has the affirmative duty to prove after its fraudulent origin has been shown, must be wholly consistent with the theory that he was not guilty of bad faith in its acquisition." *Edelen* v. *Hagerstown First National Bank,* 139 Md. 413, 419 (115 Atl. 599).

The decree entered in the circuit court is affirmed, with costs to appellee.

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

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EQUITABLE & CENTRAL TRUST CO. *v.* ZDZIEBKO.

1. JOINT TENANCY—DEPOSITS IN BANK—STATUTES.
   Strict formalities are not requisite in creating joint bank account with right of survivorship (3 Comp. Laws 1929, § 12063).

2. SAME—ACKNOWLEDGMENT OF FORMER SIGNATURE.
   Acknowledgment of former signature on card creating joint tenancy in bank account, with intention thereby of creating new joint tenancy, is as effective in accomplishing said purpose as execution of new card.

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On deposit of funds in bank account in name of depositor and another as creating joint tenancy, see annotation in 12 L. R. A. (N. S.) 355; L. R. A. 1917C, 571; 48 A. L. R. 189; 66 A. L. R. 881.

3. SAME—TRANSFER OF BANK ACCOUNT—"DEPOSIT."
Transfer of bank account in mother's name to joint account with daughter was tantamount to "deposit" within meaning of statute providing for joint tenancy in bank accounts (3 Comp. Laws 1929, § 12063).

4. SAME—COMPLIANCE WITH STATUTE.
Evidence *held*, to establish sufficient compliance with statutory requisites to create joint tenancy between mother and daughter in bank account formerly standing in mother's name only (3 Comp. Laws 1929, § 12063).

5. SAME—FRAUD—UNDUE INFLUENCE.
Mother's act creating joint tenancy in bank account between herself and daughter, *held*, not result of fraud or undue influence, under record.

Appeal from Wayne; Pugsley (Earl C.), J., presiding. Submitted June 7, 1932. (Docket No. 30, Calendar No. 36,511.) Decided October 3, 1932.

Bill by Equitable & Central Trust Company, a Michigan corporation, as administrator, against Mary Zdziebko and Guardian Detroit Bank to impress a constructive trust on the proceeds of a joint account. Decree for plaintiff. Defendants appeal. Reversed.

*McLeod, Fixel, Abbott & Fixel,* for plaintiff.

*Wm. Henry Gallagher* (*William H. Kaplan* and *S. Reymont Paul,* of counsel), for defendant Zdziebko.

*Warren, Hill & Hamblen,* for defendant Guardian Detroit Bank.

NORTH, J. This bill was filed for the purpose of determining the ownership of a bank deposit as between plaintiff, the administrator of the estate of Agatha Zdziebko, deceased, and the defendant Mary

Zdziebko. The depository bank was also made a party defendant. In the circuit court plaintiff had decree, and defendants have appealed.

Agatha Zdziebko at the age of 82 years died December 17, 1930. She was the mother of five sons and two daughters, the latter named Anna and Mary, respectively. The mother and daughters for many years occupied the home together in the city of Detroit, and at times other members of the family also lived in the household. Mary appears to have assisted largely in the discharge of household duties, while Anna over a period of years was employed in a department store. In 1923 Anna and her mother opened a joint bank account with right of survivorship in the predecessor of the defendant Guardian Detroit Bank. This account continued in this condition until Anna's death March 6, 1930. At that time there was a balance of substantially $600. Shortly after Anna's death the mother and daughter Mary went to the bank and it is Mary's contention that there was an interview between the bank teller and the mother at which time she directed the account to be changed to a joint account with right of survivorship between herself and Mary. The signature card which had been executed by the mother and Anna at the time the account was originally opened was thereupon signed by Mary. Mrs. Zdziebko was of Polish nationality and neither spoke nor wrote the English language. The teller spoke the Polish language, and the conversation relative to the transfer of the account was carried on in Polish between the teller and Mrs. Zdziebko. There is some uncertainty in the testimony as to whether Mrs. Zdziebko, by making her cross, re-executed the signature card. Because of the statute (1 Comp. Laws 1929, § 14219) Mary was not permitted to testify as to matters equally within the

knowledge of her deceased mother. The only other available witness was the teller, Mr. Wojcik. As to whether the mother re-executed the signature card, Wojcik in part testified:

"*Q.* And you say that at that time Agatha made her mark on the front of the card?
"*A.* Yes.
"*Q.* When Mary signed the card; is that correct?
"*A.* Yes. * * *
"*Q.* And that cross was on the card originally, wasn't it, when you pulled the card out to have Mary sign it, that cross was on there?
"*A.* I don't recall whether it was originally or whether I had to do that when she made the account joint."

The circuit judge was very much inclined to discredit the testimony of Wojcik, and evidently concluded that the signature card was not re-executed at the time Mary claims the joint account was created between herself and her mother. As hereinafter noted, we do not consider the question controlling. The circuit judge's opinion concerning this bank transaction contains the following:

"The defendant, Mary, claims that her mother, Agatha, at that time told Mr. Wojcik that she wished to have Mary's name written on the card, that Mr. Wojcik at that time explained in Polish to her that the effect of doing so would be to place the account in such condition that the entire amount thereof would go to Mary in the event of her death. Mr. Wojcik says that this was made very clear to Agatha and that she thoroughly understood it, and that thereupon Mary's name was written upon the card."

As to the issues in controversy, the circuit judge correctly said:

"The whole issue in this case is a question as to who is entitled to the bank account remaining in the bank at the time of Agatha's death. It is the contention of the plaintiff in this case that no joint tenancy was created in this bank account between Mary and her mother in accordance with the provisions and requirements of 3 Comp. Laws 1929, § 12063, and, further, that all efforts and attempts to create such an estate in the money in the bank was the direct result of efforts on the part of Mary through undue influence exercised by her over her mother, and that any steps taken by her mother which would in effect deprive the estate of the mother of these moneys was the direct result of Mary's undue influence and dominion over her mother."

The questions thus presented are (1) whether the act of the mother was the result of undue influence exercised upon her by Mary, and (2) whether a joint account with right of survivorship was created between Mary and her mother in accordance with the statute. The statute reads:

"When a deposit shall be made in any bank or trust company by any person in the name of such depositor or any other person, and in form to be paid to either or the survivor of them, such deposits thereupon and any additions thereto, made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants * * * and may be paid to either during the lifetime of both, or to the survivor after the death of one of them." 3 Comp. Laws 1929, § 12063.

The signature card contained the following:

"1766 Anna or Agatha Zjepko

"I hereby agree to the by-laws, rules and regulations of the First State Bank of Detroit.

"Payable to either or both of us and to the survivor, who by agreement between us, will be the sole owner of the balance of this account at the death of either.

"MARY ZDZIEBKO
"Sign here ANNA ZJEPKO Closed
her Transferred to 8405
"AGATHA X ZJEPKO 6866.03
mark J. B. JOSAKOSIEROWSK
Dec. 27, 1930."

In the opinion of the circuit judge touching this phase of the case it is noted:

"Their (Anna and Agatha) names do not appear upon the bank-book, but there does appear on the book, the number, 1766, being the same number as on the ledger sheet, exhibit 2, and the same number as on the signature card, exhibit 1. * * * There is no language which provides for the creation of a present estate in the account at the time of the deposit sufficient to negative the circumstances and other facts opposed to such estate. * * * It is very significant indeed that no new card was made at the time Mary and her mother went to the bank. It is further significant that no new ledger account was ever opened between Mary and her mother on the records of the bank; that up to the time of this trial, Mary's name appears nowhere upon the records of the bank except upon the card exhibit 1, and on her own separate bank account opened September 24th."

We think no particular significance attaches to the phases of the bank's records noted by the trial judge. The undisputed testimony is that this transaction relative to changing the account from one which stood in the name of Agatha as survivor of herself and her daughter Anna, to a joint account between Agatha and Mary was in accordance with

the methods adopted by the bank and their usual custom. By their signatures on the card the depositors "agree to the by-laws, rules and regulations of the bank." In any event, if the appellant as the survivor of her mother is otherwise entitled to this bank deposit, her rights ought not to be jeopardized by the somewhat lax methods used by the bank in transacting its business and keeping its records. Strict formalities are not requisite in creating a joint bank account with right of survivorship. *In re Rehfeld's Estate,* 198 Mich. 249; *People's State Bank* v. *Miller's Estate,* 198 Mich. 783; *In re Taylor's Estate,* 213 Mich. 497; *State Savings Bank* v. *Baker,* 257 Mich. 666; *In re Carlin's Estate,* 134 Misc. Rep. 596 (236 N. Y. Supp. 329). Regardless of whether Agatha re-executed the signature card, there is no valid reason why if her intent so to do is established, her acknowledgment of her former signature on the card should not be as effective as the execution of a new card. Nor is there any force to appellee's contention that no deposit was actually made at the time Mary's name was placed upon the signature card. To be sure, the statutory provision is "when a deposit shall be made in any bank;" but obviously a transfer of Agatha's individual account to a joint account between herself and her daughter was tantamount to a "deposit."

The trial judge seems to have concluded that our decision in *First National Bank & Trust Co.* v. *Huntley,* 251 Mich. 483, is quite controlling of the instant controversy. In this we cannot agree because the signature card in this case contains nothing that is indicative of an attempt to make a testamentary disposition of the bank deposit. That was a controlling issue in the *Huntley Case.* It was there held a deposit did "not create a joint account *in*

*præsenti,* but the provision for the payment to the sons was future and conditional." Instead of being adverse to appellant's contention, decidedly the opposite is true of the *Huntley Case,* wherein it is said, quoting syllabus:

"Where deposit in bank is specifically made joint in form provided by 2 Comp. Laws 1915, § 8040 (3 Comp. Laws 1929, § 12063), right of survivorship exists."

Appellee's contention that the alteration of the signature card was only for the purpose of creating a right or agency in Mary to withdraw funds from the account for her mother is not sustained by this record. We think there was sufficient compliance with the statutory requisites to create in the bank a joint account with right of survivorship between Agatha and Mary, and that it was the intention of the mother so to do.

Touching appellee's claim of fraud and undue influence, this record presents an unhappy picture. Without narrating details, it is sufficient to state that the family relations were, to say the least, unfortunate, characterized by frequent quarrels and physical encounters, drunkenness, calling of the police to settle family difficulties, etc. Of this phase of the case the trial judge said:

"Considerable testimony has been given in this case, showing the conditions in the home of the mother and Mary, and going back for some time prior to the death of the daughter, Anna. All of the children now surviving, except Mary, have testified to incidents of unkindness on the part of Mary to her mother. A little testimony has been introduced in opposition to this theory by disinterested neighbors. It is quite apparent that there has been much discord and lack of harmony between the chil-

dren in this family, and it is quite apparent that the sons are all very much displeased at this time over the fact that Mary seeks now to become the beneficiary of all of the money in the bank, without sharing any part thereof with any of them."

Careful consideration of the record satisfies us that Agatha Zdziebko in changing her individual bank account to one that was joint between herself and Mary was not the victim of a fraud nor was her act in so doing the result of undue influence. We are constrained to hold that the result reached in the circuit court is not sustained by the record.

The decree entered in the circuit court will be set aside and one entered in this court in accordance herewith, with costs of both courts to appellants.

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

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STIELER *v.* PEARSON.

1. CHAMPERTY AND MAINTENANCE—PURCHASING NOTE WITH INTENT TO SUE—PRACTICING ATTORNEY—ABANDONMENT.

   In action on promissory note by attorney, evidence *held*, to show that he had not abandoned practice of law, rendering him amenable to statute prohibiting attorney from purchasing promissory note with intent of bringing suit thereon contrary to 3 Comp. Laws 1929, § 13593.

2. SAME—INTENT—STATUTES.

   Attorney's purchase of promissory note is unlawful only when done for purpose of bringing suit, thereby annoying and harassing debtor and making him costs.

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On purchase of cause of action by attorney as champertous, see annotation in 4 A. L. R. 173.

3. SAME—VIOLATION OF STATUTE—INTENT.

Where evidence shows that attorney's purchase of promissory note on which he brought suit was not for purpose of oppression or annoyance, but only to put himself in more strategic position in dealing with debtor, who refused to pay just obligations, there was no violation of statute, and plaintiff was entitled to judgment (3 Comp. Laws 1929, § 13593).

Appeal from Wayne; Moll (Lester S.), J. Submitted June 10, 1932. (Docket No. 79, Calendar No. 36,565.) Decided October 3, 1932.

Assumpsit by Ernest C. Stieler, assignee of Arthur F. De Yonker, trustee in bankruptcy of Detroit Soluble Oil Company, a corporation, against Alan H. Pearson on a promissory note. Judgment for defendant. Plaintiff appeals. Reversed, and remanded for entry of judgment for plaintiff.

*Harry M. Stone,* for plaintiff.

MCDONALD, J. This action is on a promissory note given by the defendant to the Detroit Soluble Oil Company and purchased by the plaintiff from its trustee in bankruptcy.

In defense to the action it was urged that there could be no recovery because at the time he acquired the note the plaintiff was an attorney and purchased it with the intent and purpose of bringing suit thereon contrary to 3 Comp. Laws 1929, § 13593.

On the trial the court adopted the theory of the defense, and entered a judgment against the plaintiff.

As cause for appeal, the plaintiff insists that at the time he purchased the note he was not an attorney in the sense intended by the statute, and that he did not purchase it with the purpose of bringing suit thereon.

1. The plaintiff was admitted to the bar and began the practice of law in the city of Detroit in 1909. But he claims to have abandoned it in 1914, at which time he became connected in business with the Detroit Soluble Oil Company and other business concerns. He was engaged in these various enterprises when he bought the note in question. Though the major portion of his business was not of a legal character, it was shown in his own testimony that he acted as general legal counsel for the companies in which he was interested; that he used his letterheads on which he was designated an attorney in attempting to collect delinquent accounts; that he caused himself to be listed in the telephone books and city directories as "lawyer;" that he continued to transact legal business for clients up to the point of litigation and then turned them over to another lawyer of his own selection. In view of these facts, it cannot be said that he had abandoned the practice of law and was not amenable to the statute which prohibits an attorney purchasing a promissory note, etc., "with the intent and for the purpose of bringing any suit thereon."

2. The second element of the case involves the question of plaintiff's purpose in purchasing the note.

Of course it is perfectly legitimate for an attorney to buy a note or other claim of indebtedness against another. It is unlawful only when he does so for the purpose of bringing suit, thereby annoying and harassing the debtor and making him costs. The plaintiff was associated in business with the defendant. He was president of the Detroit Soluble Oil Company, and the plaintiff was its secretary. The defendant became indebted to the company by overdrawing his salary. The note in question represents

the amount of that overdraft. The defendant also became indebted to the plaintiff as a joint guarantor with him and their business associates on a $36,000 obligation to the American State Bank of Highland Park. He did not pay, and plaintiff was compelled to pay his share of the obligation. After these transactions the Detroit Soluble Oil Company went into bankruptcy. The note in suit was listed as an uncollectible asset and was offered to the highest bidder. The note was for the payment of $3,085.71. The plaintiff bought it for $15. He says he did not buy it for the purpose of bringing suit thereon, and the circumstances all tend to support his claim in that respect. He did not begin suit for nearly two years, and then only when action was about to be barred by the statute of limitations. He says he bought it for the purpose of placing himself in a more advantageous position in bringing about a settlement of defendant's other indebtedness to him.

"I wanted that note in my hands with the aim of coming to a compromise or settlement with Mr. Pearson upon these other amounts advanced by me, by my associates and myself, and to which he should have paid his share."

In purchasing the note in these circumstances, we do not think the plaintiff violated the spirit and object of the statute. The statute prohibiting the buying of claims by attorneys with the intention of bringing suit thereon has a useful and beneficial purpose, and should be rigidly adhered to when the purpose of the purchase is for speculation or profit and tends to annoy or harass the debtor and make him costs. From the facts attending the purchase of this note, we are satisfied that the plaintiff did not intend to use it as a means of oppression or

annoyance, but only to put himself in a more strategic position in dealing with a man who refused to pay his just obligations.

The judgment is reversed, and the case remanded in order that judgment may be entered for the plaintiff, with costs.

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

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HOLMES *v.* ROBERT OAKMAN LAND CO.

1. VENDOR AND PURCHASER—FRAUD—RESCISSION—WAIVER.
   In suit by vendees to rescind land contract on ground of fraud, evidence *held*, to sustain finding of trial court that right to rescission was not waived by laches and payments.

2. SAME—PLEADING—AMENDMENT—ABUSE OF DISCRETION.
   In suit by vendees to rescind land contract on ground of vendor's fraud, refusal to permit defendant trust company to amend its answer and reopen case to show that it was trustee instead of owner of vendor's equity, *held*, abuse of discretion.

Appeal from Wayne; Smith (Guy E.), J., presiding. Submitted June 22, 1932. (Docket No. 101, Calendar No. 36,597.) Decided October 3, 1932.

Bill by Alfred W. Holmes and another against Robert Oakman Land Company and Union Guardian Trust Company to rescind a land contract on the ground of fraud. Decree for plaintiffs. Defendants appeal. Affirmed as to defendant Robert

On waiver of purchaser's right to rescind, see annotation in 30 L. R. A. (N. S.) 872.

Oakman Land Company. Reversed and remanded as to Union Guardian Trust Company.

*Goodenough, Voorhies, Long & Ryan,* for plaintiffs.

*Austin & Newman,* for defendant Robert Oakman Land Company.

*Bulkley, Ledyard, Dickinson & Wright* (*Harold R. Smith, Robert E. McKean,* and *Ellis B. Merry,* of counsel), for defendant Union Guardian Trust Company.

MCDONALD, J. This is a suit for rescission of a land contract on the ground of fraud and misrepresentation.

On April 30, 1927, the plaintiffs purchased on contract from defendant Robert Oakman Land Company certain real estate in the city of Dearborn, Wayne county, Michigan. The purchase price was $40,000, of which $5,000 was paid down, and the balance was to be paid in monthly instalments. Payments were made from time to time until January, 1931, when the plaintiffs decided to rescind on the ground that they had been deceived by misrepresentations of the defendant as to the construction and quality of workmanship of the house on the property which they had purchased for a home. On July 9, 1931, they filed this bill for rescission. The Robert Oakman Land Company answered denying the fraud charged and alleging that the plaintiffs had waived their right to rescind by long delay in asserting the same, and by making payments on the contract after the alleged fraud was discovered.

The Union Guardian Trust Company was made a party defendant on the theory that it had some interest in the property by way of security for loans

or as trustee under a trust indenture. The answer of the company alleges that in April, 1927, it purchased the equity of the Robert Oakman Land Company's interest in the contract, and that, though it received payments on the contract from the plaintiffs, it had no notice of their claims of fraudulent misrepresentation.

On the hearing, the court found that the plaintiffs were entitled to a rescission, and gave them a decree for $15,022.71, which was the amount they paid less $5,651 charged to them as rental value of the house during the time they occupied it. Of the amount found to be due, the decree provided that defendant Union Guardian Trust Company should pay $8,876.87, and that the plaintiffs should have a lien on the property for the full amount of the $15,022.71. From this decree both defendants have appealed.

The first question to be considered is whether the plaintiffs are entitled to a rescission of the contract.

They bought this property for a home. They were inexperienced in building construction. It was represented to them that the house was constructed of first-class materials, with excellent workmanship, and good for a life-long home. The plaintiffs relied on these representations. The undisputed testimony shows that they were not true. The building was not properly constructed. The walls cracked, the floors sagged, the basement and windows leaked, and there were other substantial defects. The testimony is conclusive that the plaintiffs were entitled to a rescission unless their right thereto was waived by laches and payments after the defects were discovered.

They went into possession of the property in August, 1927. They ceased payments January 3, 1931. They began this suit for rescission July 9, 1931. The

record shows a reasonable excuse for delay in asserting their right to rescind. The defects in the construction of the house did not appear all at once. Some of them, particularly the cracks and the sagging, came on gradually, small cracks becoming larger and new ones appearing. Repairs were promised and were made from time to time by both parties with unsatisfactory results. In March, 1931, the plaintiffs had the house inspected by the department of engineering and building of the city of Dearborn, after which they consulted their attorneys, who wrote the Robert Oakman Land Company a letter on April 30, 1931, which correctly states the situation as shown by the facts appearing in the record. We quote the applicable part as follows:

"We understand that repairs have been made to this house from time to time, some of which were made by you and others by our clients, in an effort to remedy the numerous defects in the construction of the house. We are also advised that these repairs have given only temporary relief and that a short time ago our clients had several reputable builders make a thorough examination of the house, with the result that they discovered numerous latent defects in construction, such as the fact that the roof is entirely too heavy for the house, the weight of the house is not properly distributed so as to have the supporting girders stand the same, the concealed plumbing is installed in such a manner that it is impossible to prevent freezing, and other defects which in the opinion of the builders who have examined the house make it necessary that the house be practically reconstructed. The cracking and breaking away of the joists has been so gradual and new defects have appeared so constantly that our clients were not aware of the seriousness of the same until the examination above referred to was made.

"We have before us your letter of April 18th, indicating your willingness to make certain repairs to the house. We are advised that the repairs you offered to make would not be sufficient to place the house in proper shape and that the defects are much more serious than your letter indicates."

This letter also asked for an adjustment of the matter and rescission of the contract. No adjustment was made, and this suit followed. The testimony is convincing that after the plaintiffs became satisfied that no repairs could give them such a structure as they contracted for, they ceased their payments and with reasonable promptness asserted their right to a rescission. The record amply sustains the finding of the trial court that rescission was not waived by laches and payments.

The second and remaining question relates to the liability of the Union Guardian Trust Company.

The bill of complaint alleges:

"That plaintiffs have been informed and believe that Union Guardian Trust Company claims some interest in said property by way of security for loans made by it to Robert Oakman Land Company, or as trustee under a trust indenture executed by Robert Oakman Land Company, although plaintiffs are informed and believe that the equitable title to said property is still in Robert Oakman Land Company."

The answer of the Union Guardian Trust Company says that it has a very substantial interest in the land contract. It alleges:

"Said defendant, Union Guardian Trust Company, alleges that it is now, and for upwards of four years has been, the legal owner of the seller's equity in said land contract, as a *bona fide* purchaser for

value and without notice of the alleged claims of plaintiffs, as set forth in the bill of complaint."

On the hearing, no testimony was offered as to the interest of the trust company. It was assumed that its interest was as stated in its answer. But after the court had rendered his decision, and before decree, the company filed a motion to amend the answer in respect to its interest in the contract and to reopen the case for the purpose of offering in evidence a trust mortgage and warranty deed covering the land in suit and other property. The court accepted in evidence the deed and trust mortgage, but refused an amendment to the answer. Subsequently the trust company filed a petition for rehearing supported by affidavit showing that, in its dealings in respect to the contract in question, it acted as trustee under the trust mortgage or declaration in trust which the court had received in evidence on the previous motion to reopen the case, and that, pursuant to the trust, it had disbursed all of the payments received from the plaintiffs on the contract. From a denial of this petition the defendant trust company appealed, and that appeal has been consolidated with the appeal from the decree.

When the trial judge made his decree there was in evidence the so-called trust mortgage and warranty deed, both of which were executed and recorded in 1924, three years before the plaintiffs bought the property in question. But it is apparent he did not consider them in making his decree. It was based on the theory as alleged in the defendant trust company's answer that its interest was that of a good-faith purchaser for value of the vendor's equity in the contract. The decree provided that Robert Oakman Land Company and the Union Guardian Trust Company pay the plaintiffs

$8,876.87; that Robert Oakman Land Company pay them $6,145.84, and that plaintiffs have a lien on the premises for the full amount of $15,022.71.

This decree cannot be sustained against the Union Guardian Trust Company if its only interest was that of trustee and it disbursed all of plaintiffs' payments before suit pursuant to its trust. The prior recorded warranty deed and so-called trust mortgage were in evidence. They showed the Union Guardian Trust Company was trustee and had a lien for the benefit of holders of bonds and coupons prior to that granted to the plaintiffs in the decree. The only evidence necessary to make the trust company's defense complete on its trustee theory was as to its claim of disbursements prior to suit. The trial court refused to reopen the case for the purpose of taking this testimony. The question is whether in so ruling and refusing permission to amend the answer he abused his discretion.

The Union Guardian Trust Company had ample opportunity at the trial to present all evidence bearing on its interest in the land contract. It has not been diligent, and if decision of the question could justly be placed on that ground alone, we would agree with the ruling of the trial judge. But notwithstanding its lack of diligence, we think justice requires a reopening of the case for the admission of the proposed testimony. There seems to be no doubt as to the existence of a valid trust agreement or mortgage affecting the premises in question. The court permitted the instrument to be received in evidence, and it would have taken very little more of his time to have allowed testimony as to the disbursements pursuant to its terms. The decree adversely affects the holders of bonds and coupons for whom the Guardian Trust Company is trustee. If

allowed to stand without a further opportunity to present the real facts, it may result in grave injustice to them.

In view of the circumstances, we think it was an abuse of judicial discretion to deny the petition to amend the answer of the trust company and to permit it to introduce the proposed testimony.

The decree is reversed as to the Union Guardian Trust Company, and the cause remanded for further proceedings and hearing in accordance with this opinion.

The decree is affirmed as to the Robert Oakman Land Company, with costs.

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

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## LINSKI v. CITY OF DETROIT.

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—LOT SEPARATED FROM STREET BY STRIP OF LAND NOT ASSESSABLE.

Where city of Detroit condemned land in excess of that needed or used for street as planned and established, leaving strip of land owned by city between street and adjoining lot, latter is not subject to assessments for paving or sidewalk purposes under city charter, since it does not abut street.

Appeal from Wayne; Collingwood (Charles B.), J., presiding. Submitted June 21, 1932. (Docket No. 88, Calendar No. 36,502.) Decided October 3, 1932.

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As to validity of assessment for public improvements which exceeds benefits, see annotation in 14 L. R. A. 755; 58 L. R. A. 363; 28 L. R. A. (N. S.) 1172, 1173.

Bill by Stephen Linski against City of Detroit, a municipal corporation, to set aside special assessments for street improvement purposes. Decree for plaintiff. Defendant appeals. Affirmed.

*Frank C. Cook* and *John P. O'Hara* (*John Conway Cook,* of counsel), for plaintiff.

*Walter Barlow* and *Arthur F. Lederle* (*Clarence E. Wilcox,* of counsel), for defendant.

WIEST, J. In opening an avenue, through a subdivision in the city of Detroit, all of lot No. 161 was taken, under the power of eminent domain, and a strip thereof alongside of lot No. 160 was in excess of land needed or used for the street as planned and established. Plaintiff owns lot No. 160, and filed the bill herein to set aside assessments upon his lot for paving the street and constructing a sidewalk.

If plaintiff's lot abuts the street the assessments are valid; otherwise not. The city condemned excess land and now owns such excess strip alongside of and between plaintiff's lot and the street as opened and improved. Plaintiff's lot does not, in fact nor in a legal sense, abut the street. The city may sell the excess strip, rent it, or use it as property not a part of the public street, and plaintiff has no right of access across it from his lot to the street as established and improved.

Pavement and sidewalk assessments are limited in the city of Detroit to property abutting the street.

The city, in the first instance, assessed the mentioned strip as its property, but later canceled the assessments and laid the assessments beyond the strip and upon plaintiff's lot.

The issues all fall within our decision in *Panfil* v. *City of Detroit,* 246 Mich. 149, where we considered the same street opening and a like situation.

The decree, voiding the assessments, is affirmed, with costs to plaintiff.

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

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MALOLEPSZY *v.* CITY OF DETROIT.

This case is controlled by *Linski* v. *City of Detroit, ante,* 385.

Appeal from Wayne; Collingwood (Charles B.), J., presiding. Submitted June 21, 1932. (Docket No. 89, Calendar No. 36,503.) Decided October 3, 1932.

Bill by John Malolepszy against City of Detroit, a municipal corporation, to set aside special assessments for street improvement purposes. Decree for plaintiff. Defendant appeals. Affirmed.

*Frank C. Cook* and *John P. O'Hara* (*John Conway Cook,* of counsel), for plaintiff.

*Walter Barlow* and *Arthur F. Lederle* (*Clarence E. Wilcox,* of counsel), for defendant.

BUTZEL, J. This is a companion case to *Linski* v. *City of Detroit,* and is controlled by the decision in that case reported *ante,* 385.

The decree is affirmed, with costs to the plaintiff.

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

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KUBIT *v.* CITY OF DETROIT.

This case is controlled by *Linski* v. *City of Detroit, ante,* 385.

Appeal from Wayne; Collingwood (Charles B.), J., presiding. Submitted June 21, 1932. (Docket No. 91, Calendar No. 36,505.) Decided October 3, 1932.

Bill by Stanley Kubit against City of Detroit, a municipal corporation, to set aside special assessments for street improvement purposes. Decree for plaintiff. Defendant appeals. Affirmed.

*Frank C. Cook* and *John P. O'Hara* (*John Conway Cook,* of counsel), for plaintiff.

*Walter Barlow* and *Arthur F. Lederle* (*Clarence E. Wilcox,* of counsel), for defendant.

MCDONALD, J. This is a companion case to *Linski* v. *City of Detroit,* and is controlled by the decision in that case reported *ante,* 385.

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

# OCTOBER TERM, 1932.

KAMNKOLSKI *v.* CITY OF DETROIT.

This case is controlled by *Linski* v. *City of Detroit, ante,* 385.

Appeal from Wayne; Collingwood (Charles B.), J., presiding. Submitted June 21, 1932. (Docket No. 90, Calendar No. 36,504.) Decided October 4, 1932.

Bill by John Kamnkolski against City of Detroit, a municipal corporation, to set aside special assessments for street improvement purposes. Decree for plaintiff. Defendant appeals. Affirmed.

*Frank C. Cook* and *John P. O'Hara* (*John Conway Cook,* of counsel), for plaintiff.

*Walter Barlow* and *Arthur F. Lederle* (*Clarence E. Wilcox,* of counsel), for defendant.

CLARK, C. J. This case is a companion of *Linski* v. *City of Detroit, ante,* 385, and is ruled thereby. Affirmed.

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

BLUE RAPIDS MILLING & ELEVATOR CO. *v.* PORT HURON TERMINAL CO.

WAREHOUSEMEN—LIABILITY OF CORPORATION FOR ACTS OF OFFICER.

Where officers of warehouse corporation, after allegedly ceasing active operations, permitted its vice-president and former manager to continue business in its warehouse, and he used company's stationery and warehouse receipts, company's course of conduct was such that it is chargeable with responsibility for loss sustained on products stored in said warehouse for which company's receipts were issued.

Appeal from St. Clair; George (Fred W.), J. Submitted June 15, 1932. (Docket No. 160, Calendar No. 36,606.) Decided October 5, 1932. Rehearing denied December 6, 1932.

Case by Blue Rapids Milling & Elevator Company, a foreign corporation, against Port Huron Terminal Company, a Michigan corporation, for failure to return a quantity of stored grain products. Judgment for plaintiff. Defendant appeals. Affirmed.

*Stewart & Black,* for plaintiff.

*William O. Covington,* for defendant.

NORTH, J. The defendant in this case was incorporated in 1924 for the purpose of operating a cold storage and warehousing business incident to which it issued negotiable certificates to persons warehousing their goods at its place of business in Port Huron. In 1930 the corporate officers were: President, W. L. Jenks; secretary-treasurer, Alex

Moore; and vice-president, William Sanborn Jenks, hereinafter called W. S. Jenks. In 1929 W. S. Jenks, a nephew of W. L. Jenks, was also general manager of the company. While his title as manager seems not to have been continued during the year 1930, during that year he was a director and vice-president. Defendant claims that prior to 1930 it ceased active operations; but W. S. Jenks was permitted to carry on business in the defendant's warehouse in 1930 and 1931, and with the knowledge of the company he was there conducting the business under the name of "The Terminal Supply Company" and also the "Terminal Brokerage Company." While so doing business W. S. Jenks opened negotiations with the plaintiff which resulted in plaintiff in September and November, 1930, warehousing in defendant's plant a substantial amount of grain products. Plaintiff was a foreign corporation doing business at Blue Rapids, Kansas. The correspondence with plaintiff was carried on by W. S. Jenks on the stationery of the defendant company and signed "Port Huron Terminal Company, by W. S. Jenks, vice-president." Plaintiff's demand for an accounting of the proceeds of its products stored or a return thereof was not satisfied, and this suit was brought to recover therefor from defendant. Plaintiff had judgment, and defendant appealed.

The sole defense urged is that W. S. Jenks had no authority to represent or bind the defendant company in this transaction. After taking testimony in open court, the trial judge, who heard the case without a jury, reached the conclusion that there was "evidence in the case sufficient to form an issue of fact on the question of his (W. S. Jenks') authority to execute" the two storage receipts issued to plaintiff. Notwithstanding this, the trial judge

further stated that he based his decision upon both ratification and estoppel.

It conclusively appears from this record the president of defendant company knew that W. S. Jenks was doing business under the name of the "Terminal Supply Company" and the "Terminal Brokerage Company." It is a fair inference that the secretary-treasurer must also have been aware of this circumstance. Both of these officers of the defendant company knew that this business was being carried on in the defendant's storage building; and with or without their knowledge W. S. Jenks was continuing the use of the stationery and storage receipts of the defendant company and continuing to sign the same either as manager or vice-president of the defendant company. It is a fair inference from the record that W. S. Jenks continued to receive mail addressed to the Port Huron Terminal Company. As late as 1931 the local city directory listed William S. Jenks as vice-president and manager of the Port Huron Terminal Company. While there is no evidence that this circumstance came to the knowledge of plaintiff, it is indicative of the lack of care on the part of the other officers of the defendant company in ascertaining whether W. S. Jenks was continuing to operate in defendant's name.

As a matter of estoppel, the trial judge relied particularly on defendant's original answer, wherein it is admitted that "the plaintiff delivered a quantity of grain products *to defendant,* which issued its warehouse receipt therefor." The defense alleged was that defendant had returned "all the remaining goods" to plaintiff, and that defendant did not have in its possession any property belonging to plaintiff for which it had not already accounted. This answer was filed August 4, 1931, and an

amended answer, which does not contain the above quoted admission but relies solely upon lack of authority of W. S. Jenks to bind the company, was filed October 31, 1931. For some time prior to the trial the whereabouts of W. S. Jenks was unknown, and in consequence neither party produced him as a witness. The defense relies principally upon the recital in its corporate records made at the time W. S. Jenks was elected vice-president for 1930, which recital provides: "He (W. S. Jenks) to take no action binding the company without the written consent of the president." Both the president and the secretary-treasurer, constituting two of the three directors, testified that they had no knowledge of the transactions which are the subject-matter of this suit, and that they neither authorized nor consented thereto. Defendant's by-laws provided that the president "shall have general supervision over the affairs of the corporation and over the other officers." Notwithstanding the above-quoted restriction of power of the vice-president to bind the company and also the provision in the by-laws, we think the record contains testimony abundantly justifying the conclusion that the defendant company's course of conduct was such as charged it with responsibility. Careful consideration of this record leaves us with a decidedly unfavorable impression of defendant's disavowal of the admission in its first answer that it was a party to this transaction. In testifying relative to facts alleged in the original answer, the president of the defendant company made the following statement: "The only information I could have would be what Sanborn Jenks brought to me." If Sanborn Jenks brought him this information, by so doing he certainly advised the president of the company that he had been transacting this business with plaintiff. If this is what

happened, it is passingly strange that it did not occur to the president of defendant company that his nephew had been carrying on business in the name of the Port Huron Terminal Company not only without authority so to do, but in direct violation of the action claimed to have been previously taken by officers of the company. It is also somewhat strange that practically three months elapsed between the filing of the original answer and the amended answer wherein the defense of lack of authority is set forth. Also the record disclosed that when plaintiff's counsel first called the subject-matter of this suit to the attention of the president of the company, he said to plaintiff's attorney, "I wish you would call Sanborn at the office and he will know all about it." Also it appears from the record that when plaintiff's attorney requested W. S. Jenks to reship to plaintiff the goods still on hand, W. S. Jenks said: "Under instructions from *W. L. Jenks* he was not releasing any goods without a letter directing it." We think the defense of lack of authority of the vice-president to bind the company is not sustained by the record. While the record does not show, and it could hardly be expected it would, that the other officers of defendant company actually held W. S. Jenks out as one authorized to bind defendant, nonetheless the other officers of this company did knowingly countenance a course of conduct along the line of the facts above recited which we think renders the defendant company liable to plaintiff for the damage it seeks to recover in the instant suit.

The judgment entered in the circuit court is affirmed, with costs to appellee.

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

LIQUIDATING HOLDING CORP. *v.* MORTGAGE & CONTRACT CO.

COSTS—PREMIUM ON APPEAL BOND TAXABLE AS COSTS.

Premium on appeal bond given by defendant to stay proceedings and to pay judgment if not reversed was properly taxed as part of its costs, where judgment against it was reversed on appeal (Court Rule No. 5, § 7).

Assumpsit by Liquidating Holding Corporation, a Michigan corporation, as assignee, against Mortgage & Contract Company, a Michigan corporation, for breach of contract relating to sale of interests in real estate. (See 258 Mich. 476.) On plaintiff's motion for retaxation of costs. Submitted October 1, 1932. (April, 1932, Docket No. 126, Calendar No. 36,455.) Denied October 28, 1932.

*Shapero & Shapero* (*Harold M. Shapero,* of counsel), for plaintiff.

*Goodenough, Voorhies, Long & Ryan,* for defendant.

PER CURIAM. This is an appeal from taxation of costs and involves an item of $631.56, premium on an appeal bond, given to stay proceedings and to pay the judgment if not reversed.

The judgment was reversed and a new trial granted, and plaintiff contends that, under our holding in *Caswell* v. *Stearns,* 259 Mich. 445, the premium on the bond cannot be taxed as costs. In the *Caswell Case* no execution could have issued on the

judgment, and the only stay was against certifying the judgment to the probate court. Such is not this case. The rule applied in *Behr* v. *Baker,* 257 Mich. 487, governs, and the taxation by the clerk is affirmed, with costs to defendant.

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MOTYKA *v.* DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

MIECZNIK *v.* SAME.

KULESZA *v.* SAME.

1. INTEREST—NOT ALLOWABLE AT COMMON LAW.
   At common law interest was as a rule not allowable on judgments.

2. SAME—INTEREST ON JUDGMENTS STATUTORY.
   Interest on verdicts and judgments is purely statutory, and, being in derogation of common law, may not be extended beyond statutory regulation.

3. SAME—INTEREST ON JUDGMENTS IN TORT ACTIONS.
   In tort actions statute awards interest on judgments from time of entry of same (3 Comp. Laws 1929, § 14555).

4. SAME—INTEREST ON JUDGMENTS IN ACTIONS ON CONTRACTS.
   In actions founded on contracts, in certain specified instances, interest on verdicts may be included in judgments (2 Comp. Laws 1929, § 9238).

5. JUDGMENT—ENTRY OF JUDGMENT MINISTERIAL ACT.
   Entry of judgment means ministerial act of clerk in recording it in permanent records of court.

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As to clerical or ministerial nature of entry of judgment, see annotation in 10 A. L. R. 588.

6. INTEREST—COMMENCES TO RUN FROM ENTRY OF JUDGMENTS IN TORT CASES.

Where, in tort actions, plaintiffs had verdicts, but court entered judgments *non obstante veredicto* for defendants, which, on appeal, were reversed and judgments ordered entered on verdicts, interest commences to run from time of such entry, and not before (3 Comp. Laws 1929, § 14555).

Separate tort actions by Thomas Motyka, administrator of the estate of John Motyka, deceased, Mary Miecznik, administratrix of the estate of Casimir Krzewinski, deceased, and Maryanna Kulesza, administratrix of the estate of Stanislaw Kulesza, deceased, against the Detroit, Grand Haven & Milwaukee Railway Company and another. Judgments ordered entered on the verdicts for plaintiffs. (See 253 Mich. 647, 256 Mich. 417.) On motion to reconsider order for interest on verdicts. Submitted September 28, 1932. (January, 1931, Docket Nos. 3, 4, 5, Calendar Nos. 35,082, 35,083, 35,084.) Order directing entry of judgments for plaintiffs, and interest to run from such entry October 31, 1932.

*Arthur A. Koscinski* and *Robert J. Wojcinski,* for plaintiffs.

*Frederic T. Harward, Frederick V. Slocum, H. V. Spike,* and *Wm. W. Macpherson,* for defendants.

WIEST, J. In tort actions plaintiffs, upon trial by jury, had verdicts, but the court entered judgments *non obstante veredicto* for defendants. Upon review we reversed the judgments (*Motyka* v. *Railway Co.,* 253 Mich. 647, 256 Mich. 417) and ordered judgments in the circuit court to be entered on the verdicts.

Reconsideration of the allowance of interest upon the verdicts is moved.

"At common law interest was as a rule not allowed on judgments." 15 R. C. L. p. 15.

Interest upon verdicts and judgments is purely statutory, and, being in derogation of the common law, cannot be extended beyond stated statutory regulation. *Straus* v. *Elless Co.*, 245 Mich. 558. The statute, 3 Comp. Laws 1929, § 14555, awards interest upon judgments in tort actions "from the time of entry of the same." In actions founded on contracts, in certain specified instances, interest upon verdicts may be included in judgments. 2 Comp. Laws 1929, § 9238.

Entry of judgment means the ministerial act of the clerk in recording it in the permanent records of the court.

The circuit court is now directed to enter judgments on the verdicts, and, from the time of such entry, the interest will commence to run and not before.

No costs.

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

GALE *v.* BOARD OF SUPERVISORS OF OAKLAND COUNTY.

1. PAUPERS—SUPPORT OF POOR—DISTINCTION BETWEEN TOWNSHIP, CITY, AND COUNTY POOR—STATUTES.
   Board of supervisors has power to restore or abolish distinction between township, city, and county poor at any annual meeting by two-thirds vote (1 Comp. Laws 1929, § 1130, 2 Comp. Laws 1929, § 8268).

2. SAME—WISDOM OF STATUTE LEGISLATIVE QUESTION.
   Practical wisdom of act empowering board of supervisors to restore or abolish distinction between township, city, and county poor, with possible disastrous results therefrom, *held*, legislative and not judicial question.

3. SAME—COUNTIES—STATUTES—POSTPONEMENT OF EFFECTIVE DATE.
   Resolution of board of supervisors adopted in October, 1931, re-establishing distinction between township, city, and county poor, and providing that it should not take effect until January 1, 1933, in no way limited or restricted incoming board from rescinding said resolution by proper vote (1 Comp. Laws 1929, § 1130, 2 Comp. Laws 1929, § 8268).

4. SAME.
   There was no impropriety in, or legal objection to, provision in resolution of board of supervisors re-establishing distinction between township, city, and county poor, adopted in October, 1931, that it should not take effect until January 1, 1933.

5. SAME—SUPPORT OF POOR—COUNTIES.
   When change re-establishing distinction between township, city, and county poor becomes effective, county funds may not be used to support those who have gained settlement in any township or city.

6. STATUTES—HANDS OF SUCCEEDING LEGISLATURE NOT TIED.
   Legislative acts, as distinguished from contracts, do not tie hands of succeeding legislatures.

7. SAME—PAUPERS—COUNTIES—SUPPORT OF POOR—RE-ESTABLISHING DISTINCTION BETWEEN TOWNSHIP, CITY, AND COUNTY POOR—RESOLUTION—ORDINANCE.

Action of board of supervisors re-establishing distinction between township, city, and county poor is not void because accomplished by resolution rather than ordinance, in absence of statutory requirement that it must be done by ordinance (1 Comp. Laws 1929, § 1130; 2 Comp. Laws 1929, § 8268).

Certified question from Oakland; Gillespie (Glenn C.), J. Submitted November 12, 1932. (Calendar No. 36,943.) Decided November 21, 1932.

Bill by Alfred Gale and others, taxpayers and supervisors of certain cities and townships, against Board of Supervisors of Oakland county to declare void a resolution re-establishing distinction between township, city, and county poor. Question as to validity of resolution certified to this Court. Resolution held valid.

*Earl D. Nash, William A. Ewart,* and *James H. Lynch,* for plaintiffs.

*George A. Cram,* for defendant.

BUTZEL, J. In the year 1920, the distinction between township, city, and county poor was abolished in Oakland county by appropriate action of the board of supervisors, and the county assumed the exclusive support of the poor. However, on October 9, 1931, the board, by a two-thirds vote, adopted the following resolution:

"Resolved:

"1. That the distinction between township, city, and county poor is hereby adopted in the county of Oakland under the provisions of Act No. 146, Pub. Acts 1925, and amendments thereto, the same being

2 Compiled Laws 1929, §§ 8208–8282, to take effect January 1, 1933.

"2. That the resolution of April 22, 1920, adopting the so-called county system shall continue in force and effect only to and including December 31, 1932, whereupon the use of said county system shall cease and terminate."

It will be noted that, although the resolution was adopted on October 9, 1931, this change in the method of poor support does not go into effect until January 1, 1933. The law expressly empowers the board of supervisors to restore or abolish the distinction between township, city, and county poor at any annual meeting by a two-thirds vote. 1 Comp. Laws 1929, § 1130, and 2 Comp. Laws 1929, § 8268. The personnel of the board of supervisors of Oakland county was changed at the spring election in 1932, and the incoming board, composed of many new members and a different chairman, was organized on April 12, 1932. An effort was made to rescind the action of the former board, as hereinbefore set forth, but the resolution offered for the purpose lacked two votes of the two-thirds majority necessary for its adoption.

Plaintiffs, as taxpayers and supervisors, filed the bill in the instant suit against the board of supervisors, as defendant, and asked for a declaratory judgment finding the action of October 9, 1931, null and void. The controlling question in the case is whether a resolution passed by a former board of supervisors on October 9, 1931, to restore the distinction between township, city, and county poor in the county on and after December 31, 1932, is valid and operates to change the present method of caring for the poor of the county after that date, in the absence of inconsistent action taken by the new

board. The trial judge has certified the question to us on account of its importance and the necessity for an immediate decision.

Many cogent and appealing practical reasons are advanced for the retention of the present system, which abolishes the distinction between township, city, and county poor. It is also claimed that the entire statute is archaic and wholly inadequate for modern conditions. It is not within our province to discuss the practical wisdom of the act or the possible disastrous results that may follow defendant's action thereunder. These questions are wholly legislative and outside of our province. We shall only consider the legal questions raised.

The resolution of the board on October 9, 1931, in no way limited or restrained the present board from adopting another resolution rescinding the former one and retaining the present system. Neither was there any impropriety in, or legal objection to, providing in the resolution of October 9, 1931, that the change should not become effective until January 1, 1933. Frequently it becomes necessary that some time intervene after the passage of a new law before it becomes effective. Aside from the time that it may take to publish and acquaint the public with the new law, it very frequently becomes necessary to take steps preparatory to carrying out its provisions. This is particularly true in regard to a change in the method of raising money by taxation. In the instant case, in order that the city and township may assume their new responsibility, funds must be obtained. The supervisors of the respective townships must, after proper action by the township clerk, make an estimate of the sum necessary both to supply the deficiency in the poor fund for the preceding year and to provide for the support of the

poor for the ensuing year. Thereupon, the inhabitants of the township, by a vote of a majority of the persons qualified to choose township officers, must determine the sums of money which shall be assessed upon the township in the ensuing year for the purposes aforesaid, and the sum so voted, when raised and collected, must be paid into the township treasury, where it is to be subject to the order of the township board. 2 Comp. Laws 1929, § 8264. Likewise, somewhat similar action is necessary in cities where the amount is determined by the legislative body of the city, and the money raised by a general tax upon all city property or by a loan to be repaid by such tax. 2 Comp. Laws 1929, § 8265.

It is obvious that considerable time is consumed by townships and cities in making provision for the assessment and collection of these funds. It was not only proper but necessary to postpone the date on which the changes named in the resolution of October 9, 1931, became effective. When the change once becomes effective, the county funds cannot be used to support those who have gained a settlement in any township or city. *Township of La Grange* v. *Supts. of Poor,* 115 Mich. 181. Aside from the constitutional provision that, unless a law is given immediate effect, it shall not take effect or be in force until the expiration of 90 days from the end of the session at which the law was passed, frequently laws are made effective long after the 90 days provided for by the Constitution. Legislation is prospective. It may frequently happen that the legislative body changes its personnel before an act passed by a previous legislature has become effective.

It seems that the validity of such legislation has been heretofore taken for granted, and for that reason seldom ruled upon by a higher court. Such laws

so enacted seem to have been uniformly upheld, though we have not found any cases in which the issue was presented so squarely as in the instant case. See *Osborn* v. *Charlevoix Circuit Judge,* 114 Mich. 655; *State, ex rel. Brunjes,* v. *Bockelman* (Mo.), 240 S. W. 209; *State, ex rel. Gaston,* v. *Black,* 199 Ala. 321 (74 South. 387); *Leatherock* v. *Lawter,* 45 Okla. 715 (147 Pac. 324); see, also, *State, ex rel. Anderson,* v. *City of Camden,* 58 N. J. Law, 515 (33 Atl. 846); *City of Biddeford* v. *Yates,* 104 Me. 506 (72 Atl. 335, 15 Ann. Cas. 1091). An examination of constitutional provisions and statutes in those jurisdictions indicates that the legislation became effective after a new legislature had assumed office.

Legislative acts, as distinguished from contracts, do not tie the hands of succeeding legislatures. *Cooper, Wells & Co.* v. *City of St. Joseph,* 232 Mich. 255. As was said in *Re Seeley,* 114 Misc. Rep. 633 (187 N. Y. Supp. 130):

"An act passed by the board of supervisors pursuant to authority delegated or conferred by the legislature has the same force as a statute passed by the legislature itself."

The supervisors were given the power by legislative act to determine who was to bear the burden of caring for the poor. 1 Comp. Laws 1929, § 1130, and 2 Comp. Laws 1929, § 8268.

Nor is there any merit to the claim that the board cannot do by resolution what they might do by ordinance. Unless the legislature specifies that a certain act must be done by ordinance or in some other specified manner, it is just as valid when accomplished by resolution as by ordinance. *Atchison Board of Education* v. *De Kay,* 148 U. S. 591 (13 Sup. Ct. 706).

The answer to the certified question is that the resolution of October 9, 1931, is valid and becomes effective on January 1, 1933, unless rescinded prior to that time by a vote of two-thirds of the supervisors.

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

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## SCHOOL DISTRICT OF CITY OF LANSING *v.* CITY OF LANSING.

1. TAXATION—DUTY OF CITY TREASURER.

   Office of city treasurer is one requiring action on part of person accepting it; his oath of office imposes on him obligation to faithfully discharge its duties, and his bond also so provides.

2. SAME—COLLECTION OF DELINQUENT PERSONAL TAXES.

   When, on settlement with county treasurer, city treasurer receives warrant for collection of personal tax returned delinquent, it becomes his duty to make every reasonable effort to do so, and he may not sit idly by and receive such taxes as may be voluntarily paid by delinquent taxpayers, but he must make earnest effort to enforce collection under power conferred upon him by statute (1 Comp. Laws 1929, § 3434 *et seq.*).

3. SAME—TAX COLLECTOR LIABLE FOR NEGLIGENCE IN FAILING TO COLLECT.

   Tax collector is liable not only for taxes collected and not turned over, but also for taxes which he might have collected by due diligence.

4. SAME—SCHOOL TAXES ON PERSONALTY—DEFAULT DEFINED—STATUTES.

Neglect of city treasurer to perform full duty to collect school taxes levied on personal property constitutes "default" within meaning of statute (1 Comp. Laws 1929, § 3485).

5. SAME—CITY LIABLE FOR DEFAULT OF TREASURER IN COLLECTING PERSONAL SCHOOL TAXES.

School taxes levied and assessed on personal property which are not collected through default and neglect of city treasurer result in loss to school district for which city is liable under statute (1 Comp. Laws 1929, § 3485).

6. SAME—CITY MAY LOOK TO TREASURER'S BOND FOR DEFAULT IN COLLECTING PERSONAL SCHOOL TAXES.

Court assumes that city is protected by sufficient bond given by its treasurer, to which it may have recourse for loss sustained by school district through treasurer's default in collecting school taxes levied on personal property, which city is required to make good (1 Comp. Laws 1929, § 3485).

7. ACTION—PLEADING—VARIANCE—AMENDMENT.

Where declaration in school district's action against city sought to recover all school taxes levied and assessed in city on personal property for certain years, and in its bill of particulars made claim for such taxes which were not collected through default and neglect of its treasurer, motion to dismiss for failure to state cause of action was properly denied, since cause of action is stated and variance between declaration and bill of particulars may be corrected by amendment before trial on merits.

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

8. TAXATION—TAXES REQUIRED TO BE PAID TO SCHOOL DISTRICT—STATUTES.

While, under 2 Comp. Laws 1915, § 5706, tax collecting officer was required to pay, out of moneys collected by him, to school district, whole tax assessed, under 2 Comp. Laws 1929, § 7470, he is required to pay only amount of school tax collected.

9. SAME—DUTY OF TREASURER TO TRY TO COLLECT ALL PERSONAL TAXES—STATUTES.

It is duty of township or city treasurer to try to collect all personal taxes assessed (1 Comp. Laws 1929, § 3434); if not

paid he is required to make demand personally or by mail on taxpayer, except where, in cities, other provisions for demand or collection may be made (section 3437); he must seize property if he can find it, and sell it for taxes (section 3438); or he may bring suit and garnishment proceedings.

10. SAME—DILIGENT EFFORT TO COLLECT MANDATORY.
Diligent effort to distrain property for personal taxes, if otherwise uncollected, is mandatory.

11. SAME—AFFIDAVIT OF TREASURER IN MAKING SETTLEMENT—PERSONAL TAXES.
Treasurer may not make settlement with county treasurer, in returning personal taxes as uncollected, without affidavit that, upon diligent inquiry, he has been unable to discover any goods or chattels belonging to person liable for taxes, upon which he could levy (1 Comp. Laws 1929, § 3446).

12. SAME—CITY LIABLE FOR PERSONAL SCHOOL TAX LOST BY DEFAULT OF TREASURER.
City is not liable for whole uncollected school tax assessed on personal property but only for that part which it may be shown was lost by default of its treasurer in failing to discharge his duties under tax law.
Per CLARK, C. J., and MCDONALD, NORTH, FEAD, and BUTZEL, JJ. POTTER, J., dissenting.

Appeal from Ingham; Collingwood (Charles B.), J. Submitted January 19, 1932. (Calendar No. 36,123.) Decided October 3, 1932. Rehearing denied December 6, 1932.

Assumpsit by School District of the City of Lansing, a municipal corporation, against City of Lansing, a municipal corporation, for school taxes assessed on personal property. Motion to dismiss denied. Defendant appeals. Affirmed.

*Fred L. Warner,* for plaintiff.

*Richard Raudabaugh,* for defendant.

SHARPE, J. The issue presented by the motion to dismiss in this case is whether a city may be compelled to pay to a school district taxes assessed against personal property in the district which the city treasurer, by negligence on his part, failed to collect. We allowed an appeal from the order of the trial court denying the motion. Reference to sections are to the Compiled Laws of 1929.

A school tax is spread upon the assessment roll of the city in a column by itself. Section 3428. When completed, a warrant for collection is appended thereto and delivery made to the city treasurer. Section 3429 reads as follows:

"The taxes thus assessed shall become at once a debt due to the township, ward or city from the persons to whom they are assessed, and the amounts assessed on any interest in real property shall, on the first day of December, become a lien upon such real property, and the lien for such amounts, and for all interest and charges thereon, shall continue until payment thereof. And all personal taxes shall also be a first lien on all personal property of such persons so assessed from and after the first day of December in each year and so remain until paid, which said lien shall take precedence over all other claims, incumbrances and liens upon said personal property whatsoever, whether created by chattel mortgage, execution levy, judgment or otherwise, and whether arising before or after the assessment of said personal taxes, and no transfer of personal property assessed for taxes thereon shall operate to divest or destroy such lien, except where such personal property is actually sold in the regular course of retail trade."

The duty then devolves upon the city treasurer to make collection. Section 3434 *et seq.* To do so, he

may seize and sell the personal property of the party assessed. If otherwise unable to collect a tax on personal property, he may bring suit in the name of the city and garnishee any debtor of the person assessed. Section 3438. At a time fixed in the statute, he must make return to the county treasurer of the moneys collected and the taxes he has been unable to collect. Section 3446. Quoting therefrom:

"The said treasurer or collector shall also make a statement showing the taxes upon personal property remaining unpaid, and the names of the persons against whom assessed, and the amount against each; and in such statement shall set forth the amount of all moneys collected by him on account of taxes, which statement shall be verified by the affidavit of such treasurer, in which he shall state in substance that the sums mentioned in such statement as uncollected remain unpaid; that he has not, upon diligent inquiry, been able to discover any goods or chattels belonging to the person liable to pay such sums whereupon he could levy the same, and that the amount of moneys collected by him upon such tax roll is truly stated therein."

Taxes delinquent on real estate become a lien thereon when the tax roll is delivered to the treasurer, and it will be advertised and sold therefor as provided by the statute. For the collection of the delinquent personal taxes, the treasurer receives a warrant from the county treasurer under which he has "the same power to collect such taxes as under the original warrant." Section 3447.

The office of treasurer is one requiring action on the part of the person accepting it. The oath of office imposes upon him an obligation to faithfully discharge its duties. His bond also so provides.

When the tax roll is placed in his hands, it is his duty to "proceed to collect such taxes." Section 3434. While he may not take steps to enforce collection of the taxes on real estate before the 10th day of January thereafter, in case he is "apprehensive of the loss of any personal tax assessed upon his roll, he may proceed to enforce its collection at any time." Section 3434.

When, on settlement with the county treasurer, he receives a warrant for the collection of the personal tax returned delinquent, it becomes his duty to make every reasonable effort to do so. Those who have paid their taxes have a direct interest in his so doing. He may not sit idly by and receive such taxes as may be voluntarily paid by delinquent taxpayers. He must make an earnest effort to enforce collection under the power conferred upon him above referred to.

"A tax collector is liable not only for taxes collected and not turned over, but also for taxes which he might have collected by due diligence." 3 Cooley on Taxation (4th Ed.), § 1360.

"Failure of a tax collector to collect the legal taxes within the time required by law is a breach of the condition of his bond for which his sureties are liable, at least to the extent of such taxes as were lost through his remissness or neglect, although the sureties may show in mitigation of damages, if not in bar of the action, any circumstances which made it impossible for their principal to effect collections or which would be a sufficient legal excuse for his failure to do so." 37 Cyc. p. 1221.

The cases cited in the footnote (*State* v. *Lott,* 69 Ala. 147; *People* v. *Smith,* 123 Cal. 70 [55 Pac. 765]; *State* v. *Dorsey,* 3 Gill & J. [Md.] 75; *Boykin* v.

*State,* 50 Miss. 375; *Village of Montpelier* v. *Clarke,* 67 Vt. 479 [32 Atl. 252], and *Ballard* v. *Thomas & Ammon,* 19 Gratt. [60 Va.] 14) clearly support the rule as stated.

The treasurer is charged with the duty to make collection of all the taxes spread upon the tax roll. He is charged with the amount thereof on the clerk's books, and, on settlement, receives credit for the taxes he has returned delinquent, based on his affidavit—

"that he has not, upon diligent inquiry, been able to discover any goods or chattels belonging to the person liable to pay such sums whereupon he could levy the same." (Section 3446.)

His neglect to collect the city tax is a breach of his bond given to the city, and his neglect to collect the State and county taxes is a breach of his bond filed with the county treasurer. The school district alone is not protected by a bond. No official or contractual relation exists between the city treasurer and the district. Is it then helpless and without remedy?

Section 3485 reads as follows:

"All losses that may be sustained by the default of any township officer in the discharge of any duty imposed by this act, shall be chargeable to such township. All losses by default of any county officer shall be chargeable to such county, and all losses by default of any State officer shall be chargeable to the State."

And section 3500:

"This act shall be applicable to all cities and villages where not inconsistent with their respective charters. With such exceptions, the provisions herein as to supervisors, township treasurers, and boards of review, shall include all assessing and collecting

officers, and all boards whose duty it is to review any assessment roll. The word township may include city, ward or village."

This provision was referred to with approval in *Common Council* v. *Smith,* 99 Mich. 507; *State Tax Com'rs* v. *Board of Assessors,* 124 Mich. 491, and *State Tax Com'rs* v. *Cady,* 124 Mich. 683.

A default is defined as "The nonperformance of a duty, whether arising under a contract or otherwise" (1 Bouvier's Law Dictionary [Rawle's 1st Rev.], p. 527); as "The omission or failure to fulfil a duty, observe a promise, discharge an obligation, or perform an agreement" (Black's Law Dictionary [2d Ed.], p. 342); as "To fail in fulfilling a contract, agreement, or duty." "Neglect to do what duty or law requires" (Webster's International Dictionary).

In 18 C. J. p. 457, "defaulting official" is defined as "A statutory term which has been construed in its broad sense as including every official who fails to perform his full duty, and not limited merely to officers found guilty of collusion or defalcation." *Annis* v. *McNulty,* 51 Misc. Rep. 121 (100 N. Y. Supp. 951, 956), is cited in support thereof.

Under the Constitution (Art. 11, § 9), it is made the duty of the State legislature to "continue a system of primary schools, whereby every school district in the State shall provide for the education of its pupils without charge for tuition." The legislature has provided that a large part of the money needed for that purpose shall be collected and distributed in what is known as the "primary school fund." The balance must be obtained by a tax spread upon the property, both real and personal, in each district. The city as a whole has a direct interest in the maintenance of its schools, and the members of its council, representing it, should be

impressed with the necessity of seeing to it that the taxes spread upon its rolls for that purpose must, to the extent possible, be collected.

It cannot well be contended that the neglect of the treasurer to collect a school tax, payment of which might have been enforced by him, does not entail a loss upon the district. Suppose he had permitted the taxpayers in the district to have paid all of the taxes levied upon their property, either real or personal, except the school tax, as they might have done under section 3444, and made no effort thereafter to collect the school tax, could it well be said that a loss to the district had not been occasioned by his neglect and that the city was not chargeable therewith? The statute makes the city liable for any loss sustained by the default of its treasurer "in the discharge of any duty imposed by this act." (Section 3485.) Clearly, the duty rested upon the treasurer to collect the school tax. If he has not discharged that duty, he has breached the condition in his bond to the city, and, as loss to the district necessarily follows, such loss must be borne by the city under the provisions of the statute.

"The duty of collecting the taxes is as imperative on the collector as is the duty of honestly accounting therefor, when collected; and a failure to collect, within the period prescribed by law, the taxes which, under the law, he is required to collect, is a breach of the condition of his official bond, equally with a failure to pay over the taxes when collected." *State* v. *Lott, supra* (syllabus).

In *Smith* v. *Jones,* 136 Mich. 532, wherein it was sought to hold a township liable to a school district for funds embezzled by the township treasurer, the court said:

"The school district has no voice in the giving of the bond. The bond is to be executed to the township, with such sureties as the supervisor shall require and approve."

The section imposing the liability on the township for losses occasioned by default of its treasurer (now section 3485) was then quoted, and it was further said:

"By the act he is charged with *the collection and payment of all school-district taxes.* The funds in question were lost by his default, and, under the above statute, the township is liable."

I find no authority bearing directly upon the construction which should be placed upon the language of this statute. *State, ex rel. District Att'y,* v. *Sheriff,* 45 La. Ann. 162 (12 South. 189), *Williams* v. *Stern,* 5 Q. B. Div. (1879) 409, are relied upon to support the claim that default as here used means simply the failure to account and pay over money collected. The first of these cases involved the right of the defendant to succeed himself as sheriff. Under the law of that State, he is also a tax collector. It was claimed that at the termination of his previous term he had not "obtained a legal discharge for such collections for public moneys with which he has been entrusted." The court called attention to the two provisions in the State Constitution relating thereto (p. 179):

"The requirement of article 171 is that tax collectors must 'obtain a discharge for the amount of collections,' while article 119 provides that they shall not be released from their contractual obligations 'until they have been discharged as tax collectors.'"

It was then said (p. 179):

"Article 171 pronounces the penalty of *ineligibility to hold office* for a collector's failure to comply with its behest, and article 119 indicates a *pecuniary* liability for his nonobservance of its provisions.

"The injunction of each, as well as the pain of each is distinct and different.

"To illustrate: If a collector punctually pays over to the proper authority *all* moneys he has collected, and obtains a receipt therefor, he is constitutionally eligible to office, notwithstanding the fact that it may be shown subsequently, by proof *aliunde*, that he had been derelict in making collection of taxes uncollected, and was consequently disentitled to be discharged as tax collector.

"To further illustrate: In case a tax collector collects taxes and uses the money, he may be proceeded against criminally for embezzlement; but, on the proof disclosing that the taxes had *not* been collected through his fault or negligence, the prosecution would of course fail and the State be relegated to civil action for reparation of loss sustained."

In the other case, the default therein referred to was in the nonpayment of money due under a bill of sale executed as security for money advanced.

If default on the part of the treasurer, as claimed, be established, and the loss of the district occasioned thereby be determined, in my opinion the city is liable to account to the school district for the amount thereof. The statute, as I construe it, so provides, and this provision is a wise one, as there is no other way in which a district may reimburse itself for such loss. It will be assumed that the city is protected by a sufficient bond, and it is no hardship to require it to make such payment and have recourse thereto for its protection against loss.

In its declaration plaintiff seeks to recover all of the school taxes levied and assessed in the city for

certain years. In its bill of particulars it makes claim for "school taxes levied and assessed on personal property in the city of Lansing and collected *or which were not collected through the default and neglect of the said defendant, its servants and employees.*" Had the motion to dismiss been founded upon the variance between the declaration and bill of particulars, an amendment would doubtless have been sought and granted, and the declaration may yet be perfected in this respect before trial on the merits.

The appeal is dismissed, but without costs.

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

FEAD, J. *(concurring in affirmance).* While it may be largely repetition of what Justices POTTER and SHARPE have said, I am impelled to summarize my views of the case, but without requoting from the statutes and authorities set up in their opinions.

Under 2 Comp. Laws 1915, § 5706, the tax collecting officer, out of the moneys collected by him, was required to pay to the school district the whole school tax assessed. Under 2 Comp. Laws 1929, § 7470, he is required to pay, out of the moneys collected by him, only the amount of school tax collected. These provisions have reference merely to the disbursement of actual tax collections, not to liability for school taxes not collected. The change in the statute eliminated liability for the entire school tax assessed and leaves liability for uncollected taxes to be governed by other law.

It is the duty of the township or city treasurer to try to collect all personal taxes assessed. 1 Comp.

Laws 1929, § 3434. If not paid, he is required to make demand personally or by mail on the taxpayer, except where, in cities, other provisions for demand or collection may be made. Section 3437. If payment is not made, he must seize property, if he can find it, and sell it for taxes. Section 3438. He may bring suit and garnishment proceedings. Diligent effort to distrain property for personal taxes, if otherwise uncollected, is mandatory. The treasurer cannot make settlement with the county treasurer, in returning personal taxes as uncollected, without affidavit that, upon diligent inquiry, he has been unable to discover any goods or chattels belonging to the person liable for the taxes, upon which he could levy. Section 3446.

Failure to perform these positive duties by a township treasurer is a default "in the discharge of any duty imposed by this act," *i. e.*, the general tax law, for which the township is liable, under section 3485.

It is true that section 3485 does not in express terms make a city liable for the default of the city treasurer. But, because school taxes, as well as others, become a "debt due to the township, ward or city" from the taxpayer (section 3429), and the law declares no right of the school district to collect from the taxpayer nor from the collecting treasurer nor to have recourse to the latter's bond, and it is the policy of the law that the method of tax collections and disbursements to the proper governmental agencies shall be uniform (so expressly declared as to fourth class cities, section 2164 *et seq.*, and home-rule cities, section 2230[i]), it would do no great violence to the statute to construe "township" in section 3485 as including "city," although no other provision of law so declared. See *County of Wayne* v. *City of Detroit*, 17 Mich. 390.

Whether these considerations, of themselves, would be sufficient to justify such construction, they are persuasive, in connection with the plain language of section 3500, that:

"This act shall be applicable to all cities and villages where not inconsistent with their respective charters. * * * The word township may include city, ward or village;"

in rendering section 3485 applicable to cities.

In my opinion, the city is not liable for the whole uncollected school tax assessed, but only for that part which it may be shown was lost by default of its treasurer in failing to discharge his duties under the tax law.

The declaration sets up no breach of duty by the city treasurer as to uncollected taxes, and states no cause of action in that respect. However, it and the bill of particulars count on claims for moneys collected by the treasurer, although, in fact, there is no issue thereon. Because of this technicality, the declaration must be held to state a cause of action, and the judgment is affirmed, but without costs.

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

POTTER, J. *(dissenting)*. Plaintiff sued defendant to recover uncollected school taxes. From a judgment for plaintiff, defendant appeals.

1. It is claimed defendant is liable for school taxes assessed against personal property which the city treasurer might have collected but did not collect. The right to recover is based upon 1 Comp. Laws 1929, § 3485, which provides:

"All losses that may be sustained by the default of any township officer in the discharge of any duty

imposed by this act, shall be chargeable to such township. All losses by default of any county officer shall be chargeable to such county, and all losses by default of any State officer shall be chargeable to the State."

If defendant is liable, it is solely by reason of this statute. *Hart Township* v. *Oceana County,* 44 Mich. 417. The statute is in derogation of common law, is to be strictly construed, and nothing is to be taken by implication. There is nothing in the statute in relation to city officers and city liability. The statute expressly enumerates the things covered by it, and this express enumeration impliedly excludes from its terms the things not mentioned. No express statute makes the city liable for the failure of its city treasurer to collect school taxes.

2. No charge of embezzlement or defalcation on the part of the city treasurer is made. It is not claimed he is a defaulter. If the city treasurer had collected school taxes and neglected to pay them over, a different question would be presented. It is claimed the city is liable by reason of the default of the city treasurer. Default is a term with many meanings, its meaning in a particular case depending on its use. 1 Comp. Laws 1929, § 3485, is a part of the general tax law relating to accounts and the settlement thereof. Default, as used in this statute, means failure to account for and pay over money collected. It means something different from negligence. *State, ex rel. District Att'y,* v. *Sheriff,* 45 La. Ann. 162 (12 South. 189). It means defalcation in office—failure to account for and pay over money collected—the nonpayment of money. *Williams* v. *Stern,* 5 Q. B. Div. (1879) 409. It means being guilty of conduct which, under the Constitution, would render the city treasurer ineligible to office.

There is no claim the city treasurer has embezzled or defaulted in the payment of money, and, unless he is guilty of such misconduct, the city is not liable.

3. Prior to the enactment of the school code in 1927, defendant might have been liable under 2 Comp. Laws 1915, § 5706, for the full amount of school taxes on the assessment rolls of the city, but this statute was amended by 2 Comp. Laws 1929, § 7470, so as to make a township treasurer liable only for the full amount of school taxes collected. The same idea is incorporated in 1 Comp. Laws 1929, § 4124, which provides:

"In case the township treasurer shall not collect the full amount of taxes required by his warrant * * * such portion thereof as he shall collect shall be retained by him and paid out."

The city is bound by the acts of the city treasurer in substantially the same cases that the township is bound by the acts of the township treasurer. An examination of these statutes shows that under 2 Comp. Laws 1915, § 5706, it was the duty of the city treasurer to retain in his hands the full amount of school taxes on the assessment rolls whether collected or not, while by the school code it is made the duty of the city treasurer to retain in his hands, out of the moneys collected by him, the full amount of the school taxes collected. In the former case the amount to be retained was fixed by the amount assessed. Under the present statute the amount the city treasurer is to retain is fixed by the amount collected.

4. It is not claimed the city treasurer of defendant has not paid to plaintiff all moneys for which a proper warrant has been presented. It is not claimed he is not ready and willing to pay over any moneys which he has collected.

5. School taxes are collected and to be collected by the city treasurer, but they are not, when collected, received for or by the city. They do not become a part of the funds of the city. They are in the city treasurer's hands for school purposes, collected by him, and to be paid out by him only on the order of the proper officers of the school district. The treasurer of the school district is the disbursing officer of the district. The city has no fiscal duty in relation to school funds. When they are paid out by the city treasurer, he is not bound to look beyond the proper order of the officers of the school district for his warrant in paying them. In finally disbursing the funds raised for school purposes, the members of the school board are not agents of the city. The city treasurer is not the agent of the city in the collection of the school taxes and their payment to the treasurer of the school district. The collection of school taxes by the city treasurer is not a city matter but a school district matter. For convenience, and to avoid a multiplicity of officers, the city treasurer is charged with collecting school district taxes. This is a matter of public administration. It does not make the city treasurer a city agent in collecting these taxes. The city is not in any sense, as regards this duty of the city treasurer, a principal. *Dawson* v. *Township of Aurelius,* 49 Mich. 479.

The city treasurer, in the collection of school taxes, is but the agency designated to collect school taxes and pay them over to the school district. The school district, not the city, in the performance of this function, is his principal.

"For simplicity and convenience of administration the law makes use of the township officer to

gather and pay over the county tax. But when it does so and goes no further, the implication is that the local officer is for such function the official agent of the county, and not of the township, and that the county must look elsewhere than to the township for indemnity in case of his misconduct." *Hart Township* v. *Oceana County, supra.*

6. The city treasurer is not a party to this suit. The question of his liability for negligence is not involved and cannot be conclusively adjudicated in a suit in which he is not a party.

Under the circumstances, plaintiff is not entitled to recover. Judgment should be reversed, but without costs.

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STRAND LUMBER CO. *v.* DOSTIE.

1. MECHANICS' LIENS—NOT NECESSARY TO NAME OWNERS OF LAND WHERE LIEN AGAINST BUILDING ONLY.

   Failure to name record owners of land in claim of lien filed did not invalidate lien, where it was asserted against building only erected by contract purchasers (3 Comp. Laws 1929, § 13103).

2. SAME—NOT NECESSARY TO NAME ONE NOT AFFECTED BY LIEN—STATUTES.

   Mechanics' lien statute does not require naming in claim of lien one whose interest in property is not affected thereby.

3. SAME—"OWNER" DEFINED.

   "Owner" whom statute requires to be named and served with copy of claim of lien is owner at time claim of lien is made (3 Comp. Laws 1929, § 13103).

On who is "owner" within meaning of mechanics' lien statute requiring name of owner of property to be given in statement of lien, see annotation in 2 A. L. R. 796.

4. SAME—VENDOR AND PURCHASER—FAILURE OF OWNERS OF LAND TO SIGN CONTRACT FOR MATERIALS.

That owners of land did not sign contract for purchase of materials used by contract purchasers in construction of building thereon did not invalidate lien which is asserted against building only (3 Comp. Laws 1929, § 13103).

5. SAME—EFFECT OF SUMMARY PROCEEDING ON LIEN—STATUTES.

In view of statute giving right to claim lien against building, owners of land may not, by summary proceedings, terminate lien, even if lienholder is made party thereto, and therefore lien against building is not terminated by proceeding to which lienholder was not party (3 Comp. Laws 1929, § 13103).

6. SAME—CONSTRUCTIVE NOTICE.

Where, at time purchaser of land received conveyance from vendors, mechanic's lien was matter of record in register of deeds' office, purchaser took title with constructive notice thereof.

7. SAME—ENFORCING LIEN—BONDS—PRINCIPAL AND SURETY.

Where purchaser of land and his surety gave lienholder bond for amount of existing lien against building, decree was properly entered against them for amount of lien, accrued interest, and costs, in suit to foreclose lien.

Appeal from Wayne; Jayne (Ira W.), J. Submitted April 20, 1932. (Docket No. 36, Calendar No. 36,358.) Decided December 6, 1932.

Bill by Strand Lumber Company, a Michigan corporation, against John W. Dostie and others to foreclose a mechanic's lien. Judgment for plaintiff. Defendants Ellesin, American Employers Insurance Company, and Metropolitan Life Insurance Company appeal. Affirmed.

*Howard A. Donnelly,* for plaintiff.

*Tilden M. Gallagher,* for defendant Ellesin.

*Stevens T. Mason,* for defendant American Employers Insurance Company.

NORTH, J. In the circuit court plaintiff was given a decree foreclosing a mechanic's lien. Three of the defendants have appealed. The questions for determination are whether, under the facts presented, plaintiff possessed a valid lien, and, if so, whether such lien as against the interest of the vendee in a land contract was terminated by a subsequent proceeding whereby the contract vendors forfeited the vendee's rights and repossessed themselves of the premises, but without notice to the lienholder.

Omitting details, the material facts, as we view the record, are as follows: Mr. and Mrs. Dostie were the fee owners as tenants by the entireties of the land involved. They entered into a contract to sell the property to Niles F. Gorwell. Gorwell was a builder, and, on or about the 8th of March, 1926, purchased materials of plaintiff which were used in erecting a new building upon the land he had purchased under the Dostie contract. There is evidence that Gorwell in turn sold the property on a contract to E. M. Walton. Within the statutory period plaintiff filed a claim of lien against the property. In this claim of lien a party other than Mr. and Mrs. Dostie was erroneously named as owner of the record title. Niles F. Gorwell was named as the contractor to whom the materials were sold, and E. M. Walton was named as a person having some interest in the property. Prior to filing the bill of complaint herein, but subsequent to the claim of lien, Mr. and Mrs. Dostie gave notice of forfeiture, and by summary proceeding instituted against Gorwell and another recovered possession of the property. Also prior to filing the bill of complaint Mr. and Mrs. Dostie conveyed their interest in the property by warranty deed to the defendant

George B. Ellesin. In order to relieve the property of plaintiff's claim of lien, Ellesin as principal and the American Employers Insurance Co. as surety executed and filed a bond in accordance with the statute. 3 Comp. Laws 1929, § 13107. Ellesin mortgaged the property to the Union Trust Company, and this mortgage was subsequently assigned to the defendant and appellant the Metropolitan Life Insurance Company. Later the defendant Ellesin conveyed his interest in the property by warranty deed to the defendant Petrinovic.

If plaintiff's claim of lien is valid, it is superior to the rights of the appellant the Metropolitan Life Insurance Company, and the other appellants, George B. Ellesin and the American Employers Insurance Company, will be liable to plaintiff on the bond which they filed to release the property from its lien. These appellants contend that the lien is invalid because the claim of lien as filed did not name Mr. and Mrs. Dostie as record owners, or Mr. Ellesin as a contract purchaser, nor were either of them served with a copy of the claim of lien. Plaintiff is asserting a lien against the new building only, not against the land. This being true, such claim of lien is not invalidated by reason of failure to name Mr. and Mrs. Dostie as owners of the land or to serve them with copies thereof. The statute (3 Comp. Laws 1929, § 13103) expressly gives the right of lien under such circumstances against the building in which the materials were used. Whatever right Mr. and Mrs. Dostie had in the land is in no way affected by plaintiff's lien. We have recently held:

"The statute does not require naming in the claim of lien one whose interest in the property is

not affected thereby." *Sarar* v. *Andrews,* 251 Mich. 376.

There is no merit to the claim of invalidity of the lien on the ground that Mr. Ellesin was neither named therein nor served, because this record does not show that he had any interest in the property at that time. The "owner" whom the statute (section 13106) requires to be named and served with a copy of the statement or claim of lien is the owner at the time the claim of lien is made. *Waters* v. *Johnson,* 134 Mich. 436.

Invalidity of the lien is asserted by appellants upon the further ground that there was no contract for the purchase of the materials signed by Mr. and Mrs. Dostie. (See 3 Comp. Laws 1929, § 13102.) This contention is without force because, as noted above, plaintiff's lien is against the building on the premises only, and not against the land of which Mr. and Mrs. Dostie were the owners; and the right to claim the lien against the building is provided by the statute. 3 Comp. Laws 1929, § 13103.

The remaining question is whether the termination of the contract vendee's rights by summary proceedings without notice to the lienholder extinguished the right of lien. Determination of this issue is controlled by the statute:

"Any person furnishing services or materials for the erection of a new building or structure upon land to which the person contracting for such erection has no legal title, shall have a lien therefor upon such buildings [building] or structure; *and the forfeiture or surrender of any title or claim of title held by such contracting person to such land shall not defeat the lien upon such building or structure of such person furnishing services or materials as aforesaid.*" 3 Comp. Laws 1929, § 13103.

In view of the above statutory provision, it is evident that the Dosties could not by summary proceedings have terminated plaintiff's lien even if it had been made a party to such proceeding. Much less could the right of lien be terminated by a summary proceeding to which the lienholder was not a party.

At the time the appellant George B. Ellesin received conveyance of the property from Mr. and Mrs. Dostie, plaintiff's claim of lien was a matter of record in the office of the register of deeds. He, therefore, took title with constructive notice. Further, it is evident that he accepted conveyance of title with actual knowledge of plaintiff's claim of lien, and for the purpose of relieving the property of the lien he and his surety gave a bond. This bond, after reciting plaintiff's claim of lien upon the premises, is conditioned:

"Now, therefore, the condition of this obligation is such, that if the above bounden principal shall pay or cause to be paid to the above-named obligee (Strand Lumber Company) any sum of (for) which said obligee may obtain judgment or decree upon the demand for which such statement of account (for the lien) was filed, then this obligation to be void, otherwise to remain in full force and virtue."

The circuit judge decreed Ellesin and his surety liable to plaintiff on their bond for the amount of its lien, the accrued interest, and costs of suit. The decree is affirmed, with costs to appellee.

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

ZELHAVER *v.* KOEPKE.

1. NEGLIGENCE—FIRE ESCAPES—COMMON LAW.
   At common law no duty rested on owner of building to equip it with fire escapes.

2. SAME—NOTICE—STATUTES.
   Where owners of three-story building discovered necessity for making certain alterations in order to maintain proper exit to fire escape, defense to action against them for failing to maintain proper exit may not be predicated on fact that no notice to make such alterations was ever given them by city council as provided by statute (1 Comp. Laws 1929, §§ 2737–2742).

3. SAME—CONTRIBUTORY NEGLIGENCE—EMERGENCY.
   Law makes allowance for acts done in emergency and sudden peril, and for lack of coolness and judgment incident thereto.

4. SAME—PRESUMPTIONS—FIRE ESCAPES.
   That woman suddenly confronted with danger from fire on third floor neglected to break glass in window to reach fire escape or to avail herself more quickly of some other means of exit when she found she was unable to raise window, *held,* not to render her guilty of contributory negligence as matter of law, since it will be presumed that she did what seemed to her proper under circumstances.

5. TRIAL—INSTRUCTIONS—NEGLIGENCE—FIRE ESCAPES—APPEAL AND ERROR.
   Instruction of court as to duty of owners of building to see that orders to make needed alterations to window leading to fire escape on third floor were carried out, *held,* not reversible error, where meaning was clear, although language used was somewhat confusing.

6. NEGLIGENCE—DUTY TO MAINTAIN SAFE EXIT TO FIRE ESCAPE.
   That owners of building employed carpenter to make needed alterations to window to make it safe as exit to fire escape would not relieve them from liability if they failed to see that said alterations were made within reasonable time, if in fact they were never made (1 Comp. Laws 1929, §§ 2737–2742).

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On liability for injuries caused by lack or insufficiency of fire escapes, see annotation in 15 L. R. A. 160; 10 L. R. A. (N. S.) 177; 21 L. R. A. (N. S.) 178; 39 L. R. A. (N. S.) 744; L. R. A. 1917C, 1153.

As to excessiveness of verdicts in actions for personal injuries other than death, see annotation in L. R. A. 1915F, 30; 46 A. L. R. 1230.

7. TRIAL—INSTRUCTIONS—NEGLIGENCE—APPEAL AND ERROR.
Defendants' claim that court instructed jury that they ought to find defendants guilty of negligence, *held*, not sustained by record, which shows that any misunderstanding was cleared up by counsel's question and court's answer.

8. NEGLIGENCE—WEIGHT OF EVIDENCE.
In action for personal injuries alleged to have been due to defendants' failure to maintain safe exit to fire escape, verdict for plaintiff *held*, not against great weight of evidence.

9. DAMAGES—EXCESSIVE VERDICT—PERSONAL INJURIES.
Verdict of $12,300 for injuries caused by fire to woman 32 years of age with life expectancy of 33 years, who was earning $30 per week with room and board, *held*, not excessive, where she was confined in hospital for nine weeks, was treated by doctor for several months, suffered much pain, there is evidence of permanent injury to right hand and joints of right arm, and her person has been disfigured and is likely to remain so.

10. EVIDENCE—EXHIBITING WOUNDS TO JURY.
Plaintiff suing for personal injuries caused by fire through defendants' alleged negligence was properly permitted to exhibit her wounds to jury.

Appeal from Genesee; Black (Edward D.), J. Submitted April 22, 1932. (Docket No. 122, Calendar No. 36,030.) Decided December 6, 1932.

Case by Maye Zelhaver against Arthur C. Koepke and another for personal injuries alleged to be due to defendants' negligence in failing to maintain proper exit to a fire escape. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

*Wilson & Hoffman,* for plaintiff.

*Butzel, Levin & Winston* and *Cook, Sheppard & Stipes (Chris M. Youngjohn* and *Carl L. Whitchurch,* of counsel), for defendants.

SHARPE, J. In this action plaintiff seeks to recover damages for personal injuries sustained by her in a fire which destroyed the Paterson building, in the city of Flint, on the evening of March 11, 1930. The defendants were lessees of the building under a 60-year lease. It was three stories in height. A fire escape led from a window in the hallway on the third floor into an alley. Plaintiff was employed as "general supervisor" in a beauty shop located on this floor, and her claim is based upon the negligence of the defendants in failing to maintain this entrance to the fire escape in a condition so that it could be freely used by occupants of the third floor in case of fire in the building. She had verdict and judgment for $12,300, of which defendants seek review by appeal.

The beauty parlor occupied several rooms on this floor. There were stairs and an elevator leading to it from the ground floor. Russel Fabian was at that time employed to instruct those engaged in that work, and the plaintiff sat watching him making an experiment when she discovered smoke coming into the room and called Fabian's attention to it. She testified:

"Well, I went to the door of the laboratory out —be into the hallway, toward the front of the building, there was smoke coming up the areaway and out of the staircase, around the radiator, just everywhere, and there is a desk in the lobby where we have the telephone, and I stopped and called the fire department, and the smoke was coming up higher and blacker all of the time"—

that there was a large areaway in the center of the building and the smoke and heat were soon pouring up it and the stairway which led from the floor below; that she "ran to the back, toward the fire

escape," and "tried to raise the window, tugged at it," but "could not raise it;" that—

"I went in the laboratory, right at my right hand, to see if I could get something to break the window with, and I turned back, the smoke was coming up that way so bad I didn't dare go out there to try it any more"—

that she went back through the rooms and met with big gusts of smoke, and finally went to a window which was open and crawled on it and hung there until the fire department opened up a net and she dropped into it. She exhibited her injuries to the jury, and was apparently badly burned.

She further testified that she had before that tried to raise the window leading to the fire escape, but could not do it alone, and that it had been in that condition all of the time she had worked there; that in February, 1930, after Valentine's day, she helped a Mrs. Farless raise it, and they put a block of wood under it to hold it up.

Russel Fabian, the instructor before referred to, testified that he had been employed at the beauty parlor since the latter part of January, 1930; that he was preparing a new formula for finger-wave fluid when plaintiff called his attention to the smoke; that when she went to the telephone he went to get his formulas; that he saw her run to the window leading to the fire escape, and afterwards into another room; that he tried to open the window; "I might have opened it, but was unable to; I could not stand there in the smoke;" that he then tried to get her in a place of safety, but she was screaming and resisted his efforts; that he saw her go to the open window, and he went to the next one, and that he dropped into the net soon after she did. He further testified that he had raised the window lead-

ing to the fire escape before that time, but had to stand on a stool to do so; that he had never seen one woman raise it, but had seen two of them do so, one on each side, and that a piece of wood was put under it to keep it up, and that the smoke and heat were so intense that escape by the stairway was impossible.

Myrtle Farless, an employee in the beauty shop at the time of the fire, testified that she had tried to lift the window leading to the fire escape, but could not do so; that she had with assistance (one at each side) raised it several times, the last time she fixed as three or four weeks before the fire, and that it was kept up by placing a piece of wood under it.

Carrie Fox, also an employee, testified that she had raised the window on several occasions, but always had help to do so, the last time "maybe a week, maybe within two or three days" before the fire; that she first raised it in January, and that it "was always hard to open."

Thelma Jardie testified that she had worked in the beauty parlor since the first of January, 1930; that she had several times opened the window, but always had help to do so; that she opened it in February, and it opened as hard as at previous times.

Berneda Eckart testified that she had worked there since November, 1929; that she had helped others to raise the window, the last time in March, and it was just as hard to open then as before.

The defendant Koepke testified that he had his office on the second floor of the building; that he examined the window leading to the fire escape about the first of January, 1930; that it was "a double-hung window," "a window that has two sash, and slides up and down in grooves in the sash;" that it then had no weight or pulleys upon

it; that one had to lift the weight of the window (about 45 pounds) to open it; that he directed a man named Robson, who had been in his employ for 10 years, to repair it; that he did not afterwards examine it to see that the repairs had been made; that the glass in the window was double strength and about 42 inches in width; that his firm received a bill (producing it) from the Hubbard Hardware Company for the material used by Robson in repairing the window, the items in which were charged on January 8th and January 27, 1930; that defendants had been lessees of the building for about two years, but never had received any orders from any official of the city to repair the window.

Peter J. Weidner, the city building inspector, testified that he examined the window leading to this fire escape in August, 1929, and concluded "that it was safe," and that he made no requirement as to any change in it.

Fred Robson, the carpenter employed by Mr. Koepke to repair the window, testified that he made such repairs in the last days of January, 1930; that he took the sash out and weighed it, and it weighed about 45 pounds; that he stretched a canvas covering on the window when he removed the sash; that he put in the sash balances to fit the weight of the window, having procured them at the Hubbard Hardware Company's store, and that then the window "slid up and down very nicely;" that it did not "jam or stick," and that one could then "take your hand and raise it up very easily."

In rebuttal, the plaintiff and two of the employees in the beauty parlor above referred to testified that they were so employed in the latter part of January, 1930, and did not see any canvas stretched over the window opening as testified to by Robson.

Upon the record thus made, the trial court, after denial of defendants' motion for a directed verdict, submitted the case to the jury, who found as above stated.

It is well settled that at common law no duty rested upon the owner of a building to equip it with fire escapes. Act No. 170, Pub. Acts 1883 (1 Comp. Laws 1929, §§ 2737–2742, inclusive), is entitled:

"An act to provide for the construction of fire escapes from hotels, boarding and lodging houses, also to afford the necessary escape from fire in business places, and in buildings used for public and private assemblages."

Section 1 imposes a duty upon the owner, proprietor, lessee, or keeper of any hotel more than two stories in height to provide fire escapes from each story above the ground floor.

Section 2 requires the owner, proprietor, or lessee of any building more than two stories in height where male or female help is employed above the second floor to provide suitable fire escapes as provided in section 4 thereof.

Section 4 imposes the duty upon the board of building inspectors, created by Act No. 226, Pub. Acts 1879 (2 Comp. Laws 1929, § 8862), to examine from time to time, at least once in each year, all buildings more than two stories in height and to submit to their respective township or village boards or common council—

"such recommendations, in addition to the provisions and requirements of this act, as they may deem proper and necessary for the protection against fire, and the escape therefrom, in the several places named in the preceding sections of this act."

Section 5 imposes the duty upon such officials, on receiving such report, to direct such alterations and

additions as they may determine to be necessary, and section 6 imposes a penalty for a failure to comply therewith.

In his instructions to the jury the trial court referred to this statute, and read certain sections thereof. He then stated to them—

"The first question for you to determine in this case, and the very important one, is whether or not the defendants in this case were guilty of what is known as negligence."

He then very carefully defined that term, concluding with the question, "Was there at that time a proper means of exit from that building in case of a fire?"

Defendants' counsel insist that the statute imposed no liability upon them, for the reason that they had not received any notice from the common council of the city of Flint directing alterations or additions to be made to the fire escape. This building was equipped with what is conceded to be a suitable fire escape. The question here presented is whether a proper means of exit from the building thereto was provided. If it be conceded that under the statute no legal duty was imposed on the defendants to make changes or alterations thereto unless notified to do so, it clearly appears that the defendant Koepke personally examined the window about the first of January, 1930, and determined that its weight (about 45 pounds) was such that it needed weights upon it, and directed Mr. Robson to repair it in that respect.

The purpose of the notice above referred to is to apprise the owner or lessee that "needful alterations and additions" should be made, and when the defendant Koepke, himself, discovered the necessity

therefor, and directed that suitable alterations and additions should be made thereto, defense may not be predicated upon the fact that such notice was not given.

It is urged that "there was no showing of any negligence" upon the part of the defendants "which was the proximate cause of plaintiff's injury." This claim is largely based upon the neglect of the plaintiff to avail herself of the other means of exit from the building when the smoke was first discovered by her. It does not appear that she had any knowledge that the building, except the outside walls, was entirely of wooden construction, nor can it be said as a matter of law that she was chargeable with notice that the fire would spread so quickly therein. It is insisted that she should have used a chair or other object to break the glass in the window, and thus secure her escape. The jury had the right to presume that she desired to protect herself from injury, and that she did what seemed to her, in her then condition of excitement and panic, the proper thing to accomplish that result. The instruction of the court as to her conduct after her danger became apparent was, we think, well within the rule announced in *Myler* v. *Bentley,* 226 Mich. 384, 386 (23 N. C. C. A. 859):

"The law makes allowance for acts done in an emergency and in sudden peril and for lack of coolness of judgment incident thereto."

The testimony of the building inspector meets with well-deserved criticism. It is established beyond question that at the time he testified that he examined the window it weighed about 45 pounds and had no sufficient weights upon it. He must have known that women were employed on this floor, and it is almost inconceivable to believe that after ex-

amination he concluded that it was a safe exit to the fire escape in case of need. It also appears that the defendant Koepke examined it a few months later (and there is no evidence of change in the meantime), and he himself concluded that it was unsafe and ordered the necessary changes made.

Error is assigned upon certain portions of the charge. After instructing the jury that if the repairs to the window had been made as testified to by the witness Robson, he told them that—

"the defendant would not be guilty of negligence, unless you find from the evidence in this case that the defendant should have gone back and made an examination of this window after the carpenter had completed it,"

and that—

"If you find at the time this window was fixed by the carpenter, and you find he did fix it, and it would work, and if you find also from the evidence that the time elapsing, for the period between the 27th of January and the 11th of March, during which time it had not been examined, you find that was reasonable for the defendants not to examine it in the meantime, they would not be guilty of negligence, if you find the window worked the way it ought, but if you find it was the duty of the defendant to examine this window after the carpenter had done his work, then you would say he hadn't performed his full duty, and he would be guilty of negligence. That is to say, had the defendants in this case acted as ordinary, prudent, careful men would have acted under like circumstances? That is the law."

We are unable to discover any reversible error in this instruction. The language used may be a little confusing, but the meaning intended to be conveyed seems clear. If the duty devolved upon the defend-

ants to keep this window in a condition to afford a reasonably safe exit to the fire escape, as we here hold, it cannot be said as a matter of law that they were relieved therefrom by the mere employment of Robson to make it so.

In the closing paragraph the court said:

"Now, I think I have been brief. I don't want to say anything in any manner tending to say things that might puzzle you in any way, but I would repeat this: You ought to find, you must find in the case that the defendant was guilty of negligence—as I said, and I repeat it again, to give you that definition of negligence, which is the doing or not doing of that which the ordinary, careful, prudent man would have done under like circumstances. Contributory negligence is the same thing, did the plaintiff in this case act as an ordinary, careful, prudent person, would have acted under like circumstances. Now, those are the definitions of negligence and contributory negligence, and if you find that the defendant was guilty of negligence and the plaintiff free from negligence, then you go to the consideration of damages, and that is left to the fair, honest intelligence of jurors."

It is insisted that the court thereby instructed the jury that they "ought to find," "must find," "that the defendant was guilty of negligence." That it was not so intended is apparent from what followed. After a suggestion by plaintiff's counsel as to the effect to be given to the mortality tables, which had been offered in evidence, had been disposed of, defendants' counsel said to the court:

"*Mr. Youngjohn:* I don't know if I misunderstood Your Honor, in your last summary of your charge, it wasn't your intention to instruct the jury that they ought to find defendants were guilty of negligence?

"*The Court:* I said in order to find for the plaintiff they would have to find the defendant was guilty of negligence.

"*Mr. Youngjohn:* Did you not instruct that the jury should find?

"*The Court:* It is their duty, in the first place, to find whether the defendants in this case were guilty of negligence."

It thus clearly appears that the effect of the language used was dispelled by the pertinent question of counsel and the reply of the court thereto. Many times during the charge the court impressed upon the jury that the negligence of the defendants as a matter of fact must be established to enable the plaintiff to recover.

We have set forth the testimony of the witnesses at some length. There is much conflict. We have given it careful consideration, and cannot say that the verdict rendered is against the great weight thereof.

Counsel insist that the verdict is excessive. The plaintiff was 32 years of age at the time of her injury. Her expectancy of life was 33 years. She was earning at that time $30 per week, with room and board. She was confined in a hospital for about nine weeks, and was treated by a doctor for a number of months thereafter. She suffered much pain from the effect of the burns and the treatment therefor. There is evidence of permanent injury to her right hand, and the joints of her right arm. The trial court properly permitted her to exhibit her wounds to the jury. Potter, Michigan Evidence, p. 306. That her person has been disfigured, and is likely to remain so, is apparent. The trial court, who saw her upon the witness stand and heard the doctor testify as to her injuries and the suffering she

endured in his efforts to improve her condition, was of the opinion that the verdict was not excessive. We cannot say that the amount thereof necessitates a reversal for that reason or a reduction of the same on our part.

The judgment is affirmed.

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

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NATIONAL LUMBERMANS BANK *v.* LAKE SHORE MACHINERY CO.

1. RECEIVERS—CONSENT TO APPOINTMENT OF RECEIVER—STATUTES.
   Unless all creditors and interested parties consent to appointment of receiver of going concern, such appointment may not be made unless allowed by law (3 Comp. Laws 1929, § 13944, subd. 3).

2. SAME—RECEIVERSHIP ANCILLARY REMEDY ONLY.
   Appointment of receiver by equity court may be made only as ancillary to other relief sought in bill of complaint (3 Comp. Laws 1929, §§ 15129, 15318, 15322, 15331).

3. SAME—PARTIES—JUDGMENT CREDITORS NOT PARTIES ALLOWED TO INTERVENE.
   Where all creditors of going concern were not made parties to suit for appointment of receiver, and did not consent thereto, judgment creditors should have been permitted to intervene and object to such appointment (3 Comp. Laws 1929, § 13944, subd. 3).

Appeal from Muskegon; Vanderwerp (John), J. Submitted September 20, 1932. (Docket No. 176, Calendar No. 36,869.) Decided December 6, 1932.

Bill by National Lumbermans Bank against Lake Shore Machinery Company, a Michigan corporation, for appointment of a receiver and to enjoin levy by judgment creditors. Brown & Bigelow, a Minnesota corporation, and others, judgment creditors, petition to intervene and set aside receivership. From order enjoining levy, interveners appeal. Reversed.

*Cross, Foote & Sessions,* for plaintiff.

*Harold H. Smedley,* for interveners.

SHARPE, J. Plaintiff filed a bill of complaint alleging: That it is a creditor of the defendant in the sum of $19,729.35, and that defendant is indebted to others in the sum of approximately $13,000; that "defendant is engaged in the business of jobbers of machinery and mill supplies;" that its assets, as shown by its books, have a value in excess of its indebtedness, but that during the last two years its business has been conducted at a loss of upwards of $23,000; that it is unable to borrow money or acquire further capital to use in the payment of its obligations, although it has sufficient assets, when converted into money, to meet them and continue its business; that several suits have been instituted in justice's court on behalf of defendant's creditors, and that if executions are issued and levies made thereon defendant will be compelled to cease operations; that—

"unless a receiver is appointed by this court to take complete control of the assets and affairs of said defendant and to operate its business, if necessary, severe financial losses will be suffered by this plain-

tiff and all other of defendant's creditors and other interested parties;''

and that it believes that—

''if a receiver is appointed to handle the affairs of the said defendant and operate its business, if necessary, the claims of all of the creditors of said defendant may be paid in full.''

It concluded with a prayer for relief, asking that the Bankers Trust Company, of Muskegon, be appointed such receiver.

The defendant, Lake Shore Machinery Company, answered, admitting the truth of the allegations in the bill, and consenting to the appointment of the receiver. Upon the filing of this answer, the Bankers Trust Company was so appointed with the powers usual in such cases. About two months thereafter, certain of the creditors petitioned the court for leave to intervene, file an answer, ''and object to the appointment of a receiver.'' An order was entered denying this petition, from which this appeal has been taken.

The question presented and argued by counsel in their briefs is whether the court had the power to appoint the receiver.

There are doubtless many cases in which it is in the interest of creditors to have a receiver appointed to take charge of a going business which has an indebtedness, and, under the direction of the court, handle its affairs and dispose of its assets, rather than to have them sacrificed by sales under executions or proceedings in bankruptcy, and this may be one of them. But, unless all the creditors and interested parties consent, or the facts and circumstances are exceptional, as in *Edison* v. *Fleckenstein Pump Co.*, 249 Mich. 234, such an appointment may not be made unless ''allowed by law.'' Subsection 3,

§ 13944, 3 Comp. Laws 1929; *Hazeltine* v. *Granger,* 44 Mich. 503. There are many provisions in our statutes for appointment of receivers in certain actions. 3 Comp. Laws 1929, §§ 15129, 15318, 15322, 15331.

It seems to be well established that such an appointment can be made only as ancillary to other relief sought in the bill of complaint.

"Ordinarily, unless perhaps in the case of infants or lunatics, a suit must be actually pending to justify a court of equity in appointing a receiver." High on Receivers (4th Ed.), § 17.

"As a general rule, a receivership is a purely ancillary remedy and cannot be maintained in a proceeding instituted solely for that purpose." 23 R. C. L. p. 11.

"Unless the case is within a statute providing for the appointment of a receiver upon his application, a general or simple contract creditor who has not reduced his claim to judgment, who has no right or interest in, or lien upon, the property of the debtor, and whose interest or position does not differ from that of any other ordinary creditor, has no standing to obtain the appointment of a receiver of such property." 53 C. J. p. 29.

"The order appointing a receiver was void, for the reason that it was made when there was no suit pending." *Merchants & Manfrs. Nat'l Bank* v. *Kent Circuit Judge,* 43 Mich. 292, 296.

"This appointment of a receiver, even if one could have been appointed at any stage of the case, was absolutely void, as the bill had not been filed and no suit commenced at the time." *Jones* v. *Schall,* 45 Mich. 379, 380.

In view of the law as thus stated, it will be seen that our holding in *Corliss* v. *Clinton Circuit Judge,* 212 Mich. 476, and *Grand Rapids Trust Co.* v. *Car-*

*penter,* 229 Mich. 491, relied on by plaintiff, are in no way controlling.

The order denying the motion to intervene is reversed and set aside, with costs, and the cause remanded, with direction to permit such intervention.

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

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LIGROW *v.* ABRAHAM LINCOLN LIFE INSURANCE CO.

1. INSURANCE—"GOOD HEALTH" DEFINED.
"Good health" means that insured is free from disease that would seriously affect general soundness of system, and that he has not been attended by physician for serious ailment.

2. SAME—GOOD HEALTH QUESTION FOR JURY.
Whether insured was in good health at time health and accident policy was delivered to him, *held,* properly submitted to jury, where evidence showed that, although he was suffering from temporary ailment, it was not serious, and that he fully recovered.

3. SAME—EVIDENCE—PROOFS OF LOSS SUBJECT TO EXPLANATION.
Proofs of loss should be treated as evidence of fact stated, being in nature of admission; but it is subject to explanation, and cannot have effect of estoppel when made upon information received from attendant physician, and in good faith.

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As to meaning of "good health" in insurance policy, see annotation in 40 A. L. R. 662.

Appeal from Montcalm; Hawley (Royal A.), J. Submitted June 21, 1932. (Docket No. 64, Calendar No. 36,307.) Decided December 6, 1932.

Assumpsit by Louis Ligrow against Abraham Lincoln Life Insurance Company, an Illinois corporation, on a sick and accident indemnity policy. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

*Charles H. Goggin* and *Paul R. Cash,* for plaintiff.

*McAllister & McAllister,* for defendant.

CLARK, C. J. On March 15, 1928, defendant issued to plaintiff and delivered the next day a policy of insurance or indemnity against sickness and accident.

Under the contract, (a) the insurance was not to be in force unless delivery of the policy occurred while the insured was in good health, and (b) the insurance was against loss resulting from illness contracted after 15 days from date of policy.

The defense to a suit on the policy is upon both the above provisions. Plaintiff contends that but one defense is open, but, in our view, the contention may be passed.

On March 12, 1928, plaintiff went to St. Louis, Michigan, and took baths and consulted a physician. He remained there until March 31st. He was up and going about to shows, circuses, etc. The physician testified the ailment was temporary, not serious, and that plaintiff left fully recovered.

He received sick benefit from another company for this illness, if it may be called such, but of such fact the record has nothing more.

Plaintiff worked during the month of April without loss of time and was in good health, as he testified. He became ill on or about May 2, 1928, and thereafter suffered a protracted sickness, for which recovery is here sought under the policy.

The plaintiff contends he was in good health at all times herein mentioned prior to May 2d, and this contention is supported by evidence.

Defendant urges plaintiff was not in good health on March 16th, and that the sickness for which recovery is here sought was contracted before 15 days after date of policy, and that, for these reasons, plaintiff may not recover. Defendant has support in evidence, notably, statements made in proofs of loss, which statements plaintiff, to some extent at least, explained.

The trial judge submitted to the jury the question of whether plaintiff was in good health when the policy was delivered and the question of whether the illness for which recovery is sought was contracted after 15 days from date of policy. In the charge, good health was defined. Defendant caused to be submitted a special question, "Did Louis Ligrow contract this illness for which he seeks to recover in this case in March, 1928?" Apparently, the question was answered in the negative, as the verdict is for plaintiff. From judgment on verdict, defendant has appealed.

The definition of good health, as instructed by the trial judge, is that given in *Blumenthal* v. *Berkshire Life-Insurance Co.*, 134 Mich. 216 (104 Am. St. Rep. 604), which, quoting from syllabus:

"means that he is free from disease that would seriously affect the general soundness of the system, and that he has not been attended by a physician for a serious ailment."

Under this rule, plaintiff's testimony and that of his attending physician, above stated, to the effect that his ailment while at St. Louis was temporary and not serious, gives support to the finding of the jury that plaintiff, despite the ailment, was in good health at the time or times in question.

The verdict therefore is supported by evidence and must be sustained. That it is against the great weight of the evidence is a question not before us.

Proofs of loss were here subject to explanation under the holding in *John Hancock Mutual Life Ins. Co.* v. *Dick,* 117 Mich. 518 (44 L. R. A. 846):

"We have no doubt that the proofs of loss should be treated as evidence of the fact stated, being in the nature of an admission; but it is subject to explanation, and cannot have the effect of an estoppel, when made upon information received from the attendant physician, and in good faith."

And see *Hubbell* v. *North American Union,* 230 Mich. 668.

We find no error. Affirmed.

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

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HOYT BROTHERS, INC., *v.* CITY OF GRAND RAPIDS.

1. MUNICIPAL CORPORATIONS—ORDINANCES—LICENSES—TEST AS TO VALIDITY—ARBITRARY POWER—CHARITY.

In determining validity of ordinance vesting in city manager power to grant license for soliciting funds, selling goods, etc., for charitable purposes, court will not indulge presumption that he will or will not act reasonably, but decision is con-

As to validity of statute or ordinance vesting discretion in public officials without prescribing a rule of action, see annotation in 12 A. L. R. 1435; 54 A. L. R. 1104.

trolled by legal proposition that it is requisite to validity of ordinance that it state standard for guidance of official who passes on application for license.

2. SAME—LICENSE TO SOLICIT FOR CHARITY—CONSTITUTIONAL LAW. Ordinance vesting city manager with power to grant license for soliciting funds, selling goods, etc., for charitable purposes whenever it shall appear that charity is worthy one and persons making application are fit and responsible, is invalid as attempt to vest him with arbitrary power, where ordinance contains no rule by which to determine whether charity is "worthy" or applicant is "fit and responsible."

Appeal from Superior Court of Grand Rapids; Shaw (Arthur F.), J. Submitted October 19, 1932. (Docket No. 130, Calendar No. 36,809.) Decided December 6, 1932.

Bill by Hoyt Brothers, Incorporated, a New Jersey corporation, against City of Grand Rapids, a municipal corporation, to enjoin enforcement of an ordinance relating to solicitation for charitable purposes. Bill dismissed. Plaintiff appeals. Reversed, and decree entered for plaintiff.

*Grant Sims* and *William K. Clute,* for plaintiff.

*Dale Souter* and *Robert S. Tubbs,* for defendant.

NORTH, J. Plaintiff, a New Jersey corporation, is engaged in Grand Rapids and other cities in selling its merchandise through employees who solicit orders by a house to house canvass. The sales agents are each provided with a so-called certificate of identification, which among other things recites:

"The Passaic Home & Orphanage receives 10 per cent. of the net profits made by Hoyt Brothers, Inc., on the merchandise as shown on their regular price list. * * * Hoyt's representatives are not authorized to solicit or receive contributions."

Plaintiff alleges in its bill of complaint that it and its employees are threatened by the city of Grand Rapids with prosecution under a city ordinance which prohibits solicitation for charitable purposes without first obtaining from the city manager a permit so to do. An injunction is sought to restrain the city from enforcing the ordinance against plaintiff and its employees for the reason that it is not applicable to its business of selling merchandise and also because the ordinance is unconstitutional and void. On defendant's motion the bill of complaint was dismissed in the superior court, it being there held that the ordinance was valid and that plaintiff's bill of complaint did not state a cause of action. Plaintiff has appealed, and the primary question for review is the validity of the ordinance. We quote it in part:

"An ordinance to license and regulate within the city of Grand Rapids, the soliciting of funds, the securing of subscriptions, or the selling of goods, wares and merchandise, the proceeds from which or any part thereof, are to be used for charitable purposes, and to prohibit false representations in connection therewith.

"SECTION 1. No person, firm, corporation, or society of any kind, nature, or description, including charitable, fraternal, or eleemosynary, his, its, or their agents, representatives, or employees, within the limits of the city of Grand Rapids shall sell or solicit funds the proceeds from which, or any part thereof, are to be used for any so-called charitable purposes, without first having secured from the city manager a written permit so to do."

Sections 3, 4, and 5 provide for a written application giving information concerning the solicitor, the articles sold, the charitable purpose, the portion of

sales proceeds used for charity, indorsement of at least six reputable citizens, investigation by a police officer, and report to the city manager, and that no fee shall be charged.

"SEC. 6. Whenever it shall appear to the city manager from such investigation and report that the charity is a worthy one and that the person or persons making the application are fit and responsible parties, he shall issue a permit to such person, firm, corporation or society."

The ordinance further provides for subsequent applications and renewals, and a penalty for violation.

Appellant urges invalidity of the ordinance in that it violates sections 1 and 16 of article 2 of the Michigan Constitution. These sections provide:

"SECTION 1. All political power is inherent in the people. Government is instituted for their equal benefit, security and protection.

"SEC. 16. No person shall be * * * deprived of life, liberty or property, without due process of law."

If, as claimed by appellant, the ordinance attempts to vest the city manager with arbitrary power in the exercise of which he may either grant or withhold the permit, the quoted constitutional provisions are violated and the ordinance is wholly void. Numerous cases of this character have been before this court, and the law is well settled.

"Reasonable regulations and a uniform rule of action in its determination are essential to the validity of a municipal ordinance and it may not be left to the arbitrary decision of an administrative officer or board." *Harrigan & Reid Co.* v. *Burton* (syllabus), 224 Mich. 564 (33 A. L. R. 142).

"Section of village ordinance prohibiting removal of wooden building within fire limits without permit from chairman of building committee is void where authority to grant permit attempted to be conferred on said chairman is unlimited and arbitrary." *Village of Durand* v. *Love* (syllabus), 254 Mich. 538.

See, also, *Melconian* v. *City of Grand Rapids,* 218 Mich. 397; *Postal* v. *Village of Grosse Pointe,* 239 Mich. 286.

"Where an ordinance states a standard for the guidance of the mayor in granting licenses thereunder, and his official discretion to grant or refuse a license upon investigating the facts is limited to determining whether the requirements prescribed by the ordinance have been met, and an abuse of discretion would be subject to review, it cannot be said that the ordinance is invalid because it delegates uncontrolled licensing power to him, with authority to arbitrarily grant or refuse." *Hughes* v. *City of Detroit* (syllabus), 217 Mich. 567.

In the instant case the power to issue a permit is vested in the city manager who grants such permit "whenever it shall appear * * * from such investigation and report (made by a police officer) that the charity is a *worthy one,* and that the person or persons making the application are *fit and responsible.*" The ordinance contains no rule or provision by which the city manager is to determine whether the charity is "worthy" or the applicant is "fit and responsible." In making his determination he may apply one or more of a great variety of qualifications which to the city manager may seem proper, or he may grant or refuse the permit solely on captious grounds. And he may apply one test to one applicant and another to another. The ordinance does not contain the slightest indication of the kind

or character of charity that is a "worthy one;" and likewise it is wholly silent as to what type of qualification would constitute an applicant for a permit "fit and responsible." We see no escape from the conclusion that the ordinance attempts to vest the city manager with an arbitrary power in the exercise of which he will say to one applicant "yes," and to another "no."

It is urged in appellee's brief: "It is to be presumed that the city manager will act reasonably;" and, "In order to hold this particular ordinance invalid, therefore, it is necessary to assume that the city manager will act arbitrarily and capriciously." We think it is not necessary, in passing upon the validity of this ordinance, to indulge in presumptions or assumptions one way or the other. Instead, decision is controlled by the legal proposition that it is requisite to the validity of the ordinance that it should state "a standard for the guidance" of the official who passes upon the application for the permit. *Hughes* v. *City of Detroit, supra.* The general and indefinite terms used in this ordinance wholly fail to comply with this requisite. For the reasons indicated the ordinance must be held invalid. A decree will be entered in this court granting injunctive relief in accordance herewith. Costs to appellant.

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

BROADWELL *v.* BROADWELL.

DIVORCE—ALIMONY—CHANGE OF CIRCUMSTANCES.

Decree whereby alimony awarded to wife in former decree is increased from $100 per month to $200 is set aside, on appeal, where record fails to show such change of circumstances on part of parties as justifies said increase.

Appeal from Wayne; Jayne (Ira W.), J. Submitted November 2, 1932. (Docket No. 158, Calendar No. 36,629.) Decided December 6, 1932.

Divorce proceedings between Louis O. Broadwell and Allie M. Broadwell. On petition of defendant for increase in alimony. Cora W. Broadwell, widow of Louis O. Broadwell, appeals from decree for defendant. Modified.

*Retan & Zeleznik* (*Chandler & Culver,* of counsel), for appellant.

*Lucking, Van Auken & Sprague* (*Fred J. Schumann,* of counsel), for appellee.

NORTH, J. This is an appeal from a decree entered in the circuit court of Wayne county by which the alimony decreed to Allie M. Broadwell in this court in 1923 (see *Broadwell* v. *Broadwell,* 223 Mich. 641) was increased from $100 per month to $200 per month, payment to continue during the lifetime of Mrs. Allie M. Broadwell. Louis O. Broadwell, plaintiff in the case, died March 29, 1929. In April, 1927, he was remarried to Cora W. Broadwell. At or

On modification of alimony because of changed conditions, see annotation in 44 L. R. A. (N. S.) 1026.

As to remarriage of husband, see annotation in 62 L. R. A. 975; L. R. A. 1915F, 820; 30 A. L. R. 79; 37 A. L. R. 441; 42 A. L. R. 602.

On death of husband as affecting alimony, see annotation in 18 A. L. R. 1040.

about the time of this marriage Mr. Broadwell conveyed to her property in the city of Detroit known as the Broadwell hotel. By decree in the original case, payment of the alimony awarded to Mrs. Allie M. Broadwell was made a lien upon the Broadwell hotel property; and this lien is perpetuated incident to the increase in the alimony from which this appeal is taken. Under the circumstances, the real party in interest, as against the decreed increase in alimony, is the second Mrs. Broadwell, and she is the appellant herein.

At the circuit reference was made to Edward Pokorny, as friend of the court, to take testimony and make recommendations to the court thereon. The following is from the recommendation made:

"It is the opinion of the friend of the court who has heard the testimony as notary public, that the petitioner, Allie M. Broadwell, has failed to show a material change of circumstances upon the part of her former husband or herself justifying an increase of permanent alimony."

Notwithstanding the recommendation of the friend of the court, the circuit judge was of the opinion that there had been a change of circumstances in that Mrs. Allie M. Broadwell was not receiving financial assistance from a son by a former marriage which she had theretofore received, and because "of her increasing age and accompanying poor physical condition." In view of other facts and circumstances disclosed by the record, we are unable to agree that such a change of circumstances has been shown as justifies the increase in the amount of alimony decreed. In this connection, the record discloses that Mr. Broadwell made investments which in recent years have become practically

worthless, and that other items of his property, including the Broadwell hotel, have greatly depreciated both as to value and income. In other words, the value of the property which might be referred to as Mr. Broadwell's estate has very materially diminished. Under the record, we are constrained to hold that the modification of the decree must be set aside. Decision is controlled by *Smith* v. *Smith,* 139 Mich. 133; *Gould* v. *Gould,* 226 Mich. 340.

This record discloses that there was default in the payment of the decreed alimony of $100 for the month of May, 1929, and a like amount accruing each month thereafter. As to these instalments to date appellee is entitled to an order for immediate payment, and in default of such payment within 30 days she may foreclose her lien against the Broadwell hotel property.

A decree may be taken in this court in accordance herewith, provided, however, that taxable costs of this court in favor of appellant may be deducted from the amount otherwise due appellee.

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

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LAPEER COUNTY ROAD COMMISSIONERS *v.* MARKLEY.

1. HIGHWAYS AND STREETS—"REAL ESTATE"—INTEREST IN LANDS. Highway is easement of perpetual character, freehold estate, interest in lands, and therefore is "real estate" (1 Comp. Laws 1929, § 76).

On cost of restoration as measure of damages for injury to real property, see annotation in 17 L. R. A. 426.

2. VENUE—ACTION FOR INJURIES TO LAND—HIGHWAYS AND STREETS.
Action by board of county road commissioners for damages to highway alleged to have been caused by defendants' negligence, being for injuries to real estate, was properly brought in county where road is situated, although defendants reside in another county (1 Comp. Laws 1929, § 76; 3 Comp. Laws 1929, § 13997).

3. NEGLIGENCE—HIGHWAYS AND STREETS—CONSTRUCTION OF DAM.
In action for damages to highway alleged to have been caused by negligent construction of dam, evidence that many large chunks of frozen earth were used in said construction, *held*, to justify finding of actionable negligence.

4. DAMAGES—EVIDENCE—EXPENSE OF RESTORATION.
In action for negligent damage to highway, where plaintiff showed cost or expense of restoring it, it was not in its own behalf called upon to do more in respect of proof of expense.

5. SAME—MEASURE OF DAMAGES—REASONABLE SUM.
Measure of recovery for negligent damage to highway is not amount actually paid for restoring it, but it is reasonable sum, of which amount actually paid is evidence.

6. APPEAL AND ERROR—EVIDENCE—ORIGINAL EVIDENCE—DAMAGES.
Error, if any, in failing to produce original evidence, consisting of timekeeper's slips, in proving expense of restoring damaged highway, was not prejudicial, where books and records were introduced, and payment of expense is unquestioned as to amount.

7. DAMAGES—EVIDENCE—EXPENSE OF RESTORATION.
Where there was testimony that going or prevailing prices were paid in restoring damaged highway, fact that said expense has been paid, *held*, evidence of its reasonableness.

Appeal from Lapeer; Smith (Henry H.), J. Submitted June 17, 1932. (Docket No. 75, Calendar No. 36,492.) Decided December 6, 1932.

Case by Board of County Road Commissioners of Lapeer county against Vern C. Markley and others for damages to a county road alleged to be due to defendants' negligent construction of a nearby dam.

Judgment for plaintiff. Defendants appeal. Affirmed.

*Elmer Shumar* (*Samuel R. Williams,* of counsel), for plaintiff.

*Harold E. Howlett* and *George W. Des Jardins,* for defendants.

CLARK, C. J. The facts are stated by the trial judge:

"Defendants built a dam across a small creek for the purpose of creating an artificial lake on property they were developing in Hadley township, Lapeer county. The fill for this dam was started in January, 1927, and completed in March the same year.

"Dirt, part sand and part clay, was obtained for the fill from a nearby hill. It is undisputed that the ground was frozen when the work commenced and continued up to the time of the completion of the dam.

"There seems to be no dispute as to the necessity or fact that dynamite was required to blast out the frozen top dirt so that loose dirt could be had. This dirt was taken up by a drag line, loaded in trucks and conveyed to the fill. Whether or not frozen chunks of dirt were dumped with the loose dirt in the fill is in dispute.

"The plaintiff claims and offers proof to show that large frozen chunks of dirt were dumped with the loose dirt in the fill, while the defendants claim that these frozen chunks were segregated and rolled over the lower side. One of the defendants testified that at one time he discovered some frozen chunks within the limits of the fill and ordered them removed to the outside.

"The dam so constructed measured approximately 200 feet from bank to bank and was approxi-

mately 30 feet in height, about 24 feet in width across the top with a base width of about 125 feet. The spillway was boarded up to hold back water to the estimated depth of 30 feet.

"The artificial lake so created covered an area of around 50 acres.

"A short distance below the dam runs a public highway under the control of the plaintiff as road commissioners for Lapeer county. In the construction of this road a fill of about 11 feet in height, a 24-foot top and 55-foot bottom was made necessary. A cement culvert was maintained where the creek crossed the highway. The highway had been there for a great number of years.

"Early in the morning of May 24, 1927, the dam went out, precipitating down upon the embankment in the highway the contents of the artificial lake. The force of the rushing water is apparent from the undisputed testimony, which shows that pieces of the cement culvert in the roadway weighing several tons were carried downstream and deposited on adjacent lands 200 feet away. The roadway was completely washed out, leaving holes 15 feet deep below the surface.

"The damage to the roadway was repaired that summer at a cost to the county road fund of $7,855.68.

"Through the board of road commissioners this suit is brought to collect from defendants, owners of the dam, this sum so expended in repairing the roadway and culvert so destroyed. That the injury to the roadway and culvert was caused directly by the giving way of the dam and that the sum of $7,855.68 was expended by the commissioners in repairs is not disputed."

Plaintiff had judgment in a trial without a jury. Defendants have appealed.

The first defense is want of jurisdiction, the defendants not being residents of the county and process having been served without the county.

The statute, 3 Comp. Laws 1929, § 13997, provides in part:

"Actions shall be commenced and tried in the proper county as follows:

"Real actions; replevin. 1. Actions for the recovery of any real estate, or the possession thereof; for trespass on lands; and for injuries to real estate and actions of replevin shall be commenced and tried in the county where the subject of the action shall be situated."

1 Comp. Laws 1929, § 76, construes "real estate" to include "lands, tenements, and real estate, and all rights thereto, and interests therein."

A highway is an easement of a perpetual character, a freehold estate (29 C. J. p. 367; *United States Gypsum Co.* v. *Christenson,* 226 Mich. 347), an interest in lands (*Morrill* v. *Mackman,* 24 Mich. 279 [9 Am. Rep. 124]).

Section 13997, above, is a part of the judicature act. The same act, 3 Comp. Laws 1929, § 14007, abolishes all forms of actions at law except the following, which are retained: "Assumpsit, trespass on the case, replevin, ejectment, certiorari, mandamus, and *quo warranto.*"

In determining whether the action here is local, it is of no moment that it is case, as no other form could be employed. Because of the statute former distinctions between case and trespass are unimportant. See cases cited in *Olshove* v. *Huron Circuit Judge,* 240 Mich. 46. The action at bar, therefore, being for injuries to real estate in Lapeer county, was, under the plain language of the statute, properly commenced and tried in that county. Another section of this statute was held to mean what it plainly says. *Graham* v. *Smith,* 62 Mich. 147. And there should be like holding here.

The majority opinion in the *Olshove Case,* it seems, was urged to the trial judge as requiring a contrary conclusion. He declined to follow it, rightly, as it appears to the writer. In a later case, *Dunnebacke* v. *Railway Co.,* 248 Mich. 450, it was said:

"Actions for trespass on lands and for injuries to real estate must be tried in the county where the land is situated (citing the statute)."

And see minority opinion in *Olshove Case.* The majority opinion in the *Olshove Case* manifests apprehension of hardship in obtaining service of process, but it is observed that in actions commenced under the quoted part of section 13997 process may be served anywhere in the State. 3 Comp. Laws 1929, § 14090.

We approve finding actionable negligence in construction of the dam. The earth, largely sand, frozen to a depth of 30 inches, was blasted by dynamite, and, according to accepted evidence, this frozen earth, in chunks, many large chunks, was put into the dam. That the dam, so constructed, lacked, in the spring of 1927 following, requisite consistency, solidity, and firmness to hold a head of water of an estimated depth of nearly 30 feet must be apparent. This, as held by the trial judge, was negligent construction, and the proximate cause of plaintiff's damage, for which defendants are liable. 3 Farnham on Waters and Water Rights, p. 2547; *Wiedekind* v. *Tuolumne County Water Co.,* 83 Cal. 198 (23 Pac. 311); *Bryant* v. *Bigelow Carpet Co.,* 131 Mass. 491; *Anderson* v. *Rucker Bros.,* 107 Wash. 595 (183 Pac. 70, 186 Pac. 293, 8 A. L. R. 544); *Waidelich* v. *Andros,* 182 Mich. 374; note 3 N. C. C. A. 2.

The presence of unprotected springs in the base of the dam and a lack of core in the dam are stressed

also as negligent construction (as to which, see *Supervisor and Commissioners of Pickens County* v. *Jennings,* 181 N. C. 393 [107 S. E. 312]) but, in our view, these questions are unnecessary to decision.

As evidence of damages, plaintiff showed the cost or expense of restoring the highway. *Chandler* v. *Allison,* 10 Mich. 460. Plaintiff proved by unquestionably competent evidence payment of a certain sum as expense; it was not in its own behalf called upon to do more in respect of proof of expense. It was not suing on an account. The measure of recovery for the tort is not the amount actually paid, but it is a reasonable sum (17 C. J. p. 914; *Alt* v. *Konkle,* 237 Mich. 264), of which the amount actually paid is evidence. Plaintiff offered its books and records in evidence and they were received. Defendants say this was error because certain original entries, timekeeper's slips, were not produced. Defendants do not say they were prejudiced in their defense because the slips were not produced, they merely invoke a rule of evidence. Assuming, not stating, that the slips ought to have been produced or accounted for, we find no prejudicial error, for the payment of the expense is unquestioned as to amount.

In *Hyde* v. *Shank,* 93 Mich. 535, an illustrative case, plaintiffs, chattel mortgagees, brought replevin for mortgaged chattels which had been taken from the mortgagor by defendant on attachment. A question was whether or not the mortgage was paid. The plaintiffs, not offering in evidence their books to show the true state of the mortgagor's account, testified of the amount due. Held, the testimony was competent, and that defendant, if he believed the books would aid him, might examine them and use them if he desired.

Defendants sought to challenge the reasonableness of the amount of expense, this by opinion evidence of cost of restoration. Plaintiff had testimony that going or prevailing prices were paid, and the very fact that this expense has been paid is evidence of reasonableness. *Alt* v. *Konkle, supra.*

On the whole record the finding of damages must be sustained. No other question calls for discussion. Affirmed.

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

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VIGO AMERICAN CLAY CO. *v.* L. C. MONROE CO.

1. PLEADING—DEFENSES NOT PLEADED NOT CONSIDERED—APPEAL AND ERROR.

   In an action for purchase price of certain tile, defenses of satisfaction clause of contract and of release or termination of contract by mutual agreement, are not considered on appeal, where not pleaded.

2. SALES—RIGHT TO REJECT FOR DEFECTS—QUESTION FOR JURY.

   In action for purchase price of certain tile, where defense was rightful rejection because of defects in workmanship and material, contradictory testimony as to quality presented question of fact for jury.

3. SAME—PASSING OF TITLE ON DELIVERY TO CARRIER—INSPECTION.

   Where seller shipped tile according to contract, which buyer ought to have accepted, title passed to buyer on delivery to carrier, although contract provided for inspection by buyer, and although seller, after rejection by buyer, took tile and stored it for buyer.

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On what constitutes a sufficient delivery to transfer title to property sold, see annotation in 26 L. R. A. (N. S.) 27.

As to effect of delivery to carrier on buyer's right to reject for lack of quality, see annotation in 8 L. R. A. (N. S.) 1167.

As to what constitutes delivery of goods to carrier, see annotation in 10 A. L. R. 701; 20 A. L. R. 1236.

4. SAME—REJECTION—REMEDY OF SELLER—DAMAGES.
Where buyer rejected tile which should have been accepted because it conformed to contract, and title to which passed to buyer, seller, who took possession after its rejection, and stored it for buyer, is entitled to recover contract price and cost of freight, cartage, etc.

5. APPEAL AND ERROR—EVIDENCE—HARMLESS ERROR.
Error, if any, in admission of evidence, *held,* not reversible, in absence of showing of prejudice on account thereof.

6. SAME—CURING ERROR—INSTRUCTION.
Error, if any, in admission of evidence relative to magnitude of plaintiff and its business, *held,* not prejudicial, in view of clear and positive instruction to jury to disregard it.

Appeal from Muskegon; Vanderwerp (John), J. Submitted June 16, 1932. (Docket No. 14, Calendar No. 36,475.) Decided December 6, 1932.

Assumpsit by Vigo American Clay Company, a corporation, against L. C. Monroe Company, a corporation, for the purchase price of a quantity of building tile. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

*Harold H. Smedley,* for plaintiff.

*Alexis J. Rogoski,* for defendant.

CLARK, C. J. Plaintiff shipped, on defendant's order and by common carrier, several carloads of standard wall tile. Defendant began delivering to its customer, a builder on a job. The architect in charge refused using the tile in the building. Defendant, in a letter to plaintiff, in effect, refused the tile, stating, "they are irregular in shape, cells broken and cracked, workmanship very imperfect," and asking to be advised "what you wish us to do with these tile." To the declaration in this suit for

the price and for certain disbursements, defendant pleaded the general issue, with notice thereunder of rightful rejection under the contract because of defects in workmanship and material. Plaintiff had verdict and judgment. Defendant has appealed.

Two other defenses are here attempted, both in avoidance of the contract, one a satisfaction clause of the contract, and other release or termination of the contract by mutual agreement. Neither of these defenses was pleaded and therefore they call for no further consideration. *Cleveland* v. *Rothschild,* 132 Mich. 625.

On the issue of quality of the tile, evidence was adduced by both sides. It is contradictory and made the question of fact for the jury which was properly submitted and the verdict is not open to criticism.

In instructing of damages, plaintiff was permitted to recover the purchase price and the total of certain disbursements for freight, cartage, etc., incurred by reason of defendant's refusal to accept the tile. Appellant contends in respect of the tile the proper measure of damages is as upon breach of contract for the difference between the contract price and the market price.

It is established by the verdict that plaintiff shipped tile according to contract and which defendant ought to have accepted. The record is that the property in these tile passed to the buyer on delivery to the carrier and this is true although the contract provided for inspection by the buyer (*Dow Chemical Co.* v. *Detroit Chemical Works,* 208 Mich. 157 [14 A. L. R. 1200]), and although plaintiff, after rejection by defendant, took the tile and stored it for defendant (*Meagher* v. *Cowing,* 149 Mich. 416). In the latter case it was held, quoting syllabus:

"Defendant ordered of plaintiff ten cars of crushed stone, which plaintiff shipped consigned to

himself, and ordered the carrier to deliver to defendant. The cars were placed at defendant's order and after several days defendant learned that the stone was not suitable for the purpose for which he ordered it, and canceled the order. Plaintiff reshipped the stone to his place of business and sued for the price. *Held,* that on delivery of the stone, which conformed to the contract of sale, to defendant, the title passed to him, and that plaintiff had a right to retain the property for defendant and sue for the contract price and the necessary expense of removing same from defendant's custody."

See: *National Cash Register Co.* v. *Dehn,* 139 Mich. 406; Williston on Sales (2d Ed.), § 561.

Pages of a publication relative to standard tests of load-bearing tile were received in evidence "for the present," with invitation by the court to counsel to produce authority on the subject. While the court's attention appears not again to have been called to the matter, we decide the point on the ground that even if admitting the pages were conceded to be error, the record is wholly barren of showing of prejudice on account thereof.

Some testimony relative to the magnitude of plaintiff and its business was received. If this were conceded to have been admitted improperly, still, we must decline to find prejudice, in view of the clear and positive instruction to the jury to disregard it. And the same is true of some remarks of plaintiff's counsel urged as prejudicial.

On review of the whole case, we find no error requiring reversal.

Affirmed.

MCDONALD, POTTER, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

SACKETT *v.* METROPOLITAN LIFE INSURANCE CO.

1. INSURANCE—PRESUMPTION OF DEATH—EVIDENCE OF DILIGENT SEARCH.

In order to maintain action on life insurance policy, on presumption of insured's death after absence of seven years, there must be evidence of diligent search and inquiry; what is diligence depending on facts and circumstances of each particular case (3 Comp. Laws 1929, § 13467).

2. SAME.

In wife's action on husband's life insurance policy, on presumption of his death after absence of seven years, finding of trial court that there had been diligent search and inquiry, *held*, justified under evidence showing that insured was laborer and left wife and five children; that wife was left with little money; that she made inquiry at his place of work, of certain relatives, of sheriff, at county building; that she visited morgues, and that notice was published in Detroit paper.

3. DEATH—PRESUMPTION OF DEATH FROM ABSENCE—INFERENCE OF DEATH—EVIDENCE.

Inference of death before expiration of seven-year period is permissible, even in absence of evidence showing exposure of absentee to specific peril, where, taking into consideration circumstances relating to character, habits, condition, affections, attachments, prosperity, and objects in life of absentee which usually control conduct of men, no reasonable explanation could be given for his absence except that of death.

4. INSURANCE—INFERENCE OF DEATH—EVIDENCE.

In wife's action on husband's life insurance policy, on presumption of his death after absence of seven years, where insured had provided well for wife and children, lived happily with them, was upright citizen, enjoyed association of friends, was successful in his employment, and, in modest way, in accumulation of wealth, inference drawn by trial judge that insured died on or about date of his disappearance, and within life of his policy, *held*, justified, although there was no evidence that at time of disappearance he was exposed to any specific peril.

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As to circumstances justifying inference of death of insured before the lapse of seven years from his disappearance, see annotation in 34 A. L. R. 1390; 61 A. L. R. 1328.

Appeal from Wayne; Gilbert (Parm C.), J., presiding. Submitted June 15, 1932. (Docket No. 99, Calendar No. 36,569.) Decided December 6, 1932.

Assumpsit by Alice C. Sackett against Metropolitan Life Insurance Company on a life insurance policy. Judgment for plaintiff. Defendant appeals. Affirmed.

*Berger & Berger,* for plaintiff.

*Bulkley, Ledyard; Dickinson & Wright* (*Robert W. Conder,* of counsel), for defendant.

CLARK, C. J. Earl H. Sackett left his home in Ecorse on the morning of October 15, 1921, went to his work in a shop, worked until noon, left the shop, and has never been seen or heard of since. He owned a home and left a wife and five young children.

Plaintiff, the wife, beneficiary in a policy of life insurance, awaited the coming of the statutory presumption of death after absence of seven years (3 Comp. Laws 1929, § 13467), and brought suit on the policy and prevailed in a trial without a jury. Defendant has appealed and contends:

*First:* That the evidence does not show diligent search and inquiry, which, counsel all agreed, must be made. *Bailey* v. *Bailey,* 36 Mich. 181. Each case must be determined on its own facts. What might be diligence in one case might not even approach it in another. Here the plaintiff was the wife of a laborer. She had five young children. She was left with little or no ready money. She made inquiry at his place of work, of certain of his near relatives, and at the county building. She saw the sheriff. She visited morgues. A notice was published in the

Detroit News. On the facts and circumstances of this case a finding of diligent search and inquiry is approved.

*Second:* That there was not sufficient evidence to sustain the finding that insured died on or about October 15, 1921, and within the life of the policy. *Griffin* v. *Northwestern Mutual Life Ins. Co.*, 250 Mich. 185.

It does not appear that insured, at the time of his disappearance, was exposed to any specific peril to bring this case within the so-called peril cases. *Griffin* v. *Northwestern Mutual Life Ins. Co., supra.*

In a note, 34 A. L. R. 1390, many respectable authorities are cited holding, it is said:

"That an inference of death before the expiration of the seven-year period was permissible, even in the absence of evidence showing the exposure of the absentee to a specific peril, where, taking into consideration the circumstances, relating to the character, habits, condition, affections, attachments, prosperity, and objects in life of the absentee, which usually control the conduct of men, no reasonable explanation could be given for his absence."

And to the list of authorities there cited may be added the later case of *Ledger* v. *Northwestern Mutual Life Ins. Co.*, 258 Mich. 26.

The evidence as a whole is to the effect that insured was a good husband, provided well for his wife and children, and lived happily with them. He appears to have been an upright citizen, not perfect but human, to have enjoyed association of friends, successful in his employment and, in his modest way, in the accumulation of wealth. His disappearance on October 15, 1921, from his loved ones, his friends, his employment, from any other cause than death is, on this record, improbable and without motive and

inconsistent. *Tisdale* v. *Connecticut Mutual Life Ins. Co.*, 26 Iowa, 170 (96 Am. Dec. 136).

The inference, drawn by trial judge, that insured died on or about October 15, 1921, and within the life of the policy, is reasonable and is sustained.

Affirmed.

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

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COUGHLIN *v.* WINEMAN.

EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF CLAIMS—ENFORCEMENT OF LIABILITY AGAINST DISTRIBUTEES—DEVASTAVIT.

Where plaintiff's claim against estate of deceased person, represented by judgment against administrator, was never presented to, or allowed by, probate court, suit will not lie to enforce liability against administrator personally as one of distributees of said estate after estate has been distributed and administrator's final account has been allowed (3 Comp. Laws 1929, §§ 15687, 15689, 15691, 15712–15716). SHARPE and NORTH, JJ., dissenting.

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted June 21, 1932. (Docket No. 43, Calendar No. 36,549.) Decided December 6, 1932. Rehearing denied March 2, 1933.

Assumpsit by Jerry W. Coughlin against Henry Wineman on the common counts and as a distributee of an estate against which plaintiff was a judgment creditor. Judgment for defendant. Plaintiff appeals. Affirmed.

*Shapero & Shapero* (*Nelson S. Shapero,* of counsel), for plaintiff.

*LeRoy W. Belanger* and *Frank P. Darin,* for defendant.

POTTER, J. Plaintiff sued defendant, who had been administrator of the estate of Henrietta Wineman, deceased, charging him with mismanagement and waste, technically for devastavit. From a judgment for defendant, plaintiff appeals.

April 26, 1927, Walter Coughlin sued Henrietta Wineman in justice's court. There was judgment for defendant and plaintiff appealed to the circuit court. June 15, 1927, Henrietta Wineman sued Jerry Coughlin in the circuit court for Wayne county. September 20, 1927, the two actions were consolidated. September 1, 1928, Henrietta Wineman died. October 12, 1928, Henry Wineman was appointed administrator of the estate of Henrietta Wineman. November 12, 1929, Henry Wineman, as administrator, filed suggestion of the death of Henrietta Wineman in the case of Henrietta Wineman *v.* Jerry Coughlin in the circuit court. Henry Wineman was not substituted either as administrator or personally in the case of Walter Coughlin *v.* Henrietta Wineman. April 2, 1931, the case of Walter Coughlin *v.* Henrietta Wineman was dismissed by stipulation, without prejudice. April 2, 1931, Jerry Coughlin filed an amended plea in the case commenced against him by Henrietta Wineman, giving notice of set-off. April 4, 1931, a judgment was rendered in the circuit court in favor of Jerry Coughlin for the amount of the set-off claimed in his notice of April 2, 1931. June 1, 1931, Walter Coughlin made a motion to set aside the stipulation

dismissing the case of Walter Coughlin *v.* Henrietta Wineman. June 16, 1931, Henry Wineman, as administrator, was substituted in the place of Henrietta Wineman, as a party plaintiff in the case commenced by Henrietta Wineman *v.* Jerry Coughlin. June 16, 1931, the judgment against Henrietta Wineman rendered in the circuit court was set aside and judgment was rendered against Henry Wineman, as administrator of the estate of Henrietta Wineman, deceased. The item sued upon by Walter Coughlin in his suit commenced in justice's court and which was appealed to the circuit court for Wayne county was the same item relied upon by Jerry Coughlin in his amended plea and notice of set-off, several years after the death of Henrietta Wineman, and several months after Henry Wineman, the defendant, was discharged as administrator of the estate of Henrietta Wineman, deceased. The item upon which judgment in this case was based is not one which was ever passed upon by the probate court or by commissioners on claims in the estate of Henrietta Wineman, deceased. It is not an item which was involved in any case to which the defendant as administrator of her estate was a party. The claim, during the time the estate of Henrietta Wineman, deceased, was pending in the probate court, was involved in a suit instituted by Walter Coughlin, as assignee of the plaintiff herein, against Henrietta Wineman. After the death of Henrietta Wineman, the probate of her estate, and the discharge of the defendant as administrator by the probate court, the case brought against her by Walter Coughlin in her lifetime was dismissed. The claim was pleaded as a set-off by plaintiff after her death, after the close of the administration of her estate, and after the discharge

of the defendant as administrator. To hold defendant personally responsible for the claim here involved is to hold him responsible for a claim which plaintiff did not own at the time suit was brought against Henrietta Wineman, and did not own during the time her estate was being probated, which he did not present to the probate court, and did not plead either during the lifetime of Henrietta Wineman or during the probate of her estate, and until some months after the discharge of the defendant as administrator of her estate. Instead of defendant devastating the estate of Henrietta Wineman to the injury of her creditors, the fact is the estate was conserved to the exclusion of those who were not creditors but would like to have been, and by unsubstantial afterthought now, after the estate of Henrietta Wineman has been administered, seek to enforce a subsequently-acquired claim against defendant personally. The defendant, Henry Wineman, neither as administrator or otherwise, was ever a party to the suit of Walter Coughlin *v.* Henrietta Wineman. The claim that defendant, as administrator of the estate of Henrietta Wineman, under such circumstances, is guilty of devastating the estate of Henrietta Wineman to the prejudice of plaintiff so as to give plaintiff a right to hold defendant personally liable for this item of set-off not asserted by him as a set-off or otherwise until long after the death of Henrietta Wineman, after her estate was probated, and after her administrator was discharged, has no support in law. The trial court said:

"The claim of Jerry W. Coughlin and/or Walter Coughlin was never presented to the commissioners on claims appointed by the probate court, and the

judgment upon which the plaintiff predicates this action was on a set-off filed in said cause after the estate of Henrietta Wineman was closed."

3 Comp. Laws 1929, § 15687, provides:

"Every person having a claim against a deceased person, proper to be allowed by the commissioners, who shall not, after the publication of notice as required in the second section of this chapter, exhibit his claim to the commissioners within the time limited by the court for that purpose, shall be forever barred from recovering such demand, or from setting off the same in any action whatever."

3 Comp. Laws 1929, § 15689, provides:

"All actions and suits which may be pending against a deceased person at the time of his death, may, if the cause of action survives, be prosecuted to final judgment, and the executor or administrator may be admitted to defend the same, and if judgment shall be rendered against the executor or administrator, the court rendering it shall certify the same to the probate court, and the amount thereof shall be paid in the same manner as other claims duly allowed against the estate."

3 Comp. Laws 1929, § 15691, provides:

"In such case, the defendant may set off any claim he may have against the deceased, instead of presenting it to the commissioners, and all mutual claims may be set off in such action; and if final judgment shall be rendered in favor of the defendant, the same shall be certified by the court rendering it to the probate court, and the judgment shall be considered the true balance."

When claims are presented and allowed against the estate of a deceased person, the executor or administrator is required to pay such claims if he

has sufficient assets for that purpose. 3 Comp. Laws 1929, § 15712.

3 Comp. Laws 1929, § 15713, provides:

"When a claim shall be presented within one year from the time when it shall accrue, and be established, as mentioned in the preceding section, and the executor or administrator shall not have sufficient to pay the whole of such claim, the creditor shall have a right to recover such part of his claim as the executor or administrator has not assets to pay, against the heirs, devisees or legatees, who shall have received sufficient real and personal property from the estate."

3 Comp. Laws 1929, § 15714, provides:

"If an action shall be commenced against an executor or administrator on such claim, as is mentioned in section nineteen, and for the payment of which sufficient assets shall not have been retained, as before provided in this chapter, the executor or administrator may give notice under his plea to such action, that he has fully administered the estate which has come to his possession or knowledge."

3 Comp. Laws 1929, § 15715, provides:

"If it shall appear on the trial of such action that the defendant had fully administered at the time the claim was presented, and had no assets which could be lawfully appropriated for that purpose, he shall be discharged, and shall have judgment for his costs; but if it shall be found that he had assets sufficient to pay only a part of such claim, judgment shall be rendered against him for such sum only as shall be equal to the amount of assets in his hands."

Subsequent sections of the statute make provision for the establishment of the liability of the heirs

or beneficiaries of the estate and of creditors who have proved and established their claims in the probate court but no action may be maintained against the heirs or beneficiaries of an estate to recover property which they have received therefrom unless commenced within one year from the time the claim shall be allowed or established. 3 Comp. Laws 1929, § 15716.

In this case the defendant was not sued as administrator of the estate of Henrietta Wineman, deceased, but was sued personally. The claim was a claim sought to be established against Henrietta Wineman in her lifetime, suit having been instituted thereon before her death. The estate of Henrietta Wineman was probated in the usual and ordinary course. Notice to creditors to present and prove their claims was duly given and no claim was ever presented to, or allowed by, commissioners on claims, or by the probate court, in favor of plaintiff in said estate, while probate proceedings were pending therein. The estate was distributed in pursuance of the order of the probate court. The claim of plaintiff, not having been certified or presented to, or allowed by the probate court in any matter pending therein, this suit will not lie to enforce any liability to plaintiff against the heirs or beneficiaries of the estate, or defendant, who was administrator.

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

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

NORTH, J. (*dissenting*). Omitting immaterial details, the pertinent facts here involved may be stated

as follows: Henrietta Wineman instituted suit in the circuit court of Wayne county against Jerry Coughlin, the appellant herein. While this suit was pending in the circuit court Henrietta Wineman died, and Mr. Henry Wineman, appellee herein, was appointed as administrator of her estate. On November 12, 1929, suggestion of death was filed by the administrator in the cause pending in the circuit court. He was represented by the attorney who instituted the suit for Mrs. Wineman and he is still represented by the same counsel. Trial of the cause was had November 17, 1930; and on April 4, 1931, judgment was entered therein in favor of Jerry Coughlin on counterclaim against the plaintiff for $662.50 damages and $50.50 costs.

The practice incident to the trial of the issues resulting in this judgment was inexcusably irregular. Before Mrs. Wineman instituted her suit in circuit court there had been appeal to that court from a justice's court case in which Walter Coughlin, a brother of Jerry Coughlin, as assignee of his brother, was seeking to recover $550 from Mrs. Wineman. Apparently by consent these two causes were consolidated and tried together before the circuit judge. After the trial and after the announcement of the circuit judge's determination, but before entry of judgment, counsel for the respective parties stipulated as follows:

"It is further stipulated that a judgment be rendered as the court may find upon the set-off of Jerry W. Coughlin, filed in the above entitled cause."

This set-off of Jerry Coughlin was his claim for the same $550 for which his brother as assignee was suing Mrs. Wineman. By stipulation of counsel

in Mrs. Wineman's circuit court case, the Walter Coughlin appeal case was dismissed, and the claim in that suit was considered as the set-off of Jerry Coughlin in the pending circuit court case. While this stipulation was not entered until after the suit was tried, it is very clear that the case was submitted to the circuit judge on the theory and with the understanding that the issue should be treated as was subsequently stipulated. Through error or inadvertence the judgment was entered against Henrietta Wineman or possibly against the estate of Henrietta Wineman. Subsequently, and on June 16, 1931, on defendant's motion, Henry Wineman, as administrator of Mrs. Wineman's estate, was substituted as the plaintiff instead of Henrietta Wineman; and the judgment theretofore entered was amended so that it ran against Henry Wineman as administrator of the estate of Henrietta Wineman, deceased. Henry Wineman's subsequent motion to vacate the order amending the judgment was denied. On August 17, 1931, the judgment of the circuit court was certified to the probate court of Wayne county as provided by statute. 3 Comp. Laws 1929, § 15689.

Prior to this certification, and on January 22, 1931, an order of distribution was entered in the probate court and Henry Wineman was discharged as administrator. There were four distributees who shared equally in the Wineman estate which amounted to more than $900,000, and more than $10,000 was in the administrator's hands at the time the final order of distribution was made. Henry Wineman received one-fourth of the estate.

Except for the certification of the circuit court judgment, plaintiff's claim was not presented to the probate court; and as noted, this certification was

after the Wineman estate was closed. Plaintiff's judgment not having been satisfied, he brought this suit against Henry Wineman personally. It is not an attempt to satisfy the judgment from Mrs. Wineman's estate, nor is this suit against Mr. Wineman as administrator of the estate. Recovery is sought on the ground that Henry Wineman, as administrator, was guilty of misconduct and maladministration of the estate in that he wrongfully disposed of the assets of the estate at a time when he had full knowledge of plaintiff's claim or suit pending in the circuit court; and that this rendered him liable to plaintiff for the amount of the judgment obtained in the circuit court. The circuit judge, before whom the case was tried without a jury, found in favor of the defendant, and judgment was entered accordingly. Plaintiff has appealed.

Judgment for defendant in the circuit court was based on the conclusion of the circuit judge that since the plaintiff herein did not file his claim with the commissioners in the estate of Henrietta Wineman before the estate was closed or ask for an extension of time before the estate had been so closed, he is barred from recovery. (See 3 Comp. Laws 1929, §15687.) In this conclusion we cannot agree. There is nothing in this record to indicate that plaintiff was in any way notified or advised of the closing of the Wineman estate. At the time of Mrs. Wineman's death a suit instituted by her against the plaintiff herein was pending in the circuit court of Wayne county. The claim for which plaintiff herein recovered judgment was asserted by him as a counterclaim in the suit pending in the circuit court of Wayne county at the time Mrs. Wineman died. The procedure in such a case is clearly fixed by statute.

"All actions and suits which may be pending against a deceased person at the time of his death, may, if the cause of action survives, be prosecuted to final judgment, and the executor or administrator may be admitted to defend the same, and if judgment shall be rendered against the executor or administrator, the court rendering it shall certify the same to the probate court, and the amount thereof shall be paid in the same manner as other claims duly allowed against the estate." 3 Comp. Laws 1929, § 15689.

"Nothing in this chapter shall be construed to prevent an executor or administrator, when he shall think it necessary, from commencing and prosecuting any action against any other person, or from prosecuting any action commenced by the deceased in his lifetime, for the recovery of any debt or claim, to final judgment, or from having execution on any judgment." 3 Comp. Laws 1929, § 15690.

"In such case, the defendant may set off any claim he may have against the deceased, instead of presenting it to the commissioners, and all mutual claims may be set off in such action; and if final judgment shall be rendered in favor of the defendant, the same shall be certified by the court rendering it to the probate court, and the judgment shall be considered the true balance." 3 Comp. Laws 1929, § 15691.

"In an action commenced by the deceased in his lifetime, the executor or administrator may, under section 5904 (3 Comp. Laws 1929, § 15690), prosecute the case to final judgment. In such case the defendant, by section 5905 (3 Comp. Laws 1929, § 15691), is permitted to set off his claim in the action without first presenting it to the commissioners on claims." *Quinn* v. *McGovern,* 97 Mich. 114, 118.

Counsel for appellee stress the contention that since the set-off of the plaintiff herein was not filed in the case pending in the circuit court until after

the death of Mrs. Wineman and also until after her estate was closed the above-quoted statutes are not applicable. We think under the circumstances of this case counsel's contention cannot be sustained. The case in which plaintiff finally secured judgment for his set-off was tried in the circuit court before the Wineman estate was closed. Henry Wineman was a witness in the circuit court case months before the order for final distribution was made. As administrator of the estate of Mrs. Wineman he knew all about the claim plaintiff was asserting against her and that it was in litigation in the circuit court. Both he and his counsel knew this claim could not have been filed before the commissioners because it was the subject-matter of an appeal suit then pending in the circuit court. He and his counsel by stipulation subsequently agreed that this very claim should be adjudicated as a set-off in the circuit court case instituted by Mrs. Wineman; and this evidently was upon the condition embodied in the same stipulation that the appeal suit pending in the circuit court against Mrs. Wineman should be dismissed, which was done. Under the circumstances, the administrator cannot be heard to say that plaintiff's claim could not be adjudicated as a set-off in the circuit court case.

Plaintiff having secured a judgment in the circuit court against Henry Wineman as administrator of the Henrietta Wineman estate and no appeal having been taken from such judgment, the controlling question here is whether in this suit Henry Wineman should be held personally responsible for payment of plaintiff's judgment on the theory on which plaintiff has brought this suit and which has been above stated. We think defendant's liability has been clearly established. He knew of the pending

litigation and was a witness in the circuit court trial months before he made final distribution of the assets of the estate and received his discharge as administrator. In distributing the estate he, as administrator, was not only guilty of maladministration of the estate which was well calculated to defeat plaintiff's claim, but his misconduct resulted in a personal profit to himself as well as the other distributees of the estate. Under very similar circumstances an administrator was held personally liable in *Whitney* v. *Pinney,* 51 Minn. 146 (53 N. W. 198); and there seems to be general authority for holding the administrator liable in such cases:

"The debts of a decedent being entitled to priority over legacies and distributive shares, a representative who makes distribution to legatees or distributees without taking a refunding bond before the payment of debts is guilty of a devastavit, and personally liable to unpaid creditors prejudiced thereby, who present or give notice of their claims within the time prescribed by statute." 24 C. J. p. 500. Citing many cases.

We think the fact that the claim which plaintiff now asserts was involved in litigation pending in the circuit court at the time of the death of Mrs. Wineman and with the defendant's full knowledge the claim was still pending in circuit court at the time he secured an order for final distribution of the estate and his discharge leaves him in the same position as to his liability as though it had been a claim filed in the probate proceeding in accordance with the statutory provision. If the law is not in accord with the above-cited authorities, then any administrator or executor may prevent satisfaction of a judgment obtained in a cause of action which was pending and survived against the estate of the

deceased. At least by distribution of all the assets of the estate pending such litigation satisfaction of any judgment against the estate may be seriously jeopardized. The only reason plaintiff herein was unable to obtain satisfaction of his judgment upon its being certified to the probate court was defendant's wrongful conduct in securing distribution of the estate's assets. For this reason he should be held personally liable for the payment of the judgment obtained by plaintiff in the circuit court.

The judgment of the circuit court should be set aside, and the case remanded with direction to enter judgment therein for plaintiff. Appellant should have costs of this court.

SHARPE, J., concurred with NORTH, J.

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STATE BANK OF BEAVERTON *v.* SOUTHERN SURETY CO.

1. CHATTEL MORTGAGES—MORTGAGOR ENTITLED TO USE OF MORTGAGED PROPERTY IN HIS POSSESSION.

   Mortgagor while in possession holds not as agent of mortgagee, but as owner of incumbered property, and is entitled to use, rents, and profits.

2. SAME—FORECLOSURE—MORTGAGEE NOT ENTITLED TO RENT FOR USE OF PROPERTY—PRINCIPAL AND SURETY.

   On foreclosure of chattel mortgage on roadbuilding machinery, mortgagee is not entitled to recover from mortgagor's surety for use or rent of said property, although, on mortgagor's failure to complete contract, surety used said machinery in completing it.

Appeal from Gladwin; Smith (Guy E.), J. Submitted June 14, 1932. (Docket No. 126, Calendar No. 35,956.) Decided December 6, 1932.

Bill by State Bank of Beaverton against Southern Surety Company and others for an accounting. Decree for plaintiff. Defendant surety appeals. Reversed, and bill dismissed.

*John C. Shaffer,* for plaintiff.

*Coulter & Hampton,* for defendant surety.

CLARK, C. J. Plaintiff filed its bill of complaint against Rollin A. Jones, Roy B. McKibben, Charles McKimmey, and Southern Surety Company for accounting. Later the bill was amended to pray foreclosure of a chattel mortgage by McKimmey to plaintiff.

On September 7, 1927, Jones entered into a contract with State highway commissioner to construct a highway. McKimmey had certain road-building machinery on which plaintiff had a chattel mortgage.

On September 21, 1927, Jones, McKibben, and McKimmey formed a partnership to construct the highway, and signed articles reciting sale to the partnership of the road-building machinery and containing an agreement by and among themselves—

"to pay into the State Bank of Beaverton for the account of Charles W. McKimmey at the rate of 4 cents per yard on earth excavation as per estimates of the engineer in charge as estimates are received. The balance remaining unpaid shall be paid upon receipt of final estimate."

On October 17, 1927, a bond for the payment of subcontractors and for labor performed and materials furnished (3 Comp. Laws 1929, § 13132) was provided, in which Jones was principal and Southern Surety Company surety. The bond in its condition went beyond the language of the statute in providing of payable indebtedness, namely:

"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."

The partners, individual defendants, began work, using the machinery, and, when the job was nearly one-third finished, were in financial difficulty. The defendant surety, under its agreement with the contractor, directed that the amounts of further estimates be paid to it as contract assignee. It provided necessary funds to complete the job, which was at a loss. The individual defendants, or some of them, remained in charge of the work and were paid. The machinery was continued in use either under the agreement made in respect of the bond or by the individual defendants themselves.

Plaintiff had decree finding the amount due on its chattel mortgage to be $5,057.24; directing the plaintiff to foreclose the same and to apply the net proceeds to the debt and to report for confirmation; and that the deficiency be paid one-third by individual defendants and two-thirds by defendant surety, this on the theory and finding that the machinery had been practically exhausted in use, and that the defendant surety had had about two-thirds of the use. Defendant surety has appealed.

The quoted agreement by and between the partners to pay the plaintiff is not an assignment of money to become due on the highway contract. It is a mere agreement to pay, which, unfortunately, was not performed.

That the surety is guilty of conversion of plaintiff's chattel mortgage security is not pleaded and no case is made on that theory, and decree directing foreclosure negatives conversion.

As nearly as we can determine, plaintiff's theory of recovery is on the bond and for equipment rental. We pass as unnecessary to decision the argument of appellant that the bond in this respect went beyond the statute and therefore is not binding. Assuming it to be binding, the plaintiff is entitled to no rental. It provided no equipment. The equipment was owned by the mortgagor or his assigns. A mortgagor while in possession holds not as agent of the mortgagee but as owner of the incumbered property (*People, for use of Farrington,* v. *Bristol,* 35 Mich. 28), and is entitled to use, rents, and profits. 11 C. J. p. 561. Plaintiff here asserted no default in the mortgage and took no step toward foreclosure until the hearing of this case. It can have nothing on the claim for use or rent of property which it did not own, and hence nothing on the bond of defendant surety.

As against the individual defendants, who stood as owners of the machinery and as principal contractors, the defendant surety, if it took over the job as plaintiff contends, had right under its contract in respect of bond to continue the machinery in use on the job. Plaintiff, assuming its mortgage to have been a valid lien, might have asserted its rights thereunder, but it did not, so the machinery

was rightfully used either by the contractor or contractors, or their assign, the surety, or by both, to the completion of the job.

Whether the surety did in fact or law take over the job is therefore a question not here important.

And we need not consider the question of adequate remedy at law.

It follows that, as to appellant, the decree is reversed, and bill dismissed, with costs.

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

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PEOPLE *v.* SMITH.

1. CRIMINAL LAW—SUFFICIENCY OF INFORMATION—GAME LAWS—STATUTES.

   Complaint that defendant, on certain date, at certain place, carried rifle into area frequented by deer, season for hunting being then and there closed, without charging that rifle was loaded, or that defendant had ammunition with him, charged no crime (2 Comp. Laws 1929, § 6229).

2. SAME—CARRYING UNLOADED RIFLE IN CLOSED SEASON NO OFFENSE.

   Evidence that officer searched defendant's automobile and found unloaded rifle under blanket on back seat, without any ammunition, *held*, not to show commission of alleged crime (2 Comp. Laws 1929, § 6229).

3. SAME—STATUTES.

   Offense described and proscribed may not be enlarged by section of statute prescribing penalty.

4. SAME—UNWARRANTED CONVICTION—FAILURE TO MOVE FOR DIRECTED VERDICT.

Where complaint charged no offense, and evidence established no crime, Supreme Court may not, with full consciousness of glaring error committed, rest composed and affirm conviction on ground that no motion was made to direct verdict for want of evidence.

5. SAME—CONVICTION WITHOUT EVIDENCE NOT PERMITTED TO STAND.

Conviction by jury without evidence commands no procedural support, and when error is fundamental, manifest, and noticed, such conviction may not be permitted to stand.

6. SAME—DUTY OF APPELLATE COURT TO CORRECT FUNDAMENTAL ERROR.

Error in submitting case to jury, where complaint charged no crime and evidence did not establish any crime, permitting finding of guilt and sanction thereof by sentence in nature of probation, is so fundamental that Supreme Court cannot but notice same, and, as court for correction of errors, exercise power of correction, although said question was not raised in trial court.

Appeal from Ontonagon; Richter (Theodore J.), J., presiding. Submitted June 16, 1932. (Docket No. 155, Calendar No. 36,573.) Decided December 6, 1932.

Martin Smith was convicted of carrying a rifle during the closed season into an area frequented by deer. Reversed.

*John B. Bennett* (*Ivan D. Wright*, of counsel), for appellant.

*Paul W. Voorhies,* Attorney General, *Edward A. Bilitzke,* Assistant Attorney General, and *Joseph M. Donnelly,* Prosecuting Attorney, for the people.

WIEST, J. Defendant was convicted of carrying a rifle, during the closed season, into an area frequented by deer. The complaint charged that:

"On the second day of August, A. D. 1931, at the township of Matchwood * * * one Martin Smith, * * * did then and there carry a rifle into an area frequented by deer, the season for the hunting of deer being then and there closed."

The complaint charged no crime and the evidence did not establish any crime.

The statute, 2 Comp. Laws 1929, § 6229, and a part of the game law on August 2, 1931, provided:

"It shall be unlawful for any person to carry a rifle or shotgun with buckshot or slug loads or single ball load into any area frequented by * * * large or small game when there is no open season on such game under the existing laws."

The statute has since been amended. Act No. 325, Pub. Acts 1931.

The complaint failed to charge that defendant carried a rifle with "buckshot or slug loads or *single ball load.*" The evidence in the case was that an officer stopped an automobile, driven by defendant, searched the car and found an unloaded rifle, under a blanket on the back seat, without any ammunition. Such evidence did not show the commission of the alleged crime. The offense described and proscribed cannot be enlarged by the section of the statute prescribing the penalty.

Upon review counsel for defendant urged several reasons for reversal, some of which cannot under the record be considered and others have no merit. We cannot, however, close our eyes to the fact that the complaint charged no offense and the evidence established no crime, and we may not, with full consciousness of the glaring error committed, rest composed and affirm the conviction on the ground that no motion was made to direct a verdict for want

of evidence. Conviction by a jury without evidence commands no procedural support, and when the error is fundamental, manifest, and noticed, such a conviction cannot be permitted to stand. The error, in submitting the case to the jury and permitting the finding of guilt and sanction thereof by sentence in the nature of probation, is so fundamental that we cannot but notice the same, and, as a court for the correction of errors, exercise the power of correction.

The mentioned point, not having been raised in the circuit nor presented by briefs first filed in this court, we called for additional briefs.

The conviction is reversed, and defendant discharged.

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

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AMERICAN LIFE INSURANCE CO. *v.* BEE.

MORTGAGES—FORECLOSURE—RECEIVER TO PROTECT MORTGAGOR WHO HAS PARTED WITH HIS INTEREST.

In foreclosure of mortgage, appointment of receiver to protect mortgagor who has parted with his interest in mortgaged premises from liability for deficiency decree, *held*, without authority of law, on record.

Appeal from Wayne; Kilpatrick (Arthur W.), J. Submitted October 19, 1932. (Docket No. 147, Calendar No. 36,827.) Decided December 6, 1932.

Bill by American Life Insurance Company against William E. Bee and others to foreclose a mortgage. Cross-bill by defendant Bee against plaintiff and other defendants for appointment of receiver. From order appointing receiver, defendant Emma M. Cook appeals. Reversed.

*Harry H. Wachs,* for appellant.

*Clark, Klein, Ferris & Cook,* for appellee Bee.

SHARPE, J. In the bill of complaint filed herein to foreclose a real estate mortgage, it appears that the defendant Bee conveyed the premises to the defendant Beck, and Beck to the defendant Katz, and Katz to the defendant Taylor, and Taylor to the defendant Emma M. Kummer, now Emma M. Cook. These conveyances were all made subject to the mortgage which the grantees therein assumed and agreed to pay.

The defendant Bee in his answer and cross-bill alleged that by reason of the default of the other defendants "there is grave danger that upon the foreclosure of this mortgage" he "will be subjected to a decree of deficiency;" that he is entitled to have the rents and profits of the property "devoted to the payment and discharge of plaintiff's mortgage," and he prayed for the appointment of a receiver for that purpose. On petition therefor afterwards made, an order was entered appointing Theodore E. Flanigan as such receiver. A motion to set the same aside was later made and denied, from which Mrs. Cook has taken this appeal.

Counsel for the appellee rely on our decision in *American Trust Co.* v. *Casselman,* 248 Mich. 76, in support of the order made. In that case, the court

was divided, and it was said in the PER CURIAM opinion by which it was finally disposed of that "No precedent is therefore established." In the opinion in that case written by Chief Justice NORTH, a right of a mortgagor such as is here claimed was discussed at length and authority quoted from and cited in denial thereof. In the majority opinion the law as stated by him was not questioned, but, as it appeared that an application for a receiver had been made by the trust company and denied in the absence of the mortgagor and its renewal by him was "with the approval of the mortgagee," the order appointing the receiver was affirmed.

No such condition here exists, and on the record before us we must hold that the appointment of the receiver was without authority of law, and the order made is reversed and set aside, with costs to appellant.

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

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PEOPLE *v.* BEAUCHAMP.

1. INDICTMENT AND INFORMATION—SUFFICIENCY—NEGLIGENT HOMICIDE—SPECIFIC ACTS—STATUTES.

Information charging negligent homicide and alleging that defendant, while under influence of intoxicating liquors, did drive his car at high and immoderate rate of speed, etc., *held*, sufficient, under statute, as against objection that it does not set up duties imposed upon defendant which were neglected or improperly performed (Act No. 328, Pub. Acts 1931, § 324).

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As to form of charging negligent homicide, see annotation in 61 L. R. A. 298.

As to when intoxication may be shown in case of homicide, see annotation in 36 L. R. A. 467; 13 L. R. A. (N. S.) 1024; 25 L. R. A. (N. S.) 376; 52 L. R. A. (N. S.) 230.

As to homicide or assault in connection with operation of automobile at unlawful speed, see annotation in 46 A. L. R. 1060.

2. CRIMINAL LAW—NEGLIGENT HOMICIDE—EVIDENCE OF INTOXICATION—INSTRUCTIONS.

In prosecution for negligent homicide, where it was charged that defendant was under influence of intoxicating liquors at time offense was alleged to have been committed, there was no error in admission of testimony relative to defendant's condition in said respect, or in instruction that jury had right to consider whether defendant was in fact under influence of intoxicating liquors at time alleged (Act No. 328, Pub. Acts 1931, § 324).

3. SAME—CORPUS DELICTI—SUFFICIENCY OF EVIDENCE.

In prosecution for negligent homicide, finding of jury that deceased met his death by being struck by defendant's automobile, *held*, warranted from testimony of defendant, his companion, and a pedestrian who was a short distance away, although there was no witness to collision (Act No. 328, Pub. Acts 1931, § 324).

4. SAME—PROPER LIGHTS—PRESUMPTIONS—STATUTES.

In prosecution for negligent homicide, where victim's death was caused by collision with defendant's automobile after dark, it will be presumed that car was equipped with lights as required by statute, in absence of evidence to contrary (1 Comp. Laws 1929, § 4736).

5. SAME—MOTOR VEHICLES—DRIVING IN CARELESS OR RECKLESS MANNER.

Finding of jury that defendant charged with negligent homicide was driving in careless, reckless, or negligent manner at time of collision, *held*, justified under proof (Act No. 328, Pub. Acts 1931, § 324).

Appeal from Iron; Bell (Frank A.), J. Submitted October 14, 1932. (Docket No. 201, Calendar No. 36,437.) Decided December 6, 1932.

Frank Beauchamp was convicted of negligent homicide. Affirmed.

*M. S. McDonough,* for appellant.

*Paul W. Voorhies,* Attorney General, and *Leigh C. Caswell,* Prosecuting Attorney, for the people.

SHARPE, J. On the afternoon of December 8, 1931, the defendant, a resident of Iron River, in the county of Iron, accompanied by a woman named Mabel Christensen, drove to Chicagoan Lake, a distance of about 10 miles from Iron River. They remained there for about two hours, and started back about 4:30. When near the railroad tracks serving the Hiawatha mine, and after dark, the car, an Oldsmobile coach, struck and killed a man named John Makala. Neither of them saw him. Mabel testified that she at one time felt a "bump," and defendant testified, "I thought I was sideswiped by a truck, which had no headlights on it;" that he drove on to his oil station in Iron River and stopped and discovered that the front of his car was damaged, and at once drove back to the scene of the accident, where he found the county coroner, W. J. Johns, and several others. They both admitted that they had drunk some whisky while at the lake, and there is competent evidence that he was at that time under its influence. He was placed under arrest, and was later charged with negligent homicide, bound over to the circuit court, tried by a jury, convicted, and sentenced to from one to five years' imprisonment. He here seeks review by appeal.

The statute (Act No. 328, Pub. Acts 1931, § 324) provides:

"Any person who, by the operation of any vehicle at an immoderate rate of speed or in a careless, reckless or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of a felony, punishable by imprisonment in the State prison not more than five years or by a fine of not more than two thousand five hundred dollars."

A motion was made to quash the information for the reason that it "does not set up the duties imposed upon the respondent, which were neglected or improperly performed." Reliance is placed upon *People* v. *Maki,* 245 Mich. 455, wherein it was held that in such a case the information "must state specifically the negligence which is relied upon as the cause of death." We have read the information with care, and are satisfied that it fairly complied with the requirements pointed out in that case. In it the court was informed that the defendant "(while he was under the influence of intoxicating liquors)," did drive his car at a high and immoderate rate of speed, etc. In his instructions to the jury the trial court said:

"You will notice that the information states that this driving is charged as being done while under the influence of intoxicating liquor. This is not a charge of driving an automobile while under the influence of intoxicating liquor. It is merely descriptive, and in no event could you find this man guilty of killing Makala, while driving when he was drunk, because the charge is, driving at an immoderate rate of speed, or in a careless and reckless manner; and you must find that he did all or some of these things. And in passing upon that question, you have the right to consider whether or not the man was in fact under the influence of intoxicating liquor at the time he collided with Makala."

We find no error in the admission of the testimony relative to the defendant's condition in this respect or in the instructions as above given.

The deceased was employed at the Hiawatha mine, and had quit work for the day. Another employee, Henry Perry, testified that while on his way to his home, and when about 80 feet from the

highway, he saw a car passing along it to the north, "going at a rapid rate of speed." Soon thereafter he "heard a crash," and when walking down the highway he came upon the body of the deceased lying near the center of the highway at a point about 150 feet from where the car passed him; that he found a blood spot and a small piece of red glass close to the west curb of the pavement and a large blood spot some distance away, near where the body then lay.

While there was no witness to the collision, the jury were warranted in finding from the testimony of Perry and Mabel Christensen and the defendant himself that the deceased met his death by being struck by defendant's car. Miss Christensen felt the "bump" as the car hit or passed over some object, and, while defendant testified that he supposed he had been sideswiped by a truck without lights, on being shown the pictures which had been taken of his car after the collision and being asked: "So the collision you had that day was directly to the front of the car, wasn't it?" he answered, "Yes, sir." There is evidence that, while there was snow in the gutters, the pavement was bare, and that it was "a nice bright night."

It will be presumed that defendant's car was equipped with lights as required by the statute (1 Comp. Laws 1929, § 4736). There was proof that he was driving while under the influence of intoxicating liquor. The syllabus in *People* v. *Gibson,* 253 Mich. 476, would indicate that this in itself would sustain the conviction. The opinion does not justify this statement. We quote therefrom:

"The information charges defendant was 'under the influence of intoxicating liquor' at the time of

the homicide. The foregoing testimony of which appellant complains was competent and material."

Under the proof submitted, we think the jury were warranted in finding that the deceased met his death by reason of the careless, reckless, or negligent manner in which defendant's car was being driven by him at the time of the collision.

We have considered the other errors relied on, but find them without merit. The judgment is affirmed.

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

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CHELI *v.* CUDAHY BROTHERS CO.

CORPORATIONS—FOREIGN CORPORATIONS—PROCESS—SERVICE ON REPRESENTATIVE—STATUTES.

Where employee of foreign corporation, in addition to soliciting orders, performed other services, such as adjusting claims, filling orders by securing goods from other purchasers, and keeping some goods of company in stock at his home for immediate delivery, he was representative of company in this State, so that service on him was service on company (Act No. 177, Pub. Acts 1931).

Appeal from Dickinson; Bell (Frank A.), J. Submitted October 18, 1932. (Calendar No. 36,666.) Decided December 6, 1932.

On who is managing agent of foreign corporation for purpose of service of process, see annotation in 23 L. R. A. 496; 4 L. R. A. (N. S.) 460.

Case by Alphonse Cheli, administrator of the estate of Palmina Cheli, deceased, against the Cudahy Brothers Company, a Wisconsin corporation, and another for death of plaintiff's decedent, alleged to have been caused by sale of diseased meat. From order denying motion to dismiss as to defendant corporation, it appeals. Affirmed.

*Derham & Derham,* for plaintiff.

*Ray E. MacAllister,* for defendant company.

SHARPE, J. The defendant Cudahy Brothers Company is a Wisconsin corporation, not authorized to do business in this State. The defendant Schinderle is a grocer and meat dealer in the city of Iron Mountain. The declaration alleged that defendant Schinderle sold plaintiff's intestate some diseased pork butts, from the eating of which she died on February 21, 1931, and that said meat was sold to Schinderle by the defendant corporation.

Service on the corporation was made by serving a copy of the declaration on Elmer Oman, one of its employees. It appeared specially, and filed a motion to dismiss for lack of proper service. From an order denying such motion, it has, by leave of this court, appealed.

Section 14094, 3 Comp. Laws 1929, as amended by Act No. 177, Pub. Acts 1931, reads, in part, as follows:

"In all cases where suit is brought against a foreign corporation, process may be served upon any officer or agent of such corporation within this State, and any person representing such corporation in any capacity, shall be deemed an agent within the meaning of this section."

In support of its motion to dismiss, the corporation filed an affidavit of George A. Billings, its vice-president, who deposed that Oman was an employee of the company to solicit and procure orders for the sale of its products; that all such orders were forwarded to the company and subject to acceptance or rejection by its officers; that the products so ordered, if accepted by it, were shipped in interstate commerce to Iron Mountain and consigned to the purchaser, and collections therefor made by Oman, and that Oman had no authority to make contracts or act for it except as above stated.

An affidavit of Oman was also filed, corroborating the statements made by Mr. Billings as to his employment and authority.

The plaintiff filed affidavits of Peter Tomassoni and Joseph Crispigna in opposition thereto. Tomassoni deposed that Oman took orders from him; that he received the bills therefor from the corporation; that collections were at times made by Oman, and, when disputes arose, the differences were adjusted by him and ratified by the company; that Oman kept supplies belonging to the company at his home, and "has delivered said supplies to deponent when deponent ran short between orders;" that "said Oman has secured supplies from other bakers and delivered to deponent between orders; that deponent has been billed for said supplies by said company." The affidavit of Crispigna was, in some respects, of similar import.

Had Oman been merely an agent soliciting business for the defendant in this State, a different question would be presented. But, as stated in the affidavits of Tomassoni and Crispigna, he performed services other than as a solicitor. He adjusted claims, filled orders by securing the goods from

other purchasers, and kept some of the goods of the company in stock at his home for immediate delivery. Clearly, he was a representative of the company in this State, and service upon him was service upon the company. *Genack* v. *Gorman,* 224 Mich. 79; *A. Harvey's Sons Manfg. Co.* v. *Sterling Materials Co.,* 247 Mich. 317.

The order denying the motion to dismiss is affirmed, with costs to plaintiff.

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

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ALPER *v.* OAKMAN.

1. VENDOR AND PURCHASER—FORFEITURE—NOTICE.
   If preliminary and final notices of forfeiture, sent to vendee's assignee to last-known postoffice address, as provided for in land contracts, and assented to by him, had reached him, his interest in said contracts would have been terminated thereby.

2. SAME—CONSTRUCTION OF PROVISION FOR NOTICE OF FORFEITURE.
   Provision in land contracts for notice of forfeiture to be sent to vendee to his last-known postoffice address inured to benefit of both parties, is reasonable, and should be construed as it reads.

3. SAME—NOTICE OF CHANGE OF ADDRESS.
   Where vendee's assignee moved without notifying vendor's agent of change of address, assignee's application to abstract division of trust company acting as vendor's agent, giving his correct postoffice address, may not be considered notice of change of address provided for in land contracts.

4. SAME—ABANDONMENT—PRESUMPTION.

Where notices of forfeiture mailed to vendee's assignee to last-known postoffice address were not delivered, vendor's agent had right to assume that assignee had moved away and abandoned his rights under land contracts.

Appeal from Wayne; Gilbert (Parm C.), J., presiding. Submitted October 18, 1932. (Docket No. 129, Calendar No. 36,595.) Decided December 6, 1932.

Bill by Henry S. Alper against Robert Oakman and another to set aside judgments of restitution and for damages. Bill dismissed. Plaintiff appeals. Affirmed.

*Leo A. Coskey* (*John Sklar,* of counsel), for plaintiff.

*Austin & Newman,* for defendants.

SHARPE, J. On April 28, 1923, defendants entered into separate contracts to sell to Clarence C. Taylor two lots in the city of Detroit for the sum of $1,925 each. One hundred and ninety-two dollars was made as a down payment on each lot, and the balance was to be paid in monthly sums of $17, with interest payable quarterly on all sums unpaid at 6 per cent. Each contract contained the usual provisions for forfeiture and that "notice of such declaration shall be sufficient if mailed to the last known postoffice address" of the vendee.

On February 6, 1924, Taylor assigned his interest in the contracts to the Cardinal-Taylor Corporation, and on June 21st of that year the corporation assigned its interest to the plaintiff, who, in writing, accepted the assignment and the conditions of the

contracts and directed that notice be addressed to him "at 1935 Burlingame." The Union Trust Company, the duly authorized agent of the defendants, consented to both assignments. The address at 1935 Burlingame was changed by notice of the plaintiff to 2014 West Euclid.

In 1926 plaintiff moved to 3273 Kendall avenue, but did not notify the trust company of his change of address. There was default in payment on both contracts. On March 1, 1928, the trust company, as agent for defendants, sent a "warning of cancellation" to plaintiff by registered mail at 2014 West Euclid, and it was returned marked "Unclaimed," and on March 21, 1928, a "notice of forfeiture" was sent to him at the same address by registered mail and likewise returned marked "Unclaimed." Summary proceedings were thereafter taken. There was no personal service of the summons on the plaintiff, the officer returning that he "was unable to find the within named defendant in Wayne county after diligent search and inquiry." An affidavit of publication was then filed and an order of publication made and duly published. Plaintiff did not appear at the hearing, and an order was entered in the one case on July 27, 1928, finding the amount due to be $1,053.84, and granting a writ of restitution as provided in the statute, and in the other on September 5, 1928, with amount due $1,070.85, and also with writ of restitution.

In 1927 plaintiff sold his interest in these contracts to the "Menzies Real Homes Company," and expected this company to meet the payments and pay the taxes in default. No notice was given to defendants or the trust company of this transfer, but, as plaintiff says, "they went broke" and made no payments. Plaintiff first learned of the fore-

closure proceeding in September, 1928. He testified that he then called at the office of the trust company for the purpose of paying the balances due, and was informed that he "was out" and that it could not accept payments from him.

On July 24, 1929, he began an action to recover the moneys paid by him on the contracts. On January 16, 1932, on his motion, the cause was transferred to the chancery side of the court and the bill of complaint herein was filed, in which he prayed that the judgments rendered by the circuit court commissioner be declared null and void, and that he be awarded "the amount of any and all damages which he has suffered by reason of the unlawful and fraudulent acts of the said defendants, their agents, attorneys and employees."

The record discloses that on June 22, 1929, the defendants deeded the lots in question to Stan H. Swanson.

The trial court, after hearing the proofs, found that the defendants or their agent, the trust company, were not guilty of any fraud in the forfeiture of the contracts or the after-proceedings taken, and entered a decree dismissing the bill, from which the plaintiff has appealed.

Plaintiff's claim for relief is based upon the fact that on June 7, 1927, he had ordered an abstract of title to these lots from the Union Title & Guaranty Company, a department of the Union Trust Company, in which his address was stated to be 3273 Kendall, and that the company was thus chargeable with notice of his change of address. It also appears that this address and his telephone number appeared in the city and telephone directory for the year 1927.

It seems to be conceded that, if the preliminary and final notices of forfeiture had reached the plain-

tiff, his interest in the contracts would have been terminated thereby. *Waller* v. *Lieberman,* 214 Mich. 428. The parties to these contracts provided therein the manner in which the vendee should be notified in case of default and claim of forfeiture. When assignment was made to the plaintiff, he assumed all the conditions and obligations of the contracts and directed the place to which notice should be sent to him. He afterwards changed this to 2014 West Euclid.

The provision for notice as it appears in the contracts inured to the benefit of both the vendors and the vendee. In a city like Detroit, a vendor might have much difficulty in ascertaining the street address of his vendee, and a vendee is protected by the knowledge that his rights may not be terminated without receipt by him of such notice. It is a reasonable provision and should be construed as it reads. Plaintiff's application to the abstract division of the trust company may not be considered notice of the change of address provided for therein. The plaintiff had agreed to notify it of any such change, and, when the notices mailed to him were not delivered, it had a right to assume that he had moved away and abandoned his rights under the contracts.

The record discloses no sufficient grounds for vacating the proceedings taken before the commissioner under which the defendants acquired possession.

The decree dismissing the bill of complaint is affirmed, with costs to appellees.

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

REICHERT *v.* GUARANTY TRUST CO.

STEVENSON *v.* DETROIT TRUST CO.

1. TRUSTS—CREATION OF TRUST ESTATE—INTENT.
   Use of word "trustee" is not in all cases decisive that trust estate has been created, neither does provision for payment of interest clearly negative intent to create such estate, but intent must be gathered from entire instrument.

2. SAME.
   Under agreement whereby owners of certain real estate subject to existing mortgage delivered to trust company trust mortgage thereon, holder of existing mortgage delivered to said trust company discharge thereof, and trust company agreed to deduct from proceeds of said trust mortgage sufficient to pay amount of discharged mortgage, and pay same to such parties as might be entitled thereto, said agreement created relationship of trustee and *cestui que trust* between trust company and holder of said discharged mortgage.

3. SAME—INVESTMENT OF TRUST FUNDS—RECEIVERS.
   Where certain moneys came into hands of trust company as trust fund, and investments thereof are traceable into bonds in its possession, its receiver is required to deliver said bonds to clerk of court for delivery to proper owner.

Appeal from Wayne; Richter (Theodore J.), J. Submitted October 12, 1932. (Docket No. 74, Calendar No. 36,787.) Decided December 6, 1932.

Receivership proceedings by Rudolph E. Reichert, State banking commissioner, against Guaranty Trust Company. On petition of Eugene J. Stevenson, administrator of the estate of George H. Purchase, deceased, to compel Detroit Trust Company,

receiver of Guaranty Trust Company, to impress a trust upon certain bonds. Petition dismissed. Petitioner appeals. Reversed.

*Joslyn, Joslyn & Joslyn* (*John R. Rood* and *George E. Brand,* of counsel), for petitioner.

*A. W. Sempliner* (*Jason L. Honigman,* of counsel), for receiver.

SHARPE, J. On June 6, 1927, Joseph A. Moross and Maude S. Moross, his wife, first parties, Guaranty Trust Company of Detroit, second party, and Marie C. Purchase, third party, entered into an agreement which, after reciting that first parties had executed and delivered to second party, as trustee, a certain trust mortgage on certain real estate in Detroit for the sum of $115,000; that third party had delivered to second party a discharge of a mortgage on said premises, owned by her, in the sum of $70,000; that Eugene J. Stevenson, administrator of the estate of George H. Purchase, deceased, had secured an order from the circuit court for the county of Wayne, in chancery, restraining third party from assigning or transferring said mortgage, and that it was the desire of first and third parties that said $70,000 mortgage be paid out of the proceeds of the $115,000 mortgage, provided that—

"Said party of the second part is hereby authorized and directed and agrees to pay to said party of the third part the accrued interest due upon said mortgage of $70,000 above mentioned upon the delivery by said party of the third part to said party of the second part of a lawful discharge of said mortgage and said party of the second part

is hereby authorized and agrees to deduct from the proceeds of said first described mortgage of $115,000 said $70,000 and hold said sum as trustee for such parties as may be entitled thereto in accordance with the disposition of said cause in the circuit court for the county of Wayne, in chancery or on appeal; that during the time said sum of $70,000 is held by said party of the second part as trustee, it shall pay to said party of the third part interest thereon at six per cent. per annum payable semi-annually. Said second party shall also have the right pending the determination of said cause to pay said money to said court or any other party upon the order of said court or the Supreme Court of the State of Michigan.

"Second party agrees that it will, upon the exhibition to it of a certified copy of a final order or decree of said circuit court or of the Supreme Court of the State of Michigan showing that said suit has been dismissed or has been terminated in favor of third party together with the written consent of Lodge & Brown, her attorneys, promptly pay over to her said sum of $70,000 with accrued interest thereof."

On July 1, 1931, the Detroit Trust Company had been appointed receiver of the Guaranty Trust Company, on petition of the State banking commissioner, because of its insolvency. On September 23, 1931, a decree was rendered in the proceeding above referred to, brought by Stevenson as administrator, which recited that the proceeds of the $70,000 mortgage had been invested by the trust company in bonds secured by real estate mortgages and that said bonds were then in the possession of said receiver, and Marie C. Purchase was ordered to—

"forthwith make, execute and deliver to plaintiff or to Lee E. Joslyn, his attorney, an order directing

the Guaranty Trust Company of Detroit, a Michigan corporation and/or the Detroit Trust Company, its receiver, to turn over and deliver to Thomas F. Farrell, clerk of the circuit court for the county of Wayne, the $70,000 in bonds in its possession as aforesaid; that in default of the execution and delivery of said order by the said Marie C. Purchase as hereinbefore provided, within five days from the date hereof, this decree shall be and constitute an order directing the said Guaranty Trust Company of Detroit, a Michigan corporation, and/or the Detroit Trust Company, its receiver, to turn over and deliver said bonds unto said Thomas F. Farrell, clerk of this court; and the plaintiff is authorized to take such proceedings as may be necessary to complete the turning over and delivery of said bonds to the clerk of this court.''

Marie C. Purchase failed to comply with the terms of the decree. On December 1, 1931, the administrator filed the petition herein in the chancery proceedings in which such receiver was appointed, praying for an order requiring the trust company to do so. After a hearing thereon, in which certain proofs were taken, the trial court found that the relation existing between the trust company and Marie C. Purchase was that of debtor and creditor, and entered an order dismissing the petition, from which the administrator has taken this appeal.

No claim is made that the decree rendered on September 23d is in any way binding upon the receiver. It was not a party thereto. In a supplemental brief filed by counsel for the administrator it is insisted that the trust company, having notice of the order of the court restraining Mrs. Purchase from disposing of the mortgage, had no legal right to accept the discharge from her and enter into the contract above referred to, and that when the

proceeds of said mortgage came into its hands it should be held to hold the same in trust for the administrator. In its decree rendered on September 23d the court, doubtless as requested by counsel for the receiver, treated the transfer of the discharge of mortgage as valid, and on it based the right to relief granted therein. For this reason we are unwilling to consider the question thus presented.

Decision hinges upon whether, under the agreement of June 6, 1927, the relationship of trustee and *cestui que trust* or that of debtor and creditor was established between Mrs. Purchase and the Guaranty Trust Company as to the proceeds of the $70,000 mortgage. The original books of entry of the Guaranty Trust Company were put in evidence. An entry therein on a sheet, entitled "Corporate Trust Department, Joseph A. Moross, Loan No. 1068," shows that this account was balanced on July 30, 1927, by payment to the trust company of the sum of $71,610.96, and on a sheet, entitled "Trust No. 1779, Title of Trust-Marie Purchase," the first item is an entry showing the transfer of this sum from the Moross corporate trust to the account of Marie Purchase. It included the interest on her mortgage to that date, and a check for this amount, drawn on the First National Bank, in which the trust company kept its account, was delivered to her.

On August 4, 1927, the trust company issued a check payable to itself for $28,446.33 for the purchase of $28,000 of bonds and $446.33 accrued interest thereon, and on the next day its check for $42,437 for the purchase of $42,000 of bonds and $437 accrued interest thereon. The Marie C. Purchase Trust No. 1779 was charged with the $70,000

paid for these bonds, and the trust company's income account was charged with the accrued interest included in these checks. Each six months thereafter the trust account was charged with $2,100, the semi-annual interest on the $70,000. The vouchers issued therefor had written thereon, "Payment of interest in accordance with the terms of trust agreement of June 6, 1927."

While changes thereafter were made in the account, owing to certain of the bonds having been paid and others substituted in their places, the question at issue may, we think, be fairly determined from the facts as above stated.

At the time the agreement of June 6, 1927, was entered into, Moross was the owner of the property in question, subject to the mortgage to Marie C. Purchase of $70,000. He wanted to borrow more money. Mrs. Purchase had been enjoined from discharging her mortgage until the suit then pending to determine the rights of the administrator thereto had been disposed of. The trust company was willing to float the bonds secured by the $115,000 mortgage for Moross if the holders were protected as against the $70,000 mortgage. To protect the rights of all concerned, this agreement was entered into. Mrs. Purchase had no right to deliver a discharge of the mortgage to the trust company and accept its personal undertaking to pay her the amount thereof. She was enjoined from so disposing of it and an intent on her part to do so, or on the part of the trust company to so accept it, cannot be inferred. The trust company agreed to deduct from the $115,000 mortgage the amount of the $70,000 and to "hold said sum as trustee," not for her alone, but "for such parties as may be entitled thereto in accordance with the disposition of said

cause in the circuit court for the county of Wayne, in chancery or on appeal."

It agreed to pay Mrs. Purchase interest on the sum in its hands at 6 per cent. per annum, payable semi-annually, but it also reserved to itself the right to pay the money into court. This provision was doubtless inserted by it to protect itself in case it was unable to make such interest payments without loss to it. The use of the word "trustee" is not in all cases decisive that a trust estate has been created, neither does the provision for payment of interest clearly negative the intent to create such an estate. The intent must be gathered from the entire instrument, and from it we can but find that the $70,000 came into the hands of the trust company as a trust fund. It made investments thereof, and, as the moneys it so received in trust are traceable into bonds in its possession, these should be delivered by it to the clerk of the court.

The order entered is reversed and set aside, with costs, and the cause remanded, with direction to enter one as prayed for in the petition.

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

L. C. MONROE CO. *v.* VANDER SYS.

GARNISHMENT—ASSIGNMENTS.

Where contractor presented owner with list of materials used but not paid for, and requested that he pay for them, which he agreed to do, although total amounted to more than balance due contractor, there was, in effect, assignment by contractor of balance due him, and thereafter there was no money in owner's hands belonging to contractor subject to garnishment.

Appeal from Muskegon; Pugsley (Earl C.), J., presiding. Submitted October 18, 1932. (Docket No. 119, Calendar No. 36,732.) Decided December 6, 1932.

Garnishment proceedings by L. C. Monroe Company, a corporation, against J. Vander Sys, principal defendant, and Robert B. Taylor, garnishee defendant. Judgment for garnishee defendant. Plaintiff appeals. Affirmed.

*Harry W. Jackson,* for plaintiff.

*Cross, Foote & Sessions,* for garnishee defendant.

SHARPE, J. On July 1, 1931, Robert B. Taylor as owner entered into a written contract with J. Vander Sys as contractor for the erection by the latter of a dwelling house for the sum of $5,125. It contained the following provisions:

"The contractor is to carry on the work with utmost dispatch consistent with economy and good workmanship a (and) guarantee to turn the work

to the owner free from all liens and indebtedness incurred by the contractor in its construction. * * *

"Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials or fail in any respect to prosecute the work with promptness and diligence or fail to perform any of the agreements or refuse to arbitration (arbitrate) then the owner will be at liberty to provide at the expense of the contractor all such material and labor at such prices as (he) deems proper and cost and charges are to be retained out of the amount of the contract."

On October 1st, and before the building was completed, Vander Sys presented to Taylor a list of the materials used which were then unpaid, amounting to $1,587, with the names of the persons from whom purchased, and told him that he would have to pay them. They amounted to more than that unpaid upon the contract, but Taylor proceeded to make such payments. In the list was an item due the plaintiff. This was paid by Taylor. Soon thereafter, and while $985.79 yet remained unpaid, the plaintiff brought an action against Vander Sys and recovered a judgment for $752.74 and costs. At the time the action was brought, a writ of garnishment was issued and served on Taylor. In his disclosure he stated the facts as above.

The trial court in his opinion said:

"The test of the plaintiff's right to recover against Taylor was the liability of Taylor to Vander Sys at the time the garnishment was served. If Vander Sys could not at that time sue and recover from Taylor because of his breach of contract, then the plaintiff cannot recover that which was not due and payable to Vander Sys."

One of the items in the list above referred to was the price of a furnace which the contractor had in-

stalled in the house and which he had purchased under a title-retaining contract. Others were no doubt lienable at that time. Under the terms of the contract, the owner had the right to see to it that the material placed in his building was paid for, and the request of the contractor that he should make such payments, acceded to by him, was in effect an assignment of his claim for the balance due. *Neumann* v. *Calumet & Hecla Mining Co.*, 57 Mich. 97; *Farwell* v. *Chambers*, 62 Mich. 316; *Blumenthal* v. *Simons*, 110 Mich. 42. Thereafter, as the court found, the owner had no moneys in his hands belonging to the contractor, and the judgment in favor of the garnishee was properly entered.

It is affirmed.

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

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## PEOPLES LUMBER CO. *v.* STREHLKE.

1. GARNISHMENT—INTERVENTION—CONSTRUCTION OF STATUTE.

   Provision in section 14019, 3 Comp. Laws 1929, that intervention shall be in subordination to, and in recognition of, propriety of main proceeding, must be construed in connection with that in section 14884, which provides for intervention of claimant in garnishee proceedings when disclosure states that other persons make claim to funds in hands of garnishee.

2. SAME—DISCLOSURE.

   Judgment creditor of garnishee defendant was properly allowed to intervene, where it disclosed that it was not indebted to principal defendant, had no property in its hands belonging

to him, and that funds in its hands represented judgment against it in favor of intervener in action wherein it appeared that principal defendant had no interest in said fund and action was dismissed as to him.

3. SAME—UNEXPLAINED DELAY—QUASHING WRIT.

Since garnishee statute contemplates speedy proceedings, where there was unexplained delay of nearly four months, order quashing writ of garnishment was properly made.

Appeal from Wayne; Kilpatrick (Arthur W.), J. Submitted October 14, 1932. (Docket No. 102, Calendar No. 36,810.) Decided December 6, 1932.

Garnishment proceedings by Peoples Lumber Company, a Michigan corporation, against Irwin L. Strehlke and another, principal defendants, and Standard Fire Insurance Company, a foreign corporation, garnishee defendant. Marion H. Strehlke intervened as a third-party claimant to the fund. From order quashing writ of garnishment, plaintiff appeals. Affirmed.

*Samuel D. Frankel,* for plaintiff.

*Geo. W. Bixler,* for intervener.

SHARPE, J. Plaintiff began suit by filing declaration in assumpsit against the defendants Strehlke and Habermas on February 27, 1932, claiming damages in the sum of $1,000. On the same day plaintiff's attorney filed an affidavit for a writ of garnishment against the Standard Fire Insurance Company, a foreign corporation. The writ of garnishment was issued on the same day and duly served on the insurance company by serving the deputy insurance commissioner pursuant to the statute (3 Comp. Laws 1929, § 12315, as amended by Act No. 163, Pub. Acts 1931).

On April 13th the insurance company filed a disclosure, stating that it had no property or money in its hands belonging to the principal defendants, jointly or severally, and was not indebted to them in any amount. It was further stated therein that on October 14, 1926, it issued a policy of fire insurance to Irwin L. Strehlke and Marion H. Strehlke in the sum of $5,000; that the property insured was destroyed by fire; that an action was brought upon the policy and a judgment secured in favor of Marion H. Strehlke in the sum of $2,100; that it appeared on the trial that Irwin L. Strehlke had no interest in the property, and the action was dismissed as to him.

On April 20, 1932, plaintiff's attorney filed a demand for the trial of the statutory issue by a jury. On June 13th Marion H. Strehlke petitioned the court for leave to intervene in the garnishment proceedings. In it she set forth the recovery of her judgment and that she was a necessary party inasmuch as the insurance company has refused and neglected to pay the money to her. On the same day the trial court entered an order permitting such intervention. On June 18th she filed a motion to quash the writ of garnishment. She set up therein that, because of the judgment recovered by her, Irwin L. Strehlke, her husband, had no interest in the property insured; that plaintiff has not diligently prosecuted its suit, no service having been made upon the principal defendants therein, although more than three months had elapsed since its institution, and prayed for an order discharging the garnishee defendant. An order quashing the garnishment proceedings was entered, from which the plaintiff has taken this appeal.

Counsel for the plaintiff relies on the provision in 3 Comp. Laws 1929, § 14019, which reads as follows:

"In an action either at law, or in equity, anyone claiming an interest in the litigation may, at any time, be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding: *Provided,* That in attachment actions any party, other than the original defendant, claiming to own any of the property attached may assert his rights by motion to release the attachment so far as it affects his property, which motion shall be heard and determined by the court under the same terms and conditions as motions in other cases."

The provision that the intervention "shall be in subordination to, and in recognition of, the propriety of the main proceeding" must be construed in connection with that in section 14884, which provides for the intervention of a claimant in garnishee proceedings when the disclosure states that other persons make claim to the funds in the hands of the garnishee. *Shank* v. *Lippman,* 249 Mich. 22. The order permitting intervention was properly made.

The declaration by which this action was begun was filed on February 27, 1932. The order quashing the garnishee proceedings was entered on June 18, 1932, nearly four months thereafter. No showing was made as to why service on the principal defendants had not been made. In *Noble* v. *Bourke,* 44 Mich. 193, in which a writ of summons and one of garnishment were issued on January 7, 1880, and the order dismissing the writ of garnishment entered on March 25, 1880, this court said:

"The court in which the proceedings are carried on must certainly be empowered to conduct an in-

quiry in cases where extraordinary delay in bringing in the principal defendant is shown, and thereupon to discharge the garnishee with lawful costs if it is made to appear that the retention of the proceeding against him is unjust and in substance and effect an abuse of the process of the court."

In *Blake* v. *Hubbard,* 45 Mich. 1, it was said:

"The garnishee statute contemplates speedy proceedings. Its necessary operation is to tie up the hands of the garnishee and subject him to expense and annoyance. It cannot be regarded as a proceeding in the ordinary course, for it involves many consequences which could not otherwise arise either in law or in equity. If such proceedings could be delayed indefinitely it might not only injure the garnishee, but it might also affect other persons who have claims on the property in his hands."

See, also, *Kiely* v. *Bertrand,* 67 Mich. 332; *Hiles* v. *Selas Co.,* 219 Mich. 88; Stevens' Michigan Practice, § 124.

Under the facts here presented, the order quashing the writ of garnishment was properly made, and is affirmed.

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

*In re* JENKINS' ESTATE.

APPEAL OF SMITH.

1. TRUSTS—DUTY OF TRUSTEE—GOOD FAITH REQUIRED.
   It is trustee's duty to act in good faith and exercise sound judgment in investment of moneys in his hands as trustee.

2. SAME—DUAL CAPACITY—SELF-INTEREST CONFLICTING WITH DUTY.
   Where trustee loaned trust funds to corporation in which he was stockholder and of which he was treasurer, taking as security therefor mortgages on lots, he placed himself in position where his self-interest conflicted with his duty as trustee, and such investment will be scrutinized more closely by court than if made in usual course of business.

3. SAME—INVESTMENT OF TRUST FUNDS IN REAL ESTATE MORTGAGES—CARE REQUIRED.
   While real estate mortgages are favored for investment of trust funds, it becomes trustee's duty to satisfy himself as to its value and availability for purpose of sale in case of foreclosure, and its location and character of buildings thereon must also be considered.

4. SAME—INVESTMENT DISAPPROVED.
   Where trustee loaned trust funds to corporation in which he was stockholder and of which he was treasurer, taking as security therefor mortgages on lots in large subdivision on outskirts of city, on which were erected temporary buildings, removal of which was required by restrictions within year, said investment was properly disapproved by court.

5. PRINCIPAL AND AGENT—POWER OF ATTORNEY.
   Power of attorney to collect interest on trust fund did not authorize approval of investments, and such approval, if given, would not bind principal.

Appeal from Wayne; Pugsley (Earl C.), J., presiding. Submitted October 12, 1932. (Docket No. 86, Calendar No. 36,759.) Decided December 6, 1932.

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As to care demanded of trustee to sell real estate, see annotation in 3 L. R. A. (N. S.) 415.

Matter of estate of Isaac Jenkins, deceased. Raymond H. Smith presented his account as testamentary trustee to the probate court. Nellie M. Remer and another, beneficiaries, filed objections thereto. From order disallowing a certain credit, trustee appealed to circuit court. Judgment affirmed. Trustee appeals. Affirmed.

*Lyle G. Younglove* and *Harry H. Wait,* for appellant.

*George K. Williams* and *Edward H. Kennedy, Sr.,* for appellees.

SHARPE, J. It is conceded that under the last will and testament of the deceased there came into the hands of Raymond H. Smith, hereafter called the defendant, $16,330 as trustee for Nellie M. Remer, the beneficiary named therein. Of this sum he loaned $12,300 to the Perry Park Company, a corporation, receiving therefor 10 promissory notes of $1,230, each note being secured by a mortgage on a lot in a subdivision of the city of Pontiac.

On November 20, 1931, he filed an account as trustee in the probate court of the county of Wayne, charging himself with the $16,330 and crediting himself with disbursements, among which was the money paid to the Perry Park Company, $12,300. Objections to its allowance were filed by the attorney for Nellie M. Remer, and, after a hearing thereon, the credit therefor was disallowed. The trustee thereupon appealed to the circuit court, where, on June 4, 1932, so far as is here material, the order of the probate court was affirmed, and the trustee found to be indebted to the trust estate in the sum of $13,508.88. From the judgment so entered the defendant has taken this appeal.

It appears that, at the time the loan was made, the defendant was a stockholder in, and treasurer of, the Perry Park Company and the owner of one-third of the stock in Bassett & Smith, a corporation that purchased the lots in question with others and sold them to the Perry Park Company. It will thus be seen that in the making of these loans he was acting in a dual capacity. It was his duty to act in good faith and exercise a sound judgment in the investment of the moneys in his hands as trustee. *Caspari* v. *Cutcheon,* 110 Mich. 86; *Chambers* v. *Chambers,* 207 Mich. 129; *In re Buhl's Estate,* 211 Mich. 124 (12 A. L. R. 569). It was to the interest of the Perry Park Company, of which he was treasurer, to secure a loan on its lots on the most favorable terms. He thus placed himself in a position where his self-interest conflicted with his duty as trustee. Under such circumstances the investments made by him will be scanned with closer scrutiny than if made in the usual course of business by a trustee.

We think it may be well said that mortgages on real estate are favored for such investments. When application therefor is made to a trustee, it becomes his duty to satisfy himself as to its value and its availability for the purpose of sale in case of foreclosure. Its location and the character of the buildings thereon must be considered. These lots were located in a large subdivision on the outskirts of the city of Pontiac. On each of them was erected a frame cottage 20 x 20 feet in size, placed on cement posts, without basement, sewer, toilet, bathroom, furnace, water, or gas. Plaster board was used on the inner walls. They were of temporary construction. The restrictions required the removal of all buildings costing less than $3,000 on January 1, 1930. The mortgages were executed on April 1, 1929, and

recorded on April 22, 1929. The defendant gave his check, as trustee, therefor, payable to the order of the Perry Park Company, and indorsed and deposited the same as treasurer of that company.

The defendant relies upon an appraisal of the lots, made at defendant's request by Vern C. Markley, a man engaged in the real estate business at Pontiac, who placed a valuation of $2,200 on each lot. He stated that the price so fixed "would be a fair sale price on land contract," and that "the usual discount on land contracts in the event of sale of land contracts was from 20 to 25 per cent." It does not appear that he knew of or took into consideration the temporary nature of the structures as above referred to. It appeared that these lots had all been sold on land contracts for an average of $2,290, with a down payment of from $100 to $300 on each. No testimony was offered as to the cost of the houses.

The trial court found that: "Such an investment under such circumstances cannot meet the approval or justification of any court," and with this finding we are in accord. These temporary structures, which had to be removed within less than a year, did not add sufficient value to the lots to justify the defendant, if acting in good faith and in the exercise of a sound judgment, uninfluenced by his personal interest in the matter, in making these loans out of the trust moneys in his hands.

It appears that Grace Frey, of Newark, New York, held a power of attorney from Nellie M. Remer, authorizing her to collect the interest from this trust fund, and defendant claims that she ratified the investments made. Under the power of attorney Mrs. Frey's authority was limited to the collection of "all moneys due" under the will of the deceased. She was not empowered to approve of the invest-

ments, and had she, or her representative done so, which we do not find to be the fact, Miss Remer would not have been bound thereby.

The judgment is affirmed, with costs to appellee.

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

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## BARTH *v.* BREDSHALL.

1. CORPORATIONS—PROMOTERS—TRUSTS—FIDUCIARY RELATION.
   Promoter of company, like its directors, is deemed to sustain towards members of company and toward corporation, relation of trustee toward his *cestui que trust*.

2. SAME—SECRET PROFIT—ASSIGNMENT OF LEASE.
   Where lease was obtained by promoter incident to, and as part of, promotion of undertaking, promoter, who acts in fiduciary capacity, may not make secret profit on assigning said lease to corporation subsequently organized for purpose of carrying on contemplated enterprise.

3. SAME.
   Director who secured lease of additional land for use of corporation is not entitled to derive profit incident thereto at expense of corporation or its other stockholders, although assented to by board of directors which he dominated.

4. SAME—TRANSACTIONS BETWEEN CORPORATION AND DIRECTORS PERSONALLY—EQUITY—BURDEN OF PROOF.
   Transactions between corporation and its directors personally should be carefully scrutinized, and burden is always on directors in control of company to show that all their transactions with it are fair and not in violation of trust relation which they sustain to company and its other stockholders.

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As to liability of promoter for secret profits, see annotation in 25 L. R. A. 92; 18 L. R. A. (N. S.) 1110.

5. SAME—STOCK OBTAINED BY DIRECTORS FOR NOTES CANCELED.
Corporate stock paying dividend of 24 per cent. per annum, obtained by directors in exchange for their unsecured notes at 6 per cent., was properly canceled by court below on complaint of stockholder who paid cash for his stock, where corporation never profited from said notes, they still being in its hands, and only payments made were dividends credited thereon.

Appeal from Kent; Dunham (Major L.), J. Submitted October 18, 1932. (Docket No. 121, Calendar No. 36,111.) Decided December 6, 1932.

Bill by Louis Barth against Alvin F. Bredshall and C. T. Smith to cancel certain shares of corporate stock and for an accounting. Decree for plaintiff. Defendants appeal. Affirmed.

*Butterfield, Keeney & Amberg* and *Harry Shulsky,* for plaintiff.

*Warner, Norcross & Judd,* for defendants.

NORTH, J. Plaintiff, by his bill in chancery, seeks to have certain shares of stock in the Banquet Barbecue, Inc., a Michigan corporation, canceled, to have an accounting for certain moneys received by Bredshall and Smith, herein called defendants, and for injunctive relief. Upon hearing in the circuit court plaintiff had decree, and defendants have appealed.

It is plaintiff's claim that in May, 1927, the defendant Bredshall approached him in regard to becoming interested with Bredshall in a restaurant business. These gentlemen had been interested in previous business ventures, always on the basis of investing equally and sharing equally. Bredshall secured a lease of a desirable site for the res-

taurant for a term of four years with the privilege of extending the term by two periods of like duration. This lease in the first instance ran to Bredshall, but it was subsequently assigned to the Banquet Barbecue, Inc., upon its incorporation for the purpose of carrying on the contemplated enterprise. Early in the activities a small building was erected on the site, and subsequently a lease of additional ground was obtained from the lessor, and the building occupied by the restaurant business enlarged. This second lease also named Bredshall as the lessee, but it was later assigned to the corporation. When first organized (July 8, 1927), the authorized capital stock of the Banquet Barbecue was $10,000; but subsequently (March 28, 1928) was increased to $25,000, composed of common stock of the par value of $10 per share. When first incorporated, the stock, which ultimately went to plaintiff and Bredshall, was held by a trustee. Two other men joined in organizing the corporation. One of them, Mr. Frank Ferrell, was president of the company and held 10 shares of stock; the other, C. T. Smith, vice-president and secretary, held 250 shares.

It is plaintiff's claim that in the first instance Bredshall represented to him that the requirements of the enterprise would necessitate an investment of $2,000 by each of them; and that later, as the business was expanded and the building enlarged, that a further investment of $5,000 by each was required. Plaintiff advanced these respective amounts and received therefor $7,000 par value of the common stock of the company. Plaintiff, who was a physician actively engaged in the practice of his profession, asserts that by reason of his previous associations with Bredshall he had great confidence in

him, relied implicitly upon the representations made by him, and that it was mutually understood between them that Bredshall would look after plaintiff's interest. On this phase of the record plaintiff testified:

"He (Bredshall) asked me if I could go on the board. I replied I could not give it the time nor did I know anything about the restaurant. We have always worked on equal terms, you look after it for me, your interests and my interests are identical."

It seems as a result of the relationship above indicated between these men plaintiff paid little attention to the details of the restaurant business, notwithstanding his holdings in the corporation. He neither served as an official in connection with the corporation nor attended any of its stockholders' meetings. Plaintiff's contention is that it was understood between him and Bredshall that in this, as in previous ventures, they were to make the necessary investment in equal proportions and were to share equally in the ownership and profits of the enterprise. In the spring of 1929, because of certain facts which came to his knowledge, plaintiff employed an accountant to examine the books of the corporation and then for the first time, according to plaintiff's claim, he learned of the facts which gave rise to this litigation and which briefly outlined are as follows: The defendant Bredshall, in consideration of transferring to the corporation the first lease, had issued to him 250 shares of the company's stock. When the second lease was assigned, Bredshall was given $1,500 in stock and $1,000 in cash; and this latter sum he used to pay for $1,000 more stock at the par value. Thus for the two leases Bredshall obtained $5,000 in stock. Each of these transactions was authorized by action taken by the

board of directors composed of Bredshall, Ferrell, and Smith. But plaintiff alleges that the board of directors was under the control and domination of defendant Bredshall, and that plaintiff had no knowledge prior to the checking of the company's records by the accountant that Bredshall had profited by assigning the leases to the company. Plaintiff asserts that this was a fraud because the plan for becoming jointly interested in this enterprise contemplated that Bredshall would secure a lease of a suitable site and in this and other matters having to do with the corporation's welfare would act jointly in behalf of himself and plaintiff. On the other hand, Bredshall asserts that he obtained the first lease before plaintiff became interested in the enterprise, and that as to each of the leases it was fully understood by plaintiff at the time that in consideration of transferring them to the corporation he (Bredshall) should be compensated in the manner above noted. And in this connection he claims that the lessor insisted upon the leases being taken by Bredshall personally and that by entering into them he assumed the liability for payment of rentals aggregating approximately $30,000.

The circuit judge decreed cancellation of this $5,000 par value of stock. A careful review of the record satisfies us that he reached the right conclusion. The testimony does not sustain Bredshall's theory that there was any substantial value in either of these leases over and above the rents which the corporation is required to pay. This being so, as a result of these two transactions Bredshall secured $5,000 of stock in the corporation without giving any substantial value therefor. The trial judge was not impressed, nor are we, with Bredshall's claim that his credit or financial standing was indispensable to

the securing of these leases. The first of the two leases was obtained incident to the contemplated undertaking of plaintiff and Bredshall, and we are satisfied that the understanding and agreement between these men was that, incident to the investment and the necessary effort in developing the enterprise, they were to advance equal sums of money and share equally in the ownership and profits. The first lease was obtained incident to, and as a part of, the promotion of this undertaking; and this is true, notwithstanding the organization of a corporation to take over the enterprise was a subsequent development. From the outset there was a fiduciary relation between plaintiff and Bredshall.

"The promoter of the company, like its directors, is deemed to sustain towards the members of the company, and toward the corporation, the relation of trustee toward his *cestui que trust.*" *American Forging & Socket Co.* v. *Wiley,* 206 Mich. 664, 673.

As to the second lease, there can be no question of its having been secured expressly for the use of the corporation. Bredshall at that time was a director of the corporation, and a fair inference from the record is that he controlled the action of the board of directors. Under the circumstances of this case, notwithstanding Bredshall took the lease in his own name, he held the same for the use and benefit of his corporation; and he was not entitled to derive a profit incident thereto at the expense of the corporation or its other stockholders.

"The directors of a corporation are its agents. The entire management of corporate affairs is committed to their charge, upon the trust and confidence that they shall be cared for and managed * * * for the common benefit of the stockholders. They are required to act in the utmost good faith, and in

accepting the office they impliedly undertake to give to the enterprise the benefit of their best care and judgment, and exercise the powers conferred solely in the interest of the corporation." *Ten Eyck* v. *Railroad Co.*, 74 Mich. 226, 232 (3 L. R. A. 378, 16 Am. St. Rep. 633).

See, also, *Old Mortgage & Finance Co.* v. *Pasadena Land Co.*, 241 Mich. 426.

The decree entered in the circuit court requiring cancellation of the $5,000 par value of stock in the corporation obtained by Bredshall incident to the leases is fully justified and sustained by the record in this case.

The remaining question presented on this appeal is whether cancellation should be decreed of the stock of the par value of $3,500 held by Bredshall for which he gave his note to the corporation; and also of $1,000 par value of the stock held by the defendant Smith for which he gave his note to the corporation. It is conceded that if cancellation of this stock is to be decreed defendants are entitled to an accounting for certain dividends applied in payment upon their notes and also to have the notes canceled and returned to the makers.

On this phase of the case, the testimony discloses that, at the time the stock of the corporation was increased to $25,000, dividends were being paid at the rate of two per cent. per month. Plaintiff paid $5,000 in cash, for which he received a like amount par value of this additional stock. Bredshall and Smith were two of the three members of the board of directors, and we think it is a fair inference they were assured of the co-operation of the third member of the board in any corporate action they saw fit to take. While thus dominating the affairs of the corporation, Bredshall gave his unsecured note at

six per cent. per annum for $3,500 for a like amount of the company's stock then paying dividends at the rate of 24 per cent. per annum; and Smith gave his unsecured $1,000 note at six per cent. per annum for a like amount of the stock. The company received no benefit from these notes, since neither of them was negotiated or discounted. They are still in the hands of the corporation, and no payments have been received thereon except dividends earned and paid by the company on stock standing in the name of Bredshall or Smith. In other words, the corporation has in no way profited by this transaction with its directors. Instead, its outstanding stock was increased substantially 20 per cent. and in this same proportion the benefits which other stockholders enjoyed by way of dividends or accumulated surplus were diminished. Transactions between a corporation and its directors personally should be carefully scrutinized, and the burden is always on directors in control of a company to show that all their transactions with it are fair and not in violation of the trust relation which they sustain to the company and its other stockholders.

"An officer of a corporation may deal with the corporation if his acts are open and fair and known to the directors and stockholders.

"The burden of showing the validity of a contract between a corporation and its officer or director, and the fairness and honesty of his dealings with the corporation, is on said officer or director." *Patrons' Mutual Fire Ins. Co.* v. *Holden* (syllabus), 245 Mich. 493.

Under this record we are not satisfied that these transactions were good-faith purchases of stock by Bredshall and Smith. Instead, we think the arrangement entered into was prompted by a desire

to have a substantial control of the company's affairs, and to unduly participate in its earnings to the disadvantage of other stockholders. This being true, we must affirm the decree of the circuit court canceling the stock so purchased by these defendants.

In making disposition of this case, perhaps it should be noted the record discloses that much, and perhaps all, of the stock of which cancellation is sought has been hypothecated and is now in the hands of persons who are not parties to this suit. Obviously, the *bona fides* of such hypothecations and the rights of parties concerned cannot be adjudicated in this case. Provision was made in the decree entered in the circuit court for cancellation of the notes given to the corporation by defendants Bredshall and Smith, and also for an accounting by the corporation to these two defendants for such dividends as accrued on stock lawfully held by them and applied in payment upon the canceled notes. This provision accomplishes an equitable result between the parties. The decree of the circuit court is affirmed, with costs to appellee.

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

KIBBEY *v.* L. O. GORDON MANFG. CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ADDITIONAL COMPENSATION.

   In proceeding for additional compensation, finding of department of labor and industry that employee's loss of vision in right eye was due to accidental injury for which compensation was previously awarded, *held*, justified, on record.

2. SAME—FINDING OF FACT FINAL WHERE SUSTAINED BY EVIDENCE.

   Finding of department of labor and industry on issue of fact, where sustained by competent evidence, is binding on Supreme Court.

3. SAME—JUDGMENT—RES JUDICATA.

   Defenses that employee had not sustained compensable injury and that claim was barred by statute of limitations, having been raised and decided adversely to employer in proceeding for compensation, from which no appeal was taken, are not available in subsequent proceeding for additional compensation for injury arising out of same accident (2 Comp. Laws 1929, § 8431).

Appeal from Department of Labor and Industry. Submitted October 12, 1932. (Docket No. 78, Calendar No. 36,543.) Decided December 6, 1932.

Ornie N. Kibbey presented his claim against L. O. Gordon Manufacturing Company, employer, and General Accident, Fire & Life Assurance Corporation, Limited, insurer, for an accidental injury suffered while in defendant's employ. On petition for further compensation. From an award to plaintiff, defendants appeal. Affirmed.

*Parmenter & Van Eenenaam,* for plaintiff.

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As to additional compensation for loss or impairment of eyesight under workmen's compensation acts, see annotation in 8 A. L. R. 1324; 24 A. L. R. 1466; 73 A. L. R. 703.

As to conclusiveness of findings of fact where sustained by evidence, see annotation in L. R. A. 1916A, 266; L. R. A. 1917D, 186.

*Kerr, Lacey & Scroggie,* for defendants.

NORTH, J. In August, 1928, while in the employ of the defendant manufacturing company, plaintiff sustained an injury by reason of oil getting into his right eye. There seems to have been no report of the accident by either the employer or employee; and the former asserts that it had no knowledge of the accident having occurred. However, in February, 1929, plaintiff presented a claim for compensation, alleging injury to his right eye. The employer filed denial of liability. On March 28, 1929, the deputy awarded compensation for two weeks at $18 per week. This award was paid and the receipt filed, but the receipt was not approved. Nothing further occurred between the parties relative to this injury or compensation until November 14, 1931. On that date plaintiff petitioned for further compensation, alleging in the meantime he had suffered total loss of the sight of his right eye as the result of his former injury. An award of $18 per week for 100 weeks was made by the deputy commissioner, and upon review before the full board this award was affirmed. The defendants have appealed, and they assert that the application for further compensation should have been denied because:

"First, plaintiff did not show that this loss of vision was due to the accident; and, second, even though this were proved, he is barred by the statute of limitations."

As bearing upon these questions, we quote the following portion of the record. Plaintiff testified as follows:

"*Q.* You received an injury on August 1, 1928?
"*A.* Yes.

"Q. And were paid compensation for two weeks?

"A. Yes.

"Q. What is your condition now as compared to May 2, 1929 (the date the settlement receipt was signed)?

"A. Well, it is worse. I can't see anything and then I could see some. * * *

"Q. Have you had any other injury to that eye other than that of August 1, 1928?

"A. No, sir. * * *

"Q. How long ago did the sight in your right eye become that you could not see anything but shadow?

"A. About the first of June of this year (1931). * * *

"Q. And in March, 1929, an order was made then of two weeks' compensation following August 8, 1929?

"A. Yes.

"Q. And since March of 1929 until you filed this petition you made no further claim for compensation?

"A. No, sir."

Dr. V. N. Morford, an eye, ear, nose, and throat specialist, testified in part as follows:

"Q. When did you first see him?

"A. In August, 1928.

"Q. Did you attend him at that time?

"A. Yes.

"Q. For what?

"A. He came up from the L. O. Gordon plant complaining of his eye smarting and hurting and blurring. He could not see so good. That was his eye condition at that time. * * *

"Q. Did you learn the cause of this smarting?

"A. He said he got some oil in his eye three or four weeks previous to that time that I saw him.

"*Q.* Would that cause it?

"*A.* It would. It could. * * *

"*Q.* Have you seen him subsequent to 1928?

"*A.* I saw him three times in August and then not again until October 3, 1931.

"*Q.* What was his condition then, Doctor?

"*A.* He just came up at that time to find out if there was any help to the loss of vision to that right eye?

"*Q.* Did you examine him?

"*A.* Yes.

"*Q.* What did the examination show?

"*A.* It showed a very dense cornea and he could only see shadow at 10" at that time. * * *

"*Q.* He sets the time (when loss of vision occurred) as June 1, 1931. From your examination could you tell from the density of the cornea how long it had been?

"*A.* No, sir.

"*Q.* Do you think that would be the probable date?

"*A.* It could be."

Two other specialists testified. The testimony of one of them is to the effect that plaintiff now has no useful vision for industrial purposes in the right eye and that this condition is permanent; that following the accident plaintiff reported to him "that he got oil in the eye;" that such an accident might, so far as witness knew, and probably would, incite the inflammation of the eye; and that witness had no other history of anything else having caused plaintiff's loss of sight in his right eye. There is other testimony in the record, some of which tends to corroborate that above quoted, and some of which tends to impair the probative force of the quoted testimony. But a full consideration of the record satisfies us that there was testimony from which the

commissioners could and did find that plaintiff's loss of vision in his right eye was due to the accident of August 1, 1928. We are bound by such finding. *Estrin* v. *Workmen's Circle Colony,* 249 Mich. 186.

The other question is whether plaintiff is barred by the statute of limitations. Appellants rely primarily upon the provisions contained in 2 Comp. Laws 1929, § 8431, and they also assert reliance upon the general statute of limitations. We think the defendants cannot rely upon the particular limitations embodied in the workmen's compensation act for the reason that there has already been an adjudication between these parties incident to this same injury resulting in an award which defendants paid to plaintiff. It seems that one of two things would necessarily follow, either that defendants waived any right they might have had to urge the defense of the statute of limitations, or that there was an adjudication contrary to this defense, if asserted; and there was no appeal from such adjudication.

It appears from this record that in the 1929 hearing between these parties incident to this same injury, the defendants gave notice that they denied liability because the plaintiff did not sustain an accidental injury arising out of and in the course of his employment with defendant, "that no claim for compensation was made within the statutory period," and, further, "that the above-named defendants did not receive notice or knowledge of an injury within the statutory period." In view of the award made in the 1929 hearing it cannot be questioned that the defense urged that plaintiff had not sustained a compensable injury was definitely

adjudicated against the employer and its surety. The claim is not made by defendants, nor could it be made successfully, that they now have a right to a second adjudication of that question. Likewise it appears conclusively that the defense of the statute of limitations was urged in the 1929 hearing. It must have been decided adversely to defendants otherwise there could have been no award. Such adjudication, no appeal having been taken, was final as between these parties. It could not be again raised and readjudicated incident to the subsequent application of plaintiff in the same proceeding for further compensation. The commission was right in holding that plaintiff's claim for further compensation was not barred either by the limitations contained in the workmen's compensation act or by the general statute of limitations.

"The defenses that an award by the industrial accident board was void because claimant was not incapacitated and away from his work for two weeks, and no notice of the injury was given within three months from the happening thereof, and no claim was made within six months after its occurrence, were waived where the employer joined in arbitration, paid the amount due thereunder, and acquiesced in the board's order by taking claimant back into his employ and giving him lighter work." *Brown* v. *George A. Fuller Co.* (syllabus), 197 Mich. 1.

The award is affirmed, with costs to appellee.

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

## NYQUIST *v.* IRON RIVER CREAMERY CO.

1. CUSTOMS AND USAGES—MASTER AND SERVANT—EVIDENCE—SUFFICIENCY.

   Testimony that arsenate of lead was at one time left at defendant's branch plant for distribution to farmers, from whom it purchased cream to manufacture into butter, and that an egg crate was once left there by farmer, did not show custom on part of defendant to accommodate farmers by storing articles for them, especially where there was testimony that defendant's president had objected to said storage of arsenate of lead.

2. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPENSABLE ACCIDENT—DEATH ARISING OUT OF EMPLOYMENT.

   Where employee, in charge of branch plant for purchase of cream and manufacture of butter, permitted quantity of dynamite, caps, and fuses to be stored at plant by county agent, without knowledge or consent of employer, employee's death, few days later, caused by explosion, did not arise out of employment, and therefore award for his death under workmen's compensation act was properly denied.

Appeal from Department of Labor and Industry. Submitted October 28, 1932. (Docket No. 57, Calendar No. 36,551.) Decided December 6, 1932.

Sandria Nyquist presented a claim against Iron River Creamery Company, employer, and Century Indemnity Company, insurer, for the accidental death of her husband, Emil Nyquist. Award denying compensation is reviewed by plaintiff on appeal. Affirmed.

*C. D. Dwyer* and *Norman Trahair*, for plaintiff.

*Derham & Derham* and *Stevens T. Mason,* for defendants.

BUTZEL, J. Sandria Nyquist brings certiorari in the form of an appeal from an award of the department of labor and industry denying her compensation on account of the death of Emil Nyquist, her husband, who was killed while employed by defendant Iron River Creamery Company. Defendant's insurer is also made party defendant. The decedent was first employed by defendant at its plant in Iron River, Michigan, but almost four years ago was sent by defendant creamery company to take charge of its branch plant in the neighboring city of Florence, Wisconsin. It was his duty to purchase cream from the farmers and manufacture butter. On September 10, 1931, some dynamite, caps, and fuses were left with decedent at defendant's branch plant by the county agent of Florence county. This dangerous substance was stored by decedent without the knowledge or consent of his employer. It was first placed in the office, but subsequently moved to another room. A few days later an explosion occurred, and Nyquist was literally blown to pieces so that identification was established with difficulty. Plaintiff sought to show a custom on the part of defendant to accommodate farmers by storing articles for them. It was shown that at one time during the summer of 1930, arsenate of lead for killing potato bugs was left at the Florence plant for distribution to farmers. The natural inference would be that the good will of the farmers was sought by permitting articles to be left at the plant for their convenience. However, plaintiff's attorney brought out on cross-examination of an adverse witness that the president of defendant com-

pany had objected to the storage of the arsenate of lead. It was also shown that an egg crate was once left by a farmer at the plant. These were the only instances shown of the leaving or storing of any articles or materials at the plant for the accommodation of farmers. Neither any custom of storing articles nor any authorization by the employer was shown. The testimony indicates that the accident arose in, but not out of, the course of employment. The storage of explosives of a highly volatile nature does not bear the remotest relationship to the purchase of cream and the manufacture of butter. There is no causal relation between the employment and the accident to the extent that it can be deemed that the injury was brought about by any unusual or additional exposure of the injured party to an underlying hazard or danger. *Stocker* v. *Southfield Co.,* 244 Mich. 13. There was testimony supporting the finding of the department of labor and industry, that the injury did not arise out of the course of employment, and we may not disturb the award denying compensation. *Beaty* v. *Foundation Co.,* 245 Mich. 256.

The award is affirmed, with costs to defendant.

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

WEARNER *v.* WEST MICHIGAN CONFERENCE OF SEVENTH DAY ADVENTISTS.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—COMPENSABLE ACCIDENT—MINISTER.

Where minister, engaged to look after affairs of churches in two neighboring cities, was fatally injured by automobile after he alighted from street car on his way to attend evening meeting at home of one of his parishioners, his injuries arose out of and in course of his employment, justifying award to his dependents under workmen's compensation act.

2. SAME—NONRESIDENT—ACCIDENT IN ANOTHER STATE.

Dependents of employee, whose duties for Michigan employer under Michigan contract were rendered partly in and partly out of State, are entitled to award under workmen's compensation act for his accidental death, although he was nonresident and accident occurred out of State, where it arose out of and in course of his employment.

Appeal from Department of Labor and Industry. Submitted October 21, 1932. (Docket No. 209, Calendar No. 36,685.) Decided December 6, 1932.

Emma Wearner and another presented their claim against West Michigan Conference of Seventh Day Adventists, employer, and Employers' Liability Assurance Corporation, insurer, for the accidental death of A. G. Wearner while a minister in the employ of defendant employer. From an award to plaintiffs, defendants appeal. Affirmed.

*Dean S. Face,* for plaintiffs.

*W. E. Vaughan,* for defendants.

BUTZEL, J. West Michigan Conference of Seventh Day Adventists, as employer, and Employers' Liability Assurance Company, as insurer, appeal from an award of the department of labor and industry in favor of Emma Wearner, widow, and Bernadine Wearner, minor child, of A. G. Wearner, deceased. Appellant West Michigan Conference of Seventh Day Adventists is a religious organization with headquarters at Grand Rapids, Michigan. The government of the Seventh Day Adventists Church is divided into areas, which are called "conferences." The West Michigan conference is composed of certain counties in the western portion of the lower peninsula in this State and five counties in the State of Indiana. The salary and expenses of the minister of each church within the conference are paid by the conference organization. In the spring of 1928, the conference requested a minister of the church, who lived at Lincoln, Nebraska, to negotiate with Rev. Mr. Wearner of that city to take a pastorship under the West Michigan conference at Grand Rapids, Michigan, and also obtain his release from the Nebraska conference. Shortly thereafter, Rev. Mr. Wearner came to Grand Rapids, where a church was assigned to him, and he became an employee of the conference. Two years later the conference convened at Hastings, Michigan, and hired him for another two-year term and issued credentials to him accordingly. He remained pastor of the Adventists Church of Grand Rapids until July, 1931, when the executive committee assigned him to the territory at South Bend, Indiana, where it became his duty to look after the affairs of the church both at South Bend and also the neighboring city of Niles, Mich-

igan, both within the territory of the employer. It continued to pay his salary as well as other expenses, including the installation and service of a telephone, a subsidy on his rent and a certain amount for mileage, while traveling in the course of his duties.

One of his duties was to visit Niles, Michigan, very frequently. He went there almost daily during the month preceding his death. On the evening of December 7, 1931, while in pursuit of his regular duties, he left his home to attend an evening meeting at the home of one of his parishioners in South Bend, Ind. Almost immediately after alighting from a street car on his way to the meeting, and while between the street car and curb, he was struck by an automobile. He was severely injured and died as a result.

Even were there any merit to appellant's claim that the services of Rev. Mr. Wearner were to be rendered wholly outside of the State, and that he was no longer a resident of Michigan, the question would be governed by the recent case of *Roberts* v. *I. X. L. Glass Corp.*, 259 Mich. 644. The work was being done for a Michigan employer under a Michigan contract. The employee received his fatal injuries while performing duties arising out of and in the course of his employment. There is not only some, but an overwhelming preponderance, of evidence supporting the commission's award, which we herewith affirm, with costs to appellees.

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

SIMPSON *v.* MICHIGAN VALVE & FOUNDRY CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEPARTMENT MAY DRAW INFERENCES FROM FACTS.

   In proceedings under workmen's compensation act, department of labor and industry may draw all rational and natural inferences from facts and circumstances shown.

2. SAME—COMPENSABLE ACCIDENT—ABSENCE OF EYEWITNESSES—INFERENCES FROM FACTS.

   Where operator of boring machine was observed standing in front of machine operating it as he was supposed to do, and soon thereafter was found lying on top of machine with fractured skull, under facts and circumstances, *held*, that department of labor and industry might find that accident arose out of and in course of employment, although no one saw accident.

3. SAME—DEPARTMENT MAY DECLINE TO DRAW INFERENCE—WILFUL MISCONDUCT.

   Even if inference might be drawn from facts and circumstances that accident resulting in injuries to employee was due to his intentional and wilful misconduct, department of labor and industry may decline to draw it.

4. SAME—FINDING OF FACT CONCLUSIVE.

   Finding of department of labor and industry, based on inferences drawn from facts and circumstances, while acting within its province, is conclusive on Supreme Court.

Appeal from Department of Labor and Industry. Submitted October 28, 1932. (Docket No. 171, Calendar No. 36,667.) Decided December 6, 1932.

Elizabeth Simpson, guardian of John Simpson, a mental incompetent, presented a claim against Michigan Valve & Foundry Company, employer, and Michigan Mutual Liability Company, insurer, for an accidental injury to her ward while in defendant's employ. Award to plaintiff. Defendants appeal. Affirmed.

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As to effect of serious or wilful misconduct of employee, see annotation in L. R. A. 1916A, 75, 243; L. R. A. 1917D, 133.

*John W. Babcock,* for plaintiff.

*L. J. Carey* (*R. B. Hart,* of counsel), for defendants.

CLARK, C. J. This is review upon certiorari of an award of the department of labor and industry in favor of plaintiff, guardian of John Simpson, mentally incompetent.

Simpson was an operator of a boring machine in the plant of defendant employer. He was observed "standing in front of the machine operating it the way he was supposed to operate it." Soon thereafter he was found lying on top of the machine, unconscious, suffering from a fractured skull. No one saw the accident. Simpson, being mentally incompetent, was not a witness at the hearing. The department in making findings might draw all rational and natural inferences from the facts and circumstances shown. Under the authority of *Papinaw* v. *Railway Co.,* 189 Mich. 441 (12 N. C. C. A. 243); *Meyers* v. *Railroad Co.,* 199 Mich. 134; and *Wishcaless* v. *Hammond, Standish & Co.,* 201 Mich. 192, the department might find, as it did, that the accident arose out of and in the course of the employment. A further defense attempted is that the accident was due to intentional and wilful misconduct of Simpson. If it be conceded that an inference might have been drawn from the facts and circumstance that the accident was so occasioned, it appears that the department declined to draw it and found to the contrary, as it might under the evidence. This was within its province, and the finding is conclusive on this court.

Affirmed.

MCDONALD, POTTER, SHARPE, NORTH, FEAD, WIEST, and BUTZEL, JJ., concurred.

WEST *v.* POSTUM CO., INC.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ADDITIONAL COMPENSATION—LOSS OF HAND.

Where employee suffered accidental injury to his right hand, and was compensated for loss of four fingers, but thereafter evidence showed change of condition in stiffening and ankylosis of thumb, and that what is left of hand is totally useless, he was properly awarded additional compensation, making total of 150 weeks, compensating for loss of hand (2 Comp. Laws 1929, § 8426).

2. SAME—EVIDENCE—SUFFICIENCY.

Finding of department of labor and industry that employee's hand is entirely useless as result of accidental injury, *held*, sustained by evidence.

3. SAME—LOSS OF HAND.

Evidence that accidental injury resulted in loss of four fingers, stiffening and ankylosis of thumb, and rendered what is left of hand totally useless, justified finding that there was loss of hand.

Appeal from Department of Labor and Industry. Submitted October 18, 1932. (Docket No. 114, Calendar No. 36,668.) Decided December 6, 1932.

Floyd West presented a claim against Postum Company, Inc., employer, and Employer's Liability Assurance Corporation, insurer, for an accidental injury while in defendant's employ. On petition for further compensation. Award to plaintiff. Defendants appeal. Affirmed.

*Ronald M. Ryan,* for plaintiff.

*Joseph W. McAuliffe,* for defendants.

As to what amounts to loss of member within the meaning of workmen's compensation acts, see annotation in 18 A. L. R. 1352.

CLARK, C. J. Plaintiff suffered an accidental personal injury to his right hand on November 30, 1929. A compensation agreement was entered into and approved providing for payment of compensation for the loss of the four fingers for the period of disability, 100 weeks, deemed to exist within the schedule of 2 Comp. Laws 1929, § 8426. This compensation has been paid. In the accident plaintiff received injury to the thumb.

On November 16, 1931, plaintiff filed petition for further compensation alleging change of condition in respect of the thumb and loss of the use of the hand. At the hearing plaintiff testified in support of the averments of his petition. He had testimony of stiffening and ankylosis of the thumb, and that what is left of the hand "is totally useless."

On appeal to the commission, department of labor and industry, the facts were found with plaintiff, and he was awarded compensation for 50 additional weeks, making a total of 150 weeks, the period of disability deemed to exist for loss of the hand under statute above cited. Defendant prosecutes appeal in the nature of certiorari. The commission, in legal effect, found change in condition, permitting consideration of petition for further compensation. This is supported in fact and is conclusive. *Peet* v. *City Bakery Co.*, 238 Mich. 431. The finding the hand entirely useless as a result of the accidental injuries is sustained by evidence, and therefore stands.

A question is whether there has been loss of the hand under the act. The commission relies on *Lovalo* v. *Michigan Stamping Co.*, 202 Mich. 85. In that case there was greater loss of the member in respect of the palm, but here there is a total loss of use. The holding in that case sustains decision

here. See *Reno* v. *Holmes,* 238 Mich. 572; note 18 A. L. R. 1350.

No other question calls for discussion.

Affirmed.

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

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LANTZ *v.* SCHANZ.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—FINDING OF DEPARTMENT CONTROLLING IF SUPPORTED BY EVIDENCE.

On appeal from award in proceeding under workmen's compensation act, Supreme Court does not weigh evidence, but finding of department of labor and industry is controlling, if there is evidence to support it, notwithstanding there may be conflicting testimony.

2. SAME—RELATIONSHIP OF EMPLOYER AND EMPLOYEE.

Finding of department that relationship of parties was that of employer and employee, *held,* supported by evidence.

3. SAME—COMPENSATION—BASIS OF AWARD.

Where employee's earnings for five days he worked prior to injury resulting in death amounted to $9.62, award of compensation based thereon should have been $7.68 per week for 300 weeks, and therefore, on appeal, award of $9 per week for said period is reduced to correct amount (2 Comp. Laws 1929, § 8427, subds. b, c).

Appeal from Department of Labor and Industry. Submitted October 28, 1932. (Docket No. 207, Calendar No. 36,576.) Decided December 6, 1932.

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As to conclusiveness of finding of compensation board or commission, see annotation in L. R. A. 1916A, 266; L. R. A. 1917D, 186.

As to basis of award, see annotation in L. R. A. 1916A, 149, 260; L. R. A. 1917D, 175; 2 A. L. R. 1642; 22 A. L. R. 864.

Beryl B. Lantz and others presented their claim against Conrad Schanz, employer, and American Employers' Insurance Company, insurer, for the accidental death of Gordon Lantz while in defendant's employ. Award to plaintiffs. Defendants appeal. Modified and affirmed.

*Henry I. Bourns,* for plaintiffs.

*G. Wilson Gloster,* for defendants.

MCDONALD, J. This is a review by certiorari of an award by the department of labor and industry granting compensation to the plaintiffs for accidental injuries to Gordon Lantz which resulted in his death.

The plaintiff Beryl B. Lantz is the widow of decedent. The other plaintiffs are their minor children. The defendant, Conrad Schanz, is a general contractor at Chelsea, Michigan. He employed Gordon Lantz, decedent, to work in wrecking an icehouse. While engaged in this work decedent fell through an upper floor and was so seriously injured that he died a few hours later. It is admitted that the injury was accidental and arose out of and in the course of his employment. The principal issue is whether Gordon Lantz was an employee or an independent contractor. The commission found that he was an employee and there is evidence to support the finding.

The deceased worked five days prior to his death. There is evidence that he was not employed to do a specified piece of work; that he worked by the hour and was paid 25 cents an hour except that on the last day he worked he was paid $4 per thousand for 500 feet of lumber removed from the building and

piled on the ground. There is evidence that defendant was frequently on the job directing the work, and that when he was not there, his son-in-law, Mr. Atkinson, was in charge; that on one occasion defendant took him off the job and directed him to assist in drilling a well. There is evidence that the right to control the work and to discharge the deceased was with the defendant. The defendant calls our attention to other testimony which tends to show that the deceased was an independent contractor. We do not weigh the evidence in these cases. The finding of the commission controls if there is evidence to support it. There was evidence in support of the finding that the relationship of the parties was that of employer and employee.

The remaining question relates to the amount of compensation awarded. The amount awarded was $9 a week for a period of 300 weeks. The statute makes the average daily wage the basis for estimating the amount of compensation. The record shows that the deceased earned $9.62 for the 5 days he worked prior to his death. Dividing the total earnings by five would show a daily wage of $1.92. Multiplying this by six shows a weekly wage of $11.52, 66⅔ per cent. of which is $7.68, the rate of weekly compensation. See *Conrad* v. *Cummer-Diggins Co.*, 224 Mich. 414; 2 Comp. Laws 1929, § 8427, subds. b and c.

The case is remanded for the reduction of the award in accordance with this opinion. Neither party will have costs.

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

BECK *v.* COMMERCIAL DRIVEAWAY, INC.

CALDER *v.* SAME.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENTAL INJURY—MONOXIDE GAS POISONING.

   In proceedings under workmen's compensation act, conclusion of department of labor and industry that decedents died as result of breathing carbon monoxide gas generated from running motor and carried through defective exhaust heater into cab where they were sleeping in nighttime, and that there was accidental injury, *held*, justified by established facts and circumstances.

2. SAME—CUSTOMS AND USAGES—COMPENSABLE ACCIDENT.

   Where custom of drivers engaged in driveaway of sleeping in cars at night was known to and acquiesced in by employer, their accidental death from monoxide gas while so sleeping arose out of and in course of their employment.

3. SAME—VIOLATION OF RULE AS DEFENSE TO COMPENSATION CLAIM.

   If employer insists upon defense of violation of rule by employee as means of defeating compensation claim, he must show that such rule was made, enforced, and intentionally violated.

4. SAME—HABITUAL VIOLATION OF RULE—WILFUL MISCONDUCT.

   Where rule against drivers sleeping in cab of motor vehicle with motor running unless windows were left open, if promulgated, was not enforced, and fact that it was generally disregarded was known to employer, latter may not defeat compensation claim for death of drivers from monoxide gas while sleeping in cab on ground that they violated said rule and were therefore guilty of intentional and wilful misconduct.

Appeal from Department of Labor and Industry. Submitted October 27, 1932. (Docket Nos. 70, 71, Calendar Nos. 36,752, 36,753.) Decided December 6, 1932.

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On injury from fumes or gases as accident or occupational disease within the meaning of the compensation statutes, see annotation in 6 A. L. R. 1466; 23 A. L. R. 335.

As to what constitutes serious and wilful misconduct of employee, see annotation in L. R. A. 1916A, 75, 243, 355; L. R. A. 1917D, 133; 4 A. L. R. 116.

Luella M. Beck and another and Margaret Loraine Calder presented their claims against C. & J. Commercial Driveaway, Inc., employer, and Union Indemnity Company, insurer, for the accidental death of Ronald Beck and Loy Calder while in defendant's employ. Awards for plaintiffs. Cases consolidated for appeal. Defendants appeal. Affirmed.

*Wm. C. Brown,* for plaintiffs.

*P. L. Sawyer* (*Butzel, Levin & Winston* and *Chris M. Youngjohn,* of counsel), for defendants.

MCDONALD, J. The defendants review by certiorari to the department of labor and industry an award for compensation to Luella M. Beck and Margaret Loraine Calder for accidental injuries resulting in the deaths of their husbands, Ronald L. Beck and Loy B. Calder.

The record presents the two cases involving the same facts. They have been consolidated by stipulation and will be disposed of in one opinion.

The plaintiffs' decedents were drivers for the C. & J. Commercial Driveaway, Inc., a corporation engaged in the business of transporting automobiles to and from various cities in the United States. At the time in question the decedents, Beck and Calder, were employed with other men to drive a fleet of 25 used Yellow Taxi Cabs from Chicago, Illinois, to Washington, D. C. The drivers were allowed to park where night overtook them and to sleep in the rear of their cabs. On this trip to Washington, they stopped for the night at a barbecue settlement near Romney, West Virginia. They parked their cars beside the highway. The decedents, Beck and Cal-

der, went to sleep in the same cab. In the morning they were found dead; and their death is claimed to have been caused by carbon monoxide from the exhaust of the motor. The night was cold, and it is thought the men kept the motor running in order to keep warm.

In adjusting claims for compensation, the defendants denied liability on the ground, first, that the injury was not accidental; second, that it did not arise out of and in the course of the employment; and, third, that it was due to intentional and wilful misconduct. The commission found against the defendants on all three defenses, and awarded compensation. As cause for appeal defendants claim:

1. That there was no evidence of an accidental injury.

When the men were found in the morning, Dr. Easton of Romney, West Virginia, was called. He examined the bodies, and on the hearing before the commissioner testified:

"*Q.* In your opinion, doctor, as a physician, from all the circumstances you have above described, what caused the death of these two men?

"*A.* They were overcome by monoxide gas coming into the rear of the compartment of the taxicab in which these men were sleeping, through a defective heater, and both, in my opinion, were dead when discovered. * * *

"*Q.* Doctor, you have stated that these men came to their deaths by inhaling carbon monoxide gas. Now, will you state why you are of that opinion?

"*A.* Well, we examined the particular taxicab, No. 13, in the line where both men were found dead, and we found the heater in the rear compartment of this cab was defective, and it leaked fumes from the exhaust to the rear compartment where these men were. * * *

"*Q.* Was or was not there any physical conditions that would show that Calder died from carbon monoxide? * * *

"*A.* There was a pinkish tinge to the skin that is peculiar to monoxide poisoning. In my opinion, this condition is peculiar to death from monoxide poisoning alone, that is, the condition of the skin."

This testimony was a sufficient basis for the conclusion of the commission that the decedents died as a result of breathing carbon monoxide gas generated from a running motor and carried through a defective exhaust into the rear of the cab. It is the only reasonable inference to be drawn from the established facts and circumstances. It sufficiently shows an accidental injury.

2. That the injury did not arise out of and in the course of their employment.

This fleet of cars was in charge of a foreman, Mr. Lane, but he was not present on the night of the accident. He had motor trouble with the cab he was driving and had fallen behind the others. When night came on he was 50 miles in the rear. At about 10 o'clock he sent word to them to remain at the barbecue station until he arrived in the morning. Mr. McKinly, president of the defendant company, testified that the drivers were responsible for the cars they were driving until delivered at Washington; and that it was their duty to remain in charge of them when not being driven unless excused by the foreman. On the night in question, the men received no instructions from the foreman except to stay where they were until morning. They remained in charge of their cars and slept in them, a custom known to and acquiesced in by their employer. These facts show that when this accident occurred the decedents were not off duty. They were not actually driving but were in possession

of their employer's property charged with the duty of protecting it until the arrival of the foreman in the morning. They did not leave the field of their employment but remained on duty performing a service for their employer. While thus engaged they were injured. The injury arose out of and in the course of their employment. See *Haller* v. *City of Lansing,* 195 Mich. 753 (L. R. A. 1917 E, 324).

3. Was their injury and death due to intentional and wilful misconduct?

It was contended by the defendant that the drivers were instructed not to sleep in their cabs with the motors running unless the windows were left open. There was no rule to that effect posted in the cabs or in the employer's office where the men were accustomed to assemble. The instructions were verbal and were announced to the drivers when the weather became cold. The record does not show that Beck and Calder were present on any occasion when such instructions were given. But, assuming that they knew about the rule, they knew that it was generally disregarded by all of the drivers, which fact was also known to the employer. To be effective as a means for defeating compensation, the rule must be enforced with diligence. In reference to this rule the commission said:

"There is no evidence that such a ruling was promulgated in the regular way, and there is plenty of evidence if such a rule were promulgated, it was not enforced. Officers of the company did the same thing, and supervising employees on this trip did likewise. Several of the employees were ill in the morning on this trip when these two men were found dead. If the employer insists upon this defense as a means of defeating a compensation claim, he must show that such a rule was made, enforced,

and intentionally violated. He cannot wink at his own rule. *Rayner* v. *Sligh Furniture Co.*, 180 Mich. 168 (L. R. A. 1916 A, 22, 4 N. C. C. A. 851, Ann. Cas. 1916 A, 386); *Detwiler* v. *Consumers Power Co.*, 252 Mich. 79."

We agree with the finding of the commission that the decedents' injury was not due to intentional and wilful misconduct.

The award in both cases is affirmed, with costs to the plaintiffs.

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

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*In re* PETITION OF HUME.

CLAIM OF F. R. CRUIKSHANK & CO.

1. SALES—TITLE-RETAINING CONTRACTS—OPTIONAL REMEDIES.

   It is permissible, in title-retaining contract, to provide that vendor have option of repossessing property in case of default or declaring balance of contract price due and payable forthwith, but he may exercise only one of said optional remedies.

2. CONTRACTS—CONSTRUED MOST STRONGLY AGAINST PARTY PREPARING THEM.

   Any ambiguity in sales contract prepared by vendor must be construed more strongly against it than against opposite party.

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On what amounts to a conditional sale, see annotation in 17 A. L. R. 1421; 43 A. L. R. 1247.

3. CHATTEL MORTGAGES—TITLE-RETAINING CONTRACTS.

Mere recital of retention of title in instrument itself is not conclusive as to whether it is conditional sales contract or whether it does pass title notwithstanding recital to contrary.

4. SAME—CONSTRUCTION—RECITALS IN INSTRUMENT SIGNIFICANT BUT NOT CONTROLLING.

In determining whether instrument is conditional sales contract or chattel mortgage, it is significant, although not controlling, that it is not drafted in form or couched in terms of ordinary chattel mortgage, that no promissory notes accompany it, that no provision is made for recovery of deficiency in event of foreclosure, and that nowhere in instrument or in correspondence between parties is it referred to as chattel mortgage.

5. SAME—WHERE TITLE DID NOT PASS CHATTEL MORTGAGE COULD NOT BE GIVEN.

Where instrument provided that title should not pass to buyer until fully performed and it never was fully performed, title did not pass, and therefore buyer could not give chattel mortgage.

6. SAME.

Holding of trial court that instrument in question is not chattel mortgage, *held*, correct.

Appeal from Muskegon; Vanderwerp (John), J. Submitted October 12, 1932. (Docket No. 89, Calendar No. 36,791.) Decided December 6, 1932.

In the matter of the petition of Thomas H. Hume and others for the dissolution of Fitzjohn Manufacturing Company. On claim of F. R. Cruikshank & Company, a New York corporation, for deficiency for goods sold under an alleged chattel mortgage. Judgment for defendant (receiver). Claimant appeals. Affirmed.

*Harold H. Smedley* (*Arthur S. Jones,* of counsel), for claimant.

*Edward C. Farmer,* for appellee.

NORTH, J. Petition for the dissolution of Fitzjohn Manufacturing Company (herein called defendant) was filed in the circuit court for the county of Muskegon, and a receiver was appointed July 13, 1931. F. R. Cruikshank & Company, a New York corporation (herein called plaintiff), presented its claim for allowance in the sum of $23,772.80. From a disallowance of this claim it has appealed.

In August, 1929, plaintiff entered into an agreement with the Fitzjohn Company for installing in its manufacturing plant a sprinkler equipment and for coverage of the same by fire insurance. The contract provided for the payment of $4,969 upon installation and a like annual payment on December 1, 1930, 1931, 1932, 1933, and 1934. Installation was completed, and the contract was filed as a chattel mortgage and annual renewal certificates were also filed. The controlling question in this case is whether the instrument was in fact and law a chattel mortgage, as claimed by plaintiff, or whether it was a title-retaining sales contract, as asserted by defendant. On December 10, 1931, the receiver sold the assets of the Fitzjohn Manufacturing Company. This sale was subject to any rights of plaintiff in the sprinkler system. On the same date plaintiff gave notice of the sale of the property covered by its contract with defendant. The sale was conducted as a chattel mortgage sale, and the property sold to plaintiff for the sum of $50. Its claim of $23,772.80 was for the balance which it asserted was due it from defendant under the contract for the installation of the sprinkler system. The trial judge held that the contract under which this sprinkler system was installed was a title-retaining contract, and since plaintiff repossessed itself of the property and sold it, it had made an election of

its remedy and could not thereafter assert a claim in the receivership for the balance of the purchase price. In reviewing this determination, appellant asserts that the instrument executed by the defendant incident to the installation of the sprinkler system was in fact a chattel mortgage, and that therefore appellant was possessed of the right to foreclose its chattel mortgage and thereafter assert a claim in the receivership for any unpaid portion of the purchase price.

As noted above, the whole controversy turns upon the determination of whether the instrument in question is a chattel mortgage or a title-retaining sales contract. The instrument covers nine printed pages of the record, and we forego full reproduction. In it plaintiff is designated as the "company" and the defendant as the "purchaser." It evidently was a form prepared and used by plaintiff. Aside from the use of the word "purchaser," especial care seems to have been taken to avoid any expression indicative of a transfer of the title of the property by plaintiff to defendant prior to the time the payments provided for in the contract were made in full. After reciting that plaintiff agrees to procure fire insurance, covering defendant's property in which the sprinkler system was to be installed, the contract recites:

"Clause 4. The company agrees * * * it will cause to be installed in the premises described * * * a wet and dry pipe system of approved fire extinguishing apparatus, * * * hereinafter referred to as a 'sprinkler equipment,' in accordance with plans * * * and to maintain same at its own expense for the period of this contract (subject to certain provisions not here material).

"Clause 5. The purchaser agrees to pay the company the following sums of money on the following dates: * * * If the purchaser makes any default hereunder or fails to make any one of the above payments on the date such payment be due, all payments then due and thereafter to become due hereunder shall at the option of the company become forthwith due and payable; that upon any default by the purchaser all the rights, title and interest, if any, of the purchaser in any improvements placed upon the assets (property of defendant) by the company shall immediately cease and the company with or without the aid of legal process may enter the assets (property of defendant) and * * * remove any part or all such improvements therefrom, * * * without claim for damages or otherwise against the company and without prejudice to its rights hereunder. * * * At the company's option, the purchaser shall be deemed to have made default hereunder if it be adjudicated a bankrupt or become insolvent, or if a receiver be appointed for it. * * *

"Clause 7. The title to said sprinkler equipment shall remain at all times in the company, and the company agrees that at the full termination of this contract and upon the faithful compliance by the purchaser with the terms and conditions herein contained and the making of all the payments by it required to be made at the times fixed and specified for making same, all improvements which the company may place upon the premises and which then are in or upon said premises, *shall become the sole property of the purchaser and the company shall make, execute, acknowledge and deliver at that time a proper bill of sale for same to the purchaser.*"

Plaintiff asserts that because of the provision in clause 5 that it may repossess itself of the property, and "without prejudice to its rights hereunder," the instrument should be construed as a chattel mortgage; and that to hold otherwise de-

prives the above-quoted provision of any meaning whatever in the instrument. We think this contention of plaintiff is not well founded; and that, instead, the meaning of the quoted expression is much more apparent if the instrument is construed as a title-retaining contract, by the terms of which it was intended to provide that the vendor might have the option of repossessing the property in case of default or declaring the balance of the contract due and payable forthwith. Such provisions are permissible in title-retaining sales contracts, but the vendor has the right to exercise only one of the optional remedies. *Young* v. *Phillips,* 203 Mich. 566.

Since this contract was prepared by plaintiff, any ambiguity therein must be construed more strongly against it than the opposite party. *Patterson* v. *Miller,* 249 Mich. 89. But aside from this rule of construction, it appears that this instrument expressly retains title in plaintiff, and nowhere does it expressly or by fair implication transfer title to the defendant as a purchaser. It goes without saying that unless title to the property passed to defendant it could not give a chattel mortgage thereon. And further, if title did not pass to the defendant at the time of the execution of this instrument, so that it was in position to give a chattel mortgage at that time, it did not subsequently become vested with title and therefore could not and did not mortgage the property. It is not contended in behalf of appellant, nor could it be, that it had a right to elect at its option to hold under this instrument as a mortgagee or as a contract vendor retaining title.

We are mindful of the fact that mere recital of retention of title in the instrument itself is not conclusive as to whether it is a conditional sales con-

tract or whether the instrument, notwithstanding recital to the contrary, does pass title. *National Cash Register Co.* v. *Paul,* 213 Mich. 609, 615 (17 A. L. R. 1416), citing *Chicago Railways Equipment Co.* v. *Merchants Bank,* 136 U. S. 268 (10 Sup. Ct. 999). But as was noted by Justice STONE in the *National Cash Register Company Case, supra,* in arriving at a proper construction we look "into the contract and accompanying papers, and the surrounding circumstances." While perhaps not controlling in the instant case, it is significant that the instrument which plaintiff asserts is a chattel mortgage is by no means drafted in the form or couched in the terms of the ordinary chattel mortgage; no promissory notes seem to have been executed by defendant in connection therewith; there is no provision for recovery of a deficiency in the event of foreclosure of the instrument as a chattel mortgage; and nowhere in the instrument or in the correspondence between the parties is it referred to as a chattel mortgage. Instead, it is designated as "a contract," and by its express terms it is a title-retaining contract. Further, by the terms of this contract, plaintiff's right to repossess itself of the property is closely, and we think inseparably, connected with the provision therein that in case of default "all the rights, title and interest, *if any,* of the purchaser * * * shall immediately cease."

The above-noted features of this contract are quite in contrast with the provisions in the contracts involved in the cases cited and relied upon by appellant. For example, in *National Cash Register Co.* v. *Paul, supra,* wherein it was held that title to the property passed, Justice STONE stated:

"In the instant case there are present the elements of a bill of sale, with notes as collateral

security, as in the case of *Young* v. *Phillips, supra.* Lasley (the vendee) gave an order for the manufacture and shipment to him of a cash register 'for which undersigned agrees to pay you $550 in 22 monthly payments of $25.' This is not the language of a bailment, but of a purchase."

As hereinbefore noted, in preparing this contract, appellant seems to have studiously avoided expressions or terms which are commonly characteristic of sale or purchase. On the other hand, on its face, this is a contract by which plaintiff undertook to install, insure, and maintain in defendant's manufacturing plant a sprinkler system, and defendant agreed to pay for such installation and services the various amounts provided in the contract on the dates specified. By its terms this contract was not to be fully performed by either party until December 1, 1934, and the contract by express terms provides that when it is fully performed (and obviously not before) the sprinkler system "shall become the sole property of the purchaser and the company shall make, execute, acknowledge and deliver *at that time* a proper bill of sale for same to the purchaser." Earlier in the same clause of the contract it is specifically provided that title to the sprinkler equipment "shall remain at all times in the company" until the contract was fully and faithfully performed, in this connection expressly providing for "making of all payments." This contract was never fully performed by either party. In fact, full performance was not contemplated by the terms of the contract until December 1, 1934. Until it was performed title could not and did not pass to defendant; and if defendant did not have title, it could not give a chattel mortgage.

We think it clear from this record that the parties did not intend that title to this sprinkler system should pass to defendant, and this is true notwithstanding the contract also included the cost of fire insurance. The very fact that the appellant provided for carrying the insurance primarily at its own expense is quite indicative that it retained title to the property. The holding in the circuit court that the instrument was not a chattel mortgage was correct, and plaintiff's claim filed in the receivership was properly disallowed.

Affirmed, with costs to appellee.

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

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HENRY *v.* SANDERSON.

1. APPEAL AND ERROR—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT.

   In determining whether there was error in trial court's refusal to direct verdict in favor of defendant, in action for personal injuries arising out of automobile collision, on ground that plaintiff was guilty of contributory negligence, Supreme Court must accept version of all controverted facts which is most favorable to plaintiff.

2. MOTOR VEHICLES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

   Automobile driver attempting to cross trunk-line highway at intersection is not bound to anticipate that automobile approaching thereon will be operated in negligent manner, but is entitled to assume that it will be operated in lawful manner unless he has knowledge to contrary, or by exercise of reasonable care would have had knowledge to contrary.

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As to rights and duties at intersection of arterial (or other favored) highway and nonfavored highway, see annotation in 58 A. L. R. 1197, 1201.

3. SAME—TRUNK-LINE HIGHWAY INTERSECTION—FAILURE TO STOP—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT.

Automobile driver was not guilty of contributory negligence as matter of law for failing to bring his car to full stop before attempting to cross trunk-line highway at intersection, where he slowed down and looked in direction from which another car was approaching, but failed to see it by reason of obstructions and fact that it was being driven at excessive speed in middle or on left-hand side of road instead of on right-hand side as required by statute (1 Comp. Laws 1929, §§ 4703, 4713[e]).

Appeal from Branch; Jacobs (Theo T.), J. Submitted October 25, 1932. (Docket No. 216, Calendar No. 36,722.) Decided December 6, 1932.

Case by Marshall Henry against Ralph Sanderson for personal injuries sustained in an automobile collision at a highway intersection. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

*Frank E. Knapp,* for plaintiff.

*Stanley E. Weage* (*Wm. C. Searl,* of counsel), for defendant.

NORTH, J. This case arises out of an automobile accident which occurred at the intersection of two highways. Plaintiff had judgment, and the sole question presented for review is appellant's claim that the trial court should have directed a verdict against plaintiff on the ground that he was guilty of contributory negligence as a matter of law.

Both the question of defendant's negligence and plaintiff's contributory negligence were submitted to the jury. In appellant's brief his negligence is admitted. In reviewing the question presented, we must accept the version of all controverted facts

which is most favorable to appellee. At the time of the accident, August 23, 1930, he was a man 58 years of age. He had driven motor vehicles for 13 years, and to some extent he was familiar with the intersection of the so-called town-line road and State trunk line highway No. 49, where the accident occurred in the forenoon of the day noted. The town-line road was a gravel highway, as was also trunk line No. 49, the latter at this point being 24 feet in width, and being a preferred highway. Plaintiff approached the intersection from a westerly direction. At a point 28 feet west of the west line of the graveled portion of the trunk line there was a "stop" sign. Defendant was approaching the intersection from the south, driving at a rate of more than 50 miles per hour. When opposite the stop sign plaintiff shifted into first gear and proceeded at a speed of seven or eight miles per hour towards the trunk-line road. Because of an unusually obstructed view to the south, this intersection is obviously a dangerous corner. When opposite the sign plaintiff could see at most only a distance of two or three rods down the easterly side of the highway on which defendant was approaching. He made such an observation, and while proceeding slowly toward the trunk-line road he looked to the north and then again just as he was practically at the west line of the gravel he looked to the south on the trunk-line road. From this point he had a view which extended 10 or 12 rods down the easterly side of the trunk line. He could not see as far down the middle or westerly side of this highway. His limited view was due to the fact that vision in the direction from which defendant was coming was obstructed by an embankment at or near the southwesterly corner of this intersection more than five

feet in height above the center of the road, by a row of evergreen trees on the westerly side of highway No. 49 on which trees there were drooping limbs and under which there was a growth of grass and weeds. Visibility to the south was further impaired by the fact that there was a down grade in that direction on No. 49. At his last point of observation before entering upon the traveled portion of trunk-line No. 49 plaintiff was able to make a diagonal view in a southeasterly direction to a point 10 or 12 rods down the easterly side of the highway. Both he and his wife, who accompanied him, made such observation and saw no vehicle approaching. There was testimony supporting plaintiff's theory that defendant, as he approached this intersection, was driving on his left-hand side or in the middle of the highway instead of on his right-hand side as required by statute (1 Comp. Laws 1929, § 4703); that he was driving at an excessive rate of speed without having his car under control; and further, that he was not keeping a proper lookout. In this connection, defendant testified he did not see plaintiff until he was within 10 or 12 feet of him, and further, "I did not see him before because it was not my place to see him." Also, that defendant believed he had a right to pass over this intersection "Just as fast as I was a mind to." After making the southerly observation at the westerly edge of the traveled portion of the trunk line, plaintiff proceeded at the rate of seven or eight miles per hour, looking in the direction he was going, and before he made another observation in a southerly direction his automobile was struck by that of the defendant at or near the middle of the intersection. The first plaintiff knew of defendant's approach was when the latter was 30 to 50 feet

distant from plaintiff's machine and plaintiff's wife called his attention thereto.

In asserting plaintiff's contributory negligence defendant stresses the fact that the undisputed proof shows plaintiff did not bring his automobile to a full stop before attempting to cross the trunk-line highway. Notwithstanding this fact, under the circumstances of this case, it cannot be said that because of his failure to come to a full stop plaintiff was guilty of negligence as a matter of law. A different situation would be presented if plaintiff had observed a vehicle simultaneously approaching the intersection and had failed to come to a full stop. The provision of the statute (1 Comp. Laws 1929, § 4713, subd. [e]) is:

"All vehicles approaching the intersection of a State trunk line highway, outside of any city or village having local regulations, shall come to a full stop whenever a vehicle is approaching the intersecting highway and shall reduce speed to a maximum of ten miles per hour at all other times before entering or crossing such highway."

If, as we must accept the fact to be under plaintiff's testimony, defendant by reason of his approaching this intersection on the wrong side of the trunk-line road prevented plaintiff from observing his approach, defendant cannot charge plaintiff with contributory negligence as a matter of law because of his failure to observe defendant's oncoming car. Plaintiff was not bound to anticipate that defendant would operate his automobile in a negligent manner. Instead, plaintiff was entitled to assume that any other person on the highway would be proceeding in a lawful manner until plaintiff had knowledge to the contrary or by the exercise of

reasonable care would have had knowledge or notice to the contrary. At most, under the circumstances of this record, plaintiff's contributory negligence was a question of fact for the jury, and it was so submitted. This case is within and controlled by the principles of law announced in *Pline* v. *Parsons,* 231 Mich. 466; *Kiefer* v. *Fink,* 236 Mich. 274; *Lefevre* v. *Roberts,* 250 Mich. 675, and *Swainston* v. *Kennedy,* 253 Mich. 518.

Judgment is affirmed, with costs to appellee.

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

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HOWARD *v.* SECRETARY OF STATE.

1. LICENSES—MALT PRODUCTS—REGULATION—TAXATION—STATUTES.
   Affinity between malt products, especially wort, and beer with alcoholic content and effect is so close that legislature has general power to control traffic in them by license, taxation, or otherwise (Act No. 100, Pub. Acts 1931).

2. SAME—DISCRETION TO GRANT LICENSE—STATUTES.
   Power to license business does not presuppose that statute affecting it is license law, nor, if license law, that discretion is conferred on officer to grant or refuse license.

3. STATUTES—CONSTRUCTION—"SHALL"—"MAY."
   While it is familiar rule of construction that "shall" may be read as "may" in statute, or *vice versa,* it does not follow that such reading is necessary to carry out purpose of law, but statute must be examined to ascertain its character and purport.

4. TAXATION—MALT PRODUCTS—REGULATION—LICENSES—STATUTES.
Primary purpose of Act No. 100, Pub. Acts 1931, is to raise money by taxing manufacture of malt products, and its regulatory provisions are but incidental to collection of taxes.

5. LICENSES—REGISTRATION OF MANUFACTURER OF MALT PRODUCTS—CONSTRUCTION OF STATUTE.
Enumeration of conditions under which secretary of State may refuse first registration to manufacturer of malt products impliedly excludes all other conditions (Act No. 100, Pub. Acts 1931, § 12)..

6. SAME—DISCRETION TO REFUSE INITIAL REGISTRATION.
Act No. 100, Pub. Acts 1931, providing for registration of manufacturers of malt products, confers no discretion on secretary of State to refuse initial registration, except as it may be found in section 12 of said act.

Mandamus by James Howard, doing business as the Cedar Products Company, to compel Frank D. Fitzgerald, secretary of State, to issue a certificate of registration as manufacturer of wort under Act No. 100, Pub. Acts 1931. Submitted October 19, 1932. (Calendar No. 36,921.) Writ granted December 6, 1932.

*Chawke & Sloan,* for plaintiff.

*Paul W. Voorhies,* Attorney General, and *Hugh E. Lillie,* Assistant Attorney General, for defendant.

FEAD, J. This is mandamus to compel the secretary of State to issue plaintiff a certificate of registration as a manufacturer of wort, under Act No. 100, Pub. Acts 1931. Defendant claims the act invests him with discretion to grant or refuse licenses and justifies refusal upon grounds thus stated in defendant's brief:

"The answer to the petition in this case shows that petitioner did manufacture wort from Au-

gust 24 to September 28, 1932, without the consent of the respondent, and that petitioner did not apply for a certificate of registration to manufacture wort until September 28, 1932, after he was notified to discontinue business. It also shows that petitioner did not purchase enough malt tax stamps to pay the tax on all the wort sold by him during that period. In addition to this it shows that petitioner neglected to inform the respondent's agents as to the true ownership of said business and that it was necessary to keep inspectors on the premises where petitioner manufactured wort almost continuously to check the amount of wort sold by him. It further shows that petitioner has no property and had to borrow the money with which to start business and that he has not paid his full rent since that time."

In addition, it is claimed that plaintiff has been convicted in Federal court of possession of smuggled liquor. While not alleged in the return to the order to show cause, the claim is mentioned because of its relation to the power of the secretary of State.

Act No. 100, Pub. Acts 1931, superseded Act No. 304, Pub. Acts 1929, 1 Comp. Laws 1929, §§ 3619–3629, which provided a "privilege tax," by way of stamp tax per gallon or pound, on the business of selling or manufacturing malt syrup or malt extract or wort for other than medicinal or commercial baking purposes. The title to Act No. 100 begins, "An act to impose a privilege tax," etc. It provides a stamp tax per gallon or pound on malt syrup, malt extract, liquid malt, or wort, and a "privilege tax" upon automobiles used in the business of selling or transporting such products. In addition, it requires manufacturers and sellers of the products to register with the secretary of State

and to pay "registration fees." The provisions of the act, of interest here, are (italics ours):

"SECTION 1. * * * No person shall engage in the business defined herein as that of manufacturer of said articles 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, accompanied by a registration fee of two hundred fifty dollars. * * * Any person violating the provisions of this section shall be deemed guilty of a misdemeanor," etc.

"SEC. 3. The secretary of State may revoke any certificate issued as provided herein for any failure to comply with or any violation of the provisions of this act, upon four days' notice in writing of, and a hearing on the charges upon which such revocation is contemplated. * * * The secretary of State *may* refuse to issue a new or subsequent certificate to the holder of or former possessor of a certificate hereunder who shall have failed to comply with or shall have violated any provision of this act. * * *

"SEC. 12. The secretary of State or his assistants are hereby authorized and empowered to examine the books, papers and records of any distributor, dealer, or manufacturer in this State for the purpose of determining whether the tax as imposed by this act has been fully paid, and shall have power to investigate and examine according to law any premises where such malt syrup or malt extract or liquid malt or wort is manufactured, possessed, or stored for the purpose of sale, or sold, for the purpose of determining whether the provisions of this act are being obeyed. Any refusal to permit such examination of said books, papers and records

or the investigation and examination of such premises, shall constitute sufficient reason for the revocation of a certificate or the refusal to issue a certificate and shall be deemed a misdemeanor punishable as provided in section thirteen of this act."

Section 18 distributes the tax, after payment of necessary expenses in the enforcement of the act, for the care of tuberculosis patients and provides for the construction of a tuberculosis sanatorium at a cost not to exceed $400,000.

The affinity between malt products, especially wort, and beer with alcoholic content and effect is so close that there can be no doubt of the general power of the legislature to control the traffic in them by license, taxation, or otherwise. We are not here concerned with limitations on the power because it is conceded that Act No. 100 is valid.

The power to license, however, does not presuppose that a statute affecting the business is a license law; nor, if a license law, that discretion is conferred on an officer to grant or refuse licenses. Also, while it is a familiar rule of construction that "shall" may be read as "may" in a statute, or *vice versa,* it does not follow that such reading is necessary to carry out the purpose of the law. The statute must be examined to ascertain its character and purport.

The title declares the purpose of the act to be to impose a "privilege tax." The law conforms to the title. The large sums appropriated by section 18 demonstrate that the raising of money is the primary purpose of the law, not regulation of the business. The regulatory provisions are incidental to the collection of the taxes.

The fact that, in section 3, revocation of certificate of registration is provided, with machinery

set up, and the permissive "may" is used in connection with the powers of the secretary of State on issuance of a new certificate to a former holder, is persuasive that the use of the imperative "shall" in section 1 with reference to initial registration was not an oversight. The intent of the legislature is put beyond doubt by section 12, which enumerates the conditions under which the secretary of State may refuse first registration, and by such enumeration impliedly excludes all other conditions. For good measure, it may be noted that section 1 carries its own separate penalty clause, thus indicating the intention of the legislature that for the act of engaging in the business without registration one is subject to a specific penalty. The secretary of State is granted no power to add to it the penalty of refusal of registration.

In our opinion, the act confers no discretion on the secretary of State to refuse initial registration, except as it may be found in section 12, and the writ will issue, but without costs.

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

WIERSMA *v.* NORDELLA.

VENDOR AND PURCHASER—FORECLOSURE—DEFAULT—FRAUD—MISTAKE.

That vendor, relying on advice of real estate dealer instead of consulting attorney, mistakenly thought that contract provided for payments for release of lots in addition to semi-annual payments, while in fact contract provided otherwise, *held*, not to entitle her to foreclosure decree for default, where there was no fraud, no mutual mistake, no estoppel on part of vendees, contract is unambiguous, and under its terms vendees have prepaid substantial amount.

Appeal from Kent; Dunham (Major L.), J. Submitted October 21, 1932. (Docket No. 189, Calendar No. 36,754.) Decided December 6, 1932.

Bill by Jacoba Wiersma against Walter M. Nordella and others to foreclose a land contract. Decree for defendants. Plaintiff appeals. Affirmed.

*Eerde W. Hoogsteen,* for plaintiff.

*Willis B. Perkins, Jr.,* for defendants.

FEAD, J. The action is for foreclosure of a land contract. The question is whether, on construction of the contract, defendants are in default in payments.

The instrument, dated April 7, 1928, provides that the defendant should plat the property into 273 lots and offer them for sale. The consideration was $60,000, of which $6,000 was paid down. The contract was drafted with the understanding that the

vendees must rely largely on sales to make payments. The controversy involves the language:

"The remaining $54,000, the sum secured by this contract, together with interest on the whole sum that shall be from time to time unpaid $2,000, on the 7th day of October, 1928, and $2,000 each six months thereafter; the full balance aforesaid to be paid in 10 years from date. Second parties further agree to plat said property into not less than 273 lots of approximately 6,250 square feet each and agree to record said plat, offer said lots for sale and to pay first party, to apply on payments above specified, one-third of the monthly payments received after the down payment upon sales upon contract and 75 per cent. of the sales price of all lots sold for cash or in which a deed is given the purchaser.

"The interest mentioned above shall be at the rate of six per cent. per annum, from April 7, 1928, and computed semi-annually. Principal or interest not paid when due shall bear interest until paid at six per cent. per annum."

The contract further provides that plaintiff is to execute a deed to a lot when she shall have received $250 from payments on the lot or 75 per cent. of the cash purchase price, equal to or over $250.

Plaintiff construes the contract as requiring payment of $2,000 and interest each six months, and, in addition, $250 for each lot released. Defendants' construction is that the semi-annual payments are $2,000, to cover both interest and principal, and that the $250 per lot released is to be applied thereon.

The release clause affords a margin of over $14,000 above the balance of the contract. Sixty-two lots were sold and $15,500 paid plaintiff. Other sums were paid so that, under defendants' construction, the instalments have been prepaid in the sum of over $6,000.

The contract was drafted by defendants' attorney, who, however, called plaintiff's attention to its provisions and urged that she have it examined by her own representative. Instead of an attorney she consulted a real estate agent who advised her that the provisions were in accordance with her present contention. The difference of construction was manifested at the due date of the first payment, when a controversy arose which has continued to the present time.

There was no fraud in the transaction. There was no mutual mistake warranting reformation. The mistake was unilateral, caused by plaintiff relying upon a real estate agent for legal advice instead of consulting an attorney. Nor do we find the elements of estoppel or practical construction by the parties preventing defendants from taking their present position. The contract is not ambiguous. Defendants' construction is correct.

The decree is affirmed, with costs.

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

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NICHOLS *v.* TALLMADGE.

1. MUNICIPAL CORPORATIONS—PAVEMENTS—PETITION MUST SHOW JURISDICTIONAL FACTS—CITY CHARTER.

As basis of special assessment, petition for paving street is jurisdictional, and therefore must show jurisdictional facts on its face, such as qualifications of signers, although charter does not in terms so provide nor set up form of petition.

2. SAME—INJUNCTION—TAXATION—JURISDICTION.

In suit by property owners to set aside special assessment and to restrain collection of tax for paving street, decree for plaintiffs was properly entered, where petition for pavement failed to show qualifications of signers.

Appeal from Ingham; Carr (Leland W.), J. Submitted October 20, 1932. (Docket No. 167, Calendar No. 36,820.) Decided December 6, 1932.

Bill by Fannie J. Nichols and another, executrixes of the estate of Marcia Jones, deceased, against Nellie D. Tallmadge, treasurer of the city of Lansing, and others to set aside a special assessment for paving. Decree for plaintiffs. Defendants appeal. Affirmed.

*Jason E. Nichols,* for plaintiffs.

*Richard Raudabaugh,* for defendants.

FEAD, J. Plaintiffs filed bill to set aside a special assessment for paving Depot street in the city of Lansing and to restrain collection of the tax. They had decree.

Section 73 of the city charter provides:

"The city council shall have power and authority to determine when any work, or improvement in connection with the city shall be necessary. Provided, that no new pavement shall be laid upon any street in the city, except after a petition signed by a majority of the owners of the property and also the owners of a major portion of the property on said street, has been filed with the city clerk and presented to the council."

The petition, addressed to the mayor and common council, read:

"We, the undersigned, residents and taxpayers of the city of Lansing, do hereby petition your hon-

orable body to pave Depot street from Michigan avenue to E. Ottawa street."

The first question is whether the petition must show that petitioners have the charter qualifications. As a basis of a special assessment, the petition is jurisdictional. Therefore, it must show jurisdictional facts on its face, such as the qualifications of the signers, although the charter does not in terms so provide nor set up the form of the petition. *Tinsman* v. *Monroe Probate Judge,* 82 Mich. 562; *Grand Rapids, etc., R. Co.* v. *Round,* 220 Mich. 475. The other questions need no discussion.

Decree affirmed, with costs.

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

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*In re* PETITION OF AUDITOR GENERAL.

1. TAXATION—EASEMENT IS REAL ESTATE—FLOWAGE RIGHTS.
   Easement in nature of flowage rights is real estate, to be assessed in township where land is located.

2. SAME—REAL ESTATE MUST BE ASSESSED AS ENTIRETY.
   In this State parcel of real estate must be assessed as entirety, at cash value, including worth of standing timber, mineral rights, water power and privileges, etc. (1 Comp. Laws 1929, §§ 3390, 3391, 3415).

3. SAME—FLOWAGE RIGHTS ASSESSABLE AS PART OF LAND ALTHOUGH SEPARATELY OWNED.

Flowage rights should have been assessed as part of land, although they had been sold to separate owner.

4. SAME—WHEN TAX SALE MAY BE SET ASIDE AFTER CONFIRMATION.

Sale for taxes may not be set aside after confirmation, except where taxes were paid, property was exempt from taxation, or there was lack of jurisdiction in court to enter decree of sale (1 Comp. Laws 1929, § 3462).

5. SAME—IRREGULARITY.

Tax may not be held invalid on account of any irregularity in proceedings which does not prejudice property rights of persons whose property is assessed (1 Comp. Laws 1929, § 3492).

6. SAME—TAX SALE—JUDGMENT—ISSUES DECIDED.

On auditor general's petition for sale for taxes, decree is not formal and innocuous thing leaving all sorts of questions unsettled, but is judgment of court determining all issues within its jurisdiction, including issue as to whether property was properly assessed.

7. SAME—ASSESSING FLOWAGE RIGHTS SEPARATELY IRREGULARITY—NOT FATAL DEFECT.

Error in assessing flowage rights and land separately, because separately owned, was mere irregularity and not jurisdictional defect.

8. SAME—DESCRIPTION INCLUDING EXEMPT PROPERTY NOT FATAL.

Tax sale will not be set aside because exempt property was included in description, or because noncontiguous parcels were assessed in one description.

9. SAME—DESCRIPTION—SUFFICIENCY.

Description of land sold for taxes as "N. E. ¼ of N. W. ¼ except flowage rights" of another, *held*, sufficient, as against objection of owner of land that it was so indefinite as to invalidate sale because flowage rights were not described or delimited, since as to owner of land no extrinsic proof was required to identify property or to convey to it information that decree of sale would affect it.

10. SAME—OWNER MAY NOT COMPLAIN OF ERROR NOT AFFECTING ITS RIGHTS—DOUBLE ASSESSMENT.

If flowage rights were twice assessed separately against owner, it could complain, but owner of land, who was not injured thereby, may not complain.

Appeal from Ogemaw; Smith (Guy E.), J. Submitted October 18, 1932. (Docket No. 122, Calendar No. 36,782.) Decided December 6, 1932.

Petition of Auditor General for sale of certain lands for 1927 taxes. Petition of Hydro Land Company to set aside the sale denied. Hydro Land Company appeals. Affirmed.

*Wilson & Hoffman,* for appellant.

*Paul W. Voorhies,* Attorney General, and *Hugh E. Wilson,* Assistant Attorney General, for appellee.

FEAD, J. This is a petition, filed February 25, 1932, by Hydro Land Company, to declare void the sale of certain lands for the taxes of 1927, sold under tax decree of 1930.

Petitioner is owner of the fee of the land, except four parcels to which it has oil and gas leases. Prior to the assessment it had sold and conveyed to Iosco Land Company the "flowage rights," which include right to build dams, canals, waste ways, and power houses, to overflow lands, right of way for access to dams and power lines, right to take lumber, gravel, stone, sand, dirt, and materials from the lands for construction and repair of dams, and other pertinent rights.

For 1927 the fee, "except flowage," was assessed to the petitioner or to others or to "unknown." The flowage rights were assessed separately to Iosco Land Company, and all taxes thereon paid by it.

The petitioner did not appear before the board of review and attack the assessment or valuations. It did not appeal or file objections on hearing of the

auditor general's petition for sale of the land for taxes nor object to confirmation of sale. The tax decree was concededly regular except for petitioner's contentions here made. At the May, 1930, tax sale the lands were sold to various persons who are not made parties to this suit. The court dismissed the petition.

Counsel agree that the easement of the Iosco Land Company is real estate, to be assessed in the township where the land is located. *Glidden* v. *Beaverton Power Co.,* 223 Mich. 383; *Township of Beaverton* v. *Lord,* 235 Mich. 261; *Beaverton Power Co.* v. *Wolverine Power Co.,* 245 Mich. 541.

It is the rule in this State that a parcel of real estate must be assessed as an entirety (1 Comp. Laws 1929, §§ 3390, 3391), at cash value, including worth of standing timber, mineral rights, "water power and privileges," etc. (section 3415). This legislative policy is emphasized by the fact that the statute mentions only a single exception, *i. e.,* the interests of tenants in common, section 3394. The policy was noted and the rule declared in *Fletcher* v. *Township of Alcona,* 72 Mich. 18, and *Curry* v. *Lake Superior Iron Co.,* 190 Mich. 445, in which it was held, respectively, that standing timber and mineral rights must be assessed as part of the real estate although separately owned. To the rule an exception has been made in the case of standing timber on a railroad right of way, the latter not being locally assessable. The timber was assessable to the owner because otherwise it would escape taxation. *Ward* v. *Township of Echo,* 145 Mich. 56.

*Auditor General* v. *Brown,* 243 Mich. 192, is cited as authorizing separate assessment of interests. There, a lodge owned, in fee, the third story of a

building. The whole was assessed to the owner of the land and of the remainder of the building. It was held that the third story should have been assessed separately to the lodge. This was merely a recognition of the latitudinal division of fee ownership, given the same effect as was longitudinal division in *Newaygo Portland Cement Co.* v. *Township of Sheridan*, 137 Mich. 475.

In 1911 the legislature departed from the established policy with respect to the assessment of mineral rights, but returned to it in 1915. *Curry* v. *Lake Superior Iron Co., supra.* This return is significant of the legislative intention that one assessment cover the description. The flowage rights should have been assessed as part of the land.

A sale for taxes cannot be set aside after confirmation except where the taxes were paid or the property was exempt from taxation (1 Comp. Laws 1929, § 3462), or there was lack of jurisdiction in the court to enter decree of sale. *Rumsey* v. *Griffin*, 138 Mich. 413. Nor is the tax to be held invalid on account of any irregularity in the proceedings which does not prejudice the property rights of the persons whose property is assessed. 1 Comp. Laws 1929, § 3492.

On the auditor general's petition for sale for taxes, the decree is not a formal and innocuous thing leaving all sorts of questions unsettled, but is the judgment of the court determining all issues within its jurisdiction. The issues include the question whether the property was properly assessed. *Muirhead* v. *Sands*, 111 Mich. 487. Moreover, the error in assessment was a mere irregularity, not a jurisdictional defect. A sale will not be set aside because exempt property was included in the description (*Smith* v. *Auditor General*, 138 Mich. 582; *Porter*

v. *Auditor General,* 255 Mich. 526), or noncontiguous parcels were assessed in one description. *Detroit Life Ins. Co.* v. *Auditor General,* 228 Mich. 191.

Petitioner further contends that a description ordered sold as "N. E. ¼ of N. W. ¼ except flowage rights Iosco Land Company" was indefinite because the flowage rights were not described nor delimited. As to petitioner, no extrinsic proof was required to identify its property or convey to petitioner the information that the decree would affect it. The description was sufficient. *Cooper* v. *Durham,* 235 Mich. 47.

Petitioner makes the point that taxes were twice assessed and once paid on some descriptions. The facts are not made clear, but the instance cited in the brief indicates that flowage rights were twice assessed separately. If so, the owner of the rights could complain, but petitioner, having no interest therein, was not injured by the double assessment. The record contains no evidence that any tax has been paid on any interest of petitioner.

It thus appears that petitioner's property was not exempt from taxation, the taxes had not been paid, the court had jurisdiction to determine whether the taxes were properly assessed, the fault in the description was a mere irregularity not prejudicial to the property rights of the petitioner, and the sales cannot be set aside.

Affirmed, without costs.

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

*In re* PETITION OF AUDITOR GENERAL.

This case is controlled by *In re Petition of Auditor General, ante,* 578.

Appeal from Ogemaw; Smith (Guy E.), J. Submitted October 18, 1932. (Docket No. 123, Calendar No. 36,783.) Decided December 6, 1932.

Petition of Auditor General for sale of certain lands for 1928 taxes. Petition of Hydro Land Company to set aside the sale denied. G. M. Porter, trustee, intervened. Hydro Land Company appeals. Affirmed.

*Wilson & Hoffman,* for appellant.

*Paul W. Voorhies,* Attorney General, and *Hugh E. Wilson,* Assistant Attorney General, for appellee.

*A. W. Penny,* for intervener.

WIEST, J. The opinion filed this day in *Re Petition of Auditor General, ante,* 578, states the issues here involved and controls every question presented. The instant case involves the taxes assessed for the year 1928.

The decree in the circuit court is affirmed, without costs.

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

## *In re* PETITION OF AUDITOR GENERAL.

TAXATION—TAX SALE—VALIDITY OF TAX—FAILURE TO PAY PENDING APPEAL—APPEAL AND ERROR—STATUTES.

Where taxpayer, appealing from decree in circuit court sustaining validity of disputed tax, failed to obey mandatory provisions of statute requiring payment of tax to county treasurer, to be held pending decision in Supreme Court, appeal is dismissed (1 Comp. Laws 1929, § 3459).

Appeal from Ogemaw; Smith (Guy E.), J. Submitted October 18, 1932. (Docket No. 124, Calendar No. 36,784.) Decided December 6, 1932.

Petition of Auditor General for sale of certain lands for 1929 taxes. Hydro Land Company filed objections to the sale thereof. From decree ordering sale, objector appeals. Appeal dismissed.

*Wilson & Hoffman,* for appellant.

*Paul W. Voorhies,* Attorney General, and *Hugh E. Wilson,* Assistant Attorney General, for appellee.

BUTZEL, J. This is a companion case to two others in which the auditor general of the State of Michigan petitioned the circuit court of Ogemaw county to sell certain lands for taxes. See the opinions in *Re Petition of Auditor General, ante,* 578, for the sale of certain lands for the taxes assessed thereon for the year 1927; and in *Re Petition of Auditor General, ante,* 584, for the sale of certain lands for the taxes assessed thereon for the year 1928.

The instant petition, however, refers to taxes assessed against certain lands for the year 1929. The Hydro Land Company, the objector, attacks certain assessments, and has appealed from the order of the circuit court upholding their validity. Objector has totally disregarded and failed to comply with the mandatory provisions of section 67 of the general tax law (1 Comp. Laws 1929, § 3459), which requires one desiring to appeal from a decree upholding the validity of a disputed tax to pay the amount of the tax found due to the county treasurer within 10 days after the date of the decree, he to retain it until the decision of this court, and, if the tax is held invalid, to return it to the appellant. *In re Petition of Auditor General,* 252 Mich. 367.

For this reason, the appeal is dismissed, without costs.

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

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HARRY & MAX DUNITZ, INC., *v.* MEINECKE.

1. VENDOR AND PURCHASER—FRAUD—OPTIONAL REMEDIES—RESCISSION—DAMAGES.

   Vendees, on discovering that they had been defrauded, had option to disaffirm and rescind, or affirm and sue for damages.

2. SAME—ELECTION OF REMEDY—WAIVER—ESTOPPEL—RESCISSION.

   Where vendees, after discovering that they had been defrauded, continued to make payments, entered into agreement modifying contract, and made payments thereon, they made election to affirm contract, and thereby lost right to rescind.

Appeal from Wayne; Driscoll (George O.), J., presiding. Submitted October 5, 1932. (Docket No. 23, Calendar No. 36,611.) Decided December 6, 1932.

Bill by Harry & Max Dunitz, Inc., a Michigan corporation, contract vendor's assignee, against Helmuth Meinecke and another to foreclose a land contract. Cross-bill by defendants against plaintiff, Joseph Berger, and others for rescission. Decree for cross-plaintiffs. Plaintiff appeals. Reversed as to plaintiff, and decree for foreclosure granted.

*Shapero & Shapero,* for plaintiff.

*Trent McMath* and *Charles R. Fox* (*Alfred Lindbloom,* of counsel), for defendants.

*John W. Babcock,* for cross-defendants Berger.

FEAD, J. The suit is for foreclosure of a land contract. Defendants Meinecke claimed fraud, and, on cross-bill, had decree for rescission, with personal judgment against defendants Berger, which was made a lien on the premises, for the difference between payments made on the contract and rental value of the premises. Plaintiff appealed.

Berger sold to Dr. and Mrs. Meinecke on land contract December 10, 1926. The vendor's interest was conveyed successively to Detroit Parkside Realty Company January 21, 1927, to Michael O'Brien, February 15, 1928, to Max and Harry Dunitz, as individuals, February 15, 1928, and to plaintiff corporation on January 9, 1931.

Defendants Meinecke claimed that Berger represented the house to be of the best construction and

promised to correct defects apparent when they bought and any others that should appear. Some defects developed during the first year and others later. Defendants Meinecke said they relied on Berger's promise, and did not become convinced they had been defrauded until October, 1930.

The testimony is voluminous, and raises several questions, particularly in connection with the undisputed facts that defendants Meinecke made contract payments to the respective holders of the vendor's interest without complaint or claim of fraud until suit was brought, and that when the Dunitzes purchased, Harry made inquiry of Dr. Meinecke, told him they were about to buy, and the doctor assured him that he was satisfied with the house. It is unnecessary to discuss these questions, as another phase of the controversy is determinative upon the right to rescind.

In February, 1931, defendants were in arrears in payments, and plaintiff threatened foreclosure. Defendants consulted an attorney, and, on February 4th, a written agreement was made providing for payment of the delinquency in instalments, in connection with the regular contract payments. Defendants paid under this agreement to May 13, 1931.

Assuming that all remedies were then open to them, defendants Meinecke, on becoming certain of fraud in October, 1930, had the option to disaffirm and rescind or affirm and sue for damages. They also had the duty to make the election within a reasonable time. When, after discovery of the fraud, they continued to make payments on the contract, entered into an agreement modifying it, and made payments thereon, they made an election to affirm the contract and lost the right to rescind. *Bennett* v. *Hickey,* 112 Mich. 379; *Mestler* v. *Jeffries,* 145

Mich. 599; and, see, *Dertinger* v. *Lathrup,* 251 Mich. 476.

Decree is reversed as to plaintiff, and one may be entered in its favor against defendants Meinecke for foreclosure, with costs.

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

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BLANK *v.* AMBS.

1. BOUNDARIES—MUTUAL MISTAKE—ACQUIESCENCE—ADVERSE POSSESSION.

   Where parties attempt to find true line and are mutually mistaken, subsequent acquiescence under mistake of fact does not establish boundary, at least unless continued for statutory period.

2. SAME—INJUNCTION—LINE FENCE.

   In suit to enjoin tearing down of line fence, finding of trial court that boundary had been established by acquiescence for more than 15 years, *held,* not supported by testimony.

Appeal from Jackson; Williams (Benjamin), J. Submitted October 26, 1932. (Docket No. 6, Calendar No. 35,933.) Decided December 6, 1932.

Bill by Rose Blank, as survivor of herself and husband, against Andrew Ambs and another to enjoin destruction of fence on the alleged boundary line. Decree for plaintiff. Defendants appeal. Reversed, and bill dismissed.

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As to effect of acquiescence in boundary lines, see annotation in 4 L. R. A. 643; 69 A. L. R. 1430.

*H. A. Kinch,* for plaintiff.

*Rosenburg & Painter,* for defendants.

FEAD, J. Plaintiffs had decree restraining defendants from tearing down a line fence, which the court held established a boundary by acquiescence for more than 15 years. Plaintiff John Blank died after the hearing.

An old rail and wire fence ran between the properties for many years prior to 1909 and had become quite dilapidated. The land west of the fence was owned by James Donnelly for some 20 years, he sold to Ella Anspaugh in 1914, and she to plaintiffs in 1922. Defendants bought the east parcel in 1909. Both parcels along the fence line at times were pasture lands, and on the north end were covered with brush.

The testimony does not show who built the fence nor whether it was recognized as a boundary by the adjoining owners prior to 1909. It merely shows the existence of the fence, that it was a continuation of one farther south, and that there was no dispute of any sort between defendants and Donnelly or the Anspaughs regarding it prior to 1915.

In 1915 the Anspaughs desired to build a new fence as the old one did not hold stock. Mr. Anspaugh, representing his wife, talked with Ambs as follows:

"When I got ready to put this fence up, I said, shall I put up the fence where this old fence is, and he didn't know whether it was just exactly right or not, I presume, so we measured it from the man on the other side of the fence, Joe Green. We went and found the line fence and measured across to where that fell, and it was so near the place, he said, go ahead and put up the fence where the other old fence was, and that is what I did."

Mrs. Anspaugh testified that the land was measured at Ambs' request, so both parties would be satisfied. It was measured with a 16½-foot pole from a description of Ambs' land. The Anspaughs built a new fence substantially on the line of the old one, and they and defendants had no subsequent dispute about it nor made reference to it.

Blank testified that after he purchased, Ambs told him the fence encroached on Blank's land about nine feet. Blank told Ambs he wanted a survey, but the testimony was not pursued to a definite statement of his purpose, whether he intended to claim the nine feet or not. We need not consider whether this testimony broke a chain of acquiescence.

The north end of the property along the fence is marshy and touches the lake. Defendants sold some lots on the shore, had them surveyed, and found that the fence was not on the line, but that the boundary was 66 feet west of the fence along the lake shore and 52 feet on plaintiffs' south line. They tore down the fence erected by the Anspaughs and another built by plaintiffs in 1928, and threatened to destroy any other that should be erected.

The record presents no showing that any adjoining owner claimed to the other that the fence was on the boundary except that Anspaugh and Ambs so located it after measuring. Anspaugh said it was located as a permanent line fence, while Ambs, who denies that they measured it, said it was agreed the fence could be built on the site of the old one temporarily and until a survey was made. The court accepted Anspaugh's version.

Plaintiff relies on the doctrines, both of acquiescence in a line fence for 15 years and settlement of a doubtful boundary by agreement, as laid down in *Hanlon* v. *Ten Hove,* 235 Mich. 227 (46 A. L. R.

788); *Renwick* v. *Noggle,* 247 Mich. 150; *George* v. *Daniels,* 253 Mich. 293; and the earlier cases cited therein.

The cases are readily distinguishable on the facts. At bar, the survey was made from the calls of the deed, without reference to the fence, and the latter was not a monument. There was no doubt or dispute of the boundary, resolved by agreement. There was no showing that prior to 1915 there had been a claim by either adjoining owner, acquiesced in by the other, that the fence was on the boundary. *Dupont* v. *Starring,* 42 Mich. 492. The lack of such showing, with the condition of the fence, at least balances any inference of acquiescence which might be drawn from its location near the true line.

The fence first took on a definite status in 1915, destroying the continuity of the former condition, when the parties measured from a description of defendants' land and located what they thought was the true boundary. Thereafter they acquiesced in the fence, not as marking an unknown or doubtful boundary agreed upon, but as establishing the true boundary. Where the parties attempt to find the true line and are mutually mistaken, subsequent acquiescence under the mistake of fact does not establish the boundary, at least unless continued for the statutory period. *Thoman* v. *Gross,* 148 Mich. 505; *Cronin* v. *Gore,* 38 Mich. 381; 9 C. J. p. 240; 4 R. C. L. p. 131; *Schraeder Min. & Manfg. Co.* v. *Packer,* 129 U. S. 688 (9 Sup. Ct. 385); *Schwartzer* v. *Gebhardt,* 157 Mo. 99 (57 S. W. 782); *McAfferty* v. *Conover's Lessee,* 7 Ohio St. 99 (70 Am. Dec. 57); *Bemis* v. *Bradley,* 126 Me. 462 (139 Atl. 593, 69 A. L. R. 1399); *Cummings* v. *Williams* (Tex. Civ. App.), 269 S. W. 845; *Huddart* v. *McGirk,* 186 Cal. 386 (199 Pac. 494); *Purtle* v. *Bell,* 225 Ill. 523 (80 N. E. 350).

The testimony did not show the elements of establishment of a boundary by acquiescence.

The decree must be reversed, and the bill dismissed, with costs.

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

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MAURICE *v.* SCHRAMM.

1. LOST INSTRUMENTS—DEEDS—EVIDENCE—SUFFICIENCY.
   In suit to restore lost deed, conclusion of trial court that lost deed was executed and should be restored, *held*, justified by testimony.

2. LIMITATION OF ACTIONS—LOST DEED—SHERIFF'S DEED.
   Suit to establish lost deed from grantee in sheriff's deed is not barred by statute of limitations (3 Comp. Laws 1929, § 13964 [1]), pertaining to title under sheriff's deed, since plaintiff is not attacking said deed, nor claiming title adversely thereto, but claims thereunder and by subsequent conveyance.

Appeal from Wayne; Searl (Kelly S.), J., presiding. Submitted October 11, 1932. (Docket No. 63, Calendar No. 36,369.) Decided December 6, 1932.

Bill by Emile Maurice against Eric Schramm to restore a lost deed. Cross-bill by defendant against plaintiff and others to clear title. Decree for plaintiff. Defendant Schramm appeals. Affirmed.

*William E. Dowling* (*Samuel W. Shier*, of counsel), for appellant.

*Barbour & Martin* (*Henry C. L. Forler*, of counsel), for appellee.

FEAD, J. This is a bill to restore a lost deed.

In 1920 plaintiff, a retired farmer with some wealth, loaned Robert Wilson money which, with bonus, amounted to $14,400, secured by real estate mortgage. He and defendant had been friends for many years, and on May 6, 1922, plaintiff assigned the mortgage to defendant, taking his note for $14,400. Shortly thereafter the mortgage was foreclosed, and sheriff's deed issued to defendant on October 3, 1922. It is plaintiff's claim that on the same day, or shortly thereafter, defendant executed a quitclaim deed of the premises to plaintiff and delivered it to the latter's attorney, John C. Tobias, who failed to have it recorded, and who lost it.

The testimony portrays an unusual case of business dealing unless, as might be suspected from the testimony, the transaction was colorable to save the loan from a possible defense of usury. The advantage of personal observation of the witnesses was substantial. The circuit court held the deed had been executed by defendant to plaintiff, and decreed its restoration.

It is established that Tobias conducted the foreclosure proceedings, and plaintiff paid the expenses. Tobias managed the property for plaintiff until 1925. In January, 1928, plaintiff entered into an agreement to sell to Albert E. Day. In this transaction plaintiff invested $15,000 in remodeling the two-family flat on the lot into a seven-family apartment and connecting it with a similar building on

an adjoining lot owned by plaintiff, so that a single heating plant served both buildings. Trouble arose between plaintiff and Day, and the latter's contract was declared forfeited in November, 1930. In connection with the trouble, Mr. Tobias searched for the deed, was unable to find it, and ascertained it had not been recorded. Demand for a deed was made on defendant and refused.

Defendant paid no attention to the property nor made any claim to it until 1929, when, in the controversy with plaintiff, Day brought it to defendant's attention. It is evident that, on finding that the record title was in him, a desire to claim the property arose in defendant.

We think the testimony is clear that, out of the transaction between plaintiff and defendant, both fully understood, and so acted, that the property belonged to plaintiff, and, with the direct testimony of execution of the deed, justified the conclusion of the court that the lost deed was executed and should be restored.

Defendant's claim that the statute of limitations, 3 Comp. Laws 1929, § 13964 (1), pertaining to title under sheriff's deed on foreclosure, bars the action, is untenable. Plaintiff is not attacking the deed nor claiming title adversely thereto, but claims thereunder and by subsequent conveyance.

Decree is affirmed, with costs.

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

ZEIDLER *v.* BURLINGAME.

1. VENDOR AND PURCHASER—FORECLOSURE—ASSIGNMENTS—LIABILITY OF ASSIGNEE FOR DEFICIENCY DECREE.

   On foreclosure of land contract, vendee's assignee is subject to deficiency decree if assumption of liability is effective as between vendee and assignee, notwithstanding there is no privity of contract between vendor and assignee, which would be necessary to maintain action at law.

2. SAME—VENDOR'S CONSENT TO ASSIGNMENT—ORAL CONSENT—CONSIDERATION.

   Where agreement assigning vendee's interest in land contract provided that assumption of obligation by assignee was on condition of assent thereto by vendor, but not providing that said assent be in writing, oral consent would be fulfillment of said consideration.

3. SAME—WAIVER OF WRITTEN CONSENT—ASSIGNMENTS.

   Oral consent by vendor to assignment of land contract by vendee would validate assignment, notwithstanding provision in contract that such consent must be in writing, since oral consent would amount to waiver of provision for written consent.

4. SAME.

   Vendor's conduct in accepting assignment of land contract by vendee, attaching it to his copy of contract, receiving payments from assignee, and thereafter treating him as vendee, *held*, to amount to waiver of provision in land contract for written consent to assignment.

5. SAME—ACCEPTANCE—SPECIFIC PERFORMANCE—WAIVER.

   Where vendee's assignee made payments to vendor for more than four years, at one time wrote to vendor asking for extension of time to make payment and promising to pay in full, and made no complaint because vendor's consent to assignment had not been made in writing, he is *held*, to have accepted vendor's conduct as performance of contract for consent, or, in alternative, he waived specific performance by making payments and acknowledging both by conduct and in writing his personal obligation under contract.

6. SAME—ASSIGNMENTS—WAIVER.

Where vendee's assignee assumed liability on condition of vendor's assent to assigment, if it was vendee's duty to secure vendor's assent, said duty was waived by assignee's keeping contract for four years without complaint, making payments, and acknowledging his liability under contract.

Appeal from Wayne; Driscoll (George O.), J., presiding. Submitted October 19, 1932. (Docket No. 133, Calendar No. 36,774.) Decided December 6, 1932.

Bill by Reinhold A. Zeidler against Lewis F. Burlingame and another and Harry Suffrin, vendee's assignee, to foreclose land contracts. From decree for deficiency as to all defendants, defendant Suffrin appeals. Affirmed.

*Albert McClatchey,* for plaintiff.

*Butzel, Levin & Winston* (*Chris M. Youngjohn,* of counsel), for defendant Suffrin.

FEAD, J. Defendant Suffrin reviews decree for deficiency against him on foreclosure of two land contracts. As the contracts are identical upon the issues here, we will speak in the singular for convenience.

The contract, executed in 1923, runs from plaintiff and wife, the latter since deceased, to defendants Burlingame, and provides:

"It is further agreed, by the parties hereto, that the said parties of the second part shall not assign this contract without the consent of the parties of the first part being first indorsed in writing hereon and on the duplicate copy hereof held by the parties of the first part."

Defendants Burlingame assigned to defendant Suffrin in November, 1925, by assignment providing:

"That Harry Suffrin, party of the second part, assignee as above named, does hereby accept the above assignment and transfer, and in consideration of the assent of Reinhold A. Zeidler and Olga H. Zeidler, his wife, the vendors in the annexed land contract, to said transfer, does hereby covenant and agree to assume and fulfil all the conditions and obligations therein contained on the part of the said party of the second part therein to be fulfilled."

Burlingame sent the assignment to plaintiff, who attached it to his contract. Plaintiff executed no written consent to the assignment, expressed no oral consent, was not asked to do either, but was and is willing to execute formal consent. Collections were made by his agent, and plaintiff never saw Suffrin until shortly before trial.

Suffrin made payments on the contract to plaintiff's agent from April 20, 1926, to May 9, 1930. On one occasion he was in arrears, plaintiff gave him notice of forfeiture, commenced summary proceedings for possession, Suffrin paid the sums due, the action was discontinued, and the contract reinstated. In December, 1929, and March, 1930, Suffrin wrote plaintiff directly, asking extension of time of payment, and, in one letter, promising to pay in full. Suffrin made no complaint to Burlingame or plaintiff that plaintiff's consent had not been obtained or indorsed. He had possession of a duplicate contract, and said he did not know there was no consent on it until the case came up and his attorney discovered it.

The right of plaintiff to deficiency decree against Suffrin does not depend upon an assumption of lia-

bility by the latter, of a character which would produce privity of contract between plaintiff and Suffrin, as was involved in *Sloman* v. *Cutler,* 258 Mich. 373, a suit at law. If the assumption of liability is effective as between Burlingame and Suffrin, the latter would be subject to deficiency decree. *Barnard* v. *Huff,* 252 Mich. 258 (77 A. L. R. 259); *Hamburger* v. *Russell,* 255 Mich. 696.

Suffrin contends that the consideration for his assumption of the obligation was the consent of the vendor, that written consent by the vendor was contemplated in order to furnish him complete title papers, and that the consideration failed, and the obligation fell with it.

The circumstances negative the contention that written consent was in the minds of the parties. It was not so provided in the instrument. The assumption of obligation by Suffrin was in the present tense. The instrument had not yet been presented to plaintiff for indorsement of consent. If the parties were concerned with the technical validation of the assignment, they would have expressed the assumption in future terms, conditioned on consent being executed in conformity with the contract, and Suffrin would have made sure that his copy was properly indorsed.

Viewing and reading the assignment normally, it is apparent that the consideration for the assumption of obligation was such consent by the vendor, whether written, verbal, or otherwise, as would validate the assignment. In other words, the parties were concerned with the substitution of Suffrin for Burlingame as vendee, not so much with the technical means of accomplishing that purpose.

Oral consent by plaintiff would be a fulfillment of the consideration. It would validate the assign-

ment because it would amount to a waiver of the contract provision for written consent. *Maday* v. *Roth,* 160 Mich. 289 (136 Am. St. Rep. 441). Such waiver actually occurred by plaintiff's conduct in accepting the assignment, attaching it to his contract, receiving payments from Suffrin, and treating him as vendee. *Distasio* v. *Gervasio,* 234 Mich. 482. As a matter of fact, Suffrin received all he bargained for as consideration for his undertaking.

Moreover, Suffrin accepted vendor's conduct as performance of the contract for consent, or, in the alternative, he waived specific performance by making the payments and acknowledging, both by conduct and in writing, his personal obligation under the contract. The rule of waiver in the *Distasio Case* applies to Suffrin.

Again, the contract of assumption of liability was between Burlingame and Suffrin. If it was Burlingame's duty to secure the assent of the vendor, the duty was waived by Suffrin keeping the contract for four years without complaint to Burlingame, making payments, and acknowledging his liability upon the contract. *Distasio* v. *Gervasio, supra.*

Decree affirmed, with costs.

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

VALENTINE *v.* KING MANFG. CO.

1. APPEAL AND ERROR—DECLARATION TREATED AS AMENDED ON APPEAL.

   Defendant's motion to strike first count from plaintiff's amended declaration, on ground that it did not state complete cause of action, was properly denied, since amendment should be allowed, if necessary, in Supreme Court, to meet objection (Court Rule No. 19[1931]; former Circuit Court Rule No. 22).

2. CONTRACTS—OFFER AND ACCEPTANCE—WORK AND LABOR.

   Resolution adopted by board of directors that employee's commission be certain amount, where followed by service rendered and accepted, must be construed as offer to employ and acceptance of said offer, constituting contract of hire.

3. EVIDENCE—CONSTRUCTION OF CONTRACT—AMBIGUITY—PAROL EVIDENCE.

   Where resolution adopted by board of directors offering employment to employee was so uncertain and ambiguous that its acceptance left contract of employment uncertain and indefinite, extrinsic testimony should have been admitted to explain ambiguous terms of said resolution.

Appeal from Wayne; Runnels (Herbert W.), J., presiding. Submitted October 4, 1932. (Docket No. 3, Calendar No. 36,626.) Decided December 6, 1932. Rehearing denied March 2, 1933.

Assumpsit by Richard F. Valentine against King Manufacturing Company, a Michigan corporation, on a contract of employment. Judgment for plaintiff. Defendant appeals. Reversed.

*Kamman & Tuer* (*Younglove & Chockley*, of counsel), for plaintiff.

*Goodenough, Voorhies, Long & Ryan,* for defendant.

NORTH, J. Plaintiff brought suit for a balance which he claimed was due to him from defendant as salary computed on a commission basis. He had judgment for $2,836.37; and defendant has appealed.

Defendant is a Michigan corporation engaged in manufacturing a product marketed in the United States, the Dominion of Canada, and various other foreign countries. Early in 1925 plaintiff entered defendant's employ under the following agreement:

"We agree to pay you, during 1924 (1925), on shipments into our domestic territory (which includes the United States and Canada), a commission of five per cent. on all sales in this territory up to $100,000; seven and one-half per cent. on all sales in excess of $100,000."

Plaintiff's employment continued under the above terms until January 5, 1928, on which date at the annual meeting of the directors of the defendant company the following resolution was passed:

"Moved by C. H. Bennett, supported by E. C. Hough, that R. F. Valentine's commission be five per cent. on $100,000 and seven and one-half per cent. on any amount over $100,000. Carried."

Plaintiff continued in defendant's employ during the year 1928 under the above resolution. Theretofore he had discharged the duty of sales manager, but during 1928 he acted as general manager and vice-president of defendant company. At the end of the calendar year defendant dispensed with plaintiff's services and tendered him a check for $680.83, claimed by defendant to be the balance of commis-

sions due plaintiff. The computation by which the amount tendered plaintiff was determined included commissions on defendant's sales in the United States and Canada only. Plaintiff claimed that the amount tendered was insufficient, and then asserted for the first time that he was entitled to commissions upon all sales of defendant for the year 1928. Defendant refused to pay commissions on sales other than those in the United States and Canada. This suit followed, and, on trial before the court without a jury, judgment was rendered for plaintiff as above stated.

On appeal to this court the defendant asserts that the trial court was in error in denying defendant's motion to strike the first count from plaintiff's amended declaration on the ground that it did not state a cause of action. We forego detailed discussion, and hold that, even if defendant's contention that the count does not state a complete cause of action is well grounded, still an amendment should be allowed, if necessary, in this court to meet the objection. See Court Rule No. 19 (1931), and former Circuit Court Rule No. 22.

In his opinion the trial court held:

"The resolution passed by defendant's board of directors on June (January) 5, 1928, is clear and unambiguous. It includes all sales, it being significant that the limitation as to domestic sales contained in the first contract of hiring had been eliminated therefrom.

"Defendant seeks to avoid the effect of this resolution, claiming that it does not constitute a contract of hiring."

We think the contention of defendant as just above stated in the opinion of the trial court is not tenable. Plaintiff was present and took part in the

directors' meeting at which the quoted resolution was passed. Plaintiff's services for the ensuing year were rendered by him under this resolution for his employment. Under such circumstances defendant's resolution must be construed as an offer to employ plaintiff, and the services subsequently rendered by him and accepted by defendant constitute an acceptance of the offer. Hence defendant's contention that its motion for plaintiff's employment, notwithstanding it was subsequently consummated by the rendering and acceptance of services thereunder, did not constitute a contract of hire, cannot be sustained. 14A C. J. p. 761.

The remaining question presented in this appeal is whether or not the motion for defendant's employment was so incomplete and indefinite, in view of all the surrounding circumstances, as to leave the terms of the contract of hire ambiguous and therefore subject to explanation and amplification by extraneous testimony. As noted in the above-quoted portion of the circuit judge's opinion, he held that this motion or resolution "is clear and unambiguous." With this holding we are unable to agree.

A literal reading of the above-quoted motion makes it applicable to all sales without regard to the territory wherein such sales were made; and it must be so construed unless it appears from the record that the terms in which the motion is expressed are so indefinite, uncertain, and incomplete as to make explanation and amplification by extraneous testimony admissible, including the construction (if any) that the parties themselves have placed upon the contract. That the motion is not a plenary embodiment of the contract terms is too evident

for argument. Except by implication, it does not state on what plaintiff's commissions are to be computed, whether on sales or profits or some other basis; if on sales, the motion contains no provision as to canceled sales or goods returned; it contains no provision as to when the commissions are considered earned and payable; nor does it specify any period covered by the contract. In addition to the above, unlike plaintiff's former contract, this motion does not limit the territory in which the sales were to be made on which plaintiff's commission was based; nor on the other hand, does it specify that his commission is to be computed on all of defendant's sales. It is, therefore, obvious that there was no attempt to cover all the details of plaintiff's employment. Obviously the terms of the motion passed by the directors on January 5th left the contract relations between these parties so uncertain and indefinite as to justify the taking of extrinsic testimony in the light of which the actual contract between the parties can be ascertained.

In making his case plaintiff offered testimony of a conversation with a director who seemed to occupy the position of a manager of the defendant company. Plaintiff claimed that this conversation shortly preceded, led up to, and explained the motion passed by the directors on January 5th following. Defendant's objection to this testimony was sustained. We think it should have been received. Later, when defendant was making its case, it also offered testimony which it claimed tended to explain the terms of the contract. We do not here pass upon the admissibility of the particular testimony offered by defendant; but if competent testimony of this character was offered, we think it also should

have been received. The record now before us is such that the rights of the respective parties cannot be fully considered and accurately adjudicated. This can be done only after the receipt of any competent testimony which will tend to explain, qualify, or amplify the ambiguous terms of the motion passed at the directors' meeting on January 5th.

The judgment entered in the circuit court will therefore be set aside, and the case remanded for a new trial. The costs on this appeal will abide the final outcome of this suit.

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

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EQUITABLE TRUST CO. *v.* DETROIT GOLF & RECREATION CO.

1. MECHANICS' LIENS—BURDEN OF PROOF.
   Burden is on lienor to establish right of lien.

2. SAME—EXCESSIVE CLAIM—GOOD FAITH—STATUTES.
   Where lienor's bad faith in filing statement of lien was convincingly evidenced by failing to give credit for payment on account of over $3,000, and including nonlienable items of considerable amount, true character of which was not disclosed by account filed or by that served on defendant, trial court properly held lien invalid (3 Comp. Laws 1929, § 13105).

Appeal from Wayne; Rathbun (George A.), J., presiding. Submitted October 20, 1932. (Docket No. 178, Calendar No. 36,849.) Decided December 6, 1932.

As to inclusion of nonlienable items, see annotation in 29 L. R. A. (N. S.) 315.

Bill by Equitable Trust Company, a Michigan corporation, trustee for J. W. Butler Construction Company, bankrupt, against Detroit Golf & Recreation Company, a Michigan corporation, and Joseph F. Weber to foreclose a mechanic's lien. Bill dismissed. Plaintiff appeals. Affirmed.

*Bruno L. Blinstrub* (*Bryant, Lincoln, Miller & Bevan,* of counsel), for plaintiff.

*Longley, Bogle & Middleton,* for defendant Weber.

NORTH, J. In this suit in equity plaintiff seeks foreclosure of a mechanic's lien. Decree was entered in the circuit court dismissing the bill of complaint, and plaintiff by its trustee in bankruptcy has appealed.

The defendant Joseph F. Weber, being the owner of a parcel of vacant land in the city of Detroit, in 1930 leased it to the other defendant, the Detroit Golf & Recreation Company, a Michigan corporation. This lease was for a term of four years and 10 months, and provided that the property was to be used as a "recreation park." The parties contemplated the construction and operation of a golf driving course; and the lease required the lessee to expend within four months from the date of the lease $10,000 in "fences, buildings, booths, etc." The lease further specified that such improvements should not be removed, and that they would become the property of the lessor upon expiration of the lease. Immediately upon execution of the lease the lessee, the Detroit Golf & Recreation Company, entered into a written contract with the J. W. Butler Construction Company for the construction of the

golf driving range, buildings, and other improvements incident to developing the contemplated enterprise. The contract provided that plaintiff should be paid the cost of labor and materials furnished plus a fee of 10 per cent. It was performed by plaintiff, but except as hereinafter noted plaintiff was not paid. Plaintiff served each of the defendants with notice of intention to claim a lien upon the property, and within the statutory period it did file a claim of lien and statement of its account in the amount of $17,006.67, and notice thereof was served on each of the defendants.

The golf driving range proved to be an unsuccessful venture, and within a few months the Golf & Recreation Company was ousted from possession of the leased premises for nonpayment of rent. It has not appeared in defense of the present suit. In this connection it may be noted that two of its directors were likewise officers of or interested in plaintiff company. Evidently, because of the nature of this lease, plaintiff's lien is asserted against the rights of the lessor. See *Hart* v. *Reid,* 243 Mich. 175. Joseph F. Weber contests the validity of plaintiff's alleged lien on several grounds. Among them, he asserts that plaintiff fraudulently filed a claim of lien for an excessive amount, and that the claim of lien included a substantial amount of nonlienable materials. It was on these grounds, and others which need not be reviewed, that the circuit judge held the lien invalid, and dismissed plaintiff's bill of complaint.

As above noted, plaintiff filed a claim of lien in the amount of $17,006.67. We forego review of the record upon which defendant bases a claim that in arriving at this total plaintiff has made excessive

charges for both labor and material. The circuit judge found that this claim was sustained by the proof. But apart from this phase of the case, the record clearly discloses that prior to filing its claim of lien plaintiff had received over $3,000 on its account, and that in fixing the amount of its claim it gave no credit whatever for the amount so received. It also appears by convincing proof that there was included in the account for which plaintiff claims a lien upwards of $1,500 of materials as to which there was not the least justification for asserting a right of lien, such as golf balls, water pails, cocoa mats, etc. And the bad faith of plaintiff in so doing is quite convincingly evidenced by the fact that the character of these materials was not disclosed by the account it filed or the one it served on the defendant Weber. Instead, the nature of these charges was not developed or disclosed until the cross-examination of plaintiff's witnesses at the hearing of the case. The lien also included expenditures for insurance, cartage, and other items which we think were nonlienable. We cannot resist the conclusion that plaintiff knowingly suppressed the true status of this account, and intentionally made claim of a lien for hundreds of dollars in excess of the amount actually due plaintiff. The burden was on plaintiff to establish its right of lien. *R. C. Mahon Co.* v. *Ford Motor Co.*, 256 Mich. 255. Further, the statute requires the lien claimant to file "a just and true statement or account of the demand due him." 3 Comp. Laws 1929, § 13105. In making disposition of this case we are not unmindful of the following propositions of law:

"But we have uniformly held that where the mistake is not made in bad faith but there is an honest

mistake of fact made in the honest belief of its correctness, the lien will not be lost by reason of the excessive claim." *Ypsilanti Lumber & Coal Co.* v. *Leslie,* 218 Mich. 664.

See, also, *Gibbs* v. *Hanchette,* 90 Mich. 657.

"A lien is not rendered void by the fact that there are included in the claim nonlienable as well as lienable items, where there is no dishonest attempt on the part of the claimant to obtain more than is his due, and where by reason of the method of stating the claims the lienable and nonlienable items can be segregated." 18 R. C. L. p. 942.

But a careful review of this record satisfies us that the circuit judge was right in his opinion wherein he states:

"This court cannot credit plaintiff with good faith in originally filing its lien without making any allowance for the foregoing then known credit, and in also failing to deduct the items not lienable."

The decree entered in the circuit court is affirmed. Appellee will have costs.

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

BAY CITY BANK *v.* CONCORDIA MUTUAL FIRE INSURANCE CO.

BILLS AND NOTES—BANK CHECK—PRESENTMENT WITHIN REASONABLE TIME—STATUTES.

Where check was delivered to payee in afternoon, was deposited in bank for collection next morning, and by it, following usual custom, held for clearance next day, when drawee bank, located in same city, failed to open its doors; said check was presented within reasonable time, and loss must fall on drawer (2 Comp. Laws 1929, §§ 9249, 9435; Act No. 240, Pub. Acts 1931).

Appeal from Bay; Houghton (Samuel G.), J. Submitted October 21, 1932. (Docket No. 188, Calendar No. 36,851.) Decided December 6, 1932.

Assumpsit by Bay City Bank, by its receiver, against Concordia Mutual Fire Insurance Company for the amount of a check. Judgment for plaintiff. Defendant appeals. Affirmed.

*Carl H. Smith,* for plaintiff.

*Gilbert W. Hand,* for defendant.

NORTH, J. The question here presented for review is set forth in appellant's brief as follows:

"Where defendant delivered a check to plaintiff on December 1, 1931, early enough for plaintiff to have presented same that day for payment to payee [drawee] bank, or could have deposited it for collection in its collecting bank on that day and it would have been paid in the clearances on December 2d, and all of the parties are in the same city, but in-

As to reasonable time in presenting checks, see annotation in 13 L. R. A. 44.

stead plaintiff deposited it for collection on December 2d in its collecting bank and it was not presented for payment on December 2d but was held for the clearances on December 3d, when the payee [drawee] bank failed to open its doors, was there due presentment?"

The trial court held there was due presentment; and for reasons herein stated we think the holding should be affirmed. Appellant cites, and to some extent at least relies upon, *Holmes* v. *Roe* (1886), 62 Mich. 199 (4 Am. St. Rep. 844), which holds (syllabus):

"Where the person receiving a check, and the banker on whom it is drawn, are in the same place, in the absence of special circumstances it must be presented for payment the same day, or, at latest, the day after, it is received."

If there were no changes effected in the law by statutory enactments subsequent to decision in the *Holmes Case,* we think appellant would be correct in asserting that it is a controlling precedent, unless the instant case is distinguished by proof of a controlling local custom. The pertinent sections of the negotiable instruments act, which became effective in 1905, are:

"A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." 2 Comp. Laws 1929, § 9435.

"In determining what is a 'reasonable time' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case." 2 Comp. Laws 1929, § 9249.

Section 9435, above quoted, is merely declaratory of the common-law rule. See note in Bunker on Negotiable Instruments, p. 228. But in addition to the above-quoted statutory provisions we have the more recent Act No. 240, Pub. Acts 1931, known as the bank collection code, which provides:

"SEC. 6 (B). Where an item is received on deposit or by a subsequent agent bank for collection, payable by or at another bank in the same town or city in which such agent bank is located, it shall be deemed the exercise of ordinary care to present the item for payment at any time not later than the next business day following the day on which the item is received either (1) at the counter of the drawee or payor by agent or messenger or (2) through the local clearing house under the regular established procedure, or according to the usual banking custom where the collecting or payor bank is located in an outlying district."

Because of this statutory provision, the depository bank in the instant case conclusively "exercised ordinary care" by presenting this check for payment to the drawee bank the "next business day following the date on which the item" was received. It must follow that there was no negligence in presenting this check for payment unless the payee was guilty of negligent delay in depositing it in its bank. As noted above, defendant delivered its check to plaintiff between one and three o'clock in the afternoon of December 1, 1931, and plaintiff deposited the check in its bank for collection the next morning. We have found no case holding that one who acted with this degree of promptness in depositing a check for collection in regular course was negligent in that he did not deposit it within a reasonable time after its issue. To require a

greater degree of promptness would be a bar to the reasonable practical use of checks in commercial transactions. If a creditor is willing to accommodate a debtor by accepting his check in lieu of cash the debtor must grant to the creditor a reasonable opportunity to place the check in due course for collection. The debtor's alternative is to pay in cash. Further, it would seem to be a strained construction of the law to require a greater degree of promptness on the part of the payee in depositing a check for collection than is required by express statutory provision of the depository bank in presenting the check for payment to the bank upon which it is drawn. In the instant case the payee acted with the reasonable degree of diligence required by law.

Appellant has cited decisions holding that transfer of a check or depositing it in a bank for collection does not extend the time of presentment for payment; and many cases are cited to the proposition that where the parties reside in the same place presentment for payment must be not later than the next business day after receipt. We think the practical effect of Act No. 240, Pub. Acts 1931, is to extend the time for presentment, and to render the cited cases inapplicable. The wisdom and fairness, and we may almost say the necessity, of the statutory provision is self-evident to any one familiar with the use of checks in ordinary commercial transactions.

The holding of the trial court is further fortified by ample testimony of competent witnesses that the depositing of this check the morning following its receipt and its presentment for payment the next day after it was deposited was according to the

regular custom of business at the time and place of this transaction. See 2 Comp. Laws 1929, § 9249, above quoted.

Judgment is affirmed, with costs to appellee.

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

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WALTER *v.* PRATT.

REPLEVIN—CHATTEL MORTGAGES—GOOD FAITH—DIRECTED VERDICT.

In replevin proceedings to obtain possession of property covered by chattel mortgage, where plaintiff's testimony that he deemed himself insecure was in no way contradicted, question of his good faith was properly disposed of as question of law.

Appeal from Genesee; Parker (James S.), J. Submitted October 14, 1932. (Docket No. 105, Calendar No. 36,584.) Decided December 6, 1932.

Replevin by Arthur Walter against Fred Pratt and another to recover certain farm stock and tools. Directed verdict and judgment for plaintiff. Defendants appeal. Affirmed.

*Neithercut & Neithercut,* for plaintiff.

*Herbert W. Smith,* for defendants.

NORTH, J. Incident to the sale of a team of horses, a wagon, and certain farm tools by plaintiff to the defendant Fred Pratt, the former took a chattel mortgage from the latter and his wife. This chattel mortgage covered the property sold and in addition thereto six cows. It was given November 18, 1930, in the sum of $450, and was due and payable one year from date. The mortgage contained the usual clause that any time the mortgagee deemed himself insecure he might take possession of the mortgaged property. Asserting that he deemed himself insecure, in June, 1931, defendant demanded possession of the property. After being refused possession, he instituted replevin proceedings in the circuit court of Genesee county, and by execution of the writ obtained possession of the mortgaged property. Defendant's mother, Sarah Pratt, instituted suit against plaintiff herein and thereby established her claim that she was the owner of five of the cows and one of the horses which plaintiff had claimed were covered by his mortgage. Plaintiff's testimony is undisputed that before he started the instant suit in replevin he was aware that Mrs. Pratt claimed to be the owner of the five cows and one horse; and he also testified that if he had obtained possession of all the property covered by the mortgage it was doubtful whether it was sufficient to secure to him payment of the amount Mr. Pratt owed him. Some time prior to instituting the replevin suit, Pratt had told plaintiff that all he would ever get in satisfaction of the debt was the team and harness; and further, the former testified that his mother owned all the property.

Upon trial of the replevin case and at the close of proofs, the court granted plaintiff's motion that a verdict be directed in his favor. Judgment was

accordingly entered, and the defendants have appealed. The sole question presented is whether the circuit judge was justified under the record in directing verdict for plaintiff, or whether the question of plaintiff's good faith in asserting that he deemed himself insecure should have been presented to the jury as an issue of fact. In addition to the facts and circumstances above stated, it may be further noted that the property seized by plaintiff and held under the writ of replevin appears from the undisputed testimony to have been of far less value than the amount of the chattel mortgage. The circuit judge gave as his reasons for directing the verdict: "There is no evidence in this case, as I look at it, in any way to contradict the statement that the plaintiff believed himself to be insecure." A review of this record satisfies us that the circuit judge was fully justified in so holding.

The judgment is affirmed, with costs to appellee.

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

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## COLE v. SOUTHERN MICHIGAN FRUIT ASS'N.

CORPORATIONS—BY-LAWS—CO-OPERATIVE MARKETING.

Where by-laws of nonprofit corporation, organized for purpose of co-operative marketing of fruit, provided that each day's shipment should be prorated and filed separately, and that, on receipt of returns for each day's shipment, check should be drawn for amount due each member for fruit shipped on said day, association, on discovering it had sustained loss, had no authority to place all receipts in general fund and prorate it among members, but payment should be made in accordance with by-laws.

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As to cooperative marketing of farm products by producers' association, see annotation in 25 A. L. R. 1113; 33 A. L. R. 247; 47 A. L. R. 936; 77 A. L. R. 405.

Appeal from Van Buren; Warner (Glenn E.), J. Submitted October 19, 1932. (Docket No. 151, Calendar No. 36,659.) Decided December 6, 1932.

Assumpsit by L. L. Cole against Southern Michigan Fruit Association, a nonprofit co-operative corporation, for sums alleged to be due under a marketing agreement. Judgment for plaintiff. Defendant appeals. Affirmed.

*Lewis R. Williams,* for plaintiff.

*David Anderson,* for defendant.

NORTH, J. The defendant is a nonprofit Michigan corporation organized for the purpose of providing co-operative methods of disposing of fruit and co-operative methods of purchasing supplies needed by fruit growers in the locality where plaintiff resides. Prior to bringing this suit plaintiff had been a member of the association for more than 20 years; and he, together with other members, signed a so-called marketing agreement. This agreement, together with certain by-law provisions, sets forth the manner in which the defendant association was to represent its members in the sale of their fruit. For many years defendant had marketed large quantities of grapes through an association now known as the Federated Fruit & Vegetable Growers, Inc. In 1930 this latter association became insolvent. It was then owing about $55,000 to defendant. Its failure to pay defendant this amount resulted in the latter's inability to pay in full for the fruit it had received from and shipped for its members during the season of 1930. In this suit plaintiff had judgment for the balance he claimed was due to him for 1,414 baskets of grapes delivered to and sold by

defendant. From this judgment defendant has appealed.

A further statement of facts is essential to an understanding of the contention made by the respective parties. On October 16, 17, and 18, 1930, plaintiff delivered to defendant nearly a carload of grapes by loading them into a car procured by defendant. Another grower loaded 86 baskets of grapes in the same car. Just at this time a buyer with two automobile trucks offered to purchase these grapes. The bargain was consummated by Mr. Hardy, who was managing this phase of defendant's business. The quantity of grapes in this car was not sufficient to make two full truck loads, and a further quantity of grapes sufficient to fully load both trucks was secured from plaintiff's vineyard. In this way a total of 1,414 baskets of plaintiff's grapes were sold and delivered to this buyer October 19, 1930. Mr. Hardy was paid by check a total of $628.28, and of this amount $593.88 was for plaintiff's grapes. The money received went to the defendant association; and it is asserted by plaintiff that he is entitled to be paid for this particular shipment of October 19th. On the other hand, the defendant association asserts that this money went into its general funds and should be distributed by *pro rata* payment to all the members for money due them for fruit shipped through the defendant association during the season. The association claims it was acting only as agent in making shipments and sales for its members; that it did not become the owner of the grapes, and that it cannot be held liable for payment unless it received the money for them, and it not having received money sufficient to pay in full for the grapes which it shipped for its members, it is not liable to plaintiff or its other members beyond the

amount it has received and already paid to them. Acting accordingly, the defendant has paid to plaintiff and other members two partial payments, each being 16 per cent. of the amount due.

This controversy involves a construction of the association's by-laws and marketing agreement. Section 10, article 3, of the by-laws, in part reads:

"The financial secretary shall keep the accounts of the association, an account with each member of the association, and with each person or firm to whom the association shall sell or consign fruit. Each day's shipments shall be prorated and filed separately, and on receipt of returns for each day's shipments, he or she shall at once prepare a statement of the whole number of packages of each class and kind of fruit sold on said day; and the total amount of money received for said fruit, with the net price per ton or package, and the number of tons or packages shipped by each member on said day and the amount due each member for the same. Said statement shall also show the amount received for all varieties of fruit, other than grapes, shipped on the same day and not pooled. He or she shall draw a check upon the treasurer for the amount due each member for fruit shipped on said day to be signed by the president and secretary of the association, or by an employee designated by them."

The marketing agreement provides that the member appoints the association as his sales agent to sell his grapes, and contains the following:

"3. (a) The association shall pool, or mingle, the products of the growers with products of a like variety, grade and quality delivered during the crop season by other growers; and each pool shall cover the shipments of each day during the crop season, as determined by the association. * * *

"4. The amount to be paid to the grower shall be based on the proportional value in grapes delivered by him to the association, out of the total receipts of money from the sale or disposition of the grapes, in any form according to variety, quality, and grade, less the deductions hereinabove mentioned, all as determined by the association. Payments shall be made from time to time in the discretion of the association."

In this connection, defendant's manager, Mr. Hardy, testified that the payments made were "on the basis of the sales for the day" and "that 16 per cent. payment was made to all growers who had put grapes into the association after October 2d" regardless of whether the money had been received for each grower's shipment. He also testified that plaintiff's 1,414 "packages" of grapes were delivered to the buyer on Sunday, October 19th, and that he did not believe that any other grapes than those contained in this shipment were delivered on that day. We think the fair inference is that there were no other grapes delivered on that day. The defendant's bookkeeper testified as follows:

"*Q.* Now did you pool out each day's shipment?
"*A.* Yes, sir. Just as we always do."

We think it is evident from this record that after defendant association discovered it probably would experience a loss by reason of the insolvency of the Federated Fruit & Vegetable Growers, Inc., it sought to make an equitable distribution among its members of all moneys received by it. This, however, as was held by the circuit judge, was not in accordance with the provisions of defendant's by-laws, which are binding upon the parties to this suit. As set forth in the opinion of the trial judge,

the by-laws provide: "Each day's shipment shall be prorated and filed separately." The undisputed proof discloses that defendant received full payment for the shipment of October 19th; and the by-laws provide that, "on receipt of returns for each day's shipments," the defendant's financial secretary shall prepare a statement of the total sales on that day and the total price received therefor, and "the amount due each member for the same," and that the secretary shall "draw a check upon the treasurer for the amount due each member for fruit shipped on said day." In view of the foregoing provision of defendant's by-laws, we think it clear that plaintiff was entitled to compensation on the basis of the shipment made October 19th as soon as payment was received for that shipment, after the association deducted therefrom its charge for the service rendered. This was the holding in the circuit court, and the judgment entered is affirmed. Costs to appellee.

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

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BARRIS *v.* CITY OF DETROIT.

1. DEDICATION—HIGHWAYS AND STREETS—BOULEVARDS—MUNICIPAL CORPORATIONS.

   Where subdivision owners established and improved boulevard as such in fact and in point of law, it became city boulevard when subdivision was annexed to city.

2. SAME—INTENTION TO ESTABLISH BOULEVARD.

   Intention of subdivider to establish boulevard, indicated by such designation on recorded plat, is not defeated by dedicating "streets and alleys," shown on plat, to use of public.

3. HIGHWAYS AND STREETS—BOULEVARDS—DEDICATION.
Boulevard is in fact street with opportunity afforded for added parklike features, so that boulevard, designated as such on plat, falls within general description of street or highway.

4. MUNICIPAL CORPORATIONS—CHANGING BOULEVARD TO STREET.
Where boulevard was established and improved as such by subdividers, and was in fact and law boulevard when subdivision was annexed to city, action of city authorities in destroying boulevard features did not have effect of changing it to street.

Appeal from Wayne; Jayne (Ira W.), J. Submitted October 11, 1932. (Docket No. 67, Calendar No. 36,308.) Decided December 6, 1932. Rehearing denied March 2, 1933.

Bill by Herman Barris and others against City of Detroit, a municipal corporation, and another to set aside special assessments for paving an alleged boulevard. Decree for plaintiffs. Defendants appeal. Affirmed.

*George W. Bourke,* for plaintiffs.

*Paul T. Dwyer* (*Clarence E. Wilcox,* of counsel), for defendants.

WIEST, J. This is an appeal by defendants from a decree adjudging the Strathmoor boulevard, in Strathmoor subdivision, formerly in the township of Greenfield, Wayne county, and now annexed to the city of Detroit, in law and fact, a boulevard from Glendale to Schoolcraft avenues, a distance of 2,667.54 feet. The plat of the subdivision, executed and filed in May, 1925, dedicated the "streets and alleys," as shown thereon, to the use of the public. Strathmoor boulevard and three others in the subdivision, all 75 feet in width, were termed boulevards. On Strathmoor boulevard the proprietors of the subdivision installed curbed concrete pavements

16 or 18 feet wide on each side of a 20-foot center grass strip, upon which they planted ornamental shrubbery and placed street lights. Sidewalks four feet in width were also constructed. Such were the established characteristics and features of Strathmoor boulevard when the city of Detroit, on November 14, 1923, annexed the subdivision.

For a time after annexation the city maintained the boulevard features, but in 1927 placed a new pavement 30 feet in width in the center of the boulevard, removed the former pavement, and destroyed all the boulevard features. It is manifest that the boulevard was established and improved as such in fact and in point of law, and it became a city boulevard when the subdivision was annexed to the city.

Counsel for defendants cite *Oprisiu* v. *City of Detroit,* 248 Mich. 590; *Theisen* v. *City of Detroit,* 254 Mich. 338; *Houseman* v. *City of Detroit,* 257 Mich. 557; and *Brennan* v. *City of Detroit,* 258 Mich. 69. These cases were decided on particular facts, and decision in the instant case is controlled by the record here presented.

The intention of the subdivider to establish a boulevard, indicated by such designation on the recorded plat, is not defeated by dedicating the "streets and alleys," shown on the plat, to the use of the public. A boulevard is in fact a street with opportunity afforded for added parklike features. A boulevard, designated as such upon the plat, falls within the general description of a street or highway. *Burridge* v. *City of Detroit,* 117 Mich. 557 (42 L. R. A. 684, 72 Am. St. Rep. 582).

The decree is affirmed, with costs to plaintiffs.

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

POXSON *v.* POXSON.

1. DIVORCE—ALIMONY—CHANGED CIRCUMSTANCES—MODIFICATION OF DECREE.

   Finding of court below that allowance of $175 per month to wife as alimony and for support of child should not be reduced more than $25 per month, under circumstances, is not disturbed, on appeal.

2. APPEAL AND ERROR—CIRCUIT COURT RULES—DECREES APPEALED FROM.

   Circuit Court Rule No. 59, § 9 (1931), providing that, where more than one decree has been rendered, appeal from any decree may include review of all prior decrees, at option of appellant, applies only to interlocutory decrees leading up to final decree, but does not apply to final decrees not appealed from.

Appeal from Wayne; Jayne (Ira W.), J. Submitted October 21, 1932. (Docket No. 191, Calendar No. 36,830.) Decided December 6, 1932.

Divorce proceedings by Isabelle Andrews Poxson against Charles A. Poxson. On petition of defendant for modification of decree. From order made, defendant appeals. Affirmed.

*Corliss, Leete & Moody* (*Thomas T. Leete, Jr.*, of counsel), for plaintiff.

*Alfred Lindbloom*, for defendant.

WIEST, J. Under a decree of divorce, granted plaintiff in January, 1926, defendant was required to pay, as permanent alimony to his wife and for the support of their child, the sum of $125 per

As to modification of alimony because of changed conditions, see annotation in 44 L. R. A. (N. S.) 1026.

month until September 1, 1926, then $150 per month for one year and thereafter $175 per month.

August 1, 1931, defendant moved the circuit court for a modification of the allowance of $175 per month, alleging change in his circumstances as well as in the circumstances of plaintiff. The friend of the court made an investigation and recommended a reduction to $150 per month. The court also heard the proofs of the parties and made the reduction recommended. Defendant reviews by appeal.

Defendant's salary as a salesman has been reduced to $348.34 per month. Some time ago defendant went into debt in order to purchase stocks when such were considered good investments, and now has the stocks, of small value, and the obligations, to a considerable amount, to pay for the same. He has remarried. During the plentiful years he faithfully performed the order of the court, but, under the lean years, he wants the burden eased.

Plaintiff, since the divorce, has qualified herself for employment, and, at the time of the hearing, was earning the sum of $130 per month. Plaintiff and the now 12-year old daughter live with her parents, and she insists that the allowance of $150 per month is necessary. The friend of the court made a painstaking investigation, and this was supplemented by such proofs as the parties desired to present in open court. The health of plaintiff is not good, and now and for some time she will require the services of a physician. The health of the child is not good. We are loath to disturb the finding in the circuit court.

Counsel for defendant asserts right, under Court Rule No. 59, § 9 (1931), to have full review of the decree granted in 1926, and to that end has included in the record the testimony then taken.

The rule provides:

"In chancery cases, where more than one decree has been rendered, an appeal from any decree may include a review of any or all prior decrees, at the option of the appellant."

Clearly this applies only to interlocutory decrees leading up to final decrees, and is intended to avoid piecemeal appeals. Final decrees, not appealed from, are not at all disturbed by this rule.

The modification of the decree is affirmed, with costs to plaintiff.

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

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FREDRICKS *v.* NEAR.

1. TRUSTS—SURRENDER OF TRUST ESTATE—ACQUIESCENCE.
   Trustee may not surrender trust estate without consent or acquiescence of beneficiary.

2. SAME—TERMINATING TRUST.
   Where trustee, *cestui que trust*, and settlors were all *sui juris*, they could, by mutual consent, terminate trust and restore *status quo*.

3. SAME—HUSBAND AND WIFE—ACTION—CONTINGENT TRUST AGREEMENT.
   Where husband and wife entered into trust agreement with lumber company, deeding property and executing contingent trust agreement to pay balance of husband's debt for lumber, action could not be maintained by trustee against wife on said contingent agreement after trust agreement had been terminated by conveyance back to them of property conveyed.

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On trust as irrevocable without consent of beneficiaries, see annotation in 17 L. R. A. 77; 38 A. L. R. 965.

4. SAME—BANKRUPTCY—DISCHARGE IN BANKRUPTCY.
Nor could there be any judgment in said action against husband, who had gone through bankruptcy court, where he had listed in Federal court lumber company as creditor, and pleaded his discharge in bankruptcy.

5. SAME—PARTIES—TERMINATING TRUST—CONTINGENT AGREEMENT.
Where action was brought by trustee on contingent trust agreement against husband and wife, substitution of beneficiary for trustee as real party in interest would not help plaintiff's case, where trust agreement had been terminated, ending liability under contingent agreement.

Appeal from Muskegon; Vanderwerp (John), J. Submitted October 12, 1932. (Docket No. 80, Calendar No. 36,789.) Decided December 6, 1932.

Assumpsit by Herman H. Fredricks, trustee, against Grover Near and Blanche Near under an agreement to pay balance of account owed by defendant Grover Near. Directed verdict and judgment for defendants. Plaintiff appeals. Affirmed.

*Turner, Engle & Cochran,* for plaintiff.

*Alexis J. Rogoski,* for defendants.

WIEST, J. In 1930, Herman H. Fredricks was president, treasurer, and manager of the Fredricks Lumber Company. Defendant Grover Near was indebted to the lumber company for building material. Defendants are husband and wife, and, as such, in April, 1930, owned, subject to mortgages, lot 8, block 189, city of Muskegon Heights, by the entirety. The lumber company wanted its bill paid or secured. April 3, 1930, defendants, by deed, conveyed the mentioned premises to Herman H. Fredricks, as trustee, and on April 11, 1930, executed an agreement in which they acknowledged "themselves to be

jointly and severally indebted to the Fredricks Lumber Company, a corporation, for lumber and materials furnished at the request of said parties, in the sum of $3,131.20," and recited that the deed of April 3d was

"not given nor intended to operate as a mortgage, but * * * intended as an absolute conveyance in a trustee, with power to said trustee to sell and/or otherwise dispose of said property for the benefit of said Fredricks Lumber Company, by applying the revenue received from said property on the above indebtedness, and to reduce the same, and if possible, pay same in full. * * *

"In the event that the proceeds of the sale of said property are not sufficient to pay the entire obligation, aforesaid, of said Fredricks Lumber Company, after the above property has been disposed of, first party hereto, jointly and severally, assume the balance of said obligation."

April 19, 1930, the trustee made the following written declaration:

"I acknowledge and declare to you that I am possessed of certain realty, being lot 8 of block 189 of Muskegon Heights, Michigan, for your benefit, deeded to me by Grover Near and wife, and to be sold to apply the proceeds against your claim against said Near, and also hold their joint promise to pay the full sum due you providing the proceeds are insufficient to satisfy the claim."

June 9, 1930, Herman H. Fredricks, trustee, deeded back the property to Mr. and Mrs. Near, and the deed was accepted.

The trustee, by letter to defendants, stated:

"I herewith notify you that I have reconveyed lot 8, block 189, in the city of Muskegon Heights to you this day. * * *

"Since there is no opportunity of selling this property above this indebtedness (mortgages), there is no reason why I should not reconvey this to you as it is of no value to the Fredricks Lumber Company to give you any more than the indebtedness is, therefore, it would not reduce your account with the Fredricks Lumber Company in any way. I sincerely hope that you will be able to dispose of it in some way and realize a little out of it.

"I have recorded the deed from myself to you with the register of deeds, and I am inclosing a certificate from him showing that the deed is at his office at the present time."

October 3, 1930, plaintiff, as trustee, brought this suit against defendants to recover the amount due the Fredricks Lumber Company, basing liability of defendant Blanche Near upon the mentioned agreement of April 11, 1930.

At the time of trial defendant Grover Near was a discharged bankrupt. The court directed a verdict for defendants, holding that the trust agreement ended when plaintiff deeded back the property, and defendant Blanche Near could not be held under the agreement of April 11, 1930, because such agreement was entered into with the understanding and expectation that a sale would be made of the property and the proceeds received by the lumber company would extinguish or materially reduce the debt to the company, and, there being no sale, but a deeding back of the property, the consideration for the agreement failed. The court also found that the money due, if any, was to the Fredricks Lumber Company, and, therefore, the suit was not brought in the name of the real party in interest.

Upon review, plaintiff claims that such trust cannot be terminated by reconveyance of the property

without the consent of the beneficiary; that defendants have waived strict compliance of the trust duties by leaving with the trustee their promise to pay the obligation, and the court was in error in directing a verdict for defendants. Plaintiff also claims to be the real party in interest.

The assumption by Mrs. Near of the obligation of Mr. Near and her agreement to pay the same was expressly coupled with and dependent upon the carrying out of the trust, and was not an unconditional promise to pay.

Defendants created a trust. The trust was accepted. The *cestui que trust* was the Fredricks Lumber Company. The trustee was president, secretary, and manager of the lumber company, and he terminated the trust estate by his reconveyance to defendants, and in doing so gave as his reason that the estate was of no value to the *cestui que trust.*

We recognize the rule that a trustee, without the consent or acquiescence of the beneficiary, cannot surrender the trust estate, but, in the case at bar, the trustee, the *cestui que trust,* and settlors were all *sui juris,* and could, by mutual consent, terminate the trust and restore the *status quo.* If the *cestui que trust* is not satisfied with the action of the trustee, then it should assert breach of trust by the trustee and seek appropriate remedy or ask to have the trust relation and estate restored.

It is apparent, however, that reconveyance by the trustee to defendants was satisfactory to the *cestui que trust,* and thus terminated the trust and all engagements coupled therewith. Therefore, the trustee could not bring an action of assumpsit upon the mentioned agreement against Mrs. Near.

Defendant Grover Near pleaded his discharge in bankruptcy, and, in the Federal court, listed the Fredricks Lumber Company as a creditor. Therefore, there can be no judgment against Grover Near.

Plaintiff moved the circuit court to permit substitution of the Fredricks Lumber Company for Herman H. Fredricks, trustee, as plaintiff. Such substitution would not help, except upon the point that the suit was not in the name of the real party plaintiff, as it would but emphasize the fact that the *cestui que trust,* with knowledge of reconveyance of the trust estate, is satisfied therewith and only seeks to hold Mrs. Near under the contingent trust agreement.

The judgment in the circuit court is affirmed, with costs to defendants.

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

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KAHN *v.* GREEN.

1. VENDOR AND PURCHASER—ORAL AGREEMENTS—VARYING TERMS OF WRITTEN CONTRACT.

Oral agreement made prior to execution of land contract, whereby vendee was to assign to another, who was to become sole obligor, may not be given any control over written contract.

On evidence of prior or contemporaneous agreements as varying terms of written contract, see annotation in 17 L. R. A. 273.

2. JUDGMENT—SUMMARY JUDGMENT—DEFENSES—VENDOR AND PURCHASER—ORAL AGREEMENTS.

Where only showing in opposition to motion for summary judgment in favor of vendor against vendee for payments due under land contract was purported oral agreement made before execution of contract, substituting another as vendee, who was to become sole obligor, no defense was set forth, and motion for summary judgment was properly granted.

Appeal from Wayne; Keidan (Harry B.), J. Submitted October 27, 1932. (Docket No. 159, Calendar No. 36,801.) Decided December 6, 1932.

Assumpsit by Louis Kahn and another against Julius Green for instalments under a land contract. Summary judgment for plaintiffs. Defendant appeals. Affirmed.

*Butzel, Levin & Winston* (*Edward D. Quint* and *Carl L. Whitchurch,* of counsel), for plaintiffs.

*Shapero & Shapero,* for defendant.

WIEST, J. This is an appeal from a summary judgment awarded plaintiffs for instalments due on a land contract executed by defendant.

Defendant contends that a triable issue of fact was raised by plea and by affidavits in opposition to the motion for summary judgment.

The land contract was executed July 9, 1926, and bound defendant to pay specified instalments. July 21, 1926, defendant assigned the contract to Samuel Geltner, stating therein the contract price and interest "which the said assignee and grantee assumes and agrees to pay." For a time thereafter Mr. Geltner made payments on the contract. Defendant intended to purchase the property, and paid $500 to bind the bargain, but, when the parties met

to execute the land contract, defendant claims that he asked to be released from his agreement to purchase and have return of the $500 he had paid, and also claims he then stated that Samuel Geltner would enter into the contract as vendee but could not do so at that time, and it was agreed that the contract should be made to defendant as vendee, and, upon his assignment to Geltner, plaintiffs would look to Geltner for pay. Defendant claims that this arrangement and the subsequent assignment released him from the contract and constituted Mr. Geltner the sole obligor. The novation claimed is the familiar one of substitution of a new debtor and discharge of an old debtor by the creditor. But this required the original relation of debtor on the part of defendant under the contract and substitution of Geltner as sole debtor in his stead by consent of plaintiffs. Instead of novation, defendant really seeks to impeach the written contract by a parol agreement preceding its execution.

The land contract established liability on the part of defendant, and the parol agreement, if made, was before the execution of the contract and cannot be given any control over the written contract. Defendant's showing, in opposition to the motion for summary judgment, set forth no defense.

The judgment is affirmed, with costs against defendant.

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

NATIONAL LIFE & ACCIDENT INSURANCE CO. *v.* NAGEL.

1. INSURANCE—APPLICATION FOR REINSTATEMENT—REPRESENTATION—WARRANTY—GOOD HEALTH.

   Statement by insured, in application for reinstatement, that he was in good health, made in ignorance of fact that he had chronic pulmonary tuberculosis, *held*, representation rather than warranty (3 Comp. Laws 1929, § 12427).

2. SAME—CONSTRUCTIVE FRAUD—CANCELLATION.

   Where policy was reinstated on representation of insured that he was then in good health, but "was just getting over the flu," when in fact he had chronic pulmonary tuberculosis, which later caused his death, insurer is entitled to have policy canceled, although insured was ignorant of his true condition and made said representation without actual intent to deceive.

Appeal from Wayne; Simpson (John), J., presiding. Submitted October 21, 1932. (Docket No. 182, Calendar No. 36,825.) Decided December 6, 1932.

Bill by National Life & Accident Insurance Company, a Tennessee corporation, against Helen Nagel to cancel reinstatement of a life insurance policy. Cross-bill by defendant against plaintiff for full amount of policy. Decree for defendant. Plaintiff appeals. Reversed, and decree entered for plaintiff.

*Oxtoby, Robison & Hull,* for plaintiff.

*Ernest P. LaJoie,* for defendant.

WIEST, J. Plaintiff's bill to cancel reinstatement of a policy of insurance on the life of Julius Henry

Criterion of good health as condition of reinstatement after default, see annotation in 40 A. L. R. 667.

Nagel, for breach of warranty of physical condition and false and fraudulent representations relating thereto, was, upon hearing, dismissed, and recovery of the insurance awarded Helen Nagel, beneficiary, under her cross-bill.

The policy was issued in July, 1925, reinstated in July, 1927, and in August, 1929, and again in February, 1931. The insured died in a sanatorium August 28, 1931, the cause of his death being chronic pulmonary tuberculosis.

An agent of the insurance company visited the insured at his home in February, 1931, and the insured signed the application for reinstatement. The beneficiary claims that the application was signed in blank, and the trial judge so found.

Be that as it may, the fact is admitted by the beneficiary that the agent asked the insured if he was then in good health, and the insured answered that he was, but "was just getting over the flu." The insured had been under a doctor's care, but, at the time of reinstatement, neither he nor the doctor were aware of the fact that he had pulmonary tuberculosis. The representation that he was in good health, except that he was just getting over the flu, was not true in fact, but believed by the insured to be true. This representation was in the printed form of the application for reinstatement, with space left for exception, and in this space the agent wrote "no exception." Had the agent put in the exception that the insured was just getting over the flu it would not benefit plaintiff.

We find no intentional fraud on the part of the insured. We do find, as a fact, that when he stated he was in good health, except that he was just getting over the flu, he then had chronic pulmonary tuberculosis. Does that fact command cancellation

of the reinstatement of the policy? This depends upon whether the statement regarding his health was a warranty by the insured or a misrepresentation sufficient to void action taken by the insurer on the strength thereof.

The distinction between a warranty and a representation was well pointed out in *Eastern Dist. Piece Dye Works, Inc.*, v. *Travelers Ins. Co.*, 234 N. Y. 441 (138 N. E. 401, 26 A. L. R. 1505). The statute of New York provided that:

"Every policy of insurance issued or delivered * * * by any life insurance corporation doing business within the State shall contain the entire contract between the parties; * * * and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties." (27 McKinley's Con. Laws, § 58; Cahill's Consol. Laws, 1930, chap. 30, § 58.)

The Michigan statute, 3 Comp. Laws 1929, § 12427, requires a provision in insurance policies that:

"All statements made by the insured, shall, in the absence of fraud, be deemed representations and not warranties, and that no such statement shall avoid the policy unless it is contained in a written application and a copy of such application shall be indorsed upon or attached to the policy when issued."

The Michigan statute, relative to attaching a copy of the application to the policy when issued, does not apply to reinstatement. *New York Life Ins. Co.* v. *Buchberg*, 249 Mich. 317 (67 A. L. R. 1483).

In the New York case, above cited, the court, after quoting the statute, stated (p. 449):

"The result of this provision is that in order to produce a warranty in an application for insurance

whereof a breach would necessarily and *ipso facto* avoid the policy, the statement claimed to constitute or have the effect of a warranty must be characterized by and include the element of fraud, and which ordinarily would be established by proof that the person making it knew that the statement was false, and wherefrom could be inferred an intent to deceive and cheat. A misstatement, even though stated in the form of a warranty, if made in good faith and without this element of fraud passed into the same class as an ordinary representation and became a defense to the policy only if it was material. On the other hand, the effect of a misrepresentation was left unchanged by the statute. If material it constituted a defense although made innocently and without any feature of fraud; it was sufficient that it was material as an inducement for the issue of the policy and was untrue."

See, also, *New York Life Ins. Co.* v. *Price* (C. C. A.), 16 Fed. (2d) 660; *Bonewell* v. *North American Accident Ins. Co.*, 167 Mich. 274 (Ann. Cas. 1913A, 847).

We think the statement made by the insured a representation rather than a warranty. It was, in fact, a false representation, but made in ignorance of his true condition, and, therefore, without actual intent to deceive, but it materially affected reviver and continuance of the risk. While the insured did not know that he had tuberculosis, he did know that he had had a succession of attacks of influenza, high temperature, night sweats, and pain in his side, together with annoying expectoration, and that the doctor was in frequent attendance upon him. The representation made materially affected reviver of the lapsed policy, and what we said in *Aposito* v. *Security Benefit Ass'n*, 258 Mich. 507, is applicable here.

We are constrained to reverse the decree, and a decree will be entered in this court canceling the reinstatement of the policy. Plaintiff will recover costs.

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

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MISCHNICK *v.* DIME SAVINGS BANK.

1. BILLS AND NOTES—FOREIGN BILLS OF EXCHANGE—NONPAYMENT.
Money paid bank for foreign bill of exchange may not be recovered in action against it, where it acted in good faith, employed customary method of establishing credit, and unexplained failure to pay was due to no fault on its part.

2. SAME—BANKS AND BANKING—PROTEST.
Recovery may not be had in action against bank on foreign bill of exchange, where nonpayment by foreign bank was not protested (2 Comp. Laws 1929, §§ 9375, 9378, 9401).

Appeal from Wayne; Hunt (Ormond F.), J. Submitted October 4, 1932. (Docket No. 7, Calendar No. 36,381.) Decided December 6, 1932.

Assumpsit by William Mischnick against Dime Savings Bank on a foreign bill of exchange. Judgment for plaintiff. Defendant appeals. Reversed, without a new trial.

*Barbour & Martin,* for plaintiff.

*Bulkley, Ledyard, Dickinson & Wright* (*Glenn D. Curtis,* of counsel), for defendant.

WIEST, J. Plaintiff, wanting to send $197.60 to Jacob Will at Worms, Germany, visited defendant's branch bank in the city of Detroit, February 6, 1922, and purchased, paid for, and received the following instrument which he sent to the payee in Germany.

"THE DIME SAVINGS BANK.
9–21

"CHEQUE FOR No. 1902
"38,000 German Marks DETROIT, MICHIGAN
Feb. 6–1922

"Pay to the order of Mr. Jacob Will the sum of thirty-eight thousand German marks.
To Filiale Der Pfalzischen Bank

"Worms, A. Rh. LLOYD J. SAXTON
"Germany Mgr.
"Sherman-Chene Branch."

The payee, in due time, presented the bill of exchange to the proper bank in Germany, and payment was refused, evidently because the credit had not at that time been established. In March, 1922, Mr. Will came to Michigan, and, in April, 1922, plaintiff paid him the $197.60, and Mr. Will turned the bill of exchange over to plaintiff, who in August, 1925, brought this suit to recover the money he paid the bank for the bill of exchange, and had judgment. Defendant appealed.

Defendant contends that no recovery can be had in an action of assumpsit for the money paid the bank for the bill of exchange and no recovery can be had upon the bill itself without protest. Upon refusal of payment by the drawee no right of action accrued to plaintiff against the drawer and none to the payee or his assignee without protest.

"Where a foreign bill appearing on its face to be such, is dishonored by non-acceptance, it must be

duly protested for nonacceptance, and where such a bill which has not previously been dishonored by nonacceptance is dishonored by nonpayment it must be duly protested for nonpayment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary." 2 Comp. Laws 1929, § 9401.

This was a bill of exchange, as defined by 2 Comp. Laws 1929, § 9375, and a foreign bill on its face, 2 Comp. Laws 1929, § 9378.

In *Gorsche* v. *First National Bank of Manistique,* 233 Mich. 428, the issues here presented were decided adversely to plaintiff. There assumpsit was brought to recover money paid for foreign bills of exchange, and, there being no protest for nonpayment, we held there could be no recovery. See, also, *Kardynal* v. *Grezezinski,* 255 Mich. 421.

Defendant bank had a credit account in its correspondent bank at Berlin, Germany. The bank at Worms, Germany, was affiliated with the bank at Berlin. Defendant bank directed the Berlin bank to establish credit to its account in the bank at Worms to meet the draft. The defendant acted in good faith, employed the customary method of establishing the credit, but, for some unexplained reason and without fault on its part, there was delay. Plaintiff cannot recover the money he paid for the bill of exchange, and, without protest, no recovery can be had on the bill of exchange.

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

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

QUAIL *v.* COLE.

1. MANDAMUS—APPEAL AND ERROR—FINAL JUDGMENT—STATUTES.
   Review, if any, of order setting aside default and judgment, is by mandamus and not by appeal; there being no final judgment, statute providing for issuance of writ of error, as of course, has no application (3 Comp. Laws 1929, § 15491).

2. SAME—EFFECT OF COURT RULES REQUIRING MANDAMUS TO BE TERMED APPEAL.
   Court Rules Nos. 55 and 60 (1931), while requiring mandamus to be termed appeal, do not change law that it is original writ, and that it does not issue without application and allowance.

3. SAME—FAILURE TO OBTAIN LEAVE—APPEAL DISMISSED.
   Where leave to prosecute appeal in nature of mandamus was not obtained, but appeal is prosecuted as of right, appeal is dismissed.

Appeal from Wayne; Kilpatrick (Arthur W.), J. Submitted October 20, 1932. (Docket No. 154, Calendar No. 36,716.) Decided December 6, 1932.

Assumpsit by J. Gilbert Quail against John W. Cole for legal services. From order setting aside default judgment for plaintiff, he appeals. Appeal dismissed.

*Arthur Gloster,* for plaintiff.

WIEST, J. This is an appeal, prosecuted as of right, by plaintiff, from an order setting aside a default and judgment.

The record shows that application by plaintiff for leave to appeal was denied by this court. Review, if any, is by mandamus and not by appeal.

Counsel invokes the statute, 3 Comp. Laws 1929, § 15491, and Court Rules Nos. 55 and 60 (1931). The statute relates to final judgments, and plaintiff has no judgment, but seeks direction, by this court, to have his judgment reinstated. The mentioned rules, while requiring mandamus to be termed an appeal, do not change the law that it is an original writ, and that it does not issue without application and allowance.

Leave to prosecute an appeal in the nature of mandamus was necessary and was not obtained. We, therefore, *sua sponte,* dismiss the appeal.

Defendant, not having filed a brief at the time this opinion was written, will not recover costs.

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

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TOWNSHIP OF GROSSE ILE *v.* NEW YORK INDEMNITY CO.

1. TAXATION—MUNICIPAL CORPORATIONS—PERSONAL LIABILITY FOR IMPROVEMENTS.

   In absence of special contract, there is no personal liability on part of property owner for special assessments for improvements.

2. SAME—CONTRACTS—PUBLIC POLICY.

   Agreement by property owner, wishing to have his property benefited by local improvements, to pay assessment therefor, violated no principle of public policy, is enforceable, and law will not permit owner to repudiate liability after work is completed and benefits conferred.

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On personal liability of property owner to pay assessments for local improvements, see annotations in 35 L. R. A. 58; 18 L. R. A. (N. S.) 1259; 29 L. R. A. (N. S.) 770.

3. SAME—CONSIDERATION.

Special benefit to be conferred on property owner by improvements was sufficient consideration for his agreement to pay assessment therefor.

4. SAME—BONDS—ELECTION OF REMEDY—ESTOPPEL.

Where property owner agreed to pay assessments to be levied for improvements on his property, and gave bond conditioned upon compliance therewith, reassessing said tax with penalty did not work estoppel by election of statutory remedy, barring action on bond, since bond required demand to be fixed by assessment.

Appeal from Wayne; Gillespie (Glenn C.), J., presiding. Submitted October 28, 1932. (Docket No. 145, Calendar No. 36,645.) Decided December 6, 1932.

Assumpsit by Township of Grosse Ile, a municipal corporation, against New York Indemnity Company, a New York corporation, on a public construction surety bond. Judgment for plaintiff. Defendant appeals. Affirmed.

*Charles F. Delbridge* and *W. Leo Cahalan* (*Francis W. McCauley,* of counsel), for plaintiff.

*Austin & Newman,* for defendant.

WIEST, J. Bruce H. Wark owned platted property in the township of Grosse Ile, Wayne county, and desired water mains, fire hydrants, and other necessary appurtenances and connections to provide water for fire protection and domestic uses, to be constructed by the township under the authority of 1 Comp. Laws 1929, § 2385 *et seq.* The township board had, by resolution, determined that petitioners for such improvements should give bond to the township securing payment of the expenses.

Mr. Wark, as principal, and the defendant company, as surety, complied with the resolution and executed a bond on the 26th day of October, 1929, reciting that:

"This bond is required by said township board before the levying of said special assessment and the awarding of a contract for the construction of said public improvement."

The bond contained the following condition:

"Now, therefore, the condition of this obligation is such that if the above bounden, Bruce H. Wark, shall and will pay, when due and payable without penalty, the several instalments of said special assessments which shall be levied by said township board on the above-described lands to defray the costs of said public improvement, then this obligation shall be void, otherwise to remain in full force and effect."

The improvements were installed, and the assessment therefor was divided into five annual payments. The condition of the mentioned bond was not complied with, and this suit was brought by the township against the surety upon the bond to recover an instalment of the special assessment, and plaintiff had judgment.

A few days previous to bringing this suit the tax was reassessed with penalty. Upon review the surety on the bond contends that the bond is void, because beyond the power of the township to demand or accept, and the only recourse of the township is that provided by statute for the collection of the tax. Also, that, upon reassessing the tax with penalty, the township elected to have recourse to the statutory remedy and suit upon the bond was barred thereby.

It is well settled that, in the absence of a special contract, there is no personal liability on the part of the property owner. See *Schaefer* v. *Woodmere Cemetery Ass'n,* 256 Mich. 332. It is conceded that the improvements benefiting the property would not have been made by the township had not the bond been given, and plaintiff contends that, after inducing official action by the giving of the bond, Mr. Wark and his surety are estopped from asserting the invalidity thereof.

The agreement by a property owner, wishing to have his property benefited by local improvements, to pay the assessment therefor, violated no principle of public policy, and is enforceable, and the law will not permit such owner to repudiate liability after the work is completed and the benefits conferred. The theory of local improvements is that of local benefits, and we can see no reason for releasing the owner from the voluntary assumption of an obligation to pay for such special benefits to his property after he has thus obtained the improvements and profited by the benefits.

General principles announced in the following cases and text-books have been found helpful: *Township of North Star* v. *Cowdry,* 212 Mich. 7; *City of Charlotte* v. *Alexander,* 173 N. C. 515 (92 S. E. 384, L. R. A. 1917 F, 493); 5 McQuillin, Municipal Corporations (2d Ed.), § 2011; *Floyd* v. *Atlanta Banking Co.,* 109 Ga. 778 (35 S. E. 172); *Harnwell* v. *White,* 115 Ark. 88 (171 S. W. 108); *Gerard* v. *City of Seattle,* 73 Wash. 519 (132 Pac. 227); *City of Belfast* v. *Belfast Water Co.,* 115 Me. 234 (98 Atl. 738, L. R. A. 1917 B, 908); Page & Jones, Taxation by Assessment, § 17.

Knowing that the township would not undertake the establishment of the improvements benefiting a

few property owners without assurance that the expense thereof would be paid, Mr. Wark and the surety voluntarily entered into the engagement sued upon. There was sufficient consideration in the special benefits to be conferred by the improvements. The township will derive no benefit distinct from that of the property owners from recovery on this bond. The statute does not provide for any such bond, neither does it prohibit such an exaction. Upon the filing of the petition, the township was under no obligation to enter upon construction of the improvements. It was not a right of Mr. Wark to have the improvements made. The subject of the improvements called for action by the officials of the township, and, in this instance, they were moved to act by the giving of the bond.

As said in *City of Charlotte* v. *Alexander, supra:*

"In our opinion, it is both good morals and sound law to hold that when a person has accepted the benefits of a contract, not *contra bonos mores,* he is estopped to question the validity of it."

We find no estoppel by election worked by reassessment. The bond required the demand to be fixed by assessment, and there was no election to do otherwise in reassessing. The judgment is affirmed, with costs to plaintiff.

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

PEOPLE *v.* HOXZEY.

CRIMINAL LAW—PHYSICIANS AND SURGEONS—LICENSES—UNLAWFUL PRACTICING OF MEDICINE.

In prosecution for unlawfully practicing medicine, where evidence shows that licensed physician examined, diagnosed, and prescribed for professed patient, fact that defendant was present, assisted physician, and disagreed with his diagnosis did not render him guilty of offense charged; especially where patient was informed that defendant was not physician.

Appeal from Recorder's Court of Detroit; Skillman (W. McKay), J. Submitted October 13, 1932. (Docket No. 195, Calendar No. 36,344.) Decided December 6, 1932.

Harry M. Hoxzey was convicted of practicing medicine without license to do so. Reversed.

*Carl M. Weideman* (*Hyman Kramer,* of counsel), for appellant.

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

WIEST, J. Defendant was charged with unlawfully practicing medicine, by professing to diagnose, treat, cure, and relieve Otto Fischl of disease and ailment, by attending and giving him advice and prescribing and giving him drugs and medicine, and in holding himself out to the public as a physi-

On right of unlicensed physician to act as employee of licensed one, see annotation in 44 L. R. A. (N. S.) 1089.

cian, without registration or license as such. The evidence failed to establish the charges. Defendant was convicted and sentenced to imprisonment for six months, and prosecutes this appeal. Defendant's motion for a new trial pointed out that the proofs did not establish any violation of law, and the motion should have been granted.

In behalf of defendant it was claimed at the trial that he controls a formula for the cure of cancer, and that persons of means established a free clinic in charge of a physician, and defendant acted as technician only. The testimony in support of the prosecution was given by Mr. Fischl, an investigator for the department of health, and we state the substance thereof. Mr. Fischl visited the place of the clinic and inquired for "Dr. Hoxzey," and was informed that "Mr. Hoxzey was not a doctor." Defendant asked him what his trouble was, and he stated that he did not know.

"He told me to lay on the chair and when I sat on the chair he started to unbutton my shirt and I had to finish it, and there was another gentleman with him, Dr. Van Hyning. At that time I don't know Dr. Van Hyning at all, and Mr. Hoxzey put his hand on my stomach and rubbed his hand towards the left side, and Dr. Van Hyning done the same thing, and Mr. Hoxzey told Dr. Van Hyning to take my pulse. Dr. Van Hyning took my pulse and said to Mr. Hoxzey, 'He has a pulse in a perfect condition,' and then Mr. Hoxzey looked at Dr. Van Hyning and walked away from me probably two or three steps and didn't say anything. Later on Dr. Van Hyning said something in Latin, and I heard Mr. Hoxzey tell him something that sounded like Latin and I asked Dr. Van Hyning to explain it better. * * * And Dr. Van Hyning said, 'I am

sorry to tell you you have something far more worse than cancer. You have tumors around your intestines.'

"*Q.* How long did this examination that the defendant Hoxzey gave you—how long did it take?

"*A.* About 15 minutes.

"*Q.* After Hoxzey was through examining you, what did he do?

"*A.* He walked away and said to Dr. Van Hyning, he said, 'No, it is a cancer.'

"*Q.* What did Dr. Van Hyning say?

"*A.* Dr. Van Hyning didn't say anything.

"*Q.* What did Hoxzey do then, anything?

"*A.* He walked away from me, walked to some kind of a glass cover, and put his hand in some kind of a tin box and pulled out some pills and put them in a yellow envelope and gave them to Dr. Van Hyning, and he wrote down how to use the pills. * * *

"It was perhaps two or three minutes after I buttoned my shirt that I received the pills and walked out, when another gentleman stopped me and said, 'You are going to get some medicine.' I waited probably 15 minutes, when I received a bottle containing a black liquid from another gentleman, whom I don't see in court. I pulled out my pocketbook and offered the defendant money, and he said, 'It doesn't cost you anything now—we will find out later how you feel—come back next week.' * * *

"The pills were given to me by Dr. Van Hyning. When I went to the clinic I didn't know that Dr. Van Hyning was a registered and licensed physician, but I do now. He diagnosed my case and said something in Latin. I said, 'I can't explain that to my wife. I don't understand Latin.' What Mr. Hoxzey said to Dr. Van Hyning, I haven't the least idea, as I couldn't understand it. That is the reason I asked him what was the trouble. Dr. Van Hyning diagnosed the case as something far worse than

cancer. Mr. Hoxzey didn't tell me what was wrong with me then, nor did he tell me at any time. Mr. Hoxzey didn't tell me—Dr. Van Hyning told me what was wrong. * * * To the best of my knowledge there was nothing to indicate to me that Mr. Hoxzey was a doctor."

We have here a case where a licensed physician examined, diagnosed, and prescribed for a professed patient. This being true, it negatives guilt on the part of defendant. True, defendant was present, assisting the physician, and disagreed with the diagnosis of the physician, but such did not render him the physician in the case. Defendant's presence was explained by the fact that he claimed to have a remedy for cancer and was interested in the diagnosis of the case by a regular physician and treatment thereof. The physician, according to the testimony, had charge of the case, and the assistance given the physician by defendant did not constitute practicing the profession of a physician. The testimony negatived the holding out of defendant to the public as a physician.

The charges were not established, and the conviction is reversed, and defendant discharged.

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

*In re* PETITION OF FARBER.

LANDE *v.* J. E. FARBER CO.

1. JUDGES—DISQUALIFICATION—QUESTION OF LAW.

Whether judge was disqualified to sit in case involving accounting in receivership proceedings for corporation because bank in which he was stockholder was creditor of corporation is question of law not affected by considerations of propriety or delicacy, where record did not disclose that corporation was indebted to bank, and it is not claimed that judge knew of said debt.

2. SAME—WHEN JUDGE DISQUALIFIED BY REASON OF BEING STOCKHOLDER.

Where judge or corporation of which he is stockholder is not party to suit, interest which will disqualify him must be direct interest in subject-matter of litigation or in outcome of suit, so that he or corporation will be directly affected through pecuniary or property loss or gain or accrual of right or liability.

3. SAME—STATUTES.

General rule of law that judge is disqualified from sitting in case because corporation of which he is stockholder is creditor of one of parties has no foundation in reason, nor does it bear any relation to preservation of courts from shadow of suspicion, which is purpose of statute (3 Comp. Laws 1929, § 13888).

4. SAME.

Judge was not disqualified to sit in case involving receivership of corporation because bank of which he was stockholder was creditor of corporation, where record did not disclose said fact, and it is not claimed that judge knew of said debt (3 Comp. Laws 1929, § 13888).

5. RECEIVERS—DISCHARGE—CORPORATIONS.

When receivers for corporation were discharged by order of court, corporation became its own master, as though no receivers had been appointed.

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On holding stock as disqualification of judge, see annotation in 48 A. L. R. 617.

As to reduction of capital stock and distribution of capital assets upon reduction, see annotation in 44 A. L. R. 11.

6. COURTS—JURISDICTION—CONFLICT OF LAWS—RECEIVERS—PRIORITY.

In case of conflict, in appointment of receiver, priority generally follows decree of court which first obtains jurisdiction of parties and subject-matter, and it does not rest upon race between courts to final decree.

7. RECEIVERS—COURTS—CONFLICT OF LAWS.

Although different receivers may be appointed in different proceedings, such conflict should be avoided, especially as between branches of same court.

8. SAME—PRIORITY OF RECEIVERSHIP.

Where receivers for corporation were discharged by order of judge appointing them, and nearly two years later same judge set discharge aside and ordered receivership to continue under one of receivers, but in meantime another judge of same court, in different proceedings, had appointed other receivers for same corporation, latter had priority as to control of corporation.

9. SAME—ACCOUNTING—OVERLAPPING—APPEAL AND ERROR.

Where accounting in different receivership proceedings before different judges in same court overlapped, but both decrees have been appealed, and both accountings are before Supreme Court, accounting is divided according to logical jurisdiction rather than upon basis of technical jurisdiction.

10. CORPORATIONS—TRANSFER OF STOCK—MINUTES OF STOCKHOLDERS' MEETING.

Minutes of stockholders' meeting clearly showing intent to presently convey certain shares of stock to certain persons operated to transfer said stock, although there was no issuance of formal certificates.

11. SAME—REDUCTION OF CAPITAL STOCK.

If capital stock of corporation was reduced, stockholder to whom no stock was issued is entitled to decree for shares proportionate to capital structure.

12. RECEIVERS—ACCOUNTING—LIABILITY FOR MISAPPROPRIATION OF FUNDS.

In suit for accounting for funds of corporation which had been in hands of receiver, court will not concern itself with apportioning liability for misappropriation between receiver and directors on items where both participated in defrauding corporation.

13. SAME—ACCOUNTING FOR MONEYS IRREGULARLY OBTAINED.
Receivers and officers of corporation who appropriate corporate moneys by irregular and devious devices may not justify themselves by mere oral claims of honest application of said funds, but proof of honest disposition must be clear, since trickery of method implies dishonesty.

14. SAME—RECEIVER ACCOUNTABLE FOR UNLAWFUL ACTS.
Receiver for corporation must account as such, and he may not excuse unlawful acts because others receive part of their benefits.

15. SAME—IRREGULARITY NO EXCUSE FOR NEGLECT.
Although receivership was not conducted in regular way, receiver may not plead irregularity as excuse for neglect of duty, since receiver departs from proper procedure at his peril.

16. SAME—RECEIVER CHARGEABLE WITH MONEY IRREGULARLY DRAWN.
Where receiver caused checks to be drawn in favor of creditor of corporation and indorsed in her name, and then he deposited them to his account or cashed them, he is chargeable with amount thereof, notwithstanding his claim that he paid the money to officer of corporation for creditor.

17. SAME.
Check drawn by corporation's receiver to nonexistent company, claimed to be in payment of goods for which no invoice can be found, is chargeable to receiver.

18. SAME.
Where corporation's receiver, by means of fictitious invoices, drew certain amount of money and compromised with corporation's creditors, he is chargeable with balance for which he has not accounted.

19. SAME—PADDED PAYROLLS.
Corporation's receiver who obtained money by issuing payroll checks payable to persons who had not worked for corporation is chargeable with whole amount thus obtained, although part of money was given to officer of corporation.

20. SAME—WHEN RECEIVER ENTITLED TO CREDIT.
Corporation's receiver is entitled to credit for amounts paid to officer of corporation if expended for proper purposes of corporation; if not properly expended both are chargeable with said amount until corporation is reimbursed.

21. SAME—ACCOUNTING—DISCHARGE OF RECEIVER—EQUITY.
Where custom of monthly adjustments between corporation and purchaser of its scrap was continued after said purchaser became corporation's receiver, officers of corporation, who were largely responsible for said custom, and who consented to discharge of receiver, may not, months later, and after records have been destroyed, profit from said transaction at expense of receiver.

22. SAME.
Where corporation's receiver and one of its officers appropriated corporation's money to purchase property in receiver's name as trustee, but deal was not consummated and only part of money recovered, balance is chargeable against both of them.

23. SAME.
Receiver may not be charged with moneys claimed to have been illegally expended for legal services where there is no testimony on items to sustain said charge.

24. SAME.
Corporation's receiver is chargeable with amount paid for copper purchased for himself with corporate funds, where he fails to show repayment.

25. SAME—EXCESSIVE ALLOWANCE FOR SALARY.
Salaries of $1,000 per month to corporation's receiver and its officers, *held*, excessive, and reduced to $500 per month, except for period when corporation was under private management, for which period receiver is allowed $300 per month.

26. CORPORATIONS—PATENTS.
Finding of court below that corporation's officer owns patent rights which receiver claimed belonged to corporation is sustained, on appeal.

27. SAME—ACCOUNTING—CREDITS TO OFFICER OF CORPORATION.
Corporation's officer is entitled to benefit of amount owing to him by corporation, less credits, and carried on its books, in accounting between him and corporation.

28. SAME—RECEIVERS—ACCOUNTING.
Provision of decree that corporation's receivers institute proceedings against former receiver and corporation's officers to recover all moneys of corporation improperly taken is approved, on appeal; scope of proceedings to be stated in decree.

29. SAME—STOCKS AND STOCKHOLDERS—LIEN ON STOCK—ACCOUNTING.

Charges against corporation's receiver, who was stockholder, and its officers, is made lien on their stock in corporation, including sums paid by corporation in connection with officer's patents not properly accounted for.

Appeal from Genesee; Parker (James S.), J. Submitted November 2, 1932. (Docket No. 106, Calendar No. 36,681.) Decided December 6, 1932.

In the matter of the petition of John E. Farber and another for voluntary dissolution of J. E. Farber Company, a Michigan corporation. On petition to reopen case for accounting from receiver Louis Lande. From decree rendered, receiver appeals. Modified.

Appeal from Genesee; Gadola (Paul V.), J. Submitted November 2, 1932. (Docket No. 107, Calendar No. 36,687.) Decided December 6, 1932.

Bill by Louis Lande and another against J. E. Farber Company and others for accounting and other relief. Cross-bill by defendants against plaintiff Lande for an accounting. From decree rendered, all parties appeal. Modified. Cases consolidated for opinion.

*C. M. Van Benschoten* and *Wilson & Hoffman,* for appellant Lande.

*Frank C. Cook* and *John P. O'Hara,* for appellants John E. Farber Company and others.

NORTH, J. These appeals were submitted together, and, while separate records were made, the causes are so intermingled that it is better to dispose of them in one opinion.

In June, 1925, a manufacturing concern conducted by John and Edward Farber, who are brothers, was incorporated as J. E. Farber Company, Inc., for the purpose of securing more capital. The plan of financing was not successful, and in November, 1925, on bill for dissolution filed by the Farbers, Louis Lande and George Taft were appointed receivers by Hon. James S. Parker, circuit judge. Taft was inactive and is not interested here.

In December, 1928, the receivers prepared a petition for discharge, alleging that all debts had been settled except current bills and a mortgage, and praying that the property be returned to the corporation. The corporation, over the signatures of John Farber as president and Edward Farber as secretary and treasurer, appended to the petition formal consent to the discharge. The petition and a form of order were either delivered to Judge Parker at chambers or left at his office. For some reason the petition was not filed in the clerk's office and the order signed. No reports had been made by the receivers, no accounting had, and none accompanied the petition. A year later, carbon copies of the original petition and form of order were redated and executed and the formal order of discharge of the receivers was made on December 9, 1929.

During the receivership, the business was conducted much as before by John and Edward Farber, but with Lande acting as financial director. John was manager of production, sales, and service. Edward worked in the shop and had general charge while John was away. Lande kept the books. Lande was a junk dealer and for many years had taken the Farbers' scrap metal and furnished them used machines and various supplies. The practice con-

tinued during the receivership. It is a fair characterization of the situation that the receivership merely provided the corporation a moratorium on its debts, but without substantial change in the operation of its business except that Lande gave it financial aid and direction.

After the receivership, Lande was elected a director and officer of the corporation, and participated in the management until the present trouble arose.

March 13, 1931, Lande and VanDoorn, as stockholders, filed a bill against the corporation, the Farbers, and their aunt, Celestine Voiland, alleging misappropriation of corporate moneys, property, and patent rights, mismanagement by the Farbers, that the corporation was in financial straits, and praying for a receiver and return of the misappropriated assets to the corporation. March 20th, defendants filed answer and cross-bill, alleging that Lande, while receiver, misappropriated moneys of the corporation, and praying an accounting from him and return to the corporation of the sums taken. The cause was heard by Hon. Paul V. Gadola, circuit judge, the hearing commencing March 30th and running about two weeks. April 25th the court filed findings in which he appointed George Taft and Paul H. Kelly receivers. No other order of the appointment appears in the record, but the calendar entries show receivers' bonds filed May 2d and 6th. May 23d, the court filed findings of fact and law to the effect that Lande is a stockholder, that Lande and defendants Farber have misappropriated corporate moneys, that the patent rights belong to John Farber personally, and in the findings it ordered the receivers "previously appointed" to institute proceedings against Lande and Farber to

recover such moneys. Formal decree was entered October 10, 1931, in accordance with the findings and "the receivers previously appointed, whose appointment is now confirmed," were ordered to institute proceedings against Lande and defendants Farber for misappropriated moneys. There was no order specifically authorizing the receivers to take possession of the property of the corporation, but it appears that they have done so, although the plant has not operated for some time because of this litigation. All parties appeal.

June 6, 1931, after the findings but before decree by Judge Gadola, John and Edward Farber filed petition in the original proceeding, charging Lande with misappropriation of corporate moneys while he was receiver, praying that the order of December 9, 1929, discharging the receivers, be set aside and that Lande be ordered to render an account as receiver and pay the corporation the sums found due. Full hearing was had before Judge Parker, who filed an opinion September 14th, holding Lande to account in the sum of $30,000, and on September 25th entered decree in accordance therewith, setting aside the order of discharge of receivers, removing Lande as receiver, ordering the receivership to continue with Taft as receiver, and authorizing execution for collection of the sums found due from Lande. Lande appeals.

The hearings overlapped as to transactions of 1929, and the findings and decrees therein do not agree. More facts will be stated in connection with specific subjects.

February 8, 1932, Lande filed motion to vacate the decree entered by Judge Parker on September 25, 1931, and to refer the cause to another judge for a new hearing, on the claim that Judge Parker had

been disqualified to sit. By affidavit, he set up that, at the time of the hearing, findings, and decree, Judge Parker was a stockholder in the Citizens Commercial & Savings Bank, the principal creditor of J. E. Farber Company, Inc.; that Lande and John Farber were indorsers on the notes to the bank for $27,500; that the bank would be the principal creditor to be benefited by the decree, and the facts had been discovered after entry of decree. The contention is that the decree is void, citing *Horton* v. *Howard,* 79 Mich. 642 (19 Am. St. Rep. 198); *Davis Colliery Co.* v. *Charlevoix Sugar Co.,* 155 Mich. 228, applying 3 Comp. Laws 1929, § 13888:

"No judge of any court shall sit as such in any cause or proceeding in which he is a party, or in which he is interested."

The claim was not made before decree. The bank is not a party to the suit. The record did not disclose that the corporation is indebted to the bank. It is not claimed that Judge Parker knew there was such a debt. The question, therefore, is one of law, not affected by considerations of propriety or delicacy.

Where a judge, or a corporation of which he is a stockholder, is not a party to the suit, the interest which will disqualify him must be a direct interest in the subject-matter of the litigation or in the outcome of the suit, so that he or the corporation will be directly affected through pecuniary or property loss or gain or accrual of right or liability. 33 C. J. pp. 992, 1009; *Aldrich, Appellant,* 110 Mass. 189.

Without anticipating the effect of special circumstances in any given case, especially when brought to the attention of the court before hearing, a general rule of law that a judge is disqualified from

sitting in a case because a corporation, of which he is a stockholder, is a creditor of one of the parties, has no foundation in reason, nor does it bear any relation to the preservation of the courts from the shadow of suspicion, which is the purpose of the statute.

As both the corporation and Lande are obligated to the bank on the same debt, it does not appear that it is to the interest of the bank to take money from Lande and give it to the corporation, to be paid to creditors generally; nor was there a showing that the bank might sustain a loss or more readily obtain payment whatever the decree.

The claim of disqualification is unfounded.

Jurisdiction to appoint receiver. Counsel do not agree upon which receivership has priority.

When the receivers in the original proceeding were discharged by order of December 9, 1929, the corporation became its own master, as though no receiver had been appointed. In case of conflict, priority generally follows the decree of the court which first obtains jurisdiction of the parties and subject-matter. 53 C. J. p. 50. It does not rest upon a race between courts to final decree. Although different receivers may be appointed in different proceedings (53 C. J. p. 76), such conflict should be avoided, especially as between branches of the same court.

Judge Gadola appointed receivers before the petition heard by Judge Parker was filed. The latter petition did not set up grounds nor pray for continuance of the original receivership with control of the corporation. Nor was such continuance necessary to the purpose of the proceeding, with the possible exception of suing out execution and collecting the judgment against Lande.

In the suit before Judge Gadola, sufficient misappropriation and mismanagement by those in control of the corporation were shown to justify receivership, at least until the corporation is reimbursed and honest management made probable.

The receivers appointed by Judge Gadola have priority as to control of the corporation.

When were the original receivers discharged? Counsel stress this question because the accounting in the two proceedings overlapped, and the findings are not consistent as to the overlapping period.

Judge Gadola, taking the position that the original receivership closed to all intents and purposes in December, 1928, when the first petition for discharge was prepared and sent to Judge Parker, considered the accounts of 1929, but denied the Farbers right to accounting prior thereto on the ground the remedy was in the original proceeding. Judge Parker passed upon transactions in the same period of 1929 because the formal order of discharge was not made until December, 1929.

Both original receivers and the Farbers considered that the receivership practically terminated in or about December, 1928, as a matter of fact, although they knew that the order of discharge had not been signed and they or their attorney often inquired about it until the summer of 1929. They were uncertain as to procedure for a time, as, during the period, some checks were signed by officers of the corporation, some by the receivers and some by both. Padded pay roll checks running from October, 1928, to April, 1929, were signed by the receivers. However, during most of the year the corporation was conducted as a private concern by the officers with Lande assisting, not as under receivership. While the time of the transition is not

definite, we think April 1st, accepted by Judge Parker as a date for allowing change of compensation for receivers, is near enough for practical purposes.

The Farbers and the corporation cannot attack the jurisdiction of Judge Gadola to consider the events of 1929, because, by cross-bill, they asked for an accounting against Lande for the whole period of receivership and presented the transactions of 1929 to the court for determination. On the other hand, Lande interposed no objection to the jurisdiction of Judge Parker to order an accounting as receiver. As to the events of 1929, Lande's contention before Judge Parker was that the findings of Judge Gadola were *res judicata.*

The conflict of jurisdiction presents only a technical question, because both decrees have been appealed and both accountings are before us. Instead of dividing the present accountings between the decrees upon the basis of technical jurisdiction, we think it better to divide them according to logical jurisdiction—the decree of Judge Parker to cover Lande's acts as receiver and the decree of Judge Gadola to encompass other transactions, with the dividing date April 1st, as nearly as may be convenient.

Is Lande a stockholder of the corporation? The contention is that, as VanDoorn sold his stock during the hearing, and Lande was never a stockholder, Judge Gadola had no jurisdiction to enter decree, because the suit could be maintained to decree only by a stockholder.

Lande's stock ownership rests upon the records of the meeting of stockholders of December 30, 1929:

"John E. Farber and Edward E. Farber agreed at this time to give to Louis Lande and George Taft,

gratis, 500 shares each of their individual holdings of the capital stock of the J. E. Farber Company, Incorporated.

"John E. Farber proposed the following names as a board of directors for the ensuing year: John E. Farber, George Taft, Edward E. Farber, Louis Lande, C. M. Van Benschoten.

"The motion was seconded by C. M. Van Benschoten, carried by a unanimous vote.

"F. E. Reeder moved that C. M. Van Benschoten be attorney for the corporation. This was seconded by George Taft, unanimous vote in favor."

The minutes were signed by Edward Farber as secretary. At that time each of the Farbers owned $131,000 worth of stock but no certificates had been issued for it. The only certificates issued had been to the other four stockholders, aggregating $4,000.

That the Farbers intended the minutes of the stockholders' meeting to constitute a present conveyance of stock to Lande and Taft, and the latter so accepted it, is clear from the words of the minutes "at this time," and because Lande and Taft were immediately recognized as stockholders by their being elected directors and by Taft seconding a motion, all with the participation of the legal adviser of the corporation. Because certificates for the Farber stock had never been issued, and the affairs of the corporation were conducted in an informal manner, the failure to issue formal certificates to Lande did not affect the transfer as between these litigants. We think the minutes of the meeting operated to transfer stock to Lande. *Auditor General* v. *Bassett's Estate,* 246 Mich. 440.

In Judge Gadola's decree it is stated that Lande owns $5,000 of stock. The record is not entirely definite in this respect, but there is testimony that later the capital was reduced to $27,500, and each

of the Farbers was allotted $11,500. The number of Lande's shares, therefore, must be proportioned to capital structure, and he is entitled to decree for certificates.

Accounting. Some general observations will obviate the necessity of extended reasons on the various items. The controversy is not alone between Lande and the Farbers. The concern of the court must be for innocent stockholders and creditors and to decree return of misappropriated assets for their benefit. It is not a defense to Lande or Farber that the other participated in peculations with him, nor will the court concern itself with apportioning liability for misappropriation between them on items where both participated in defrauding the corporation.

Receivers and officers of corporations who appropriate corporate moneys by irregular and devious devices cannot justify themselves by mere oral claim of honest application of the funds. Trickery of method implies dishonesty, and proof of honest disposition must be clear.

Where Lande acted as receiver, he must account as such. He cannot excuse unlawful acts because others received part of their benefits. Although the receivership was not conducted in a regular way, receivers cannot be permitted to plead irregularity as an excuse for neglect of duty. A receiver departs from proper procedure at his peril.

In our opinion, both decrees must be modified. We think a more workable result would be attained if counsel would stipulate to cover the cases with one decree. But, pending their consideration of the suggestion, we find the accounting as follows:

Voiland checks. In 1925, Celestine Voiland loaned the receiver $2,500. In January, 1926, two re-

ceivers' checks for $1,700 and $800, respectively, were drawn to her, indorsed in her name by the bookkeeper at Lande's order, and he deposited one to his account and apparently cashed the other. He testified that he delivered the money to John E. Farber for Miss Voiland. Farber denied this. Lande's testimony upon the payment to Farber was confusing. Later he issued another check to Miss Voiland for $1,500 and gave it to Farber for her. It must be held that Lande has not made a proper accounting for the item of $2,500 and is chargeable with it.

American Iron & Metal Company check. In August, 1926, Lande issued a check for $1,000 to the American Iron & Metal Company. No invoice for the account can be found. There is no record of purchase of goods for the corporation from such company. It appears there was no such company, and Lande did not produce evidence of the existence of the person with whom he claims he dealt, although he said he could produce him. He has not accounted for this item and is chargeable with it.

Settlement of creditors. In 1928, Lande drew $15,669.55 by means of fictitious invoices and compromised with the creditors. After liberal allowance for other items by Judge Parker, $1,096 is still unaccounted for, and Lande is chargeable with it.

Padded payrolls. From October, 1928, to April, 1929, payroll checks for $5,036, all, or substantially all, signed by the receivers, were issued by order of Lande. The payees had not worked for the corporation, and Lande obtained the money on the checks. He states he gave some of the money to John Farber for expenses and to bribe purchasing agents. Farber received at least four of the checks. We cannot find proof by Lande that any part of this money

was expended for legitimate purposes of the corporation; and, because of the manner in which the money was drawn, he must be charged with the whole amount on receivership account.

As further accounting must be had in the suit before Judge Gadola, the amounts paid to John Farber by Lande should be credited to Lande if it is shown on further hearing that they were expended for proper purposes of the corporation. If it is not so shown, such amounts as Farber received should be charged against both Lande and Farber until the corporation is reimbursed.

Scrap. The business of the corporation is the manufacture of screw machine products and tool and die work. The screws, bolts, etc., were fabricated from metal bars in automatic machines. There was a waste, of shavings and bar ends, of about 50 per cent.

For several years before the receivership, Lande purchased all the scrap, and in return sold the Farbers automatic machines, discarded by automobile manufacturers, tool steel, piping, structural steel, and various other articles which he had purchased as junk. No book entries were made of such items. Before the receivership, Lande and one of the Farbers made an adjustment each month at junk prices. Sometimes the balance was paid and sometimes it was carried to the next month on slips.

This method of handling the scrap was carried into the receivership, except that adjustments were made monthly between Lande and the bookkeeper, usually in the presence of Edward Farber. So well understood was the mutual furnishing of metals that the men at the Farber plant would take materials from Lande's junk yard without his order and report it at Farber's office for monthly adjustment.

The testimony upon the charges and credits was not definite. Upon estimates, Judge Parker found a charge against Lande for scrap, with credit for materials furnished.

We do not think the Farbers should profit from the transaction at Lande's expense. The manner of disposing of scrap and making settlement was known to the Farbers at the time. It was not something they discovered after the receivership closed. They made no complaint until Lande filed suit for an accounting against them. The records have been destroyed. With full knowledge of the situation, the corporation, over the signatures of the Farbers, consented to the discharge of the receivers without accounting for the scrap. It would be inequitable, at this late date and under such circumstances, to permit the Farbers to profit from a condition for which they were largely responsible. This item is rejected.

Modification of decrees. Except as otherwise indicated, the decree of Judge Parker will be modified to cover only the above items. The following items will be included in the modified form of Judge Gadola's decree:

Purchase of property. September, 1929, Lande appropriated $3,000 to purchase property in Detroit, taking contract to himself as trustee. He states the Farbers were with him in the transaction. They denied it. John Farber was with him in the attorney's office when the contract was drafted. The deal was not consummated and only $1,000 of the money recovered. Both Lande and John Farber are chargeable with the balance of $2,000. Another charge of $550 was made in the decree against Lande for corporate moneys expended for legal services in this transaction, but as counsel did not point out testi-

mony or items to sustain the charge, it cannot be allowed.

Copper. In 1929, Lande bought $398.85 worth of copper for himself with corporate funds. He undertook to show repayment but did not prove that the money was returned to the corporation. He is chargeable with this item.

Salaries. We agree with both judges that salaries to the Farbers and Lande of $1,000 per month were excessive, that $500 per month was ample, and the corporation is entitled to the return of the excess. Lande, however, will draw only the compensation of $300 per month, allowed as receiver to April 1, 1929, when the transition to private management seems to have been substantially made by the parties. We think the better arrangement would be for Judge Parker's decree to cover adjustment of Lande's salary to April 1, 1929, and Judge Gadola's decree to include the period subsequent thereto.

Patents. We agree with Judge Gadola that John E. Farber owns the patent rights which Lande claimed belonged to the corporation.

John E. Farber's claim. At the time of settlement with creditors, the corporation owed Farber $4,100, since reduced by credits. This claim was not paid nor compromised. Lande also had a claim which he paid in full. Farber's account was regularly carried upon the books and we hold he is entitled to the benefit of it.

Conclusion. The records are large and complicated. Much testimony was taken and a multitude of checks and accounts introduced. The testimony suggests that the Farbers and Lande have used corporate moneys and labor and property for their personal benefit other than the items mentioned above. Judge Gadola's decree orders the receivers

to institute proper proceedings against Lande and the Farbers to recover all moneys of the corporation improperly taken by them. We approve this provision, because the present litigation has been principally at their suit, the Farbers have had control of the books, and innocent stockholders and creditors are entitled to investigation by disinterested officers of the court and return of misappropriated assets by whomsoever taken.

The scope of such proceedings by the receivers should be stated in the decree. As to the Farbers, they may cover the whole period from the inception of the first receivership. As to Lande, they will date from April 1, 1929. However, should investigation disclose misappropriation by Lande prior to that date, and not covered by the accounting herein, the receivers will be authorized to present petition to Judge Parker for further accounting by Lande in connection therewith.

In Judge Gadola's suit, the charges against the Farbers and Lande should be made liens on their stock in the corporation. Any sums found expended by the corporation in connection with John Farber's patents and not properly accounted for should be made lien thereon.

The decrees will be modified in accordance with this opinion, without costs.

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

## PEOPLE v. LENESCHMIDT.

1. BASTARDY—EVIDENCE—OTHER ACTS OF INTERCOURSE.
   In prosecution for bastardy, conviction must be confined to act of intercourse charged in complaint; showing of other acts of intercourse being permitted only as bearing on probability of commission of act relied on.

2. SAME—VARIANCE.
   When date is alleged with particularity, it must be proved as laid, but amendment may be permitted; and where date is not alleged with particularity, variance in time is not fatal, if verdict is confined to particular act within scope of complaint upon which prosecution introduces evidence for purpose of procuring conviction.

3. SAME.
   Where, in prosecution for bastardy, complaint charged that child was begotten on or about 9th day of May, occasion and circumstance being definitely stated, there was no fatal variance, although proofs placed time in forepart of April, without change of occasion and circumstance.

4. SAME—ALIBI.
   Nor was defendant prejudiced in his defense of *alibi*, where his evidence covered time relied on as fully as it did date named in complaint.

5. SAME—EVIDENCE—OTHER ACTS OF INTERCOURSE.
   There was no error in admitting evidence of act of intercourse other than one relied on, where court confined conviction to act charged.

Appeal from Shiawassee; Collins (Joseph H.), J. Submitted October 14, 1932. (Docket No. 203, Calendar No. 36,527.) Decided December 6, 1932.

Alex Leneschmidt was convicted of bastardy. Affirmed.

*Ellis F. Wilson,* for appellant.

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On evidence of other crimes in prosecution for bastardy, see annotation in 62 L. R. A. 329.

*Paul W. Voorhies,* Attorney General, and *Norman L. DesJardins,* for the people.

FEAD, J. Complaint for bastardy alleged that the child was begotten on or about the 9th day of May, 1930, the occasion and circumstances being definitely stated. The proofs placed the time in the forepart of April, without change of the occasion and circumstances. Defendant claims fatal variance as to dates.

Conviction must be confined to the act charged in the complaint. Showing of other acts of intercourse is permitted only as bearing on the probability of commission of the one relied on. *People* v. *Schilling,* 110 Mich. 412. When the date is alleged with particularity, it must be proved as laid (*Hull* v. *People,* 41 Mich. 167; *People* v. *Wilson,* 136 Mich. 298), but amendment may be permitted (*People* v. *Cole,* 113 Mich. 83). But where the date is not alleged with particularity, variance in the time is not fatal, if the verdict is confined to the particular act within the scope of complaint upon which the prosecution introduces evidence for the purpose of procuring conviction. *People* v. *Swanson,* 217 Mich. 103; 7 C. J. p. 987.

In this case there was testimony of two acts of intercourse. The court carefully confined conviction to the one charged. Defendant was apprised by the examination that complainant was uncertain of the date, but the occasion was made clear. The defense was an *alibi,* and defendant's evidence covered the time relied upon as fully as it did the date named in the complaint. No motion was made for continuance after the court ruled that the act could be shown as of the forepart of April, nor does the

record indicate that defendant was deprived of a fair trial nor injured in his defense by the variance.

The other points raised have been examined, are without merit, and need no discussion.

Judgment affirmed.

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

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PEOPLE v. HAAB.

1. BASTARDY—EVIDENCE—HEARSAY—STATEMENTS OF COMPLAINING WITNESS.

In prosecution for bastardy, admission of testimony by father of complaining witness as to statements made by her, several months after conception, that defendant was father of her child, was error; it not being admissible either in corroboration of her, or as substantive evidence of defendant's guilt.

2. SAME—TRIAL—INSTRUCTIONS.

In said case, instruction by court that jury could take into consideration said statements of complaining witness, in determining guilt or innocence of defendant, was reversible error.

3. SAME—EVIDENCE—EXHIBITING CHILD TO JURY—REQUESTS TO CHARGE.

Where, in prosecution for bastardy, 39-day old child, of which defendant was alleged to be father, was exhibited to jury without objection, there was no error in refusal of court to instruct jury that baby was too young to constitute evidence against defendant, since probative value of said exhibit was not dependent on age, but on resemblance, or want of it, to defendant, and age and immaturity of child affected weight of evidence and not its admissibility.

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As to exhibition of child for purpose of determining paternity, see annotation in 52 L. R. A. 502; L. R. A. 1917B, 1148.

As to admissibility and weight of evidence of resemblance on question of paternity, see 40 A. L. R. 97.

4. SAME—ADMISSIONS—OFFER TO COMPROMISE—EVIDENCE.

In prosecution for bastardy, it was proper to show, by cross-examination of defendant, that, when accused, he denied his guilt, but said he would pay expenses of complaining witness' confinement; said testimony not being inadmissible as offer to compromise.

Appeal from Washtenaw; Sample (George W.), J. Submitted October 14, 1932. (Docket No. 204, Calendar No. 36,572.) Decided December 6, 1932.

Otto H. Haab was convicted of bastardy. Reversed, and new trial granted.

*Jacob F. Fahrner* and *Andrew J. Sawyer,* for appellant.

*Paul W. Voorhies,* Attorney General, *Albert J. Rapp,* Prosecuting Attorney, and *Frank B. DeVine,* for the people.

WIEST, J. Defendant was convicted of bastardy, and prosecutes review by appeal in the nature of certiorari.

At the trial Miss Brandt, the complaining witness, in answer to questions, gave details not mentioned at the examination before the magistrate, and defendant was not permitted to so show by the transcript of the evidence returned. The evidence, taken before the magistrate, is in the record, and we find nothing therein tending to impeach her testimony at the trial, and, therefore, pass the point without further comment.

Miss Brandt was 23 years of age, and her father testified, in behalf of the prosecution, in part as follows:

"*Q.* Did you learn that your daughter was pregnant some months ago?

"*A.* Yes, sir.

"*Q.* And whom did she accuse when you found that out? Who was the father of this child?
"*A.* Otto Haab.
"*Mr. Sawyer:* I object. That's hearsay unless it was done in the presence of the respondent.
"*The Court:* No.
"*Mr. DeVine:* That's perfectly competent.
"*The Court:* Yes.
"*Q.* She accused Otto Haab?
"*A.* Yes.
"*Q.* And any time you talked to her about her pregnancy did she suggest anyone else?
"*Mr. Fahrner:* That's leading and suggestive.
"*Q.* Did she mention anyone else?
"*A.* No, sir.
"*Q.* Mr. Haab is the only one she accused?
"*A.* Yes, sir."

The court instructed the jury:

"I instruct you further, that in determining the guilt or innocence of the defendant that you may take into consideration declarations of the complaining witness, Hilda Brandt, when the fact became known that she was pregnant; that she stated to her parents and attending physician that the defendant was the father of the child, in connection with all the other testimony in the case and give it such weight as you deem proper."

The testimony was not admissible and the instruction was erroneous and prejudicial. The instruction sent the incompetent testimony to the jury as substantive evidence upon a vital question.

It is true that in *People* v. *Cole,* 113 Mich. 83, it was said it was proper to ask the attending physician if the complaining witness told him who was the father of her child, but the record in that case discloses that this was on cross-examination and

under the claim that she did not then accuse the defendant.

The statement to the father was made months after conception, and could not be employed in corroboration of Miss Brandt, much less as substantive evidence of defendant's guilt.

The baby was exhibited to the jury, without objection, but later the court was requested to instruct the jury that the baby was too young to constitute evidence against defendant. The court refused a request to so instruct the jury, and gave the following instruction:

"I further charge you that the child which was born upon the 21st day of February, 1932, was produced in court in the trial of this cause and that you may take into consideration the appearance of the child, in determining whether or not the defendant is guilty as charged."

At that time the baby was 39 days old. No opinion evidence of resemblance was given. The probative value of the exhibit was not dependent upon age, but upon resemblance or want of it as a fact. The age and immaturity of the child affected the weight of the evidence and not its admissibility. *Anderson* v. *Aupperle*, 51 Ore. 556 (95 Pac. 330); *State* v. *Danforth*, 73 N. H. 215 (60 Atl. 839, 111 Am. St. Rep. 600, 6 Ann. Cas. 557). We are aware of the conflict of authority on this subject. See note in 40 A. L. R. 97. But, as said in *People* v. *White*, 53 Mich. 537:

"While arguments of resemblance in so young an infant, in the absence of peculiarities, are a little preposterous, it is difficult on this record to determine that any rule of law was violated in discussing it."

Exhibition of even so young a child might in some cases furnish the most cogent evidence in favor of an accused.

On cross-examination, defendant was questioned about alleged conversations as to how and where Miss Brandt would be cared for during her confinement, and as to who was to pay for the same. It appears that at such times defendant denied his guilt, but it is claimed that he said he would pay the expenses of confinement.

Counsel for defendant contend that such testimony was inadmissible under the rule which excludes, as privileged, offers to compromise, and cite *People* v. *Gill,* 247 Mich. 479, where we held that the rule, rejecting offers of compromise as evidence of guilt, applies to a prosecution for bastardy, but in that case there was an offer of settlement made by the defendant, accepted by complainant and her parents, and rejected by the board of superintendents of the poor. In the case at bar there was no compromise, and defendant at all times asserted his innocence.

The question here presented was considered in *Robb* v. *Hewitt,* 39 Neb. 217 (58 N. W. 88). There the father of the prosecutrix told the defendant of the girl's condition and asked him what he was going to do about it. Defendant denied the implied charge. There was talk about sending the girl away, and defendant said:

"Do you mean if I would pay half that you would pay half?"

The court stated:

"This testimony was objected to, and its admission assigned as error, counsel invoking the rule which excludes, as privileged, offers to compromise.

The rule referred to applies to this class of cases. (*Olson* v. *Peterson,* 33 Neb. 358 [50 N. W. 155].) It is a salutary rule and should be rigidly enforced; but this evidence did not fall within it. There was no offer to compromise, but merely a suggestion that defendant would share the expense of sending the girl away. The rule arises from the policy of the law which favors amicable settlements, but does not extend to offers made, which, if accepted, would merely baffle prosecutions or conceal evidence, without effecting a legal compromise."

It was competent for the prosecution to show what defendant said when accused by Miss Brandt and third parties.

For the error pointed out, the judgment is reversed, and a new trial granted.

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

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BRADY *v.* WEISSENSTEIN.

SEATON *v.* SAME.

1. SCHOOLS AND SCHOOL DISTRICTS—ELECTIONS—PROPERTY OWNERS—ASSESSMENT ROLL—STATUTES.

   Words "assessment roll," as used in 2 Comp. Laws 1929, § 7420, providing that qualified voter in school district whose name appears in assessment roll shall be eligible to office in such school district, mean roll as prepared by assessing officer and before submission to, and action thereon by, board of review (1 Comp. Laws 1929, §§ 3412, 3417).

2. SAME—WHEN PROPERTY OWNER ELIGIBLE TO ELECTION.
Persons whose names did not appear on assessment roll as owners of property subject to taxes in school district for year 1931, but whose names were on said roll for 1932, as submitted by assessor to board of review, were eligible to election as officers of said school district, although said roll had not yet been approved by board of review (2 Comp. Laws 1929, § 7420).

3. SAME—MANDAMUS—ELECTION TO OFFICE.
Plaintiffs, whose names were wrongfully kept off ballot at school election on ground that they were not eligible, and who ran on sticker ballots and received highest number of votes, are entitled to writ of mandamus requiring board of canvassers of said school district to reconvene, canvass returns, declare plaintiffs elected, and issue certificates to such effect.

Appeal from Wayne; Reid (Neil E.), and Doty (Frank L.), JJ., presiding. Submitted November 1, 1932. (Calendar Nos. 36,876–36,878.) Decided December 6, 1932.

Separate petitions for mandamus by Joseph R. Brady and Clinton V. Seaton to compel Robert Weissenstein and others, members of Board of Education of Ecorse Township School District No. 11, a municipal corporation, to place their names on ballot for members of the school board. Petition by both plaintiffs against same defendants as board of canvassers to reconvene and issue certificates of election to plaintiffs. Writs denied. Plaintiffs appeal. Reversed, and writs ordered to issue.

*Colby, Berns & Costello* (*Willard H. Bracklow,* of counsel), for plaintiffs.

*Wm. Henry Gallagher,* for defendants.

WIEST, J. This is certiorari to review mandamus. Relators in the circuit, and here termed plaintiffs, filed nominating petitions with the secretary of

the board of education of school district No. 11, Ecorse township, Wayne county, to have their names placed on the ballot for members of the school board at the election on June 13, 1932. Eligibility for candidacy required that their names appear on the assessment roll as owners of property subject to taxes in the township and school district. The names of plaintiffs were upon the assessment roll submitted by the assessor to the board of review on June 7, 1932. The school district election officers held that plaintiffs were not eligible because their names did not appear on the assessment roll for 1931, and the fact that their names appeared on the assessment roll for 1932 did not render them eligible previous to approval of such assessment roll by the board of review, and refused to place their names upon the ballot. Plaintiffs applied to the circuit court for writs of mandamus directing the school election officers to place their names upon the ballot. Such applications for writs were denied on June 9, 1932, and the ballot was printed without plaintiffs' names thereon.

Plaintiffs Brady and Seaton ran as sticker candidates and received the highest number of votes. The board of canvassers held that plaintiffs were not legally eligible for election, and, therefore, declared two others, with lesser votes, elected. Thereupon plaintiffs filed a petition in the circuit for a writ of mandamus requiring the board of canvassers to reconvene, declare plaintiffs elected, and issue certificates to such effect. The application was denied, the circuit judge ruling that the former denial was *res judicata,* and plaintiffs review by certiorari.

The question of *res judicata* is of no moment. As stated by counsel for defendants:

"A discussion of this question by us would only be academic, in view of the fact that appeals were taken

by the relators from the orders made by both Judge Reid and Judge Doty."

The question involved is well stated in defendants' brief:

"Do the words 'assessment roll' in 2 Comp. Laws, 1929, § 7420, providing that a 'qualified voter in a school district whose name appears on the assessment roll,' etc., shall be eligible to office in such school district, refer to: (1) the roll or list prepared by the assessors before its submission to the board of review; or (2) to the roll or list after its correction and revision by the board of review, as provided for by 1 Comp. Laws 1929, § 3417?"

The question is not when the assessed tax becomes a lien, as decided in *Harrington* v. *Hilliard,* 27 Mich. 271, but whether the assessment roll is such within the meaning of 2 Comp. Laws 1929, § 7420, after it is made and completed by the assessing officer and before submission to and action thereon by the board of review:

2 Comp. Laws 1929, § 7420, provides:

"Any qualified voter in a school district whose name appears on the assessment roll and who is the owner in his own right of the property so assessed, shall be eligible to election or appointment to office in such school district."

The general tax law, 1 Comp. Laws 1929, § 3412, provides that:

"On or before the first Monday in June in each year, the supervisor or assessor shall make and complete an assessment roll, upon which he shall set down the name of every person liable to be taxed in his township or assessment district, with a full description of all the real property therein liable to be taxed. * * * The supervisor shall estimate, according to his best information and judgment, the

true cash value of every parcel of real property and set the same down opposite such parcel."

The statute (1 Comp. Laws 1929, § 3417) provides that such assessment roll, prepared by the assessing officer, shall be submitted to the board of review for the correction of errors and to pass upon each valuation and each interest, and also provides that:

"The roll as prepared by the supervisor shall stand as approved and adopted as the act of the board of review, except as changed by a vote as herein provided."

The legislature, having termed the list of taxable persons and the property and its valuation in the assessment district "an assessment roll," did the same body, in fixing qualification for school district officers, and in employing the same term, intend the same thing or something different? The term "assessment roll" is equivocal, but, construed with reference to its employment by the legislature in 1 Comp. Laws 1929, § 3412, it means a listing of persons and property to be taxed, and a valuation of the property of each person as a basis of apportionment, and cannot be extended to subsequent approval by the board of review.

Plaintiffs were entitled to have their names upon the ballot, and, as sticker candidates, having received the highest number of votes, were entitled to certificates of election.

The holdings in the circuit court are reversed, with costs to plaintiffs, and it is ordered that writs of mandamus issue out of the circuit court, directing the school district board of canvassers to reconvene, canvass the returns, declare plaintiffs elected, and issue certificates to such effect.

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

FORT PITT MALLEABLE IRON CO. *v.* DETROIT STEEL PRODUCTS CO.

1. CONTRACTS—CONSTRUED MOST STRICTLY AGAINST MAKER.
   Language used in contract is to be construed most strictly against party responsible for its use, especially where construction contended for by maker of instrument would result in binding other party, while performance by him would be optional.

2. CUSTOMS AND USAGES—EVIDENCE.
   Proof of existence of custom which would tend to contradict, not explain, express terms of contract, was properly excluded.

3. SAME—CONTRACTS.
   Where order in clear and unambiguous terms ordered 4,000 castings to be manufactured, 2,000 to be shipped at once, and balance to be shipped when ordered, testimony as to alleged custom in trade that balance was not to be manufactured until further orders were given, effect of which would be to bind manufacturer but leave purchaser free from liability for failure to call for balance, was properly excluded.

Appeal from Wayne; Smith (Henry H.), J., presiding. Submitted October 4, 1932. (Docket No. 8, Calendar No. 36,636.) Decided December 6, 1932.

Assumpsit by Fort Pitt Malleable Iron Company, a foreign corporation, against Detroit Steel Products Company, a Michigan corporation, for balance of purchase price of certain castings. Judgment for plaintiff. Defendant appeals. Affirmed.

*Douglas, Barbour, Desenberg & Schaeffer* (*Harold B. Desenberg,* of counsel), for plaintiff.

*Stevenson, Butzel, Eaman & Long* (*Leo W. Kuhn* and *Richard H. Hecker,* of counsel), for defendant.

BUTZEL, J. Fort Pitt Malleable Iron Company of Pittsburgh, plaintiff, received from Detroit Steel Products Company, defendant, two orders for castings designed for use on freight cars. Both are dated February 16, 1925. One reads as follows:

"Purchase Order
"DETROIT STEEL PRODUCTS COMPANY
"Manufacturers
"Detroit, Michigan.
"Order No. B28776
"(The above number must appear on all invoices and packages)
"2-16-25.

"To:
"FORT PITTSBURGH MALLEABLE IRON Co.,
"Pittsburgh, Pa.
"Please enter our order and ship via F.O.B.

| "Quantity | Description of Material Wanted | Price |
|---|---|---|
| "1,000 | J-13 Malleable Iron Castings— Lower Bolster Cap. | .0575 per lb. |
| "1,000 | J-14 Malleable Iron Castings— Top Bolster Cap. | f.o.b. Pittsburgh. |

"Blue prints inclosed.
"For Harvey Bolster Cushion #55
"You to furnish patterns
"Part number must show on castings
"Ship: 500 of each at once.
"Balance to be specified later. * * *
"All changes to be made in writing. * * *
"DETROIT STEEL PRODUCTS COMPANY,
"L. T. MILLER,
"Purchasing Agent."

The other is almost identical in form and content except that it bears a different serial number and provides for 1,000 J-15 and 1,000 J-16 malleable iron castings.

Very shortly after receipt of the orders, plaintiff proceeded to manufacture the 4,000 castings called for, and shipped 500 of each kind, or 2,000 in all, and held the other 2,000 awaiting shipping instructions. It notified defendant to this effect, but the latter never gave shipping instructions for the balance of the order. On March 25, 1926, a year later, it wrote plaintiff that:

"You may rest assured that, as soon as possible, we will be glad to take the castings off your hands."

On February 15, 1927, two years later, defendant again wrote plaintiff stating that there was a possibility of using the castings within the next 60 days, also that it felt plaintiff had been at fault in manufacturing the castings in advance of specifications. This is the first indication in the correspondence that shows defendant found fault with the fact that plaintiff had manufactured the unshipped balance of the order in advance of further specific instructions to that effect. On February 9, 1928, almost three years later, defendant asserted that the contract did not mean what the words indicated, and that releases should have been secured prior to the manufacturing of the undelivered castings. In the instant suit, brought to recover the purchase price of these 2,000 castings, the judge who tried the case without a jury properly rendered a judgment for the full amount of plaintiff's claim, less the admitted value of the castings as scrap iron.

Defendant contended, and now insists on appeal, that, owing to a custom in the trade, the words: "Ship: 500 each at once. Balance to be specified later," had a different meaning than the words indicate on their face. While defendant does not dispute the use of the word "ship" in its ordinary sense, it does attempt to contradict the apparent

meaning of the phrase: "Balance to be specified later," by contending that according to the customs and usages of the trade, it referred to the fact that the remainder of the order was not to be manufactured until further directions were given; that an order of this type binds the manufacturer for the entire amount specified in the order, if called for, but leaves the purchaser free from liability for failure to call for a part of the goods ordered, except possibly for the expense of making the patterns.

The order appears to be an unconditional, unambiguous, and certain one to manufacture 4,000 castings and to ship 2,000 at once, the time of the shipment of the balance to be specified later. The placing of the words, "balance to be specified later" immediately below and to the left of the phrase, "Ship: 500 of each at once," is almost conclusive proof of the fact that it referred to shipment rather than manufacture. The entire contract is on a printed form issued by the defendant. It is an elementary principle that the language is to be construed most strictly against the party responsible for its use. *Patterson* v. *Miller,* 249 Mich. 89; *Lower* v. *Muskegon Heights Co-operative Dairy,* 251 Mich. 450. This principle seems to be particularly applicable when the construction contended for by the maker of the document would result in binding the other party, while performance by himself would be optional. *Jewett, Bigelow & Brooks* v. *Detroit Edison Co.* (C. C. A.), 274 Fed. 30.

Defendant attempts to prove the existence of this custom by reference to large contracts made in the automotive and steel industries, where, under similar circumstances, goods to be shipped at once are manufactured, and nothing further is done to make up the balance of the order until releases are executed. Even here there seems to be a great deal of

uncertainty, for there is a conflict in the testimony of defendant's own witnesses as to whether there is any liability, and if so, just what is the measure of damages, for failure to order subsequent releases. The testimony in the instant case does not show a custom that is certain, uniform, invariable, and notorious so as to be binding on plaintiff. *Fogarty* v. *Railroad Co.,* 180 Mich. 422. Even assuming defendant's contentions are correct as to the steel and automotive industries, the evidence in the instant case fails to satisfy us that such a custom exists in the malleable iron industry as a whole to such an extent that plaintiff was or should have been familiar with it. Defendant's letters fully support plaintiff's claim that the orders meant just exactly what the language indicates. On the present record, proof of the existence of such a custom would tend to contradict, not explain, the express terms of the order. A policy entertaining such evidence would be extremely dangerous and should not be tolerated when the dispute centers about a contract whose language is so clear and unambiguous as the one presented in the instant case. *Chaney* v. *Lake Drive Garage,* 252 Mich. 412; *Hanna* v. *Smith,* 173 Mich. 483, 490; *Meloche* v. *Railway Co.,* 116 Mich. 69; *Burrows & Kenyon, Inc.,* v. *Warren* (C. C. A.), 9 Fed. (2d) 1; *Bushey & Sons* v. *American Ins. Co.,* 237 N. Y. 24 (142 N. E. 340). Also see *Mowbray, Robinson & Co.* v. *Rosser,* 126 L. T. 748, where it was held that evidence seeking to attach a different meaning by force of custom to the word "shipment" should be excluded.

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

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

HEINTZELMAN *v.* PENNSYLVANIA RAILROAD CO.

1. APPEAL AND ERROR—DIRECTED VERDICT.

In reviewing denial of defendant's motion for directed verdict, in personal injury case, on ground that plaintiff was guilty of contributory negligence, Supreme Court must assume plaintiff's testimony to be true, and disregard that of defendant's witnesses as well as plaintiff's signed statement, made four days after accident, when, as he claims, he was still under influence of opiate.

2. RAILROADS—GRADE CROSSING ACCIDENT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

One may not recover for injuries suffered in accident at railroad grade crossing not required by law to be guarded, despite his testimony to effect that he looked but did not see oncoming train, when physical facts clearly indicate that he would undoubtedly have been apprised of its approach had he properly looked.

3. SAME—FAILURE TO SEE TRAIN—DIRECTED VERDICT.

Automobile driver, who was struck and injured by train backing across street crossing without displaying light or giving warning signal, was guilty of contributory negligence as matter of law, barring right to recover therefor, where, from his own testimony and physical facts, it clearly appears that, had he looked, he could have seen approaching train, notwithstanding his testimony that he looked and failed to see it.

Appeal from Kent; Brown (William B.), J. Submitted October 5, 1932. (Docket No. 28, Calendar No. 36,677.) Decided December 6, 1932.

Case by Robert Heintzelman against the Pennsylvania Railroad Company for personal injuries received in a railroad crossing accident. Verdict and judgment for plaintiff. Defendant appeals. Reversed.

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As to care required of driver of automobile at railroad crossing, see annotation in 21 L. R. A. (N. S.) 794; 29 L. R. A. (N. S.) 924; 46 L. R. A. (N. S.) 702.

On failure to stop, look and listen at railroad crossing as negligence per se, see annotation in 1 A. L. R. 203; 41 A. L. R. 405.

On duty of driver of automobile as to stopping, looking and listening, see annotation in 46 L. R. A. (N. S.) 702.

*Linsey, Shivel & Phelps* and *Arthur Sherk,* for plaintiff.

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

BUTZEL, J. On August 31, 1930, Robert Heintzelman, plaintiff, was returning from a dance at Alpine, Michigan, in company with a young lady. In order to reach his farm home, he drove his old Model "T" Ford car through Grand Rapids, with whose streets he was not very familiar. Shortly after midnight he was driving in an easterly direction along the right or southerly side of Goodrich street, and had reached a point at which the street is traversed for a distance of 583 feet by a series of 27 tracks belonging to various railroads, and within a few blocks from the depot located on another street. After driving about half way across the tracks, he reached three of them belonging to the Pennsylvania Railroad Company, defendant herein. For convenience, we shall call the most easterly of these three tracks the "main" track, and the two immediately to the west the "side tracks." As he approached the crossing, he was able to see all of the tracks ahead of him with the aid of the headlights of his car. Just east of the main track, and also 200 to 300 feet to their west, two street lamps were lighted and suspended in the center of the street. From the westerly rail of the more westerly side track, and the most westerly rail of the main track, there is a distance of approximately 29 feet.

Plaintiff testified that as he approached the first of the side tracks, he noticed that there were two rows of box cars standing north of the street on each of the side tracks; and that the end of the cars nearest the street was about five feet north of the sidewalk; that he saw these cars clearly, and that they

were standing still with no engine attached to any of them; that as he came to the side tracks, he stopped his car, looked through its open windows and listened, but neither saw any cars on the main track nor heard any signals; that he thereupon proceeded in low gear at the rate of about 8 miles an hour; that, just as he reached the main track, a large black object suddenly loomed up before him; that it was the end of the rear coach of a string of passenger cars that were being backed across Goodrich street from the north at a rate of speed about one-third in excess of that at which plaintiff was driving. The front of his automobile was struck and demolished, and he sustained serious injuries, for all of which he seeks recovery. Plaintiff's companion testified that she saw the cars on the main track, but assumed that they were stationary, just as the box cars on the side tracks had been. She corroborated plaintiff's testimony that there were no lights nor warning signals given.

Defendant claimed that plaintiff was guilty of contributory negligence, even on his own testimony and theory of the case, and moved for a directed verdict both at the conclusion of plaintiff's testimony and again at the close of all the proofs. The motions were both denied, plaintiff recovered verdict and judgment, and defendant appeals.

In our discussion we must assume plaintiff's testimony to be true and disregard that of defendant's witnesses as well as plaintiff's signed statement made four days after the accident. He claims it was signed without knowledge of what it contained, and while he was still under the alleged influence of an opiate administered more than 36 hours before. The physical facts and plaintiff's own testimony indicate that plaintiff could see the two rows of box cars

clearly enough to realize that there was no locomotive attached to any of them. When he stopped, just before reaching the side tracks, he was still in a zone of safety; he was on the south side of the street where his vision to the north was unobstructed for a distance of about 95 feet, and as he moved across the side tracks, his view down the main track became correspondingly greater, so that, as he reached the most easterly rail of the easterly side track, his view down the main track was unobstructed for a very great distance. He was then still in a zone of safety, where, with the aid of his headlights and the street lights, not to mention the undisputed testimony that there were also two locomotive lights on the other tracks directed towards the street, he could have seen the approaching train on the main track had he looked. Since he was able to observe the lines of box cars so distinctly as to determine that there were no locomotives attached to them, we are led to the conclusion that had he looked he would have realized the danger of the oncoming cars. The moving train approached very slowly, and he had plenty of time to see it. The very fact that he was in such a dangerous position at nighttime should have made him increase, not relax, his caution. His companion saw the approaching cars, although she assumed that they were standing still. Plaintiff did not exercise the care that the law demands of him. While the facts in the various cases differ somewhat, we have frequently held that one may not recover for injuries suffered in an accident at a grade crossing, not required under the law to be guarded, despite plaintiff's testimony to the effect that he looked, but did not see the oncoming train, when the physical facts clearly indicate that he would undoubtedly have been apprised of

its approach had he properly looked. Plaintiff was guilty of contributory negligence. The case is ruled by the recent decisions in *Brady* v. *Railway Co.*, 248 Mich. 406; *Stone* v. *Railway Co.*, 248 Mich. 538; *Ackerman* v. *Railroad Co.*, 249 Mich. 693; *Richman* v. *Railway Co.*, 254 Mich. 607; *DePotty* v. *City of Detroit*, 258 Mich. 657.

Under the circumstances, we are constrained to reverse the judgment of the trial court, with costs to defendant, and without a new trial.

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

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WATKINS *v.* GABRIEL STEEL CO.

1. MASTER AND SERVANT—NEGLIGENCE—LIABILITY FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR WHERE WORK UNUSUALLY DANGEROUS TO OTHERS.

   General rule that one who has contracted with competent person to do work within scope of his independent employment is not answerable for negligent acts of such contractor or of his servants or agents in performance of contract is subject to exception that immunity from responsibility may not be claimed when work to be done is of such character that it necessarily subjects third persons to unusual danger.

2. SAME—WORK OF FASTENING STEEL JOISTS UNUSUALLY DANGEROUS TO OTHERS.

   If mason working on third floor of building was injured because steel joists were improperly fastened, contractor who had contract for furnishing and fastening said joists may not evade liability therefor on ground that it sublet contract to competent independent contractor, since said work was of such nature that it subjected mason to unusual danger.

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On general rule as to absence of liability of employer for torts of independent contractor, see annotation in 65 L. R. A. 620; 18 A. L. R. 801.

3. SAME—TRIAL—DIRECTED VERDICT.

In action against contractor for personal injuries alleged to have been caused by defendant's negligence in failing to properly fasten steel joists, it was error to direct verdict in favor of defendant on its showing that it did not do said work but that it had sublet contract therefor to competent independent contractor, since it may not evade responsibility therefor unless it took precautions to see that said work, which was inherently dangerous, was properly done.

Appeal from Wayne; Black (Edward D.), J., presiding. Submitted October 28, 1932. (Docket No. 190, Calendar No. 36,634.) Decided December 6, 1932.

Case by Louis Watkins against Gabriel Steel Company, a Michigan corporation, for personal injuries alleged to have been due to defendant's negligence in the erection of a building. Judgment for defendant. Plaintiff appeals. Reversed, and new trial granted.

*Wm. Henry Gallagher* (*Francis Fitzgerald,* of counsel), for plaintiff.

*L. J. Carey* and *George J. Cooper* (*Joseph J. Kennedy,* of counsel), for defendant.

SHARPE, J. Jacob Adler was erecting an apartment building on a lot owned by him in the city of Detroit in the year 1928. He entered into a written contract for the furnishing and erection of the steel joists with the defendant, a corporation engaged in their manufacture. It sublet the erection of the joists to J. L. Peters. The plaintiff had the contract for the masonry. It is the claim of the plaintiff that when the third floor was reached the joists were placed in position, but not properly fastened. The masons were about to proceed with their work, and

placed planks upon the steel work to permit them to move about thereon. While the plaintiff was superintending the work of his employees, the joists loosened and he was precipitated into the basement and suffered injury, for which he seeks to recover damages in this action.

The case was tried before the court without a jury. After the opening statement of plaintiff's counsel, he called the secretary of the defendant as a witness for cross-examination. His testimony developed the fact that the contract for the erection of the joists had been sublet by the defendant to Peters. Of this the plaintiff had not been theretofore informed. Discussion arose as to the liability of the defendant when the work of erection had been sublet. After some delay, in which counsel submitted authorities to the court, he expressed grave doubt as to the liability of the defendant, and, in order that the question should be determined without the expense of a trial, entered a judgment in defendant's favor, of which the plaintiff here seeks review by appeal.

It clearly appears that Peters was an independent contractor, and that he was competent to perform the work undertaken by him. While the general rule is that a contractor is exempt from liability caused by the negligence of an independent contractor or his servants, it is subject to the exception that such liability cannot be evaded, unless proper precautions are taken, when the work to be done is inherently or intrinsically dangerous. 39 C. J. pp. 1331, 1332.

This exception was clearly stated and applied in *Olah* v. *Katz,* 234 Mich. 112, 116, wherein it was said:

"The general rule relied on by defendant that one who has contracted with a competent person to

do a work within the scope of his independent employment is not answerable for the negligent acts of such contractor, or of his servants or agents, in the performance of the contract, is subject to the exception that immunity from responsibility may not be claimed when the work to be done is of such a character that it necessarily subjects third persons to unusual danger.''

See, also, *Inglis* v. *Millersburg Driving Ass'n,* 169 Mich. 311 (Ann. Cas. 1913 D, 1174); *Wight* v. *H. G. Christman Co.,* 244 Mich. 208. The safety of plaintiff was dependent upon the joists on which the planks were placed being securely fastened, and the neglect of Peters and his employees to do so subjected plaintiff to an unusual danger in the performance of his work. If his injury was due to such neglect, defendant may not be relieved from the consequences thereof by the fact that the work was being done by Peters as an independent contractor.

While the record is not sufficiently complete to justify a holding that plaintiff is entitled to recover, it is apparent that the defendant was not entitled to a judgment at the time it was entered. It will be reversed and set aside and the cause remanded for a new trial, with costs of this court to abide the result of such trial.

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

DAUGHERTY *v.* READING.

1. COVENANTS—BREACH—DEEDS — INCUMBRANCES — EASEMENT FOR HIGHWAY.

   Generally, existence of known easement for public highway at time of conveyance does not constitute breach of covenant against incumbrances in deed.

2. SAME.

   Where owners were entitled to compensation for land taken for highway purposes long before entering into preliminary agreement for sale of farm, and purchasers knew that title acquired would be subject to rights of public in said highway, they are not entitled to have consideration paid for said easement credited on purchase price of farm, although release to State was not executed until after preliminary agreement was entered into.

Appeal from Jackson; Simpson (John), J. Submitted October 25, 1932. (Docket No. 214, Calendar No. 36,879.) Decided December 6, 1932.

Bill by John F. Daugherty and another against Walter F. Reading and another to discharge a mortgage. Bill dismissed. Plaintiffs appeal. Affirmed.

*Haskell L. Nichols,* for plaintiffs.

*John E. Shekell,* for defendants.

SHARPE, J. On August 13, 1926, the plaintiffs made written offer to purchase a farm consisting of about 166 acres in the county of Jackson for the sum of $11,000 payable as therein provided. The defendants in writing accepted said offer. Pursuant

On easement for highway as breach of covenant against encumbrances, see annotation in 64 A. L. R. 1479.

thereto, defendants conveyed the land to plaintiffs on December 24, 1926, receiving a mortgage thereon for a part of the purchase price.

Prior to the date of the preliminary agreement, the State highway department had taken possession of a strip of land 100 feet in width across a part of said land for a right of way for a State highway known as M-50. New fences had been erected, grading done, and some cement then laid. These facts were known to Mr. Daugherty at that time. The release to the State, under which Mr. and Mrs. Reading received $2,750, was not executed until November 10, 1926.

On November 27, 1931, the plaintiffs had reduced the amount of the mortgage to $2,750, and they then filed the bill of complaint herein, in which they seek to compel the defendants to credit them with the $2,750 received from the highway department. From a decree dismissing the bill, the plaintiffs have appealed.

It clearly appears that the defendants were entitled to compensation for the land thus taken long before the preliminary agreement was entered into, and that plaintiffs knew at that time that the title they would acquire would be subject to the rights of the public in the highway. The release executed was "for the sole and only purpose of conveying to the said State of Michigan right of way over the above described lands for highway purposes."

A somewhat similar question was presented in *Dunlap* v. *Railway Co.*, 50 Mich. 470. The defendant company in that case had taken possession of a right of way "under pretense of a judgment which proved to be utterly void." The court said:

"Had the plaintiff sold the land to a third person, his right to recover from the railroad company

would have remained unaffected, for the injury was already inflicted, and the injurious consequences which had resulted or were likely to result would be taken into account in determining the price."

In a note to *Lavey* v. *Graessle* (245 Mich. 681), in 64 A. L. R. 1482, it is said:

"The majority of the jurisdictions support the general rule that the existence of a known easement for a public highway at the time of the conveyance does not constitute a breach of the covenant against incumbrances in the deed."

Many cases are cited in its support, among them *Haldane* v. *Sweet,* 55 Mich. 196, wherein it was held that public alleys "open to observation at the time," and of which the purchaser "must have known all about them and bought with them in mind," did not constitute a breach of covenant entitling the purchaser to rescission. This holding was cited with approval in *Simons* v. *Diamond Match Co.,* 159 Mich. 241, and *Hyman* v. *Boyle,* 239 Mich. 357.

The decree is affirmed, with costs to appellees.

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

STEED *v.* PURE OIL CO.

1. MINES AND MINERALS—OIL AND GAS LEASE—RENEWAL—DEFAULT.
Where so-called oil and gas lease, which was in fact merely option, provided for payment of certain sum annually in advance for its extension, deposit of same to be made in certain bank, failure of check to reach bank on date due resulted in default, although check had been mailed, and its failure to arrive was due to delay in mail.

2. SAME—DEFAULT—ACCEPTANCE—WAIVER.
Where, under so-called oil and gas lease, lessee had right to deposit payments in bank as they became due, and bank had authority from lessors to accept said payments, bank was not chargeable with notice as to when they were due, and its acceptance of payment two days after it was due does not constitute waiver on part of lessors of their rights under said agreement.

3. CONTRACTS—OPTIONS—ACCEPTANCE.
Acceptance of option must be agreeable to terms proposed and to exact thing offered, and it must be within time specified or right will be lost.

4. MINES AND MINERALS—OIL AND GAS LEASE—EXTENSION—FORFEITURE.
Where lessee under so-called oil and gas lease failed to make payment payable in advance for its extension on date due, its rights thereunder were terminated by notice of its forfeiture served on it by lessors.

Appeal from Midland; Hart (Ray), J. Submitted November 1, 1932. (Docket No. 58, Calendar No. 36,544.) Decided December 6, 1932.

Bill by Adrian L. Steed and another against Pure Oil Company, an Ohio corporation, to remove cloud from title by recording a so-called oil and gas lease.

As to time and manner of accepting option, see annotation in 21 L. R. A. 129.

Decree for plaintiffs. Defendant appeals. Affirmed.

*T. R. McNamara,* for plaintiffs.

*Virgil W. McClintic,* for defendant.

SHARPE, J. On October 17, 1927, the plaintiffs as first parties, in consideration of the sum of one dollar, entered into a written agreement, spoken of as an oil and gas lease, with one S. M. Walley as second party, granting to him the oil and gas in and under 140 acres of land in the county of Midland, described therein, on certain specified terms, among which were the following:

"Second party agrees to drill a well upon said premises within 14 days from this date, or thereafter pay to the first party one dollar per acre annually, payable in advance, until said well is drilled or the property hereby granted is conveyed to first party. * * *

"Payments coming due on this grant, except by mutual consent, shall be made by deposit to the credit of Adrian L. Steed in the Isabella County State Bank, of Mt. Pleasant, Michigan."

On October 20, 1927, Walley assigned his interest under this agreement to the defendant, Pure Oil Company. Both instruments were duly recorded in the office of the register of deeds.

Claiming default in the payment due thereunder on October 31, 1930, the plaintiffs mailed a notice of the forfeiture thereof to the defendant on November 5, 1930. On defendant's failure to surrender the so-called lease, the plaintiffs executed the affidavit provided for in Act No. 81, Pub. Acts 1929 (3 Comp. Laws 1929, § 13506), but was prevented from filing

it by a notice given to the register of deeds by defendant.

On February 16, 1931, plaintiffs filed the bill of complaint herein, setting forth the facts as above stated, and praying that said lease (agreement) be declared null and void and its record removed as a cloud upon plaintiffs' title to the land. The defendant in its answer denied that there was any default in the making of the payment and that plaintiffs were entitled to the relief prayed for. Plaintiffs had decree, from which defendant has taken this appeal.

The facts are not in dispute. On Saturday, November 1, 1930, Adrian L. Steed, hereafter spoken of as the plaintiff, went to the Isabella County State Bank and asked for the money which, as he claims, should at that time have been placed to his credit under the terms of the agreement. He was informed that it had not been sent to the bank by the defendant. On Monday, November 3d, he again called at the bank, and was again told that "the November payments hadn't come into the bank yet." Tuesday, November 4th, was an election day. On the next day, he signed the notice of forfeiture above referred to and sent it to the defendant by registered mail.

Defendant submitted proof that a registered letter containing a check to plaintiff for $140 was mailed at Saginaw on October 31st, addressed to the Isabella County State Bank at Mt. Pleasant. This check was not received by the bank until the afternoon of November 3d, and after plaintiff had made inquiry about it. The agreement is dated October 17th. The undertaking was to drill within 14 days from that date or thereafter pay one dollar per acre annually in advance. That there was default is clearly established.

But defendant's counsel contends that under the terms of the agreement the bank was made the agent of plaintiffs to receive the payments, and that as plaintiffs took no steps to declare a forfeiture "prior to acceptance of rental by bank, such attempted forfeiture thereafter is of no force or effect." Under the agreement the defendant might deposit the payments as they became due to the credit of the plaintiffs in the bank, and, if such a deposit had been made by it within the time limited therefor, it would have fully performed on its part. The bank had authority from plaintiffs to accept these payments and credit them therewith. It was not chargeable with notice as to when they were due, and its acceptance of the money on November 3d cannot be held to constitute a waiver on the part of plaintiffs of their rights under the agreement. If the money had been on deposit when it became payable to plaintiffs and the bank had thereafter failed, the loss would have fallen upon them.

Counsel forcibly urges that "it is inequitable to allow forfeiture" under the facts presented. It appears that defendant has developed much of the surrounding territory and thus greatly increased the value of its rights under this agreement, and that, had its check not been delayed in the mails, it would have reached the bank within the time fixed.

The court was not asked to declare a forfeiture. It was asked, if it found that defendant's rights under the agreement had been terminated by the notice of forfeiture, to remove the cloud on plaintiffs' title to their land occasioned by its record.

We again quote from the agreement:

"Second party agrees to drill a well upon said premises within 14 days from this date, or thereafter pay to the first party one dollar per acre annu-

ally, payable in advance, until said well is drilled or the property hereby granted is conveyed to first party."

In *Concord Oil & Gas Co.* v. *Thompson,* 248 Mich. 230, the undertaking of the plaintiff was couched in quite similar language. It was therein held that the payments were not rentals, but compensation only for delay; that (p. 235):

"Both parties understood that these payments should be made in advance to secure the extension, and there is no injustice in so holding. Plaintiff's rights were conditional on such payments being made in advance. Its failure to do so terminated its rights under the lease."

It was also held that the agreement was not a lease; that under it "the obligation was to pay for an option to do a certain thing if exercised within a limited time."

In *Olson* v. *Sash,* 217 Mich. 604, 606, it was said:

"An option is a mere offer. * * * Compliance with its terms is minutely required. * * * The acceptance must be agreeable to the terms proposed and to the exact thing offered. * * * The acceptance must be within the time specified or the right will be lost."

See, also, *Bailey* v. *Grover,* 237 Mich. 548.

Construing this agreement as we did the similar one in *Concord Oil & Gas Co.* v. *Thompson, supra,* as an option, it follows that, by defendant's neglect to make payment within the time specified therein, its rights thereunder were terminated by the notice of forfeiture served on it.

The decree is affirmed, with costs to appellees.

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

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APPEAL AND ERROR.

1. Where, on appeal, appellee confesses error, judgment is reversed. *In re Wellman's Estate*, 13.
2. Notice of appeal, when served on circuit court stenographer, constitutes order to him for transcript of testimony specified in it, and it is his duty to furnish said transcript unless, within ten days after receiving such order, he files and serves on appellant demand for prepayment or security for his charges, and appellant fails to comply therewith (Court Rule No. 64, §§ 1, 4). *Trask* v. *Norell*, 21.
3. Circuit court has no jurisdiction to dismiss appeal for failure of appellant to prepay or secure payment of stenographer's charges for transcript of testimony unless provisions of Court Rule No. 64, §§ 1, 4, have been strictly followed. *Id.*
4. Motion to strike impertinent statements and unfounded accusations made in brief of counsel, where unopposed, is granted, with costs. *Deadwyler* v. *Consolidated Paper Co.*, 131.
5. On appeal from decree in suit to foreclose land contract, Supreme Court hears case *de novo*, and each party should be required to do equity, but in determining their respective equitable rights, court is bound by specific terms of their contract. *Dirr* v. *Hitchman*, 179.
6. Findings of trial court in passing on disputed questions of fact and denying step-daughter's claim against estate of deceased step-father for room and board are affirmed, on appeal. *Hartle* v. *Keefer's Estate*, 189.
7. Error, if any, in failing to produce original evidence, consisting of timekeeper's slips, in proving expense of restoring damaged highway, was not prejudicial, where books and records were introduced, and payment of expense is unquestioned as to amount. *Lapeer County Road Com'rs* v. *Markley*, 456.
8. Error, if any, in admission of evidence, *held*, not reversible, in absence of showing of prejudice on account thereof. *Vigo American Clay Co.* v. *L. C. Monroe Co.*, 463.
9. Error, if any, in admission of evidence relative to magnitude of plaintiff and its business, *held*, not prejudicial, in view of clear and positive instruction to jury to disregard it. *Id.*

APPEAL AND ERROR—Continued.

10. In determining whether there was error in trial court's refusal to direct verdict in favor of defendant, in action for personal injuries arising out of automobile collision, on ground that plaintiff was guilty of contributory negligence, Supreme Court must accept version of all controverted facts which is most favorable to plaintiff. *Henry* v. *Sanderson*, 563.

11. Defendant's motion to strike first count from plaintiff's amended declaration, on ground that it did not state complete cause of action, was properly denied, since amendment should be allowed, if necessary, in Supreme Court, to meet objection (Court Rule No. 19 [1931]; former Circuit Court Rule No. 22). *Valentine* v. *King Manfg. Co.*, 601.

12. Circuit Court Rule No. 59, § 9 (1931), providing that, where more than one decree has been rendered, appeal from any decree may include review of all prior decrees, at option of appellant, applies only to interlocutory decrees leading up to final decree, but does not apply to final decrees not appealed from. *Poxson* v. *Poxson*, 625.

13. In reviewing denial of defendant's motion for directed verdict, in personal injury case, on ground that plaintiff was guilty of contributory negligence, Supreme Court must assume plaintiff's testimony to be true, and disregard that of defendant's witnesses as well as plaintiff's signed statement, made four days after accident, when, as he claims, he was still under influence of opiate. *Heintzelman* v. *Pennsylvania Railroad Co.*, 688.

See CORPORATIONS (29, 31); COSTS; CRIMINAL LAW (1, 6, 11–13); HABEAS CORPUS (1); JUDGMENT (2); MANDAMUS (2–4); MASTER AND SERVANT (9, 12); MORTGAGES (7); NEGLIGENCE (1); PLEADING (2); RECEIVERS (17); TAXATION (35); TRIAL; WILLS (5–11).

APPEAL BONDS—See COSTS (2); PRINCIPAL AND SURETY.

APPEARANCE.

1. Jurisdictional irregularities are waived by general appearance and pleading to merits of case. *Harvey* v. *Stewart*, 66.

2. Where defendants entered appearance and pleaded general issue, they waived question of court's jurisdiction, and therefore dismissal of case on ground that neither party was resident of county in which action was brought was error. *Id.*

APPLICATION—See INSURANCE (9).

APPOINTMENT OF RECEIVER—See MORTGAGES (13); RECEIVERS (3, 11–16).

APPROVAL OF PLAT—See CEMETERIES (1).

ARBITRARY POWER—See MUNICIPAL CORPORATIONS (16, 17).

ARM—See DAMAGES (1).

ARSENATE OF LEAD—See CUSTOMS AND USAGES (1).

ASSAULT AND BATTERY—See INDICTMENT AND INFORMATION (1).

ASSAULT WITH INTENT TO DO BODILY HARM LESS THAN MURDER—See CRIMINAL LAW (1).

ASSAULT WITH INTENT TO RAPE—See INDICTMENT AND INFORMATION (1, 3).

ASSESSMENT AS ENTIRETY—See TAXATION (26, 27, 31–34).

ASSESSMENT ROLL—See SCHOOLS AND SCHOOL DISTRICTS (1, 2).

ASSIGNMENTS—See CHATTEL MORTGAGES (1, 2, 4); CORPORATIONS (22); GARNISHMENT (4); GUARANTY (1, 5–7); HUSBAND AND WIFE (3); TAXATION (4); VENDOR AND PURCHASER (9, 10, 32–38); WITNESSES (2).

ASSUMPTION—See CONSTITUTIONAL LAW (4); MORTGAGES (2); MOTOR VEHICLES (9); TAXATION (18); TRUSTS (1); VENDOR AND PURCHASER (9, 28, 32, 33).

ASSUMPTION OF RISK—See NEGLIGENCE (8, 12).

ATMOSPHERIC CONDITIONS—See MOTOR VEHICLES (2).

ATTEMPT TO RAPE—See INDICTMENT AND INFORMATION (3).

ATTESTING WITNESSES—See WILLS (1, 2).

ATTORNEY AND CLIENT—See CHAMPERTY AND MAINTENANCE; RECEIVERS (1–3); VENDOR AND PURCHASER (29); WILLS (8); WITNESSES (3).

AUDITOR GENERAL—See COUNTIES (3); TAXATION (5–7, 10, 30).

AUTHORITY—See CUSTOMS AND USAGES (1); RELIGIOUS SOCIETIES (4).

BAD FAITH—See MECHANICS' LIENS (9).

BALLOTS—See SCHOOLS AND SCHOOL DISTRICTS (3).

BANK COLLECTION CODE—See BILLS AND NOTES (7).

BANKRUPTCY—See TRUSTS (13).

BANKS AND BANKING—See BILLS AND NOTES (4, 7–9); CONTRACTS (4, 5); CORPORATIONS (16, 17, 19); HUSBAND AND WIFE (4–7); JOINT TENANCY (1); JUDGES (1, 4); MINES AND MINERALS (1, 2); RECEIVERS (10); TRUSTS (2).

BASIS OF AWARD—See MASTER AND SERVANT (25).

BASTARDY.

1. In prosecution for bastardy, conviction must be confined to act of intercourse charged in complaint; showing of other acts of intercourse being permitted only as bearing on probability of commission of act relied on. *People* v. *Leneschmidt*, 671.

BASTARDY—Continued.

2. When date is alleged with particularity, it must be proved as laid, but amendment may be permitted; and where date is not alleged with particularity, variance in time is not fatal, if verdict is confined to particular act within scope of complaint upon which prosecution introduces evidence for purpose of procuring conviction. *Id.*
3. Where, in prosecution for bastardy, complaint charged that child was begotten on or about 9th day of May, occasion and circumstance being definitely stated, there was no fatal variance, although proofs placed time in forepart of April, without change of occasion and circumstance. *Id.*
4. Nor was defendant prejudiced in his defense of *alibi*, where his evidence covered time relied on as fully as it did date named in complaint. *Id.*
5. There was no error in admitting evidence of act of intercourse other than one relied on, where court confined conviction to act charged. *Id.*
6. In prosecution for bastardy, admission of testimony by father of complaining witness as to statements made by her, several months after conception, that defendant was father of her child, was error; it not being admissible either in corroboration of her, or as substantive evidence of defendant's guilt. *People* v. *Haab*, 673.
7. In said case, instruction by court that jury could take into consideration said statements of complaining witness, in determining guilt or innocence of defendant, was reversible error. *Id.*
8. Where, in prosecution for bastardy, 39-day old child, of which defendant was alleged to be father, was exhibited to jury without objection, there was no error in refusal of court to instruct jury that baby was too young to constitute evidence against defendant, since probative value of said exhibit was not dependent on age, but on resemblance, or want of it, to defendant, and age and immaturity of child affected weight of evidence and not its admissibility. *Id.*
9. In prosecution for bastardy, it was proper to show, by cross-examination of defendant, that, when accused, he denied his guilt, but said he would pay expenses of complaining witness' confinement; said testimony not being inadmissible as offer to compromise. *Id.* 674.

BEER—See LICENSES (1).

BENEFICIARY—See TRUSTS (10, 14).

BILL OF COMPLAINT—See EVIDENCE (1); LIMITATION OF ACTIONS (2).

BILL OF PARTICULARS—See ACTION (2).

BILLS AND NOTES.

1. Where mortgagee sold chattel mortgage, indorsing promissory notes given by mortgagor, and thereafter disclaimed any interest in said mortgage or notes, no right to presentment, demand, or notice of dishonor was thereby waived. *Jassy* v. *Marciniak,* 153.
2. Stock brokerage firm named as payee in check which it indorsed and passed on to another brokerage firm through latter's misrepresentation is liable to maker for loss sustained, although it never received any of money, never had unconditional possession of check, and maker was stranger to it (2 Comp. Laws 1929, § 9314). *Diamant* v. *Keane, Higbie & Co.,* 261.
3. Payee who receives and indorses check and thereafter passes it to another may not be heard to say that check was not delivered to him (2 Comp. Laws 1929, § 9314). *Id.*
4. Note executed by married woman as surety for brother's indebtedness to bank was accommodation note as between her and brother, but not as between her and bank (2 Comp. Laws 1929, §§ 9274, 9278). *Palmer National Bank* v. *Van Doren,* 310.
5. Where payee shows that he was tricked into indorsing checks, and that they were taken from him without his knowledge, burden shifts to holder to show that he acquired title as holder in due course (2 Comp. Laws 1929, § 9308). *Central State Bank* v. *Zelli,* 361.
6. Evidence *held,* insufficient to sustain burden of proof that holder of checks was holder in due course. *Id.* 362.
7. Where check was delivered to payee in afternoon, was deposited in bank for collection next morning, and by it, following usual custom, held for clearance next day, when drawee bank, located in same city, failed to open its doors, said check was presented within reasonable time, and loss must fall on drawer (2 Comp. Laws 1929, §§ 9249, 9435; Act No. 240, Pub. Acts 1931). *Bay City Bank* v. *Concordia Mutual Fire Insurance Co.,* 611.
8. Money paid bank for foreign bill of exchange may not be recovered in action against it, where it acted in good faith, employed customary method of establishing credit, and unexplained failure to pay was due to no fault on its part. *Mischnick* v. *Dime Savings Bank,* 639.
9. Recovery may not be had in action against bank on foreign bill of exchange, where nonpayment by foreign bank was not protested (2 Comp. Laws 1929, §§ 9375, 9378, 9401). *Id.*

See CHAMPERTY AND MAINTENANCE; CHATTEL MORTGAGES (2, 9); CORPORATIONS (25); EVIDENCE (3); HUSBAND AND WIFE (7); MORTGAGES (4).

BLANK INDORSEMENTS—See CORPORATIONS (16, 18, 19).

BOARD OF TRUSTEES—See RELIGIOUS SOCIETIES (4).

BOILER REPAIRS—See CONTRACTS (1).

BONDS—See MECHANICS' LIENS (7); MUNICIPAL CORPORATIONS (11–14); PRINCIPAL AND SURETY; TAXATION (13, 18, 39); TRUSTS (2, 5).

BOOKS AND RECORDS—See APPEAL AND ERROR (7).

BORING MACHINE—See MASTER AND SERVANT (17).

BOULEVARDS—See DEDICATION; HIGHWAYS AND STREETS (2); MUNICIPAL CORPORATIONS (20).

BOUNDARIES.

1. Where parties attempt to find true line and are mutually mistaken, subsequent acquiescence under mistake of fact does not establish boundary, at least unless continued for statutory period. *Blank* v. *Ambs*, 589.
2. In suit to enjoin tearing down of line fence, finding of trial court that boundary had been established by acquiescence for more than 15 years, *held*, not supported by testimony. *Id.*

See ADJOINING LANDOWNERS; REWARD.

BRAKEMAN—See NEGLIGENCE (5, 7, 8).

BREACH OF CONTRACT—See CONTRACTS (1).

BREACH OF COVENANT—See CONTRACTS (4, 5); COVENANTS (1); EASEMENTS (1).

BREAKING AND ENTERING—See CRIMINAL LAW (5).

BRIEF—See APPEAL AND ERROR (4); COSTS (1).

BROKERS—See BILLS AND NOTES (2); RECEIVERS (10); VENDOR AND PURCHASER (29).

BURDEN OF PROOF—See BILLS AND NOTES (5, 6); CORPORATIONS (24); DAMAGES (2); GUARANTY (2); MALICIOUS PROSECUTION (2, 3); MECHANICS' LIENS (8); NEGLIGENCE (8); TRUSTS (1).

BURGLARY—See WASTE (4, 5).

BY-LAWS—See CORPORATIONS (26); RELIGIOUS SOCIETIES (1, 2).

CANCELLATION OF INSTRUMENTS—See CONTRACTS (2); CORPORATIONS (25); INSURANCE (10).

CANCELLATION OF RECEIVER'S CERTIFICATES—See RECEIVERS (5).

CANVASSERS, BOARD OF—See SCHOOLS AND SCHOOL DISTRICTS (3).

CARRYING UNLOADED RIFLE IN CLOSED SEASON—See CRIMINAL LAW (7, 8).

CASTING—See CUSTOMS AND USAGES (3); EVIDENCE (4); NEGLIGENCE (10, 12).

CAUSE OF ACTION—See APPEAL AND ERROR (11).

CEMENT TUBING—See MUNICIPAL CORPORATIONS (4).

CEMETERIES.

1. Requirement that cemetery plat must be approved by township board of health (1 Comp. Laws 1929, § 2656) is met by approval by township board, because said board acts as board of health (2 Comp. Laws 1929, § 6475). *White Chapel Memorial Ass'n* v. *Willson*, 239.
2. Meeting of township board at which cemetery plat was approved will be presumed to have been regularly called, although only three members were present. *Id.*

See TAXATION (3, 4).

CEMETERY ASSOCIATION—See CORPORATIONS (15).

CERTIFICATE OF DEPOSIT—See HUSBAND AND WIFE (6).

CERTIORARI—See HABEAS CORPUS (3).

CESTUI QUE TRUST—See CORPORATIONS (21); TRUSTS (4, 10, 11).

CHAMPERTY AND MAINTENANCE.

1. In action on promissory note by attorney, evidence *held*, to show that he had not abandoned practice of law, rendering him amenable to statute prohibiting attorney from purchasing promissory note with intent of bringing suit thereon contrary to 3 Comp. Laws 1929, § 13593. *Stieler* v. *Pearson*, 374.
2. Attorney's purchase of promissory note is unlawful only when done for purpose of bringing suit, thereby annoying and harassing debtor and making him costs. *Id.*
3. Where evidence shows that attorney's purchase of promissory note on which he brought suit was not for purpose of oppression or annoyance, but only to put himself in more strategic position in dealing with debtor, who refused to pay just obligations, there was no violation of statute, and plaintiff was entitled to judgment (3 Comp. Laws 1929, § 13593). *Id.* 375.

CHANGE OF ADDRESS—See VENDOR AND PURCHASER (27).

CHANGE OF CIRCUMSTANCES—See DIVORCE.

CHARACTER—See DEATH.

CHARITY—See MUNICIPAL CORPORATIONS (16, 17).

CHARTER—See CORPORATIONS (5–7, 12); MUNICIPAL CORPORATIONS (5, 6, 15).

CHATTEL MORTGAGES.

1. Assignment of chattel mortgage and debt which it secures will generally invest assignee with all rights and powers which were possessed by mortgagee, and assignee stands in same position as to mortgagor, or his donee, as did mortgagee, and same rights and obligations exist between them. *Jassy* v. *Marciniak*, 153.
2. Purchaser of chattel mortgage and notes given in connection therewith is not entitled to judgment for deficiency against mortgagee, in absence of any promise other than indorsement of notes, where notice of dishonor was neither given nor waived. *Id.*
3. Where dealer sold automobile covered by floor-plan mortgage on conditional sale contract, title so retained remained subject to mortgage. *National Bond & Investment Co.* v. *Union Investment Co.*, 307.
4. Where dealer sold automobile covered by recorded floor-plan mortgage on conditional sale contract, and then assigned said contract, assignee thereof acquired no rights beyond those of mortgagor, which remained subject to mortgage. *Id.*
5. On foreclosure of chattel mortgage covering stock, implements, etc., on large farm, evidence *held*, to show no emergency justifying appointment of receiver to sell same. *White* v. *Fulton*, 346.
6. Mortgagor while in possession holds not as agent of mortgagee, but as owner of incumbered property, and is entitled to use, rents, and profits. *State Bank of Beaverton* v. *Southern Surety Co.*, 482.
7. On foreclosure of chattel mortgage on roadbuilding machinery, mortgagee is not entitled to recover from mortgagor's surety for use or rent of said property, although, on mortgagor's failure to complete contract, surety used said machinery in completing it. *Id.*
8. Mere recital of retention of title in instrument itself is not conclusive as to whether it is conditional sales contract or whether it does pass title notwithstanding recital to contrary. *In re Petition of Hume*, 556.
9. In determining whether instrument is conditional sales contract or chattel mortgage, it is significant, although not controlling, that it is not drafted in form or couched in terms of ordinary chattel mortgage, that no promissory notes accompany it, that no provision is made for recovery of deficiency in event of foreclosure, and that nowhere in instrument or in correspondence between parties is it referred to as chattel mortgage. *Id.*
10. Where instrument provided that title should not pass to buyer until fully performed and it never was fully performed, title did not pass, and therefore buyer could not give chattel mortgage. *Id.*
11. Holding of trial court that instrument in question is not chattel mortgage, *held*, correct. *Id.*

See BILLS AND NOTES (1); REPLEVIN; SALES (1).

CHECKS—See BILLS AND NOTES (2, 3, 5–7); CORPORATIONS (26); EVIDENCE (2); MINES AND MINERALS (1); RECEIVERS (22, 23, 25).

CHRONIC TUBERCULOSIS—See INSURANCE (9, 10).

CHURCHES—See MASTER AND SERVANT (14); MORTGAGES (7); PARTIES; RELIGIOUS SOCIETIES.

CIRCUIT COURT COMMISSIONER—See MORTGAGES (9).

CIRCUIT COURT STENOGRAPHER—See APPEAL AND ERROR (2, 3).

CITIES—See PAUPERS; TAXATION (13, 14, 16–18, 20, 23).

CITY CHARTER—See MUNICIPAL CORPORATIONS (18).

CITY COUNCIL—See NEGLIGENCE (14).

CITY MANAGER—See MUNICIPAL CORPORATIONS (16, 17).

CITY TREASURER—See ACTION (2); TAXATION (13, 14, 16–18, 20, 22, 23).

CLAIM ADJUSTER—See CORPORATIONS (20).

CLEARANCE—See BILLS AND NOTES (7).

CLOSED BANK—See BILLS AND NOTES (7).

CLOSED SEASON—See CRIMINAL LAW (7).

CLUBHOUSE—See EASEMENTS (1, 4).

COERCION—See ADOPTION.

COLLATERAL SECURITY—See RECEIVERS (10).

COLLECTION OF PERSONAL TAXES—See TAXATION (14–23).

COMMENT OF COURT—See CRIMINAL LAW (4).

COMMISSIONS—See RECEIVERS (6).

COMMISSIVE WASTE—See WASTE (2).

COMMON LAW—See CORPORATIONS (4); HUSBAND AND WIFE (1); INTEREST (1, 2); NEGLIGENCE (13); TAXATION (1); WASTE (1).

COMMON PROPERTY—See ADJOINING LANDOWNERS.

COMPENSABLE ACCIDENT—See MASTER AND SERVANT (13, 14, 17, 27).

COMPENSATION—See COUNTIES (6); MASTER AND SERVANT (25); RECEIVERS (1–4).

COMPETITION—See CONTRACTS (4, 5).

COMPROMISE AND SETTLEMENT—See BASTARDY (9); RECEIVERS (24, 25).

CONCEALED WEAPONS—See CRIMINAL LAW (1).

CONCEPTION—See BASTARDY (6).

CONCURRENT JURISDICTION—See EQUITY.

CONDEMNATION—See MUNICIPAL CORPORATIONS (15).

CONDITIONAL SALES CONTRACT—See CHATTEL MORTGAGES (3, 4, 8–10).

CONDITION PRECEDENT—See GUARANTY (1).

CONFESSION OF ERROR—See APPEAL AND ERROR (1).

CONFIRMATION OF SALE—See MORTGAGES (9, 10); TAXATION (28).

CONFLICT OF LAWS—See COURTS; HUSBAND AND WIFE (7–9); RECEIVERS (15).

CONSENT—See ADJOINING LANDOWNERS; ADOPTION; CORPORATIONS (4, 7); RECEIVERS (11, 13, 27); TRUSTS (10, 11); VENDOR AND PURCHASER (33–37).

CONSIDERATION—See COVENANTS (2); GUARANTY (7); MORTGAGES (1, 2); MUNICIPAL CORPORATIONS (7); TAXATION (38); VENDOR AND PURCHASER (33).

CONSOLIDATION AGREEMENT—See CORPORATIONS (11, 13, 14).

CONSTITUTIONAL LAW.

1. Fees of public officers are strictly regulated by statute, and are not open to equitable considerations by courts nor to discretionary action of officers. *Board of Supervisors of Jackson County* v. *Dicker*, 79.
2. State having "occupied field" of regulating operation of interurban motor vehicles by enactment of Acts Nos. 212, 312, Pub. Acts 1931, authority of city over said carriers is withdrawn except such as is strictly referable to reasonable control over its streets or as is reserved to it by law (Const., art. 8, § 28). *Detroit, Wyandotte & Trenton Transit Co.* v. *City of Detroit*, 124.
3. Under city's constitutional right to reasonable control of its streets, it may regulate method of operation on city streets of interurban jitneys not doing local business, but it may not by ordinance prohibit their operation thereon, since it would thereby invade jurisdiction of State. *Id.*
4. That owners of interurban motor jitneys have no permit from State does not validate city ordinance prohibiting their operation on city streets, since penalty for illegal operation is part of control and jurisdiction taken by State (Acts Nos. 212, 312, Pub. Acts 1931), and court may not assume that law will be violated. *Id.*

See MUNICIPAL CORPORATIONS (6, 17); STATUTES (1, 2).

CONSTRUCTION OF CONTRACT—See CHATTEL MORTGAGES (9); CONTRACTS (6, 8); CUSTOMS AND USAGES (2); EVIDENCE (7); VENDOR AND PURCHASER (26).

CONSTRUCTION OF DEED—See EASEMENTS (1–3).

CONSTRUCTION OF EASEMENT—See EASEMENTS (2–4).

CONSTRUCTION OF STATUTE—See GARNISHMENT (5); LICENSES (3, 4); MORTGAGES (8); MUNICIPAL CORPORATIONS (11); STATUTES (4); TAXATION (6, 8, 9).

CONSTRUCTIVE FRAUD—See INSURANCE (10).

CONSTRUCTIVE NOTICE—See MECHANICS' LIENS (6).

CONTEMPORANEOUS AGREEMENT—See EVIDENCE (3).

CONTINGENT TRUST AGREEMENT—See TRUSTS (12, 14).

CONTRACTS.

1. In action for breach of contract to repair boiler, evidence *held*, sufficient to sustain judgment for plaintiff.. *McClure* v. *Wimmer*, 76.
2. Rescission is remedy properly restricted to cancellation of contracts involving mutual obligations. *Wilson* v. *Lingon*, 134.
3. Generally, where specific performance would be refused, rescission will be decreed, though rescission is more nearly matter of right than specific performance. *Id.*
4. Where bank sold insurance business because it was *ultra vires* for it to conduct it, and agreed to give moral support to continuance of said business, it was not actionable breach of said contract for bank's officers to engage in competing business. *Sloan* v. *Charlevoix State Savings Bank*, 291.
5. Sale of insurance business by bank and agreement not to reengage in said business, without restraint upon and agreement thereto by its officers, did not preclude officers from conducting competing business. *Id.*
6. Any ambiguity in sales contract prepared by vendor must be construed more strongly against it than against opposite party. *In re Petition of Hume*, 555.
7. Resolution adopted by board of directors that employee's commission be certain amount, where followed by service rendered and accepted, must be construed as offer to employ and acceptance of said offer, constituting contract of hire. *Valentine* v. *King Manfg. Co.*, 601.
8. Language used in contract is to be construed most strictly against party responsible for its use, especially where construction contended for by maker of instrument would result in binding other party, while performance by him would be optional. *Fort Pitt Malleable Iron Co.* v. *Detroit Steel Products Co.*, 683.

CONTRACTS—Continued.

9. Acceptance of option must be agreeable to terms proposed and to exact thing offered, and it must be within time specified or right will be lost. *Steed* v. *Pure Oil Co.*, 699.

See APPEAL AND ERROR (5); CHATTEL MORTGAGES (7); CORPORATIONS (2, 3, 9); CUSTOMS AND USAGES (2, 3); EVIDENCE (7); GARNISHMENT (4); GUARANTY (3); HUSBAND AND WIFE (7–9); INTEREST (4); MECHANICS' LIENS (4); MORTGAGES (12); MUNICIPAL CORPORATIONS (1–8, 10); PARENT AND CHILD; PLEADING (2); SALES (3, 4); STATUTES (2); TAXATION (37, 38); VENDOR AND PURCHASER (2, 20, 29); WASTE (1).

CONTRIBUTORY NEGLIGENCE—See APPEAL AND ERROR (10, 13); MOTOR VEHICLES (4, 9, 10); NEGLIGENCE (7, 8, 15, 16); RAILROADS.

CONVERSION.

1. Where, in action for conversion of truck, evidence was sufficient to justify finding that defendant's taking was tortious, demand for possession by plaintiff was not necessary prerequisite to bringing action. *Davidson* v. *Midwest Commercial Credit Co.*, 14.
2. Where defendant, by selling truck, was guilty of actual conversion, and demand for possession would have been idle, no demand was required before bringing action for conversion. *Id.*

CONVEYANCING—See COVENANTS.

CONVICTION—See CRIMINAL LAW (3, 11).

CO-OPERATIVE MARKETING—See CORPORATIONS (26).

COPIES—See EVIDENCE (1).

COPPER—See RECEIVERS (30).

COPY OF BOND—See PRINCIPAL AND SURETY (1).

CORPORATIONS.

1. Proposed association, which never reached the stage of being *de jure* or *de facto* corporation, may not exercise any corporate powers, assert corporate rights, or assume corporate liabilities. *Campbell* v. *Rukamp*, 43.
2. Individual assuming to act as corporation and contracting as such, where there is no corporation either *de jure* or *de facto*, is individually liable, and liability also attaches to all stockholders or members of said nonexisting corporation who expressly or impliedly authorize such contracts. *Id.*
3. Relation between corporation and its stockholders is contractual in its nature. *Voigt* v. *Remick*, 198.

CORPORATIONS—Continued.

4. At common law, neither directors of corporation nor majority of its stockholders had right, power, or authority to sell and convey all property of going and prosperous corporation capable of achieving objects of its creation, as against objections of single stockholder. *Id.*
5. Charter of corporation is its constitution, prescribing duties of stockholders and directors in exercise of power therein conferred upon them. *Id.*
6. Majority of stockholders is sovereign when they act within limits of their charter, but when they transcend scope of their corporate powers and authority their acts are not binding. *Id.*
7. General doctrine that board of directors of corporation may not sell out its business and property and defeat object of its organization without consent of stockholders has no application in case where, in charter creating it, such power has been conferred on directors. *Id.*
8. Corporations are creations of statute, having right to exercise powers and privileges conferred on them by law, and stockholders therein have only those rights fixed and defined by statute. *Id.*
9. Those who become stockholders in private corporation become such upon agreement and contract that their investment therein may be handled subject to exercise of any and all powers conferred upon corporation by law. *Id.*
10. Corporate directors occupy fiduciary relation to stockholders, and are forbidden to act where duty is opposed to interest, fidelity to cupidity, integrity to personal gain. *Id.* 199.
11. Majority of stockholders of corporation, by consolidation agreement or otherwise, may not manipulate its assets so as to destroy equality of right among stockholders, or in any manner which is unequal, unfair, or inequitable, oppressive, discriminatory, or illegal, deprive minority stockholders from having same rights as others. *Id.*
12. That charter provided against voiding transactions entered into between corporations with interlocking directorates does not render it void, but it is duty of court to scrutinize deal accomplished between corporations represented in whole or in part by same directors with care, and, if fraud is found, to properly protect interests of those injuriously affected. *Id.*
13. Consolidation agreement is neither void nor voidable at election of any stockholder merely because directors making or controlling agreement are common directors of both consolidating companies. *Id.*
14. Stockholder attacking merger of corporation with another was properly denied equitable relief, in absence of evidence of fraud, although merger may have been error in judgment on part of board of directors. *Id.*
15. Failure of incorporated cemetery association to file corporation reports required by 2 Comp. Laws 1929, § 10123, does not bar its right to relief from tax liens created by unwarranted

CORPORATIONS—Continued.

assessments against cemetery for road and drain taxes, where it has complied with provisions of Act No. 22, Pub. Acts 1932, waiving compliance with former statute. *White Chapel Memorial Ass'n* v. *Willson*, 239.

16. Stock certificates indorsed in blank by owner, and fraudulently pledged to bank by brokers who held it as collateral, may not be reclaimed where bank was without notice of any facts making it wrongful (2 Comp. Laws 1929, §§ 9524–9526). *Connolly* v. *Peoples State Bank*, 352.

17. Evidence *held*, insufficient to show that bank had knowledge of facts sufficient to place it on inquiry to ascertain ownership of stock fraudulently pledged to it by broker. *Id.*

18. Purchaser of stock certificates made negotiable by signature in blank of person to whom issued owes no duty to such person to inquire into title of party in possession. *Id.*

19. Bank acting honestly in taking as pledge stock certificates indorsed in blank was good-faith pledgee (2 Comp. Laws 1929, §§ 9524–9526). *Id.*

20. Where employee of foreign corporation, in addition to soliciting orders, performed other services, such as adjusting claims, filling orders by securing goods from other purchasers, and keeping some goods of company in stock at his home for immediate delivery, he was representative of company in this State, so that service on him was service on company (Act No. 177, Pub. Acts 1931). *Cheli* v. *Cudahy Brothers Co.*, 496.

21. Promoter of company, like its directors, is deemed to sustain towards members of company and toward corporation, relation of trustee toward his *cestui que trust*. *Barth* v. *Bredshall*, 522.

22. Where lease was obtained by promoter incident to, and as part of, promotion of undertaking, promoter, who acts in fiduciary capacity, may not make secret profit on assigning said lease to corporation subsequently organized for purpose of carrying on contemplated enterprise. *Id.*

23. Director who secured lease of additional land for use of corporation is not entitled to derive profit incident thereto at expense of corporation or its other stockholders, although assented to by board of directors which he dominated. *Id.*

24. Transactions between corporation and its directors personally should be carefully scrutinized, and burden is always on directors in control of company to show that all their transactions with it are fair and not in violation of trust relation which they sustain to company and its other stockholders. *Id.*

25. Corporate stock paying dividend of 24 per cent. per annum, obtained by directors in exchange for their unsecured notes at 6 per cent., was properly canceled by court below on complaint of stockholder who paid cash for his stock, where corporation never profited from said notes, they still being in its hands, and only payments made were dividends credited thereon. *Id.* 523.

CORPORATIONS—Continued.

26. Where by-laws of nonprofit corporation, organized for purpose of co-operative marketing of fruit, provided that each day's shipment should be prorated and filed separately, and that, on receipt of returns for each day's shipment, check should be drawn for amount due each member for fruit shipped on said day, association, on discovering it had sustained loss, had no authority to place all receipts in general fund and prorate it among members, but payment should be made in accordance with by-laws. *Cole* v. *Southern Michigan Fruit Ass'n*, 617.

27. Minutes of stockholders' meeting clearly showing intent to presently convey certain shares of stock to certain persons operated to transfer said stock, although there was no issuance of formal certificates. *In re Petition of Farber*, 653.

28. If capital stock of corporation was reduced, stockholder to whom no stock was issued is entitled to decree for shares proportionate to capital structure. *Id.*

29. Finding of court below that corporation's officer owns patent rights which receiver claimed belonged to corporation is sustained, on appeal. *Id.* 655.

30. Corporation's officer is entitled to benefit of amount owing to him by corporation, less credits, and carried on its books, in accounting between him and corporation. *Id.*

31. Provision of decree that corporation's receivers institute proceedings against former receiver and corporation's officers to recover all moneys of corporation improperly taken is approved, on appeal; scope of proceedings to be stated in decree. *Id.*

32. Charges against corporation's receiver, who was stockholder, and its officers, is made lien on their stock in corporation, including sums paid by corporation in connection with officer's patents not properly accounted for. *Id.* 656.

See GARNISHMENT (2); JUDGES; MORTGAGES (2); MUNICIPAL CORPORATIONS (5, 6, 8, 10); PARTNERSHIP; RECEIVERS (14, 16, 18–20, 22–28, 30, 31); RELIGIOUS SOCIETIES (1, 3, 4); TAXATION (2); TRUSTS (7, 9); WAREHOUSEMEN.

CORPUS DELICTI—See CRIMINAL LAW (14).

CORROBORATION—See BASTARDY (6).

COST OF REPAIRS—See MUNICIPAL CORPORATIONS (4).

COSTS.

1. Appellee, having filed no brief before decision of case on appeal, is not allowed costs therefor. *Grusiecki* v. *Jaglay*, 10.

2. Premium on appeal bond given by defendant to stay proceedings and to pay judgment if not reversed was properly taxed as part of its costs, where judgment against it was reversed on appeal (Court Rule No. 5, § 7). *Liquidating Holding Corp.* v. *Mortgage & Contract Co.*, 395.

See APPEAL AND ERROR (4); CHAMPERTY AND MAINTENANCE (2); MECHANICS' LIENS (7); RECEIVERS (1, 2).

COUNTIES.

1. Where unclaimed money was deposited by administrator with county treasurer under 3 Comp. Laws 1929, § 15759 *et seq.*, treasurer is not entitled to retain interest received thereon, but is limited to statutory fee. *Brown* v. *Vidro*, 54.
2. Nor does said interest belong to county, in absence of express statutory provision to contrary. *Id.*
3. Where board of supervisors voted to place county treasurer on straight salary basis and all fees to belong to county, neither audit of treasurer's report, which showed retention by him of certain fees, nor advice of members of board or of auditor general's staff that he was entitled to retain said fees, can annul said action of board (1 Comp. Laws 1929, § 1346). *Board of Supervisors of Jackson County* v. *Dicker*, 78.
4. Settlements with county are *prima facie* evidence of state of accounts between treasurer and county, but are not conclusive, and may be impeached. *Id.*
5. County treasurer, placed on straight salary basis, is not entitled to retain fees because of settlements with county showing retention of said fees; especially where retention of fees is punishable as misdemeanor (1 Comp. Laws 1929, §§ 1346, 1353). *Id.*
6. County treasurer placed on straight salary basis is not entitled to increased compensation or to retain fees collected because of addition of new duties for benefit of county (1 Comp. Laws 1929, § 5261). *Id.* 79.
7. Failure of statute providing for payment of salary to county officers and payment of all fees to county to repeal former acts providing for retention of fees by officers does not render said statute inoperative, since there are certain counties expressly excluded from its operation as well as others not taking advantage thereof (1 Comp. Laws 1929, § 1346). *Id.*

See MANDAMUS (1); PAUPERS; STATUTES (1, 3).

COUNTY TREASURER—See COUNTIES (1, 3–6); MANDAMUS (1); TAXATION (14, 22, 35).

COURT RULES—See APPEAL AND ERROR (2, 3, 11, 12); COSTS (2); MANDAMUS (3); PLEADING (1); PRINCIPAL AND SURETY (1).

COURTS.

In case of conflict, in appointment of receiver, priority generally follows decree of court which first obtains jurisdiction of parties and subject-matter, and it does not rest upon race between courts to final decree. *In re Petition of Farber*, 653.

See CORPORATIONS (12); EQUITY; JUDGMENT (3); RECEIVERS (1–4, 8, 9, 14–18).

COVENANTS.

1. Generally, existence of known easement for public highway at time of conveyance does not constitute breach of covenant against incumbrances in deed. *Daugherty* v. *Reading*, 696.

COVENANTS—Continued.

2. Where owners were entitled to compensation for land taken for highway purposes long before entering into preliminary agreement for sale of farm, and purchasers knew that title acquired would be subject to rights of public in said highway, they are not entitled to have consideration paid for said easement credited on purchase price of farm, although release to State was not executed until after preliminary agreement was entered into. *Id.*

See EASEMENTS (1).

CREAMERY—See CUSTOMS AND USAGES (1); MASTER AND SERVANT (13).

CREATION OF TRUST ESTATE—See TRUSTS (3).

CREDITORS—See PARTNERSHIP; RECEIVERS (6, 11, 22, 24, 25); TRUSTS (13).

CREDITS—See CORPORATIONS (30).

CRIMINAL LAW.

1. In prosecution for assault with intent to do great bodily harm less than murder, growing out of gun fight engaged in by defendant and others with officers, testimony that defendant admitted, when arrested in another State with others for carrying concealed weapons, that gun found belonged to him, was not admissible, since it had no relation to crime charged, nor was it competent as bearing on his intent or motive, under 3 Comp. Laws 1929, § 17320; but it was not prejudicial of itself, and therefore its admission is not reversible error, in absence of showing of actual prejudice. *People* v. *Bolduc*, 1.
2. Denial of defendant's motion to suppress evidence against him on charge of illegal possession of intoxicating liquor, where he did not comply with 3 Comp. Laws 1929, § 17288, disposed of question, and he was not entitled to second hearing on same matter on trial, or to have jury determine admissibility of said evidence. *People* v. *Kramer*, 94.
3. Proof of judgment and conviction of prostitute by oath of justice of peace, who produced minutes thereof as full and complete as entries on his docket are required to be, *held*, not error, although his docket was not written up; statute as to docket entries being directory merely (3 Comp. Laws 1929, §§ 14185, 16273, 17427). *People* v. *Johnson*, 118.
4. Charge to jury that there were certain items before them in proofs that tended to indicate guilt of defendant, and that it was for jury to take all testimony and determine whether defendant was guilty or not, *held*, not incorrect under 3 Comp. Laws 1929, § 17322; issue of fact being submitted to jury for their sole determination. *Id.*
5. Where accused stood convicted of charge of breaking and entering, and prosecuting attorney filed information accusing him of several certain and specified previous convictions (3

CRIMINAL LAW—Continued.

Comp. Laws 1929, § 17341), to which accused pleaded guilty, no trial was necessary, and he was properly sentenced as third offender (3 Comp. Laws 1929, § 17339). *In re Gardner*, 122.

6. Conviction of statutory rape, alleged to have been committed on or about certain date, is affirmed, on appeal, where there was evidence of repeated acts of intercourse before and at about date alleged, although no specific act of intercourse was pointed out or segregated by prosecution, on which conviction was had. *People* v. *Lummis*, 170.

7. Complaint that defendant, on certain date, at certain place, carried rifle into area frequented by deer, season for hunting being then and there closed, without charging that rifle was loaded, or that defendant had ammunition with him, charged no crime (2 Comp. Laws 1929, § 6229). *People* v. *Smith*, 486.

8. Evidence that officer searched defendant's automobile and found unloaded rifle under blanket on back seat, without any ammunition, *held*, not to show commission of alleged crime (2 Comp. Laws 1929, § 6229). *Id.*

9. Offense described and proscribed may not be enlarged by section of statute prescribing penalty. *Id.*

10. Where complaint charged no offense, and evidence established no crime, Supreme Court may not, with full consciousness of glaring error committed, rest composed and affirm conviction on ground that no motion was made to direct verdict for want of evidence. *Id.* 487.

11. Conviction by jury without evidence commands no procedural support, and when error is fundamental, manifest, and noticed, such conviction may not be permitted to stand. *Id.*

12. Error in submitting case to jury, where complaint charged no crime and evidence did not establish any crime, permitting finding of guilt and sanction thereof by sentence in nature of probation, is so fundamental that Supreme Court cannot but notice same, and, as court for correction of errors, exercise power of correction, although said question was not raised in trial court. *Id.*

13. In prosecution for negligent homicide, where it was charged that defendant was under influence of intoxicating liquors at time offense was alleged to have been committed, there was no error in admission of testimony relative to defendant's condition in said respect, or in instruction that jury had right to consider whether defendant was in fact under influence of intoxicating liquors at time alleged (Act No. 328, Pub. Acts 1931, § 324). *People* v. *Beauchamp*, 492.

14. In prosecution for negligent homicide, finding of jury that deceased met his death by being struck by defendant's automobile, *held*, warranted from testimony of defendant, his companion, and a pedestrian who was a short distance away, although there was no witness to collision (Act No. 328, Pub. Acts 1931, § 324). *Id.*

CRIMINAL LAW—Continued.

15. In prosecution for negligent homicide, where victim's death was caused by collision with defendant's automobile after dark, it will be presumed that car was equipped with lights as required by statute, in absence of evidence to contrary (1 Comp. Laws 1929, § 4736). *Id.*

16. Finding of jury that defendant charged with negligent homicide was driving in careless, reckless, or negligent manner at time of collision, *held*, justified under proof (Act No. 328, Pub. Acts 1931, § 324). *Id.*

17. In prosecution for unlawfully practicing medicine, where evidence shows that licensed physician examined, diagnosed, and prescribed for professed patient, fact that defendant was present, assisted physician, and disagreed with his diagnosis did not render him guilty of offense charged; especially where patient was informed that defendant was not physician. *People* v. *Hoxzey*, 648.

See COUNTIES (5); INDICTMENT AND INFORMATION (4); WITNESSES (1).

CROSS-EXAMINATION—See BASTARDY (9); WITNESSES (1).

CROSSING ACCIDENT—See RAILROADS.

CURING ERROR—See APPEAL AND ERROR (9); TRIAL (2).

CUSTOMS AND USAGES.

1. Testimony that arsenate of lead was at one time left at defendant's branch plant for distribution to farmers, from whom it purchased cream to manufacture into butter, and that an egg crate was once left there by farmer, did not show custom on part of defendant to accommodate farmers by storing articles for them, especially where there was testimony that defendant's president had objected to said storage of arsenate of lead. *Nyquist* v. *Iron River Creamery Co.*, 537.

2. Proof of existence of custom which would tend to contradict, not explain, express terms of contract, was properly excluded. *Fort Pitt Malleable Iron Co.* v. *Detroit Steel Products Co.*, 683.

3. Where order in clear and unambiguous terms ordered 4,000 castings to be manufactured, 2,000 to be shipped at once, and balance to be shipped when ordered, testimony as to alleged custom in trade that balance was not to be manufactured until further orders were given, effect of which would be to bind manufacturer but leave purchaser free from liability for failure to call for balance, was properly excluded. *Id.*

See BILLS AND NOTES (7); MASTER AND SERVANT (27); RECEIVERS (27).

DAM—See NEGLIGENCE (19); WATERS AND WATERCOURSES.

DAMAGES.

1. Verdict of $12,300 for injuries caused by fire to woman 32 years of age with life expectancy of 33 years, who was earning $30 per week with room and board, *held*, not excessive, where she was confined in hospital for nine weeks, was treated by doctor for several months, suffered much pain, there is evidence of permanent injury to right hand and joints of right arm, and her person has been disfigured and is likely to remain so. *Zelhaver* v. *Koepke*, 429.

2. In action for negligent damage to highway, where plaintiff showed cost or expense of restoring it, it was not in its own behalf called upon to do more in respect of proof of expense. *Lapeer County Road Com'rs* v. *Markley*, 456.

3. Measure of recovery for negligent damage to highway is not amount actually paid for restoring it, but it is reasonable sum, of which amount actually paid is evidence. *Id.*

4. Where there was testimony that going or prevailing prices were paid in restoring damaged highway, fact that said expense has been paid, *held*, evidence of its reasonableness. *Id.*

See APPEAL AND ERROR (7); CONTRACTS (1); GUARANTY (2); LANDLORD AND TENANT; NEGLIGENCE (1); SALES (4); VENDOR AND PURCHASER (30).

DANGEROUS WORK—See MASTER AND SERVANT (30–32).

DEATH.

Inference of death before expiration of seven-year period is permissible, even in absence of evidence showing exposure of absentee to specific peril, where, taking into consideration circumstances relating to character, habits, condition, affections, attachments, prosperity, and objects in life of absentee which usually control conduct of men, no reasonable explanation could be given for his absence except that of death. *Sackett* v. *Metropolitan Life Insurance Co.*, 466.

See CRIMINAL LAW (14, 15); HUSBAND AND WIFE (6); INSURANCE (6–8, 10); MASTER AND SERVANT (13–15, 26, 27).

DECLARATION—See ACTION (2); APPEAL AND ERROR (11); PLEADING (1); PRINCIPAL AND SURETY (1–3).

DEDICATION.

1. Where subdivision owners established and improved boulevard as such in fact and in point of law, it became city boulevard when subdivision was annexed to city. *Barris* v. *City of Detroit*, 622.

2. Intention of subdivider to establish boulevard, indicated by such designation on recorded plat, is not defeated by dedicating "streets and alleys," shown on plat, to use of public. *Id.*

See HIGHWAYS AND STREETS (2); MUNICIPAL CORPORATIONS (20); TAXATION (4).

DEEDS—See COVENANTS (1); EASEMENTS (1–3); LIMITATION OF ACTIONS (4); LOST INSTRUMENTS; TAXATION (12); VENDOR AND PURCHASER (1–3, 17).

DEER—See CRIMINAL LAW (7).

DEFAULT—See ACTION (2); GUARANTY (1–5, 7); MANDAMUS (2); MINES AND MINERALS (1, 2); SALES (5); TAXATION (16–18, 23); VENDOR AND PURCHASER (4–6, 11, 12, 15, 16, 19–22, 29).

DEFECTIVE EXHAUST HEATER—See MASTER AND SERVANT (26).

DEFECTIVE TITLE—See SALES (1); VENDOR AND PURCHASER (7, 8).

DEFECTS—See SALES (2); TAXATION (31).

DEFENSES—See MASTER AND SERVANT (12, 28); PLEADING (2); SALES (2).

DEFICIENCY DECREE—See CHATTEL MORTGAGES (2, 9); MORTGAGES (1, 2, 13); VENDOR AND PURCHASER (9, 32).

DELAY—See GARNISHMENT (7).

DELAYED APPEAL—See WILLS (5–11).

DELINQUENCIES—See TAXATION (5).

DELINQUENT PERSONAL TAXES—See TAXATION (14).

DELIVERY—See BILLS AND NOTES (3); SALES (3); VENDOR AND PURCHASER (2).

DEMAND—See BILLS AND NOTES (1); CONVERSION; TAXATION (20).

DEPOSIT—See JOINT TENANCY (3); MINES AND MINERALS (1, 2).

DEPOSITORY—See TRUSTS (2).

DEPOSITS IN BANK—See HUSBAND AND WIFE (4–6); JOINT TENANCY; TRUSTS (2).

DESCRIPTION—See TAXATION (32, 33).

DESIGNATION OF DEPOSITORY—See TRUSTS (2).

DETROIT CHARTER—See MUNICIPAL CORPORATIONS (15).

DEVASTAVIT—See EXECUTORS AND ADMINISTRATORS.

DIAGNOSIS—See CRIMINAL LAW (17).

DIFFERENT OFFENSES—See INDICTMENT AND INFORMATION (2, 3).

DILIGENT SEARCH—See INSURANCE (6, 7).

DIRECTED VERDICT—See APPEAL AND ERROR (10, 13); CRIMINAL LAW (10); MALICIOUS PROSECUTION (1); MASTER AND SERVANT (32); MOTOR VEHICLES (10); MUNICIPAL CORPORATIONS (2); NEGLIGENCE (8, 16); RAILROADS (2); REPLEVIN.

DIRECTOR OF CONSERVATION—See TAXATION (7).

DIRECTORS—See CORPORATIONS (4, 5, 7, 10, 12–14, 21, 23–25); RECEIVERS (18).

DIRECTORS, BOARD OF—See CONTRACTS (7); CORPORATIONS (7, 14); EVIDENCE (7).

DISAPPEARANCE—See INSURANCE (8).

DISCHARGE—See MORTGAGES (6); RECEIVERS (14, 16, 27).

DISCHARGE IN BANKRUPTCY—See TRUSTS (13).

DISCHARGE OF MORTGAGE—See TRUSTS (4).

DISCLOSURE—See GARNISHMENT (5, 6).

DISCRETION OF CITY OFFICIALS—See MUNICIPAL CORPORATIONS (9).

DISCRETION OF COURT—See EVIDENCE (1); LIMITATION OF ACTIONS (1).

DISCRETION TO GRANT LICENSE—See LICENSES (2, 4).

DISFIGURATION—See DAMAGES (1).

DISMISSAL OF APPEAL—See APPEAL AND ERROR (3).

DISQUALIFICATION—See JUDGES.

DISTRAINT—See TAXATION (20, 21).

DISTRIBUTION—See EXECUTORS AND ADMINISTRATORS.

DITCH—See MOTOR VEHICLES (5).

DIVIDENDS—See CORPORATIONS (25).

DIVORCE.

1. Decree whereby alimony awarded to wife in former decree is increased from $100 per month to $200 is set aside, on appeal, where record fails to show such change in circumstances on part of parties as justifies said increase. *Broadwell* v. *Broadwell*, 453.
2. Finding of court below that allowance of $175 per month to wife as alimony and for support of child should not be reduced more than $25 per month, under circumstances, is not disturbed, on appeal. *Poxson* v. *Poxson*, 625.

See TRUSTS (1).

DOCKET—See CRIMINAL LAW (3).

DOING BUSINESS—See TAXATION (2).

DOMICILE—See HUSBAND AND WIFE (7, 9); TAXATION (1, 2).

DOUBLE ASSESSMENT—See TAXATION (34).

DRAINS—See CORPORATIONS (15); TAXATION (4).

DRIVING IN CARELESS OR RECKLESS MANNER—See CRIMINAL LAW (16).

DUAL CAPACITY—See TRUSTS (7).

DURESS—See ADOPTION.

DYNAMITE—See MASTER AND SERVANT (13).

EARNINGS—See MASTER AND SERVANT (25).

EASEMENTS.

1. Right of lot purchaser to enjoin erection of clubhouse on certain lake front lots, reserved by owners for benefit of all lot purchasers, as infringement of easement, rests wholly on terms of deed, and not on early promises or expressions of intention not incorporated in deed. *Kirby* v. *Meyering Land Co.*, 156.
2. Deed must be construed as it reads, and easement granted by it may not be construed to create another or different easement for benefit of grantees. *Id.*
3. Grant in deed to lot purchaser of "perpetual use * * * in passing to and from" lake and river, in common with all other lot owners, is grant of way or right of passage over said tract, and does not include other use. *Id.*
4. Lot purchaser granted right of way or passage over certain lots reserved for benefit of all lot purchasers is not entitled to enjoin erection of clubhouse on said lots, where his right of way to lake for full width of his lot is not obstructed thereby, and clubhouse is for benefit of all lot owners. *Id.*

See COVENANTS; HIGHWAYS AND STREETS (1); TAXATION (25).

ELECTION OF REMEDY—See TAXATION (39); VENDOR AND PURCHASER (16, 31).

ELECTIONS—See SCHOOLS AND SCHOOL DISTRICTS.

ELECTRICITY—See MUNICIPAL CORPORATIONS (5, 6, 8, 10).

EMERGENCY—See CHATTEL MORTGAGES (5); NEGLIGENCE (15, 16).

EMINENT DOMAIN—See COVENANTS (2); MUNICIPAL CORPORATIONS (15).

ENLARGING ISSUE—See MASTER AND SERVANT (5).

ENTIRETY—See TAXATION (26).

ENTRY OF JUDGMENT—See CRIMINAL LAW (3); INTEREST (3, 5); JUDGMENT (3).

EQUITY.

Where probate court, awarding certain amount to guardian on filing final account, did not constitute said award lien upon interest of ward in real estate sold on contract, circuit court has no power to impress equitable lien under its reserved concurrent jurisdiction under 3 Comp. Laws 1929, § 15519, since said remedy is now beyond power of probate court to grant; guardian having adequate remedy at law. *Ely* v. *Dewey*, 38.

See APPEAL AND ERROR (5); CONSTITUTIONAL LAW (1); CONTRACTS (3); CORPORATIONS (14, 24); JUDGMENT (1, 2); RECEIVERS (12, 27); TRUSTS (7); VENDOR AND PURCHASER (9, 22).

ESTATES OF DECEDENTS—See APPEAL AND ERROR (6); EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE (6); PARENT AND CHILD; WITNESSES (2).

ESTOPPEL—See COUNTIES (3); INSURANCE (2, 5); MUNICIPAL CORPORATIONS (1, 3); RELIGIOUS SOCIETIES (3); TAXATION (39); VENDOR AND PURCHASER (21, 29, 31); WAREHOUSEMEN.

EVIDENCE.

1. Admission in evidence of copy of bill of complaint claimed to have been filed by plaintiff in another suit was properly refused, where it was not proved or admitted to be true, and no offer or attempt to identify it was made except by reading it to plaintiff before jury, nor did court abuse its discretion in prohibiting its reading before jury. *Grusiecki* v. *Jaglay*, 10.
2. Where witness testified that certain checks, offered in evidence, refreshed her recollection, they were properly refused admission. *Id.*
3. In action on promissory note given by married woman as surety for brother's indebtedness, maker could not show by parol testimony contemporaneous agreement varying terms of note. *Palmer National Bank* v. *Van Doren*, 310.
4. Testimony as to admission by fisherman, which he denied, that he was in fault in making cast which hooked guide in eye, *held*, admissible for what it was worth. *Williams* v. *Wood*, 323.
5. Expert opinions, when properly admitted, are competent evidence. *In re Harris' Estate*, 358.
6. Plaintiff suing for personal injuries caused by fire through defendants' alleged negligence was properly permitted to exhibit her wounds to jury. *Zelhaver* v. *Koepke*, 429.
7. Where resolution adopted by board of directors offering employment to employee was so uncertain and ambiguous that its acceptance left contract of employment uncertain and indefinite, extrinsic testimony should have been admitted to explain ambiguous terms of said resolution. *Valentine* v. *King Manfg. Co.*, 601.

See ADOPTION; APPEAL AND ERROR (7–9, 13); BASTARDY; BILLS AND NOTES (6); BOUNDARIES (2); CHAMPERTY AND MAINTENANCE (1, 3); CHATTEL MORTGAGES (5); CONTRACTS (1);

EVIDENCE—Continued.

CONVERSION (1); CORPORATIONS (14, 17); COUNTIES (4); CRIMINAL LAW (1–4, 6, 8, 10–17); CUSTOMS AND USAGES; DAMAGES; DEATH; GARNISHMENT (2); INDICTMENT AND INFORMATION (2); INSURANCE (4, 5, 7, 8); JOINT TENANCY (4); JUDGMENT (1); JUSTICES OF PEACE; LOST INSTRUMENTS; MASTER AND SERVANT (6, 7, 11, 21–24); MORTGAGES (2, 5, 6, 10); MUNICIPAL CORPORATIONS (2, 4, 8); NEGLIGENCE (2, 4, 10, 11, 18, 19); PARENT AND CHILD; PROSTITUTION (2); RAILROADS; RECEIVERS (8, 19, 29); REPLEVIN; SALES (2); TRUSTS (1); VENDOR AND PURCHASER (23, 38); WILLS (9, 14, 15); WITNESSES (2).

EXCESS CONDEMNATION—See MUNICIPAL CORPORATIONS (15).

EXCESSIVE ALLOWANCE FOR SALARY—See RECEIVERS (31).

EXCESSIVE CLAIM—See MECHANICS' LIENS (9).

EXCESSIVE SPEED—See MOTOR VEHICLES (2, 10).

EXCESSIVE VERDICT—See DAMAGES (1).

EXECUTORS AND ADMINISTRATORS.

Where plaintiff's claim against estate of deceased person, represented by judgment against administrator, was never presented to, or allowed by, probate court, suit will not lie to enforce liability against administrator personally as one of distributees of said estate after estate has been distributed and administrator's final account has been allowed (3 Comp. Laws 1929, §§ 15687, 15689, 15691, 15712–15716). *Coughlin* v. *Wineman*, 469.

See COUNTIES (1).

EXEMPTIONS—See CORPORATIONS (15); TAXATION (3, 4, 32).

EXHAUST HEATER—See MASTER AND SERVANT (26).

EXHIBITING CHILD TO JURY—See BASTARDY (8).

EXHIBITING WOUNDS TO JURY—See EVIDENCE (6).

EXIT TO FIRE ESCAPE—See NEGLIGENCE (17).

EXPERT TESTIMONY—See EVIDENCE (5); WILLS (15).

EXPLOSIVES—See MASTER AND SERVANT (13).

EXPOSURE—See DEATH.

EXPURGATION OF BRIEF—See APPEAL AND ERROR (4).

EXTENSION OF LEASE—See MINES AND MINERALS (1, 3).

EYES—See EVIDENCE (4); MASTER AND SERVANT (10); NEGLIGENCE (10, 12).

EYEWITNESSES—See CRIMINAL LAW (14); MASTER AND SERVANT (17).

FACTORY—See NEGLIGENCE (7).

FARM—See MORTGAGES (11, 12).

FARM STOCK AND TOOLS—See CHATTEL MORTGAGES (5).

FATHER—See BASTARDY (6, 8).

FEES—See CONSTITUTIONAL LAW (1); COUNTIES (1, 3, 5–7); MANDAMUS (1); RECEIVERS (1, 4).

FENCES—See BOUNDARIES (2); TAXATION (3).

FICTITIOUS INVOICES—See RECEIVERS (23, 25).

FIDUCIARY RELATION—See CORPORATIONS (10, 21–23); RECEIVERS (6).

FINAL ACCOUNT—See EQUITY; EXECUTORS AND ADMINISTRATORS.

FINAL JUDGMENT—See APPEAL AND ERROR (12); MANDAMUS (2).

FINDING OF COURT—See APPEAL AND ERROR (6); BOUNDARIES (2); CHATTEL MORTGAGES (11); CORPORATIONS (29); DIVORCE (2); INSURANCE (7); LOST INSTRUMENTS; NEGLIGENCE (19); VENDOR AND PURCHASER (23).

FINDING OF DEPARTMENT—See MASTER AND SERVANT (10, 11, 16, 17, 19, 22–24, 26).

FINDING OF FACT—See CRIMINAL LAW (14, 16); MASTER AND SERVANT (11, 19).

FINGERS—See MASTER AND SERVANT (20, 22).

FIRE ESCAPES—See NEGLIGENCE (13, 14, 16–18); TRIAL (1).

FIRES—See DAMAGES (1); EVIDENCE (6).

FISHERMAN—See EVIDENCE (4).

FISHING—See NEGLIGENCE (10, 12).

FIXTURES—See WASTE (4, 5).

FLOOR-PLAN MORTGAGE—See CHATTEL MORTGAGES (3, 4).

FLOWAGE RIGHTS—See TAXATION (25, 27, 31, 33, 34).

FORECLOSURE—See APPEAL AND ERROR (5); CHATTEL MORTGAGES (5, 7, 9); GUARANTY (1, 2, 4, 5); LIMITATION OF ACTIONS (3); MECHANICS' LIENS (7); MORTGAGES (1, 2, 7–13); PARTIES; TRUSTS (8); VENDOR AND PURCHASER (9, 10, 17–22, 29, 32).

FOREIGN BILLS OF EXCHANGE—See BILLS AND NOTES (8, 9).

FOREIGN CONTRACTS—See HUSBAND AND WIFE (9).

FOREIGN CORPORATIONS—See CORPORATIONS (20); TAXATION (2).

FOREIGN HEIRS—See WILLS (6, 7).

FORFEITURE—See MINES AND MINERALS (3); VENDOR AND PURCHASER (4–6, 25, 26, 28); WASTE (1).

FORGERY—See WILLS (15).

FORM—See CHATTEL MORTGAGES (9).

FRACTURED SKULL—See MASTER AND SERVANT (17).

FRANCHISES—See MUNICIPAL CORPORATIONS (6, 7).

FRAUD—See BILLS AND NOTES (2, 5); CORPORATIONS (12, 14, 16, 17); INSURANCE (9, 10); JOINT TENANCY (5); MUNICIPAL CORPORATIONS (8); RECEIVERS (10, 18, 19, 23–25); TRUSTS (1); VENDOR AND PURCHASER (10, 23, 24, 29–31).

FREEHOLD ESTATE—See HIGHWAYS AND STREETS (1).

FURTHER COMPENSATION—See MASTER AND SERVANT (4–6).

GAME LAWS—See CRIMINAL LAW (7, 8).

GARNISHMENT.

1. If summons in garnishment issued against theatre corporation was served on manager or employee in charge of theatre at time service was had, service was good and commanded attention (3 Comp. Laws 1929, §§ 16009, 16204). *Dexter Theatre Co.* v. *Lesher,* 185.
2. Evidence *held,* sufficient to show that summons in garnishment issued against theatre corporation was served on proper person. *Id.*
3. Having made no objection to sufficiency of mileage fee tendered with service of summons in garnishment proceeding, defendant may not, after judgment, urge that it was insufficient. *Id.*
4. Where contractor presented owner with list of materials used but not paid for, and requested that he pay for them, which he agreed to do, although total amounted to more than balance due contractor, there was, in effect, assignment by contractor of balance due him, and thereafter there was no money in owner's hands belonging to contractor subject to garnishment. *L. C. Monroe Co.* v. *Vander Sys,* 511.
5. Provision in section 14019, 3 Comp. Laws 1929, that intervention shall be in subordination to, and in recognition of, propriety of main proceeding, must be construed in connection with that in section 14884, which provides for intervention of claimant in garnishee proceedings when disclosure states that other persons make claim to funds in hands of garnishee. *Peoples Lumber Co.* v. *Strehlke,* 513.

GARNISHMENT—Continued.

6. Judgment creditor of garnishee defendant was properly allowed to intervene, where it disclosed that it was not indebted to principal defendant, had no property in its hands belonging to him, and that funds in its hands represented judgment against it in favor of intervener in action wherein it appeared that principal defendant had no interest in said fund and action was dismissed as to him. *Id.*

7. Since garnishee statute contemplates speedy proceedings, where there was unexplained delay of nearly four months, order quashing writ of garnishment was properly made. *Id.* 314.

See TAXATION (20).

GENERAL APPEARANCE—See APPEARANCE.

GIFTS—See MORTGAGES (3).

GOING CONCERN—See RECEIVERS (11, 13).

GOOD FAITH—See BILLS AND NOTES (8); CORPORATIONS (17, 19); INSURANCE (5); REPLEVIN; TRUSTS (6).

GOOD HEALTH—See INSURANCE (3, 4, 9, 10).

GRADE CROSSING ACCIDENT—See RAILROADS (1).

GRAND RAPIDS CHARTER—See MUNICIPAL CORPORATIONS (5, 6).

GRATUITOUS SERVICES—See PARENT AND CHILD.

GREAT WEIGHT OF EVIDENCE—See NEGLIGENCE (18).

GROSS NEGLIGENCE—See MOTOR VEHICLES (3, 5).

GUARANTY.

1. Where there was no provision in land contract for notice of default before foreclosure suit or before acceleration, and no such provision in contract guaranteeing vendee's payment by vendor, who assigned her interest, guarantor was not entitled to notice of default as condition precedent to instituting foreclosure proceedings. *Mortgage & Contract Co.* v. *Limenberg,* 142.

2. In proceedings to foreclose land contract and hold guarantor liable for balance due under acceleration clause, burden was on guarantor to show loss, if any, caused by lack of notice of vendee's default. *Id.*

3. Failure to give guarantor timely notice does not wholly vitiate contract of guaranty, but only releases guarantor who has been damaged by lack of notice *pro tanto. Id.*

4. Starting suit to foreclose land contract and serving process on guarantor of vendee's payments as party defendant is sufficient notice of vendee's default to obviate necessity of further notice. *Id.*

GUARANTY—Continued.

5. Provision in land contract that payments thereunder would be accelerated if proceedings were taken to enforce it in equity after default by vendee is binding on vendor who assigned her interest and guaranteed vendee's payments, and therefore she is liable in foreclosure suit to which she was made party for payments due under acceleration clause as well as for past-due payments, notwithstanding want of notice of vendee's default, in absence of showing that she was damaged thereby. *Id.* 143.
6. Enforcing liability of vendee's guarantor under acceleration clause in land contract in no way changes terms of contract of guaranty, since acceleration clause is part and parcel of original contract. *Id.*
7. Litigation by which guarantors seek to escape terms of their plain and positive contracts of guaranty, by means of which contracts they have negotiated guaranteed obligations for valuable consideration, ought not to be encouraged. *Id.*

GUARDIAN AND WARD—See EQUITY.

GUEST PASSENGER—See MOTOR VEHICLES (3–8); NEGLIGENCE (3).

GUNS—See CRIMINAL LAW (1, 7, 8).

HABEAS CORPUS.

1. Questions reviewable by writ of error may not be reviewed in *habeas corpus* proceeding. *In re Gardner,* 122.
2. In *habeas corpus* proceeding, court deals only with radical defects rendering proceeding or judgment absolutely void. *Id.*
3. In *habeas corpus* proceeding, writ of certiorari is ancillary merely, and used to supply material for intelligent decision of alleged radical defects in judgment. *Id.*

HABITS OF ABSENTEE—See DEATH.

HABITUAL CRIMINAL—See CRIMINAL LAW (5).

HAND—See DAMAGES (1); MASTER AND SERVANT (4–6, 20–22).

HANDWRITING EXPERTS—See WILLS (15).

HARMLESS ERROR—See APPEAL AND ERROR (7–9); CRIMINAL LAW (1); TRIAL (1).

HARVESTING ICE—See WATERS AND WATERCOURSES.

HEAD-ON COLLISION—See MOTOR VEHICLES (7).

HEALTH AND ACCIDENT INSURANCE—See INSURANCE (4).

HEARING DE NOVO—See APPEAL AND ERROR (5).

HEARSAY—See BASTARDY (6).

HEDGES—See TAXATION (3).

HIGHWAYS AND STREETS.

1. Highway is easement of perpetual character, freehold estate, interest in lands, and therefore is "real estate" (1 Comp. Laws 1929, § 76). *Lapeer County Road Com'rs* v. *Markley*, 455.

2. Boulevard is in fact street with opportunity afforded for added parklike features, so that boulevard, designated as such on plat, falls within general description of street or highway. *Barris* v. *City of Detroit*, 623.

See APPEAL AND ERROR (7); CONSTITUTIONAL LAW (2, 3); CORPORATIONS (15); COVENANTS; DAMAGES (2, 4); DEDICATION; MORTGAGES (10); MOTOR VEHICLES (1, 2, 9, 10); MUNICIPAL CORPORATIONS (6, 15, 20); NEGLIGENCE (19); TAXATION (4); VENUE.

HOLDER IN DUE COURSE—See BILLS AND NOTES (5, 6); CORPORATIONS (18).

HOLDING OVER—See LANDLORD AND TENANT; VENDOR AND PURCHASER (4).

HUSBAND AND WIFE.

1. By Act No. 158, Pub. Acts 1917 (3 Comp. Laws 1929, §§ 13062–13067), common-law disability of married woman to make and enter into written instrument with her husband as joint tenants of real estate was removed. *McDougall* v. *Henderson*, 71.

2. Where wife is survivor of husband, judgment against her arising out of joint obligation entered into by them as joint tenants of real estate may be satisfied only out of property to which she became entitled as survivor of herself and husband (3 Comp. Laws 1929, § 13064). *Id.*

3. Where home in which husband and wife lived together belonged to him, was furnished by him, and he furnished board, claim for room and board of boarder, if any, belonged to husband, unless assigned by him. *Hartle* v. *Keefer's Estate*, 188.

4. Bank deposits in joint names of husband and wife are not subject to provisions of 3 Comp. Laws 1929, § 13071, subjecting evidences of indebtedness therein named to same restrictions, etc., as are incident to joint ownership of real estate by husband and wife, under theory that said deposits are included in words "other evidences of indebtedness." *McMahon* v. *Holland*, 246.

5. In absence of evidence as to ownership of money deposited in bank in joint names of husband and wife, no inference may be drawn that it was property of husband (3 Comp. Laws 1929, § 12061 *et seq.*). *Id.*

6. Where money deposited in bank in joint names of husband and wife was withdrawn by her and certificate of deposit therefor issued to her, said certificate was not impressed with trust in favor of husband, but, on wife's death, belonged to her estate. *Id.*

HUSBAND AND WIFE—Continued.

7. Note executed and delivered in Illinois to bank by married woman domiciled in Michigan as surety for brother's indebtedness, and renewals thereof subsequently executed in Michigan and mailed to bank, *held,* Illinois contract; renewal note being continuation of original note. *Palmer National Bank* v. *Van Doren,* 310.
8. Law of place of contracting controls on question of capacity of married woman to contract. *Id.*
9. Note and renewals thereof executed by married woman domiciled in Michigan as surety for brother's indebtedness, constituting Illinois contract and valid in that State, is enforceable in Michigan. *Id.*

See BILLS AND NOTES (4); EVIDENCE (3); PARENT AND CHILD; PRINCIPAL AND SURETY (4); TRUSTS (1, 12–14); WITNESSES (2).

ICE—See WATERS AND WATERCOURSES.

IDENTIFICATION—See EVIDENCE (1).

ILLNESS OF ATTORNEY AS EXCUSE FOR DELAY—See WILLS (8).

IMPROVEMENTS—See TAXATION (36–39).

IMPUTED NEGLIGENCE—See MOTOR VEHICLES (4); NEGLIGENCE (3).

"INCLOSED"—See TAXATION (3).

INCUMBRANCES—See COVENANTS (1); INSURANCE (2).

INDEPENDENT CONTRACTOR—See MASTER AND SERVANT (30–32).

INDICTMENT AND INFORMATION.

1. One charged with rape may be convicted of assault with intent to commit rape, assault and battery, or simple assault. *People* v. *Gibbons,* 96.
2. Although 3 Comp. Laws 1929, § 17290, permits amendment of information in respect to defects, imperfections, or omissions in form or substance or of any variance with evidence, it does not permit amendment of information after trial has begun so as to charge different crime, punishable with more severe penalty. *Id.*
3. It was reversible error, after trial had begun, to permit information charging attempt to rape (3 Comp. Laws 1929, § 17342) to be amended so as to charge assault with intent to commit rape, for which more severe penalty is provided (3 Comp. Laws 1929, § 16728). *Id.*

INDICTMENT AND INFORMATION—Continued.

4. Information charging negligent homicide and alleging that defendant, while under influence of intoxicating liquors, did drive his car at high and immoderate rate of speed, etc., *held*, sufficient, under statute, as against objection that it does not set up duties imposed upon defendant which were neglected or improperly performed (Act No. 328, Pub. Acts 1931, § 324). *People* v. *Beauchamp*, 491.

See CRIMINAL LAW (5, 7).

INDORSEMENT—See CORPORATIONS (16, 19); INSURANCE (2); RECEIVERS (22).

INDORSER—See BILLS AND NOTES (1–3); CHATTEL MORTGAGES (2).

INEXCUSABLE DELAY—See WILLS (7).

INFANTS—See BASTARDY (8).

INFERENCES—See DEATH; HUSBAND AND WIFE (5); INSURANCE (8); MASTER AND SERVANT (16–19).

INFORMATION—See REWARD.

INITIAL REGISTRATION—See LICENSES (4).

INJUNCTION—See BOUNDARIES (2); EASEMENTS (1, 4); MUNICIPAL CORPORATIONS (19).

INJURIES TO LAND—See VENUE.

INNOCENT PURCHASER—See RELIGIOUS SOCIETIES (5).

INSPECTION—See SALES (3).

INSTALMENT PAYMENTS—See VENDOR AND PURCHASER (1).

INSTRUCTIONS—See APPEAL AND ERROR (9); BASTARDY (7); CRIMINAL LAW (4, 13); MUNICIPAL CORPORATIONS (3); TRIAL; WILLS (13).

INSURANCE.

1. Insurance company is *held*, to have all the knowledge possessed by its agent as to insurable nature of property described in policy. *Schaefer* v. *East & West Insurance Co.*, 220.
2. Where insured disclosed to insurer's agent that there was small incumbrance against insured property, and was informed that it need not be referred to in policy, although policy provided otherwise, insurer is estopped from claiming that policy was void from its issuance by reason of its agent's failure to make said indorsement. *Id.*
3. "Good health" means that insured is free from disease that would seriously affect general soundness of system, and that he has not been attended by physician for serious ailment. *Ligrow* v. *Abraham Lincoln Life Insurance Co.*, 444.

INSURANCE—Continued.

4. Whether insured was in good health at time health and accident policy was delivered to him, *held*, properly submitted to jury, where evidence showed that, although he was suffering from temporary ailment, it was not serious, and that he fully recovered. *Id.*
5. Proofs of loss should be treated as evidence of fact stated, being in nature of admission; but it is subject to explanation, and cannot have effect of estoppel when made upon information received from attendant physician, and in good faith. *Id.*
6. In order to maintain action on life insurance policy, on presumption of insured's death after absence of seven years, there must be evidence of diligent search and inquiry; what is diligence depending on facts and circumstances of each particular case (3 Comp. Laws 1929, § 13467). *Sackett* v. *Metropolitan Life Insurance Co.*, 466.
7. In wife's action on husband's life insurance policy, on presumption of his death after absence of seven years, finding of trial court that there had been diligent search and inquiry, *held*, justified under evidence showing that insured was laborer and left wife and five children; that wife was left with little money; that she made inquiry at his place of work, of certain relatives, of sheriff, at county building; that she visited morgues, and that notice was published in Detroit paper. *Id.*
8. In wife's action on husband's life insurance policy, on presumption of his death after absence of seven years, where insured had provided well for wife and children, lived happily with them, was upright citizen, enjoyed association of friends, was successful in his employment, and, in modest way, in accumulation of wealth, inference drawn by trial judge that insured died on or about date of his disappearance, and within life of his policy, *held*, justified, although there was no evidence that at time of disappearance he was exposed to any specific peril. *Id.*
9. Statement by insured, in application for reinstatement, that he was in good health, made in ignorance of fact that he had chronic pulmonary tuberculosis, *held*, representation rather than warranty (3 Comp. Laws 1929, § 12427). *National Life & Accident Insurance Co.* v. *Nagel*, 635.
10. Where policy was reinstated on representation of insured that he was then in good health, but "was just getting over the flu," when in fact he had chronic pulmonary tuberculosis, which later caused his death, insurer is entitled to have policy canceled, although insured was ignorant of his true condition and made said representation without actual intent to deceive. *Id.*

See CONTRACTS (4, 5); MASTER AND SERVANT (3).

INTANGIBLE PROPERTY—See TAXATION (1, 2).

INTENT—See CHAMPERTY AND MAINTENANCE (2, 3); CORPORATIONS (27); CRIMINAL LAW (1); DEDICATION (2); EASEMENTS (1); INSURANCE (10); JOINT TENANCY (2); MASTER AND SERVANT (18, 28, 29); TRUSTS (3); WILLS (12).

INTENT TO RAPE—See INDICTMENT AND INFORMATION (1, 3).

INTEREST.

1. At common law interest was as a rule not allowable on judgments. *Motyka* v. *Detroit, Grand Haven & Milwaukee Ry. Co.*, 396.
2. Interest on verdicts and judgments is purely statutory, and, being in derogation of common law, may not be extended beyond statutory regulation. *Id.*
3. In tort actions statute awards interest on judgments from time of entry of same (3 Comp. Laws 1929, § 14555). *Id.*
4. In actions founded on contracts, in certain specified instances, interest on verdicts may be included in judgments (2 Comp. Laws 1929, § 9238). *Id.*
5. Where, in tort actions, plaintiffs had verdicts, but court entered judgments *non obstante veredicto* for defendants, which, on appeal, were reversed and judgments ordered entered on verdicts, interest commences to run from time of such entry, and not before (3 Comp. Laws 1929, § 14555). *Id.* 397.

See COUNTIES (1, 2); MECHANICS' LIENS (7); TRUSTS (3).

INTEREST IN LAND—See HIGHWAYS AND STREETS (1); TAXATION (4).

INTERLOCKING DIRECTORATES—See CORPORATIONS (12, 13).

INTERLOCUTORY DECREE—See APPEAL AND ERROR (12).

INTERSECTING HIGHWAYS—See MOTOR VEHICLES (9, 10).

INTERVENERS—See RECEIVERS (13).

INTERVENING STRIP OF LAND—See MUNICIPAL CORPORATIONS (15).

INTERVENTION—See GARNISHMENT (5, 6).

INTOXICATING LIQUORS—See CRIMINAL LAW (2, 13); INDICTMENT AND INFORMATION (4); LICENSES (1).

INVESTMENT—See CORPORATIONS (9); PRINCIPAL AND AGENT; TRUSTS (5, 8, 9).

INVITEE—See NEGLIGENCE (5–8).

IRREGULARITIES—See APPEARANCE (1); MUNICIPAL CORPORATIONS (1); RECEIVERS (19, 21, 22); TAXATION (29, 31, 34).

ISSUES OF FACT—See MUNICIPAL CORPORATIONS (2, 3).

ISSUE VOLUNTEERED BY DEPUTY COMMISSIONER—See MASTER AND SERVANT (6, 7, 9).

JITNEYS—See CONSTITUTIONAL LAW (3, 4).

JOINT BANK ACCOUNT—See HUSBAND AND WIFE (4–6); JOINT TENANCY.

JOINT TENANCY.

1. Strict formalities are not requisite in creating joint bank account with right of survivorship (3 Comp. Laws 1929, § 12063). *Equitable & Central Trust Co.* v. *Zdziebko,* 366.
2. Acknowledgment of former signature on card creating joint tenancy in bank account, with intention thereby of creating new joint tenancy, is as effective in accomplishing said purpose as execution of new card. *Id.*
3. Transfer of bank account in mother's name to joint account with daughter was tantamount to "deposit" within meaning of statute providing for joint tenancy in bank accounts (3 Comp. Laws 1929, § 12063). *Id.* 367.
4. Evidence *held,* to establish sufficient compliance with statutory requisites to create joint tenancy between mother and daughter in bank account formerly standing in mother's name only (3 Comp. Laws 1929, § 12063). *Id.*
5. Mother's act creating joint tenancy in bank account between herself and daughter, *held,* not result of fraud or undue influence, under record. *Id.*

See HUSBAND AND WIFE (1, 2, 4–6).

JUDGES.

1. Whether judge was disqualified to sit in case involving accounting in receivership proceedings for corporation because bank in which he was stockholder was creditor of corporation is question of law not affected by considerations of propriety or delicacy, where record did not disclose that corporation was indebted to bank, and it is not claimed that judge knew of said debt. *In re Petition of Farber,* 652.
2. Where judge or corporation of which he is stockholder is not party to suit, interest which will disqualify him must be direct interest in subject-matter of litigation or in outcome of suit, so that he or corporation will be directly affected through pecuniary or property loss or gain or accrual of right or liability. *Id.*
3. General rule of law that judge is disqualified from sitting in case because corporation of which he is stockholder is creditor of one of parties has no foundation in reason, nor does it bear any relation to preservation of courts from shadow of suspicion, which is purpose of statute (3 Comp. Laws 1929, § 13888). *Id.*
4. Judge was not disqualified to sit in case involving receivership of corporation because bank of which he was stockholder was creditor of corporation, where record did not disclose said fact, and it is not claimed that judge knew of said debt (3 Comp. Laws 1929, § 13888). *Id.*

See RECEIVERS (16, 17).

JUDGMENT.

1. Court of equity may not entertain bill to vacate judgment at law on ground that false testimony was given in trial. *Graure* v. *Detroit Lumber Co.,* 47.

JUDGMENT—Continued.

2. Court of equity will not retry suit at law in which judgment has been rendered and time for review by appeal has elapsed. *Id.*

3. Entry of judgment means ministerial act of clerk in recording it in permanent records of court. *Motyka* v. *Detroit, Grand Haven & Milwaukee Ry. Co.*, 396.

4. Where only showing in opposition to motion for summary judgment in favor of vendor against vendee for payments due under land contract was purported oral agreement made before execution of contract, substituting another as vendee, who was to become sole obligor, no defense was set forth, and motion for summary judgment was properly granted. *Kahn* v. *Green*, 633.

See APPEAL AND ERROR (12); CHAMPERTY AND MAINTENANCE (3); CORPORATIONS (31); COSTS (2); CRIMINAL LAW (3); GARNISHMENT (3); HABEAS CORPUS (2, 3); HUSBAND AND WIFE (2); INTEREST; MALICIOUS PROSECUTION (3); MANDAMUS (2); MASTER AND SERVANT (4, 9, 12); MECHANICS' LIENS (7); MORTGAGES (6, 7); NEGLIGENCE (1); PRINCIPAL AND SURETY (1, 2, 4); TAXATION (30, 33); WILLS (15).

JUDGMENT CREDITORS—See RECEIVERS (13).

JURISDICTION—See APPEAL AND ERROR (3); APPEARANCE; CONSTITUTIONAL LAW (3, 4); COURTS; EQUITY; MASTER AND SERVANT (8, 9); MUNICIPAL CORPORATIONS (18, 19); RECEIVERS (17); TAXATION (7, 10, 12, 28, 30, 31).

JUSTICE—See WILLS (10, 11).

JUSTICES OF PEACE.

Proceedings before justice may be proved by his oath (3 Comp. Laws 1929, § 14185). *People* v. *Johnson*, 117.

See CRIMINAL LAW (3).

KNOWLEDGE OF AGENT—See INSURANCE (1).

LABORERS—See MUNICIPAL CORPORATIONS (11–14).

LACHES—See JUDGMENT (2); VENDOR AND PURCHASER (23).

LAKES—See EASEMENTS (1, 3, 4).

LAND CONTRACTS—See APPEAL AND ERROR (5); GUARANTY (1, 2, 4–6); JUDGMENT (4); TAXATION (4); VENDOR AND PURCHASER (1–29, 31–38).

LANDLORD AND TENANT.

1. Tenant who retained possession of store building after expiration of his lease for purpose of advertising his new location is liable to respond in damages to landlord. *Pasieczny* v. *Bonkowski*, 107.

LANDLORD AND TENANT—Continued.

2. Although, generally, measure of damages for tenant's retaining possession of premises after expiration of lease is reasonable rental for time possession is retained, yet, in proper case, landlord may be entitled to special damages suffered by reason of tenant's failure to surrender premises, independent of rental value. *Id.* 108.

3. Where tenant retained possession after expiration of his lease, for purpose of advertising his new location, although notified that premises had been leased to new tenant, and landlord was compelled to bring summary proceedings to obtain possession, he is entitled to recover special damages in action therefor. *Id.*

See VENDOR AND PURCHASER (4); WASTE.

LAST-KNOWN POSTOFFICE ADDRESS—See VENDOR AND PURCHASER (25, 26, 28).

LAST WILL REVOKES FORMER—See WILLS (3).

LEASES—See CORPORATIONS (22, 23); MINES AND MINERALS; MUNICIPAL CORPORATIONS (5–8, 10); RECEIVERS (8).

LEAVE TO APPEAL—See MANDAMUS (3, 4); WILLS (7).

LEGAL SERVICES—See RECEIVERS (29).

LICENSES.

1. Affinity between malt products, especially wort, and beer with alcoholic content and effect is so close that legislature has general power to control traffic in them by license, taxation, or otherwise (Act No. 100, Pub. Acts 1931). *Howard* v. *Secretary of State*, 568.

2. Power to license business does not presuppose that statute affecting it is license law, nor, if license law, that discretion is conferred on officer to grant or refuse license. *Id.*

3. Enumeration of conditions under which secretary of State may refuse first registration to manufacturer of malt products impliedly excludes all other conditions (Act No. 100, Pub. Acts 1931, § 12). *Id.* 569.

4. Act No. 100, Pub. Acts 1931, providing for registration of manufacturers of malt products, confers no discretion on secretary of State to refuse initial registration, except as it may be found in section 12 of said act. *Id.*

See CONSTITUTIONAL LAW (2–4); CRIMINAL LAW (17); MUNICIPAL CORPORATIONS (16, 17); TAXATION (24).

LIEN AGAINST BUILDING ONLY—See MECHANICS' LIENS (1, 4, 5, 7).

LIEN LAW—See MUNICIPAL CORPORATIONS (13).

LIENS—See CORPORATIONS (15, 32); EQUITY; RECEIVERS (1, 2, 5–7); TAXATION (4).

LIFE INSURANCE—See INSURANCE (6–8).

LIGHTS—See CRIMINAL LAW (15); MOTOR VEHICLES (1, 2); RAILROADS (2).

LIMITATION OF ACTIONS.

1. Permitting defendants to amend their answer by also pleading statute of limitations is within discretion of trial judge. *Lau* v. *Pontiac Commercial & Savings Bank*, 73.
2. Failure of defendants to raise question of statute of limitations within 15 days after receiving bill of complaint did not constitute waiver of said defense. *Id.*
3. Where it is contended that mortgage foreclosed over five years ago was nullity because given on property not belonging to mortgagors, suit to set aside mortgage is not barred by 3 Comp. Laws 1929, § 13964. *Id.*
4. Suit to establish lost deed from grantee in sheriff's deed is not barred by statute of limitations (3 Comp. Laws 1929, § 13964[1]), pertaining to title under sheriff's deed, since plaintiff is not attacking said deed, nor claiming title adversely thereto, but claims thereunder and by subsequent conveyance. *Maurice* v. *Schramm*, 593.

See BOUNDARIES; MASTER AND SERVANT (12); PRINCIPAL AND SURETY (2); TAXATION (7–9, 11).

LINE FENCE—See BOUNDARIES (2).

LOSS OF HAND—See MASTER AND SERVANT (20–22).

LOST INSTRUMENTS.

In suit to restore lost deed, conclusion of trial court that lost deed was executed and should be restored, *held*, justified by testimony. *Maurice* v. *Schramm*, 593.

See LIMITATION OF ACTIONS (4).

LUMBER—See TRUSTS (12).

MACHINERY—See CHATTEL MORTGAGES (7).

MAILING—See MINES AND MINERALS (1).

MAJORITY—See CORPORATIONS (6, 11).

MALICIOUS PROSECUTION.

1. In action for malicious prosecution, where facts relative to probable cause are undisputed, question of probable cause is one of law. *Schneider* v. *Briggs Manfg. Co.*, 51.
2. In action for malicious prosecution, burden is on plaintiff to show want of probable cause. *Id.*
3. Where, in action for malicious prosecution, plaintiff failed to meet burden of proof to show want of probable cause, trial court properly directed judgment *non obstante veredicto* for defendants. *Id.*

MALT PRODUCTS—See LICENSES (1, 3, 4); TAXATION (24).

MANAGER—See WAREHOUSEMEN.

MANDAMUS.

1. Mandamus will issue requiring county treasurer to pay to county all fees collected and retained by him subsequent to adoption of resolution by board of supervisors placing him on straight salary basis (1 Comp. Laws 1929, § 1346). *Board of Supervisors of Jackson County* v. *Dicker*, 79.
2. Review, if any, of order setting aside default and judgment, is by mandamus and not by appeal; there being no final judgment, statute providing for issuance of writ of error, as of course, has no application (3 Comp. Laws 1929, § 15491). *Quail* v. *Cole*, 642.
3. Court Rules Nos. 55 and 60 (1931), while requiring mandamus to be termed appeal, do not change law that it is original writ, and that it does not issue without application and allowance. *Id.*
4. Where leave to prosecute appeal in nature of mandamus was not obtained, but appeal is prosecuted as of right, appeal is dismissed. *Id.*

See SCHOOLS AND SCHOOL DISTRICTS (3).

MANIPULATION OF DAM—See WATERS AND WATERCOURSES.

MANIPULATION OF STOCK—See CORPORATIONS (11).

MANUFACTURERS—See LICENSES (3, 4).

MARKETING AGREEMENT—See CORPORATIONS (26).

MARRIED WOMAN—See EVIDENCE (3); HUSBAND AND WIFE (7–9).

MASON—See MASTER AND SERVANT (31).

MASTER AND SERVANT.

1. Notice to employee of employer's acceptance of provisions of workmen's compensation act, actual or by posting, is not essential factor of operation under said act or withdrawal therefrom. *Lester* v. *Auto Haulaway Co.*, 16.
2. Employee is deemed to have accepted workmen's compensation act if at time of accident employer charged with liability therefor is subject to provisions of act, whether employee has actual notice thereof or not, and employee shall not have given employer written notice of rejection (2 Comp. Laws 1929, § 8414). *Id.*
3. Where employer's acceptance of provisions of workmen's compensation act was revoked by department of labor and industry because of employer's failure to secure insurance, it was not under said act, and therefore employee is not entitled to compensation thereunder for injury received during revocation period, although no notice of revocation was given to employees (2 Comp. Laws 1929, § 8412). *Id.*
4. Order of deputy commissioner denying employee's petition for further compensation for injury to hand, which was sole issue presented, was adjudication thereof, and, where not appealed from, department of labor and industry had no authority to declare said order nullity. *Deadwyler* v. *Consolidated Paper Co.*, 130.

MASTER AND SERVANT—Continued.

5. To enlarge issue presented by employee's petition for further compensation for injury to hand, amendment to petition, at least, is required, with notice to employer and opportunity to make denial thereof. *Id.*

6. Where employee's petition for further compensation for injury to hand was not amended, employer was not required to submit to issue volunteered by deputy commissioner, but was entitled to determination of issue presented in first instance by official not engaged in procuring evidence to be submitted to himself. *Id.*

7. While strict rules of court procedure may not be applicable to proceedings under workmen's compensation act, deputy commissioner may not decide issue injected on his own motion, and in support of which he takes part in procuring evidence. *Id.*

8. Proper petition for award under workmen's compensation act is jurisdictional. *Id.*

9. Where only petition filed for award under workmen's compensation act was denied and no appeal taken, jurisdiction was ended, and therefore award on another issue, injected by deputy commissioner, may not be upheld. *Id.*

10. In proceeding for additional compensation, finding of department of labor and industry that employee's loss of vision in right eye was due to accidental injury for which compensation was previously awarded, *held*, justified, on record. *Kibbey* v. *L. O. Gordon Manfg. Co.*, 531.

11. Finding of department of labor and industry on issue of fact, where sustained by competent evidence, is binding on Supreme Court. *Id.*

12. Defenses that employee had not sustained compensable injury and that claim was barred by statute of limitations, having been raised and decided adversely to employer in proceeding for compensation, from which no appeal was taken, are not available in subsequent proceeding for additional compensation for injury arising out of same accident (2 Comp. Laws 1929, § 8431). *Id.*

13. Where employee, in charge of branch plant for purchase of cream and manufacture of butter, permitted quantity of dynamite, caps, and fuses to be stored at plant by county agent, without knowledge or consent of employer, employee's death, few days later, caused by explosion, did not arise out of employment, and therefore award for his death under workmen's compensation act was properly denied. *Nyquist* v. *Iron River Creamery Co.*, 537.

14. Where minister, engaged to look after affairs of churches in two neighboring cities, was fatally injured by automobile after he alighted from street car on his way to attend evening meeting at home of one of his parishioners, his injuries arose out of and in course of his employment, justifying award to his dependents under workmen's compensation act. *Wearner* v. *West Michigan Conference of Seventh Day Adventists*, 540.

MASTER AND SERVANT—Continued.

15. Dependents of employee, whose duties for Michigan employer under Michigan contract were rendered partly in and partly out of State, are entitled to award under workmen's compensation act for his accidental death, although he was nonresident and accident occurred out of State, where it arose out of and in course of his employment. *Id.*

16. In proceedings under workmen's compensation act, department of labor and industry may draw all rational and natural inferences from facts and circumstances shown. *Simpson* v. *Michigan Valve & Foundry Co.*, 543.

17. Where operator of boring machine was observed standing in front of machine operating it as he was supposed to do, and soon thereafter was found lying on top of machine with fractured skull, under facts and circumstances, *held*, that department of labor and industry might find that accident arose out of and in course of employment, although no one saw accident. *Id.*

18. Even if inference might be drawn from facts and circumstances that accident resulting in injuries to employee was due to his intentional and wilful misconduct, department of labor and industry may decline to draw it. *Id.*

19. Finding of department of labor and industry, based on inferences drawn from facts and circumstances, while acting within its province, is conclusive on Supreme Court. *Id.*

20. Where employee suffered accidental injury to his right hand, and was compensated for loss of four fingers, but thereafter evidence showed change of condition in stiffening and ankylosis of thumb, and that what is left of hand is totally useless, he was properly awarded additional compensation, making total of 150 weeks, compensating for loss of hand (2 Comp. Laws 1929, § 8426). *West* v. *Postum Co., Inc.*, 545.

21. Finding of department of labor and industry that employee's hand is entirely useless as result of accidental injury, *held*, sustained by evidence. *Id.*

22. Evidence that accidental injury resulted in loss of four fingers, stiffening and ankylosis of thumb, and rendered what is left of hand totally useless, justified finding that there was loss of hand. *Id.*

23. On appeal from award in proceeding under workmen's compensation act, Supreme Court does not weigh evidence, but finding of department of labor and industry is controlling, if there is evidence to support it, notwithstanding there may be conflicting testimony. *Lantz* v. *Schantz*, 547.

24. Finding of department that relationship of parties was that of employer and employee, *held*, supported by evidence. *Id.*

25. Where employee's earnings for five days he worked prior to injury resulting in death amounted to $9.62, award of compensation based thereon should have been $7.68 per week for 300 weeks, and therefore, on appeal, award of $9 per week for said period is reduced to correct amount (2 Comp. Laws 1929, § 8427, subds. b, c). *Id.*

MASTER AND SERVANT—Continued.

26. In proceedings under workmen's compensation act, conclusion of department of labor and industry that decedents died as result of breathing carbon monoxide gas generated from running motor and carried through defective exhaust heater into cab where they were sleeping in nighttime, and that there was accidental injury, *held*, justified by established facts and circumstances. *Beck* v. *Commercial Driveaway, Inc.*, 550.

27. Where custom of drivers engaged in driveaway of sleeping in cars at night was known to and acquiesced in by employer, their accidental death from monoxide gas while so sleeping arose out of and in course of their employment. *Id.*

28. If employer insists upon defense of violation of rule by employee as means of defeating compensation claim, he must show that such rule was made, enforced, and intentionally violated. *Id.*

29. Where rule against drivers sleeping in cab of motor vehicle with motor running unless windows were left open, if promulgated, was not enforced, and fact that it was generally disregarded was known to employer, latter may not defeat compensation claim for death of drivers from monoxide gas while sleeping in cab on ground that they violated said rule and were therefore guilty of intentional and wilful misconduct. *Id.*

30. General rule that one who has contracted with competent person to do work within scope of his independent employment is not answerable for negligent acts of such contractor or of his servants or agents in performance of contract is subject to exception that immunity from responsibility may not be claimed when work to be done is of such character that it necessarily subjects third persons to unusual danger. *Watkins* v. *Gabriel Steel Co.*, 692.

31. If mason working on third floor of building was injured because steel joists were improperly fastened, contractor who had contract for furnishing and fastening said joists may not evade liability therefor on ground that it sublet contract to competent independent contractor, since said work was of such nature that it subjected mason to unusual danger. *Id.*

32. In action against contractor for personal injuries alleged to have been caused by defendant's negligence in failing to properly fasten steel joists, it was error to direct verdict in favor of defendant on its showing that it did not do said work but that it had sublet contract therefor to competent independent contractor, since it may not evade responsibility therefor unless it took precautions to see that said work, which was inherently dangerous, was properly done. *Id.* 693.

See CONTRACTS (7); CUSTOMS AND USAGES (1); GARNISHMENT (1).

MATERIALMEN—See MUNICIPAL CORPORATIONS (11–14).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—See WITNESSES (2).

"MAY"—See STATUTES (4).

MEASURE OF DAMAGES—See DAMAGES (3); LANDLORD AND TENANT (2); SALES (4); WASTE (1).

MECHANICS' LIENS.

1. Failure to name record owners of land in claim of lien filed did not invalidate lien, where it was asserted against building only erected by contract purchasers (3 Comp. Laws 1929, § 13103). *Strand Lumber Co.* v. *Dostie*, 422.
2. Mechanics' lien statute does not require naming in claim of lien one whose interest in property is not affected thereby. *Id.*
3. "Owner" whom statute requires to be named and served with copy of claim of lien is owner at time claim of lien is made (3 Comp. Laws 1929, § 13103). *Id.*
4. That owners of land did not sign contract for purchase of materials used by contract purchasers in construction of building thereon did not invalidate lien which is asserted against building only (3 Comp. Laws 1929, § 13103). *Id.* 423.
5. In view of statute giving right to claim lien against building, owners of land may not, by summary proceedings, terminate lien, even if lienholder is made party thereto, and therefore lien against building is not terminated by proceeding to which lienholder was not party (3 Comp. Laws 1929, § 13103). *Id.*
6. Where, at time purchaser of land received conveyance from vendors, mechanic's lien was matter of record in register of deeds' office, purchaser took title with constructive notice thereof. *Id.*
7. Where purchaser of land and his surety gave lienholder bond for amount of existing lien against building, decree was properly entered against them for amount of lien, accrued interest, and costs, in suit to foreclose lien. *Id.*
8. Burden is on lienor to establish right of lien. *Equitable Trust Co.* v. *Detroit Golf & Recreation Co.*, 606.
9. Where lienor's bad faith in filing statement of lien was convincingly evidenced by failing to give credit for payment on account of over $3,000, and including nonlienable items of considerable amount, true character of which was not disclosed by account filed or by that served on defendant, trial court properly held lien invalid (3 Comp. Laws 1929, § 13105). *Id.*

MEDICINE, PRACTICE OF—See CRIMINAL LAW (17).

MENTAL COMPETENCY—See WILLS (14).

MERGER OF CORPORATIONS—See CORPORATIONS (14).

MILEAGE FEE—See GARNISHMENT (3).

MILL POND—See WATERS AND WATERCOURSES.

MINES AND MINERALS.

1. Where so-called oil and gas lease, which was in fact merely option, provided for payment of certain sum annually in advance for its extension, deposit of same to be made in certain bank, failure of check to reach bank on date due resulted in default, although check had been mailed, and its failure to arrive was due to delay in mail. *Steed* v. *Pure Oil Co.*, 699.
2. Where, under so-called oil and gas lease, lessee had right to deposit payments in bank as they became due, and bank had authority from lessors to accept said payments, bank was not chargeable with notice as to when they were due, and its acceptance of payment two days after it was due does not constitute waiver on part of lessors of their rights under said agreement. *Id.*
3. Where lessee under so-called oil and gas lease failed to make payment payable in advance for its extension on date due, its rights thereunder were terminated by notice of its forfeiture served on it by lessors. *Id.*

See TAXATION (26).

MINISTER—See MASTER AND SERVANT (14).

MINISTERIAL ACT—See JUDGMENT (3).

MINORITY STOCKHOLDERS—See CORPORATIONS (4–11).

MINUTES OF STOCKHOLDERS' MEETING—See CORPORATIONS (27).

MISAPPROPRIATION OF FUNDS—See RECEIVERS (18, 19, 28, 29).

MIST—See MOTOR VEHICLES (2).

MISTAKE—See BOUNDARIES (1); VENDOR AND PURCHASER (29).

MODIFICATION OF DECREE—See DIVORCE (2).

MONOXIDE GAS POISONING—See MASTER AND SERVANT (26, 29).

MORAL OBLIGATION—See ACTION (1); CONTRACTS (4).

MORGUES—See INSURANCE (7).

MORTGAGE ON PERSONALTY NOT DEFECT IN TITLE—See SALES (1).

MORTGAGES.

1. If grantee, as part of consideration for purchase of premises, agrees to assume and pay outstanding mortgage, deficiency decree on foreclosure may run against him, although his agreement was in parol. *Keeler* v. *Richards Storage Corp.*, 23.
2. On foreclosure of mortgage, evidence *held*, sufficient to justify conclusion of trial court that grantee, as part of consideration in purchase of premises, assumed and agreed to pay mortgage thereon, rendering defendant corporation, which merged with said grantee and stands in its place, liable for deficiency decree. *Id.*

MORTGAGES—Continued.

3. Mortgage may be subject-matter of gift. *Cooklin* v. *Cooklin*, 69.

4. It is not necessary that mortgage be accompanied by note, where mortgage contains promise to pay. *Id.*

5. Possession of note and mortgage by one standing as mortgagor creates very strong presumption that they were paid, and said presumption could only be displaced or repelled by very clear proof that debt was still owing. *Rorke* v. *LaDuke*, 105.

6. In suit to have mortgage discharged on ground that debt secured thereby has been paid, evidence *held*, to warrant decree in favor of plaintiffs. *Id.*

7. Decree determining validity of first mortgage on church property, from which no appeal was taken, is *res judicata* in subsequent suit to foreclose second mortgage. *Horbal* v. *St. John's Greek Catholic Church*, 331.

8. Sections 14588, 14620, 3 Comp. Laws 1929, referring to sales in pursuance of court decrees, must be read together, since one supplements the other, and, where inconsistent, provisions of former section are impliedly repealed by latter. *Grand Rapids Trust Co.* v. *Von Zellen*, 341.

9. Where circuit court commissioner posted notice of adjournment of foreclosure sale for six days at place where sale was to be had, but failed to make public declaration thereof at time and place previously appointed for sale, said attempted adjournment was invalid, and court properly refused to confirm sale made on adjourned day (3 Comp. Laws 1929, § 14588, 14620). *Id.*

10. Where foreclosure sale on adjourned day was void because of invalid adjournment, purchaser had sold portion of said land to State for highway purposes, and at time of hearing to confirm sale State had paved it, offer to show interests of State and circumstances of sale was properly refused, since foreclosure sale had not been confirmed, and State got no title. *Id.*

11. On foreclosure of mortgage on large farm, care and maintenance of large orchard, *held*, not to warrant appointment of receiver. *White* v. *Fulton*, 346.

12. Where owner of farm held son out as having almost unlimited authority, son had apparent authority to make agreement engaging mortgagee to manage orchard at owner's expense, and therefore on foreclosure of mortgage accounting under said agreement was properly allowed. *Id.*

13. In foreclosure of mortgage, appointment of receiver to protect mortgagor who has parted with his interest in mortgaged premises from liability for deficiency decree, *held*, without authority of law on record. *American Life Insurance Co.* v. *Bee*, 489.

See LIMITATION OF ACTIONS (3); PARTIES; RELIGIOUS SOCIETIES (1, 3, 5); TRUSTS (1, 4, 7–9); VENDOR AND PURCHASER (6, 12–17, 19–22).

MOTION TO DISMISS—See ACTION (2).

MOTION TO SUPPRESS EVIDENCE—See CRIMINAL LAW (2).

MOTIVE—See CRIMINAL LAW (1).

MOTOR VEHICLES.

1. Owner of truck was guilty of negligence in leaving stalled truck and trailers on highway without rear warning light; and said negligence is not excused by fact that highway had row of arc lights in its center. *Moore* v. *United States Truck Co.*, 56.
2. Automobile driver was guilty of negligence in driving at speed of 35 miles per hour back of another automobile and within four or five feet thereof on a misty night, with view ahead cut off, resulting in collision with truck stalled on highway; and said negligence is not excused by failure to have rear light on truck. *Id.* 57.
3. Guest passenger may not recover from host for personal injuries resulting from automobile collision, unless host was guilty of gross negligence, or wanton and wilful misconduct (1 Comp. Laws 1929, § 4648). *Id.*
4. Guest passenger is not entitled to recover against owner of truck with which automobile in which she was riding collided, where her host was guilty of contributory negligence, since his negligence is imputable to her. *Id.*
5. While attempting to drive automobile without sufficient acquaintance and experience with method of control may constitute negligence, it is not "gross negligence or wilful and wanton misconduct," within meaning of guest passenger act (1 Comp. Laws 1929, § 4648), and therefore recovery may not be had from host for personal injuries to gratuitous passenger caused by automobile going into ditch. *Willett* v. *Smith*, 101.
6. Elements necessary to characterize injury to guest passenger as being wantonly or wilfully inflicted, within meaning of 1 Comp. Laws 1929, § 4648, are: (1) knowledge of situation requiring exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid resulting harm by ordinary care and diligence in use of means at hand; (3) omission to use such care and diligence to avoid threatened danger, when to ordinary mind it must be apparent that result is likely to prove disastrous to another. *Id.*
7. Failure of automobile driver, in attempting to pass automobile going in same direction, to give due heed to oncoming automobile or to situation in which it would place him, may constitute negligence, but it is wanting in wilfulness or wantonness within meaning of guest passenger act (1 Comp. Laws 1929, § 4648). *Wyma* v. *Van Anrooy*, 295.
8. As regards liability of automobile driver under guest passenger act, gross negligence or wilful and wanton misconduct must arise out of operation of car, and does not arise out of failure to stop at scene of accident, as required by statute (1 Comp. Laws 1929, §§ 4648, 4722). *Id.*

MOTOR VEHICLES—Continued.

9. Automobile driver attempting to cross trunk-line highway at intersection is not bound to anticipate that automobile approaching thereon will be operated in negligent manner, but is entitled to assume that it will be operated in lawful manner unless he has knowledge to contrary, or by exercise of reasonable care would have had knowledge to contrary. *Henry* v. *Sanderson*, 563.

10. Automobile driver was not guilty of contributory negligence as matter of law for failing to bring his car to full stop before attempting to cross trunk-line highway at intersection, where he slowed down and looked in direction from which another car was approaching, but failed to see it by reason of obstructions and fact that it was being driven at excessive speed in middle or on left-hand side of road instead of on right-hand side as required by statute (1 Comp. Laws 1929, §§ 4703, 4713 [e]). *Id.* 564.

See APPEAL AND ERROR (10); CHATTEL MORTGAGES (3, 4); CONSTITUTIONAL LAW (2–4); CONVERSION; CRIMINAL LAW (14–16); MASTER AND SERVANT (14); NEGLIGENCE (3).

MUNICIPAL CORPORATIONS.

1. Where city was named as one of parties to sewer contract, received benefits thereof, and during course of construction and subsequent thereto it acted as though it were party to contract, it is estopped thereby from afterward denying liability thereunder, although contract was signed by owners of subdivision and city did not sign it. *L. W. Kinnear, Inc.*, v. *City of Lincoln Park*, 250.

2. Where, in action by contractor on sewer contract, there was conflicting testimony on material issues of fact presented upon question as to whether collapse of part of sewer was due to faulty design or improper plans and specifications, for which city was responsible, or to improper installation or poor workmanship, for which contractor was responsible, trial court was in error in directing verdict which in effect was holding of law that contractor was chargeable with responsibility for loss. *Id.*

3. Trial court's refusal to submit to jury as issues of fact whether city had accepted work done on sewer by contractor and was thereby foreclosed from questioning performance of contract in accordance with its terms, or whether city waived provision of contract that there should be no claim for extras unless ordered in writing by engineer, *held*, correct, in view of express terms of contract. *Id.*

4. Contractor's claim that use by city of cement tubing instead of cement blocks in repairing sewer prevents city from recovering cost of repairs, on ground that method of making repairs was not that specified in contract, *held*, without merit, where undisputed testimony shows that cost of repairs would have been greater had cement blocks been used instead of cement pipes. *Id.*

MUNICIPAL CORPORATIONS—Continued.

5. Grand Rapids city commission has power to contract to lease its electric lighting plant to private corporation for period of three years, with option of renewal for like period or to sell to lessee if electors so determine, notwithstanding neither authority to consummate contract nor ratification thereof was obtained by vote of electors (1 Comp. Laws 1929, § 2235; Grand Rapids Charter, tit. 8, § 27). *White* v. *City of Grand Rapids,* 267.

6. Contract by which Grand Rapids city commission agreed to lease its electric lighting plant to private corporation for period of three years, with option of renewal for like period or to sell to lessee if electors so determine, is not grant in nature of franchise requiring its submission to vote of electors, but is contract in nature of lease, and such rights as lessee may exercise in streets or public places are merely incident to exercise of its rights as lessee (Const., art. 8, §§ 20, 25; Grand Rapids Charter, tit. 8, § 1). *Id.*

7. There is distinction between lease and franchise; lease being contract for possession and profits of property in consideration of rent, and franchise being special privilege granted by government. *Id.*

8. Claim that contract in nature of lease of electric lighting plant executed by Grand Rapids city commission to private corporation perpetrates fraud upon said city and its taxpayers, *held,* not sustained by proofs. *Id.*

9. Exercise of discretion vested in city officials, acting within scope of their power, is not reviewable by courts. *Id.*

10. Contract executed by Grand Rapids city commission, leasing to private corporation city's electric lighting plant, which was within power of commission to make, is not reviewable by court, whether bargain thus made was good or bad. *Id.* 268.

11. In construing statute providing for protection of subcontractors, their laborers, and materialmen under statutory bond of contractor erecting public building, language should be read in harmony with history and purport of act and in connection with context (3 Comp. Laws 1929, § 13133). *Davy Fuel & Supply Co.* v. *S. R. Ratcliffe Plastering Co.,* 276.

12. Statutory rights of subcontractor's laborers and materialmen under contractor's statutory bond, *held,* not decreased by change in statute extending protection of said bond to subcontractors, but limitation is placed upon recovery of subcontractor, with special reference to his rights acquired by subrogation (3 Comp. Laws 1929, § 13133). *Id.*

13. Statute providing for protection of subcontractors, their laborers, and materialmen under contractor's statutory bond is not lien law, but rights under respective acts and procedure to establish and enforce them are essentially different. *Id.*

14. Unpaid laborers and materialmen of subcontractor on public buildings are entitled to full benefit of subcontractor's statutory bond, although subcontract price may be exceeded thereby (3 Comp. Laws 1929, § 13133). *Id.*

MUNICIPAL CORPORATIONS—Continued.

15. Where city of Detroit condemned land in excess of that needed or used for street as planned and established, leaving strip of land owned by city between street and adjoining lot, latter is not subject to assessments for paving or sidewalk purposes under city charter, since it does not abut street. *Linski* v. *City of Detroit,* 385; *Malolepszy* v. *City of Detroit,* 387; *Kubit* v. *City of Detroit,* 388; *Kamnkolski* v. *City of Detroit,* 389.

16. In determining validity of ordinance vesting in city manager power to grant license for soliciting funds, selling goods, etc., for charitable purposes, court will not indulge presumption that he will or will not act reasonably, but decision is controlled by legal proposition that it is requisite to validity of ordinance that it state standard for guidance of official who passes on application for license. *Hoyt Brothers, Inc.,* v. *City of Grand Rapids,* 447.

17. Ordinance vesting city manager with power to grant license for soliciting funds, selling goods, etc., for charitable purposes whenever it shall appear that charity is worthy one and persons making application are fit and responsible, is invalid as attempt to vest him with arbitrary power, where ordinance contains no rule by which to determine whether charity is "worthy" or applicant is "fit and responsible." *Id.* 448.

18. As basis of special assessment, petition for paving street is jurisdictional, and therefore must show jurisdictional facts on its face, such as qualifications of signers, although charter does not in terms so provide nor set up form of petition. *Nichols* v. *Tallmadge,* 576.

19. In suit by property owners to set aside special assessment and to restrain collection of tax for paving street, decree for plaintiffs was properly entered, where petition for pavement failed to show qualifications of signers. *Id.* 577.

20. Where boulevard was established and improved as such by subdividers, and was in fact and law boulevard when subdivision was annexed to city, action of city authorities in destroying boulevard features did not have effect of changing it to street. *Barris* v. *City of Detroit,* 623.

See ACTION (2); CEMETERIES (2); CONSTITUTIONAL LAW (2–4); DEDICATION; HIGHWAYS AND STREETS (2); NEGLIGENCE (14); PAUPERS; REWARD; TAXATION (13, 36).

MUTUAL ASSOCIATIONS—See CORPORATIONS (26).

MUTUAL MISTAKE—See BOUNDARIES (1); VENDOR AND PURCHASER (29.)

NEGLIGENCE.

1. Where defendant undertook to take care of summary proceeding case against plaintiff, but failed to ascertain that judgment had been entered or to notify plaintiff thereof or to advise him of his rights of appeal and redemption, especially on being informed that plaintiff had money available to redeem, defendant was guilty of negligence rendering him liable for resultant damages. *Grusiecki* v. *Jaglay,* 9.

NEGLIGENCE—Continued.

2. In action for damages for defendant's alleged negligence in failing to properly take care of summary proceeding case against plaintiff after agreeing to do so, evidence *held*, sufficient to present issues of fact for jury on all elements of liability. *Id.* 10.

3. Guest act has not abrogated rule that automobile driver's negligence is imputable to guest, barring recovery against owner of truck with which automobile collided (1 Comp. Laws 1929, § 4648). *Moore* v. *United States Truck Co.*, 56.

4. In action for personal injuries to customer resulting from fall on floor of defendant's store, alleged to have been caused by its oily and greasy condition, rendering it unsafe, evidence of accumulation of oil on floor where plaintiff fell, causing unusual condition, *held*, evidence of negligence, sustaining verdict for plaintiff. *Galarno* v. *Great Atlantic & Pacific Tea Co.*, 113.

5. Brakeman on private premises for purpose of switching cars is invitee. *Boylen* v. *Berkey & Gay Furniture Co.*, 211.

6. It is duty of owners of premises to use such reasonable care as ordinarily prudent person would exercise to avoid injuring employees of railroad company engaged in switching cars thereon. *Id.*

7. Brakeman having knowledge that premises he was entering for purpose of switching cars was used for manufacturing purposes was bound thereby to anticipate that premises might be used for any and all purposes consistent with advancement of said manufacturing interests, including presence of trucks and structures necessary in loading and unloading freight from railroad cars. *Id.* 212.

8. Brakeman is not entitled to recover for personal injuries received by coming in contact with loaded truck while engaged in switching cars on private premises, where he failed to sustain burden of proving defendants' negligence, that he did not assume risk, or that he was free from contributory negligence. *Id.*

9. Generally, recovery for injury resulting from accident attendant on outdoor sport may be had only if injury is result of negligence that could and should have been avoided by use of ordinary care. *Williams* v. *Wood*, 322.

10. Negligence of fisherman, in boat with guide, in making cast which hooked guide in eye, should have been submitted to jury, where evidence was sufficient to present question upon which reasonable minds might differ. *Id.*

11. Presumption of negligence may arise from competent evidence. *Id.*

12. Guide hooked in eye by fisherman while casting may recover therefor only if fisherman was negligent, and although guide did not assume risks of dangerous occupation, he knew that accidents frequently occur, and therefore did not need to be specially warned of danger. *Id.* 323.

NEGLIGENCE—Continued.

13. At common law no duty rested on owner of building to equip it with fire escapes. *Zelhaver* v. *Koepke*, 428.

14. Where owners of three-story building discovered necessity for making certain alterations in order to maintain proper exit to fire escape, defense to action against them for failing to maintain proper exit may not be predicated on fact that no notice to make such alterations was ever given them by city council as provided by statute (1 Comp. Laws 1929, §§ 2737–2742). *Id.*

15. Law makes allowance for acts done in emergency and sudden peril, and for lack of coolness and judgment incident thereto. *Id.*

16. That woman suddenly confronted with danger from fire on third floor neglected to break glass in window to reach fire escape or to avail herself more quickly of some other means of exit when she found she was unable to raise window, *held*, not to render her guilty of contributory negligence as matter of law, since it will be presumed that she did what seemed to her proper under circumstances. *Id.*

17. That owners of building employed carpenter to make needed alterations to window to make it safe as exit to fire escape would not relieve them from liability if they failed to see that said alterations were made within reasonable time, if in fact they were never made (1 Comp. Laws 1929, §§ 2737–2742). *Id.*

18. In action for personal injuries alleged to have been due to defendants' failure to maintain safe exit to fire escape, verdict for plaintiff *held*, not against great weight of evidence. *Id.* 429.

19. In action for damages to highway alleged to have been caused by negligent construction of dam, evidence that many large chunks of frozen earth were used in said construction, *held*, to justify finding of actionable negligence. *Lapeer County Road Com'rs* v. *Markley*, 456.

See ACTION (2); APPEAL AND ERROR (10); DAMAGES (2, 3); EVIDENCE (4, 6); INDICTMENT AND INFORMATION (4); MASTER AND SERVANT (30–32); MOTOR VEHICLES (1–5, 7–10); RAILROADS (1); RECEIVERS (21); TAXATION (15–17); TRIAL (2); VENUE; WILLS (9).

NEGLIGENT HOMICIDE—See CRIMINAL LAW (13–16); INDICTMENT AND INFORMATION (4).

NEGOTIABILITY—See BILLS AND NOTES (2, 3); CORPORATIONS (18).

NEWSPAPERS—See INSURANCE (7).

NONPAYMENT—See BILLS AND NOTES (8).

NONRESIDENTS—See MASTER AND SERVANT (15).

NOTICE—See CORPORATIONS (16, 17); CRIMINAL LAW (11, 12); GUARANTY (1–5); INSURANCE (1, 2, 7); MASTER AND SERVANT (1–3, 5); MINES AND MINERALS (2, 3); MORTGAGES (9); NEGLIGENCE (1, 14); RELIGIOUS SOCIETIES (2); VENDOR AND PURCHASER (4, 7, 21, 25–28); WILLS (6, 7).

NOTICE OF APPEAL—See APPEAL AND ERROR (2).

NOTICE OF DISHONOR—See BILLS AND NOTES (1); CHATTEL MORTGAGES (2).

NULLITY—See MASTER AND SERVANT (4).

OATH OF OFFICE—See TAXATION (13).

OCCUPATION OF FIELD—See CONSTITUTIONAL LAW (2–4).

OFFER AND ACCEPTANCE—See CONTRACTS (7).

OFFICERS—See CONTRACTS (4, 5); CORPORATIONS (29–32); RECEIVERS (19, 22, 26–28, 31); WAREHOUSEMEN.

OIL AND GAS LEASE—See MINES AND MINERALS.

OIL ON FLOOR—See NEGLIGENCE (4).

OPIATE—See APPEAL AND ERROR (13).

OPINIONS OF EXPERTS—See EVIDENCE (5).

OPTIONS—See CONTRACTS (8, 9); MINES AND MINERALS (1); MUNICIPAL CORPORATIONS (5); SALES (5); VENDOR AND PURCHASER (3, 12–15, 20).

ORAL AGREEMENTS—See JUDGMENT (4); VENDOR AND PURCHASER (38).

ORAL CONSENT—See VENDOR AND PURCHASER (33, 34).

ORCHARD—See MORTGAGES (11, 12).

ORDINANCES—See CONSTITUTIONAL LAW (3, 4); MUNICIPAL CORPORATIONS (16, 17); STATUTES (3).

ORIGINAL EVIDENCE—See APPEAL AND ERROR (7).

OTHER ACTS OF INTERCOURSE—See BASTARDY (1, 5); CRIMINAL LAW (6).

OTHER OFFENSES—See CRIMINAL LAW (1).

OUTDOOR SPORTS—See NEGLIGENCE (9).

OVERLAPPING—See RECEIVERS (17).

"OWNER" DEFINED—See MECHANICS' LIENS (3).

OWNERS OF LAND—See MECHANICS' LIENS (1, 3, 4).

PADDED PAYROLLS—See RECEIVERS (25).

PAIN AND SUFFERING—See DAMAGES (1).

PARENT AND CHILD.

Furnishing room and board by step-daughter to step-father is presumed to be gratuitous, in absence of evidence of contract to pay therefor, where she had lived with him as his daughter, and after her marriage he lived with her and her husband in home provided by husband. *Hartle* v. *Keefer's Estate,* 189.

See APPEAL AND ERROR (6); BASTARDY (6); JOINT TENANCY (3–5); MORTGAGES (12).

PARISH MEETINGS—See RELIGIOUS SOCIETIES (1–3).

PARK FEATURES—See HIGHWAYS AND STREETS (2).

PAROL AGREEMENT—See MORTGAGES (1).

PAROL TESTIMONY—See EVIDENCE (3, 7).

PARTIES.

Trustee refusing to act in interest of his *cestuis* in foreclosure of mortgage on church property was properly made party defendant. *Horbal* v. *St. John's Greek Catholic Church,* 331.

See JUDGES (2, 3); MECHANICS' LIENS (2–5); MUNICIPAL CORPORATIONS (1); RECEIVERS (11, 13); TRUSTS (14); VENDOR AND PURCHASER (17, 18).

PARTNERSHIP.

1. Persons who subscribed for stock and advanced money to transact business before incorporation are liable, as partners, to creditors, although not sustaining the relation of partners between themselves. *Campbell* v. *Rukamp,* 43.
2. Corporation subscribing for stock in proposed corporation which was never incorporated, but advancing no money, is not liable as partner to creditors of proposed corporation. *Id.*

PASSING OF TITLE—See SALES (3).

PATENTS—See CORPORATIONS (29, 32).

PAUPERS.

1. Board of supervisors has power to restore or abolish distinction between township, city, and county poor at any annual meeting by two-thirds vote (1 Comp. Laws 1929, § 1130, 2 Comp. Laws 1929, § 8268). *Gale* v. *Board of Supervisors of Oakland County,* 399.
2. Practical wisdom of act empowering board of supervisors to restore or abolish distinction between township, city, and county poor, with possible disastrous results therefrom, *held,* legislative and not judicial question. *Id.*
3. Resolution of board of supervisors adopted in October, 1931, re-establishing distinction between township, city, and county poor, and providing that it should not take effect until January 1, 1933, in no way limited or restricted incoming board from rescinding said resolution by proper vote (1 Comp. Laws 1929, § 1130, 2 Comp. Laws 1929, § 8268). *Id.*

PAUPERS—Continued.

4. There was no impropriety in, or legal objection to, provision in resolution of board of supervisors re-establishing distinction between township, city, and county poor, adopted in October, 1931, that it should not take effect until January 1, 1933. *Id.*

5. When change re-establishing distinction between township, city, and county poor becomes effective, county funds may not be used to support those who have gained settlement in any township or city. *Id.*

See STATUTES (3).

PAVEMENTS—See MUNICIPAL CORPORATIONS (15, 18, 19).

PAYMENT—See MINES AND MINERALS; MORTGAGES (5, 6); SALES (1); TAXATION (35); VENDOR AND PURCHASER (1, 6, 12–16, 19–23, 31, 36, 37).

PEDESTRIAN—See CRIMINAL LAW (14).

PENALTY—See CRIMINAL LAW (9); INDICTMENT AND INFORMATION (3).

PERFORMANCE—See VENDOR AND PURCHASER (11, 36).

PERJURY—See JUDGMENT (1).

PERMANENT INJURIES—See DAMAGES (1).

PERMISSIVE WASTE—See WASTE (3).

PERSONAL INJURIES—See APPEAL AND ERROR (10, 13); DAMAGES (1); EVIDENCE (6); MASTER AND SERVANT (4–6, 17, 18, 22, 32); MOTOR VEHICLES (3, 5, 6); NEGLIGENCE (4, 8–10, 12, 18); RAILROADS.

PERSONAL LIABILITY—See TAXATION (36).

PERSONAL TAXES—See ACTION (2); TAXATION (14, 16–18, 20–23).

PETITION—See MASTER AND SERVANT (5, 6, 8, 9).

PETITION FOR IMPROVEMENT—See MUNICIPAL CORPORATIONS (18).

PHYSICAL FACTS—See RAILROADS.

PHYSICIANS AND SURGEONS—See CRIMINAL LAW (17); INSURANCE (3, 5).

PLANS AND SPECIFICATIONS—See MUNICIPAL CORPORATIONS (2).

PLATS—See CEMETERIES; DEDICATION (2); HIGHWAYS AND STREETS (2).

PLEADING.

1. Under Court Rule No. 26, answer, not having been amended after amendment of declaration, remained in effect as to amended declaration. *Harvey* v. *Stewart*, 66.
2. In action for purchase price of certain tile, defenses of satisfaction clause of contract and of release or termination of contract by mutual agreement, are not considered on appeal, where not pleaded. *Vigo American Clay Co.* v. *L. C. Monroe Co.*, 462.

See ACTION (2); APPEAL AND ERROR (11); APPEARANCE; LIMITATION OF ACTIONS (1, 2); PRINCIPAL AND SURETY (1–3); TRUSTS (13); VENDOR AND PURCHASER (10, 24).

PLEA OF GUILTY—See CRIMINAL LAW (5).

PLEDGES—See CORPORATIONS (16, 17, 19); RECEIVERS (10).

POSSESSION—See BILLS AND NOTES (2); CHATTEL MORTGAGES (6); CONVERSION; CORPORATIONS (18); LANDLORD AND TENANT; MUNICIPAL CORPORATIONS (7); PRINCIPAL AND SURETY (3); RECEIVERS (9); REPLEVIN; SALES (4); TRUSTS (5); VENDOR AND PURCHASER (4).

POSSESSION OF PAPERS BY MORTGAGOR—See MORTGAGES (5).

POSTING NOTICE—See MASTER AND SERVANT (1); MORTGAGES (9).

POSTPONEMENT OF EFFECTIVE DATE—See PAUPERS (3, 4).

POWER OF ATTORNEY—See PRINCIPAL AND AGENT.

PRACTICING ATTORNEY—See CHAMPERTY AND MAINTENANCE (1).

PREFERRED CLAIMS—See TRUSTS (2).

PREJUDICE—See APPEAL AND ERROR (7–9); CRIMINAL LAW (1).

PRELIMINARY AGREEMENT—See COVENANTS (2).

PREMIUMS—See COSTS (2).

PRESENTATION OF CLAIMS—See EXECUTORS AND ADMINISTRATORS.

PRESENTMENT—See BILLS AND NOTES (1, 7).

PRESUMPTIONS—See CEMETERIES (2); CRIMINAL LAW (15); DEATH; INSURANCE (6–8); MORTGAGES (5); MUNICIPAL CORPORATIONS (16); NEGLIGENCE (11, 16); PARENT AND CHILD; VENDOR AND PURCHASER (28).

PRIMA FACIE EVIDENCE—See COUNTIES (4).

PRINCIPAL AND AGENT.

Power of attorney to collect interest on trust fund did not authorize approval of investments, and such approval, if given, would not bind principal. *In re Jenkins' Estate*, 518.

See CHATTEL MORTGAGES (6); INSURANCE (1, 2); MINES AND MINERALS (2); MORTGAGES (12); WAREHOUSEMEN.

PRINCIPAL AND SURETY.

1. In action on bond given on appeal from judgment of restitution, it was not necessary, under former Circuit Court Rule No. 21, § 6, to attach copy of bond to declaration as exhibit. *August* v. *Collins*, 232.
2. Where, in action on bond given on appeal from judgment of restitution, it clearly appeared from declaration that plaintiffs' claim for damages was based on rental value of premises, declaration stated cause of action not barred by statute of limitations, and therefore amendment thereof claiming rental value of premises during time defendants unlawfully retained possession was not barred (3 Comp. Laws 1929, §§ 14118, 14144). *Id.*
3. Recovery on appeal bond may be had, notwithstanding failure of declaration to allege that plaintiff obtained restitution, where it appears from record that writ of restitution issued was not executed because there was voluntary surrender of possession. *Id.*
4. Where husband and wife as plaintiffs in summary proceedings before circuit court commissioner obtained judgment of restitution, bond given by defendants pursuant to 3 Comp. Laws 1929, § 14987, to stay proceedings thereon inured to wife as well as husband, although, through inadvertence of defendants' attorney, husband was only obligee named therein. *Id.*
5. Where bond is given under authority of statute, that which is not expressed but should have been incorporated, is included in bond. *Id.*
6. Unintentional omission from bond, given on appeal from judgment of restitution, of words "or the rental value thereof," insertion of which is required by statute, in no way changes obligation of sureties thereunder (3 Comp. Laws 1929, § 14987). *Id.* 233.

See BILLS AND NOTES (4); CHATTEL MORTGAGES (7); EVIDENCE (3); HUSBAND AND WIFE (7, 9); MECHANICS' LIENS (7).

PRIORITY—See COURTS; RECEIVERS (7, 16).

PRIVATE PROPERTY—See NEGLIGENCE (5, 8).

PRIVILEGE—See MUNICIPAL CORPORATIONS (7).

PROBABLE CAUSE—See MALICIOUS PROSECUTION.

PROBATE COURTS—See EQUITY; EXECUTORS AND ADMINISTRATORS; WILLS (5–11).

PROBATION—See CRIMINAL LAW (12).

PROCEDURE—See MASTER AND SERVANT (7).

PROCESS—See CORPORATIONS (20); GARNISHMENT (1–3).

PROCURING INMATE FOR HOUSE OF PROSTITUTION—See PROSTITUTION; WITNESSES (1).

PROFITS—See CHATTEL MORTGAGES (6); MUNICIPAL CORPORATIONS (7).

PROMISE TO PAY—See MORTGAGES (4).

PROMOTERS—See CORPORATIONS (2, 21, 22); PARTNERSHIP (1, 2).

PROOFS OF LOSS—See INSURANCE (5).

PROPERTY OWNERS—See SCHOOLS AND SCHOOL DISTRICTS (1, 2).

PROPERTY RIGHTS—See TAXATION (29).

PROPOSED CORPORATION—See CORPORATIONS (1).

PROSTITUTION.

1. Female who came to house of prostitution, was taken in by owner, and there remained, was "procured" within meaning of statute penalizing procurement of female inmate for house of prostitution (3 Comp. Laws 1929, § 16862). *People* v. *Johnson*, 117.

2. In prosecution for procuring female inmate for house of prostitution, evidence of arrest and conviction of prostitute from said house, and that female inmate committed act of prostitution therein, was properly received (3 Comp. Laws 1929, § 16862). *Id.*

See CRIMINAL LAW (3); WITNESSES (1).

PROTECTING MORTGAGOR AGAINST DEFICIENCY DECREE—See MORTGAGES (13).

PROTEST—See BILLS AND NOTES (9).

PROXIMATE CAUSE—See WASTE (3, 4).

PUBLICATION—See WILLS (12, 13).

PUBLIC BUILDING—See MUNICIPAL CORPORATIONS (14).

PUBLIC LANDS—See TAXATION (7).

PUBLIC POLICY—See TAXATION (37).

PULMONARY TUBERCULOSIS—See INSURANCE (9, 10).

PURCHASING NOTE WITH INTENT TO SUE—See CHAMPERTY AND MAINTENANCE (1).

QUALITY—See SALES (2).

QUASHING WRIT—See GARNISHMENT (7).

QUESTION FOR JURY—See CRIMINAL LAW (4, 13); NEGLIGENCE (2, 10); SALES (2); WILLS (14, 15).

QUESTION OF FACT—See MUNICIPAL CORPORATIONS (2); SALES (2).

QUESTION OF LAW—See JUDGES (1); MALICIOUS PROSECUTION (1); MECHANICS' LIENS (9); REPLEVIN.

QUESTIONS REVIEWABLE—See CRIMINAL LAW (10–12); HABEAS CORPUS (1); MASTER AND SERVANT (12); MUNICIPAL CORPORATIONS (9, 10); PAUPERS (2).

RADICAL DEFECTS—See HABEAS CORPUS (2, 3).

RAILROADS.

1. One may not recover for injuries suffered in accident at railroad grade crossing not required by law to be guarded, despite his testimony to effect that he looked but did not see oncoming train, when physical facts clearly indicate that he would undoubtedly have been apprised of its approach had he properly looked. *Heintzelman* v. *Pennsylvania Railroad Co.*, 688.
2. Automobile driver, who was struck and injured by train backing across street crossing without displaying light or giving warning signal, was guilty of contributory negligence as matter of law, barring right to recover therefor, where, from his own testimony and physical facts, it clearly appears that, had he looked, he could have seen approaching train, notwithstanding his testimony that he looked and failed to see it. *Id.*

See NEGLIGENCE (5–7).

RAPE—See CRIMINAL LAW (6); INDICTMENT AND INFORMATION (1).

RATIFICATION—See MUNICIPAL CORPORATIONS (5).

REAL ESTATE—See HIGHWAYS AND STREETS (1); TAXATION (25, 26).

REAL PARTY IN INTEREST—See TRUSTS (14).

REAR LIGHT—See MOTOR VEHICLES (1, 2).

REASONABLE SUM—See DAMAGES (3, 4).

REASONABLE TIME—See BILLS AND NOTES (7); VENDOR AND PURCHASER (2).

RECEIPTS—See WAREHOUSEMEN.

RECEIVERS.

1. Compensation of receiver and his attorneys is out of funds or property *in custodia legis*, and no lien authorized by court on funds or property has priority of such court administrative costs. *In re Dissolution of Henry Smith Floral Co.*, 299.
2. Fees of receiver and his attorney are court expenses of receivership, and have priority of first lien receiver's certificates. *Id.*

RECEIVERS—Continued.

3. Court properly allowed compensation to counsel assisting attorneys appointed for receiver, where said aid was rendered with knowledge of court, and circumstance is exceptional. *Id.*
4. That receiver drew certain sum weekly, not fixed by court, would not bar him from receiving additional sum, or prevent court from awarding adequate pay for services rendered. *Id.*
5. Receiver's certificates, constituting first lien, given to dealer furnishing supplies, with understanding that holder would join in reorganization, were properly canceled when he refused to do so, thus relegating claim to class where it belonged. *Id.*
6. First lien receivership certificates, issued for purchase of goods, which were transferred by seller to member of unsecured creditors' committee, acting in fiduciary capacity, as commission in effecting sale, were properly canceled. *Id.* 300.
7. Obligations of receiver for material, supplies, and rent, in carrying on business pending second sale, are given parity with first certificates. *Id.*
8. Where there was no evidence of reasonable rental value of premises occupied by lessee's receivers, court properly allowed rent at rates stipulated in lease. *Vogt* v. *General Necessities Corp.*, 349.
9. Where lease required payment of taxes as additional rent, and taxes became due and payable while lessee's receivers were occupying premises, court should have included them and also water charges for time receivers were in occupancy in allowance for rent. *Id.*
10. Stock brokers' receiver has no interest in stock put up with them as collateral, and by them fraudulently pledged to bank, where their debt was paid in full. *Connolly* v. *Peoples State Bank*, 352.
11. Unless all creditors and interested parties consent to appointment of receiver of going concern, such appointment may not be made unless allowed by law (3 Comp. Laws 1929, § 13944, subd. 3). *National Lumbermans Bank* v. *Lake Shore Machinery Co.*, 440.
12. Appointment of receiver by equity court may be made only as ancillary to other relief sought in bill of complaint (3 Comp. Laws 1929, §§ 15129, 15318, 15322, 15331). *Id.*
13. Where all creditors of going concern were not made parties to suit for appointment of receiver, and did not consent thereto, judgment creditors should have been permitted to intervene and object to such appointment (3 Comp. Laws 1929, § 13944, subd. 3). *Id.*
14. When receivers for corporation were discharged by order of court, corporation became its own master, as though no receivers had been appointed. *In re Petition of Farber*, 652.
15. Although different receivers may be appointed in different proceedings, such conflict should be avoided, especially as between branches of same court. *Id.* 653.

RECEIVERS—Continued.

16. Where receivers for corporation were discharged by order of judge appointing them, and nearly two years later same judge set discharge aside and ordered receivership to continue under one of receivers, but in meantime another judge of same court, in different proceedings, had appointed other receivers for same corporation, latter had priority as to control of corporation. *Id.*

17. Where accounting in different receivership proceedings before different judges in same court overlapped, but both decrees have been appealed, and both accountings are before Supreme Court, accounting is divided according to logical jurisdiction rather than upon basis of technical jurisdiction. *Id.*

18. In suit for accounting for funds of corporation which had been in hands of receiver, court will not concern itself with apportioning liability for misappropriation between receiver and directors on items where both participated in defrauding corporation. *Id.*

19. Receivers and officers of corporation who appropriate corporate moneys by irregular and devious devices may not justify themselves by mere oral claims of honest application of said funds, but proof of honest disposition must be clear, since trickery of method implies dishonesty. *Id.* 654.

20. Receiver for corporation must account as such, and he may not excuse unlawful acts because others receive part of their benefits. *Id.*

21. Although receivership was not conducted in regular way, receiver may not plead irregularity as excuse for neglect of duty, since receiver departs from proper procedure at his peril. *Id.*

22. Where receiver caused checks to be drawn in favor of creditor of corporation and indorsed in her name, and then he deposited them to his account or cashed them, he is chargeable with amount thereof, notwithstanding his claim that he paid the money to officer of corporation for creditor. *Id.*

23. Check drawn by corporation's receiver to nonexistent company, claimed to be in payment of goods for which no invoice can be found, is chargeable to receiver. *Id.*

24. Where corporation's receiver, by means of fictitious invoices, drew certain amount of money and compromised with corporation's creditors, he is chargeable with balance for which he has not accounted. *Id.*

25. Corporation's receiver who obtained money by issuing payroll checks payable to persons who had not worked for corporation is chargeable with whole amount thus obtained, although part of money was given to officer of corporation. *Id.*

26. Corporation's receiver is entitled to credit for amounts paid to officer of corporation if expended for proper purposes of corporation; if not properly expended both are chargeable with said amount until corporation is reimbursed. *Id.*

RECEIVERS—Continued.

27. Where custom of monthly adjustments between corporation and purchaser of its scrap was continued after said purchaser became corporation's receiver, officers of corporation, who were largely responsible for said custom, and who consented to discharge of receiver, may not, months later, and after records have been destroyed, profit from said transaction at expense of receiver. *Id.* 655.

28. Where corporation's receiver and one of its officers appropriated corporation's money to purchase property in receiver's name as trustee, but deal was not consummated and only part of money recovered, balance is chargeable against both of them. *Id.*

29. Receiver may not be charged with moneys claimed to have been illegally expended for legal services where there is no testimony on items to sustain said charge. *Id.*

30. Corporation's receiver is chargeable with amount paid for copper purchased for himself with corporate funds, where he fails to show repayment. *Id.*

31. Salaries of $1,000 per month to corporation's receiver and its officers, *held*, excessive, and reduced to $500 per month, except for period when corporation was under private management, for which period receiver is allowed $300 per month. *Id.*

See CHATTEL MORTGAGES (5); CORPORATIONS (29, 31, 32); COURTS; JUDGES (1, 4); MORTGAGES (11, 13); TRUSTS (2, 5).

RECEIVER'S CERTIFICATES—See RECEIVERS (2, 5–7).

RECITALS—See CHATTEL MORTGAGES (8–10).

RECORD—See CHATTEL MORTGAGES (4); DIVORCE (1); JOINT TENANCY (5); JUDGES (1, 4); JUDGMENT (3); MASTER AND SERVANT (10); MORTGAGES (13); PRINCIPAL AND SURETY (3); RECEIVERS (27); TAXATION (10); TRIAL (2); TRUSTS (2).

RECORD TITLE—See MECHANICS' LIENS (1, 6).

REDEMPTION—See NEGLIGENCE (1); TAXATION (11).

REDUCTION OF CAPITAL STOCK—See CORPORATIONS (28).

RE-ENGAGING IN BUSINESS—See CONTRACTS (5).

REFRESHING WITNESS' MEMORY—See EVIDENCE (2).

REGISTRATION—See LICENSES (3, 4).

REGULATIONS—See CONSTITUTIONAL LAW (2, 3); LICENSES (1); TAXATION (24).

REINSTATEMENT—See INSURANCE (9, 10).

REJECTION—See SALES (2–4).

RELEASE—See COVENANTS (2); GUARANTY (3); PLEADING (2); VENDOR AND PURCHASER (29).

RELIGIOUS SOCIETIES.

1. Where by-laws of church society, an ecclesiastical corporation, do not confer any power on parishioners to mortgage its property, mortgage authorized by parish meeting and signed by proper officers is void for want of authorization by board of trustees (2 Comp. Laws 1929, §§ 10112, 10115). *Horbal* v. *St. John's Greek Catholic Church,* 331.
2. Failure of by-laws of church society to require specifically that purpose of special parish meeting must be stated in notice does not obviate necessity of such statement. *Id.*
3. Where all parishioners were not present at special meeting authorizing execution of mortgage on church property to certain members as security for money advanced by them, church is not estopped from denying validity of said mortgage on ground that it was not authorized by board of trustees, even if all trustees were present. *Id.*
4. Where act may be performed only in pursuance of resolution or authority of board of trustees, it can only bind church corporation when board has acted thereon at legal meeting as board. *Id.*
5. Church members, taking mortgage on church property for antecedent debts, were or should have been familiar with all preceding transactions, and therefore may not claim status of innocent purchaser. *Id.*

See PARTIES.

REMEDY—See CONTRACTS (2); SALES (5); VENDOR AND PURCHASER (15).

REMEDY AT LAW—See ACTION (1).

REMEDY OF SELLER—See SALES (4).

RENEWAL—See MINES AND MINERALS (1, 3); MUNICIPAL CORPORATIONS (5, 6).

RENEWAL NOTES—See HUSBAND AND WIFE (7, 9).

RENT—See MUNICIPAL CORPORATIONS (7); PRINCIPAL AND SURETY (2, 6); RECEIVERS (7–9).

RENT FOR USE OF PROPERTY—See CHATTEL MORTGAGES (6, 7).

REOPENING CASE—See VENDOR AND PURCHASER (24).

REORGANIZATION—See RECEIVERS (5).

REPAIRS—See CONTRACTS (1); MUNICIPAL CORPORATIONS (4).

REPEAL—See COUNTIES (7); MORTGAGES (8).

REPLEVIN.

In replevin proceedings to obtain possession of property covered by chattel mortgage, where plaintiff's testimony that he deemed himself insecure was in no way contradicted, question of his good faith was properly disposed of as question of law. *Walter* v. *Pratt,* 615.

REPORTS—See CORPORATIONS (15).

REPRESENTATION—See INSURANCE (9).

REQUESTS TO CHARGE—See BASTARDY (8).

RESCISSION—See CONTRACTS (2, 3); PAUPERS (3); SALES (1); VENDOR AND PURCHASER (3, 8, 10–12, 15, 16, 23, 24, 30, 31).

RESIDENCE—See APPEARANCE (2).

RESIDUE OF ESTATE—See WILLS (4).

RES JUDICATA—See MASTER AND SERVANT (12); MORTGAGES (7).

RESOLUTIONS—See CONTRACTS (7); EVIDENCE (7); MANDAMUS (1); RELIGIOUS SOCIETIES (4); STATUTES (3).

RESTITUTION—See PRINCIPAL AND SURETY (1–4).

RESTORATION—See DAMAGES (2–4).

RESULTANT DAMAGES—See NEGLIGENCE (1).

RESULTING TRUST—See TRUSTS (1).

RETENTION OF FEES—See COUNTIES (3, 5–7).

REVIEW, BOARD OF—See SCHOOLS AND SCHOOL DISTRICTS (1, 2).

REVOCATION—See MASTER AND SERVANT (3); WILLS (3).

REWARD.

City may lawfully offer reward for information leading to apprehension and conviction of violators of State law within city boundaries. *Visch* v. *City of Grand Rapids,* 318.

RIFLE—See CRIMINAL LAW (7, 8).

RIGHT OF WAY—See EASEMENTS (3, 4).

RIGHT SIDE OF ROAD—See MOTOR VEHICLES (10).

RIGHT TO POSSESSION—See CHATTEL MORTGAGES (6).

ROADBUILDING MACHINERY—See CHATTEL MORTGAGES (7).

ROAD COMMISSIONERS, BOARD OF COUNTY—See VENUE.

ROOM AND BOARD—See APPEAL AND ERROR (6); HUSBAND AND WIFE (3); PARENT AND CHILD; WITNESSES (2).

SALARIES—See COUNTIES (3, 5–7); MANDAMUS (1); RECEIVERS (31); STATUTES (1).

SALES.

1. Mortgage on personalty, of which vendee had knowledge, and which may be removed by payment of sum due, is not defect in title entitling vendee to rescind. *Detroit Fidelity & Surety Co.* v. *Bushman,* 115.

SALES—Continued.

2. In action for purchase price of certain tile, where defense was rightful rejection because of defects in workmanship and material, contradictory testimony as to quality presented question of fact for jury. *Vigo American Clay Co.* v. *L. C. Monroe Co.*, 462.
3. Where seller shipped tile according to contract, which buyer ought to have accepted, title passed to buyer on delivery to carrier, although contract provided for inspection by buyer, and although seller, after rejection by buyer, took tile and stored it for buyer. *Id.*
4. Where buyer rejected tile which should have been accepted because it conformed to contract, and title to which passed to buyer, seller, who took possession after its rejection, and stored it for buyer, is entitled to recover contract price and cost of freight, cartage, etc. *Id.* 463.
5. It is permissible, in title-retaining contract, to provide that vendor have option of repossessing property in case of default or declaring balance of contract price due and payable forthwith, but he may exercise only one of said optional remedies. *In re Petition of Hume*, 555.

See CHATTEL MORTGAGES (4, 8–11); CONTRACTS (4–6); CUSTOMS AND USAGES (3); MORTGAGES (8–10).

SATISFACTION CLAUSE—See PLEADING (2).

SCHOOL FUNDS—See TRUSTS (2).

SCHOOLS AND SCHOOL DISTRICTS.

1. Words "assessment roll," as used in 2 Comp. Laws 1929, § 7420, providing that qualified voter in school district whose name appears in assessment roll shall be eligible to office in such school district, mean roll as prepared by assessing officer and before submission to, and action thereon by, board of review (1 Comp. Laws 1929, §§ 3412, 3417). *Brady* v. *Weissenstein*, 678.
2. Persons whose names did not appear on assessment roll as owners of property subject to taxes in school district for year 1931, but whose names were on said roll for 1932, as submitted by assessor to board of review, were eligible to election as officers of said school district, although said roll had not yet been approved by board of review (2 Comp. Laws 1929, § 7420). *Id.* 679.
3. Plaintiffs, whose names were wrongfully kept off ballot at school election on ground that they were not eligible, and who ran on sticker ballots and received highest number of votes, are entitled to writ of mandamus requiring board of canvassers of said school district to reconvene, canvass returns, declare plaintiffs elected, and issue certificates to such effect. *Id.*

See ACTION (2); TAXATION (16–19, 23).

SCRAP—See RECEIVERS (27).

SEARCHES AND SEIZURES—See CRIMINAL LAW (2).

SEARCH FOR EVIDENCE AS EXCUSE FOR DELAY—See WILLS (9).

SECRETARY OF STATE—See LICENSES (3, 4).

SECRET PROFIT—See CORPORATIONS (22, 23).

SECURITY—See TRUSTS (7, 9, 17).

SELF-INTEREST—See TRUSTS (7, 9).

SERVICE OF PROCESS—See CORPORATIONS (20); GARNISHMENT (1–3); GUARANTY (4).

SETTING ASIDE TAX SALE—See TAXATION (28).

SETTLEMENT—See PAUPERS (5).

SETTLEMENT WITH COUNTY—See COUNTIES (4, 5).

SETTLEMENT WITH COUNTY TREASURER—See TAXATION (14, 22).

SEWER CONTRACT—See MUNICIPAL CORPORATIONS (1–4).

"SHALL"—See STATUTES (4).

SHERIFF—See INSURANCE (7).

SHERIFF'S DEED—See LIMITATION OF ACTIONS (4).

SIGNATURE CARD—See JOINT TENANCY (2).

SIGNATURES—See WILLS (1, 2, 13).

SIGNED STATEMENT—See APPEAL AND ERROR (13).

SIMPLE ASSAULT—See INDICTMENT AND INFORMATION (1).

SLEEPING—See MASTER AND SERVANT (26, 27, 29).

SOLICITATION—See MUNICIPAL CORPORATIONS (16, 17).

SPECIAL ASSESSMENTS—See MUNICIPAL CORPORATIONS (15, 18, 19); TAXATION (4, 36–39).

SPECIAL DAMAGES—See LANDLORD AND TENANT (2, 3).

SPECIAL MEETINGS—See RELIGIOUS SOCIETIES (2, 3).

SPECIFIC ACTS—See BASTARDY (1–5); CRIMINAL LAW (6); INDICTMENT AND INFORMATION (4).

SPECIFIC PERFORMANCE—See CONTRACTS (3); VENDOR AND PURCHASER (36).

SPECIFIC PERIL—See DEATH; INSURANCE (8).

SPEED—See INDICTMENT AND INFORMATION (4); MOTOR VEHICLES (2).

STALLED TRUCK—See MOTOR VEHICLES (1, 2).

STANDING TIMBER—See TAXATION (26).

STATE—See MORTGAGES (10).

STATEMENT OF LIEN—See MECHANICS' LIENS (9).

STATE TAX HOMESTEAD LANDS—See TAXATION (6–12).

STATE TAX LANDS—See TAXATION (5–8).

STATIONERY—See WAREHOUSEMEN.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES.

1. Statute providing for payment of salary to county officers is not unconstitutional as embracing more than one subject, nor because its objects are not fully set forth in title (1 Comp. Laws 1929, § 1346). *Board of Supervisors of Jackson County* v. *Dicker*, 79.
2. Legislative acts, as distinguished from contracts, do not tie hands of succeeding legislatures. *Gale* v. *Board of Supervisors of Oakland County*, 399.
3. Action of board of supervisors re-establishing distinction between township, city, and county poor is not void because accomplished by resolution rather than ordinance, in absence of statutory requirement that it must be done by ordinance (1 Comp. Laws 1929, § 1130; 2 Comp. Laws 1929, § 8268). *Id.* 400.
4. While it is familiar rule of construction that "shall" may be read as "may" in statute, or *vice versa*, it does not follow that such reading is necessary to carry out purpose of law, but statute must be examined to ascertain its character and purport. *Howard* v. *Secretary of State*, 568.

See BILLS AND NOTES (2–5, 7, 9); CEMETERIES (1); CHAMPERTY AND MAINTENANCE (1, 3); CONSTITUTIONAL LAW (1, 2, 4); CORPORATIONS (8, 9, 15, 16, 19, 20); COUNTIES (1–3, 5–7); CRIMINAL LAW (1–5, 7–9, 13–16); EQUITY; EXECUTORS AND ADMINISTRATORS; GARNISHMENT (1, 5); HIGHWAYS AND STREETS (1); HUSBAND AND WIFE (1, 2, 4, 5); INDICTMENT AND INFORMATION (2–4); INSURANCE (6, 9); INTEREST (2–5); JOINT TENANCY (1, 3, 4); JUDGES (3, 4); JUSTICES OF PEACE; LICENSES; LIMITATION OF ACTIONS (3, 4); MANDAMUS (1, 2); MASTER AND SERVANT (2, 3, 7–9, 12, 20, 25); MECHANICS' LIENS (1–5, 9); MORTGAGES (8, 9); MOTOR VEHICLES (3, 5–8, 10); MUNICIPAL CORPORATIONS (5, 11–14); NEGLIGENCE (3, 14, 17); PAUPERS (1–3); PRINCIPAL AND SURETY (2, 4–6); PROSTITUTION; RECEIVERS (11–13); RELIGIOUS SOCIETIES (1); SCHOOLS AND SCHOOL DISTRICTS (1, 2); TAXATION (3, 5–9, 11, 12, 14, 16–20, 22, 24, 26, 28, 29, 35, 39); TRUSTS (1, 2); VENUE; WILLS (1–3, 6, 7, 10–13); WITNESSES (2).

STATUTORY BOND—See MUNICIPAL CORPORATIONS (11–14); PRINCIPAL AND SURETY (4–6); TRUSTS (2).

STATUTORY RAPE—See CRIMINAL LAW (6).

STAY OF PROCEEDINGS—See COSTS (2).

STEEL JOISTS—See MASTER AND SERVANT (31, 32).

STENOGRAPHER'S CHARGES—See APPEAL AND ERROR (2, 3).

STEP-FATHER—See APPEAL AND ERROR (6); PARENT AND CHILD; WITNESSES (2).

STICKER CANDIDATES—See SCHOOLS AND SCHOOL DISTRICTS (3).

STOCK AND STOCKHOLDERS—See CORPORATIONS (3–6, 8–11, 13, 14, 16–20, 23–25, 27, 28, 32); JUDGES; PARTNERSHIP; RECEIVERS (10); TRUSTS (7, 9).

STOPPING AT SCENE OF ACCIDENT—See MOTOR VEHICLES (8).

STORAGE—See SALES (3).

STOREKEEPER'S LIABILITY FOR OILY FLOOR—See NEGLIGENCE (4).

STORING OF ARTICLES—See CUSTOMS AND USAGES (1); MASTER AND SERVANT (13).

STREET CARS—See MASTER AND SERVANT (14).

SUBCONTRACTORS—See MUNICIPAL CORPORATIONS (11–14).

SUBROGATION—See MUNICIPAL CORPORATIONS (12).

SUBSTITUTION—See JUDGMENT (4).

SUDDEN PERIL—See NEGLIGENCE (15).

SUMMARY JUDGMENT—See JUDGMENT (4).

SUMMARY PROCEEDINGS—See LANDLORD AND TENANT (3); MECHANICS' LIENS (5); NEGLIGENCE (1, 2); PRINCIPAL AND SURETY (4).

SUPERVISORS, BOARD OF—See COUNTIES (3); MANDAMUS (1); PAUPERS (1–4); STATUTES (3).

SUPPORT OF POOR—See PAUPERS; STATUTES (3).

SURETY—See PRINCIPAL AND SURETY.

SURRENDER—See LANDLORD AND TENANT (2); PRINCIPAL AND SURETY (3).

SURRENDER OF TRUST ESTATE—See TRUSTS (10, 11).

SURVIVORSHIP—See HUSBAND AND WIFE (2); JOINT TENANCY (1, 2, 4, 5).

SWITCHING CARS—See NEGLIGENCE (5–8).

TAXATION.

1. Common-law rule that intangible property must follow domicile of owner, unless separated from it by positive law, is applicable in Michigan in applying tax laws. *Reliable Stores Corp.* v. *City of Detroit*, 2.
2. Intangible assets of foreign corporation are assessable only at its domicile, and therefore are not assessable in Michigan under general tax laws, although corporation is doing business in this State. *Id.*
3. Land inclosed on three sides by fence, and on fourth side partly by fence and balance by hedges and small trees, was "inclosed" within meaning of 2 Comp. Laws 1929, § 10447, exempting from taxation lands inclosed and set apart for cemetery purposes. *White Chapel Memorial Ass'n* v. *Willson*, 238.
4. Where cemetery association, as assignee of vendees' interest in land contract, had received deed to part of land dedicated as cemetery at time road and drain taxes were assessed thereon, and thereafter acquired title to balance, said association *held*, to have such interest in said land at time suits were commenced as entitled it to seek relief from liens created by said assessments. *Id.* 239.
5. Amendment to statute providing for withdrawal from sale of lands bid off to State for taxes after they had become five years delinquent is not automatic in operation, but requires affirmative action by auditor general to withdraw lands from sale (Act No. 155, Pub. Acts 1927). *Hartman* v. *Edwards*, 281.
6. Auditor general has authority to accept applications to purchase lands bid off to State for taxes at any time before proceedings for examination for classifying them as State tax homestead lands were commenced; "pending" being construed as "during" (Act No. 155, Pub. Acts 1927). *Id.*
7. Determination of auditor general and director of conservation that lands bid off to State for taxes are proper to be classified as State tax homestead lands is conclusive unless suit is brought within six months to set it aside, if precedent proceedings are not jurisdictionally defective (1 Comp. Laws 1929, §§ 3520, 3724). *Id.*
8. Effect of statute making determination that lands bid off to State for taxes are proper to be classified as State tax homestead lands conclusive unless suit is brought within six months to set it aside applies to indirect as well as direct attack upon determination (1 Comp. Laws 1929, §§ 3520, 3724). *Id.* 282.
9. Statutes making determination that lands should be classified as State tax homestead lands conclusive unless suit is brought within six months to set it aside are statutes of repose (1 Comp. Laws 1929, §§ 3520, 3724). *Id.*
10. Where application to purchase State tax lands was canceled by auditor general, cancellation acquiesced in, and money returned, and record showed no other application to purchase at

TAXATION—Continued.

time determination was made classifying said lands as State tax homestead lands, there was jurisdiction to so determine. *Id.*

11. Lands are subject to State tax homestead law if period of redemption has expired on one or more sales (1 Comp. Laws 1929, § 3520 *et seq.;* Act No. 155, Pub. Acts 1927). *Id.*

12. Error in report and deed that proceedings determining that lands conveyed were State tax homestead lands were taken under certain statute, and making no reference to amendment thereto, *held,* inconsequential, where amendment made no change in jurisdiction and proceedings, and determination and deed were made in accordance with law (1 Comp. Laws 1929, § 3520 *et seq.;* Act No. 155, Pub. Acts 1927). *Id.*

13. Office of city treasurer is one requiring action on part of person accepting it; his oath of office imposes on him obligation to faithfully discharge its duties, and his bond also so provides. *School District of City of Lansing* v. *City of Lansing,* 405.

14. When, on settlement with county treasurer, city treasurer receives warrant for collection of personal tax returned delinquent, it becomes his duty to make every reasonable effort to do so, and he may not sit idly by and receive such taxes as may be voluntarily paid by delinquent taxpayers, but he must make earnest effort to enforce collection under power conferred upon him by statute (1 Comp. Laws 1929, § 3434 *et seq.*). *Id.*

15. Tax collector is liable not only for taxes collected and not turned over, but also for taxes which he might have collected by due diligence. *Id.*

16. Neglect of city treasurer to perform full duty to collect school taxes levied on personal property constitutes "default" within meaning of statute (1 Comp. Laws 1929, § 3485). *Id.* 406.

17. School taxes levied and assessed on personal property which are not collected through default and neglect of city treasurer result in loss to school district for which city is liable under statute (1 Comp. Laws 1929, § 3485). *Id.*

18. Court assumes that city is protected by sufficient bond given by its treasurer, to which it may have recourse for loss sustained by school district through treasurer's default in collecting school taxes levied on personal property, which city is required to make good (1 Comp. Laws 1929, § 3485). *Id.*

19. While, under 2 Comp. Laws 1915, § 5706, tax collecting officer was required to pay, out of moneys collected by him, to school district, whole tax assessed, under 2 Comp. Laws 1929, § 7470, he is required to pay only amount of school tax collected. *Id.*

20. It is duty of township or city treasurer to try to collect all personal taxes assessed (1 Comp. Laws 1929, § 3434); if not paid he is required to make demand personally or by mail on taxpayer, except where, in cities, other provisions for demand or collection may be made (section 3437); he must seize property if he can find it, and sell it for taxes (section 3438); or he may bring suit and garnishment proceedings. *Id.*

TAXATION—Continued.

21. Diligent effort to distrain property for personal taxes, if otherwise uncollected, is mandatory. *Id.* 407.

22. Treasurer may not make settlement with county treasurer, in returning personal taxes as uncollected, without affidavit that, upon diligent inquiry, he has been unable to discover any goods or chattels belonging to person liable for taxes, upon which he could levy (1 Comp. Laws 1929, § 3446). *Id.*

23. City is not liable for whole uncollected school tax assessed on personal property but only for that part which it may be shown was lost by default of its treasurer in failing to discharge his duties under tax law. *Id.*

24. Primary purpose of Act No. 100, Pub. Acts 1931, is to raise money by taxing manufacture of malt products, and its regulatory provisions are but incidental to collection of taxes. *Howard* v. *Secretary of State,* 569.

25. Easement in nature of flowage rights is real estate, to be assessed in township where land is located. *In re Petition of Auditor General,* 578, 584.

26. In this State parcel of real estate must be assessed as entirety, at cash value, including worth of standing timber, mineral rights, water power and privileges, etc. (1 Comp. Laws 1929, §§ 3390, 3391, 3415). *Id.*

27. Flowage rights should have been assessed as part of land, although they had been sold to separate owner. *Id.* 579.

28. Sale for taxes may not be set aside after confirmation, except where taxes were paid, property was exempt from taxation, or there was lack of jurisdiction in court to enter decree of sale (1 Comp. Laws 1929, § 3462). *Id.*

29. Tax may not be held invalid on account of any irregularity in proceedings which does not prejudice property rights of persons whose property is assessed (1 Comp. Laws 1929, § 3492). *Id.*

30. On auditor general's petition for sale for taxes, decree is not formal and innocuous thing leaving all sorts of questions unsettled, but is judgment of court determining all issues within its jurisdiction, including issue as to whether property was properly assessed. *Id.*

31. Error in assessing flowage rights and land separately, because separately owned, was mere irregularity and not jurisdictional defect. *Id.*

32. Tax sale will not be set aside because exempt property was included in description, or because noncontiguous parcels were assessed in one description. *Id.*

33. Description of land sold for taxes as "N. E. ¼ of N. W. ¼ except flowage rights" of another, *held,* sufficient, as against objection of owner of land that it was so indefinite as to invalidate sale because flowage rights were not described or delimited, since as to owner of land no extrinsic proof was required to identify property or to convey to it information that decree of sale would affect it. *Id.*

TAXATION—Continued.

34. If flowage rights were twice assessed separately against owner, it could complain, but owner of land, who was not injured thereby, may not complain. *Id.*

35. Where taxpayer, appealing from decree in circuit court sustaining validity of disputed tax, failed to obey mandatory provisions of statute requiring payment of tax to county treasurer, to be held pending decision in Supreme Court, appeal is dismissed (1 Comp. Laws 1929, § 3459). *Id.* 585.

36. In absence of special contract, there is no personal liability on part of property owner for special assessments for improvements. *Township of Grosse Ile* v. *New York Indemnity Co.*, 643.

37. Agreement by property owner, wishing to have his property benefited by local improvements, to pay assessment therefor, violated no principle of public policy, is enforceable, and law will not permit owner to repudiate liability after work is completed and benefits conferred. *Id.*

38. Special benefit to be conferred on property owner by improvements was sufficient consideration for his agreement to pay assessment therefor. *Id.* 644.

39. Where property owner agreed to pay assessments to be levied for improvements on his property, and gave bond conditioned upon compliance therewith, reassessing said tax with penalty did not work estoppel by election of statutory remedy, barring action on bond, since bond required demand to be fixed by assessment. *Id.*

See ACTION (2); CORPORATIONS (15); LICENSES (1); MUNICIPAL CORPORATIONS (15, 18, 19).

TAX COLLECTOR—See TAXATION (15, 19, 20).

TAXES—See RECEIVERS (9).

TAX SALE—See TAXATION (11, 28, 30, 32, 35).

TENANCY AT WILL—See VENDOR AND PURCHASER (4); WASTE (1, 5).

TENDER—See CONVERSION (1); GARNISHMENT (3); VENDOR AND PURCHASER (1, 3).

TERMINATING TRUST—See TRUSTS (11, 14).

THEATRES AND SHOWS—See GARNISHMENT (1, 2).

THEFT OF FIXTURES—See WASTE (4, 5).

THIRD PARTY CLAIMANTS—See GARNISHMENT (5, 6).

THUMB—See MASTER AND SERVANT (20, 22).

TILE—See PLEADING (2); SALES (2–4).

TIMBER—See TAXATION (26).

TIME—See BASTARDY (2–4).

TIMEKEEPER'S SLIPS—See APPEAL AND ERROR (7).

TITLE—See ACTION (2); BILLS AND NOTES (5); CHATTEL MORTGAGES (3, 8–10); CORPORATIONS (18); COVENANTS; LIMITATION OF ACTIONS (4); MECHANICS' LIENS (6); MORTGAGES (10); SALES (1, 3–5); TAXATION (4); TRUSTS (1); VENDOR AND PURCHASER (2, 7, 8).

TITLE OF ACT—See STATUTES (1).

TORT ACTIONS—See INTEREST (3, 5).

TOWNSHIP BOARD OF HEALTH—See CEMETERIES (1).

TOWNSHIP BOARDS—See CEMETERIES.

TOWNSHIPS—See PAUPERS.

TOWNSHIP TREASURER—See TAXATION (20).

TRANSCRIPT OF TESTIMONY—See APPEAL AND ERROR (2, 3).

TRANSFER OF BANK ACCOUNT—See JOINT TENANCY (3).

TRANSFER OF STOCK—See CORPORATIONS (27).

TREASURER'S BOND—See TAXATION (18).

TREES—See ADJOINING LANDOWNERS; TAXATION (3).

TRIAL.

1. Instruction of court as to duty of owners of building to see that orders to make needed alterations to window leading to fire escape on third floor were carried out, *held,* not reversible error, where meaning was clear, although language used was somewhat confusing. *Zelhaver* v. *Koepke,* 428.
2. Defendants' claim that court instructed jury that they ought to find defendants guilty of negligence, *held,* not sustained by record, which shows that any misunderstanding was cleared up by counsel's question and court's answer. *Id.* 429.

See BASTARDY (7); CRIMINAL LAW (2, 5, 13); JUDGMENT (1); MASTER AND SERVANT (32); MUNICIPAL CORPORATIONS (2, 3); WITNESSES (1, 3).

TRICK—See BILLS AND NOTES (5).

TRICKERY—See RECEIVERS (19).

TRUCK—See MOTOR VEHICLES (1).

TRUNK-LINE HIGHWAY—See MOTOR VEHICLES (9, 10).

TRUSTEES—See PARTIES; RELIGIOUS SOCIETIES (1, 3, 4); TRUSTS (3, 4, 6–12, 14); VENDOR AND PURCHASER (24).

TRUSTS.

1. Wife, who waited eight years and until after husband's death before asserting that he had fraudulently taken title in his own name to home purchased with her money, *held*, not to have sustained burden of proof that he held title in trust for her, where, in meantime, they had been divorced, property settlement had been had without reference to property in question, inference is strong that she knew how title stood, and evidence preponderates that defendant, to whom husband deeded, advanced substantial sum of money and assumed mortgage without knowledge of wife's claim (3 Comp. Laws 1929, §§ 12975, 12976). *Sirianni* v. *Devaney*, 26.

2. Where bank was informally designated as depository of school funds by some officers of school district, but no vote was had or record made, and treasurer deposited school money therein without exacting statutory bond, deposit was unlawful and constitutes preferred claim against bank's receiver (2 Comp. Laws 1929, §§ 7112, 7113). *Reichert* v. *American State Savings Bank*, 49.

3. Use of word "trustee" is not in all cases decisive that trust estate has been created, neither does provision for payment of interest clearly negative intent to create such estate, but intent must be gathered from entire instrument. *Reichert* v. *Guaranty Trust Co.*, 504.

4. Under agreement whereby owners of certain real estate subject to existing mortgage delivered to trust company trust mortgage thereon, holder of existing mortgage delivered to said trust company discharge thereof, and trust company agreed to deduct from proceeds of said trust mortgage sufficient to pay amount of discharged mortgage, and pay same to such parties as might be entitled thereto, said agreement created relationship of trustee and *cestui que trust* between trust company and holder of said discharged mortgage. *Id.*

5. Where certain moneys came into hands of trust company as trust fund, and investments thereof are traceable into bonds in its possession, its receiver is required to deliver said bonds to clerk of court for delivery to proper owner. *Id.*

6. It is trustee's duty to act in good faith and exercise sound judgment in investment of moneys in his hands as trustee. *In re Jenkins' Estate*, 518.

7. Where trustee loaned trust funds to corporation in which he was stockholder and of which he was treasurer, taking as security therefor mortgages on lots, he placed himself in position where his self-interest conflicted with his duty as trustee, and such investment will be scrutinized more closely by court than if made in usual course of business. *Id.*

8. While real estate mortgages are favored for investment of trust funds, it becomes trustee's duty to satisfy himself as to its value and availability for purpose of sale in case of foreclosure, and its location and character of buildings thereon must also be considered. *Id.*

TRUSTS—Continued.

9. Where trustee loaned trust funds to corporation in which he was stockholder and of which he was treasurer, taking as security therefor mortgages on lots in large subdivision on outskirts of city, on which were erected temporary buildings, removal of which was required by restrictions within year, said investment was properly disapproved by court. *Id.*

10. Trustee may not surrender trust estate without consent or acquiescence of beneficiary. *Fredricks* v. *Near*, 627.

11. Where trustee, *cestui que trust*, and settlors were all *sui juris*, they could, by mutual consent, terminate trust and restore *status quo*. *Id.*

12. Where husband and wife entered into trust agreement with lumber company, deeding property and executing contingent trust agreement to pay balance of husband's debt for lumber, action could not be maintained by trustee against wife on said contingent agreement after trust agreement had been terminated by conveyance back to them of property conveyed. *Id.*

13. Nor could there be any judgment in said action against husband, who had gone through bankruptcy court, where he had listed in Federal court lumber company as creditor, and pleaded his discharge in bankruptcy. *Id.* 628.

14. Where action was brought by trustee on contingent trust agreement against husband and wife, substitution of beneficiary for trustee as real party in interest would not help plaintiff's case, where trust agreement had been terminated, ending liability under contingent agreement. *Id.*

See CORPORATIONS (21, 24); HUSBAND AND WIFE (6); PARTIES; PRINCIPAL AND AGENT.

TUBERCULOSIS—See INSURANCE (9, 10).

ULTRA VIRES—See CONTRACTS (4).

UNCLAIMED MONEY—See COUNTIES (1, 2).

UNDUE INFLUENCE—See JOINT TENANCY (5).

UNIFORM STOCK TRANSFER ACT—See CORPORATIONS (16, 19).

UNINTENTIONAL OMISSION—See PRINCIPAL AND SURETY (4, 6).

UNLAWFUL ACTS—See RECEIVERS (20).

UNLAWFUL PRACTICE OF MEDICINE—See CRIMINAL LAW (17).

UNSAFE PREMISES—See NEGLIGENCE (4).

UNWARRANTED CONVICTION—See CRIMINAL LAW (10–12).

UNWILLING WITNESS—See WITNESSES (1).

VARIANCE—See ACTION (2); BASTARDY (2, 3).

VENDOR AND PURCHASER.

1. If conveyance is to be made upon payment, purchaser is entitled to conveyance as soon as purchase price is paid or tendered, or, in case of payment in instalments, upon payment or tender of last instalment. *Haight* v. *Salter,* 6.
2. That person lawfully may contract to sell real estate which he does not own does not extend contract time for delivery of deed, but he must take steps to acquire title in anticipation of his duty to deliver, and is entitled only to reasonable time to execute proper conveyance. *Id.*
3. Where vendee, after making final payment on land contract, gave vendors 10 days' time in which to make conveyance, and vendors failed to do so, vendee was entitled to rescind and recover purchase price, and he was not bound to accept deed tendered after suit was begun. *Id.*
4. Under provision in land contract that, on vendee's default and notice of forfeiture, vendor might treat vendee as tenant holding over without permission and take immediate possession, forfeiture of contract constituted vendee tenant at will. *Bresnahan* v. *Hicks,* 32.
5. That vendor was indebted to vendee for costs taxed in vendor's unsuccessful suit to forfeit contract would not excuse vendee from paying balance due on contract. *Heath* v. *Gloster,* 85.
6. Rule that vendor is precluded from forfeiting land contract when he is in default in making payments on mortgage is not applicable where vendee's default in making payments is responsible for vendor's default; and especially where vendee had right to make payment on mortgage and receive credit therefor on contract. *Id.*
7. Defect in vendor's title, of which vendee has knowledge, is waived by entering into contract of purchase. *Detroit Fidelity & Surety Co.* v. *Bushman,* 115.
8. Vendee is not entitled to rescind, before time vendor is bound to convey, for reason that vendor has defective title. *Id.*
9. Vendor, in foreclosure of land contract in equity, is entitled to decree for deficiency against vendee's assignees who in writing assumed contract. *Johnson* v. *Bangs-McCutcheon, Inc.,* 120.
10. Where, in foreclosure of land contract, assignees filed no cross-bill for rescission and sought no affirmative relief, allegations of fraud in their answer may not be considered. *Id.*
11. Failure of vendor to perform his contract is ground for rescission by vendee. *Wilson* v. *Lingon,* 134.
12. Where land contract provided that vendors should meet payments of principal and interest on mortgage on premises as they matured, default on their part to make such payments gave vendees right to rescind; and it is immaterial that vendees had right, under contract, to make such payments and receive credit therefor on contract. *Id.*

VENDOR AND PURCHASER—Continued.

13. Option to vendees to make payments on vendors' mortgage and receive credit therefor on contract does not impair obligation of vendors' contractual obligation to pay. *Id.*

14. Provision in contract that vendors should meet payments of principal and interest on mortgage on premises as they matured is mandatory, although contract gave vendees right to make said payments and receive credit therefor on contract. *Id.*

15. Option to vendees to make payments on mortgage which vendors were obligated to pay, and receive credit therefor on contract, is not mandatory, but permissive; and is not exclusive remedy to which vendees are by contract restricted, but on vendors' default vendees have right to rescind, provided said default was not caused by vendees' default. *Id.*

16. That vendees, on discovering that vendors were in default in making payments due on mortgage, elected to rescind, did not make it incumbent on vendees to pay additional money to vendors which they might not be able to recover. *Id.* 135.

17. In proceedings to foreclose land contract, vendee, who entered into said contract to purchase the property for others, is not entitled to have them held as vendees and she treated as their mortgagee; rule that deed given as security is mortgage having no application to issues presented in instant case. *Mortgage & Contract Co.* v. *Linenberg,* 142.

18. Where vendee's son and wife were not parties to land contract, although vendee was purchasing property for them, vendor was under no obligation to make them parties to foreclosure proceedings. *Id.*

19. Where vendor agreed to make semi-annual payments on mortgage and pay principal at maturity, but failed to do so, rights of vendee are in jeopardy, and said default is not obviated by fact that mortgagee has neither instituted nor threatened foreclosure. *Dirr* v. *Hitchman,* 179.

20. Provision in land contract that, if vendor defaults in payments due on mortgage, vendee may pay same, or, in case of foreclosure, may incumber land by mortgage, is optional merely, and does not impose upon him obligation or duty to do so. *Id.*

21. That vendee continued to make payments on his contract after vendor defaulted in making payments on mortgage would not estop vendee from asserting his contract rights to have said mortgage paid or renewed, in suit by vendor to foreclose contract, especially in view of fact that vendor continued in default, and that vendee was advised thereof only short time before suit. *Id.*

22. Vendor, who was first in default in making payments on mortgage, is not entitled to foreclose contract until mortgage is paid or renewed and opportunity given vendee to pay amount decreed to be due. *Id.*

VENDOR AND PURCHASER—Continued.

23. In suit by vendees to rescind land contract on ground of fraud, evidence *held,* to sustain finding of trial court that right to rescission was not waived by laches and payments. *Holmes* v. *Robert Oakman Land Co.,* 378.

24. In suit by vendees to rescind land contract on ground of vendor's fraud, refusal to permit defendant trust company to amend its answer and reopen case to show that it was trustee instead of owner of vendor's equity, *held,* abuse of discretion. *Id.*

25. If preliminary and final notices of forfeiture, sent to vendee's assignee to last-known postoffice address, as provided for in land contracts, and assented to by him, had reached him, his interest in said contracts would have been terminated thereby. *Alper* v. *Oakman,* 499.

26. Provision in land contracts for notice of forfeiture to be sent to vendee to his last-known postoffice address inured to benefit of both parties, is reasonable, and should be construed as it reads. *Id.*

27. Where vendee's assignee moved without notifying vendor's agent of change of address, assignee's application to abstract division of trust company acting as vendor's agent, giving his correct postoffice address, may not be considered notice of change of address provided for in land contracts. *Id.*

28. Where notices of forfeiture mailed to vendee's assignee to last-known postoffice address were not delivered, vendor's agent had right to assume that assignee had moved away and abandoned his rights under land contracts. *Id.* 500.

29. That vendor, relying on advice of real estate dealer instead of consulting attorney, mistakenly thought that contract provided for payments for release of lots in addition to semi-annual payments, while in fact contract provided otherwise, *held,* not to entitle her to foreclosure decree for default, where there was no fraud, no mutual mistake, no estoppel on part of vendees, contract is unambiguous, and under its terms vendees have prepaid substantial amount. *Wiersma* v. *Nordella,* 574.

30. Vendees, on discovering that they had been defrauded, had option to disaffirm and rescind, or affirm and sue for damages. *Harry & Max Dunitz, Inc.,* v. *Meinecke,* 586.

31. Where vendees, after discovering that they had been defrauded, continued to make payments, entered into agreement modifying contract, and made payments thereon, they made election to affirm contract, and thereby lost right to rescind. *Id.*

32. On foreclosure of land contract, vendee's assignee is subject to deficiency decree if assumption of liability is effective as between vendee and assignee, notwithstanding there is no privity of contract between vendor and assignee, which would be necessary to maintain action at law. *Zeidler* v. *Burlingame,* 596.

VENDOR AND PURCHASER—Continued.

33. Where agreement assigning vendee's interest in land contract provided that assumption of obligation by assignee was on condition of assent thereto by vendor, but not providing that said assent be in writing, oral consent would be fulfillment of said consideration. *Id.*

34. Oral consent by vendor to assignment of land contract by vendee would validate assignment, notwithstanding provision in contract that such consent must be in writing, since oral consent would amount to waiver of provision for written consent. *Id.*

35. Vendor's conduct in accepting assignment of land contract by vendee, attaching it to his copy of contract, receiving payments from assignee, and thereafter treating him as vendee, *held*, to amount to waiver of provision in land contract for written consent to assignment. *Id.*

36. Where vendee's assignee made payments to vendor for more than four years, at one time wrote to vendor asking for extension of time to make payment and promising to pay in full, and made no complaint because vendor's consent to assignment had not been made in writing, he is *held*, to have accepted vendor's conduct as performance of contract for consent, or, in alternative, he waived specific performance by making payments and acknowledging both by conduct and in writing his personal obligation under contract. *Id.*

37. Where vendee's assignee assumed liability on condition of vendor's assent to assignment, if it was vendee's duty to secure vendor's assent, said duty was waived by assignee's keeping contract for four years without complaint, making payments, and acknowledging his liability under contract. *Id.* 597.

38. Oral agreement made prior to execution of land contract, whereby vendee was to assign to another, who was to become sole obligor, may not be given any control over written contract. *Kahn* v. *Green*, 632.

See APPEAL AND ERROR (5); COVENANTS (2); GUARANTY; JUDGMENT (4); MECHANICS' LIENS (1, 4, 6, 7); PRINCIPAL AND SURETY (4, 6).

VENUE.

Action by board of county road commissioners for damages to highway alleged to have been caused by defendants' negligence, being for injuries to real estate, was properly brought in county where road is situated, although defendants reside in another county (1 Comp. Laws 1929, § 76; 3 Comp. Laws 1929, § 13997). *Lapeer County Road Com'rs* v. *Markley*, 456.

See APPEARANCE (2).

VERDICTS—See INTEREST (2, 4, 5).

VICE-PRESIDENT—See WAREHOUSEMEN.

VISION—See MASTER AND SERVANT (10).

VOLUNTARY SURRENDER—See PRINCIPAL AND SURETY (3).

WAIVER—See APPEARANCE; BILLS AND NOTES (1); CHATTEL MORTGAGES (2); CORPORATIONS (15); LIMITATION OF ACTIONS (2); MINES AND MINERALS (2); MUNICIPAL CORPORATIONS (3); VENDOR AND PURCHASER (7, 23, 31, 34–37).

WAREHOUSEMEN.

Where officers of warehouse corporation, after allegedly ceasing active operations, permitted its vice-president and former manager to continue business in its warehouse, and he used company's stationery and warehouse receipts, company's course of conduct was such that it is chargeable with responsibility for loss sustained on products stored in said warehouse for which company's receipts were issued. *Blue Rapids Milling & Elevator Co.* v. *Port Huron Terminal Co.*, 390.

WARNING—See MOTOR VEHICLES (1); NEGLIGENCE (12); RAILROADS (2).

WARRANTY—See INSURANCE (9).

WASTE.

1. Where forfeiture ended contract relation and vendee became tenant at will, his liability, if any, for waste thereafter occurring is at common law and is not to be measured by any provision of contract. *Bresnahan* v. *Hicks*, 32.
2. Commissive waste by tenant contemplates participation, at least to some extent, by him. *Id.*
3. Permissive waste by tenant requires showing that it was allowed by him or was proximate result of want of reasonable care on his part. *Id.*
4. Tenant's leaving house unlocked may not be said to be proximate cause of theft of fixtures by one who entered at night, during tenant's absence. *Id.*
5. Tenant at will is not liable to respond in damages for fixtures taken and carried away by thief who entered at night in tenant's absence, although door of house was left unlocked, in absence of showing that tenant participated in theft or that it was allowed by him. *Id.*

WATER CHARGES—See RECEIVERS (9).

WATER POWER—See TAXATION (26).

WATERS AND WATERCOURSES.

While lessee of land under mill pond is not entitled to have dam, owned by others, operated for its benefit, it is entitled to have it operated reasonably, so as not to interfere with formation or harvesting of ice. *Pere Marquette Railway Co.* v. *Siegle*, 89.

WEIGHT OF EVIDENCE—See BASTARDY (8); NEGLIGENCE (18).

WILFUL AND WANTON MISCONDUCT—See MOTOR VEHICLES (3, 5–8).

WILFUL MISCONDUCT—See MASTER AND SERVANT (18, 29).

WILLS.

1. Under 3 Comp. Laws 1929, § 13482, requiring two attesting witnesses to will, they must sign in presence of testator, but may do so at different times. *In re Reycraft's Estate*, 40.
2. Where testator complied with statutory requirements, will is not defeated by lapse of 32 months between attesting signatures; it not having been in any respect changed after first witness attested it (3 Comp. Laws 1929, § 13482). *Id.*
3. Where two inconsistent wills purport to dispose of entire estate, last will, if properly executed, of necessity revokes previous will, although containing no revocation clause (3 Comp. Laws 1929, § 13486). *Id.*
4. That testator disposed of residue of his estate in first, instead of last, clause of will, is of no moment. *Id.*
5. Denial of petition for delayed appeal from order of probate court admitting will to probate must stand unless there was abuse of discretion. *Hawgood* v. *Howard's Estate*, 60.
6. Want of notice of probate proceeding furnished foreign heirs with good excuse for not appealing within statutory period, but required prompt use thereof to be of avail (3 Comp. Laws 1929, §§ 15603, 15969). *Id.* 61.
7. Where foreign heirs did not apply for leave to appeal from probate court within three months after notice of proceeding therein, they are not entitled to delayed appeal under 3 Comp. Laws 1929, § 15971. *Id.*
8. Illness of one of attorneys for period of eight weeks is no excuse for delay of six months in appealing from probate court. *Id.*
9. Want of diligence in appealing from probate court is not excused by time taken in search for evidence tending to show meritorious cause for contest. *Id.*
10. Where, on face of record, probate court had jurisdiction, delayed appeal may only be allowed in case it is established that justice requires revision of case (3 Comp. Laws 1929, § 15969). *Id.*
11. Where showing was insufficient to establish that justice requires revision of case, and there was inexcusable delay in appealing from probate court, delayed appeal was properly denied (3 Comp. Laws 1929, § 15969). *Id.*
12. Publication signifies act of declaring or making known to witnesses that testator understands and intends instrument subscribed by him to be his last will and testament; but unless required by statute publication of will is unnecessary. *In re Mette's Estate*, 225.
13. In will contest case, it was error for trial court to instruct jury that witness must have been informed that document to which he signed his name as witness was will in order to render it valid, since publication is not required by statute in this State to give will effect. *Id.*

WILLS—Continued.

14. Evidence, *held,* to present question for jury as to mental competency of testator. *Id.*
15. Competent testimony by handwriting experts that in their opinion signature to will was forgery disputed testimony of witnesses to will, raising issue of fact, and therefore trial court was in error in rejecting said expert testimony and directing judgment *non obstante veredicto* for proponent. *In re Harris' Estate,* 358.

WINDOWS—See NEGLIGENCE (16, 17); TRIAL (1).

WITHDRAWAL—See MASTER AND SERVANT (1); TAXATION (5).

WITNESSES.

1. Cross-examination, under guidance of trial judge, of female inmate, in prosecution for procuring her for house of prostitution, *held,* not prejudicial. *People* v. *Johnson,* 118.
2. In wife's claim against estate of her deceased step-father for room and board, she and her husband are incompetent to testify as to matters equally within knowledge of deceased which are relied on to establish claim; as to said claim husband being "assignor" (3 Comp. Laws 1929, § 14219). *Hartle* v. *Keefer's Estate,* 189.
3. Practice of attorneys of record for respective parties in participating as leading witnesses on issues involved is not to be commended. *In re Mette's Estate,* 226.

See APPEAL AND ERROR (13); BASTARDY (6, 7, 9); EVIDENCE (1, 2); WILLS (1, 2, 12, 13, 15).

WORDS AND PHRASES—See HIGHWAYS AND STREETS (1); INSURANCE (3); JOINT TENANCY (3); MECHANICS' LIENS (3); MUNICIPAL CORPORATIONS (7); PROSTITUTION (1); SCHOOLS AND SCHOOL DISTRICTS (1); STATUTES (4); TAXATION (3, 6, 16).

WORK AND LABOR—See CONTRACTS (7); EVIDENCE (7).

WORKMEN'S COMPENSATION ACT—See MASTER AND SERVANT.

WORT—See LICENSES (2).

WRITTEN CONSENT—See VENDOR AND PURCHASER (33–36, 38).